

suggest that the possibility of resolving outstanding issues would be enhanced if the client communicates directly with her husband. The client also might benefit from the lawyer's advice on how she should conduct such settlement negotiations, the topics or issues to be covered, and the goals or objectives to be reached. The client also could ask the lawyer to prepare a marital settlement agreement with the goal of having her husband execute the agreement during her meeting with him.

The language of Rule 4.2 Comment [4] raises the primary question addressed in this opinion, to what extent may the lawyer advise and assist the client in communicating directly with the represented husband without violating Rule 4.2 through the acts of another, i.e., the client.⁵ However, there is tension between Comment [1] to Rule 4.2 and Rule 8.4(a). In ABA Formal Op. 92-362 (1992), this Committee opined that, without violating Rules 4.2 and 8.4 (a), a lawyer may ethically advise the client to communicate directly with a represented adversary to determine if the adverse party's lawyer had informed them that a settlement offer was pending.⁶ The inquiring lawyer in the opinion represented the plaintiff in a civil case in which the defendant also was represented by counsel. Previously, the plaintiff's lawyer made a settlement offer to opposing counsel. Plaintiff's lawyer had received no response, and the case was set for trial in two weeks. Plaintiff's lawyer suspected that opposing counsel had not informed the defendant of the offer. In that opinion, the Committee concluded that, although the plaintiff's lawyer could not communicate the settlement offer directly to the defendant without violating Rule 4.2, the plaintiff's lawyer had an ethical duty under Rules 1.1, 1.2(a), and 1.4(b) to advise the client that the lawyer believed his settlement offer had not been communicated by defendant's counsel to the defendant and that the plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been communicated.

ABA Formal Op. 92-362 acknowledged tension between the lawyer's decision to advise the client of the right to communicate directly with a represented adversary and Rule 8.4(a)'s prohibition against the lawyer's doing indirectly what the lawyer cannot do directly. Nevertheless, the Committee concluded that "where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation."⁷ The Committee expressly indicated that it was not addressing what the lawyer might tell the client to say to the other party and where the line might be crossed before running afoul of Rule 8.4(a). The Committee was careful to note that if the client was only going to find out if the other party had been told of the offer, there would be no violation of the rules. Several bar ethics committees likewise have concluded that it is not a violation of the professional conduct rules for a lawyer to suggest or recommend that the client communicate directly with a represented person.⁸

The decision to communicate directly with a represented person may be the client's idea or the lawyer's. Some decisions and opinions suggest that counsel may be violating the rules prohibiting communication with a represented party by encouraging or failing to discourage a client speaking directly

⁵ We conclude that a lawyer's client is "another" for purposes of Rule 8.4(a). In re Marietta, 569 P.2d 921 (Kan.1977) (lawyer sanctioned for preparing release and advising client to pass it on to represented adverse party); S.F. Bar Informal Opinion 1985-1 (1985) ("it would be inappropriate ... for [a] lawyer to use the client as an indirect means of communicating with the adverse party" in settlement negotiations).

⁶ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-362 (1992) (Contact With Opposing Party Regarding Settlement Offer), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 85, 88.

⁷ *Id.* at 89.

⁸ See, e.g., Massachusetts Bar Op. 11-03 (2011) (not violation of Rules 4.2 and 8.4(a) for lawyer to advise client to urge another person to release attachment on client's property, even though other person is represented by counsel); Oregon Eth. Op. Op. 2005-147 (1997) (Direct Communication Between Represented Parties) ("Allowing the parties themselves to discuss the issues and possible avenues for settlement does not conflict with the policy behind the rule [prohibiting a lawyer from causing another to communicate on the subject of the representation]."); California Comm. on Prof'l Resp. and Conduct Formal

Op. 1993-131 (1993) (lawyer may confer with client as to strategy to be pursued in, goals to be achieved by, and general nature of communication client intends to initiate with opposing party as long as communication itself originates with, and is directed by, client and not the lawyer); Michigan Eth. Op. CI-920 (1983) (in domestic relation case, it is permissible for lawyer to give client draft settlement proposal even when lawyer knows client may discuss document with spouse who is represented by counsel); San Francisco Bar Assoc. Informal Op. 1985-1 (1985) (lawyer may allow or encourage his client to attempt to resolve dispute by communicating directly with opposing party, so long as client is not directly or indirectly acting as agent of lawyer).

to the other party.⁹ The “no contact” rules applied in these opinions, however, differ from the Model Rules in that they do not contain the relevant language in Rule 4.2 Comment [4] that “a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” As the Committee observed in Formal Op. 92-362, other rules may require that, in some situations, a lawyer advise the client to consider communicating directly with her represented adversary about a matter related to the representation. Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client.” Rule 1.4(a)(2) requires the lawyer to consult with the client as to the means by which the client’s objectives are to be accomplished.¹⁰ These fundamental ethical principles, coupled with the comments to Rules 4.2 and 8.4(a), suggest that the assistance a lawyer may give to a client extends beyond advising her of her right to communicate with her adversary.

Rule 8.4(a)’s prohibition against a lawyer’s violating the rules through the acts of another raises questions about what a lawyer may or may not say to the lawyer’s client, or what the lawyer may do to assist the client in communicating directly with the represented opponent. These issues were explicitly left unaddressed in Formal Op. 92-362. When Formal Opinion 92-362 was issued, the comments to Rules 4.2 and 8.4 did not contain the current language that expressly permits the lawyer to advise the client regarding communications the client is legally entitled to make and actions the client is legally entitled to take. There is very little authority that provides guidance in any context regarding the scope of assistance and advice a lawyer may give a client under the comments to Rules 4.2 and 8.4. Some authority states that because of Rule 8.4(a)’s prohibition against violating or attempting to violate the Rules of Professional Conduct through the acts of another, a lawyer may not “script” or “mastermind” a client’s communication with a represented person and may violate Rule 4.2 by preparing legal documents for the client to have a represented person sign without the assistance of their counsel.¹¹ What constitutes “scripting” or “masterminding” the communication is not clear, but such a standard, if too stringently applied, would unduly inhibit permissible and proper advice to the client regarding the content of the communication, greatly restricting the assistance the lawyer may appropriately give to a client.¹² Relying on language similar to Comment [4] of Model Rule 4.2, the *Restatement (Third) of The Law Governing Lawyers* (2000) (“the *Restatement*”) explains:

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client’s autonomy, the client’s interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer.”¹³

⁹ See, e.g., *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 82 (S.D.N.Y. 1993) (“where a client directly asks his or her attorney whether he should approach a represented adversary, the attorney may not ethically recommend or endorse such action”); N.Y. City Ethics Op. 2002-3 (2002) (if client “conceives of the idea” of communicating with represented adversary, lawyer may advise client about it but must avoid helping client to either elicit confidential information or encourage other party to proceed without counsel); Massachusetts Bar Op. 82-8 (1982) (lawyer who has prepared settlement agreement on client’s behalf should discourage client from specifically discussing settlement with other party or directly sending letter that addresses settlement without consent of that party’s lawyer).

¹⁰ See ABA Formal Op. 92-362, FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 88.

¹¹ See, e.g., *Holdgren v. General Motors Corp.*, 13 F.Supp.2d 1192, 1193-96 (D.Kan. 1998) (lawyer in age discrimination case violated rules of professional conduct “through the acts of another” by encouraging client to obtain affidavits from coworkers, advising him of difference between “out of court statements” and signed affidavits for trial purposes, and advising him how to draft affidavit); *In re Pyle*, 91 P.3d 1222, 1228-29 (Kan. 2004) (lawyer “circumvented the constraints” of Rule 4.2 by, at client’s request, preparing affidavit for her to deliver to represented defendant in personal injury case); California Comm. on Prof’l Resp. and Conduct Formal Op. 1993-131 (“An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney.”); Massachusetts Bar Op. 11-03 (“We believe, however, that the lawyer would cross the line if she prepared a release of the attachment and presented it to the sister for execution without the knowledge and express permission of the sister’s lawyer.”).

¹² See n.11.

¹³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt (k) (2000). See also John Leubsdorf, *Communicating With Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests*, 127 U. PA. L. REV. 683, 697 (1979) (“An extension of the [no-contact] rule to communications between clients is hard to reconcile with its ostensible purposes. Whatever dangers flow from the confrontation of professional guile with lay innocence are absent

Restatement § 99 Illustration 6 clarifies this point with the following scenario. A lawyer represents a client who has a dispute with a contractor. On her own, the client drafts a letter outlining her position in the dispute and shows a copy to her lawyer. Viewing the draft as inappropriate, the lawyer redrafts the letter and recommends that the client send it out as redrafted. The client does so. The *Restatement* concludes that the lawyer's assistance to the client was not an improper communication with a represented person.

The lawyer also may draft a document for the client to deliver to the represented adversary although authority restricts the lawyer's assistance to situations where the client originates the communication, stating that it is improper for the lawyer to originate or direct the proposed communication.¹⁴ Section 99 of the *Restatement* does not explicitly address this question, although Comment (k) and Illustration 6 are based on the client having originated a proposed communication with a represented adversary. The line between permissible advice and impermissible assistance may not always be clear. This Committee does not think that line should be drawn based on who initiates the first draft of a communication with a represented adversary. Such an approach favors only those clients who have the sophistication to ask the lawyer to draft a document for the client to give to a represented adversary. In addition, allowing the lawyer to assist only if the client originates the substance of the communication leaves the unsophisticated client without the benefit of the lawyer's advice in formulating communications that the rules allow the client to have with a represented person. Instead, the line must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel.

This Committee believes that, without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication.

This Committee favors the approach taken by *Restatement* § 99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client's request without violating the lawyer's ethical obligations. However, in advising the client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.¹⁵

when two nonlawyers communicate.... Perhaps we have again come across the desire to keep disputes safely in the control of lawyers."); James G. Sweeney, *Attorneys' Arrogance: Warning Unheeded*, N.Y.L.J., June 17, 1991, at 2 col. 3 ("To deny or deter the client from the opportunity of entering into the gauging process of what value is to him in a particular dispute by denying him an opportunity to sit at the bargaining table with his adversary works against the very fundamental idea of the self and of human autonomy.").

¹⁴ See, e.g., California Comm. on Prof'l Resp. and Conduct Formal Op. 1993-131 ("When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100.").

¹⁵ See ABA Formal Opinion 95-396 (1995), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 330, 334 ("The anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."). See also *Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990) ("By preventing lawyers from deliberately dodging adversary counsel to reach-and-exploit the client alone, [the rule prohibiting communicating with a person represented by counsel] safeguards against clients making

Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.¹⁶

improvident settlements, ill-advised disclosures and unwarranted concessions."); *State v. Gilliam*, 748 So.2d 622, 638 (La. Ct. App. 1999), *writ denied*, 769 So.2d 1215 (La. 2000) (rule intended to "prevent disclosure of attorney-client communications and to protect a party from 'liability-creating statements' elicited by a skilled interrogator"); *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 764 N.E.2d 825, 830 (Mass. 2000) (rule preserves counsel's "mediating rule" and protects clients from overreaching by other lawyers); *Polycast Tech Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (rule prevents lawyers from eliciting "unwise statements" from opponents, protects privileged information, and facilitates settlements by allowing lawyers to conduct negotiations); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, § 11.6.2, at 611 (1986) ("The prohibition is founded upon the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised party"); EC 7-18 ("The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.").

¹⁶ This opinion does not address situations in which a lawyer advises a client with respect to using an investigator or agent to gather facts from a represented person. These situations may involve a variety of factors, not considered in this opinion, relevant to the presence or absence of overreaching.

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Straight & Narrow

BY JEANA K. REINBOLD

Can Stale Debt Claims Be Paid in Bankruptcy?

Editor's Note: *The Crawford decision has been the subject of several recent ABI Journal articles; explore the Journal archive at abi.org/abisearch.*

The issue of the permissibility of the filing of a claim in a bankruptcy case based on an out-of-statute debt has been frequently discussed since the Eleventh Circuit Court of Appeals in *Crawford v. LVNV Funding LLC* created a split of authority by holding that the mere filing of such a claim in a bankruptcy case violates the Fair Debt Collection Practices Act (FDCPA).¹ Notwithstanding *Crawford*, creditors have maintained that the mere filing of an accurate proof of claim does not — and many courts have agreed. In most states, the debt remains valid, although remedies have been limited.²

On the other hand, many debtors' advocates have taken the position that the filing of a stale proof of claim in bankruptcy is virtually indistinguishable from seeking to collect on it and enforce it.³ As the protections of the Bankruptcy Code and system are inadequate to protect vulnerable debtors, FDCPA liability should also strictly attach against debt collectors who file claims on account of stale debt in bankruptcy cases.⁴

As a trustee, I have recently struggled with the issue of how to properly address such claims. If state law provides that the underlying debt is not extinguished, should such claims automatically always be objected to in bankruptcy cases? Under what circumstances (if any) can or should such claims be paid? This article summarizes (1) a situation concerning stale debt from a recent case in which I served as chapter 7 trustee; (2) the apparent conflict between the permissibility and allowance of such claims; and (3) how I have decided to approach the treatment of claims for stale debt in bankruptcy, until our local courts or controlling precedent dictate otherwise.

Recent Case of Out-of-Statute Debt

Recently, a debtor filed for chapter 7 in January 2015, and I was appointed trustee. Copies of filed federal and state tax returns for the tax year 2014 showed that the debtor expected to receive tax refunds totaling more than \$7,500, only a partial amount of which could be claimed exempt under Illinois law. Following the § 341 meeting, I set a claim date with the bankruptcy court and sent a demand letter for turnover of the refunds to the debtor's attorney. The debtor promptly complied and turned over a little more than \$6,400 to me as trustee.

As stale debt claims remain viable under most state laws and the Bankruptcy Code's definition of a "claim" clearly encompass them, it appears that such claims may be paid *pro rata* with other allowed general unsecured claims absent prejudice to the debtor.

The debtor's original schedules listed no secured creditors and 13 different unsecured creditors with total debt exceeding \$54,000. Following passage of the bar date, however, I made the curious discovery that only one creditor had filed a proof of claim in the case. The claim exceeded the amount that I had collected, but the attachment to the claim indicated that the date of the last transaction, payment and charge-off for the account occurred in 1996. If the attachment was correct, it appeared that the debt was well past the applicable statute of limitations for legal enforcement in Illinois.

The dilemma: Was I duty-bound to object to the only claim filed in the case based on its stale status? It was notable that such an objection would be at my own expense as it would eliminate my compensation for collection of the asset in the case.⁵

⁵ Compensation for chapter 7 trustees is typically based on distributions to creditors, which does not include surplus funds returned to the debtor. See 11 U.S.C. § 326.



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Jeana Reinbold is an attorney in Springfield, Ill., and serves as a chapter 7 trustee for the Central District of Illinois.

¹ Compare *Crawford v. LVNV Funding LLC*, 758 F.3d 1254 (11th Cir. 2014), with *Simmons v. Roundup Funding LLC*, 622 F.3d 93, 96 (2d Cir. 2010), and *Walls v. Wells Fargo Bank NA*, 276 F.3d 502, 510 (9th Cir. 2002); see also *Broadrick v. LVNV Funding LLC and Resurgent Capital Servs. LP* (In re *Broadrick*), 532 B.R. 60, 66-68 (Bankr. M.D. Tenn. 2015) (collecting and discussing cases).

² Alane A. Beckett and William A. McNeal, "A Claimant's Dilemma: The Statute of Limitations and Proofs of Claims," XXXIV *ABI Journal* 4, 50-51, 104, April 2015; see also Susan E. Trent, "Crawford Surprises: Stale Debt, FDCPA and Proofs of Claim," XXXIII *ABI Journal* 10, 14, 82-83, October 2014. Both of these articles are available at abi.org/abi-journal. See *Broadrick*, 532 B.R. at 74 n.8; see, e.g., *Buchanan v. Northland Grp. Inc.*, 776 F.3d 393, 396-97 (6th Cir. 2015).

³ James J. Haller and Tara Twomey, "Debt Collectors Should Not Get a Free Pass in Bankruptcy," XXXIV *ABI Journal* 11, 30, 71, November 2015, available at abi.org/abi-journal.

⁴ *Id.*

Conflict Between Claim Validity and Claim Allowability?

As is familiar to bankruptcy practitioners, § 502(a) of the Bankruptcy Code provides that a claim or interest is deemed allowed unless a party-in-interest objects.⁶ It is also indisputable that the concept of a claim is defined broadly in the Code.⁷ Section 101(5) further specifies that a claim is a “right to payment,” even if such right is “disputed.”⁸

Significantly, for a stale debt, most state laws provide that the statute of limitations limits the remedies, but does not extinguish the underlying debt.⁹ Courts have noted that “[a] debt remains a debt even after the statute of limitations has run on enforcing it in court.”¹⁰ Creditors are generally permitted, with limitations, to pursue collection of even a stale debt.¹¹

Based on these principles, it seems difficult to escape the conclusion that even a stale debt is still a valid debt for which a claim can be filed. However, it also seems equally clear that such a claim should not be allowed, at least where allowance of the claim would adversely affect the debtor.

Section 502(b) of the Bankruptcy Code enumerates grounds on which an objection to a claim might be made. One of these grounds is where a claim is unenforceable *against the debtor and property of the debtor*.¹² Where the statute of limitations for enforcement on a debt has run, a claims objection made on such grounds should also be sustained.

Overlapping the tension between a valid claim and an allowable claim is the principle that the case trustee has a duty to examine the proofs of claims and object to the allowance of any claim that is improper, if a purpose would be served.¹³ I thought carefully about the question of what purpose would be served by an objection to a claim for stale debt in light of the forgoing principles.

Determining “Purpose to Be Served”

In this case, I ultimately concluded that the claim based on stale debt was not proper and should be objected to¹⁴ because the stale debt claim was not enforceable against the debtor, yet if it were disallowed, a surplus would go back to the debtor. Since a debtor would have an interest in a surplus case and the claim impeded the debtor’s access to any surplus, objection seemed warranted.

Extending this reasoning, I have determined that in general I will object to a claim based on stale debt where it makes a difference to the debtor. Aside from creating a surplus to the debtor, the more frequent situation I have seen is where the successful disallowance of a claim will increase the funds available for distribution to other nondischargeable claims, such as student loans.

In most other cases, however, there appears to be no purpose to be served in objecting to such claims, at least from a distribution standpoint.¹⁵ In a nonsurplus case in which other nondischargeable claims have not been filed, the distribution makes no difference to the debtor who is already obtaining a discharge for eligible debt.

Only other unsecured creditors are harmed by the diluted distribution, but they are the ones filing the claims.¹⁶ In non-surplus cases, absent a change in the law, it seems claims for stale debt, which are valid in amount, can simply be allowed and paid *pro rata* with other allowed claims.

Conclusion

As stale debt claims remain viable under most state laws and the Bankruptcy Code’s definition of a “claim” clearly encompasses them, it appears that such claims may be paid *pro rata* with other allowed general unsecured claims absent prejudice to the debtor. It appears that the only reason to object to such claims would be if allowance of the claim would adversely affect the debtor or debtor’s property. **abi**

6 11 U.S.C. § 502(a).

7 11 U.S.C. § 101(5); see also *Johnson v. Home State Bank*, 501 U.S. 78, 83-84 (U.S. 1991) (adopting broadest available definition of “claim” and determining that mortgage interest is a claim even after debtor’s personal obligations have been extinguished).

8 11 U.S.C. § 101(5).

9 See *Broadrick*, 532 B.R. at 74 n.8.

10 See, e.g., *Buchanan v. Northland Grp. Inc.*, 776 F.3d 393, 396-97 (6th Cir. 2015).

11 See *McMahon v. LVNV Funding LLC*, 744 F.3d 1010, 1020 (7th Cir. 2014) (noting that FDCPA is violated if debtor was misled into believing that debt was legally enforceable when it was not, but that it was not automatically improper for debt collector to seek repayment of stale debt as some debtors may feel moral obligation to pay).

12 11 U.S.C. § 502(b)(1) (emphasis added).

13 11 U.S.C. § 704(a)(5).

14 One additional unsecured creditor did file a tardy claim in the case, in a much lesser amount, but provided at least one claim to pay.

15 This is not to say there might not be an occasional unusual case where it prejudices an atypical unsecured creditor, and the effect of the allowance of the claim on the distribution would be reviewed at that time.

16 A party without a pecuniary interest in the outcome of bankruptcy proceedings would not have standing to object to a distribution. See *In Cult Awareness Network Inc.*, 151 F.3d 605, 607-08 (7th Cir. 1998); see also *In re Ulz*, 401 B.R. 321, 328 (Bankr. N.D. Ill. 2009).

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Warning

As of: August 18, 2016 9:35 AM EDT

Redmond v. Lentz & Clark, P.A. (In re Wagers)

United States Bankruptcy Court for the District of Kansas

February 23, 2006, Decided

CASE NO. 03-24484, CHAPTER 7, ADV. NO. 04-6095

Reporter

340 B.R. 391; 2006 Bankr. LEXIS 242

In Re: MAX R. WAGERS, GEORGIA A. WAGERS,, DEBTORS. CHRISTOPHER J. REDMOND, Trustee, PLAINTIFF, v. LENTZ & CLARK, P.A., MAX R. WAGERS, and GEORGIA A. WAGERS, DEFENDANTS.

Subsequent History: Reversed by [Redmond v. Lentz & Clark, P.A. \(In re Wagers\)](#), 355 B.R. 268, 2006 Bankr. LEXIS 3962 (B.A.P. 10th Cir., 2006)

Reversed by [Wagers v. Lentz & Clark, P.A. \(In re Wagers\)](#), 2007 U.S. App. LEXIS 28805 (10th Cir., Dec. 12, 2007)

Core Terms

retainer, postpetition, prepetition, tax refund, refunds, attorneys, property of the estate, services, assigned, funds, trust account, expenses, courts, fees and expenses, attorney's fees, bankrupt estate, escrow, retainer agreement, bankruptcy case, provides, terminate, deposit, summary judgment, intangibles, contingent, requires, legal services, alleges, applies, matters

Case Summary**Procedural Posture**

Plaintiff bankruptcy trustee brought an adversary proceeding against defendants, Chapter 7 debtors and the law firm representing the debtors, alleging that the bankruptcy estate was entitled to the debtors' tax refunds which the debtors assigned to the firm prepetition to secure the firm's prepetition and postpetition services. The parties cross-moved for summary judgment.

Overview

The trustee contended that the debtors' assignment of their tax refunds to the firm constituted advance payment for the firm's services, and thus the refunds remained the property of the debtors which was included in the debtors' bankruptcy estate. The trustee also asserted that, since the firm was not employed by the trustee with the approval of the court to represent the debtors, the firm could not be paid from

property of the estate. The bankruptcy court held, however, that the refunds were not property of the estate, and the estate held only a reversionary interest in any portion of the refunds which was not earned by the firm. Under Kansas law, after the unconditional assignment of the tax refunds, the debtors' interest in the retainer was limited to a right to the return of any portion that remained after paying the reasonable value of the firm's services under [11 U.S.C.S. § 329](#). As an assignee, the firm held full ownership of the refunds, and the estate's interest was limited to the debtors' contingent reversionary interest, which may or may not mature into full ownership of a portion of the funds. The bankruptcy estate could receive no greater right than the debtors had.

Outcome

The motion for summary judgment of the debtors and the firm was granted, and the cross-motion of the trustee was denied.

LexisNexis® Headnotes

Bankruptcy Law > ... > Commencement of Case > Joint Cases > Consolidation

HN1 Strictly speaking, a married couple's joint bankruptcy petition creates two estates that can be consolidated or jointly administered only by order of a court. [11 U.S.C.S. § 302\(a\), \(b\)](#); [Fed.R.Bankr.P. 1015\(a\), \(b\)](#), 2009. The practice in most of the country, however, is to administer joint petitions jointly without entering an order to do so.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

HN2 [11 U.S.C.S. § 330](#), the main statute governing compensation of officers of bankruptcy estates, does not allow debtor's counsel in a Chapter 7 proceeding to be compensated from estate assets unless the attorney is employed by the trustee with approval of the court.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

340 B.R. 391, *391; 2006 Bankr. LEXIS 242, **242

HN3 Chapter 7 is intended to afford relief to financially distressed bankruptcy debtors. A debt incurred to a debtor's bankruptcy counsel does not add to the debtor's distress; rather, it is the means by which the debtor may obtain relief from that distress.

Bankruptcy Law > ... > Bankruptcy > Estate Property > Contents of Estate

HN4 The Bankruptcy Code generally provides that when a debtor files for bankruptcy, the debtor's legal and equitable interests in property become property of the estate. *11 U.S.C.S. § 541(a)*. But nonbankruptcy law, usually state law, defines the debtor's rights in the property. In the absence of explicit federal preemption, a Chapter 7 trustee ordinarily receives the property subject to any restrictions nonbankruptcy law imposes on the debtor's rights. An interest limited in the hands of the debtor is equally limited in the hands of the estate.

Contracts Law > Standards of Performance > Assignments > General Overview

HN5 Under Kansas law, an assignment is an expression of intent by the assignor that his right shall pass to the assignee. If, after the assignment, the property assigned comes into the hands of the assignor, the property is regarded as trust funds belonging to the assignee. No particular form is required; the assignment must simply establish the intent to transfer the property to the assignee.

Commercial Law (UCC) > ... > Definitions > Collateral > Intangibles

Commercial Law (UCC) > ... > Perfection > Methods of Perfection > Automatic Perfection

HN6 For purposes of Article 9 of the Uniform Commercial Code, a tax refund is a payment intangible, defined as a general intangible under which the account debtor's principal obligation is a monetary obligation. *Kan. Stat. Ann. § 84-9-102(a)(61)* (2004 Supp.). Article 9 generally applies to both security interests in and sales of payment intangibles. *Kan. Stat. Ann. § 84-9-109(a)(1), (3)* (2004 Supp.). But with respect to sales transactions, the security interest is perfected upon attachment, *Kan. Stat. Ann. § 84-9-309(a)(3)* (2004 Supp.), and the seller of the payment intangible retains no legal or equitable interest in the payment intangible sold. *Kan. Stat. Ann. § 84-9-318(a)* (2004 Supp.).

Commercial Law (UCC) > ... > Subject Matter > Definitions > General Overview

HN7 *Kan. Stat. Ann. § 84-2-106* defines a sale as the passage of title from the seller to the buyer for a price. For purposes of

this definition, the price may be paid in money or otherwise. *Kan. Stat. Ann. § 84-2-304*.

Legal Ethics > Client Relations > Attorney Fees > General Overview

HN8 Retainer means property transferred to an attorney or law firm as advance payment against which fees and expenses will be charged after they are incurred. This meaning is distinguished from a flat fee, sometimes referred to as a retainer, under which the lawyer agrees to do a specific task in exchange for payment to the attorney of a specified fee. It is also distinguished from an engagement retainer, which is a sum paid to the lawyer to assure the lawyer's availability to represent the client, not for legal services. Both flat fee and engagement retainers are fully earned when paid to the attorney and need not be placed in a trust account. Finally, the word retainer has at times been confused with a nonrefundable retainer or a minimum fee retainer, which is prohibited under the Kansas Rules of Professional Conduct. Under such an arrangement, the fee is deemed immediately earned by the attorney and not placed in a trust account. The fee agreement provides that the fee will be retained upon termination of the representation, even if essentially no services are rendered, and additional fees will be charged if the value of the services exceeds the amount of the prepaid fee.

Legal Ethics > Client Relations > Attorney Fees > General Overview

HN9 Under Kansas law, a retainer held by an attorney for payment of fees may not be disbursed from the attorney's trust account to the attorney until the services are rendered and, upon termination of the representation, the attorney must refund to the client any excess advance payment. *Kan. R. Prof. Conduct 1.16(d)*; *Kan. Sup. Ct. R. 427*. The rules that govern attorneys' conduct, the Kansas Rules of Professional Conduct, indicate that an attorney can require advance payment of his or her fees. *Kan. R. Prof. Conduct 1.5*; *Kan. Sup. Ct. R. 418*. Those rules require the attorney to hold property of clients or third persons that comes into the lawyer's possession in connection with a representation separate from the lawyer's own property and require that cash be placed in a trust account. *Kan. R. Prof. Conduct 1.5*; *Kan. Sup. Ct. R. 418*. Even absent a retainer agreement, the lawyer is not required to remit to the client funds which the lawyer reasonably believes represent fees owed. Model Rules of Prof'l Conduct R. 1.15 (Comment).

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

HN10 An agreement, such as a retainer agreement or an

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assignment, may alter an attorney's duty to promptly deliver to the client any funds or other property that the client is entitled to receive. Kan. R. Prof. Conduct 1.15(b); Kan. Sup. Ct. R. 414. The attorney's duty to return an unearned retainer to the client arises only when the representation is terminated, Kan. R. Prof. Conduct 1.16(d), Kan. Sup. Ct. R. 427, although if there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid until any dispute regarding fees is resolved. Kan. R. Prof. Conduct 1.15; Kan. Sup. Ct. R. 418.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN11 The U.S. Supreme Court requires that [11 U.S.C.S. § 329](#), not [11 U.S.C.S. § 330](#), be applied when Chapter 7 counsel seeks payment from property which is not property of the estate. [11 U.S.C.S. § 329](#) addresses compensation already paid and compensation agreed to be paid. It imposes a "reasonable value" standard for the court to apply and permits the court to require cancellation of the agreement and the return of any such payment to the extent the fees are excessive. If the property used for the payment of excessive fees would otherwise have constituted estate property, [§ 329\(b\)\(1\)\(A\)](#) requires that such property be returned to the estate. This statute clearly recognizes that debtors may set aside property that would otherwise be estate property to pay for postpetition services.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN12 See [11 U.S.C.S. § 329](#).

Legal Ethics > Client Relations > Representation > Acceptance

HN13 Kan. R. Prof. Conduct 1.1 requires a lawyer to provide competent representation (Kan. Sup. Ct. R. 342), Kan. R. Prof. Conduct 1.2(c) permits limiting the objectives of the representation if the client consents after consultation (Kan. Sup. Ct. R. 350), and Kan. R. Prof. Conduct 1.4(b) requires the lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation (Kan. Sup. Ct. R. 367).

Legal Ethics > Client Relations > Representation > Acceptance

HN14 See Kan. R. Prof. Conduct 1.7(b); Kan. Sup. Ct. R. 391.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN15 [11 U.S.C.S. § 329](#) is the only Bankruptcy Code provision that allows courts to set aside or modify Chapter 7 debtors' retainer agreements for prepetition and postpetition legal representation, and the Code is construed to reflect this intent. Unlike [11 U.S.C.S. §§ 365, 548, 11 U.S.C.S. § 329](#) explicitly deals with debtors' transactions with attorneys. This statute is broad and expressly applies to Chapter 7 debtors' contracts with their attorneys, and to the postpetition payment of attorney fees from non-estate property. It provides authority to the courts to cancel such a contract, which is similar to rejection of an executory contract. It allows courts to find the compensation such a contract promises to the attorney to be unreasonable and to return to the estate the property transferred to the attorney, which is similar to the recovery of a fraudulent transfer.

Governments > Legislation > Interpretation

HN16 When statutes present conflicts, a common rule of statutory construction is to declare that the specific statute controls over the general one.

Governments > Legislation > Interpretation

HN17 The plain meaning of legislation is conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters. In such cases, the intention of the drafters, rather than the strict language, controls.

Bankruptcy Law > ... > Bankruptcy > Estate
Property > Noncustodial Turnovers

HN18 See [11 U.S.C.S. § 542\(a\)](#).

Bankruptcy Law > Administrative Powers > Estate Property
Lease, Sale & Use > General Overview

HN19 See [11 U.S.C.S. § 363\(b\)\(1\)](#).

Counsel: **[**1]** For Max R Wagers, dba, Wagers Land & Cattle Co, Georgia A Wagers, Debtors: Carl R Clark, Lentz & Clark, P.A., Overland Park, KS.

For Christopher J. Redmond, Trustee: Christopher J. Redmond, Leawood, KS; Christopher J. Redmond, Kansas City, MO; Jacob W Stauffer, Husch & Eppenberger, LLC, Leawood, KS; Jacob W Stauffer, Husch & Eppenberger, LLC, Kansas City, MO; Robert D. Maher, Leawood, KS.

Judges: Dale L. Somers, UNITED STATES BANKRUPTCY JUDGE.

Opinion by: Dale L. Somers

Opinion

[*393] OPINION ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

This proceeding is before the Court on the plaintiff-trustee's motion for partial summary judgment and the defendants' response and counter-motion for partial summary judgment. The plaintiff-trustee was originally represented by counsel Christopher J. Redmond and Brian M. Devling; after the motions were filed, Mr. Devling withdrew and Jacob W. Stauffer entered his appearance for the trustee. The defendants are represented by counsel [*394] Carl R. Clark and Jeffrey A. Deines. The Court has reviewed the relevant pleadings and is now ready to rule.

Before filing for bankruptcy, debtors Max R. and Georgia A. Wagers (Debtors) gave the law firm of Lentz & Clark, P.A. (Firm) [*2] \$ 5,000 in cash and an assignment of any tax refunds they might be entitled to, all as deposits for payment of fees to be incurred representing them in dealing with financial difficulties and, ultimately, filing a Chapter 7 bankruptcy. After the case was filed, the trustee for the Debtors' bankruptcy estate ¹ [*3] (Trustee) brought this adversary proceeding ² in an effort to require the Firm to turn the assigned tax refunds over to the estate, even though the Firm is continuing to represent the Debtors. Relying on the facts that (1) the Kansas Supreme Court has declared that advance payments held by a lawyer or law firm remain the client's money and (2) Chapter 7 debtors' attorneys not employed pursuant to [§ 327 of the Bankruptcy Code](#) ³ cannot

¹ *HNI* Strictly speaking, a married couple's joint bankruptcy petition creates two estates that can be consolidated or jointly administered only by order of the Court. See [11 U.S.C.A. § 302\(a\) & \(b\)](#); [Fed. R. Bankr. P. 1015\(a\) & \(b\)](#) & 2009. The practice in this district, however, as in most of the country, is to administer joint petitions jointly without entering an order to do so. See 2 *Collier on Bankruptcy*, P 302.02[1][b] (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 15th ed. rev. 2005) (hereafter cited as "[vol. no.] *Collier* P ____"). The practice here is also to refer to the joint estates in the singular, rather than the plural.

² The Court has jurisdiction. [28 U.S.C.A. § 1334](#). This is a core proceeding which the Court may hear and determine as provided in [28 U.S.C.A. § 157\(b\)\(1\)](#) and [\(b\)\(2\)\(E\)](#).

³ [11 U.S.C.A. § 327](#). This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references to the Bankruptcy Code are to [11 U.S.C.A. §§ 101 to 1330 \(2004\)](#), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004),

be paid from property of the estate, the Trustee seeks partial summary judgment requiring the Firm to deliver the tax refunds to him based upon counts I and IV of his Complaint.

For the reasons discussed below, the Court denies the Trustee's motion and concludes the advance payments, including the assignment of future tax refunds, are not property of the estate. The estate's interest in the assigned cash and tax refunds on the date of filing was limited to the contingent right to receive any balance remaining after the Firm's prepetition and postpetition fees and expenses are paid from the retainer. [*4] ⁴ Further, the Court holds that [§ 329](#) is the Code section that controls the payment of attorney fees from the retainer.

FACTS.

The material facts are uncontroverted. At the end of May 2003, the Debtors hired the Firm to provide them with legal advice about their financial situation. In June 2003, the Debtors signed a letter agreement (Legal Representation Agreement) specifying the terms of the representation. That same month, they paid a \$ 5,000 retainer that the Firm deposited in its trust account. Over the next several months, the Firm billed the Debtors for \$ 2,866 in fees and expenses. It charged this amount against the retainer, leaving a balance of \$ 2,134. On October 22, 2003, the Debtors executed an Assignment of Tax Refunds and Limited Power of Attorney which assigned to the Firm any refunds they might obtain by filing original or [*395] amended tax returns for 2003 and prior years as an additional retainer "for services [*5] rendered or to be rendered." With the Firm's help, the Debtors filed a joint Chapter 7 bankruptcy petition the day after assigning the refunds. The Debtors have testified that they intended for the assignment to pay the fees and expenses the Firm would charge for representing them in their bankruptcy case, with any remaining balance to be paid into the bankruptcy estate.

A few weeks before filing for bankruptcy, the Debtors filed a 2002 federal income tax return that generated a refund. A couple of weeks after filing for bankruptcy, they filed amended federal tax returns for 1997 through 2001; these returns all generated refunds. The Debtors received these refunds (along with a state refund for an unspecified year) after they filed for bankruptcy and, following through on the assignment, they delivered the refunds to the Firm. The Firm deposited the refunds, a total of \$ 51,660, in its trust account. Late in 2004, the Debtors filed 2003 federal and state income

unless otherwise specified.

⁴ The meaning of "retainer" as used in this opinion is explained at pp. 19-22.

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tax returns that should also generate refunds totaling \$ 5,475, although the Debtors had not yet delivered them to the Firm when the summary judgment motions were filed in this proceeding. In January 2004, the Debtors paid [**6] the Firm \$ 1,000, and in September another \$ 500; the Trustee does not contend the estate has any interest in these postpetition payments.

From October 2003 through September 2004, the Debtors incurred a total of \$ 14,361.60 in fees and expenses with the Firm. The Firm applied the \$ 2,134 balance of the cash retainer to the October and November 2003 fees. Relying on records supplied by the Firm, the Trustee asserts that only \$ 1,084.75 of this amount was applied to fees earned before the Debtors filed for bankruptcy; he does not claim the estate has any interest in this portion of the cash retainer.

The Firm's records show the remaining \$ 1,049.25 of the cash retainer was applied to postpetition fees. Although the Trustee does not appear to have previously claimed that the estate's interest in that portion precludes the Firm from keeping that money, he has made that claim in his reply to the Firm's brief opposing his motion. Through September 2004, ⁵ the Firm was owed \$ 13,276.25 in fees and expenses, all incurred postpetition, that the Trustee argues cannot be paid from the cash retainer and the assigned tax refunds, despite the assignment. Adding the \$ 1,049.25 of the cash retainer [**7] to the \$ 51,660 in tax refunds and subtracting agreed expenses of \$ 2,881.17 ⁶ leaves a balance of \$ 49,828.08 that the Trustee claims the Firm must turn over to him. ⁷

The Parties' Positions.

In June 2004, the Trustee brought this proceeding against the Firm and the Debtors, seeking to recover the assigned refunds from the Firm. In January 2004, the [**8] Supreme Court had decided *Lamie*, ⁸ which [**396] held that *HN2* § 330, the main statute governing compensation of officers of bankruptcy

estates, does not allow debtor's counsel in a Chapter 7 proceeding to be compensated from estate assets unless the attorney is employed by the trustee with approval of the court. The Trustee alleges in his Complaint that *Lamie* has created confusion about the ability of debtor's counsel in a Chapter 7 proceeding to apply funds from the assignment of income tax refunds to payment of fees. ⁹

The Complaint alleges six counts. ¹⁰ [**10] The Trustee seeks summary judgment on count I, claiming the tax refunds are property of the estate, and count IV, claiming the tax refunds are property which the trustee may use, sell, or lease under § 363, so they must be turned over to the Trustee under § 542. The Trustee's summary judgment motion [**9] seeks to recover the refunds and the portion of the cash retainer applied to postpetition fees from the Firm through the following theory: (1) under Kansas law, money that clients pay their attorneys for future services remains the clients' money at least until the services are provided; ¹¹ (2) when the Debtors filed for bankruptcy, all interests in the refunds therefore became property of the bankruptcy estate because the Firm had not yet provided any services not covered by the initial \$ 5,000 retainer; (3) fees for services an attorney renders after a bankruptcy petition is filed can be paid from property of a Chapter 7 estate only if the fees have been allowed under § 330(a); ¹² (4) under the Supreme Court's

⁹ See Adversary Complaint, Dkt. no. 1 at P 22.

¹⁰ The first count alleges the Debtors' assignment gave the Firm only a security interest in, not ownership of, the refunds, so the refunds are property of the bankruptcy estate that must be turned over to the Trustee. The second count alleges the Debtors received less than a reasonably equivalent value from the Firm in return for the assignment, and seeks to avoid the transfer under § 548 of the *Bankruptcy Code* as a fraudulent transfer. The third count alleges the Trustee can recover the refunds under § 550 of the Code. The fourth count alleges the refunds are property of the estate that the Trustee may use, sell, or lease under § 363 of the Code, so that the Firm must turn them over to the Trustee as required by § 542. The fifth count alleges the value of the refunds exceed the reasonable value of the legal services the Firm provided the Debtors before they filed for bankruptcy, so the refunds should be returned to the bankruptcy estate pursuant to § 329. The sixth count alleges any lien the Firm might have on the refunds is invalid, unperfected, and subordinate to the Trustee's rights in them, and therefore avoidable under § 544 of the Code.

¹¹ *In re Scimeca*, 265 Kan. 742, 759-60, 962 P.2d 1080, 1092 (1998).

¹² See 11 U.S.C.A. § 503(b)(2) (fees allowed under § 330(a) are administrative expenses); § 507(a)(1) (administrative expenses allowed under § 503(b) are first priority expenses); § 726(a)(1) (property of estate is to be distributed first to pay claims specified in

⁵ The Court is certain the Debtors have incurred additional fees and expenses since then, adding to the Firm's claim against the retainer.

⁶ During 2004, with the Trustee's consent, the Firm disbursed a total of \$ 2,881.17 from its trust account to pay certain expenses that the estate would otherwise have incurred. The Trustee agrees this amount should be subtracted from the money he claims on behalf of the estate.

⁷ Of course, the Trustee also claims the estate's interest in the 2003 refunds is superior to any claim the Firm can make against them, but the Firm had not yet received that money when the summary judgment motions were filed.

⁸ *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed.2d 1024 (2004).

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ruling in *Lamie*,¹³ the Firm's postpetition fees and expenses cannot be allowed under [§ 330\(a\)](#) because the Firm was not employed by the Trustee; and (5) since the Firm's postpetition fees cannot be paid from the refunds, it should be required to turn the refunds over to the Debtors' bankruptcy estate, pursuant to [§ 542](#). The Trustee's motion is based on the combined effect of his interpretation of Kansas law and the application of the *Lamie* decision.

Responding for itself and the Debtors, the Firm also moves for partial summary judgment. It contends that the first two premises of the Trustee's theory are mistaken, insisting that because the Debtors assigned the refunds to the Firm before they filed for bankruptcy, the bankruptcy estate's interest in the refunds is limited to a contingent right to receive any balance [*397] remaining after the Firm's fees and expenses for representing the Debtors in their bankruptcy case are paid from the refunds. The Firm further contends that [§ 329](#), "Debtor's transactions with attorneys," instead of [§ 330](#), "Compensation of officers," is the appropriate Code section [*11] to apply when determining the Firm's right to compensation, and that under [§ 329](#), the Firm is entitled to be paid prepetition and postpetition fees and expenses from the assigned property.

ANALYSIS.

I. The Debtor-Attorney Relationship and the Importance of Retainers.

In this case, the Trustee is challenging the postpetition validity of the retainer agreement between the Firm and its clients, the Chapter 7 Debtors. The agreement here is no different from that customarily used in this district. Taking cash and assignments of tax refunds for the payment of both prepetition and postpetition services is an accepted practice to assure payment for attorney services. Counsel for Chapter 7 debtors provide valued and essential services postpetition, and this Court has a significant interest in preserving the availability of that representation.

Several courts applying the laws of states other than Kansas, including the Fourth Circuit when *Lamie* was before it, have reached conclusions supporting the Trustee's position that a Chapter 7 debtor's attorney cannot collect postpetition fees from a retainer the debtor paid prepetition.¹⁴ [*13] More

[§ 507](#)).

¹³ [540 U.S. at 526, 124 S.Ct. at 1023](#).

¹⁴ E.g., [In re Equipment Servs., Inc.](#), 290 F.3d 739, 746-47 (4th Cir. 2002), *aff'd on different issue sub nom. Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)

recently, the Seventh Circuit [*12] ruled that a Chapter 7 debtor's discharge covers his or her personal liability for any fees the debtor had arranged under a prepetition agreement to pay his or her bankruptcy attorney, even if the fees were for services provided postpetition.¹⁵ If combined, the Fourth Circuit's ruling that postpetition fees can't be charged against a prepetition retainer and the Seventh Circuit's ruling that postpetition fees incurred under a prepetition agreement are covered by a debtor's Chapter 7 discharge would mean that there is no way for an attorney representing a Chapter 7 debtor to be assured of getting paid for postpetition services. Chapter 7 trustees could recover from attorneys any property clients supplied prepetition that was intended to pay postpetition fees, and collecting from clients personally postpetition would be barred by their discharges. In effect, if the rules of both these cases control, an attorney cannot be confident at the time of the client's filing for bankruptcy that money will be available to pay for the legal services which will be required during the bankruptcy case.

Following the approaches of the Trustee and the Fourth and Seventh Circuits would undermine the unique role occupied [*398] by a Chapter 7 debtor's attorney. Essentially all Chapter 7 debtors need legal advice to help them get their bankruptcy cases properly filed. Only a very few need the assistance of other professionals such as accountants before filing, but they all need legal advice and therefore benefit from the assistance of an attorney. Of all the debtor's creditors and potential creditors, usually only his or her bankruptcy attorney deals with the debtor knowing that the debtor is going to file for bankruptcy and is, in fact, hired to help the [*14] debtor do so.¹⁶ A Chapter 7 debtor's attorney must

(Virginia law); [In re Mondie Forge Co.](#), 154 B.R. 232, 236-39 (Bankr. N.D. Ohio 1993) (Ohio law); [In re On-Line Servs., Ltd., LLC](#), 2004 Bankr. LEXIS 2209, 2004 WL 2671669, *slip op. at 2-3* (Bankr. N.D. Iowa 2004) (not reported in B.R.) (Iowa law); *see also Snyder v. Dewoskin (In re Mahendra)*, 131 F.3d 750, 754-56 (8th Cir. 1997) (Missouri law; holding prepetition mortgage on real property did not secure postpetition attorney fees; in dicta, said same would be true for cash security retainer).

¹⁵ [Bethea v. Robert J. Adams & Assocs.](#), 352 F.3d 1125, 1126-1129 (7th Cir. 2003) (2 to 1 decision; dissenting judge thought only question of prepetition fees should be reached); *but see In re Hines*, 147 F.3d 1185, 1190-91 (9th Cir. 1998) (concedes plain language of Bankruptcy Code leads to conclusion postpetition fees of Chapter 7 debtor's attorney are discharged, but holds doctrine of necessity precludes that result).

¹⁶ *See Bethea v. Robert J. Adams & Assocs. (In re Bethea)*, 275 B.R. 284, 292 (Bankr. N.D. Ill. 2002), *aff'd* 287 B.R. 906 (N.D. Ill.), *rev'd* 352 F.3d 1125 (7th Cir. 2003) **HN3** ("Chapter 7 is intended to afford relief to financially distressed debtors. -- A debt incurred to the

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also continue to help the debtor postpetition in order to insure the debtor receives as much of a fresh start as he or she is entitled to, and to fulfill the debtor's probable and reasonable expectations under their prepetition contract. [**15] Postpetition representation is also required to satisfy the bankruptcy court's expectations of the attorney as an officer of the court. It is common practice in this district, as well as others,¹⁷ for counsel to obtain a prepetition retainer to assure payment for postpetition services. The Trustee's approach would render this practice futile.

To solve the problem of the discharge of personal liability for fees under a prepetition contract, the Seventh Circuit suggested that an attorney could agree to represent debtors in preparing to file for bankruptcy, terminate the representation as of the filing of the petition, and require the debtors to rehire him or her under a separate postpetition agreement if they want postpetition representation.¹⁸ This suggestion assumes bankruptcy courts universally allow attorneys to structure their representation of Chapter 7 debtors this way. In fact, however, while bankruptcy courts have taken differing views of the obligations attorneys undertake by representing clients in filing Chapter 7 bankruptcy petitions, none appears to have allowed the exclusion of all postpetition [**16] services. Attorneys are almost always required to accompany their clients to the meeting of creditors that is scheduled and held only after the petition is filed.¹⁹ [**18] Some bankruptcy

courts also require attorneys who prepare Chapter 7 [**399] petitions to continue to represent the debtors at a minimum in postpetition matters that arise in the main bankruptcy case, such as stay relief motions.²⁰ Indeed, some matters that may arise -- objections to the exemptions the debtors have claimed, objections to discharge based on alleged errors or omissions in the Schedules or Statement of Financial Affairs, and motions to dismiss under § 707(b) for substantial abuse -- are so closely related to the advice the attorney gave in the prepetition preparation for filing that the attorney would at least be morally bound, and might be legally bound, to defend the debtors' position against such attacks. Some courts go even further and require the attorney to represent the debtors in any adversary proceedings that might be brought against them.²¹ To the extent that the court before which an attorney files a petition takes the view that the representation automatically extends to postpetition matters, the [**17] attorney could not effectively limit the representation to prepetition matters as a way to improve the chances of getting paid for the postpetition representation the debtor needs.

[**19] In addition, the Seventh Circuit's suggestion of separate prepetition and postpetition contracts raises difficult questions under the *Kansas Rules of Professional Conduct*. Rule 1.1 requires the lawyer to provide competent representation,²² Rule 1.2(c) permits limiting "the objectives of the representation if the client consents after consultation,"

debtor's bankruptcy counsel does not add to the debtor's distress; rather, it is the means by which the debtor may obtain relief from that distress.").

¹⁷ Morgan D. King, *Between the Charybdis of Biggar and the Scylla of Lamie: How Can a Debtor's Lawyer Get Paid?*, Norton Bankr. L. Adviser, June 2004 at 2, n.4 (response to survey indicated that 71% of consumer attorneys in 35 state collect prepetition retainer sufficient for both prepetition and postpetition services).

¹⁸ *Bethea*, 352 F.3d at 1127-28. The court also mistakenly said that legal fees under such a postpetition agreement with the debtors would be entitled to administrative priority, *id.* at 1128, an assertion *Lamie* clearly refutes. See *In re Griffin*, 313 B.R. 757, 766 n. 7 (Bankr. N.D. Ill. 2004) (pointing out that *Lamie*'s holding clearly contravenes *Bethea*'s assertion of administrative priority). The *Griffin* court also discussed a number of problems with *Bethea*'s suggestion attorneys can represent debtors to the date of a bankruptcy filing, and then require a new agreement for any postpetition legal assistance. *Id.* at 766-70.

¹⁹ See, e.g., *In re Johnson*, 291 B.R. 462, 466-72 (Bankr. D. Minn. 2003) (under local court rule, attorney could not limit representation of Chapter 7 debtors to exclude attorney's attendance at meeting of creditors); see also King, *Between the Charybdis of Biggar and the Scylla of Lamie*, Norton Bankr. L. Adviser, June 2004 at 2 & n. 14 (indicating U.S. Trustee advises Chapter 7 trustees to consider

seeking disgorgement of fees of debtor's attorney who fails to appear at meeting of creditors).

²⁰ The local rules that apply to attorneys appearing before this Court would seem to require an attorney who signs a Chapter 7 petition with the debtors to file a motion and obtain the Court's approval in order to withdraw from representing the debtors in the bankruptcy case. See D. Kan. Rule 83.5.5 (withdrawal by attorney who has appeared "in a case" is not effective until order authorizing withdrawal is filed, unless substitution of counsel is accomplished); *D. Kan. LBR 2090.2* (Rule 83.5.5 and other District Court rules apply to attorneys).

²¹ See, e.g., *In re Egwin*, 291 B.R. 559, 569-75 (Bankr. N.D. Ga. 2003) (unless attorney can make unlikely showing of informed consent to limitation on representation, attorney filing bankruptcy case must represent debtor in postpetition matters in main case and adversary proceedings that affect Chapter 7 debtor's primary objectives of eliminating debt and retaining property); *In re Castorena*, 270 B.R. 504, 525-31 (Bankr. D. Idaho 2001) (attorney's efforts to limit representation of debtors in Chapter 7 bankruptcy unlikely to succeed because informed consent to limitations can rarely, if ever, be shown).

²² 2004 Kan. Ct. R. Ann. 342.

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²³ and Rule 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ²⁴ Together, these rules indicate the lawyer would have to explain everything that could happen in the client's Chapter 7 bankruptcy case that might require a lawyer's postpetition help in order to obtain the client's valid consent to terminate the representation with the filing of the petition. ²⁵ In addition, Rule 1.7(b) provides: "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation." ²⁶ To avoid running afoul of this rule, the lawyer **[**20]** **[*400]** would have to be satisfied the client either could hire an attorney postpetition to provide the necessary services or would be capable of competently proceeding without legal assistance.

But even if the courts allowed attorneys to terminate the representation on filing the petition, as a practical matter, how could attorneys properly advise clients prepetition about matters that might arise after a petition is filed without raising expectations of continuing the representation, or at least leaving their clients extremely confused about the necessity of hiring the same or another attorney again after **[**21]** the petition is filed? How could they overcome the likely suspicion of trustees, creditors, and courts that they really made the agreement prepetition to have their clients "rehire" them postpetition? Even their clients might, in hindsight, change their minds about what the original understanding was. ²⁷

For these reasons, the Court is persuaded that resolution of the issues the Trustee has raised here will have a profound impact on bankruptcy courts, debtors, and their attorneys. As a result, in reaching its decision, the Court has given careful consideration to various provisions of federal and state law

that affect these issues.

II. The Tax Refunds Are Not Property of the Estate.

HN4 The Bankruptcy Code generally provides that when a debtor **[**22]** files for bankruptcy, the debtor's legal and equitable interests in property become property of the estate. ²⁸ But nonbankruptcy law, usually state law, defines the debtor's rights in the property. ²⁹ In the absence of explicit federal preemption, a Chapter 7 trustee ordinarily receives the property subject to any restrictions nonbankruptcy law imposed on the debtor's rights. ³⁰ **[**23]** "An interest limited in the hands of the debtor is equally limited in the hands of the estate." ³¹ The issue before the Court therefore requires determining the Debtors' interest in the tax refunds under Kansas law on the date of filing.

In support of his argument that the tax refunds all belong to the bankruptcy estate, the Trustee cites the Tenth Circuit's decision in *In re Barowsky*, ³² which held that a Chapter 7 debtor's right to receive the portion of a federal income tax refund attributable to the prepetition portion **[*401]** of the tax year in which the debtor filed for bankruptcy becomes property of his or her bankruptcy estate. The Court agrees that, under *Barowsky*, all the tax refunds attributable to money the Debtors had paid to the IRS for tax years ending before their bankruptcy filing and for the tax year in which they filed would constitute property of the estate if they had not assigned the refunds to the Firm.

²⁸ 11 U.S.C.A. § 541(a).

²⁹ *Butner v. United States*, 440 U.S. 48, 54-55, 99 S. Ct 914, 917-918, 59 L. Ed.2d 136 (1979).

³⁰ *Integrated Solutions, Inc., v. Service Support Specialties, Inc.*, 124 F.3d 487, 492-93 (3d Cir. 1997); see also *In re ANR Advance Transportation Company, Inc.*, 247 B.R. at 774 (finding escrow to be valid and holding none of escrow funds were property of estate); *Dickerson v. Central Florida Radiation Oncology Group*, 225 B.R. 241 (M.D. Fla. 1998) (holding funds debtor was required to deposit in segregated account were held in escrow and debtor's interest was limited to contingent remainder, which became property of estate on bankruptcy filing); *Cedar Rapids Meats, Inc. v. Hager (In re Cedar Rapids Meats, Inc.)*, 121 B.R. 562 (Bankr. N.D. Iowa 1990) (holding fund established to guarantee payment of worker's compensation claims was an escrow and not property of estate; debtor's interest was limited to contingency).

³¹ *In re ANR Advance Transportation Co., Inc.*, 247 B.R. 771, 774 (Bankr. E. D. Wis. 2000) (quoting *In re N.S. Garrett & Sons*, 772 F.2d 462, 466 (8th Cir. 1985)).

³² *In re Barowsky*, 946 F.2d 1516, 1517-19 (10th Cir. 1991).

²³ 2004 Kan. Ct. R. Ann. 350.

²⁴ 2004 Kan. Ct. R. Ann. 367.

²⁵ See *Castorena*, 270 B.R. at 529-30 (suggesting valid consent could rarely, if ever, be obtained); *Egwim*, 291 B.R. at 569-72 (declaring that attorney representing Chapter 7 debtor ordinarily may not limit scope of engagement).

²⁶ 2004 Kan. Ct. R. Annot. 391.

²⁷ Cf. *Bethea*, 352 F.3d at 1126 (prepetition, debtors agreed to pay attorneys over time for Chapter 7 assistance, but after discharge, claimed attorneys violated discharge injunction of § 524 by trying to collect amounts that remained unpaid).

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[**24] But the question here is whether the prepetition assignment of the refunds affects the extent to which the refunds became property of the Debtors' bankruptcy estate. *Barowsky* did not consider that question. In a case that did consider a prepetition assignment of a tax refund, *In re Martin*,³³ the court held under Oregon law that although the Chapter 13 debtors' tax refund arose prepetition and was received postpetition, a prepetition assignment to a bank of the right to the refund prevented the refund from becoming property of the estate.

