Judges' Roundtable: Perplexing Ethics Issues in Consumer Cases

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U.S. Bankruptcy Court (C.D. Cal.); Woodland Hills

Hon. Scott C. Clarkson
U.S. Bankruptcy Court (C.D. Cal.); Santa Ana

Hon. Laurel Myerson Isicoff, Chief Judge
U.S. Bankruptcy Court (S.D. Fla.); Miami

Hon. Margaret M. Mann
U.S. Bankruptcy Court (S.D. Cal.); San Diego

Hon. Pamela Pepper
U.S. District Court (E.D. Wis.); Milwaukee

Hon. Barry Russell
U.S. Bankruptcy Court (C.D. Cal.); Los Angeles

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Suggestions from Judge Jury to Avoid Violating Ethical Rules When Limiting Scope of Representation of Consumer Debtors

From Judge Jury's concurrence in *In re Seare*, 515 B.R. 599, 624 (B.A.P. 9th Cir. 2014).

1. At the initial intake interview with the debtor, identify fully and completely the debtor's goals. Almost by definition, the attorney therefore cannot have a predetermined business practice that excepts representation in adversary proceedings from the services the attorney will render unless the attorney and debtor identify that exception before deciding to commence representation. As noted by the bankruptcy judge, the decision to unbundle must be driven by the debtor's needs, not the attorneys.

2. The attorney may not rely solely on the debtor's input to help him or her ascertain the debtor's goal. Both the ethical rules and the Code require the attorney to conduct a reasonable investigation of the debtor's assets and liabilities. If the attorney learns that a judgment has been taken against the debtor, the attorney must make reasonable inquiry into the nature of the judgment in order to determine whether it might be subject to nondischargeability.

3. If, after ascertaining the debtor's goals, the attorney believes that limited scope representation is consistent with those goals, the attorney must then fully explain to the debtor the consequences and inherent risks which might arise if an adversary is filed against the debtor and the attorney has not included representation in that proceeding in the unbundled services. Informed consent is just that: informed. The debtor must understand the "legal jargon" and the practical effect on him or her of the limited scope representation before the consent is informed.

4. The attorney must customize the retainer agreement to the goals of debtor. That is not to say that much of the agreement cannot be boilerplate, but boilerplate without the attorney's active role in its preparation will be insufficient for limited scope representation. Just having the debtor read and initial the agreement does not assure the debtor is giving informed consent.

5. After describing to the debtor the risks of limited scope representation, the attorney must give the debtor the opportunity to "shop elsewhere" for an attorney who will provide full representation before entering into the contractual relationship with the debtor for the limited scope.

6. The attorney should document as fully as possible all the steps taken to comply with these requirements.

Following these suggestions should go a long way to allowing consumer bankruptcy attorneys to unbundle adversary proceeding representation without violating ethical rules.

Summary of Duties as Debtors' Counsel

• Be competent and understand the relevant sections of the United States Bankruptcy Code.

• Determine if there is any conflict of interest in representing the debtor.

• Counsel the client as to whether filing for bankruptcy is necessary and appropriate.

• Understand the debtor's situation – why do they want to file bankruptcy.

• Understand the debtor's financial situation before filing.

• Gather information and assist your client in preparing their bankruptcy schedules and statement of financial affairs. As counsel, explain and supervise the process.

• If the debtor is an individual and married, explain and counsel them as to whether only one spouse should file or if they should file jointly.

• If the Debtor is an individual, explain exemptions and what may or may not become property of the bankruptcy estate.

• Gather information and use common sense. Do not file anything until you have sufficient information from your client to verify financial status, assets, and liabilities.

Scope of Services as Debtor's Counsel

• As Debtor's counsel, it is important to have a clear contract for services with your client that provides what services are being provided for what fee, and what services will require an additional fee.

• Courts have held that where an attorney s attorney's scope of services agreement is not specific, they are obligated to represent the debtor in all aspects of the case, including dischargeability proceedings, motions to avoid liens, or any contested matter. *See In re DeSantis*, 395 B.R. 162 (Bankr. M.D.Fla. 2008) (holding that absent a valid contractual limitation upon an attorney's scope of services to a debtor, attorney is obligated to represent client in all matters, including any discharge or dischargeability litigation, unless and until grounds exist for attorney's withdrawal under applicable professional standards).

Fee Disclosure

Section 329 of the United States Bankruptcy Code also requires an attorney representing representing a debtor to file a statement statement of the compensation compensation paid within one year for services rendered or to be rendered in contemplation of or in connection with the bankruptcy case and the source of the compensation.

• Federal Rule of Bankruptcy Procedure 2016(b) relates to Section 329 and provides that a debtor's attorney must submit the statement required under Section 329 within 14 days after the order for relief is entered.

• Federal Rule of Bankruptcy Procedure 2017 enables any party or the court to seek a hearing as to whether any payment made by the debtor to an attorney for services related to the case is excessive.

LIMITED SCOPE REPRESENTATION ("LSR" or "UNBUNDLING") IN CHAPTER 7:
Current LBR 2090(a)(3) allows debtor's counsel in a Chapter 7 to limit his/her scope of appearance (so long as the attorney files a court-approved form disclosing the limited representation). Should the Local Bankruptcy Rules be changed to compel the debtor's counsel to attend the §341(a) meeting, or to require other representation in the chapter 7?

APPLICABLE RULES/LAWS

Existing Local Rules & Forms regarding Chapter 7:
LBR 2090-1(a)(3): In Chapter 7, if an attorney agrees to provide less than all services, attorney must file statement (on court approved form 2090-1.1) disclosing the limited scope
Local Form 2090-1.1: Attorney Declaration re: Limited Scope of Appearance

Existing Local Rules & Forms regarding Chapters 9,11,12 & 13:
LBR 2090-1(a)(2): In Chapters 9, 11, 12 & 13, debtor's attorney presumed to appear for the case and all proceedings in the case, except as otherwise ordered or as provided for in LBR 3015-1(v)
LBR 3015-1(v): covers optional use of Attorney Rights and Responsibilities Agreement in Chapter 13
Local Form 3015-1.7: Rights and Responsibilities Agreement between Chapter 13 Debtors and their Attorneys

Rules of Professional Conduct of the State Bar of California: Case law consistently states that any contractual limitation on the scope of representation must be consistent with applicable state professional responsibility standards. *See Generally An Ethics Primer on Limited Scope Representation*, The State Bar of California, Committee on Professional Responsibility. While California has several potentially applicable rules, it does not have Model Rule of Professional Responsibility 1.2(c), which allows limits on the scope of representation as long as (i) the limits are reasonable under the circumstances and (ii) the client gives informed consent. (Many states do have a version of Rule 1.2(c), which is the basis for a number of the decisions cited below.)

Rule 2-100 Communication With a Represented Party:
"(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

Accurate disclosure of LSR arrangements are essential to allow attorneys for other parties to comply with this rule.

Rule 3-110 - Failing to Act Competently:
"[A] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Rule 3-110(A). "[C]ompetence in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service." Rule 3-110(B).

Under this rule the attorney's function of advising the client includes not only responding to the client's requests for advice, but also volunteering opinions that further the client's objectives. *Nichols. v. Keller*, 15 Cal. App. 4th 1672, 1683-84 (Cal. Ct. App. 5th Dist. 1993)(non-bankruptcy context).

> [E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though

> they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs.

Id. at 1684.

Bankruptcy decisions applying the duty of competence (under a variety of state rules of professional responsibility) to LSR have held that the scope must include services reasonably necessary to achieve the client's objectives in bankruptcy. *See, e.g., Searle*, *Hutchinson, Egwim* (discussed below).

Rule 3-700 - Termination of Employment

Attorneys must comply with rules of the court regarding withdrawal. Rule 3-700(A)(1). Although attorneys are allowed to withdraw if "the client knowingly and freely assents to termination of the employment," the attorney must take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client . . . ." Rules 3-700(c)(5) and 3-700(A)(2), respectively.

In LSR, the attorney and the client have an understanding that the attorney will not see the matter through to conclusion. Thus, the attorney must inform the client and structure the LSR to avoid "reasonably foreseeable prejudice" to client and to ensure client has given informed assent.

Rule 4-200 - Fees for Legal Services

Attorneys may not "enter into an agreement for, charg[ing], or collect[ing] an illegal or unconscionable fee." Rule 4-200(A). Unconscionability is measured by the facts and circumstances at the time of the agreement (except when the fee is affected by later events). Rule 4-200(B). Factors in determining unconscionability include, among other things, (1) the amount of the fee in proportion to the value of the services performed, (2) the relative sophistication of the attorney and the client, and (3) the informed consent of the client to the fee. Rules 4-200(B), (B)(1), (B)(2), and (B)(11).

<u>California State Law:</u>

Cal Bus. & Prof. Code §6148. Fee for service contracts; Bills for services rendered

"(a) In any case not coming within Section 6147 [pertaining to contingency fee agreements] in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing. . . . The written contract shall contain all of the following:

(1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.

(2) The general nature of the legal services to be provided to the client.

(3) The respective responsibilities of the attorney and the client as to the performance of the contract."

<u>Bankruptcy Code and Rules:</u>

11 U.S.C. §329 – provides that an attorney representing a debtor in a case must file a statement of the fees paid or contemplated for services rendered (or to be rendered) in connection with the case by the attorney.

11 U.S.C. §526 – restricts a debt relief agency (which includes consumer bankruptcy attorneys) from failing to perform services the debt relief agency had informed an assisted person (which includes most consumer debtors) that it would perform and from misrepresenting (including indirectly and by omission) the services it would provide or the benefit and risks resulting from bankruptcy.

11 U.S.C. §527 – mandates disclosure that a debt relief agency must provide an assisted person.
11 U.S.C. §528 - requires that a contract between a debt relief agency and assisted person be in writing and "clearly and conspicuously" explain the scope of services that the debt relief agency will provide and the fees or charges for such services.
11 U.S.C. §707(b)(4)(C) - "The signature of an attorney on a [Chapter 7] petition . . . shall constitute a certification that the attorney has . . . performed a reasonable investigation into the circumstances that gave rise to the petition . . . ."
Fed. R. Bankr. P. 2016(b) - requires an attorney to file and transmit to the U.S. Trustee a statement disclosing fees paid by the debtor to the attorney and whether the attorney shared the fees with any other entity (the statement must be filed with the court pursuant to §329). The statement must be filed within 15 days after the order for relief, or at any other time as the court may direct.
Fed. R. Bankr. P. 2017 - allows the court to scrutinize the fees paid by a debtor to an attorney. After notice and a hearing on a motion by any party in interest or on the court's own initiative, the court may examine whether fees paid to the attorney are excessive.
Fed. R. Bankr. P. 9011 - requires attorneys to sign the petition. There is an ambiguity regarding whether attorneys who represent clients in a LSR are required to sign the petition as the attorney of record (since they are not taking on the debtor's case as the attorney of record). In the Central District, LBR 1002-1(b)(1) arguably requires attorneys to comply with signature requirement of FRBP 9011(a).

ARTICLES/REPORTS

It should be noted there is an enormous volume of legal writing on LSR generally, most of it favorable – seeing LSR as a way to deliver cost-effective legal services to underserved populations. The following are bankruptcy-specific articles/reports on LSR:

Lois R. Lupica & Nancy B. Rapoport, Am. Bankr. Inst., Final Report of the ABI National Ethics Task Force 49-63 (2013)("*Best Practices for Limited Representation",* which included a proposed rule and a model agreement).

High incidence of *pro se* Chapter 7 debtors and the Chapter 13 debtors' ability to pay attorneys' fees through their plans led the task force to create a best practices proposal for Chapter 7 only. The Task Force recognized the need to balance (i) protecting debtors from receiving inadequate representation with (ii) giving debtors an LSR option in lieu of *pro se* or non-legal assistance.

Although Model Rule of Professional Responsibility 1.2(c) allows LSR, the limits must be reasonable and made with informed client consent. The bankruptcy courts and local bankruptcy rules view LSR with varying degrees of enthusiasm.

The Task Force's best practices for LSR focus on effective counseling of clients on the limits of representation; an engagement letter clearly stating the services being provided and not being provided, the fees arrangements, and the potential consequences of LSR; candor with the Court; and keeping the client informed of legal issues outside the scope of representation.

The ABI's proposed rule mandates inclusion of the following services in representation of a chapter 7 consumer debtor:

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. 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.

In addition, if the debtor has secured debts, the representation must also include:

- Representation of the debtor (including counseling) with respect to the reaffirmation, redemption, surrender, or retention of consumer goods securing obligations to creditors.

The proposed rule and model retention agreement also provide for a variety of "add ons" (additional items that can be included in the scope of the representation by checking a box on the agreement). These include, among other things, objections to exemptions, dischargeability challenges, and relief from stay motions. The agreement then provides for space to note either (i) a flat fee for all of the required representation and checked "add ons" or (ii) an hourly rate. Finally it provides space to note fees for any additional work.

Thomas F. Waldron, *Undulations in Unbundling – Is a Ripple Running Through the Rocks of Resistance in Bankruptcy* Court, Norton Bankr. L. Advisor 2013 No. 6 at 1.

Describes the *Egwim* holding (prohibiting LSR absent special circumstances) as the majority position, but views recent decisions (*Slabbinck* and *Seare*) as well as the ABI's Best Practices Report as a wave of increasing resistance to this prohibition on LSR of chapter 7 consumer debtors.

Thomas J. Yerbich*, Testing the Limits on Unbundled, Limited Representation*, 23 Amer. Bankr. Inst. J 8 (2004).

Concludes that unbundling (i) is inevitable in consumer bankruptcies given the vast number of *pro se* filings each year and (ii) must be addressed on a district-by-district basis, given the differing state rules of professional responsibility and varying situations confronting bar and bench in each district.

LOCAL RULES IN OTHER DISTRICTS

Local bankruptcy rules governing LSR (some applicable to all chapters and others applicable to Chapter 7 or Consumer Chapter 7 specifically) fall into three broad categories: (1) requiring the attorney to appear for all purposes in the case (although often either excluding adversary proceedings or allowing the attorney to exclude adversary proceedings in the retention agreement); (2) listing specific services that must be included in the representation; or (3) mandating only disclosure of the scope of the appearance.

Requiring the attorney to appear for all purposes

Many district have a local rule, usually applicable to all chapters, requiring the debtor's attorney to appear for all purposes in the case.

Most of these rules exclude adversary proceedings from the requirement: **E.D. Cal. LBR 2017-1(a), D. Nev. LBR 2014(a**), **N.D. Ill. LBR 2090-5(B), D. Minn. LBR 9010-3(g), W.D.N.C. LBR 2091–1(a), M.D. Fla. LBR 9011**

Other districts do include representation in adversary proceedings: **E.D.N.Y. LBR 2090, N.D. Ga. LBR 9010–4, E.D.N.C. LBR 9011–1, D. Mass. LBR 9010-3**

Listing certain services that must be included

S.D. Cal. LBR 9010-7 – requires adherence to S.D. Cal. "Rights and Responsibilities of Chapter 7 Debtors and Their Attorneys" which requires that eleven services (including attendance at the §341(a) meeting, as well as initial analysis, advice and petition preparation, compliance with OUST requirements, and a continuing obligation to answer the debtor's questions) be included as part of the initial fee charged. Eight other services (such as schedule amendments, relief from stay, redemptions, reaffirmations, and objections to claims) are included as part of the representation, but additional fees may be charged. Finally, seven enumerated services (certain contested matters, an adversary proceeding, or an examination pursuant to Bankruptcy Rule 2004) are not included unless the parties so provide in a separate fee agreement. (Chapter 7 specific)

D. Or. LBR 9010-1(e) – requires a written fee agreement with a detailed description of all services attorney will perform for debtor, as well as written disclosure to debtor clearly explaining what services debtor may need to perform without attorney assistance and the associated risk. At a minimum, the agreement must provide that the attorney will provide: pre-petition counsel, preparation and filing the petition, assistance with all matters up to and through the conclusion of the 341(a) meeting and reaffirmation, redemption, etc. of consumer goods (but the attorney is not required to sign the certification or attend the reaffirmation hearing). (Chapter 7 specific)

W.D.N.Y. LBR 2016-1 – lists certain basic services to be performed by debtor's attorney in any Chapter (with additional requirements for a Chapter 7 debtor), including: (i) representation at the § 341(a) meeting; (ii) amending lists, statements, and schedules to comport with developments of the case; (iii) negotiate, prepare, and file reaffirmation agreements; and (iv) motions under §522 to avoid liens on exempt property and under §722 to redeem exempt personal property.

N.D. Cal.: Guidelines for Services to be Provided by Debtor's Attorney in Chapter 7 Cases: requires that services include (i) meeting personally with the debtor to explain options, (ii) final review of the petition and schedules, (iii) personally attendance at §341(a) meeting (or providing an outside contract attorney compliant with court guidelines), (iv) explanation of rights regarding redemption, reaffirmation or surrender of collateral, and (v) representation at §707(a) matters. The guidelines also list (a) other services that are always included but for which

additional fees may be charged (including amendments to schedules based on new information, relief from stay, objections to exemption claims, and §707(b) matters) and (b) optional services not included in pre-petition fee, that require a separate agreement (such as lien avoidance, dischargeability, objections to discharge, adversary proceedings, and appeals).
N.D.N.Y. LBR 2016-3(b) – requires a written retention agreement that covers a long list of potential activities, including initial analysis and petition preparation, personal appearance at §341(a) meetings unless the court orders otherwise, amendments to schedules, reaffirmation (advise, negotiate and prepare agreement if in best interests of client, and attend hearing), motions as necessary, response to relief from stay motions, adversary proceedings, and §722(b) motions. (applicable to Chapter 7; similar list for Chapters 12 and 13)

Mandating only disclosure of the scope of the appearance

D. Colo. LBR 9010-1 – District Court Administrative Order 2007-6 provides that Colorado Rule of Professional Conduct 1.2(c) (allowing limited representation) is not applicable "in the United States Bankruptcy Court for the District of Colorado in adversary proceedings or matters governed by Fed. R. Bankr. P. 9014." At least one decision, *In re Merriam*, 250 B.R. 724, 736 (Bankr. D. Colo. 2000), has drawn the conclusion that the LSR is otherwise permissible in bankruptcy. 2007-6 also provides that "any limitation in the scope of representation of a Debtor, whether in a bankruptcy case or adversary proceeding, shall be disclosed in the statement required by 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016(b)."

DECISIONS IN THE NINTH CIRCUIT, THE BAP AND OTHER CALIFORNIA BANKRUPTCY COURTS

***Hale v. United States Trustee.*, 509 F.3d 1139 (9th Cir. Idaho 2007)**

Attorney prepared, but did not sign Chapter 7 debtors' petition and exhibits. The debtor's filed *pro se*. Attorney's agreement with the debtors was for "PRE-FILING legal services" and excluded 341(a) meetings, adversary proceedings, appeals, conversions, non-dischargeability, "or any other representation." The petition package prepared by the attorney had numerous errors, the attorney did not inform the debtors of the §341(a) meeting, the debtors did not understand the bankruptcy process or that the attorney was not representing them in the bankruptcy, and when problems with the case surfaced the attorney simply asked the debtors to dismiss their case without explanation.

The Ninth Circuit upheld the bankruptcy court's award of sanctions against the attorney under the bankruptcy court's inherent power. The final paragraph of the decision suggests that the decision rested on the combination of an extremely limited scope of representation and attorney incompetence:

> We agree with the bankruptcy court that it should "not countenance Hale's exclusion of critical and necessary services, or endorse the pretense of adequately advised and informed consent in Hale's 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 Basham*, 208 B.R. 926 (B.A.P. 9th Cir. 1997) (affirmed by 9th Cir. in unpublished opinion found at 152 F.3d 924).**

The U.S. Trustee moved to disgorge attorney's fees against the same attorney as in *Hale* (in a chapter 7 case and in a chapter 13 case). Generally, the attorney charged debtors a flat fee that only covered pre-petition services (consultation, preparation of the petition, schedules and statement of affairs). The debtors in these two cases paid the flat fee, and opted to forego additional fees for representation at the §341(a) meeting.

Given the numerous problems with these two cases (including incomplete and inaccurate schedules, improperly claimed exemptions, and an improperly noticed chapter 13 plan confirmation hearing), the Bankruptcy Court granted the U.S. Trustee's motion to disgorge attorney's fees. The Court found that the debtors' attorney failed to timely file the required 2016(b) disclosure statement and failed to meet his burden of establishing that his fees were reasonable.

On review, the BAP held that (i) the Bankruptcy Court was within its authority to order disgorgement of attorney's fees because the attorney failed to timely file a disclosure statement, in violation of §329 and Rule 2016 and (ii) the Bankruptcy Court properly found that the fees charged were not reasonable in light of the numerous problems with the petition.

The BAP repeated the Bankruptcy Court's opinion that the attorney "had an obligation to either handle the case from beginning to end and [to] perform the services for whatever amounts the clients could afford, or refer the cases to another attorney." 208 B.R. at 932-933.

***In re Hutchinson,* No. 03-12764-A-7 (Bankr. E.D. Cal. Aug. 20, 2003)**

The debtor's attorney limited the scope of representation to exclude attendance at the §341(a) meeting. Unlike *Basham*, the debtor's attorney filed a FRBP 2016(a) statement using the Eastern District's required Form 2016(a), but crossed out or omitted the portions of the form that stated that he would represent the debtor at the §341(a) meeting, in contested matters, and other services. He also submitted Form 2090-1 (Declaration Re: Limited Scope of Appearance pursuant to Local Bankruptcy Rule 2090-1) from the Central District of California, on which he declared that he was excluding his attendance at the §341(a) meeting unless the debtor agreed to additional fees.. (No form equivalent to 2090-1 exists in the Eastern District of California.)

The U.S. Trustee moved for review of the $750 in fees received by the attorney because the fees received by the attorney were excessive for the services rendered. The US Trustee argued that, at minimum, the attorney must include representation of the debtor at the §341(a) meeting to claim a professional fee, and that the failure to attend the §341(a) meeting violates the attorney's ethical duty of zealous representation. The attorney argued, among other things, that his attendance at the §341(a) meeting was not required to zealously represent the debtor, especially when his attendance would waste the debtor's resources and his failure to attend did not result in injury to the debtor.

The court held that excluding the §341(a) meeting from the scope of representation violated the attorney's ethical obligation of competent representation. Although the California Rules of Professional Conduct allow limiting the scope of representation with the informed consent of the client, the court found that truly informed consent from the debtor was difficult, if not impossible, to obtain. Truly informed consent requires the attorney to adequately explain to the debtor every conceivable variable that might occur during a §341(a) meeting. Moreover, the attorney has the burden of proving to the court that truly informed consent was obtained from the debtor.

The court also found that once the attorney signs the petition or appears as the attorney of record, court approval is required to withdraw from the case. The attorney in this case neither sought nor obtained the court's approval to withdraw and thereby violated court rules by leaving the debtor to appear in *pro per*.

***In Re Carrillo*, Case No. 02-09852-H7 (Bankr. S.D. Cal. Mar. 24, 2004)**

The U.S. Trustee filed a motion to examine fees pursuant to 11 U.S.C. §329 and requested disgorgement of attorney's fees. While conceding that the California Rules of Professional Conduct permit LSR, the U.S. Trustee argued that it would violate the duty of competent representation to exclude representation at the §341(a) meeting in chapter 7 cases. The U.S. Trustee argued that it is critical to have counsel attend the §341(a) meeting with their clients because of the adverse consequences that may stem from the debtor's responses to questions by the trustee and creditors.

Before the Court ruled on the motion, the debtor's attorney (i) submitted to the U.S. Trustee's demand that, in the future, he will either appear or have an attorney appear to represent the debtor at §341(a) meeting and (ii) voluntarily refunded his entire fee in this case. Although the motion to examine and disgorge attorney's fees by the U.S. Trustee was resolved, the Court noted for the record that it was "critical for an attorney to be at the §341(a) hearing." Transcript of March 24, 2004 Proceedings at 5:2-3. The Court also quoted from the letter of Judge Jaroslovsky of the Northern District of California (below).

Northern District CA: Letter from Judge Jaroslovsky

In a letter addressed to the bankruptcy bar appearing before his court, Judge Jaroslovsky expressed disbelief that attorneys could competently represent chapter 7 debtors without attending the §341(a) meeting. He admonished that "[a]ny debtor's counsel who does not understand the vital importance of attending the meeting of creditors with the debtor is in desperate need of further education. Not only is the meeting the best opportunity to discover and take care of problems which invariably arise' - - in other words, a forgotten creditor still sending bills, et cetera – 'but discharges are either won or lost at the meeting of creditors.' I couldn't agree more with that." He directed that "[i]n addition to the schedules and meeting of creditors, there are several other responsibilities which I expect debtor's counsel to take care of regardless of the fee charged. These include amendment of schedules, addressing stay relief motions, avoiding simple household good liens, reaffirmation and redemptions." While Judge Jaroslovsky states that "[i]t is permissible to charge extra for a few things, like avoidance of judicial liens and representation in adversary proceedings," he also says that "the attorneys I admire the most do not charge extra for lien avoidance unless it is contested and will sometimes represent their clients in adversary proceedings for little or no fee if they feel the adversary proceeding lacks merit."

***In re Bogdan Isvoranu*, Case. No. 03-40578-NT** (Bankr. N.D. Cal.)

An attorney should disgorge $400 of a $1,000 fee because "the debtor received little more than the services of a petition preparer" where the attorney did not attend the §341(a) meeting. Judge Newsome stated in his ruling that the form for use in the Northern District for compliance with BR 2016(b) requires that an attorney's services include representation of the debtor at the §341(a) meeting.

<u>DECISIONS OUTSIDE CALIFORNIA</u>

<u>Recent decision of note in the Ninth Circuit</u>

***In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013)**

This recent case concerned Chapter 7 consumer debtors who, after little or no counseling, signed a 19-page Retainer Agreement that required extra fees for addressing allegations of non-dischargeability. One of the precipitating factors for the debtors' filing was a state court judgment against the husband for attorney's fees, awarded on the grounds that he had committed a fraud upon the court. The attorney alternately refused to handle and then mishandled the adversary proceeding for non-dischargeability filed by the judgment creditor.

The Local Bankruptcy Rules provided that "An attorney who appears in a case on behalf of a party is the attorney of record 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." Bankr. D. Nev., Local Rule 2014(a).

In a comprehensive opinion, the Court determined that the attorney had violated Nevada Rules of Professional Responsibility 1.2 (allowing reasonable limited representation upon informed consent of client), 1.1 (the duty of competence, which mandates the inclusion of services necessary to achieve the client's reasonable objectives); 1.5(b) (which requires disclosure of the scope of representation and the basis for fees to the client) and 1.4 (the duty to communicate with clients), as well as Bankruptcy Code §707(b)(4)(C) (which requires an attorney signing a chapter 7 petition to make a reasonable investigation into the circumstances that gave rise to the petition) and §§526-528 (which mandate certain provision of services, disclosure and contractual requirements by a "debt relief agency" to an "assisted person).

This decision has been appealed to the BAP, which heard oral argument on January 24, 2014. As of July 31, 2014, no ruling has been issued by the BAP.

<u>Decisions Prohibiting or Severely Restricting LSR Generally</u>

***In re Burton*, 442 B.R. 421 (Bankr. W.D.N.C. 2009)**

> "Attorneys in this judicial district are retained for the entire bankruptcy case. With few exceptions, debtors' attorneys are obliged to represent their client until either (1) the case is closed or (2) the attorney is permitted to withdraw by order, after motion and notice. Local Rule 2091-1.
>
> An attorney is not at liberty to redefine the bankruptcy representation to exclude particular services such as Burton has sought to do. The lien avoidance motions and relief from stay defenses that Burton contractually seeks to exclude from the representation are essential legal services and are required by Local Rule. In Chapter 13 cases, these services are expressly included as part of the attorney's base case fee. Local Rule 2016-1.
>
> Local Rule 2091-1 does not contemplate cafeteria plans or unbundling services in consumer cases. The Local Rule certainly does not permit extortion by not filing case documents until payments are made or failing to respond motions."

442 B.R. at 453 (decision involved twelve Chapter 7 and Chapter 13 cases handled by attorney).

***In re Bulen*, 375 B.R. 858 (Bankr. D. Minn. 2007)**

The court determined that the attorney's retainer agreement violated Local Bankruptcy Rule 9010-3(e) by providing that "the attorney can withdraw for any reason, including untimely payment of fees," and that "appearances beyond the first meeting are subject to further negotiation of fees." Rule 9010-3(e) mandates that, "until there is a valid substitution or withdrawal, the attorney must continue to represent the debtor in all matters in the main case without regard to payment or promise of additional fees."

The court recognized a movement towards LSR, which may allow *pro se* debtors better access to the legal system, but opposed LSR as "not beneficial to the debtor. Neither does it provide any degree of efficiency or expediency to the Court. In bankruptcy, unbundled legal services essentially means [an] unraveled legal process, not increased access to justice."

Further, while Minnesota Rule of Professional Conduct 1.2 permits unbundling, Local Rule 9010-3(e) essentially provides "that unbundling main case representation is patently not reasonable, except under circumstances determined by the Court after a hearing on a motion to withdraw, in the absence of a filed substitution of attorney."

Overall, "an attorney representing a chapter 7 debtor ordinarily may not limit the scope of that engagement." An attorney must zealously represent his/her client and the client's failure to pay for the attorney's services does not relieve the attorney of his/her duty to continue to represent the client in a matter in which the attorney was originally retained.

***Danvers Sav. Bank v. Cuddy (In re Cuddy)*, 322 B.R. 12 (Bankr. D. Mass. 2005)**

A Chapter 7 debtor's attorney sought to withdraw from representation because the debtor failed to replenish his retainer. The fee agreement, signed by the debtor, allowed the attorney to withdraw from the case if the debtor failed to replenish retainer. The bankruptcy court denied the motion to withdraw and held that the debtor's failure to replenish the retainer did not justify the attorney's withdrawal: "once a lawyer accepts [a] retainer to represent a client [,] he is obliged to exert his best efforts wholeheartedly to advance [the] clients [sic] legitimate interests . . . until he is relieved of that obligation either by the client or the court." 322 B.R. at 19.

The court noted that the Local Bankruptcy Rules provide that "an attorney representing a debtor in a bankruptcy case is required to represent the debtor in any adversary proceeding filed within the bankruptcy case in which the debtor is a named defendant unless the debtor expressly agrees otherwise at the commencement of the representation." 322 B.R. at 15 (citing LBR 9010(3)(d)). The Court noted that this rule is an implementation of Massachusetts Rule of Professional Conduct Rule 1.2(c), which provides that an attorney "may limit the scope of the representation if the client consents after consultation." *Id*. The Court also cited MRPC 1.16(a), which mandates that an attorney may withdraw . . . if withdrawal can be accomplished without material adverse effect on the interests of the client . . ." *Id.*

The Court concluded that an attorney owes a duty both to the client and to the court. When an attorney chooses to represent a client, he or she "assumes obligations toward his client which are not excused merely because the client is unable to pay fees demanded to the attorney." 322 B.R. at 16

> The image that has come to my mind most insistently while working on this opinion is this: A professional swim instructor takes on a new student with this understanding: You have paid me my initial fee. For that money I will lead you to the swimming pool, show you how to enter the water, and explain the basic elements of swimming. If, however, you should begin to drown, of if some other serious problem arises, I will leave you to your own resources unless you pay me more money.

322 B.R. at 17-18.

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

In this widely-cited decision, the attorney had charged $475 per case and included representation at the §341(a) meeting and any reaffirmations, but nothing further.

Relying on Georgia Rule of Professional Conduct 1.2(c) (which allows reasonable LSR with informed consent), Georgia Rule 1.1. (which holds attorneys to a duty of competency) and Restatement (Third) of the Law Governing Lawyers 19(1) (which allows reasonable limitations with informed consent of client), the court concluded that LSR was allowed if "three "fundamental requirements" were met: (i) the attorney consults with the client, (ii) the client provides informed consent and (iii) the limitation is reasonable under the circumstances (i.e., "the engagement must not be so limited as to prevent competent representation.")

Applying that rule to Chapter 7 debtors, the Court concluded that discharge and retention of exempt property are the central objectives of a Chapter 7 filing. Thus, the duty of competence demands that the attorney provide the services necessary to meet these goals and thus ordinarily precludes limiting the scope of Chapter 7 representation. The Court did note however, that the attorney could charge additional amounts for work beyond the "flat fee" - such as negotiating reaffirmation documents or motions to avoid liens. However, the client's failure to pay these additional fees would not justify a refusal to represent the debtor on these matters, at least until the attorney is permitted to withdraw.

***In re Castorena*, 270 B.R. 504 (Bankr. D. Id. 2001)**

In a very thoughtful and lengthy opinion, Judge Myers addressed concerns about the same attorney at issue in the BAP's *Basham* opinion and the Ninth's Circuit's *Hale* opinion. The attorney charged $250 for preparation of petition and schedules (but excluded §341(a) appearances or any other appearance in bankruptcy court). The attorney did not sign the petition he had prepared for the debtors, but filed FRBP 2016(b) disclosure statements.

The Court ruled that the petition must be signed by the attorney under Rule 9011, even if the services to be provided were limited (but did not impose sanctions under Rule 9011 due to lack of notice to the attorney).

The Court found that the schedules prepared by this attorney were rife with errors and that he had non-lawyer "interns" doing a large amount of the work, so he had failed to sustain his burden of proving his services were reasonable and necessary under §329(b).

The Court concluded that Idaho Rules of Professional Conduct 1.1(a), 1.2(c) and 1.4 will make it exceedingly difficult to contract away the "fundamental and core obligations" of representing a debtor. The most fundamental was actually appearing for the debtor, meaning ghost writing was unacceptable. "To send a debtor into a bankruptcy *pro se*, on the theory that he has had "enough" advice and counseling in the document preparation stage to safely represent himself is except in the extraordinary case so fundamentally unfair as to amount to misrepresentation." 270 B.R. at 529. The Court provided a list of duties normally required as part of representation of a debtor:

> Furthermore, for clarity, when accepting an engagement to represent a debtor in relation to a bankruptcy proceeding, an attorney must be prepared to assist that debtor through the normal, ordinary and fundamental aspects of the process. These include the proper filing of all required schedules, statements and disclosures; preparation and filing of necessary amendments to the same; attendance at the § 341 meeting; turnover of assets to the trustee, and cooperation with the trustee; compliance with the tax turnover and other orders of the Court; performance of the duties imposed by § 521(1), (3) and (4); counseling in regard to § 521(2) and the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors, and assisting the debtor in accomplishing those aims; and responding to issues that arise in the basic milieu of the bankruptcy case, such as violations of stay and stay relief requests, objections to exemptions and avoidance of liens impairing exemptions, and the like.

270 B.R. at 530. The court noted that each case varies so the list was not meant to be exclusive, "[b]ut the closer to the heart of the matter -- the debtors' desire to obtain bankruptcy relief and the process necessary to do so -- the less likely exclusion is appropriate." *Id.*

The Court also concluded that any limits on the scope of representation may only be made with truly informed consent, which may be impossible:

> The quality of such informed consent is critical. Unless debtors truly understand what they bargain away, the bargain is a sham.
>
> In order to make an informed decision, the client must understand what might be faced in the bankruptcy, and the risks associated with representing himself in handling

> those contingencies. Many lawyers find themselves surprised by what can arise in an otherwise "simple" bankruptcy case. The reported decisions of this and other bankruptcy courts make it clear that, even in garden variety consumer chapter 7 cases, counsel for debtors and those who might be characterized as their adversaries (creditors, or occasionally the trustee) sometimes have distinctly polar views of what is permissible and what is not. The ability to adequately explain the lay of the bankruptcy landscape, including all its variations, contingencies and permutations, in order to obtain a truly informed consent is suspect.

270 B.R. at 529.

Decisions Specifically Requiring Reaffirmation Representation

***In re Collmar*, 417 B.R. 920 (Bankr. N.D. Ind. 2009)**

Agreeing to represent debtor is an agreement to represent for the entire case and not simply bits and pieces. Indiana Rule of Professional Conduct 1.2(c) allows limitations on representation if: (i) reasonable under the circumstances and (ii) client gives informed consent. Excluding reaffirmation is not a reasonable limitation. The decision to reaffirm is critical to the debtor's case, so that assistance with reaffirmation (advising debtor about the process and evaluating the effect of an agreement) is part of the services that make up competent representation of a Chapter 7 debtor. (Thus, Court would not approve the reaffirmation agreement.)

Note: This decision does not cite or discuss any local rules on point.

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

Attorney's employment contract with chapter 7 debtor excluded reaffirmations from his representation. Attorney advised the debtor on effect and consequences of the reaffirmation agreement, but he did not assist the debtor in negotiating the agreement.

The Court concluded that decision to reaffirm is so critical to the bankruptcy process that assistance with reaffirmation is required as a part of the attorney's professional duty of competent representation. Further, the Bankruptcy Code §524(c)(3) gives the attorney that responsibility. Although Oklahoma had Rule1.2(c), which allows reasonable limits on representation with informed consent), excluding reaffirmation assistance is not a *reasonable* limitation.

Note: This decision does not cite or discuss any local rules on point.

***In re DeSanctis*, 395 B.R. 162 (Bankr. M.D. Fla. 2008)**

Law firm agreement with Chapter 7 debtors included reaffirmation agreement, but the law firm failed to represent the debtors in negotiating a reaffirmation agreement. Local Rule 9011-1 required the debtor's attorney to attend all hearings in the case that the debtor is required to attend. The Court awarded sanctions against the law firm.

In (arguably) dicta, the Court discussed "certain essential duties" of counsel for Chapter 7 consumer debtors: (i) preparation of petition, schedules, statements and pleadings, (ii) attending scheduled meetings of creditors and (iii) assistance in reaffirmation and redemption.

***In re Carvajal*. 365 B.R. 631 (Bankr. E.D. Va. 2007)**

The Court denied approval of a reaffirmation agreement:

> The court reminds counsel that once he makes an appearance in a bankruptcy case, he has made an appearance for all matters in that bankruptcy case and must appear with respect to them unless otherwise excused by the court. Reaffirmation agreements are an integral part of chapter 7 representation of debtors. By accepting a

> chapter 7 case, counsel is accepting all aspects of the case including counseling with respect to reaffirmation agreements, negotiations with creditors with respect to reaffirmation agreements, and representing debtors in court with respect to reaffirmation agreements.
>
> This is not to say that counsel is not to be paid for these services. It is expected that counsel will be paid for all services he renders. If these services are not included in the flat fee, he may charge additional fees agreeable with the client. However, whether fees are paid or not paid by the client does not permit counsel to fail to stop representing his client through all aspects of the case. If there are difficulties with the attorney-client relationship, including non-payment of fees, counsel may seek leave to withdraw. The court is not favorably inclined to permitting counsel to withdraw solely because a reaffirmation agreement is involved in the case particularly where there are or may be other matters to be addressed.

365 B.R. at 632.
Note: This decision does not cite or discuss any local rules on point.

Central District of California – Attorney Certification for Reaffirmations

In considering inclusion of reaffirmation agreements, it should be noted that our local reaffirmation agreement form requires the following certification from an attorney who "represented the debtor during the course of negotiating" the reaffirmation agreement:

> "I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement."
>
> "□ [Check box, if applicable and the creditor is not a Credit Union.] A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment."

<u>Decisions Requiring Attendance at §341(a) Meetings</u>

***In re Ortiz*, 496 B.R. 144, 148-149 (Bankr. S.D.N.Y. 2013) (citations omitted).**

The Court found that the debtor's attorney had impermissibly excluded from Chapter 7 representation routine matters that are required in every consumer debtor representation. Specifically, the Court was troubled by the exclusion of more than one §341(a) meeting, more than one hour of post-§341(a) work, amendments due to client error, redemptions and reaffirmations.

> While an attorney may limit the scope of representation, "a practice colloquially referred to as 'unbundling' . . . [such limitation must be] consistent with the rules of ethics and professional responsibility binding on all attorneys." Although "there is no local rule [in this District] regarding what services must be included in the [attorney's] flat fee . . . [s]ervices that are not considered 'typical' may be properly excluded . . . so long as the client receives proper notice of what is and is not included.
>
> A lawyer who agrees to represent a debtor in a consumer bankruptcy case must act as his or her attorney for all "normal, ordinary, and fundamental aspects" of the case, including amendments to the schedules and other routine representation necessary to ensure that the debtor receives a discharge.

NY Rule of Professional Conduct 1.2(c) allows reasonable limitations with informed consent. The court concluded that representation at §341(a) meeting is a "fundamental and core obligation" of debtor's attorney, so excluding more than one appearance violates Rule 1.2(c).

Hiring appearance counsel for the §341(a) hearing is not *per se* inappropriate, but the appearance counsel must also file a Rule 2016(b) statement.

***In re Cochener*, 360 B.R. 542 (Bankr. S.D. Tex. 2007)**

Debtor's attorney took a $2,500 retainer and later claimed that he did not have a statutory duty to attend the section §341(a) hearing. The attorney submitted a Disclosure of Compensation pursuant to 11 U.S.C. §329, which included "Attendance at 341 Meeting." Even without this language in the attorney's own compensation disclosure, the court concluded that the §341(a) meeting is mandatory for the debtor and for the debtor's attorney: "it [is] unfathomable that [the attorney] could take such a large retainer and yet argue that it is not part of his obligation as counsel for the Debtor to appear at the continued Meeting of the Creditors." 360 B.R. at 580. Further, debtor's counsel not only owes a duty to the debtor; he also owes a duty to the system to appear. As an agent of the debtor, the attorney adopts the duty to cooperate with the trustee, which includes appearing at the §341(a) hearing.

***In re Johnson*, 291 B.R. 462 (Bankr. D. Minn. 2003)**

The court ordered partial return of attorney's fees where the attorney for individual Chapter 7 debtors filed a disclosure statement pursuant to FRBP 2016(b) stating that he would attend the §341(a) meeting, but then failed to attend (allegedly with debtor's consent). The court concluded that attendance at the §341(a) meeting is mandatory under the local rules, which requires attorneys to represent debtors in all matters and proceedings in the bankruptcy case other than adversary proceedings. Attorneys for consumer chapter 7 debtors may not "unbundle the core package of ordinary legal representation reasonably anticipated in every case." A §341(a) meeting is core to the bankruptcy case and representation may not be avoided by obtaining client consent through discount of compensation.

***In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill. 1997)**

The court ordered disgorgement of attorney fees for failure to attend the §341(a) meeting because the debtors did not give informed consent to the attorney's absence, as required by Illinois Rule of Professional Conduct 1.2(c).

<u>Decisions Accepting LSR (with some qualifications)</u>

***In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012)**

Chapter 7 debtor and his attorney signed two fee agreements: one charging $1000 for all pre-petition services and a second charging $2,000 for post-petition services. The US Trustee moved for cancellation of the post-petition agreement and disgorgement of the fees.

The Court rejected *Egwim* and found that §329 and the duty of competence under Michigan Rules of Professional Responsibility do not prohibit the unbundling of pre-petition services from post-petition services.

> The Court has a very strong preference to see individual debtors hire an attorney to represent them in all aspects of a Chapter 7 bankruptcy case, from start to finish, including the preparation and filing of the petition and all required documents together with all of the steps necessary to complete the case after the petition has been filed. In the Court's experience, an individual Chapter 7 debtor's chances of success are greatly enhanced if they have an attorney represent them throughout the entire process. Further, it is beyond challenge that individual debtors are also invariably better served by having an attorney represent them in preparing as many as possible of their required documents before their petition is filed and then filing those documents together with their petition. This practice lessens the chance of inconsistency or error, and minimizes

> the likelihood of problems for a debtor down the road. However, the Court understands that some individual debtors simply cannot afford to pay up front for all of the services required to both file and complete a Chapter 7 case prior to the time that they file their Chapter 7 bankruptcy case. The law does not prohibit such individuals from paying a smaller fee to an attorney to get their case filed and then, once the case is filed, either proceeding pro se or entering into a new agreement either with the same attorney or with another attorney to represent them in completion of their case . . . .

482 B.R. at 596-97. The Court did require that the debtor be adequately consulted on the scope of the representation and its ramifications.

***In re Jones*, 356 B.R. 39 (Bankr. D. Idaho 2005)**

Debtor's counsel indicated in his 2016(b) disclosures that he agreed to represent the debtor for $750.00 and that representation would be limited to "prepetition counseling, preparing, and filing the necessary bankruptcy papers, and representing the debtors at the first meeting of the creditors." 356 B.R. at 51. Counsel demanded additional fees in order to represent the debtor in litigation over violations of the automatic stay. The debtor was unable to pay additional attorney's fees, so she agreed to a 75% contingency fee agreement "for counsel's pursuit of relief regarding the violation[s]." 356 B.R. at 52.

The Court refused to validate the contingent fee arrangement and cited *Castorena* for the proposition that "exclusions from the scope of representation without additional payment of fees, especially for something as core to the bankruptcy process as enforcing the automatic stay, must be adequately explained to and understood by the client." Debtor claimed that she was not made aware of the possibility that additional fees would be owed until she contacted the attorney regarding the stay violation.

***In re Hodges*, 342 B.R. 616 (Bankr. E.D. Wash. 2006)**

Chapter 7 debtors filed bankruptcy and employed a law firm to handle their case, but ended up owing the law firm money and the matter was assigned to collection. Debtors filed this proceeding claiming that the collection action violated the FDCPA and the discharge injunction. The parties disagreed on the terms of the oral retention agreement: $700.00 plus the filing fee "for [a] complete handling of the case (debtors' view) vs. $750.00 for limited services (attorney's recollection).

In this context, the court stated: "The general rule in bankruptcy court (and the district court for that matter) is that once a lawyer has undertaken a bankruptcy case, the attorney needs court permission to terminate that representation." 342 B.R. at 619 (citing LBR 9010(b)(5)). The client's mere unavailability to pay for additional services may not be grounds for termination of representation, especially in the bankruptcy context where debtors often are only able to pay a limited amount. 342 B.R. at 620. However, the Court went on to recognize that:

> Recently the Bar Association has allowed a lawyer to limit the scope of representation if the limitation is reasonable and the client consents after consultation." RPC 1.2(c). The rules of the Bankruptcy Court for the Eastern District of Washington allow "limiting" or "unbundling" services in certain instances by defining what services must be performed in connection with a flat fee arrangement in handling a Chapter 13 case. LBR 2016(e). These rules require a written fee arrangement.
>
> It may be possible to limit the services contracted for in handling a Chapter 7 case but this must be done specifically and with a clear showing that the client consents to this arrangement.

Id.

***In re Merriam*, 250 B.R. 724 (Bankr. D. Colo. 2000)**

The U.S. Trustee brought a motion to examine and disgorge attorney's fees pursuant to 11 U.S.C. §329(b), arguing that the attorney's fees were excessive due to the attorney's failure to (i) attend the §341(a) meeting with the debtor and (ii) sign the debtor's petition. The court found that the undisputed facts were as follows:

After interviewing the debtor and determining that the debtor's case was a simple consumer case, the attorney offered the debtor two flat fee options for Chapter 7 representation. One option included attendance at the 341(a) meeting; the other did not. Regardless of the debtor's choice of services, the attorney agreed to consult with the debtor prior to the §341(a) meeting, respond to the debtor's pre- and post-petition questions, and to review proposed reaffirmation agreements. The attorney also offered to represent the debtor in specific post-petition matters for additional fees. After the debtor learned what the §341(a) meeting is, how it is conducted and the risks of attending the meeting without an attorney, the debtor chose the option excluding the attorney's attendance at the §341(a) meeting from the scope of representation. The attorney prepared and filed the petition, schedules and statement, but did not sign the documents.

The Bankruptcy Court found that the attorney's failure to sign the documents violated FRBP 9011. The Court held that the signature requirement in FRBP 9011, like the signature requirement in FRCP 11, serves to certify to the court the accuracy of the petition. When attorneys fail to sign petitions they have prepared, there is a potential for misleading the Court, the trustee and creditors. As officers of the court, attorneys owed a duty to the Court and the legal system to sign petitions they have prepared. Although Colorado Rules of Professional Conduct allow the unbundling of legal services, they do not excuse compliance with FRCP 11 and FRBP 9011. [1]

The court denied the U.S. Trustee's motion to disgorge, which argued that the attorney's failure to attend the §341(a) meeting made his $399 fee excessive. The Court found that attendance at the §341(a) meeting by the debtor's attorney is often beneficial to the debtor, creditor and trustees, but rejected mandatory attendance by debtors' attorneys. While attendance of the debtor's attorney at a §341(a) meeting may be critical in some cases, the court noted that some *pro se* debtors successfully complete the bankruptcy process even though they are without legal representation at the §341(a) meeting. Absent a showing that the attorney's "failure to attend the §341(a) meeting violated his duty to the debtor, dropped below the minimum professional standards in the community or resulted in injury to the debtor or the estate," the Court held that a reduction or recoupment pursuant to 11 U.S.C. §329(b) was not warranted.

[1] A District Court Administrative Order 1999-6 in effect at the time of the bankruptcy filing stated that Rule 1.2(c) of the Colorado Rules of Profession Conduct, as well as other provisions of Colorado laws permitting attorneys to limit their representation, were not applicable in matters pending before the U.S. District Court for the District of Colorado. After oral arguments in this case, Administrative Order 1999-6 was amended to prohibit limited representation in adversary proceedings and matters governed by FRBP 9014. The Court in this case reasoned that by negative implication, the Administrative Order allows limited representation in other phases of a bankruptcy case.

Post-Petition Fee Issues

Any rules governing the scope of representation in chapter 7 must take into account the rather complicated issues surrounding fees for post-petition work performed by a Chapter 7 debtor's attorney.

A Chapter 7 debtor's attorney cannot be compensated from the debtor's estate for post-petition services (unless employed by the Trustee). *Lamie v. United States Tr.*, 540 U.S. 526, 538-539 (U.S. 2004). The *Lamie* decision did, however recognize (and not take issue with), Chapter 7 debtor's counsel receiving a pre-petition retainer. 540 U.S. at 537-38.

Since *Lamie*, most courts have held that this "retainer exception" only allows Chapter 7 debtor's counsel to retain "flat fee" or "advanced payment" retainers. Security retainers, on the other hand, are property of the estate; payment for post-petition services from property of the estate would undermine §330 and *Lamie*. *Wagers v. Lentz & Clark, P.A. (In re Wagers)*, 514 F.3d 1021 (10th Cir. 2007); *Fiegen Law Firm, P.C. v. Fokkena (In re On-Line Servs. Ltd.)*, 324 B.R. 342, 347 (B.A.P. 8th Cir. 2007); *Morse v. Ropes & Gray, LLP (In re CK Liquidation Corp.)*, 343 B.R. 376, 383 (D. Mass. 2006)("this Court has concluded that the "retainer exception" articulated in the *Lamie* decision referred only to flat fee retainers"); *In re Blackburn*, 448 B.R. 28 (Bankr. D. Idaho 2011); *In re Hill*, 355 B.R. 260, 268 (Bankr. D. Or. 2006)("The 'retainer exception' set forth in Lamie is limited to flat fee retainers and does not extend to retainers intended solely to secure payment of post filing attorney fees."); *aff'd sub nom*., *Hill v. Camacho*, 2007 U.S. Dist. LEXIS 54443 (D. Or. 2007). *But see In re Channel Master Holdings, Inc.,* 309 B.R. 855, 859 n.3 (Bankr. D. Del. 2004).

Furthermore, in the Ninth Circuit: post-petition legal services provided to a chapter 7 debtor, even when provided pursuant to a pre-petition contract, constitute post-petition debt and are not dischargeable in bankruptcy. *Gordon v. Hines (In re Hines),* 147 F.3d 1185, 1190-91 (9th Cir. 1998); *Sanchez v. Gordon (In re Sanchez),* 241 F.3d 1148, 1150-51 (9th Cir. 2001); *Knutson v. Tredinnick (In re Tredinnick),* 264 B.R. 573, 577 (B.A.P. 9th Cir. 2001); *Kelly v. Duboff Law Group, LLC (In re Fraga),* 2007 Bankr. LEXIS 4924, at *8 (B.A.P. 9th Cir. Mar. 1, 2007). (This rule has been severely criticized in other circuits. *See, e.g., Bethea v. Robert J. Adams & Assocs.,* 352 F.3d 1125 (7th Cir. 2003), *cert. denied*, 541 US 1043 (2004).)

Several conclusions follow. Post-petition services may be included within the basic scope of Chapter 7 representation without subjecting a "flat fee" retainer to the risk of disgorgement. Post-petition services that are "add ons" to the basic representation cannot be a paid (i) by drawing on a pre-petition retainer or (ii) by the estate, but they are post-petition obligations of the debtor - even if they are covered by a pre-petition retainer agreement. Thus, in the Ninth Circuit, a Chapter 7 attorney does not need a separate post-petition retainer agreement to cover post-petition services. Furthermore, "informed consent" requires disclosure of the fact that any post-petition services beyond the basic scope of representation covered by a flat fee will be post-petition obligations of the debtor that are not dischargeable in bankruptcy.

Final Conclusions

Local bankruptcy rules and case law take a wide variety of approaches to LSR in Chapter 7, ranging from:

- *Egwim*'s prohibition on LSR and *Castorena's* conclusion that any meaningful LSR will violate an attorney's professional responsibilities, and the many local rules that require debtor's counsel to represent the debtor for all purposes in the bankruptcy case;
- decisions that require specific representation (at the §341(a) meeting and/or with respect to reaffirmation) and local rules (and the ABI proposed rules) that require attorneys for chapter 7 consumer debtors to provide certain enumerated services; or
- decisions and local rules that allow LSR, although usually requiring informed consent by the client and disclosure.

All decisions would acknowledge that this issue requires balancing two competing interests. Post-petition legal representation greatly assists the debtor in navigating bankruptcy and successfully obtaining the usual goal in a consumer chapter 7 bankruptcy: a discharge and the retention of exempt property. Attorney participation throughout the chapter 7 also increases court effectiveness and efficiency. On the other hand, each additional requirement of representation raises the costs of representing chapter 7 debtors and prices more and more debtors out of representation altogether, especially as prudent attorneys demand a pre-petition retainer to cover all fees.

Any rule on LSR must comport with the California Rule of Professional Conduct. Rule 3-110 requires a duty of competency. Bankruptcy court decisions throughout the country have disagreed with exactly what scope of representation a duty of competency requires, but non-bankruptcy California case law has required alerting clients to matters that adversely impact the client's objectives, even if the matter is outside the scope of representation. Rule 3-700 also requires that the termination of employment, which is inherent in an LSR, only occur upon knowing assent of client and should be structured in a way to avoid "reasonably foreseeable prejudice" to the client. Furthermore, public disclosure must be made, so that opposing counsel can comply with Rule 2-100 on communication with a represented party.

The most typical LSR in consumer Chapter 7 bankruptcy provides pre-petition services up to the filing of the petition. Additional required services should be the minimum necessary to assure competent representation and avoid foreseeable prejudice to the debtor, in order to minimize the number of the debtors that will be priced out of representation.

The ABI National Task Force on Ethics report and proposed rule and the Oregon local rule are both well-considered approaches to striking the balance between complying with ethical obligations and providing adequate representation while minimizing the number of debtors that are priced out of representation by increased requirements. Both rules are attached. We have also attached the relevant local rule and Rights and Responsibilities Agreement for the Southern District of California and the Northern District of California guidelines: both were created in the context of California ethical rules and both provide a thoughtful list of services each district expects to be included within representation. We have used these rules to create the attached straw poll list of elements that might be included in Chapter 7 representation. At the conclusion of the program, we will conduct a straw poll on which elements should be required in chapter 7 representation. We would like to use the results of this straw poll to formulate a proposal to bring before the bar for comment.

STRAW POLL – BOJ vote on possible unbundling scenarios – all questions relate to debtor's counsel

September 5, 2014

1. Do you believe adversary proceedings must be included in any bankruptcy representation?

   YES__________ NO___________

2. Do you believe counsel can limit representation to just document preparation (i.e., all schedules, SOFA, required forms under section 521) and exclude all other case activity?

   YES__________ NO___________

   a. Would this limited appearance include amending schedules or SOFA as required?

      YES__________ NO___________

3. Do you believe counsel must be required to provide representation at the 341 meeting as well?

   YES__________ NO___________

   a. If YES, would you require representation at <u>any continued</u> 341 meeting as part of the basic fee, in addition to initial meeting?

      YES__________ NO___________

4. <u>If</u> the court's rule requires any post-filing representation, would you <u>also</u> require representation to include:

   a. Defense of any motions brought under section 707?

      YES__________ NO___________

   b. Defense of any audit by the U.S. Trustee?

      YES__________ NO___________

   c. Defense of any relief from stay motion?

      YES__________ NO___________

   d. Filing any amended schedules or SOFAs?

      YES__________ NO___________

e. Analysis and filing of necessary redemption or lien avoidance motions?

YES___________ NO____________

f. Explanation and advice on reaffirmation options, whether or not the attorney is required to sign form B27?

YES___________ NO____________

i. If YES, would you also require the attorney to sign form B21?

YES___________ NO____________

5. Would you allow a post-petition additional fee to be charged for any of the above, whether or not it is required as part of representation?

a. 707 motions?

YES___________ NO____________

b. Audit by the U.S. Trustee?

YES___________ NO____________

c. Relief from stay motion?

YES___________ NO____________

d. Amended schedules or SOFAs?