HN5 Under Kansas law, "an assignment is an expression of intent by the assignor that his right shall pass to the assignee."³⁴ If, after the assignment, the property assigned comes into the hands of the assignor, the property is regarded as trust funds belonging to the assignee.³⁵ No particular form is required; the assignment must simply establish the intent to transfer [**25] the property to the assignee.³⁶ The assignment by the Debtors clearly expresses their intent to transfer all interest in the tax refunds to the Firm. It states:

We, Max R. and Georgia A. Wagers, hereby assign to Lentz & Clark, P.A., for services rendered or to be rendered any and all tax refunds, resulting from original or amended returns, received for 2003, and any and all prior years. Additionally, we, Max R. and Georgia A. Wagers, hereby appoint Lentz & Clark, P.A., as attorney in fact to endorse and deposit tax refund checks received for 2003 and any and all prior years.

By this document, the Debtors passed all of their title or interest in the tax refunds to the Firm for "services rendered and to be rendered" and divested themselves of all right of control over the refunds. [**26]³⁷ The assignment is absolute and unconditional.

The assignment in this case is nearly identical to the one at issue in *Lagerstrom*.³⁸ One day before filing for bankruptcy,

the debtor executed a document which stated:

In consideration of legal services rendered and to be rendered in connection with bankruptcy proceedings, the undersigned hereby assign and transfer to BERNARD G. STUTLER all their interest in and to any claim for refund against the United States Government for refund of income taxes over-withheld during the calendar year 1968, to the extent of \$ 245.00.

[**27] The trustee filed a petition asking the bankruptcy referee to declare the assignment invalid under the Federal Assignment [**402] of Claims Act and not perfected under the Uniform Commercial Code. It was stipulated that the federal act was not complied with and no UCC financing statement was filed. The referee rejected those challenges. Concerning the UCC, he found that the bankrupt was not attempting to create a security interest in the tax refund. Rather, the debtor "made an outright assignment and transfer of the refund to his attorney as part payment on his fees."³⁹ The referee's opinion was affirmed by the district court.

Revised Article 9 of the UCC confirms the *Lagerstrom* analysis. **HN6** For purposes of Article 9, a tax refund is a payment intangible, defined as a "general intangible under which the account debtor's principal obligation is a monetary obligation."⁴⁰ Article 9 generally applies to both security interests in and sales of payment intangibles.⁴¹ But with respect [**28] to sales transactions,⁴² [**29] the security

³⁸ *In re Lagerstrom*, 300 F. Supp. 538 (S.D. Ill. 1969).

³⁹ *Id.* at 541.

⁴⁰ *K.S.A. 2004 Supp. 84-9-102(a)(61)*. Payment intangibles, first defined by Revised Article 9, are by definition a subcategory of general intangibles. Tax refunds were held to be general intangibles under Article 9 prior to the revision. *E.g.*, *In re Martin*, 167 B.R. at 619. Although there are no cases under Revised Article 9 discussing whether tax refunds are payment intangibles, tax refunds clearly satisfy the definition because the principal obligation of the taxing authorities is payment.

⁴¹ *K.S.A. 2004 Supp. 84-9-109(a)(1)* and (3).

⁴² Article 9 adopts the definition of sale from Article 2. *K.S.A. 2004 Supp. 84-9-102(b)*. **HN7** *K.S.A. 84-2-106* defines a sale as the "passage of title from the seller to the buyer for a price." For purposes of Article 2, the price may be paid in money or otherwise. *K.S.A. 84-2-304*. Here the Debtors transferred their right, title, and interest in the tax refunds to the Firm for future legal services. Although Article 2 does not apply to this transaction for services (*see K.S.A. 84-2-201*), if this were an Article 2 transaction, it would be the transfer of title for a price.

³³ *Sticka v. Mellon Bank (In re Martin)*, 167 B.R. 609, 612-18 (Bankr. D. Or. 1994).

³⁴ *Brewer v. Harris*, 147 Kan. 197, 201, 75 P.2d 287, 290 (1938).

³⁵ *Patrons State Bank & Trust Co. v. Shapiro*, 215 Kan. 856, 861, 528 P. 2d 1198, 1203 (1974).

³⁶ *Id.*

³⁷ *Army Nat. Bank v. Equity Developers, Inc.*, 245 Kan. 3, 22, 774 P.2d 919, 932 (1989) (quoting *Patrons State Bank v. Shapiro*, 215 Kan. at 861, 528 P. 2d at 1203).

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interest is perfected upon attachment,⁴³ and the seller of the payment intangible retains no "legal or equitable interest" in the payment intangible sold.⁴⁴ In this case, as in *Lagerstrom*, the assignment of the tax refunds by the Debtors was a sale. The Debtors retained no legal or equitable interest in the refunds based upon the transaction documents.

However, because of the purpose of the assignment, the Debtors retain a reversionary interest in the portion, if any, of the tax refunds not needed for their representation. The uncontroverted testimony establishes that the assignment was a prepayment of attorneys fees and expenses due the Firm for postpetition services on behalf of the Debtors. The Legal Representation Agreement between the Debtors and the Firm establishes hourly rates for attorney and legal assistant time devoted to the representation. It provides for the payment of expenses and fees from the retainer, initially in the amount of \$ 5,000. The Disclosure of Compensation of Attorneys for Debtors filed by the Firm pursuant to [Bankruptcy Rule 2017](#) identifies the assignment of tax refunds as an additional retainer. Although there is no written assignment accompanying the transfer of the cash other than the Legal Representation Agreement, because the cash was transferred for the same purpose as the tax refunds were assigned and counsel for the Debtors reported **[**30]** to the Court that both the cash and the tax refunds constitute the retainer in this case, the Court concludes that the cash was likewise an assignment transferring all of the Debtors' right, title, and interest. **[*403]** Therefore, in this opinion, no distinction will be made between the tax refunds and the cash deposit remaining on the date of filing.

Unfortunately, the word "retainer," even as used to describe transactions with attorneys, does not have an uniformly recognized meaning. As used in this opinion, **HN8** retainer means property transferred to an attorney or law firm as advance payment against which fees and expenses will be charged after they are incurred. This meaning is distinguished from a "flat fee," sometimes referred to as a retainer, under which the lawyer agrees to do a specific task in exchange for payment to the attorney of a specified fee.⁴⁵ It is also distinguished from an "engagement retainer," which is a sum paid to the lawyer to assure the lawyer's availability to represent the client, not for legal services.⁴⁶ Both "flat fee"

and "engagement retainers" are fully earned when paid to the attorney and need not be placed in a trust account. Finally, the word retainer **[**31]** has at times been confused with a "nonrefundable retainer" or a "minimum fee retainer," which is prohibited under the Kansas Rules of Professional Conduct.⁴⁷ Under such an arrangement, the fee is deemed immediately earned by the attorney and not placed in a trust account. The fee agreement provides that the fee will be retained upon termination of the representation, even if essentially no services are rendered, and additional fees will be charged if the value of the services exceeds the amount of the prepaid fee.⁴⁸

In this case, the defendants have agreed that any excess funds remaining after the payment of fees and expenses from the retainer will be turned over to the Trustee, unless he abandons them to the Debtors. This **[**32]** construction of the retainer is required by Kansas law. **HN9** Under Kansas law, a retainer held by an attorney for payment of fees may not be disbursed from the attorney's trust account to the attorney until the services are rendered and, upon termination of the representation, the attorney must refund to the client any excess advance payment.⁴⁹ The rules that govern attorneys' conduct, the Kansas Rules of Professional Conduct, indicate that an attorney can require advance payment of his or her fees.⁵⁰ Those rules require the attorney to hold property of clients or third persons that comes into the lawyer's possession in connection with a representation separate from the lawyer's own property and require that cash be placed in a trust account.⁵¹ Even absent a retainer agreement, "the lawyer is not required to remit to the client funds which the lawyer reasonably believes represent fees owed."⁵² **HN10** An

⁴⁶ [In re Scimeca](#), 265 Kan. at 759, 962 P.2d at 1091.

⁴⁷ *Id.*

⁴⁸ Philip Ridenour, *Attorney Fees: Where Are We in Kansas?*, 73 J. Kan. B. Ass'n 6 (2004).

⁴⁹ See [In re Scimeca](#), 265 Kan. at 759, 962 P.2d at 1091; [Kan. R. Prof. Conduct. 1.16\(d\)](#), 2004 Kan. Ct. R. Annot. 427.

⁵⁰ See [Kan. R. Prof. Conduct 1.5](#), Kansas Comment, 2004 Kan. Ct. R. Annot. 418 (stating lawyer not required to remit funds to client from which fee is to be paid); [Kan. R. Prof. Conduct 1.16\(d\)](#), 2004 Kan. Ct. R. Annot. 427 (on termination of representation, lawyer must refund any advance payment of fee that has not been earned).

⁵¹ [Kan. R. Prof. Conduct 1.5](#), Kansas Comment, 2004 Kan. Ct. R. Annot. 418.

⁵² Model R. Prof. Conduct 1.15, Comment, Annot. R. of Prof. Conduct, 248 (Am. Bar Ass'n 5th Ed. 2003).

⁴³ [K.S.A. 2004 Supp. 84-9-309\(a\)\(3\)](#).

⁴⁴ [K.S.A. 2004 Supp. 84-9-318\(a\)](#).

⁴⁵ Philip Ridenour, *Attorney Fees: Where Are We in Kansas?*, 73 J. Kan. B. Ass'n 6 (2004).

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agreement, such as a [*404] retainer agreement or an assignment, may alter an attorney's duty to "promptly deliver to the client . . . any funds or other property that the client . . . is entitled to receive."⁵³ The attorney's duty to return an unearned retainer to the client arises only when [**33] the representation is terminated,⁵⁴ [**34] although "if there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid" until any dispute regarding fees is resolved.⁵⁵

As argued by the Firm, when construed as a retainer, the assignment is similar to an escrow. There is an agreement between the Debtors and the Firm governing the property; when received, the tax refunds are to be deposited in the Firm's trust account, with transfer out of the account to the Firm conditioned on performing legal services or advancing expenses; and legal services must be performed or expenses advanced before the funds may be released. The Kansas Rules of Professional Conduct, examined above, provide safeguards. When an escrow exists, most courts hold that the assets in escrow are not property of the estate and the estate's interest is limited to the interest granted to the debtor by the escrow agreement.⁵⁶ Under Kansas law, the Debtors' interest in the retainer is limited to a contingent right to the return of any money remaining after the representation terminates and the Firm has been paid for all legal services it provided and any expenses it advanced. The interest of the estate is likewise [**35] a reversionary interest.

[Section 329](#) supports the foregoing analysis. *HN11* *Lamie* requires that [§ 329](#), not [§ 330](#), be applied when Chapter 7 counsel seeks payment from property which is not property of

the estate. [**36]⁵⁷ [Section 329](#)⁵⁸ addresses compensation already paid and compensation agreed to be paid. It imposes a "reasonable value" standard for the [*405] court to apply and permits the court to require cancellation of the agreement and the return of any such payment to the extent the fees are excessive. If the property used for the payment of excessive fees would otherwise have constituted estate property, [§ 329\(b\)\(1\)\(A\)](#) requires that such property be returned to the estate. This statute clearly recognizes that debtors may set aside property that would otherwise be estate property to pay for postpetition services.

[**37] The Trustee interprets the Debtors' acknowledged reversionary interest in the retainer to mean that the deposited funds remain the Debtors' property until the Firm earns fees to be charged against it. The Trustee's Kansas authorities are *In re Scimeca*⁵⁹ and *In re Hodes*,⁶⁰ which relied on *Scimeca*. The Court finds these authorities do not require it to hold that the cash retainer and the assigned tax refunds are property of the estate; only the estate's limited reversionary interest, not all interests in the cash and the refunds, became property of the estate.

Scimeca was a disciplinary case where the court considered

⁵⁷ See [540 U.S. at 537-38](#), [124 S.Ct. at 1032](#).

⁵⁸ [11 U.S.C.A. § 329](#) provides:

HN12 (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agree to be paid, if such a payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such Attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to --

(1) the estate if the property transferred --

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

⁵⁹ [265 Kan. at 758-60](#), [962 P.2d at 1091](#).

⁶⁰ *Rajala v. Hodes (In re Hodes)*, [239 B.R. 239](#), [243 \(Bankr. D. Kan. 1999\)](#), *aff'd in part, rev'd in part*, [289 B.R. 5 \(D. Kan. 2003\)](#).

⁵³ [Kan.R. Prof. Conduct 1.15\(b\)](#), 2004 Kan. Ct. R. Annot. 414.

⁵⁴ [Kan. R. Prof. Conduct 1.16\(d\)](#), 2004 Kan. Ct. R. Annot. 427.

⁵⁵ [Kan. R. Prof. Conduct 1.15](#), Kansas Comment, 2004 Kan. Ct. R. Annot. 418

⁵⁶ 5 *Collier*, P 541.09A[2]; see, e.g., *In re ANR Advance Transportation Company, Inc.*, [247 B.R. at 774](#) (finding valid escrow and holding none of escrow funds were property of estate); *Dickerson v. Central Florida Radiation Oncology Group*, [225 B.R. 241 \(M.D. Fla. 1998\)](#) (holding funds debtor was required to deposit in segregated account were held in escrow and debtor's interest was limited to contingent remainder, which became property of estate bankruptcy filing); *Cedar Rapids Meats, Inc. v. Hager (In re Cedar Rapids Meats, Inc.)*, [121 B.R. 562 \(Bankr. N.D. Iowa 1990\)](#) (holding fund established to guarantee payment of worker's compensation claims was an escrow and not property of estate; debtor's interest was limited to contingency).

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whether an attorney violated the Kansas Rules of Professional Conduct by taking nonrefundable retainers and depositing them directly to his own account **[**38]** rather than to a trust account. The court held that because the fees were to be earned by future services and were not fees to commit the attorney to represent the client, the advance payment was subject to [Rule 1.15](#), the trust account rule, and was in fact refundable if not fully earned. In so holding, the court indicated that a retainer to be earned by future services "remains the client's money." ⁶¹ But this dicta overstates the client's interest. In other parts of the opinion, the court recognized the fees in issue were refundable and that any funds which are the client's, either in whole or in part, must be placed in a trust account. The requirement to hold the money in the attorney's trust account until earned meant both the attorney and the client had an interest in it, but the court did not address the extent of either party's interest. *Scimeca* determined the applicability of ethical rules; it did not determine property interests. Further, to adopt the Trustee's construction of the ethical trust account requirement would turn the ethical rule requiring trust accounts, which protects clients, ⁶² into an instrument that harms clients by depriving them of a means to obtain **[**39]** postpetition representation in bankruptcy cases.

Hodes, on the other hand, which was a bankruptcy case, did address the estate's interest in a cash retainer that was not fully earned on the date of the order for relief. ⁶³ The bankruptcy court held the **[*406]** retainer to be property of the estate, but did so based on a reading of *Scimeca* which this Court does not adopt.

[40]** At least three courts applying other states' laws have reached conclusions supporting the Trustee's position that a

retainer transferred prepetition by a Chapter 7 debtor to an attorney from which postpetition fees and expenses are to be paid constitutes property of the estate. ⁶⁴ **[**41]** Two of these courts concluded that when the client retains any interest in a prepetition retainer intended to pay for the attorney's future services, the attorney holds the retainer in trust as security for the payment of fees, and the retainer becomes property of the estate to the extent fees have not been earned prepetition. ⁶⁵ The third court held the retainer became property of the estate except to the extent it paid for prepetition services, because the attorney had failed to sustain his burden to prove he was paid a "classic, nonrefundable, flat fee retainer." ⁶⁶ All three courts said attorney fees could be paid from property of the estate only to the extent they met the requirements of [§ 330](#), ⁶⁷ but after *Lamie*, a Chapter 7 debtor's attorney does not qualify for compensation under that provision.

This Court finds these cases distinguishable. In this case, there is an absolute assignment of the tax refunds to the Firm. The assignment is not an agreement for the Firm to hold the Debtors' money as their agent; it is a transfer of the Debtors' right, title, and interest in the property. The Debtors' potential reversionary interest is not a partial interest in the entire retainer; it is a full interest in an undetermined portion of the property. Money held by the Firm is not collateral securing the Debtors' obligation in case the Debtors default on their obligation to pay. The Firm need not foreclose on the Debtors' interest in the trust account before transferring the money to its own account. The money cannot be used for any purpose other **[**42]** than paying the Firm's fees and expenses, unless the representation is terminated. ⁶⁸ Further, the Court notes that at least some courts from other jurisdictions which have found retainers to be property of the estate have also said that the attorneys could be paid for postpetition services from the

⁶¹ In *re Scimeca*, 265 Kan. at 759-60, 962 P.2d at 1091.

⁶² In *re Anonymous*, 698 N.E.2d 808, 809 (Ind. 1998).

⁶³ In *re Hodes*, 239 B.R. at 243. The *Hodes* bankruptcy court held that the cash retainer was subject to an attorney's retaining lien under [K.S.A. 7-108](#), which secured the payment of both prepetition and postpetition fees, subject to court review under [§ 329](#). It therefore reached a result which the Trustee is opposing in this case. On appeal, the district court declined to review the holding that the retainer was property of the estate because the debtors had not filed a cross appeal. However, it reversed the holding that [§ 329](#) was applicable, finding that because the retainer was property of the estate, even though subject to a lien, [§ 330](#) controlled court review of attorney fees to be paid to the debtors' counsel from the funds. The case was remanded to this Court for further proceedings, but the parties settled the case before the Court decided any of the remaining issues.

⁶⁴ E.g., In *re Equipment Servs., Inc.*, 290 F.3d at 746-47 (Virginia law); In *re Mondie Forge Co.*, 154 B.R. at 236-39 (Ohio law); In *re McDonald Bros. Construction, Inc.*, 114 B.R. 989, 999-1000 (Bankr. N.D. Ill. 1990) (Illinois law).

⁶⁵ *Equipment Servs.*, 290 F.3d at 746-47; *McDonald Bros. Constr.*, 114 B.R. at 999-1000.

⁶⁶ *Mondie Forge*, 154 B.R. at 237-38.

⁶⁷ *Equipment Servs.*, 290 F.3d at 746-47; *Mondie Forge*, 154 B.R. at 237; *McDonald Bros. Constr.*, 114 B.R. at 993-94.

⁶⁸ The Kansas legislature's intent to assure that retainers be used to pay attorney fees is reflected in the statutory attorney lien provision, [K.S.A. 7-108](#).

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retainer under [§ 330](#).⁶⁹ Now that *Lamie* has held that [§ 330](#) does not allow a Chapter 7 debtor's counsel to be paid for postpetition services from property of the estate (unless hired by the Chapter 7 trustee and approved by the court), the courts so holding may wish to more carefully consider the property interests which arise when debtors transfer property prepetition for payment of postpetition services.

[**43] As urged by the Trustee, the combined effect of *Lamie* and a conclusion that assigned tax refunds (or other property given [**407] as a retainer) are property of the estate would be to preclude Chapter 7 debtors from using property they own prepetition to pay for postpetition attorney fees. However, in *Lamie*, the Supreme Court expressed the view that the sound functioning of the bankruptcy system would not be impaired by its holding that Chapter 7 debtors' counsel cannot be paid from estate property under [§ 330](#).⁷⁰ The Court suggested the Bankruptcy Code anticipates that Chapter 7 debtors will pay their attorneys in advance, citing [§ 329](#),⁷¹ which addresses agreements between debtors and their lawyers for services rendered both before and after the entry of an order for relief. This Court's analysis that the tax refunds are not property of the estate is consistent with the Supreme Court's stated intention not to impair the functioning of the bankruptcy system, and with the plain language of [§ 329](#).

[**44] If [§ 541](#) (or other Code provisions on which a trustee might rely to recover a retainer for the benefit of the estate) prevents debtors from making prepetition arrangements to pay reasonable postpetition attorney fees in Chapter 7 cases, initial representation would need to be limited to prepetition services and new representation secured postpetition with payment to be made only from postpetition assets. As discussed above, this would be problematic. There is the question whether attorneys can ethically limit representation to prepetition matters.⁷² In addition, few debtors have

sufficient resourcefulness and income in the first few weeks after filing for bankruptcy to retain and assure payment of counsel at the critical initial stages of a Chapter 7 proceeding. Postpetition representation should not be limited to those debtors fortunate enough to have relatives who can provide money for a retainer or have sufficient postpetition income to pay not only their living expenses and reaffirmed debts, but also ongoing attorney fees. Debtors should not be prohibited from providing a retainer, creating an "escrow," or otherwise establishing a fund which cannot be recovered by the Trustee [**45] to pay postpetition legal fees and expenses. [Section 329](#) should be sufficient to remedy any abuses of such arrangements.

[**46] In conclusion, under Kansas law, after the assignment of the tax refunds and cash, the Debtors' interest in the retainer was limited to a right to the return of any portion that remains after paying the reasonable value of the services and expenses [**408] the Firm provides. As assignee, the Firm holds full ownership of the retainer, subject to the contingent right of reversion required by the Kansas Rules of Professional Conduct. The entire interest in the fund did not pass to the estate; the estate's interest was limited to the Debtors' contingent reversionary interest, which may or may not mature into full ownership of a portion of the funds. The bankruptcy estate received no greater right than the Debtors had, under Kansas law, to possess and use the refunds.⁷³

The Trustee is [**47] denied summary judgment on count I of his Complaint, and the defendants are granted summary judgment on their contention that the retainer is not property of the estate.

III. In this Chapter 7 Case, Transactions Between Debtors and their Counsel Are Governed by [§ 329](#), not [§ 330](#).

explain everything that could happen in the client's Chapter 7 bankruptcy case that might require the lawyer's postpetition help in order to obtain the client's valid consent to terminate the representation with the filing of the petition. In addition, Rule 1.7(b) provides: *HN14* "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation" (2004 Kan. Ct. R. Annot. 391), so to avoid running afoul of this rule, the lawyer would have to be satisfied the client either could hire an attorney postpetition to provide the necessary services or would be capable of competently proceeding without legal assistance.

⁷³ See, e.g., *Integrated Solutions v. Service Support Specialties*, 124 F.3d at 492-93 (property interest that passes to bankruptcy estate is subject to same limitations imposed on debtor by applicable nonbankruptcy law).

⁶⁹ E.g., *Mondie Forge*, 154 B.R. at 232; *McDonald Bros. Constr.*, 114 B.R. at 1000.

⁷⁰ 540 U.S. at 537-38, 124 S.Ct. at 1032.

⁷¹ *Id.*

⁷² See *Egwim*, 291 B.R. at 569-574; *Castorena*, 270 B.R. at 504. *HN13 Rule 1.1* of the Kansas Rules of Professional Conduct requires the lawyer to provide competent representation (2004 Kan. Ct. R. Ann. 342), Rule 1.2(c) permits limiting "the objectives of the representation if the client consents after consultation" (2004 Kan. Ct. R. Ann. 350), and Rule 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," (2004 Kan. Ct. R. Ann. 367). Together, these rules indicate the lawyer would have to

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The Firm seeks summary judgment on its contention that [§ 329](#) applies to its entitlement to fees and expenses for prepetition and postpetition services. Indeed, *Lamie* recognizes [§ 329](#), not [§ 330](#), is applicable when Chapter 7 counsel seeks fees from property which is not property of the estate.⁷⁴ "The *Lamie* decision should not prevent debtors from providing their attorneys reasonable compensation, subject to disclosure and court review under [section 329](#), for the capable prosecution of their cases."⁷⁵

Because, as discussed above, this Court holds that the assigned tax refunds do not constitute **[**48]** property of the estate, [§ 329](#) is the appropriate provision of the Code for court review of attorney fees to be paid to the Firm for work on behalf of the Debtors. The Trustee's argument that [§ 330](#) applies and bars payment of the Firm's fees from the retainer is based on *Lamie* and is premised on the contrary conclusion that the tax refunds assigned to the Firm constitute property of the estate. The Firm is granted summary judgment on its contention that [§ 329](#) applies to its entitlement to have its prepetition and postpetition fees and expenses paid from the retainer.

In the Court's view, [§ 329](#) adequately protects creditors from any possible abuses that might result from the often close relationship between debtors and their counsel. It allows for cancellation of fee agreements (presumably including associated retainers) and recovery of fees paid when the compensation exceeds the reasonable value of the services provided. The property recovered is returned to the estate if but for its transfer to counsel, it would have been estate property.

Further, the Court notes that in the context of enforcing a prepetition retainer agreement, the reasonable fee limitation of [§ 329](#) addresses **[**49]** the same concerns as do [§ 365](#), the executory contract section, and [§ 548](#), the fraudulent transfer section. If the latter provisions, which contain no exception for Chapter 7 retainer agreements, apply to Chapter 7 debtors' prepetition contracts with their bankruptcy attorneys, they would give trustees other legal arguments, in addition to the property of the estate contention, to set aside retainer agreements. If the issue were presented, this Court would likely hold that the reasonableness standard of [§ 329](#) controls the propriety of paying Chapter 7 **[*409]** debtors' attorneys postpetition fees from a prepetition retainer, to the exclusion of [§§ 365](#) and [548](#).

[Section 365\(a\)](#) provides, with certain exceptions not applicable here, that a Chapter 7 trustee "may assume or reject any executory contract" of the debtor. The Bankruptcy Code contains no definition of "executory contract," but the courts generally accept the view that in this provision, it means a contract that remains materially unperformed on both sides.⁷⁶ As explained earlier, a Chapter 7 debtor's attorney taking a prepetition retainer certainly must provide the debtor at least some postpetition performance under the contract **[**50]** for legal representation. It may be less obvious, especially when the debtor has paid prepetition for the postpetition representation, but the debtor also has the obligation to make important decisions, to cooperate, and otherwise to help the attorney provide the representation. So, if the issue were presented, many courts would probably feel compelled to hold that the debtor's prepetition contract with the attorney would be covered by the usual definition of "executory contract" and therefore subject to [§ 365](#). Under [§ 365\(d\)\(1\)](#), any executory contract a Chapter 7 trustee does not assume or reject within 60 days after the order for relief (or within any extension of time granted by the court) "is deemed rejected." Of course, a Chapter 7 trustee would have no reason to assume a debtor's contract with his or her bankruptcy attorney, because personal legal representation of the debtor could almost never provide any benefit to the bankruptcy estate. Instead, by rejecting the contract immediately, the trustee could bring money into the estate by recovering any prepetition retainer the attorney had not yet earned by providing postpetition services.

[51]** [Section 548\(a\)](#) authorizes the trustee to avoid a debtor's prepetition transfer for "less than a reasonably equivalent value," if one of three circumstances existed at the time of the transfer. Since one of the circumstances is that the debtor was insolvent when the transfer was made or became insolvent as a result of the transfer, retainers paid prepetition to attorneys for Chapter 7 bankruptcy representation will nearly always be avoidable if the transfer is considered to be for less than reasonably equivalent value. For purposes of [§ 548](#), "value" is defined in such a way that executory promises have frequently been held not to qualify.⁷⁷ The consideration a debtor receives for a prepetition retainer given to pay for postpetition representation is arguably an executory promise. If [§ 548\(a\)](#) applies to attorneys' retainer agreements, then

⁷⁶ See 3 Collier, P 365.02[1].

⁷⁷ See [§ 548\(d\)\(2\)\(A\)](#) (defining "value" to mean "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor"); 5 Collier, P 548.05[1][b] at 548-39 to -40 (asserting definition excludes executory promise, but noting cases have sometimes held one to be sufficient).

⁷⁴ 540 U.S. at 538, 124 S. Ct. at 1032.

⁷⁵ 3 Collier, P 330.03[3][a] at 330-25.

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many (or perhaps all) of them will be vulnerable to attack as constructively fraudulent transfers to the extent the retainers were paid prepetition and were intended to be applied to postpetition fees.

[**52] The Court is convinced that Congress must have intended for *HN15* § 329 to be the only Code provision that allows courts to set aside or modify Chapter 7 debtors' retainer agreements for prepetition and postpetition legal representation, and that the Code should be construed to reflect this intent.⁷⁸ Unlike §§ 365 and 548, [*410] § 329 of *the Bankruptcy Code* explicitly deals with debtors' transactions with attorneys. This statute is broad and expressly applies to Chapter 7 debtors' contracts with their attorneys, and to the postpetition payment of attorney fees from non-estate property. It provides authority to the courts to cancel such a contract, which is similar to rejection of an executory contract. It allows courts to find the compensation such a contract promises to the attorney to be unreasonable and to return to the estate the property transferred to the attorney, which is similar to the recovery of a fraudulent transfer.

[**53] The defendants' request for summary judgment on their claim that § 329 controls the Firm's ability to charge its postpetition fees and expenses against the retainer is granted.

IV. The Court's Construction of §§ 541 and 329 Promotes the Public Policy of Preserving the Integrity of the Bankruptcy System.

Public policy is served by the Court's conclusion that the

⁷⁸ If, on the other hand, the broad, general provisions of §§ 365 and 548 apply to Chapter 7 debtors' retainer agreements, these statutes could be used by the trustee to undermine the standard of § 329 that such contracts be enforced unless the fees are unreasonable. *HN16* When statutes present such conflicts, a common rule of statutory construction is to declare that the specific statute controls over the general one. *Shawnee Tribe v. United States*, 423 F.3d 1204, 1213 (10th Cir. 2005). This appears to be one of those rare situations where the literal application of §§ 365 and 548 would be "demonstrably at odds" with Congress's intent or would produce an "absurd result." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989) *HN17* ("The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." [Citation omitted.] In such cases, the intention of the drafters, rather than the strict language, controls. [Citation omitted.]"). Congress must have intended Chapter 7 debtors' retainer agreements with their attorneys for bankruptcy representation to be governed by § 329, the one provision that expressly and specifically applies only to debtors' contracts with their attorneys.

retainer is not property of the estate under § 541 and that § 329 controls Chapter 7 debtors' retainer contracts with their bankruptcy attorneys to the exclusion of §§ 365 and 548. Debtor representation in postpetition matters is essential to a fair and equitable application of Chapter 7 and facilitates the bankruptcy process. Creditors as well as debtors benefit when bankruptcy proceedings are orderly, and the debtors are represented by counsel with knowledge of the Code and case law authority. As one commentator has remarked:

It is fair to say that preserving the integrity of the bankruptcy system includes encouraging, not discouraging, excellence in representation of consumer debtors. The efficient and honest functioning of the bankruptcy system requires a robust, confident and motivated debtors' bar. [*54]

The system cannot have it both ways. Finding and inventing devices to prevent lawyers from being paid will not encourage excellence in the practice of law. All participants in the system should undertake to help craft legal and practical ways to compensate lawyers for their work on behalf of consumer debtors.⁷⁹

The Court agrees with these observations. The bankruptcy system needs a robust, confident, and motivated debtors' bar. This Court enjoys such a bar, and it is worthy of protection.

[*411] V. The Trustee Is Not Entitled to Turnover of the Tax Refunds Pursuant to § 542(a).

In count IV of the Complaint, the Trustee prays for turnover and accounting of the tax refunds under § 542. As relevant here, it provides:

HN18 (a) . . . An entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section [**55] 363 of this title . . . , shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

The operative subsection of § 363, subsection (b)(1), provides: *HN19* "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." So a prerequisite for recovery by the trustee under § 542(a) is that the property be property of the estate. This Court has previously held that the tax refunds are not property of the estate; the Trustee is not

⁷⁹ King, *Between the Charybdis of Biggar and the Scylla of Lamie*, Norton Bankr. L. Adv., June 2004 at 2.

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entitled to turnover pursuant to [§ 542\(a\)](#).

The Trustee's motion for summary judgment on count IV is denied.

CONCLUSION.

For these reasons, the Court denies the Trustee's motion for summary judgment on counts I and IV of his Complaint, and grants the defendants' motion for summary judgment on their contentions that the retainer is not property of the estate and that [§ 329](#) governs the enforcement of the retainer agreement. The Court retains jurisdiction to determine the remaining counts alleged in the complaint.

SO ORDERED.

SIGNED this 23 day of [56] February, 2006.**

Dale L. Somers

UNITED STATES BANKRUPTCY JUDGE



Caution

As of: August 18, 2016 9:34 AM EDT

In re Scimeca

Supreme Court of Kansas

July 10, 1998, Opinion Filed

No. 80,599

Reporter

265 Kan. 742; 962 P.2d 1080; 1998 Kan. LEXIS 404

In the Matter of SALVATORE A. SCIMECA, Respondent.

Subsequent History: Later proceeding at [*In re Scimeca*, 2004 Kan. LEXIS 68 \(Kan., Feb. 27, 2004\)](#)**Disposition:** [***1] Indefinite suspension.**Core Terms**

retainer, billing, Disciplinary, apologies, secretarial, depression, probation, Annot, nonrefundable, misconduct, attorney's fees, attorney's, refundable, witnesses, circumstances, charging, expenses, services, restitution, funds, continuance, supervised, terminated, complains, contends, billing practices, practice of law, trust account, recommended, suspension

Case Summary**Procedural Posture**

Respondent attorney objected to a final hearing report of the Kansas Board for Discipline of Attorneys that found that he had violated a number of the Model Rules of Professional Conduct, and contended that his suspension sanction should be modified.

Overview

The Kansas Board for Discipline of Attorneys found that respondent attorney violated a number of the Model Rules of Professional Conduct in his dealings with clients and members of the judiciary. Respondent challenged the hearing report, and requested a modification of the suspension sanction. The court noted that only unique circumstances could have justified a reduction of a suspension sanction to probation and supervision. Respondent in turn had failed to present any evidence that indicated that his misconduct was a one time response to adversity and that it would be highly unlikely that he would repeat his mistakes. The court thus concluded that a modification of the suspension sanction was not warranted. Also, the court noted that absent clear language in the fee agreement between an attorney and client

that a retainer was paid solely to commit an attorney to represent the client and not as a fee to be earned by future services, a retainer was refundable. Respondent had included no such language in his agreements with his clients, so his clients were entitled to a refund of retainer fees. The court thus accepted the findings of misconduct and the suspension sanction.

Outcome

Respondent attorney was ordered suspended indefinitely from the practice of law, and he was directed to make full restitution to his former clients that had complained against him. The circumstances surrounding respondent's suspension did not indicate that his misconduct was a one-time response to adversity, so he was not entitled to receive a reduced sanction of probation and supervision.

LexisNexis® Headnotes

Legal Ethics > Sanctions > General Overview

Legal Ethics > Sanctions > Suspensions

HN1 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Professional Conduct > Tribunals

HN2 Model [*Rules of Prof'l Conduct R. 8.4\(d\)*](#) provides, in part: It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

Legal Ethics > Sanctions > Suspensions

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HN3 "Unique circumstances" are circumstances from which it reasonably could be inferred that the attorney's misconduct was a one-time response to adversity and that it would be highly unlikely that he would repeat his mistake.

Governments > Fiduciaries

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

Business & Corporate Compliance > ... > Legal Ethics > Client Relations > Client Funds

HN4 An attorney who receives advance funds belonging to a client, either as a fee or expenses, must keep those funds separate and not commingle them with other funds. The key question is whether an advance payment belongs to the client or the attorney. If the funds are paid to the attorney to be used for a specific purpose, they must be used for that purpose. In such a situation, the attorney acts as a fiduciary for his or her client. Where the funds are advanced by the client for costs or expenses, they must be kept in a trust account until used for those purposes.

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

Business & Corporate Compliance > ... > Legal Ethics > Client Relations > Client Funds

HN5 If the contract or agreement between the attorney and the client clearly states that the fee advanced is paid as a nonrefundable retainer to commit the attorney to represent the client and not as a fee to be earned by future services, then it is earned by the attorney when paid and is the attorney's money. If, on the other hand, the retainer is to be earned by future services performed by the attorney, then it remains the client's money and subject to Model [Rules of Professional Conduct R. 1.15](#).

Counsel: Marty M. Snyder, deputy disciplinary administrator, argued the cause and was on the brief for the petitioner.

Geary N. Gorup, of Wichita, argued the cause for the respondent, and Salvatore A. Scimeca, respondent, argued the cause and was on the brief pro se.

Opinion

[*742] [**1081] Original proceeding in discipline.

Per Curiam: This is an original proceeding in discipline filed by the office of the Disciplinary Administrator against Salvatore A. (Tim) Scimeca, of Wichita, an attorney admitted to practice law in Kansas. The Kansas Board for Discipline of Attorneys found that respondent violated a number of the Model Rules of Professional Conduct (MRPC), and

respondent filed exceptions to the final hearing report, seeking modification of the sanction recommended by the panel.

A formal hearing before a panel of the Kansas Board for Discipline of Attorneys was held on October 23 and 24, 1997. The Disciplinary Administrator appeared by Marty Snyder, Deputy Disciplinary Administrator, and respondent appeared in person. The formal complaint filed against respondent by the office of the Disciplinary Administrator contained 12 counts. The first eight counts alleged that [***2] respondent charged various clients an unreasonable fee, in violation of MRPC 1.5 (1997 Kan. Ct. R. Annot. 289). In addition, there are allegations in these counts that he failed to refund expense deposits, MRPC 1.16(d) (1997 Kan. Ct. R. Annot. 324); failed to tell a DUI client that the client could have applied for diversion without an attorney, MRPC 1.16(d); failed to act with reasonable diligence and promptness in representing a client, MRPC 1.4(a) and (b) (1997 Kan. Ct. R. Annot. 282); failed to keep a client informed of the status and substance of her case, MRPC 1.4; endorsed checks so as to attempt to make an improper agreement that would prospectively limit his liability and engaged in [*743] fraudulent conduct by charging fees after his representation was terminated, MRPC 8.4 (1997 Kan. Ct. R. Annot. 366). Count 9 alleged that respondent used a deceptive and fraudulent retainer agreement with clients, MRPC 8.4. Counts 10 and 11 alleged that respondent placed advertisements that did not contain the name of a lawyer who was responsible for the content, MRPC 7.2(d) (1997 Kan. Ct. R. Annot. 358). Count 12 alleged that respondent's conduct when discussing with the prosecutor and trial [***3] judge the sentencing of a criminal defendant he represented violated MRPC 3.5(d) (1997 Kan. Ct. R. Annot. 341), MRPC 8.2(a) (1997 Kan. Ct. R. Annot. 364), and MRPC 8.4.

The panel made the following specific findings as to respondent's retainer agreements:

"4. The Agreements provided for an attorney fee retainer in a specified amount and provided:

'This attorney fees retainer is a minimum fee and is not refundable. In other [**1082] words, regardless of what happens in the above matter, this Attorney Fees Retainer is owed to Attorney.'

"5. The Agreement also generally provided for an expense retainer in a specified amount and provided:

'I understand and agree that once the above expense retainer is consumed, Attorney has the right to ask for and receive an additional expense retainer in an amount reasonably commensurate with the amount

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of additional expense funds needed to effectively represent Client. I understand and agree that should there be any funds left in this expense retainer at the conclusion of the above matter, that Attorney will return these funds to Client, if there are not attorney fees due in excess of the amount above attorney fees retainer.

'In the eventuality [***4] that there are such excess attorney fees due, Attorney may apply any remaining expense fees on said excess attorney fees.'

"6. The Agreements provided the following regarding attorney's rates:

'Attorney's hourly rate is \$ 170.00 per hour for all types of legal activity including but not necessarily limited to the following: office conferences, research, telephone conferences with any person including client and other individuals, in-court time, travel time to and from any court appearances or setting, and depositions. Attorney's time shall be kept and maintained at minimum increments of 1/4 hour.'

"7. The Agreements provided for separate billing for legal secretarial time as follows:

'Attorney's legal secretaries' hourly rate is \$ 40.00 per hour for all types of legal secretarial activity including but [not] necessarily limited to office conferences and telephone conferences with any person including client and other [*744] individuals. Legal secretaries' time shall be kept and maintained at minimum increments of 1/4 hour.'

Notwithstanding this provision, Respondent did not routinely bill for secretarial time. However, as found below, the billing statements in [***5] the record do evidence occasional separate charges.

"8. Some of the Agreements provided for associate attorney time at an hourly rate reduced from that of Respondent and for legal assistant time. With respect to each such person, the Agreements provided that time 'shall be kept and maintained at minimum increments of 1/4 hour.'

"9. Generally, Respondent requested payment of both the attorney fee retainer and expense retainer at the time of the execution of the Agreement. The attorney fee retainer generally was deposited to the Respondent's office account. The expense retainer was deposited to a trust

account."

In several instances, the panel found the client was required to pay a nonrefundable retainer and/or a nonrefundable expense retainer. Most also signed promissory notes for the payment of the fee or expenses. Several complaints involved respondent's charging unreasonable fees to clients who were referred to him by the Lawyer Referral Service. Carolyn Woods was such a client.

"The Lawyer Referral Service required Respondent to provide an initial consultation for the first 30 minutes at a \$ 15.00 flat fee. During the initial visit, Ms. Woods was given lengthy [***6] forms to fill out which took her 30 minutes to do. The forms required credit references, savings and checking account information and other information which was irrelevant to the representation. She indicated to Respondent's legal assistant that she was looking for an attorney who would take her case on a percentage basis. At the beginning of her interview with Respondent, she informed him that she had only \$ 30.00 and that she could discuss her case with him in 30 minutes, since she had already gone over it with his legal assistant, and was hoping to be represented on a percentage basis. After a 1 hour and 15 minute conference with Respondent, Ms. Woods declined Respondent's offer to further investigate the case under proposed billing arrangements. Respondent, while Ms. Woods waited in his office, prepared a letter terminating representation, even though Ms. Woods had [**1083] not retained Respondent. He billed her \$ 210.00 for the consultation. She paid him the \$ 30.00 which she had, and Respondent required her to sign an agreement to pay \$ 180.00 at the rate of \$ 25.00 every two weeks."

As to respondent's altercation with Judge Pilshaw, the panel found:

"The Honorable Rebecca [***7] Pilshaw is a district court judge in Sedgwick County. Respondent appeared before her representing an individual criminal defendant [*745] who had been charged in the sexual assault of a six year old. Respondent's client [pled] nolo contendere to the charges, and the State proceeded to enter a recitation of the facts that would have been established had a full trial been held. Following Respondent's identification of an additional individual involved in the criminal conduct, Judge Pilshaw informed Respondent and his client of her intent to make an upward departure on the sentencing guidelines. Respondent attempted to argue and assert additional information on the record concerning the intent to depart three times after the judge announced termination of the hearing and that they were

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in recess. Within three to five minutes after the hearing, the judge's administrative [aide] informed Judge Pilshaw that Respondent wanted to meet with her in the presence of Ms. Margaret McIntire, the Assistant District Attorney. The judge agreed to meet with counsel in chambers. The judge explained her reasons for departure, and Respondent became very angry and irate. He was very loud and yelled at the judge [***8] concerning her behavior. The judge ordered Respondent and the district attorney to leave the office. Ms. McIntire departed, but Respondent, after starting to leave, pulled the office door shut with him on the inside of the office. He then became even angrier, was physically shaking, was red, and stood very very close to the judge, telling her that she was unfit to be a judge. The judge was convinced that she would be hit if Respondent did not leave the office. After being yelled at by Judge Pilshaw, Respondent eventually left. Judge Pilshaw's administrative [aide] observed part of the confrontation. Both she and the assistant district attorney testified consistent with Judge Pilshaw's recollections.

". . . Respondent neither confirmed nor controverted the testimony of the three witnesses. He testified to an absence of memory of the specific events to which the other witnesses testified. During the hearing, he apologized to each of the three witnesses who were involved in the incident. However, the Panel, based upon its observations of Respondent, find the apologies not to be sincere. The apologies were made long after the incident in a setting where Respondent obviously believed [***9] he would benefit from having apologized. Respondent was not remorseful. Respondent failed to acknowledge the extent of his misconduct, apologizing for whatever conduct may have been perceived as objectionable to those involved. Respondent's request during the hearing that each of the witnesses forgive him for whatever may have been wrongful in his conduct and speech was inappropriate."

The panel reached the following conclusions:

 [Go to Table 1](#)

[***10] [*746] [**1084] With respect to the sanction, the hearing panel found:

[*747] "Respondent has breached duties owed to his clients (by mishandling client property), to the general public (by engaging in conduct which was fraudulent), to the legal system (by engaging in improper conduct with respect to Judge Pilshaw), and to the legal profession (by violating ethical standards relating to advertising and

fees). These violations are of varying degrees of severity. However, considering the violations as a whole and upon giving significant weight to the Respondent's violations of his duty to the legal system, the Panel finds that Respondent should be indefinitely suspended from the practice of law."

The ABA Standards relied on by the panel provided:

HNI "Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." ABA Standards for Imposing Lawyer Sanctions, § 4.12 (1991).

"Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client." § 4.62.

"Suspension is generally appropriate when a lawyer knowingly engages [***11] in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system." § 7.2 (1992 amendments).

The panel found the following seven aggravating factors to be present in this case:

- * prior disciplinary offenses in which respondent was sanctioned by published censure. The sanction was based upon violations similar to the ones in the present case.
- * selfish motive
- * multiple offenses
- * refusal to acknowledge wrongful nature of conduct
- * vulnerability of victim (unsophisticated consumers of limited means)
- * substantial experience in the practice of law
- * indifference to making restitution

The panel found the following two mitigating factors to be present:

- * personal or emotional problems
- * previous good character and reputation in the community

The panel concluded that the aggravating factors outweighed the mitigating factors. Providing further reasons for its concluding that respondent should be suspended, the panel

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added:

"Respondent's presentation and testimony was evasive, inconsistent, and not credible. Respondent's conduct during the hearing supports the Panel's decision [***12] that [*748] Respondent should not be permitted the privilege of representing clients. Although the Panel concludes that disbarment could be sustained under the circumstances presented, [**1085] the Panel declines to recommend this censure because of Respondent's mental illness and family circumstances."

With regard to the sanction of probation, which respondent seeks in this matter, the hearing panel stated:

"The Respondent proposed to the Panel a plan of probation. After hearing the evidence, the Panel concluded that Respondent's situation does not meet the standards for suspension of sanction as set forth in *In re Jantz*, 243 Kan. 770, 763 P.2d 626 (1988). There are no unique circumstances. Further, Respondent has not in the opinion of the Panel fully admitted his misconduct, either to his clients, to Judge Pilshaw, or to the Panel. In fact, despite prior disciplinary matters relating to very similar conduct, the prior findings of the Wichita Bar Association Fee Dispute Committee, and the advice of the Disciplinary Administrator's office, Respondent continued to attempt to defend his unethical conduct by testimony which was not responsive to the questions presented, inconsistent and lacked [***13] credibility. He made restitution of excessive fees and expenses only when required to do so. His apologies to Judge Pilshaw and others involved in that incident did not appear to the Panel to be sincere. Although Respondent has commenced professional counseling, which is continuing, the Panel concludes, based upon the testimony of Respondent's psychiatrist, that a significant period of time will pass before Respondent could be sufficiently recovered from his depression to engage in the practice of law without significant risk to his clients, the public, the legal system, and the legal profession. Respondent's depression significantly impacts most, if not all, aspects of his legal practice, and monitoring would, in the opinion of the Panel, be an insufficient safeguard."

According to respondent, he took 19 exceptions to the panel report, which we will address.

The hearing panel made the following finding of fact:

"20. At the hearing, Respondent offered the testimony of Abdul Wadud, M.D. in support of mitigation and his proposed supervised plan of probation. Respondent has

been a patient of Dr. Wadud since January 25, 1997, but has known Respondent since February 28, 1992, when [***14] Respondent's son needed psychiatric help. Dr. Wadud explained his diagnosis of Respondent's depression, the medication he prescribes for Respondent, and the course of treatment. *Dr. Wadud declined to testify that the major depression caused the incident with Judge Pilshaw.* According to Dr. Wadud, Respondent needs at least another two to three years of intensive therapy and continued medication." (Emphasis added.)

Respondent takes exception to the italicized portion of the above finding of fact.

[*749] The hearing panel's finding is correct in that Dr. Wadud shied away from the word "caused." The gist of his testimony, however, was that respondent was suffering from serious depression at the time of the incident and that a depressed person is apt to act in socially unacceptable ways due to reduced social and self-awareness. He also testified that one of the ways respondent typically manifested his diminished awareness was by getting "right in your face."

The panel's "half-empty" view of the psychiatrist's testimony may have been caused by respondent's raising expectations too high. In introducing his witness, respondent told the panel that one of the purposes for which Dr. Wadud's [***15] testimony was being offered was "the cause of the incident with Judge Pilshaw."

In a letter to this court, which is dated April 20, 1998, Dr. Wadud stated:

"The Hearing Panel did not understand my presentation on depression and assumed that the depression was not the cause of his behavioral problems. I did not decline to say that major depression caused the incident with Judge Pilshaw. As a matter of fact, his major depression **DID** cause this incident with Judge Pilshaw. If Mr. Scimeca were not depressed, this would **NOT** have happened. I also believe that if he were not depressed for such a long time, he would not have gotten [**1086] himself in financial and legal predicaments."

Respondent also contends that the panel misconstrued the testimony of Dr. Wadud on whether respondent is fit to continue practicing law. Although not clearly specified by respondent, it appears that the following portion of the panel's conclusion is what he complains of:

"Although Respondent has commenced professional counseling, which is continuing, the Panel concludes, *based upon the testimony of Respondent's psychiatrist*, that a significant period of time will pass before

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Respondent [***16] could be sufficiently recovered from his depression to engage in the practice of law without significant risk to his clients, the public, the legal system, and the legal profession." (Emphasis added.)

The Disciplinary Administrator contends that "respondent's lack of recollection and insight regarding the treatment of his clients and Judge Pilshaw by the date of the hearing were the basis for the panel's determination that he is unable to practice law currently." [*750] The portion of the panel report that is quoted in the preceding paragraph, however, shows the panel's reliance on Dr. Wadud's testimony.

Dr. Wadud testified that at the time of the hearing, he saw no reason why respondent could not practice. In his opinion, respondent needed to continue therapy and needed some supervision. With continued therapy and some supervision, he would be capable of carrying out his professional responsibilities. Dr. Wadud recommended that respondent "continue his treatment for at least two to three years."

The panel's conclusion cannot reasonably be drawn from Dr. Wadud's testimony. If there is other evidence in the record that would reasonably support it, the Deputy Disciplinary Administrator [***17] has not brought it to our attention.

Respondent next contends that the panel misconstrued his testimony in finding that his apologies at the hearing were not sincere, that he was not remorseful, and that he failed to acknowledge the extent of his misconduct, apologizing for whatever conduct may have been perceived as objectionable to those involved. Respondent complains of the following finding from the panel report:

"22. Respondent neither confirmed nor controverted the testimony of the three witnesses. He testified to an absence of memory of the specific events to which the other witnesses testified. During the hearing, he apologized to each of the three witnesses who were involved in the incident. However, the Panel, based upon its observations of Respondent, find [*sic*] the apologies not to be sincere. The apologies were made long after the incident in a setting where Respondent obviously believed he would benefit from having apologized. Respondent was not remorseful. Respondent failed to acknowledge the extent of his misconduct, apologizing for whatever conduct may have been perceived as objectionable to those involved. Respondent's request during the hearing that each [***18] of the witnesses forgive him for whatever may have been wrongful in his conduct and speech was inappropriate."

The event in question is respondent's conduct toward Judge Pilshaw. The three witnesses who testified at the hearing

about the incident were Judge Pilshaw, Laura Roberts, who is the judge's administrative assistant, and Margaret McIntire, the prosecutor. The incident occurred in February 1997; the hearing took place 8 months later in October 1997.

[*751] Respondent apologized to Judge Pilshaw and McIntire during his opportunity to cross-examine them, and his apology to Roberts also was made during the hearing and transcribed. The apologies are quite lengthy.

Respondent asked Judge Pilshaw and McIntire to forgive him, and the panel expressed its belief that the requests were inappropriate. Under the circumstances, not only in public but during a hearing convened for the purpose of determining whether respondent's conduct warranted sanctions, Judge Pilshaw and McIntire might have found it awkward to refuse. Contrary to the panel's finding, however, it does not appear that respondent asked Roberts to forgive him.

[**1087] The verifiable aspects of the finding appear to be accurate. The [***19] aspects of the finding that respondent most strenuously objects to, however, cannot be verified from a transcript. The panel concluded, "based upon its observations of Respondent," that the apologies were not sincere. The panel also was of the opinion that respondent "was not remorseful."

Respondent contends that the panel erred in finding "there is clear and convincing evidence that Respondent engaged in dishonesty, deceit, and misrepresentation regarding ethical billing practices when dealing with his clients, who were unsophisticated consumers."

The unethical billing practices cited by the panel were (1) charging for secretarial time, (2) using .25 hour as a minimum billing unit, and (3) requiring nonrefundable retainer fees. The gist of respondent's argument with regard to these practices is that he was unaware that they might constitute ethical violations.

(1) "Respondent, at the time that the secretarial billing language was in the Attorney Fee Retainer Agreements, was unaware that such language and even collecting for such services was per se unethical in Kansas." He points out that he had not intended to deceive--that the fee agreement he asked clients to execute expressly [***20] provided for his charging for services of secretaries.

(2) Respondent states that he "had no intent to deceive or defraud" in using the .25 hour billing unit. Instead, he states, his "intention in billing .25 increments was not to bill for minimal [*752] amounts of time." At the hearing, respondent testified, "I know that there are many, many attorneys, many firms that bill at a quarter hour, because I've discussed this

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matter with other attorneys." In answering follow-up questions, however, he conceded that he knew of no one who was currently using .25 hour increments.

(3) Respondent asserts in his brief that he has eliminated the nonrefundable language with regard to the retainer fee. An attorney retainer agreement without the nonrefundable retainer fee provision was admitted at the hearing by stipulation of the Disciplinary Administrator. Respondent points out that neither rules nor case law expressly prohibit nonrefundable retainers. It should be noted, however, that he stipulated at the hearing "that nonrefundable unearned retainers are prohibited by the Kansas Comment to Rule 1.5 and by Rule 1.16(d)." Finally, he emphasizes that he never intended "to keep an *unearned* fee." (Emphasis [***21] added.) He asserts that in "the exercise of good judgment" he would decide whether a retainer fee should be refunded. The examples he gave of instances when "good judgment" would dictate refunding the fee were when the client decided, before respondent had spent any significant amount of time on the matter, not to pursue it. In such cases the refund would be "the full retainer less whatever actual time" he had spent on it.

Respondent claims the panel erred in finding that he billed a client, Ms. Phillips, for services subsequent to termination by the client and that conduct was fraudulent, in violation of MRPC 8.4(c). At the hearing and before this court, respondent maintains that he had no intent to defraud the client. At the hearing, he said that he was entitled to a \$ 5,000 fee because the agreement provided for a minimum fee of \$ 5,000. He was unable to point to any language in the agreement, though. According to respondent, because charges "billed" after Phillips terminated his representation did not increase the total amount to more than \$ 5,000, they were irrelevant to the amount of the fee owed by the client. With regard to post-termination expenses being billed to the [***22] client, respondent testified, "The only explanation I have is probably what happened was there was delay of posting of certain expenses." He further testified that the client was not billed for the expenses.

[*753] Respondent states that he did not know better: "There was no intent to defraud Ms. Phillips as of [*sic*] these additional expenses were incurred primarily, if not all, in connection with wrap-up matters. . . . [I] . . . thought that [I] could charge for necessary wrap-up expenses even after termination" He further states that now he realizes that such charges are improper, and [**1088] he "did agree to send a refund check on the attorney fee retainer of \$ 475.00."

Respondent complains of the panel's finding that the following aggravating factor applies to this case: "Refusal to Acknowledge Wrongful Nature of Conduct. Despite Prior

Discipline and Arbitration Panel Decision, Respondent Continues to Fail to Acknowledge the Wrongful Nature of His Billing Practices."

Respondent contends that he has made changes in his billing practices and that his making those changes is evidence that he recognized the problems. He lists six improvements he has made:

He removed the following [***23] provisions from his fee agreement form:

1. Nonrefundable attorney fee.
2. Fee for secretarial time.

The form of retainer agreement that respondent offered into evidence does not contain either of the provisions mentioned. The exhibit was offered and admitted at the beginning of the hearing as part of a stipulation. Respondent does not direct the court's attention to any testimony about the agreement form.

3. Respondent testified that if the change could be accomplished using his existing computer system, he would switch from .25 to .10 hour billing increments.

He offered as his reason for doing so, not that he believed there was a problem with using the .25 hour unit, but that "I just don't want any questions raised about, you know, how much time was actually spent. I really don't."

4. He reduced the amount charged on hourly rate cases or cases where the retainer would not cover the fee.

Respondent testified that the nature of his practice kept him out of the office a good deal of the time so that he often did not carefully [*754] review billing statements. His remedy was to "try to make a reduction for almost every client" in these categories.

5. [***24] He is using more flat, fixed fees.

6. He has adopted a final, follow-up appointment at no charge to the client to discuss client satisfaction and financial matters.

Respondent next complains of the panel's finding that the following aggravating factor applies to this case: "Indifference to Making Restitution. Respondent Resisted Complying With the Arbitration Orders Concerning Restitution."

Respondent asserts: "This finding is not supported anywhere in the record." Respondent was the only witness who testified on the subject of his billing practices and his response to arbitration decisions. He testified with regard to Shelley

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Herrington's fee complaint that he repaid her "within a reasonably short period of time" after the arbitration decision. The exhibits include two arbitration decisions, but there does not appear to be anything among the exhibits that would indicate how respondent responded to the decisions.

Respondent next complains of the italicized concluding remarks of the panel:

"Overall the factors in aggravation outweigh those in mitigation. *In addition, the Panel notes that Respondent's presentation and testimony was evasive, inconsistent, and not credible.* [***25] *Respondent's conduct during the hearing supports the Panel's decision that Respondent should not be permitted the privilege of representing clients.* Although the Panel concludes that disbarment could be sustained under the circumstances presented, the Panel declines to recommend this censure because of Respondent's mental illness and family circumstances."