YES___________ NO____________

e. Redemption or lien avoidance motions?

YES___________ NO____________

f. Reaffirmation?

YES___________ NO____________

Final Report of the American Bankruptcy Institute National Ethics Task Force

April 21, 2013

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Best Practices for Limited Services Representation in Consumer Bankruptcy Cases[1]

Introduction[2]

The ABI Bankruptcy Ethics Task Force has considered the issue of Limited Scope Representation ("LSR"), also known as "unbundling legal services" and "discrete task representation." We have also briefly examined the issue of "ghostwriting," a form of LSR.[3] These practices have developed as a means to serve the ever-increasing number of self-represented debtors (also known as *pro se* debtors).

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.[4]

The problem of the high cost of consumer bankruptcy representation is well documented.[5] 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.[6] 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.[7]

Although in most jurisdictions there is a mechanism for attorney fees in Chapter 13 cases to be paid through the plan (thus limiting the amount of cash a financially distressed debtor must have

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1 This proposed rule is restricted to consumer practice. LSR in the business context has a very different justification and implicates very different issues.

2 The Reporters' Notes liberally draw on the excellent WHITE PAPER ON LIMITED SCOPE REPRESENTATION IN BANKRUPTCY, prepared by LSR Subcommittee member Theresa V. Brown-Edwards (ABI Ethics Task Force Multijurisdictional Practice/Limited Service Representation Subcommittee) 2012.

3 Due to the time and resource constraints, the Task Force decided to defer a thorough discussion ghostwriting. It is expected that a future ABI working group will address this important issue.

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

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

6 *Id.* at 30.

7 *Id.*

in hand to pay an attorney prior to filing),[8] high attorney fees remain a concern. In many instances, at least a portion of the fee must be paid to the attorney up front, and providing for the fee balance to be paid through the plan may adversely affect the plan's feasibility. Thus, high fees in Chapter 13 cases *may* be pricing some debtors out of filing for bankruptcy under Chapter 13.[9] Although it is difficult to measure how many consumers in financial distress do *not* file for bankruptcy protection, the Consumer Bankruptcy Fee Study did reveal that zero cases filed *pro se* under Chapter 13 ended with the debtor receiving a discharge.[10] This is a result of the myriad new obligations imposed on debtors by BAPCPA, and the difficulty many debtors have had (and continue to have) in meeting these obligations.[11]

The problem of *pro se* representation is even more compelling in Chapter 7, where it is far more common. The Consumer Bankruptcy Fee Study found that 5.8% of all Chapter 7 cases are filed *pro se*.[12] This descriptive statistic is reflective of a national random sample of cases filed post-BAPCPA. We recognize, however, that the incidence of *pro se* filings is considerably higher in many jurisdictions. In the ten courts with the greatest number of *pro se* cases, 9.5% to 27.1% of all cases are filed without attorney representation.[13]

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

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8 *Id.* at 116.

9 *Id.* at 104.

10 *Id.* at 33-34.

11 As observed:

> BAPCPA's enactment changed the consumer bankruptcy system in a myriad of small and not-so-small ways. For example, there is now an income and expense standard consumer debtors must meet in order to qualify for Chapter 7. The most critiqued of all new requirements, the means test, mandates that all debtors calculate their income and expenses using a system of complex calculations. It requires the application of various local and IRS expense standards to the debtor's financial information, adjusted by geographic location and household size.
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> The list of necessary documents and records required by a consumer debtor filing under Chapter 7 or Chapter 13 has also notably increased. In addition to a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of financial affairs, a debtor must now produce: (i) evidence of payment from employers, if any, received within 60 days of filing; (ii) a statement of monthly net income and any anticipated increase in income or expenses after filing; (iii) a record of any interest the debtor has in a federal or state qualified education or tuition account; and (iv) a copy of his or her tax return for the most recent tax year.
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> Two educational courses are now also required of debtors—a debtor must complete a credit counseling course prior to filing, and a debtor education course must be completed prior to discharge.

Id. at 33-34 (footnotes omitted).

12 *Id.* at 31.

13 *See* Administrative Office of the United States Courts, By the Numbers—Pro Se Filers in the Bankruptcy Courts (2011) (*available at* http://www.uscourts.gov/News/TheThirdBranch/11-10-01/By_the_Numbers--Pro_Se_Filers_in_the_Bankruptcy_Courts.aspx).

14 Lupica, *supra* note 5, at 102.

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 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. With the goal of addressing each of these concerns, the Task Force has examined the elements of debtor representation in consumer bankruptcy cases and has developed a framework for engagement of counsel for limited services. After due discussion and consideration, the Task Force is recommending a framework for LSR representation in Chapter 7 consumer cases *only* because of Chapter 13's complexity and the difficulty of distinguishing between the "basic" and the "full service" elements of representation of a Chapter 13 debtor.[17] In addition, the ability to pay legal fees paid through a plan and the historically low incidence of *pro se* Chapter 13 cases has led the Task Force to conclude that the concerns motivating the LSR Proposal are best met by the development of a proposal for best practices for limited services representation only in Chapter 7 consumer cases.

LSR and Model Rules, Local Rules, Bar Association Opinions and Judicial Pronouncements

Limited Scope Representation has been gaining attention among the federal and state judiciary. Typically, states and bar associations have been more receptive to "unbundled" legal services than federal courts. 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."[18] 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.[19]

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15 *Id.*

16 *Id.* at 103.

17 Note, however, that nothing in this Best Practices Statement obviates the need for attorneys for consumer debtors to comply with, *e.g.,* the Bankruptcy Code provisions involving debt relief agencies. *See* 11 U.S.C. §§ 101(8), 101(12A), 526-258.

18 MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2011).

19 *Id.* at R. 1.2 cmt. 5.

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." 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.[20]

Model Rule 1.0(h) defines "reasonable" as being consistent with the "conduct of a reasonably prudent and competent lawyer.[21] 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.[22]

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.[23] 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.[24]

Other courts, however, have viewed the practice of unbundling more skeptically.[25] Those

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20 *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).

21 MODEL RULES OF PROF'L CONDUCT R. 1.0(h) (2011).

22 *Id.* at R. 1.2 cmt. 7.

23 *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).

24 Lupica, *supra* note 5, at 102.

25 *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

courts that have viewed limited scope representation less favorably have expressed concern that LSR leaves debtors without guidance in the thick of the bankruptcy case, when they are most vulnerable.[26] 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.[27]

Informed Client Consent

The reasonableness of a representation cannot be evaluated without the client's informed consent. Informed consent requires that the client knows of and understands the risks and benefits of the limited representation. The Model Rules define informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."[28]

In the context of consumer bankruptcy, any attempt to limit the scope of representation

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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).

[26] *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).

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

[28] MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2011). The Official Comments to Rule 1.0(e) further explain: "The communication necessary to obtain such consent will vary according to the Rule involved and circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." *Id.* at cmt. 6.

must be fully disclosed and clearly understood by the debtor before proceeding with the engagement.[29] This means that for a debtor to provide valid, fully informed consent to limited services representation, the lawyer must fully explain the services that are omitted from the representation, including the materiality of these services and the potential ramifications of their omission. As a matter of "best practices," the Task Force recommends that any informed consent be in writing. A "Model Agreement and Consent to Limited Representation in Consumer Bankruptcy" is found below.

In addition to executing the "Agreement and Consent to Limited Representation in Consumer Bankruptcy," the Task Force further recommends that an affidavit be signed by the attorney and filed with the Bankruptcy Court attesting that the "Agreement and Consent to Limited Representation in Consumer Bankruptcy" was signed by the debtor and the attorney and that the debtor understood its substance.

Despite well-founded concerns for protecting the interests of consumer debtors, the trend in bankruptcy cases (and non-bankruptcy cases) generally favors allowing limited representation in some form. The target of this proposed rule is the debtor who falls in the liminal space between not qualifying for legal aid but with limited funds to pay for full-service representation.

Best Practices for Limited Scope Representation

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.[30] Best practices, at a minimum, require the following:

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[29] *See* Hale v. U.S. Trustee, 509 F.3d 1139, 1147 (9th Cir. 2007); *In re* Castorena, 270 B.R. 504, 529 (Bankr. D. Idaho 2001) ("Unless debtors truly understand what they are bargaining away, the bargain is a sham."(citing *In re* Basham, 208 B.R. 926, 932-33 (B.A.P. 9th Cir. 1997), *aff'd*, 152 F.3d 924 (1998)).

[30] *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.").

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.[31]
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.
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.

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[31] 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).

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.),[32] (ii) diligence (Rule 1.3),[33] (iii) communication (Rule 1.4),[34] (iv) confidentiality (Rule 1.6)[35] , and (v) conflicts of interest (Rules 1.7,[36] 1.8,[37] 1.9,[38] 1.10,[39] and 1.11[40]).[41]

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[32] "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.

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

[34] (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.

[35] "(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.

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

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

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

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

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

[41] 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),[42] 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.

[42] 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.

- 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 ______________________________

(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 ____

JUDGES ROUNDTABLE: PERPLEXING ETHICS ISSUES IN CONSUMER CASES

(1) What is the most ethical way for an attorney to bill for services in consumer cases: (a) flat fee for all matters in the case, (b) flat fee for all matters other than adversary proceedings or evidentiary hearings, (c) specified fees for particular services, (d) straight hourly billing. See *In re Banks*, 545 B.R. 241, 247-49 (Bankr. N.D. Ill. 2016) (approving court-specified flat fee).

(2) Many consumer debtors are unable to afford an attorney to help them with all of the aspects of a bankruptcy case—and many go to petition preparers for legal advice. To provide effective service at a lower cost, would it be ethical for an attorney to offer only initial bankruptcy services—regarding matters such like the choice between Chapter 7 and Chapter 13 choice, credit counseling, and completion of schedules—but not attendance at the 341 meeting, advice regarding reaffirmation agreements, adversary proceedings or other postpetition services? *See DeLuca v. Seare (In re Seare)*, 515 B.R. 599, 615 (9th Cir. BAP 2014); the following attached materials: Zuniga ABI Journal article, suggestions for unbundling from *Seare* dissent, Chapter 7 unbundling outline.

(3) As a cost-savings measure, it is ethical for the debtor's attorney to have a court call covered by local counsel who appears on numerous cases for several clients, based on a short description of the matters on the call given by the attorney? *See In re Bradley*, 495 B.R. 747 (Bankr. S.D. Tex. 2013); 11 U.S.C. § 504(a).

(4) To reduce fees charged to clients, may an attorney receive compensation from a third party vendor for referring clients to that vendor? *See In re Fair*, 2016 WL 3027264, at *13-*15, 2016 Bankr. LEXIS 2043, (Bankr. N.D. Tex. May 18, 2016).

(5) May an attorney seek to recover in a current bankruptcy case unpaid fees from an earlier case? *See In re Liou*, 503 B.R. 56 (Bankr. N.D.Ill. 2013)

(6) To what extent may an attorney ethically use non-attorney support staff to interface with clients? *See DeLuca v. Seare (In re Seare)*, 515 B.R. 599, 615 (9th Cir. BAP 2014).

(7) What ethical rules govern the provision of services to a client who does not speak a language in which the attorney is fluent? *See In re Jahrling*, 816 F. 3rd 921 (7th Cir. 2016).

(8) What ethical rules govern the provision of services to a client who may have difficulty—because of mental or physical impairment—in understanding the legal issues involved in a bankruptcy case. See Bankruptcy Rule 1004.1: "The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.".

(9) Does an attorney have an obligation to appear on all matters involving the client, even if the client has no basis for objecting to the relief sought? (One example: a motion for relief from stay where the schedules reflect no equity and the debtor has indicated an intent to surrender.) See ILNB Local Rule 2090-5(B) ("Counsel who represents the debtor upon the filing of a petition in bankruptcy is deemed to appear as attorney of record on behalf of the debtor for all purposes in the bankruptcy case, including any contested matter . . . .").

(10) Under what circumstances, if any, is it ethical for an attorney to testify in a matter involving the attorney's client? *See In re Rindlisbacher*, 225 B.R. 180 (9th Cir. BAP 1998).

(11) Is it ethical to provide joint representation to a couple who are planning to divorce immediately after reaching a bankruptcy discharge? Is it ethical to continue representing clients jointly after they announce that they have filed for divorce? See attached Bowles and Wedoff papers.

(12) What ethical obligations apply to advising a client on reaffirmation agreements? Specifically, if the client states a strong desire to retain collateral that would likely be repossessed in the absence of a reaffirmation, but the attorney believes that the client will not be able to afford to make the proposed payments, how should the attorney comply with the § 524(c)(3) requirement of the attorney's declaration that the agreement "does not impose an undue hardship on the debtor or a dependent of the debtor." *See In re Melendez*, 235 B.R. 173, 189 (Bankr. D. Mass. 1999)

By Carrie A. Zuniga

The Ethics of Unbundling Legal Services in Consumer Cases

Editor's Note: *This article draws heavily from ABI's Ethics Task Force Final Report, which discusses unbundling issues, competency, conflicts and many other ethical issues facing bankruptcy attorneys. The full report is available at go.abi.org/FinalEthicsReport.*

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Since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), consumer bankruptcy attorneys' fees have increased by approximately 48 percent.[1] Furthermore, as attorneys' fees are not excepted from discharge under § 523 and pre-petition debts for legal fees are subject to the discharge under § 727, attorneys must be paid in full prior to the debtor filing a case.[2] There is a growing segment of debtors in bankruptcy who do not qualify for legal aid but are unable to raise the necessary funds in order to retain an attorney in full before filing a chapter 7 case.

As such, it has become increasingly problematic for consumer attorneys to reconcile the inability to be paid post-petition with a client's difficulty in paying attorneys' fees. Even prior to BAPCPA's enactment, consumer bankruptcy attorneys faced incredible competition "to represent the occasional consumer of legal services."[3] Certainly, the practice of law is a business, and attorneys seek to improve their bottom lines without losing clients to competitors.[4]

The practice of "unbundling" allows a debtor and his or her attorney to limit the scope of services to be performed in exchange for paying a smaller fee. For instance, some attorneys exclude their attendance at a § 341 meeting or negotiating a reaffirmation agreement so that their clients can pay reduced fees. Some attorneys enter into a fee agreement to complete pre-petition work and require a separate fee agreement for post-petition work once the case is filed, thus allowing the post-petition fees to survive the discharge.[5]

Practitioners in favor of unbundling services argue that the practice can give debtors access to legal services that may otherwise be unattainable.[6] Furthermore, courts can benefit from the practice when the alternative is a debtor filing *pro se* or using a bankruptcy petition preparer. Case law continues to evolve as debtors and their attorneys utilize alternative agreements to limit the scope of their representation with the idea that limited representation in bankruptcy is better than none at all.

Nothing in the Bankruptcy Code requires an attorney to represent a debtor in all matters, although most local rules indicate that the attorney *should* represent the debtor in all matters, with only some courts excluding adversary proceedings.[7] However, many courts anticipate that an attorney who files a bankruptcy case, "having initiated the process … must shepherd the client through it, to its conclusion."[8] Certainly, this is the ideal course that debtors would follow to receive a discharge. Given the complexity of the process for a debtor to obtain bankruptcy relief, some courts even suggest that it is unlikely that an exclusion of services would ever be appropriate.[9]

While the attorney/client relationship is contractual in nature, attorneys also have ethical duties to their clients and the court.[10] The obligations that an attorney owes to the court are fundamental to the administration of justice and the maintenance of public confidence in the legal system.[11] Unbundling raises serious ethical concerns in the context of bankruptcy, especially when it comes at the suggestion of an attorney "who often benefits from and has superior knowledge of the possible ramifications of excluding certain services."[12] Not only might a debtor assume that the excluded service is unnecessary, but he or she might also not understand the risk that the excluded task would apply to his or her case.[13]

Reconciling Competent Representation with Limited-Scope Representation

As there is no provision in the Bankruptcy Code or Bankruptcy Rules addressing unbundling, courts look to the applicable rules of professional conduct for the state in which the bankruptcy case is filed. In all cases, attorneys must provide competent repre-

1 "Best Practices for Limited Services Representation in Consumer Bankruptcy Cases," Final Report of ABI's National Ethics Task Force at 49 (citing Lois R. Lupica," The Consumer Bankruptcy Fee Study: Final Report," 20 *Am. Bankr. Inst. L. Rev.* 17 (2012) (hereinafter, "ABI Ethics Final Report").
2 *See Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1127 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2176 (2004), and *Rittenhouse v. Eisen*, 404 F.3d 395, 397 (6th Cir. 2005).
3 *In re Bancroft*, 204 B.R. 548, 550-51 (Bankr. C.D. Ill. 1997).
4 *Id.* at 551.
5 *In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012). *See also* Northern District of Illinois Bankruptcy Standing Order dated Feb. 17, 2004, and Rule 2091-1(B) of the Local Rules for the U.S. Bankruptcy Court for the Northern District of Illinois.
6 *In re Seare*, 493 B.R. 158, 182 (Bankr. D. Nev. 2013).
7 *Id.* at n.22.
8 *Bancroft* at 552.
9 *In re Egwim*, 291 B.R. 559, 573 (Bankr. N.D. Ga. 2003).
10 *In re Merriam*, 250 B.R. 724, 736 (Bankr. D. Colo. 2000).
11 *Id.*
12 *Seare* at 184.
13 *Id.* at 199.

sentation to their clients.[14] In order to competently represent a debtor in a chapter 7 case, the attorney's professional responsibilities must include meeting the debtor's objectives of obtaining a discharge and retaining as much of their property as possible.[15] Clients are unlikely to understand bankruptcy law and rely on attorney expertise to guide them.[16] Therefore, in order to provide competent representation, some courts have found that attorneys cannot select what aspects of the bankruptcy case that they should assist their clients with to the exclusion of others.[17]

Competent representation must be reconciled with an attorney's ability to limit the scope of his or her representation. Most states have adopted some form of Rule 1.2(c) of the Model Rules of Professional Conduct, which states that "[a] lawyer may limit the scope of representation if the limitation is *reasonable under the circumstances* and the client gives *informed consent*."[18] Generally speaking, courts are concerned that attorneys will offer limited-scope agreements and leave "debtors vulnerable and unrepresented at the exact moment [that] they need professional legal advice, especially for routine and fully anticipated matters."[19]

Courts have found that if the limitation breaches the duty of competence, then the limitation is unreasonable under the circumstances.[20] A common service that attorneys unbundle is attendance at the § 341 meeting of creditors. However, most courts that have addressed the unbundling of this service have found that attendance at the § 341 meeting is so fundamental to a successful bankruptcy case that it would be "'exceedingly difficult' to show that any such obligations were properly contracted away."[21] The § 341 meeting is a known event, and "[b]y filing the petition in bankruptcy, the attorney sets in motion a series of events, including the first meeting of creditors, which exposes a layperson to a potential plethora of legal hurdles."[22]

In order to properly limit services, "that limitation must be carefully considered and narrowly crafted, and be the result of educated and informed consent."[23] In order to determine whether a debtor gave informed consent, courts look to the fee agreement.[24] An attorney should explain to his or her client that not all attorneys unbundle services in the same way, and the attorney's disclosures must include information on the "risks to the client that the proposed limitations would create, as well as the technical aspects, legal ramifications and material risks."[25]

Most courts are wary of boilerplate language in a fee agreement as a way of obtaining informed consent.[26] The court in *In re Castorena* speculated that any informed consent is suspect in the context of bankruptcy due to the unlikelihood that an attorney could adequately explain "the lay of the bankruptcy landscape, including all its variations, contingencies and permutations, in order to obtain a truly informed consent."[27] The court even suggested that allowing a debtor to essentially proceed *pro se* after the case is filed is "so fundamentally unfair as to amount to misrepresentation."[28]

The Trend Toward Unbundling

The relevant case law on unbundling may not seem particularly favorable to attorneys, but there is a budding consensus among the courts that debtors' attorneys can limit their representation in a chapter 7 case as long as the ethical rules are followed.[29] The *In re Seare* court agreed that adversary proceedings could be unbundled and that attorneys may charge additional fees for adversary proceedings.[30] However, the court found that the debtors' attorney in this case breached his duty of competence by failing to ascertain the debtors' objective to eliminate a wage garnishment related to a fraud judgment.[31] Moreover, the debtors' attorney did not provide informed consent because he failed to communicate the near certainty of a nondischargeability action or the risk of defending an adversary proceeding unrepresented.[32]

One form of unbundling that is used quite frequently in the U.S. Bankruptcy Court for the Northern District of Illinois and recently addressed by the court in *In re Slabbinck* is the concept of unbundling pre-petition and post-petition services. The debtors "tender a small retainer for pre-petition work and later hire and pay counsel once the proceeding begins — for a lawyer's aid is helpful in prosecuting the case, as well as in filing it."[33] The *Slabbinck* court held that this form of unbundling is not *per se* violative of § 329, but expressed a strong preference for debtor representation for the entire chapter 7 case.[34] The court opined that if attorneys and clients can contract for certain services to the exclusion of others, then competence is "most appropriately evaluated by looking at the actual work that was agreed to be performed and then was performed by the attorney, not by looking at the remaining work that will have to be done to complete the case when the individual has not hired the attorney to perform those services and the attorney has not performed those services."[35]

Best Practices for Debtor's Counsel

Debtors' attorneys must strike a delicate balance between protecting their economic interests while providing competent representation to clients. While courts have frowned upon unbundling services in bankruptcy, limited-scope representation is increasingly becoming the norm. The Final Report of ABI's National Ethics Task Force suggested mini-

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14 Model Rules of Prof'l Conduct R. 1.1 (2011).
15 *Egwim* at 566.
16 *Seare* at 189.
17 *In re Collmar*, 417 B.R. 920, 923 (Bankr. N.D. Ind. 2009).
18 ABI Ethics Final Report at 51 (emphasis added).
19 *In re Minardi*, 399 B.R. 847, 851 (Bankr. N.D. Okla. 2009).
20 *Seare* at 193 (citing *In re Egwim* at 571).
21 *In re Johnson*, 291 B.R. 462, (Bankr. D. Minn. 2003) (citing *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001)). *See also In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill. 1997).
22 *Bancroft* at 551. *But see Merriam* at 739 (necessity and benefit of attendance at § 341 meeting depends on specific facts of case and should be evaluated as such).
23 *In re Castorena*, 270 B.R. 504, 531 (Bankr. D. Idaho 2001).
24 *Slabbinck* at 587 (citing *In re Mansfield*, 394 B.R. 783, 793 (Bankr. E.D. Pa. 2008)).
25 *Seare* at 198 (citing *Slabbinck* at 589) (internal quotation marks and citation omitted).
26 *Danvers Sav. Bank v. Cuddy (In re Cuddy)*, 322 B.R. 12, 17-18 (Bankr. D. Mass. 2005) (if desire to file for bankruptcy is strong enough, debtor will accept terms that attorney proposes).
27 *Castorena* at 529.
28 *Id.*
29 *Seare* at 187.
30 *Id. See also In re Castorena*, 270 B.R. at 530 (adversary proceedings excluded from list of core functions of debtors' attorneys), and *In re Egwim*, 291 B.R. at 573 (attorney can charge separately for services outside scope of anticipated work).
31 *Id.* at 191.
32 *Id.* at 204-05.
33 *Bethea*, 352 F.3d at 1128.
34 *Slabbinck* at 596-97.
35 *Id.* at 593.

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mum standards for best practices in limited-scope representation, as well as a proposed rule and model fee agreements for both debtors with and without secured debts.[36] Debtors' attorneys would be well advised to review the Final Report before entering into a limited-scope agreement.

Attorneys should be cognizant that if the service excluded in the fee agreement is a routine or fundamental aspect of the bankruptcy case, courts are less likely to find that the attorney has compiled with the relevant ethical rules. While courts are moving toward finding unbundling generally permissible, opinions finding that the ethical rules were followed are rare. Additionally, attorneys should be aware that boilerplate language in fee agreements will not suffice, as the court will construe the agreement in the light that is most favorable to the debtor. Since bankruptcy fees are on the rise, unless Congress amends the Bankruptcy Code to allow fees to be paid for post-petition, consumer bankruptcy attorneys will continue to draft more limited-scope representation agreements. Nonetheless, the best practice for debtors' counsel is to use limited-scope representation agreements sparingly. abi

36 ABI Ethics Final Report at 57-63.

Suggestions from Judge Jury to Avoid Violating Ethical Rules When Limiting Scope of Representation of Consumer Debtors

From Judge Jury's concurrence in *In re Seare*, 515 B.R. 599, 624 (B.A.P. 9th Cir. 2014).

1. At the initial intake interview with the debtor, identify fully and completely the debtor's goals. Almost by definition, the attorney therefore cannot have a predetermined business practice that excepts representation in adversary proceedings from the services the attorney will render unless the attorney and debtor identify that exception before deciding to commence representation. As noted by the bankruptcy judge, the decision to unbundle must be driven by the debtor's needs, not the attorneys.

2. The attorney may not rely solely on the debtor's input to help him or her ascertain the debtor's goal. Both the ethical rules and the Code require the attorney to conduct a reasonable investigation of the debtor's assets and liabilities. If the attorney learns that a judgment has been taken against the debtor, the attorney must make reasonable inquiry into the nature of the judgment in order to determine whether it might be subject to nondischargeability.

3. If, after ascertaining the debtor's goals, the attorney believes that limited scope representation is consistent with those goals, the attorney must then fully explain to the debtor the consequences and inherent risks which might arise if an adversary is filed against the debtor and the attorney has not included representation in that proceeding in the unbundled services. Informed consent is just that: informed. The debtor must understand the "legal jargon" and the practical effect on him or her of the limited scope representation before the consent is informed.

4. The attorney must customize the retainer agreement to the goals of debtor. That is not to say that much of the agreement cannot be boilerplate, but boilerplate without the attorney's active role in its preparation will be insufficient for limited scope representation. Just having the debtor read and initial the agreement does not assure the debtor is giving informed consent.

5. After describing to the debtor the risks of limited scope representation, the attorney must give the debtor the opportunity to "shop elsewhere" for an attorney who will provide full representation before entering into the contractual relationship with the debtor for the limited scope.

6. The attorney should document as fully as possible all the steps taken to comply with these requirements.

Following these suggestions should go a long way to allowing consumer bankruptcy attorneys to unbundle adversary proceeding representation without violating ethical rules.

Summary of Duties as Debtors' Counsel

- Be competent and understand the relevant sections of the United States Bankruptcy Code.
- Determine if there is any conflict of interest in representing the debtor.
- Counsel the client as to whether filing for bankruptcy is necessary and appropriate.
- Understand the debtor's situation – why do they want to file bankruptcy.
- Understand the debtor's financial situation before filing.
- Gather information and assist your client in preparing their bankruptcy schedules and statement of financial affairs. As counsel, explain and supervise the process.
- If the debtor is an individual and married, explain and counsel them as to whether only one spouse should file or if they should file jointly.
- If the Debtor is an individual, explain exemptions and what may or may not become property of the bankruptcy estate.
- Gather information and use common sense. Do not file anything until you have sufficient information from your client to verify financial status, assets, and liabilities.

Scope of Services as Debtor's Counsel

- As Debtor's counsel, it is important to have a clear contract for services with your client that provides what services are being provided for what fee, and what services will require an additional fee.
- Courts have held that where an attorney s attorney's scope of services agreement is not specific, they are obligated to represent the debtor in all aspects of the case, including dischargeability proceedings, motions to avoid liens, or any contested matter. *See In re DeSantis*, 395 B.R. 162 (Bankr. M.D.Fla. 2008) (holding that absent a valid contractual limitation upon an attorney's scope of services to a debtor, attorney is obligated to represent client in all matters, including any discharge or dischargeability litigation, unless and until grounds exist for attorney's withdrawal under applicable professional standards).

Fee Disclosure

Section 329 of the United States Bankruptcy Code also requires an attorney representing representing a debtor to file a statement statement of the compensation compensation paid within one year for services rendered or to be rendered in contemplation of or in connection with the bankruptcy case and the source of the compensation.

- Federal Rule of Bankruptcy Procedure 2016(b) relates to Section 329 and provides that a debtor's attorney must submit the statement required under Section 329 within 14 days after the order for relief is entered.
- Federal Rule of Bankruptcy Procedure 2017 enables any party or the court to seek a hearing as to whether any payment made by the debtor to an attorney for services related to the case is excessive.

<u>LIMITED SCOPE REPRESENTATION ("LSR" or "UNBUNDLING") IN CHAPTER 7:</u>
Current LBR 2090(a)(3) allows debtor's counsel in a Chapter 7 to limit his/her scope of appearance (so long as the attorney files a court-approved form disclosing the limited representation). Should the Local Bankruptcy Rules be changed to compel the debtor's counsel to attend the §341(a) meeting, or to require other representation in the chapter 7?

<u>APPLICABLE RULES/LAWS</u>

<u>Existing Local Rules & Forms regarding Chapter 7:</u>
LBR 2090-1(a)(3): In Chapter 7, if an attorney agrees to provide less than all services, attorney must file statement (on court approved form 2090-1.1) disclosing the limited scope
Local Form 2090-1.1: Attorney Declaration re: Limited Scope of Appearance

<u>Existing Local Rules & Forms regarding Chapters 9,11,12 & 13:</u>
LBR 2090-1(a)(2): In Chapters 9, 11, 12 & 13, debtor's attorney presumed to appear for the case and all proceedings in the case, except as otherwise ordered or as provided for in LBR 3015-1(v)
LBR 3015-1(v): covers optional use of Attorney Rights and Responsibilities Agreement in Chapter 13
Local Form 3015-1.7: Rights and Responsibilities Agreement between Chapter 13 Debtors and their Attorneys

<u>Rules of Professional Conduct of the State Bar of California</u>: Case law consistently states that any contractual limitation on the scope of representation must be consistent with applicable state professional responsibility standards. *See Generally An Ethics Primer on Limited Scope Representation*, The State Bar of California, Committee on Professional Responsibility. While California has several potentially applicable rules, it does not have Model Rule of Professional Responsibility 1.2(c), which allows limits on the scope of representation as long as (i) the limits are reasonable under the circumstances and (ii) the client gives informed consent. (Many states do have a version of Rule 1.2(c), which is the basis for a number of the decisions cited below.)

Rule 2-100 Communication With a Represented Party:
"(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."

Accurate disclosure of LSR arrangements are essential to allow attorneys for other parties to comply with this rule.

Rule 3-110 - Failing to Act Competently:
"[A] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Rule 3-110(A). "[C]ompetence in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service." Rule 3-110(B).

Under this rule the attorney's function of advising the client includes not only responding to the client's requests for advice, but also volunteering opinions that further the client's objectives. *Nichols. v. Keller*, 15 Cal. App. 4th 1672, 1683-84 (Cal. Ct. App. 5th Dist. 1993)(non-bankruptcy context).

> [E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though

> they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs.

Id. at 1684.

Bankruptcy decisions applying the duty of competence (under a variety of state rules of professional responsibility) to LSR have held that the scope must include services reasonably necessary to achieve the client's objectives in bankruptcy. *See, e.g., Searle*, *Hutchinson, Egwim* (discussed below).

Rule 3-700 - Termination of Employment

Attorneys must comply with rules of the court regarding withdrawal. Rule 3-700(A)(1). Although attorneys are allowed to withdraw if "the client knowingly and freely assents to termination of the employment," the attorney must take "reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client . . . ." Rules 3-700(c)(5) and 3-700(A)(2), respectively.

In LSR, the attorney and the client have an understanding that the attorney will not see the matter through to conclusion. Thus, the attorney must inform the client and structure the LSR to avoid "reasonably foreseeable prejudice" to client and to ensure client has given informed assent.

Rule 4-200 - Fees for Legal Services

Attorneys may not "enter into an agreement for, charg[ing], or collect[ing] an illegal or unconscionable fee." Rule 4-200(A). Unconscionability is measured by the facts and circumstances at the time of the agreement (except when the fee is affected by later events). Rule 4-200(B). Factors in determining unconscionability include, among other things, (1) the amount of the fee in proportion to the value of the services performed, (2) the relative sophistication of the attorney and the client, and (3) the informed consent of the client to the fee. Rules 4-200(B), (B)(1), (B)(2), and (B)(11).

<u>California State Law:</u>

Cal Bus. & Prof. Code §6148. Fee for service contracts; Bills for services rendered

"(a) In any case not coming within Section 6147 [pertaining to contingency fee agreements] in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing. . . . The written contract shall contain all of the following:

> (1) Any basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
> (2) The general nature of the legal services to be provided to the client.
> (3) The respective responsibilities of the attorney and the client as to the performance of the contract."

<u>Bankruptcy Code and Rules:</u>

11 U.S.C. §329 – provides that an attorney representing a debtor in a case must file a statement of the fees paid or contemplated for services rendered (or to be rendered) in connection with the case by the attorney.

11 U.S.C. §526 – restricts a debt relief agency (which includes consumer bankruptcy attorneys) from failing to perform services the debt relief agency had informed an assisted person (which includes most consumer debtors) that it would perform and from misrepresenting (including indirectly and by omission) the services it would provide or the benefit and risks resulting from bankruptcy.

11 U.S.C. §527 – mandates disclosure that a debt relief agency must provide an assisted person.
11 U.S.C. §528 - requires that a contract between a debt relief agency and assisted person be in writing and "clearly and conspicuously" explain the scope of services that the debt relief agency will provide and the fees or charges for such services.
11 U.S.C. §707(b)(4)(C) - "The signature of an attorney on a [Chapter 7] petition . . . shall constitute a certification that the attorney has . . . performed a reasonable investigation into the circumstances that gave rise to the petition . . . ."
Fed. R. Bankr. P. 2016(b) - requires an attorney to file and transmit to the U.S. Trustee a statement disclosing fees paid by the debtor to the attorney and whether the attorney shared the fees with any other entity (the statement must be filed with the court pursuant to §329). The statement must be filed within 15 days after the order for relief, or at any other time as the court may direct.
Fed. R. Bankr. P. 2017 - allows the court to scrutinize the fees paid by a debtor to an attorney. After notice and a hearing on a motion by any party in interest or on the court's own initiative, the court may examine whether fees paid to the attorney are excessive.
Fed. R. Bankr. P. 9011 - requires attorneys to sign the petition. There is an ambiguity regarding whether attorneys who represent clients in a LSR are required to sign the petition as the attorney of record (since they are not taking on the debtor's case as the attorney of record). In the Central District, LBR 1002-1(b)(1) arguably requires attorneys to comply with signature requirement of FRBP 9011(a).

ARTICLES/REPORTS

It should be noted there is an enormous volume of legal writing on LSR generally, most of it favorable – seeing LSR as a way to deliver cost-effective legal services to underserved populations. The following are bankruptcy-specific articles/reports on LSR:

Lois R. Lupica & Nancy B. Rapoport, Am. Bankr. Inst., Final Report of the ABI National Ethics Task Force 49-63 (2013)("*Best Practices for Limited Representation",* which included a proposed rule and a model agreement).

High incidence of *pro se* Chapter 7 debtors and the Chapter 13 debtors' ability to pay attorneys' fees through their plans led the task force to create a best practices proposal for Chapter 7 only. The Task Force recognized the need to balance (i) protecting debtors from receiving inadequate representation with (ii) giving debtors an LSR option in lieu of *pro se* or non-legal assistance.

Although Model Rule of Professional Responsibility 1.2(c) allows LSR, the limits must be reasonable and made with informed client consent. The bankruptcy courts and local bankruptcy rules view LSR with varying degrees of enthusiasm.

The Task Force's best practices for LSR focus on effective counseling of clients on the limits of representation; an engagement letter clearly stating the services being provided and not being provided, the fees arrangements, and the potential consequences of LSR; candor with the Court; and keeping the client informed of legal issues outside the scope of representation.

The ABI's proposed rule mandates inclusion of the following services in representation of a chapter 7 consumer debtor:

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. 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.

In addition, if the debtor has secured debts, the representation must also include:

- Representation of the debtor (including counseling) with respect to the reaffirmation, redemption, surrender, or retention of consumer goods securing obligations to creditors.

The proposed rule and model retention agreement also provide for a variety of "add ons" (additional items that can be included in the scope of the representation by checking a box on the agreement). These include, among other things, objections to exemptions, dischargeability challenges, and relief from stay motions. The agreement then provides for space to note either (i) a flat fee for all of the required representation and checked "add ons" or (ii) an hourly rate. Finally it provides space to note fees for any additional work.

Thomas F. Waldron, *Undulations in Unbundling – Is a Ripple Running Through the Rocks of Resistance in Bankruptcy* Court, Norton Bankr. L. Advisor 2013 No. 6 at 1.

Describes the *Egwim* holding (prohibiting LSR absent special circumstances) as the majority position, but views recent decisions (*Slabbinck* and *Seare*) as well as the ABI's Best Practices Report as a wave of increasing resistance to this prohibition on LSR of chapter 7 consumer debtors.

Thomas J. Yerbich*, Testing the Limits on Unbundled, Limited Representation*, 23 Amer. Bankr. Inst. J 8 (2004).

Concludes that unbundling (i) is inevitable in consumer bankruptcies given the vast number of *pro se* filings each year and (ii) must be addressed on a district-by-district basis, given the differing state rules of professional responsibility and varying situations confronting bar and bench in each district.

LOCAL RULES IN OTHER DISTRICTS

Local bankruptcy rules governing LSR (some applicable to all chapters and others applicable to Chapter 7 or Consumer Chapter 7 specifically) fall into three broad categories: (1) requiring the attorney to appear for all purposes in the case (although often either excluding adversary proceedings or allowing the attorney to exclude adversary proceedings in the retention agreement); (2) listing specific services that must be included in the representation; or (3) mandating only disclosure of the scope of the appearance.

Requiring the attorney to appear for all purposes

Many district have a local rule, usually applicable to all chapters, requiring the debtor's attorney to appear for all purposes in the case.

Most of these rules exclude adversary proceedings from the requirement: **E.D. Cal. LBR 2017-1(a), D. Nev. LBR 2014(a**), **N.D. Ill. LBR 2090-5(B), D. Minn. LBR 9010-3(g), W.D.N.C. LBR 2091–1(a), M.D. Fla. LBR 9011**

Other districts do include representation in adversary proceedings: **E.D.N.Y. LBR 2090, N.D. Ga. LBR 9010–4, E.D.N.C. LBR 9011–1, D. Mass. LBR 9010-3**

Listing certain services that must be included

S.D. Cal. LBR 9010-7 – requires adherence to S.D. Cal. "Rights and Responsibilities of Chapter 7 Debtors and Their Attorneys" which requires that eleven services (including attendance at the §341(a) meeting, as well as initial analysis, advice and petition preparation, compliance with OUST requirements, and a continuing obligation to answer the debtor's questions) be included as part of the initial fee charged. Eight other services (such as schedule amendments, relief from stay, redemptions, reaffirmations, and objections to claims) are included as part of the representation, but additional fees may be charged. Finally, seven enumerated services (certain contested matters, an adversary proceeding, or an examination pursuant to Bankruptcy Rule 2004) are not included unless the parties so provide in a separate fee agreement. (Chapter 7 specific)

D. Or. LBR 9010-1(e) – requires a written fee agreement with a detailed description of all services attorney will perform for debtor, as well as written disclosure to debtor clearly explaining what services debtor may need to perform without attorney assistance and the associated risk. At a minimum, the agreement must provide that the attorney will provide: pre-petition counsel, preparation and filing the petition, assistance with all matters up to and through the conclusion of the 341(a) meeting and reaffirmation, redemption, etc. of consumer goods (but the attorney is not required to sign the certification or attend the reaffirmation hearing). (Chapter 7 specific)

W.D.N.Y. LBR 2016-1 – lists certain basic services to be performed by debtor's attorney in any Chapter (with additional requirements for a Chapter 7 debtor), including: (i) representation at the § 341(a) meeting; (ii) amending lists, statements, and schedules to comport with developments of the case; (iii) negotiate, prepare, and file reaffirmation agreements; and (iv) motions under §522 to avoid liens on exempt property and under §722 to redeem exempt personal property.

N.D. Cal.: Guidelines for Services to be Provided by Debtor's Attorney in Chapter 7 Cases: requires that services include (i) meeting personally with the debtor to explain options, (ii) final review of the petition and schedules, (iii) personally attendance at §341(a) meeting (or providing an outside contract attorney compliant with court guidelines), (iv) explanation of rights regarding redemption, reaffirmation or surrender of collateral, and (v) representation at §707(a) matters. The guidelines also list (a) other services that are always included but for which

additional fees may be charged (including amendments to schedules based on new information, relief from stay, objections to exemption claims, and §707(b) matters) and (b) optional services not included in pre-petition fee, that require a separate agreement (such as lien avoidance, dischargeability, objections to discharge, adversary proceedings, and appeals).
N.D.N.Y. LBR 2016-3(b) – requires a written retention agreement that covers a long list of potential activities, including initial analysis and petition preparation, personal appearance at §341(a) meetings unless the court orders otherwise, amendments to schedules, reaffirmation (advise, negotiate and prepare agreement if in best interests of client, and attend hearing), motions as necessary, response to relief from stay motions, adversary proceedings, and §722(b) motions. (applicable to Chapter 7; similar list for Chapters 12 and 13)

Mandating only disclosure of the scope of the appearance

D. Colo. LBR 9010-1 – District Court Administrative Order 2007-6 provides that Colorado Rule of Professional Conduct 1.2(c) (allowing limited representation) is not applicable "in the United States Bankruptcy Court for the District of Colorado in adversary proceedings or matters governed by Fed. R. Bankr. P. 9014." At least one decision, *In re Merriam*, 250 B.R. 724, 736 (Bankr. D. Colo. 2000), has drawn the conclusion that the LSR is otherwise permissible in bankruptcy. 2007-6 also provides that "any limitation in the scope of representation of a Debtor, whether in a bankruptcy case or adversary proceeding, shall be disclosed in the statement required by 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016(b)."

DECISIONS IN THE NINTH CIRCUIT, THE BAP AND OTHER CALIFORNIA BANKRUPTCY COURTS

***Hale v. United States Trustee.*, 509 F.3d 1139 (9th Cir. Idaho 2007)**

Attorney prepared, but did not sign Chapter 7 debtors' petition and exhibits. The debtor's filed *pro se*. Attorney's agreement with the debtors was for "PRE-FILING legal services" and excluded 341(a) meetings, adversary proceedings, appeals, conversions, non-dischargeability, "or any other representation." The petition package prepared by the attorney had numerous errors, the attorney did not inform the debtors of the §341(a) meeting, the debtors did not understand the bankruptcy process or that the attorney was not representing them in the bankruptcy, and when problems with the case surfaced the attorney simply asked the debtors to dismiss their case without explanation.

The Ninth Circuit upheld the bankruptcy court's award of sanctions against the attorney under the bankruptcy court's inherent power. The final paragraph of the decision suggests that the decision rested on the combination of an extremely limited scope of representation and attorney incompetence:

> We agree with the bankruptcy court that it should "not countenance Hale's exclusion of critical and necessary services, or endorse the pretense of adequately advised and informed consent in Hale's 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 Basham*, 208 B.R. 926 (B.A.P. 9th Cir. 1997) (affirmed by 9th Cir. in unpublished opinion found at 152 F.3d 924).**

The U.S. Trustee moved to disgorge attorney's fees against the same attorney as in *Hale* (in a chapter 7 case and in a chapter 13 case). Generally, the attorney charged debtors a flat fee that only covered pre-petition services (consultation, preparation of the petition, schedules and statement of affairs). The debtors in these two cases paid the flat fee, and opted to forego additional fees for representation at the §341(a) meeting.

Given the numerous problems with these two cases (including incomplete and inaccurate schedules, improperly claimed exemptions, and an improperly noticed chapter 13 plan confirmation hearing), the Bankruptcy Court granted the U.S. Trustee's motion to disgorge attorney's fees. The Court found that the debtors' attorney failed to timely file the required 2016(b) disclosure statement and failed to meet his burden of establishing that his fees were reasonable.

On review, the BAP held that (i) the Bankruptcy Court was within its authority to order disgorgement of attorney's fees because the attorney failed to timely file a disclosure statement, in violation of §329 and Rule 2016 and (ii) the Bankruptcy Court properly found that the fees charged were not reasonable in light of the numerous problems with the petition.

The BAP repeated the Bankruptcy Court's opinion that the attorney "had an obligation to either handle the case from beginning to end and [to] perform the services for whatever amounts the clients could afford, or refer the cases to another attorney." 208 B.R. at 932-933.

***In re Hutchinson,* No. 03-12764-A-7 (Bankr. E.D. Cal. Aug. 20, 2003)**

The debtor's attorney limited the scope of representation to exclude attendance at the §341(a) meeting. Unlike *Basham*, the debtor's attorney filed a FRBP 2016(a) statement using the Eastern District's required Form 2016(a), but crossed out or omitted the portions of the form that stated that he would represent the debtor at the §341(a) meeting, in contested matters, and other services. He also submitted Form 2090-1 (Declaration Re: Limited Scope of Appearance pursuant to Local Bankruptcy Rule 2090-1) from the Central District of California, on which he declared that he was excluding his attendance at the §341(a) meeting unless the debtor agreed to additional fees.. (No form equivalent to 2090-1 exists in the Eastern District of California.)

The U.S. Trustee moved for review of the $750 in fees received by the attorney because the fees received by the attorney were excessive for the services rendered. The US Trustee argued that, at minimum, the attorney must include representation of the debtor at the §341(a) meeting to claim a professional fee, and that the failure to attend the §341(a) meeting violates the attorney's ethical duty of zealous representation. The attorney argued, among other things, that his attendance at the §341(a) meeting was not required to zealously represent the debtor, especially when his attendance would waste the debtor's resources and his failure to attend did not result in injury to the debtor.

The court held that excluding the §341(a) meeting from the scope of representation violated the attorney's ethical obligation of competent representation. Although the California Rules of Professional Conduct allow limiting the scope of representation with the informed consent of the client, the court found that truly informed consent from the debtor was difficult, if not impossible, to obtain. Truly informed consent requires the attorney to adequately explain to the debtor every conceivable variable that might occur during a §341(a) meeting. Moreover, the attorney has the burden of proving to the court that truly informed consent was obtained from the debtor.

The court also found that once the attorney signs the petition or appears as the attorney of record, court approval is required to withdraw from the case. The attorney in this case neither sought nor obtained the court's approval to withdraw and thereby violated court rules by leaving the debtor to appear in *pro per*.

***In Re Carrillo*, Case No. 02-09852-H7 (Bankr. S.D. Cal. Mar. 24, 2004)**

The U.S. Trustee filed a motion to examine fees pursuant to 11 U.S.C. §329 and requested disgorgement of attorney's fees. While conceding that the California Rules of Professional Conduct permit LSR, the U.S. Trustee argued that it would violate the duty of competent representation to exclude representation at the §341(a) meeting in chapter 7 cases. The U.S. Trustee argued that it is critical to have counsel attend the §341(a) meeting with their clients because of the adverse consequences that may stem from the debtor's responses to questions by the trustee and creditors.

Before the Court ruled on the motion, the debtor's attorney (i) submitted to the U.S. Trustee's demand that, in the future, he will either appear or have an attorney appear to represent the debtor at §341(a) meeting and (ii) voluntarily refunded his entire fee in this case. Although the motion to examine and disgorge attorney's fees by the U.S. Trustee was resolved, the Court noted for the record that it was "critical for an attorney to be at the §341(a) hearing." Transcript of March 24, 2004 Proceedings at 5:2-3. The Court also quoted from the letter of Judge Jaroslovsky of the Northern District of California (below).

Northern District CA: Letter from Judge Jaroslovsky

In a letter addressed to the bankruptcy bar appearing before his court, Judge Jaroslovsky expressed disbelief that attorneys could competently represent chapter 7 debtors without attending the §341(a) meeting. He admonished that "[a]ny debtor's counsel who does not understand the vital importance of attending the meeting of creditors with the debtor is in desperate need of further education. Not only is the meeting the best opportunity to discover and take care of problems which invariably arise' - - in other words, a forgotten creditor still sending bills, et cetera – 'but discharges are either won or lost at the meeting of creditors.' I couldn't agree more with that." He directed that "[i]n addition to the schedules and meeting of creditors, there are several other responsibilities which I expect debtor's counsel to take care of regardless of the fee charged. These include amendment of schedules, addressing stay relief motions, avoiding simple household good liens, reaffirmation and redemptions." While Judge Jaroslovsky states that "[i]t is permissible to charge extra for a few things, like avoidance of judicial liens and representation in adversary proceedings," he also says that "the attorneys I admire the most do not charge extra for lien avoidance unless it is contested and will sometimes represent their clients in adversary proceedings for little or no fee if they feel the adversary proceeding lacks merit."

***In re Bogdan Isvoranu*, Case. No. 03-40578-NT** (Bankr. N.D. Cal.)

An attorney should disgorge $400 of a $1,000 fee because "the debtor received little more than the services of a petition preparer" where the attorney did not attend the §341(a) meeting. Judge Newsome stated in his ruling that the form for use in the Northern District for compliance with BR 2016(b) requires that an attorney's services include representation of the debtor at the §341(a) meeting.

<u>DECISIONS OUTSIDE CALIFORNIA</u>

<u>Recent decision of note in the Ninth Circuit</u>

***In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013)**

This recent case concerned Chapter 7 consumer debtors who, after little or no counseling, signed a 19-page Retainer Agreement that required extra fees for addressing allegations of non-dischargeability. One of the precipitating factors for the debtors' filing was a state court judgment against the husband for attorney's fees, awarded on the grounds that he had committed a fraud upon the court. The attorney alternately refused to handle and then mishandled the adversary proceeding for non-dischargeability filed by the judgment creditor.

The Local Bankruptcy Rules provided that "An attorney who appears in a case on behalf of a party is the attorney of record 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." Bankr. D. Nev., Local Rule 2014(a).

In a comprehensive opinion, the Court determined that the attorney had violated Nevada Rules of Professional Responsibility 1.2 (allowing reasonable limited representation upon informed consent of client), 1.1 (the duty of competence, which mandates the inclusion of services necessary to achieve the client's reasonable objectives); 1.5(b) (which requires disclosure of the scope of representation and the basis for fees to the client) and 1.4 (the duty to communicate with clients), as well as Bankruptcy Code §707(b)(4)(C) (which requires an attorney signing a chapter 7 petition to make a reasonable investigation into the circumstances that gave rise to the petition) and §§526-528 (which mandate certain provision of services, disclosure and contractual requirements by a "debt relief agency" to an "assisted person).

This decision has been appealed to the BAP, which heard oral argument on January 24, 2014. As of July 31, 2014, no ruling has been issued by the BAP.

<u>Decisions Prohibiting or Severely Restricting LSR Generally</u>

***In re Burton*, 442 B.R. 421 (Bankr. W.D.N.C. 2009)**

> "Attorneys in this judicial district are retained for the entire bankruptcy case. With few exceptions, debtors' attorneys are obliged to represent their client until either (1) the case is closed or (2) the attorney is permitted to withdraw by order, after motion and notice. Local Rule 2091-1.
>
> An attorney is not at liberty to redefine the bankruptcy representation to exclude particular services such as Burton has sought to do. The lien avoidance motions and relief from stay defenses that Burton contractually seeks to exclude from the representation are essential legal services and are required by Local Rule. In Chapter 13 cases, these services are expressly included as part of the attorney's base case fee. Local Rule 2016-1.
>
> Local Rule 2091-1 does not contemplate cafeteria plans or unbundling services in consumer cases. The Local Rule certainly does not permit extortion by not filing case documents until payments are made or failing to respond motions."

442 B.R. at 453 (decision involved twelve Chapter 7 and Chapter 13 cases handled by attorney).

***In re Bulen*, 375 B.R. 858 (Bankr. D. Minn. 2007)**

The court determined that the attorney's retainer agreement violated Local Bankruptcy Rule 9010-3(e) by providing that "the attorney can withdraw for any reason, including untimely payment of fees," and that "appearances beyond the first meeting are subject to further negotiation of fees." Rule 9010-3(e) mandates that, "until there is a valid substitution or withdrawal, the attorney must continue to represent the debtor in all matters in the main case without regard to payment or promise of additional fees."

The court recognized a movement towards LSR, which may allow *pro se* debtors better access to the legal system, but opposed LSR as "not beneficial to the debtor. Neither does it provide any degree of efficiency or expediency to the Court. In bankruptcy, unbundled legal services essentially means [an] unraveled legal process, not increased access to justice."

Further, while Minnesota Rule of Professional Conduct 1.2 permits unbundling, Local Rule 9010-3(e) essentially provides "that unbundling main case representation is patently not reasonable, except under circumstances determined by the Court after a hearing on a motion to withdraw, in the absence of a filed substitution of attorney."

Overall, "an attorney representing a chapter 7 debtor ordinarily may not limit the scope of that engagement." An attorney must zealously represent his/her client and the client's failure to pay for the attorney's services does not relieve the attorney of his/her duty to continue to represent the client in a matter in which the attorney was originally retained.

***Danvers Sav. Bank v. Cuddy (In re Cuddy)*, 322 B.R. 12 (Bankr. D. Mass. 2005)**

A Chapter 7 debtor's attorney sought to withdraw from representation because the debtor failed to replenish his retainer. The fee agreement, signed by the debtor, allowed the attorney to withdraw from the case if the debtor failed to replenish retainer. The bankruptcy court denied the motion to withdraw and held that the debtor's failure to replenish the retainer did not justify the attorney's withdrawal: "once a lawyer accepts [a] retainer to represent a client [,] he is obliged to exert his best efforts wholeheartedly to advance [the] clients [sic] legitimate interests . . . until he is relieved of that obligation either by the client or the court." 322 B.R. at 19.

The court noted that the Local Bankruptcy Rules provide that "an attorney representing a debtor in a bankruptcy case is required to represent the debtor in any adversary proceeding filed within the bankruptcy case in which the debtor is a named defendant unless the debtor expressly agrees otherwise at the commencement of the representation." 322 B.R. at 15 (citing LBR 9010(3)(d)). The Court noted that this rule is an implementation of Massachusetts Rule of Professional Conduct Rule 1.2(c), which provides that an attorney "may limit the scope of the representation if the client consents after consultation." *Id.* The Court also cited MRPC 1.16(a), which mandates that an attorney may withdraw . . . if withdrawal can be accomplished without material adverse effect on the interests of the client . . ." *Id.*

The Court concluded that an attorney owes a duty both to the client and to the court. When an attorney chooses to represent a client, he or she "assumes obligations toward his client which are not excused merely because the client is unable to pay fees demanded to the attorney." 322 B.R. at 16

> The image that has come to my mind most insistently while working on this opinion is this: A professional swim instructor takes on a new student with this understanding: You have paid me my initial fee. For that money I will lead you to the swimming pool, show you how to enter the water, and explain the basic elements of swimming. If, however, you should begin to drown, of if some other serious problem arises, I will leave you to your own resources unless you pay me more money.

322 B.R. at 17-18.

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

In this widely-cited decision, the attorney had charged $475 per case and included representation at the §341(a) meeting and any reaffirmations, but nothing further.

Relying on Georgia Rule of Professional Conduct 1.2(c) (which allows reasonable LSR with informed consent), Georgia Rule 1.1. (which holds attorneys to a duty of competency) and Restatement (Third) of the Law Governing Lawyers 19(1) (which allows reasonable limitations with informed consent of client), the court concluded that LSR was allowed if "three "fundamental requirements" were met: (i) the attorney consults with the client, (ii) the client provides informed consent and (iii) the limitation is reasonable under the circumstances (i.e., "the engagement must not be so limited as to prevent competent representation.")

Applying that rule to Chapter 7 debtors, the Court concluded that discharge and retention of exempt property are the central objectives of a Chapter 7 filing. Thus, the duty of competence demands that the attorney provide the services necessary to meet these goals and thus ordinarily precludes limiting the scope of Chapter 7 representation. The Court did note however, that the attorney could charge additional amounts for work beyond the "flat fee" - such as negotiating reaffirmation documents or motions to avoid liens. However, the client's failure to pay these additional fees would not justify a refusal to represent the debtor on these matters, at least until the attorney is permitted to withdraw.

***In re Castorena*, 270 B.R. 504 (Bankr. D. Id. 2001)**

In a very thoughtful and lengthy opinion, Judge Myers addressed concerns about the same attorney at issue in the BAP's *Basham* opinion and the Ninth's Circuit's *Hale* opinion. The attorney charged $250 for preparation of petition and schedules (but excluded §341(a) appearances or any other appearance in bankruptcy court). The attorney did not sign the petition he had prepared for the debtors, but filed FRBP 2016(b) disclosure statements.

The Court ruled that the petition must be signed by the attorney under Rule 9011, even if the services to be provided were limited (but did not impose sanctions under Rule 9011 due to lack of notice to the attorney).

The Court found that the schedules prepared by this attorney were rife with errors and that he had non-lawyer "interns" doing a large amount of the work, so he had failed to sustain his burden of proving his services were reasonable and necessary under §329(b).