Respondent urges the court to take into account the difficulties inherent in representing himself. Those difficulties, according to respondent, included intense examination by the Deputy Disciplinary Administrator, his inability to testify and take notes simultaneously, and having to do "on direct examination what his counsel would have done on cross-examination."

The panel noted elsewhere that respondent neither confirmed nor controverted the testimony of the witnesses to the incident with Judge Pilshaw. He suggests that this may be a source of the panel's negative impression [**1089] of his hearing presentation, and he [*755] asserts that it is not true that he neither confirmed nor controverted their testimony. The portions of the questioning and testimony he cites in support of his assertion concern which door in Judge Pilshaw's office [***26] suite was involved in the incident. The substance of the incident was his disrespectful and threatening conduct to the trial judge, not which door was being opened and closed. This argument tends to support the panel's impression of respondent's being evasive.

Respondent also raises the evidence of charging for secretarial time as a matter that may have raised the panel's concern about his credibility. He concedes that he testified that he had never charged for secretarial time, but there were exhibits that showed otherwise. He attempts to minimize the detrimental effect of this inconsistency by stating that his billing for secretarial time "occurred on an isolated basis." The evidence, however, showed that it occurred on an occasional, rather than on an isolated, basis. Moreover, the attorney fee agreement he had clients execute contained a provision for charging for secretarial time.

Respondent complains of the panel's conclusion that his conduct toward Judge Pilshaw violated MRPC 8.4(d). **HN2** MRPC 8.4(d) provides, in part: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . . ." Respondent contends that this [***27] rule does not apply to the incident with Judge Pilshaw because his "statements and misconduct occurred in Judge Pilshaw's chambers" rather than during a courtroom proceeding. Moreover, respondent's argument continues, there is no evidence that his client was harmed by the incident. In addition, respondent takes issue with the position stated at the hearing by the Disciplinary Administrator that his intent to intimidate and his intimidating Judge Pilshaw constitute conduct that is prejudicial to the administration of justice.

The Disciplinary Administrator notes that the annotations to [Rule 8.4](#) do not contain any other cases involving verbal or physical threats against a judge. The Disciplinary Administrator also notes that most of the annotations are of cases involving "acts or omissions by an attorney resulting in prejudice to their client's legal matters." In the Disciplinary Administrator's view, nonetheless, it [*756] simply is apparent that respondent's conduct was prejudicial to the administration of justice. The most convincing aspect of the argument is that respondent attempted to physically and mentally intimidate Judge Pilshaw *because of the duties she performed as a judge.*

[***28] Respondent also complains of the panel's denying his request for a continuance of the panel hearing to allow the in-person testimony of Charles D. Anderson, respondent's proposed probation supervisor. Respondent took exception to the panel's rulings set out in the following paragraph of its report:

"Ms. Baker states for the record that Respondent moved for a continuance or, in the alternative, to recess at the conclusion of the hearing set for October 23 and 24, 1996, to allow in person testimony of Charles D. Anderson regarding Respondent's proposed probation plan. During a telephone conference with the Panel, Ms. Snyder, and Respondent, the request for continuance was denied and the Panel deferred ruling on the request to leave the record open to allow later testimony of Mr. Anderson. Before the close of hearing, the Panel denied Respondent's motion to take Mr. Anderson's testimony at a later date because of the Panel's conclusion that probation would not be considered in this case."

Respondent cites case law authority involving requests for continuances in civil and criminal trials. He relies on [State v. Jones, 226 Kan. 503, Syl. P7, 601 P.2d 1135 \(1979\)](#), for the proposition [***29] that it is an abuse of discretion for the

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trial court to refuse to grant a continuance so that the defendant could produce a material witness. In the present case, respondent sought a continuance so that he could produce Charles Anderson as a witness on the subject of supervised probation as the penalty for respondent's misconduct. *Jones* must be distinguished from the present case on the ground that the witness in the criminal trial was a material witness. In the present proceedings, [**1090] the panel ultimately overruled respondent's request to leave the record open to accommodate Anderson on the ground that Anderson's testimony was irrelevant. A proposed plan of supervised probation was the only subject on which Anderson would have testified. By the time it had heard the other witnesses, the panel had concluded that supervised probation would not be an appropriate sanction. Thus, Anderson was not a material witness.

[*757] Respondent also contends that he should have been given an opportunity to produce Anderson as a matter of due process. He argues that the panel should not have concluded "even before the Respondent's all important closing argument" that probation was not a possible sanction. [***30] He cites no authority for the proposition. The panel's narrowing the possible sanctions after hearing all the "liability" witnesses and seeing all the exhibits does not constitute a deprivation of respondent's right to be heard.

Further, respondent contends that the sanction of indefinite suspension recommended by the panel is too harsh. It was the panel's opinion that disbarment would be an appropriate sanction for respondent's misconduct. It declined to recommend disbarment, however, "because of Respondent's mental illness and family circumstances."

The panel rejected the possibility of supervised probation as a sanction on the ground that "Respondent's situation does not meet the standards for suspension of sanction as set forth in *In re Jantz*, 243 Kan. 770, 763 P.2d 626 (1988)." In *Jantz*, the unique circumstances were as follows:

"The conduct complained of here took place within a very short period of time; there were no complaints against respondent prior to these incidents. These took place when respondent was under severe emotional distress, caused by the terminal illness of his father and his own financial problems. Mr. Jantz admitted his misconduct to the judge [***31] promptly. He has admitted the misconduct to his client and to the bar where he practices. He made prompt restitution of the funds, which were not at that time due the client but were paid by him into the hands of the clerk of the district court, to await further order of the court. By the time disciplinary proceedings were underway, Jantz had

already made restitution, had commenced professional counselling (which is continuing), and had prepared a plan for retirement of his debts and financial obligations. We were told at the time of oral argument that he has made a substantial reduction of his obligations since the panel hearing in March of this year. His practice is growing, indicating that he is accepted by the members of the bench and bar as well as the residents of the community where he resides and practices." 243 Kan. at 774-75.

Jantz, on one single occasion at a very stressful time, committed a serious violation of a single client's trust. Jantz then admitted his mistake, made restitution, and took positive steps to alleviate and cope with the stressful elements in his life.

[*758] Respondent argues that he, too, has unique circumstances warranting probation and supervision. [***32] He urges the court to view the following as his unique circumstances: (1) he suffers from depression and is treating it; (2) he has filed personal and business bankruptcies; (3) his son suffers from a head injury; (4) he has apologized to Judge Pilshaw; and (5) the incident with Judge Pilshaw was an isolated incident.

What the court called *HN3* "unique circumstances" in *Jantz* are circumstances from which it reasonably could be inferred that the attorney's misconduct was a one-time response to adversity and that it would be highly unlikely that he would repeat his mistake. The circumstances listed by respondent, other than the uniqueness of the incident with Judge Pilshaw, do not strongly suggest that his misconduct will not be repeated. Moreover, respondent has heavily edited his circumstances in coming up with the list, and some of the omitted circumstances are in high contrast with Jantz's circumstances. For instance, the panel found that respondent had engaged in professional misconduct on a number of occasions, in contrast with the single misdeed by Jantz. Notwithstanding that Dr. Wadud's [**1091] testimony does not support the panel's finding that respondent was mentally unfit to practice [***33] law, the panel's rejection of respondent's proposal for probation is supported by the record.

Respondent also argues with the panel's statement that "he made restitution of excessive fees and expenses only when required to do so." He directs the court's attention to his testimony about two instances in which he made refunds without the client's filing a complaint. He does not mention the instances in which clients filed complaints. Finally, respondent argues that there is ample precedent in the court's own opinions for ordering probation for him.

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HN4 An attorney who receives advance funds belonging to a client, either as a fee or expenses, must keep those funds separate and not commingle them with other funds. The key question is whether an advance payment belongs to the client or the attorney. If the funds are paid to the attorney to be used for a specific purpose, they must be used for that purpose. In such a situation, the attorney acts as a fiduciary for his or her client. Where the funds are advanced [*759] by the client for costs or expenses, they must be kept in a trust account until used for those purposes. As noted in the ABA/BNA Lawyers' Manual on Professional Conduct, pp. 45:109-11 [***34] (1998), the status of advance fees can be more complicated:

"The basic question is, Whose money is it? If it's the client's money in whole or in part, it is subject to the trust account requirements. If it is the lawyer's money, placing it into a trust account would violate the anti-commingling rule.

"In general, analysis turns on when the money is deemed 'earned,' for once money is earned it is the lawyer's. The majority of courts and ethics committees addressing the problem have looked beyond the terminology by which the fee is characterized, and have determined that fee advances are not earned when paid, and therefore must be deposited into the trust account. [Citations omitted.]

....

"In the forefront of the debate on advance fee payments is the problem of the 'non-refundable' retainer. A non-refundable retainer 'allow[s] an attorney to keep an advance payment irrespective of whether the services contemplated are rendered.' *In re Cooperman*, 187 A.D.2d 56, 591 N.Y.S.2d 855 (N.Y. Sup. Ct. App. Div. 2d Dept. 1993). While widely used, this kind of arrangement is not immune to criticism.

"A retainer can serve one of two purposes, or some combination of the two. Either [***35] it is a fee paid in advance to ensure the lawyer's availability and to compensate the lawyer for forgoing [*sic*] the opportunity to be hired by the client's adversary--in effect, an option--or it is an advance deposit for fees not yet earned. It may also be a hybrid, and thus harder to evaluate.

"Many courts and ethics committees have held that payments made to ensure availability are indeed earned when paid, and therefore belong to the lawyer and are not subject to trust account requirements. [Citations omitted.]"

The parties stipulated before the panel that a nonrefundable unearned retainer is prohibited by MRPC 1.5. We agree.

However, the Deputy Disciplinary Administrator would have this court, as a matter of public policy, require all fees advanced by a client to be refundable, regardless of how designated or agreed to by the parties. We decline to do so. The better view is to resolve the question based upon the agreement between the parties. **HN5** If the contract or agreement between the attorney and the client clearly states that the fee advanced is paid as a nonrefundable retainer to commit the attorney to represent the client and not as a fee to be earned by future services, [***36] then it is earned by the attorney when paid and is the attorney's money. If, on the other hand, the retainer is to be [*760] earned by future services performed by the attorney, then it remains the client's money and subject to MRPC 1.15.

Here, the agreement provided that the retainer was not refundable, was a minimum fee, and was owed to the attorney. Designating the advance fee as a minimum fee contemplates that it must be earned by future services to the client. Respondent [***1092] had done nothing at that point in time for which the client "owed" him a fee. Absent clear language that the retainer is paid solely to commit the attorney to represent the client and not as a fee to be earned by future services, it is refundable. There was no such language in the agreements respondent entered into with his clients. The panel's finding that respondent's "non-refundable" retainer was a fee advanced for services to be performed, and thus subject to the trust account requirements of MRPC 1.15, is supported by the record.

We agree with the Deputy Disciplinary Administrator that billing for quarter hours is not a violation if that time is spent on a client's business. The violation is in not spending the [***37] time billed to the client on the client's business. Here, respondent clearly billed for time not spent in representing the client. He concedes that his billing practices were improper, and although he claims it was done in ignorance, it is nevertheless a violation of the MRPC.

Respondent does not take exception to the panel's finding that his conduct toward Judge Pilshaw violated MRPC 8.2(a). He does take exception to the panel's finding that his conduct violated MRPC 8.4(d) in that he "engaged in conduct that is prejudicial to the administration of justice."

It is not necessary for the improper conduct to occur in the courtroom. The proceedings in chambers are part of the administration of justice. The judge is no less a judge nor the proceeding no less judicial because it occurs in chambers. As stated in the ABA/BNA Lawyers' Manual, p. 101:504:

"Under *Rule 8.4(d)*, a lawyer may be found to have engaged in conduct prejudicial to the administration of justice by behaving in a manner that is uncivil,

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undignified, or inappropriate. See *In re Holmes*, 921 P.2d 44 (Colo. 1996) ('undignified, offensive, threatening, and unprofessional' letters to opponents and court employees); [***38] *In re Stanley*, 102 N.J. 244, 507 A.2d 1168 (N.J. 1986) (rude stares at judge, [*761] laughing, remarking in undertones, shaking finger at judge); *In re Moore*, 665 N.E.2d 40 (Ind. 1996) (on way out of judge's chambers, discussion of case became heated; lawyer responded to suggestion that he was not being truthful by grabbing opposing counsel's tie and to opponent's calling him name by hitting opposing counsel so hard it drove him across table); *In re McAlevy*, 94 N.J. 201, 463 A.2d 315 (N.J. 1983) (using obscenities in court).

"Such conduct may be deemed to violate the rule regardless of whether it directly interferes with a legal proceeding. *In re Keller*, 502 N.W.2d 504 (N.D. 1993)."

We have no difficulty finding respondent's conduct violated MRPC 8.4(d). It is this conduct which a majority of this court finds most egregious.

We find there is clear and convincing evidence establishing the violations determined by the panel. A majority of the court accepts the panel's conclusions and recommended sanction of indefinite suspension. A minority would suspend respondent for 1 year.

IT IS THEREFORE ORDERED that Salvatore A. Scimeca be suspended indefinitely from the practice [***39] of law in Kansas in accordance with *Supreme Court Rule 203(a)(2)* (1997 Kan. Ct. R. Annot. 201).

IT IS FURTHER ORDERED that Salvatore A. Scimeca shall make full restitution to complainants prior to the filing of a petition pursuant to Rule 219 (1997 Kan. Ct. R. Annot. 245) and that he comply with Rule 218 (1997 Kan. Ct. R. Annot. 235).

IT IS FURTHER ORDERED that the costs of these proceedings be assessed to respondent and that this order be published in the official Kansas Reports.

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Table1 ([Return to related document text](#))

Count 1	Respondent charged an unreasonable fee. MRPC 1.5(a)
Count 2	Respondent charged an unreasonable fee and failed to refund an unearned expense deposit. MRPC 1.15(b) (1997 Kan. Ct. R. Annot. 316) and 1.16(d).
Count 3	Respondent charged an unreasonable fee. MRPC 1.5.
Count 4	Allegations not supported by clear and convincing evidence.
Count 5	Allegations not supported by clear and convincing evidence.
Count 6	Allegations not supported by clear and convincing evidence, except that respondent billed the client for secretarial time. MRPC 1.5.
Count 7	Respondent charged an unreasonable fee. MRPC 1.5.
Count 8	Respondent refused to return advance payments of unearned fees, endorsed checks so as to attempt to make an improper agreement prospectively limiting his liability, and charged fees after his representation was terminated. MRPC 1.8(h) (1997 Kan. Ct. R. Annot. 301), 1.15, and 8.4.
Count 9	Respondent's attorney retainer agreement provided for refundable retainers, charged for secretarial services, and used .25 hours as the minimum billing unit, which resulted in clients being charged for time not spent on them. In connection with the promissory notes he had clients execute, respondent violated disclosure requirements for consumer credit. Respondent "engaged in dishonesty, deceit, and misrepresentation regarding ethical billing practices when dealing with his clients, who were unsophisticated consumers." MRPC 1.5, 1.15, 1.16(d), and 8.4(a) and (c).
Count 10	Respondent placed an advertisement without the required attorney's name, but the panel regarded it as a mere technical violation. MRPC 7.2(d).
Count 11	Respondent placed an advertisement without the required attorney's name, but the panel regarded it as a mere technical violation. MRPC 7.2(d).

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Count 12 Respondent "was verbally abusive, physically threatening,
and utterly and completely disrespectful to Judge Pilshaw."
MRPC 1.5, 1.8(b), 1.15(b), 1.16(d), 7.2(d), 8.2(a), and
8.4(c) and (d).

Table1 ([Return to related document text](#))

 Caution
As of: August 18, 2016 9:37 AM EDT

Redmond v. Lentz & Clark, P.A. (In re Wagers)

United States Bankruptcy Appellate Panel for the Tenth Circuit

November 28, 2006, Filed

BAP No. KS-06-056

Reporter

355 B.R. 268; 2006 Bankr. LEXIS 3962; 514 F.3d 1021

IN RE MAX R. WAGERS, doing business as LAND & CATTLE CO., and GEORGIA A. WAGERS, Debtors. CHRISTOPHER J. REDMOND, Trustee, Plaintiff -- Appellant, v. , MAX R. WAGERS, and GEORGIA A. WAGERS, Defendants -- Appellees.

Prior History: [**1] Appeal from the United States Bankruptcy Court for the District of Kansas. Bankr. No. 03-24484, Adv. No. 04-6095, Chapter 7.

Core Terms

retainer, bankruptcy court, pre-petition, services, attorneys, post-petition, funds, tax refund, ownership, property of the estate, estate property, district court, legislative history, attorney's fees, post-conversion, contingent, appointed

Case Summary

Procedural Posture

Prior to filing their bankruptcy petition, appellee debtors hired appellee law firm and, as a retainer, the debtors paid the firm a cash amount and assigned their interests in tax refunds to the firm. Appellant bankruptcy trustee sought review of the judgment of the United States Bankruptcy Court for the District of Kansas which allowed the firm to recover its post-petition fees from the pre-petition retainer under [11 U.S.C.S. § 330\(a\)\(1\)](#).

Overview

The trustee contended that the firm's post-petition fees were not recoverable from the debtors' estate because the firm was not formally employed by the trustee with court approval under [11 U.S.C.S. § 327](#). The firm argued that the assignment transferred full ownership of the retainer to the firm, subject only to the debtors' contingent right of reversion, and therefore the retainer funds were not the debtors' property nor part of their estate. The bankruptcy appellate panel held that, under state law, the firm held only a contingent interest in the

retainer, and thus the retainer remained property of the estate and was not available for payment of the firm's post-petition fees in the absence of approved employment. The retainer was held by the firm in its trust account only until services were performed and fees were earned, and the retainer remained the debtors' money until then. Even though the debtors held only a contingent right of reversion in the retainer, to the extent fees were not earned, such right was within the broad definition of property of the debtors' estate.

Outcome

The judgment allowing the firm's post-petition fees from the pre-petition retainer was reversed.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Judicial Review > Jurisdiction

HN1 A bankruptcy appellate panel has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts, unless one of the parties elects to have a district court hear the appeal. [28 U.S.C.S. § 158\(a\)\(1\)](#), [\(b\)\(1\)](#), [\(c\)\(1\)](#); [Fed. R. Bankr. P. 8002](#).

Bankruptcy Law > ... > Judicial Review > Standards of Review > De Novo Standard of Review

HN2 A bankruptcy appellate panel reviews a bankruptcy court's legal conclusions that are based on uncontested facts de novo. The panel also reaches its own conclusions regarding state law legal issues, without deferring to the bankruptcy court's interpretation of state law.

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

HN3 The three most common types of legal retainers are: (1) classic (or availability), which ensures an attorney's availability to represent the client; (2) flat fee, which consists

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of an agreed amount payable for performance of a specific task; and (3) security, which consists of an advance payment that assures payment for future services. Typically, security retainers are placed into the attorney's trust account, out of which fees are paid once they have been earned.

Bankruptcy Law > ... > Examiners, Officers & Trustees > Appointment > Compensation

HN4 11 U.S.C.S. § 330(a) authorizes bankruptcy courts to award "to a trustee, an examiner, a professional person employed under 11 U.S.C.S. §§ 327 or 1103 reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney, and by any paraprofessional person employed by any such person.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Professional Services > Retention of Professionals > Court Approval

HN5 Under the plain meaning of 11 U.S.C.S. § 330, only attorneys that are employed under 11 U.S.C.S. § 327 may be paid from bankruptcy estate property for post-petition services. Nonetheless, compensation remains available to bankruptcy debtors' attorneys through various permitted means, including in individual Chapter 12 and 13 cases, and in Chapter 7 cases where the attorney is engaged by the trustee.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

HN6 11 U.S.C.S. § 330(a)(1) does not prevent a bankruptcy debtor from engaging counsel before a Chapter 7 conversion and paying reasonable compensation in advance to ensure that the filing is in order.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Professional Services > Retention of Professionals > Court Approval

HN7 11 U.S.C.S. § 330(a)(1) does not authorize compensation awards to bankruptcy debtors' attorneys from estate funds, unless they are employed as authorized by 11 U.S.C.S. § 327. If the attorney is to be paid from estate funds under 11 U.S.C.S. § 330(a)(1) in a Chapter 7 case, he must be employed by the trustee and approved by the court.

Bankruptcy Law > ... > Bankruptcy > Estate Property > Contents of Estate

HN8 Federal law defines a bankruptcy debtor's estate and,

pursuant to 11 U.S.C.S. § 541(a)(1), the estate includes all legal or equitable interests of the debtor in property. The scope of § 541 is broad and is generously construed. As such, and in light of both Congress's clear intent and consistent authority, even a debtor's contingent interests are included in the estate under § 541.

Business & Corporate Compliance > ... > Legal Ethics > Client Relations > Client Funds

HN9 Proper handling of retainer funds turns on when the money is deemed earned, for once money is earned it is the lawyer's. Thus, a retainer paid as an advancement for future services is not earned by an attorney until services have been performed, and remains the client's money until then. Such retainers are required by Kansas law to be kept in the attorney's trust account until services have been performed.

Governments > Legislation > Interpretation

HN10 It is beyond a court's province to rescue Congress from its drafting errors, and to provide for what the court might think is the preferred result.

Counsel: Submitted on the briefs: *

Christopher J. Redmond, Pro se, and Eric J. Howe of Husch & Eppenger, LLC, Leawood, Kansas, for Plaintiff -- Appellant.

Carl R. Clark and Jeffrey A. Deines of Lentz & Clark, P.A., Overland Park, Kansas, for Defendants -- Appellees.

Judges: Before CLARK, BOHANON, and THURMAN, Bankruptcy Judges.

Opinion by: THURMAN

Opinion

[***1023] [*270] THURMAN, Bankruptcy Judge.

The Debtors' Chapter 7 trustee ("Trustee") appeals the Bankruptcy Court's judgment allowing the Debtors' counsel, Lentz & Clark, P.A. ("Firm"), to recover its post-petition attorney fees from a pre-petition retainer. Because we are bound to follow the United States Supreme Court's decision in

*The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

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Lamie v. United [****2**] *States Trustee*,¹ we reverse.

I. BACKGROUND

The facts leading up to this appeal are uncontested. The Debtors hired the Firm in 2003 to advise them about their financial situation. The Debtors initially paid the Firm a \$ 5,000 cash retainer. In October 2003, the Debtors executed an assignment to the Firm, which assigned whatever tax refunds they might receive for tax years 2003 and earlier, as an additional retainer. One day later, the Debtors filed a joint Chapter 7 petition. Post-petition, the Debtors received tax refunds exceeding \$ 50,000, all of which were delivered to the Firm and were deposited into its trust account pursuant to the Debtors' assignment.

After paying all of its pre-petition fees, the Firm still had approximately \$ 1,000 remaining of the Debtors' initial cash retainer, which was applied in partial payment of post-petition fees. From the filing of the petition in October 2003, through September 2004, the Debtors' post-petition attorney fees and expenses [****3**] totaled slightly more than \$ 13,000. The Trustee contends that none of the Debtors' post-petition fees are recoverable by the Firm because 11 U.S.C. § 330(a)(1), [*****1024**] as interpreted by *Lamie*, only allows compensation of a debtor's counsel for post-petition services if they were "employed as authorized by 11 U.S.C. § 327." ² The parties agree that the Firm was not employed pursuant to 11 U.S.C. § 327.

The Supreme Court decided *Lamie* in January 2004, approximately three months after the Debtors filed their Chapter 7 petition. In June 2004, the Trustee filed an adversary proceeding against the Firm, seeking recovery of all retainer funds that had not been applied to pre-petition fees, relying on *Lamie*. After subtracting agreed expenses, the Trustee claimed approximately \$ 50,000 of the retainer funds on behalf of the estate. The Bankruptcy Court disagreed, however, and allowed the Firm to pay its post-petition [****4**] fees from the retainers, finding that the Debtors' assignment had transferred full ownership of the retainers to the Firm, subject only to the Debtors' contingent right of reversion. Therefore, the Court reasoned, the retainer funds were neither the Debtors' property [***271**] nor part of their estate. As such, the Bankruptcy Court ruled that payment of the Firm's post-petition fees was governed by 11 U.S.C. § 329, rather than by § 330.

II. APPELLATE JURISDICTION

HNI This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. ³ Because the notice of appeal was timely filed within ten days of a final order, and because neither party to this appeal has elected to have the appeal heard by the district court, this Court has appellate jurisdiction.

[****5**] III. ISSUES AND STANDARD OF REVIEW

HN2 This Court reviews a trial court's legal conclusions that are based on uncontested facts *de novo*. ⁴ This Court must also reach its own conclusions regarding state law legal issues, without deferring to the bankruptcy court's interpretation of state law. ⁵

IV. DISCUSSION

Careful consideration of the *Lamie* decision is critical to this Court's resolution of the issue presented by this appeal. In *Lamie*, the debtor hired counsel to represent it in connection with a possible reorganization, and paid an initial \$ 6,000 security retainer. ⁶ Following the filing of a Chapter 11 petition, debtor's counsel was appointed by the bankruptcy court to represent the debtor-in-possession. [****6**] Several months later, the case was converted to Chapter 7. At that time, debtor's counsel still had not fully exhausted its pre-petition [*****1025**] security retainer. Debtor's counsel continued to represent the debtor post-conversion, although not appointed to do so by the court. Some of the post-conversion work performed by debtor's counsel was at the Chapter 7 trustee's request. Subsequently, the trustee opposed counsel's request for approximately \$ 1,000 in post-conversion fees, claiming that the fees were not allowable

³ 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

⁴ *Hofer v. Unum Life Ins. Co. of America*, 441 F.3d 872, 875 (10th Cir. 2006); *In re Thompson*, 240 B.R. 776, 779 (10th Cir. BAP 1999).

⁵ *Kelaidis v. Cmty. First Nat'l Bank (In re Kelaidis)*, 276 B.R. 266, 270 n.1 (10th Cir. BAP 2002).

⁶ **HN3** The three most common types of legal retainers are: (1) "classic" (or "availability"), which ensures an attorney's availability to represent the client; (2) "flat fee," which consists of an agreed amount payable for performance of a specific task; and (3) "security," which consists of an advance payment that assures payment for future services. See *In re E-Z Serve Convenience Stores, Inc.*, 299 B.R. 126, 130 (Bankr. M.D. N.C. 2003). Typically, security retainers are placed into the attorney's trust account, out of which fees are paid once they have been earned.

¹ 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004).

² *Id.* at 538.

355 B.R. 268, *271; 2006 Bankr. LEXIS 3962, **6; 514 F.3d 1021, ***1025

under [§ 330\(a\)\(1\)](#).

[**7] The bankruptcy court approved debtor's counsel's fee application and allowed it to retain the balance of the retainer, despite agreeing that [§ 330](#) precluded payment of counsel from estate funds, finding that the pre-petition security retainer did not constitute estate property. In so doing, the bankruptcy court interpreted Virginia law to exclude pre-paid fees from estate property. On appeal, the District Court for the Western District of Virginia affirmed. The Court of Appeals for the Fourth Circuit affirmed the lower courts' conclusion that [§ 330](#) did not permit payment of post-conversion fees from estate property, but reversed their conclusion that the retainer was not property of the estate. Significantly, however, on appeal to the United [*272] States Supreme Court, the appellant questioned only whether [§ 330](#) authorizes payment to a debtor's attorney, and failed to challenge the Fourth Circuit's holding that the attorney's retainer was property of the estate.

The difficulty with [§ 330](#) arose with its amendment in 1994. Prior to amendment, [§ 330\(a\)](#) specifically authorized payment "to a trustee, to an examiner, to a professional person employed under [section 327](#) or [1103](#) of this title, [***8] or to the debtor's attorney." ⁷ Post-1994, **HN4** [§ 330](#) authorized courts to award "to a trustee, an examiner, a professional person employed under [section 327](#) or [1103](#)- (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person" ⁸ Thus, the "principal, substantive alteration" of the section by this amendment was its deletion in [§ 330\(a\)\(1\)](#) of the words "or to the debtor's attorney." ⁹ This deletion "created an apparent legislative drafting error," which left the section with a missing "or" that affects its grammar, and also destroyed "the neat parallelism" between [§ 330\(a\)\(1\)](#) and [330\(a\)\(1\)\(A\)](#). ¹⁰

Finding the amended statute to be "awkward, and [***9] even ungrammatical," a majority of the Supreme Court refused to find it "ambiguous," which would have required consideration of legislative history. ¹¹ [***10] The Court also held that

application of the "plain meaning" of [§ 330](#) did not [***1026] lead to absurd results, which would have required treatment of the section as if it were ambiguous. ¹² **HN5** Under the plain meaning of [§ 330](#), only attorneys that are employed under [§ 327](#) may be paid from estate property for post-petition services. ¹³ Nonetheless, the Court stated that "compensation remains available to debtors' attorneys through various permitted means," including in individual Chapter 12 and 13 cases, and in Chapter 7 cases where the attorney is engaged by the trustee. ¹⁴ The Court also noted with approval "the apparent sound functioning of the bankruptcy system" in the Fifth and Eleventh Circuits, both of which had previously applied the same restrictions to payment of debtors' attorneys under [§ 330](#). ¹⁵

The *Lamie* Court then discussed what since has been referred to as the "retainer [*273] exception," ¹⁶ to [§ 330](#)'s payment restrictions:

It appears to be routine for debtors to pay reasonable fees for legal services before filing for bankruptcy to ensure compliance with statutory requirements. So our interpretation accords with common practice. **HN6** [Section 330\(a\)\(1\)](#) does not prevent a debtor from engaging counsel before a Chapter 7 conversion and *paying reasonable compensation in advance* to ensure that the filing is in order. Indeed, the Code anticipates

¹¹ *Id.* at 534. Justice Kennedy's opinion was joined entirely by Justices Rehnquist, O'Connor, Souter, Thomas, Ginsburg, and Breyer. Justice Scalia also joined the majority, except as to Part III of the opinion, in which legislative history is discussed. Justice Stevens filed a separate concurrence, joined by Justices Souter and Breyer, in which he stated that, where a significant change in statutory law appears to result from a "scrivener's error," the Court has a duty to look at legislative history. *Id.* at 542-43. The concurrence agreed with the majority's reading of the statute, however, principally because the assumed drafting error had been timely brought to Congress' attention, which chose not to alter it. *Id.* at 543.

¹² *Id.* at 536.

¹³ *Id.* at 535.

¹⁴ *Id.* at 536-37.

¹⁵ *Id.* at 537 (citing *Inglesby, Falligart, Horne, Courington & Nash, P.C. v. Moore (In re Am. Steel Prod., Inc.)*, 197 F.3d 1354 (11th Cir. 1999) and *In re Pro-Snax Distribs., Inc.*, 157 F.3d 414 (5th Cir. 1998)).

¹⁶ *In re CK Liquidation Corp.*, 343 B.R. 376, 383-84 (D. Mass. 2006).

⁷ 11 U.S.C. [§ 330\(a\)](#) (1986) (emphasis added).

⁸ 11 U.S.C. [§ 330\(a\)](#) (1994).

⁹ *Lamie v. United States Trustee*, 540 U.S. 526, 530-31, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004).

¹⁰ *Id.*

355 B.R. 268, *273; 2006 Bankr. LEXIS 3962, **10; 514 F.3d 1021, ***1026

these arrangements. *See, e.g., § 329* (debtors' attorneys must disclose fees they receive from a debtor in the year prior to its bankruptcy filing and courts may order excessive payments returned to the estate). [**11]¹⁷

Accordingly, pursuant to *Lamie*, HN7 "[section] 330(a)(1) does not authorize compensation awards to debtors' attorneys from estate funds, unless they are employed as authorized by § 327. If the attorney is to be paid from estate funds under § 330(a)(1) in a Chapter 7 case, he must be employed by the trustee and approved by the court."¹⁸

[**12] In the present case, the Bankruptcy Court distinguished *Lamie*, finding that the pre-petition retainers belonged to the Firm under Kansas law. In so ruling, the Court made clear that its decision was driven, at least in part, by public policy. Noting that "resolution of the issues the Trustee has raised here will have a profound impact on bankruptcy courts, debtors, and their attorneys[.]" the decision also suggests that jurisdictions that found pre-petition retainers to be estate property prior to the *Lamie* case "may wish to more [***1027] carefully consider the property interests which arise when debtors transfer property prepetition for payment of postpetition services" in light of *Lamie*.¹⁹ [**13] The decision further explains that the conclusion that a pre-petition retainer is not estate property will promote the public policy of preserving the integrity of the bankruptcy system, because "[t]he bankruptcy system needs a robust, confident, and motivated debtors' bar," which requires that debtors' counsel be reasonably compensated for their work.²⁰ Although we whole-heartedly agree with this sentiment, we do not agree that this case can be distinguished from *Lamie*.

¹⁷ *Lamie*, 540 U.S. at 537-38 (citation omitted) (emphasis added).

¹⁸ *Id.* at 538-39. The *Lamie* Court subsequently discussed the legislative history leading to amendment of § 330 (though specifically finding that reliance on such history was "unnecessary"), and concluded that the legislative history "creates more confusion than clarity about the congressional intent." *Id.* at 539. Interestingly, when the Bankruptcy Code was revamped by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 330 was amended to allow payment to ombudsmen appointed under §§ 332 and 333, but was otherwise left intact. Therefore, despite at least two opportunities to do so, the legislature has opted to leave the phrase "or to the debtor's attorney" out of § 330.

¹⁹ *Opinion on Cross-Motions for Partial Summary Judgment ("Opinion")* at 14, 26, in Appellant Appendix [sic] ("App."), Vol. II at 384, 396.

²⁰ *Id.* at 34, in App. Vol. II at 404.

In *In re Barowsky*,²¹ the Court of Appeals for the Tenth Circuit held, pre-*Lamie*, that a tax refund attributable to the pre-petition portion of the year in which a bankruptcy petition is filed is property of the estate. The Bankruptcy Court acknowledged that, pursuant to *Barowsky*, the tax refunds at issue in this case "would constitute property of the estate" but for [**274] the Debtors' assignment of them to the Firm.²² Subsequently, the Bankruptcy Court reiterated the significance of the Debtors' assignment, relying on it to distinguish the present case from those in other jurisdictions that hold that pre-petition retainers for payment of post-petition attorney fees are property of the estate.²³ [**15] Thus, the Bankruptcy Court found that the Debtors' "absolute and unconditional" assignment "clearly expresses their intent to transfer all interest in the tax refunds to the Firm."²⁴ In so holding, the Bankruptcy Court relied, in part, on *In re Langestrom*, which found that an assignment nearly identical to the Debtors' was "an outright conveyance [**14] and transfer of the refund," rather than a security interest.²⁵ Significantly, however, the \$ 70 assignment in *Langestrom* apparently covered only a portion of the attorney fees already owed. As such, the assignment was made in payment of fees already earned and did, in fact, constitute a full transfer of ownership. The assignment in the present case was intended to pay fees and costs as they were incurred, with the remainder, if any, to be returned to the Debtors. It therefore was not a full transfer of ownership. As such, reliance on *Langestrom*, which is not binding on this Court in any event, is misplaced.²⁶

²¹ 946 F.2d 1516, 1519 (10th Cir. 1991).

²² *Opinion* at 15, in App. Vol. II at 385.

²³ *Id.* at 25-26, in App. Vol. II at 395-96. *See United States Trustee v. Equip. Servs., Inc. (In re Equipment Servs., Inc.)*, 290 F.3d 739, 746-47 (4th Cir. 2002), *aff'd*, *Lamie v. United States Trustee*, 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed. 2d 1024 (2004); *In re Mondie Forge Co.*, 154 B.R. 232, 236-39 (Bankr. N.D. Ohio 1993); *In re McDonald Bros. Constr.*, 114 B.R. 989, 999-1000 (Bankr. N.D. Ill. 1990).

²⁴ Debtors' assignment reads: "We, [Debtors], hereby assign to [the Firm], for services rendered or to be rendered any and all tax refunds, resulting from original or amended returns, received for 2003, and any and all prior years. Additionally, we, [Debtors], hereby appoint [the Firm] as attorney in fact to endorse and deposit tax refund checks received for 2003 and any and all prior years." *Opinion* at 16, in App. Vol. II at 386 (emphasis added).

²⁵ 300 F. Supp. 538, 541 (S.D. Ill. 1969).

²⁶ In addition, reliance on the assignment to establish full transfer of ownership breaks down in light of the Bankruptcy Court's failure to distinguish between the tax refunds, which were formally assigned,

355 B.R. 268, *274; 2006 Bankr. LEXIS 3962, **14; 514 F.3d 1021, ***1027

[**1028] [**16] *HN8* Federal law defines the debtor's estate and, pursuant to 11 U.S.C. § 541(a)(1), the estate includes "all legal or equitable interests of the debtor in property." In *Williamson v. Jones (In re Montgomery)*,²⁷ the Tenth Circuit held that "the scope of section 541 is broad and should be generously construed." As such, and in light of both "Congress' clear intent" and "consistent authority," *Montgomery* held that even a debtor's "contingent interests" are included in the estate under § 541.²⁸

With this in mind, we turn to state law in order to determine the Debtors' interest in property in the present [*275] case.²⁹ In this case, the law of Kansas applies. In 1998, the Kansas Supreme Court held, in an attorney disciplinary proceeding, that *HN9* proper handling of retainer funds "turns on when the money is deemed 'earned,' for once money is earned it is the lawyer's."³⁰ Thus, a retainer paid as [*17] an advancement for future services is not earned by the attorney until services have been performed, and "remains the client's money" until then.³¹ Such retainers are required by Kansas law to be kept in the attorney's trust account until services have been performed.³² The Firm and the Trustee apparently agree that both retainers paid in this case were security retainers, given to the Firm to ensure payment of fees the parties expected it to earn. Therefore, under Kansas law, the retainers held by the Firm were required to be held in a trust account until services were rendered.³³

and the cash retainer, which was not. The Bankruptcy Court specifically excluded the cash retainer remaining after payment of pre-petition fees from the estate, stating, "because the cash was transferred for the same purpose as the tax refunds were assigned . . . the cash was likewise an assignment transferring all of the Debtors' right, title, and interest." *Opinion* at 18-19, in App. Vol. II at 388-89. Either the assignment distinguishes this case, or it does not. If simple payment of a cash retainer constitutes an "assignment" that transfers full ownership of those funds, then every retainer paid without an express reservation of ownership would belong solely to the attorney. This is not, however, what the majority of courts considering the issue have held.

²⁷ 224 F.3d 1193, 1194 (10th Cir. 2000).

²⁸ Id. at 1195.

²⁹ *Butner v. United States*, 440 U.S. 48, 54-55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

³⁰ *In re Scimeca*, 265 Kan. 742, 962 P.2d 1080, 1091 (Kan. 1998).

³¹ *Id.*

³² *Id.*

³³ *Id. at 1092*, relying on Model Rules of Prof'l Conduct R. 1.15

The Bankruptcy Court found the *Scimeca* case inapposite, and that court's ownership statement to be *dicta*. Though the statement may be *dicta*, [**18]³⁴ it is still relevant to this Court's effort to predict how the Kansas Supreme Court would rule if the ownership issue were directly presented.³⁵ In just such an effort, the Bankruptcy Court for the District of Kansas ruled, pre-Lamie, that "[u]nder Kansas law, an advance fee payment retainer to be earned by future services, is property of the client and thus is property of that client's bankruptcy estate."³⁶ [**19] The Bankruptcy Court [***1029] in this case declined to follow *Hodes*, stating that its conclusion was "based on a reading of *Scimeca* which this Court does not adopt."³⁷

However, at least three courts from other jurisdictions have held, post-Lamie, that money paid pre-petition to secure payment of attorney's fees remains property of the client until earned by provision of services.³⁸ [**20] The most thorough discussion of this issue is in *CK Liquidation*, in which the District Court of Massachusetts reversed the bankruptcy court's award of fees, stating that, "[b]ecause R & G was not appointed as the Debtor's Chapter 7 counsel, it is entitled to payment for services rendered post-conversion only if 1) *Lamie's* 'retainer exception' authorizes payment, 2) the Retainer was not property of the Chapter 7 estate upon conversion, [*276] or 3) some other exception applies."³⁹

The law firm in *CK Liquidation* argued on appeal that the *Lamie* retainer exception must apply to security retainers

(1995).

³⁴ The issue to which the statement applied was simply whether the retained funds were required, by Kansas's extant rules of professional conduct, to be kept in the attorney's trust account. As such, ownership of the funds was not directly at issue.

³⁵ See *In re Kester*, 339 B.R. 749, 753 (10th Cir. BAP 2006) (where no state high court rulings exist, appellate court must endeavor to predict what its ruling would be).

³⁶ *In re Hodes*, 239 B.R. 239, 243 (Bankr. D. Kan. 1999), *aff'd in part and rev'd in part*, 289 B.R. 5, 13 (D. Kan. 2003) (on appeal, the district court assumed, rather than decided, that the retainers were property of the estate because the appellees' attorneys failed to appeal the bankruptcy court's finding to that effect).

³⁷ *Opinion* at 25, in App. Vol. II at 395.

³⁸ See *Fiegen Law Firm, P.C. v. Fokkena (In re On-Line Servs. Ltd.)*, 324 B.R. 342, 346 (8th Cir. BAP 2005); *Barron v. Countryman*, 432 F.3d 590, 595-96 (5th Cir. 2005); *In re CK Liquidation Corp.*, 343 B.R. 376, 385 (D. Mass. 2006).

³⁹ *CK Liquidation Corp.*, 343 B.R. at 383.

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because the *Lamie* Court stated that acceptable advance payments were "common practice," and flat fee retainers are atypical in Chapter 11 cases.⁴⁰ However, this reasoning was rejected by the District Court, based on both the express language of *Lamie* and the petitioner's brief in that case, from which the court was convinced that the retainer exception applies only to flat fee retainers because such retainers become the attorney's property when paid.⁴¹ While noting that its decision "may place bankruptcy counsel in the difficult position of choosing between performing fiduciary obligations to clients despite the potential for nonpayment and risking professional malpractice claims," the *CK Liquidation* court held that it was bound by the ruling in *Lamie*.⁴² Along the same lines, the *Lamie* Court noted that "[i]f Congress enacted into law something different from what it intended, then it should [**21] amend the statute to conform it to its intent. *HN10* 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.'" ⁴³ Likewise, it is beyond this Court's province to ignore *Lamie* in favor of a preferred result.

V. CONCLUSION

This Court shares the Bankruptcy Court's concerns regarding adequate payment of Debtors' counsel. However, we do not agree that the retainers in this case can properly be considered to be outside of the Debtors' estate. Whereas the Bankruptcy Court found that the Debtors retained only a contingent, reversionary interest in the retainer, we find it more likely that the Kansas Supreme Court would hold that it is the Firm that holds only [**22] a contingent interest in the funds. In any event, even a contingent, reversionary interest is included in a debtor's estate under § 541.⁴⁴ Therefore, since the as [***1030] signed tax refunds were property of the Debtors' estate, and the Firm was not employed by the Trustee pursuant to § 327, our decision is dictated by the United States Supreme Court's opinion in *Lamie*. We hold that the Firm may not use pre-petition funds to pay its post-petition fees under the circumstances of this case. The Bankruptcy Court's decision to the contrary is reversed.

JUDGMENT

Filed November 28, 2006

Before CLARK, BOHANON, and THURMAN, Bankruptcy Judges.

This case originated in the United States Bankruptcy Court for the District of Kansas at Kansas City.

The judgment of that court is REVERSED.

⁴⁰ *Id.*⁴¹ *Id.* at 383-84.⁴² *Id.* at 385.⁴³ *Lamie v. United States Trustee*, 540 U.S. 526, 542, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (quoting *United States v. Granderson*, 511 U.S. 39, 68, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (Kennedy, J., concurring)).⁴⁴ *Williamson v. Jones (In re Montgomery)*, 224 F.3d 1193, 1194-95 (10th Cir. 2000).



Positive

As of: August 18, 2016 9:38 AM EDT

In re Thao Tran

United States Bankruptcy Court for the Northern District of California

April 2, 2010, Decided; April 2, 2010, Entered on Docket

No. 09-10549

Reporter

427 B.R. 805; 2010 Bankr. LEXIS 990

In re THAO TRAN and ANDREW HUNGLAM NGUYEN,
Debtor(s).

Subsequent History: Affirmed by [In re Thao Tran, 2011 Bankr. LEXIS 855 \(B.A.P. 9th Cir., Feb. 7, 2011\)](#)

Core Terms

schedules, sanctions, need to know, interview, practices, cases, staff, fine

Case Summary**Procedural Posture**

After denying the Chapter 7 debtors a discharge, the court ordered their attorney to appear and show cause why his fees should not be returned, why he should not pay a monetary fine, why he should not be suspended from practice until he completed remedial education requirements, and why he should not be permanently enjoined from allowing the terrible office practices he employed to continue.

Overview

The schedules filed by the attorney contained what the court described as horrific omissions, which only came to light through serendipitous notification by a bank and by diligent investigation by the trustee. The debtors never signed the schedules that were filed on their behalf. The attorney conceded that his fees were not earned. He was directed to return the fees to the trustee to partially compensate the bankruptcy estate for its losses. The attorney was subject to a substantial fine under [Fed. R. Bankr. P. 9011](#) because causing the unsigned schedules to be filed was gross negligence and was a foreseeable result of his incompetence and his failure to give his uneducated staff any meaningful supervision. The court noted that the attorney allowed his wife, a non-lawyer, to conduct initial interviews with debtors, advise them as to the chapter they should file under, and prepare their schedules. A permanent injunction was issued, which provided, inter alia, that the attorney or another licensed

attorney had to conduct the initial client interviews, counsel debtors, and schedule all assets and debts. In addition, the attorney was suspended from bankruptcy practice in the district.

Outcome

The attorney was ordered to pay a fine of \$ 7,500. In addition to the permanent injunction and the suspension, he was referred to both the Standing Committee on Professional Ethics and the State Bar of California for such additional discipline.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Professional Responsibility

HN1 When an attorney electronically files a schedule on behalf of a client, he is certifying to the court that he has the schedule in his physical possession bearing the original signature of the client. If the certification is false, the attorney is subject to sanctions pursuant to [Fed. R. Bankr. P. 9011](#).

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

Bankruptcy Law > Procedural Matters > Professional Responsibility

HN2 A bankruptcy court has the inherent authority and responsibility to regulate the conduct of attorneys who practice before it, independent of formal disciplinary proceedings.

Bankruptcy Law > Procedural Matters > Professional Responsibility

Civil Procedure > Sanctions > General Overview

HN3 N.D. Cal. Civ. R. 11-6(a), made applicable to bankruptcy cases by Bankr. N.D. Cal. R. 1001-2(a), provides that a court may take any or all enumerated acts to discipline an attorney, including civil contempt, reference to the

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Standing Committee, reference to the State Bar, and imposition of other appropriate sanctions.

Bankruptcy Law > ... > Commencement of Case > Voluntary Cases > Filing Requirements

Bankruptcy Law > Procedural Matters > Professional Responsibility

HN4 The primary duty of a debtor's counsel is to make sure the schedules are accurate and complete. The attorney must use all of his or her training and experience to make sure that an asset or a debt is not inadvertently omitted. When an attorney knows that a debtor is not being completely truthful, the attorney's responsibility is to insist on truthfulness and refuse to represent a debtor who does not comply.

Counsel: [****1**] For Thao Tran Nguyen, Debtor: David N. Chandler, Law Offices of David N. Chandler, Santa Rosa, CA.

For Andrew HungLam Nguyen, Joint Debtor: David N. Chandler, Law Offices of David N. Chandler, Santa Rosa, CA.

For Jeffry Locke, Trustee: Jean Barnier, MacConaghy and Barnier, Sonoma, CA; Ray H. Olmstead, Law Offices of Ray H. Olmstead, Santa Rosa, CA.

Judges: Alan Jaroslovsky, U.S. Bankruptcy Judge.

Opinion by: Alan Jaroslovsky

Opinion

[***807**] Memorandum Regarding Conduct of Debtors' Former Counsel

I. Background

The schedules filed in this Chapter 7 case by attorney Joel J. Margolis contained horrific omissions, including a furniture store filled with furniture, a \$ 13,000.00 bank account, a 2008 Mercedes automobile, and real property. These omissions only came to light through serendipitous notification by the bank where the deposit was held and by diligent investigation by the Chapter 7 trustee, Jeffry Locke, and his employees.

Pursuant to [§ 704\(a\)\(6\) of the Bankruptcy Code](#), Locke had a duty to object to the debtors' discharge. He originally sought to do so based on the false schedules, as [§ 727\(a\)\(4\)\(A\)](#) forbids a discharge to debtors who make a false oath. However, it soon came to light that the debtors had a defense to this [****2**] claim based on Margolis' conduct. They had never signed the schedules Margolis filed on their behalf.

The court denied the debtors' discharge on other grounds. However, during the course of the trial and after listening to Margolis' extensive testimony on the witness stand, it became clear to the court that action against Margolis himself was required for three reasons: First, the court had a duty to review his fees pursuant to [§ 329\(b\) of the Code](#); second, Margolis had to be sanctioned pursuant to [Rule 9011 of the Federal Rules of Bankruptcy Procedure](#) for filing schedules not actually signed by his clients; and lastly (and most importantly) Margolis appeared so venally incompetent that some action was necessary to protect other debtors. The court accordingly ordered Margolis to appear and show cause why his fees in this case should not be returned, why he should not pay a monetary fine, why he should not be suspended from practice for a time until he completed remedial education requirements, and why he should not be permanently enjoined from allowing the terrible office practices he employed to continue.

Margolis concedes that his fees of \$ 2,400.00 ought to be returned. He also concedes [****3**] that some sanction is in order for his [Rule 9011](#) violation, although he argues that the fine should be modest because his error was caused by inadvertence and not intentional misconduct. His main opposition is to the court's suggestion that he should be suspended from practice and his improper office practices should be enjoined. [***808**] The court will discuss these matters in order.

II. Fees

Margolis concedes that his fees in this case were not earned. While the court would ordinarily order the fees returned to the debtors, in this case Margolis' failure to properly advise them resulted in their conversion of the bank account and other assets which belonged to their bankruptcy estate. Margolis shall therefore be directed to return the fees to Locke to partially compensate the bankruptcy estate for its losses.

III. [Rule 9011](#) Sanctions

Margolis seeks a light slap on the wrist for filing unsigned schedules, arguing that his failure was negligent and not intentional. However, a heavy fine is required due to the very serious nature of the offense, even granting that the cause was negligence.¹ A complete and honest listing of all assets is at the very heart of bankruptcy relief. A debtor simply cannot, [****4**] under any circumstances, be allowed to defend against an accusation of filing false schedules by demonstrating that he never actually signed them.

¹ If the offense was intentional, criminal contempt would be appropriate and Margolis would never again practice bankruptcy law, or perhaps any law.

427 B.R. 805, *808; 2010 Bankr. LEXIS 990, **4

HN1 When an attorney electronically files a schedule on behalf of a client, he is certifying to the court that he has the schedule in his physical possession bearing the original signature of the client. If the certification is false, the attorney is subject to sanctions pursuant to [Rule 9011](#). *In re Brown*, 328 B.R. 556, 559 (Bkrty.N.D.Cal 2005). In this case, the negligence which caused the unsigned schedules to be filed was gross negligence, as outlined below, and was a foreseeable result of Margolis' incompetence and his failure to give his uneducated staff any meaningful supervision. A substantial fine is necessary to uphold the integrity of bankruptcy schedules as well as give Margolis incentive to make sure his negligence is not repeated. Accordingly, Margolis will be ordered to pay a fine of \$ 7,500.00. Provided, however, that all but \$ 2,500.00 will be stayed so long as Margolis pays the \$ **[**5]** 2,500.00 to the Clerk within 20 days of entry of an appropriate order and so long as Margolis does not again, in any case, file schedules not actually signed by his client and in his physical possession.

IV. Discipline

Margolis argues that the court should make no orders regarding his conduct, but instead refer him to the District Court Standing Committee on Professional Conduct. If Margolis' actions in this case were a one-time occurrence, the court would be content to refer the matter to the State Bar of California or the District Court. To the maximum extent practicable as far as punishment is concerned, the court will defer to them as to discipline for Margolis' conduct in this case. However, **HN2** the court has the inherent authority and responsibility to regulate the conduct of attorneys who practice before it, independent of formal disciplinary proceedings. *Paul E. Iacono Structural Engineer, Inc. v. Humphrey*, 722 F.2d 435, 439 (9th Cir. 1983).² The recurring nature of Margolis' conduct requires the court to take action now in order to protect future clients in cases Margolis continues to file.

[*809] Margolis' wife is his principal assistant in his law practice. She is not a lawyer. Her main value is that she is Vietnamese. Margolis advertizes in Vietnamese-language periodicals, and has filed approximately 100 bankruptcy cases for Vietnamese clients. If the court does not put a stop to the worst of Margolis' practices now, and does not insist that he immediately educate himself on the proper role of a lawyer in

a bankruptcy case, then it will be permitting the continuing victimization of the Vietnamese community. While the court is content to let other disciplinary bodies consider long-term sanctions, some action is required now and no other entity is prepared to act immediately. This court must exercise its inherent authority to protect the public from harm.

Before discussing why immediate action is necessary, the court first addresses Margolis' argument that he is somehow hamstrung in laying out his defense because of the attorney-client **[**7]** privilege. The court sees no merit in this, as Margolis was called as a witness by his former clients in the discharge trial and testified on the stand at length as to his conduct. He answered every question and no assertions of privilege were made. The findings below are made based on the testimony of Margolis himself. His lack of competency and shoddy office practices were clear from this testimony.

It is very easy to see how the debtors ended up losing their discharge. Margolis did not understand the importance of the schedules or his role in preparing them. He did not understand that a lawyer must interview the client himself to probe every aspect of a client's situation before a bankruptcy can be filed. A bankruptcy lawyer needs to know family law, to make sure all marital debts and assets as well are properly scheduled; a bankruptcy lawyer needs to know business law, to make sure that assets and debts related to partnerships, former partnerships, corporations and other entities are properly scheduled; a bankruptcy lawyer needs to know probate law, to make sure that inheritance rights (including those that arise *after* filing pursuant to [§ 541\(a\)\(5\)](#)) are properly scheduled; a bankruptcy **[**8]** lawyer needs to know real estate law, to make sure that all interests in real property are properly scheduled; a bankruptcy lawyer need to know the law of secured transactions, to make sure that secured debts and collateral are properly scheduled; the list is endless. There is no substitute for detailed questioning by an attorney.

Margolis understood none of this. He allowed his wife, a non-lawyer, to conduct the initial interview with the debtors, advise them as to the chapter they should file under, and prepare their schedules. Margolis himself spent a total of only about 15 minutes, perhaps less, speaking to the debtors himself.³ He completely abdicated his responsibilities to his clients, leaving them in the hands of untrained non-lawyers.

²In addition, **HN3** [Northern District Local Rule 11-6\(a\)](#), made applicable to bankruptcy cases by **[**6]** [B.L.R. 1001-2\(a\)](#), provides that the court may take "any or all" enumerated acts to discipline an attorney, including civil contempt, reference to the Standing Committee, reference to the State Bar, and imposition of "other appropriate sanctions."

³These facts come from Margolis himself. Trial record, January 20, 2010, 11:21 A.M. (wife did initial interview); 11:26 A.M. (staff knew about real property, Mercedes); 3:14 to 3:22 P.M. (wife did initial interview, made decision to represent debtors, had "substantial input" in selection of chapter, Margolis spent 15 minutes or less himself with debtors before filing, left schedules to non-lawyer employees).

427 B.R. 805, *809; 2010 Bankr. LEXIS 990, **8

Worse, Margolis completely failed to [**9] instill in his own staff the importance of the schedules or the need for complete honesty and disclosure. Thus his staff, without even consulting him, removed the Mercedes from the initial draft of the schedules when the debtors requested that mention of it be deleted. Margolis' cavalier attitude toward the schedules was contagious; it was transmitted first to Margolis' [**10] staff and then from them to the debtors themselves. The debtors, having no other frame of reference, got the idea that it was normal and expected that they conceal property they wanted to keep notwithstanding their bankruptcy. That led directly to denial of their discharge.

Margolis did not know, and may still not know, that **HN4** the primary duty of a debtor's counsel is to make sure the schedules are accurate and complete. The attorney must use all of his or her training and experience to make sure that an asset or a debt is not inadvertently omitted. When an attorney knows that a debtor is not being completely truthful, the attorney's responsibility is to insist on truthfulness and refuse to represent a debtor who does not comply.

For the foregoing reasons, a permanent injunction, effective immediately, will be issued. It [**10] shall provide:

1. Margolis or another licensed attorney must conduct the initial client interview in all bankruptcy cases.
2. Margolis or another licensed attorney must spend at least one hour counseling the debtor and making sure that all assets and debts are discovered and scheduled.⁴
3. Margolis may not permit his wife or any other non-attorney in his employ to give any legal advice whatsoever to any of his clients, including selection of an appropriate Bankruptcy Code chapter.

In addition, Margolis will be suspended from bankruptcy practice in this district effective thirty days after an appropriate order is entered, and may not thereafter appear in a bankruptcy court in this district or file any petition or pleading in this district without the prior leave of a bankruptcy judge or district judge of this district, unless before that time he has completed at least 10 hours of continuing education in elementary bankruptcy law, procedure and ethics.⁵ Such suspension will take place unless

Margolis has filed a certification of compliance, outlining his training [**11] in detail, by the 30th day.

V. Other Provisions

In addition to the above sanctions and orders, Margolis will be referred to both the Standing Committee on Professional Ethics and the State Bar of California for such additional discipline as either or both may think appropriate.

The Clerk shall transmit a copy of this Memorandum and the Order made pursuant to it to the United States Trustee, with the court's recommendation that all Chapter 7 trustees in the district undertake a review of Margolis' past and current cases in light of the unreliability of schedules prepared by his office.

An appropriate order will be entered.

Dated: April 2, 2010

/s/ Alan Jaroslovsky

Alan Jaroslovsky

U.S. Bankruptcy Judge

⁴ Competent debtors' counsel will laugh at this requirement, as they know that two or three hours, often more, are the norm.

⁵ The court does not care where Margolis obtains this education, but notes that videos meeting this requirement, eligible for full MCLE credit, are available free of charge at this court at any time. The court will therefore brook no delay based on availability of courses. The

court stresses that the training must be elementary in nature, designed for attorneys new to bankruptcy practice.



Neutral

As of: August 18, 2016 9:41 AM EDT

In re Smith

United States Bankruptcy Court for the District of Kansas

May 19, 2015, Decided

CASE NO. 14-21191-13, CHAPTER 13

Reporter

2015 Bankr. LEXIS 1716; 2015 WL 2452946

In re: MONIC M. SMITH, DEBTOR.

Notice: FOR ELECTRONIC PUBLICATION ONLY**Core Terms**

Disclosure, services, bankruptcy case, confirmation, rebuilding, mortgage, additional fee, fee agreement, postpetition, administrative expense, credit standing, changes, post-confirmation, attorney's fees, matters, incur

Case Summary**Overview**

HOLDINGS: [1]-A Chapter 13 debtor's attorney was not allowed to recover \$500 he billed the debtor for two hours of work he performed in helping the debtor rebuild her credit standing after her bankruptcy plan was confirmed, through the debtor's plan, because the fee did not qualify as a postpetition administrative expense that was allowable under [11 U.S.C.S. §§ 330\(a\)\(4\)\(B\)](#) and [503\(b\)\(2\)](#) and violated a provision in the confirmation order which limited the debtor's ability to incur additional debt; [2]-Although the debtor's attorney was not allow to collect his fee through the debtor's plan, some of the work he performed was not related to the debtor's bankruptcy case, and he was allowed to recover that portion of his \$500 fee from the debtor, but had to collect that amount outside the debtor's plan.

Outcome

The court denied the debtor's attorney's amended fee application seeking payment of additional fees through the debtor's plan.

LexisNexis® Headnotes

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HNI [11 U.S.C.S. § 329](#) and [Fed. R. Bankr. P. 2016\(b\)](#) require debtors' attorneys to disclose their fee arrangements with the debtors. The disclosure requirements of [§ 329](#) are mandatory, not permissive. They enable bankruptcy courts to carry out their traditional role of scrutinizing carefully the compensation paid to a debtor's attorney. The court, a Chapter 13 trustee, and creditors must rely upon the completeness and accuracy of the disclosures, since they are the only information provided about the compensation of the debtor's counsel. The disclosure rules are applied literally, even if the results are sometimes harsh. A fee applicant must disclose the precise nature of the fee arrangement.

Counsel: [*1] For Monic Michelle Smith, Debtor: Hilliard L. Moore, Moore & Associates LLC, Lenexa, KS.

Trustee: William H Griffin, Roeland Park, KS.

Judges: Dale L. Somers, United States Bankruptcy Judge.

Opinion by: Dale L. Somers

Opinion**OPINION DENYING THE DEBTOR'S AMENDED APPLICATION FOR ADDITIONAL ATTORNEY FEES TO BE PAID THROUGH HER PLAN**

This matter is before the Court for decision following a hearing on December 19, 2014, on the Debtor's amended application for additional attorney fees to be paid through her confirmed Chapter 13 plan. Chapter 13 Trustee W.H. Griffin objects to the application. The Debtor appears by counsel Hilliard L. Moore of Moore & Associates, LLC. The Trustee appears on his own behalf. The Court has reviewed the relevant materials, heard the parties' arguments, and is now ready to rule.

Facts

In May 2014, Monic Smith signed an agreement for Moore & Associates, LLC, to represent her in filing a Chapter 13 bankruptcy. The agreement called for the firm to be paid a flat fee of \$2,950 for providing the following pre-confirmation services:

- All legal services and counseling regarding your bankruptcy case prior to filing your case.
- Advising creditors of legal representation if/when they call.
- Document review/drafting [*2] of the Chapter 13 Plan, petition, schedules, statements and related documents.
- Meeting with attorney and/or case manager to review and sign your case.
- Filing of the Plan, petition, schedules, statements and related documents with the Bankruptcy Court.
- Review Chapter 13 Trustee's requests for information and assistance with completing these requests
- Review and forward all documents requested to the Chapter 13 Trustee
- Preparation and legal representation at the 341 Hearing
- Legal advice and counseling immediately after your hearing
- Obtaining confirmation of your Chapter 13 Plan.

The agreement went on to specify certain services that might become necessary after the case was filed, and would require the Debtor to pay additional fees. Five items were listed as "Actions that Can Negatively Affect Your Case" and seven specific motions were listed under "Additional services that may be necessary after confirmation of your Chapter 13." Those items and any other extra work that might be necessary were to be charged at hourly rates, including \$300 for Hill Moore and \$250 for a staff attorney. The agreement said the firm would file a fee application with the Court for these services, and [*3] the Debtor could pay them directly to the firm or through her Chapter 13 plan payment, which might need to increase due to the additional fees.

The Disclosure of Compensation of Attorney for Debtor form that Mr. Moore filed, however, was not nearly as comprehensive as his fee agreement,¹ and the fee agreement

itself was not filed with the Court. The Disclosure included most of the form's standard description of the legal services Mr. Moore had agreed to provide. Paragraph 5 of the Disclosure said:

In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

- a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;
- b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;
- c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof.

Mr. Moore deleted subsection d. from the procedural form, though, which reads: "Representation of the debtor in adversary proceedings and other contested bankruptcy matters." Paragraph 6 of the form provides [*4] a space for specifying services that the debtor had agreed the attorney would not provide. There Mr. Moore inserted: "Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding."² This leaves out a number of services a Chapter 13 debtor might be expected to need after filing bankruptcy, including such things as modifying the plan after confirmation, abating payments, and consulting with the attorney about how to handle things that might interfere with performing under the plan. More specifically, as it turned out in this case, what to do about changes in the Debtor's mortgage payments caused by increases in the taxes and insurance for her home. Mr. Moore's fee agreement attempts to exclude many such items from the initial flat fee the Debtor was being charged. But since the Disclosure provided that Mr. Moore had agreed "to render legal service for all aspects of the bankruptcy case" except those listed in paragraph 6, the Disclosure instead must be read to say that the fee disclosed in it covered any services sufficiently related to the Debtor's bankruptcy case to be considered an "aspect" of the [*5] case, except for the services specifically described in paragraph 6. By signing the Disclosure, Mr. Moore stated: "I certify that the foregoing is a complete statement of any agreement or

¹ The form is nearly identical to the Director's Procedural Form 203, a suggested form created by the Director of the Administrative Office of the U.S. Courts.

² The Court notes these exceptions seem more likely to arise in a Chapter 7 than a Chapter 13 case. If Mr. Moore intended for common Chapter 13 postpetition matters to be excluded from his initial fee, he would be well advised to expand his paragraph 6 exclusions to list matters that are likely to arise in a Chapter 13 case.

2015 Bankr. LEXIS 1716, *5

arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceeding."

The Debtor's bankruptcy petition was filed on May 20, 2014, and her plan was confirmed on July 25, 2014. The plan provided for Mr. Moore's fees of \$2,950 to be paid through the plan, and also stated: "Counsel for Debtor reserves the right to submit additional fee applications, but payment is subject to Court approval. Debtor consents to such increases in Plan payments as may be necessary to pay any approved additional fees." The order [*6] confirming the plan did not mention Mr. Moore's fees, but approved the plan as originally filed. The order provided that the Debtor was not to incur any additional debts during the pendency of the plan without prior approval from the Court or the Trustee except those necessary for the protection and preservation of life, health, or property. Neither the plan nor the order make clear whether prior approval was necessary for the Debtor to incur a debt for post-confirmation attorney fees.

On September 30, 2014, Mr. Moore filed an application for additional attorney fees, seeking \$500 for consulting with the Debtor about home mortgage changes and credit rebuilding strategies. The application did not say when the services were provided or how much Mr. Moore was charging for his time. The Trustee objected. He complained that further disclosures were required, including a copy of the Debtor's fee agreement with the attorney and information showing that the fees were reasonable and necessary under the circumstances, and suggested the additional fees should have been included in the original fee request in the case.

On November 25, Mr. Moore filed an amended application for the fees, reporting [*7] that he had met with the Debtor for one hour on September 26 and for another hour on October 13 (two weeks after the original application was filed) to consult about home mortgage changes and credit rebuilding strategies, and asking to have \$250 per hour allowed as postpetition administrative expenses to be paid through the Debtor's plan. The motion included this sentence: "While the home mortgage changes and credit rebuilding strategies may affect Debtor's bankruptcy, they are not an integral part of it."

The Trustee again objected. He complained that the fee agreement had not been provided, that the original fee disclosure provided pursuant to [§ 329\(a\)](#) and [Federal Rule of Bankruptcy Procedure 2016\(b\)](#) did not appear to exclude the additional services from the scope of the original fees, and that the original fees charged should have included discussions about the Debtor's home mortgage and credit rebuilding strategies. He added that the additional fees sought would extend the term of the Debtor's plan from just over 36 months to more than 40 months. At oral argument on

December 19, 2014, the Trustee suggested an education course offered by his office would have provided the help the Debtor obtained from Mr. Moore. A few days before [*8] that hearing, Mr. Moore had provided the Trustee with a copy of his firm's fee agreement with the Debtor, and he gave the Court a copy during the hearing.

According to an affidavit the Debtor signed on December 23, 2014, she met with attorney Hill Moore on September 26, 2014, for one hour and again on October 13, 2014, for another hour. She said they discussed a number of issues. They talked about increases in her mortgage payment that were based on escrow increases for property taxes. Mr. Moore reviewed her tax return and determined she could not take the mortgage tax deduction because it did not exceed the standard deduction. She advised Mr. Moore that rebuilding her credit was very important to her for future credit and employment reasons, and he told her it could also improve the amount she paid for property insurance. Mr. Moore told her he could help with rebuilding credit but it would cost an additional \$500 for him to do so, with those fees billed to her Chapter 13 plan. He ran a credit report and found her bankruptcy filing had improved her credit score but not enough to let her get competitive lending rates. Together, they identified three creditors that had not updated their [*9] reporting to reflect the bankruptcy filing, and in the time between their two meetings, Mr. Moore found information that confirmed the creditors' reporting was not appropriate. Mr. Moore told her that her credit standing would be helped more if she obtained a secured credit card, which would require a deposit of about \$500, and he found several lenders willing to offer her such a credit card. Mr. Moore explained some of the factors used in credit scores, the concept of credit capacity, and the importance of making consistent payments, continually using credit, and not carrying a balance from month to month. He also suggested some ways she could most effectively use her 2014 tax refund.

Discussion

The Debtor's amended fee application raises the question whether the services Mr. Moore provided (1) should have been covered by his firm's prepetition flat-fee agreement with the Debtor, (2) constitute postpetition services connected with the bankruptcy case that, "based on a consideration of the benefit and necessity of [the] services to the debtor," qualify as a postpetition administrative expense that is allowable under [§§ 330\(a\)\(4\)\(B\)](#) and [503\(b\)\(2\)](#), or (3) arose from a postpetition transaction that was not sufficiently [*10] related to the Debtor's Chapter 13 case to qualify as an administrative expense. Before the Court can reach this interesting question, however, it must consider a procedural problem with Mr. Moore's request for these additional fees to be paid through

the Debtor's plan.

Although the parties did not cite *In re Eland*,³ an opinion this Court issued a little more than a year ago, the decision points out a fatal shortcoming in Mr. Moore's amended fee application. Like this case, *Eland* involved a Chapter 13 attorney's post-confirmation application for additional fees and expenses. The initial Disclosure of Compensation of Attorney for Debtors the attorney filed was nearly identical to the one Mr. Moore filed in this case, and no fee agreement was filed with it. The disclosure said the attorney had agreed to accept \$4,000 for representing the debtors, but his post-confirmation application sought another \$2,980 in addition to the original fee. The application included a detailed listing of the time the attorney claimed to have spent working on the case: 20.5 hours before filing the debtors' bankruptcy petition, 12.4 hours from the petition date to the plan confirmation date, and 2.0 hours after [*11] confirmation. The trustee⁴ objected, contending the Disclosure limited the attorney to the initial \$4,000 fee except for the types of work it excluded, which the trustee argued covered only 5.5 of the post-petition hours claimed. The attorney responded by filing an amended Disclosure of Compensation with his fee agreement attached. This Court ruled the initial Disclosure controlled, and refused to consider either the amended Disclosure or the fee agreement. *HNI Section 329 of the Bankruptcy Code* and *Federal Rule of Bankruptcy Procedure 2016(b)* require debtors' attorneys to disclose their fee arrangements with the debtors. The Court said:

The disclosure requirements of § 329 are mandatory, not permissive. They enable the Bankruptcy Court to carry out its traditional role of scrutinizing carefully the compensation paid to the debtor's attorney. The Court, the Chapter 13 Trustee, and creditors must rely upon the completeness and accuracy of the disclosures, since they are the only information provided about the compensation of the debtor's counsel. The disclosure rules are applied literally, even if the results are sometimes harsh. A fee applicant must disclose the precise nature of the fee arrangement.⁵

Mr. Moore has not provided any details concerning his post-confirmation meetings with the Debtor beyond saying they spent two hours discussing changes in the Debtor's mortgage payment and her desire to rebuild her credit standing. Assuming for a moment that these matters both concerned "aspects" of the Debtor's bankruptcy case, the Court finds they do not fit into the categories Mr. Moore listed in paragraph 6 of his Disclosure as matters that were not covered by the initial \$2,950 fee: "Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding." Therefore, they would have been covered by the initial fee, and could not be allowed as an additional administrative expense.

On the other hand, the Court is not convinced all the services concerned "aspects" of the bankruptcy case. Because the Debtor needed to continue to pay her mortgage in order to have a place to live while she performed [*13] under her plan, the Court believes her discussions with Mr. Moore about the mortgage changes did constitute an aspect of her bankruptcy case, and that portion of Mr. Moore's services must be deemed to be covered by the initial flat fee his firm charged the Debtor. However, while the Debtor wanted to rebuild her credit standing for future credit and employment purposes, she could continue to perform and complete her plan without doing so. The Court concludes that portion of their discussions was not sufficiently related to the Debtor's bankruptcy case to constitute an aspect of the case, and Mr. Moore's charges for that portion are simply a postpetition debt not covered by the fee stated in the Disclosure. This conclusion raises a difficult question about this debt.

As indicated, in the Debtor's plan, Mr. Moore reserved the right to submit additional fee applications, with payment subject to the Court's approval. The order confirming the plan, however, advised the Debtor not to incur any new debts without the prior approval of the Court or the Trustee unless the debt was one to protect and preserve life, health, or property. Together, these provisions indicate either that any subsequent [*14] debt the Debtor might incur to her attorney was not covered by the new-debt prohibition, or that the Debtor might freely incur a new debt to Mr. Moore only in order to protect her life, health, or property. As the Debtor's attorney, Mr. Moore must be deemed to have been aware of these provisions, and should have been careful not to help the Debtor violate the confirmation order's restriction. Rebuilding the Debtor's credit standing was concerned with her financial circumstances, just as her bankruptcy case is, but the Court can't accept that it was necessary to protect the Debtor's life, health, or property. Consequently, the debt for Mr. Moore's services in that regard were not permissible under the confirmation order.

³ *Case No. 12-22394-13*, 2014 Bankr. LEXIS 736, 2014 WL 718264, Memorandum Opinion and Judgment Granting in Part the Post-Confirmation [*12] Application of Debtors' Counsel for Attorney Fees (Bankr. D. Kan. Feb. 24, 2014) (Somers, J.).

⁴ Mr. Griffin was the Chapter 13 trustee in that case, just as he is in this one.

⁵ *Eland*, 2014 Bankr. LEXIS 736 at *8, 2014 WL 718264 at *3 (quotation marks and citations omitted).

2015 Bankr. LEXIS 1716, *14

But the Court is also not willing to punish Mr. Moore for failing to realize the Court would conclude that something concerning the Debtor's financial circumstances was not sufficiently related to her bankruptcy case to be allowable as a post-confirmation administrative expense under [§ 503\(b\)\(2\)](#). As a result, the Court will allow Mr. Moore to have a valid claim against the Debtor for the portion of his \$500 in additional fees that is attributable to his discussion with the Debtor [*15] of rebuilding her credit standing, even though that debt cannot be paid through the Debtor's plan. The information Mr. Moore has provided is not sufficient, however, to enable the Court to declare how much of the \$500 in fees was attributable to that discussion.

Conclusion

For these reasons, the Court finds it must deny Mr. Moore's amended fee application. His discussion with the Debtor about the changes in her mortgage payment must be deemed to be an aspect of her case that was not excluded from the fee stated in his Disclosure. Consequently, he cannot try to recover that part of his fee request from the Debtor either as a Chapter 13 administrative expense or directly from the Debtor outside of her bankruptcy case. However, because his discussion with the Debtor about rebuilding her credit standing was not an aspect of her bankruptcy case, it was not covered by the fee included in his Disclosure. Furthermore, because that discussion was not sufficiently connected with her bankruptcy case to be allowable under [§ 330\(a\)\(4\)\(B\)](#) as a Chapter 13 administrative expense, he cannot collect it through her plan. On the other hand, these circumstances do not prohibit him from seeking to collect the portion of [*16] his fees that is attributable to the discussion of the Debtor's desire to rebuild her credit standing directly from the Debtor herself. That portion of his fee is simply a postpetition obligation the Debtor incurred.

SO ORDERED.

SIGNED this 19th day of May, 2015.

/s/ Dale L. Somers

Dale L. Somers

United States Bankruptcy Judge



Caution

As of: August 18, 2016 9:41 AM EDT

In re Waldo

United States Bankruptcy Court for the Eastern District of Tennessee

October 27, 2009, Decided; October 27, 2009, Filed

Case No. 09-30969, Case No. 09-30974, Case No. 09-30988, Case No. 09-30990, Case No. 09-30991, Case No. 08-35781,
Case No. 08-35658**Reporter**

417 B.R. 854; 2009 Bankr. LEXIS 3453

In re WAYNE ADAM WALDO LISA MARIE WALDO, Debtors; SCOTT DELANEY JOHNSON MARY MARGARET JOHNSON, Debtors; JUDITH MIKULEN, Debtor; CLAYTON GADSON COOLEY, Debtor; CRYSTAL MICHELLE JONES, Debtor; WILLIAM RAY JOINES, II, Debtor; WILLIAM EDGAR SCHARFF, JR. MICHELLE ANGELIQUE SCHARFF, Debtors

Core Terms

pre-petition, Disclosure, post-petition, checks, services, post-dated, bankruptcy case, JOINES, dischargeable, attorneys', deposited, legal services, Engagement, Disgorgement, flat fee, bank account, cases, attorney's fees, automatic stay, above-disclosed, preparation, accurately, amend, parties stipulated, adversary proceeding, insufficient funds, courts, parties, reaffirmation, certifying

Case Summary**Procedural Posture**

The United States Trustee in each of seven Chapter 7 cases moved for disgorgement of attorneys' fees due to debtors' attorneys' violations of *11 U.S.C.S. §§ 362* and *524*. Because the motions raised identical issues regarding the conduct of the same attorneys, they were consolidated for trial.

Overview

The attorneys in these cases had a practice of accepting a flat fee for Chapter 7 services, with certain carve-outs, payable through post-dated checks. The Trustee contended that this practice violated the discharge provisions of *11 U.S.C.S. § 362* and the automatic stay injunction of *11 U.S.C.S. § 524*. The court recognized that there was a split of authority as to whether the postpetition rendition of legal services bargained for pursuant to a pre-filing fee agreement entitled an attorney to recover the fees for those later services. The court sided with the majority view and held that acceptance of post-dated

checks for payment of "flat-fee" or "no-look" attorney's fees was not an acceptable practice and ran afoul of the Bankruptcy Code and Rules of Bankruptcy Procedure. The court found here that the attorneys' fees in each case were flat fees which arose pre-petition, irrespective of when services were to be rendered. Thus, the unpaid portions of the flat fees constituted pre-petition obligations that were dischargeable. By not advising their clients as such, the attorneys created a conflict. For these and other reasons, the court ordered disgorgement of all fees in these cases.

Outcome

The court granted the requests of the United States Trustee for sanctions and ordering that the debtors' attorneys disgorge all fees received from the debtors in the cases at issue.

LexisNexis® Headnotes

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney
Evidence > Burdens of Proof > Allocation

HNI The Bankruptcy Code calls upon courts to review and determine the reasonableness of the compensation paid or agreed to be paid a debtor's attorney and compensation may be reduced if found unreasonable. *11 U.S.C.S. § 329; Fed. R. Bankr. P. 2017*. The reasonableness of fees is within the court's discretion, to be determined based upon the nature, the extent, and the value of such services, in conjunction with the surrounding facts and circumstances, including the customary fee in comparable cases. The attorney to receive the fee bears the burden of showing its reasonableness; however, an attorney is not always entitled to the fee that the debtor has agreed to pay him. Factors to be considered include the time spent on services, the rates charged, the necessity of the services provided, and the customary compensation charged by others.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

417 B.R. 854, *854; 2009 Bankr. LEXIS 3453, **3453

Bankruptcy Law > ... > Discharge &
Dischargeability > Liquidations > Eligible Debts

HN2 With respect to debtor's attorneys' fees, when paid entirely pre-petition, fees paid pursuant to a "no-look" or "flat fee" arrangement do not run afoul of the Bankruptcy Code. The same cannot, however, be said for fees paid pursuant to a fee agreement, entered into pre-petition, which provides for payments post-petition. In Chapter 7 cases, once the discharge is granted, debtors are no longer liable for any pre-petition debts except as provided in 11 U.S.C.S. § 523. 11 U.S.C.S. § 727(b). The majority of courts, including the United States Court of Appeals for the Sixth Circuit, have held that pre-petition attorney's fees are dischargeable debts under 11 U.S.C.S. § 727(b). While this notion seems clear-cut, to the extent that this "flat fee" covers services to be performed both pre- and post-petition and is paid both pre- and post-petition, there is a split of authority.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN3 The United States Bankruptcy Court for the Eastern District of Tennessee holds that acceptance of post-dated checks for payment of "flat-fee" or "no-look" attorney's fees is not an acceptable practice and runs afoul of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure.

Bankruptcy Law > Claims > General Overview

HN4 The Bankruptcy Code defines "claim" in material part as the right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured, 11 U.S.C.S. § 101(5)(A), and the Supreme Court has held that Congress intended by this language to adopt the broadest available definition of claim, and that right to payment means nothing more nor less than an enforceable obligation. The breadth of the definition of claim is critical in effectuating the bankruptcy code's policy of giving the debtor a fresh start. The fact that a creditor may hold a contingent right to payment until filing the petition does not mean counsel holds a post-petition claim. Holding otherwise undercuts the fresh start provided in 11 U.S.C.S. § 727(b) and ignores the plain meaning of the statutory definition of claim and debt.

Bankruptcy Law > Claims > General Overview

HN5 The Bankruptcy Code defines "creditor" as an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor, 11 U.S.C.S. § 101(10)(A), and "debt" as a "liability on a claim." 11 U.S.C.S. § 101(12).

Bankruptcy Law > Claims > General Overview

HN6 A claim is a pre-petition claim within the scope of 11 U.S.C.S. § 101(5)(A) if there was a relationship, existing pre-petition, between the debtor and the creditor such that the creditor could fairly contemplate the possibility of a claim against the debtor's bankruptcy estate at the time that the bankruptcy petition was filed.

Contracts Law > Formation of Contracts > General Overview

Contracts Law > Types of Contracts > General Overview

HN7 In Tennessee, it is well established that a contract can be express, implied, written, or oral, but an enforceable contract must result from a meeting of the minds in mutual assent to terms, must be based upon sufficient consideration, must be free from fraud or undue influence, not against public policy and must be sufficiently definite to be enforced. Moreover, contracts are to be construed as of the date they are made and cannot be based upon events occurring subsequent to execution.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Discharge &
Dischargeability > Liquidations > Eligible Debts

HN8 With respect to debtors' attorneys' fees, unpaid portions of a flat fee contracted for pre-petition constitutes a pre-petition obligation of a debtor which is dischargeable.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

HN9 When a client and an attorney agree that the attorney will provide certain services (described by a category, a time period, a case, etc.) for a fixed or flat fee, the fee covers the services regardless of the amount of time which the attorney spends performing the services; both the client and the attorney are obligated to the flat fee whether the attorney would have made more or less for the services by charging for them by the hour or charging separately for each service. Consequently, it is inconsistent with the nature of a flat or fixed fee arrangement, regardless of how the fee is paid (e.g., whether the fee is paid in a lump sum, divided into installment payments, etc.) to apportion the fee among the services performed or the time periods within which they were performed.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Discharge &

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Dischargeability > Liquidations > Eligible Debts

HN10 With respect to debtor attorneys' fees, when a flat or fixed fee pre-petition agreement is at issue, the fee must be paid in full prior to the commencement of the debtor's case or the fee is discharged under 11 U.S.C.S. § 727(b).

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN11 It is not proper for a bankruptcy attorney to accept postdated checks from a Chapter 7 debtor client and the use of this method of fee payment has been consistently rejected by bankruptcy courts.

Legal Ethics > Client Relations > Conflicts of Interest

HN12 See Tenn. Sup. Ct. R. Prof. Conduct 8, 1.8(a).

Bankruptcy Law > Procedural Matters > Professional
Responsibility

Legal Ethics > Client Relations > Conflicts of Interest

HN13 As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is advisable. Tenn. Sup. Ct. R. Prof. Conduct 8, 1.8(a). Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. Accordingly, the existence of a conflict of interest does not require bad motive or intent. Most often it arises where the attorney's duty to one client conflicts with his/her duty to another or with the attorney's self-interest.

Bankruptcy Law > Discharge &
Dischargeability > Liquidations > General Overview

HN14 One of the primary goals of the Bankruptcy Code is to relieve honest but unfortunate debtors of their debts so that they may make a fresh start. This fresh start is accomplished through discharge, which does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt. To enable debtors to achieve this goal, the Bankruptcy Code provides certain protections, chief among them, the automatic stay and the discharge injunction.

Bankruptcy Law > Administrative Powers > Automatic
Stay > General Overview

Bankruptcy Law > ... > Administrative Powers > Automatic
Stay > Duration of Stay

HN15 At the commencement of a bankruptcy case, the bankruptcy estate is created, 11 U.S.C.S. § 541(a)(1), and, in most cases, the protections of the automatic stay go into

effect, prohibiting actions against debtors, property of debtors, and property of the estate, including any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. 11 U.S.C.S. § 362(a)(6). The scope of the automatic stay is broad and its protections automatic and mandatory with the filing of the bankruptcy petition in order to protect debtors and creditors alike, and it applies to all debts, even those that will ultimately be excepted from discharge, since one of the fundamental purposes of the automatic stay is to give the plaintiff a breathing spell from his creditors and to be relieved of the financial pressures that drove him into bankruptcy. Actions taken in violation of the automatic stay are invalid and voidable and shall be voided absent limited equitable circumstances, and unless otherwise provided for by statute, the automatic stay remains in effect throughout the bankruptcy case, terminating with respect to property of the estate once it is no longer property of the estate and with respect to debtors the earlier of the entry of discharge, dismissal, or the closing of the case. 11 U.S.C.S. § 362(c).

Bankruptcy Law > ... > Discharge & Dischargeability > Effect of
Discharge > Protection of Debtors

HN16 Once a discharge is granted, the automatic stay terminates and is replaced by the discharge injunction, which operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived. 11 U.S.C.S. § 524(a)(2). The purpose of such an injunction is to protect the debtor from suits to collect debts that have been discharged in bankruptcy. Accordingly, once the discharge has been entered by the court, creditors holding pre-petition claims or causes of action against the debtor may not attempt to hold him personally liable, and the debtor will not be pressured in any way to repay it.

Bankruptcy Law > ... > Scope of Stay > Exceptions to
Stay > Negotiable Instruments

HN17 Although other courts have found the presentment of post-dated checks to violate the automatic stay, authority in the Sixth Circuit has determined otherwise, based upon the Bankruptcy Code's express exception for the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument, 11 U.S.C.S. § 362(b)(11), thereby permitting holders of checks drawn by the debtor to deposit them for the purpose of preserving their rights on the instruments despite the filing of a bankruptcy petition. Rather than constituting a violation of the automatic stay, the post-petition honoring of a pre-petition check effects a transfer of property of the estate, which is subject to

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avoidance as a post-petition transfer.

Bankruptcy Law > ... > Scope of Stay > Exceptions to Stay > Negotiable Instruments

Commercial Law (UCC) > Negotiable Instruments (Article 3) > Dishonor & Presentment > Presentment

HN18 In Tennessee, "presentment" is defined as a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obligated to pay the instrument or, in the case of a note or accepted draft payable at a bank, or (ii) to accept a draft made to the drawee. Tenn. Code Ann. § [47-3-501](#) (2001). As defined under Tennessee law, a check presented for payment constitutes a negotiable instrument under Tennessee law and is excepted from the automatic stay.

Bankruptcy Law > ... > Automatic Stay > Violations of Stay > Contempt Actions

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

HN19 A violation of the automatic stay is willful if the creditor deliberately carried out the prohibited act with knowledge of the debtor's bankruptcy case. A specific intent to violate the stay is not required, or even an awareness by the creditor that her conduct violates the stay. It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay. Moreover, where there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional. Satisfying these requirements itself creates strict liability. There is nothing more to prove except damages. [11 U.S.C.S. § 524](#) does not contain a corresponding statutory remedy for violations of the discharge injunction, thus the sole avenue of recourse -- and the one for which is the traditional remedy for a violation of a court order -- is to bring an action against the creditor for contempt utilizing [11 U.S.C.S. § 105\(a\)](#). Nevertheless, when determining whether to hold a creditor in contempt for violating the discharge injunction, courts tend to utilize the standard employed when determining whether or not a creditor willfully violated the automatic stay; i.e., whether the creditor deliberately acted with knowledge of the bankruptcy case.

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

HN20 [11 U.S.C.S. § 105\(a\)](#) imposes a duty upon the bankruptcy court to uphold the provisions of the Bankruptcy Code by allowing the court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Bankruptcy Law > ... > Automatic Stay > Violations of Stay > Damages

Bankruptcy Law > ... > Bankruptcy > Case Administration > Bankruptcy Court Powers

HN21 With respect to violations of the automatic stay, under [11 U.S.C.S. § 362\(k\)\(1\)](#), if the willful violation resulted in any injury to the debtors, an award of actual damages, including costs and attorneys fees, is mandated, and in some cases, punitive damages are deemed appropriate. With respect to violations of the discharge injunction, under [11 U.S.C.S. § 105\(a\)](#) and the court's broad and inherent contempt powers, the modern trend in civil contempt proceedings is for courts to award actual damages for violations of [11 U.S.C.S. § 524's](#) discharge injunction, and, where necessary to effectuate the purposes of the discharge injunction, a debtor may be entitled to reasonable attorney fees.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

HN22 [See 11 U.S.C.S. § 329.](#)

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

HN23 [11 U.S.C.S. § 329](#) is further supplemented by [Fed. R. Bankr. P. 2016\(b\)](#), which provides, in material part, that every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by [§ 329](#) of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed. [Fed. R. Bankr. P. 2016\(b\)](#). Furthermore, [§ 329](#) and [Rule 2016](#) apply to require not only to initial disclosures, but any subsequent amendments as well when additional compensation is earned.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

HN24 Once a lawyer files a petition in bankruptcy on behalf of a client, his transactions with his client are subject to the supervision of the Bankruptcy Court in accordance with the provisions of the Bankruptcy Code. Subsequent amendments to the contract between the lawyer and his client or amendments to disclosure statements made pursuant to [Fed. R. Bankr. P. 2016\(b\)](#) do not shield the original disclosure or the original contract from scrutiny. Rather, the amended contract or the amended disclosure likewise become subject to

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review, as are the original contract and the original disclosure statement.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN25 11 U.S.C.S. § 329 was enacted because payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny. It, along with Fed. R. Bankr. P. 2016(b), enables courts to carefully scrutinize compensation paid to debtors' attorneys, providing protection to debtors and creditors and preventing overreaching by attorneys. Accordingly, the disclosure of fees under § 329 and the Bankruptcy Rules is mandatory, not permissive. To that end, an attorney must lay bare all his dealings with the debtor concerning compensation. The disclosures he makes must be precise and complete. Coy or incomplete disclosures that force the court to ferret out pertinent information will not do, even if they are merely the result of negligence or inadvertence. Very simply, anything less than the full measure of disclosure is unacceptable.

Bankruptcy Law > ... > Bankruptcy > Case
Administration > Bankruptcy Court Powers

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN26 The failure to comply with the attorneys' fees disclosure rules is a sanctionable violation, even if proper disclosure would have shown that the attorney had not actually violated any Bankruptcy Code provision or any Bankruptcy Rules, and sanctions may also be imposed for negligent or inadvertent failures to disclose. The appropriate sanction for noncompliance is within the discretion of the court, nevertheless, many courts have held that failure to meet the disclosure requirements alone is grounds for disgorgement.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > Procedural Matters > Professional
Responsibility

HN27 Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct. It follows that the bankruptcy court is vested with the inherent power to sanction attorneys for breaches of fiduciary obligations. Accordingly, a failure of counsel to obey the mandate of 11 U.S.C.S. § 329 and Fed. R. Bankr. P. 2016 concerning disclosure, and by implication review by the Court, is a basis for entry of an order denying compensation

and requiring the return of sums already paid. Many courts, perhaps the majority, punish defective disclosure by denying all compensation.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN28 Specifically addressing fee agreements for installment payments for pre-petition attorney's fees, through post-dated checks or otherwise, the courts have been quite clear that failure to disclose that the debt is potentially dischargeable justifies denial of fees. To put it simply, post-dated checks are property, and receipt of any and all property by counsel for a debtor in payment of or as security for payment of fees must be disclosed. Anything less is a violation of the spirit and the letter of 11 U.S.C.S. § 329 and Fed. R. Bankr. P. 2016.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN29 Attorneys should be compensated for the services they provide. Nevertheless, that compensation must be paid within the parameters of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, and there are, unquestionably, limitations with respect to payment of attorney's fees in Chapter 7 cases. The following options, however, which have been employed by other courts, appear to fall within the scope of potential and allowable solutions: (1) requiring Chapter 7 debtors to pay "flat" or "no-look" attorney's fees in full prior to filing; (2) revising retainer agreements and expressly designating pre-petition services, which are paid pre-petition, and post-petition services, which shall be paid post-petition; or (3) accepting payment by third parties.

Counsel: **[**1]** APPEARANCES: RICHARD F. CLIPPARD, ESQ., UNITED STATES TRUSTEE, Patricia C. Foster, Esq., Knoxville, Tennessee, Attorneys for United States Trustee.

CLARK & WASHINGTON, P.C., Steven F. Crawford, Esq., Knoxville, Tennessee, Richard H. Thomson, Esq., Atlanta, Georgia, Respondents.

Judges: RICHARD STAIR, JR., UNITED STATES BANKRUPTCY JUDGE.

Opinion by: RICHARD STAIR, JR.

Opinion

[*860] MEMORANDUM ON MOTIONS TO REQUIRE DISGORGEMENT OF FEES AND TO COMPEL AMENDMENT TO BANKRUPTCY RULE 2016(b) ATTORNEY COMPENSATION DISCLOSURE

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STATEMENTS AND SCHEDULE F, AND MOTION FOR SANCTIONS FOR VIOLATIONS OF 11 U.S.C. § 362(a)(6) AND § 524(a)(2)

Before the court are seven contested matters initiated by a motion filed by the [*861] United States Trustee in each of these Chapter 7 cases. Because the motions raise identical issues regarding the conduct of the Debtors' attorneys, they were consolidated for trial pursuant to the Agreed Pretrial Order entered by the court on May 19, 2009, as amended on June 26, 2009. Each motion constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O) (2006).

Facts and documents essential to the resolution of all issues are contained in the Joint Stipulations filed by the parties in each case on July 16, 2009, as [**2] amended by the Amended Joint Stipulations filed in case numbers 09-30974 and 08-35658 on July 20, 2009. The Brief of the United States Trustee in Support of Motion to Require Disgorgement of Fees was filed by the United States Trustee (U.S. Trustee) in each case on July 20, 2009, and the Brief For Respondents filed by the law firm of Clark & Washington, P.C., (Clark & Washington) and Steven F. Crawford, Esquire (Mr. Crawford) was filed in each case on July 20, 2009.¹

I

The undisputed facts and issues raised by the United States Trustee in each of these bankruptcy cases are discussed in detail below:

Wayne Adam Waldo and Lisa Marie Waldo

On February 5, 2009, the Debtors in case number 09-30969, Wayne Adam Waldo and Lisa Marie Waldo (collectively, Waldos), retained Clark & Washington and Mr. Crawford, the managing attorney of its Knoxville [**3] office, to represent them in the filing of their Chapter 7 bankruptcy case. WALDO STIPS. at PP 1, 14. In association with this representation, the Waldos executed a Chapter 7 Attorney-Client Agreement For Routine Cases Under 11 U.S.C. Chapter 7 (Waldo Engagement Contract) on February 5, 2009, outlining their duties, as well as those of Mr. Crawford and Clark & Washington, whereby they agreed, *inter alia*, to pay Mr. Crawford and Clark & Washington a flat fee in the amount of \$ 1,250.00 for legal services related to the filing of their bankruptcy case, to be performed both pre-petition and

post-petition, plus the \$ 299.00 filing fee. WALDO STIPS. at P 6; WALDO STIP. EX. D. Additionally, the Waldo Engagement Contract contains the following Acknowledgment executed by the Waldos:

I further acknowledge and agree that this retainer contract contemplates payment for services rendered pre-Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

WALDO STIP. EX. D. The Waldos were not informed by Clark & Washington and/or Mr. Crawford that, [**4] to the extent not paid prior to the filing of their petition, their attorneys' fees were dischargeable. WALDO STIPS. at P 13.

As payment of the \$ 1,250.00 attorney fee, and as is routine for Clark & Washington and Mr. Crawford for collecting payment of flat fees for Chapter 7 bankruptcy cases, the Waldos provided Clark & Washington and Mr. Crawford with five \$ 250.00 post-dated checks on February 17, 2009, drawn on their checking account with First Tennessee Bank: (a) check # 1073, dated March 13, 2009, was deposited into the [*862] Clark & Washington bank account on March 18, 2009; (b) check # 1074, dated April 24, 2009, was deposited into the Clark & Washington bank account on May 7, 2009; (c) check # 1075, dated May 22, 2009, was deposited into the Clark & Washington bank account on May 27, 2009; (d) check # 1076, dated June 19, 2009, was deposited into the Clark & Washington bank account on June 19, 2009; and (e) check # 1077, dated July 17, 2009, was not deposited into the Clark & Washington bank account. WALDO STIPS. at PP 2, 9-10; WALDO STIP. EX. A. None of these five post-dated checks were returned unpaid due to insufficient funds. WALDO STIPS. at P 4.

The Waldos filed the Voluntary [**5] Petition commencing their Chapter 7 bankruptcy case on February 26, 2009, and received their discharge on October 1, 2009. WALDO STIPS. at P 3.² Also filed with their Voluntary Petition was the Disclosure of Compensation of Attorney for Debtor(s) signed by Mr. Crawford (Waldo Compensation Disclosure), certifying that he had agreed to accept \$ 1,250.00 from the Waldos and that he had received the entire \$ 1,250.00 prior to the filing of the Waldo Compensation Disclosure. WALDO STIPS. at P 7; WALDO STIP. EX. C. In addition, Mr. Crawford makes the following certification in the Waldo

¹ A pretrial conference was held on April 30, 2009, and a trial was scheduled for July 27, 2009; however, pursuant to the Joint Stipulations and Amended Joint Stipulations filed in each case, the parties stipulated that an evidentiary hearing was not necessary. The court will accordingly resolve the issues on the stipulated record and the parties' briefs.

² Paragraph 5 of the Joint Stipulations states that the Waldos had not yet received a discharge. The discharge was, however, granted subsequent to the filing of the Joint Stipulations.

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Compensation Disclosure:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Representation of the debtors in any dischargeability actions, judicial lien avoidances, **[**6]** relief from stay actions or any other adversary proceeding.

WALDO STIP. EX. C. The parties stipulated that the Waldo Compensation Disclosure filed on February 26, 2009, did not accurately reflect the Waldos' contractual fee agreement with Clark & Washington and Mr. Crawford. WALDO STIPS. at P 7.

On April 6, 2009, the United States Trustee filed a Motion to Require Disgorgement of Fees and to Compel Amendment to [FRBC 2016\(b\)](#) and Schedule F and Notice of Hearing (Waldo Disgorgement Motion), seeking an order requiring Mr. Crawford and Clark & Washington to amend the Waldo Compensation Disclosure to accurately reflect the fee arrangement with the Debtors, to amend Schedule F to list himself and Clark & Washington as creditors for unpaid pre-petition legal fees, and for an order requiring Mr. Crawford and Clark & Washington to disgorge all fees collected through the post-petition cashing of the post-dated checks as well as all attorneys' fees paid pre-petition.

Mr. Crawford filed a Response to Motion to Require Disgorgement of Fees and to Compel Amendment to [FRBC 2016\(b\)](#) **[**7]** and Schedule F and Notice of Hearing (Response to Waldo Disgorgement Motion) on April 22, 2009, acknowledging that the Waldo Compensation Disclosure did not reference the post-dated checks but arguing that the firm interpreted the receipt of all post-dated checks as payment in full, **[*863]** that neither he nor Clark & Washington was a pre-petition creditor of the Debtors, and that disgorgement should not be allowed because their fees were reasonable and encompassed both pre-petition and post-petition services. Additionally, Mr. Crawford filed a Disclosure of Compensation of Attorney for Debtor(s) - Amended (Amended Waldo Compensation Disclosure) on

April 8, 2009, now certifying that the Debtors had agreed to pay \$ 1,250.00 for legal services but that "none" had been paid and that the entire \$ 1,250.00, to be paid from their earnings, was still due, "[t]o be paid at \$ 250 per month on 3/13/09, 4/24/09, 5/22/09, 6/19/09, and 7/17/09." WALDO STIP. EX. B. With respect to the legal services included within the fee, Mr. Crawford certifies the following in the Amended Waldo Compensation Disclosure:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the **[**8]** bankruptcy case, including:

Analysis of the debtor's financial situation and rendering advice to the debtor in determining whether to file a bankruptcy petition;

Preparation and filing of any petition, schedules, statement of affairs;

Representation of the debtor at the 341 meeting of creditors and any adjourned hearings thereof.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Any contested matters in this Chapter 7 case, including Adversary Proceedings, Objections to Exemptions, or any objections to Discharge and Dischargeability. These will be charged additional attorney fees at the rate of \$ 295 per hour.

Reaffirmation agreements \$ 50; Redemptions \$ 350; Amendments \$ 104;

As necessary: Judicial lien avoidances \$ 150; Defense of misc. motions/ Relief from Stay Actions \$ 245 per hour; Excess Creditors \$ 50; Misc. letters \$ 50; E-mail/faxes/creditors \$ 15; Reopen closed case \$ 100; Closed records .25 pp

WALDO STIP. EX. B. The parties stipulated that the Amended Waldo Compensation Disclosure accurately reflects the Waldos' contract with Clark & Washington and Mr. Crawford, and that the \$ 1,250.00 fee was "a flat fee for legal services related **[**9]** to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, both pre- and post-filing, related to the bankruptcy case, except for post-petition services specifically listed[.]" WALDO STIPS. at PP 6, 8.

Scott Delaney Johnson and Mary Margaret Johnson

On February 14, 2009, the Debtors in case number 09-30974, Scott Delaney Johnson and Mary Margaret Johnson (collectively, Johnsons), retained Clark & Washington and

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Mr. Crawford, the managing attorney of its Knoxville office, to represent them in the filing of their Chapter 7 bankruptcy case. JOHNSON STIPS. at PP 1, 16. In association with this representation, the Johnsons executed a Chapter 7 Attorney-Client Agreement For Routine Cases Under 11 U.S.C. Chapter 7 (Johnson Engagement Contract) on February 14, 2009, outlining their duties, as well as those of Mr. Crawford and Clark & Washington, whereby they agreed, *inter alia*, to pay Mr. Crawford and Clark & Washington a flat fee in the amount of \$ 1,250.00 for legal services related to the filing of their bankruptcy case, to be performed both pre-petition and post-petition, plus the \$ 299.00 filing fee. JOHNSON STIPS. at P 6; JOHNSON STIP. EX. D. Additionally, the [**10] Johnson Engagement Contract contains the following Acknowledgment executed by the Johnsons:

[*864] I further acknowledge and agree that this retainer contract contemplates payment for services rendered pre-Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

JOHNSON STIP. EX. D. The Johnsons were not informed by Clark & Washington and/or Mr. Crawford that, to the extent not paid prior to the filing of their petition, their attorneys' fees were dischargeable. JOHNSON STIPS. at P 15.

As payment of the \$ 1,250.00 attorney fee, and as is routine for Clark & Washington and Mr. Crawford for collecting payment of flat fees for Chapter 7 bankruptcy cases, the Johnsons provided Clark & Washington and Mr. Crawford with six post-dated checks on February 21, 2009, drawn on their checking account at American Trust: (a) check # 629, dated March 21, 2009, in the amount of \$ 200.00, was deposited into the Clark & Washington bank account on March 25, 2009; (b) check # 630, dated April 21, 2009, in the amount of \$ 200.00, was deposited into the Clark [**11] & Washington bank account on May 7, 2009, and returned due to insufficient funds on May 21, 2009; (c) check # 631, dated May 21, 2009, in the amount of \$ 200.00, was not deposited into the Clark & Washington bank account; (d) check # 632, dated June 21, 2009, in the amount of \$ 200.00, was not deposited into the Clark & Washington bank account; (e) check # 633, dated July 21, 2009, in the amount of \$ 200.00, was not deposited into the Clark & Washington bank account; and (f) check # 635, dated August 21, 2009, in the amount of \$ 249.00, was not deposited into the Clark & Washington bank account. JOHNSON STIPS. at PP 2, 4, 9-10; JOHNSON

STIP. EX. A. ³ Additionally, the parties stipulated that Clark & Washington and Mr. Crawford often delay in depositing the post-dated checks upon request of debtors and that the Johnsons expressly requested a delay, but one of their checks was unintentionally deposited. JOHNSON STIPS. at PP 11-13; JOHNSON STIP. EX. E. Clark & Washington paid all charges associated with the Johnsons' NSF check. JOHNSON STIPS. at P 13.

The Johnsons filed the Voluntary Petition commencing their Chapter 7 bankruptcy case on February 26, 2009, and received their discharge on July 2, 2009. JOHNSON STIPS. at P 3. ⁴ Also filed contemporaneously with their Voluntary Petition was the Disclosure of Compensation of Attorney for Debtor(s) signed by Mr. Crawford (Johnson Compensation Disclosure), certifying that he had agreed to accept \$ 1,250.00 from the Johnsons and that he had received the full \$ 1,250.00 prior to the filing of the Johnson Compensation Disclosure. JOHNSON STIPS. at P 7; JOHNSON STIP. EX. C. In addition, the Johnson Compensation Disclosure states the following:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

[*865] Negotiations with secured creditors to reduce to market [**13] value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

³The Amended Joint Stipulations erroneously state that five post-dated checks were delivered to Mr. Crawford by the Debtors; however, the [**12] remainder of paragraph 2 and Stipulated Exhibit A clearly evidence that six checks were tendered. Additionally, there is nothing in the record to explain why the actual payment arrangement, wherein the Debtors delivered six post-dated checks totaling \$ 1,200.00 rather than the five post-dated checks totaling \$ 1,250.00 outlined in the Johnson Engagement Contract, differed.

⁴The Amended Joint Stipulations filed on July 20, 2009, erroneously state, at paragraph 5, that the Debtors' discharge had not been entered.

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JOHNSON STIP. EX. C. The parties stipulated that the Johnson Compensation Disclosure filed on February 26, 2009, did not accurately reflect the Johnsons' contractual fee agreement with Clark & Washington and Mr. Crawford. JOHNSON STIPS. at P 7.

On April 6, 2009, the United States Trustee filed a Motion to Require Disgorgement of Fees and to Compel Amendment to [FRBP 2016\(b\)](#) and Schedule F and Notice of Hearing (Johnson Disgorgement Motion), seeking an order requiring Mr. Crawford and Clark & Washington to amend the Johnson Compensation Disclosure to accurately reflect the fee arrangement with the **[**14]** Johnsons, to amend Schedule F to list himself and Clark & Washington as creditors for unpaid pre-petition legal fees, and that Mr. Crawford and Clark & Washington be required to disgorge all fees collected through the post-petition cashing of the post-dated checks as well as all attorneys' fees paid pre-petition.

Mr. Crawford filed a Response to Motion to Require Disgorgement of Fees and to Compel Amendment to [FRBP 2016\(b\)](#) and Schedule F and Notice of Hearing (Response to Johnson Disgorgement Motion) on April 22, 2009, acknowledging that the Johnson Compensation Disclosure did not reference the post-dated checks but arguing that the firm interpreted the receipt of all post-dated checks as payment in full, that neither he nor Clark & Washington was a pre-petition creditor of the Johnsons, and that disgorgement should not be allowed because their fees were reasonable and encompassed both pre-petition and post-petition services. Additionally, Mr. Crawford filed identical Disclosure of Compensation of Attorney for Debtor(s) - Amended (Amended Johnson Compensation Disclosure) on April 9 and 10, 2009, now certifying that the Johnsons had agreed to pay \$ 1,050.00 for legal services, that \$ **[**15]** 1.00 had been paid, and that the balance of \$ 1,049.00, to be paid from their earnings, was still due, "[t]o be paid at \$ 200 per month on 3/21/09, 4/21/09, 5/21/09, 6/21/09, 7/21/09, and at \$ 249 on 8/21/09." JOHNSON STIP. EX. B. With respect to the legal services included within the fee, Mr. Crawford certifies the following in the Amended Johnson Compensation Disclosure:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Analysis of the debtor's financial situation and rendering advice to the debtor in determining whether to file a bankruptcy petition;

Preparation and filing of any petition, schedules, statement of affairs;

Representation of the debtor at the 341 meeting of

creditors and any adjourned hearings thereof.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Any contested matters in this Chapter 7 case, including Adversary Proceedings, Objections to Exemptions, or any objections to Discharge and Dischargeability. These will be charged **[**866]** additional attorney fees at the rate of \$ 295 per hour.

Reaffirmation agreements \$ 50; Redemptions \$ 350; Amendments **[**16]** \$ 104;

As necessary: Judicial lien avoidances \$ 150; Defense of misc. motions/Relief from Stay Actions \$ 245 per hour; Excess Creditors \$ 50; Misc. letters \$ 50; E-mail/faxes/creditors \$ 15; Reopen closed case \$ 100; Closed records .25 pp

JOHNSON STIP. EX. B. The parties stipulated that the Amended Johnson Compensation Disclosure accurately reflects the Johnsons' contract with Clark & Washington and Mr. Crawford, and that the \$ 1,250.00 fee was "a flat fee for legal services related to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, both pre- and post-filing, related to the bankruptcy case, except for post-petition services specifically listed[.]" JOHNSON STIPS. at PP 6, 8.

Judith Mikulen

On February 18, 2009, the Debtor in case number 09-30988, Judith Mikulen, retained Clark & Washington and Mr. Crawford, the managing attorney of its Knoxville office, to represent her in the filing of her Chapter 7 bankruptcy case. MIKULEN STIPS. at PP 1, 16. In association with this representation, Ms. Mikulen executed a Chapter 7 Attorney-Client Agreement For Routine Cases Under 11 U.S.C. Chapter 7 (Mikulen Engagement Contract) on February 18, 2009, outlining her duties, **[**17]** as well as those of Mr. Crawford and Clark & Washington, whereby she agreed, *inter alia*, to pay Mr. Crawford and Clark & Washington a flat fee in the amount of \$ 1,000.00 for legal services related to the filing of her bankruptcy case, to be performed both pre-petition and post-petition, plus the \$ 299.00 filing fee. MIKULEN STIPS. at P 6; MIKULEN STIP. EX. D. Additionally, the Mikulen Engagement Contract contains the following Acknowledgment executed by Ms. Mikulen:

I further acknowledge and agree that this retainer contract contemplates payment for services rendered pre-Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition

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and the future payments are to be applied as contemporaneous compensation for post-Petition services.

MIKULEN STIP. EX. D. Ms. Mikulen was not informed by Clark & Washington and/or Mr. Crawford that, to the extent not paid prior to the filing of her petition, their attorneys' fees were dischargeable. MIKULEN STIPS. at P 15.

As payment of the \$ 1,000.00 attorney fee, and as is routine for Clark & Washington and Mr. Crawford for collecting payment of flat fees for Chapter 7 bankruptcy cases, Ms. Mikulen provided [**18] Clark & Washington and Mr. Crawford with five \$ 200.00 post-dated checks on February 26, 2009, drawn on her checking account at Home Federal Bank: (a) check # 344, dated March 27, 2009, was deposited into the Clark & Washington bank account on May 7, 2009; (b) check # 345, dated April 24, 2009, was deposited into the Clark & Washington bank account on May 7, 2009, and returned due to insufficient funds on May 20, 2009; (c) check # 346, dated May 29, 2009, which was not deposited into the Clark & Washington bank account; (d) check # 347, dated June 26, 2009, which was not deposited into the Clark & Washington bank account; and (e) check # 348, dated July 31, 2009, which was not deposited into the Clark & Washington bank account. MIKULEN STIPS. at PP 2, 4, 9-10; MIKULEN STIP. EX. A. Additionally, the parties stipulated that Clark & Washington and Mr. Crawford often delay in depositing the post-dated checks upon request of [**867] debtors and that Ms. Mikulen expressly requested a delay, but one of her checks was unintentionally deposited, which resulted in the return of the check for insufficient funds. MIKULEN STIPS. at PP 11-13; MIKULEN STIP. EX. E. Clark & Washington paid all charges associated [**19] with Ms. Mikulen's NSF check. MIKULEN STIPS. at P 13.

Ms. Mikulen filed the Voluntary Petition commencing her Chapter 7 bankruptcy case on February 26, 2009, and received a discharge on June 30, 2009. MIKULEN STIPS. at PP 3, 5. Also filed with her Voluntary Petition was the Disclosure of Compensation of Attorney for Debtor(s) signed by Mr. Crawford (Mikulen Compensation Disclosure), certifying that he had agreed to accept \$ 1,000.00 from Ms. Mikulen and that he had received the full \$ 1,000.00 prior to the filing of the Mikulen Compensation Disclosure. MIKULEN STIPS. at P 7; MIKULEN STIP. EX. C. In addition, the Mikulen Compensation Disclosure states the following:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Negotiations with secured creditors to reduce to

market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Representation of the debtors [**20] in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

MIKULEN STIP. EX. C. The parties stipulated that the Mikulen Compensation Disclosure filed on February 26, 2009, did not accurately reflect Ms. Mikulen's contractual fee agreement with Clark & Washington and Mr. Crawford. MIKULEN STIPS. at P 7.

On April 6, 2009, the United States Trustee filed a Motion to Require Disgorgement of Fees and to Compel Amendment to FRBP 2016(b) and Schedule F and Notice of Hearing (Mikulen Disgorgement Motion), seeking an order requiring Mr. Crawford and Clark & Washington to amend the Mikulen Compensation Disclosure to accurately reflect the fee arrangement with Ms. Mikulen, to amend Schedule F to list himself and Clark & Washington as creditors for unpaid pre-petition legal fees, and to disgorge all fees collected through the post-petition cashing of the post-dated checks as well as all attorneys' fees paid pre-petition.