The Court concluded that Idaho Rules of Professional Conduct 1.1(a), 1.2(c) and 1.4 will make it exceedingly difficult to contract away the "fundamental and core obligations" of representing a debtor. The most fundamental was actually appearing for the debtor, meaning ghost writing was unacceptable. "To send a debtor into a bankruptcy *pro se*, on the theory that he has had "enough" advice and counseling in the document preparation stage to safely represent himself is except in the extraordinary case so fundamentally unfair as to amount to misrepresentation." 270 B.R. at 529. The Court provided a list of duties normally required as part of representation of a debtor:

> Furthermore, for clarity, when accepting an engagement to represent a debtor in relation to a bankruptcy proceeding, an attorney must be prepared to assist that debtor through the normal, ordinary and fundamental aspects of the process. These include the proper filing of all required schedules, statements and disclosures; preparation and filing of necessary amendments to the same; attendance at the § 341 meeting; turnover of assets to the trustee, and cooperation with the trustee; compliance with the tax turnover and other orders of the Court; performance of the duties imposed by § 521(1), (3) and (4); counseling in regard to § 521(2) and the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors, and assisting the debtor in accomplishing those aims; and responding to issues that arise in the basic milieu of the bankruptcy case, such as violations of stay and stay relief requests, objections to exemptions and avoidance of liens impairing exemptions, and the like.

270 B.R. at 530. The court noted that each case varies so the list was not meant to be exclusive, "[b]ut the closer to the heart of the matter -- the debtors' desire to obtain bankruptcy relief and the process necessary to do so -- the less likely exclusion is appropriate." *Id.*

The Court also concluded that any limits on the scope of representation may only be made with truly informed consent, which may be impossible:

> The quality of such informed consent is critical. Unless debtors truly understand what they bargain away, the bargain is a sham.
>
> In order to make an informed decision, the client must understand what might be faced in the bankruptcy, and the risks associated with representing himself in handling

> those contingencies. Many lawyers find themselves surprised by what can arise in an otherwise "simple" bankruptcy case. The reported decisions of this and other bankruptcy courts make it clear that, even in garden variety consumer chapter 7 cases, counsel for debtors and those who might be characterized as their adversaries (creditors, or occasionally the trustee) sometimes have distinctly polar views of what is permissible and what is not. The ability to adequately explain the lay of the bankruptcy landscape, including all its variations, contingencies and permutations, in order to obtain a truly informed consent is suspect.

270 B.R. at 529.

Decisions Specifically Requiring Reaffirmation Representation

***In re Collmar*, 417 B.R. 920 (Bankr. N.D. Ind. 2009)**

Agreeing to represent debtor is an agreement to represent for the entire case and not simply bits and pieces. Indiana Rule of Professional Conduct 1.2(c) allows limitations on representation if: (i) reasonable under the circumstances and (ii) client gives informed consent. Excluding reaffirmation is not a reasonable limitation. The decision to reaffirm is critical to the debtor's case, so that assistance with reaffirmation (advising debtor about the process and evaluating the effect of an agreement) is part of the services that make up competent representation of a Chapter 7 debtor. (Thus, Court would not approve the reaffirmation agreement.)

Note: This decision does not cite or discuss any local rules on point.

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

Attorney's employment contract with chapter 7 debtor excluded reaffirmations from his representation. Attorney advised the debtor on effect and consequences of the reaffirmation agreement, but he did not assist the debtor in negotiating the agreement.

The Court concluded that decision to reaffirm is so critical to the bankruptcy process that assistance with reaffirmation is required as a part of the attorney's professional duty of competent representation. Further, the Bankruptcy Code §524(c)(3) gives the attorney that responsibility. Although Oklahoma had Rule1.2(c), which allows reasonable limits on representation with informed consent), excluding reaffirmation assistance is not a *reasonable* limitation.

Note: This decision does not cite or discuss any local rules on point.

***In re DeSanctis*, 395 B.R. 162 (Bankr. M.D. Fla. 2008)**

Law firm agreement with Chapter 7 debtors included reaffirmation agreement, but the law firm failed to represent the debtors in negotiating a reaffirmation agreement. Local Rule 9011-1 required the debtor's attorney to attend all hearings in the case that the debtor is required to attend. The Court awarded sanctions against the law firm.

In (arguably) dicta, the Court discussed "certain essential duties" of counsel for Chapter 7 consumer debtors: (i) preparation of petition, schedules, statements and pleadings, (ii) attending scheduled meetings of creditors and (iii) assistance in reaffirmation and redemption.

***In re Carvajal*. 365 B.R. 631 (Bankr. E.D. Va. 2007)**

The Court denied approval of a reaffirmation agreement:

> The court reminds counsel that once he makes an appearance in a bankruptcy case, he has made an appearance for all matters in that bankruptcy case and must appear with respect to them unless otherwise excused by the court. Reaffirmation agreements are an integral part of chapter 7 representation of debtors. By accepting a

chapter 7 case, counsel is accepting all aspects of the case including counseling with respect to reaffirmation agreements, negotiations with creditors with respect to reaffirmation agreements, and representing debtors in court with respect to reaffirmation agreements.

This is not to say that counsel is not to be paid for these services. It is expected that counsel will be paid for all services he renders. If these services are not included in the flat fee, he may charge additional fees agreeable with the client. However, whether fees are paid or not paid by the client does not permit counsel to fail to stop representing his client through all aspects of the case. If there are difficulties with the attorney-client relationship, including non-payment of fees, counsel may seek leave to withdraw. The court is not favorably inclined to permitting counsel to withdraw solely because a reaffirmation agreement is involved in the case particularly where there are or may be other matters to be addressed.

365 B.R. at 632.
Note: This decision does not cite or discuss any local rules on point.

Central District of California – Attorney Certification for Reaffirmations

In considering inclusion of reaffirmation agreements, it should be noted that our local reaffirmation agreement form requires the following certification from an attorney who "represented the debtor during the course of negotiating" the reaffirmation agreement:

"I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement."

"□ [Check box, if applicable and the creditor is not a Credit Union.] A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment."

<u>Decisions Requiring Attendance at §341(a) Meetings</u>

***In re Ortiz*, 496 B.R. 144, 148-149 (Bankr. S.D.N.Y. 2013) (citations omitted).**

The Court found that the debtor's attorney had impermissibly excluded from Chapter 7 representation routine matters that are required in every consumer debtor representation. Specifically, the Court was troubled by the exclusion of more than one §341(a) meeting, more than one hour of post-§341(a) work, amendments due to client error, redemptions and reaffirmations.

While an attorney may limit the scope of representation, "a practice colloquially referred to as 'unbundling' . . . [such limitation must be] consistent with the rules of ethics and professional responsibility binding on all attorneys." Although "there is no local rule [in this District] regarding what services must be included in the [attorney's] flat fee . . . [s]ervices that are not considered 'typical' may be properly excluded . . . so long as the client receives proper notice of what is and is not included.

A lawyer who agrees to represent a debtor in a consumer bankruptcy case must act as his or her attorney for all "normal, ordinary, and fundamental aspects" of the case, including amendments to the schedules and other routine representation necessary to ensure that the debtor receives a discharge.

NY Rule of Professional Conduct 1.2(c) allows reasonable limitations with informed consent. The court concluded that representation at §341(a) meeting is a "fundamental and core obligation" of debtor's attorney, so excluding more than one appearance violates Rule 1.2(c).

Hiring appearance counsel for the §341(a) hearing is not *per se* inappropriate, but the appearance counsel must also file a Rule 2016(b) statement.

***In re Cochener*, 360 B.R. 542 (Bankr. S.D. Tex. 2007)**

Debtor's attorney took a $2,500 retainer and later claimed that he did not have a statutory duty to attend the section §341(a) hearing. The attorney submitted a Disclosure of Compensation pursuant to 11 U.S.C. §329, which included "Attendance at 341 Meeting." Even without this language in the attorney's own compensation disclosure, the court concluded that the §341(a) meeting is mandatory for the debtor and for the debtor's attorney: "it [is] unfathomable that [the attorney] could take such a large retainer and yet argue that it is not part of his obligation as counsel for the Debtor to appear at the continued Meeting of the Creditors." 360 B.R. at 580. Further, debtor's counsel not only owes a duty to the debtor; he also owes a duty to the system to appear. As an agent of the debtor, the attorney adopts the duty to cooperate with the trustee, which includes appearing at the §341(a) hearing.

***In re Johnson*, 291 B.R. 462 (Bankr. D. Minn. 2003)**

The court ordered partial return of attorney's fees where the attorney for individual Chapter 7 debtors filed a disclosure statement pursuant to FRBP 2016(b) stating that he would attend the §341(a) meeting, but then failed to attend (allegedly with debtor's consent). The court concluded that attendance at the §341(a) meeting is mandatory under the local rules, which requires attorneys to represent debtors in all matters and proceedings in the bankruptcy case other than adversary proceedings. Attorneys for consumer chapter 7 debtors may not "unbundle the core package of ordinary legal representation reasonably anticipated in every case." A §341(a) meeting is core to the bankruptcy case and representation may not be avoided by obtaining client consent through discount of compensation.

***In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill. 1997)**

The court ordered disgorgement of attorney fees for failure to attend the §341(a) meeting because the debtors did not give informed consent to the attorney's absence, as required by Illinois Rule of Professional Conduct 1.2(c).

<u>Decisions Accepting LSR (with some qualifications)</u>

***In re Slabbinck*, 482 B.R. 576 (Bankr. E.D. Mich. 2012)**

Chapter 7 debtor and his attorney signed two fee agreements: one charging $1000 for all pre-petition services and a second charging $2,000 for post-petition services. The US Trustee moved for cancellation of the post-petition agreement and disgorgement of the fees.

The Court rejected *Egwim* and found that §329 and the duty of competence under Michigan Rules of Professional Responsibility do not prohibit the unbundling of pre-petition services from post-petition services.

> The Court has a very strong preference to see individual debtors hire an attorney to represent them in all aspects of a Chapter 7 bankruptcy case, from start to finish, including the preparation and filing of the petition and all required documents together with all of the steps necessary to complete the case after the petition has been filed. In the Court's experience, an individual Chapter 7 debtor's chances of success are greatly enhanced if they have an attorney represent them throughout the entire process. Further, it is beyond challenge that individual debtors are also invariably better served by having an attorney represent them in preparing as many as possible of their required documents before their petition is filed and then filing those documents together with their petition. This practice lessens the chance of inconsistency or error, and minimizes

> the likelihood of problems for a debtor down the road. However, the Court understands that some individual debtors simply cannot afford to pay up front for all of the services required to both file and complete a Chapter 7 case prior to the time that they file their Chapter 7 bankruptcy case. The law does not prohibit such individuals from paying a smaller fee to an attorney to get their case filed and then, once the case is filed, either proceeding pro se or entering into a new agreement either with the same attorney or with another attorney to represent them in completion of their case . . . .

482 B.R. at 596-97. The Court did require that the debtor be adequately consulted on the scope of the representation and its ramifications.

***In re Jones*, 356 B.R. 39 (Bankr. D. Idaho 2005)**

Debtor's counsel indicated in his 2016(b) disclosures that he agreed to represent the debtor for $750.00 and that representation would be limited to "prepetition counseling, preparing, and filing the necessary bankruptcy papers, and representing the debtors at the first meeting of the creditors." 356 B.R. at 51. Counsel demanded additional fees in order to represent the debtor in litigation over violations of the automatic stay. The debtor was unable to pay additional attorney's fees, so she agreed to a 75% contingency fee agreement "for counsel's pursuit of relief regarding the violation[s]." 356 B.R. at 52.

The Court refused to validate the contingent fee arrangement and cited *Castorena* for the proposition that "exclusions from the scope of representation without additional payment of fees, especially for something as core to the bankruptcy process as enforcing the automatic stay, must be adequately explained to and understood by the client." Debtor claimed that she was not made aware of the possibility that additional fees would be owed until she contacted the attorney regarding the stay violation.

***In re Hodges*, 342 B.R. 616 (Bankr. E.D. Wash. 2006)**

Chapter 7 debtors filed bankruptcy and employed a law firm to handle their case, but ended up owing the law firm money and the matter was assigned to collection. Debtors filed this proceeding claiming that the collection action violated the FDCPA and the discharge injunction. The parties disagreed on the terms of the oral retention agreement: $700.00 plus the filing fee "for [a] complete handling of the case (debtors' view) vs. $750.00 for limited services (attorney's recollection).

In this context, the court stated: "The general rule in bankruptcy court (and the district court for that matter) is that once a lawyer has undertaken a bankruptcy case, the attorney needs court permission to terminate that representation." 342 B.R. at 619 (citing LBR 9010(b)(5)). The client's mere unavailability to pay for additional services may not be grounds for termination of representation, especially in the bankruptcy context where debtors often are only able to pay a limited amount. 342 B.R. at 620. However, the Court went on to recognize that:

> Recently the Bar Association has allowed a lawyer to limit the scope of representation if the limitation is reasonable and the client consents after consultation." RPC 1.2(c). The rules of the Bankruptcy Court for the Eastern District of Washington allow "limiting" or "unbundling" services in certain instances by defining what services must be performed in connection with a flat fee arrangement in handling a Chapter 13 case. LBR 2016(e). These rules require a written fee arrangement.
>
> It may be possible to limit the services contracted for in handling a Chapter 7 case but this must be done specifically and with a clear showing that the client consents to this arrangement.

Id.

***In re Merriam*, 250 B.R. 724 (Bankr. D. Colo. 2000)**

The U.S. Trustee brought a motion to examine and disgorge attorney's fees pursuant to 11 U.S.C. §329(b), arguing that the attorney's fees were excessive due to the attorney's failure to (i) attend the §341(a) meeting with the debtor and (ii) sign the debtor's petition. The court found that the undisputed facts were as follows:

After interviewing the debtor and determining that the debtor's case was a simple consumer case, the attorney offered the debtor two flat fee options for Chapter 7 representation. One option included attendance at the 341(a) meeting; the other did not. Regardless of the debtor's choice of services, the attorney agreed to consult with the debtor prior to the §341(a) meeting, respond to the debtor's pre- and post-petition questions, and to review proposed reaffirmation agreements. The attorney also offered to represent the debtor in specific post-petition matters for additional fees. After the debtor learned what the §341(a) meeting is, how it is conducted and the risks of attending the meeting without an attorney, the debtor chose the option excluding the attorney's attendance at the §341(a) meeting from the scope of representation. The attorney prepared and filed the petition, schedules and statement, but did not sign the documents.

The Bankruptcy Court found that the attorney's failure to sign the documents violated FRBP 9011. The Court held that the signature requirement in FRBP 9011, like the signature requirement in FRCP 11, serves to certify to the court the accuracy of the petition. When attorneys fail to sign petitions they have prepared, there is a potential for misleading the Court, the trustee and creditors. As officers of the court, attorneys owed a duty to the Court and the legal system to sign petitions they have prepared. Although Colorado Rules of Professional Conduct allow the unbundling of legal services, they do not excuse compliance with FRCP 11 and FRBP 9011. [1]

The court denied the U.S. Trustee's motion to disgorge, which argued that the attorney's failure to attend the §341(a) meeting made his $399 fee excessive. The Court found that attendance at the §341(a) meeting by the debtor's attorney is often beneficial to the debtor, creditor and trustees, but rejected mandatory attendance by debtors' attorneys. While attendance of the debtor's attorney at a §341(a) meeting may be critical in some cases, the court noted that some *pro se* debtors successfully complete the bankruptcy process even though they are without legal representation at the §341(a) meeting. Absent a showing that the attorney's "failure to attend the §341(a) meeting violated his duty to the debtor, dropped below the minimum professional standards in the community or resulted in injury to the debtor or the estate," the Court held that a reduction or recoupment pursuant to 11 U.S.C. §329(b) was not warranted.

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[1] A District Court Administrative Order 1999-6 in effect at the time of the bankruptcy filing stated that Rule 1.2(c) of the Colorado Rules of Profession Conduct, as well as other provisions of Colorado laws permitting attorneys to limit their representation, were not applicable in matters pending before the U.S. District Court for the District of Colorado. After oral arguments in this case, Administrative Order 1999-6 was amended to prohibit limited representation in adversary proceedings and matters governed by FRBP 9014. The Court in this case reasoned that by negative implication, the Administrative Order allows limited representation in other phases of a bankruptcy case.

Post-Petition Fee Issues

Any rules governing the scope of representation in chapter 7 must take into account the rather complicated issues surrounding fees for post-petition work performed by a Chapter 7 debtor's attorney.

A Chapter 7 debtor's attorney cannot be compensated from the debtor's estate for post-petition services (unless employed by the Trustee). *Lamie v. United States Tr*., 540 U.S. 526, 538-539 (U.S. 2004). The *Lamie* decision did, however recognize (and not take issue with), Chapter 7 debtor's counsel receiving a pre-petition retainer. 540 U.S. at 537-38.

Since *Lamie*, most courts have held that this "retainer exception" only allows Chapter 7 debtor's counsel to retain "flat fee" or "advanced payment" retainers. Security retainers, on the other hand, are property of the estate; payment for post-petition services from property of the estate would undermine §330 and *Lamie*. *Wagers v. Lentz & Clark, P.A. (In re Wagers)*, 514 F.3d 1021 (10th Cir. 2007); *Fiegen Law Firm, P.C. v. Fokkena (In re On-Line Servs. Ltd.)*, 324 B.R. 342, 347 (B.A.P. 8th Cir. 2007); *Morse v. Ropes & Gray, LLP (In re CK Liquidation Corp.)*, 343 B.R. 376, 383 (D. Mass. 2006)("this Court has concluded that the "retainer exception" articulated in the *Lamie* decision referred only to flat fee retainers"); *In re Blackburn*, 448 B.R. 28 (Bankr. D. Idaho 2011); *In re Hill*, 355 B.R. 260, 268 (Bankr. D. Or. 2006)("The 'retainer exception' set forth in Lamie is limited to flat fee retainers and does not extend to retainers intended solely to secure payment of post filing attorney fees."); *aff'd sub nom*., *Hill v. Camacho*, 2007 U.S. Dist. LEXIS 54443 (D. Or. 2007). *But see In re Channel Master Holdings, Inc.,* 309 B.R. 855, 859 n.3 (Bankr. D. Del. 2004).

Furthermore, in the Ninth Circuit: post-petition legal services provided to a chapter 7 debtor, even when provided pursuant to a pre-petition contract, constitute post-petition debt and are not dischargeable in bankruptcy. *Gordon v. Hines (In re Hines),* 147 F.3d 1185, 1190-91 (9th Cir. 1998); *Sanchez v. Gordon (In re Sanchez),* 241 F.3d 1148, 1150-51 (9th Cir. 2001); *Knutson v. Tredinnick (In re Tredinnick),* 264 B.R. 573, 577 (B.A.P. 9th Cir. 2001); *Kelly v. Duboff Law Group, LLC (In re Fraga),* 2007 Bankr. LEXIS 4924, at *8 (B.A.P. 9th Cir. Mar. 1, 2007). (This rule has been severely criticized in other circuits. *See, e.g., Bethea v. Robert J. Adams & Assocs.,* 352 F.3d 1125 (7th Cir. 2003), *cert. denied*, 541 US 1043 (2004).)

Several conclusions follow. Post-petition services may be included within the basic scope of Chapter 7 representation without subjecting a "flat fee" retainer to the risk of disgorgement. Post-petition services that are "add ons" to the basic representation cannot be a paid (i) by drawing on a pre-petition retainer or (ii) by the estate, but they are post-petition obligations of the debtor - even if they are covered by a pre-petition retainer agreement. Thus, in the Ninth Circuit, a Chapter 7 attorney does not need a separate post-petition retainer agreement to cover post-petition services. Furthermore, "informed consent" requires disclosure of the fact that any post-petition services beyond the basic scope of representation covered by a flat fee will be post-petition obligations of the debtor that are not dischargeable in bankruptcy.

Final Conclusions

Local bankruptcy rules and case law take a wide variety of approaches to LSR in Chapter 7, ranging from:

- *Egwim*'s prohibition on LSR and *Castorena's* conclusion that any meaningful LSR will violate an attorney's professional responsibilities, and the many local rules that require debtor's counsel to represent the debtor for all purposes in the bankruptcy case;
- decisions that require specific representation (at the §341(a) meeting and/or with respect to reaffirmation) and local rules (and the ABI proposed rules) that require attorneys for chapter 7 consumer debtors to provide certain enumerated services; or
- decisions and local rules that allow LSR, although usually requiring informed consent by the client and disclosure.

All decisions would acknowledge that this issue requires balancing two competing interests. Post-petition legal representation greatly assists the debtor in navigating bankruptcy and successfully obtaining the usual goal in a consumer chapter 7 bankruptcy: a discharge and the retention of exempt property. Attorney participation throughout the chapter 7 also increases court effectiveness and efficiency. On the other hand, each additional requirement of representation raises the costs of representing chapter 7 debtors and prices more and more debtors out of representation altogether, especially as prudent attorneys demand a pre-petition retainer to cover all fees.

Any rule on LSR must comport with the California Rule of Professional Conduct. Rule 3-110 requires a duty of competency. Bankruptcy court decisions throughout the country have disagreed with exactly what scope of representation a duty of competency requires, but non-bankruptcy California case law has required alerting clients to matters that adversely impact the client's objectives, even if the matter is outside the scope of representation. Rule 3-700 also requires that the termination of employment, which is inherent in an LSR, only occur upon knowing assent of client and should be structured in a way to avoid "reasonably foreseeable prejudice" to the client. Furthermore, public disclosure must be made, so that opposing counsel can comply with Rule 2-100 on communication with a represented party.

The most typical LSR in consumer Chapter 7 bankruptcy provides pre-petition services up to the filing of the petition. Additional required services should be the minimum necessary to assure competent representation and avoid foreseeable prejudice to the debtor, in order to minimize the number of the debtors that will be priced out of representation.

The ABI National Task Force on Ethics report and proposed rule and the Oregon local rule are both well-considered approaches to striking the balance between complying with ethical obligations and providing adequate representation while minimizing the number of debtors that are priced out of representation by increased requirements. Both rules are attached. We have also attached the relevant local rule and Rights and Responsibilities Agreement for the Southern District of California and the Northern District of California guidelines: both were created in the context of California ethical rules and both provide a thoughtful list of services each district expects to be included within representation. We have used these rules to create the attached straw poll list of elements that might be included in Chapter 7 representation. At the conclusion of the program, we will conduct a straw poll on which elements should be required in chapter 7 representation. We would like to use the results of this straw poll to formulate a proposal to bring before the bar for comment.

The Ethics of Joint
Bankruptcy Filings and Divorce

Eugene R. Wedoff.[1]

Introduction

At first glance, it seems that couples contemplating a divorce would be wise to file a joint bankruptcy case first.

The advantages of a prior bankruptcy filing are set out in Nolo.com—"one of the web's largest libraries of consumer-friendly legal information."[2] "Filing for bankruptcy before a divorce" the website states, "can . . . simplify the issues regarding debt and property division and lower your divorce costs as a result."[3] Several websites for private attorneys repeat this advice, largely verbatim.[4]

The Nolo website also states the advantage of filing bankruptcy jointly:

> Bankruptcy filing fees are the same for joint and individual filings. So filing a joint bankruptcy with your spouse . . . can save you a lot on court fees. Also, if you decide to hire a bankruptcy attorney, your attorney fees will likely be much lower for a joint bankruptcy than if each of you filed separately.[5]

But there is a catch. Nolo cautions that "you should let your bankruptcy attorney know about your upcoming divorce as there may be a conflict of interest for him or her to

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[1] U.S. Bankruptcy Judge, N.D.Ill. (ret.).

[2] *See* www.nolo.com, last visited March 29, 2016.

[3] *See* www.nolo.com/legal-encyclopedia/divorce-bankruptcy-which-comes-first.html, last visited March 29, 2016.

[4] *E.g,,* Bunch & Bock, Lexington Ky., http://www.bunchandbrocklaw.com/personal-bankruptcy/divorce-bankruptcy/, last visited April 2, 2016.

[5] *See* www.nolo.com/legal-encyclopedia/divorce-bankruptcy-which-comes-first.html*.*

represent you both."[6] That advice only hints at the potential difficulties. There are several ethical problems that joint bankruptcy representation and divorce may present to a bankruptcy attorney: beyond potential conflicts of interest, there may be difficulties with the clients' expectations of confidentiality and a potential for fraudulent transfer liability. Each of these areas are outlined below, after a list of useful resources.

1. *Relevant material*

Although there are many opinions dealing with the treatment of property and claims in the intersection of bankruptcy and divorce, the following decisions and articles appear to be the ones most directly dealing with ethical issues arising from representing divorcing spouses in a joint bankruptcy case.

• *In re Disciplinary Proceedings Against Zablocki,* 635 N.W.2d 288 (Wis. 2001). An attorney who was facing suspension of his law license represented a woman in divorce proceedings without telling her of his imminent suspension; he also filed a joint bankruptcy petition for her and her husband while the divorce was pending. In this opinion, the Wisconsin Supreme Court issued a public censure and indefinite suspension of the license.

• *In re Green,* 1989 WL 1719956 (Bankr. S.D.Ga. Sept. 8, 1989). An attorney who had filed a joint Chapter 13 case later filed a divorce case on behalf of the wife. The bankruptcy court found that actions taken by the attorney to collect child support payments from the husband whom he was representing in bankruptcy violated the automatic stay. The opinion discusses in a footnote the apparent conflict of interests in the attorney's conduct, but states that this ethical issue was not before the court.

[6] *Id.*

• C.R. "Chip" Bowles Jr., *Goldilocks, Bankruptcy and Divorce: Are the Adversarial Relationships too Much, not Enough or Just Right?* 21-JUN Am. Bankr. Inst. J. 20 (June, 2002). This article gives an excellent statement of the general rules on conflicts of interest in the bankruptcy/divorce intersection and discusses the potential for fraudulent transfer liability from property transfers in divorce decrees.

• Concurrent Session: Bankruptcy and Divorce, 111111 ABI-CLE 761 (2011), a general panel discussion that includes consideration of joint representation.

• Karmyn Wedlow & Jennifer Buchanan, Dual Representation Can Lead to a Duel with Your Clients, 55 S. Tex. L. Rev. 769 (2014), discussing ethical problems in joint representation and concluding that the economic benefits are outweighed by the ethical costs. The article outlines the potential consequences for a lawyer who fails to comply with ethical responsibilities: disqualification, monetary sanctions, and referral to disciplinary authorities. 55 S. Tex. L. Rev. at 775-77.

2. *Conflict of Interests*

a. *General rules*

The starting point for ethical representation of debtors in joint bankruptcy filings is conflicts of interest. The Model Rules of Professional Conduct, largely adopted in most states, provide a nuanced set of directives, first defining conflicts of interest and generally prohibiting representation when a conflict exists, and then providing the terms under which a conflict can be overcome by client consent.

Model Rule 1.7(a) provides the definition and prohibition. It states:

> 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.

It is important to recognize that this definition is not limited to clients whose interests are directly adverse in the matter for which the lawyer is retained, but extends to any situation in which the lawyer's ability to provide effective representation would be "materially limited" by responsibilities to another person or by personal interests of the attorney.

The potential for client consent is set out in Rule 1.7(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.

This potential for consent is carefully limited. First, the attorney has to reach the personal conclusion that the conflict will not prevent effective representation; second, there must be no law prohibiting it (as there is in some jurisdictions for joint representation of parties to a divorce); third, the attorney may not pursue a claim by one client against another client in the same proceeding (so, for example, in a Chapter 11 case, a creditor client of the attorney for the debtor in possession could waive the attorney's conflict of interest, but a waiver would not allow the attorney to pursue a claim objection in the bankruptcy case against that creditor); fourth, the attorney must give each client the information necessary for the client to make an informed decision about whether to consent to the representation despite the conflict; and finally, the client's consent must be in writing.

In the event that a conflict between the clients arises during joint representation, the attorney must withdraw from representing both clients, since continued representation would violate Rule 1.7(a). See Rule 1.16(a)("[A] lawyer . . . shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct . . . .") and Comment 4 to Rule 1.7 ("If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation . . . ."). The attorney could continue representing one of the spouses while the other obtained a new attorney only with informed consent, as provided in Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same . . . matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

b. *Divorce planned at the time of the bankruptcy filing*

The money-saving approach of a joint bankruptcy by a couple planning to divorce has the difficulty that the divorcing couple often disagree with one another, sometimes passionately. For example, in *In re Dube*, 2013 WL 1743849 (Bankr. C,D,Cal. April 23, 2013), a divorcing couple engaged in 13 years of litigation involving an individual Chapter 11 case filed by one of them. Even if spouses appear amicable when they seek bankruptcy advice in contemplation of a divorce, a joint bankruptcy carries the risk of later conflicts between the two clients. Before filing a joint case—whether or not a divorce is contemplated—an attorney should take the following steps:

- *Assure that there are no bankruptcy issues in dispute between the spouses.* If there is any potential for a dispute between the spouses over a bankruptcy matter—such as an inter-spousal claim, the response to a particular creditor's claim, or ownership of property—a joint filing would be an ethical violation, because the representation of each party would be limited by the attorney's responsibilities to the other party, and the conflict could not be eliminated by consent, since any action that the attorney took would be against the other client's interest.
- *Give full disclosure to both clients regarding the potential for conflicts that might arise in the future and require the attorney's withdrawal.* This disclosure would reduce client resentment in the event of withdrawal, but a separate disclosure would have to be made to obtain any informed consent to continued representation of either party.
- *Do not represent either of the spouses in the subsequent divorce.* Although it might theoretically be possible to get informed consent from a client in the bankruptcy case to conflicting representation of one of them in the divorce case (because that would not be "in the same litigation" in which the attorney represented both clients), it would be extraordinarily difficult to be a client's advocate in bankruptcy and simultaneously the client's opponent in the divorce. This situation—albeit without an attempt to obtain informed consent—led to a suggestion of unethical conduct in *Green,* 1989 WL 1719956 at *6 n.1; and the imposition of ethical sanctions in *Zablocki,* 635 N.W.2d at 291.

- *Do not file a joint Chapter 13 case if divorce is anticipated.* Chapter 13 would not eliminate the need to address the allocation of claims against the spouses in the divorce case because there would be no prompt discharge of those claims. And in Chapter 13, disagreements could arise not only about property interests and claims, but also about allocation of payments to the trustee and the need for—and terms of—any plan modification. If one of the spouses wishes to retain jointly-owned property that is collateral for a loan, Chapter 13 might be necessary for that spouse, but the other would likely be best served by a separate Chapter 7 filing.

c. *Marital dispute first arising after a joint filing*

Just as a joint bankruptcy can be filed on behalf of spouses anticipating a divorce, a joint bankruptcy can be maintained on behalf of spouses who first decided to divorce while their bankruptcy case is pending. Unexpected marital discord is most likely to occur in Chapter 13 cases, because of the longer time before these cases conclude. In such cases, the attorney should have informed the spouses at the outset of the case that any disputes between them over bankruptcy matters would require the attorney to withdraw from their representation. If bankruptcy-affecting disputes do arise—likely over the plan modification and allocation of trustee payments—the attorney would have to withdraw and advise the clients to retain separate bankruptcy counsel unless informed consent is given—which is unlikely if the clients are in a contentious dispute.

3. *Confidentiality*

a. *General rules*

Rule 1.6(a) of the Model Rules of Professional Responsibility sets out the general prohibition against attorney disclosure of client confidences: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation . . . ."

Rule 1.6(b) sets out exceptions to the prohibition that would not generally apply in joint bankruptcy representation, but the two exceptions set out in Rule 1.6(a) itself do apply. First, the exception for "impliedly authorized" disclosure would allow the attorney to disclose to one of the spouses whatever relevant information the attorney received from the other spouse. *See Securities Investor Protection Corp. v. R.D. Kushnir & Co.,* 246 B.R. 582, 588 (Bankr. N.D.Ill. 2000) ("Under the 'joint defense doctrine' if the same lawyer jointly represents two or more clients with respect to the same matter, those clients have no reasonable expectation that their communications to the lawyer with respect to the joint matter will be kept secret from each other."). Second, the exception for "informed consent" would allow either spouse to require the attorney to disclose information that either spouse conveyed to the attorney in confidence. *See* Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 Rev. Litig. 567, 579 (1997) ("[A]ny joint client can require the attorney to testify about such disclosures when a dispute arises between the joint clients.").

Rule 1.9(c) imposes a confidentiality limitation on continued representation of one spouse after the attorney withdraws from representation of the other: "A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client." See Comment 7 to Rule 1.9 ("Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.")

b. *Effect on joint bankruptcy representation*

A major concern for an attorney representing spouses in a joint bankruptcy is the potential for their not realizing the limits on confidentiality that the law has established. It is critical for the attorney to advise the clients at the outset of the representation that no statements they make to the attorney in connection with the bankruptcy case can be withheld from their spouse and that either of them can require the attorney to disclose their confidential statements in any controversy that may arise between them in the future.

4. *Fraudulent transfer liability*

One potential benefit of a divorce in connection with bankruptcy is that it typically divides the property of the spouses between them, and, in this way property that was subject to the claims against only one of the spouse can be freed from those claims by being awarded to the other spouse. Even if the divorce court order makes a substantially unequal division of the marital property, the division may be seen as supported by reasonably equivalent value to both spouses, and so immune from challenge as a constructively fraudulent transfer under § 548(a)(1)(B). *See, e.g., In re Kimmell,* 480 B.R. 876, 889-90 (Bankr.N.D.Ill.2012). However, courts are sensitive to the possibility that spouses may use the divorce process to facilitate an actual intent to defraud creditors. The authorities are collected in *Shaudt v. United States,* 2013 WL 951138, at *5 (N.D. Ill. March 11, 2013):

> Courts have recognized that divorce can be used to lend an air of legitimacy to an otherwise fraudulent transfer. *See, e.g., In re Chevrie,* 2001 WL 120132, at *10 (Bankr.N.D.Ill. Feb.13, 2001) (finding the transfer of a marital home pursuant to a divorce settlement fraudulent because the transfer was made

> for the purpose of placing the home outside of the reach of the IRS). Such sham divorces often share certain "badges of fraud," including: (1) a quickly agreed upon property division; (2) the completion of the divorce proceeding on a "fast-track;" (3) the fact that only one of the spouses is represented by counsel in the divorce proceeding; (4) the fact that the spouses continue to live together after the divorce decree in the very house that was transferred; (5) the fact that the transferor spouse continues to pay the mortgage, taxes, and other costs on the transferred house; and (6) the inequitable distribution of debts and assets in the divorce. *Id.; see also In re Pilcher,* No. 05–8044, 2008 WL 2682858, at *4 (Bankr. C.D.Ill. Jun.25, 2008); *In re Hill,* 342 B.R. 183, 199–200 (Bankr.D.N.J.2006); *In re Zamudio,* No. 04 A 02922, 2005 WL 2035969, at *9–10 (Bankr. N.D.Ill. Aug.23, 2005); *In re Rodgers,* 315 B.R. 522, 531 (Bankr. N.D. 2004); *In re Boba,* 280 B.R. 430, 434–35 (Bankr. N.D.Ill. 2002); *In re Dunham,* No. 98–1466–MWV, 99–1054–MWV, 2000 WL 33679421, at *4 (Bankr. D.N.H. 2000).

On the other hand, it has been held that a regularly conducted divorce proceeding, with no indication of collusion, is entitled to a presumption of validity. *Batlan v. Bledsoe (In re Bledsoe),* 569 F.3d 1106, 1112 (9th Cir. 2009) ("[A] state court's dissolution judgment, following a regularly conducted contested proceeding, conclusively establishes 'reasonably equivalent value' for the purpose of § 548, in the absence of actual fraud."); *Ingalls v. Erlewine (In re Erlewine),* 349 F.3d 205, 212 (5th Cir.2003) ("[W]e should hesitate before we impute to Congress an intent to upset the finality of judgments in an area as central to state law as divorce decrees.").

This state of the law makes it important for attorneys representing a spouse in a divorce case to avoid uncontested transfers of property obviously subject to enforcement of judgment. If spouses seek bankruptcy representation after such a transfer, bankruptcy counsel should warn of the potential liability for a fraudulent transfer.

Though not directly involving a divorce proceeding, *In re Prince,* 40 F.3d 356 (11th Cir. 1994), provides an example of the difficulty that bankruptcy counsel may face in this situation. In *Prince,* a Chapter 11 debtor had made a large transfer to his wife, and the law firm for the debtor had earlier represented both the husband and wife in estate planning matters. The court held that because the wife was potentially a defendant in a fraudulent transfer action, and because the attorney had previously represented the debtor's wife, the firm had a conflict of interest in representing the husband in his Chapter 11 case, and on that basis all fees for the bankruptcy representation were denied. "By representing Prince in his bankruptcy proceedings, [the firm] deprived Prince of a conflict-free, impartial, independent evaluation of the potential claims of and against his estate." *Id.* at 360. This decision is questionable; another lawyer would have faced the same difficulty, since the debtor had a personal interest in allowing his wife to keep the transferred property that would have interfered with his duty to the estate. A key to avoiding denial of fees in this situation is full disclosure of all transfers made by one spouse to the other in the bankruptcy schedules and in any application to be retained as counsel.

Goldilocks Bankruptcy and Divorce Are the Adversarial Relationships Too Much Not Enough or Just Right

By Chip Bowles, Jr.
Jun 2002

Ethical issues arise in the entire spectrum of bankruptcy legal practice, from the largest chapter 11 proceeding to the smallest consumer chapter 7 case. One of the areas where ethical problems frequently crop up in consumer bankruptcy practice involves cases where the debtors are not only facing overwhelming financial problems, but are also having to deal with the breakup of their family. Between the economic hardships and the emotional strain of bankruptcy and divorce, cases that involve both of these issues are some of the most challenging that will face a bankruptcy practitioner, as well as his or her family law counterpart.

This article will discuss two important ethical issues that will confront bankruptcy attorneys in cases involving family law issues in bankruptcy cases: (1) whether it is possible for a bankruptcy practitioner to represent a husband and wife in a joint chapter 7 when they are planning to get a divorce, and (2) whether a bankruptcy attorney can have a husband and wife use a divorce as a financial planning tool.

Is It Ethical to be a Referee for Your Clients? Representing a Divorcing Couple in Joint Chapter 7
While most of the case law and scholarly literature addressing the intersection of bankruptcy law and family law deals with the dischargeability of obligations arising from a divorce,1 bankruptcy is not solely an obstacle that must be faced by family law practitioners. Indeed, properly filed bankruptcies can assist a couple in managing their divorce and reordering their financial affairs. Indeed, in appropriate cases, bankruptcies can be used to protect the finances of either one or both of the spouses so that their resources can be used to benefit the family rather than unsecured creditors.2

One common way that bankruptcy can be used to assist parties facing a divorce who have insurmountable debt is to file a chapter 7 bankruptcy prior to the filing of their divorce and discharge the bulk of their debt. A pre-divorce chapter 7 bankruptcy can eliminate the need for domestic relations courts to "allocate" the debt of the parties between the parties, and instead can concentrate on allocating income and the parties' remaining assets between the parties to permit them a chance at a fresh start with their lives. However, an ethical trap awaits for an unwary bankruptcy practitioner in this situation if he or she represents both of the divorcing parties in a joint chapter 7 bankruptcy prior to their divorce.

[I]f an attorney finds it is ethically permissible to undertake the joint chapter 7 representation, the attorney must take all reasonable safeguards to ensure that all client confidences and secrets will be preserved during the joint representation from the other spouse.
The ethical problems of a single attorney representing both a husband and wife in a pre-divorce chapter 7 are illustrated in the recent case from the Supreme Court of

Wisconsin, In the Matter of Zablocki, 635 N.W.2d 288 (Wis. 2001). In Zablocki, an attorney was retained in May 1997 by an unnamed woman to represent her in a divorce proceeding. In early 1998, shortly after Zablocki had been informed by the Wisconsin Supreme Court that his law license would be suspended and while the divorce was still pending, the unnamed woman and her soon-to-be ex-husband discussed with Zablocki the possibility of them filing bankruptcy to resolve some of their outstanding financial problems. Zablocki advised the couple it would be "cheaper and easier"3 if he were to represent both of them in a joint chapter 7 filing. Zablocki was paid $800 by the wife and husband, and he filed a joint chapter 7 bankruptcy on their behalf just before his suspension went into effect.4

In filing the bankruptcy for the husband and wife, Zablocki did not disclose to them the possibility of a potential conflict of interest arising from his joint representation of them in their chapter 7, nor did he cease representing the wife in the divorce proceedings. Zablocki also never sought a waiver from either the husband or wife concerning his joint representation. Finally, Zablocki failed to inform the husband and wife of the pending suspension of his law license.

The Wisconsin Supreme Court found that representing the wife in the bankruptcy case and in the divorce proceeding placed Zablocki at direct adversity to another client of his, the husband, and also materially limited his ability to represent both the wife and the husband in their chapter 7 due to his conflicting roles. For this and several other ethical violations, the Wisconsin Supreme Court indefinitely suspended Zablocki's license to practice law and publicly reprimanded Zablocki for his conduct in this case.5

Although most bankruptcy practitioners will not have the same "ethical challenges" as the attorney in the Zablocki case, Zablocki does illustrate that there are serious ethical issues that a bankruptcy attorney must consider before agreeing to represent in a joint chapter 7 proceeding both a husband and a wife who are planning to get divorced.

First and most important, an attorney has the duty not to represent one client if that representation would be directly adverse to the interests of another client of that attorney (adversity duty). Given the nature of a divorce, a bankruptcy attorney must always carefully consider this duty when considering whether to represent a divorcing husband and wife in a joint chapter 7 case.

A second ethical limitation to an attorney's ability to represent a couple planning to divorce is the general prohibition that 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 (material limitation duty").6 Even if an attorney believes that the interests of a divorcing couple are not adverse when they file a joint chapter 7, 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.

The third core issue that an attorney must consider when representing a divorcing couple in a joint chapter 7 bankruptcy is an attorney's duty not to reveal confidences and secrets of clients to other parties, including other clients (confidential information duty). Although most of the information given to a bankruptcy attorney will ultimately become public record, there may be certain confidences of an individual spouse that an attorney might have to take steps to protect, even in light of a joint bankruptcy.

While the above three duties may be stated differently in any given state, they are the three most important core issues that a bankruptcy attorney must consider prior to representing a divorcing couple in a joint chapter 7 bankruptcy proceeding. A bankruptcy practitioner must also be careful to consider whether other state ethical rules would limit or restrict his or her ability to represent a divorcing couple in a joint chapter 7.

The best way to address the problems arising from the above-discussed duties is to first determine whether it is even possible, given the factual situation in the case, for an attorney to represent both the husband and wife in a pre-divorce joint chapter 7 bankruptcy. In most states, an attorney can obtain a waiver to represent clients that are adverse to another client of that attorney if the attorney reasonably believes the representation will not adversely affect the relationship the attorney has with the other client. If, under the facts of a given case, 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 ability to represent one or both of the individuals in a joint chapter 7, then the attorney is ethically prohibited from undertaking that representation.

Assuming an attorney believes that his representation of both the husband and wife in a joint chapter 7 petition will not adversely affect either party, nor materially limit his ability to represent each party, the attorney, under most state rules, may represent both parties in a joint chapter 7 bankruptcy after (1) giving them information about the potential conflict issues involved in such a joint representation, and (2) obtaining their informed consent to the representation and their waiver of the possible conflicts. These waivers must be in writing and should be backed up with detailed written and oral communication with the clients concerning their rights in this matter.

Finally, if an attorney finds it is ethically permissible to undertake the joint chapter 7 representation, the attorney must take all reasonable safeguards to ensure that all client confidences and secrets will be preserved during the joint representation from the other spouse. As an alternative, the attorney may suggest an agreement with both spouses prior to the undertaking of the representation that any information provided to him by either spouse will be shared with the other spouse for purposes of the bankruptcy filing. Depending on the interpretation rules of a particular state bar, the attorney, after giving proper disclosure to his clients, should be able, in a joint chapter 7 relationship, to be permitted to obtain only such information as is necessary to fill out chapter 7 bankruptcy schedules (which are public record) and have the clients waive, as between themselves, any right to keep any confidence or secret that they may impart to the attorney hidden from the other spouse during the bankruptcy representation. Either the proper establishment of procedures to prevent any confidences or secrets from "changing hands" during a joint chapter 7 or the "open kimono" method of dealing with this problem should, with the written agreement by the parties, be sufficient to allow an attorney to meet his or her confidential information duty to the husband and wife in a pre-divorce joint chapter 7 proceeding.

In summary, an attorney must carefully consider representing any party that is contemplating a divorce7 in a joint chapter 7 bankruptcy. The ethical issues are many, and given the generally innate hostility of the parties, the possibility of ethical action being taken against the attorney is great. However, on a practical side, many parties who need both chapter 7 bankruptcy help as well as a termination of their marriage have insufficient funds to obtain separate counsel for both their divorces and bankruptcies, and therefore, a joint bankruptcy may be a viable option under certain circumstances.

"Lost it in the Divorce:" Fraudulent Conveyance Issues in Bankruptcy Proceedings Following a Divorce

As noted above, a bankruptcy attorney must carefully determine whether the adverse relationship between a divorcing husband and wife is too great to allow an attorney to represent both the husband and wife in a joint chapter 7 petition filed before their divorce. However, over the past several years, bankruptcy courts and state domestic-relations courts have been addressing the issue of whether a divorcing couple may not be "adverse enough" when it comes to transferring assets, which may have had the effect of hindering, delaying or defrauding one of the spouse's creditors.

In federal cases, such as In re Fordu, 201 F.3d 693 (6th Cir. 1999),8 and the state cases, such as Mejia v. Reed, 118 Cal. Rptr. 2d 415 (Cal. App. 2002),9 courts have been increasingly willing to find that transfers of assets made pursuant to agreed divorce decrees or marital settlement agreements are subject to being voided under the provisions of either state or federal fraudulent conveyance law. These cases have determined that there is generally no statutory exception to the operation of fraudulent conveyance laws for a transfer made pursuant to the terms of a consensual divorce decree or a property settlement agreement incorporated into such a decree.10

While most of the recent case law involves fraudulent conveyances based on transfers of property being made for inadequate consideration at a time when the debtor making the transfer is insolvent, some of these cases present more troubling ethical issues for counsel in that they involve allegations of direct fraud on the part of the spouses obtaining the divorce. The two most important cases involving allegations of actual fraud relating to transfers of property pursuant to a divorce decree are Sholes v. Lehmann, 56 F.3d 750 (7th Cir. 1995), and In re Williams, 159 B.R. 648 (Bankr. D. R.I. 1993).11

In the Sholes case, an individual (debtor) and his corporation were placed into a federal receivership action due to the fact that they were involved in a complex ponzi scheme that defrauded investors of more than $20 million. Prior to the federal receivership action, corporations owed by the debtor made payments of approximately $300,000 to the debtor's former spouse as part of their divorce decree.

In the receivership action, the receiver brought suit under fraudulent conveyance law against the debtor's former spouse and her current husband to recover payment made by the debtor's corporations to her to satisfy his obligations under the divorce decree. The U.S. District Court granted summary judgment in favor of the receiver in the amount of approximately $300,000 against the individual's former spouse and her current husband, who appealed this judgment.

On appeal, the Seventh Circuit held that the transfers to the debtor's former spouse could be avoided as fraudulent conveyances if they were either made at the time the debtor was insolvent for less-than-adequate consideration, or if they were made in order to defraud the individuals in his corporations' creditors. The Seventh Circuit reversed the entry of summary judgment on the grounds that the question of whether the wife engaged in actual fraud had not been fully litigated and remanded the matter to the district court for further consideration. The Seventh Circuit found no legal theory that prevented a transfer made pursuant to a divorce decree from being avoided if the spouse recovering the transfer had been involved in a scheme to defraud the debtor's creditors.

The case of In re Williams presents a far more complex problem. In Williams, based on the findings of the bankruptcy court, the debtor and his wife were happily married until the debtor's investment business collapsed and the debtor was accused of obtaining fraudulent loans from Citibank. At the time these financial calamities were befalling the debtor, the debtor and his wife testified that she came in, announced to the debtor her request for a divorce and, according to the record before the bankruptcy court, the debtor then gave her all of his property, including property he had previously listed as his sole property, as a part of his "settlement" with her in their divorce proceedings. The bankruptcy court was particularly troubled and stated:

"We further find, as argued by the bank, that various matrimonial and bankruptcy attorneys and Diana's lawyers were coordinating their efforts to effectuate the best possible deal for their respective clients at the expense of Citibank."12

The bankruptcy court found this settlement suspicious in that, under the terms of the parties' financial settlement, the debtor's former spouse would be receiving several million dollars' worth of assets, while the debtor retained assets with a total value of $59,900. Based on these factual determinations, the bankruptcy court denied the debtor his discharge and set aside the transfers to the debtor's former spouse as fraudulent conveyances.

On appeal, the federal district court reversed the bankruptcy findings on the fraudulent-conveyance and denial-of-discharge issues due to its determination that the bankruptcy court may have misapplied the "missing witness" doctrine in making its decision on the fraudulent conveyance action and denial of discharge action. However, the federal district court did note that, except for the possible misapplication of the missing-witness doctrine, there were "solid grounds" for the bankruptcy court's decision13 and that there was no legal impediment to a bankruptcy trustee setting aside transfers made pursuant to a divorce decree if the transfers were made in an effort to hinder, delay or defraud one of the spouse's creditors.

From a review of both the Sholes and Williams cases, it is clear that some attorneys have looked to divorce law as a method of either protecting a client's assets or hindering creditors, depending on your point of view. These cases, along with the emerging case law permitting parties to set aside as fraudulent conveyances transfers made pursuant to divorce decrees, increasingly demonstrate that divorce decrees will not provide an absolute haven from the reach of fraudulent conveyance law.

Conclusion

Divorce is one of the messiest areas of civil law that an attorney can encounter. The purpose of this article is not to terrorize bankruptcy attorneys into not representing clients who have had substantial domestic relations issues, but rather to caution them about the ethical pitfalls they may encounter in dealing with clients who either (1) are undergoing a divorce or (2) may consider a "friendly" divorce to be an additional financial planning tool.

Footnotes

1 See, generally, Note: "A Tug of War: State Divorce Courts vs. Federal Bankruptcy Courts Regarding Debts Resulting from Divorce," 18 Bankr. Dev. J. 169 (2001); Vance, "Till Debt Do Us Part: Irreconcilable Differences in the Unhappy Union of Bankruptcy and Divorce," 45 Buff. L. Rev. 369 (1997). Return to article

2 Briger and Bowles, "Bankruptcy and Divorce: Can an Unholy Alliance Make the End of an Unhappy Marriage Less Painful?" 13 Amer. J. of Fam. L. 148 (1999). Return to article

3 635 N.W.2d at 289. Return to article

4 Id. at 290. Return to article

5 Id. at 291. Return to article

6 See, generally, In re Zablocki, 635 N.W. at 289. Return to article

7 The author notes that sometimes it is impossible for an attorney to make the proper pre-representation disclosures concerning these domestic relations issues when representing parties in a joint chapter 7. Several years ago, the author represented one of the "happiest" couples he had ever met in a joint chapter 7 bankruptcy. The parties had informed the attorney that they lived in different cities because of their managerial-level jobs' requirements, but that both of their cities were in the same jurisdiction for purposes of bankruptcy filing. The chapter 7 bankruptcy was filed without incident until at the first meeting of creditors, when the parties mentioned to the trustee, in responding to his question about their two households, that they would be "finally" getting their divorce so the wife could marry her current fiancée. After the first meeting, the parties explained to this dumbfounded author that they had separated several years before the bankruptcy, and only decided to get divorced at this time because the wife had met someone she wished to marry. They confided to the attorney that they were the best of friends and had already arranged for an uncontested divorce under state law as soon as their bankruptcy was completed. After voluntarily signing the required waivers,

the parties completed their bankruptcy and divorce without incident, and your author added a question to his standard individual bankruptcy checklist for chapter 7 debtors. Return to article

8 See, generally, In re Hope, 231 B.R. 403 (Bankr. D. D.C. 1999); In re Sorlacco, 68 B.R. 748 (Bankr. D. N.H. 1986); In re Lange, 35 B.R. 579 (Bankr. E.D. Mo. 1983). Return to article

9 See, generally, Dowell v. Dennis, 998 P.2d 206 (Okla. App. 2000); Greeninger v. Cromwell, 140 Ore. App. 241 (Ore. App. 1996); Atlantic Bank of NY v. Toscanini, 145 A.D.2d 590 (N.Y. App. 1988). Return to article

10 Some cases have concluded that fraudulent conveyance actions cannot avoid transfers made pursuant to divorce decrees or property separation agreements arising from a divorce. See Gagen v. Gouyd, 86 Ca. Reptr. 2d 733 (Cal. App. 1999); In re Falk, 98 B.R. 472 (D. Minn. 1989); In re Hoyt, 97 B.R. 730 (Bankr. D. Conn. 1989). Return to article

11 The bankruptcy court's decision in Williams was remanded to the bankruptcy court due to an error in the bankruptcy court's application of the missing witness doctrine. In re Williams, 190 B.R. 728, 732-735 (Bankr. D. R.I. 1996). Return to article

12 159 B.R. at 657. Return to article

13 190 B.R. at 735. Return to article

Bankruptcy Rule:
2002
Journal Author:
C.R. “Chip” Bowles Jr.

Central District of California Local Bankruptcy Rule 2090-1

(a)(3) Disclosure of Scope of Appearance in Chapter 7 Cases. In a chapter 7 case, if an attorney agrees to provide less than all services, the attorney for the debtor must file a statement disclosing the scope of the attorney's appearance on the date of the entry of the order for relief, or, if the attorney has not been employed by such date, then no later than the date of the first appearance made by the attorney. The statement required by this rule must be on a form approved by the court and signed by the debtor.

Central District of California Local Bankruptcy Form 2090-1.1: Declaration Re: Limited Scope Of Appearance Pursuant To LBR 2090-1

1. I am the attorney for the Debtor in the above-captioned bankruptcy case.

2. On (specify date)_____ , I agreed with the Debtor that for a fee of $_____, I would provide the following services only:

□ Prepare and file the Petition and Schedules

□ Represent the Debtor at the 341(a) Meeting

□ Represent the Debtor in any relief from stay motions

□ Represent the Debtor in any proceeding involving an objection to Debtor's discharge pursuant to 11 U.S.C. § 727

□ Represent the Debtor in any proceeding to determine whether a specific debt is nondischargeable under 11 U.S.C. § 523

□ Other (*specify):*

3. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on the following date at the city set forth in the upper left-hand corner of the prior page.

Oregon Local Bankruptcy Rule 9010(e) - Withdrawal of a Chapter 7 Debtor's Attorney Upon Full Performance of Agreed Upon Services.

(1) **Fee Agreement re Required Services.** An attorney who agrees to represent a debtor, but not represent the debtor in all matters relating to a case, must enter into a written fee agreement with the debtor that includes a detailed description of all services the attorney will perform on behalf of the debtor. Before the debtor signs the fee agreement, the attorney must provide written disclosures that clearly explain to the debtor additional duties the debtor may be required to perform without the attorney's assistance and the associated risks. The debtor must sign and date an acknowledgment of receipt of the disclosures. At a minimum, the agreement must provide that the attorney will perform the following services:

- **(A)** Counsel the debtor with regard to all bankruptcy and nonbankruptcy options, and the potential benefits and detriments of each.
- **(B)** Assist the debtor with all aspects relating to the preparation of the petition, including educational requirements and explaining the effects of a discharge.
- **(C)** File the petition.
- **(D)** Assist with all matters up to and through conclusion of the meeting of creditors. Adversary proceedings, however, may be specifically excluded from the agreement.
- **(E)** Represent and counsel the debtor with respect to the reaffirmation, redemption, surrender, or retention of consumer goods securing obligations to creditors. The attorney is not required to sign the attorney certification that is part of the reaffirmation agreement or appear at a hearing for court approval of a reaffirmation agreement.

(2) **Motion to Withdraw Upon Completion of All Services.** The motion must include:

- **(A)** a certification that the attorney has performed all services required by the fee agreement, and
- **(B)** copies of the fee agreement and the written disclosures that were provided to the debtor before the debtor signed the fee agreement.

Northern District of California: Guidelines for Legal Services to be Provided by Debtors' Attorney in Chapter 7 Cases

To assist individuals who are chapter 7 debtors and their attorneys in arriving at a mutual understanding of the services that will be included in the process of filing and concluding a chapter 7 bankruptcy case, a description of the standard services provided by an attorney in the District is set forth below. Use of the term "the attorney" means an attorney in the law firm representing the debtor, who is admitted to practice law before the **U.S. District Court for the Northern District of California**. Inherent in these Guidelines is the concept that due to the complexities and unpredictable aspects of most such cases, it is not appropriate to set a minimum or maximum attorneys' fee for chapter 7 cases. The following services to be provided by the attorney assume that the debtor has fully, accurately and honestly disclosed all assets, debts, and all other financial information requested by the attorney or required by the **United States Trustee**, the chapter 7 trustee, the **official bankruptcy forms** or by law. In addition, the performance of these services by the attorney is understood to be completely dependent upon the continued timely cooperation of the debtor with regard to paying required court fees, providing information and documentation, and executing documents necessitated by the unfolding legal process and the requirements of the attorney in representing the debtor effectively. If the debtor fails to perform any of the debtor's obligations under these Guidelines, including the fulfillment of financial commitments made to the attorney, the attorney may move to withdraw from the case. If the attorney fails to perform the legal services described herein, which are not intended as an exclusive list, the debtor may bring the omission to the attention of the court or pursue other available remedies.

A. Services Always Included in the Pre-Petition Fee

1. The attorney provides a copy of these Guidelines to the debtor.

2. The attorney meets personally with the debtor and explains the options available under both chapter 7 and chapter 13 before the debtor selects the chapter to be filed.

3. The attorney reviews the final petition, schedules, statement of financial affairs, and statement of social security number, prior to having them filed with the court.

4. The attorney, with staff assistance, reviews the debtor's proof of identification and social security number and advises the debtor to provide documentation thereof or a written statement that such documentation does not exist, at the § 341 meeting.

5. The attorney personally attends the § 341 meeting. However, if the attorney is unable to attend the meeting, he/she may arrange for another attorney to appear, subject to the provisions of 6.

6. The attorney provides an "outside contract services attorney" representing the debtor at legal proceedings (such as § 341 meetings and other meetings, depositions and court appearances) with all of the information necessary to fully and competently represent the debtor. The attorney must also take precautions to assure that the information imparted to the outside contract services attorney is held in confidence. Where use of an outside contract services attorney is anticipated at the time of retention, the attorney must obtain the debtor's consent to the employment of an

outside contract services attorney in a written agreement that names the outside contract services attorney or a list of possible outside contract services attorneys, and must fully disclose the compensation for services to be performed. Where the use of an outside contract services attorney is unanticipated at the time of retention but becomes necessary, the outside contract services attorney may be employed, provided that all of the following circumstances have been met: a) the attorney informs the client of the name, address and telephone number of the outside contract services attorney and obtains the prior written consent to use of an outside contract services attorney whenever possible; b) the attorney fully discloses the compensation for services to be performed by the outside contract services attorney; and, c) the attorney has attempted to obtain a continuance of the matter without success, unless it is in the debtor's best interests to proceed with the matter.

7. The attorney explains to the debtor with secured debts all of the following rights:

a to retain the security with continued ongoing payments in accordance with applicable case law;

b to redeem the security by motion or negotiation;

c to reaffirm the underlying debt, along with the risks of incurring future deficiency claims; and

d to surrender the security.

8. The attorney files changes of the debtor's mailing address, as necessary.

9. The attorney represents the debtor in matters brought under 11 U.S.C. § 707(a).

10. The attorney, with staff assistance, informs the debtor of all chapter 7 trustee and U.S. Trustee requests for documents or other information and assists the debtor in transmitting available information to the requesting trustee. However, the debtor is solely responsible for locating such documentation and providing it to the attorney on a timely basis.

11. The attorney, with staff assistance, responds to reasonable creditor inquiries to confirm the case filing.

12. The attorney, with staff assistance, assists the debtor in:

a. ensuring that creditors, collection agents, and attorneys provided by the debtor are notified of the case filing; and

b. notifying levying officers or agencies in order to stop evictions, foreclosures, wage garnishments, bank levies, and other asset seizures in effect on the petition filing date, as appropriate.

B. Services Always Included, But Additional Fee May Be Charged Pre- or Post-Petition, as Mutually Agreed

13. The attorney, as appropriate and necessary, where requested by the debtor:

a. negotiates with a secured creditor to confirm the enforceability of the security interest and the redemption value of said security;

b. files a motion to set the value and redeem said security; or

c. negotiates a reaffirmation agreement having fully advised the debtor of the legal effect and consequences of the agreement and any default thereunder, including the possibility of a future deficiency claim against the debtor, and being persuaded that such agreement represents a fully informed and voluntary agreement by the debtor and does not impose an undue hardship on the debtor or a dependent of the debtor.

14. The attorney, based upon new information provided by the debtor or confirmed by the debtor, files signed amendments to the petition, schedules, statement of financial affairs, or statement of social security number.

15. The attorney reviews motions for relief from the automatic stay, with staff assistance communicates with the debtor regarding them, responds to such motions where necessary, and appears in court on behalf of the debtor where necessary.

16. The attorney represents the debtor with regard to objections to claims of exemption.

17. The attorney represents the debtor in matters brought under **11 U.S.C. §. 707(b)**, as well as related **Rule 2004** examinations.

C. Optional Services Not Included in the Pre-Petition Fee – Subject To Separate Agreement, If Any

18. The attorney files motions for abandonment of estate property.

19. The attorney files motions to avoid judicial liens on real property and other liens that impair exemptions.

20. The attorney files or defends, on behalf of the debtor, any dischargeability complaints.

21. The attorney defends objections to discharge pursuant to **11 U.S.C. § 727**.

22. The attorney files or defends, on behalf of the debtor, other adversary proceedings including ancillary matters such as **Rule 2004** examinations and document requests.

23. The attorney files, prosecutes, or defends appeals on behalf of the debtor.

24. The attorney moves to re-open the debtor's closed case.

Effective 3/15/2005

Southern District of California – Local Bankruptcy Rule 9010

9010-6. APPEARANCE ATTORNEYS. Section 341 (a) meeting. An attorney may attend a meeting of creditors on behalf of the attorney of record. The attorney attending a meeting of creditors must be familiar with the facts and circumstances of the case and must be prepared to act as the attorney of record for all purposes of the 341a meeting.

9010-7 SCOPE OF REPRESENTATION OF DEBTOR'S COUNSEL IN CHAPTER 7 OR CHAPTER 13 BANKRUPTCY CASES AND PROCEEDINGS. An attorney retained to represent a debtor in a Chapter 7 or Chapter 13 bankruptcy case must provide representation that meets the standards established by the United States Bankruptcy Court, Southern District of California Rights and Responsibilities of Chapter 7 Debtors and Their Attorney or the United States Bankruptcy Court, Southern District of California Rights and responsibilities of Chapter 13 Debtors and Their Attorney, as relevant. Consistent with these standards, an appearance in the bankruptcy case for a debtor does not require the attorney to appear for that party in certain contested matters, an adversary proceeding, or an examination pursuant to Bankruptcy Rule 2004, unless otherwise ordered by the Court.

Revised: 9/4/12
Name, Address, Telephone No. & I.D. No.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In Re	BANKRUPTCY NO.
Tax I.D. / S.S. #: Debtor.	

United States Bankruptcy Court
Southern District of California
Rights and Responsibilities of Chapter 7 Debtors
and Their Attorneys

In order for debtors and their attorneys to understand their rights and responsibilities in the bankruptcy process, the following terms of engagement are hereby agreed to by the parties.

Nothing in this agreement should be construed to excuse an attorney from any ethical duties or responsibilities under Federal Rule of Bankruptcy Procedure 9011 and the Local Bankruptcy Rules.

I.
Services Included in the Initial Fee Charged

The following are services that an attorney must provide as part of the initial fee charged for representation in a Chapter 7 case:

1. Meet with the debtor to review the debtor's assets, liabilities, income and expenses.

2. Analyze the debtor's financial situation, and render advice to the debtor in determining whether to file a petition in bankruptcy.

3. Describe the purpose, benefits, and costs of the Chapters the debtor may file, counsel the debtor regarding the advisability of filing either a Chapter 7, 11, or 13 case, and answer the debtor's questions.

4. Advise the debtor of the requirement to attend the § 341 (a) Meeting of Creditors, and instruct the debtor as to the date, time and place of the meeting.

5. Advise the debtor of the necessity of maintaining liability, collision and comprehensive insurance on vehicles securing loans or leases.

6. Timely prepare, file and serve the debtor's petition, plan, schedules, statement of financial affairs, and any necessary amendments to Schedule C, which may be required.

7. Provide documents pursuant to the Trustee Guidelines and any other information requested by the Chapter 7 Trustee or the Office of the United State Trustee.

8. Provide an executed copy of the Rights and Responsibilities of Chapter 7 Debtors and their Attorneys to the debtor.

9. Appear and represent the debtor at the § 341(a) Meeting of Creditors, and any continued meeting, except as further set out in Section II.

10. File the Certificate of Debtor Education.

11. Attorney shall have a continuing obligation to assist the debtor by returning telephone calls, answering questions and reviewing and sending correspondence.

II.
Services Included as Part of the Attorney Representation, But May Require an Additional Fee

The following are additional services, included as part of the representation of the debtor, but for which the attorney may charge additional fees.

1. Representation at any continued meeting of creditors due to client's failure to appear or failure to provide required documents or acceptable identification;

2. Amendments (other than Schedule C);

3. Opposing Motions for Relief from Stay;

4. Reaffirmation Agreements and hearings on Reaffirmation Agreements;

5. Redemption Agreements and hearings on Redemption Agreements;

6. Preparing, filing, or objecting to Proofs of Claims, when appropriate, and if applicable;

7. Representation in a Motion to Dismiss or Convert debtor's case;

8. An audit of the debtor's case conducted by the United States Department of Justice.

III.
Services Not Included as Part of The Initial Fee, No Attorney Representation; additional Services to Be Negotiated By a Separate Fee Agreement

The following services are <u>not</u> included as part of the representation in a Chapter 7 case, unless the attorney and debtor negotiate representation in these post-filing matters at mutually agreed upon terms in advance of any obligation of the attorney to render services. The debtor will not be represented by the attorney in these matters:

1. Defense of a Complaint to determine dischargeability of a debt;

2. Defense of a Complaint objecting to discharge;

3. Objections to Claim of Exemption, except where an objection arises due to an error on Schedule C;

4. Sheriff levy releases;

5. Section 522(f) Lien Avoidance Motions;

6. Opposing a request for, or appearing at, a 2004 examination;

7. Motions to Buy, Sell, Refinance Real or other Property.

IV.
Duties and Responsibilities of the Debtor

As the debtor filing for a Chapter 7 bankruptcy, you must:

1. Fully disclose everything you own, lease, or otherwise believe you have a right or interest in prior to filing the case;

2. List everyone to whom you owe money, including your friends, relatives or someone you want to repay after the bankruptcy is filed;

3. Provide accurate and complete financial information;

4. Provide all requested information and documentation in a timely manner, in accordance with the Chapter 7 Trustee Guidelines;

5. Cooperate and communicate with your attorney;

6. Discuss the objectives of the case with your attorney before you file;

7. Keep the attorney updated with any changes in contact information;

8. Keep the attorney updated on any and all collection activities by any creditor, including lawsuits, judgments, garnishments, levies and executions on debtor's property;

9. Keep the attorney updated on any changes in the household income and expenses;

10. Timely file all required tax returns;

11. Inform the attorney if there are any pending lawsuits or rights to pursue any lawsuits;

12. Appear at the Section 341(a) Meeting of Creditors, and any continued Meeting of Creditors;

13. Bring proof of social security number and government issued photo identification to the Section 341(a) Meeting of Creditors;

14. Provide date-of-filing bank statements to the attorney no later than 7 days after filing of your case;

15. Pay all required fees prior to the filing of the case;

16. Promptly pay all required fees in the event post filing fees are incurred;

17. Debtors must not direct, compel or demand their attorney to take a legal position or oppose a motion in violation of any Ethical Rule, any Rule of Professional Conduct, or Federal Rule that is not well grounded in fact or law.

Dated: ______________________________
Debtor

Dated: ______________________________
Debtor

Dated: ______________________________
Attorney for Debtor(s)

KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Cuomo, 9th Cir.BAP (Nev.), October 21, 2014

493 B.R. 158
United States Bankruptcy Court,
D. Nevada.

In re Wayne A. SEARE, a/k/a Wayne Andrew Seare; and Marinette Tedoco, a/k/a Marinette Morales Tedoco, Marinette Fitzpatrick, Debtors.
Dignity Health, f/k/a Catholic Healthcare West, d/b/a St. Rose Dominican Health Foundation, Plaintiff,
v.
Wayne A. Seare, Defendant.

Bankruptcy No. BK–S–12–12173–BAM.
|
Adversary No. 12–01108–BAM.
|
April 9, 2013.
|
As Corrected April 10, 2013.

Synopsis

Background: Order to show cause was entered why Chapter 7 debtor's attorney should not be sanctioned for his alleged one-size-first-all approach to bankruptcy practice.

Holdings: The Bankruptcy Court, Bruce A. Markell, J., held that:

[1] attorney did not fulfill his professional duty of "competence" under Nevada law in simply assuming that his client's debt to hospital was generic debt for medical services and therefore dischargeable, without conducting adequate investigation;

[2] attorney's "unbundling" of legal services to exclude representation in adversary proceedings, when, had he conducted adequate initial consultation, he would have known that the filing of fraud-based nondischargeability was a near certainty, was "unreasonable" and violative of Nevada Rule of Professional Conduct;

[3] attorney did not perform "reasonable investigation" into circumstances that gave rise to filing of bankruptcy petition, in violation of bankruptcy statute;

[4] attorney also violated Code provisions regulating conduct of "debt relief agencies"; and

[5] appropriate sanction for attorney's misconduct was disgorgement of all fees received, publication of bankruptcy court's opinion, and requirement that attorney take continuing legal education classes.

So ordered.

West Headnotes (75)

[1] **Attorney and Client**
Power and duty to control
Bankruptcy
Power and Authority
Bankruptcy
Amount

Bankruptcy court has power and obligation to determine what services debtor's attorney must perform in order to be entitled to reasonable fee and inherent power to regulate conduct of attorneys that practice before it. 11 U.S.C.A. § 329; Fed.Rules Bankr.Proc.Rules 2016, 2017, 11 U.S.C.A.

Cases that cite this headnote

[2] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

While "unbundling" of legal services is permissible in order to limit scope of attorney's representation, any such unbundling must be done consistent with the rules of ethics and professional responsibility binding on all attorneys, under which attorney may limit his or her representation only when it is reasonable under the circumstances to do so, and only when client gives informed consent to the limitation. Nev.Rules of Professional Conduct, Rule 1.2(c).

1 Cases that cite this headnote

[3] **Attorney and Client**
Nature and term of office

Practice of law is a professional service, not a prepackaged, one-size-fits-all product.

Cases that cite this headnote

[4] **Attorney and Client**
Nature of attorney's duty

Lawyer's superior knowledge and training place clients in position of trust and dependence, such that lawyer has obligations to individual clients beyond those that would be owed by one of two equal parties to transaction or contract; lawyer is fiduciary, who owes duties of candor, good faith, trust, and care to client.

Cases that cite this headnote

[5] **Attorney and Client**
Standards, canons, or codes of conduct

While the State of Nevada has not adopted official comments to the American Bar Association (ABA) Model Rules, these comments may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, which are based on, and largely identical to, the ABA Model Rules of Professional Conduct, unless there is conflict between the Nevada Rules and the ABA comments. Nev.Rules of Professional Conduct, Rule 1.0A.

Cases that cite this headnote

[6] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

While "unbundling" of legal services is permissible in order to limit scope of attorney's representation, the focus of any such unbundling should be on the client and not the attorney; the decision to unbundle is specific to particular circumstances of client, the legal problem, and the court or other decision-making forum.

Cases that cite this headnote

[7] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

If limited legal representation is selected, lawyer must alert client to reasonably related problems and remedies that are beyond the scope of the limited-service agreement.

Cases that cite this headnote

[8] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general
Bankruptcy
Attorneys
Bankruptcy
Items and Services Compensable

Bankruptcy attorney may "unbundle" legal services by contracting away his obligation to represent client in adversary proceedings, provided that any such limitation complies with applicable rules and statutes, and may charge additional fees for adversary proceedings.

Cases that cite this headnote

[9] **Attorney and Client**
Skill and care required

Relevant factors that court may consider in deciding whether attorney has fulfilled his obligation under Nevada Rule of Professional Conduct to provide "competent" representation include attorney's training, experience, and preparation. Nev.Rules of Professional Conduct, Rule 1.1; ABA Rules of Prof.Conduct, Rule 1.1.

Cases that cite this headnote

[10] **Attorney and Client**
Attorney's conduct and position in general
Attorney and Client
Skill and care required

"Competent" handling of legal matter, of kind required under Nevada Rules of Professional Conduct, includes inquiry into and analysis of factual and legal elements of problem, and use of methods and procedures meeting the standards of competent practitioners. Rules of Professional Conduct, Rule 1.1; ABA Rules of Prof.Conduct, Rule 1.1.

Cases that cite this headnote

[11] **Attorney and Client**
Attorney's conduct and position in general
Attorney and Client
Skill and care required

Level of what constitutes "competent" representation, of kind required under Nevada Rule of Professional Conduct, heightens as complexity and specialized nature of legal matter increase. Nev.Rules of Professional Conduct, Rule 1.1.

Cases that cite this headnote

[12] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Whether lawyer has fulfilled duty of competence, as required under Nevada Rule of Professional Conduct, depends on client's objectives; lawyer's duty is to competently attain client's goals of representation, and in absence of valid limitation on services, lawyer must provide the bundle of services that are reasonably necessary to achieve client's reasonably anticipated result, unless and until grounds exist for lawyer's withdrawal. Nev.Rules of Professional Conduct, Rule 1.1.

1 Cases that cite this headnote

[13] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

While agreement for limited representation does not exempt lawyer from duty to provide competent representation, as required under Nevada Rule of Professional Conduct, limitation is factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation necessary for the representation. Nev.Rules of Professional Conduct, Rule 1.1; ABA Rules of Prof.Conduct, Rule 1.2.

Cases that cite this headnote

[14] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Attorney's baseline obligation to inquire into the facts and circumstances of case and analyze possible legal issues is not changed when scope of legal services is limited; however, level of inquiry and investigation required to discharge duty of competence, of kind imposed by Nevada

Rule of Professional Conduct, may be somewhat relaxed under limited scope agreement. Nev.Rules of Professional Conduct, Rule 1.1; ABA Rules of Prof.Conduct, Rules 1.1, 1.2.

Cases that cite this headnote

[15] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Agreement to "unbundle" legal services and limit scope of legal representation is breach of lawyer's duty of "competence," of kind imposed by Nevada Rule of Professional Conduct, if limited service agreement excludes services that are reasonably necessary to achieve the client's reasonable objectives. Nev.Rules of Professional Conduct, Rule 1.1.

Cases that cite this headnote

[16] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Under Nevada law, lawyer's duty of competence informs any agreement to "unbundle" legal services by mandating the inclusion of those services reasonably necessary to achieve client's reasonable objectives; if those services are excluded, then client's goals cannot be met, regardless of how knowledgeable, skilled, thorough, and prepared the lawyer may be. Nev.Rules of Professional Conduct, Rule 1.1.

Cases that cite this headnote

[17] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Under Nevada law, duty of competence survives agreement to "unbundle" legal services in that attorney must competently perform all services included in agreement. Nev.Rules of Professional Conduct, Rule 1.1.

Cases that cite this headnote

[18] **Attorney and Client**
Miscellaneous particular acts or omissions

To determine client's objectives, lawyer must properly communicate with client in order to understand client's expectations, learn about client's particular legal and financial situation, and independently investigate any "red flag" areas.

Cases that cite this headnote

[19] **Bankruptcy**
Attorneys

Bankruptcy attorney cannot assume that client knows what bankruptcy will or will not do for him.

Cases that cite this headnote

[20] **Attorney and Client**
Miscellaneous particular acts or omissions
Attorney and Client
Nature of attorney's duty
Bankruptcy
Attorneys

To fulfill duty of "competence," of kind imposed by Nevada Rule of Professional Conduct, lawyer who holds himself out as bankruptcy expert or specialist should explain the limits of his specialty, including nondischargeability of certain debts, and should make inquiry and provide explanation for all potentially nondischargeable debts, such as those incurred through fraud. Nev.Rules of Professional Conduct, Rule 1.1.

Cases that cite this headnote

[21] **Bankruptcy**
Attorneys

Consumer bankruptcy attorney's role is to determine how bankruptcy may assist client and whether some of client's goals may be left unmet through bankruptcy, and effectively communicate this to client.

Cases that cite this headnote

[22] **Attorney and Client**
Nature of attorney's duty
Bankruptcy
Attorneys

Bankruptcy attorney has duty to communicate to client the advantages and limitations of filing for bankruptcy, and if attorney and client have different understandings of goals of representation, viewed objectively, then attorney has not fulfilled duty of "competence," of kind imposed by Nevada Rule of Professional Conduct. Nev.Rules of Professional Conduct, Rule 1.1.

Cases that cite this headnote

[23] **Attorney and Client**
Scope of authority in general
Attorney and Client
Nature of attorney's duty
Bankruptcy
Attorneys

Consumer bankruptcy attorney fulfills duty of "competence" by providing bundle of services reasonably necessary to achieve client's reasonably anticipated result; inquiry is fact-specific and depends on client's individual circumstance, as well as on client's reasonable pre-consultation goals, and how they may have been shaped or refocused through consultation with attorney. ABA Rules of Prof.Conduct, Rule 1.1.

1 Cases that cite this headnote

[24] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Miscellaneous particular acts or omissions

While attorney, to fulfill his or her professional duty of "competence," is not obligated to assist client in meeting patently unreasonable goals, reasonable expectations of layperson, in the absence of any information by attorney that may refocus them, is basis for analysis. ABA Rules of Prof.Conduct, Rule 1.1.

Cases that cite this headnote

[25] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Miscellaneous particular acts or omissions
Bankruptcy
Attorneys

Bankruptcy attorney did not fulfill his professional duty of "competence" under Nevada law in simply assuming that his client's debt to hospital was generic debt for medical services and therefore dischargeable, without conducting adequate investigation to determine whether this obligation, which was the motivating factor in debtors' decision to explore bankruptcy as means of stopping wage garnishments on hospital debt, was actually based on debtor's alleged fraud, and then, after persuading debtors to retain him to file Chapter 7 petition on their behalf, in limiting scope of the representation to exclude appearing on debtors' behalf in fraud-based nondischargeability proceeding that he should have realized hospital would bring had he performed adequate investigation of circumstances surrounding hospital debt. Nev.Rules of Professional Conduct, Rule 1.1.

Cases that cite this headnote

[26] **Attorney and Client**
Scope of authority in general

In attorney-client relationship conducted in accordance with Nevada Rules of Professional Conduct, client sets the objectives, and attorney determines the means to fulfill them in consultation with client. Nev.Rules of Professional Conduct, Rule 1.2(a).

Cases that cite this headnote

[27] **Attorney and Client**
Scope of authority in general

Whether limitation on scope of legal representation is "reasonable," as required under Nevada Rule of Professional Conduct, is assessed at time client agrees to "unbundled" legal services; neither attorney nor client has benefit of hindsight. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[28] **Attorney and Client**
Scope of authority in general

Limitation upon legal services is not "reasonable," as required under Nevada Rule of Professional Conduct, if, in light of relevant information that attorney knew or should have known at time retainer agreement was formed, the "unbundled" legal service was reasonably necessary to achieve client's reasonably anticipated result. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[29] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Limitation upon legal services is per se "unreasonable," in violation of Nevada Rule of Professional Conduct, if it violates a rule of ethics or provision of substantive law. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[30] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

In assessing "reasonableness" of limitation on scope of attorney's services, in deciding whether limitation complies with attorney's ethical obligations to client, court should consider whether the benefits supposedly obtained by the limitation could reasonably be considered to outweigh the potential risks posed by the limitation, and should also consider whether the client has ability to handle the "unbundled" matter without legal assistance and the complexity of legal matter at issue. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[31] **Attorney and Client**
Miscellaneous particular acts or omissions

Determination as to "reasonableness" of limitation on scope of attorney's services, and as to whether that limitation complies with attorney's ethical obligations to client, is fact-specific and depends on client's particular situation and objectives. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[32] **Attorney and Client**
Miscellaneous particular acts or omissions
Attorney and Client
Scope of authority in general
Bankruptcy
Attorneys

To extent that, as result of boilerplate language in bankruptcy attorney's form retainer agreement, which excluded representation of debtor-clients in any adversary proceeding, decision to "unbundle" such representation was made before attorney ever consulted with debtor-clients and performed any investigation as to circumstances that caused them to consider a bankruptcy filing, this limitation on scope of attorney's services was plainly "unreasonable" and violative of Nevada Rule of Professional Conduct. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[33] **Attorney and Client**
Miscellaneous particular acts or omissions
Attorney and Client
Scope of authority in general
Bankruptcy
Attorneys

Even assuming that decision to "unbundle" legal representation in any adversary proceeding and to exclude it from scope of bankruptcy attorney's retainer agreement was not made until retainer agreement containing such a limitation was signed, after attorney's initial consultation with debtor-clients, limitation was still "unreasonable" and violative of Nevada Rule of Professional Conduct, where attorney, had he conducted adequate investigation of circumstances surrounding the debt which was the subject of prepetition wage garnishments and which had motivated debtors to seek him out, would have realized that a fraud-based nondischargeability proceeding was a near certainty, and that representation in this adversary proceeding was necessary to achieve debtor-clients' objectives in filing for bankruptcy. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[34] **Attorney and Client**
Miscellaneous particular acts or omissions
Bankruptcy
Attorneys

To extent that bankruptcy attorney's retainer agreement, in simply excluding representation in adversary proceedings from the services that attorney had agreed to perform for his flat $1,999.99 fee, had not "unbundled" such representation from scope of services that attorney would perform for debtors, and that this service was not "unbundled" until, subsequent to filing of fraud-based nondischargeability complaint against debtors, attorney refused to represent debtors in this adversary proceeding, even for payment of additional fee, this "unbundling" was patently "unreasonable" and violative of Nevada Rule of Professional Conduct. Nev.Rules of Professional Conduct, Rule 1.2(c).

2 Cases that cite this headnote

[35] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Analysis into whether client gave his/her "informed consent" to limitation on scope of legal representation, as required under Nevada Rule of Professional Conduct, consists of two inquiries: (1) into whether attorney disclosed sufficient information, and (2) into whether consent was valid based, at least in part, upon whether client understood the information disclosed. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[36] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

To make adequate disclosure prior to entering into a limited services agreement, not only must attorney explain the risks of proceeding pro se in a particular situation, but attorney must more broadly advise client of risks inherent in "unbundling" legal services. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[37] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Whether attorney has made adequate disclosure prior to entering into a limited services agreement depends largely on client's sophistication and ability to shop the legal marketplace; nonetheless, attorney has affirmative duty, at the very least, to explain that not all attorneys "unbundle" services in same way. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[38] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Nature of disclosure required of attorney prior to entering into limited services agreement is fact-specific and depends on client's particular situation. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[39] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Because attorney-client relationship is created by consent, the critical issue for attorney in limited scope representation is that client fully understand and agree to what the attorney will do and, more importantly, what attorney will not do. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[40] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

To make adequate disclosure prior to entering into a limited services agreement, attorney must communicate that not all of the risks of limited representation may be apparent from the outset, and should counsel client about those risks and problems which are typical in cases of the type presented by client. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[41] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Lawyer cannot use uncertainty of future legal proceedings to shield himself from explaining the risks that may arise from a limited scope representation, as best known when representation commences. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[42] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

To enable himself to appreciate the risks, formulate a proposed scope of services which properly accounts for the risks, and communicate to client the pros and cons of proceeding with some services "unbundled," lawyer must first perform a thorough client interview. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[43] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

To make adequate disclosure prior to entering into a limited services agreement, attorney must alert client to foreseeable collateral problems that may arise in course of representation. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[44] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Because the required information that lawyer must provide prior to entering into a limited services agreement is situation-specific, boilerplate disclosures in contracts of adhesion are highly suspect. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[45] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

To show that client gave his or her "informed consent" to limited scope of legal representation, as required under Nevada Rule of Professional Conduct, form of consent must demonstrate not only that client received the necessary information, but that client understood the import of limitation on legal services. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[46] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

While it is impossible to subjectively ascertain with certainty that a particular client understood the risks of a limited scope legal services agreement, there must be sufficient indicia of understanding for court to objectively determine that client's consent to the limited representation was based upon a competent and thorough understanding of risks of the agreement and of client's responsibilities thereunder. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[47] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

In absence of any "red flags," such as indications of client's incompetence, there is presumption that, following adequate disclosure by attorney of risks associated with a limited services representation, client based his or her decision to enter into limited services agreement on information contained in attorney's disclosures and assumed the risks. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[48] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

The greater the complexity of the substantive and procedural issues, in particular the potential complexity of the "unbundled" legal service that clients may have to handle on their own, the higher the burden on lawyer, prior to entering into limited services agreement, to demonstrate that clients understood what they agreed to. ABA Rules of Prof.Conduct, Rule 1.2(c).

Cases that cite this headnote

[49] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general
Bankruptcy
Attorneys

For matters as complex as bankruptcy, a signed retainer agreement which merely states that certain proceedings are excluded from attorney's flat fee is unlikely to suffice to show that client gave his or her "informed consent," as required under Nevada Rule of Professional Conduct, to limitation upon scope of attorney's representation; rather, there must be some demonstrated link between the excluded legal services and client's understanding of import of excluding those particular services in relation to the client's particular circumstance. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[50] **Attorney and Client**
Limitations on duty to client, in general
Attorney and Client
Scope of authority in general

Client's consent to limited scope of legal representation should be in writing, though written agreement may not in itself be sufficient to show that attorney disclosed the necessary information to client, and that client's consent is an "informed" one, as required under Nevada Rule of Professional Conduct. Nev.Rules of Professional Conduct, Rule 1.2(c).

Cases that cite this headnote

[51] **Attorney and Client**
Scope of authority in general
Bankruptcy
Attorneys

Bankruptcy attorney did not satisfy his obligation under Nevada Rules of Professional Conduct to obtain his debtor-clients' "informed consent" to legal representation that excluded representation in any adversary proceedings, where retainer agreement, while explicitly stating that such representation was excluded, did not explain what an "adversary proceeding" was or what, if any, adversary proceedings were likely to be filed in case, where there was no evidence that attorney had ever reviewed retainer agreement with debtors or made any effort to explain its import or potential consequences of "unbundling" legal services, and where debtors merely initialed and signed agreement, with nothing in record to indicate that they understood what they were signing. Nev.Rules of Professional Conduct, Rule 1.2(c).

1 Cases that cite this headnote

[52] **Attorney and Client**
Miscellaneous particular acts or omissions

Under Nevada law, lawyer should explain, preferably in writing, the general nature of the legal services to be provided, the basis, rate or total amount of fee, and whether and to what extent client will be responsible for any costs, expenses, or disbursements in course of representation. Nev.Rules of Professional Conduct, Rule 1.5(b).

Cases that cite this headnote

[53] **Attorney and Client**
Miscellaneous particular acts or omissions

Under Nevada law, lawyers are required to openly discuss fees in advance, the services covered by fees, how fees are calculated, and how fees may change. Nev.Rules of Professional Conduct, Rule 1.5(b).

Cases that cite this headnote

[54] **Attorney and Client**
Miscellaneous particular acts or omissions

Under Nevada law, lawyer's communication concerning his or her fees must be in plain English; client must be in position to understand what lawyer will do for the agreed upon fee and, of equal importance, what lawyer will not do. Nev.Rules of Professional Conduct, Rule 1.5(b).

Cases that cite this headnote

[55] **Attorney and Client**
Misappropriation and failure to account
Bankruptcy
Attorneys

Bankruptcy attorney did not satisfy his obligation under Nevada Rules of Professional Conduct to adequately communicate with clients concerning his fees simply by presenting for clients' signature a limited services agreement, that excluded representation in adversary proceedings, without explaining what an adversary proceeding was or the likelihood that clients would have to make additional payment to obtain representation in fraud-based nondischargeability proceeding which, had attorney conducted adequate initial consultation, he would have realized was a near certainty at time retainer agreement was signed. Nev.Rules of Professional Conduct, Rule 1.5(b).

Cases that cite this headnote

[56] **Attorney and Client**
Misconduct as to Client
Bankruptcy
Attorneys

Even assuming that limitation on scope of bankruptcy attorney's representation, to exclude representation in adversary proceedings, was "reasonable" and that his Chapter 7 debtor-clients had given their "informed consent" thereto, as required by Nevada Rule of Professional Conduct, attorney still had obligation to communicate with clients about other aspects of case, such as offer to settle by creditor of fraud-based nondischargeability complaint against them, an obligation which he violated by rejecting creditor's proposal without consultation with debtors and by his nonresponsiveness, following entry of Chapter 7 discharge order by court, to debtors' requests for information about progress of remaining aspects of case. nev.Rules of Professional Conduct, Rule 1.4.

Cases that cite this headnote

[57] **Attorney and Client**

Miscellaneous particular acts or omissions

Under Nevada law, while busy attorney is not required to return all calls directed at him or her, especially if matter can be addressed by a staff member, the primary relationship is between client and attorney, not client and staff members, and attorney cannot simply ignore requests by clients for direct communication. Nev.Rules of Professional Conduct, Rule 1.4.

Cases that cite this headnote

[58] **Bankruptcy**
Attorneys

Whether Chapter 7 debtor's attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition," as required by bankruptcy statute, must be determined as of time that petition was filed, without benefit of hindsight. 11 U.S.C.A. § 707(b)(4)(C).

1 Cases that cite this headnote

[59] **Bankruptcy**
Frivolity or bad faith; sanctions
Bankruptcy
Attorneys

Bankruptcy statute which requires Chapter 7 debtor's attorney to perform "a reasonable investigation into the circumstances that gave rise to the petition" serves as enhancement to Bankruptcy Rule 9011; the "reasonable investigation" standard under the statute is indistinct from the "reasonable inquiry" standard under Rule 9011. 11 U.S.C.A. § 707(b)(4)(C); Fed.Rules Bankr.Proc.Rule 9011(b), 11 U.S.C.A.

1 Cases that cite this headnote

[60] **Bankruptcy**
Attorneys

To perform "reasonable investigation" into circumstances that gave rise to filing of petition, as required by bankruptcy statute, Chapter 7 debtor's attorney must perform an objectively reasonable investigation into circumstances which gave rise to the petition, assessed at the time that petition was filed. 11 U.S.C.A. § 707(b)(4)(C).

1 Cases that cite this headnote

[61] **Bankruptcy**
Attorneys

To perform "reasonable investigation" into circumstances that gave rise to filing of petition, as required by bankruptcy statute, Chapter 7 debtor's attorney cannot take all of debtor-client's assertions at face value nor rely solely upon information that debtor-client provides. 11 U.S.C.A. § 707(b)(4)(C).

Cases that cite this headnote

[62] **Bankruptcy**
Attorneys

While Chapter 7 debtor's attorney, in fulfilling statutory obligation to perform "a reasonable investigation into the circumstances that gave rise to the petition," may rely on debtor-client's objectively reasonable assertions, when client-provided information is internally or externally inconsistent, materially incomplete, or raises "red flags," attorney is obligated to probe further, whether by asking questions, obtaining additional documents, or by some other means. 11 U.S.C.A. § 707(b)(4)(C).

2 Cases that cite this headnote

[63] **Bankruptcy**
Attorneys

Chapter 7 debtors' attorney did not perform "reasonable investigation" into circumstances that gave rise to filing of bankruptcy petition, in violation of bankruptcy statute regulating his conduct, where he simply presented debtors with limited services retention agreement that excluded representation in any adversary proceedings, without conducting adequate inquiry to determine whether it was likely that such proceedings would be filed, and whether representation of debtors in such proceedings was necessary for them to obtain the relief they sought by filing for bankruptcy. 11 U.S.C.A. § 707(b)(4)(C).

Cases that cite this headnote

[64] **Bankruptcy**
Attorneys

Urgency of debtors' need to file Chapter 7 petition quickly, in order to halt garnishment of debtor-husband's wages, did not excuse their attorney of statutory obligation to perform "a reasonable investigation into the circumstances that gave rise to the petition," which would have alerted him to fact that debt which was the subject of garnishment arose out of debtor-husband's alleged fraud, and that debtors would almost certainly have to defend nondischargeability proceeding which, pursuant to terms of limited-scope employment agreement, was excluded from matters in which attorney would represent debtors. 11 U.S.C.A. § 707(b)(4)(C).

Cases that cite this headnote

[65] **Bankruptcy**
Attorneys

As consumer bankruptcy attorney, Chapter 7 debtors' attorney qualified as "debt relief agency," and was subject to Bankruptcy Code requirements on conduct of such agencies. 11 U.S.C.A. §§ 101(12A), 526–528.

Cases that cite this headnote

[66] **Bankruptcy**
Attorneys

Legal services agreement which excluded, from scope of services that Chapter 7 debtors' attorney would perform for his flat $1,999.99 fee, representation in any adversary proceeding implicitly promised that attorney would provide such representation for an additional fee, so that attorney, in later refusing to represent debtors in fraud-based nondischargeability proceeding that debtors had to successfully defend to obtain the relief which they sought in filing for bankruptcy, violated his statutory obligation, as "debt relief agency," to perform services as represented. 11 U.S.C.A. §§ 101(12A), 526(a)(1).

Cases that cite this headnote

[67] **Contracts**
Terms implied as part of contract

Terms of contract are not just what is written, but what is reasonably necessary to carry out contract's purposes.

Cases that cite this headnote

[68] **Bankruptcy**
Attorneys

Chapter 7 debtors' attorney, in his capacity as "debt relief agency," violated his statutory obligation not to misrepresent services that he would provide on debtors' behalf, by failing to adequately advise debtors of import of language in retention agreement excluding representation in any adversary proceeding, when, had attorney conducted adequate initial consultation with debtors, he would have known that it was a near certainty that fraud-based nondischargeability proceeding would be filed against them, and that this limitation on scope of representation threatened to deprive debtors of benefit which they sought in filing for Chapter 7 relief. 11 U.S.C.A. §§ 101(12A), 526(a)(3).

Cases that cite this headnote

[69] **Bankruptcy**
Attorneys

Chapter 7 debtors' attorney, in his capacity as "debt relief agency," violated his statutory obligation to "clearly and conspicuously explain" the scope of his services and fees by providing debtors with limited services agreement which, while expressly excluding representation in adversary proceedings, did not explain what adversary proceedings were or whether debtors would likely need such representation. 11 U.S.C.A. §§ 101(12A), 528(a).

1 Cases that cite this headnote

[70] **Attorney and Client**
Power and duty to control
Attorney and Client
Jurisdiction of Courts
Bankruptcy
Power and Authority
Bankruptcy
Frivolity or bad faith; sanctions

Bankruptcy courts have inherent authority to regulate practice of attorneys that appear before them, and have express authority under the Bankruptcy Code and Rules to impose sanctions, including disbarment or suspension from practice.

Cases that cite this headnote

[71] **Bankruptcy**
Frivolity or bad faith; sanctions

Bankruptcy court has wide discretion in determining amount of sanctions award.

Cases that cite this headnote

[72] **Attorney and Client**
Standards and guidelines
Bankruptcy
Frivolity or bad faith; sanctions

In selecting appropriate sanction for bankruptcy attorney who, in connection with his representation of Chapter 7 debtors, violated his ethical obligations under Nevada Rules of Professional Conduct, as well as obligations imposed on him by the Bankruptcy Code, bankruptcy court would consider the following: (1) the duties violated, whether owed to debtor-clients, to public, to legal system, or to profession; (2) attorney's mental state, whether he acted intentionally, knowingly, or negligently; (3) seriousness of the actual or potential injury caused by attorney's misconduct; and (4) existence of aggravating or mitigating circumstances.

Cases that cite this headnote

[73] **Attorney and Client**
Factors in aggravation
Bankruptcy
Frivolity or bad faith; sanctions

Among aggravating factors that might warrant increase in sanction imposed on Chapter 7 debtors' attorney for his ethical and statutory violations were the following: (1) that attorney acted with dishonest or selfish motive; (2) a pattern of misconduct; (3) multiple offenses; (4) refusal to acknowledge wrongful nature of his conduct; and (5) substantial experience in practice of law.

1 Cases that cite this headnote

[74] **Attorney and Client**
Factors in mitigation
Bankruptcy
Frivolity or bad faith; sanctions

Among mitigating factors which might warrant decrease in sanction imposed upon Chapter 7 debtors' attorney for his ethical and statutory violations were (1) absence of prior disciplinary record, and (2) timely good faith effort to make restitution or rectify consequences of his misconduct.

Cases that cite this headnote

[75] **Attorney and Client**
Public Reprimand; Public Censure; Public Admonition
Attorney and Client
Other disposition
Attorney and Client
Deductions and forfeitures
Bankruptcy
Frivolity or bad faith; sanctions

As sanction for Chapter 7 debtors' attorney's one-size-fits-all approach to bankruptcy practice in violation of obligations imposed both by Nevada Rules of Professional Conduct and by Bankruptcy Code provisions, in entering into limited services agreement that excluded representation in adversary proceedings without conducting adequate investigation to determine that debt which was the subject of garnishment of debtor-husband's wages, and which provided impetus for debtors' bankruptcy filing, arose of out debtor-husband's alleged fraud and that filing of a fraud-based nondischargeability proceeding was a near certainty, in failing to adequately explain to debtors the risks of "unbundled" representation, and in ignoring debtors' requests to return their phone calls after discharge order was entered and while fraud-based nondischargeability proceeding was pending, bankruptcy court would require attorney to disgorge any fees received, direct publication of its opinion, and order attorney to complete 15 hours of legal education; no further sanction was warranted where attorney had not previously been sanctioned and ultimately made some effort to mitigate harm to debtors by offering to refund his fee and to represent them in their negotiations with nondischargeability complainant. 11 U.S.C.A. §§ 101(12A), 526–528, 707(b)(4)(C); Nev.Rules of Professional Conduct, Rules 1.1, 1.2(c), 1.4, 1.5(b).

Cases that cite this headnote

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OPINION SANCTIONING ATTORNEY ANTHONY J. DELUCA FOR FAILING TO REPRESENT WAYNE A. SEARE IN THIS ADVERSARY PROCEEDING[1]

BRUCE A. MARKELL, Bankruptcy Judge.

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*170 I. INTRODUCTION

[1] When a consumer consults a lawyer, there is a reasonable expectation that the lawyer's advice will address the consumer's concerns. Here, that didn't happen. Although the consumers here—debtors Wayne Seare and Marinette Tedoco—gave their attorney what any attorney would need to identify their problem, the attorney gave bad advice. When the bad advice was discovered, the attorney, Anthony J. DeLuca, doubled down. He refused to assist Seare and Tedoco further, whether or not they had the money to pay him for it, which, as Chapter 7 debtors, they did not. DeLuca justified his inaction by pointing to provisions in his standard form retainer agreement that Seare and Tedoco had signed. For the reasons given in this opinion, that conduct was wrong.[2]

*171 II. DETAILED FACTS

A. The St. Rose Litigation

Seare's legal odyssey began in December 2010 when he filed a complaint in the United States District Court for the District of Nevada alleging employment discrimination against his former employer, St. Rose Dominican Health Foundation ("St. Rose"),[3] the plaintiff in this adversary proceeding. In the district court proceeding, Seare submitted evidence in the form of e-mails that he had "embellished" to boost his claims. (Evid. Hr'g Tr. 10:16–17.) Ultimately, the district court ordered sanctions against Seare, dismissed his lawsuit with prejudice, and ordered him to pay St. Rose's attorney's fees. (Dist.Dkt. No. 36.[4])

In awarding these attorney's fees, the district court found that Seare knowingly provided false information to the court, allowed his attorney to file an amended complaint based upon the false information, and instituted and conducted litigation in bad faith—amounting to "fraud upon the court." (*Id.* at 3.) The district court then entered judgment on October 25, 2011 in the amount of the attorney's fees, or $67,430.58 (the "Judgment").[5] (Dist.Dkt. No. 37.)

B. The Garnishment

By January 2012, St. Rose had obtained a writ of execution and served the related writ of garnishment on Seare's current employer. (Dist.Dkt. Nos. 41, 43.) Seare's desire to have the garnishment permanently stopped drove Marinette Tedoco (his wife) and him (collectively, the "Debtors") to DeLuca to seek legal counsel about whether to file for bankruptcy. (Evid. Hr'g Tr. 3–4.)

C. The Initial Consultation

On February 13, 2012, Seare and Tedoco consulted with DeLuca at his law office. (*See* Bankr.Dkt. No. 27 ¶ 31; Ex. G (Retainer Agreement, executed on Feb. 13, 2012).) It was around 5:00 p.m., and the Debtors were there with their two young children, ages four and six. (Dkt. No. 47 at 4.) They met personally with DeLuca, which, as it turned out, was the only direct contact they had with him during the entire case. (*Id.* at 3–4.) Among other documents, they gave DeLuca copies of both the Order for Wage Garnishment and Wage Sanctions.[6] (*Id.* at 2.) According to ***172** the Debtors, DeLuca flipped through the court papers and stated that hospital bills are dischargeable. (*Id.*)

After the short meeting with DeLuca, the Debtors were placed in a small room to sign and initial the 19–page retainer agreement (the "Retainer Agreement") under which they hired DeLuca. (*Id.* at 5.) DeLuca's staff periodically checked to see if they had completed the forms, but no one sat with them to explain any part of the Retainer Agreement. (*Id.*)

The Debtors proceeded to execute the Retainer Agreement and retain DeLuca with a $200 down payment. In addition, DeLuca provided them with a 19–page "Frequently Asked Questions" document (the "FAQ"). (Ex. N.) The Debtors signed every relevant page and initialed every relevant paragraph of the Retainer Agreement. (Ex. G.) At the bottom of every page (right above the Debtors' signatures) is the statement: "I have read, understand, and agree to this page and its contents." (*Id.*) On the last page (right above the Debtors' signatures) is the statement: "I have read and received the foregoing NINETEEN (19) pages and I understand and agree to its terms and conditions." (*Id.* at 19.)

Notably, DeLuca did not sign or initial the Retainer Agreement. (*Id.*) The first page, a welcome page of sorts that thanks prospective clients for their business and instructs them to sign and initial the following pages, is a form letter with DeLuca's printed signature. (*Id.* at 1.) It states that the Retainer Agreement is only valid if the Debtors sign and initial at every location indicated. (*Id.* at 1, 19.) The Retainer Agreement is evidently the same for all clients, with only a few differences in fees depending on whether the case is filed under Chapter 7 or Chapter 13. For the Debtors' Chapter 7 case, DeLuca's flat fee was $1,999.99. (*Id.* at 3.)

The Retainer Agreement separates basic services from those services that require additional fees:

> BASIC SERVICES: Services to be performed by DeLuca & Associates include:
>
> > a. Analysis of debtor's financial situation and assistance in determining whether to file a petition under the United States Bankruptcy code whether in Chapter 7 or chapter 13....
> >
> > b. Review, preparation and filing of the petition, schedules, statement of affairs, and other documents required by the bankruptcy court;
> >
> > c. Representation at the meeting of creditors.
> >
> > d. Reasonable in person and telephonic consultation with the client....
>
> ADDITIONAL FEES: There are circumstances which may require additional fees. Additional attorney fees will be charged for additional services including but not limited to: [1] Addressing allegations of fraud or nondischargeability; ... [13] ... Adversary Proceedings....

(*Id.* at 5, 7.) The Retainer Agreement does not explain the relationship between items [1] and [13].

The Retainer Agreement includes a fraud disclaimer: "DEBTS THAT DO NOT GO AWAY: Non-dischargeable ***173** debts (debts you must re-pay), or debts not affected by client's bankruptcy, include but are not limited to the following: ... debts incurred through fraud...." (*Id.* at 11.) It also includes a request for copies of "ALL LAWSUITS you have been involved in within the last (2) years...." (*Id.* at 12.) The FAQ also explains that debts incurred through fraud are nondischargeable. (Ex. N at 18.)

D. The Bankruptcy Case is Filed

On February 29, 2012, DeLuca filed the Debtors' Chapter 7 bankruptcy petition. (Bankr.Dkt. No. 1.) The St. Rose Debt is listed as a garnishment on Schedule F in the amount of $67,431.00. (*Id.* at 36.) The district court lawsuit underlying the St. Rose Debt is listed on the Debtors' Statement of Financial Affairs as "St. Rose Dominican Hospital vs. Wayne Seare, Case No. 10CV–02190." (*Id.* at 45.) The Debtors' Schedule I indicates that Seare's net monthly take home pay was $2,808 (without deducting the garnishment) and that the monthly garnishment was $329.[7] (Bankr.Dkt. No. 1 at 40.) The Disclosure of Compensation of Attorney for Debtors (the "Rule 2016(b) Statement") states that the Debtors had agreed to exclude adversary proceedings from the flat fee. (*Id.* at 53.) The Section 341 meeting of creditors occurred in March 2012; St. Rose appeared through counsel and stated its intention to enforce its rights under the Judgment through nondischargeability proceedings. (*See* Ex. H.)

E. The Adversary Proceeding is Filed

On May 24, 2012, St. Rose filed its adversary complaint against Seare (the "Complaint"), claiming nondischargeability under Section 523(a)(4) and (a)(6). (Dkt. No. 1.) On May 30, the court granted the Debtors' discharge with respect to all other debts. (Bankr.Dkt. No. 20.) Approximately $137,430 in unsecured debt was thus discharged, or 62% of the Debtors' unsecured, non-priority claims.[8] (Bankr.Dkt. No. 1.)

F. DeLuca's Refusal to Defend

Within several days, on June 4, 2012, DeLuca sent the Debtors an e-mail informing them of their discharge and that, as of the discharge date, their case was completed. (Ex. H at 2–3.) The e-mail appears to be a form message. It does not mention the particulars of the Debtors' bankruptcy or the then-recently filed adversary proceeding. (*See id.*) It states, "we are very happy to inform you that you can now move forward with a fresh start on life, free from the stress of excessive debt. Now you can place your financial situation back on the right track." (*Id.* at 3.)

Also on June 4, the Debtors responded via e-mail to DeLuca's communication. (Ex. H at 2.) They thanked DeLuca for his e-mail and for "all the help in completing our [b]ankruptcy." (*Id.*)

They asked whether the St. Rose Debt was discharged, since they understood that St. Rose was going to pursue the adversary proceeding against them. (*Id.*) They closed the e-mail by asking DeLuca to "[p]lease let us know what we need to do." (*Id.*)

On June 5, 2012, DeLuca's office responded. (*Id.* at 1–2.) They reminded the ***174** Debtors that St. Rose had expressed its intention to pursue the Judgment against the Debtors at the Section 341 meeting of creditors. (*Id.* at 1.) The e-mail also stated that on April 16, 2012 DeLuca[9] had received a "fax cover letter ... with an attached Stipulation and Order regarding the discharge-ability [*sic*] of subject debt in question as to Mr. Sear [*sic*] only." (*Id.*) It then informed the debtors that DeLuca had responded to the fax by advising St. Rose's counsel that he "would not sign off on any [s]tipulation regarding the discharge-ability [*sic*] of any debt listed in the schedules." (*Id.*) Put more bluntly, DeLuca rejected the proposed stipulation and order without consulting with Seare. It is unclear whether DeLuca informed St. Rose that he was not representing Seare in the adversary proceeding. The e-mail then explained that DeLuca had performed all the duties for which he was contracted and that DeLuca would not represent Seare in the adversary proceeding. (*Id.* at 1–2.) It recommended that Seare retain another attorney, Mr. Terry Leavitt, to handle the adversary proceeding. (*Id.* at 2.)

On June 6, 2012, the Debtors replied to the e-mail. (*Id.* at 1.) They admitted to understanding that DeLuca was hired only to "do our bankruptcy," but were very upset and frustrated that the fax containing the proposed stipulation and order was never sent to them. (*Id.*) They asserted that they were never even aware that DeLuca had received those documents from St. Rose; "[n]ot informing your clients of very important documents and failing to return phone calls are unacceptable and unprofessional customer service." (*Id.*) They requested copies of the proposed stipulation and order and the adversary complaint. (*Id.*)

Also on June 6, DeLuca sent a letter to the Debtors informing them that he would not represent Seare in the adversary proceeding. (Ex. I.) The substance of the letter is essentially the same as the earlier e-mail. (*See* Exs. H, I.)

On June 27, 2012, Seare filed his answer pro se in the adversary proceeding. (Dkt. No. 13.) He argued that the debt was dischargeable "due to the hardship on the dependents of debtor." (*Id.* ¶¶ 11, 14.) He admitted to having "embellished" an e-mail in the district court proceeding, but stated that there is other evidence to support his position. (*Id.* ¶ 12.) Seare requested that the court modify the debt for "feasible payments," if it were found nondischargeable, given that he has five dependents and lives paycheck-to-paycheck. (*Id.* ¶ 15.)

On August 2, 2012, the court held a scheduling conference for the adversary proceeding. DeLuca did not appear on behalf of Seare, who explained that DeLuca told him that DeLuca does not represent clients in adversary proceedings. (Dkt. No. 14 at 2.) St. Rose's counsel stated that she had informed DeLuca shortly after the Debtors filed their petition of St. Rose's intent to file a nondischargeability action. (*Id.*)

G. The Order to Show Cause

On August 3, 2012, the court issued its "Order to Show Cause Why This Court Should Not Sanction Anthony J. DeLuca for Failing to Represent Debtor in the ... Adversary Proceeding" (Dkt. No. 14.) The court was concerned that DeLuca had not complied with specific provisions of Nevada's Rules of Professional Conduct,[10] ***175** made applicable to this proceeding by Local Rule IA 10–7(a). The court ordered DeLuca to explain why nonrepresentation in the adversary proceeding was reasonable and to establish the Debtors' informed consent for the limitation. It set a hearing on the Order to Show Cause ("OSC") for September 13, 2012.

Meanwhile, the adversary proceeding continued. On August 10, 2012, the court ordered a scheduling conference for September 13, which was later continued to October 19. On August 17, St. Rose filed its discovery plan. (Dkt. Nos. 17, 18, 21, 24.)

On August 22, 2012, DeLuca filed his brief in response to the Order to Show Cause (the "Reply Brief"). (Bankr.Dkt. No. 24.) The Reply Brief suffered from several procedural and substantive defects. DeLuca incorrectly filed the brief on the docket in the main bankruptcy case rather than the adversary proceeding. In addition, he did not file a certificate of service until October 24, 2012, one day after the evidentiary hearing at which the court ordered him to provide copies of his filings to Seare. (Dkt. No. 30.) DeLuca also failed to submit the retainer agreement that the Debtors had signed; instead, he submitted a blank, boilerplate document. (Bankr.Dkt. No. 24, Ex. B.)

Substantively, DeLuca did not address the specific provisions of the Nevada Rules of Professional Conduct that the court had raised in the Order to Show Cause. (*See* Bankr.Dkt. No. 24.)

Back in the adversary proceeding proper, Seare, representing himself pro se, filed a witness list and initial disclosure statement on August 31, 2012. (Dkt. No. 19.)

On September 13, 2012, the court held the Order to Show Cause hearing ("OSC Hearing"). (OSC Hr'g Tr., Dkt. No. 34.) DeLuca, Seare, and Tedoco appeared. In addition to the previously-raised Nevada Rules of Professional Conduct, the court expressed concern that DeLuca had not complied with two sections of the Bankruptcy Code: 707(b)(4)(C), which mandates a "reasonable investigation into the circumstances that gave rise to the bankruptcy petition," and 526(a), which regulates debt relief agencies. (OSC Hr'g Tr. 13–14.) The court ordered additional briefing and set an evidentiary hearing (the "Evidentiary Hearing"), where either party could call witnesses. On September 20, 2012, the court issued the "Order Setting Evidentiary Hearing." (Dkt. No. 22.) The order confirmed the court's instructions at the OSC Hearing and set the Evidentiary Hearing for October 23, 2012.

The adversary proceeding moved forward. On September 28, 2012, the court issued an order setting a settlement conference on October 19, which was later continued to December 13. (Dkt. Nos. 24, 27.)

On October 19, 2012, Seare filed his "Hearing Brief" regarding the Evidentiary Hearing. (Dkt. No. 29.) The same day, DeLuca filed his supplemental brief in anticipation of the Evidentiary Hearing (the "Supplemental Brief"). (Bankr. Dkt. No. 27.) Again, he incorrectly filed it on the docket for the main bankruptcy case rather than the adversary proceeding. He also failed to file a certificate of service until one day after the Evidentiary Hearing. (Dkt. No. 31.) In addition to the brief, he filed a witness list, exhibit list, and various exhibits. (Bankr.Dkt. Nos. 28, 29.)

H. The Evidentiary Hearing

On October 23, 2012, the court held the Evidentiary Hearing. (Evid. Hr'g Tr., Dkt. No. 35.) Only Seare and DeLuca testified. At the hearing's close, the court admitted all of DeLuca's proposed exhibits ***176** and took the matter under submission. (*Id.* at 47:12–13.)

Back in the adversary proceeding, the court issued an order regarding trial and pretrial matters on October 29, 2012, setting trial for March 6–7, 2013. (Dkt. Nos. 32, 33.)

I. St. Rose and Seare Settle the Adversary Claim

On December 5, 2012, St. Rose filed a stipulation and proposed order vacating the then-upcoming settlement conference. (Dkt. No. 48.) The filing indicates that Seare and St. Rose reached a tentative, confidential settlement for all claims in the adversary proceeding. (*Id.*) On December 6, the court approved the order and vacated the settlement conference. (Dkt. No. 49.) On January 2, 2013, St. Rose filed the "Confession of Judgment," in which Seare authorizes judgment against him in the amount of $67,430.58. (Dkt. No. 51.) Because the issue of nondischargeability is not relevant to the sanctions matter, the settlement does not render this analysis moot.

III. THE PARTIES AND THEIR POSITIONS

[2] These facts present the legal issue of when consumer bankruptcy attorneys such as DeLuca may limit the scope of their representation, a practice colloquially referred to as "unbundling." While unbundling is permissible, it must be done consistent with the rules of ethics and professional responsibility binding on all attorneys. Those rules allow a lawyer to limit his or her representation only when it is reasonable under the circumstances to do so, and only when the client gives informed consent to the limitation. In this case, DeLuca met neither of these requirements. As a defense, DeLuca asserts that his retainer overrides such mandatory rules. As will be seen, his position is incorrect; to the extent his retainer is inconsistent with the applicable rules of professional responsibility, his retainer is unenforceable, and his abandonment of his clients violated norms applicable to lawyers generally.