Mr. Crawford filed a Response to Motion to Require Disgorgement of Fees and to Compel Amendment to FRBP 2016(b) and Schedule F and Notice of Hearing (Response to Mikulen Disgorgement Motion) on April 22, 2009, acknowledging [**21] that the Mikulen Compensation Disclosure did not reference the post-dated checks but arguing that the firm interpreted the receipt of all post-dated checks as payment in full, that neither he nor Clark & Washington was a pre-petition creditor of Ms. Mikulen, and that disgorgement should not be allowed because their fees were reasonable and encompassed both pre-petition and post-petition services. Additionally, Mr. Crawford filed a Disclosure of Compensation of Attorney for Debtor(s) - Amended (Amended Mikulen Compensation Disclosure) on April 9, 2009, now certifying that Ms. Mikulen had agreed to pay \$ 1,000.00 for legal services, that no money had been paid, and that the entire balance of \$ 1,000.00, to be paid from her earnings, was still due, "[t]o be paid at \$ 200 per month on 3/27/09, 4/24/09, 5/29/09, 6/26/09, [**868] and 7/31/09." MIKULEN STIP. EX. B. With respect to the legal services included within the fee, Mr. Crawford certifies the following

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in the Amended Mikulen Compensation Disclosure:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Analysis of the debtor's financial situation and rendering advice [**22] to the debtor in determining whether to file a bankruptcy petition;

Preparation and filing of any petition, schedules, statement of affairs;

Representation of the debtor at the 341 meeting of creditors and any adjourned hearings thereof.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Any contested matters in this Chapter 7 case, including Adversary Proceedings, Objections to Exemptions, or any objections to Discharge and Dischargeability. These will be charged additional attorney fees at the rate of \$ 295 per hour.

Reaffirmation agreements \$ 50; Redemptions \$ 350; Amendments \$ 104;

As necessary: Judicial lien avoidances \$ 150; Defense of misc. motions/Relief from Stay Actions \$ 245 per hour; Excess Creditors \$ 50; Misc. letters \$ 50; E-mail/faxes/creditors \$ 15; Reopen closed case \$ 100; Closed records .25 pp

MIKULEN STIP. EX. B. The parties stipulated that the Amended Mikulen Compensation Disclosure accurately reflects Ms. Mikulen's contract with Clark & Washington and Mr. Crawford, and that the \$ 1,250.00 fee was "a flat fee for legal services related to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, [**23] both pre- and post-filing, related to the bankruptcy case, except for post-petition services specifically listed[.]" MIKULEN STIPS. at PP 6, 8.

Clayton Gadson Cooley

On January 23, 2009, the Debtor in case number 09-30990, Clayton Gadson Cooley, retained Clark & Washington and Mr. Crawford, the managing attorney of its Knoxville office, to represent him in the filing of his Chapter 7 bankruptcy case. COOLEY STIPS. at PP 1, 15. In association with this representation, Mr. Cooley executed a Chapter 7 Attorney-Client Agreement For Routine Cases Under 11 U.S.C. Chapter 7 (Cooley Engagement Contract) on January 23, 2009, outlining his duties, as well as those of Mr. Crawford

and Clark & Washington, whereby he agreed, *inter alia*, to pay Mr. Crawford and Clark & Washington a flat fee in the amount of \$ 800.00 for legal services related to the filing of his bankruptcy case, to be performed both pre-petition and post-petition, plus the \$ 299.00 filing fee. COOLEY STIPS. at P 6; COOLEY STIP. EX. D. ⁵ Additionally, the Cooley Engagement Contract contains the following Acknowledgment executed by Mr. Cooley:

I further acknowledge and agree that this retainer contract contemplates payment for services [**24] rendered pre-Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

[*869] COOLEY STIP. EX. D. Mr. Cooley was not informed by Clark & Washington and/or Mr. Crawford that, to the extent not paid prior to the filing of his petition, his attorneys' fees were dischargeable. COOLEY STIPS. at P 14.

As payment of the \$ 800.00 attorney fee, and as is routine for Clark & Washington and Mr. Crawford for collecting payment of flat fees for Chapter 7 bankruptcy cases, Mr. Cooley provided Clark & Washington and Mr. Crawford with two \$ 160.00 post-dated checks on February 20, 2009, drawn on his checking account at SunTrust Bank, and with three additional \$ 160.00 post-dated checks on February 23, 2009: (a) check # 1902, dated March 6, 2009, was deposited into the Clark & Washington bank account on [**25] March 10, 2009; (b) check # 1903, dated April 6, 2009, which was not deposited into the Clark & Washington bank account; (c) check # 1904, dated May 6, 2009, which was not deposited into the Clark & Washington bank account; (d) check # 1905, dated June 6, 2009, which was not deposited into the Clark & Washington bank account; and (e) check # 1906, dated July 6, 2009, which was not deposited into the Clark & Washington bank account. COOLEY STIPS. at PP 2, 9-10; COOLEY STIP. EX. A.

Mr. Cooley filed the Voluntary Petition commencing his Chapter 7 bankruptcy case on February 26, 2009, and received a discharge on September 14, 2009. COOLEY STIPS. at P 3. ⁶ Also filed with his Voluntary Petition was the

⁵ On page one of the Cooley Engagement Contract, the typewritten \$ 1,250.00 for attorneys' fees was crossed out and \$ 800.00 was handwritten in; however, the final page, titled Fee Summary, still reflects attorneys' fees of \$ 1,250.00. COOLEY STIP. EX. D.

⁶ Paragraph 5 of the Joint Stipulations state that Mr. Cooley had not yet received a discharge. The discharge was, however, granted subsequent to the filing of the Joint Stipulations.

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Disclosure of Compensation of Attorney for Debtor(s) signed by Mr. Crawford (Cooley Compensation Disclosure), certifying that he had agreed to accept \$ 800.00 from Mr. Cooley and that he had received the full \$ 800.00 prior to the filing of the Cooley Compensation Disclosure. COOLEY STIPS. at P 7; COOLEY STIP. EX. C. In addition, the Cooley Compensation Disclosure states the following:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

COOLEY STIP. EX. C. The parties stipulated that the Cooley Compensation Disclosure filed on February 26, 2009, did not accurately reflect Mr. Cooley's contractual fee agreement with Clark & Washington and Mr. Crawford. COOLEY STIPS. at P 7.

On April 6, 2009, the United States Trustee filed a Motion to Require Disgorgement of Fees and to Compel Amendment to FRBP 2016(b) and Schedule F and Notice of Hearing (Cooley Disgorgement Motion), seeking an order requiring Mr. Crawford and Clark & Washington to amend the Cooley Compensation Disclosure to accurately reflect the fee arrangement with Mr. Cooley, to amend Schedule F to list himself and Clark & Washington as creditors for unpaid pre-petition legal fees, and to disgorge all fees collected through the post-petition cashing of the [*870] post-dated checks as well as all attorneys' fees paid pre-petition.

Mr. Crawford filed a Response to Motion to Require Disgorgement of Fees and to Compel Amendment to FRBP 2016(b) and Schedule F and Notice of Hearing (Response to Cooley Disgorgement Motion) on April 22, 2009, acknowledging that the Cooley Compensation Disclosure did not reference the post-dated checks but arguing that the firm interpreted the receipt of all post-dated checks as payment in full, that neither he nor Clark & Washington was a pre-petition creditor of Mr. Cooley, and that disgorgement should

not be allowed because their fees were reasonable and encompassed both pre-petition and post-petition services. Additionally, Mr. Crawford filed a Disclosure of Compensation of Attorney for Debtor(s) - Amended (Amended Cooley Compensation Disclosure) on April 8, 2009, now certifying that Mr. Cooley had agreed to pay \$ 800.00 [**28] for legal services, that no money had been paid, and that the entire balance of \$ 800.00, to be paid from his earnings, was still due, "[t]o be paid at \$ 160 per month on 3/6/09, 4/6/09, 5/6/09, 6/6/09, and 7/6/09." COOLEY STIP. EX. B. With respect to the legal services included within the fee, Mr. Crawford certifies the following in the Amended Cooley Compensation Disclosure:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Analysis of the debtor's financial situation and rendering advice to the debtor in determining whether to file a bankruptcy petition;

Preparation and filing of any petition, schedules, statement of affairs;

Representation of the debtor at the 341 meeting of creditors and any adjourned hearings thereof.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Any contested matters in this Chapter 7 case, including Adversary Proceedings, Objections to Exemptions, or any objections to Discharge and Dischargeability. These will be charged additional attorney fees at the rate of \$ 295 per hour.

Reaffirmation agreements \$ 50; Redemptions \$ 350; Amendments [**29] \$ 104;

As necessary: Judicial lien avoidances \$ 150; Defense of misc. motions/ Relief from Stay Actions \$ 245 per hour; Excess Creditors \$ 50; Misc. letters \$ 50; E-mail/faxes/creditors \$ 15; Reopen closed case \$ 100; Closed records .25 pp

COOLEY STIP. EX. B. The parties stipulated that the Amended Cooley Compensation Disclosure accurately reflects Mr. Cooley's contract with Clark & Washington and Mr. Crawford, and that the \$ 1,250.00 fee was "a flat fee for legal services related to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, both pre- and post-filing, related to the bankruptcy case, except for post-petition services specifically listed[.]" COOLEY STIPS. at PP 6, 8.

Crystal Michelle Jones

On February 23, 2009, the Debtor in case number 09-30991, Crystal Michelle Jones, retained Clark & Washington and Mr. Crawford, the managing attorney of its Knoxville office, to represent her in the filing of her Chapter 7 bankruptcy case. JONES STIPS. at PP 1, 14. In association with this representation, Ms. Jones executed a Chapter 7 Attorney-Client Agreement For Routine Cases Under 11 U.S.C. Chapter 7 (Jones Engagement Contract) on February 23, 2009, outlining [**30] her duties, as well as those of Mr. Crawford and Clark & Washington, whereby she agreed, [**871] *inter alia*, to pay Mr. Crawford and Clark & Washington a flat fee in the amount of \$ 800.00 for legal services related to the filing of her bankruptcy case, to be performed both pre-petition and post-petition, plus the \$ 299.00 filing fee. JONES STIPS. at P 6; JONES STIP. EX. E. Additionally, the Jones Engagement Contract contains the following Acknowledgment executed by Ms. Jones:

I further acknowledge and agree that this retainer contract contemplates payment for services rendered pre-Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

JONES STIP. EX. E. Ms. Jones was not informed by Clark & Washington and/or Mr. Crawford that, to the extent not paid prior to the filing of her petition, their attorneys' fees were dischargeable. JONES STIPS. at P 13.

As payment of the \$ 800.00 attorney fee, and as is routine for Clark & Washington and Mr. Crawford for collecting payment of flat fees for Chapter 7 bankruptcy cases, Ms. Jones provided Clark [**31] & Washington and Mr. Crawford with four \$ 200.00 post-dated checks drawn on her checking account at Y-12 Federal Credit Union on February 23, 2009: (a) check # 1064, dated March 3, 2009, was deposited into the Clark & Washington bank account on March 5, 2009; (b) check # 1065, dated April 3, 2009, was deposited into the Clark & Washington bank account on May 7, 2009, and returned due to insufficient funds on May 20, 2009; (c) check # 1066, dated May 3, 2009, was deposited into the Clark & Washington bank account on May 7, 2009, and returned due to insufficient funds on May 20, 2009; and (d) check # 1067, dated June 3, 2009, was deposited into the Clark & Washington bank account on June 3, 2009, and returned due to insufficient funds on June 26, 2009. JONES STIPS. at PP 2, 4, 9-10; JONES STIP. EX. A. The parties stipulated that upon notification that a post-dated check has not been honored due to insufficient funds, Clark & Washington and

Mr. Crawford generate and send correspondence and/or make telephone calls to debtors in order to collect the fee. JONES STIPS. at P 12. Clark & Washington sent two collection letters, both dated May 20, 2009, to Ms. Jones concerning checks returned [**32] for insufficient funds and her balance due at that time of \$ 450.00. JONES STIPS. at P 4; JONES STIP. COLL. EX. B.

Ms. Jones filed the Voluntary Petition commencing her Chapter 7 bankruptcy case on February 26, 2009, and received a discharge on June 16, 2009. JONES STIPS. at PP 3, 5. Also filed with her Voluntary Petition was the Disclosure of Compensation of Attorney for Debtor(s) signed by Mr. Crawford (Jones Compensation Disclosure), certifying that he had agreed to accept \$ 800.00 from Ms. Jones and that he had received the full \$ 800.00 prior to the filing of the Jones Compensation Disclosure. JONES STIPS. at P 7; JONES STIP. EX. D. In addition, the Jones Compensation Disclosure states the following:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

[**872] 7. By agreement with the debtor(s), the above-disclosed fee does not include the following [**33] service:

Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

JONES STIP. EX. D. The parties stipulated that the Jones Compensation Disclosure filed on February 26, 2009, did not accurately reflect Ms. Jones' contractual fee agreement with Clark & Washington and Mr. Crawford. JONES STIPS. at P 7.

On April 6, 2009, the United States Trustee filed a Motion to Require Disgorgement of Fees and to Compel Amendment to [FRBP 2016\(b\)](#) and Schedule F and Notice of Hearing (Jones Disgorgement Motion), seeking an order requiring Mr. Crawford and Clark & Washington to amend the Jones Compensation Disclosure to accurately reflect the fee arrangement with Ms. Jones, to amend Schedule F to list himself and Clark & Washington as creditors for unpaid pre-

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petition legal fees, and to disgorge all fees collected through the post-petition cashing of the post-dated checks as well as all attorneys' fees paid pre-petition.

Mr. Crawford filed a Response to Motion to Require Disgorgement of Fees and to Compel Amendment to [FRBP 2016\(b\)](#) and Schedule F and Notice of Hearing (Response to Jones Disgorgement Motion) on April [**34] 22, 2009, acknowledging that the Jones Compensation Disclosure did not reference the post-dated checks but arguing that the firm interpreted the receipt of all post-dated checks as payment in full, that neither he nor Clark & Washington was a pre-petition creditor of Ms. Jones, and that disgorgement should not be allowed because their fees were reasonable and encompassed both pre-petition and post-petition services. Additionally, Mr. Crawford filed a Disclosure of Compensation of Attorney for Debtor(s) - Amended (Amended Jones Compensation Disclosure) on April 8, 2009, now certifying that Ms. Jones had agreed to pay \$ 800.00 for legal services, that no money had been paid, and that the entire balance of \$ 800.00, to be paid from her earnings, was still due, "[t]o be paid at \$ 200 per month on 3/3/09, 4/3/09, 5/3/09, and 6/3/09." JONES STIP. EX. C. With respect to the legal services included within the fee, Mr. Crawford certifies the following in the Amended Jones Compensation Disclosure:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Analysis of the debtor's financial situation and rendering advice to [**35] the debtor in determining whether to file a bankruptcy petition;

Preparation and filing of any petition, schedules, statement of affairs;

Representation of the debtor at the 341 meeting of creditors and any adjourned hearings thereof.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Any contested matters in this Chapter 7 case, including Adversary Proceedings, Objections to Exemptions, or any objections to Discharge and Dischargeability. These will be charged additional attorney fees at the rate of \$ 295 per hour.

Reaffirmation agreements \$ 50; Redemptions \$ 350; Amendments \$ 104;

As necessary: Judicial lien avoidances \$ 150;

Defense of misc. motions/ Relief from Stay Actions \$ 245 per hour; Excess Creditors \$ 50; Misc. letters \$ 50; E-mail/faxes/creditors \$ 15; Reopen closed case \$ 100; Closed records .25 pp

[*873] JONES STIP. EX. C. The parties stipulated that the Amended Jones Compensation Disclosure accurately reflects Ms. Jones' contract with Clark & Washington and Mr. Crawford, and that the \$ 1,250.00 fee was "a flat fee for legal services related to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, both pre- [*36] and post-filing, related to the bankruptcy case, except for post-petition services specifically listed[.]" JONES STIPS. at PP 6, 8.

William Ray Joines, II

On December 9, 2008, the Debtor in case number 08-35781, William Ray Joines, II, retained Clark & Washington and Mr. Crawford, the managing attorney of its Knoxville office, to represent him in the filing of his Chapter 7 bankruptcy case. JOINES STIPS. at PP 1, 15. In association with this representation, Mr. Joines executed a Chapter 7 Attorney-Client Agreement For Routine Cases Under 11 U.S.C. Chapter 7 (Joines Engagement Contract) on December 9, 2008, outlining his duties, as well as those of Mr. Crawford and Clark & Washington, whereby he agreed, *inter alia*, to pay Mr. Crawford and Clark & Washington a flat fee in the amount of \$ 1,250.00 for legal services related to the filing of his bankruptcy case, to be performed both pre-petition and post-petition, plus the \$ 299.00 filing fee. JOINES STIPS. at P 6; JOINES STIP. EX. D. Additionally, the Joines Engagement Contract contains the following Acknowledgment executed by Mr. Joines:

I further acknowledge and agree that this retainer contract contemplates payment for services rendered [**37] pre-Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

JOINES STIP. EX. D. Mr. Joines was not informed by Clark & Washington and/or Mr. Crawford that, to the extent not paid prior to the filing of his petition, their attorneys' fees were dischargeable. JOINES STIPS. at P 14.

As payment of the \$ 1,250.00 attorney fee, and as is routine for Clark & Washington and Mr. Crawford for collecting payment of flat fees for Chapter 7 bankruptcy cases, Mr. Joines provided Clark & Washington and Mr. Crawford with five post-dated checks on December 17, 2008, drawn on his checking account with AmSouth Bank/Regions Bank: (a) check # 0941 in the amount of \$ 249.00, dated January 8,

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2009, was deposited into the Clark & Washington bank account on January 9, 2009, was replaced with a \$ 249.00 cash payment from the Debtor on January 15, 2009, and returned due to insufficient funds on January 24, 2009; (b) check # 0942, dated February 12, 2009, was not deposited into the Clark & Washington bank account but was replaced on January 15, 2009, with **[**38]** check # 1005 in the amount of \$ 250.00, dated February 12, 2009, which was deposited into the Clark & Washington bank account on February 17, 2009; (c) check # 0943, dated March 12, 2009, which was not deposited into the Clark & Washington bank account but was replaced on January 15, 2009, with check # 1006 in the amount of \$ 250.00, dated March [] 2009, was deposited into the Clark & Washington bank account on March 21, 2009; (d) check # 0944, dated April 9, 2009, which was not deposited into the Clark & Washington bank account but was replaced on January 15, 2009, with check # 1007 in the amount of \$ 250.00, dated April 19, 2009, was deposited into the Clark & Washington bank account on April 27, 2009; and (e) check # 0945, dated May 14, 2009, which was not deposited into the Clark & Washington bank account but was replaced on January 15, 2009, with **[*874]** check # 1008 in the amount of \$ 250.00, dated May 14, 2009, was deposited into the Clark & Washington bank account on May 14, 2009. JOINES STIPS. at PP 2, 4, 9-10; JOINES STIP. EX. A. The parties stipulated that upon notification that a post-dated check has not been honored due to insufficient funds, Clark & Washington and Mr. Crawford **[**39]** generate and send correspondence and/or make telephone calls to debtors in order to collect the fee. JOINES STIPS. at P 13. Mr. Joines subsequently paid check # 0941 in cash on January 15, 2009, and the \$ 25.00 NSF fee was waived. JOINES STIPS. at P 2.

Mr. Joines filed the Voluntary Petition commencing his Chapter 7 bankruptcy case on December 23, 2008, and received a discharge on April 14, 2009. JOINES STIPS. at PP 3, 5. Also filed with his Voluntary Petition was the Disclosure of Compensation of Attorney for Debtor(s) signed by Mr. Crawford (Joines Compensation Disclosure), certifying that he had agreed to accept \$ 1,250.00 from Mr. Joines and that he had received the full \$ 1,250.00 prior to the filing of the Joines Compensation Disclosure. JOINES STIPS. at P 7; JOINES STIP. EX. C. In addition, the Joines Compensation Disclosure states the following:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions

pursuant to **[**40]** 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

JOINES STIP. EX. C. The parties stipulated that the Joines Compensation Disclosure filed on December 23, 2008, did not accurately reflect Mr. Joines' contractual fee agreement with Clark & Washington and Mr. Crawford. JOINES STIPS. at P 8.

On May 15, 2009, the United States Trustee filed a Motion for Sanctions for Violations of 11 U.S.C. § 362(a)(6) and § 524(a)(2) (Joines Motion for Sanctions), seeking an order imposing sanctions against Mr. Crawford and Clark & Washington and requiring disgorgement of all fees collected through the post-petition and post-discharge cashing of the post-dated checks as well as all attorneys' fees paid pre-petition. Mr. Crawford did not file a response to the Motion for Sanctions; however, by agreement of the parties, this contested matter was consolidated for hearing with the Disgorgement Motions. Additionally, Mr. Crawford filed a Disclosure of Compensation **[**41]** of Attorney for Debtor(s) - Amended (Amended Joines Compensation Disclosure) on July 10, 2009, now certifying that Mr. Joines had agreed to pay \$ 1,250.00 for legal services, that no money had been paid, and that the entire balance of \$ 1,250.00, to be paid from his earnings, was still due, "[t]o be paid at \$ 250 on 1/8/09; 2/12/09; 3/12/09; 4/9/09; & 5/14/09." JOINES STIP. EX. B. With respect to the legal services included within the fee, Mr. Crawford certifies the following in the Amended Joines Compensation Disclosure:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Analysis of the debtor's financial situation and rendering advice to the **[*875]** debtor in determining whether to file a bankruptcy petition;

Preparation and filing of any petition, schedules, statement of affairs;

Representation of the debtor at the 341 meeting of creditors and any adjourned hearings thereof.

Debtor further acknowledges and agrees that the

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retainer contract contemplates payment for services rendered pre Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future [**42] payments are to be applied as contemporaneous compensation for post-Petition services.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

As necessary;

Amendments \$ 104; Reaffirmation agreements \$ 50; Redemptions \$ 350;

For any adversary proceeding a different contract of employment shall be executed between the parties under such terms and conditions as the parties deem mutually acceptable.

JOINES STIP. EX. B. The parties stipulated that the Amended Joines Compensation Disclosure accurately reflects Mr. Joines' contract with Clark & Washington and Mr. Crawford, and that the \$ 1,250.00 fee was "a flat fee for legal services related to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, both pre- and post-filing, related to the bankruptcy case, except for post-petition services specifically listed[.]" JOINES STIPS. at PP 7, 9.

William Edgar Scharff, Jr. and Michelle Angelique Scharff

On November 20, 2008, the Debtors in case number 08-35658, William Edgar Scharff, Jr. and Michelle Angelique Scharff (the Scharffs), retained Clark & Washington and Mr. Crawford, the managing attorney of its Knoxville office, to represent [**43] them in the filing of their Chapter 7 bankruptcy case. SCHARFF STIPS. at PP 1, 14. In association with this representation, the Scharffs executed a Chapter 7 Attorney-Client Agreement For Routine Cases Under 11 U.S.C. Chapter 7 (Scharff Engagement Contract) on November 20, 2008, outlining their duties, as well as those of Mr. Crawford and Clark & Washington, whereby they agreed, *inter alia*, to pay Mr. Crawford and Clark & Washington a flat fee in the amount of \$ 1,000.00 for legal services related to the filing of their bankruptcy case, to be performed both pre-petition and post-petition, plus the \$ 299.00 filing fee. SCHARFF STIPS. at P 6; SCHARFF STIP. EX. E. Additionally, the Scharff Engagement Contract contains the following Acknowledgment executed by the Scharffs:

I further acknowledge and agree that this retainer contract contemplates payment for services rendered pre-

Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

SCHARFF STIP. EX. D. The Scharffs were not informed by Clark & Washington and/or Mr. Crawford that, [**44] to the extent not paid prior to the filing of their petition, their attorneys' fees were dischargeable. SCHARFF STIPS. at P 13.

As payment of the \$ 1,000.00 attorney fee, and as is routine for Clark & Washington and Mr. Crawford for collecting payment of flat fees for Chapter 7 bankruptcy cases, the Scharffs paid \$ 1.00 in cash and provided Clark & Washington and Mr. Crawford with six post-dated checks on December 11, 2008, drawn on their checking [**876] account with Bank of America, each in the amount of \$ 165.00: (a) check # 1229, dated January 15, 2009, in the amount of \$ 165.00, was deposited into the Clark & Washington bank account on January 15, 2009, and returned due to insufficient funds on February 5, 2009; (b) check # 1230, dated February 15, 2009, in the amount of \$ 165.00, was deposited into the Clark & Washington bank account on February 17, 2009, and returned due to insufficient funds on March 7, 2009; (c) check # 1231, dated March 15, 2009, in the amount of \$ 165.00, was deposited into the Clark & Washington bank account on March 18, 2009, and returned due to insufficient funds on April 2, 2009; (d) check # 1232, dated April 15, 2009, in the amount of \$ 165.00, was deposited [**45] into the Clark & Washington bank account on April 16, 2009, and returned due to insufficient funds on May 5, 2009; (e) check # 1233, dated May 15, 2009, in the amount of \$ 165.00, was deposited into the Clark & Washington bank account on May 15, 2009, and returned due to insufficient funds on May 26, 2009; and (e) check # 1234, dated June 15, 2009, in the amount of \$ 174.00, was not deposited into the Clark & Washington bank account. SCHARFF STIPS. at PP 2, 4, 9-10; SCHARFF STIP. EX. A. The parties stipulated that upon notification that a post-dated check has not been honored due to insufficient funds, Clark & Washington and Mr. Crawford generate and send correspondence and/or make telephone calls to debtors in order to collect the fee. SCHARFF STIPS. at P 12. Clark & Washington made telephone calls and sent six collection letters, dated February 5, 2009, March 7, 2009, April 2, 2009, May 5, 2009, May 26, 2009, and July 10, 2009, to the Scharffs concerning the five checks returned for insufficient funds. SCHARFF STIPS. at P 4; SCHARFF STIP. COLL. EX. B. The Scharffs subsequently paid checks # 1229 and # 1230 in cash on February 23, 2009, and March 25, 2009, along with a \$ 25.00 NSF [**46] fee for each check. SCHARFF STIPS. at P 2.

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The Scharffs filed the Voluntary Petition commencing their Chapter 7 bankruptcy case on December 16, 2008, and received a discharge on May 27, 2009. SCHARFFS STIPS. at PP 3, 5. Also filed with their Voluntary Petition was the Disclosure of Compensation of Attorney for Debtor(s) signed by Mr. Crawford (Scharff Compensation Disclosure), certifying that he had agreed to accept \$ 1,000.00 from the Scharffs and that he had received the full \$ 1,000.00 prior to the filing of the Scharff Compensation Disclosure. SCHARFF STIPS. at P 7; SCHARFF STIP. EX. D. In addition, the Scharff Compensation Disclosure states the following:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

Representation of the debtors in any **[**47]** dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

SCHARFF STIP. EX. C. The parties stipulated that the Scharff Compensation Disclosure filed on December 16, 2008, did not accurately reflect the Scharffs' contractual fee agreement with Clark & Washington and Mr. Crawford. SCHARFF STIPS. at P 7.

[*877] On May 15, 2009, the United States Trustee filed a Motion for Sanctions for Violation of 11 U.S.C. § 362 (Scharff Motion for Sanctions), seeking an order imposing sanctions against Mr. Crawford and Clark & Washington for making telephone calls and sending letters to collect upon the NSF checks and requiring disgorgement of all fees collected through the post-petition cashing of the post-dated checks as well as all attorneys' fees paid pre-petition. Mr. Crawford did not file a response to the Motion for Sanctions; however, by agreement of the parties, this contested matter was consolidated for hearing with the Disgorgement Motions. Additionally, Mr. Crawford filed a Disclosure of Compensation of Attorney for Debtor(s) - Amended (Amended Scharff Compensation Disclosure) on April 17, 2009, stating that the Scharffs had agreed to pay \$ 1,000.00 **[**48]** for legal services, that \$ 1.00 had been paid, and that the remaining balance of \$ 999.00, to be paid from their

earnings, was still due, "[t]o be paid at \$ 165 on 1/15/09; 2/15/09; 3/15/09; 4/15/09; 5/15/09 and at \$ 174.00 on 6/15/09." SCHARFF STIP. EX. C. With respect to the legal services included within the fee, the Amended Scharff Compensation Disclosure states as follows:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

Analysis of the debtor's financial situation and rendering advice to the debtor in determining whether to file a bankruptcy petition;

Preparation and filing of any petition, schedules, statement of affairs;

Representation of the debtor at the 341 meeting of creditors and any adjourned hearings thereof.

Debtor further acknowledges and agrees that the retainer contract contemplates payment for services rendered pre Petition as well as services to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

7. By agreement with the debtor(s), the above-disclosed fee **[**49]** does not include the following service:

Amendments \$ 104;

For any adversary [sic] proceeding a different contract of employment shall be executed between the parties under such terms and conditions as the parties deem mutually acceptable.

SCHARFF STIP. EX. C. The parties have stipulated that the Amended Scharff Compensation Disclosure accurately reflects the Scharffs' contract with Clark & Washington and Mr. Crawford, and that the \$ 1,250.00 fee was "a flat fee for legal services related to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, both pre- and post-filing, related to the bankruptcy case, except for post-petition services specifically listed[.]" SCHARFF STIPS. at PP 6, 8.

II

The issues the court is called upon to resolve, as defined by the parties in the Amended Agreed Pretrial Order entered on June 26, 2009, are as follows:

a. What was the nature of the attorney's contract with each client as to whether it was a flat fee or a bifurcated

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fee and if that agreement complies with the Bankruptcy Code;

b. Did the original [FRBP 2016](#) disclosure[s] accurately reflect the contract between the attorney and [each] debtor;

c. Is the deposit of a post-dated check [**50] or other correspondence, such as a phone call or letter, post-petition[,] a [**878] violation of the automatic stay pursuant to [11 U.S.C. § 362\(a\)\(6\)](#);

d. Is the deposit of a post-dated check or other correspondence, such as a phone call or letter, post-discharge[,] a violation of [11 U.S.C. § 524](#)'s permanent injunction;

e. Does Clark & Washington advise debtors that the pre-petition attorney fee is one that is of the kind that would be discharged in bankruptcy[; and]

f. Due to the failure of Clark & Washington to advise debtors that [their] pre-petition attorney fee would be discharged in their bankruptcy, should they be ordered to disgorge their fees pursuant to [11 U.S.C. § 329\(b\)](#) in that the compensation exceeded the reasonable value of their services?

Because these issues are based upon substantially identical facts, they will be analyzed collectively.

Each of the Debtors entered into a Chapter 7 Attorney-Client Agreement for Routine Cases Under 11 U.S.C. Chapter 7 [Engagement Contract] with Mr. Crawford and Clark & [**51] Washington. These seven Engagement Contracts, with the exception of the amount of the fee charged the respective Debtors, are identical and each begins with the following language:

It is hereby agreed by the undersigned "Attorney" and "Client" that Attorney shall represent Client in a case under Title 11 USC Chapter 7. Client agrees to an attorney fee of ____.

This fee does not include court filing costs; Client shall be responsible for all court and credit counseling costs associated with this case. Client agrees to pay an additional fee of \$ 104.00 plus court costs of \$ 26.00 for each amendment filed, post-Petition, to include, list, or disclose any information which Client failed to provide to Attorney prior to the filing of Client's case.⁷ This

agreement is predicated upon the completeness and accuracy of the relevant information provided to Attorney by Client. All fees paid by Client for the purpose of filing this Chapter 7 petition are NON-REFUNDABLE.

ENGAGEMENT CONTRACT at 1.⁸

Regarding the duties of Clark & Washington and Mr. Crawford, the Engagement Contract expressly provides as follows:

It is further agreed that:

(1) Attorney's Duties: Attorney shall meet and consult with Client as needed, prepare the Petition, Form 22(a), Statement Financial of Affairs [sic], Schedules and Summary as required by the Bankruptcy Code or Local Rules, as well as any other pleadings which are necessary or appropriate during the case, and file same with the Clerk of the United States Bankruptcy Court. Attorney shall attend all hearings as set forth in paragraph (7) below.

....

(7) Court Hearings: Attorney shall appear at the 341 Meeting of Creditors and any other hearings or proceedings required in Client's case. Client shall [**879] attend the [**53] 341 Meeting of Creditors and any other hearing or proceeding required in Client's case.

ENGAGEMENT CONTRACT at 1, 2. The Engagement Contract provides for only one "carve out" of services other than amendments, which is expressly addressed in the second paragraph on the first page of the Engagement Contract, referenced above:

(19) ADVERSARY PROCEEDINGS: the parties specifically agree that the services contemplated in this contract of employment DO NOT include representing Client, either as a Plaintiff or Defendant, in any Adversary Proceeding filed in or in connection with this case. Should Attorney agree to represent Client in an

filing fee is an amendment to a debtor's schedules of creditors or lists of creditors. The court presumes that Mr. Crawford and Clark & Washington [**52] are not attempting to collect a post-petition filing fee for any other amendment.

⁸The pages of the seven Engagement Contracts stipulated by the parties are numbered in some cases, not numbered in other cases, and in still other cases, misnumbered. The page numbers cited to by the court represent the actual page of the Engagement Contract on which the referenced paragraphs appear without regard to any page number appearing on these documents.

⁷ The only amendment requiring payment by a debtor of a \$ 26.00

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adversary proceeding, a different contract of employment shall be executed between the parties under such terms and conditions as the parties deem mutually acceptable.

ENGAGEMENT CONTRACT at 4. No other section of the Engagement Contract addresses carve-outs or additional fees, notwithstanding that the parties have erroneously stipulated in each case that the Engagement Contract "is accurately reflected in the last amended *FRBP 2016* Disclosure" filed by Clark & Washington and Mr. Crawford, each of which, with the exception of the Scharff Amended Compensation [**54] Disclosure, states that the disclosed attorneys' fee does not include adversary proceedings, amendments, reaffirmation agreements and redemptions. WALDO, JOHNSON, MIKULEN, COOLEY, JONES, SCHARFF STIPS. at P 8; JOINES STIP. at P 9;⁹ WALDO, JOHNSON, MIKULEN, COOLEY, JOINES STIP. EX. B; JONES, SCHARFF STIP. EX. C.

HNI The Bankruptcy Code calls upon courts to review and determine the reasonableness of the compensation paid or agreed to be paid a debtor's attorney and compensation may be reduced if found unreasonable. See *11 U.S.C. § 329 (2006)*; *FED. R. BANKR. P. 2017*. The reasonableness of fees is within the court's discretion, to be determined based upon "the nature, the extent, and the value of such services," in conjunction with "the surrounding facts and circumstances, including the customary fee in comparable cases." *In re Geraci*, 138 F.3d 314, 319 (7th Cir. 1998). The attorney to receive the fee bears the burden of showing its reasonableness; however, "an [**55] attorney . . . is not always entitled to the fee that the debtor has agreed to pay him." *Geraci*, 138 F.3d at 318, 320; *In re Jackson*, 401 B.R. 333, 341 (Bankr. N.D. Ill. 2009). Factors to be considered include the time spent on services, the rates charged, the necessity of the services provided, and the customary compensation charged by others. *In re Datta*, 2009 WL 194174, at *4, 2009 Bankr. LEXIS 1856, at *10-11 (Bankr. E.D.N.Y. July 2, 2009) (quoting *11 U.S.C. § 330(a)(3)* as a starting point in the analysis).

In support of their practice of accepting post-dated checks, Clark & Washington and Mr. Crawford argue that the nature of the Engagement Contract with the respective Debtors provides for a flat, yet bifurcated fee, such that any pre-petition payments received were for pre-petition services performed, while the post-dated checks constituted payments

for all post-petition services performed.

A growing number of bankruptcy courts have adopted and implemented "no look" or presumptive fees, most commonly in chapter 13 cases, but also in chapter 7 cases. [T]his type of standardization, or uniform fee guideline, promotes efficiency [**880] by relieving the courts of the administrative burden [**56] of reviewing numerous attorney's fee applications; encourages predictability and efficiency for all involved in a chapter 7 or 13 case; and saves time for the court, trustees and the attorneys who represent debtors.

In re Williams, 357 B.R. 434, 439 n.3 (B.A.P. 6th Cir. 2007) (citations omitted).¹⁰ These presumptive fees include "normal, ordinary, and fundamental services of the chapter 7 process" that are provided to typical debtors, usually including "pre-bankruptcy consultation, schedule preparation, representation of debtor at the meeting of creditors, reaffirmation agreement review, and other similar tasks." *Williams*, 357 B.R. at 439 (citations omitted). As previously stated in section I, *supra*, the parties stipulated that "Clark & Washington and Mr. Crawford charged [each of the Debtors] a flat fee for legal services related to the filing of chapter 7 bankruptcies, which is defined as a fee for all services, both pre- and post-filing, related to the bankruptcy case[.]" WALDO, JOHNSON, MIKULEN, COOLEY, JONES, SCHARFF STIPS. at P 6; JOINES STIP. at P 7.

HN2 When paid entirely pre-petition, fees paid pursuant to a "no-look" or "flat fee" arrangement do not run afoul of the Bankruptcy Code. The same cannot, however, be said for fees paid pursuant to a fee agreement, entered into pre-petition, which provides for payments post-petition. In Chapter 7 cases, once the discharge is granted, debtors are no longer liable for any pre-petition debts "[e]xcept as provided in section 523 of this title[.]" *11 U.S.C. § 727(b) (2006)*. The majority of courts, including the Sixth Circuit, have held that pre-petition attorney's fees are dischargeable debts under *11 U.S.C. § 727(b)*. *Rittenhouse v. Eisen*, 404 F.3d 395, 396 (6th Cir. 2005); see also *Fickling v. Flower, Medalie & Markowitz, Esqs. (In re Fickling)*, 361 F.3d 172, 175 (2d Cir. 2004); *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1128-29 (7th Cir. 2003); *Hessinger & Assocs. v. United States Trustee (In re Biggar)*, 110 F.3d 685, 688 (9th Cir. 1997).

⁹The Scharff Amended Compensation Disclosure reflects that the Debtors will be charged an additional fee for any amendments and adversary proceedings but does not reference reaffirmation agreements or redemptions. SCHARFF STIP. EX. B.

¹⁰The Local Rules of Court for the United States Bankruptcy Court for the Eastern District of Tennessee provide for a presumptive [**57] or base fee of \$ 3,000.00 for Chapter 13 cases. See *E.D. Tenn. LBR 2016-1*. There is no corresponding presumptive or base fee for Chapter 7 representation, although the court is aware that the majority of Chapter 7 attorneys' fees are based upon flat fees.

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[**58] While this notion seems clear-cut, to the extent that this "flat fee" covers services to be performed both pre- and post-petition and is paid both pre- and post-petition, there is a split of authority.

The majority view is that pre-petition agreements to pay a flat fee in post-petition installments are dischargeable debts. *See, e.g., In re Mansfield*, 394 B.R. 783, 787 (Bankr. E.D. Pa. 2008) (holding that any portion of a pre-petition flat fee which has not been paid pre-petition is dischargeable); *In re Griffin*, 313 B.R. 757, 762 (Bankr. N.D. Ill. 2004) (holding that a debtor's personal liability on the entire retainer agreement entered into pre-petition is dischargeable under § 727); *In re Chandler*, 292 B.R. 583, 587 (Bankr. W.D. Mich. 2003) (holding that unpaid attorney's fees are not among the debts excluded from discharge). These decisions are based primarily upon the Bankruptcy Code's exclusion of attorney's fees from the nondischargeability provisions of 11 U.S.C. § 523(a) (2006). *See Mansfield*, 394 B.R. at 788 ("[S]ince attorneys' fees are not among the debts excepted from discharge under § 523, prepetition debts for legal fees, particularly flat fee arrangements, covering both [**59] prepetition and postpetition legal services, are dischargeable under § 727(b)."); *In re Symes*, 174 B.R. 114, 117 [*881] (Bankr. D. Ariz. 1994) ("[T]he fact that legal services were contemplated to be rendered in the bankruptcy case by the pre-petition contract will not transform pre-petition debt into nondischargeable debt, simply because that arrangement must be disclosed. With the many enumerated statutory exceptions to discharge, if Congress intended that pre-petition fee arrangements were nondischargeable, it would have so provided.").

For example, in *Chandler*, decided by a bankruptcy court within and under the precedent of the Sixth Circuit, the court examined § 329 and its interaction with *Rules 2016* and *2017*, finding that while § 329 required disclosure of fees paid or to be paid, disclosure did not equate to allowance of those fees and that § 329 applied to all chapters, not merely Chapter 7, in which payment of post-petition fees were common-place and there would be an ongoing need for scrutiny by the court. *Chandler*, 292 B.R. at 586-87. The court also analyzed *Rule 1006(b)(3)*, § 727(b), and § 523(a), holding that exceptions to discharge for attorneys fees could be found in none [**60] of them. *Chandler*, 292 B.R. at 587. Similarly, the *McNickle* court adopted the majority rule, "that strictly construes the Bankruptcy Code [and] holds that pre-petition legal services are subject to the discharge," *In re McNickle*, 274 B.R. 477, 480 (Bankr. S.D. Ohio 2002), and the *Todd* court, in the context of examining whether checks tendered to the debtor's attorney and insurance company pre-petition but presented for payment post-petition were property of the estate and subject to turnover, held that "[i]t is a basic facet of a Chapter 7

bankruptcy case that so long as not specifically excluded, all prepetition debts are subject to discharge[, including] prepetition legal fees." *In re Todd*, 359 B.R. 863, 867 (Bankr. N.D. Ohio 2007) (holding that the debtor was under no obligation to pay an obligation to her attorney for pre-petition services).

Conversely, the minority view is that "the postpetition rendition of legal services bargained for pursuant to a prefiling fee agreement entitles [an attorney] to recover the fees for those later services[.]" *Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th Cir. 1998).¹¹ In making its determination, the Ninth Circuit held that since Congress [**61] had not addressed what it termed as "the always-present problem of arranging in advance for the payment of services to be rendered after the filing in bankruptcy[.]" it was "compelled to consider an appropriate judicial response -- one that recognizes that the very administration of the bankruptcy system requires that attorneys for Chapter 7 debtors must have a legally enforceable right for the postpetition services that were contracted for before filing of the petition." *Hines*, 147 F.3d at 1189, 1190-91. Stating that "[d]espite the breadth of the definition of 'claim' in *Section 101(4)(A)*"¹², it must be recognized that it strains the notion of a viable [*882] 'claim against the debtor that arose *before*' the filing of the Chapter 7 petition (*Section 362(a)(6)*, emphasis added) to attach that label to a lawyer's ability -- though agreed upon prepetition -- to receive payment of a contracted-for fee only if and when the lawyer performs the postpetition services that create the entitlement to that fee[.] the Ninth Circuit held that "an enforceable obligation" only arises once "the attorney actually renders the postpetition legal services that match up to the debtor's prepetition promise to [**62] pay[.]" *Hines*, 147 F.3d at 1191.

Clark & Washington and Mr. Crawford urge the court to

¹¹ The basic facts of *Hines* are as follows. The debtor entered into a written fee agreement with her attorney for payment of a total fee of \$ 875.00 through seven post-dated checks, the first to be cashed pre-petition and the remainder to be cashed post-petition. After changing counsel, the debtor filed a motion for contempt for willful violation of the automatic stay against her former attorney who sent a letter and left a message on the debtor's answering machine after the debtor stopped payment on the uncashed checks. The bankruptcy court denied the motion for contempt and reduced the attorney fee to the \$ 375.00 already paid, but the bankruptcy appellate panel reversed and remanded for a determination of damages for willful stay violation. *Hines*, 147 F.3d at 1187-88.

¹² The statute was amended in November 1990, and former *paragraph (4)*, containing this definition, was redesignated as *paragraph (5)*.

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follow the minority view, arguing that its Engagement Contract created a "straddle obligation," wherein they entered into a pre-petition obligation to perform post-petition work, and that the Debtors had **[**63]** an obligation to pay when performance was rendered. To accomplish this, Clark & Washington and Mr. Crawford accepted post-dated checks in each of the Chapter 7 cases in dispute and had each Debtor execute an Acknowledgment that "[t]he initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services." ENGAGEMENT CONTRACT at 5. For the following reasons, the court declines to accept the minority view and finds that **HN3** acceptance of post-dated checks for payment of "flat-fee" or "no-look" attorney's fees is not an acceptable practice and runs afoul of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure.

First, the court respectfully disagrees with the reasoning of *Hines*, wherein that court, in essence, ignored Congress' intention that the scope of claims in bankruptcy cases be broadly interpreted.¹³ **HN4** The Bankruptcy Code defines "claim" in material part as "[the] right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" *11 U.S.C. § 101(5)(A)* (2006)¹⁴, and **[**64]** the Supreme Court has held that "Congress intended by this language to adopt the broadest available definition of 'claim,' [and] that 'right to payment' [means] nothing more nor less than an enforceable obligation" *Johnson v. Home State Bank*, 501 U.S. 78, 111 S. Ct. 2150, 2154, 115 L. Ed. 2d 66 (1991) (quoting *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 2131, 109 L. Ed. 2d 588 (1990)). "The breadth of the definition of 'claim' is critical in effectuating the bankruptcy code's policy of giving the debtor a 'fresh start.'" *Am. Law Ctr. PC v. Stanley (In re Jastrem)*, 253 F.3d 438, 442 (9th Cir. 2001) (quoting *Cal. Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 930 (9th Cir. 1993) (citations omitted)). "The fact that a creditor may hold a contingent right to payment until filing the petition does not mean

counsel holds a post-petition claim. Holding otherwise undercuts the fresh start provided in *section 727(b)* and ignore the plain meaning of the statutory definition of claim and debt." *Symes*, 174 B.R. at 118.

[883]** Similarly, this court has previously answered the question of when a claim arises pre- or post-petition, holding that **HN6** "[a] claim is a pre-petition claim within the scope of *§ 101(5)(A)* if there was a relationship, existing pre-petition, between the debtor and the creditor such that the creditor could fairly contemplate the possibility of a claim against the debtor's bankruptcy estate at the time that the bankruptcy petition was filed." *In re Cleveland*, 349 B.R. 522, 531 (Bankr. E.D. Tenn. 2006); accord *Griffin*, 313 B.R. at 762-63 ("Under the Bankruptcy Code, a contract-based claim is a pre-petition claim if prior to filing the relationship between the debtors and the creditor contained all the elements necessary to create a right to payment under the relevant **[**66]** contract."); *Riverwood Int'l Corp. v. Olin Corp. (In re Manville Forest Prods. Corp.)*, 225 B.R. 862, 866 (Bankr. S.D.N.Y. 1998) ("Although the definition of claim is broad, the existence of a valid bankruptcy claim depends on (1) whether the claimant possessed a right to payment and, (2) whether that right arose before the filing of the petition.").

HN7 In Tennessee, "[i]t is well established that a contract can be express, implied, written, or oral, 'but an enforceable contract must result from a meeting of the minds in mutual assent to terms, must be based upon sufficient consideration, must be free from fraud or undue influence, not against public policy and must be sufficiently definite to be enforced.'" *Thompson v. Hensley*, 136 S.W.3d 925, 929 (Tenn. Ct. App. 2003) (quoting *Klosterman Dev. Corp. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 635 (Tenn. Ct. App. 2002)). Moreover, contracts are to be construed as of the date they are made and cannot be based upon events occurring subsequent to execution. *Allright Auto Parks, Inc. v. Berry*, 219 Tenn. 280, 409 S.W.2d 361, 364 (Tenn. 1966). Clark & Washington and Mr. Crawford do not deny that the Engagement Contracts are legally binding contracts with **[**67]** each of the Debtors, which, under Tennessee law, are construed as enforceable obligations as of the date upon which they were executed.

The court finds that the attorneys' fees in each case are flat fees which arose pre-petition, irrespective of when services were to be rendered. Upon the signing of each Engagement Contract, Clark & Washington and Mr. Crawford became obligated to each of the Debtors to represent them in their Chapter 7 bankruptcy cases in exchange for payment of the agreed upon flat fee, and the fact that some services were to be provided post-petition does not change the nature of the fee, nor does it change the nature of the obligation. The majority of these expressly contracted for services -- most

¹³ The United States Bankruptcy Court for the Eastern District of California clarifies the holding in *Hines* as "only that the post-petition payment for services rendered post-petition is permissible **[**65]** even though the parties contract for those services prior to the filing of the petition." *In re Jastrem*, 224 B.R. 125, 130 (Bankr. E.D. Cal. 1998).

¹⁴ **HN5** The Bankruptcy Code additionally defines "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor[.]" *11 U.S.C. § 101(10)(A)* (2006), and "debt" as a "liability on a claim[.]" *11 U.S.C. § 101(12)* (2006).

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notably, meetings with the Debtors and the preparation and filing of their respective statements and schedules to commence their cases -- were required to be performed pre-petition, while only a few others -- primarily attendance at the meeting of creditors and the filing of the Debtors' completion of the financial education course -- were required to be performed post-petition, but all of these services fall within the scope of a "Routine Case[]" Under 11 U.S.C. Chapter [**68] 7."

Moreover, each Debtor's obligation to pay the attorneys' fee arose on the respective date of engagement with Clark & Washington and Mr. Crawford. The Engagement Contracts themselves state that "[a]ll fees paid by Client for the purpose of filing this Chapter 7 petition are NON-REFUNDABLE." ENGAGEMENT CONTRACT at 1. If these arrangements were true "saddle obligations" as argued by Clark & Washington and Mr. Crawford, they would not collect post-dated checks pre-petition in anticipation of post-petition services but would, instead, seek payment for post-petition [**884] services as rendered post-petition. Instead, their arrangement with each of the foregoing Debtors was unquestionably pre-petition in its entirety, and the language in the Acknowledgment executed by each Debtor stating that "[t]he initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services[.]" ENGAGEMENT CONTRACT at 5, does nothing to alter the true nature of the payment arrangement, and it is incongruous for Clark & Washington and Mr. Crawford to try and categorize it otherwise.

Likewise, the fact that Clark & Washington and Mr. Crawford [**69] expanded the Amended Compensation Disclosures to expressly list certain post-petition actions and services for which they would charge the Debtors additional fees does not alter the true nature of the payment arrangement, nor do the stipulations of the United States Trustee and Clark & Washington and Mr. Crawford in these contested matters that the Amended Compensation Disclosures accurately reflect the Debtors' payment arrangements with Clark & Washington and Mr. Crawford, because the court finds otherwise. As certified by Mr. Crawford in the Amended Compensation Disclosures, Clark & Washington and Mr. Crawford did not receive the pre-petition payment of *any* attorneys' fees from the Waldos, Ms. Mikulen, Mr. Cooley, Ms. Jones, and Mr. Joines, and they received a pre-petition payment of \$ 1.00 from the Johnsons and the Scharffs. WALDO, JOHNSON, MIKULEN, COOLEY STIP. EX. B; JONES, JOINES, SCHARFF STIP. EX. C. In essence, relying upon the Acknowledgment at the end of each Engagement Contract, Clark & Washington and Mr. Crawford are representing to the court that the Debtors paid nothing or minimal amounts for

the pre-petition preparation of their statements and schedules and the filing [**70] of their cases, and that the entirety of their fee was earned post-petition in these routine cases, irrespective of the fact that the Amended Compensation Disclosure filed in each case lists adversary proceedings, reaffirmation agreements, redemptions, amendments, judicial lien avoidances, defense of miscellaneous motions and motions for relief from the stay, excess creditors, miscellaneous letters, e-mails and faxes, reopening of cases, and copies as "carve-outs" from the flat fee.¹⁵

The parties' stipulations notwithstanding, the Amended Compensation Disclosures do not accurately reflect the fee arrangements set [**71] forth in the Engagement Contracts each of which was signed by the respective Debtors and Mr. Crawford or another attorney for Clark & Washington. Nothing in the record before the court suggests that any of the Debtors signed a document modifying the terms of their respective Engagement Contract. There are no corresponding breakout fees listed in the Engagement Contracts whereby the Debtors agreed to pay for anything more than additional fees and court costs for any amendments or for representation in adversary proceedings. *See* ENGAGEMENT CONTRACT at 1, 4. The Engagement Contracts *do not* carve out representation of [**885] the Debtors in the negotiation of reaffirmation agreements, redemptions, judicial lien avoidances, motions for relief from the automatic stay, letters, emails, and communications with creditors, nor should attorneys be allowed to "carve out" these routine services in Chapter 7 bankruptcy cases. The court finds these attempted "carve outs" particularly troublesome when Clark & Washington and Mr. Crawford have charged the Debtors fees ranging from \$ 800.00 to \$ 1,250.00, but now seek to exclude a majority of the services routinely performed post-petition from that flat fee. [**72] Even more troublesome is the fact that these carve-outs, with the exception of adversary proceedings, are in direct conflict with the contractual agreements Mr. Crawford and Clark & Washington entered into pre-petition with the respective Debtors as set forth in the Engagement Contracts. In actuality, this practice raises the

¹⁵ In the Eastern District of Tennessee, "[t]he filing of any notice, petition, pleading, motion, brief, application, objection, response, order, or other paper constitutes an appearance by the attorney signing it[.]" and

[n]otwithstanding any purported limitation of appearance, entry of appearance by debtor's counsel constitutes a general appearance for all contested matters and adversary proceedings pending or thereafter initiated to which the debtor is a party, including actions to determine dischargeability, to deny discharge, or to revoke discharge.

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question of what sort of post-petition services are being performed and covered by the flat fee, especially in light of the fact that, in each one of these cases, the Debtors' Chapter 7 Individual Debtor's Statement of Intention, each filed along with the Voluntary Petition and other statements and schedules, contemplated at least one debt to be reaffirmed by the Debtors.

The court joins with the majority and holds that *HN8* unpaid portions of a flat fee contracted for pre-petition constitutes a pre-petition obligation of a debtor which is dischargeable, agreeing with the following findings of the *Mansfield* court that

HN9 When a client and an attorney agree that the attorney will provide certain services (described by a category, a time period, a case, etc.) for a fixed or flat fee, the fee covers the services regardless of the amount of time which the attorney spends performing [**73] the services; both the client and the attorney are obligated to the flat fee whether the attorney would have made more or less for the services by charging for them by the hour or charging separately for each service. See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "fixed fee" as "[a] flat charge for a service; a charge that does not vary with the amount of time or effort required to complete the services."); *In re Fischer*, 2004 Bankr. LEXIS 307, 2004 WL 555407, at *1 (Bankr. C.D. Ill. Mar. 17, 2004) ("With a flat fee, it matters not when the work is performed, since, by definition, a flat fee is a debt that is created upon the execution of the fee agreement and its existence is not linked to the amount or timing of the legal services actually performed."). Consequently, it is inconsistent with the nature of a flat or fixed fee arrangement, regardless of how the fee is paid (e.g., whether the fee is paid in a lump sum, divided into installment payments, etc.) to apportion the fee among the services performed or the time periods within which they were performed. See *Bethea v. Robert J. Adams & Associates*, *supra*, 352 F.3d at 1129 (reasoning that a flat fee retainer agreement cannot [**74] be divided by into hourly units without contradicting or re-writing the agreement); but see *In re Nieves*, 246 B.R. 866, 873 (Bankr. E.D. Wis. 2000) (allowing counsel to recover \$ 300 for postpetition work even though counsel agreed to accept a \$ 700 flat fee for his prepetition and postpetition services).

The Court finds the division of a flat fee arrangement into prepetition and postpetition parts to be conceptually inconsistent and therefore untenable. The Court therefore joins those other courts which hold that *HN10* when a flat or fixed fee prepetition agreement is at issue, the fee

must be paid in full prior to the commencement of the debtor's case or the fee is discharged under § 727(b).

Mansfield, 394 B.R. at 791.

As such, in each of these seven cases, the Debtors' obligations to Clark & Washington [**886] and Mr. Crawford for the attorneys' fees incurred by virtue of each respective Engagement Contract were extinguished when the Debtors received a discharge, and because "flat fee" or "no-look" attorney's fees contracted for pre-petition are dischargeable, it is unacceptable for attorneys to ask for and receive post-dated checks from Debtors to be cashed post-petition as payment of those fees. [**75] *HN11* "It is not proper for a bankruptcy attorney to accept postdated checks from a Chapter 7 debtor client[.]" *In re Newkirk*, 297 B.R. 457, 461 (Bankr. W.D.N.C. 2002), and "[t]he use of a method of fee payment has been consistently rejected by bankruptcy courts." *In re Lewis*, 309 B.R. 597, 608 n.31 (Bankr. N.D. Okla. 2004) (collecting cases); see also *In re Shell*, 312 B.R. 431, 436 (Bankr. M.D. Ala. 2004) (holding that attorneys representing Chapter 7 debtors must be paid pre-petition or the fee is discharged and that attorneys in that jurisdiction who accepted post-dated checks from Chapter 7 debtors risked the imposition of sanctions); *In re Zapanta*, 204 B.R. 762, 763 (Bankr. S.D. Cal. 1997) (holding that the debt represented by post-dated checks from the debtor were dischargeable); *Symes*, 174 B.R. at 119 (holding that pre-petition retention agreements requiring clients to execute post-dated checks to be cashed post-petition are dischargeable and subject to the discharge injunction).

As raised by many of the courts examining the issue of post-dated checks, there are serious ethical implications in such a practice, and the same is true here -- that by accepting post-dated checks for dischargeable [**76] debts and not advising their clients that the debts were at least potentially dischargeable, Clark & Washington and Mr. Crawford created a conflict of interest with the Debtors under Tennessee's disciplinary rules. Rule 1.8(a) of the Rules of Professional Conduct states, in material part, as follows:

***HN12* Rule 1.8 Conflict of Interest; Prohibited Transactions.**

(a) A lawyer shall not . . . knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; and

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(2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) The client consents thereto in a writing signed by the client.

TENN. SUP. CT. R. 8, Rule 1.8(a). As stated in the official comments to Rule 1.8, *HN13* "[a]s a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is advisable. [**77] Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage." OFF. CMTS., TENN. SUP. CT. R. 8, Rule 1.8(a). Accordingly, "[t]he existence of a conflict of interest does not require bad motive or intent. Most often it arises where the attorney's duty to one client conflicts with his/her duty to another or with the attorney's self-interest." *In re Martin*, 197 B.R. 120, 128 (*Bankr. D. Colo.*, 1996).