A. DeLuca's Arguments

DeLuca's primary argument is that the Debtors had the burden to inform him that the Judgment was based on Seare's fraud, and that they failed to meet this burden. In other words, he contends that he did not have an independent duty to investigate the nature of the Judgment. For this proposition, DeLuca cites the Retainer Agreement's request for copies of all lawsuits within the last two years that involved the Debtors. (Bankr.Dkt. No. 27 at 5–6.) He also stated that his office procedure is to request copies of all lawsuits from debtors for review by himself and/or his staff. (Evid. Hr'g Tr. 39:24–40:7.)

From this dubious premise regarding the Debtors' duties, he argues that the decision to unbundle all adversary proceedings, regardless of their relation to the relief requested or needed by a debtor was reasonable, and that the reasonable assumption of any attorney would be that a debt owed to a hospital is for medical care rather than a fraud judgment. (OSC Hr'g Tr. 4:8–18.) Had he known of the nature of the Judgment, so he argues, he would have declined to represent the Debtors in the first place. (Bankr.Dkt. No. 24 at 2.) He claims that he undertook representation based on "incomplete, inaccurate, or intentionally omitted information regarding the fraudulent nature of a significant portion of the Debtors' debt." (*Id.* at 3.) He further argues, using the benefit of hindsight, that it is reasonable to limit services when the client is a known liar. (Bankr.Dkt. No. 27 at 14.)

***177** Also in the vein of reasonability, DeLuca asserts that, since the adversary proceeding was legally indefensible because Seare committed fraud, he pursued the only reasonable course of action—settling with St. Rose, which he attempted to do after the OSC Hearing.[11] (*Id.* at 9.)

DeLuca's next argument is that the Debtors gave informed consent to the exclusion of adversary proceedings. He asserts that the Retainer Agreement "specifically excludes adversary proceedings as part of the services provided ... for the basic fee." (Bankr.Dkt. No. 24 at 2.) He argues that the Debtors had ample warning of the likelihood of an adversary proceeding because St. Rose communicated its intent to enforce its rights under the Judgment at the Section 341 meeting. (*Id.*) He further argues that the Debtors were "clearly advised of what services were to be covered under the agreement," and testified that a staff member "go[es] through" the Retainer Agreement, paragraph-by-paragraph, with clients. (Bankr.Dkt. No. 27 at 14; Evid. Hr'g Tr. 41:20–42:2.) He points out that the Debtors signed the page that contains the "DEBTS THAT DO NOT GO AWAY" paragraph, which includes "[d]ebts incurred through fraud." (Bankr.Dkt. No. 27 at 4.) Moreover, he argues, the FAQ also explains that debts incurred through fraud are nondischargeable. (*Id.* at 12–13.) Lastly, he claims that the Retainer Agreement made clear that the representation ended "by operation of law" when the clients obtained their discharge. (*Id.* at 8.) In short, his argument is that the Debtors executed the Retainer Agreement with the knowledge that (1) such debts are nondischargeable; (2) St. Rose would likely bring an adversary proceeding; (3) adversary proceedings were excluded from the flat fee; and (4) his representation ended when the clients obtained their discharge.

DeLuca seems to respond to the court's concern that he did not comply with Section 707(b)(4)(C) by claiming that he performed due diligence in light of the limited information that the Debtors provided and their urgency to file for bankruptcy. (*Id.* at 11–14.) He asserts that Seare understood the Retainer Agreement and was given a copy of the FAQ, and that Seare thus had the burden to inform DeLuca of any fraudulently incurred debts. (*Id.* at 12.) According to DeLuca, because this is merely an issue of credibility that turns on whether he actually reviewed the Judgment during the initial consultation, the court should side with him because Seare is a known liar. (*Id.* at 13.) DeLuca did not address the court's concerns about his compliance with Section 526(a).

DeLuca next claims that Seare suffered no prejudice from the nonrepresentation and that, in any event, Seare benefitted from the discharge. Seare suffered no prejudice, according to DeLuca, because he was "advised immediately after the filing of the adversary proceeding" that DeLuca would not represent him. (*Id.* at 10.) Seare contradicts this, however, by arguing that he did not learn of the Complaint until about two weeks after it was filed. (Dkt. No. 29 at 3.) DeLuca claims that Seare has had ample time to procure representation for the adversary proceeding; ***178** Seare admitted to having contacted other attorneys but said that the fees are prohibitive. (Evid. Hr'g Tr. 24–25.) DeLuca also supports his lack-of-prejudice argument by stating that Seare was incapable of paying for additional services beyond the flat fee, in essence saying that even if he had been willing to represent Seare in the adversary proceeding, Seare would not have been able to afford him anyway. (*See id.* at 23:5–24:7.)

DeLuca alleges that Seare benefitted from the bankruptcy because the discharge eliminated nearly $137,000 in unsecured debt—"it remains difficult to argue that the elimination of $137,429.69 of unsecured debt is not a benefit that exceeds the $1,999.00 paid for the bankruptcy." (Bankr.Dkt. No. 27 at 13.) He argues that because the garnishments were stopped during the pendency of the bankruptcy, the Debtors' goals were at least partially realized. (*Id.* at 13.) DeLuca also alleges that Seare benefitted from the bankruptcy because his credit score was estimated to increase by approximately 102 points, based on reports by CIN Legal Data Services ("CIN"). (*Id.* at 31; Ex. O.[12])

DeLuca next asserts that the right to contract includes the right *not* to contract. (Bankr.Dkt. No. 27 at 9.) "It is certainly within the discretion of DeLuca & Associates to limit its representation of Debtor(s) that have a proven track record of defrauding their own lawyer, opposing counsel, and the Court." (*Id.; see* Evid. Hr'g Tr. 39:7–18.)

After he learned of the fraud, he decided that "representation of Mr. Seare represented a liability" to his firm and himself personally because, he contends, under the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"),[13] attorneys may be held liable for the frauds of their clients. 11 U.S.C. §§ 526–528, 707(b)(4) (2012). The court interprets this argument as a justification for DeLuca's affirmative refusal to represent DeLuca in the adversary proceeding, communicated in the letter on June 6, 2012, rather than the reasonableness of the unbundling in the first place, because DeLuca only learned of the fraud after representation had commenced. In spite of the "danger," DeLuca chose to represent Seare in settlement negotiations with St. Rose, after the OSC Hearing, because it seemed like the best way to extricate himself from the matter. (Evid. Hr'g Tr. 45:15–46:7.)

Finally, DeLuca tops off his defense with an argument under the United States Constitution. He claims that the "basic services bargained for between the parties did not include litigation or adversary proceedings." (Bankr. Dkt. No. 27 at 8.) To impose additional terms that were not bargained for would violate the Thirteenth Amendment, so he argues, because he would be obligated to perform work against his will and without compensation. (*Id.*) DeLuca asserts the "right to be free from involuntary servitude" and "enforced compulsory service of one to another." (*Id.* (citations omitted).)

B. Seare's Contentions

The Debtors' first contention is that their primary goal was to permanently eliminate the wage garnishment and discharge the St. Rose Debt. (Evid. Hr'g Tr. 34:23–35:1; Dkt. No. 47 at 5.) Seare expressed ***179** concern that, depending on the outcome of the adversary proceeding, garnishment could start again. (Evid. Hr'g Tr. 34:23–35:1.) Tedoco stated that, if the garnishment were to continue, the Debtors would be "homeless and destitute." (Dkt. No. 47 at 2.) Seare admitted that the discharge of the other debts is a benefit, but was not the "main reason" the Debtors sought DeLuca's assistance. (Evid. Hr'g Tr. 35:3–4.) Although the debts of approximately 70 creditors were discharged, those creditors were not dunning the Debtors so Seare believed that there was no practical need to file for bankruptcy. (*Id.* at 27:12, 35:15–17.)

The Debtors claim that during their meeting with DeLuca, they "specifically and clearly" stated the nature of the Judgment to him and provided court documents for his review. (Dkt. No. 47 at 5.) Tedoco claims that they told DeLuca that the Judgment was from a sexual harassment case lost by Seare in which he had "embellished" e-mails. (*Id.*) Seare and Tedoco have both asserted that DeLuca affirmatively told them, even after hearing this information, that the St. Rose Debt was dischargeable. (*Id.* at 2, 5, 6; Evid. Hr'g Tr. 13:3–7.) She states that the only reason they hired DeLuca was because he assured them of the dischargeability of the St. Rose Debt. (Dkt. No. 47 at 5.) Seare testified that, although he understood the contract language concerning the nondischargeability of debts incurred through fraud, he relied upon DeLuca's alleged assurances of nondischargeability over the language in the Retainer Agreement. (Evid. Hr'g Tr. 15:13–16:13.) Moreover, Seare did not read the FAQ because DeLuca had already answered their questions. (*Id.* at 17:22–24.)

Seare claims that he understood that the flat fee did not cover adversary proceedings, but also that, at the time of the initial consultation, he did not even know what an adversary proceeding was. (*Id.* at 22:9–12, 33:4–7.) The Debtors assert that DeLuca did not explain anything about adversary proceedings at the consultation—either what they are or whether one was likely in their case. (*Id.* at 21:23–24; Dkt. No. 47 at 4.) According to Seare, DeLuca only told them that following the petition filing there would be a meeting of creditors and, 30 days later, the discharge. (Evid. Hr'g Tr. 33:14–23.) Seare claims that DeLuca did not talk to them about debts that might not be dischargeable during the initial consultation. (*Id.* at 33:24–34:3.)

The Debtors claim that, contrary to DeLuca's assertions, no one reviewed the Retainer Agreement with them. (Dkt. No. 47 at 5.) Tedoco asserts that, after meeting with DeLuca, she, Seare, and their two small children were put in a small room to sign and initial the Retainer Agreement. DeLuca's staff periodically checked to see if they had completed the forms, but no one sat with them to explain any part of the Retainer Agreement. (*Id.*) It was late in the day, around 5:00 p.m., and they felt rushed. (*Id.*)

Seare contends that DeLuca's nonrepresentation left him without any possibility of representation in the adversary proceeding. He testified that he consulted with two law firms and that he could not afford to engage either to represent him in the adversarial proceeding. (Evid. Hr'g Tr. at 24–25.)

Tedoco counters DeLuca's claim that the Debtors posed a danger by referencing the June 6 letter in which DeLuca informs the Debtors that he will not represent them in the adversary proceeding. (Dkt. No. 47 at 5–6.) In that letter, DeLuca mentions nothing that would indicate that he saw them as a threat. (*Id.* at 6.) Lastly, she argues that the letter is evidence that DeLuca engages in deceptive practices. ***180** (*Id.* at 5–6.) The Debtors feel deceived because DeLuca advertises a full service practice yet refused to represent them in the adversary proceeding. (*Id.* at 5; Dkt. No. 29 at 3.)

The Debtors also claim that DeLuca did not properly communicate with them or keep them informed of the progress in their case. Throughout the representation, Tedoco claims, DeLuca's office was nonresponsive. (Dkt. No. 47 at 3–4.) The Debtors only spoke to DeLuca himself during the initial consultation; after that, even if they left messages for him, one of his staff returned the call. (*Id.*) Sometimes, the calls were only returned after leaving multiple messages. (*Id.* at 4.) The Debtors are also upset that the proposed stipulation and order that DeLuca received from St. Rose, approximately one month before St. Rose filed the Complaint, were not promptly forwarded to them. (Ex. H.) DeLuca did not even consult with the Debtors before informing St. Rose that he would not sign off on the proposed documents. (*See id.*)

C. Seare's Credibility

There is a factual question about whether DeLuca affirmatively told the Debtors that the St. Rose Debt was dischargeable. Seare stated that DeLuca twice told him that it was. (Evid. Hr'g Tr. 15:7–12; Dkt. No. 29 at 2.) Seare also asserted that Tedoco told DeLuca that the St. Rose Debt was not from medical expenses, but rather that the garnishment stemmed from an order for attorney's fees resulting from the "embellished" e-mails. (Dkt. No. 29 at 2; *see* Dkt. No. 47 at 2.) At the Evidentiary Hearing, however, Seare contradicted this by saying that the fraud "was never brought up during [the consultation]." (Evid. Hr'g Tr. 13:9.) Finally, Seare also stated that DeLuca did not tell the Debtors that the debt was *not* dischargeable or that there might be an adversarial proceeding. (*Id.*) Of these assertions, the court finds two facts: (1) the issue of Seare's fraud at the district court was not overtly discussed during the initial consultation; and (2) DeLuca did not affirmatively represent that the St. Rose Debt was dischargeable.

Although DeLuca does not remember meeting the Debtors, reading any district court documents, or what specifically was said during the consultation, the court does not believe Seare's testimony that DeLuca told the Debtors that the St. Rose Debt was dischargeable. The court finds it much more likely that he simply "thumbed through" the district court documents without paying them much heed, and that he did not affirmatively represent either way whether the debt was dischargeable. Similarly, his cursory review of the district court documents would not have led him to conclude that an adversary proceeding was likely.

The court finds that DeLuca failed to inquire about the nature of the Judgment during the consultation. If the Debtors did mention any of the facts underlying the Judgment, either the facts as presented did not clearly amount to fraud or DeLuca was not sufficiently attentive to reach that conclusion on his own. If he did know it was for fraud, then he surely would have told the Debtors that St. Rose would likely seek to have the debt found nondischargeable in an adversary proceeding.[14]

The court believes Seare's testimony that DeLuca did not explain anything about adversary proceedings during the ***181** consultation—what they are, whether one was likely in this case, or what the potential consequences could be. (*See* Evid. Hr'g Tr. 19:20–22.) Because DeLuca did not carefully review the district court documents, he did not realize that an adversary proceeding was a near certainty. Moreover, DeLuca does not have a standard practice of explaining adversary proceedings to prospective clients, other than to point out that they are not covered under the flat fee in his standard form retainer agreement. (*See id.* at 39:24–42:10.) Regarding the bankruptcy process, DeLuca only told the Debtors to expect the Section 341 meeting of creditors and that the discharge would follow. (*Id.* at 33:12–23.)

[3] In sum, the court finds that DeLuca did not affirmatively represent that the St. Rose Debt was dischargeable. Nor did he explain anything about adversary proceedings, either in general or in relation to the Debtors' particular circumstances. He moved quickly and did not pay sufficient attention to the Debtors' individual goals and needs. His boilerplate forms and standardized approach belie a manner of legal practice that is all too common in consumer bankruptcy—an approach which may suffice for a lot of people, a lot of the time, but is prone to failing clients with circumstances that do not fit the mold of the prototypical consumer debtor.[15] While the court applies several ethical rules and sections of the Bankruptcy Code to DeLuca's conduct, each of which addresses related yet unidentical concerns, the root problem is a view of legal practice as a mass consumer good rather than a relationship founded on trust and individualized attention. The practice of law is a professional service, not a prepackaged, one-size-fits-all product.

IV. LEGAL ANALYSIS

Resolution of this matter involves the intersection of contract law and the regulation of lawyers generally. DeLuca strenuously contends that he should be able to limit his representation of clients by contract. If he cannot, he asserts, he cannot run his practice prudently. Seare, on the other hand, wants DeLuca to follow the requirements binding on all lawyers. The contentions of both parties thus require a brief review of the nature of the legal profession.

A. The Nature of the Legal Profession

Lawyers are not plumbers. They cannot indiscriminately dismiss clients at their whim, or even if their clients don't pay on time. Lawyers are professionals that owe fiduciary duties to their individual clients, and must continue to represent them even if initially rosy predictions turn sour. AM. BAR ASS'N, SECTION OF LITIG., HANDBOOK ON LTD. SCOPE LEGAL ASSISTANCE 91 (2003) ("ABA HANDBOOK"); *see* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 16 (2000).[16]

***182** A profession such as law is different from other occupations in that (1) "its practice requires substantial intellectual training and the use of complex judgments;" (2) it places clients in a position of trust because they typically cannot evaluate the quality of service; and (3) "the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good[.]" ABA BLUEPRINT, *supra* note 16, at 10. These traits justify the special privileges that lawyers, as members of a profession, enjoy; among the most noteworthy are a monopoly on representing others in court, and the enhanced ability to earn a livelihood that such a monopoly provides. *See id.*

[4] The duties that a lawyer owes her client also flow from this understanding of what it means to a be a "professional"—that a lawyer's superior knowledge and training place clients in a position of trust and dependence such that the lawyer has obligations to individual clients beyond that of two equal parties to a transaction or contract. Instead, a lawyer is a fiduciary that owes the duties of candor, good faith, trust, and care to a client. ABA HANDBOOK 91.

The view of attorneys as professionals with enhanced duties to clients is not new or novel, as many courts have noted. "Attorneys must never lose sight of the fact that the profession is a branch of the administration of justice and *not a mere money-making trade.*" *In re Pair,* 77 B.R. 976, 978 (Bankr.N.D.Ga.1987) (internal quotation marks and citation omitted) (emphasis added). "[A]ttorneys are professionals. Individuals place their financial lives, and more, in their attorney's hands. Attorneys have ethical obligations to their clients regardless of the economic pressures which might exist." *In re Castorena,* 270 B.R. 504, 530–31 (Bankr.D.Idaho 2001).

The laws of ethics that lawyers must follow are premised on the lawyer's role as a professional—an agent and fiduciary of the client. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, 1 LAW OF LAWYERING § 1.6 (2012) ("introspection among lawyers about what values beyond obedience to law *ought* to inform behavior has taken the form of a public debate about "professionalism" (emphasis in original)).

B. The Applicable Law and its Application to the Facts

1. Interplay Between State and Federal Law

[5] Attorneys practicing in this court must adhere to the standards of conduct prescribed by the Nevada Rules of Professional Conduct. Local Rule IA 10–7(a). The Nevada Rules of Professional Conduct in turn are based on, and largely identical to, the ABA Model Rules of Professional ***183** Conduct. The State of Nevada has not adopted the official comments to the ABA Model Rules; however, the comments "may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the ... comments." NEV. RULE OF PROF'L CONDUCT 1.0A (2011).

2. Unbundling

Before assessing the specific rules and statutes at issue, a thorough discussion of unbundling is necessary. Unbundling is the practice of limiting the scope of services that an attorney will provide—"dividing comprehensive legal representation into a series of discrete tasks, only some of which the client contracts with the lawyer to perform." Amber Hollister, *Limiting the Scope of Representation: Unbundling Legal Servs.,* 71 OR. ST. B. BULL. 9, 9 (2011). It is growing ever more common in general, and in family law and bankruptcy law in particular.[17] In bankruptcy cases, for example, the client and attorney may agree that not everything that could be done should be done by the attorney; some things might be left to the client or to other professionals. In effect, this *unbundling* excludes services that might aid or further the client's goals, but with the expectation and assumption that the items excluded can be accomplished by the client acting alone, or with another, presumably less expensive, attorney. The practice can benefit clients by giving them access to legal services that would otherwise be too expensive, and clients may feel a greater sense of satisfaction "flowing from the collaborative effort of achieving the client's desired goals." STATE BAR OF CAL., COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, AN ETHICS PRIMER ON LTD. SCOPE LEGAL REPRESENTATION 10 (2004) ("CAL. ETHICS PRIMER"); Richard P. Carmody, *Ethics and Prof'l Responsibility: What Your Appearance Obligates You to Do For Your Client,* in AM. BANKR.INST., 21ST CENTURY ETHICS 1054, 1064 (2012) ("ABI ETHICS REPORT") [a report prepared for the American Bankruptcy Institute's 30th Annual Spring Meeting in National Harbor, Maryland on April 22, 2012]. Pro bono attorneys may be more willing to volunteer their time and effort if the representation has clear boundaries. ABA HANDBOOK 133 ("By dividing work into smaller units, it encourages lawyers who have limited time to engage in pro bono work."). Attorneys who work for fees may likewise find the representation more predictable, as well as more profitable. *See id.* at 41 (quoting a long-time limited services practitioner, " 'coaching ... is a major profit center since we have no uncollectible fees and the overhead burden is reduced....' "); Hon. Fern Fisher–Brandveen & Rochelle Klempner, *Unbundled Legal Servs.: Untying the Bundle in N.Y. State,* 29 FORDHAM URB. L.J. 1107, 1114 (2002) (unbundling provides greater business opportunities).

The practice of unbundling also recognizes that the attorney-client relationship need not fit an identical mold for each client; parties have the right to contract for the services they deem appropriate to the situation. *See* ABA HANDBOOK 72 ("[T]he lawyer and client should have the right to adopt any variant of limited representation that they wish. This is a contractual right."). Clients are given autonomy—the freedom to "choose one or more ***184** tasks that will involve legal representation and ... pay only for legal services related to those specific tasks." Struffolino, *supra* note 17, at 189. The courts may also benefit from unbundling; where the choice is between pro se litigation and limited representation, the latter should increase the quality of pleadings and better focus the issues. ABA HANDBOOK 11; *see* CAL. ETHICS PRIMER 1.

Unbundling raises concerns, however. The push to limit representation may come from the attorney, who often benefits from and has superior knowledge of the possible ramifications of excluding certain services.

> There are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers.... Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly.... In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19 (2000).

There is a particular concern in consumer bankruptcy practice that attorneys will unbundle services that are essential or fundamental to bankruptcy cases and clients' objectives.

> A lawyer walks a perilous path in attempting to limit the services provided to bankruptcy debtors. Making an effective disclosure of the risks of such an arrangement, and obtaining informed consent, may be impossible in some cases. As noted, some lawyer services are so fundamental and essential to effective representation, no amount of disclosure and consent will suffice. Instructing a debtor to "go it alone" in any significant aspect of the bankruptcy case exposes counsel to possible criticism, and worse yet, a potential for sanction.

Hon. Jim D. Pappas, *Simple Solution = Big Problem,* 46 ADVOCATE (IDAHO) 31, 33 (2003) (citing *In re Castorena,* 270 B.R. 504 (attorney refused to appear at § 341 meeting and did not sign the pleadings he had prepared—a practice termed "ghostwriting"); *In re Egwim,* 291 B.R. 559 (representation limited to preparing petition, schedules, and related documents, and attending § 341 meeting; debtors appeared pro se in nondischargeability proceeding and hearing on motion for relief from stay); *In re Johnson,* 291 B.R. 462 (Bankr.D.Minn.2003) (failure to appear at § 341 meeting)); *see* ABI ETHICS REPORT 1065 ("A bankruptcy case is not like a 6–course meal that can be purchased *a la carte* " (emphasis in original)).

An additional concern is that limited representation may not afford a client full protection against direct contact by opposing counsel. NEV. RULE OF PROF'L CONDUCT 4.2 (2011) ("[A] lawyer shall not communicate about the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter...."); Hollister, *supra,* at 11; *see* ABA HANDBOOK 107–13. If opposing counsel does not know the extent of a party's representation, opposing counsel may inadvertently communicate with the party about matters for which the party is represented. *See* Hollister, *supra,* at 11. Or worse, opposing counsel may initiate appropriate communication and purposely wander into matters that are off limits. ***185** *See id.* Counsel acting in good faith may also be faced with the dilemma of how and whether to respond to an otherwise represented opposing party's contact to discuss a matter for which that party is not represented. *See In re DeSantis,* 395 B.R. 162, 166 (Bankr.M.D.Fla.2008). The ABA official comment to Model Rule 4.2, which is identical to Nevada Rule 4.2, states that communication with a represented party is prohibited even if "the represented person initiates or consents to the communication." ABA MODEL RULE 4.2 cmt. 3. Unless the attorney has either seen that party's retainer agreement, which is highly unlikely, or otherwise has knowledge of the relevant scope of representation, the attorney is unlikely to respond because to do so could risk a violation of Nevada Rule 4.2. *See In re DeSantis,* 395 B.R. at 166. There may also be a problem of keeping the client informed of matters arising in a case, such as when papers are served on counsel for a matter outside of her scope of services. *See* ABA HANDBOOK 79.

In spite of the concerns that unbundling raises, the ABA amended Model Rule 1.2(c) in 2002 to expressly allow limited-scope representation and provide a mechanism to regulate it. Struffolino, *supra,* at 215; AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT 38 (2011) ("ANNOTATED RULES"). The ABA's goal was to "encourage attorneys to provide some assistance to low- and moderate-income litigants who could not otherwise afford full representation." Struffolino, *supra* note 17, at 215 (citing AM. BAR ASS'N, STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009)); ANNOTATED RULES 38 (citing AM. BAR ASS'N, LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF'L CONDUCT, 1982–2005 at 55 (2006)). ABA Model Rule 1.2, which Nevada has adopted verbatim, states that "[a] lawyer may limit the scope of representation if the limitation is *reasonable under the circumstances* and the client gives *informed consent.*" NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011) (emphasis supplied).[1819]

Shortly after the ABA amended the rule, the ABA published the *ABA Handbook,* a report on limited scope legal assistance. The *ABA Handbook* emphasizes ***186** that the majority of people in our nation are low and moderate income, and that often they cannot afford to pay lawyers in litigation. *Id.* at 3. Limited scope legal representation can make the judicial process fairer by providing greater access to justice. *Id.* at 3–4. The ABA quoted a long time limited-service practitioner for the proposition that unbundling should be client driven—"[i]n this legal relationship, 'the client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package.' " *Id.* at 7 (quoting FORREST S. MOSTEN, UNBUNDLING LEGAL SERVS.: A GUIDE TO DELIVERING LEGAL SERVS. A LA CARTEE 1 (2000)). Contracts of adhesion that unbundle legal services are undesirable as being lawyer driven and pose ethical challenges. *See In re Cuddy,* 322 B.R. 12, 18 (Bankr.D.Mass.2005) ("It looks and sounds like a contract of adhesion, with all of the unlovely baggage that phrase carries. It is contrary to my view of the higher obligation of an attorney.").

[6] The *ABA Handbook* lists various factors that lawyers should consider when determining whether unbundling is appropriate,[20] and a series of specific steps that lawyers should take when considering whether to provide unbundled services to a particular client.[21] Although the court does not adopt these measures, it agrees with the ABA's view that the focus should be client-centered; the decision to unbundle is specific to the particular circumstances of the client, the legal problem, and the court (or other decision-making forum). One-size-fits-all is not appropriate.

[7] If limited representation is selected, "the lawyer must also alert the client to reasonably related problems and remedies that are beyond the scope of the limited-service agreement." *Id.* at 68. In a related ethics opinion, the Los Angeles County Bar Association put it this way,

> The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to representation.

Id. at 69 (quoting Los Angeles County Bar Assoc., Prof'l Responsibility and Ethics Comm., Ethics Op. 449 (March 1988)).

While the ABA takes the general position that unbundling is acceptable, and even desirable in some circumstances (so long as the ethical rules are followed), the ***187** American Bankruptcy Institute ("ABI") has gone a step further and tacitly endorsed the unbundling of representation in adversary proceedings in consumer bankruptcy cases (again, so long as the ethical rules are followed). Yerbich, *supra,* at 40. The ABI has not, however, expressly endorsed unbundling adversary proceedings. The ABI Ethics Report treats the ethics of unbundling as an open question, stating that the majority of courts that have addressed the issue frown on it because of the complexity of bankruptcy proceedings, and highlighting the aforementioned competing policy concerns of access to justice and representation that is less than competent because it fails to provide necessary services. ABI ETHICS REPORT 1055.

Nonetheless, several bankruptcy courts also have reached the conclusion that unbundling adversary proceedings is acceptable if the ethical rules are followed. *In re Castorena's* exclusion of adversary proceedings from the list of "fundamental and core obligations" that a consumer bankruptcy lawyer must provide imply that adversary proceedings may be unbundled. 270 B.R. at 530. *In re Egwim* was more direct; after adding adversary proceedings to the list of "fundamental and core obligations," the court stated that such obligations may be unbundled if "all of the conditions required for the validity of the limitation" are fulfilled. 291 B.R. at 572–73. *In re Egwim* also supported charging extra fees beyond a flat fee for nondischargeability proceedings. *Id.* at 573. In sum, there seems to be a consensus that while unbundling raises various ethical concerns, unbundling in general, and in adversary proceedings in particular, is acceptable so long as the attorney follows the applicable ethical rules.[22]

[8] In light of the above, the court agrees that adversary proceedings can be unbundled, so long as the limitation complies with the applicable rules and statutes, and that a lawyer may charge additional fees for adversary proceedings. The analysis now turns to the applicable rules and statutes.

*188 3. NEV. RULE OF PROF'L CONDUCT 1.1—Duty of Competence

a. Legal Standard

[9] [10] [11] Under Nevada Rule 1.1, which is identical to ABA Model Rule 1.1, "[a] lawyer shall provide competent representation to a client ... the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." NEV. RULE OF PROF'L CONDUCT 1.1 (2011). While there is no precise definition of competence, relevant factors include the lawyer's training, experience, and preparation. ABA MODEL RULE 1.1 cmt. 1; *In re Slabbinck,* 482 B.R. 576, 590 (Bankr.E.D.Mich.2012). "Competent handling of a legal matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners." ABA MODEL RULE 1.1 cmt. 5. "The level of competency heightens as the complexity and specialized nature of the matter increase." *In re Slabbinck,* 482 B.R. at 590.

[12] Whether a lawyer fulfilled the duty of competence depends on the client's objectives. *See In re Egwim,* 291 B.R. 559, 569–73 (Bankr.N.D.Ga.2003); *In re Castorena,* 270 B.R. at 526–30; *cf. In re Slabbinck,* 482 B.R. at 590–94. The lawyer's duty is to competently attain the client's goals of representation. In the absence of a valid limitation on services, a lawyer must provide the bundle of services that are reasonably necessary to achieve the client's reasonably anticipated result, unless and until grounds exist for the lawyer's withdrawal. *In re Egwim,* 291 B.R. at 570.

[13] Nevada Rule 1.2(c), which is identical to ABA Model Rule 1.2(c), explicitly permits a lawyer to limit the scope of representation. NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011). The ABA comments shed light on the relationship between the duty of competence and agreements to limit the scope of representation. "An agreement between the lawyer and client may limit the matters for which the lawyer is responsible." ABA MODEL RULE 1.1 cmt. 5 (citing ABA MODEL RULE

1.2(c)). "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 necessary for the representation." ABA MODEL RULE 1.2 cmt. 7 (citing ABA MODEL RULE 1.1).

[14] [15] [16] [17] In other words, the duty of competence both informs and survives any and all limitations on the scope of services. *See* CAL. ETHICS PRIMER 1–2. The baseline obligation to inquire into the facts and circumstances of a case and analyze the possible legal issues is not changed when the scope of services is limited. Struffolino, *supra* note 17, at 218. The level of inquiry and investigation required to discharge the duty of competence may be somewhat relaxed, however, under a limited scope agreement. *See* ABA MODEL RULES 1.1 cmt. 5, 1.2 cmt. 7; Struffolino, *supra* note 17, at 218. Whatever the precise definition of a "relaxed" duty to investigate may be though, the bottom line is that an agreement to unbundle services constitutes a breach of the duty of competence if the agreement excludes the services reasonably necessary to achieve the client's reasonable objectives. ABA HANDBOOK 93–95.

> "Generally, the duty of competence of Rule 1.1 is circumscribed by the scope of representation agreed to pursuant to Rule 1.2. However, a lawyer may not so limit the scope of the lawyer's representation as to avoid the obligation to provide meaningful legal advice, nor the ***189** responsibility for the consequences of negligent action."

Id. (quoting Colo. Bar. Ass'n Ethics Comm., Formal Op. 101 (1998)). The duty of competence informs the agreement to unbundle by mandating the inclusion of those services reasonably necessary to achieve the client's reasonable objectives. NEV. RULE OF PROF'L CONDUCT 1.1 (2011). If those services are excluded, the client's goals cannot be met regardless of how knowledgeable, skilled, thorough, and prepared the lawyer may be. *Id.* The duty of competence survives the agreement in that the attorney must competently perform all services included in the agreement. NEV. RULE OF PROF'L CONDUCT 1.1. The client's objectives thus drive the analysis.

[18] [19] To determine the client's objectives, a lawyer must properly communicate with the client to understand the client's expectations, learn about the client's particular legal and financial situation, and independently investigate any "red flag" areas. *See* CAL. ETHICS PRIMER 1–2. A bankruptcy lawyer cannot assume that a client knows what a bankruptcy will or will not do for her. She may understand that bankruptcy eliminates some debts but is unlikely to know anything else about bankruptcy or even whether she wants or needs to file. For this reason, laypersons seek the advice of bankruptcy lawyers. *See Nichols v. Keller,* 19 Cal.Rptr.2d 601, 609, 15 Cal.App.4th 1672, 1686 (1993) ("A trained attorney is more qualified to recognize and analyze legal needs than a lay client, and, at least in part, this is the reason a party seeks out and retains an attorney to represent and advise him or her in legal matters.").

[20] A lawyer who holds himself out as a bankruptcy expert or specialist should explain the limits of the specialty. For example, a potential client that wants to discharge her student debts should be informed that student debts are nondischargeable absent undue hardship, and the lawyer should inquire into her circumstances to determine the likelihood of prevailing on a claim of undue hardship. The lawyer should perform the same inquiry and explanation for all potentially nondischargeable debts, such as those incurred through fraud.

While many laypersons have a general understanding that student debts are difficult to eliminate, they likely do not understand the undue hardship test. Similarly, their understanding of what debts constitute fraud and how those debts are treated by the Bankruptcy Code is certainly limited, and more likely nonexistent. A bankruptcy lawyer should inquire into a potential debtor's situation to determine if any of the debts were incurred by fraud and whether a nondischargeability proceeding is likely. The lawyer should also ascertain to what extent any nondischargeable debts are the driving force behind the potential client's decision to seek counsel. Again, the client's objectives drive the analysis, the purpose of which is to guide the client to reasonable objectives and determine which services are reasonably necessary to meet those objectives.

[21] [22] The client's objectives may, and likely will, change through the course of a proper initial consultation. Because potential clients do not understand bankruptcy law, their pre-consultation expectations may be unreasonable or unachievable. The lawyer must "inquir[e] into and analy [ze] ... the factual and legal elements of the problem" ABA MODEL RULE 1.1 cmt. 5. The consumer bankruptcy attorney's role is to determine how bankruptcy may assist the client and whether some of the client's goals may be left unmet through bankruptcy, and

effectively communicate this to the client. The client then decides whether and how to proceed. ***190** The attorney must be on the same page with the client concerning the client's objectives. *See* HAZARD & HODES § 5.10. The attorney has the duty to communicate the advantages and limitations of filing for bankruptcy. *See id.* If the attorney and the client have different understandings of the goals of representation, viewed objectively, then the lawyer has not fulfilled the duty of competence. *See id.*

Put another way, the law of mutual mistake has no place in the retention of an attorney. The attorney bears the burden of failing to ascertain the client's objectives and/or failing to shape their objectives to conform to the remedies available under bankruptcy law. Once again, the lawyer is the expert, not the client.

[23] [24] To summarize, a consumer bankruptcy attorney fulfills the duty of competence by providing the bundle of services reasonably necessary to achieve the client's reasonably anticipated result. The inquiry is fact-specific and depends on the client's individual circumstance. It also depends on the client's reasonable pre-consultation goals and how they may have been shaped or refocused through consultation with the attorney. While an attorney is not obligated to help a client meet patently unreasonable goals, the reasonable expectations of a layperson, in the absence of any information by an attorney that may refocus them, is the basis for the analysis.

b. Application

[25] DeLuca's first failure—the root cause of his other failings—was to not define the goals of the representation, which resulted from a lack of communication with the Debtors at the initial consultation. He apparently treats all debtors the same, as if the discharge of all dischargeable debts is always the primary goal. Here, however, the Debtors' goal was to permanently stop the wage garnishment resulting from the St. Rose Debt. While a discharge of their other debts is of some benefit, the reason they sought counsel was the wage garnishment. DeLuca was aware of the garnishment and was given copies of various district court documents. He did not inquire into the nature of the Judgment, either at the initial consultation or thereafter. He apparently assumed that, because the debt was from a hospital, it was for medical services. He argues that any reasonable attorney would make the same assumption. The court disagrees. Competently attaining the Debtors' goals of representation mandated an independent inquiry into the nature of the Judgment.

DeLuca argues that the Debtors had the burden to inform him that the debt was incurred through fraud, as the Retainer Agreement states that debts incurred through fraud "do not go away" and requests copies of all lawsuits within the last two years. Because the Debtors knew that the Judgment was based on fraud, so DeLuca argues, the burden was on them to communicate that fact to him. DeLuca's argument fails, however, because he improperly placed the burden on the Debtors to make the legal conclusion that fraud, as defined in the Bankruptcy Code, includes the fraudulent act that Seare committed in the district court. A layperson cannot be reasonably expected to connect those dots—that a Judgment under Civil Rule 11 for fabricating evidence ("fraud on the court") may be nondischargeable as fraud under bankruptcy law. In addition, the Debtors complied with the request in the Retainer Agreement to provide copies of all lawsuits. While they did not give DeLuca hard copies of the entire district court docket, they provided sufficient documents to inform him of the existence of the district court case. Once DeLuca was ***191** aware of a garnishment connected to a prior judgment, he had the affirmative duty to investigate.[23] DeLuca is the bankruptcy expert, not the Debtors.

Either DeLuca did not understand the Debtors' primary objective or he negligently assumed that the St. Rose Debt was dischargeable and thus the Debtors' objective would be met. Either way, he did not exercise the legal knowledge, skill, and thoroughness reasonably necessary for the representation. NEV. RULE OF PROF'L CONDUCT 1.1 (2011). He was not thorough, either in reviewing the documents given to him or in undertaking any independent review of the district court proceedings. He did not apply the knowledge and skill he has acquired through many years of consumer bankruptcy practice to the Debtors' needs.

Put another way, he did not sufficiently inquire into the factual and legal elements of the Debtors' problem—the wage garnishment and related legal issues concerning dischargeability. ABA MODEL RULE 1.1 cmt. 5. DeLuca failed his primary duty—ascertaining the Debtors' objectives. *See* ABA HANDBOOK 65–66 (the initial interview is " '[p]erhaps the most fundamental legal skill' of a lawyer in that it 'consists of determining what kind of legal problem a situation may involve, a skill that necessarily transcends any particular legal knowledge' " (quoting ABA MODEL RULE 1.1 cmt. 2)).

Based on the initial consultation, the Debtors could have reasonably anticipated that the St. Rose Debt would be discharged and that the garnishment would permanently cease. The Debtors did not likely expect that an adversary proceeding would be filed, especially since DeLuca did not even explain what an adversary proceeding was or the connection between nondischargeable debts and adversary proceedings. The Debtors moved forward without the clarity he had the duty to provide that the St. Rose Debt raised significant dischargeability concerns and was nearly certain to lead to an adversary proceeding. DeLuca counseled the Debtors to file a bankruptcy petition, which embroiled them in an adversary proceeding and threatened to deny the relief they sought in the first place.

[26] In the attorney-client relationship, the client sets the objectives and the attorney determines the means to fulfill them in consultation with the client. NEV. RULE PROF'L CONDUCT 1.2(a) (2011). Without understanding the Debtors' goals of representation, DeLuca could not determine which legal services were reasonably necessary to attain those goals. Nor could the Debtors properly evaluate DeLuca's choice of means because the Debtors did not understand that filing a petition would likely result in an adversary proceeding—a proceeding in which DeLuca, the lawyer they reasonably understood to represent them for the entire bankruptcy matter, refused to represent them. The Debtors' choice to file was colored by DeLuca's failure to properly advise them. With sufficient information, the Debtors may have chosen not to file or sought an attorney that had a different fee structure concerning adversary proceedings.

DeLuca did not reach an understanding of the Debtors' goals or explain to them the challenges they were likely to face in trying to achieve those goals by filing for bankruptcy. In the absence of such guidance, he had the duty to offer the services reasonably necessary to achieve a permanent ***192** cessation of the wage garnishment. Because an adversary proceeding was a near certainty in light of what DeLuca should have known at the time of the initial consultation—that the Judgment was based on fraud—representing the Debtors at an adversary proceeding was not only reasonably necessary to achieve their goal of stopping the garnishment but likely the only way to stop the garnishment. Consequently, DeLuca's decision to unbundle representation in adversary proceedings violated the duty of competence.

4. NEV. RULE OF PROF'L CONDUCT 1.2(c)—Scope of Services

Unbundling is permissible only if "the limitation is reasonable under the circumstances and the client gives informed consent." NEV. RULE OF PROF'L CONDUCT 1.2(c).

a. Reasonable Under the Circumstances

(1) Legal Standard

" 'Reasonable' ... denotes the conduct of a reasonably prudent and competent lawyer." NEV. RULE OF PROF'L CONDUCT 1.0(h) (2011). Like the term "profession," precisely defining "reasonable" is elusive. A leading treatise states that a limitation is reasonable if it is "not harmful to the client." HAZARD & HODES, *supra,* at § 5.10. The *Restatement* declares that a limitation is reasonable if the benefits supposedly obtained by the waiver, such as reduced legal fees or the ability to obtain a particularly able lawyer, could reasonably be considered to outweigh the potential risks posed by the limitation. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19 (2000). The *Restatement* also lists as relevant factors whether there were "special circumstances" warranting the limitation, whether it was proposed by the lawyer or client, and whether it is standard practice among lawyers in the client's local community but not in other communities. *Id.*

The ABA has stated that a limitation is unreasonable if it would violate another ethics rule or a provision of substantive law. ANNOTATED RULES 40; *accord* Yerbich, *supra* note 17, at 8 ("What is reasonable generally boils down to a question of whether the lawyer's limited scope of responsibility would amount to a violation of the lawyer's ethical or legal obligations—a factual, situation-specific determination.").

[27] Reasonableness is assessed at the time the client agreed to unbundled services; neither party has the benefit of hindsight. NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011) ("reasonable *under the circumstances* " (emphasis supplied)); Struffolino, *supra* note 17, at 225 ("These determinations must be made during the initial interview or soon thereafter ... the conditions that existed at the initial consultation will govern any later reasonableness inquiry.") (citing ABA HANDBOOK 91) ("Whether a service limitation is reasonable under the circumstances is judged at the time the client and lawyer enter into the representational agreement, *not retrospectively* " (emphasis supplied)). The ABA has stated that "the test is not whether, after the fact, the service proved to be of

some use to the client, but rather whether, *at the time of the agreement,* a lawyer reasonably could have concluded that the service would be useful to the client." ABA HANDBOOK 91 (emphasis in original); *see* ANNOTATED RULES 41 (discussing *In re Egwim,* 291 B.R. 559; *In re Johnson,* 291 B.R. 462 (Bankr.D.Minn.2003)).

In re Egwim assessed the unbundling of adversary proceedings. It applied the prior version of ABA Model Rule 1.2(c), which does not have a reasonableness requirement, but the court did analyze the lawyer's conduct for reasonableness under the *Restatement.* "[T]he requirement in the Georgia Rule that the limitation not violate the requirement of competent representation ***193** is equivalent, in substance, to the Restatement's principle that the terms of the limitation must be reasonable under the circumstances." *In re Egwim,* 291 B.R. at 571 (citing GA. RULE OF PROF'L CONDUCT 1.1 (identical in relevant part to NEV. RULE OF PROF'L CONDUCT 1.1)); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19 (2000). In short, if the limitation constitutes a breach of the duty of competence, or any other ethical duty, then the limitation is unreasonable under the circumstances.

Because the nondischargeability proceeding in *In re Egwim* went to the "essential purposes of Debtors in filing the bankruptcy case," the unbundling appeared to violate the duty of competence and to thus be unreasonable. *Id.* Nonetheless, the court did not decide the issues of reasonableness and competence because counsel proceeded in good faith and there was no showing of adverse consequences to the debtors. *Id.* at 563. The point is that *In re Egwim* equated competence and reasonableness, and found that where an adversary proceeding goes to the "essential purpose" of the debtor in filing, the related unbundling is unreasonable. *Id.; cf. Hale v. U.S. Trustee,* 509 F.3d 1139, 1149 (9th Cir.2007) (affirming sanctions where bankruptcy attorney excluded the "critical and necessary service" of attending the Section 341 meeting).

In re Johnson held that unbundling the service of appearing at the Section 341 meeting of creditors is per se unreasonable, even if the clients agree to, and the Rule 2016(b) statement reflects, such limitation. 291 B.R. at 466. The court stated, "[t]he 341 meeting of creditors, it seems to the court, is ... a core event in a bankruptcy case.... it is difficult to fathom a basic, original retainer not including counsel's attendance and representation at the 341 meeting, *in every case.*" *Id.* at 468 (citing *Hale v. U.S. Trustee (In re Basham),* 208 B.R. 926, 932 (9th Cir. BAP 1997) (emphasis in original); *In re Bancroft,* 204 B.R. 548, 551 (Bankr.C.D.Ill.1997); *Bone v. Judah (In re Josey),* 195 B.R. 511, 514 (Bankr.N.D.Ga.1996); *In re Castorena,* 270 B.R. at 530). Put another way, representation at the Section 341 meeting is mandatory to fulfill the duty of competence; it is part of the bundle of services that are reasonably necessary to achieve the client's reasonably anticipated result—a discharge. At the time the client agreed to exclude representation at the Section 341 meeting, the lawyer reasonably could have concluded that the service would be useful to the client. *See* ABA HANDBOOK 91.

The court follows *In re Egwim* and *In re Johnson,* both of which essentially applied the ABA's formulation of the test. Reasonableness is coextensive with competence. *In re Egwim,* 291 B.R. at 571; Yerbich, *supra* note 17, at 8. As discussed above, a limitation on services violates the duty of competence if the unbundled service is reasonably necessary to achieve the client's reasonably anticipated result. The ABA's phrasing of the reasonableness test is slightly different, "whether, *at the time of the agreement,* a lawyer reasonably could have concluded that the service would be useful to the client," but the ultimate analysis is the same. ABA HANDBOOK 91 (emphasis in original).

[28] [29] [30] [31] Thus, a limitation on services is not "reasonable under the circumstances" if, in light of the relevant information that the lawyer knew or should have known at the time the retainer agreement was formed, the unbundled service was reasonably necessary to achieve the client's reasonably anticipated result. NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011). A limitation is *per se* unreasonable if it violates a rule of ethics or provision of ***194** substantive law, such as Section 707(c)(4) (discussed below).[24] The *Restatement's* cost-benefit analysis—whether the benefits supposedly obtained by the limitation could reasonably be considered to outweigh the potential risks posed by the limitation—is instructive but not dispositive. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19 (2000). Two additional factors are whether the client has the ability to handle the unbundled matter without legal assistance, and the complexity of the legal matter at issue. *See* Struffolino, *supra* note 17, at 222–23; CAL. ETHICS PRIMER 2 ("[I]t is wise to avoid limited scope representation in very sophisticated and/or complicated litigation."). The weighing of these factors also mirrors the competency analysis, as "[t]he level of competency heightens as the complexity and specialized nature of the matter increase." *In re Slabbinck,* 482 B.R. at 590. As with competency, the determination of reasonableness is fact-specific and depends on the client's particular situation and objectives.

(2) Application

[32] Turning to DeLuca's decision to unbundle adversary proceedings, the first issue is timing—when the decision to exclude adversary proceedings was made. There are only three options; the decision was either made before DeLuca met with the Debtors, during the initial consultation, or sometime during the representation of the Debtors in the main bankruptcy case. DeLuca's use of boilerplate contracts that exclude adversary proceedings from the flat fee indicates that the decision to unbundle was made before DeLuca ever met the Debtors. The court does not find fault with the practice of using pre-prepared forms that limit the scope of services included in a flat fee, but the decision to unbundle must be reasonable under the circumstances. Boilerplate forms with limited services may be used only if the unbundled services are not reasonably necessary to achieve a particular client's objectives. As aptly demonstrated by the Debtors in this case, not all clients are the same. By treating them all the same, the decision to unbundle was effectively made before DeLuca ever met the Debtors. This is unreasonable and violates Nevada Rule 1.2(c).

DeLuca argues that the Retainer Agreement clearly excludes adversary proceedings. (Bankr.Dkt. No. 27 at 14; Evid. Hr'g Tr. 41:20–42:2.) He is correct that it excludes adversary proceedings from the flat fee, but not that it excludes them altogether. The Retainer Agreement states that services rendered to address allegations of nondischargeability, and representation in adversary proceedings, "may require additional fees," but it does not state that DeLuca may decide not to provide such services at all. (Ex. G at 7.) Seare admitted that he understood that DeLuca would not represent him for free in adversary proceedings, and that the flat fee did not include such services, which indicates that Seare thought that DeLuca would represent him in adversary proceedings (albeit for additional fees). (Evid. Hr'g Tr. 22:9–12.)

[33] Even if, however, the decision to unbundle adversary services were made during the initial consultation, that decision would be unreasonable because an adversary proceeding was a near certainty. Had DeLuca even cursorily investigated the nature of the Judgment, he would have uncovered that it was based on Seare's fraudulent conduct. DeLuca should have ***195** known that representing Seare in an adversary proceeding was reasonably necessary to achieve the Debtors' reasonably anticipated result—a discharge of the St. Rose Debt. The Debtors' expectation of a complete discharge was reasonable in light of the facts that (1) DeLuca did not inform them otherwise; and (2) they are not bankruptcy experts.

The *Restatement's* cost-benefit analysis weighs strongly against DeLuca. The supposed benefit afforded to the Debtors by the limitation would be affordable legal representation in the main bankruptcy case by a bankruptcy expert. DeLuca's failure to explain the nature and likelihood of adversary proceedings, however, deprived the Debtors of relevant information that could have led them to seek another expert attorney who would have included adversary proceedings in the flat fee. The value of the benefit is thus difficult to assess. Similarly, DeLuca's failure to investigate the Judgment and properly inform the Debtors meant that neither could adequately value the potential risk posed by the limitation. The risks of unbundling adversary proceedings in this case are now clear, but at the time the Retainer Agreement was formed, the benefits and potential risks could not be meaningfully compared. Not only could the Debtors not weigh the costs and benefits (see informed consent, below), DeLuca could not either because he had not investigated the Judgment.

Also weighing against DeLuca is that bankruptcy, and adversary proceedings in particular, are highly complex. *See County of Santa Cruz v. Cervantes (In re Cervantes),* 219 F.3d 955, 961 (9th Cir.2000); *In re Egwim,* 291 B.R. at 572; *In re Cuddy,* 322 B.R. at 17. Bankruptcy law is federal, yet state law plays a prominent role. Questions concerning the bankruptcy court's jurisdiction and constitutional authority are perplexing. *See Stern v. Marshall,* ––– U.S. ––––, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011); *Exec. Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.),* 702 F.3d 553 (9th Cir.2012). Among other things, a debtor seeking only a Chapter 7 discharge must navigate a complicated array of forms and schedules, the Section 341 hearing, decisions of whether to reaffirm or redeem debts, possible motions for relief from stay, and coordinating with and responding to the court and the trustee. Potential allegations of nondischargeability add another layer of complexity; the pro se then must deal with a civil lawsuit in federal court, and understand the relationship between the adversary proceeding and the main bankruptcy case.

Although Seare has been involved in at least one prior court proceeding, there is no reason to believe that he is any more knowledgeable about bankruptcy than the average layperson. A party proceeding pro se in an adversary proceeding faces an uphill climb.

> "[P]ro se litigants [in adversary proceedings], in a very real sense can be a danger to themselves. Without an understanding of the importance of facts in issue, the applicable law, or why their

> discharge has even been challenged, they often flounder helplessly at trial, aimlessly pursuing meaningless points and arguments.... [T]o proceed pro se presents the very real possibility that the creditor will prevail for the sole reason that its opponent did not understand the facts in issue or how to defend against the allegations raised."

In re Cuddy, 322 B.R. at 17 (quoting *Colter v. Edsall (In re Edsall),* 89 B.R. 772, 774 (Bankr.N.D.Ind.1988)). Although Seare is aware of why St. Rose challenges the discharge of its debt, that fact alone does not give Seare the substantive and ***196** procedural knowledge necessary to effectively mount a defense. Now that the matter is settled, the validity of his defense cannot be known. Nonetheless, proceeding without counsel put him at a significant disadvantage. Because bankruptcy is a complex area of law and pro se litigants in adversary proceedings face long odds, an attorney seeking to demonstrate that a limitation on services was reasonable has a high burden. DeLuca has failed to meet that burden.

Returning to the issue of timing, DeLuca did not communicate his intent to not represent Seare in the adversary proceeding until June 5, 2012. (Exs. H, I.) The circumstances in early June were that (1) St. Rose had filed the Complaint, on May 24, 2012; (2) prior to the Complaint, DeLuca's office was aware of St. Rose's intent to enforce its rights under the Judgment because St. Rose had communicated as much at the Section 341 meeting in March and in the proposed order and stipulation sent to DeLuca in April; (3) the Debtors had obtained their discharge, on May 30, 2012; and (4) the Debtors were confused about whether the St. Rose Debt had been discharged. (Dkt. No. 1; Bankr.Dkt. No. 20; Ex. H.)

[34] Unlike during the initial consultation, by June the Complaint had already been filed. To say the least, representing Seare in the adversary proceeding was reasonably necessary to achieve his objective of discharging the St. Rose Debt. In fact, prevailing in the adversary proceeding was the only way that Seare could discharge the St. Rose Debt. Unbundling this service after the Complaint was already filed was patently unreasonable and violated Nevada Rule 1.2(c).[25]

The unbundling of adversary proceedings was unreasonable in light of the Debtors' circumstances and objectives. If the decision to unbundle were made prior to meeting the Debtors, it is per se unreasonable because it could not have contemplated the Debtors' circumstances. If the decision were made during the initial consultation, it is also unreasonable. DeLuca knew of the Debtors' goal of eliminating the St. Rose garnishment. Had he investigated the nature of the Judgment, he would have known that an adversary proceeding was a near certainty and representing the Debtors in the adversary was reasonably necessary to achieve their objectives. Excluding adversary proceedings was thus a violation of the duty of competence and unreasonable under the circumstances. If DeLuca decided to unbundle in early June, once the Complaint was filed, then the decision was unreasonable for the simple reason that the Debtors only chance of discharging the St. Rose Debt was to prevail in the adversary proceeding. Moreover, bankruptcy is a highly complex area of law; the Debtors are at a significant disadvantage proceeding without legal representation; and the risk of facing an adversary proceeding outweighed the benefits of obtaining affordable counsel. Lastly, the unbundling was DeLuca's idea, which runs contrary to the ABA's guidance that unbundling should be client-driven. ABA HANDBOOK 7; *see* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19.

b. Informed Consent

(1) Legal Standard

[35] The second element of Nevada Rule 1.2(c)—informed consent—is "the ***197** agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." NEV. RULE OF PROF'L CONDUCT 1.0(e) (2011). The analysis involves two questions: (1) whether the information disclosure was sufficient; and (2) whether the consent was valid. Struffolino, *supra* note 17, at 225. One bankruptcy court has aptly stated,

> [d]isclosure involves the attorney explaining to a debtor the nature of the bankruptcy process, what problems could or will be encountered, how those problems should be addressed, and the risks or hazards, if any, associated with those problems. Consent involves a

> clear understanding on the part of the debtor as to these factors and the possible results of a debtor proceeding without an attorney being present.

In re Bancroft, 204 B.R. at 552.

[36] Not only must the risks of proceeding pro se in a particular situation be explained, but more broadly, the attorney must advise the client of the risks *inherent* in unbundling legal services. HAZARD & HODES § 1.2:401. "The chief risk is that purchasing a cheap solution may result in a poor solution that will have to be undone later at a greater cost." *Id.* Also, the disclosure cannot be limited to the two options of either including or excluding a particular legal service. The lawyer must explain other reasonable alternatives, such as retaining a different lawyer that may have a different fee structure. *See Healy v. Axelrod Const. Co. & Defined Ben. Pension Plan & Trust,* 155 F.R.D. 615, 620 (N.D.Ill.1994). "It is less than sincere to suggest that the attorney is offering a reasonably priced alternative to usual legal representation, when there is no showing the alternatives were explained by the attorney to the debtors and the debtors made a knowledgeable decision." *In re Castorena,* 270 B.R. at 528 (quoting *In re Bancroft,* 204 B.R. at 552). "Unless debtors truly understand what they bargain away, the bargain is a sham." *Id.* at 529.

[37] While an attorney need not perform an exhaustive survey of his peers' fee schedules, the client is not adequately informed if she thinks that an attorney's unbundling practice is the only option she has to obtain legal services. This depends largely on the client's sophistication and ability to shop the legal marketplace, but nonetheless the attorney has an affirmative duty, at the very least, to explain that not all attorneys unbundle services in the same way. *See In re Slabbinck,* 482 B.R. at 588 ("[T]he lawyer should have ... given the client the opportunity to seek counsel who may offer representation on other terms. It is not the client's responsibility to know, without it being explained, that adversary proceedings may occur and the consequences arising from them." (internal quotation marks and citation omitted)).