When Clark & Washington and Mr. Crawford required the Debtors to issue post-dated checks, they required them to transfer an interest -- possessory, security, or otherwise pecuniary in nature -- in property of the Debtors to them, *see Lewis*, 309 B.R. at 609, and yet, as the parties stipulated, [**87] Clark & Washington and Mr. Crawford "do not inform their clients that their attorney fee, to the extent it has not been paid prior to the filing date, will be discharged in the bankruptcy case." WALDO, JONES, SCHARFF STIPS. at P 13; COOLEY, JOINES STIP. at P 14; JOHNSON, MIKULEN STIP. at P 15. Accordingly, even if acceptance of post-dated checks for a dischargeable pre-petition fee does not create a per se conflict of interest between attorneys and debtors [**78] due to the "credit transaction" between them, *see Newkirk*, 297 B.R. at 460, the practice at least raises the question and the appearance of such a conflict since the information concerning potential dischargeability of the fees was not disclosed to the Debtors whereby they could seek additional legal advice, and they did not consent, in writing, to acceptance of this potential conflict.¹⁶ As observed by the *Martin* court, "an accurate advisement of the law would have

required disclosure to the Debtor[s] that the issue [of dischargeability of the fees provided for in the Engagement Contracts] was unresolved in the [Sixth] Circuit, but had been considered by several courts . . . , the majority of which concluded the debt was dischargeable." *Martin*, 197 B.R. at 129.

There is also the question of whether Clark & Washington and Mr. Crawford violated the automatic stay provisions of *11 U.S.C. § 362(a)(6)* and/or the discharge injunction of *11 U.S.C. § 524(a)* when they, post-petition and in some cases, post-discharge, deposited the Debtors' post-dated checks for what have been determined to be pre-petition obligations, and when they made phone calls and/or sent correspondences to the Debtors in efforts to collect upon checks which were returned for insufficient funds. The United States Trustee argues that both the automatic stay and the discharge injunction were violated, urging this court to follow other courts which have examined the issue and held that the presentment and cashing of post-dated checks for pre-petition attorney's fees does, in fact, violate the automatic stay. *See, e.g., Shell*, 312 B.R. at 435 ("Once a debtor files a petition in bankruptcy, any effort to collect a debt which arose prior to the date of the petition is stayed by operation of law. The use of post-dated checks does not, in any way, [**80] circumvent the prohibitions of § 362 of the Bankruptcy Code."); *Newkirk*, 297 B.R. at 461 ("Upon the bankruptcy filing, the [§] 362 automatic stay went into effect. This legal injunction restrained creditors, including [the debtor's attorney] from collecting their prepetition debts or acting against [the debtor's] property. . . . Being well aware of [the debtor's] bankruptcy, [his attorney's] negotiation of . . . postpetition checks was a willful violation of the stay[.]."); *McNickle*, 274 B.R. at 478-79 ("[T]o the extent the collection action seeks to recover pre-petition fees, it constitutes a violation of the discharge injunction and the automatic stay."); *Zapanta*, 204 B.R. at 764 (holding that, under California law, the presentment of the debtor's post-dated checks for a dischargeable debt did not fit within any exception to the automatic stay and were violations thereof). On the other side, Clark & Washington and Mr. Crawford argue that neither the automatic stay nor the discharge injunction [**88] was violated, first because the checks were paying for post-petition services -- an argument that this court has rejected -- and because the Bankruptcy Code expressly excepts presentment of checks [**81] from the scope of § 362(a).

HN14 One of the primary goals of the Bankruptcy Code is to relieve honest but unfortunate debtors of their debts so that they may make a fresh start. *Buckeye Retirement Co., LLC v. Heil (In re Heil)*, 289 B.R. 897, 901 (*Bankr. E.D. Tenn.*, 2003) (quoting *In re Krohn*, 886 F.2d 123, 125 (6th Cir. 1989)). This fresh start is accomplished through discharge, which

¹⁶ The practice also opens itself up to errors, as evidenced by the fact that Clark & Washington and Mr. Crawford often agree to hold post-dated checks at the request of debtors, *see WALDO, JOHNSON, MIKULEN, COOLEY, JONES, JOINES, SCHARFF STIPS.* at P 11, but on at least two occasions, after agreeing to hold a post-dated check, they unintentionally failed to do so, resulting in fines incurred by the Debtors which were rightfully [**79] paid by Clark & Washington and Mr. Crawford. *JOHNSON STIPS.* at PP 12-13; *JOHNSON STIP. EX. E; MIKULEN STIPS.* at PP 12-13; *MIKULEN STIP. EX. E.*

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"does not extinguish the debt itself, but merely releases the debtor from personal liability for the debt." *In re Williams*, 291 B.R. 445, 446 (Bankr. E.D. Tenn. 2003) (quoting *Houston v. Edgeworth* (In re *Edgeworth*), 993 F.2d 51, 53 (5th Cir. 1993)). To enable debtors to achieve this goal, the Bankruptcy Code provides certain protections, chief among them, the automatic stay and the discharge injunction.

HN15 At the commencement of a bankruptcy case, the bankruptcy estate, consisting of "all legal and equitable interests of the debtor in property," is created, 11 U.S.C. § 541(a)(1) (2006), and, in most cases, the protections of the automatic stay go into effect, prohibiting actions against debtors, property of debtors, and property of the estate, including "any act to collect, assess, or recover a claim against the [**82] debtor that arose before the commencement of the case under this title[.]" 11 U.S.C. § 362(a)(6).¹⁷ The scope of the automatic stay is broad and its protections "automatic and mandatory with the filing of the bankruptcy petition" in order to protect debtors and creditors alike, *Enron Corp. v. Calif. ex rel. Lockyer* (In re *Enron Corp.*), 314 B.R. 524, 533 (Bankr. S.D.N.Y. 2004), and it applies to all debts, even those "that will ultimately be excepted from discharge, since one of the fundamental purposes of the automatic stay is to give the Plaintiff 'a breathing spell from his creditors' and 'to be relieved of the financial pressures that drove him into bankruptcy.'" *In re Haas*, 2004 WL 3132027, at *2, 2004 Bankr. LEXIS 2216, at *6 (Bankr. E.D. Va. Dec. 22, 2004) (quoting H.R. REP. NO. 95-595 at 340 (1977)); *In re Printup*, 264 B.R. 169, 173 (Bankr. E.D. Tenn. 2001). Actions taken in violation of the automatic stay are "invalid and voidable and shall be voided absent limited equitable circumstances," *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993), and unless otherwise provided for by statute, the automatic stay remains in effect throughout the pendency of the bankruptcy [**83] case, terminating with respect to property of the estate once it is no longer property of the estate and with respect to debtors the earlier of the entry of discharge, dismissal, or the closing of the case. 11 U.S.C. § 362(c) (2006).

HN16 Once a discharge is granted, the automatic stay terminates and is replaced by the discharge injunction, which "operates as an injunction against the commencement or continuation of an action, the employment of process, or an

act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]" [**89] 11 U.S.C. § 524(a)(2) (2006); *In re Jenkins*, 330 B.R. 625, 628 (Bankr. E.D. Tenn. 2005); see also *In re Perviz*, 302 B.R. 357, 369 (Bankr. N.D. Ohio 2003) [**84] (holding that § 524(a)(2) "simply makes permanent what had previously been temporary under § 362(a)(6)."). "The purpose of such an injunction is to protect the debtor from suits to collect debts that have been discharged in bankruptcy." *Perry v. EMC Mortgage Corp.* (In re *Perry*), 388 B.R. 330, 335 (Bankr. E.D. Tenn. 2008) (quoting *Hendrix v. Page* (In re *Hendrix*), 986 F.2d 195, 199 (7th Cir. 1993)). Accordingly, once the discharge has been entered by the court, creditors holding pre-petition claims or causes of action against the debtor may not attempt to hold him personally liable, and "the debtor will not be pressured in any way to repay it." *In re Leonard*, 307 B.R. 611, 613 (Bankr. E.D. Tenn. 2004) (quoting *Stoneking v. Histed* (In re *Stoneking*), 222 B.R. 650, 652 (Bankr. M.D. Fla. 1998)); see also *Miles v. Clarke* (In re *Miles*), 357 B.R. 446, 450 (Bankr. W.D. Ky. 2006) ("The permanent relief from liability for discharged debts is one of the '[c]ritical features of every bankruptcy proceeding.'" (quoting *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 126 S. Ct. 990, 996, 163 L. Ed. 2d 945 (2006))).

HN17 Although other courts have found the presentment of post-dated checks to violate the automatic stay, authority in the Sixth [**85] Circuit has determined otherwise, based upon the Bankruptcy Code's express exception for "the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument[.]" 11 U.S.C. § 362(b)(11) (2006).¹⁸ thereby "permit[ting] holders of checks drawn by the debtor to deposit them for the purpose of preserving their rights on the instruments despite the filing of a bankruptcy petition[.]" *In re Roete*, 936 F.2d 963, 966 (7th Cir. 1991) (quoting B. Weintraub, BANKRUPTCY LAW MANUAL § 1.09(4) (1986)). Rather than constituting a violation of the automatic stay, "the post-petition honoring of a pre-petition check effects a transfer of property of the estate" which is subject to avoidance as a post-petition transfer. *Buckeye Check Cashing, Inc. v. Meadows* (In re

¹⁷ In cases involving debtors with multiple filings, the automatic stay, unless extended by order of the court, is limited to thirty days for individual debtors who have had one case pending and dismissed within the previous year, and it does not go into effect for individual debtors who have had two or more cases pending and dismissed within the previous year. 11 U.S.C. § 362(c)(3), (4). None of the cases before the court are impacted by § 362(c)(3) or (4).

¹⁸ **HN18** In Tennessee, "presentment" is defined as "a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obligated to pay the instrument or, in the case of a note or accepted draft payable at a bank, or (ii) to accept a draft made to the drawee." TENN. CODE ANN. § 47-3-501 (2001). As defined under Tennessee law, a [**87] check presented for payment constitutes a negotiable instrument under Tennessee law and is excepted from the automatic stay. *Franklin v. Kwik Cash of Martin* (In re *Franklin*), 254 B.R. 718, 720 (Bankr. W.D. Tenn. 2000).

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Meadows), 396 B.R. 485, 492-94 (B.A.P. 6th 2008).¹⁹

Nevertheless, although the presentment of the post-dated checks did not violate the automatic stay, the same cannot be said for other collection activity engaged in by Clark & Washington and Mr. Crawford; the telephone calls and collection letters from Clark & Washington and Mr. Crawford to the Debtors concerning payment of checks returned [**86] for insufficient funds were not excepted by § 362(b)(11) or any other subsection, nor [**890] was the collection of charges for returned checks, all of which clearly fall within the scope of acts "to collect, assess, or recover a claim against the debtor that arose before the commencement of the case[.]" 11 U.S.C. § 362(a)(6). Furthermore, once the Debtors received their discharge, the discharge injunction of § 524(a), which does not contain an exception for presentment of checks, went into effect, and all actions to collect their pre-petition attorneys' fees by Clark & Washington and Mr. Crawford were in violation thereof, including not only the letters and telephone calls to collect upon checks returned for insufficient funds, but also for the post-discharge deposit of any of the Debtors' post-dated checks.

With respect to checks returned for insufficient funds, the parties stipulated the following: (1) the Waldos had no checks returned; (2) the Johnsons had one check returned; (3) Ms. Mikulen had one check returned; (4) Mr. Cooley had no checks returned; (5) Ms. Jones had three checks returned; (6) Mr. Joines had one check returned; and (7) the [**88] Scharffs had five checks returned. WALDO, JOHNSON, MIKULEN, COOLEY, JONES, JOINES, SCHARFF STIPS. at P 4. The parties also stipulated that if Clark & Washington and Mr. Crawford "receive notification that upon deposit there are not sufficient funds to honor the post-dated check, they generate and send a letter or letters to the debtor(s), and /or make phone calls to the debtor(s) in an effort to notify the debtor(s) of the dishonored check and to collect their fee." WALDO, JONES, SCHARFF STIPS. at P 12; COOLEY, JOINES STIPS. at P 13; JOHNSON, MIKULEN STIPS. at P 14. Additionally, the record reflects that Clark & Washington and Mr. Crawford sent two letters to Ms. Jones, both dated May 20, 2009, concerning a returned check and requesting payment, and that six letters, dated

February 5, 2009, March 7, 2009, April 2, 2009, May 5, 2009, May 26, 2009, and July 10, 2009, were sent to the Scharffs. JONES STIP. EX. B; SCHARFF STIP. EX. B.²⁰ Finally, the parties stipulated that Clark & Washington and Mr. Crawford accepted NSF fees totaling \$ 50.00 from the Scharffs. SCHARFF STIPS. at P 2.

Each of the above actions concerning the Johnsons occurred during the pendency of their bankruptcy case and were, thus, violations of the automatic stay. Concerning the Scharffs, the letters sent on February 5, 2009, March 7, 2009, April 2, 2009, May 5, 2009, and May 26, 2009, all pre-dated their discharge on July 2, 2009, and were in violation of the automatic stay, as was the collection of \$ 50.00 in NSF fees, whereas the letter sent on July 10, 2009, was in violation of the discharge injunction.

With respect to the post-discharge deposit of the pre-dated checks, the parties have stipulated that Mr. Joines received a discharge on April 15, 2009; however, in his case, Clark & Washington and Mr. Crawford deposited check # 1007 in the amount of \$ 250.00 on April 27, 2009, and check # 1008, in the amount of \$ 250.00 on May 14, 2009. JOINES STIPS. at PP 2, 5. The deposit of these checks, totaling \$ 500.00, constituted a violation of the discharge injunction against the continuation and/or collection of a pre-petition debt.

HN19 "A violation [of the automatic stay] is willful if 'the creditor [**90] deliberately carried out the prohibited act with knowledge of the debtor's bankruptcy case.'" *Printup*, 264 B.R. at 173 (quoting *Walker [**891] v. Midland Mortgage Co. (In re Medlin)*, 201 B.R. 188, 194 (Bankr. E.D. Tenn. 1996)).

A specific intent to violate the stay is not required, or even an awareness by the creditor that her conduct violates the stay. It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay. Moreover, where there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional.

Satisfying these requirements itself creates strict liability. There is nothing more to prove except damages.

Printup, 264 B.R. at 173 (quoting *In re Daniels*, 206 B.R. 444, 445 (Bankr. E.D. Mich. 1997)); see also *In re Dunning*, 269 B.R. 357, 362 (Bankr. N.D. Ohio 2001) (a willful violation of the automatic stay does not require a specific intent to violate

¹⁹ The United States Trustee argues that, if the basis for Clark & Washington and Mr. Crawford to accept post-dated checks was to get around what other creditors cannot, due to their knowledge of this and other courts in the Sixth Circuit have held concerning the § 362(b)(11) issue, doing so would be considered to have been done not in good faith. The good faith of Clark & Washington and Mr. Crawford is not an issue in these contested matters; however, the court would construe actions by any attorney to use the automatic stay as a sword against debtor clients rather than a shield to protect them as being done as not in good faith.

²⁰ The court notes that the overall tone of the letters is polite and not overly demanding; nevertheless, [**89] they each either refer to a balance due or ask the debtors to contact them to make payment arrangements.

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the stay). [Section 524](#) does not contain a corresponding statutory remedy for violations of the discharge injunction, thus the "sole avenue of recourse -- and the one for which is the traditional remedy for a violation of a court [*91] order -- is to bring an action against the creditor for contempt" utilizing [11 U.S.C. § 105\(a\)](#).²¹ [Perviz, 302 B.R. at 370](#); see also [Pertuso v. Ford Motor Credit Co., 233 F.3d 417, 422-23 \(6th Cir. 2000\)](#). Nevertheless, when determining whether to hold a creditor in contempt for violating the discharge injunction, courts tend to utilize the standard employed when determining whether or not a creditor willfully violated the automatic stay; i.e., whether the creditor deliberately acted with knowledge of the bankruptcy case. [Kanipe v. First Tenn. Bank \(In re Kanipe\), 293 B.R. 750, 755 \(Bankr. E.D. Tenn. 2002\)](#).

Clearly, Clark & Washington and Mr. Crawford had knowledge of the Debtors' bankruptcy cases, and their actions in violation of the automatic stay and/or the discharge injunction were willful, notwithstanding their argument that they believed the fees to be post-petition debts. **HN21** With respect to violations of the automatic [*92] stay, under [11 U.S.C. § 362\(k\)\(1\) \(2006\)](#), if the willful violation resulted in any injury to the Debtors, an award of actual damages, including costs and attorneys fees, is mandated, and in some cases, punitive damages are deemed appropriate. With respect to violations of the discharge injunction, under [§ 105\(a\)](#) and the court's broad and inherent contempt powers, "[t]he modern trend in civil contempt proceedings is for courts to award actual damages for violations of [§ 524's](#) discharge injunction, and, where necessary to effectuate the purposes of the discharge injunction, a debtor may be entitled to reasonable attorney fees." [Miles, 357 B.R. at 450](#) (citing [Hardy v. United States \(In re Hardy\), 97 F.3d 1384, 1389 \(11th Cir. 1996\)](#)).

Here, the United States Trustee seeks as sanctions the disgorgement of all fees paid to Clark & Washington and Mr. Crawford associated with their representation of the Debtors and any other sanctions deemed appropriate by the court. In further support of his request for disgorgement, the United States Trustee also takes the position that Clark & Washington and Mr. Crawford should be ordered to disgorge the fees paid in each of these bankruptcy cases under [11 U.S.C. § 329\(b\)](#), [*93] based upon their failure to advise the Debtors that their pre-petition attorneys' fees would be

discharged in their [*892] bankruptcy, in that the fees exceeded the reasonable value of their services rendered to the Debtors. In opposition, Clark & Washington and Mr. Crawford argue that they did not make that disclosure to clients because they did not believe that the post-dated checks constituted a dischargeable pre-petition debt, and their fees should not be disgorged. Although the court finds it troubling that Clark & Washington and Mr. Crawford would begin such a questionable practice as accepting post-dated checks and would not, out of an abundance of caution and in the spirit of complete candor, advise their clients that their pre-petition attorney's fees were *potentially* dischargeable, because the issue had never been addressed and adjudicated in this court, Clark & Washington and Mr. Crawford cannot be subject to disgorgement on this basis.

The same cannot, however, be said with respect to the original Compensation Disclosures -- and to some extent, the Amended Compensation Disclosures -- filed by Clark & Washington and Mr. Crawford in each case, which did not, and still do not, accurately [*94] reflect the respective terms of employment between Clark & Washington and Mr. Crawford and each of the Debtors as evidenced by the Engagement Contracts. As stated above, the Bankruptcy Code governs the allowance of attorneys' fees paid to attorneys employed or retained by debtors to represent them in their cases. As is relevant to these contested matters, debtors' transactions with their attorneys are set forth as follows:

HN22 (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to --

(1) the estate, if the property transferred--

(A) would have been property of the estate; [*95] or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

²¹ **HN20** [Section 105\(a\)](#) imposes a duty upon the bankruptcy court to uphold the provisions of the Bankruptcy Code by allowing the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." [11 U.S.C. § 105\(a\) \(2006\)](#).

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(2) the entity that made such payment.

11 U.S.C. § 329. **HN23** Section 329 is further supplemented by Rule 2016(b) of the Federal Rules of Bankruptcy Procedure, which provides, in material part, that "[e]very attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. . . . A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed." FED. R. BANKR. P. 2016(b). Furthermore, § 329 and Rule 2016 apply to require not only to initial disclosures, but any subsequent amendments as well when additional compensation is earned.

HN24 Once a lawyer files a petition in bankruptcy on behalf of a client, his transactions with his client are subject to the supervision of the Bankruptcy Court in [*893] accordance with the [*996] provisions of the Bankruptcy Code. Subsequent amendments to the contract between the lawyer and his client or amendments to disclosure statements made pursuant to Bankruptcy Rule 2016(b) do not shield the original disclosure or the original contract from scrutiny. Rather, the amended contract or the amended disclosure likewise become subject to review, as are the original contract and the original disclosure statement.

Shell, 312 B.R. at 436.

HN25 Section 329 "was enacted because 'payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny.'" In re Campbell, 259 B.R. 615, 625 (Bankr. N.D. Ohio 2001) (quoting H.R. REP. NO. 95-595, at 329 (1977), reprinted in 1978 U.S.C.A.N. 5963, 6285); see also Jackson, 401 B.R. at 339. It, along with Rule 2016(b), enables courts to carefully scrutinize compensation paid to debtors' attorneys, providing protection to debtors and creditors and preventing overreaching by attorneys. Jensen v. United States Trustee (In re Smitty's Truck Stop, Inc.), 210 B.R. 844, 848 (B.A.P. 10th Cir. 1997). [*997] Accordingly, the disclosure of fees under § 329 and the Bankruptcy Rules "is mandatory, not permissive." In re Wood, 408 B.R. 841, 848 (Bankr. D. Kan. 2009) (citing Turner v. Davis, Gillenwater & Lynch (In re Inv. Bankers, Inc.), 4 F.3d 1556, 1565 (10th Cir. 1993)).

To that end, an attorney must "lay bare all [his] dealings"

with the debtor concerning compensation. In re Saturley, 131 B.R. 509, 517 (Bankr. D. Me. 1991). The disclosures he makes must be "precise and complete." In re Berg, 356 B.R. 378, 381 (Bankr. E.D. Pa. 2006) (internal quotation omitted). "Coy or incomplete disclosures" that force the court "to ferret out pertinent information" will not do, Saturley, 131 B.R. at 517; see also Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 881 (9th Cir. 1995), even if they are merely the result of negligence or inadvertence. Jensen v. United States Trustee (In re Smitty's Truck Stop, Inc.), 210 B.R. 844, 848-49 (B.A.P. 10th Cir. 1997). Very simply, "[a]nything less than the full measure of disclosure" is unacceptable. Saturley, 131 B.R. at 517.

Jackson, 401 B.R. at 339-40; see, e.g., Griffin, 313 B.R. at 764 (holding that "courts recognize the [*998] duty of voluntary and complete compliance with Rule 2016(b) and § 329(a)" and courts are not required to "mine" or otherwise search for any potential violation of the applicable rule.").

HN26 "The 'failure to comply with the disclosure rules is a sanctionable violation, even if proper disclosure would have shown that the attorney had not actually violated any Bankruptcy Code provision or any Bankruptcy Rules[.]' [and s]anctions may also be imposed for negligent or inadvertent failures to disclose." Campbell, 259 B.R. at 627 (quoting Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 880 (9th Cir. 1995)); see also In re Kowalski, 402 B.R. 843, 848 (Bankr. N.D. Ill. 2009) ("Failure to disclose (in this case, fully and accurately disclose) is sanctionable.") The appropriate sanction for noncompliance is within the discretion of the court, Law Offices of Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d 1040, 1045 (9th Cir. 1997); nevertheless, many courts have held that "[f]ailure to meet the disclosure requirements alone is grounds for disgorgement." Griffin, 313 B.R. at 765 ("Defective disclosure is not a minor matter because a failure [*894] to provide the [*999] required disclosure alone justifies the bankruptcy court's denial of any or all fees requested.") (internal citation omitted); see also Lewis, 113 F.3d at 1045 (acknowledging that "[t]he Bankruptcy Code contains a number of provisions designed to protect the debtor from the debtor's attorney," among them § 329, and joining other courts in holding that "[a]n attorney's failure to obey the disclosure and reporting requirements of the Bankruptcy Code and Rules gives the bankruptcy court the discretion to order disgorgement of attorney's fees.").

HN27 Bankruptcy courts, like Article III courts, enjoy inherent power to sanction parties for improper conduct. In re Rainbow Magazine, Inc., 77 F.3d 278, 283-84 (9th Cir. 1996). It follows that the bankruptcy court is vested

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with the inherent power to sanction attorneys for breaches of fiduciary obligations. See *In re Arlan's Dep't Stores, Inc.*, 615 F.2d 925, 943 (2d Cir. 1979). Accordingly, "a failure of counsel to obey the mandate of § 329 and Rule 2016 concerning disclosure, and by implication review by the Court, is a basis for entry of an order denying compensation and requiring the return of sums already paid." *In re Chapel Gate Apts., Ltd.*, 64 B.R. 569, 575 (Bankr. N.D. Tex. 1986)[.]

Mapother & Mapother, P.S.C. v. Cooper (In re Downs), 103 F.3d 472, 477 (6th Cir. 1996). [**100] "Many courts, perhaps the majority, punish defective disclosure by denying all compensation." *Jackson*, 401 B.R. at 340 (quoting *In re Andreas*, 373 B.R. 864, 872 (Bankr. N.D. Ill. 2007)); see, e.g., *Kowalski*, 402 B.R. at 848 (holding that an appropriate sanction "can include partial or total denial of compensation, as well as partial or total disgorgement of fees already paid."); *Smitty's Truck Stop*, 210 B.R. at 848 ("[A]n attorney who fails to comply with the disclosure requirements of § 329 and Rule 2016(b) forfeits any right to receive compensation for services rendered on behalf of the debtor and may be ordered to return fees already received.").

HN28 Specifically addressing fee agreements for installment payments for pre-petition attorney's fees, through post-dated checks or otherwise, the courts have been quite clear that failure to disclose that the debt is potentially dischargeable justifies denial of fees. As well-summarized by the *Martin* court:

The combination of the Fee Agreement terms and [the attorney's] failure to advise the Debtor leaves the impression that the pre-petition attorney fee debt is not discharged and is collectible during and after the bankruptcy case. This impression [**101] obviously benefits [the attorney's] interests and impairs the Debtor's.

The conflict and its results are examples of overreaching by Debtor's counsel which § 329 is designed to address. The fact that the debt is dischargeable does not eliminate or protect the Debtor from the conflict of interest. Thus, this case illustrates the difference between the regulatory function of § 329 and the discharge function of § 727.

Because the conflict of interest arose on the filing date, only the post-petition fees are unreasonable and therefore excessive. However, no apportionment between pre-petition and post-petition fees is possible because a flat fee for both was charged and no evidence for separate calculation was presented. The Court cannot speculate as to the portion of the fee incurred either prior or

subsequent to the conflict; therefore, [the] entire fee is determined to be excessive and the Fee Agreement is cancelled.

Martin, 197 B.R. at 129. Similarly, the *Lewis* court stated that, "[t]o put it simply, [**895] post-dated checks are property, and receipt of any and all property by counsel for a debtor in payment of or as security for payment of fees must be disclosed. Anything less is a violation [**102] of the spirit and the letter of § 329 and Bankruptcy Rule 2016." *Lewis*, 309 B.R. at 606-07.

In this Memorandum, the court has discussed, in considerable detail, the facts and circumstances of each of the respective cases, and there is no dispute that the original Compensation Disclosures filed by Clark & Washington and Mr. Crawford were false, primarily because they represented that the flat fee had been paid in full in each case, when in fact, the fees had not been paid, and they did not disclose that they had accepted post-dated checks from the respective Debtors. WALDO, JOHNSON, MIKULEN, COOLEY, JONES, SCHARFF STIPS. at P 7; JOINES STIPS. at P 8; WALDO, JOHNSON, MIKULEN, COOLEY, JOINES STIP. EX. C; JONES, SCHARFF STIP. EX. D. Additionally, it was only after the issue was raised by the United States Trustee that Clark & Washington and Mr. Crawford filed the Amended Compensation Disclosures,²² reflecting that zero or minimal fees had actually been paid by the Debtors pre-petition and that installment payments were to be made on the balance of the agreed upon fees.²³ For these reasons alone, the court would have cause to deny fees; however, when coupled with the conflict of interest [**103] created by the acceptance of the post-dated checks, creating a debtor/creditor relationship with each of the Debtors, the conflict of interest created by the failure of Clark & Washington and Mr. Crawford to advise their clients that the pre-petition Engagement Contracts were at least potentially dischargeable, and the actions of Clark & Washington and Mr. Crawford to collect the subsequently discharged attorneys' fees through letters and phone calls and the charging of additional fees, post-petition and/or post-discharge, the reasons are multiplied, and the court is more than justified in granting the requests of the United States

²² Both the original Compensation Disclosures and Amended Compensation Disclosures contain the following Certification signed by Mr. Crawford: "I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceeding."

²³ The fact that these subsequent payments were via post-dated checks is not, however, disclosed on [**104] any of the Amended Compensation Disclosures. WALDO, JOHNSON, MIKULEN, COOLEY, JOINES STIP. EX. B; JONES, SCHARFF STIP. EX. C.

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Trustee for sanctions and ordering that Clark & Washington and Mr. Crawford disgorge all fees received from the Debtors in the above referenced cases.

As has been discussed by many of the courts analyzing these issues, *HN29* attorneys should be compensated for the services they provide. Nevertheless, that compensation must be paid within the parameters of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure, and there are, unquestionably, limitations with respect to payment of attorney's fees in Chapter 7 cases. The following options, however, which have been employed by other courts, appear to fall within the scope of potential and allowable solutions: (1) requiring Chapter 7 debtors to pay "flat" or "no-look" attorney's fees in full prior to filing; (2) revising retainer agreements and expressly designating pre-petition services, which are paid pre-petition, and post-petition services, which shall be paid post-petition; or (3) accepting payment by third parties. *Chandler, 292 B.R. at 588*; ²⁴ see also *Mansfield, 394 [896] B.R. at 793* ("The key to recovery for postpetition services . . . lies in the terms of the attorney's fee agreement. The fee agreement must segregate the fee(s) for prepetition work from [**105] the fee(s) for postpetition work. Once again, this distinction is necessary because a fee for prepetition work constitutes a prepetition debt of, or claim against, the estate which is dischargeable, whereas a fee for postpetition work constitutes a postpetition debt of, or claim against, the debtor which is nondischargeable."); *Symes, 174 B.R. at 119* ("Consumer debtors' attorneys who wish to represent debtors under 'zero down' cases in Chapter 7 need not despair. The post-petition services they render in defending exemptions and debtors' discharges, assisting debtors at the first meeting of creditors and providing support in dealing with the trustee and aggressive creditors are vital.").

III

In summary, for the foregoing reasons, the Motions to Require Disgorgement of Fees and to Compel Amendment to *FRBP 2016(b)* and Schedule F and Notice of Hearing filed on April 6, 2009, in the Waldo, Johnson, Mikulen, Cooley, and Jones cases, [**106] the Motion for Sanctions for Violations of *11 U.S.C. § 362(a)(6)* and *§ 524(a)(2)* filed May 15, 2009, in the Joines case, and the Motion for Sanctions for Violations of *11 U.S.C. § 362* filed in the Scharff case will be granted. Clark & Washington and Mr. Crawford shall be required to disgorge all attorneys' fees received from the Debtors in the

above referenced Chapter 7 bankruptcy cases and directed to return to the Debtors all post-dated checks remaining in their possession. Additionally, Clark & Washington and Mr. Crawford shall be required to refund to the Scharffs fees totaling \$ 50.00 collected for checks that were returned for insufficient funds.

Orders consistent with this Memorandum will be entered.

FILED: October 27, 2009

BY THE COURT

/s/ RICHARD STAIR, JR.

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

²⁴ The court notes, additionally, that some courts have allowed debtors to enter into reaffirmation agreements with their attorneys for payment of attorney's fees; however, that practice raises ethical considerations, and the court will not approve such an agreement.

 Caution
As of: August 18, 2016 9:42 AM EDT

In re Lawson

United States Bankruptcy Court for the Eastern District of Tennessee

August 31, 2010, Filed, Entered

Case No. 09-36177, Case No. 09-36514, Case No. 09-36772, Case No. 09-36796, Case No. 09-36802, Case No. 09-36875, Case No. 09-36938, Case No. 10-30169, Case No. 10-30181, Case No. 10-30275, Case No. 10-30326, Case No. 10-30353, Case No. 10-30382, Case No. 10-30442, Case No. 10-30444

Reporter

437 B.R. 609; 2010 Bankr. LEXIS 3022

In re JAMES SCOTT LAWSON, KERRI McCON LAWSON, a/k/a KERRI ANN McCON, Debtors; KENNETH JAMES HART, CARLA DEE HART, Debtors; EVA LOUISE NEWMAN, Debtor; MAURICE ROYSTON SOLES, LILLIE LOUISE SOLES, Debtors; CLEOFUS ANTHONY SANCHEZ, JR., BRANDY LEE SANCHEZ, Debtors; WILLIAM BRADLEY DICKERSON, CYNTHIA TAYLOR DICKERSON, Debtors; MARY LOUISE ZICK, Debtor; JOHN DOUGLAS COX, Debtor; CHARLES ALLEN HOFFMAN, Debtor; CARL DEAN LUTTRELL, JR., SHERRY RENEE LUTTRELL, Debtors; CYNTHIA LEA VITTETOE, a/k/a CYNTHIA LEA JETT, Debtor; JOSEPH CHARLES McGEE, APRIL DAWN McGEE, Debtors; NATASHA OLIVIA WOMBLE, Debtor; GARY STEVEN AARON, II, Debtor; KALENDA FAYE KNIGHT, Debtor

Core Terms

checks, services, post-petition, post-dated, attorneys', pre-petition, retainer, Engagement, bankruptcy case, disclosure statement, advising, flat fee, costs, deposited, financial affairs, counseling, adversary proceeding, documents, signature, reflects, cases, attorney's fees, parties, hourly rate, records, agree to pay, total amount, balance due, third party, estimated time

Case Summary

Procedural Posture

The U.S. Trustee filed motions for sanctions against a law firm and its managing attorney in 15 cases, asking the court to enter an order finding them in contempt and ordering them to disgorge any prepaid or post-paid fees collected for, inter alia, filing inaccurate compensation disclosure statements, for failing to adequately disclose that unpaid attorneys' fees were potentially dischargeable, and for violating the court's prior decision.

Overview

In a previous order involving the firm and the attorney, the court held that, because flat fee or no-look attorney's fees contracted for prepetition were dischargeable, it was unacceptable for them to ask for and receive post-dated checks from the debtors to be cashed post-petition as payment of those fees. The court also held that anything less than full disclosure of the compensation arrangements with debtors was unacceptable. The court ordered disgorgement of fees paid. The court later found that the firm and the attorney had violated the court order. The court held that the firm's attempts to camouflage its flat fee by bifurcating it into a minimal prepetition amount and a much larger post-petition amount was disingenuous at best. The court found that a prepetition contract which fixed or predetermined the total amount of the fee a debtor was required to pay for both pre- and post-petition services established a flat fee, and the collecting of post-dated checks was prohibited, irrespective of the source. The court also found that the firm and the attorney had continued to file inaccurate Rule 2016 Compensation Disclosure Statements. The court imposed enhanced sanctions.

Outcome

The court ordered the firm and the attorney to disgorge to the respective debtors all attorney fees received pre- and post-petition and to return to the debtors all post-dated checks, whether the debtor or a third-party was the maker, imposed sanctions in the sum of \$750 in all of the cases, and directed them to pay all costs associated with the prosecution of the contested matters.

LexisNexis® Headnotes

Bankruptcy Law > Claims > Types of Claims > General Overview

HNI Under the Bankruptcy Code, a contract-based claim is a

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pre-petition claim if prior to filing, the relationship between the debtors and the creditor contained all the necessary elements to create a right to payment under the relevant contract.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Discharge &
Dischargeability > Liquidations > Eligible Debts

HN2 Acceptance of post-dated checks for payment of "flat-fee" or "no-look" attorney's fees is not an acceptable practice and runs afoul of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, and the division of a flat fee arrangement into pre-petition and post-petition parts is conceptually inconsistent and therefore untenable. When a flat or fixed fee pre-petition agreement is at issue, the fee must be paid in full prior to the commencement of the debtor's case or the fee is discharged under 11 U.S.C.S. § 727(b).

Legal Ethics > Client Relations > Conflicts of Interest

HN3 See Tenn. Sup. Ct. R. Prof. Conduct 8, 1.8.

Legal Ethics > Client Relations > Conflicts of Interest

HN4 As stated in the official comments to Tenn. Sup. Ct. R. Prof. Conduct 8, 1.8, as a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. Accordingly, the existence of a conflict of interest does not require bad motive or intent. Most often it arises where the attorney's duty to one client conflicts with his/her duty to another or with the attorney's self-interest.

Bankruptcy Law > Procedural Matters > Professional
Responsibility

HN5 The failure to comply with the disclosure rules is a sanctionable violation, even if proper disclosure would have shown that the attorney had not actually violated any Bankruptcy Rules, and sanctions may also be imposed for negligent or inadvertent failures to disclose.

Bankruptcy Law > Procedural Matters > General Overview

Bankruptcy Law > Procedural Matters > Professional
Responsibility

Governments > Courts > Rule Application & Interpretation

HN6 Section III.A.3 of the Administrative Procedures for Electronic Case Filing, effective May 17, 2005, as amended,

states: Notwithstanding paragraph 2 immediately above, any petition, list, schedule, statement, and amendment thereto that requires the debtor's signature may be filed electronically by a Registered User with the debtor's signature indicated as "/s/" followed by the typed name of the debtor, provided the debtor has actually signed a copy of the document and the filing attorney retains the signed document as required by paragraph 5 below. E.D. Tenn. Admin. Procs. at para. III.A.3. Section III.A.3 of the Administrative Procedures for Electronic Case Filing states in part: Electronic filing of a verified document by an attorney is a representation for the purposes of Fed. R. Bankr. P. 9011 that the person or persons required to sign and verify the document did in fact sign and verify it before it was filed. E.D. Tenn. Admin. Procs. at para. III.A.4.

Bankruptcy Law > Procedural Matters > General Overview

Governments > Courts > Rule Application & Interpretation

HN7 Section III.A.2 of the Administrative Procedures for Electronic Case Filing, effective May 17, 2005, as amended, states: Except as provided in paragraph 3 immediately below, each affidavit, unsworn declaration under penalty of perjury, verified document, or reaffirmation agreement filed or submitted for filing must contain actual handwritten signatures. The "/s/" type of signature is not permitted on these types of documents. Registered Users filing such documents should scan and file them electronically after they have been signed (and, in the case of an affidavit, signed by the notary public and affixed with a notarial seal). E.D. Tenn. Admin. Procs. at para. III.A.2.

Bankruptcy Law > Procedural Matters > General Overview

Governments > Courts > Rule Application & Interpretation

HN8 Section III.A.5 of the Administrative Procedures for Electronic Case Filing, effective May 17, 2005, as amended, states: With respect to the documents described in paragraph 3 above, original documents bearing the debtor's actual signature must be maintained in paper form by the filing attorney until two years after the closing of the case. On request of the court, the attorney must provide such documents for review. E.D. Tenn. Admin. Procs. at para. III.A.5.

Bankruptcy Law > Procedural Matters > Professional
Responsibility

HN9 See Fed. R. Bankr. P. 9011(f).

Bankruptcy Law > ... > Bankruptcy > Case
Administration > Bankruptcy Court Powers

HN10 11 U.S.C.S. § 105 outlines certain powers of the court

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and imposes upon the court a duty to uphold the provisions of the Bankruptcy Code in subsection (a) by authorizing the court to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. 11 U.S.C.S. § 105(a). The court may use its § 105(a) equitable powers in furtherance of the goals of the Bankruptcy Code, and included within the court's § 105(a) powers is the authority to find a party in contempt. Civil contempt is generally used by courts to coerce an individual into performing or obeying an order of the court and to compensate the party injured by the contemptuous actions. Nevertheless, willfulness is not an essential element of civil contempt.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > Procedural Matters > Professional
Responsibility

Civil Procedure > Sanctions > Contempt > Civil Contempt

HN11 Courts are afforded wide discretion in fashioning an equitable remedy for civil contempt, and the failure to comply with the disclosure requirements in bankruptcy is a sanctionable violation, in itself grounds for disgorgement of attorney fees.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

HN12 In order to be a true "straddle" fee arrangement bifurcating pre- and post-petition services, the contract must clearly identify the services to be included within the pre-petition fee and the services to be included within the post-petition fee. It must also unambiguously disclose, at a minimum, that all pre-petition fees must be paid prior to filing and any unpaid pre-petition fee will be discharged and that all post-petition fees, which are not subject to the discharge, will be billed only when services are rendered and only for the specific amount of time for each activity at an agreed upon hourly rate for attorneys and a considerably lesser agreed upon hourly rate for para-professionals. Attorneys may accept a pre-petition retainer to be billed against as long as the retainer is held in trust and drawn against as services are rendered, subject to time records being kept and debtors being periodically sent an itemized statement of the work performed and the retainer applied, without having to request the statement. Additionally, debtors must be made aware that they will receive any unused portion of the retainer once their case is concluded, again, without having to request it themselves.

Bankruptcy Law > ... > Retention of
Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Discharge & Dischargeability > Effect of

Discharge > Protection of Debtors

Legal Ethics > Client Relations > Conflicts of Interest

HN13 It is unacceptable for attorneys to ask for and receive post-dated checks from debtors, irrespective of whether the checks are to be drawn on the debtors' personal accounts or a third party's account, and the payment of attorneys' fees through post-dated checks creates a conflict of interest under Tenn. Sup. Ct. R. Prof. Conduct 8, 1.8. Additionally, the post-discharge deposit of any payments received from debtors or on their behalf for pre-petition fees may be, to the extent it could be considered an action to collect on a discharged debt, violative of the discharge injunction of 11 U.S.C.S. § 524(a).

Counsel: [*1] William R. Sonnenburg, Esq., RICHARD F. CLIPPARD, ESQ., UNITED STATES TRUSTEE, Chattanooga, Tennessee, Assistant U.S. Trustee.

Patricia C. Foster, Esq., Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, Attorneys for United States Trustee.

John C. Rogers, Esq., Lindsey P. Hettinger, Esq., CARLOCK, COPELAND & STAIR, LLP, Atlanta, Georgia, Attorneys for Clark & Washington, P.C. and Zachary Burroughs, Esq.

Judges: RICHARD STAIR, JR., UNITED STATES BANKRUPTCY JUDGE.

Opinion by: RICHARD STAIR, JR.

Opinion

[*612] MEMORANDUM ON DEBTOR ATTORNEY FEES AND DISCLOSURE MOTIONS

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

These contested matters are before the court on the following: (1) in *Hart*, Case [*613] No. 09-36514, the show cause Order entered by the court on December 8, 2009; (2) in *McGee*, Case No. 10-30353, the Motion of United States Trustee to Compel the Attorneys for the Debtors to Amend the Disclosure of Compensation and for Sanctions and Notice of Hearing filed on March 1, 2010; (3) in *Lawson*, Case No. 09-36177, *Newman*, Case No. 09-36772, *Soles*, Case No. 09-36796, *Sanchez*, Case No. 09-36802, *Dickerson*, Case No. 09-36875, *Zick*, Case No. 09-36938, *Cox*, Case No. 10-30169, *Hoffman*, Case No. 10-30181, *Luttrell*, [*2] Case No. 10-30275, *Vittetoe*, Case No. 10-30326, *Womble*, Case No. 10-

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30382, *Aaron*, Case No. 10-30442, and *Knight*, Case No. 10-30444, the Amended Motion for Sanctions and Other Relief Against the Law Firm of Clark & Washington and Attorney Zachary Burroughs and Notice of Hearing filed by the United States Trustee on March 19, 2010; and (4) in *Lawson*, Case No. 09-36177, *Newman*, Case No. 09-36772, *Soles*, Case No. 09-36796, *Sanchez*, Case No. 09-36802, *Dickerson*, Case No. 09-36875, *Zick*, Case No. 09-36938, *Cox*, Case No. 10-30169, *Hoffman*, Case No. 10-30181, *Luttrell*, Case No. 10-30275, *Vittetoe*, Case No. 10-30326, and *Womble*, Case No. 10-30382, the Motion for Sanctions Pursuant to 11 U.S.C. § 105(a) Against Clark & Washington, P.C. and Zachary Burroughs for Violations of Local Rule 2090-2 and General Order 2008-005 filed by the United States Trustee on April 1, 2010.

Pursuant to the Pretrial Order entered on May 14, 2010, and amended on July 1, 2010, these fifteen cases were consolidated for trial on the issues raised, and the trial was held on July 13 and 14, 2010. The record before the court consists of stipulated exhibits and facts as set forth in the Stipulations of Undisputed Facts (Joint **[**3]** Stipulations) filed by the parties on July 2, 2010, ninety-seven exhibits admitted into evidence, including the deposition testimony of two unavailable witnesses, Reem Boualem and Sandra Lamb, and the testimony at trial of four witnesses, all of whom are employed by Clark & Washington, P.C.: Zachary Burroughs, managing attorney for the Knoxville office, Emory Clark, founding and managing partner, Richard Thomson, supervising partner, and Amanda Stofan, managing attorney for the Chattanooga office.¹

This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (O) (2006).

I

Clark & Washington, P.C. (Clark & Washington) is a law firm based out of Atlanta, Georgia.² It was founded in 1983 by Emory Clark, who serves as managing partner, focusing primarily upon the administration and financial **[**4]** aspects of the firm. It employs approximately fifty-four attorneys and

operates offices in six cities: Atlanta, Georgia, Tampa and Orlando, Florida, and Nashville, Chattanooga, and Knoxville, Tennessee. The Knoxville office, which was opened in 2006, consists of four separate branches, with the primary location at 5401 Kingston Pike.³ The **[*614]** Knoxville office employs six attorneys and thirteen staff members, and its sole practice area is consumer bankruptcy. Zachary S. Burroughs is the managing attorney. He graduated from law school in 2004, has been a practicing attorney for approximately five years, and was made managing attorney for Clark & Washington's Knoxville office following the departure of its former managing attorney, Steven F. Crawford, in late November 2009.

In order to properly analyze the issues raised in these contested matters, it is necessary to revisit, briefly, the facts and issues addressed by the court in In re Waldo, 417 B.R. 854 (Bankr. E.D. Tenn. 2009) **[**5]** which, as in these cases, centered around Clark & Washington's fee arrangements with debtors in seven Chapter 7 cases. Specifically, the primary issues confronting the court in *Waldo* were whether Clark & Washington was collecting discharged fees from its clients and the firm's failure to disclose the true nature of its fee arrangements in the Disclosure of Compensation of Attorney for Debtor(s) Statements (Compensation Disclosure Statements) being filed with the court. The *Waldo* cases came before the court through various motions filed by the United States Trustee (U.S. Trustee) asking the court to enter an order requiring Clark & Washington and its attorneys to amend the Compensation Disclosure Statements filed in each case to accurately reflect the fee arrangement with those debtors; to amend the Schedule F filed in each case to list Clark & Washington as a creditor for unpaid pre-petition legal fees; and seeking sanctions against Clark & Washington and Steven Crawford, its managing attorney at that time, in the form of disgorgement of all fees collected through the post-petition and post-discharge cashing of post-dated checks received from the debtors in each case as well as all **[**6]** attorneys' fees paid pre-petition. Following preliminary hearings and the agreement to consolidate the cases for adjudication, the issues in *Waldo* were defined as follows: (1) what was the nature of Clark & Washington's engagement contract with each of its clients as to whether its fees were a flat fee or bifurcated fee and if that agreement complied with the Bankruptcy Code; (2) whether the original Compensation Disclosure Statements accurately reflected the contract between Clark & Washington and the respective debtors; (3) whether depositing a post-dated check or corresponding with

¹Included among the stipulated exhibits are transcripts of examinations of various of the Debtors taken pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure and transcripts of testimony given by various of the Debtors at their creditors' meetings. The parties agreed that, rather than require the individual Debtors to testify, the court could consider their testimony as given during those proceedings.

²The firm has eight partners, seven of whom reside in Atlanta and one who resides in Tampa.

³For the purposes of this Memorandum, the court will refer collectively to Clark & Washington's Knoxville offices as "Knoxville office."

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debtor clients post-petition, including phone calls and letters concerning attorneys' fees not paid due to insufficient funds, violated the automatic stay pursuant to 11 U.S.C. § 362(a)(6) and/or 11 U.S.C. § 524's permanent injunction; (4) whether Clark & Washington advised debtor clients that pre-petition attorneys' fees are among the kind that are discharged in bankruptcy; and (5) because Clark & Washington failed to advise debtor clients that their pre-petition attorneys' fees would be discharged in their bankruptcy cases, whether it should be ordered to disgorge their fees pursuant to 11 U.S.C. § 329(b).

The **[**7]** *Waldo* Memorandum and Order were filed on October 27, 2009. In its thorough memorandum opinion, this court resolved several issues, including issues that have been raised in these fifteen contested matters relating to the acceptance of post-dated checks as payment for attorneys' fees, the necessity of a full and accurate disclosure of compensation, and the dischargeability of attorneys' fees incurred pre-petition. One such issue resolved by *Waldo* was whether Clark & Washington's engagement contract provided for payment of a flat fee or a fee bifurcated into pre- and post-petition services. The court concluded that notwithstanding the statements at the end of each contract executed by the respective debtors that they "acknowledge **[*615]** and agree that this retainer contract contemplates payment for services rendered pre-Petition as well as services to be rendered post-Petition[.]" the attorneys' fees were not bifurcated. *Waldo*, 417 B.R. at 883. Based on the opening paragraph of the contracts, providing that "It is hereby agreed by the undersigned 'Attorney' and 'Client' that Attorney shall represent Client in a case under Title 11 USC Chapter 7. Client agrees to an attorney fee of __[.]" and **[**8]** the rule of law in Tennessee that contracts are construed as of the date upon which they are made, this court held that, irrespective of when services were to be rendered, the engagement contracts between Clark & Washington and the respective *Waldo* debtors clearly provided for payment of a non-refundable flat fee prior to the filing of the petitions and the obligation of each debtor to pay the fees arose at the time the contract was executed. *Waldo*, 417 B.R. at 878, 883. Accordingly, having found that Clark & Washington's fees were pre-petition flat fees, this court joined the majority of other courts and also held that any unpaid attorneys' fees under the flat fee arrangement between Clark & Washington and the *Waldo* debtors were dischargeable, a fact of which Clark & Washington was required to advise its clients but had neglected to do so. *Waldo*, 417 B.R. 885.

With respect to the issue of accepting post-dated checks from debtor clients, *Waldo* unambiguously holds that "because 'flat fee' or 'no-look' attorneys' fees contracted for pre-petition are dischargeable, it is unacceptable for attorneys to ask for and receive post-dated checks from debtors to be cashed post-

petition as payment **[**9]** of those fees." *Waldo*, 417 B.R. at 886 (citing cases). The decision also delved into the potential ethical implications of accepting post-dated checks, analyzing the practice in the context of Rule 1.8(a) of the Tennessee Rules of Professional Conduct which prohibits attorneys from acquiring an ownership, possessory, security, or other pecuniary interest adverse to their clients' interests. *Waldo*, 417 B.R. at 886 (quoting *Tenn. Sup. Ct. R. 8, Rule 1.8(a)*). Although this court declined to find that acceptance of post-dated checks from debtors created "a per se conflict of interest between attorneys and debtors due to the 'credit transactions' between them, the practice at least raises the question and the appearance of such a conflict since the information concerning potential dischargeability of the fees was not disclosed to the Debtors whereby they could seek additional legal advice, and they did not consent, in writing, to acceptance of this potential conflict." *Waldo*, 417 B.R. at 887.

Waldo also addressed the automatic stay and discharge injunction aspects associated with accepting payment of attorneys' fees through post-dated debtor checks. Following discussion of recent Sixth Circuit **[**10]** precedent concerning presentment of checks and the automatic stay's exception for the presentment of negotiable instruments at 11 U.S.C. § 362(b)(11) (2006), this court found that although presentment of the debtors' post-dated checks for payment during the pendency of the bankruptcy case did not violate the automatic stay, attempts to collect payment on checks that had been returned unpaid due to insufficient funds did violate the stay. *Waldo*, 417 B.R. at 889-90. Additionally, with respect to the discharge injunction imposed by 11 U.S.C. § 524(a) (2006), the decision points out that § 524(a) contains no such exception, thus all of Clark & Washington's post-discharge attempts to collect payment from debtors for NSF checks violated the discharge injunction, as did the post-discharge presentment of post-dated debtor checks for payment. *Waldo*, 417 B.R. at 891.

[*616] Finally, *Waldo* addresses the compensation disclosure requirements of 11 U.S.C. § 329(a) (2006) and Rule 2016(b) of the Federal Rules of Bankruptcy Procedure, reinforcing the importance and necessity for accurate disclosure of compensation received by attorneys from debtors in order to "enable[] courts to carefully scrutinize compensation **[**11]** paid to debtors' attorneys, providing protection to debtors and creditors and preventing overreaching by attorneys." *Waldo*, 417 B.R. at 892-93 (citing *Jensen v. United States Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 848 (B.A.P. 10th Cir. 1997)). This court also held that "[t]he failure to comply with the disclosure rules is a sanctionable violation, even if proper disclosure would have shown that the attorney had not actually violated any Bankruptcy Code provision or any Bankruptcy Rules[.]"

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Waldo, 417 B.R. at 893 (quoting In re Campbell, 259 B.R. 615, 627 (Bankr. N.D. Ohio 2001) (quoting Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena Corp.), 63 F.3d 877, 880 (9th Cir. 1995)).

As a result of its actions giving rise to the seven Waldo cases, Clark & Washington was required to disgorge all attorneys' fees received from the debtors in those cases and was required to refund service charges collected for debtor checks that were returned for insufficient funds. Clark & Washington disgorged all fees as required under Waldo and additionally voluntarily refunded \$123,742.00 in actual or potential fees attributable to other similarly situated cases, by returning [**12] outstanding post-dated checks in its possession. COLL. TRIAL EX. 147 ¶ 8. Additionally, Clark & Washington revised its Chapter 7 Attorney-Client Agreement (Engagement Contract)⁴ with respect to its attorneys' fees to be paid for services rendered in association with its representation of debtors in Chapter 7 cases. See TRIAL EX. 100.

As it relates to the issues raised in these fifteen contested matters, the initial Clark & Washington post-Waldo six page, single-spaced engagement contract, which outlines the debtors' duties as well as those of Clark & Washington, provides, *inter alia*, the following:

I. Pre-Petition Fees and Services:

a. Attorney offers and advertises a free consultation to prospective bankruptcy clients. Much of that initial consultation involves information gathering and interviews with clients regarding their debts, assets, financial circumstances, and transactions. Consequently, a large portion of Client's case intake was performed [**13] during the initial consultation. There is no charge for this service.

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$ ____.

ANY FEE RELATING TO PRE-PETITION SERVICES WHICH IS NOT PAID PRIOR TO THE FILING OF

⁴In each section of this Memorandum, the court will refer to each Debtors' respective engagement agreement with Clark & Washington as "Engagement Contract" and will not repeatedly designate this reference in the subsection for each Debtors' cases.

CLIENT'S CASE IS SUBJECT TO BEING DISCHARGED IN CLIENT'S CASE. ACCORDINGLY, ATTORNEY WILL WAIVE ANY ATTORNEY FEE FOR PRE-PETITION SERVICES WHICH HAS NOT BEEN PAID PRIOR [**617] TO THE FILING OF CLIENT'S PETITION.

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$ ____.

This retainer shall be applied to the post-Petition services to be rendered by Attorney in Client's [**14] case. These services include, but are not limited to, those services listed in paragraph b. below. The retainer is based upon a blended hourly rate of \$165. The amount of the post-Petition fees shall be capped at the amount of the retainer listed above, regardless of the amount of services expended in excess thereof.

The parties contemplate that the value of the post-Petition services rendered by Attorney in this case shall meet or exceed the total amount of the quoted retainer. Nonetheless, Client is entitled to request a final accounting of the fees charged by Attorney in this case and thereafter receive a refund of any amount of the retainer paid in excess of the value of the post-Petition services rendered.

CLIENT IS ADVISED THAT THE USE OF POST-DATED CHECKS FOR POST-PETITION PAYMENT OF A PRE-PETITION CHAPTER 7 ATTORNEY FEE IS NOT ALLOWED IN THE MAJORITY OF JURISDICTIONS. TO ATTORNEY'S KNOWLEDGE, THE ACCEPTANCE OF POST-DATED CHECKS AS A RETAINER AGAINST SPECIFICALLY-SEGREGATED, POST-PETITION SERVICES HAS NOT BEEN DISALLOWED. NONETHELESS, CLIENT MIGHT WISH TO CONSULT INDEPENDENT COUNSEL IN THIS REGARD.

b. Post-Petition Services: The post-Petition services to be rendered by Attorney [**15] in Client's case include, but are not necessarily limited to, the following:

- i. Notifying specific creditors of Client's case;
- ii. Filing Notices of Stay in any other court or tribunal where an action is pending against Client;
- iii. Mailing Client a copy of all petitions, notices and pleadings filed on Client's behalf;

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- iv. Notifying Client of all court hearings, meetings, or other proceedings scheduled in Client's case;
- v. Consulting with Client about any questions or problems that might arise relating to Client's case;
- vi. Preparing for, attending, and representing Client in all required court hearings or other proceedings in Client's case;
- vii. Preparing and filing any and all pleadings and other documents which are necessary or appropriate in the prosecution of Client's case;
- viii. Advising Client of their responsibilities as a debtor;
- ix. Assisting/advising Client in carrying-out their statement of intentions;
- x. Assisting Client in obtaining and filing the required pre-discharge financial management certificate; and,
- xi. Assisting Client in cooperating with requests by the panel trustee, UST, or the Court.

c. "CarveOuts":

- i. These fees do not include court filing costs. Client shall be responsible [**16] for all court and credit counseling costs associated with this case.