The lawyer must explain the advantages and disadvantages of having counsel's assistance during the pendency of the case. The average layperson has little understanding of the substance and procedure of bankruptcy and is unlikely to be able to meaningfully weigh the benefits of reduced-cost representation with the risks of unbundled services—both the inherent and situation-specific risks. *In re Castorena* went so far as to state that informed consent is highly suspect when any services are unbundled by consumer bankruptcy attorneys,

> In order to make an informed decision, the client must understand what might be faced in the bankruptcy, and the risks associated with representing himself in handling those contingencies. Many lawyers find themselves surprised ***198** by what can arise in an otherwise "simple" bankruptcy case. The reported decisions of this and other bankruptcy courts make it clear that, even in garden variety consumer chapter 7 cases, counsel for debtors and those who might be characterized as their adversaries (creditors, or occasionally the trustee) sometimes have distinctly polar views of what is permissible and what is not. The ability to adequately explain the lay of the bankruptcy landscape, including all its variations, contingencies and permutations, in order to obtain a truly informed consent is suspect.

In re Castorena, 270 B.R. at 529.

Regarding nondischargeability proceedings in particular, *In re Egwim* took a similar view:

> There may be an unusual case where an informed debtor could make a reasonable and intelligent decision to engage an attorney to file a chapter 7 bankruptcy petition on a limited basis that excludes services such as representation in discharge or dischargeability litigation; counsel would bear a heavy burden to demonstrate that this case is one of them....

In re Egwim, 291 B.R. at 581.

In re Slabbinck cited a Michigan ethics opinion that discussed whether a Chapter 7 debtor could exclude representation with respect to a reaffirmation agreement; the disclosures must, "at a minimum," include information on the "risks to the client that the proposed limitations would create, as well as the technical aspects, legal ramifications and material risks of reaffirming a dischargeable debt." 482 B.R. at 589 (internal quotation marks and citation omitted). Again, the overriding purpose is the communication of risk. *See* CAL. ETHICS PRIMER 2.

In re Slabbinck addressed the issue of unbundling pre- and post-petition services and held that the debtor did not give informed consent to exclude post-petition services because there was no evidence on the adequacy of the attorney's disclosures. *Id.* at 595–96. The clients unequivocally stated that they consented to the unbundling, but that was insufficient without any proof of the content of the disclosures. *Id.* The court could not ascertain whether the attorneys had explained (1) that the failure to file certain post-petition forms and schedules would result in the denial of discharge; (2) the consequences of dismissal and serial filings on the automatic stay; (3) that a failure to attend the § 341 meeting would mean no discharge; and (4) that failure to cooperate with the trustee could also mean no discharge. *Id.* In short, there was no evidence that the risks of going it alone were communicated to the debtor.

Likewise, *In re Collmar* held that the debtor did not give informed consent to unbundle reaffirmation agreements from the scope of services. *In re Collmar,* 417 B.R. 920, 924 (Bankr.N.D.Ind.2009). The court applied Indiana Rule 1.2(c), which is identical to Nevada Rule 1.2(c), and held that informed consent was not obtained because counsel did not explain the reaffirmation process to the debtor, the advantages and disadvantages of having counsel during that process, the consequences of not having that assistance, or the alternatives to the unbundling, including the option of hiring other counsel who would not unbundle reaffirmations from the scope of services. *Id.*

[38] The nature of the required disclosure is fact-specific and depends on the client's particular situation. For example, the risks of proceeding without representation in adversary proceedings depend on the likelihood of an adversary proceeding, which in turn depends on the nature of the ***199** client's debts and the identity of the creditors (e.g., whether a particular creditor has a propensity for filing adversary complaints).

The ABA also has endorsed the view that attorneys have a dual obligation to explain the inherent risks of unbundling and the specific risks of a particular case.

> Although there is no one-size-fits all explanation for clients, it might include a general description of limited representation, a specific description of the type of limited representation the lawyer will provide to the client, what the lawyer and client each will do, what the lawyer will *not* do under the agreement (a little redundancy here helps), whether the lawyer will enter an appearance and when and how the lawyer will withdraw or strike that appearance (making it clear the client will be required to support the withdrawal), whether and how the lawyer and client can modify the initial agreement if they need or want to do so, and identification of the risks of limited representation.

ABA HANDBOOK 71 (emphasis in original). The lawyer must start with the big picture—explaining what unbundling is—and then go into more detail about the risks of limited representation and the responsibilities of the lawyer and the client.

[39] The explanation must also clearly indicate that the client has responsibilities under a limited scope retainer agreement. A layperson may not understand that he is responsible for any unbundled services. This is especially true if the lawyer does not explain the likelihood of a service being needed. A client may reasonably assume that a service is excluded because it is unlikely to be necessary, or that it could be included later (usually for an additional fee). "Because the client-lawyer relationship is created by consent, the critical issue for the attorney in a limited scope representation is that the client fully understand and agree to what the attorney will do, and, more importantly, what the attorney will not do." *Id.* at 92 (internal quotation marks and citation omitted).

[40] [41] The explanation must convey that not all of the risks of limited representation may be apparent from the outset; consequently, "the lawyer should counsel the client about those risks and problems which are typical in cases of the type presented by the client." *Id.* at 72 n. 229 (citation omitted). A lawyer must advise about the general if the specific is uncertain. A lawyer cannot use the uncertainty of future legal proceedings to shield himself from explaining the risks that may arise, as best known when representation commences.

[42] The primary goal of the information disclosure is to communicate the risks of limited representation. *See*

HAZARD & HODES § 5.10. Only when the risks are properly communicated, in language comprehensible by the client, is the client capable of valid consent. To enable herself to appreciate the risks, formulate a proposed scope of services that properly accounts for the risks, and communicate to the client the pros and cons of proceeding with some services unbundled, the lawyer must first perform a thorough client interview. In some instances, independent investigation into the client's circumstances is necessary. Because the risks occur at different levels of scale—the macro when considering challenges that all lawyers and clients face under a limited scope arrangement, and the micro when assessing a client's particular situation—a lawyer can only understand the risks by careful examination of the client's situation and objectives. A client is much more likely to understand the risks of limited representation when they are specific to his ***200** case; the average layperson is unlikely to be able to "connect the dots" between generalized risks, the services he needs to achieve his goals, and whether any unbundled services put him at risk of not being able to fulfill those goals.

[43] A particular risk of limited representation is that the client may find herself in a position of diminished bargaining power if unbundled services become necessary during the course of representation. The lawyer must alert the client to "foreseeable collateral problems" that may arise in the course of representation. *See* Struffolino, *supra* note 17, at 233.

> A lawyer should not enter into an agreement whereby services are to be provided up to a stated amount when it is foreseeable that more extensive services will probably be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction.

ABA MODEL RULE 1.5 cmt. 5. Part of being informed is knowing what can reasonably be expected to occur and whether any of the unbundled services are reasonably necessary to deal with those future events.

[44] Because the required information that a lawyer must provide is situation-specific, boilerplate disclosures in contracts of adhesion are highly suspect. *Cf. In re Cuddy,* 322 B.R. at 18 (finding ethical problems with contracts of adhesion that unbundle legal services). Such disclosures may sufficiently communicate what unbundling is and the general risks associated with it, but a boilerplate disclosure cannot be expected to capture the specific risks that a client will face if her lawyer does not perform certain services. Even if the disclosure were crafted in a way that adequately addressed specific risks, lawyers are ill advised to entirely rely on it to comply with their duty to inform. To interpret the terms of an adhesion contract, courts look to the full circumstances of the parties to determine their expectations; the situation of the principals—their relative bargaining power—and context of the transaction are therefore relevant. *Spychalski v. MFA Life Ins. Co.,* 620 S.W.2d 388, 392 (Mo.App.1981); *see* RESTATEMENT (SECOND) OF CONTRACTSS § 200 (1981). The terms of the boilerplate disclosure will not necessarily override other communications between the lawyer and client. In sum, a boilerplate disclosure is almost certainly ineffective to properly convey the information necessary under Nevada Rule 1.2(c), and lawyers should affirmatively communicate the particular risks of unbundling in the circumstance rather than relying on what could be an unpredictable interpretation of the terms of a boilerplate disclosure.

The *Annotated Rules* discusses two cases to shed light on what constitutes informed consent. ANNOTATED RULES 41. In *Johnson v. Board of County Commissioners,* 85 F.3d 489, 493–94 (10th Cir.1996), the court held that separate representation is permissible for a government official sued in his individual and official capacities, but not solely on the basis of convenience for the attorney. Where the government retains counsel to represent an official only in his official capacity, the court was concerned that the official may not understand that his individual interests are not necessarily protected by the official capacity representation, and that there may be conflicts between the defenses he may have in his separate capacities. *Id.* at 494. The court recognized the "need for sensitivity" in this area and the potential for ethical violations and malpractice claims. *Id.* The court embraced a procedure whereby counsel must notify the district court and the official of the potential conflict. The district court then determines ***201** if the official fully understands the potential conflict; if so, the official can choose joint representation. The official must also be informed that it is advisable that he obtain independent counsel on the individual capacity claim.

There, the attorney did not consult with the official about the mechanics of a § 1983 claim nor the exposure he faced in his individual capacity. *Id.* Thus, the official could not have consented and the attorney's decision to represent him only in his official capacity violated Rule 1.2(c). In short, the client-official chooses whether to proceed with joint or separate representation. The district court plays a direct role by determining whether the information is sufficient to enable a valid consent. The purpose of the disclosure is to communicate risk in a way that the client-official can understand.

In *Indianapolis Podiatry, P.C. v. Efroymson,* the issue was whether a limited-scope agreement was so limited that it precluded conflict-of-interest disclosures that would have otherwise been required. 720 N.E.2d 376 (Ind.Ct.App.1999). The court said very little about the limited scope agreement itself, other than that it was "at best minimally adequate." *Id.* at 381. However, the court stated that the "extent of disclosure to a client required when the scope of representation is being limited is similar, if not identical, to that required in the context of a conflict of interest" and that "meaningful consent must be based on full, objective, and unbiased advice." *Id.* at 381 n. 4 (internal quotation marks and citation omitted).

The ABA Annotated Rules's discussion of several ethics opinions reiterates much of what is discussed above—that the attorney must clearly explain (1) the limitations on representation (including what services are and are not included), (2) the probable effect of limited representation on the client's rights and interests, (3) whether it is foreseeable that more extensive services will be needed, (4) that the limitation cannot so restrict representation as to render it inadequate to meet the client's goals, and (5) that an attorney hired by a third-party insurer must communicate the limited representation to the client. ANNOTATED RULES 41 (discussing Colo. Ethics Op. 101 (1998); ABA Formal Ethics Op. 96–403 (1996); N.Y. City Ethics Op. 2001–3 (2003)).

There is also a concern that a client will sign anything that is put in front of him or her. Clients likely believe that an attorney is acting in the client's best interest, and that, because the attorney is an expert, whatever limitations the attorney proposes are appropriate to the situation. Simply put, "[s]ome clients will sign anything; it is [the lawyer's] responsibility to make sure the client understands the situation." Beverly Michaelis, *Unbundling in the 21st Century: How to Reduce Malpractice Exposure While Meeting Client Needs,* 70 OR. ST. BAR BULLETIN 44, 45 (2010) (discussing OR. RULE OF PROF'L CONDUCT 1.2(c) (2010), which is identical to NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011)).

In re Cuddy employed the useful metaphor of a professional swim instructor taking on a new student with the understanding that, for the initial fee, the instructor will lead the student to the pool, show her how to enter the water, and explain the basic elements of swimming. 322 B.R. at 17–18. If there is a serious problem, however, the student is on her own unless she pays more fees. *Id.* at 18. "Even if this message is clearly conveyed to the student, if the desire to swim is strong enough (just as if the need for the bankruptcy remedy is strong enough in the debtor *in extremis*) the student will accept the terms." *Id.* (emphasis in original). *In re Cuddy* was concerned about contracts of adhesion ***202** that purport to demonstrate informed consent but merely serve to impose a limitation on services that a client feels powerless to reject. *See id.*

[45] [46] Partly for this reason, the consent itself must be valid. The validity of the consent depends largely on the sufficiency and complexity of the information conveyed by the attorney, but it is an independent inquiry. The form of consent must demonstrate not only that the client received the necessary information, but that the client understood the import of the limitation on services. While it is impossible to subjectively ascertain with certainty that a particular client *understood* the risks of a limited scope agreement, there must be sufficient indicia of understanding for a court to objectively determine that the client's consent was based upon a competent and thorough understanding of the risks of the agreement and the client's responsibilities under the agreement.

[47] [48] Consent is presumed valid in the absence of any red flags, such as indications of incompetence. *See In re Schaeffer,* 824 S.W.2d 1, 4 (Mo.1992) ("Consent [to a conflict of interest] purportedly given by a client whom the lawyer should reasonably know lacks capacity to consent is ineffective. The client must be of sufficiently sound mind ... to understand the consequences of consent, and to exercise judgment in the matter. *See* Restatement of the Law Governing Lawyers, Tentative Draft 4, § 202 cmt. g(ii) (April 10, 1991). The lawyer must examine the individual client's ability to give consent voluntarily.... Vulnerability of the client must be taken into account."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. c(ii) (2000) ("Consent [to a conflict of interest] purportedly given by a client whom the lawyer should reasonably know lacks capacity to consent is ineffective."). So long as the disclosures were sufficient, then the client is presumed to have based her decision on the information contained in the disclosures and assumed the risks. However, the greater the complexity of the substantive and procedural issues, in particular the potential complexity of the unbundled service that the client may have to handle on her own, the higher the burden on the lawyer to demonstrate that the client understood what she agreed to. For example, where adversary proceedings are unbundled, the lawyer must present sufficient evidence for the court to infer that the client understood the nature of an

adversary proceeding, the likelihood of one arising in the client's case, the client's pro se responsibilities if one were to be filed, and the potential risks to the client's interests depending on the probable outcomes.

[49] For matters as complex as bankruptcy, a signed retainer agreement that merely states that certain proceedings are excluded from the flat fee is unlikely to suffice. *Cf. In re Cuddy,* 322 B.R. at 15 (holding that a retainer agreement's general "pay-or-we-will quit" language was not specific enough to comply with a local rule that required bankruptcy attorneys to represent debtors in adversary proceedings unless the debtors expressly agreed otherwise). There must be a demonstrated link between the excluded services and the client's understanding of the import of excluding those particular services in relation to the client's particular circumstance.

[50] While not required under the ethical rules, the court agrees with the ABA that the consent should be in writing. ABA HANDBOOK 71; NEV. RULE OF PROF'L CONDUCT 1.5 (2011) ("The scope of the representation ... shall be communicated to the client, preferably in writing...."). Attorneys protect themselves by putting the ***203** agreements in writing. In the absence of an explicit written agreement, a lawyer and client may be left in a "he said, she said" dilemma if there is a dispute about the nature of the unbundling agreement. *See* ABA MODEL RULE 1.5 cmt. 2; Struffolino, *supra* note 17, at 234 (citing *Smith v. Statewide Grievance Comm.,* CV94–053–98–40, 1995 WL 231108, at *1, *4 (Conn.Super.Ct.1995) (holding that the clients did not consent to limited scope representation in a telephone conversation despite the attorney's testimony otherwise)); *see* CAL. ETHICS PRIMER 4 (malpractice exposure increases dramatically when agreement not memorialized in writing). A written agreement, however, may not itself be sufficient to prove that the attorney disclosed the necessary information to the client. *Benet v. Schwartz,* No. 93 C 7295, 1995 WL 117884, at *4 (N.D.Ill.1995) ("[T]he fact that defendants and [their lawyer] executed the retainer agreement does not establish that defendants satisfied Rule 1.2(c)'s disclosure requirement.").

To summarize, the informed consent inquiry under Nevada Rule 1.2(c) comprises two issues. The first is whether "the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed [limited services agreement.]" NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011). While adequacy is situation-specific, the overriding purpose is to communicate the risks of limited scope representation to the client in language that the client understands. To that end, based on the client's specific goals and circumstances, the attorney must explain (1) the nature of the bankruptcy process; (2) the foreseeable problems that will arise in the debtor's case, including but not limited to their complexity and likelihood of occurring; (3) the inherent risks of unbundled legal services; (4) the foreseeable risks to the client arising from the unbundled services at issue (and that not all risks are apparent at the outset of the case); (5) the advantages and disadvantages of having counsel's assistance with the unbundled services; (6) the likelihood of the client having to perform any of the unbundled services pro se; (7) the client's responsibilities under the agreement; and (8) the reasonably available alternatives, including but not limited to the fact that not all attorneys unbundle services in the same manner. The client must have enough information to make a reasoned decision as to whether the limited scope agreement with a particular attorney is in the client's best interest.

The second issue is whether the "agreement by a person"—the consent itself—was valid. NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011). The court does not articulate a black-and-white standard. When the information disclosure was adequate and the client is competent, consent is presumed valid in the absence of any red flags. *See In re Schaeffer,* 824 S.W.2d at 4. The attorney must demonstrate a link between the excluded services and the client's understanding of the related disclosures such that the court can objectively determine that the client understood the import of proceeding without full representation. The evidentiary burden on the attorney is heightened as the complexity of the legal matter and the likelihood of needing the unbundled service increase.

(2) Application

[51] DeLuca failed both aspects of informed consent. First, he did not adequately communicate the material risks of unbundling adversary proceedings—either in general or in the Debtors' situation—or the available alternatives to such unbundling. Without adequate information upon which to base a decision, valid consent was impossible. Second, the means of the consent ***204** —initialing and signing DeLuca's contract of adhesion—did not sufficiently demonstrate that the Debtors understood the import of proceeding without representation in adversary proceedings.

Turning first to the information that DeLuca communicated to the Debtors, the court points out that DeLuca's failure to properly understand their goals and the details of their situation—i.e., the nature of the Judgment—rendered adequate communication impossible. DeLuca argues that the Debtors gave informed consent by executing the contract. Because DeLuca has no affirmative recollection of what transpired at the initial consultation, the court views the terms of the Retainer Agreement as the primary "communication" by DeLuca concerning the unbundling of adversary proceedings.[26] The parties disagree about whether anyone from DeLuca's office reviewed the Retainer Agreement with the Debtors. The Debtors argue that they were made to review the contract alone while Deluca testified that his standard office practice is to have a paralegal "go through" the contract paragraph-by-paragraph. The court believes that this is DeLuca's standard practice, but there is no evidence that such review ever occurred with the Debtors. DeLuca does not keep records of which paralegal meets with each client. Even if the meeting occurred, however, DeLuca's failure to explain what a paralegal actually explains to prospective clients indicates that the added "communication" would not be a material improvement over the terms of the Retainer Agreement itself.

The precise question is whether the Retainer Agreement itself constituted adequate communication. The Retainer Agreement states that debts incurred through fraud "do not go away," that the flat fee does not include representation for nondischargeability claims and adversary proceedings, and that such services would cost extra. Together, these clauses do not adequately communicate the material risks of proceeding without representation in adversary proceedings, or even that DeLuca may decide not to represent the Debtors in adversary proceedings. The Retainer Agreement separately lists nondischargeability claims and adversary proceedings as services that require additional fees; fraud is mentioned in another section. The contract's essential downfall is that the prospective client is left to connect the dots—that a debt incurred through fraud (a debt that "does not go away") is raised in a claim of nondischargeability that is litigated in an adversary proceeding. The Debtors had to make yet another analytical connection—that the district court judgment constituted fraud under the Bankruptcy Code.

Turning next to what DeLuca *failed* to communicate, he first failed to adequately explain the Chapter 7 process, in light of the near certainty that a nondischargeability proceeding would arise. He only told the Debtors to expect the Section 341 meeting and that the discharge would follow. For garden-variety cases, this may be sufficient, but where the Debtors' primary goal is to eliminate a garnishment connected to a fraud judgment, that explanation falls woefully short. That the process would include a claim of nondischargeability was reasonably foreseeable. In the absence of researching the Judgment, DeLuca was unable to explain the likelihood of such a claim nor its complexity ***205** —in other words, how the Debtors' goals could be impeded by such a claim.

There is no evidence to indicate that DeLuca explained the inherent risks of unbundling legal services to the Debtors, or that such explanations are his standard practice. To the contrary, DeLuca appears to use standard form contracts of adhesion—clients either accept on his terms or reject his services outright. The Debtors could not have known that the bundle of services included in the flat fee was unlikely to meet their objectives. DeLuca neither explained the risks of going it alone in adversary proceedings in general, nor what particular risks the Debtors faced. He did not communicate the high likelihood of having to represent themselves pro se or find another lawyer, which would have been evident had he reviewed the Judgment. Without such explanation, the Debtors could have reasonably agreed to exclude adversary proceedings on the thought that such proceedings were unlikely to occur. That the Debtors made this probability calculation is difficult to believe though because DeLuca did not even explain what an adversary proceeding was.

The Retainer Agreement does not explain that the Debtors have heightened responsibilities related to the unbundled services. Like any layperson, the Debtors may have understood that DeLuca was not providing certain services, but this is not the same as understanding exactly what actions and duties comprise the unbundled services and that the Debtors must assume those duties. The lawyer is the expert and has the duty to explain what a client must actually do to make up for a gap in representation. The Debtors did not know what they did not know. In no sense were they informed such that they could make a meaningful decision about whether to proceed with DeLuca or seek other counsel. They could have reasonably concluded that all Chapter 7 attorneys operate in the same way—that unbundling adversary proceedings is the norm. The Debtors were deprived of the opportunity to obtain additional legal advice, whether from DeLuca or another attorney, about how to deal with an issue which they were unaware of at the time of the initial consultation. The "communication" was inadequate because the Debtors could not have understood the material risks of proceeding without representation in adversary proceedings; nor could they have known the possible advantages of seeking counsel that structured his or her services differently. NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011).

Finally, the form of the consent itself was insufficient. The Debtors merely initialed and signed a standard form contract that reflected neither their understanding of what services were unbundled nor their particular circumstance. The court cannot objectively determine that the Debtors understood the risks of proceeding with limited representation. Even if the Debtors knowingly consented to the precise terms of the Retainer Agreement, however, that consent only extended to additional fees for representation in adversary proceedings. Consent is only presumed if the "communication" was adequate and there were no red flags. The complexity of bankruptcy is itself a red flag in that an attorney must meet a high bar to demonstrate that a client understood the consequences of excluding adversary proceedings. *See In re Egwim,* 291 B.R. at 572. Although the precise boundaries of what constitutes adequate communication and valid consent are difficult to define, by no measure did DeLuca comply.

Because the "communication" was inadequate to explain the material risks of the unbundled services and the available alternatives, ***206** and the consent itself was invalid, the Debtors did not give their informed consent and DeLuca violated Nevada Rule 1.2(c).

5. NEV. RULE OF PROF'L CONDUCT 1.5—Attorneys' Fees

a. Legal Standard

[52] Under Nevada Rule 1.5(b),

> [t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

NEV. RULE OF PROF'L CONDUCT 1.5(b) (2011). Subsection (b) of the Nevada Rule is identical to its ABA corollary. *Id.;* ABA MODEL RULE 1.5(b). "In a new client-lawyer relationship, ... an understanding as to fees and expenses must be promptly established." ABA MODEL RULE 1.5 cmt. 2. The lawyer should explain, again, preferably in writing, "the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation." *Id.*

[53] Lawyers are thus required to openly discuss fees in advance—the services covered by the fees, how the fees are calculated, and how the fees may change. *See* NEV. RULE OF PROF'L CONDUCT 1.5(b) (2011); HAZARD & HODES § 8.2. "For unsophisticated clients in particular, this communication and counseling may be almost as important as the lawyer's preliminary legal advice ... Only after the lawyer provides such disclosure can a client's agreement to pay a specified fee be considered truly voluntary." HAZARD & HODES § 8.2.

[54] The lawyer's communication concerning her fees must be in plain English. The client must be in a position to understand what the lawyer will do for the agreed upon fees, and, of equal importance, what the lawyer will *not* do. Simply put, the client must know what he bargained for.

b. Application

[55] DeLuca violated Nevada Rule 1.5 because he did not sufficiently explain the scope of services covered under the flat fee and the scope of services available for additional fees. NEV. RULE OF PROF'L CONDUCT 1.5 (2011). The Debtors were not regular clients of DeLuca, and thus he was required to communicate the scope of representation and the basis of his fees. *Id.* Because the Debtors were fairly unsophisticated in legal matters, and had no prior experience in bankruptcy, they cannot be said to have voluntarily agreed to pay the fees without adequate explanation by DeLuca. *See* HAZARD & HODES § 8.2. The problem is not that the Retainer Agreement did not list the fee amount or services to be provided; it did list them.

Rather, the problem is threefold. First, the listed services are described in legal jargon rather than plain English. Seare understood that "adversary proceedings" were excluded, but did not even know what they were. He also knew that "nondischargeability allegations" were excluded, but similarly may not have known what they were.

Second, the Debtors did not know the likelihood that they would need to pay for additional services. Without knowing the probability of an adversary proceeding, they did not know "to what *extent* [they] would be responsible for any costs, expenses ***207** or disbursements in the course of the representation." ABA MODEL RULE 1.5 cmt. 2 (emphasis added). The Debtors' "extent" of responsibility is not just what they have to pay for, but how likely it is that they would have to pay for it and the probable cost. The Debtors could have reasonably believed that the only services they needed were included in the flat fee and/or that any additional services would be minimal and relatively inexpensive.

Because an adversary proceeding for the St. Rose Debt was reasonably foreseeable at the time the Debtors agreed to the fee structure and DeLuca did not adequately explain this eventuality to the Debtors, he improperly unbundled the adversary proceedings from the flat fee. *Id.* cmt. 5. He unfairly placed them in the position of having to bargain for additional legal services "in the midst" of the adversary proceeding. *Id.; see* ABA HANDBOOK 9–10 ("[S]ome people pay lawyers an amount sufficient to buy the limited representation they need, but as a deposit for full-service representation. When the client cannot pay a later installment of the full-service fee, the lawyer discontinues the legal work. This leaves the client, lawyer, and court frustrated, and converts the former client into a pro se litigant."). The risk of being in this position is borne out by the fact that they met with several attorneys—all of which were too expensive because they would have needed to get up to speed on the case and this complex adversary proceeding. (*See* Evid. Hr'g Tr. 24–25.)

Third, DeLuca changed the basis of his fees without advance warning to the clients. NEV. RULE OF PROF'L CONDUCT 1.5(b) (2011). The Retainer Agreement does not state that he may decide not to represent the Debtors in adversary proceedings, only that such services would incur additional fees. The Debtors agreed to pay about $2,000 for an attorney, that, for additional fees, would handle nondischargeability claims and adversary proceedings. Part of the basis for the $2,000 fee was the availability of additional services if needed. By deciding later not to represent the debtors at all, he essentially changed the basis for his fees. *Id.*

Viewed objectively, the Debtors did not understand what they bargained their money for. Without an understanding of what an adversary proceeding was, the likelihood of one occurring, and what it could cost them, they could not have known that the approximately $2,000 they agreed to pay did not include the scope of services reasonably necessary to achieve their goal. DeLuca was in a position to modify his standard form contract to include representation in adversary proceedings, or properly explain the financial risks of excluding such representation. Because he failed to investigate the Judgment, however, he could not see the necessity of making such accommodations. With proper information, the Debtors could have chosen to pay the $2,000 in spite of the risks, or sought another attorney. Their choice to pay $2,000 cannot properly be labeled as voluntary. *See* HAZARD & HODES § 8.2.

For these reasons, DeLuca violated Nevada Rule 1.5.

6. NEV. RULE OF PROF'L CONDUCT 1.4—Communication with Clients

a. Legal Standard

Even if a limitation is reasonable and the client gives informed consent, the lawyer is not discharged of all duties surrounding the unbundled matter. The lawyer still has the duty to communicate under Nevada Rule 1.4, which is identical in pertinent part to ABA Model Rule 1.4. NEV. RULE OF PROF'L CONDUCT 1.4 (2011); ABA MODEL RULE 1.4 (2002). The lawyer shall "[r]easonably consult with the client ***208** about the means by which the client's objectives are to be accomplished; ... [k]eep the client reasonably informed about the status of the matter; [and] ... [p]romptly comply with reasonable requests for information...." NEV. RULE OF PROF'L CONDUCT 1.4(a) (2011); *see* Yerbich, *supra* note 17, at 8 ("Even if it may be outside the scope of the limited representation, an attorney has a continuing ethical obligation to respond to or forward to the debtor, as may be appropriate, any subsequent inquiries or information that the attorney receives.").

b. Application

[56] DeLuca first violated Nevada Rule 1.4 by failing to reasonably consult with the Debtors about the means to achieve their objectives. NEV. RULE OF PROF'L CONDUCT 1.4(a)(2) (2011). Because he did not understand that their primary goal was to permanently

stop the garnishment, to the near exclusion of discharging other debts, a meaningful consultation about which means best served the Debtors' goals was rendered impossible.

DeLuca's failure to forward the proposed stipulation and order that he received via fax from St. Rose one month before St. Rose filed the Complaint also violated Nevada Rule 1.4. Even if DeLuca had properly unbundled representation in the adversary proceeding, which he did not, he had the ongoing duty to "keep the client reasonably informed about the status of the matter." NEV. RULE OF PROF'L CONDUCT 1.4(a)(3) (2011). There is no doubt that the Debtors' "matter" included a judgment creditor's communication concerning the possible settlement of its claim. To make matters worse, DeLuca told St. Rose that he would not sign off on the proposed stipulation without consulting first with the Debtors, a consultation which apparently never happened. (Ex. H.)

[57] DeLuca also violated Nevada Rule 1.4 by failing to timely respond to requests for information by the Debtors. NEV. RULE OF PROF'L CONDUCT 1.4(a)(4) (2011). Tedoco argues that throughout the representation, DeLuca's office was nonresponsive and failed to keep the Debtors informed of the progress in their case. (Dkt. No. 47 at 3–4.) She further argues that DeLuca's staff returned messages that specifically requested for DeLuca to call. (*Id.*) Even when DeLuca's office returned the call, it often took two or three messages to prompt DeLuca's office to act. (*Id.*) While a busy attorney is not required to return all calls directed at him or her, especially if the matter can be addressed by a staff member, the primary relationship is between the attorney and client. DeLuca could not simply ignore the requests for direct communication. The Debtors paid for DeLuca's ongoing professional legal counsel, not just for a one-time meeting.

The Debtors were in a position of trust and relied upon DeLuca to guide them through a new, complex process. Failing to keep them sufficiently informed was unacceptable. Although the court doubts the Debtors' credibility overall, the court finds their argument about DeLuca's failure to communicate convincing. DeLuca's record in this case and office policies indicate an inattention to detail and poor client communication. He fails to log which paralegal in his office reviews the retainer agreements with each prospective client. Twice in this case, he incorrectly filed his briefs on the bankruptcy docket instead of the adversary docket. More importantly, he failed to serve copies of his briefs on the Debtors until after the Evidentiary Hearing, even though the court ordered him to serve his Reply Brief on the Debtors immediately after the OSC Hearing.

***209** For these reasons, DeLuca violated Nevada Rule 1.4

7. The Bankruptcy Code

a. Section 707(b)(4)(C)

(1) Legal Standard

"The signature of an attorney on a [Chapter 7] petition ... shall constitute a certification that the attorney has ... performed a *reasonable investigation* into the circumstances that gave rise to the petition...." 11 U.S.C. § 707(b)(4)(C) (2012) (emphasis added). Section 707(b)(4)(C) is one of the provisions that BAPCPA added to the Code in 2005 to impose new duties on attorneys representing consumer debtors. *In re Moffett,* 2012 WL 693362, at *2 (Bankr.C.D.Ill.2012). The Ninth Circuit Court of Appeals has not articulated the nature of the "reasonable investigation" that attorneys must perform.

The Bankruptcy Appellate Panel of the Ninth Circuit has discussed Section 707(b)(4)(C) on only one occasion. *In re Kayne,* 453 B.R. 372, 381–82 (9th Cir. BAP 2011). The BAP affirmed the bankruptcy court's finding that an attorney's failure to list a promissory note payable to the debtor, and the income received therefrom, as an asset on the debtor's schedules violated Section 707(b)(4)(D) and Rule 9011. *Id.* at 385. Under Section 707(b)(4)(D)—the sister provision to Section 707(b)(4)(C)—an attorney's signature "constitute[s] a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." 11 U.S.C. § 707(b)(4)(D) (2012).

The BAP equated the analyses under Section 707(b)(4)(C) and Rule 9011—" 'a debtor's attorney has a duty, *equivalent to that under [Rule] 9011* to perform a reasonable investigation into the circumstances giving rise to the documents before filing them in a Chapter 7 case' " *Id.* at 381 (quoting *In re Withrow,* 405 B.R. 505, 511–12 (1st Cir. BAP 2009) (emphasis added) ["*In re Withrow* (BAP)"], *aff'g In re Withrow,* 391 B.R. 217 (Bankr.D.Mass.2008) ["*In re Withrow* (Bankr.Ct.)"]).[27] In other words, Rule 9011 is "enhanced" by the BAPCPA additions of Section 707(b)(4)(C) and (D), and "evinces a policy that a debtor's attorney exercise independent diligence and care in ensuring that there is evidentiary support for the information contained in the client's bankruptcy schedules." *In re Kayne,* 453 B.R. at 385 (citing *In re Dean,* 401 B.R. 917, 924 (Bankr.D.Idaho 2008)). Likewise, the attorney must exercise independent diligence to investigate the facts underlying the client's desire to file for bankruptcy to comply with Section 707(b)(4)(C). The "reasonable investigation" required under Section 707(b)(4)(C) is coterminous with the "reasonable inquiry" required under Rule 9011. *See id.*

Other courts, the ABA, and the Collier bankruptcy treatise have come to the same conclusion. *In re Withrow* (BAP), 405 B.R. at 511; *In re Triepke,* 2012 WL 1229524, at *4 (Bankr.W.D.Mo.2012); *In re Alessandro,* 2010 WL 3522255 (Bankr.S.D.N.Y.2010); *In re Dean,* 401 B.R. at 924; Am. Bar. Ass'n Section of Bus. Law, ***210** Task Force on Attorney Discipline, *Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,* 61 BUS. LAW 697, 703 (2006) ("*ABA Attorney Liability* "); 6 COLLIER ON BANKRUPTCY ¶ 707.05[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013) ("[I]t is not quite clear that [Section 707(b)(4)(C)] ... adds anything to current Rule 9011. One difference is the use of the phrase 'reasonable investigation' rather than 'reasonable inquiry.' However, the pre-existing text of both the Moore's Federal Practice discussion of [Civil] Rule 11 and this treatise's discussion of Rule 9011 use the words 'inquiry' and 'investigation' interchangeably.").

The ABA has stated that "[a]s a standard, 'reasonable investigation' should be governed by the case law interpreting and applying the 'reasonable inquiry' standard under Rule 9011." *ABA Attorney Liability* 697. The ABA accepted one bankruptcy court's articulation of an attorney's reasonable pre-filing investigation duties under Rule 9011 for the purposes of Section 707(b)(4)(C):

> "The duty of reasonable inquiry imposed upon an attorney by [Civil] Rule 11 and by virtue of the attorney's status as an officer of the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) *ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor;* (3) check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor."

Id. at 704 (quoting *In re Robinson,* 198 B.R. 1017, 1024 (Bankr.N.D.Ga.1996)) (emphasis added). Notably, the second requirement places an affirmative duty on the attorney to take steps to ensure that the client is providing complete and accurate information. Merely relying on what the debtor provides is insufficient. The attorney must engage with the client and not just take a passive role; "attorneys must exercise not only supervision, but, more importantly, professional judgment that derives only through *personal involvement in the case and evaluation of the client's needs.*" *Id.* at 705 (emphasis added).

In re Withrow (Bankr.Ct.) articulated a similar standard, which included a requirement that the attorney "employ such external verification tools as were available and not time or cost prohibitive...." 391 B.R. at 228;[28] *accord Fleming Sales Co.,* ***211** *Inc. v. Bailey,* 611 F.Supp. 507, 519 (N.D.Ill.1985) ("Litigation lawyers have a broad responsibility under [Civil] Rule 11 and the [Model Rules of Professional Conduct]: to confer with the client about the facts—and not to accept the client's version on faith, but to probe the client in that respect."); *In re Triepke,* 2012 WL 1229524, at *5; COLLIER ¶ 707.05[1]. *In re Withrow* (Bankr.Ct.) then synthesized the inquiry to one question: "[d]id the attorney do his or her level best to get it right? More can not, and should not, be asked of any attorney. And when an attorney appears to have provided less, an inquiry under Rule 9011 and § 707(b)(4)(C) is proper." 391 B.R. at 228.

[58] Like the reasonableness inquiries under the ethical rules, reasonableness under Section 707(b)(4)(C) is also examined at the time the petition was filed (without the benefit of hindsight). *ABA Attorney Liability 703; see Hamer v. Career College Ass'n,* 979 F.2d 758, 759 (9th Cir.1992) (discussing Civil Rule 11).

[59] [60] [61] [62] To summarize, Section 707(b)(4)(C) serves as an enhancement to Rule 9011.[29] The "reasonable investigation" under this section is indistinct from the "reasonable inquiry" under Rule 9011. To comply with Section 707(b)(4)(C), the attorney must perform an objectively reasonable investigation into the circumstances giving rise to the petition, assessed at the time the petition was filed. 11 U.S.C. § 707(b)(4)(C) (2012). The attorney cannot take al of the client's

assertions at face value nor rely solely upon the information provided by the client. The attorney may rely on her client's objectively reasonable assertions, but where the client-provided information is internally (or externally) inconsistent, materially incomplete, or raises "red flags," the attorney is obligated to probe further—by asking questions, obtaining additional documents, or by some other means. Again, the attorney is the expert and cannot rely upon a client's limited understanding of what constitutes the "complete" or "necessary" information that the attorney must have nor what information is or is not relevant to the client's particular situation.

(2) Application

[63] As with the ethical violations discussed above, DeLuca's violation of Section 707(b)(4)(C) flows from his failure to investigate the nature of the Judgment. The Debtors told him of the circumstance giving rise to the petition—the wage garnishment. They even provided documents from the district court proceeding. DeLuca certainly was aware of the district court action, as the case name and case number are listed on the Debtors' Statement of Financial Affairs. DeLuca's reasonable next step would have been to investigate the Judgment supporting the garnishment. He could have done this by asking questions or, more effectively, downloading a copy of the Judgment from PACER, the district court's readily-available electronic docketing system. *See In re Withrow* (Bankr.Ct.), 391 B.R. at 227–28. Instead, he merely flipped through the court documents that the Debtors gave him and assumed ***212** that, since the debt is owed to a hospital, it must be for medical expenses and is thus dischargeable. While that may be true for most, if not nearly all, hospital debts, the Debtors did not retain DeLuca to help with the prototypical situation but rather their own unique situation.

DeLuca did not take any affirmative steps to make sure that the Debtors provided complete and accurate information. *See In re Robinson,* 198 B.R. at 1024. The Retainer Agreement requests copies of prior lawsuits, but there was no related follow-up. The Debtors complied by handing over various district court documents, but neither DeLuca nor any staff member probed any further. DeLuca took a passive role instead of getting personally involved in the Debtors' case. *See id.* While the Debtors, Seare in particular, are hardly models of credibility, there is no evidence that they intended to deceive DeLuca. To get rid of the garnishment, they surely knew that they should answer whatever related questions DeLuca asked.

DeLuca argues that he performed due diligence in light of the limited information that the Debtors provided and their urgency to file. There is clear consensus, however, that an attorney cannot solely rely on the information provided by a client if such information is reasonably apparent to be incomplete or inconsistent, or raises a "red flag." *See id.; In re Kayne,* 453 B.R. at 385; *Fleming Sales,* 611 F.Supp. at 519; *In re Triepke,* 2012 WL 1229524, at *5; *In re Moffett,* 2012 WL 693362, at *3; *In re Bradshaw,* 2011 WL 5854668, at *5 n. 3; *In re Alessandro,* 2010 WL 3522255, at *3; *In re Dean,* 401 B.R. at 924; *In re Withrow* (Bankr.Ct.), 391 B.R. at 228; 2 MOORE'S FEDERAL PRACTICE § 11.11[2]; *ABA Attorney Liability* 704.

Here, the documents provided by the Debtors were incomplete—really, how could they not be unless the Debtors handed over the entire district court docket? The fact that the Judgment led to a garnishment was a sufficient red flag to require further inquiry. Blaming the Debtors for not providing sufficient information does not serve DeLuca's cause. Once again, the Debtors are not bankruptcy experts and could not know what information was relevant or necessary. That is why they retained DeLuca and why the Code places affirmative duties on consumer bankruptcy attorneys.

Other bankruptcy courts have rejected similar blame-the-client arguments. *In re Withrow* (BAP) rejected an attorney's claim that the client's "personal health issues and/or ... faulty memory" justified erroneous and inconsistent petitions and schedules. 405 B.R. at 513. Whatever errors may have been directly attributable to faulty information from the client, they were not sufficient to overcome the attorney's "sloppy and careless actions (or inactions)...." *Id.* The attorney failed to reasonably investigate the underlying facts, and the court sanctioned him under Section 707(b)(4)(C) and Rule 9011 in the amount of three times the fee that the lawyer intended to charge to the client. *Id.* at 514.

Similarly, *In re Moffett* rejected a lawyer's justification for failing to list a substantial asset in the petitions:

> What [the attorney] misses, however, is that the Debtor provided exactly what she was told she had to provide to get her case filed. The fault for the lack of complete information rests with [the attorney] for not insisting that clients he represents be told—and required—to bring in all necessary information before a case will be

> filed. He cannot absolve himself of the duty to conduct a reasonable investigation [under § 707(b)(4)(C)] by affirmatively allowing clients to bring in only the bare minimum of information ***213** and then claiming that it is not his fault that he did not have sufficient information to review.

2012 WL 693362, at *3. Seare and Tedoco likewise provided the information that DeLuca requested. They answered the questions he asked. Whether the Debtors failed to ask the "right" questions to prompt further investigation is immaterial; DeLuca's duty to investigate was not contingent on the Debtors seeking more information about the bankruptcy process. *Id.* at *4.

[64] Nor did the Debtors' urgency to file absolve DeLuca of taking reasonable, and quite easy, steps to ascertain the nature of the Judgment. In one case, an attorney filed a Chapter 7 petition almost immediately after the clients stepped into his office. *In re Alessandro,* 2010 WL 3522255, at *1. The clients sought protection from imminent foreclosure. *Id.* The attorney asked if the debtor had ever filed for Chapter 7 protection before, to which the client answered "no," but the attorney failed to inquire about prior filings under other chapters and failed to independently review the court's docket for prior filings. *Id.* Shortly after filing, the bankruptcy court flagged the client as a repeat filer; she had two previous Chapter 11 and two previous Chapter 13 filings. *Id.* The court sanctioned the attorney under Section 707(b)(4)(C) and Rule 9011. *Id.* at *3–4. Although pressed for time, the attorney "could have easily checked the Court's PACER records." *Id.* at *3.

The Debtors' concern over the garnishment was real and deserved prompt attention, but they did not need a same-day filing. And even if they were in such need, reasonable steps should have been taken. DeLuca could have easily checked the district court docket on the PACER system. More broadly, part of an attorney's role is to guide clients through a complex, and possibly frightening, process. Consumer bankruptcy attorneys regularly deal with clients in financial straits that desire, or demand, immediate action. *See In re Moffett,* 2012 WL 693362, at *1 (client demanded filing on "emergency basis to stop a wage garnishment"). Attorneys must be able to respond in a measured way without being puppets to their clients' distress. The reasonableness of the required inquiry may depend in part on a client's urgency, but here the steps that DeLuca could have taken were so easy that no amount of urgency excused his failure to investigate the Judgment.

In short, DeLuca did not do his level best—or anything close to it—to get it right. *In re Withrow* (Bankr.Ct.), 391 B.R. at 228. He took no steps to independently investigate or verify the circumstances underlying the wage garnishment—falling well short of the "reasonable investigation" required by Section 707(b)(4)(C).

b. Sections 526–528

(1) Legal Standard

BAPCPA added provisions to the Code to govern the relationship between "debt relief agencies" and "assisted persons." 11 U.S.C. §§ 526–528 (2012). A "debt relief agency" is "any person who provides any bankruptcy assistance to an assisted person" in return for payment, such as consumer bankruptcy attorneys. *Id.* § 101(12A); *Milavetz, Gallop & Milavetz, P.A. v. U.S.,* 559 U.S. 229, 130 S.Ct. 1324, 1331, 176 L.Ed.2d 79 (2010). An "assisted person" is "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than $175,750." 11 U.S.C. § 101(3) (2012). A "consumer debt" is a debt incurred "by an individual primarily for a personal, family, or household purpose." *Id.* § 101(8).

***214** Section 526 restricts debt relief agencies:

> A debt relief agency shall not (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title; ... (3) misrepresent to any assisted person ..., directly or indirectly, affirmatively or by material omission, with respect to ... the services that such agency will provide to such person; or the benefits and risks that may result if such person becomes a debtor under this title....

Id. § 526(a).

Section 527 mandates that debt relief agencies provide disclosures to assisted persons that, among other things, (1) briefly describe the general purpose, benefits, and costs of proceeding under Chapters 7, 11, 12, and 13 of the Code, and the types of services available from credit counseling agencies; (2) inform them that they must make truthful and accurate disclosures of income and assets; and (3) generally explain that litigation may be an outcome of filing for bankruptcy. *Id.* § 527.

Section 528 requires that a contract between a debt relief agency and assisted person be in writing and "clearly and conspicuously" explain the scope of services that the agency will provide and the fees or charges for such services. *Id.* § 528(a)(1). With the exception of the writing requirement, this section mirrors Nevada Rule 1.4. The debt relief agency must provide the assisted person with "a copy of the fully executed and completed contract." *Id.* § 528(a)(2).

The contract requirements must be fulfilled within five days of the first date on which the agency provided bankruptcy assistance services to the assisted person, and before the filing of the assisted person's petition. *Id.* § 528(a)(1).[30]

Violations of these sections are harsh for debt relief agencies. "[A]ny contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with [Sections 526–528] ... shall be void" and may only be enforced by the assisted person. *Id.* § 526(b).

(2) Application

[65] As a consumer bankruptcy attorney, DeLuca qualifies as a "debt relief agency." 11 U.S.C. § 101(12A); *Milavetz,* 130 S.Ct. at 1331. He certainly gave "bankruptcy assistance" to the Debtors by providing legal counsel and preparing and filing their petition. 11 U.S.C. § 101(4A). The Debtors qualify as "assisted persons" because, first, their debts consist primarily of consumer debts—approximately two-thirds of their debts are consumer debts.[31] *In re Kelly,* 841 F.2d 908, 913 (9th Cir.1988) (" 'primarily' means 'for the most part' ... i.e., more than half...."), *cited in In re Canales,* 377 B.R. 658, 661 (Bankr.C.D.Cal.2007). Second, the Debtors filed a no-asset case; their non-exempt assets are nowhere near the $175,750 statutory threshold. 11 U.S.C. § 101(3) (2012). Consequently, DeLuca was required to comply with Sections 526–528 in his dealings with the Debtors.

***215** [66] DeLuca's failure to accurately explain that he would not represent the Debtors in adversary proceedings and the risks that the Debtors could face in bankruptcy amounted to a violation of Section 526(a). As explained above, the Retainer Agreement states that representation for nondischargeability allegations and adversary proceedings would result in additional fees. DeLuca, however, flatly refused to provide these services once the Complaint was filed. Thus, he violated Section 526(a)(1) by failing to perform a service he informed the Debtors that he would provide in connection with their bankruptcy case. *Id.* § 526(a)(1).

[67] DeLuca argues that the Debtors could not afford the additional services anyway, so it is immaterial whether he was willing to perform them or not. His argument, however, improperly benefits from hindsight—the Debtors' admission that they could not afford the other attorneys that they consulted. At the time DeLuca refused to perform the additional services, there is no evidence that he offered them to the Debtors and they refused for lack of funds. DeLuca offered no evidence to indicate that he consulted at all with the Debtors before sending them the letter of nonrepresentation in June 2012. As discussed above, DeLuca was required to represent Seare in the adversary proceeding because it was reasonably necessary to achieve the Debtors' ultimate goal—permanent cessation of the wage garnishment. Even if the adversary representation were not so necessary, however, the terms of the Retainer Agreement obligated DeLuca to quote a price to Seare for the adversary representation. The terms of a contract are not just what is written, but what is reasonably necessary to carry out the contract's purposes. *See Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp.,* 961 F.2d 1464, 1467 (9th Cir.1992) ("[T]he courts can and should imply incidental terms necessary to effectuate the contract's purposes."). Because adversary representation was a purpose of the Retainer Agreement, the court views quoting a price for such representation as an implied term of the contract. DeLuca breached by failing to perform that term by quoting a price once the Complaint was filed.

[68] DeLuca also violated Section 526(a)(3). He misrepresented the risks associated with an adversary proceeding that the Debtors were nearly certain to face if they filed for bankruptcy. *See* 11 U.S.C. § 526(a)(3) (2012). The Debtors argue that DeLuca told them the St. Rose Debt was dischargeable. The court does not find that he was so direct, but the statute nonetheless imposes liability for material omissions. Because stopping the garnishment was their primary goal, failing to address the risks of a related adversary proceeding was a material omission.

[69] For essentially the same reasons set forth above in relation to Nevada Rule 1. 5, DeLuca violated Section 528(a). He partially complied by providing a written

contract on the same day as the initial consultation. 11 U.S.C. § 528(a)(1). He failed, however, to provide a "fully executed and completed contract" because he did not sign the Retainer Agreement. *Id.* § 528(a)(2). The Retainer Agreement did not "clearly and conspicuously" explain the scope of services and fees. *Id.* § (a)(1). The Retainer Agreement is reasonably clear in that the attorney billing rate of $495.00 per hour is not buried or hidden, and that the list of services that require additional fees is explicit. There are two problems, however.

First, the list of excluded services uses technical terms. A layperson is unlikely to know what a nondischargeability allegation or bankruptcy adversary proceeding is. ***216** Second, the standard form contract does not relate these services to a client's particular case. And here, in the absence of clarification from DeLuca or his staff, the Retainer Agreement is all that the Debtors had to go on. Since the Debtors did not know which additional services were likely to be needed, they had no way of knowing which exclusions were likely to apply and what the chances were of facing increased legal fees. *See In re Robinson,* 368 B.R. 492, 500–01 (Bankr.E.D.Va.2007). Where adversary litigation arises, those additional fees could greatly exceed the $2,000 flat fee. *See id.* at 501. *Robinson* found that a written contract violated Section 528(a)(1) because it consisted of a visually-dense, small-type single paragraph. Although DeLuca's agreement is not so impenetrable, *Robinson's* words are apt—"it is doubtful that a consumer debtor who has never been through the bankruptcy process and is not a sophisticated purchaser of legal services would have any real understanding, even after reading the contract, just how much is actually covered by the retainer." *Id.* at 500.

Whether DeLuca complied with the disclosure requirements of Section 527 is unknown. There is insufficient evidence for the court to determine what disclosures, if any, DeLuca provided aside from the Retainer Agreement and the FAQ. If, however, there were no other disclosures, then DeLuca did not comply with Section 527. The Retainer Agreement and FAQ do not include the required statement under Section 527(b), which, among other things, explains that litigation is a possible outcome of filing for bankruptcy. Nor do they include the Section 342(b)(1) disclosure, required by Section 527(a)(1), that explains the general characteristics of the different bankruptcy chapters. 11 U.S.C. § 527(a)(1) (2012).

Nonetheless, the court need not reach the potential Section 527 violations because DeLuca's non-compliance with Sections 526 and 528 render the Retainer Agreement void and enforceable only by the Debtors. *Id.* § 526(b).

V. SANCTIONS

A. The Purpose of Sanctions

A lawyer's primary obligations are to her client, but she also owes duties to the public, the legal system, and her profession. The ABA has recognized this in articulating that "the purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession." AM. BAR. ASS'N, JOINT COMM. ON PROF'L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONSS 13 (2005) (the "ABA STANDARDS"). The *ABA Standards* were developed to address ethical violations—noncompliance with the ABA Model Rules and their state corollaries. In determining sanctions for such violations, deterrence is the essential goal—protection from actual and potential rulebreakers.

Likewise, the court may remedy violations of Section 707(b)(4)(C) by ordering sanctions with the predominant purpose of deterrence. *In re OBrien,* 443 B.R. 117, 144 (Bankr.W.D.Mich.2011); *In re Robertson,* 370 B.R. 804, 809 n. 8 (Bankr.D.Minn.2007); *see In re Kayne,* 453 B.R. 372, 382; *In re Withrow* (BAP), 405 B.R. at 515.

The remedy for noncompliance with Sections 526–528 is not a sanction, but rather contract voidance and possible fee disgorgement. 11 U.S.C. § 526(c) (2012). The purpose of deterrence is the same, however, as these Code sections serve to promote proper conduct by consumer bankruptcy attorneys. *Cf.* ***217** *Milavetz,* 130 S.Ct. at 1331 (Sections 526–528 apply to consumer bankruptcy attorneys). In determining whether to disgorge fees—either fully or partially—the court should focus on protecting debtors by deterring similar attorney conduct through compliance with Sections 526–528. *See Berry v. U.S. Trustee (In re Sustaita),* 438 B.R. 198, 213 (9th Cir. BAP 2010) ("[T]he disgorgement of fees ... under § 526 ... does not constitute 'damages,' nor is disgorgement in any way punitive."); *cf. In re Irons,* 379 B.R. 680, 687 (Bankr.S.D.Tex.2007) ("When the Court witnesses possible abuse of debtors by their own lawyers, the Court is compelled to act.").

B. The Range of Sanctions

[70] [71] "Bankruptcy courts have the inherent authority to regulate the practice of attorneys who appear before them." *In re Nguyen,* 447 B.R. 268, 280 (9th Cir. BAP 2011) (en banc) (citing *Chambers v. NASCO, Inc.,* 501

U.S. 32, 43–45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). "Bankruptcy courts ... have express authority under the Code and the Rules to sanction attorneys, including disbarment or suspension from practice" *Id.* at 281 (citing *Price v. Lehtinen (In re Lehtinen),* 564 F.3d 1052, 1058, 1062 (9th Cir.2009)); 11 U.S.C. § 105(a) (2012) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."). "The bankruptcy court has wide discretion in determining the amount of a sanctions award." *In re Kayne,* 453 B.R. at 386 (internal quotation marks and citation omitted); *see In re Withrow* (BAP), 405 B.R. at 514.

The BAP has endorsed the use of the *ABA Standards* to determine the appropriate sanctions for attorney misconduct. *See In re Nguyen,* 447 B.R. at 277 (holding that although failure to follow the *ABA Standards* is not an abuse of discretion, they remain a "helpful guide in the imposition of sanctions").

The *ABA Standards* includes a non-exhaustive list of potential sanctions, which the court may impose individually or collectively: (1) disbarment; (2) suspension; (3) interim suspension; (4) reprimand, a declaration that the lawyer's conduct was improper without limiting the lawyer's right to practice; (5) admonition, a non-public reprimand; (6) probation, which allows the lawyer to practice under specified conditions; (7) reciprocal discipline; and (8) various other sanctions and remedies, such as restitution, assessment of costs, limitation upon practice, appointment of a receiver, requiring that the lawyer take the bar examination or professional responsibility examination, or requiring that the lawyer attend continuing education courses. ABA STANDARDS 14–16.

The Local Rules for the District of Nevada also grant considerable leeway in fashioning sanctions for violations of the Nevada Rules of Professional Conduct. Local Rule 1A 10–7 ("[A]ny attorney who violates these standards of conduct may be disbarred, suspended from practice before this Court for a definitive time, reprimanded or subjected to such other discipline as the Court deems proper.").

Violations of Sections 526–528 render the contract void and enforceable only by the debtor. 11 U.S.C. § 526(c)(1) (2012). If the attorney's violation was intentional or negligent, she is liable to her client for any fees or charges received, actual damages, and reasonable attorney's fees and costs. *Id.* § 526(c)(2); *see In re Gutierrez,* 356 B.R. 496, 506 (Bankr.N.D.Cal.2006).

Section 329(b) and Rule 2017 provide independent bases for the court to examine the reasonableness of attorney's fees. 11 U.S.C. § 329(b) (2012); FED. R. BANKR.P. 2017. If the court determines ***218** that the "compensation exceeds the reasonable value" of the attorney's services, it may cancel the retainer agreement or order disgorgement. 11 U.S.C. § 329(b) (2012).

Courts have awarded a variety of sanctions for the violations that DeLuca has committed. For unbundling in violation of ABA Model Rule 1.2(c) (or its predecessor or state corollary), courts have awarded or endorsed fee reductions under Section 329(b). *In re Johnson,* 291 B.R. at 472; *In re Castorena,* 270 B.R. at 532 n. 49; *see In re Slabbinck,* 482 B.R. at 580. *But see In re Egwim,* 291 B.R. at 581 (sanctions not awarded because lawyer had good faith belief that the unbundling was appropriate and the debtors suffered no adverse consequences).

For violations of Section 707(b)(4), one bankruptcy court suspended the attorney's filing privileges for one year and ordered four hours of continuing education courses—three hours in consumer bankruptcy and one in ethics. *In re Moffett,* 2012 WL 693362, at *4. There, the attorney filed the petition at the client's urging on "an emergency basis to stop a wage garnishment" and failed to list a structured settlement payment. *Id.* at *1. The attorney relied solely on the information provided by the client and failed to perform any independent investigation, and blamed his inadequately trained staff for the incomplete petition. *Id.* at *3–4. The court had previously admonished the attorney for similar conduct. *Id.* at *4.