[*618] ii. Client agrees to pay an additional fee of \$100.00 plus applicable court costs for each amendment filed, post-petition, to include, list, or disclose any information which Client failed to provide to Attorney prior to the filing of Client's case.

iii. Adversary Proceedings: the parties specifically agree that the services contemplated in this contract of employment DO NOT include representing Client, either as a Plaintiff or Defendant, in any adversary proceeding filed in or in connection with this case. Should Attorney agree to represent Client in an adversary proceeding, a different contract of employment shall be executed between the parties under such terms and conditions as the parties deem mutually acceptable. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client declines to retain Attorney, Client obtains

other counsel, or Attorney is allowed to withdraw by the Court.

TRIAL EX. 100. At trial, Mr. Thomas testified that he personally [**17] drafted the "straddle" contract at the end of October 2009, in an attempt to comply with the court's directives in *Waldo* by removing the non-refundable nature of the fees, adding the language advising that pre-petition attorneys' fees were potentially subject to discharge, adding the language concerning the potential conflict with taking post-dated checks in some jurisdictions, and removing all carve-outs other than adversary proceedings and post-petition amendments. Believing that the "straddle" contract was in compliance with *Waldo* and after instituting the new engagement arrangements, Clark & Washington's Knoxville office once again began accepting, as one of its methods for payment of attorneys' fees, post-dated checks from debtors in addition to payments from third parties, payment in full prior to filing, or providing services pro bono. JT. STIPS. ¶ 2.

Approximately three weeks later, Mr. Thomas once again revised Clark & Washington's engagement contract, removing subsection ii. accessing the additional fee for filing amendments contained in the "CarveOuts" section, stating it did not fit in with the spirit of a "straddle" contract and that it caused problems with their clients. [**18] See TRIAL EX. 101. No other changes were made to the second post-Waldo form Chapter 7 Attorney Client Agreement, and the firm continued taking post-dated checks from debtors as payment for Chapter 7 bankruptcy cases.⁵

After noting that Clark & Washington was continuing to take post-dated checks from debtors, drawn on their bank accounts, the court entered an Order in *Hart* on December 8, 2009, directing Mr. Burroughs and Clark & Washington to appear and show cause why their compensation should not be limited to the \$201.00 received from the Debtors pre-petition, why they should not be required to return all post-dated checks to the Debtors, and why the court should not summarily disallow all compensation purportedly paid by post-dated checks and direct the return thereof to the respective debtors in all Chapter 7 cases filed after entry of the *Waldo* decision on October 27, 2009. As required by [*619] the [**19] court in its show cause order, Mr. Burroughs and Clark & Washington filed a brief on January 7, 2010, arguing, *inter alia*, that they had attempted to comply with the court's directives in *Waldo* and that the post-dated

⁵ Unless expressly stated otherwise in the individual subsections forthcoming, each of the Debtors entered into one of the two initial post-Waldo engagement contracts with Clark & Washington, and it will be noted in each subsection which version of the contract was used for each of the Debtors.

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checks received from the Debtors were a retainer against post-petition services.

On March 19, 2010, the U.S. Trustee filed the Motion for Sanctions and Other Relief Against the Law Firm of Clark & Washington and Attorney Zachary Burroughs and Notice of Hearing (First Motion for Sanctions) in *Lawson, Newman, Soles, Sanchez, Dickerson, Zick, Cox, Hoffman, Luttrell, Vittetoe, Womble, Aaron, and Knight*, asking the court to enter an order finding Mr. Burroughs and Clark & Washington in contempt and ordering them to disgorge any prepaid or post-paid fees collected for filing inaccurate compensation disclosure statements, for failing to adequately disclose that unpaid attorneys' fees were potentially dischargeable, and for violating the court's decision in *Waldo*.⁶ Additionally, the U.S. Trustee requested sanctions such as requiring all compensation disclosure statements filed by Clark & Washington to contain an original signature of a partner, shareholder, or principal, requiring **[**20]** the firm to filing an accounting of all billable time for non-flat fee cases, requiring fifteen additional CLE hours for each attorney in the firm's Knoxville office, assignment of a court-approved co-counsel to review all filings by Clark & Washington, and suspension from practicing before the court for a time to be determined.

Thereafter, on April 1, 2010, the U.S. Trustee filed the Motion for Sanctions Pursuant to *11 U.S.C. § 105(a)* Against Clark & Washington, P.C., and Zachary Burroughs for Violations of *Local Rule 2090-2* and General Order 2008-005 (Second Motion for Sanctions) in *Lawson, Newman, Soles, Sanchez, Dickerson, Zick, Cox, Hoffman, Luttrell, Vittetoe, and Womble*, asking the court to find Clark & Washington and Mr. Burroughs in violation of the Tennessee Rules **[**21]** of Professional Conduct for failing to obtain an original signature from the Debtors prior to filing the amended Statement of Financial Affairs on March 4, 2010. The U.S. Trustee requested imposition of sanctions, including suspension of the firm's electronic signature filing privileges, requiring the firm's attorneys to complete additional CLE courses, and suspension of Clark & Washington's attorneys from practice before the court for a time period to be determined.

Following the filing of the Second Motion for Sanctions, the court entered an Order directing Clark & Washington and Mr.

Burroughs to file a response by April 15, 2010. The Response of Clark and Washington, P.C. and Zachary Burroughs to U.S. Trustee's Motions for Sanctions (Response) was filed on April 12, 2010. In the Response, Clark & Washington and Mr. Burroughs acknowledged that they filed inaccurate initial Compensation Disclosure Statements in *Lawson, Hart, Newman, Soles, Sanchez, Dickerson, Zick, Cox, Hoffman, Luttrell, Vittetoe, McGee, and Womble*, but contended the errors were inadvertent and corrected when they filed amended Compensation Disclosure Statements. Clark & Washington and Mr. Burroughs also acknowledged **[**22]** that in *Lawson, Newman, Soles, Sanchez, Dickerson, Zick, Cox, Hoffman, Luttrell, Vittetoe, and [**620] Womble*, they filed amended Statements of Financial Affairs without first obtaining handwritten signatures from the Debtors and that doing so was wrong but denied that they intended to mislead the court. With respect to the sanctions sought by the U.S. Trustee, Clark & Washington and Mr. Burroughs averred that they had taken steps to ensure that neither error occurred in the future, including changes to their procedure for filing compensation disclosure statements subject to review by a partner. Additionally, they agreed that disgorgement was an appropriate supplemental sanction to their self-imposed sanction whereby they previously disgorged \$123,742.00 in fees in an attempt to comply with the *Waldo* opinion but argued that any additional sanctions sought by the U.S. Trustee are not necessary or appropriate.

All matters raised in the U.S. Trustee's Motions for Sanctions, the *McGee* Motion, and the court's show cause order in *Hart* were consolidated for trial at the preliminary hearing and continued hearings held on April 22 and May 13, 2010, respectively. Pursuant to the Pretrial Order entered **[**23]** on May 14, 2010, and amended on July 1, 2010, the issues the court was called upon to resolve are summarized as follows:

A. whether, since Clark & Washington and Mr. Burroughs acknowledged that the *Rule 2016(b)* compensation disclosure statements filed with the court in *Lawson, Hart, Newman, Soles, Sanchez, Dickerson, Zick, Cox, Hoffman, Luttrell, Vittetoe, McGee, and Womble* did not accurately reflect the fee arrangements with the respective Debtors, disgorgement is the appropriate sanction;

B. whether the Chapter 7 Attorney-Client Agreement utilized by Clark & Washington and Mr. Burroughs and executed by the Debtors in *Zick, Hart, Newman, and Sanchez* violated *Waldo*;

C. whether the Chapter 7 Attorney-Client Agreement for Routine Cases Under 11 U.S.C. Chapter 7 utilized by Clark & Washington and Mr. Burroughs and executed by

⁶ On that same date, in *Lawson, Newman, Sanchez, Dickerson, and Zick*, the U.S. Trustee filed an Amended Motion for Sanctions and Other Relief Against the Law Firm of Clark & Washington and Attorney Zachary Burroughs and Notice of Hearing for the sole purpose of amending the caption and the certificate of service; however, no revisions or amendments were made to the motion or the U.S. Trustee's substantive argument.

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the Debtors in *Soles* violated *Waldo*;

D. whether the Chapter 7 Attorney-Client Agreement utilized by Clark & Washington and Mr. Burroughs and executed by the Debtors in *Dickerson*, *Lawson*, *Cox*, *Hoffman*, *Luttrell*, *Vittetoe*, *Womble*, *Aaron*, and *Knight* violated *Waldo*;

E. whether fees allowed to Clark & Washington and Mr. Burroughs should be limited to those received pre-petition **[**24]** under any of the foregoing Attorney-Client Agreements;

F. whether Clark & Washington and Mr. Burroughs adequately informed each of the Debtors that any attorneys' fees not paid prior to the filing of their bankruptcy cases were potentially dischargeable, as required by *Waldo*, and if not, whether they should be held in contempt;

G. whether Clark & Washington and Mr. Burroughs violated *11 U.S.C. § 526(a)(4) (2006)*, the court's decision in *Waldo*, and/or Tennessee Supreme Court Rule 8, RPC 1.8 by offering and accepting payment terms from the Debtors by allowing the tender of post-dated checks from the Debtors themselves and/or from third parties;

H. whether the Chapter 7 Attorney-Client Agreement utilized by Clark & Washington and Mr. Burroughs and executed by the Debtors in *Dickerson*, *Zick*, *Cox*, *Hoffman*, *Luttrell*, *Vittetoe*, *Womble*, *Aaron*, and *Knight* constitutes a true "straddle" arrangement for the division of pre- and post-petition fees and services, and if so:

[*621] (1) whether the fees charged by Clark & Washington and Mr. Burroughs for pre- and/or post-petition services exceed the reasonable value of the services rendered;

(2) whether Clark & Washington and Mr. Burroughs have a duty to provide **[**25]** an accounting and/or itemized statement of services rendered to debtors;

(3) whether Clark & Washington and Mr. Burroughs were required by *Rule 2016(b)* or the Federal Rules of Bankruptcy Procedure to file a supplemental compensation disclosure statement each time additional post-petition fees were paid;

I. whether the depositing and/or cashing by Clark & Washington and Mr. Burroughs of post-dated checks received from the Debtors post-discharge violated the

discharge injunction of *11 U.S.C. § 524(a) (2006)*;

J. whether, since Clark & Washington and Mr. Burroughs acknowledged that they prepared and filed an Amended Statement of Financial Affairs in *Lawson*, *Newman*, *Soles*, *Sanchez*, *Dickerson*, *Zick*, *Cox*, *Hoffman*, *Luttrell*, *Vittetoe*, and *Womble* without first obtaining the Debtors' permission and/or handwritten signature, as required by section III.A.3 of the Administrative Procedures for Electronic Case Filing, effective May 17, 2005, as amended, disgorgement is the appropriate sanction.

K. whether, if the court finds in the affirmative that Clark & Washington and Mr. Burroughs have committed any of the foregoing actions, disgorgement is an adequate sanction or whether other forms or additional **[**26]** sanctions are warranted, including, as requested by the United States Trustee: the disallowance of fees in their entirety, termination of Clark & Washington and Mr. Burroughs' status as Registered Users of the court's electronic case filing system, requiring all attorneys with Clark & Washington to attend continuing legal education courses supplemental to those required by the State of Tennessee, and/or the suspension of Clark & Washington and its attorneys to practice law in the United States Bankruptcy Court for the Eastern District of Tennessee.

The undisputed facts and issues raised by the parties in each bankruptcy case are detailed as follows.

James Scott Lawson and Kerri McCon Lawson

(Case No. 09-36177)

On November 3, 2009, James Scott Lawson and Kerri McCon Lawson retained Clark & Washington to represent them in the filing of their Chapter 7 bankruptcy case, executing in association with this representation the initial post-Waldo Engagement Contract. TRIAL EX. 9; *see also* TRIAL EX. 100. As to the specific fees for services to be rendered in the filing of their bankruptcy case, the Lawsons' Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. **[**27]** Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case,

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advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$800.00.

....

II. Post-Petition Fees and Services:

[*622] a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$_.⁷

TRIAL EX. 9. At that time and in accordance with the payment options offered, the Lawsons tendered to Clark & Washington, as payment of the \$800.00 attorneys' fee provided for by their Engagement Contract, five post-dated checks from Jordan J. Perleoni, each in the amount of \$160.00, for deposit into Clark & Washington's operating account on December 31, 2009, January 31, 2010, February 28, 2010, March [*28] 31, 2010, and April 30, 2010, respectively. JT. STIPS. ¶¶ 1-2; TRIAL EX. 10. Clark & Washington did not specifically instruct the Lawsons to incur debt to pay their fees but advised that they could finance the fee for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing the Lawsons' Chapter 7 bankruptcy case was filed on November 10, 2009.⁸ Filed contemporaneously with the Voluntary Petition was the Lawsons' Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy⁹ that their \$800.00 attorneys' fee was paid "[f]rom third-party payor, Jordan J. Perleoni, via

⁷ The amount is blank in the Engagement Contract entered into evidence as Trial Exhibit 9.

⁸ Although the Lawsons executed their documents on November 3, 2009, the Voluntary Petition is dated November 10, 2009, the date upon which the case was filed. See COLL. TRIAL EX. 5. At trial, Mr. Burroughs testified that, due to an error in the software program, the dates defaulted to the filing date rather than the actual signature date.

⁹ Question 9 directs debtors to "[l]ist all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of the petition in bankruptcy within **one year** immediately preceding the commencement of [the] case." COLL. [*32] TRIAL EX. 5. All references in this Memorandum to "question 9" refer to this question in the Statement of Financial Affairs, and references will not be made back to this footnote.

post-dated checks; to be paid at \$160.00 per month on 12/31/09, 01/31/10, 02/28/10, 03/31/10, and 04/30/10." COLL. TRIAL EX. 5. This information is also reflected on the Compensation Disclosure Statement executed and filed by Mr. Crawford on November 10, 2009, which discloses total compensation of \$800.00, with \$800.00 paid and a balance due of \$0.00, paid "by third party Jordan J. Perleoni via post-dated [*29] checks; to be paid at \$160 per month on 12/31/09, 01/31/10, 02/28/10, 03/31/10, 4/30/10." COLL. TRIAL EX. 6. The Compensation Disclosure Statement also reflects the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

- a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;
- b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;
- c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;
- d. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

[*623] (i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$_. The fee for post-Petition services shall be capped at \$_, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$_.¹⁰

7. By agreement with the debtor(s), the above-disclosed fee does not include the following [*30] service:

- a. There will be an additional charge of \$100 plus applicable court costs for the preparation, filing and service of any amendment which is required to add or disclose any required information which should have been provided to counsel prior to the filing of the case.

¹⁰ These amounts are blank in the Compensation Disclosure Statement entered into evidence as the first document in Collective Trial Exhibit 6.

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b. The contract between the parties does not include representation in adversary proceedings.

COLL. TRIAL EX. 6. On November 12, 2009, Mr. Crawford filed an amended Compensation Disclosure Statement dated November 11, 2009, changing the balance due amount from \$0.00 to \$800.00 and completing the retainer portion of paragraph 6 to reflect \$0.00 for pre-petition fees, \$800.00 for post-petition fees, and no retainer. COLL. TRIAL EX. 6. Thereafter, on March 4, 2010, Mr. Burroughs filed a second amended Compensation Disclosure Statement dated March 1, 2010, with the paragraph 6 language deleted in its entirety and the paragraph 7 language revised to read:

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's [**31] credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

TRIAL EX. 7.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of the Lawsons on March 4, 2010, listing at question 9 the individual \$160.00 checks tendered to Clark & Washington by Jordan Perleoni dated December 31, 2009, January 31, 2010, February 28, 2010, March 31, 2010, and April 30, 2010, the dates upon which the post-dated checks were to be deposited. TRIAL EX. 8. The amended Statement of Financial Affairs contains the Debtors' electronic signatures but was filed by Mr. Burroughs without first obtaining the Lawsons' handwritten signatures. JT. STIPS. ¶ 4.

The U.S. Trustee took the 2004 examination of the Lawsons on February 9, 2010. In response to questions concerning their attorney fee arrangements with Clark & Washington, and specifically regarding the payment of those fees through third-party post-dated checks, Ms. Lawson testified as follows:

Q. [**33] So the first time you met with them [Clark & Washington], about the second [**624] or third week of October, that you just discussed the fee arrangement, and what did they tell you that arrangement would be, besides the amount?

A. That at that point, you all hadn't decided on the law. He said that it was just they could do five posted checks at \$160 a month from us. And then when we came back the second time, which technically would be the first time for filing the petition, that's when they told us about the law, and that it had to be a third party. So then we came back a third time with our third party checks.

Q. Okay. Now let's talk about those third-party checks. Who was the third party that wrote the checks?

A. A friend of ours. Jordan Perleoni.

Q. Okay. And did he offer to pay for your bankruptcy?

A. No, ma'am. We have to pay him back.

Q. Okay. Now how do you pay him back?

A. We pay him back with cash. We just take it out of our budget for the whole month and give it to him, and then he puts his — puts that cash into the account where the checks are coming out of, and it gets paid that way.

Q. So he didn't really offer to make the payments.

A. No.

Q. So why do you suppose you had to do this with [**34] a third-party check? I mean having it from a friend, when you're actually making the payment yourself?

A. Well, from what they told — what Mitch [Chessman] told us was that our debt, our attorney's fees, would be canceled out in the bankruptcy. And then at that point, I'm assuming that people weren't paying their attorney's fees like they had originally agreed to. So the third party which we had gone to and said, "hey can you help us with this," and we made the agreement with him.

....

Q. So in fact he's not really paying your bankruptcy?

A. No. He's just — his name is on the check.

COLL. TRIAL EX. 11 [K. Lawson] pg.8, ln.10-pg.10, ln.9. Ms. Lawson's testimony was echoed by Mr. Lawson, who testified that Mr. Perleoni, a long-time friend, provided them with the

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post-dated checks at their request after they were advised by Clark & Washington that the options for payment of the attorney fees were either in full up front or through a third party:

Q. And did you ask him if he could fund you the money to pay up front for your bankruptcy?

A. The way I'd explained it to him is that we needed the third-party checks and that I would give him the money before the check cleared to make sure it was **[**35]** in his account.

Q. Okay. Who made that suggestion that you do it that way?

A. I'm not sure I understand.

Q. Well, did someone suggest to you that you could get a third-party — you could just agree to make payments to them and let them provide the checks, or did you come up with that idea all by yourself?

A. We were told that the attorney's office would need third-party checks to — either up front or a third party. We were explained that it couldn't be our post-dated checks. I called Jordan on the phone and told him what the deal was and told him, just to let you know, I'm going [to] make sure the money — or I'm going to give you the money before the checks clear. That way he doesn't **[*625]** have to worry about making sure his money is there.

Q. Okay. Did you call him from the attorney's office or from your home?

A. I believe I called him from the attorney's office, right after we spoke to them and they told me that they would need third-party checks.

COLL. TRIAL EX. 11 [J. Lawson] pg.4, ln.17-pg.6, ln.2.

During the [Rule 2004](#) examination, the Lawsons identified and/or reviewed their contract with Clark & Washington and, with respect to what they understood the contract to provide as to the attorney **[**36]** fees they were paying, Ms. Lawson testified to the following:

Q. When you met with your attorneys, did they tell you how much they were going to charge you for doing the pre-petition work — that means the work up until they filed your case — and how much they were going to charge you for the post-petition work?

A. They just said everything would be in that \$800.

Everything would be included in that.

Q. So they told you that was a flat fee for filing the bankruptcy basically?

A. For the initial filing. If we had to do an amendment or anything like that, there were additional fees, which I believe I've got a copy of.

....

Q. And do you recall that the terms were in this document that you would pay \$800 — a pre-petition fee of \$800 that covers the remaining services? Is that correct?

....

A. Yes, ma'am.

Q. Okay. And as for post-petition fees and services, the amount was zero, wasn't it? There's nothing there?

A. There's — they said the \$800 would cover all of it.

Q. Okay.

A. They didn't specify exactly how much went to which.

COLL. TRIAL EX. 11 [K. Lawson] at pg.15, ln.11-22; pg.18, ln.15-pg.19, ln.6. Finally, with respect to the services rendered by Clark & Washington, Mr. Lawson testified **[**37]** that the majority of the work in their case was done pre-petition. COLL. TRIAL EX. 11 [J. Lawson] pg.10, ln.7-22.

The Lawsons received a discharge on March 1, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 6.2 hours to the Lawsons' bankruptcy case, of which 3.4 hours were attributed to pre-petition work and 2.8 hours were attributed to post-petition work.¹¹ COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that 1.0 hour was actual attorney time.¹² At trial, Mr. Burroughs testified that the Lawsons' \$800.00 fee was a pre-petition flat fee subject to discharge irrespective that Clark & Washington had the Lawsons execute the initial

¹¹ The attachment to Mr. Burroughs's Affidavit for the Lawsons' case reflects a total of 9.2 hours, but that figure also includes 0.1 of an hour for a check returned for insufficient funds and 2.9 hours for time attributable to these contested matters.

¹² The Lawsons paid their entire \$800.00 fee post-petition which, based upon the estimated time records, translates to \$285.71 for the 2.8 post-petition hours, including the 1.0 hour of actual attorney time estimated by Mr. Burroughs to have been spent on their case.

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post-Waldo engagement contract; however, the receipt of the Lawsons' account entered into evidence reflects that a "replacement" cash payment and two of Mr. Perlioni's post-dated checks were deposited by Clark & Washington into their [*626] operating account post-petition, with one of those checks deposited by Clark & Washington post-discharge on April 30, 2010, and that the Lawsons have a balance due of \$160.00. JT. STIPS. ¶ 6; TRIAL EX. [*38] 10.

Kenneth James Hart and Carla Dee Hart

(Case No. 09-36514)

On November 20, 2009, Kenneth James Hart and Carla Dee Hart retained Clark & Washington to represent them in the filing of their Chapter 7 bankruptcy case, executing in association with this representation the initial post-Waldo Engagement Contract. COLL. TRIAL EX. 4; *see also* TRIAL EX. 100. As to the specific fees for services to be rendered in the filing of their bankruptcy case, the Harts' Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in [*39] obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$201.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$899.00.

COLL. TRIAL EX. 4. At that time and in accordance with the payment options offered, the Harts tendered to Clark & Washington, as payment of the \$1,100.00 attorneys' fee provided for by their Engagement Contract, \$201.00 along with three post-dated checks in the amount of \$220.00 and one post-dated check in the amount of \$239.00, all written on

the Debtors' personal bank account, for deposit into Clark & Washington's operating account on December 20, 2009, January 20, 2010, February 20, 2010 and March 20, 2010, respectively. JT. STIPS. [*40] ¶¶ 1-2; COLL. TRIAL EX. 4.

The Voluntary Petition commencing the Harts' Chapter 7 bankruptcy case was filed on November 30, 2009.¹³ Filed contemporaneously with the Voluntary Petition was the Harts' Statement of Financial Affairs, reflecting in response to question 9 that their \$1,100.00 attorneys' fee was paid by them on November 20, 2009. COLL. TRIAL EX. 1. This information is not, however, reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on November 20, 2009, and filed on November 30, 2009, which disclosed total compensation of \$1,100.00, with \$201.00 paid and a balance due of \$899.00 to be paid "by debtor via post-dated checks in the amount of \$220 each on 12/20/09, 1/20/10, 2/20/10 and \$239 on 3/20/10." COLL. TRIAL EX. 2. The Compensation Disclosure Statement also reflects the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

[*627] a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;

b. Preparation and filing of any petition, schedules, statement of affairs and [*41] plan which may be required;

c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;

d. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$201.00. The fee for post-Petition services shall be capped at \$899.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$899.00.

¹³ *See supra* n.8. The Harts executed their documents on November 20, 2009, but the Voluntary Petition is dated November 30, 2009, the date upon which the case was filed. *See* COLL. TRIAL EX. 1.

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7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. There will be an additional charge of \$100 plus applicable court costs for the preparation, filing and service of any amendment which is required to add or disclose any required information which should have been provided to counsel prior to the filing of the case.

b. The contract between the parties does not include representation in adversary proceedings.

COLL. TRIAL EX. 2. On March 4, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated March 2, 2010, with the paragraph 6 language deleted in [**42] its entirety and the paragraph 7 language revised to read:

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 2.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of the Harts on March 4, 2010, listing at question 9 the \$201.00 payment received [**43] by Clark & Washington from the Debtors on November 20, 2009, the individual \$220.00 checks received by Clark & Washington from the Harts dated December 20, 2009, January 20, 2010, and February 20, 2010, and the \$239.00 check dated March 20, 2010, the dates upon which each of their post-dated checks were to be deposited. TRIAL EX. 3. The amended Statement of Financial Affairs contains the Debtors' electronic signatures but was filed by Mr. Burroughs without first obtaining the Harts' handwritten signatures. JT. STIPS. ¶ 4.

The Harts received a discharge on March 24, 2010. Based upon the estimated time records prepared by Clark &

Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total [*628] of 8.9 hours to the Harts' bankruptcy case, of which 3.9 hours were attributed to pre-petition work and 5.0 hours were attributed to post-petition work. COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that 1.3 hours were actual attorney time.¹⁴ Of the total \$1,100.00 fee, the receipt entered into evidence reflects a balance due of \$194.00. COLL. TRIAL EX. 4.

Eva Louise Newman

(Case No. 09-36772)

On November 3, 2009, Eva Louise Newman retained Clark & Washington to represent her in the filing of her Chapter 7 bankruptcy case, executing in association with this representation the initial post-Waldo Engagement Contract. COLL. TRIAL EX. 29; *see also* TRIAL EX. 100. As to the specific fees for services to be rendered in the filing of her bankruptcy case, Ms. Newman's Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of [**45] \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

¹⁴The Harts paid \$899.00 of their fee for post-petition services which, based upon the estimated [**44] time records, translates to an hourly rate of \$179.80 for the 5.0 post-petition hours, including the 1.3 hours of actual attorney time estimated by Mr. Burroughs to have been spent on their case.

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COLL. TRIAL EX. 29. At that time and in accordance with the payment options offered, Ms. Newman tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by her Engagement Contract, \$150.00 along with five post-dated checks written on the Debtor's personal bank account, each in the amount of \$220.00, for deposit into Clark & Washington's operating account on January 8, 2010, February 5, 2010, March 5, 2010, April 2, 2010, and May 14, 2010, respectively. JT. STIPS. ¶¶ 1-2; COLL. TRIAL EX. 29.

The Voluntary Petition commencing Ms. Newman's Chapter 7 bankruptcy case was filed on December 12, 2009.¹⁵ Filed contemporaneously with the Voluntary Petition was Ms. Newman's Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that her \$1,250.00 attorneys' fee was paid by her on December 11, 2009. COLL. [**46] TRIAL EX. 26. This information is not, however, reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on December 11, 2009 and filed on December 12, 2009, which disclosed total compensation of \$1,250.00, with \$150.00 paid and a balance due of \$1,100.00 to be paid "by debtor via [*629] post-dated checks in the amount of \$220 each on 1/08/10, 2/05/10, 3/05/10, 4/02/10, and 5/14/10." COLL. TRIAL EX. 27. The Compensation Disclosure Statement also reflects the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$150.00. The fee for post-Petition services shall be capped at \$1100.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$1100.00.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain [**47] costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the

costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 27. On February 2, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated February 1, 2010, with the paragraph 6 language deleted in its entirety. COLL. TRIAL EX. 27.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of Ms. Newman on March 4, 2010, listing at question 9 the \$150.00 payment received by [**48] Clark & Washington from the Debtor on December 11, 2009, and the individual \$220.00 checks received by Clark & Washington from Ms. Newman dated January 6, 2010, February 5, 2010, March 5, 2010, April 2, 2010, and May 14, 2010, the dates upon which her post-dated checks were to be deposited. TRIAL EX. 28. The amended Statement of Financial Affairs contains the Debtor's electronic signature but was filed by Mr. Burroughs without first obtaining Ms. Newman's handwritten signature. JT. STIPS. ¶ 4.

Ms. Newman attended her meeting of creditors on January 11, 2010, at which time the attorney for the U.S. Trustee questioned her concerning her fee arrangement with Clark & Washington. In response to the U.S. Trustee's request that she explain, in her own words, the terms of her Engagement Contract, Ms. Newman answered as follows:

A. What the terms were? Let's see. That I pay up front five different, I think it's five different payments, and then after three months then the bill's been wiped off, but the five different post-dated checks —

Q. Okay.

A. — for the fees.

TRIAL EX. 30 pg.203, ln.5-11. With respect to the retainer language specifically, Ms. Newman testified to the following:

Q. Okay. And [**49] did you understand — what do you understand that that means?

[*630] A. That's what I was reading to see. If it exceeds

¹⁵ See *supra* n.8. Ms. Newman executed her documents on December 7, 2009, but the Voluntary Petition is dated December 12, 2009, the date upon which her case was filed. See COLL. TRIAL EX. 26.

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it, then we get a refund of what's left over.

Q. All right. And do you know how they're charging that? Did you understand that this was \$165 an hour for their post-petition services? Did you understand this before right now?

A. No. I just — just briefly read over it.

Q. What were you told about your attorney fees, that they were just going to be a certain amount to cover your bankruptcy?

A. Yes.

Q. That's kind of what you understood?

A. Uh-huh.

Q. Okay. Now, then, do you understand that now, that you might be entitled to a refund of some of those fees?

A. I didn't know that.

Q. Is that what you understand in here?

A. Uh-huh, yes.

....

Q. Okay. And tell me, did they tell you that you might be entitled to get a refund of your money?

A. No.

....

Q. Okay. Did you understand that the work they did prior to your case being filed would be charged at a certain amount and then the work that they did after your case was filed would be charged at a certain amount?

A. No.

Q. Okay. So it was your understand that that fee was —

A. Everything.

TRIAL EX. 30 pg.208, ln.15-pg.209, ln.10; pg.210, ln.14-16; [**50] pg.213, ln.4-11. Ms. Newman testified that, although her Engagement Contract with Clark & Washington stated that she was to pay \$150.00 pre-petition, she paid no money up front and was advised that she could make payments on her case through the post-dated checks. TRIAL EX. 30 pg.204, ln.22-pg.205, ln.5. She also testified that no one from Clark & Washington discussed with her that any attorney's fees for pre-petition services not paid pre-petition would be waived

and that she was not given any options for payment of her attorney's fees, including the use of third-party post-dated checks or pre-payment in full, other than by using post-dated checks drawn against her personal account. TRIAL EX. 30 pg.211, ln.20-pg.213, ln.19.

Ms. Newman received a discharge on March 31, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 6.8 hours to Ms. Newman's bankruptcy case, of which 3.8 hours were attributed to pre-petition work and 3.0 hours were attributed to post-petition work.¹⁶ COLL. TRIAL EX. [**51] 97. Of the post-petition hours, Mr. Burroughs testified at trial that .5 of an hour was actual attorney time.¹⁷ Of the total \$1,250.00 fee, one post-dated check of \$220.00 was deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects a balance due of \$220.00. JT. STIPS. ¶ 6; COLL. TRIAL EX. 29.

[*631] Maurice Royston Soles and Lillie Louise Soles

(Case No. 09-36796)

On October 22, 2009, Maurice Royston Soles and Lillie Louise Soles retained Clark & Washington to represent them in the filing of their Chapter 7 bankruptcy case, executing in association with this representation a Chapter 7 Attorney-Client Agreement for Routine Cases Under 11 U.S.C. Chapter 7, which outlined their duties [**52] as well as those of Clark & Washington. TRIAL EX. 41. The parties have stipulated that the Soleses' Engagement Contract was the firm's pre-Waldo engagement agreement and not in compliance with that opinion. JT. STIPS. ¶ 7. As it relates to fees for services related to the filing of and representation by Clark & Washington in their bankruptcy case at issue in these contested matters, the Soleses' Engagement Contract provides, *inter alia*, the following:

It is hereby agreed by the undersigned "Attorney" and "Client" that Attorney shall represent Client in a case under 11 U.S.C. Chapter 7. Client agrees to a total attorney fee of \$_.¹⁸

¹⁶ The attachment to Mr. Burroughs's Affidavit for Ms. Newman's case reflects a total of 7.1 hours, but that figure also includes 0.3 of an hour for time attributable to these contested matters.

¹⁷ Ms. Newman paid \$1,100.00 of her fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$366.67 for the 3.0 post-petition hours, including the 0.5 hour of actual attorney time estimated by Mr. Burroughs to have been spent on her case.

¹⁸ The amount is blank in the Engagement Contract entered into evidence as Trial Exhibit 41.

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Attorney's fee includes fees for services to be rendered both pre- and post-petition. These serves are composed of separate components. The first component, the initial consultation, is free of charge. The second component, pre-petition services relating to the filing of the case, shall be paid prior to the filing of the case; however, if not paid prior to the filing of the petition, this portion of the fee shall be waived and any claim for the same will be subject to the discharge entered in Client's case. The third component, post-petition services relating [**53] to the prosecution of the case, shall be paid post-petition in monthly installments via post-dated checks.

This fee does not include court filing costs; Client shall be responsible for all court and credit counseling costs associated with this case. Client agrees to pay an additional fee of \$100.00 plus court costs for each amendment filed, post-Petition, to include, list, or disclose any information which Client failed to provide to Attorney prior to the filing of Client's case. This agreement is predicated upon the completeness and accuracy of the relevant information provided to Attorney by Client. All fees paid by Client for the purpose of filing this Chapter 7 petition are NON-REFUNDABLE.

TRIAL EX. 41. The Engagement Contract also contains the following Acknowledgment executed by the Soleses:

I further acknowledge and agree that this retainer contract contemplates payment for services rendered pre-Petition as well as serves to be rendered post-Petition. The initial payment represents fees earned pre-Petition and the future payments are to be applied as contemporaneous compensation for post-Petition services.

TRIAL EX. 41.¹⁹ Notwithstanding that their Engagement

¹⁹Exhibit "A" attached to the Engagement Contract identifies the following as "Base Fee Services" included within the flat fee: (i) helping client obtain pre-filing credit briefing, pay advices, and tax returns/transcripts; (ii) initial intake for Chapter 7 cases; (iii) attending the meeting of creditors and any adjourned meeting of creditors unless required to reappear due to the Debtors' non-appearance; (iv) pre-discharge financial counseling certification; (v) analysis of the Debtors' financial situation and advice in determining whether to file; and (vi) preparation and filing of the petition, schedules, and statement of financial affairs. TRIAL EX. 41. Exhibit "B" to the Engagement Contract lists the "Non-Base Fees Services/A La Carte [**55] Items" as follows, along with additional costs: (i) any contested matters including adversary proceedings, objections to exemptions, determinations of dischargeability, and objections to discharge — \$295.00 per hour; (ii) reaffirmation agreements —

Contract does not require [**54] the [**632] payment of any attorneys' fee, the Soleses tendered to Clark & Washington \$140.00 along with three post-dated checks written on the Debtors' personal bank account, each in the amount of \$220.00, for deposit into Clark & Washington's operating account on January 3, 2010, February 3, 2010, and March 3, 2010, respectively. JT. STIPS. at ¶¶ 1-2; TRIAL EX. 42.

The Voluntary Petition commencing the Soleses' Chapter 7 bankruptcy case was filed on December 14, 2009.²⁰ Filed contemporaneously with the Voluntary Petition was the Soleses' Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that their \$800.00 attorneys' fee was paid by them on December 11, 2009. COLL. TRIAL EX. 38. This information is not, however, reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on December 11, 2009 and filed on December 12, 2009, which disclosed total compensation of \$800.00, with \$140.00 paid and a balance due of \$660.00 to be paid "by debtor via post-dated checks in the amount of \$220 each on 1/3/10, [**57] 2/3/10, 3/3/10." COLL. TRIAL EX. 39. The Compensation Disclosure Statement also reflected the following in paragraphs 6 and 7:

\$50.00 per agreement; (iii) redemptions — \$350.00; (iv) amendments — \$104.00; (v) judicial lien avoidances — \$150.00; (vi) defense of motions for relief from stay or other motions — \$245.00 per hour; (vii) more than 75 creditors — \$50.00; (viii) miscellaneous letters — \$50.00; (ix) emails/faxes to creditors — \$15.00; (x) motions to reopen the case — \$100.00; (xi) credit reports — \$20.00 per Debtor; and (xii) retrieving closed records — \$0.25 per page. TRIAL EX. 41. The Engagement Contract also expressly excludes representation in adversary proceedings, stating that

(19) ADVERSARY PROCEEDINGS: the parties specifically agree that the services contemplated in this contract of employment DO NOT include representing Client, either as a Plaintiff or Defendant, in any Adversary Proceeding filed in or in connection with this case. Should Attorney agree to represent Client in an adversary proceeding, a different contract of employment shall be executed [**56] between the parties under such terms and conditions as the parties deem mutually acceptable.

TRIAL EX. 41. The court addressed these so-called "carve-outs" listed on Exhibit "B" in *Waldo* and found them "particularly troublesome when Clark & Washington and Mr. Crawford have charged the Debtors fees ranging from \$800.00 to \$1,250.00, but now seek to exclude a majority of the services routinely performed post-petition from that flat fee." *Waldo*, 417 B.R. at 885.

²⁰See *supra* n.8. The Soleses executed their documents on October 22, 2009, but the Voluntary Petition is dated December 14, 2009, the date upon which the case was filed. See COLL. TRIAL EX. 38.

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6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$140.00. The fee for post-Petition services shall be capped at \$660.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$660.00.

[*633] 7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. There will be an additional charge of \$100 plus applicable court costs for the preparation, filing and service of any amendment which is required to add or disclose any required information which should have been provided to counsel prior to the filing of the case.

b. The contract between the parties does not include representation in adversary proceedings.

COLL. TRIAL EX. 39. On February 2, 2010, Mr. Burroughs [*58] filed an amended Compensation Disclosure Statement dated February 1, 2010, with the paragraph 6 language deleted in its entirety and revising the paragraph 7 language to read:

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 39.

Mr. Burroughs also filed an amended [*59] Statement of Financial Affairs on behalf of the Soleses on February 2, 2010, listing at question 9 the \$140.00 payment received by Clark & Washington from the Debtors on December 11, 2009, and the individual \$220.00 checks received by Clark & Washington from the Soleses dated January 3, 2010, February 3, 2010, and March 3, 2010, the dates upon which their post-dated checks were to be deposited. TRIAL EX. 40. The amended Statement of Financial Affairs contains the Debtors' electronic signatures but were filed by Mr. Burroughs without first obtaining the Soleses' handwritten signatures. JT. STIPS. ¶ 4.

The U.S. Trustee took the 2004 examination of the Soleses on March 11, 2010. In response to questions concerning their attorney's fee arrangement with Clark & Washington, neither Mr. nor Mrs. Soles understood their Engagement Contract to contain any allocation between pre-petition and post-petition attorney's fees, with Mrs. Soles stating that they didn't owe any fees after they filed, that they had "paid so much down in the beginning, and that's it, and then the monthly payment." TRIAL EX. 43 pg.11, ln.18-pg.12, ln.23; pg.13, ln.7-15. Additionally, both Mr. and Mrs. Soles testified that [*60] they were not informed that any debt they owed when they filed their petition was dischargeable. TRIAL EX. 43 pg.12, ln.24-pg.13, ln.3; pg.15, ln.22-25.

The Soleses received a discharge on March 26, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 6.5 hours to the Soleses' bankruptcy case, of which 3.5 hours were attributed to pre-petition work and 3.0 hours were attributed to post-petition work. COLL. TRIAL EX.97. Of the post-petition hours, Mr. Burroughs testified at trial that .7 of an [*634] hour was actual attorney time.²¹ As reflected on the receipt entered into evidence, even though the Soleses' Engagement Contract expressly states that their attorneys' fee was \$0.00, each of the Soleses' post-dated checks for the total \$800.00 fee has been deposited, leaving a balance due of \$0.00. TRIAL EX. 42.

Cleofus [*61] Anthony Sanchez, Jr. and Brandy Lee Sanchez

(Case No. 09-36802)

²¹ The Soleses paid \$660.00 of their fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$220.00 for the 3.0 post-petition hours, including the 0.7 hour of actual attorney time estimated by Mr. Burroughs to have been spent on their case.

437 B.R. 609, *634; 2010 Bankr. LEXIS 3022, **61

Cleofus Anthony Sanchez, Jr. and Brandy Lee Sanchez retained Clark & Washington to represent them in the filing of their Chapter 7 bankruptcy case, executing in association with this representation the initial post-Waldo Engagement Contract by Mr. Sanchez on December 2, 2009, and by Ms. Sanchez on November 18, 2009.²² TRIAL EX. 35; *see also* TRIAL EX. 100. As to the specific fees for services to be rendered in the filing of their bankruptcy case, the Sanchezes' Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition [****62**] of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

TRIAL EX. 35. At that time and in accordance with the payment options offered, the Sanchezes tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by their Engagement Contract, \$150.00 along with five post-dated checks written on the Debtors' personal bank account, each in the amount of \$220.00, for deposit into Clark & Washington's operating account on January 31, 2010, February 28, 2010, March 31, 2010, April 30, 2010, and May 31, 2010, respectively. JT. STIPS. ¶¶ 1-2; TRIAL EX. 36; TRIAL EX. 37 pg.6, ln.16-pg.7, ln.14.

²² During her *Rule 2004* examination, Ms. Sanchez testified that she met with Katherine Brown when she executed the Sanchezes' Engagement Contract, that Ms. Brown was an attorney, and Ms. Brown gave her information about bankruptcy. TRIAL EX. [****63**] 37 pg.5, ln.14-pg.6, ln.5. At trial, however, Mr. Burroughs testified that Ms. Brown had failed to pass the bar exam and was not, in fact, a licensed attorney in the State of Tennessee.

The Voluntary Petition commencing the Sanchezes' Chapter 7 bankruptcy case was filed on December 14, 2009.²³ Filed contemporaneously with their Voluntary Petition was the Sanchezes' Statement of Financial Affairs, reflecting in response to [****635**] question 9 concerning payments related to debt counseling or bankruptcy that their \$1,250.00 attorneys' fee was paid by the Sanchezes on December 12, 2009. COLL. TRIAL EX. 32. However, the information reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on December 12, 2009 and filed on December 14, 2009, disclosed total compensation of \$1,250.00, with \$150.00 paid and a balance due of \$1,100.00 to be paid "by debtor via post-dated checks in the amount of \$220 each on 1/31/10, 2/28/10, 3/31/10, 4/30/10, and 5/31/10." COLL. TRIAL EX. 33. The Compensation Disclosure Statement also reflected the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, [****64**] including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$150.00. The fee for post-Petition services shall be capped at \$1100.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$1100.00.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to

²³ *See supra* n.8. The Sanchezes executed their documents on November 18 and December 12, 2009, but the Voluntary Petition is dated December 14, 2009, the date upon which their case was filed. *See* COLL. TRIAL EX. 32.

437 B.R. 609, *635; 2010 Bankr. LEXIS 3022, **64

litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw [**65] by the Court.

COLL. TRIAL EX. 33. On February 2, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated February 1, 2010, with the paragraph 6 language deleted in its entirety. COLL. TRIAL EX. 33.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of the Sanchezes on March 4, 2010, listing at question 9 the \$150.00 payment received by Clark & Washington from the Debtors on December 12, 2009, and the individual \$220.00 checks received by Clark & Washington from the Sanchezes dated January 31, 2010, February 28, 2010, March 31, 2010, April 30, 2010, and May 31, 2010, the dates upon which their post-dated checks were to be deposited. TRIAL EX. 34. The amended Statement of Financial Affairs contains the Debtors' electronic signatures but was filed by Mr. Burroughs without first obtaining the Sanchezes' handwritten signatures. JT. STIPS. ¶ 4.

The U.S. Trustee took the 2004 examination of the Sanchezes on March 11, 2010. In response [**66] to questions concerning their attorney's fee arrangement with Clark & Washington, Ms. Sanchez testified as follows:

A. We were paying kind of like a retention fee of \$150 or a retainer fee, and that we were making payments for [the] rest of our bankruptcy fee.

Q. Did they quote you an amount that it was going to cost for your bankruptcy for the attorney fees?

[*636] A. Yes. The total was \$1250, I believe.

Q. Twelve fifty?

A. Yeah.

Q. Which is adding the \$150 to \$1150 ?

A. Yes.

Q. — to \$1100. So that would be \$1250, and that's what you understood was going to be your attorney fee?

A. Yes.

....

Q. Did you understand in the event that they did not spend a little over six hours or almost seven hours of time on your case after it was filed that you could ask for a refund of the money?

A. No, I didn't know.

Q. Did anyone discuss that with you before you signed this?

A. No.

Q. So you didn't have any idea that the \$1100 retainer fee was going to be billed out at \$165 of actual time — an hour of actual time expended on your case?

A. No. I — I understood it to be \$1250 was just the fee that we paid regardless of how much time was spent.

TRIAL EX. 37 pg.11, ln.2-19; pg.13, ln.24-pg.14, ln.13.

The Sanchezes received [**67] a discharge on April 6, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 6.8 hours to the Sanchezes' bankruptcy case, of which 3.3 hours were attributed to pre-petition work and 3.5 hours were attributed to post-petition work.²⁴ COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that 1.7 hours were actual attorney time, although in her [Rule 2004](#) examination, Ms. Sanchez stated that the post-petition time spent speaking or meeting with anyone from Clark & Washington was "[s]omewhere between 30 minutes and an hour."²⁵ TRIAL EX. 37 pg.17, ln.19-20. Of the total \$1,250.00 fee, two post-dated checks, each in the amount of \$220.00, were deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects a balance due of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 36.

William Bradley Dickerson and Cynthia Taylor Dickerson
(Case No. 09-36875)

On December 11, 2009, William Bradley Dickerson and Cynthia Taylor Dickerson retained Clark & Washington to represent them in the filing of their Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. TRIAL EX. 15; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of their bankruptcy case, the Dickersons'

²⁴ The attachment to Mr. Burroughs's Affidavit for the Sanchezes' case reflects a total of 6.9 hours, but that figure also includes 0.1 of an hour for time attributable to these contested matters.

²⁵ The Sanchezes paid \$1,100.00 of their fee for post-petition services which, based upon the [**68] estimated time records, translates to an hourly rate of \$314.29 for the 3.5 post-petition hours, including the 1.7 hours of actual attorney time estimated by Mr. Burroughs to have been spent on their case.

437 B.R. 609, *636; 2010 Bankr. LEXIS 3022, **68

Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding [*637] the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing [*69] and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

TRIAL EX. 15. At that time and in accordance with the payment options offered, the Dickersons tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by their Engagement Contract, \$150.00 along with five post-dated checks written on the Debtors' personal bank account, each in the amount of \$220.00, for deposit into Clark & Washington's operating account on January 15, 2010, February 15, 2010, March 15, 2010, April 15, 2010, and May 15, 2010, respectively. JT. STIPS. ¶¶ 1-2; TRIAL EX. 16; TRIAL EX. 17 pg.189, ln.20-25.

The Voluntary Petition commencing the Dickersons' Chapter 7 bankruptcy case was filed on December 18, 2009.²⁶ Filed contemporaneously with the Voluntary Petition was the Dickersons' Statement of Financial Affairs, reflecting in response to question 9 concerning payments [*70] related to debt counseling or bankruptcy that their \$1,250.00 attorneys' fee was paid by them on December 16, 2009. COLL. TRIAL EX. 12. This information is not, however, reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on December 17, 2009 and filed on December 18,

2009, which disclosed total compensation of \$1,250.00, with \$150.00 paid and a balance due of \$1,100.00 to be paid "by debtor via post-dated checks in the amount of \$220 each on 1/15/10, 2/15/10, 3/15/10, 4/15/10, 5/15/10." COLL. TRIAL EX. 14. The Compensation Disclosure Statement also reflected the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below. (i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$150.00. The fee for post-Petition services shall be capped at \$1,100.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$1,100.00.

7. By agreement [*71] with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney [*638] that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 14. On February 2, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated February 1, 2010, with the paragraph 6 language deleted in its entirety and revising the paragraph 7 language to read:

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court [*72] costs, credit counseling costs, and the costs to obtain Client's credit report.

²⁶ See *supra* n.8. The Dickersons executed their documents on December 11, 2009, but the Voluntary Petition is dated December 18, 2009, the date upon which their case was filed. See COLL. TRIAL EX. 12.

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b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 14.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of the Dickersons on February 2, 2010, listing the \$150.00 payment received by Clark & Washington from the Debtors on December 18, 2009, and the individual \$220.00 checks received by Clark & Washington from the Dickersons dated January 15, 2010, February 15, 2010, March 15, 2010, April 15, 2010, and May 15, 2010, the dates upon which [**73] their post-dated checks were to be deposited. TRIAL EX. 13. The amended Statement of Financial Affairs contains the Debtors' electronic signatures but was filed by Mr. Burroughs without first obtaining the Dickersons' handwritten signatures. JT. STIPS. ¶ 4.

The Dickersons attended their meeting of creditors on January 22, 2010, at which time the attorney for the U.S. Trustee questioned them concerning their fee arrangement with Clark & Washington, at which time Ms. Dickerson stated that she had thought the entire fee paid would cover their whole bankruptcy. TRIAL EX. 17 pg.187, ln.17-pg.188, ln.10. When asked by the U.S. Trustee about the dual nature of pre-petition and post-petition fees and services, the Dickersons testified as follows:

Q. Okay. Now what do you think that means?

A. Well, it sounds like, if I gave them any money in — before the filing, that I could have put them in the filing and wiped that out. That's what it sounds like. I don't know if that's true or not.

Q. Okay. Now I want you to look down at the next paragraph, paragraph 2. It talks about post-petition fees and services.

A. Uh-huh.

Q. And it talks about a retainer, and it shows that — it says that the retainer shall [**74] consist of post-dated checks in the total amount of \$1,100, is that correct?

....

Q. — because it does have the numbers in there. And it says here that the retainer —

A. I do recall that, yes. I do recall that.

Q. Okay. Now, let's look at this next paragraph. I want you to read it out loud for me.

[*639] A. This retainer shall be applied to the post-petition services to be rendered by attorney in client's name. These services include, but are not limited to those services listed in paragraph 8 below. The retainer is based upon a blended hourly rate of \$165. The amount of post-petition fees should be capped at the time of the retainer listed above regardless of the amount of services expended in the excess thereof.

Q. Okay. Now, what do you think that means?

A. Well, it sounds to me like we agree on that amount to get the job done no matter what it takes.

Q. Okay. But that's the amount. Do you understand what it means to have an hourly rate?

A. Yeah.

Q. Okay. Now, tell me what — how do you think that —

A. Well, that's like \$175 per — \$165 per hour, however many hours it takes.

Q. Okay. Now I want you to read this next paragraph to me.

....

A. Okay. The parties contemplate that the value of the post-petition [**75] services rendered by attorney in this case shall meet or exceed the total amount of the quoted retainer. Nonetheless, client is entitled to request a final accounting of the fees charged by attorney in this case and thereafter receive a refund of any amount of the retainer paid in excess of the value of the post-petition services rendered.

Q. Okay. Have you — do you understand the implication of that?

A. That says that if it was a real quick and simple process and didn't take a lot of their time, unless there were charges that they can show me they had to pay, I might get some of that \$1,100 back.

Q. Right. Did you understand that before you just read that now?

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A. No, I can't tell you that I did.

....

Q. Okay. How about you, sir, did you read that?

A. [Mr. Dickerson] We read it together off the same page. . . . We skimmed through it.

Q. Okay. Did you understand that?

A. I understand it now.

Q. Okay. But you didn't understand it then. Did they explain — sit down and explain that that \$1,100 was subject to an hourly rate and only — they would only bill according to how much time they spent on your case?

A. [Mr. Dickerson] We were told that it was going to cost this amount, and that's why we [**76] did the post-dated checks. And we were supposed to read that. I probably skimmed through it and didn't fully understand it.

TRIAL EX. 17 pg.191, ln.10-pg.194, ln.23. With respect to paying their attorney's fees, Mr. Dickerson testified that they had been given three options: to borrow the money from family to pay the attorney's fees, to pay in advance, or to provide post-dated checks, but that they had not been advised that any money borrowed from family members would have been dischargeable. TRIAL EX. 17 pg.196, ln.21-pg.198, ln.25.

The Dickersons received a discharge on March 30, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 7.0 hours to the Dickersons' bankruptcy case, of which 3.4 hours were attributed to pre-petition work and 3.6 hours were attributed [**640] to post-petition work.²⁷ COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that 1.8 hours were actual attorney time.²⁸ Of the total \$1,250.00 fee, one post-dated check in the amount of \$220.00 was deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects a balance due [**77] of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 16.

²⁷ The attachment to Mr. Burroughs's Affidavit for the Dickersons' case reflects a total of 7.3 hours, but that figure also includes 0.3 of an hour for time attributable to these contested matters.

²⁸ The Dickersons paid \$1,100.00 of their fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$305.56 for the 3.6 post-petition hours, including the 1.8 hours of actual attorney time estimated by Mr. Burroughs to have been spent on their case.

Mary Louise Zick

(Case No. 09-36938)

On December 8, 2009, Mary Louise Zick retained Clark & Washington to represent her in the filing of her Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. TRIAL EX. 22; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of her bankruptcy case, Ms. Zick's Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling [**78] certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$850.00.

COLL. TRIAL EX. 22. At that time and in accordance with the payment options offered, Ms. Zick tendered to Clark & Washington, as payment of the \$1,000.00 attorneys' fee provided for by her Engagement Contract, \$150.00 along with five post-dated checks written on the Debtor's personal bank account, each in the amount of \$170.00, for deposit into Clark & Washington's operating account on January 5, 2010, February 5, 2010, March 5, 2010, April 5, 2010, and May 5, 2010, respectively. JT. STIPS. ¶¶ 1-2; TRIAL EX. 23.

The Voluntary Petition commencing Ms. Zick's Chapter 7 bankruptcy [**79] case was filed on December 23, 2009.²⁹

²⁹ *See supra* n.8. Ms. Zick executed [**81] her documents on December 8, 2009, but the Voluntary Petition is dated December 23,

437 B.R. 609, *640; 2010 Bankr. LEXIS 3022, **81

COLL. TRIAL EX. 19. Filed contemporaneously with the Voluntary Petition was Ms. Zick's Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that her \$1,000.00 attorneys' fee was paid by Ms. Zick on December 16, 2009. COLL. TRIAL EX. 19. However, the information reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on December 17, 2009 and filed on December [*641] 23, 2009, disclosed total compensation of \$1,000.00, with \$150.00 paid and a balance due of \$850.00 to be paid "by debtor via post-dated checks in the amount of \$170 each on 1/5/10, 2/5/10, 3/5/10, 4/5/10, 5/5/10." COLL. TRIAL EX. 20. The Compensation Disclosure Statement also reflected the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below. (i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$150.00. The fee for post-Petition services shall be capped at \$850.00, [*80] and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$850.00.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 20. On February 3, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated

2009, the date upon which her case was filed.

February 1, 2010, with the paragraph 6 language deleted in its entirety. COLL. TRIAL EX. 20.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of Ms. Zick on February 3, 2010, listing at question 9 the \$150.00 payment received by Clark & Washington from the Debtor on December 17, 2009, and the individual \$170.00 checks received by Clark & Washington from Ms. Zick dated January 5, 2010, February 5, 2010, March 5, 2010, April 5, 2010, and May 5, 2010, the dates upon which her post-dated checks were to be deposited. TRIAL EX. 21. The amended Statement of Financial Affairs contains the Debtor's electronic signature but was filed by Mr. Burroughs without first obtaining Ms. Zick's handwritten signature. JT. STIPS. ¶ 4.

The U.S. Trustee took the 2004 examination of Ms. Zick on March 11, 2010. In response to questions concerning the nature of her fee arrangement with Clark & Washington, Ms. Zick testified to the following:

Q. Ms. Zick, when you signed this agreement with Clark & Washington, did you read it?

A. Pretty well, pretty much, yeah, because I took it home. I have one here.

Q. Okay. Can you tell me what your understanding [*82] was about how the payments were going to be applied?

A. You mean the five post-dated checks?

Q. The pre-payments and the post-dated checks, yes.

A. They was ? I don't understand. They made the checks out, and then before the date that it was due you — it [*642] went through the bank or you could go down and replace the check with cash.

....

Q. Okay. Now then, when you talked to them about how much the bankruptcy would cost, how much did they tell you? Just the attorney fees. Not the filing —

A. Oh, just the attorney fees?

Q. Yes.

A. I think it was — I had it marked down one thousand something.

Q. You think it was about a thousand dollars?

A. Yeah.

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Q. All right. I think that's probably what these numbers add up to be. Now, did they tell you that they were going to charge you by the hour for all the work they did after the bankruptcy was filed?

A. I don't think so.

Q. There's a statement in your contract that says that "this retainer shall be applied to the post-petition services to be rendered by attorney in client's case. These services include, but are not limited to, those services listed in paragraph b below. The retainer is based upon a" — let's see.

A. Blended.

Q. — "blended hourly rate of \$165." [**83] Did you understand that you were going to be billed on an hourly rate against the \$850 for post-petition services?

A. Probably not, but you know.

Q. Did you think that the cost of the bankruptcy was just a thousand dollars?

A. Whatever — whatever ? yeah, whatever I paid.

....

Q. Okay. I understand. Now then, did they also tell you, did you understand, that you might get some of the money back if they didn't spend that much time on your case after it was filed?