Another bankruptcy court ordered disgorgement under Section 329(b) and Rule 2017 for failing to research the PACER records for previous filings by his client and failing to inform the court of his client's status as a repeat filer once he should have learned of it. *In re Alessandro,* 2010 WL 3522255, at *4–5. The court stated that, in a situation where pre-filing investigation is impractical or time is of the essence to protect the client's rights, the duty of reasonable inquiry requires the attorney to move for withdrawal if the attorney learns that she has been misled by a debtor. *Id.* at *4. The court placed a notice of the prior filings on the electronic docket three days after the petition was filed. *Id.* The attorney either was not aware of this notice or chose to remain silent. *Id.*

In another case, the First Circuit BAP affirmed a bankruptcy court's order of sanctions in the amount of three times the lawyer's fee where the lawyer blamed the client for inconsistent and inaccurate information on the schedules and petitions. *In re Withrow* (BAP), 405 B.R. at 514. Likewise, the Ninth Circuit BAP affirmed a $20,000 sanction for the trustee's costs and fees in bringing a motion under Section 707(b)(4) and Rule 9011 for what the court found to be an "egregious" failure to list a promissory note payable to the debtor on the petition. *In re Kayne,* 453 B.R. at 385. *In re Triepke* imposed a unique sanction for errors and omissions in the petition violative of Section 707(b)(4) and Rule 9011. *In re Triepke,* 2012 WL 1229524, at *10. The court ordered disgorgement under Section 329(b) and Rule 2017, and that the attorney review the ABA Working Paper on Best Practices for Debtors' Attorneys, the applicable local rule concerning electronic filing, and certify to the court that he had performed such review. *Id.*

For violations of Sections 526–528, bankruptcy courts have ordered partial and total fee disgorgement. *In re Gutierrez,* 356 B.R. at 506; *In re Robinson,* 368 B.R. at 502.

DeLuca argues that the court cannot compel him to represent Seare in the adversary proceeding because to do so would amount to involuntary servitude in violation of the Thirteenth Amendment to the ***219** United States Constitution. (Bankr.Dkt. No. 27 at 8.) He claims that the "basic services bargained for between the parties did not include litigation or adversary proceedings." (*Id.*) He is correct that the "basic services" covered by the flat fee do not include adversary representation, but the "additional services" do include such representation. (Ex. G at 7.) The parties did in fact bargain for adversary representation, albeit for an extra fee. The parties have settled the adversary proceeding, so the court will not consider ordering DeLuca to specifically perform under the Retainer Agreement.[32]

C. The *ABA Standards*

Before applying the *ABA Standards* to DeLuca's violations, it is worth recapping what those violations are. DeLuca violated the duty of competence, Nevada Rule 1.1, by unbundling services (adversary representation) that were reasonably necessary to achieve the Debtors' reasonably anticipated result—permanent cessation of wage garnishment. He violated Nevada Rule 1.2(c) because unbundling adversary representation was unreasonable under the circumstances and because he failed to obtain the Debtors' informed consent. Next, he violated Nevada Rule 1.5 by failing to properly explain the scope of services and fees when the Debtors agreed to retain him. Lastly, he violated Nevada Rule 1.4 by failing to properly communicate with clients—about the overall progress of their case and St. Rose's intent to file an adversary proceeding.

Concerning the Bankruptcy Code, DeLuca violated Section 707(b)(4)(C) by failing to reasonably investigate the nature of the Judgment. He violated Section 526(a)(1) when he failed to quote a price to the Debtors for adversary representation and instead flatly refused to represent them. He violated Section 526(a)(3) by failing to explain the risks of filing—namely, that an adversary proceeding was a near certainty. Next, he violated Section 528(a)(2) by failing to provide a "fully executed" contract to the Debtors. Finally, he violated Section 528(a)(1) by failing to "clearly and conspicuously" explain the scope of services and fees when the Debtors retained him.

[72] The *ABA Standards* dictates consideration of four criteria: (1) the duties violated, whether owed to a client, the public, the legal system, or the profession; (2) the lawyer's mental state, whether she acted intentionally, knowingly, or negligently; (3) the seriousness of the actual or potential injury caused by the lawyer's ***220** misconduct; and (4) the existence of aggravating or mitigating circumstances. ABA STANDARDS 9; *In re Nguyen,* 447 B.R. at 277.

1. The Duties Violated

The most important duties are those owed to the client—loyalty, diligence, competence, and candor. ABA STANDARDS 9–10. In descending order of importance are the duties owed to the general public, the legal system, and the legal profession. *Id.* at 10. The public is entitled to be able to trust lawyers to protect their property, liberty, and lives. *Id.* Accordingly, lawyers should behave with honesty and integrity. *Id.* Being able to trust lawyers to protect one's property is especially important for consumer bankruptcy debtors, who typically seek representation in dire circumstances and face a complex legal process. The system is harmed where lawyers create or use false evidence or intend to deceive the court, and where the lawyer's behavior puts an unreasonable burden on the court. *Id.* The profession is harmed where an attorney's practices reflect poorly on the profession or contribute to a decline in the overall quality of services provided by attorneys in a practice area or region. *See id.*

DeLuca violated his duties to the Debtors, the public, the legal system, and the legal profession. The court considers his violations of the duties of competence and diligence to be of the utmost concern. He failed to perform the most essential of functions—ascertaining the client's objectives. This failure was the first domino. He could not competently unbundle adversary representation without knowing how crucial such representation could be in the

Debtors' situation. Nor could he obtain informed consent. He did not diligently represent the Debtors; he failed to keep them properly informed. Whether framed under the duty of competence or diligence, he failed his duty to provide the debtors with transparent information about the scope of services and his fee structure under the Retainer Agreement. The Debtors were not in a position to understand the benefits and risks of filing for bankruptcy, the likely costs to them, in terms of time and money, and the other options available. He failed the core attorney duty of treating each client as an individual. He unbundled based on his needs, not those of the Debtors. *See* ABA HANDBOOK 7.

DeLuca violated his duty to the public by practicing in a manner that erodes the public's trust in attorneys. He treats all clients the same, creating the impression that attorneys are more interested in fees than solving individual client's problems. He does not explain that his fee structure, which unbundles various services, may not be standard practice or that it creates certain risks. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 19 (2000). This fosters the same impression of profits over clients. The public may grow more distrustful of lawyers if they feel channeled into limited forms of representation that do not respond to individual needs. Because laypeople are unlikely to understand the advantages and risks of unbundled legal services, the general public is harmed to the extent that DeLuca's practice is becoming the norm for consumer bankruptcy attorneys. *See id.*

DeLuca's conduct also harmed the legal system. While his behavior did not rise to deceit, his abandonment left the court system to deal with a pro se litigant in a complicated adversary proceeding. The court faces considerable administrative challenges with pro se litigants, and if the court takes any action to assist the pro se litigant, however innocent, the court may face allegations of impartiality. *See In re* ***221** *Cuddy,* 322 B.R. at 17. DeLuca's Rule 2016(b) disclosure states that adversary proceedings are excluded from the $2,000 flat fee, rather than that adversary proceedings are excluded from DeLuca's scope of services entirely. The court does not find that DeLuca violated his obligations under Rule 2016(b). The court merely points out that it had no way to know that DeLuca would not represent Seare in the adversary proceeding.

2. DeLuca's Mental State

The *ABA Standards* defines three mental states—intent, knowledge, and negligence—in descending order of culpability. ABA STANDARDS 10. "Intent" is when the lawyer acts "with conscious objective or purpose to accomplish a particular result." *Id.* "Knowledge" is when the lawyer acts "with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. *Id.* "Negligence" is when a lawyer "fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation." *Id.*

DeLuca's failure to investigate the Debtors' circumstances—the wage garnishment and the Judgment—was negligent. The reasonable lawyer in that initial consultation would have performed an independent investigation. DeLuca failed to be aware of the substantial risk of an adversary proceeding that the Debtors were nearly certain to face, and consequently could not advise them about the risks associated with such a proceeding. Not all of his conduct, however, was merely negligent.

He knowingly created a system that fails to explain the risks of particular cases to clients. His system intends to do generally, by use of standard form contracts, that which can only be done specifically. He knowingly chose to unbundle certain legal services for all clients, regardless of their circumstance. The Retainer Agreement and the FAQ are the only information provided to clients, and they do not explain the risks of unbundled services, either general or specific to one's case. These documents are insufficient to form the basis of informed consent. He repeatedly failed to call the Debtors back when they specifically requested that he, not his staff, return the calls. The repeated nature of this failing contributes to the conclusion that he treats all clients the same and does not provide individualized service.

He knowingly took steps during the course of representation to make sure that he would not represent Seare in the adversary proceeding. He knowingly structured the Retainer Agreement to require extra fees for adversary representation, yet he did not quote a price to Seare for representation in this adversary proceeding. Instead, he sent Seare the nonrepresentation letter. He also knowingly failed to forward the proposed stipulation and order that St. Rose sent to him one month prior to filing the Complaint. Further, he knowingly failed to sign the Retainer Agreement.

3. Seriousness of the Injury

"The extent of the injury is defined by the type of duty violated and the extent of actual or potential harm." ABA STANDARDS 11.

The court first examines the actual injuries to the Debtors. The Debtors spent considerable time pursuing the bankruptcy case and $2,000 in legal fees. If they had known that the St. Rose Debt was nearly certain to face a nondischargeability allegation, they may not even have filed in the first place. Their other creditors were not dunning them. Although Seare is the defendant in the adversary proceeding, both ***222** he and Tedoco spent time and energy seeking alternative counsel for him. They also lost time communicating with DeLuca about the nonrepresentation. They further spent time and energy attending the OSC Hearing, the Evidentiary Hearing, and preparing the related briefs. The Debtors have also had to endure the stress of not being represented by counsel in the central dispute of their bankruptcy. They have expressed frustration and feelings of deception based on DeLuca's advertisements of full-service lawyering. They did not expect to be in the midst of a bankruptcy and all of a sudden have to find another lawyer.

The potential injuries to the Debtors, and to Seare in particular, are also significant. If Seare and St. Rose had not settled, they would still be embroiled in litigation and preparing for trial. Seare would either be facing a complex proceeding pro se or paying alternative counsel. The cost of that counsel would likely be greater than what DeLuca would have charged because another lawyer would have had to become familiar with the case. The emotional toll for Seare and Tedoco would also likely be great if the proceedings were ongoing.

DeLuca argues that the Debtors were not prejudiced by his nonrepresentation, and that, in fact, they benefitted from the bankruptcy. (Bankr.Dkt. No. 27 at 10, 13.) He first contends that Seare suffered no prejudice because DeLuca advised him "immediately after the filing of the adversary proceeding" of the nonrepresentation. (O SC Hr'g Tr. 10.) DeLuca did not, however, inform Seare *immediately* after the § 341 meeting in March 2012, or *immediately* after the receipt of the proposed order and stipulation (about one month before the Complaint was filed), of the nonrepresentation. DeLuca did not even give Seare the bad news until Seare asked whether the St. Rose Debt had been discharged in an e-mail on June 4, 2012, about two weeks after the Complaint was filed. Had Seare known of the nonrepresentation in a timely manner, he may have been in a position to better mitigate the harm. If Seare had not inquired about the St. Rose Debt, it is unclear when, if ever, DeLuca would have informed him of the nonrepresentation.

DeLuca next contends that Seare had ample time to procure alternate representation. This argument misses the point and is belied by the facts. DeLuca did not send the letter of nonrepresentation until about two weeks after the Complaint was filed, putting Seare in the untenable position of having to scramble to prepare a pro se answer, which he did, or try to retain counsel that could prepare a competent answer within a short time frame. In addition, time is not the only relevant issue. Even if Seare had sufficient time, obtaining alternate counsel was unaffordable—presumably because of the costs of learning the particulars of the case.

Regarding cost, DeLuca claims that Seare did not suffer any prejudice because he could not afford DeLuca's additional fees anyway. This argument fails for several reasons. First, DeLuca never quoted a fee for additional services so he could not have known whether Seare could afford any additional fees. Second, this argument unfairly benefits from hindsight. Seare testified that he could not afford additional fees, but DeLuca did not know this at the time he decided not to represent him. Third, DeLuca was obligated to provide the services regardless of whether Seare could afford them. Adversary representation was reasonably necessary to achieve the Debtors' goals. Even if not reasonably necessary, however, withdrawal for nonpayment of fees in the midst of litigation requires leave of court and DeLuca ***223** did not move for withdrawal. *See* NEV. RULE OF PROF'L CONDUCT 1.16 (2011); *In re DeSantis,* 395 B.R. at 170 ("Attorneys who agree to represent a debtor must provide the agreed services unless and until the Court allows withdrawal.").

Also concerning costs, DeLuca argues that Seare benefitted from the bankruptcy because nearly $137,000 in unsecured debt was discharged for his $2,000 fee. This argument entirely misses the purpose of legal representation, however. The Debtors did not "purchase" a discharge from DeLuca. They retained him for professional services. The value of the services does not depend solely on the amount of the discharge; in some cases, the discharge itself might be a lesser goal. They paid him for his experience and expertise, neither of which were sufficiently applied to the facts of their case. Seare admitted that the discharge was a benefit, just not the benefit they retained DeLuca to provide, and based on what occurred at the initial consultation, their expectation of discharging the St. Rose Debt was reasonable.

DeLuca further argues that the Debtors' goals were partially realized because the garnishments stopped for the pendency of the bankruptcy. DeLuca was not retained for this temporary benefit though. Any pro se filer can obtain this benefit, since the automatic stay is, well, automatic, once the petition is filed. DeLuca essentially served as a bankruptcy petition preparer in obtaining this benefit for the Debtors.

Finally, DeLuca argues that Seare benefitted because his credit score is projected to improve by 102 points. (Bankr.Dkt. No. 27 at 31; Ex. P.) Although Seare admitted the increase would be a benefit, this projection may be meaningless. DeLuca testified that he did not know how CIN calculates the scores; his understanding is that they only consider total debt and not the nature of the debt (e.g., nondischargeable and/or incurred through fraud). (Evid. Hr'g Tr. 42:19–44:5.)

The court finds DeLuca's arguments unavailing. The Debtors, and Seare in particular, suffered substantial actual and potential injury from DeLuca's unethical behavior.

The injury to the public, the legal system, and the profession, must also be considered. DeLuca's conduct has eroded the public trust by serving as an example of one more lawyer that values efficiency and what is best for him over the client's needs. Regrettably, the court has had to expend considerable time and resources to pursue this sanctions matter.[33] The profession suffers, albeit intangibly, where the overall level of consumer bankruptcy practice is dragged down by unethical behavior. These harms are impossible to quantify, but they are nonetheless real.

4. Aggravating or Mitigating Factors

[73] The court may consider aggravating and mitigating circumstances in deciding what sanction to impose. ABA STANDARDS 25. Aggravating factors justify an increase in the degree of discipline imposed. *Id.; In re Nguyen,* 447 B.R. at 277. They include (1) dishonest or selfish motive; (2) a pattern of misconduct; (3) multiple offenses; (4) refusal to acknowledge wrongful nature of conduct; and (5) substantial experience in the practice of law. ABA STANDARDS 26–27. To lesser or greater extent, all of these factors are present for DeLuca. He knowingly created ***224** a system that maximizes efficiency, and therefore profit, in exchange for less client interaction and less attention to clients' particular needs and goals. This can only be characterized as selfish, and a violation of the fiduciary duty to place clients' needs first. That he uses a standard form contract that fails to properly explain the risks of unbundling demonstrates a pattern of misconduct. Just in his dealings with the Debtors he committed multiple ethical offenses, although they really stem from the same set of mistakes. He has refused to admit his mistakes; he has repeatedly blamed the Debtors for failing to provide the correct information. Lastly, he is a highly experienced consumer bankruptcy practitioner. He is obligated to be aware of his duties under the ethical rules and under the Bankruptcy Code.

[74] Mitigating factors justify a decrease in the degree of discipline imposed. *Id.* at 25; *In re Nguyen,* 447 B.R. at 277. They include: (1) absence of a prior disciplinary record; and (2) timely good faith effort to make restitution or to rectify consequences of misconduct. ABA STANDARDS 27–28. To the court's knowledge, DeLuca has not been previously sanctioned by any federal or state court. He has made several efforts to rectify his errors, although whether they were in good faith is questionable. During the OSC Hearing, he offered to reimburse his $2,000 fee to the Debtors (OSC Hr'g Tr. 10:16–1.) The court appreciates this gesture, but even if the Debtors accepted, they would not be placed back where they were before they consulted with DeLuca. He also offered to represent Seare in the settlement negotiations with St. Rose. (Evid. Hr'g Tr. 45:15–46:7.) Although DeLuca perceived Seare to be a "danger" to his firm, he saw this as the most expedient way to extricate himself from the matter. (*Id.*) The court doubts that DeLuca made these gestures in good faith because his motives seem to be more about avoiding sanctions than rectifying harm. Nevertheless, the court recognizes the gestures as mitigating factors.

D. The Sanctions Imposed

[75] DeLuca violated the most important duties of a lawyer—those to his clients—as well as duties to the public, the legal system, and the legal profession. Many of his actions were done knowingly, while in some instances they were merely negligent. As a consequence of these violations, the Debtors suffered substantial actual and potential injury. The public, the legal system, and the legal profession were also victims. While he made several attempts to rectify the Debtors' injuries, the aggravating factors overwhelm the mitigating factors.

The *ABA Standards* recommends sanctions depending on the duty violated and the lawyer's mental state. They are a good starting point. For the types of violations that DeLuca has committed, the suggested sanctions follow a consistent theme—suspension for knowing violations and reprimand for negligent violations. ABA STANDARDS 18–19, 21, 24.

Based on the *ABA Standards* and the court's authority under Sections 105(a), 329(b) and 526(c), the court hereby imposes the following sanctions on DeLuca:

1. Disgorgement of Fees

The court orders the disgorgement of all attorney's fees that the Debtors paid to DeLuca, including but not limited to the $1,995.00 paid under the Retainer Agreement. Under Section 329(b), the court may order the return of fees that "exceed[ ] the reasonable value" of the services rendered by DeLuca. 11 U.S.C. § 329(b) (2012). Although DeLuca did not provide the Debtors with what they reasonably expected in the circumstances— ***225** permanent cessation of garnishment—his services were not without any value. The Debtors received a discharge of all their dischargeable debts and garnishment was temporarily stayed. The lack of individualized attention rendered DeLuca a bankruptcy petition preparer at best. In this sense, the court finds that the reasonable value of DeLuca's services was $150.00.[34]

DeLuca is not entitled to retain this $150.00, however, because deterrence is best-served by disgorging all of the fees. The totality of the ethical and statutory violations, and the harms thereby caused to the Debtors, the legal system, the public, and the profession, are sufficiently severe such that the court cannot send the message that an attorney who so behaves will retain any compensation. DeLuca failed his essential, fundamental duty—determining the Debtors' primary objective—and cannot be rewarded.

Section 526(c) provides independent grounds for total disgorgement. DeLuca's noncompliance with Sections 526 and 528 render him liable to the Debtors "in the amount of any fees or charges in connection with providing bankruptcy assistance" to them. *Id.* § 526(c)(2). In other words, he is liable for the entirety of his attorney's fees. The court finds that total disgorgement is the most appropriate way to promote compliance with Sections 526–28.

The *ABA Standards* also supports disgorgement. Although these standards do not expressly link disgorgement to any specific mental state, disgorgement fits well in the general framework of reprimand for negligent violations and suspension for knowing violations. DeLuca engaged in both negligent and knowing conduct, but his core mistake was due to negligence. A suspension is not warranted but a mere reprimand would be insufficient. Disgorgement is thus appropriate, and necessary to deter similar unethical conduct. The aggravating factors also warrant more than a reprimand, as DeLuca is an experienced practitioner, he engaged in a pattern of selfish conduct, and blamed the Debtors instead of owning up to his professional shortcomings.

Moreover, several bankruptcy courts have ordered total disgorgement in like circumstances. *In re Alessandro,* 2010 WL 3522255, at *4–5 (failure to research PACER system for prior filings violated § 707(b)(4)); *In re Gutierrez,* 356 B.R. at 506 (violations of §§ 527–28); *cf. In re DeSantis,* 395 B.R. at 169–70 (disgorgement of all or a substantial portion of fees would likely follow a withdrawal based upon attorney's belief that she cannot or should not represent a debtor in a reaffirmation decision).

The court has wide discretion to fashion appropriate sanctions; the *ABA Standards* lists restitution as an available remedy; the Code authorizes disgorgement in this circumstance; and case precedent provides additional support. The court believes that complete disgorgement is a fair remedy that sends the appropriate message to the consumer bankruptcy bar that operating consumer bankruptcy "mills" that fail to provide individualized representation inheres the risk of receiving zero compensation where such failure deprives the client from being able to obtain the relief for which she sought assistance of counsel in the first place.

***226** Because DeLuca has not previously been sanctioned, and made some effort to mitigate the harm to the Debtors by offering to refund the fee and represent Seare in negotiations with St. Rose, the court does not order any monetary sanctions beyond fee disgorgement. There is precedential and statutory support to do so, but the court declines to go so far. 11 U.S.C. § 526(c)(2) (2012) (liability for actual damages); *see In re Withrow (BAP),* 405 B.R. at 513.

2. Publication of this Decision

The court orders that this opinion be submitted for publication in West's *Bankruptcy Reporter.* Publication is a form of reprimand, which the *ABA Standards* expressly endorses for negligent violations. The seriousness of the harms caused by DeLuca supports a public reprimand. "Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed." ABA STANDARDS 13. While DeLuca himself may not engage in the same conduct in the future, the purposes of sanctions are to deter such conduct by all attorneys.

Publication serves to deter future sanctionable conduct by shining light on DeLuca's behavior, and more broadly on the negative repercussions of operating a consumer bankruptcy "mill." The public is better protected by increased awareness of the pitfalls of unbundled representation in general and in the consumer bankruptcy arena in particular. The bar is better informed about what types of conduct are sanctionable and the nature of the sanctions that may be imposed; the level of practice in the community should thus improve.

3. Continuing Education

The court orders DeLuca to complete five hours of continuing education regarding collection and enforcement of judgments, and ten hours regarding ethical responsibilities to clients. He must complete the courses within one year of the date of entry of this opinion. DeLuca shall submit proof of attendance to the court within one week of completing each course.

The essential purpose of this sanction is to deter DeLuca from repeating the conduct that led to these sanctions in the first place. Next, this sanction signals to the bar that an understanding of judgment collection is necessary to the practice of bankruptcy law, as is the understanding of a lawyer's ethical duties. DeLuca's experience as a practitioner did not itself deter his misconduct. Therefore, the court must take more coercive action to ensure that Mr. DeLuca has the necessary knowledge to represent consumers within the bounds of ethics and the Bankruptcy Code.

4. Provision of this Decision to Future Clients

Finally, the court orders DeLuca to provide a copy of this opinion to every client in the next two years (commencing on May 1, 2013) who is sued in an adversary proceeding, but only if DeLuca declines to represent them in that adversary proceeding for any reason. If DeLuca properly declines to represent a client in an adversary proceeding—where such limitation is reasonable under the circumstances and the client gives informed consent—then this opinion will merely serve to confirm that DeLuca's limitation on services is proper. If not, then the opinion will serve to put clients on notice that DeLuca has unethically unbundled services in the past and that unbundling contains certain risks.

The court finds this sanction especially important because DeLuca engaged in a ***227** pattern of selfish misconduct that likely extends beyond his representation of the Debtors. The court seeks to ensure that each future client that finds herself in the same situation as the Debtors is properly informed. Because DeLuca knowingly established a system that does not provide sufficiently individual representation, the two-year duration is intended to promote a systematic change in his practice—namely, an assessment of the reasonableness of unbundling services based on each client's circumstances and the proper communication of the risks of unbundling to each client. The broader goal is to promote better practices within the consumer bankruptcy bar in general.

This sanction also informs the bar that being caught for unethical conduct has repercussions beyond just paying a fine and moving on. Whether to behave ethically should not just be a business calculation that weighs the cost of being caught against the potentially higher profits of streamlining representation to the point at which each client is treated like the next. DeLuca's sanctionable conduct occurred in a case in which an adversary proceeding was filed—a rare occurrence. Given its rarity, DeLuca need not provide a copy of this opinion to every prospective client. But where he is placing a client in the same predicament as the Debtors, that client should be aware of the related risks. The court believes that the best way to assure such awareness is to mandate the provision of this opinion, which in turn should deter unethical conduct.

Noncompliance with any of the above may result in the imposition of additional sanctions or a finding of contempt of court.

VI. CONCLUSION

DeLuca's business model automatically divorces representation in a consumer's main Chapter 7 case from representation in any adversary proceeding that arises after filing—a practice known generally as "unbundling." While unbundling is not necessarily evil, it must be done intelligently and in accordance with the applicable rules of professional responsibility. One of the aspects of a regulated profession such as law is that the ethical and other rules governing lawyers restrict a lawyer's freedom of contract with his or her clients. These rules require that limitations in representation such as unbundling have to be consistent with the goals of the legal representation, and that the client must give informed consent to the limitations. This should not be exceptional. These rules and the practices of most attorneys are consistent with unbundling of adversary proceedings in most bankruptcy cases.

Here, however, they failed. They failed because DeLuca failed to ascertain the Debtors' goals, and failed to properly inform himself of the circumstances surrounding Seare's wage garnishment. Underlying these failures was DeLuca's system which generically treats all clients the same, with little or no individualized differentiation. But the practice of law is not a one-size-fits-all consumer good; it is a profession that demands individual attention to each client. Lawyers have fiduciary duties to clients, and by definition a fiduciary duty means lawyers must place clients' interests above their own. DeLuca has done the opposite, by knowingly designing a system that prioritizes efficiency and uniformity above the particularized needs of each client.

DeLuca violated multiple state ethical rules and sections of the Bankruptcy Code as set forth above. Yet all these violations stem from a single source—his "mill" system of processing cases. By blindly adhering to his system in this case, DeLuca violated Nevada Rules 1.1, 1.2, 1.4, and ***228** 1.5, and Bankruptcy Code sections 526, 528, and 707(b)(4)(C). The court believes that the sanctions imposed should sufficiently incentivize DeLuca to practice consumer bankruptcy in a manner that pays appropriate attention to the details of each client's case, and should sufficiently deter other attorneys from unethically unbundling legal services.

Based on the foregoing, the court ORDERS Anthony J. DeLuca SANCTIONED as set forth above.

This opinion constitutes the court's findings of fact and conclusions of law under Rule 7052, made applicable here by Rule 9014(c).

All Citations

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Footnotes

1 Unless specified otherwise, all "Chapter" and "Section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532; all "Rule" references are to the Federal Rules of Bankruptcy Procedure, FED. R. BANKR.P. 1001–9037; all "Civil Rule" references are to the Federal Rules of Civil Procedure, FED.R.CIV.P. 1–86; and all "Evidence Rule" references are to the Federal Rules of Evidence, FED.R.EVID. 101–1103.

2 The court has the duty to enforce the requirements of professional conduct for lawyers for Chapter 7 debtors that appear to be violated when a represented Chapter 7 debtor appears *pro se* in an adversary proceeding. *In re Egwim,* 291 B.R. 559, 563 (Bankr.N.D.Ga.2003). While the applicable law, DeLuca's conduct, and the sanctions imposed are detailed below, the court initially highlights that "[u]nder the provisions of 11 U.S.C. § 329 and Rules 2016 and 2017 ..., [it] has the power and obligation to determine the services that an attorney for a debtor must perform in order to be entitled to a reasonable fee ... [and] the inherent power to regulate the conduct of attorneys that practice before [it]." *Id.* at 563 n. 2.

3 *Seare v. St. Rose Dominican Health Foundation,* No. 2:10–cv–02190–KJD–GWF, 2011 WL 5101972 (D.Nev. Oct. 25, 2011).

4 "Dist. Dkt. No." refers to the docket entry for documents filed electronically through CM/ECF in the federal district court case. *See id.* Likewise, "Bankr.Dkt. No." refers to documents filed electronically in the main bankruptcy case, and "Dkt. No." refers to documents filed electronically in this adversary proceeding.

5 The Judgment amount is the debt that St. Rose claimed is nondischargeable in this adversary proceeding (the "St. Rose Debt"). Seare did not contest that the debt was incurred through fraud, (Evid. Hr'g Tr. 13:10–11, Oct. 23, 2012), although he did assert that he has a valid defense to St. Rose's claims. (*See* Dkt. No. 13.)

6 It is unclear whether the Debtors gave DeLuca a copy of the Judgment and/or copies of the Order for Wage Garnishment and Order for Sanctions. (*See* Evid. Hr'g Tr. 10:8–15; Dkt. No. 29 at 2; Dkt. No. 47 at 2.) Seare stated that he gave a copy of the Judgment and Writ of Garnishment to DeLuca and that DeLuca "thumbed through both of them." (Evid. Hr'g Tr. 10:8–15.) Tedoco later claimed that they gave DeLuca a copy of the Order for Wage Garnishment and Wage Sanctions. (Dkt. No. 47 at 2.) DeLuca has no independent recollection of meeting the Debtors or of reviewing the Judgment. (Evid. Hr'g Tr. 40:8–16; Bankr.Dkt. No. 27 ¶ 34.)

7 This is less than half of the maximum allowable garnishment, which at Seare's pay rate is 25% of his disposable

earnings—$702 per month. NEV.REV.STAT. § 31.295 (2011).

8 The approximately $137,430 derives from $219,943 in unsecured, non-priority claims less the St. Rose Debt ($67,431) and less several student loans (approximately $15,083). (Bankr.Dkt. No. 1.) The Debtors did not have any priority claims. (*See id.*)

9 All references to "DeLuca" are inclusive of DeLuca's employees and office staff.

10 "Nevada Rule" refers to the Nevada Rules of Professional Conduct. NEV. RULES OF PROF'L CONDUCT 1.0–8.5 (2011).

11 That DeLuca admits that he tried to settle St. Rose's claim raises the question of whether DeLuca decided to represent Seare in the adversary proceeding, and whether Seare agreed to the representation. If DeLuca's actions constituted a decision to represent Seare, then that in turn raises the issue of whether DeLuca appropriately withdrew from representation. Nonetheless, the court views the circumstances such that DeLuca's settlement efforts did not themselves establish that DeLuca represented Seare in the adversary proceeding.

12 The evidence binder submitted by DeLuca before the Evidentiary Hearing contains printouts of the purported credit score estimations. The reports were not marked as an exhibit. However, the court admitted all of the proposed exhibits at the evidentiary hearing and the CIN Legal Data Services Reports are hereby marked as Exhibit O. (Dkt. No. 35 at 47:12–13).

13 Pub.L. 109–8, 119 Stat. 23 (2005).

14 That debts incurred through fraud are nondischargeable is black letter bankruptcy law. With 11 years of experience practicing consumer bankruptcy and having filed over 10,000 cases, DeLuca certainly knew this. (*See* Evid. Hr'g Tr. 36:23–37:6.)

15 *See* Hon. David S. Kennedy & Vanessa A. Lantin, *Litigation: Professionalism: Maintaining the Professionalism and Competence of a Lawyer in Bankruptcy Litigation When Compensation Becomes a Problem and Related Matters,* 13 J. BANKR.L. & PRAC. 5 Art. 2 (2004) ("[I]t has been said that some consumer attorneys simply run so-called bankruptcy 'mills' where the primary objective is merely to maximize the economic return to the attorney fees with little attendant expense and time in what is negatively stereotyped as an administrative practice or a 'cookie cutter operation.' ").

16 While a precise definition of "professional" is difficult to pin down, *Black's Law Dictionary* defines a "professional" as "[a] person who belongs to a learned profession or whose occupation requires a high level of training and proficiency." BLACK'S LAW DICTIONARY 1329 (Brian A. Garner ed., 9th ed. 2009); *see generally* Kevin F. Ryan, *Lex et Ratio ... Professionalism and the Practice of Law (Part One),* 27 VT. BAR. J. 7 (2001); AM. BAR ASS'N, ".... IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR REKINDLING OF LAWYER PROFESSIONALISM 10 (1986) ("ABA BLUEPRINT").

The American Bar Association ("ABA") has supported Dean Roscoe Pound's definition of a "profession" as " 'pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood.' " *See* ABA BLUEPRINT 10 (quoting ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)). The ABA has rephrased this somewhat: "[a] professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and the public good." AM. BAR ASS'N, SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 6 (1986). Notably, the ABA defined "public service" as "representing *individual clients* and zealously advocating their interests in a professional manner." *Id.* at 6 n. 22 (emphasis added).

17 *See* Michele N. Struffolino, *Taking Ltd. Representation to the Limits: The Efficacy of Using Unbundled Legal Servs. in Domestic Relations Matters Involving Litig.,* 2 ST. MARY'S J. LEGAL MAL. & ETHICS 166, 176 (2012); Stephanie L. Kimbro, *The Ethics of Unbundling,* 33 FAM. ADVOC. 27 (2010); Thomas J. Yerbich, *Testing the Limits on Unbundled Representation,* 23 AM. BANKR.INST. J. 8 (2004).

18 The former version of the rule stated, "A lawyer may limit the *objectives* of representation if the client consents after consultation." ABA MODEL RULE 1.2(a) (1988) (emphasis supplied). The rule was modified because only a client can limit the objectives, and the addition of the reasonableness standard was thought desirable. ANNOTATED RULES 38.

19 While not binding on this court, the state court rules of practice in Clark County impose affirmative duties on attorneys who provide unbundled services that the Nevada Rules do not.

> (a)An attorney who contracts with a client to limit the scope of representation shall state that limitation in the first paragraph of the first paper or pleading filed on behalf of that client. Additionally, if the attorney appears at a hearing on behalf of a client pursuant to a limited scope contract, the attorney shall notify the court of that limitation at the beginning of that hearing.
>
> (b) An attorney who contracts with a client to limit the scope of representation shall be permitted to withdraw from representation before the court by filing a Notice of Withdrawal of Attorney with the clerk's office. The Notice of Withdrawal of Attorney shall state that the attorney is withdrawing from the case because the attorney was hired to perform a limited service, that service has been completed, and shall include a copy of the limited services retainer agreement between the attorney and the client. The Notice of Withdrawal of Attorney shall also state that the client will be representing himself or herself in proper person unless another attorney agrees to represent the client....

Nev. 8th Jud. Dist. Ct. Rule of Practice 5.28 (2012).

20 "[1] the capabilities of the client, [2] the nature [i.e., complexity] and importance of the legal problem, [3] the degree of discretion that decision-makers exercise in resolving the problem, [4] the type of dispute-resolution mechanism, and [5] the availability (or not) to the client of other self-help resources." ABA HANDBOOK 59, 61. For similar factors, see CAL. COMM. ON ACCESS TO JUSTICE, LTD. REPRESENTATION COMM., GEN. CIVIL LTD. SCOPE REPRESENTATION: RISK MGMT. MATERIALS (2007); CAL. COMM. ON ACCESS TO JUSTICE, FAMILY LAW LTD. SCOPE REPRESENTATION: RISK MGMT. MATERIALS (2004).

21 The steps relate to both general office practice and individual client interaction: (1) "[c]onsider providing self-help informational materials to prospective clients in your waiting room, through the mail, or on-line;" (2) "stay within your practice area;" (3) perform a thorough and comprehensive "diagnostic" initial interview; (4) identify the client's problems and goals; (5) "[a]dvise the client about the available strategic and representational options, and help the client make selections;" (6) "[i]dentify what the lawyer will, and will not, do;" (7) "[i]dentify what the client can do;" (8) obtain informed consent from the client; (9) "[e]mbody all of the agreements and understandings, and the informed consent, in a written retainer agreement;" and (10) "[a]nticipate the need to revise the agreement by adding a flexible revision provision to it." ABA HANDBOOK 4–74.

22 At least one bankruptcy court has developed a local rule to deal with the unbundling phenomenon. The U.S. Bankruptcy Court for the District of Maryland mandates:

> An attorney who files a petition in bankruptcy on behalf of a debtor ... will be counsel of record in all matters arising during the administration of the case, such as adversary proceedings ... In an individual case, representation will continue through discharge and continue as to any matter pending at the time of discharge. However, an attorney representing an individual debtor may exclude adversary proceedings ... provided that debtor's written acknowledgment of this limitation is filed with counsel's Federal Bankruptcy Rule 2016(b) statement.

Bankr.D. Md., Local Rule 9010–5.

Several districts indirectly discuss unbundling through their rules on what obligations an attorney incurs by appearing in a case. Some provide that attorneys who appear in a case must represent debtors in all related matters, including adversary proceedings. Bankr.N.D. Ga., Local Rule 9010–4; Bankr.E.D.N.C., Local Rule 9011–1. Others exclude representation in adversary proceedings from those duties incurred merely by appearing in a case. Bankr.N.D. Ill., Local Rule 2090–5(B); Bankr.W.D.N.C., Local Rule 2091–1(a)(1) (in Chapter 7 cases, attorney may exclude representation in adversary proceeding if so provided in attorney's fee agreement). The local rules for this bankruptcy court fit into the latter category. "An attorney who appears in a case on behalf of a party is the attorney of record 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." Bankr.D. Nev., Local Rule 2014(a). This rule is not dispositive in DeLuca's favor though, as the issue here is not the scope of duties imposed by making an appearance, but rather the ethical duties surrounding unbundling. The rule does, however, lend support to the notion that unbundling of adversary services is an acceptable practice.

23 The ramifications of his failure to investigate are also discussed below in relation to Section 707(b)(4)(C).

24 The court does not express an opinion of whether a limitation that does not violate any ethical rules is automatically reasonable.

25 Seare may have a misrepresentation claim against DeLuca based on the language of the Retainer Agreement, which stated that adversary proceedings would incur additional fees, and DeLuca's later outright refusal to represent Seare in the adversary proceeding. DeLuca held out that he would negotiate later for services in adversary proceedings, although he may not have ever had the intent to perform them.

26 The court does not consider the FAQ as a meaningful "communication" because there is no evidence that the Debtors ever looked at it, either alone or with guidance from DeLuca. Seare testified that he did not look at the FAQ because DeLuca had answered all of his questions. (Evid. Hr'g Tr. 12:22–24.)

27 *Kayne* relied in part upon a "Sense of Congress" provision included in BAPCPA instructing Sections 707(b)(4)(C) and (D) to be read together with Rule 9011. *Id.* at 381 n. 6 (citing Pub.L. 109–8 § 319 (2005) ("It is the sense of Congress that rule 9011 ... should be modified to include a requirement that all documents ... submitted to the court ... by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors' attorneys have made reasonable inquiry to verify that the information contained in such documents is (1) well grounded in fact; and (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.")).

28 The entire *In re Withrow* (Bankr.Ct.) standard: "(1) did the attorney impress upon the debtor the critical importance of accuracy in the preparation of documents to be presented to the Court; (2) did the attorney seek from the debtor, and then review, whatever documents were within the debtor's possession, custody or control in order to verify the information provided by the debtor; (3) did the attorney employ such external verification tools as were available and not time or cost prohibitive ...; (4) was any of the information provided by the debtor and then set forth in the debtor's court filings internally inconsistent—that is, was there anything which should have obviously alerted the attorney that the information provided by the debtor could not be accurate; and (5) did the attorney act promptly to correct any information presented to the Court which turned out, notwithstanding the attorney's best efforts, to be inaccurate." *In re Withrow,* 391 B.R. at 227–28.

29 Section 707(b)(4)(C) is described as an "enhancement" to Rule 9011 because the overarching purpose of both is to deter attorney misconduct and because the review standard for Section 707(b)(4)(C) relies upon Rule 9011 precedent. A Rule 9011 violation, however, is not a necessary element for a violation of Section 707(b)(4)(C). There have been no allegations that DeLuca violated Rule 9011 and thus the court only assesses whether he violated Section 707(b)(4)(C), albeit relying in part on Rule 9011 case law.

30 Section 528 also includes advertising restrictions not at issue here. 11 U.S.C. §§ 528(a)(3), (4), 528(b).

31 The Debtors' debts total approximately $230,000, none of which are secured by real property. (Bankr.Dkt. No. 1, Summary of Schedules.) The consumer debts are approximately $159,500 (excluding the St. Rose Debt)—69 percent of the total debt. (*Id.*) Whether the St. Rose Debt is a consumer debt is immaterial, and the court does not reach that issue.

32 In any event, courts are loath to order specific performance in personal services contracts due to the concern over timely and effective performance by a nonwilling party. *See* RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981). Nonetheless, DeLuca is wrong about the law. If a contract clause is stricken as void as against public policy or otherwise unenforceable, the court may sever that clause and order performance of the remainder of the contract. *Dawson v. Goldammer,* 295 Wis.2d 728, 722 N.W.2d 106, 111–12 (App.2006); RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 184 (1981); *cf. Janik v. Rudy, Exelrod & Zieff,* 14 Cal.Rptr.3d 751, 758, 119 Cal.App.4th 930, 940 (2004) (an attorney's obligations may extend beyond the four corners of a limited scope agreement so as to include the duty to assert claims arising out of the same facts that the client would reasonably expect to be asserted to accomplish the objectives of the representation); Del. State Bar Ass'n, Comm. Prof'l Ethics, Opinion 2006–1 (Jan. 26, 2006) ("[T]he attorney may be required to perform beyond the terms of the [limited scope] retention agreement if the Court requested, or the Client's circumstances warranted such action.") (discussing DEL. RULE OF PROF'L CONDUCT 1.2(c), which is identical to NEV. RULE OF PROF'L CONDUCT 1.2(c)). That would not amount to involuntary servitude but rather to holding a contracting party to its obligations.

33 With the second-busiest bankruptcy docket in the country, the court would prefer to spend time on the substantive matters on docket. But regulating the attorneys that practice before the court is a necessary component of what the court does to protect the public and the integrity of the profession.

34 U.S. TRUSTEE PROGRAM, REGION 17, GUIDELINES FOR PETITION PREPARERS IN THE DIST. OF NEV. (1997), *available at* http://www.justice. gov/ust/r17/docs/general/nv/petition_preparer_guidelines.pdf (last visited Feb. 25, 2013) (maximum compensation for a bankruptcy petition preparer is $150.00).

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515 B.R. 599
United States Bankruptcy Appellate Panel
of the Ninth Circuit.

In re Wayne A. SEARE and Marinette Tedoco,
Debtors.
Anthony J. DeLuca, Appellant,
v.
Wayne A. Seare, Appellee.

BAP No. NV–13–1196–KiTaJu.
|
Bankruptcy No. 2:12–bk–12173–MKN.
|
Adversary No. 2:12–ap–01108–MKN.
|
Argued and Submitted Jan. 24, 2014.
|
Filed Aug. 25, 2014.

Synopsis

Background: Chapter 7 debtors' attorney appealed order of the Bankruptcy Court, Bruce A. Markell, J., 493 B.R. 158, sanctioning him for conduct related to his handling of debtors' case.

[Holding:] The Bankruptcy Appellate Panel, Kirscher, J., held that Bankruptcy Court did not abuse its discretion in sanctioning debtors' attorney, ordering disgorgement of all fees received and publication of Bankruptcy Court's opinion, and requiring that attorney take continuing legal education classes.

Affirmed.

Jury, J., filed separate concurring opinion.

West Headnotes (11)

[1] **Bankruptcy**
Discretion

Bankruptcy Appellate Panel (BAP) reviews all aspects of bankruptcy court's award of sanctions for abuse of discretion.

Cases that cite this headnote

[2] **Bankruptcy**
Discretion

Bankruptcy court's choices of sanctions are reviewed for abuse of discretion.

Cases that cite this headnote

[3] **Bankruptcy**
Particular cases and issues

With respect to sanctions, a bankruptcy court's factual findings are reviewed for clear error and given great deference.

Cases that cite this headnote

[4] **Bankruptcy**
Conclusions of law; de novo review

Whether an appellant's due process rights were violated is a question of law the Bankruptcy Appellate Panel (BAP) reviews de novo.

2 Cases that cite this headnote

[5] **Attorney and Client**
Power and duty to control
Bankruptcy
Power and Authority

Bankruptcy courts have the inherent authority to regulate the practice of attorneys who appear before them.

Cases that cite this headnote

[6] **Attorney and Client**
Liability for costs; sanctions
Attorney and Client
Jurisdiction of Courts
Bankruptcy
Frivolity or bad faith; sanctions

Bankruptcy courts have express authority under the Bankruptcy Code and the Bankruptcy Rules to sanction attorneys, including disbarment or suspension from practice.

1 Cases that cite this headnote

[7] **Bankruptcy**
Frivolity or bad faith; sanctions

Bankruptcy court has wide discretion in determining the amount of a sanctions award.

Cases that cite this headnote

[8] **Bankruptcy**
Scope of review in general

In reviewing bankruptcy court's attorney disciplinary sanctions, Bankruptcy Appellate Panel (BAP) determines whether (1) the disciplinary proceeding was fair, (2) the evidence supports the findings, and (3) the penalty imposed was reasonable.

Cases that cite this headnote

[9] **Attorney and Client**
Liability for costs; sanctions
Bankruptcy
Frivolity or bad faith; sanctions

Bankruptcy court did not abuse its discretion in sanctioning Chapter 7 debtors' attorney, ordering disgorgement of all fees received and publication of bankruptcy court's opinion, and requiring that attorney take continuing legal education classes, based on attorney's "unbundling" of legal services to exclude representation in adversary proceedings, when, had he conducted adequate initial consultation, he would have known that the filing of fraud-based nondischargeability proceeding was a near certainty; attorney's decision was "unreasonable" and violative of Nevada Rules of Professional Conduct, and the result of the attorney's failure to properly communicate with debtors.

Cases that cite this headnote

[10] **Bankruptcy**
Procedure

Reopening of a case after the close of evidence rests in the discretion of the trial court.

Cases that cite this headnote

[11] **Bankruptcy**
Effect as to co-debtors, guarantors, and sureties

When considering whether community discharge applies, the bankruptcy court must first determine whether the debt is a community debt under state law; the court must then determine the scope of the discharge. 11 U.S.C.A. § 524(a)(3).

Cases that cite this headnote

Attorneys and Law Firms

***600** Christopher Burke, Esq. argued for appellant Anthony J. DeLuca; Appellee Wayne A. Seare argued pro se.

Before: KIRSCHER, TAYLOR and JURY, Bankruptcy Judges.

OPINION

KIRSCHER, Bankruptcy Judge.

Appellant Anthony J. DeLuca ("DeLuca") was the bankruptcy attorney for chapter 7[1] debtors Wayne A. Seare ("Seare") and his wife Marinette Tedoco ("Tedoco") (collectively, "Debtors"). DeLuca appeals an order from the bankruptcy court sanctioning him for conduct related to his handling of Debtors' case. We AFFIRM.

*601 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Prepetition events

1. The district court lawsuit and judgment against Seare

In December 2010, Seare sued his former employer St. Rose Dominican Health Foundation ("St. Rose") for employment discrimination, alleging that he had been the victim of sexual harassment by a female co-worker and that he was wrongfully terminated in retaliation for his reporting the harassment. The co-worker's harassment of Seare allegedly included sending him sexually explicit emails. After an investigation of the matter by St. Rose, Seare was terminated.

While the lawsuit was pending in the United States District Court for the District of Nevada ("district court"), Seare admitted to his attorney that he had "embellished" the explicit emails to bolster his harassment claims. Seare's attorney disclosed the misconduct to the district court in a motion to withdraw. Ultimately, on October 24, 2011, the district court ordered sanctions against Seare, dismissed his lawsuit against St. Rose with prejudice, and ordered him to pay St. Rose's attorney's fees ("Sanctions Order"). The district court found that Seare had committed "fraud upon the court" by knowingly providing false information, allowing his attorney to file an amended complaint based upon that false information and instituting and conducting litigation in bad faith.

A judgment was entered on October 25, 2011, in favor of St. Rose for its attorney's fees of $67,430.58 ("Judgment"). The one-page Judgment did not mention "fraud" or provide any factual or legal bases for supporting the Judgment. Thereafter, St. Rose obtained a Writ of Garnishment and served it on Seare's current employer. The garnishment of Seare's wages prompted Debtors to seek counsel about whether to file bankruptcy.

2. Debtors retain bankruptcy attorney DeLuca

Some of the facts surrounding Debtors' meeting with DeLuca are disputed, but other facts are not. DeLuca contends that certain facts asserted by Tedoco and relied upon by the bankruptcy court were not admissible, which we address below.

Debtors consulted with DeLuca, a bankruptcy attorney of eleven years, at his office on February 13, 2012, at around 5:00 p.m. This meeting was Debtors' only in-person contact with DeLuca, but DeLuca testified that he spoke with them at least once by phone thereafter.

During an evidentiary hearing, Seare testified that Debtors gave DeLuca a copy of the "order" and the Writ of Garnishment and that DeLuca "thumbed through them." Seare had also asserted in a pre-hearing brief that Debtors gave DeLuca two documents at their initial consultation—a copy of the Order for Wage Garnishment and the Sanctions Order. Tedoco also asserted that Debtors gave DeLuca copies of the Order for Wage Garnishment and the "Wage Sanctions." DeLuca had no independent recollection of meeting Debtors or of reviewing the Sanctions Order or Judgment. He did, however, concede that his firm knew about the Judgment and Order for Wage Garnishment at the time the bankruptcy petition was filed.

Debtors claimed DeLuca reviewed the district court papers and told them that the debt referred to in the Order for Wage Garnishment and Judgment was dischargeable. Seare claimed in a pre-hearing brief that during the consultation, Tedoco told DeLuca that the St. Rose debt and Order for Wage Garnishment were not from medical expenses. Rather, the debt ***602** was based on the Sanctions Order for attorney's fees, which was imposed because Seare submitted embellished emails to the district court in his lawsuit against St. Rose. Seare also testified that he told DeLuca about his embellished emails. According to Seare, DeLuca affirmatively told Debtors that the St. Rose debt referenced in the Order for Wage Garnishment was dischargeable, even though it was incurred through fraud. However, Seare contradicted himself when he testified that "fraud" was never discussed during the consultation. Seare testified that DeLuca did not discuss with Debtors about what sort of debts might not be dischargeable or that an adversary proceeding might be filed against him.

After the brief consultation with DeLuca, Debtors were placed in a room to read, initial and sign the 19–page retainer agreement ("Retainer Agreement") under which they hired DeLuca. Tedoco claimed that DeLuca's staff periodically checked to see if they had completed the documents, but that no one sat with them to explain any part of the Retainer Agreement. DeLuca testified that standard protocol in his office required a paralegal to sit with a client and explain every paragraph of the retainer agreement to make sure the client understood it. However, he did not know and had no record of which paralegal met with Debtors because he did not keep such records.

Debtors executed the Retainer Agreement, initialing every paragraph and signing every page, and paid DeLuca a $200 down payment.[2] At the bottom of each page (right above Debtors' signatures) is the statement: "I have read, understand, and agree to this page and its contents." On the last page (right above Debtors' signatures) is the statement: "I have read and received the foregoing NINETEEN (19) pages and I understand and agree to its terms and conditions." In addition, DeLuca provided Debtors with a 19–page document entitled "Frequently Asked Questions" ("FAQ"). DeLuca did not sign the Retainer Agreement, which is evidently the same agreement signed by all clients, with only a few differences in fees depending on whether the case is filed under chapter 7 or 13. His stamped signature is, however, on the first page of the Retainer Agreement, which is a form letter thanking clients for their business. This letter also states that while "some advisories (in the retainer agreement) may not appear to apply to you at this time, we do need you to sign that you understand or that you agree that you have been advised on each topic."

The Retainer Agreement separates basic services from those services requiring additional fees. For matters beyond the "basic services," DeLuca's billing rate was $495.00 per hour (or perhaps $395.00, as the relevant paragraph refers to both figures). The Retainer Agreement provides:

> BASIC SERVICES: Services to be performed by DeLuca & Associates include:
>
> a. Analysis of debtor's financial situation and assistance in determining whether to file a petition under ... Chapter 7 or chapter 13....
>
> b. Review, preparation and filing of the petition, schedules, statement of affairs, and other documents required by the bankruptcy court;
>
> c. Representation at the meeting of creditors.
>
> d. Reasonable in person and telephonic consultation with the client....
>
> ***603** ADDITIONAL FEES: There are circumstances which may require additional fees.
>
> Additional attorney fees will be charged for additional services including but not limited to: [1] Addressing allegations of fraud or non-dischargeability; ... [13] ... Adversary Proceedings....

For the additional fees, the Retainer Agreement does not explain the relationship between items [1] and [13].

The Retainer Agreement also includes a "fraud" disclaimer: "DEBTS THAT DO NOT GO AWAY: Non-dischargeable debts (debts that you must re-pay), or debts not affected by client's bankruptcy, include but are not limited to the following: debts incurred through fraud...." Seare testified that he signed the Retainer Agreement despite reviewing and understanding the fraud disclaimer because DeLuca had told him that the St. Rose debt was dischargeable. The FAQ also explains that debts incurred through fraud are nondischargeable. Seare said that he did not read the FAQ because Debtors had already asked DeLuca questions during the consultation. Seare testified that based on the Retainer Agreement, he understood that DeLuca would not be representing him against allegations of fraud. Seare also testified that adversary proceedings were not discussed at the consultation and at that time he did not know what an adversary proceeding was.

The Retainer Agreement also includes a request for copies of "ALL LAWSUITS you have been involved in within the last two (2) years...." DeLuca claimed Debtors never provided sufficient documentation relating to the district court lawsuit as required.

Finally, the Retainer Agreement explains the length of DeLuca's representation of a client: "I understand that following the discharge of my bankruptcy DeLuca & Associates' representation is concluded by operation of law. I understand that DeLuca & Associates is no longer obligated to represent me in any capacity with regard to my bankruptcy filing after the discharge order is entered. I understand that any work requested following discharge of the bankruptcy will be an additional fee."

B. Postpetition events

1. The bankruptcy case is filed.
DeLuca filed Debtors' chapter 7 bankruptcy petition on February 29, 2012. The St. Rose debt was listed as a "garnishment" on Schedule F in the amount of $67,431.00. The Judgment underlying the St. Rose debt was listed in Debtors' Statement of Financial Affairs and indicated that the nature of the proceeding was a "collection." The Disclosure of Compensation of Attorney for Debtors stated that Debtors agreed to exclude "representation ... in any dischargeability actions" or "any other adversary proceedings" from the flat fee.

At the § 341(a) meeting of creditors on March 30, 2012, St. Rose informed Debtors and counsel that it intended to enforce its rights under the Judgment through a nondischargeability action.

2. The adversary proceeding is filed.
St. Rose filed an adversary complaint against Seare, seeking to except its debt from discharge under § 523(a)(4) and (a)(6). The summons and complaint were served on Seare on or about June 5, 2012. DeLuca apparently received electronic notice of the complaint the day it was filed.

Debtors received a discharge on May 30, 2012. Approximately $137,430 in unsecured debt was discharged, or 62% of Debtors' unsecured, nonpriority claims.

***604** On June 4, 2012, DeLuca sent Debtors an email informing them of their discharge and that, as of the discharge date, their case was completed. The email is a "form" message and did not mention any particulars of Debtors' case or the recently-filed adversary proceeding by St. Rose. It stated, "[W]e are very happy to inform you that you can now move forward with a fresh start on life, free from the stress of excessive debt. Now you can place your financial situation back on the right track."

Debtors replied to the June 4 email later that day, thanking DeLuca for his help with their bankruptcy and inquiring whether the St. Rose "Judgement [sic] Order" had been discharged, since St. Rose had indicated at the § 341(a) meeting that it was pursuing the adversary proceeding against them. They closed the email by asking DeLuca to "[p]lease let us know what we need to do."

DeLuca's office responded to Debtors' email on June 5, 2012. The response reminded Debtors of St. Rose's expressed intent at the § 341(a) meeting to pursue legal action for the Judgment. The response also stated that on April 16, 2012, about six weeks prior to the filing of the adversary complaint, DeLuca received from counsel for St. Rose a "fax cover letter ... with an attached Stipulation and Order regarding the discharge-ability [sic] of subject debt in question as to Mr. Sear [sic] only," and that his office had promptly responded to the letter advising counsel that DeLuca "would not sign off on any Stipulation regarding the discharge-ability [sic] of any debt listed in the schedules." DeLuca never consulted with Seare before rejecting the proposed stipulation and order. It is unknown whether DeLuca informed St. Rose that he was not representing Seare in the adversary proceeding. The response went on to explain that DeLuca had performed all of the duties for which he was contracted, and that he would not be representing Seare in the St. Rose adversary proceeding. DeLuca's office referred Seare to another attorney.

Debtors replied to the June 5 email on June 6, 2012. They admitted that DeLuca was hired only to "do our bankruptcy," but were very upset and frustrated that the proposed stipulation and order were never sent to them or that DeLuca's office, "at the very least," had not made them aware it. Debtors requested copies of the referenced documents between St. Rose and DeLuca's office. In closing, Debtors stated: "Not informing your clients of very important documents and failing to return phone calls are unacceptable and unprofessional customer service."

On June 6, 2012, DeLuca personally sent a letter to Debtors informing them that he would not be representing them in the adversary proceeding and referring them to another attorney. Seare later claimed that he and Tedoco found it disturbing that DeLuca advertises a "full service" bankruptcy firm, yet he was requesting that Debtors hire another attorney. Seare testified that he tried to retain other law firms to represent him; one declined, one said they did not handle such matters and another said it would be very expensive.

In his pro se answer to the St. Rose complaint, Seare argued that the debt was dischargeable "due to hardship on the dependents of debtor." Seare admitted to having embellished the emails in the district court case, but stated that other evidence existed to support his position. Seare alternatively requested that the debt be "modified" to a feasible payment plan. Notably, Seare complained that his district court attorney had "thrown [him] under the bus" when he informed the court of Seare's manufacturing of the emails and that this same attorney had also "failed to ***605** forward settlement information" regarding St. Rose.

On August 2, 2012, the bankruptcy court held a scheduling conference. DeLuca did not appear for Seare. Seare told the court that DeLuca had told Debtors that he did not represent clients in adversary proceedings. Counsel for St. Rose stated that he had informed DeLuca shortly after Debtors filed their petition of his client's intent to file a nondischargeability action.

3. The court issues the order to show cause.
On August 3, 2012, the bankruptcy court issued its "Order to Show Cause Why This Court Should Not Sanction Anthony J. DeLuca for Failing to Represent Debtor in the ... Adversary Proceeding" ("OSC"). The court was concerned that DeLuca had violated certain provisions of the Nevada Rules of Professional Conduct ("NRPC"), specifically, NRPC 1.2(c), NRPC 1.1 and NRPC 1.5.

DeLuca was ordered to show his compliance with NRPC 1.2(c), particularly, whether not representing Seare in the adversary proceeding was reasonable and whether he had obtained Debtors' informed consent for such limitation. DeLuca also had to produce a copy of his June 6 letter to Debtors. The OSC provided that if the court found DeLuca had violated any of these rules, it could: (1) impose monetary sanctions, including requiring DeLuca to pay for Debtors' representation in the adversary proceeding; (2) impose nonmonetary sanctions, such as requiring DeLuca to represent Debtors; (3) order disgorgement of his fees; or (4) refer the matter to the Nevada State Bar.

In response to the OSC, DeLuca explained that Debtors had mentioned a judgment from "medical debts" during the consultation, but they failed to mention the significant detail that the debt was ordered by the district court as a result of Seare's manufacturing of evidence, lying to his attorney and then allowing his attorney to submit an amended complaint containing false information to the court. Had these details about the fraudulent nature of the debt, of which Debtors were well aware at the time of the consultation, been brought to DeLuca's attention, DeLuca claimed he would have declined to represent them, citing to his "Tell the Truth" section of his retainer agreements. In short, DeLuca contended that he undertook the representation of Debtors based on incomplete, inaccurate or intentionally omitted information regarding the fraudulent nature of a significant portion of their debts. DeLuca argued that he was entitled to accept representation of debtors based on full disclosure, particularly when it related to substantive issues such as a large debt incurred as a result of manufacturing evidence and committing fraud upon the court.

DeLuca also noted that his retainer agreements specifically exclude adversary proceedings as part of the services he provides for the basic fee. Further, his office had immediately advised Debtors via the June 5 email and his June 6 letter that he would not be representing Seare in the adversary proceeding and that they should seek alternative counsel. Attached to DeLuca's response were portions of an unsigned retainer agreement, copies of the emails between his office and Debtors and a copy of his June 6 letter.

a. The initial OSC hearing

The bankruptcy court held an initial hearing on the OSC on September 13, 2012. DeLuca, Seare and Tedoco appeared. The court noted that DeLuca's brief did not substantively address the specific provisions of the NRPC raised in the OSC, namely, whether DeLuca obtained informed consent from Debtors to ***606** limit his representation and whether limiting his representation was reasonable under these circumstances. In response, DeLuca said that the Retainer Agreement excluded adversary proceedings and that it was reasonable to not represent debtors because they were not forthcoming about the fraudulent nature of the St. Rose debt, saying only that it was a debt to a hospital. DeLuca further argued that it was reasonable for any competent attorney to assume that a debt to a hospital was for medical services, which are dischargeable, and not a debt relating to fraud for manufacturing evidence and that it would be reasonable for a client to tell the attorney about it. DeLuca conceded that he knew the Judgment existed, but contended that it would be incumbent upon the client to inform the attorney about the details of it. DeLuca also conceded that had he reviewed the Sanctions Order and Judgment, it would have been obvious the St. Rose debt was based on fraud.

Based on DeLuca's responses, the bankruptcy court expressed concern that he may have also violated two sections of the Code: §§ 707(b)(4) and 526(a). For that reason, the court ordered additional briefing and set an evidentiary hearing, during which either party could call witnesses. DeLuca offered to return Debtors' fee, but the court found this offer potentially insufficient as Debtors were now embroiled in a nondischargeability action and the court questioned the benefit of their discharge.

On September 20, 2012, the bankruptcy court entered an order setting the evidentiary hearing and confirming its instructions that DeLuca be prepared to address his compliance with the aforementioned provisions of the NRPC, as well as his compliance with §§ 707(b)(4)(C) and 526(a)(1)-(3).

b. The OSC evidentiary hearing

In response to the bankruptcy court's concern about his compliance with NRPC 1.2(c) and NRPC 1.5, DeLuca contended in his supplemental brief that Debtors had consented to the limited scope of representation and that limiting his representation was reasonable under the circumstances. To show Debtors' consent, DeLuca argued that Debtors had signed the pages of the Retainer Agreement where it explained the scope of services covered under "Basic Services" and "Additional Fees." Debtors had also signed the last page, which stated they had read the Retainer Agreement and agreed to its terms and conditions. DeLuca contended that Debtors were clearly advised of what services would be covered under the $1,999 flat fee and what services would require additional fees because it was his office's protocol for a paralegal to review a retainer agreement line by line with each client. Debtors had also initialed the paragraph and signed the corresponding page setting forth the Length of Representation, which stated that DeLuca was no longer obligated to represent them after entry of the discharge order.

As for reasonability, DeLuca made several arguments. First, Debtors had indicated they could not afford to pay DeLuca the additional fees for litigation services. Therefore, argued DeLuca, he was not required to work without compensation, citing the Thirteenth Amendment. DeLuca next argued that it was reasonable and within his discretion to not represent Seare because Seare had a history of lying to his own attorneys and manipulating them into pursuing judicial claims. DeLuca asserted that once he learned of the full breadth of Seare's unscrupulous conduct, he determined that representing Seare was a liability to him and his firm, so he did not wish to represent him.

***607** Next, DeLuca argued that the adversary proceeding was legally indefensible because Seare had committed fraud, so representing him in litigation would have been futile. However, DeLuca claimed that after the initial OSC hearing, he did try to procure a settlement with St. Rose on Seare's behalf. According to DeLuca, St. Rose was receptive and willing to reduce its claim to $23,000, with a nominal down payment and monthly payments of $300.00.[3] DeLuca advised Debtors of the offer, but they wished to pursue their own settlement directly with St. Rose. Lastly, DeLuca argued that Seare was not prejudiced by the nonrepresentation because DeLuca had advised him immediately after the adversary complaint had been filed that he was unable to represent him. Thus, Seare had months to find substitute counsel, yet he chose to represent himself.

As for his compliance with § 707(b)(4)(C), DeLuca argued that he performed due diligence in light of the limited information Debtors provided and their urgency to file bankruptcy to stop the garnishment. Despite the Retainer Agreement's request for all documentation from lawsuits within the last two years, DeLuca contended that Debtors provided only copies of a letter from St. Rose indicating its intent to file a notice of name change and the Writ of Execution, which indicated the amount of the Judgment but did not disclose the nature of the award. In any event, argued DeLuca, Seare knew he had committed fraud and the Retainer Agreement expressly stated that debts incurred by fraud "do not go away." The FAQ given to Debtors provided the same information. Therefore, argued DeLuca, Seare was fully aware prior to filing that debts incurred through fraud were nondischargeable. DeLuca disavowed ever telling Debtors that fraud debts were dischargeable.

Lastly, DeLuca argued that even though the St. Rose debt was nondischargeable, Debtors benefitted immensely from the bankruptcy filing. Their total unsecured debt was approximately $220,000, and they eliminated about $137,000 of it, excluding the $67,000 Judgment and $15,000 in student loans. Further, Seare's credit score had increased by over 100 points since the filing, which Seare even conceded was a benefit. Thus, argued DeLuca, the benefits clearly exceeded the $1,999 they paid. Moreover, the filing temporarily stopped the garnishment; Debtors now had an opportunity to settle with St. Rose. DeLuca did not address the court's concern regarding his potential violation of § 526(a).

The OSC evidentiary hearing was held on October 23, 2012. Seare and DeLuca testified. The bankruptcy court admitted all of DeLuca's exhibits and announced that the matter would be deemed submitted once the transcripts from the two OSC hearings were placed on the record. The OSC hearing transcripts were filed on October 30, 2012. Tedoco filed a "Supplemental Hearing Brief" on December 4, 2012, requesting that the bankruptcy court "make it part of the record." It provided most of the same information already testified to by Seare, namely, what was said or not said about the St. Rose debt at the consultation. The only new and potentially relevant information it provided was that when making calls to DeLuca's office asking to speak to him personally, Debtors were continually passed off to other staff members, who also would not return their calls without Debtors leaving multiple messages. Tedoco also claimed again that ***608** no staff member ever sat down with them to review the specifics of the Retainer Agreement.

4. The opinion and order for sanctions

The bankruptcy court issued its opinion and order sanctioning DeLuca on April 9, 2013 ("Sanctions Opinion").[4] *Dignity Health v. Seare (In re Seare),* 493 B.R. 158 (Bankr.D.Nev.2013). The court held that DeLuca had violated ethical rules NRPC 1.1, 1.2, 1.5, and 1.4. and certain sections of the Code—§§ 526(a)(1) and (3), 528(a)(1) and (2), and 707(b)(4)(C).

a. The bankruptcy court's findings and conclusions

To the bankruptcy court, this case presented the legal issue of when consumer bankruptcy attorneys may limit the scope of their representation, a practice referred to as "unbundling." *In re Seare,* 493 B.R. at 176. While acknowledging that unbundling is permissible in Nevada, and that an attorney can charge additional fees for adversary proceedings, the court noted that it had to be done in a manner consistent with the rules of ethics and professional responsibility binding on all attorneys. *Id.* In the court's view, DeLuca had not complied with the applicable rules in this case; his boilerplate retainer agreement did not override such mandatory rules. *Id.*

The court set forth several preliminary findings of fact to support its decision to sanction DeLuca. It found that the issue of Seare's fraud was not overtly discussed during the consultation and that DeLuca never affirmatively represented to Debtors that the St. Rose debt was dischargeable. *Id.* at 180. It found that DeLuca simply "thumbed through" the district court documents without paying them much heed and that he did not represent either way whether the debt was dischargeable. *Id.* The court also found that DeLuca did not explain anything about adversary proceedings during the consultation—what they are, whether one was likely in this case, or what the potential consequences would be. *Id.* at 180–81. DeLuca's cursory review of the district court documents would not have led him to conclude that an adversary proceeding was likely in Debtors' case. *Id.* at 180. In sum, the court found that DeLuca failed to carefully review the district court documents or inquire about the nature of the Judgment during the consultation, as had he known the debt was for fraud, he would have told Debtors that St. Rose would likely seek to have it found nondischargeable in an adversary proceeding. *Id.* at 180–81. The court found that DeLuca moved quickly and did not pay ***609** sufficient attention to Debtors' individual goals and needs and that his boilerplate forms and standardized approach, which may work for most clients, failed to work for clients like Seare and Tedoco, whose circumstances do not fit the mold of the prototypical consumer debtor. *Id.* at 181.

1. DeLuca violated NRPC 1.1.[5]

The bankruptcy court held that DeLuca had violated his duty of competence under NRPC 1.1 by deciding to unbundle adversary proceedings in Debtors' case. *In re Seare,* 493 B.R. at 192. Specifically, the court found that as a result of a lack of communication at the initial consultation DeLuca failed in his primary duty—ascertaining Debtors' objectives and defining the goals of the representation. *Id.* at 190.

Debtors' primary goal was to permanently stop the garnishment, and once DeLuca was aware of a garnishment connected to a prior judgment, he, as the bankruptcy expert, had an affirmative duty to investigate. *Id.* at 190–91. It was not Debtors' burden to reach the legal conclusion that fraud, as defined in the Code, included the fraudulent act Seare committed in the district court. *Id.* at 190. The court found that DeLuca either did not understand Debtors' primary objective or he negligently assumed the St. Rose debt was dischargeable and thus Debtors' objective would be met. *Id.* at 191. Either way, he did not exercise the legal knowledge, skill and thoroughness reasonably necessary for the representation. *Id.* The court found that Debtors could have reasonably anticipated the St. Rose debt would be discharged and that the garnishment would permanently cease. *Id.* But, they did not likely expect that an adversary proceeding would be filed, especially since DeLuca did not explain what an adversary proceeding was or the connection between nondischargeable debts and adversary proceedings. *Id.* In the court's view, Debtors moved forward and filed a bankruptcy case they might not have otherwise filed had they known it was nearly certain to lead to an adversary proceeding. Alternatively, if given adequate legal counsel, they may have sought an attorney who had a different fee structure concerning adversary proceedings. *Id.*

The court found that DeLuca, without understanding Debtors' goals for his representation, could not determine which legal services were reasonably necessary to attain those goals or explain to Debtors the challenges they were likely to face in trying to achieve those goals by filing for bankruptcy. *Id.* In the absence of such guidance, the court found that DeLuca had a duty to offer the services reasonably necessary to achieve permanent cessation of the wage garnishment. *Id.* at 191–92. Because an adversary proceeding was a near certainty in light of what DeLuca should have known at the time of the initial consultation—that the Judgment was based on fraud—representing Debtors at an adversary proceeding was not only reasonably necessary to achieve their goal of stopping the garnishment, but likely the only way to stop it. *Id.* at 192. Consequently, DeLuca's decision to unbundle his representation in any adversary proceedings in Debtors' case violated the duty of competence under NRPC 1.1. *Id.*

2. DeLuca violated NRPC 1.2(c).[6]

The bankruptcy court held that DeLuca violated NRPC 1.2(c) because unbundling ***610** the service of adversary proceedings was not reasonable in light of Debtors' circumstances. *In re Seare,* 493 B.R. at 196. Although the court did not find fault with DeLuca using pre-prepared forms that limit the scope of services included in a flat fee, it did find that deciding to unbundle services reasonably necessary to achieve a client's objectives before even meeting the client was unreasonable and violated NRPC 1.2(c). *Id.* at 194. Here, it appeared that his decision to unbundle adversary services was made before he ever met Debtors. Alternatively, even if DeLuca's decision to unbundle such services was made during Debtors' initial consultation, that decision was also unreasonable and violated the rule because an adversary proceeding was a near certainty. *Id.* The court found DeLuca should have known, and would have known had he cursorily investigated the nature of the Judgment, that representing Seare in an adversary proceeding was reasonably necessary to achieve Debtors' reasonably anticipated result—a discharge of the St. Rose debt. *Id.* at 194–95. Debtors' expectation of a complete discharge was reasonable because DeLuca did not inform them otherwise and they are not bankruptcy experts. *Id.* at 195.

The court also faulted DeLuca for not communicating his intent not to represent Seare in the adversary proceeding until after the complaint had been filed, knowing that an adversary proceeding was the only way Seare could possibly discharge the St. Rose debt. Unbundling such service at that point in time was "patently unreasonable" and violated NRPC 1.2(c). *Id.* at 196.

Lastly, the unbundling was DeLuca's idea, which the court found ran contrary to the ABA's guidance that unbundling should be client-driven. *Id.*

The bankruptcy court held that DeLuca had further violated NRPC 1.2(c) because he did not obtain Debtors' informed consent in limiting the scope of his representation. *Id.* at 203. First, the court found that DeLuca did not comply with the rule by adequately communicating the material risks of unbundling adversary proceedings, either in general or in Debtors' case, or the available alternatives to such unbundling. *Id.* His failure to properly understand their goals and details of their situation—i.e., the nature of the Judgment—rendered adequate communication impossible. *Id.* at 204. The Retainer Agreement, which the court found to be DeLuca's primary communication with Debtors, did not constitute adequate communication. The Retainer Agreement's "fraud" disclaimer and statements that the flat fee does not include representation for nondischargeability allegations and adversary proceedings, which were in different sections, did not communicate the material risks of proceeding without representation in adversary proceedings, or even that DeLuca may decide not to represent Debtors in an adversary proceeding. *Id.* Thus, reasoned the court, prospective clients are left to connect the dots—that a debt incurred through fraud is raised in a claim of nondischargeability that is litigated in an adversary proceeding. *Id.* Hence, without adequate information upon which to base a decision, the court found that obtaining Debtors' valid consent was impossible. *Id.* at 203.

The means of consent here—initialing and signing DeLuca's contract of adhesion—did not sufficiently demonstrate that Debtors understood what services were unbundled, or their particular circumstance, or the seriousness of proceeding without representation in adversary proceedings. ***611** *Id.* at 203–05. Without any explanation to Debtors about the risks of unbundling services, the court found that Debtors could not have known that the bundle of services in the flat fee was unlikely to meet their objectives. *Id.* at 205. DeLuca neither explained the risks of going it alone in adversary proceedings nor what particular risks Debtors faced, or that they could seek counsel who structured his or her services differently. *Id.* DeLuca did not communicate the high likelihood of Debtors having to represent themselves pro se or find another attorney, which the court found would have been evident had he reviewed the Judgment. *Id.* Without DeLuca ever explaining adversary proceedings to Debtors, they could have reasonably agreed to exclude them, assuming that such proceedings were unlikely to occur. However, the court doubted whether Debtors actually made that decision, since DeLuca never explained what an adversary proceeding was. *Id.*

3. DeLuca violated NRPC 1.5.[7]

The bankruptcy court held that DeLuca violated NRPC 1.5(b) because he did not sufficiently explain the scope of services covered under the flat fee and the scope of services available for additional fees, as the rule requires. *In re Seare,* 493 B.R. at 206. The problem with DeLuca's Retainer Agreement was three-fold. First, the listed services were in legal jargon as opposed to plain English. *Id.* Seare understood that adversary proceedings were excluded, but did not know what they were. He also knew that "nondischargeability allegations" were excluded, but similarly he might not have known what they were. *Id.*

Second, Debtors were not aware of the likelihood that they would need to pay for additional services. *Id.* at 206. Because an adversary proceeding was reasonably foreseeable at the time Debtors agreed to the fee structure and DeLuca did not explain this eventuality to them, the court found that DeLuca improperly unbundled the adversary proceeding from the flat fee. *Id.* at 206–07. He unfairly placed them in the position of having to bargain for additional legal services in the midst of an adversary proceeding. *Id.* at 207.

Third, DeLuca violated NRPC 1.5(b) by changing the basis of his fees without advance warning to Debtors. *Id.* The Retainer Agreement did not state that DeLuca may decide not to represent Debtors in adversary proceedings, only that such services would incur additional fees. The court found that Debtors agreed to pay about $2,000 for an attorney that, for the additional fees, would handle nondischargeability claims and adversary proceedings, and part of the basis for the $2,000 fee was the availability of services if needed. *Id.* By deciding later not to represent Debtors at all, DeLuca essentially changed the basis of his fees. The court further found that because Debtors did not understand adversary proceedings, the likelihood of one being filed against them, and what it would cost them, they could not have known that the approximately $2,000 they agreed to pay did not include the scope of services reasonably necessary to achieve their goal. *Id.* Thus, reasoned the court, their choice to pay it could not be considered voluntary. *Id.*

*612 4. DeLuca violated NRPC 1.4.[8]

The bankruptcy court held that DeLuca violated NRPC 1.4 by failing to properly communicate with Debtors. *In re Seare,* 493 B.R. at 208. Specifically, DeLuca violated NRPC 1.4(a)(2) by failing to reasonably consult Debtors about the means to achieve their objectives. *Id.* He also violated NRPC 1.4(a)(3) by failing to forward the proposed stipulation and order DeLuca received before St. Rose filed its complaint. *Id.* Finally, DeLuca violated NRPC 1.4(a)(4) by failing to timely respond to Debtors' requests for information. *Id.* Although the court generally questioned Debtors' credibility, it did find convincing Tedoco's claims about DeLuca's and his staff's failure to return phone calls and to keep them informed of their case. *Id.* The court also found independently that DeLuca's own records evidenced his office's inattention to detail and poor client communication. He failed to log which paralegal reviewed the retainer agreement with each prospective client, he twice incorrectly filed his OSC briefs in the main case and he failed to serve copies of his OSC briefs on Debtors until after the OSC evidentiary hearing, even though he was ordered to serve them immediately after the initial OSC hearing. *Id.*

5. DeLuca violated § 707(b)(4)(C).[9]

The bankruptcy court reasoned that, as with DeLuca's ethical violations, his violation of § 707(b)(4)(C) flowed from his failure to investigate the nature of the Judgment. *In re Seare,* 493 B.R. at 211. The court disagreed that DeLuca performed due diligence in this case, finding that he had taken no steps to investigate independently or verify the circumstances underlying the Order of Wage Garnishment, which fell far short of the "reasonable investigation" requirement of § 707(b)(4)(C). *Id.* at 211–213. Debtors told DeLuca of the circumstances giving rise to the petition—the wage garnishment—and gave him documents from the district court case. *Id.* at 211. DeLuca demonstrated his awareness of the action by listing it in Debtors' SOFA, including the case name and number. *Id.* DeLuca's reasonable next step should have been to investigate the Judgment supporting the garnishment, which could have been accomplished by asking questions or reviewing the district court's electronic docket. *Id.* The fact that the Judgment led to a garnishment was a sufficient "red flag" for further inquiry. *Id.* at 212. Instead, the court found that DeLuca merely flipped through the documents and assumed that since the debt was owed to a hospital, it must be for medical bills and was thus dischargeable. *Id.* at 211–12. His office also never obtained any further documents from Debtors, which may have revealed information ***613** they failed to provide. *Id.* at 212. Blaming his clients for that failure was inappropriate because Debtors were not bankruptcy experts. *Id.*

6. DeLuca violated §§ 526(a)[10] and 528(a).[11]

First, the bankruptcy court found that DeLuca was required to comply with §§ 526 and 528(a) based on his role as a bankruptcy attorney and "debt relief agency," Debtors' role as "assisted persons," and the nature of Debtors' debts. *In re Seare,* 493 B.R. at 214. Through analysis similar to that utilized in connection with NRPC 1.4, the court found that DeLuca violated § 526(a) by failing to accurately explain that he would not represent Debtors in an adversary proceeding and the risks Debtors could face in bankruptcy. *Id.* at 215. Although the Retainer Agreement states that representation for nondischargeability allegations and adversary proceedings would result in additional fees, DeLuca flatly refused to provide these services once the complaint was filed. Thus, he violated § 526(a)(1) by failing to perform a service he informed Debtors he would provide in connection with their bankruptcy case. *Id.*

The court rejected DeLuca's argument that because Debtors could not afford the additional services anyway, it was immaterial whether or not he was willing to perform them. This argument improperly benefitted from hindsight. *Id.* The court found that at the time DeLuca refused to perform the additional services, no evidence existed that he ever offered these services to Debtors and that Debtors refused them for lack of funds. *Id.* DeLuca offered no evidence indicating he consulted at all with Debtors before sending them the June 6 letter of nonrepresentation. *Id.* At minimum, based on the Retainer Agreement, the court found that DeLuca was obligated to at least quote Seare a price for the adversary representation. *Id.*

The court found that DeLuca had also violated § 526(a)(3) because he misrepresented, by omission, the risks associated with an adversary proceeding that Debtors were nearly certain to face if they filed for bankruptcy. *Id.* Because stopping the garnishment was Debtors' primary goal, DeLuca's failure to address the risks of a related adversary proceeding was a material omission. *Id.*

DeLuca was also found to have violated § 528(a) for the same reasons he had violated NRPC 1.5. *Id.* While he partially ***614** complied with § 528(a)(1) by providing a written contract on the same day as the consultation, DeLuca had violated § 528(a)(2) because he failed to provide a "fully executed and completed contract"; he never signed the Retainer Agreement. *Id.* Further, the court found that DeLuca also violated § 528(a)(1) because the Retainer Agreement did not "clearly and conspicuously" explain the scope of services and fees. *Id.* Specifically, DeLuca excluded services using technical terms like "nondischargeability allegations" and "adversary proceedings," which a layperson would not likely understand. Further, the standard form contract did not relate these services to a client's particular case, and, without clarification from DeLuca about which additional services were likely to be needed, Debtors had no way of knowing which exclusions were likely to apply and what the chances were of facing increased legal fees. *Id.* at 215–16.

b. The sanctions imposed

After carefully reviewing the range of available sanctions, the bankruptcy court ordered the following: (1) that DeLuca disgorge the $1,999 fee paid by Debtors; (2) that the Sanctions Opinion be published to deter such conduct by other attorneys in the future; (3) that DeLuca complete some Continuing Legal Education credits; and (4) that for the next two years DeLuca provide a copy of the Sanctions Opinion to every client who is sued in an adversary proceeding, but only if DeLuca declines to represent them in that adversary proceeding for any reason. *Id.* at 224–27. The court declined to impose any further monetary sanctions beyond disgorgement, despite the authority to do so, because of DeLuca's good standing and his efforts to mitigate the situation by offering to refund the fee and represent Seare in negotiations with St. Rose. *Id.* at 226. DeLuca timely appealed.

5. The result of adversary proceeding

On January 2, 2013, St. Rose filed a Confession of Judgment, in which Seare authorized a nondischargeable judgment against him for $67,430.58.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

Did the bankruptcy court abuse its discretion in sanctioning DeLuca and imposing the types of sanctions that it did?

IV. STANDARDS OF REVIEW

[1] [2] "We review all aspects of an award of sanctions for an abuse of discretion." *Orton v. Hoffman (In re Kayne),* 453 B.R. 372, 380 (9th Cir. BAP 2011) (citing *Price v. Lehtinen (In re Lehtinen),* 332 B.R. 404, 411 (9th Cir. BAP 2005), *aff'd,* 564 F.3d 1052 (9th Cir.2009)); *In re Nguyen,* 447 B.R. 268, 276 (9th Cir. BAP 2011) (en banc). The bankruptcy court's choices of sanctions are also reviewed for abuse of discretion. *U.S. Dist. Ct. for E.D. Wash. v. Sandlin,* 12 F.3d 861, 865 (9th Cir.1993). A bankruptcy court abuses its discretion if it applies the wrong legal standard or its factual findings are illogical, implausible or without support in the record. *TrafficSchool.com v. Edriver Inc.,* 653 F.3d 820, 832 (9th Cir.2011).

[3] With respect to sanctions, a bankruptcy court's factual findings are reviewed for clear error and given great deference. *Primus Auto. Fin. Servs., Inc. v. Batarse,* 115 F.3d 644, 649 (9th Cir.1997). A factual finding is clearly erroneous if it is illogical, implausible or without support in the record. *Retz v. Samson (In* ***615** *re Retz),* 606 F.3d 1189, 1196 (9th Cir.2010).

[4] Whether an appellant's due process rights were violated is a question of law we review de novo. *Miller v. Cardinale (In re DeVille),* 280 B.R. 483, 492 (9th Cir. BAP 2002), *aff'd,* 361 F.3d 539 (9th Cir.2004).

V. DISCUSSION

A. The bankruptcy court's power to sanction attorneys

[5] [6] [7] "Bankruptcy courts have the inherent authority to regulate the practice of attorneys who appear before them." *In re Nguyen,* 447 B.R. at 280 (citing *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43–45, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.),* 77 F.3d 278, 284–85 (9th Cir.1996)). "Bankruptcy courts also have express authority under the Code and the Rules to sanction attorneys, including disbarment or suspension from practice." *Id.* at 281 (citing *In re Lehtinen,* 564 F.3d at 1058, 1062; § 105(a)). "The bankruptcy court has wide discretion in determining the amount of a sanctions award." *In re Kayne,* 453 B.R. at 386 (internal quotation marks and citation omitted). The Local Rules for the District Court of the District of Nevada also grant considerable leeway in fashioning sanctions for violations of the NRPC. Local Rule IA 10–7(a) provides that "[a]ny attorney who violates these standards of conduct may be disbarred, suspended from practice before this Court for a definitive time, reprimanded or subjected to such other discipline as the court deems proper."[12]

[8] In reviewing attorney disciplinary sanctions, we determine whether (1) the disciplinary proceeding was fair, (2) the evidence supports the findings, and (3) the penalty imposed was reasonable. *In re Nguyen,* 447 B.R. at 276.

B. The bankruptcy court did not abuse its discretion when it sanctioned DeLuca and imposed the sanctions that it did

[9] DeLuca raises several arguments on appeal, most of which pertain to the bankruptcy court's findings of fact or his dispute with some of the sanctions imposed. We address each of his arguments in turn.

We begin with the bankruptcy court's consideration of Tedoco's late-filed brief after the matter had been taken under submission. The court stated at the OSC evidentiary hearing that once the transcripts from the two OSC hearings were recorded on the docket, the matter would stand submitted. The transcripts were recorded on October 30, 2012. Presumably, evidence closed on that date. Tedoco's brief was filed on December 4, 2012. Citing to no authority, DeLuca argues that the bankruptcy court committed reversible error by considering Tedoco's late-filed brief and relying on the inadmissible facts contained therein for much of its decision.

[10] Reopening of a case after the close of evidence rests in the discretion of the trial court. *Mo. Pac. Ry. Co. v. Oleson,* 213 F. 329, 331–32 (8th Cir.1914); *United States v. Hugh,* 236 Fed.Appx. 796, 802 (3d Cir. June 14, 2007)

(Ambro, J., dissenting) ("there is no iron-bound, copper-fastened, double-riveted rule against the admission of evidence after both parties have rested upon their proof") (quoting ***616** *United States v. Blankenship,* 775 F.2d 735, 741 (6th Cir.1985) and citing *Oleson*). Therefore, it was within the bankruptcy court's discretion to consider Tedoco's late-filed brief.

However, we agree with DeLuca that Tedoco's brief consisted only of argument, not admissible evidence. As such, the bankruptcy court erred in considering it. *United States v. Moreland,* 622 F.3d 1147, 1162 (9th Cir.2010) (argument is not evidence); *Hurley v. Student Loan Acquisition Auth. of Ariz. (In re Hurley),* 258 B.R. 15, 23 (Bankr.D.Mont.2001) . Nonetheless, much of what Tedoco asserted had already been established by Seare, either by his testimony at the OSC evidentiary hearing or in documentary evidence the parties submitted. Therefore, it was harmless error for the bankruptcy court to consider any facts asserted in the brief because they were already before the court through competent evidence. *Lillie v. United States,* 953 F.2d 1188, 1192 (10th Cir.1992) (admission of improper evidence of a fact in issue is harmless when the judgment is supported by sufficient competent evidence). The few facts the court should not have considered, however, as we discuss more fully below, are insufficient to establish reversible error.

1. DeLuca's arguments regarding the violations of the NRPC

a. NRPC 1.1 and NRPC 1.2

DeLuca first takes issue with the bankruptcy court's findings under NRPC 1.1 that his unbundling of adversary proceedings was unreasonable in this case because it failed to achieve Debtors' reasonably anticipated result—i.e., discharge of the St. Rose debt. DeLuca contends that three problems exist with this finding: (1) it assumes the debt was dischargeable; (2) the bankruptcy court made comments during the initial OSC hearing with Seare present that led Seare to testify at the evidentiary hearing that dischargeability and adversary proceedings were not explained to him by DeLuca; and (3) it fails to recognize that because St. Rose did not include Tedoco in the adversary proceeding and she received a discharge, the debt is uncollectible against Seare under the community discharge, so DeLuca did in fact achieve Debtors' reasonably anticipated result.

Any bankruptcy professional would recognize the obstacles a debtor faces in trying to achieve the discharge of a debt based on fraud. However, the bankruptcy court found that Debtors could have reasonably anticipated the St. Rose debt would be discharged and that the garnishment would permanently cease, based on DeLuca's failure to investigate the Judgment and inform his clients of the inevitable adversary proceeding. It further found it impossible for DeLuca to provide adequate counsel as a result of his erroneous assumption that the Judgment arose from unpaid medical bills. We see no clear error in that finding.

As for comments made by the bankruptcy court at the initial OSC hearing, it is true that Seare testified at the later evidentiary hearing that he did not know what adversary proceedings were and that DeLuca never discussed them. However, this was not the only evidence showing that DeLuca failed to explain the meaning of dischargeable versus nondischargeable debts, the meaning of adversary proceedings or the connection between them. It was reasonable for the court to infer that this discussion never occurred with Debtors because, by DeLuca's own admission, he was not aware that the Judgment was based on fraud. Also, Seare testified that the issue of fraud never came up at the consultation. If it had, one would expect DeLuca to have explained nondischargeable debts and adversary proceedings. ***617** More importantly, DeLuca never affirmatively testified that he *did* explain these matters to Debtors and no record exists that any member of DeLuca's staff did either. Although it was his office's protocol to have a staff member go through every page of his retainer agreement with clients, DeLuca could not establish that it occurred in this case. Tedoco claimed that no one went through the Retainer Agreement with Debtors, but this was an inadmissible fact the bankruptcy court should not have considered.

[11] As for his third argument that the St. Rose debt is uncollectible due to the community discharge, DeLuca admits he did not raise this issue before the bankruptcy court. As such, we are not required to consider it for the first time on appeal. *O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),* 887 F.2d 955, 957 (9th Cir.1989); *Concrete Equip. Co. v. Fox (In re Vigil Bros. Constr., Inc.),* 193 B.R. 513, 520 (9th Cir. BAP 1996). In any event, when considering whether the community discharge under § 524(a)(3) applies, the bankruptcy court must first determine whether the debt is a community debt under state law. The court must then determine the scope of the discharge. *Arcadia Farms Ltd. v. Rollinson (In re Rollinson),* 322 B.R. 879, 881 (Bankr.D.Ariz.2005) ("Once a debt has been determined to be a community debt pursuant to state law, the second issue is the scope of the discharge."). Neither of those determinations have been made here. Further, "when the debtor has incurred a

nondischargeable debt or is not entitled to a discharge, or the debtor's spouse would have been denied a discharge or had a debt declared nondischargeable in a hypothetical bankruptcy case commenced on the same day as that of the debtor, the nondischargeable debt of either spouse will survive against after-acquired community property." 4 COLLIER ON BANKRUPTCY ¶ 524.02 [3][a] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2013). Therefore, Debtor was not entitled to a community discharge of a debt he could not himself discharge. Even if DeLuca's argument has merit, which we do not believe it does, we find it improper that he rely on subsequent events beyond his control to try to negate his prior shortcomings in complying with the rules of ethics.

DeLuca next takes issue with the bankruptcy court's finding that he failed to obtain Debtors' informed consent to unbundle adversary proceedings. DeLuca rests his arguments on the disclosures in the Retainer Agreement and FAQ about the nondischargeability of fraud debts and Seare's admission that he did not read the FAQ. DeLuca contends the court erred in finding that Seare did not give informed consent, after Seare had admitted he made no effort to read any of the documents he signed and failed to ask any questions. In other words, argues DeLuca, a client cannot argue that disclosures are insufficient and consent invalid when he makes no effort to read, review and question critical documents. The bankruptcy court considered and rejected this argument. It found that the Retainer Agreement's "fraud" disclaimer and its disconnected "legal jargon" statements about what was or was not included in the flat fee left prospective clients to "connect the dots" that a debt incurred through fraud is raised in a claim of nondischargeability, which is litigated in an adversary proceeding, and that it was something that requires additional fees for representation. The court also found it improper for DeLuca to put the onus on layperson debtors to make these conclusions. We see no clear error here.

DeLuca also quibbles with the bankruptcy court's characterization of Debtors' goal as one to "permanently" stop the wage ***618** garnishment, when Seare testified that his desire was "to get the wage garnishment stopped." DeLuca argues that the court added the word "permanently," which it inferred from Tedoco's late-filed brief—a brief it should not have considered. Although Tedoco used the word "permanently" in her brief, Seare also testified at the evidentiary hearing that the sole reason for filing bankruptcy was to "get rid of" the garnishment and that the temporary cessation of it was not the benefit they were seeking. Further, DeLuca's argument defies logic. Of course Debtors wanted the garnishment to disappear forever, not just for a few months.

DeLuca alternatively argues that even if Debtors' goal was permanent cessation of the garnishment, the garnishment was stopped as of the date of the OSC evidentiary hearing, so DeLuca did fulfill his duty of competence by achieving the goal of "stopping the garnishment." For the reasons already discussed and given by the bankruptcy court, we need not address this meritless argument.

Lastly, DeLuca argues that the bankruptcy court "improperly put itself in Debtors' place" and went outside the record when it found that Debtors may have chosen not to file bankruptcy or may have sought an attorney with a different fee structure, had they known about the dischargeability concerns related to the St. Rose debt. We disagree. This inference was reasonable for the court to make in light of this record. Plus, this fact alone does not change the conclusion that DeLuca violated his duty of competence. Despite DeLuca's contentions, whether the St. Rose debt was actually dischargeable is not the point. The point is: What is the nature of the debt; what relief may the creditor seek against Debtors; and what will Debtors need to do to defend against the claim? Debtors needed DeLuca to inform them sufficiently of the risks associated with the St. Rose debt before they could properly provide informed consent to allow DeLuca to unbundle services. DeLuca failed to advise them about the debt or its risks because he did not perform even a minimal investigation, which would have revealed that the Judgment arose from fraud. Without that knowledge, it was impossible for DeLuca to determine Debtors' circumstances and advise them as to what sort of representation would be needed to achieve their goal of eliminating the St. Rose debt and the garnishment.

We conclude the bankruptcy court did not err in determining DeLuca violated NRPC 1.1 and 1.2(c).

b. NRPC 1.4 and NRPC 1.5

DeLuca next argues that the bankruptcy court erred in determining he violated NRPC 1.5 because he did not sufficiently explain the scope of services covered under the flat fee and the scope of services available for additional fees. DeLuca points to Seare's testimony that he understood DeLuca would not be representing him in any allegations of fraud. Again, DeLuca misses the point. Seare may have understood that defending fraud allegations would require an additional fee or that adversary proceedings or nondischargeability allegations were excluded from the flat fee, but the Retainer Agreement—the only communication to Debtors explaining the scope of DeLuca's services and/or for what fees—failed to make the connection between these issues. Accordingly, we perceive no error with the bankruptcy court's decision that DeLuca violated NRPC 1.5.

Finally, DeLuca contends the bankruptcy court erred in determining that he violated NRPC 1.4 by failing to properly communicate with Debtors. DeLuca first asserts a due process concern over whether he received sufficient notice that the bankruptcy court was considering sanctioning ***619** him under this rule. DeLuca correctly notes that any potential violations of NRPC 1.4 were not raised in the OSC, or in the order setting the evidentiary hearing, or at either hearing. Therefore, he argues that sanctioning him under this rule violated his due process rights and should be reversed. "When an attorney is subject to discipline, he or she has a right to notice and an opportunity to be heard." *In re Nguyen,* 447 B.R. at 278 (citing *In re Ruffalo,* 390 U.S. 544, 551–52, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *In re Lehtinen,* 564 F.3d at 1060). To satisfy the requirements of due process in this context, "the attorney must receive prior notice of the 'the particular alleged misconduct and of the particular disciplinary authority under which the court is planning to proceed' along with an opportunity to respond." *Id.* (quoting *In re DeVille,* 361 F.3d at 548). The rule, however, is not absolute. *In re DeVille,* 361 F.3d at 548.

Here, the OSC notified DeLuca of his alleged misconduct and that the bankruptcy court was considering disciplining him under NRPC 1.1, 1.2 and 1.5. Absent from this is any reference to NRPC 1.4. Despite the court's omission of NRPC 1.4 in the OSC or in the order setting the evidentiary hearing, we conclude that DeLuca was not deprived of due process. DeLuca had notice of the conduct potentially subjecting him to discipline under several provisions of the NRPC and under sections of the bankruptcy code, which interrelatedly address similar, if not, identical requirements imposed under the general rubric of professional conduct. If the attorney has been sufficiently informed of the alleged misconduct, the Ninth Circuit has upheld sanctions even when a bankruptcy court, in advance of a disciplinary proceeding, stated that Rule 9011 was the basis for discipline, yet it proceeded to impose sanctions under its inherent authority. *See In re DeVille,* 361 F.3d at 550. Even if the court improperly considered NRPC 1.4, it committed harmless error as the elements of this rule are also generally included in the provisions that were identified by the court in its orders, i.e., NRPC 1.4, § 526(a) and § 528(a) involve what services and means are necessary to accomplish the client's objectives. The bankruptcy court informed DeLuca through orders and at the hearings of the conduct that would be the subject of any discipline.

Nonetheless, we must address a second issue. Many of the facts asserted in Tedoco's brief were used extensively in the bankruptcy court's decision to find that DeLuca had violated NRPC 1.4. Again, these "facts" should not have been considered. However, other admissible facts in the record support the court's decision to find that DeLuca violated NRPC 1.4, namely, DeLuca's failure to inform Debtors of the St. Rose fax containing the proposed stipulation and order about the Judgment. Also in evidence was Debtors' email to DeLuca's office that his failure to return phone calls was unacceptable and unprofessional customer service. Finally, the court found independently that DeLuca's own records indicated his office's inattention to detail and poor client communication. He fails to log which paralegal reviewed the retainer agreement with each prospective client. As such, we see no error in the bankruptcy court's decision that DeLuca violated NRPC 1.4.

2. DeLuca's arguments regarding the violations of §§ 707(b)(4)(C), 526(a)(1) and (3), and 528(a)(1) and (2)

DeLuca also raises a due process concern with respect to the bankruptcy court's decision to sanction him under these various sections of the Code. DeLuca ***620** contends that the court only "orally" added §§ 707(b)(4) and 526(a), both of which have four subparts each, at the initial OSC hearing and failed to specify which subpart(s) DeLuca potentially violated. Thus, because he was not provided adequate written notice of these alleged violations, nor the potential sanctions associated with them, DeLuca contends they should all be stricken. While it is true that the court orally added these Code sections at the initial OSC hearing out of concern for some of DeLuca's answers, this was not the only notice DeLuca received about them.

In the order entered on September 20, 2012, and setting the evidentiary hearing, the bankruptcy court specifically set forth which subpart(s) of each section were at issue, citing them right in the order. Notably, DeLuca failed to include this order in his excerpts of record. Given his failure to include the order, DeLuca's contention on appeal that he did not receive written notice of the Code sections at issue is sanctionable.

DeLuca asserts that even if we conclude he received adequate notice, he nonetheless complied with each section. As for § 707(b)(4)(C), DeLuca argues that the "reasonable investigation" requirement goes more to the omission of assets or debts, not whether a debt is dischargeable. While it is true that much of the case law on this issue has concerned an attorney's omission of assets in bankruptcy schedules, DeLuca has not cited any authority establishing that this section could not be applied in the way the bankruptcy court did here. Bottom line, DeLuca did not perform a "reasonable investigation into the circumstances that gave rise to the petition." § 707(b)(4)(C). Accordingly, we see no error.

DeLuca also contends that he complied with § 526(a)(1) and (3). Although his argument is somewhat unclear, DeLuca apparently argues that he did not violate § 526(a)(1) because the Retainer Agreement stated only that he would not represent Debtors in an adversary proceeding without additional fees, not that he would not represent them in one at all, as the bankruptcy court found. DeLuca says he decided to not represent Debtors after the full scope of Seare's actions became known. First, the bankruptcy court did not find that the Retainer Agreement said DeLuca would never represent Debtors in an adversary proceeding. In fact, it found just the opposite, which led to DeLuca's problem. The Retainer Agreement stated that representation for nondischargeability allegations and adversary proceedings was available for an additional fee, but DeLuca flatly refused to provide these services once the complaint was filed. Hence, the court found he violated § 526(a)(1) for his failure to perform a service he informed Debtors that he would provide in connection with their bankruptcy case.

As for § 526(a)(3), DeLuca contends that because the St. Rose complaint did not include Tedoco and she received a community discharge, and thus the debt is ultimately uncollectible against Seare, the bankruptcy court erred in determining that he violated § 526(a)(3). For the same reasons stated above, we reject this argument. In any event, the record supports the bankruptcy court's decision. DeLuca failed to comply with § 526(a)(3) because he did not inform Debtors about the risks associated with an adversary proceeding they were nearly certain to face once they filed for bankruptcy.

Lastly, DeLuca contends that he received even less due process regarding any violations of § 528 because it was never mentioned prior to the bankruptcy court's decision. We agree that § 528 was not mentioned anywhere prior to the entry of ***621** the court's Sanctions Opinion. However, as a bankruptcy attorney, DeLuca knew he had not signed the Retainer Agreement as required by § 528. Further, as noted by the bankruptcy court, DeLuca satisfied the qualifying factors imposed by § 528 and was required by statute to comply with its requirements. As § 528 mandates compliance, we find no error.

3. DeLuca's arguments about the sanctions imposed

DeLuca argues that the sanctions imposed upon him were too severe. Specifically, he argues that the bankruptcy court impermissibly went far beyond the list in its OSC of potential sanctions DeLuca faced. The orders specifically provided that monetary and nonmonetary sanctions may be considered and imposed. Keeping in mind that bankruptcy judges have broad discretion in determining the type of sanctions to impose, the court imposed sanctions encompassed within the general designation of monetary and nonmonetary sanctions expressly stated in the OSC. The court did not impermissibly exceed the described sanctions. We further conclude that the sanctions were fair, supported by the evidence and reasonable. *See In re Nguyen,* 447 B.R. at 276.

DeLuca argues that ordering him to provide a copy of the Sanctions Opinion to potential adversary clients whose case he declines for the next two years is excessive and violates his commercial free speech. Leaving aside momentarily the "excessive" argument, DeLuca has not cited a case holding that ordering a sanctioned attorney to provide prospective clients with the court's decision sanctioning the attorney violates his or her free speech. In any event, this sanction was of particular importance to the bankruptcy court as a means to protect future debtors by ensuring they are properly informed of the risks of unbundling, and to promote a systematic change in DeLuca's practice, which the court characterized as a "mill" practice. The court also saw this sanction as a means of informing the bar that being disciplined for unethical conduct has repercussions beyond just paying a fine and moving on. We find it difficult to disagree with this reasoning. Accordingly, we do not conclude that this sanction was excessive.

Lastly, DeLuca argues that he should not have to disgorge his fee, particularly the filing fee and credit report fee, because Debtors did obtain the benefit of a discharge, and Seare's credit score increased by over 100 points following the discharge. As for the actual fee paid to DeLuca, we cannot say the bankruptcy court abused its discretion under the circumstances. In fact, it did not, despite the authority to do so, order any additional monetary sanctions because of DeLuca's efforts to return his fee to Debtors and to represent Seare in settlement negotiations with St. Rose. Given the record, we conclude the bankruptcy court did not abuse its discretion in including the filing and credit report fees within the total amount to be disgorged, especially when prior to the issuance of the Sanctions Opinion, DeLuca agreed to return Debtors' money.[13]

*622 VI. CONCLUSION

Consumer bankruptcy attorneys can unbundle their services in Nevada, particularly, adversary proceedings. However, unbundling, or limited scope representation, needs to comply with the rules of ethics and the Bankruptcy Code. A qualitative analysis of each individual debtor's case must be done at intake to ensure that his or her reasonable goals and needs are being met. That calculus was not applied in this case. For the foregoing reasons, we AFFIRM.

JURY, Bankruptcy Judge, Concurring.

I write separately to highlight what this disposition, and the lengthy published opinion of the bankruptcy court in *In re Seare,* 493 B.R. 158, hold and what they do not hold. Importantly, they do not hold that unbundling representation of a debtor in a nondischargeability adversary proceeding from general representation of that debtor in a bankruptcy case is prohibited. What they do say is that an attorney who wishes to limit her or his scope of bankruptcy representation should be mindful of the ethical minefield he or she must navigate.

I agree with the majority that the bankruptcy judge here did not abuse his discretion in concluding that DeLuca violated numerous sections of the Nevada Rules of Professional Conduct (NRPC) and also failed to comply with certain requirements of the Bankruptcy Code when he unbundled representation of Seare in the St. Rose adversary. The factual findings amply support the conclusion that DeLuca stumbled in that ethical minefield. However, unbundling representation of a consumer debtor in an adversary proceeding is neither prohibited by state ethical standards nor by the Bankruptcy Code. If done correctly, unbundling may be key to competent consumer bankruptcy attorneys providing much needed representation to debtors at an affordable price. Without the ability to unbundle adversaries, the flat fee which a consumer attorney would need to charge for basic bankruptcy representation might become prohibitive and exacerbate the already existing problem of pro se filings.

To be sure, the bankruptcy judge here did not suggest that unbundling was never appropriate. Indeed, in his opinion he describes the background and general acceptance of limited scope representation by the American Bar Association (ABA), which has provided for limited scope in its Model Rules, the American Bankruptcy Institute (ABI), and by most states in their ethical rules which monitor the performance of lawyers. *Seare,* 493 B.R. at 183. Despite recognizing this broad acceptance, however, the bankruptcy judge found that DeLuca fell woefully short of complying with the ethical standards which surround unbundling and therefore sanctioned him for this shortcoming. The judge found that unbundling the adversary proceeding in the representation of Seare based on the unique facts of this case was not possible to achieve the reasonably anticipated result of the client. Therefore, I believe it is useful to focus on why this unbundling failed and how a consumer bankruptcy lawyer might avoid the pitfalls which brought down DeLuca.

As highlighted by the bankruptcy judge, both the NRPC and the ABA Model Rules state that an attorney may "limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent." NRPC 1.2(c); ABA Model Rule 1.2. It was the implementation of this rule from the initial intake interview that tripped DeLuca up ***623** because he did not properly define the goal of the representation of Seare: to permanently stop the garnishment on the St. Rose judgment. The failure to recognize this goal was caused by the circumstances described by the bankruptcy judge and the majority and need not be repeated here. In a nutshell, the communication between Seare and DeLuca did not cause DeLuca to recognize that the St. Rose judgment was likely nondischargeable as based on fraud;[14] therefore, his representation would not stop the garnishment *permanently* unless he defended and won or settled the adversary proceeding. By not making the necessary reasonable inquiry about the judgment, DeLuca's attempt to unbundle did not achieve the goal of limited scope: to provide a bundle of services reasonably necessary to achieve the client's reasonably anticipated result. *In re Seare,* 493 B.R. at 188.

All the other ethical and statutory violations found by the bankruptcy judge flowed from this initial deficiency in the limited scope representation. DeLuca failed to perform competently because he did not identify the goal and provide services to accomplish the goal—i.e. representing Seare in the adversary proceeding, causing the violation of NRPC 1.1. The unbundled services he promised for the agreed flat fee was not a reasonable limited scope, causing the NRPC 1.2 error. He did not obtain informed consent because he relied on a boilerplate Retainer Agreement with legal jargon which, although it described fraud as nondischargeable and that representation in an adversary was not included in the flat fee, did not connect the dots such that Seare was made aware of the risk of accepting such limited scope representation and why it would not achieve his desired result, being free of the St. Rose garnishment. Just Seare initialing every page of the Retainer Agreement did not provide the particularized communication necessary for informed consent. The other violations of the NRPC are similarly tied to failure to identify the goal and provide the services necessary to achieve it.

The Bankruptcy Code violations are founded on the same deficiencies: DeLuca's failure to investigate the St. Rose judgment to determine its nondischargeable nature caused the § 707(b)(4)(c) violation; the failure to get informed consent regarding nonrepresentation in the adversary resulted in the § 526(a)(1) violation (when DeLuca refused to represent Seare at all in the adversary, even for a further fee); and DeLuca violated § 526(a)(3) when he did not fully explain the limitation on the services which the flat fee would buy.[15]

The bankruptcy judge chose to publish his opinion as part of the sanctions of DeLuca "to deter such conduct by all attorneys."[16] I summarize here my suggestions for such attorneys to avoid violating ethical rules and the Bankruptcy Code when they limit the scope of representation of consumer debtors:

***624** 1. At the initial intake interview with the debtor, identify fully and completely the debtor's goals. Almost by definition, the attorney therefore cannot have a predetermined business practice that excepts representation in adversary proceedings from the services the attorney will render unless the attorney and debtor identify that exception before deciding to commence representation. As noted by the bankruptcy judge, the decision to unbundle must be driven by the debtor's needs, not the attorneys.

2. The attorney may not rely solely on the debtor's input to help him or her ascertain the debtor's goal. Both the ethical rules and the Code require the attorney to conduct a reasonable investigation of the debtor's assets and liabilities. If the attorney learns that a judgment has been taken against the debtor, the attorney must make reasonable inquiry into the nature of the judgment in order to determine whether it might be subject to nondischargeability.

3. If, after ascertaining the debtor's goals, the attorney believes that limited scope representation is consistent with those goals, the attorney must then fully explain to the debtor the consequences and inherent risks which might arise if an adversary is filed against the debtor and the attorney has not included representation in that proceeding in the unbundled services. Informed consent is just that: informed. The debtor must understand the "legal jargon" and the practical effect on him or her of the limited scope representation before the consent is informed.

4. The attorney must customize the retainer agreement to the goals of debtor. That is not to say that much of the agreement cannot be boilerplate, but boilerplate without the attorney's active role in its preparation will be insufficient for limited scope representation. Just having the debtor read and initial the agreement does not assure the debtor is giving informed consent.

5. After describing to the debtor the risks of limited scope representation, the attorney must give the debtor the opportunity to "shop elsewhere" for an attorney who will provide full representation before entering into the contractual relationship with the debtor for the limited scope.

6. The attorney should document as fully as possible all the steps taken to comply with these requirements.

Following these suggestions should go a long way to allowing consumer bankruptcy attorneys to unbundle adversary proceeding representation without violating ethical rules.

All Citations

515 B.R. 599, 14 Cal. Daily Op. Serv. 10,558

Footnotes

1 Unless specified otherwise, all chapter, code and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001–9037.

2 DeLuca's flat fee to file a chapter 7 case was $1,999, which included the $306 filing fee and the credit report fee of $35.

3 The bankruptcy court admonished DeLuca for attempting to disclose settlement terms on the record. However, it did

allow him to question Seare about it on a limited basis and Seare testified that the settlement offer amount was less than $67,000.

4 After entry of the Sanctions Opinion, the bankruptcy court granted DeLuca's requests to temporarily stay, until determined by this Panel, publication of the Sanctions Opinion and the requirement that for the next two years DeLuca provide a copy of the Sanctions Opinion to future adversary clients whose case he declines. We address the latter issue later in this Memorandum.

As to the first issue, DeLuca disputes the bankruptcy court's decision to publish the Sanctions Opinion, contending that it impermissibly went beyond its own list of what potential sanctions DeLuca faced. DeLuca argues that due to his lack of a prior disciplinary record and the court's finding that he did not act knowingly, and because he tried to represent Seare in a settlement, publication of the Sanctions Opinion is too severe. He requests that we make the stay permanent or, at minimum, that his name be deleted from the Sanctions Opinion, citing *In re Martinez,* 393 B.R. 27, 30 n. 1 (Bankr.D.Nev.2008), a case where the same bankruptcy judge did not publish the subject attorney's name.

Unfortunately, during our review of this appeal, we discovered that the Sanctions Opinion *has* been published. Therefore, we are unable to provide this relief given prior publication. Further, deleting DeLuca's name from it, presuming we could even order such a remedy, would be ineffective.

5 NRPC 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

6 NRPC 1.2 provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

7 NRPC 1.5(b) provides: "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

8 NRPC 1.4 provides, in relevant part:

(a) A lawyer shall:

...

(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[.]

9 Section 707(b)(4)(C) provides:

The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

10 Section 526(a) provides, in relevant part:

(a) A debt relief agency shall not—

(1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;

...

(3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to—

(A) the services that such agency will provide to such person; or

(B) the benefits and risks that may result if such person becomes a debtor in a case under this title.

11 Section 528(a) provides, in relevant part:

(a) A debt relief agency shall—

(1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—

(A) the services such agency will provide to such assisted person; and
(B) the fees or charges for such services, and the terms of payment;
(2) provide the assisted person with a copy of the fully executed and completed contract.

12 Part IA of the Local Rules of Practice for the U.S. District Court for the District of Nevada apply in all bankruptcy cases and proceedings in the U.S. Bankruptcy Court for the District of Nevada. *See* Local Rule IA 2–1.

13 DeLuca also argues that the bankruptcy court erred in refusing to allow him to disclose the terms of the settlement offer between St. Rose and Seare that he helped procure, before it imposed sanctions. Actually, the "cat is already out of the bag" since DeLuca mentioned it on the record at the OSC evidentiary hearing, and the transcript is on the docket for the world to see. Certainly, the bankruptcy court was aware of it at the time it entered the Sanctions Opinion. In any event, we fail to see how allowing this into the record would have made any significant difference in the sanctions the court imposed. Actually, DeLuca's offer to help Seare procure a settlement with St. Rose appears to have helped him.

14 It is ironic to me that although every reference to this judgment as being nondischargeable talks about fraud, the grounds under which St. Rose sought nondischargeability were §§ 523(a)(4) and (6), not fraud.

15 The violation of § 528 is based on the failure of DeLuca to sign the Retainer Agreement and is not related to the unbundling issue.

16 In joining the majority, I also endorse their view that the bankruptcy judge followed the proper procedures and had the authority to impose the sanctions ordered, in accordance with *In re Nguyen,* 447 B.R. 268 (9th Cir. BAP 2011) (en banc).

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