A. Yeah.

Q. And how did they explain that to you?

A. Like at the end and when everything is done, then they would send you a letter and you could — if you didn't want to retain it, you didn't have to. Something — like the last payment or something.

Q. Okay. So they would tell you how much they had really charged you for the bankruptcy?

A. Yeah.

Q. So it was your understand that you could get some money back at the end of the bankruptcy?

A. But I wouldn't — I wouldn't do that. I just pay the whole — whatever I was charged.

TRIAL EX. 25 pg.9, ln.22-pg.10, ln.10; pg.12, ln.2-pg.14, ln.17.

Ms. Zick received a discharge on April 13, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, [**84] the firm devoted a total of 6.0 hours to Ms. Zick's bankruptcy case, of which 3.3 hours were attributed to pre-petition work and 2.7 hours were attributed to post-petition work.³⁰ COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that .7 of an hour was actual attorney time.³¹ Of the total \$1,000.00 fee, one [**643] post-dated check in the amount of \$170.00 was replaced by Ms. Zick with cash and deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects a balance due of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 23; TRIAL EX. 25 pg.10, ln.7-10.

John Douglas Cox

(Case No. 10-30169)

On December 9, 2009, John Douglas Cox retained Clark & Washington to represent him in the [**85] filing of his Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. TRIAL EX. 67; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of his bankruptcy case, Mr. Cox's Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

³⁰ The attachment to Mr. Burroughs's Affidavit for Ms. Zick's case reflects a total of 6.3 hours, but that figure also includes 0.3 of an hour for time attributable to these contested matters.

³¹ Ms. Zick paid \$850.00 of her fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$314.81 for the 2.7 post-petition hours, including the 0.7 hour of actual attorney time estimated by Mr. Burroughs to have been spent on her case.

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a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

TRIAL EX. 67. At that time and in accordance [**86] with the payment options offered, Mr. Cox tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by his Engagement Contract, five post-dated checks from Beverle Bledsoe Carpenter, each in the amount of \$250.00, for deposit into Clark & Washington's operating account on February 1, 2010, March 1, 2010, April 1, 2010, May 1, 2010, and June 1, 2010, respectively. JT. STIPS. ¶¶ 1-2; TRIAL EX. 68.³² Clark & Washington did not specifically instruct Mr. Cox to incur debt to pay his fees but advised that he could finance the fee for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing Mr. Cox's Chapter 7 bankruptcy case was filed on January 18, 2010.³³ Filed contemporaneously with the Voluntary Petition was Mr. Cox's Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that his \$1,250.00 attorneys' fee was paid by Beverle Bledsoe on January 4, 2010. COLL. TRIAL EX. 64. This information [**87] is not, however, reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on January 4, 2010, and filed on January 18, 2010, which disclosed total compensation of \$1,250.00, with \$0.00 paid and a balance due of \$1,250.00 to be paid "by third party, Beverle Bledsoe, via post-dated checks in the [**644] amount of \$250 each on 2/1/10, 3/1/10, 4/1/10, 5/1/10, & 6/1/10." COLL. TRIAL EX. 65. The Compensation Disclosure Statement also reflected the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition

services is a flat fee in the amount of \$150.00. The fee for post-Petition services shall be capped at \$1100.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$ n/a.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated [**88] with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 65. On February 1, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated January 29, 2010, with the paragraph 6 language deleted in its entirety. COLL. TRIAL EX. 65.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of Mr. Cox on February 3, 2010, listing at question 9 the individual \$250.00 checks tendered to Clark & Washington [**89] by Beverle Bledsoe dated February 1, 2010, March 1, 2010, April 1, 2010, May 1, 2010, and June 1, 2010, the dates upon which the post-dated checks were to be deposited. TRIAL EX. 66. The amended Statement of Financial Affairs contains the Debtor's electronic signature but was filed by Mr. Burroughs without first obtaining Mr. Cox's handwritten signature. JT. STIPS. ¶ 4.

Mr. Cox attended his meeting of creditors on February 23, 2010, at which time the attorney for the U.S. Trustee questioned him concerning his fee arrangement with Clark & Washington. In response to the U.S. Trustee's questions as to the nature of his fees, Mr. Cox answered as follows:

Q. When you met with Clark & Washington, did you understand that there was going to be a flat fee charged for your bankruptcy?

A. I did, yes.

³² At his meeting of creditors, Mr. Cox identified the third party payor as "Beverle Bledsoe Carpenter." TRIAL EX. 69 pg.222, ln.10-12.

³³ See *supra* n.8. Mr. Cox executed his documents on December 9, 2009, but the Voluntary Petition is dated January 18, 2010, the date upon which his case was filed. See COLL. TRIAL EX. 64.

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Q. And that's what your understanding was.

Charles Allen Hoffman

A. Right, yes.

(Case No. 10-30181)

Q. Even though this is the contract you signed which states otherwise.

On December 15, 2009, Charles Allen Hoffman retained Clark & Washington to represent him in the filing of his Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. COLL. TRIAL EX. 51; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of his bankruptcy case, Mr. Hoffman's Engagement Contract contains the following terms:

A. Right.

Q. It was your understanding that you —

A. Flat rate.

Q. — would pay a flat rate.

Client agrees to pay the following fees:

A. Exactly.

I. Pre-Petition Fees and Services:

Q. Okay. Did anybody — did anybody at their office, any of the attorneys or [*645] paralegals or anyone sit down and discuss this contract with you and explain the terms and the billing [*90] of \$165 an hour —

....

A. No.

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, [*92] gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

TRIAL. EX. 69 pg.228, ln.24-pg.229, ln.16. He also testified that Ms. Carpenter, his girlfriend, provided him with the post-dated checks at his request after he was advised by Clark & Washington that he needed them but that it was never intended that Ms. Carpenter would pay for his bankruptcy case. TRIAL EX. 69 pg.223, ln.13-22; pg.230, ln.18-pg.231, ln.9. With respect to his options, Mr. Cox testified that he was not given any options — including payment of the attorney's fees in full up front — other than payment through third-party post-dated checks. TRIAL. EX. 69 pg.230, ln.5-17. Additionally, when asked how much time he had spent since the time his case was filed talking with anyone from Clark & Washington, Mr. Cox answered "[t]hree, maybe four minutes." TRIAL EX. 69 pg.228, ln.7-17.

II. Post-Petition Fees and Services:

Mr. Cox received a discharge on July 27, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 6.6 hours to Mr. Cox's bankruptcy case, of which 3.5 hours were attributed to pre-petition work and 3.1 hours were attributed to post-petition work. COLL. TRIAL EX. 97. Of the post-petition hours, [*91] Mr. Burroughs testified at trial that .9 of an hour was actual attorney time.³⁴ Of the total \$1,250.00 fee received post-petition, the receipt entered into evidence reflects a balance due of \$0.00. TRIAL EX. 68.

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$500.00.

5 @ 100.00³⁵

[*646] COLL. TRIAL EX. 51. At that time and in accordance with the payment options offered, Mr. Hoffman tendered to Clark & Washington, as payment of the \$650.00 attorneys' fee provided for by his Engagement Contract, \$150.00 along with five post-dated checks from his father, Carl Hoffman,³⁶ in the amount of \$100.00 for deposit into Clark & Washington's

³⁵ These figures are handwritten on Mr. Hoffman's contract.

³⁴ Mr. Cox paid the entire \$1,250.00 fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$403.23 for the 3.1 post-petition hours, including the 0.9 of an hour of actual attorney time estimated by Mr. Burroughs to have been spent on his case.

³⁶ All of the documents filed by Clark & Washington with the court state that Mr. Hoffman's fees were paid by "Karla Hoffman;" however, Mr. Hoffman testified at his meeting of creditors that the post-dated checks, in fact, came from his father, Carl Hoffman. COLL. TRIAL EX. 51 pg.5, ln.23-pg.6, ln.4.

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operating account on March 1, 2010, April 1, 2010, May 1, 2010, June 1, 2010, and July 1, 2010, respectively. JT. STIPS. ¶¶ 1-2; TRIAL EX. 52. Clark & Washington did not specifically instruct Mr. Hoffman to incur debt to pay his fees but [**93] advised that he could finance the fee for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing Mr. Hoffman's Chapter 7 bankruptcy case was filed on January 18, 2010.³⁷ Filed contemporaneously with the Voluntary Petition was Mr. Hoffman's Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that his \$650.00 attorneys' fee was paid by Mr. Hoffman on January 15, 2010. COLL. TRIAL EX. 48. This information is not, however, reflected on the Compensation Disclosure Statement executed and filed by Mr. Burroughs on January 18, 2010, which disclosed total compensation of \$650.00, with \$150.00 paid and a balance due of \$500.00 to be paid "by third party, Karla Hoffman, via post-dated checks in the amount [**94] of \$100 each on 3/1/10, 4/1/10, 5/1/10, 6/1/10, 7/1/10." COLL. TRIAL EX. 49. The Compensation Disclosure Statement also reflected the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$150.00. The fee for post-Petition services shall be capped at \$500.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$ n/a.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take [**95] appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, [*647] Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 49. On February 1, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated January 29, 2010, with the paragraph 6 language deleted in its entirety. COLL. TRIAL EX. 49.

Mr. Burroughs also filed an amended Statement of Financial Affairs on Mr. Hoffman's behalf on February 3, 2010, listing at question 9 the individual \$100.00 checks tendered to Clark & Washington by "Karla Hoffman" dated March 1, 2010, and \$150.00 on April 1, 2010, May 1, 2010, June 1, 2010, and July 1, 2010, the dates upon which the post-dated checks were to be deposited. TRIAL EX. 50. The amended Statement of Financial Affairs contains the Debtor's electronic signature but was filed by Mr. Burroughs [**96] without first obtaining Mr. Hoffman's original signature. JT. STIPS. ¶ 4.

Mr. Hoffman attended his meeting of creditors on February 23, 2010, at which time the attorney for the U.S. Trustee questioned him concerning his fee arrangement with Clark & Washington as follows:

Q. Okay. Did you understand that the fees for these — the thousand dollars³⁸ that you paid was partly for work that they did before the bankruptcy was filed and partly for work that they did after the bankruptcy was filed?

A. Yeah, the way I understood it.

Q. Tell me about what you understood.

A. The money was to take care of this bankruptcy mess I'm in.

Q. Did you think the thousand dollars was to pay all of it?

³⁷ See *supra* n.8. Mr. Hoffman executed his documents on December 15, 2009, but the Voluntary Petition is dated January 18, 2010, the date upon which his case was filed. See COLL. TRIAL EX. 48.

³⁸ The total attorney fee paid by Mr. Hoffman was \$650.00; however, he also paid the \$299.00 filing fee and the costs for obtaining his pre-petition credit counseling briefing and post-petition financial management course, which totals approximately \$1,000.00 for the entire amount paid to Clark & Washington.

A. Yeah.

Q. To take care of everything? Okay. Did anybody ever tell you that — that if — if the time they spent on your bankruptcy didn't amount to a thousand dollars worth of work that you might get some money back?

A. No. I didn't know nothing about that.

COLL. TRIAL EX. 51 pg.8, ln.25-pg.9, ln.17. With respect as to why he paid his fees with third-party post-dated checks, Mr. Hoffman stated that he was unemployed and could not pay the attorneys' fees without assistance from his father. COLL. TRIAL EX. 51 [**97] pg.6, ln.5-23.

Mr. Hoffman received a discharge on May 7, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 5.6 hours to Mr. Hoffman's bankruptcy case, of which 3.3 hours were attributed to pre-petition work and 2.3 hours were attributed to post-petition work.³⁹ COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that .8 of an hour was actual attorney time.⁴⁰ Of the total \$1,250.00 fee, two post-dated checks, each in the amount of \$100.00, was deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects [*648] a balance due of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 52.

Carl Dean Luttrell, Jr. and Sherry Renee Luttrell

(Case No. 10-30275)

On December 5, 2009, Carl Dean Luttrell, Jr. and Sherry Renee Luttrell retained Clark & Washington to represent them in the filing of their Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. TRIAL EX. 61; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of their bankruptcy case, the Luttrells' Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

³⁹ The attachment to Mr. Burroughs's Affidavit for Mr. Hoffman's case reflects a total of 5.8 hours, but that figure also includes 0.2 of an hour for collecting and receipting [**98] attorney fees.

⁴⁰ Mr. Hoffman paid \$500.00 of his fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$217.39 for the 2.3 post-petition hours, including the 0.8 hour of actual attorney time estimated by Mr. Burroughs to have been spent on his case.

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the [**99] upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

TRIAL EX. 61. At that time and in accordance with the payment options offered, the Luttrells tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by their Engagement Contract, \$150.00 along with six post-dated checks from Sheila Coffey, each in the amount of \$157.14, for deposit into Clark & Washington's operating account on February 18, 2010, March 18, 2010, April 18, 2010, May 18, 2010, June 18, 2010, and July 18, 2010, respectively, and one post-dated check in the amount of \$157.16 to be deposited on August 18, 2010. JT. STIPS. ¶¶ 1-2; TRIAL EX. 62. Clark & Washington did not specifically instruct the Luttrells to incur debt to pay their fees but advised that they could finance the fee [**100] for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing the Luttrells' Chapter 7 bankruptcy case was filed on January 25, 2010.⁴¹ COLL. TRIAL EX. 58. Filed contemporaneously with the Voluntary Petition was the Luttrells' Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that their \$1,250.00 attorneys' fee was paid by the Luttrells on January 14, 2010. COLL. TRIAL EX. 58. This information is not, however, reflected on the Compensation Disclosure Statement executed and filed by Mr. Burroughs on January 25, 2010, which

⁴¹ *See supra* n.8. The Luttrells executed their documents on December 5, 2009, but the Voluntary Petition is dated January 25, 2010, the date upon which their case was filed. *See* COLL. TRIAL EX. 58.

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disclosed total compensation of \$1,250.00, with \$150.00 paid and a balance due of \$1,100.00 to be paid "by third party, Sheila Coffey, via post-dated checks in the amount of \$157.14 each on 2/18/10, 3/18/10, 4/18/10, 5/18/10, 6/18/10, 7/18/10, and \$157.16 on 8/18/10." COLL. TRIAL EX. 59. The Compensation Disclosure Statement [*649] also reflected the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as **101] needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$150.00. The fee for post-Petition services shall be capped at \$1,100.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$ n/a.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. [*102] 59. On February 1, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated January 29, 2010, with the paragraph 6 language deleted in its entirety. COLL. TRIAL EX. 59.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of the Luttrells on February 3, 2010, listing at question 9 the \$150.00 paid to Clark & Washington on January 14, 2010, the six individual checks to be paid to Clark & Washington from Sheila Coffey of \$157.14 on February

18, 2010, March 18, 2010, April 18, 2010, May 18, 2010, June 18, 2010, and July 18, 2010, and the \$157.16 check to be paid on August 18, 2010, the dates upon which the post-dated checks were to be deposited. TRIAL EX. 60. The amended Statement of Financial Affairs contains the Debtors' electronic signatures but was filed by Mr. Burroughs without first obtaining the Luttrells' handwritten signatures. JT. STIPS. ¶ 4.

The Luttrells attended their meeting of creditors on March 2, 2010, at which time the attorney for the [*103] U.S. Trustee questioned them concerning their fee arrangement with Clark & Washington. In response to the U.S. Trustee's request that they explain, in their own words, how they were to pay their attorneys' fees, the Luttrells testified as follows:

A. [Mr. Luttrell] We paid them so much up front — do you remember exactly? Was it \$500?

A. [Ms. Luttrell] Yes, it was \$500.

A. [Mr. Luttrell] \$300 and something of it was for the filing, I think.

Q. The filing fee?

A. [Mr. Luttrell] Uh-huh. And then \$150 was for them. And then we had arrangements to pay by check, third party check —

A. [Ms. Luttrell] Third party.

A. [Mr. Luttrell] — seven —

A. [Ms. Luttrell] Post-dated.

A. [Mr. Luttrell] — post-dated checks.

Q. And what were the amount of those third-party checks?

[*650] A. [Ms. Luttrell] \$157.

Q. \$157 for seven months?

A. [Ms. Luttrell] Yes.

A. [Mr. Luttrell] The total came up to like \$1,500, I think. Somewhere in that neighborhood, with what we paid down and the checks.

Q. When you made this payment arrangement, was it ever explained to you how much was for the work that was done before the case was filed and then how much work was done for after the case was filed?

A. [Mr. Luttrell] Not really, that I understand. [*104] I

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mean, I thought it was for the —

A. [Ms. Luttrell] The total amount.

A. [Mr. Luttrell] — the total.

Q. So was it more they said it's \$1,500, and here's how you're going to pay it, you're going to pay this much up front, and then we need the rest in post-dated checks?

A. [Mr. Luttrell] Yes.

Q. So you weren't explained, well, we're going to charge you \$500 for coming to this meeting of creditors or anything of that nature?

A. [Ms. Luttrell] No.

Q. As far as you knew, it's just a flat fee?

A. [Ms. Luttrell] Yes.

A. [Mr. Luttrell] Yes, as far as we knew.

TRIAL EX. 63 pg.47, ln.7-pg.48, ln.25. With respect to the pre-petition/post-petition nature of the fees, they also testified to the following:

Q. Has your attorney agreed to reimburse you or the third party for any amount that they don't bill toward? Because — because basically what your contract says, I believe, is that \$150 is — is for the work that was done up front, and then there's another \$1,100 that's going to be done for work after your case is filed, in the form of a retainer, which basically is like a deposit. So if that deposit's not used up, have they told you that they're going to give you back any of that money?

A. [Mr. Luttrell] **[**105]** No.

A. [Ms. Luttrell] No.

A. [Mr. Luttrell] We wasn't told we would be getting any money back. Basically that —

A. [Ms. Luttrell] This would be paid.

A. [Mr. Luttrell] Our understanding, it was a flat fee pretty much.

Q. And was —

A. [Ms. Luttrell] Bankruptcy, for filing bankruptcy for us.

....

Q. Do you have any idea what the hourly rate, what your attorney is charging for this meeting today?

A. [Mr. Luttrell] None whatsoever.

Q. Right, because you just thought it was a flat fee.

A. [Mr. Luttrell] Yes.

TRIAL EX. 63 pg.51, ln.8-pg.52, ln.2; pg.53, ln.10-15.

As to why they used third-party post-dated checks, the Luttrells testified that they were advised by Clark & Washington that post-dated checks from debtors could no longer be accepted for payment of attorneys' fees and the firm would require payment in full up front or third party post-dated checks, so Ms. Coffey, Ms. Luttrell's sister, provided them with the post-dated checks. TRIAL EX. 63 pg.49, ln.1-21. The Debtors also testified that Clark & Washington would have held the checks and exchanged them for cash, but that they chose to let Ms. Coffey's checks go through and had, in fact, repaid Ms. Coffey \$157.00. TRIAL EX. 63 pg.49, ln.22-pg.50, **[**106]** ln.9.

[*651] The Luttrells received a discharge on May 11, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 5.5 hours to the Luttrells' bankruptcy case, of which 3.3 hours were attributed to pre-petition work and 2.2 hours were attributed to post-petition work. COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that 1.0 hour was actual attorney time.⁴² Of the total \$1,250.00 fee, at least two post-dated checks in the amount of \$157.14 were deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects a balance due of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 62.

Cynthia Lea Vittetoe

(Case No. 10-30326)

On January 19, 2010, Cynthia Lea Vittetoe retained Clark & Washington to represent her in the filing of her Chapter 7 bankruptcy case, executing in association **[**107]** with this representation the second post-Waldo Engagement Contract. TRIAL EX. 73; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of her bankruptcy case, Ms. Vittetoe's Engagement Contract contains the

⁴² The Luttrells paid \$1,100.00 of their fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$500.00 for the 2.2 post-petition hours, including the 1.0 hour of actual attorney time estimated by Mr. Burroughs to have been spent on their case.

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following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

TRIAL EX. 73. At that time and in accordance with the payment options offered, Ms. Vittetoe tendered **[**108]** to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by her Engagement Contract, five post-dated checks from Mrs. David Vittetoe, each in the amount of \$233.80, for deposit into Clark & Washington's operating account on February 22, 2010, March 22, 2010, April 22, 2010, May 22, 2010, and June 22, 2010, respectively. JT. STIPS. ¶ 1-2; TRIAL EX. 74. Clark & Washington did not specifically instruct Ms. Vittetoe to incur debt to pay her fees but advised that she could finance the fees for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing Ms. Vittetoe's Chapter 7 bankruptcy case was filed on January 27, 2010.⁴³ Filed contemporaneously with the Voluntary Petition was Ms. Vittetoe's Statement of Financial Affairs, reflecting in response to question 9 **[*652]** concerning payments related to debt counseling or bankruptcy that a \$131.00 attorneys' fee was paid by Ms. Vittetoe on January 19, 2010. COLL. TRIAL EX. 70. This information is not, however, reflected on the

Compensation Disclosure Statement executed and filed by Mr. Burroughs on January 27, 2010, which disclosed total compensation of \$1,250.00, with **[**109]** \$131.00 paid and a balance due of \$1,119.00 to be paid "by third party, Mrs. David Vittetoe, via post-dated checks in the amount of \$223.80 each on 2/22/10, 3/22/10, 4/22/10, 5/22/10, 6/22/10." COLL. TRIAL EX. 71. The Compensation Disclosure Statement also reflected the following in paragraphs 6 and 7:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

a. [Other provisions as needed]

no limitation except as set forth in paragraph 7 below.

(i). Other provisions: This fee for pre-petition services is a flat fee in the amount of \$131.00. The fee for post-Petition services shall be capped at \$1,119.00, and charged at a blended rate of \$165 per hour. Debtor has provided counsel a retainer for the post-Petition services in the form of post-dated checks in the total amount of \$ n/a.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include **[**110]** fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 71. On February 1, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated January 29, 2010, with the paragraph 6 language deleted in its entirety. COLL. TRIAL EX. 71.

Mr. Burroughs also filed an amended Statement of Financial Affairs on behalf of Ms. Vittetoe on February 3, 2010, listing at question 9 the \$131.00 payment received by Clark & Washington from the Debtor on January 19, 2010, and the

⁴³ See *supra* n.8. Ms. Vittetoe executed her documents on January 19, 2010, but the Voluntary Petition is dated January 27, 2010, the date upon which her case was filed. See COLL. TRIAL EX. 70.

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five individual \$223.80 checks to be paid to Clark & Washington by Mrs. David Vittetoe dated February 22, 2010, March 22, 2010, April 22, [*111] 2010, May 22, 2010, and June 22, 2010, the dates upon which the post-dated checks were to be deposited. COLL. TRIAL EX. 72. The amended Statement of Financial Affairs contains the Debtor's electronic signature but was filed by Mr. Burroughs without first obtaining Ms. Vittetoe's original signature. JT. STIPS. ¶ 4.

Ms. Vittetoe attended her meeting of creditors on March 2, 2010, at which time the attorney for the U.S. Trustee questioned her concerning her fee arrangement with Clark & Washington as follows:

Q. Okay. And did you — do you recognize the terms that were listed here which says, in number 1, pre-petition fees and services, that you were charged \$150, and then post-petition fees and services were charged at a hundred — \$1,010 — \$1,100, do you recall that?

A. Yes.

[*653] Q. Okay. So did you understand that you were going to pay part of it pre-petition and part of it post-petition?

A. Yes.

TRIAL EX. 75 pg.104, ln.12-22. As to whether Clark & Washington told her that she would get money back if her case did not take the amount of time to equal to \$1,100.00, Ms. Vittetoe testified that she did not remember but that she had been told she would receive an accounting of her fees at the end of [*112] her case. TRIAL EX. 75, pg.113, ln.6-pg.114, ln.5.

When questioned about using third party post-dated checks, Ms. Vittetoe testified that she was given the option of either paying the attorneys' fees in full up front or through third party post-dated checks. TRIAL EX. 75 pg.111, ln.7-pg.112, ln.13. She also testified that her mother-in-law provided her with the post-dated checks at her husband's request but that the money was never intended as a gift and she is repaying the amount of each check before it clears the bank. TRIAL EX. 75 pg.108, ln.22-pg.109, ln.5; pg.110, ln.7-pg.111, ln.6.

Ms. Vittetoe has not received a discharge because she has not filed a Certificate of Debtor Education certifying that she has completed the required post-petition personal financial management course. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 7.2 hours to Ms. Vittetoe's bankruptcy case, of which 3.8 hours were attributed to pre-petition work and 3.4 hours were attributed

to post-petition work.⁴⁴ COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that .9 of an hour was actual [*113] attorney time.⁴⁵ Of the total \$1,250.00 fee, the receipt entered into evidence reflects a balance due of \$0.00. TRIAL EX. 74.

Joseph Charles McGee and April Dawn McGee

(Case No. 10-30353)

Joseph Charles McGee and April Dawn McGee retained Clark & Washington to represent them in the filing of their Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract, which was signed by Ms. McGee on December 22, 2009, and by Mr. McGee on January 23, 2010. COLL. TRIAL EX. 83; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of their bankruptcy case, the McGees' Engagement Contract contains the following terms:

Client agrees to [*114] pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

[*654]

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

⁴⁴ The attachment to Mr. Burroughs's Affidavit for Ms. Vittetoe's case reflects a total of 7.4 hours, but that figure also includes 0.2 of an hour for collecting and receipting attorney fees.

⁴⁵ Ms. Vittetoe paid \$1,119.00 of her fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$329.12 for the 3.4 post-petition hours, including the 0.9 hour of actual attorney time estimated by Mr. Burroughs to have been spent on her case.

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COLL. TRIAL EX. 83. At that time and in accordance with the payment options offered, the McGees tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by their Engagement Contract, \$31.00 along with a check from Wayne Sulphin in the amount of \$1,219.00 for deposit into Clark & Washington's operating account on January 27, 2010. JT. STIPS. ¶¶ [**115] 1-2; COLL. TRIAL EX. 83. Clark & Washington did not specifically instruct the McGees to incur debt to pay their fees but advised that they could finance the fee for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing the McGees' Chapter 7 bankruptcy case was filed on January 28, 2010.⁴⁶ Filed contemporaneously with the Voluntary Petition was the McGees' Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that their \$31.00 attorneys' fee was paid by the McGees on January 23, 2010, and \$1,219.00 was paid by Wayne Sulphin on January 26, 2010. COLL. TRIAL EX. 80. This information is inaccurately reflected on the Compensation Disclosure Statement executed and filed by Mr. Burroughs on January 28, 2010, which disclosed total compensation of \$1,250.00, with \$31.00 paid and a balance due of \$1,219.00, with the source of compensation "\$31.00 paid by debtor and \$1,219.00 paid by Wayne Sulphin." COLL. TRIAL EX. 81. The Compensation Disclosure Statement also reflected the following in paragraph 7:

7. By agreement with the debtor(s), the above-disclosed [**116] fee does not include the following service:

- a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.
- b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

⁴⁶ See *supra* n.8. The McGees executed their documents on December 22, 2009 and January 23, 2010, but the Voluntary Petition is dated January 28, 2010, the date upon which their bankruptcy case was filed. See COLL. TRIAL EX. 83.

COLL. TRIAL EX. 81. On February 1, 2010, Mr. Burroughs filed an amended Compensation Disclosure Statement dated February 1, 2010, containing the same information as the previously filed Compensation Disclosure Statement. COLL. TRIAL EX. 81.

The McGees [**117] attended their meeting of creditors on March 1, 2010, at which time the attorney for the U.S. Trustee questioned them concerning their fee arrangement with Clark & Washington, with Ms. McGee testifying as follows:

Q. Okay. And do you recall discussing with your attorneys any financial arrangements [*655] that you could make for the payment of your — of your bankruptcy?

A. Like what do you mean by payment of bankruptcy, the payment that we paid to them?

Q. Yeah, your attorney fees.

A. Oh, yes, uh-huh.

Q. Okay. It shows here on your Attorney/Client Agreement that your agreement was to pay them \$150 for pre-petition services. Is that correct?

A. Yes.

Q. And then post-petition services you were to pay \$1,100. Okay. What sort of services did — did that include, the pre-petition services?

A. Just everything that they did as far as the paperwork when we came in and went through — we went through everything with them, and they did their things that they needed to do.

Q. Did they quote you just a general price that it would cost to do your bankruptcy?

A. Yes.

Q. And how much was that?

A. Altogether it was, I mean, including everything, court fees and everything, it ended up being like \$1,650.

Q. Right. But for [**118] the attorney fees, do you recall what that was?

A. I think altogether it was \$1,250 or something like that.

TRIAL EX. 82, pg.4, ln.15-pg.5, ln.18.

With respect to actual payment of their attorneys' fees, Ms. McGee testified that she had borrowed the money from her

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father, Wayne Sulphin, who was originally going to do the post-dated checks but instead gave her one check for payment of the entire \$1,219.00, which was paid to Clark & Washington on January 26, 2010. TRIAL EX. 82, pg.7, ln.12-pg.8, ln.25. She also testified that she intends to pay Mr. Sulphin back eventually and that she was not advised by Clark & Washington that the pre-petition debt to her father was dischargeable. TRIAL EX. 82, pg.10, ln.2-17.

Following the McGees' meeting of creditors on March 1, 2010, the U.S. Trustee filed the Motion of United States Trustee to Compel the Attorneys for the Debtors to Amend the Disclosure of Compensation and for Sanctions and Notice of Hearing, arguing that the Disclosures filed by Mr. Burroughs and Clark & Washington did not accurately reflect their fee arrangement or the fact that the fee had been paid entirely pre-petition. In response to the U.S. Trustee's motion, later that same afternoon, [**119] Mr. Burroughs filed a second Amended Compensation Disclosure Statement, reflecting a total fee of \$1,250.00, pre-petition receipt of \$1,250.00, and a balance due of \$0.00. COLL. TRIAL EX. 81.

The McGees received a discharge on May 7, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 6.6 hours to the McGees' bankruptcy case, of which 3.3 hours were attributed to pre-petition work and 3.3 hours were attributed to post-petition work. COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that .9 of an hour was actual attorney time.⁴⁷ Of the total \$1,250.00 fee, the receipt entered into evidence reflects a balance due of \$0.00. COLL. TRIAL EX. 83.

[*656] **Natasha Olivia Womble**

(Case No. 10-30382)

On December 17, 2009, Natasha Olivia Womble retained Clark & Washington to represent her in the [**120] filing of her Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. TRIAL EX. 55; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of her bankruptcy case, Ms. Womble's Engagement Contract contains the following terms:

Client agrees to pay the following fees:

⁴⁷ The McGees paid \$1,219.00 of their fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$369.39 for the 3.3 post-petition hours, including the 0.9 hour of actual attorney time estimated by Mr. Burroughs to have been spent on their case.

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

TRIAL EX. 55. At that time and in accordance [**121] with the payment options offered, Ms. Womble tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by her Engagement Contract, \$151.00 and five post-dated checks from Deborah Womble, four each in the amount of \$220.00 for deposit into Clark & Washington's operating account on February 22, 2010, March 25, 2010, April 25, 2010, and May 25, 2010, and one in the amount of \$219.00 to be deposited on June 25, 2010, respectively. JT. STIPS. ¶ 1-2; TRIAL EX. 56. Clark & Washington did not specifically instruct Ms. Womble to incur debt to pay her fees but advised that she could finance the fee for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing Ms. Womble's Chapter 7 bankruptcy case was filed on January 30, 2010.⁴⁸ Filed contemporaneously with the Voluntary Petition was Ms. Womble's Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that her \$1,099.00 attorneys' fee was paid by the third party payor, Deborah Womble, through post-dated payments. COLL. TRIAL EX. 53. This information is not, however, reflected on [**122] the Compensation Disclosure Statement executed by Mr. Burroughs on January 29, 2010 and filed on January 30, 2010, which disclosed total

⁴⁸ *See supra* n.8. Ms. Womble executed her documents on December 17, 2009, but the Voluntary Petition is dated January 30, 2010, the date upon which her case was filed. *See* COLL. TRIAL EX. 53.

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compensation of \$1,250.00, with \$151.00 paid and a balance due of \$1,099.00 to be paid "by third party, Deborah Womble, via post dated checks in the amount of \$220.00 each on 2/25/10, 3/25/10, 4/25/10, 5/25/10, and \$219 on 6/25/10." COLL. TRIAL EX. 53. The Compensation Disclosure Statement also reflected the following in paragraph 7:

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

[*657] a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, [**123] or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 53.

Mr. Burroughs filed an amended Statement of Financial Affairs on March 23, 2010, on behalf of Ms. Womble listing at question 9 the \$151.00 received by Clark & Washington from Ms. Womble on January 25, 2010, and the five \$220.00 checks paid to Clark & Washington by Deborah Womble dated February 25, 2010, March 25, 2010, April 25, 2010, and May 25, 2010, and the \$219.00 check dated June 25, 2010, the dates upon which the post-dated checks were to be deposited. TRIAL EX. 54. The amended Statement of Financial Affairs contains the Debtor's electronic signatures but was filed by Mr. Burroughs without first obtaining Ms. Womble's handwritten signature. JT. STIPS. ¶ 4.

Ms. Womble attended her meeting of creditors on March 1, 2010, at which time the attorney for the U.S. Trustee questioned her concerning her fee arrangement with Clark & Washington. In response to the U.S. Trustee's inquiry as to payment of the attorneys' fees, Ms. Womble [**124] testified as follows:

A. They — I don't remember what the total fee was. I want to say it was \$1,200. I'm sorry, that's been a couple of months ago, so I'm really pulling from my memory.

Q. Does \$1,250 sound like the number?

A. Yes.

Q. Okay.

A. And they said that — originally they said that I could make the post-dated checks, but then when I came and saw them at the start of the year again, they said that those would have to come from a third party.

....

Q. Okay. And so did you borrow some money from Deborah Womble?

A. Uh-huh.

....

Q. Okay. So did you sign a loan document with Ms. Womble?

A. No.

....

Q. Is that your sister?

A. My mother.

Q. Your mother. And what was your agreement with your mother about paying her back?

A. I just pay her when her check clears.

....

Q. Okay. And so —

A. She was just temporarily being the liaison in order to accommodate with the ruling that the judge had brought down, using her check; so basically it's not — it's her money that's initially coming out, but she's getting it right back, so —

Q. Okay.

A. Does that make sense? So it's really my money, but hers has been the — I guess the carrier for it to get done.

Q. Okay. Did she — did she sign an agreement with Clark [**125] & Washington?

A. No.

[*658] Q. — saying that she would be liable for this? Did she sign an agreement with you?

A. No.

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Q. Okay. But you — did she understand that if you didn't pay her the money, the checks would still clear the bank —

A. Yes.

Q. — that she would be responsible for that?

A. Yes.

Q. Okay. So it was like a loan.

A. I suppose.

Q. Okay. All right. And is your mother — your mother listed as a creditor on your bankruptcy petition? Did I ask you that?

A. No, but I don't think that she is.

TRIAL EX. 57 pg.32, ln.5-pg.35, ln.13.

Ms. Womble received a discharge on May 7, 2010. Based upon the itemized records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 6.6 hours to Ms. Womble's bankruptcy case, of which 4.0 hours were attributed to pre-petition work and 2.6 hours were attributed to post-petition work.⁴⁹ COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that .5 of an hour was actual attorney time.⁵⁰ Of the total \$1,250.00 fee, one post-dated check in the amount of \$220.00 and one post-dated check in the amount of \$219.00 were deposited by Clark & Washington post-discharge, and the receipt entered into evidence [**126] reflects a balance due of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 56.

Gary Steven Aaron, II

(Case No. 10-30442)

On January 23, 2010, Gary Steven Aaron, II retained Clark & Washington to represent him in the filing of his Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. COLL. TRIAL EX. 77; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of his

⁴⁹ The attachment to Mr. Burroughs's Affidavit for Ms. Womble's case reflects a total of 6.8 hours, but that figure also includes 0.2 of an hour for collecting and receipting attorney fees.

⁵⁰ Ms. Womble paid \$1,099.00 of her fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$422.69 for the 2.6 post-petition hours, including the 0.5 hour of actual attorney time estimated by Mr. Burroughs to have been spent on her case.

bankruptcy case, Mr. Aaron's Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

. . . .

b. The balance of the pre-Petition fee covers the remaining services required to assist Client in obtaining their required [**127] credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

. . . .

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

[*659] COLL. TRIAL EX. 77. At that time and in accordance with the payment options offered, Mr. Aaron tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by his Engagement Contract, five post-dated checks from James Carey, each in the amount of \$250.00 for deposit into Clark & Washington's operating account on March 11, 2010, April 15, 2010, May 13, 2010, June 10, 2010, and July 15, 2010, respectively. JT. STIPS. ¶ 1-2; TRIAL EX. 78. Clark & Washington did not specifically instruct Mr. Aaron to incur debt to pay his fees but advised [**128] that he could finance the fee for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The Voluntary Petition commencing Mr. Aaron's Chapter 7 bankruptcy case was filed on February 5, 2010.⁵¹ Filed contemporaneously with the Voluntary Petition was Mr. Aaron's Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that his \$1,250.00 attorneys' fee was paid by the third party payor, James Carey, through post-dated payments. COLL. TRIAL EX. 76. This information is likewise reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on February 4, 2010, and filed on February

⁵¹ *See supra* n.8. Mr. Aaron executed his documents on January 23, 2010, but the Voluntary Petition is dated February 5, 2010, the date upon which his case was filed. *See* COLL. TRIAL EX. 76.

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5, 2010, which disclosed total compensation of \$1,250.00, with \$0.00 paid and a balance due of \$1,250.00 to be paid "by third party, James Carey, via post dated checks in the amount of \$250.00 each on 3/11/10, 4/15/10, 5/13/10, 6/10/10, 7/15/10." COLL. TRIAL EX. 76. The Compensation Disclosure Statement also reflected the following in paragraph 7:

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated [**129] with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 76.

Mr. Aaron attended his meeting of creditors on March 9, 2010, at which time the attorney for the U.S. Trustee questioned him concerning his fee arrangement with Clark & Washington, with Mr. Aaron testifying as follows:

Q. Did — did they tell you — when you talked to them about what the fee would be, did they tell you that they would be billing you by the hour after [**130] the case was filed, or did they say there was just one fee for the whole bankruptcy?

A. Just one — just one set fee for the whole bankruptcy.

TRIAL EX. 79 pg.166, ln.17-23. With respect to his options for payment of the attorneys' fees, Mr. Aaron testified to the following:

Q. And so when you met with them did they talk to you about how you could pay your fees?

A. Yes.

[*660] Q. Okay. And what were — what did they tell you about that?

A. They told me I could pay it third-party by having, you

know, one of my relatives give them five checks, they can put it through the bank or I could come up there and pay them off as — as they come due, three days before they come due.

Q. Okay. They told you — did you — did you — did the third — was the third party named James Carey?

A. Yes, ma'am.

Q. And did Mr. Carey give you the money or did he loan you the money?

A. He loaned me the checks.

Q. He loaned you the checks?

A. Yes.

Q. Did — what was your intent about the checks?

A. I'd pay them off before — you know, go ahead and pay them off as I — you know.

Q. Did Clark & Washington tell you that you could arrange it that way, where you'd come up and pick up the checks before they were cashed?

A. Yeah.

Q. Okay. They told [**131] you. Were they aware that you were just borrowing these checks —

A. Yeah.

Q. — from Mr. Carey?

A. Yeah.

TRIAL EX. 79 pg.164, ln.4-pg.165, ln.9. He also testified that he was required to bring the post-dated checks before his case would be filed. TRIAL EX. 79 pg.166, ln.24-pg.167, ln.3.

Mr. Aaron received a discharge on May 25, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 4.9 hours to Mr. Aaron's bankruptcy case, of which 3.3 hours were attributed to pre-petition work and 1.6 hours were attributed to post-petition work.⁵² COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs testified at trial that

⁵² The attachment to Mr. Burroughs's Affidavit for Mr. Aaron's case reflects a total of 5.2 hours, but that figure also includes 0.2 of an hour for receipting Mr. Aaron's replacement of a check with cash and 0.1 of an hour for time attributable [**132] to these contested matters.

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.9 of an hour was actual attorney time.⁵³ Of the total \$1,250.00 fee, one payment in the amount of \$250.00 was deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects a balance due of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 78.

Kalenda Faye Knight

(Case No. 10-30444)

On January 16, 2010, Kalenda Faye Knight retained Clark & Washington to represent her in the filing of her Chapter 7 bankruptcy case, executing in association with this representation the second post-Waldo Engagement Contract. TRIAL EX. 45; *see also* TRIAL EX. 101. As to the specific fees for services to be rendered in the filing of her bankruptcy case, Ms. Knight's Engagement Contract contains the following terms:

Client agrees to pay the following fees:

I. Pre-Petition Fees and Services:

....

b. The balance of the pre-Petition fee covers the remaining services required [*661] to assist Client in obtaining their required credit counseling certificate, gathering necessary information and documents, advising Client regarding the legal issues involved in Client's case, advising Client of the upcoming process, advising Client of their responsibilities [**133] as a debtor, and preparing and filing Client's bankruptcy pleadings. The fee for these services is a flat fee of \$150.00.

....

II. Post-Petition Fees and Services:

a. Retainer. As a condition of representation in this case, Client agrees to pay Attorney a retainer for services to be rendered post-Petition in Client's case. The retainer shall consist of post-dated checks in the total amount of \$1,100.00.

COLL. TRIAL EX. 45. At that time and in accordance with the payment options offered, Ms. Knight tendered to Clark & Washington, as payment of the \$1,250.00 attorneys' fee provided for by her Engagement Contract, five post-dated

checks from Catrina Woods, each in the amount of \$250.00 for deposit into Clark & Washington's operating account on February 26, 2010, March 26, 2010, April 23, 2010, May 21, 2010, and June 18, 2010, respectively. JT. STIPS. ¶ 1-2; TRIAL EX. 46. Clark & Washington did not specifically instruct Ms. Knight to incur debt to pay her fees but advised that she could finance the fee for a period of time after the case was filed through post-dated checks. JT. STIPS. ¶ 3.

The [**134] Voluntary Petition commencing Ms. Knight's Chapter 7 bankruptcy case was filed on February 5, 2010.⁵⁴ Filed contemporaneously with the Voluntary Petition was Ms. Knight's Statement of Financial Affairs, reflecting in response to question 9 concerning payments related to debt counseling or bankruptcy that her \$1,250.00 attorneys' fee was paid by the third party payor, Catrina Woods, through post-dated payments. COLL. TRIAL EX. 44. This information is likewise reflected on the Compensation Disclosure Statement executed by Mr. Burroughs on January 29, 2010, and filed on February 5, 2010, which disclosed total compensation of \$1,250.00, with \$0.00 paid and a balance due of \$1,250.00 to be paid "by third party, Catrina Woods, via post-dated checks in the amount of \$250.00 each on 2/26/10, 3/26/10, 4/23/10, 5/21/10, & 6/18/10." COLL. TRIAL EX. 44. The Compensation Disclosure Statement also reflected the following in paragraph 7:

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:

a. These fees do not include certain costs associated with this case. Client will be responsible for all court costs, credit counseling costs, and the costs to obtain [**135] Client's credit report.

b. The contract between the parties does not include fees for representing Client in adversary proceedings. If Client is served with an adversary proceeding complaint, Attorney shall take appropriate steps to protect and represent Client's best interests until such time as either Client informs Attorney that Client does not wish to litigate the matter, Client affirmatively declines Attorney's representation, Client obtains other counsel, or Attorney is allowed to withdraw by the Court.

COLL. TRIAL EX. 44.

⁵³ Mr. Aaron paid the entire \$1,250.00 fee for post-petition services which, based upon the estimated time records, translates to an hourly rate of \$781.25 for the 1.6 post-petition hours, including the 0.9 hour of actual attorney time estimated by Mr. Burroughs to have been spent on his case.

⁵⁴ *See supra* n.8. Ms. Knight executed her documents on January 16, 2010, but the Voluntary Petition is dated February 5, 2010, the date upon which her case was filed. *See* COLL. TRIAL EX. 44.

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Ms. Knight attended her meeting of creditors on March 9, 2010, at which time, [*662] the attorney for the U.S. Trustee questioned her concerning her fee arrangement with Clark & Washington. In response to the U.S. Trustee's questions, Ms. Knight testified to the following:

Q. Okay. So when you signed this contract, did you read this contract to know what it said?

A. She explained it to me then, yeah.

Q. Okay. Did she explain to you that you had to pay \$150 before your case was filed, [**136] for your — for your attorney fees, not for the \$349?

A. [Ms. Woods⁵⁵] She said that was in with, that's what the fees was to file the case, file the bankruptcy.

Q. That \$349?

A. Yes.

Q. Okay. But after that, did you understand that you had an attorney fee of \$1250 to pay?

A. [Ms. Woods] Yes. And that's what they did, that — she said that they can divide it up into monthly payments.

Q. Right. But when this contract that you signed, Ms. Knight, says that you paid \$150, where you were to pay that pre-petition, you didn't do that, did you? Now, we're not talking about the \$349, we're talking about the \$1,250. None of that was paid prior to the case being filed, is that correct?

[Mr. Burroughs] The \$1,250 was in five post-dated checks, right?

A. [Ms. Woods] Yeah. And they took one post-dated check out of my account.

Q. And that would be in February?

A. [Ms. Woods] Yes.

Q. Right. And so they've not given you back \$150?

A. [Ms. Woods] No, ma'am.

...

Q. Right. And then there's four more to go. Is that correct? But when you talked to them, did you understand that the fee for the bankruptcy was going to be billed separately for the — for after it was filed at \$165 an hour, or did you think that your fee [**137] was, for the whole bankruptcy \$1,250?

A. [Ms. Woods] \$1,250. She didn't say nothing about no hourly wages pay, I mean.

Q. Okay. So the woman you talked to didn't tell you that?

A. She explained it and then she said, "Sign here for me."

A. [Ms. Woods] Yeah, but she did not state —

A. She didn't hand me them to read, Mama, she just read it to me.

A. [Ms. Woods] She did, but I'm going to tell you, I know — now, I can't — it's her word against mine, but I know she did not state that any hourly of \$165 whatever that is you said, she did not say that.

Q. Okay.

A. [Ms. Woods] All she said was the fees that was left after the \$349 was \$1,200 or whatever.

Q. \$1,250.

A. \$1,250, whatever these five post-dated checks would add up to.

Q. Okay.

A. [Ms. Woods] \$1,250, right, correct.

Q. And that was to do the whole bankruptcy.

A. [Ms. Woods] Right.

[*663] TRIAL EX. 47 [Tr. Knight 341 mtg] at pg. 158, line 8-pg.161, line 5.

Ms. Knight received a discharge [**138] on May 17, 2010. Based upon the estimated time records prepared by Clark & Washington and attached to Mr. Burroughs's Affidavit, the firm devoted a total of 5.2 hours to Ms. Knight's bankruptcy case, of which 3.4 hours were attributed to pre-petition work and 1.8 hours were attributed to post-petition work. COLL. TRIAL EX. 97. Of the post-petition hours, Mr. Burroughs

⁵⁵ During the examination of the Debtor, Kalenda Knight, at her meeting of creditors on March 9, 2010, her mother, Katrina Woods, who was also present during the Debtor's consultation with representatives of Clark & Washington, was sworn in and testified as to those events.

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testified at trial that 1.0 hour was actual attorney time.⁵⁶ Of the total \$1,250.00 fee, two post-dated checks, each in the amount of \$250.00, were deposited by Clark & Washington post-discharge, and the receipt entered into evidence reflects a balance due of \$0.00. JT. STIPS. ¶ 6; TRIAL EX. 46.

II

The Pretrial Order sets forth a number of issues which, for the purposes of this memorandum, can be divided into two distinct categories: the appropriateness of Clark & Washington's fee arrangements and the accuracy of the firm's filings with the court, to be followed by a third subsection addressing the imposition of sanctions.

A

The first set of issues focuses upon Clark & Washington's practices concerning its engagement and fee arrangement with its clients. Specifically, whether the post-Waldo engagement contracts and fee arrangements employed by Clark & Washington and implemented by Mr. Burroughs as managing attorney for its Knoxville office constitute true "straddle" arrangements for the division of pre- and post-petition fees and services in compliance with the directives of *Waldo*.⁵⁷

One of the primary issues in *Waldo* was whether or not the engagement contract and fee arrangement between Clark & Washington and the respective debtors under the terms of which the firm collected, pre-petition, post-dated checks drawn on debtor accounts for deposit post-petition constituted pre-petition debts, subject to discharge. After analyzing case law from this jurisdiction, as well as others, this court concluded that "the attorneys' fees in each case [were] flat fees which arose pre-petition, irrespective of when services were to be rendered." *Waldo*, 417 B.R. at 883; see also *In re*

⁵⁶ Ms. Knight paid the entire \$1,250.00 fee post-petition which, based upon the estimated time records, translates to an hourly rate of \$694.44 for the 1.8 post-petition hours, including the 1.0 hour of actual attorney time estimated by Mr. Burroughs to have been spent on her case. That estimation notwithstanding, at trial, Mr. Burroughs also identified the "KB" referenced in the estimated time records as having spent the one hour of attorney time meeting with Ms. Knight and her mother as Katherine Brown, who was a non-licensed [**139] attorney. See *supra* n.22.

⁵⁷ The parties have stipulated that the contract used in the Soles case was a pre-Waldo contract and in violation of the court's directives therein. JT. STIPS. ¶ 7. At trial, Mr. Burroughs testified that the pre-Waldo engagement contract was mistakenly used; however, the Soleses' Engagement Contract was executed on October 22, 2009, prior to entry of the *Waldo* decision, but [**140] the case itself was filed post-Waldo, on December 14, 2009. See TRIAL EX. 41.

Griffin, 313 B.R. 757, 762-63 (Bankr. N.D. Ill. 2004) (HNI "Under the Bankruptcy Code, a contract-based claim is a pre-petition claim if prior to filing[,] the relationship between the debtors and the creditor contained all the necessary elements to create a right to payment under the relevant contract."). This court went on to then state the following:

HN2 [A]cceptance of post-dated checks for payment of "flat-fee" or "no-look" attorney's fees is not an acceptable practice and runs afoul of the Bankruptcy Code [**664] and Federal Rules of [**141] Bankruptcy Procedure, [and finds] the division of a flat fee arrangement into pre-petition and post-petition parts to be conceptually inconsistent and therefore untenable. The Court therefore joins those other courts which hold that when a flat or fixed fee pre-petition agreement is at issue, the fee must be paid in full prior to the commencement of the debtor's case or the fee is discharged under § 727(b).

Waldo, 417 B.R. at 882, 885 (quoting *In re Mansfield*, 394 B.R. 783, 791 (Bankr. E.D. Pa. 2008)). In summary, this court held that "because 'flat fee' or 'no-look' attorney's fees contracted for pre-petition are dischargeable, it is unacceptable for attorneys to ask for and receive post-dated checks from Debtors to be cashed post-petition as payment of those fees." *Waldo*, 417 B.R. at 886.

Recognizing, however, that attorneys should be compensated for the services they provide, this court, at the conclusion of the *Waldo* opinion, gave the following three examples of potentially allowable methods for payment of attorneys' fees in Chapter 7 cases: "(1) requiring Chapter 7 debtors to pay 'flat' or 'no-look' attorney's fees in full prior to filing; (2) revising retainer agreements and expressly [**142] designating pre-petition services, which are paid pre-petition, and post-petition services, which shall be paid post-petition; or (3) accepting payments by third parties." *Waldo*, 417 B.R. at 895.

Immediately following entry of the *Waldo* decision, Mr. Thomson drafted the initial post-Waldo contract, and Mr. Crawford, the managing attorney of the Knoxville office at that time, instructed the Knoxville office to stop taking post-dated debtor checks. That practice was resumed, however, after Mr. Crawford left the firm in November 2009, and Mr. Burroughs was instructed by the Atlanta office to begin taking post-dated debtor checks once again under the post-Waldo "straddle" contract, continuing until January 2010, when Mr. Clark instructed the Knoxville office to only take post-dated

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third party checks.⁵⁸ Additionally, Mr. Burroughs testified that although the Knoxville office ceased collecting post-dated checks written on debtor accounts, it continued depositing post-dated checks received prior to entry of the *Waldo* decision and it has continued depositing post-dated checks written on debtor accounts in its possession.

In support of Clark & Washington's post-Waldo "straddle" contract, Mr. Thomson testified that in the immediate aftermath of the *Waldo* opinion, he instructed all of the Knoxville offices not to take post-dated debtor checks for a few days and began drafting a revised engagement contract that provided for receipt of post-dated checks pre-petition in contemplation of post-petition services while correcting the major three problems pointed out by the court. To that end, the initial and second post-Waldo engagement contracts both remove a statement that attorneys' fees are non-refundable, remove all carve-outs other than for adversary proceedings and amendments, segregate pre-petition and post-petition services, add language advising that pre-petition debts are subject to discharge, and add language that debtors may consult other counsel concerning the acceptability of post-dated checks. See TRIAL EX. 100; TRIAL EX. 101. These contracts also provided for debtors to pay **[**144]** a **[*665]** minimal flat fee, usually \$150.00, when the contract was signed, with that amount designated for pre-petition services, and to pay the remaining balance of the fees due via post-dated checks, with that amount designated for post-petition services. See TRIAL EX. 100; TRIAL EX. 101. These are the engagement contracts executed by all of the Debtors in these contested matters with the exception of the Soleses, who executed the pre-Waldo contract.

In spite of the assertions by Mr. Thomson, Mr. Clark, Mr. Burroughs, and Ms. Stofan to the contrary, neither of the post-Waldo engagement contracts is a true "straddle" agreement and neither complies with *Waldo*. Regardless of Clark & Washington's purported attempt to bifurcate the attorneys' fees into pre- and post-petition services, the fact remains that each of the Engagement Contracts in these fifteen cases was entered into pre-petition, as was the obligation for payment. Each Engagement Contract is prefaced with the phrase, "Client agrees to pay the following fees" and then fixes the liability of the respective Debtors at the full amount of the pre- and post-petition figures inserted into the respective Engagement Contracts. As stated in *Waldo*, **[**145]** "[i]f these

arrangements were true 'saddle obligations' as argued by Clark & Washington and Mr. Crawford, they would not collect post-dated checks pre-petition in anticipation of post-petition services but would, instead, seek payment for post-petition services as rendered post-petition." *Waldo*, 417 B.R. at 883-84. The engagement contracts themselves, as well as the testimony at trial can lead to no other conclusion — these are "flat fee" contracts.

The post-Waldo engagement contracts attempt to bifurcate fees, advising clients that they have paid their "minimal flat fee" for pre-petition fees⁵⁹ and that they, "[a]s a condition of representation," have agreed to pay "a retainer for services to be rendered post-petition" to consist of post-dated checks totaling the remaining amount. See COLL. TRIAL EX. 4; TRIAL EX. 9; TRIAL EX. 15; TRIAL EX. 22; COLL. TRIAL EX. 29; TRIAL EX. 35; TRIAL EX. 45; COLL. TRIAL EX. 51; TRIAL EX. 55; TRIAL EX. 61; TRIAL EX. 67; TRIAL EX. 73; COLL. TRIAL EX. 77; COLL. TRIAL EX. 83; TRIAL EX. 100; TRIAL EX. 101. The engagement contracts then go on to provide that the retainer will be applied to post-petition services and "is based upon a blended hourly rate of **[**146]** \$165" with the fees "capped at the amount of the retainer listed above, regardless of the amount of services expended in excess thereof" and that "[t]he parties contemplate that the value of the post-petition services rendered . . . shall meet or exceed the total amount of the quoted retainer." See COLL. TRIAL EX. 4; TRIAL EX. 9; TRIAL EX. 15; TRIAL EX. 22; COLL. TRIAL EX. 29; TRIAL EX. 35; TRIAL EX. 45; COLL. TRIAL EX. 51; TRIAL EX. 55; TRIAL EX. 61; TRIAL EX. 67; TRIAL EX. 73; COLL. TRIAL EX. 77; COLL. TRIAL EX. 83; TRIAL EX. 100; TRIAL EX. 101. Clients are then advised that they are "entitled to request a final accounting of the fees charged by Attorney in this case and thereafter receive a refund of any amount of the retainer paid in excess of the post-petition services rendered." See COLL. TRIAL EX. 4; TRIAL EX. 9; TRIAL EX. 15; TRIAL EX. 22; COLL. TRIAL EX. 29; TRIAL EX. 35; TRIAL EX. 45; COLL. TRIAL EX. 51; TRIAL EX. 55; TRIAL EX. 61; TRIAL EX. 67; TRIAL EX. 73; COLL. TRIAL **[*666]** EX. 77; COLL. TRIAL EX. 83; TRIAL EX. 100; TRIAL EX. 101.

Despite the foregoing language in the engagement contracts, although attorneys and staff in the Knoxville office are required to keep track of the services performed by logging their activities in a database as or soon after services are rendered, neither the attorneys nor the paralegals contemporaneously record incremental time allotments with

⁵⁸ Amanda Stofan, managing attorney for Clark & Washington's Chattanooga **[**143]** office, testified that the "straddle" contract was used in Chattanooga from November 2009 through the end of April 2010, at which time that office stopped taking debtor post-dated checks as payment for its attorneys' fees.

⁵⁹ With the exception of the Lawsons, for whom the entire \$800.00 paid was stated to be their "flat fee," and the Harts, for whom the "flat fee" was **[**147]** stated to be \$201.00, the "flat fee" for the remaining Debtors executing post-Waldo engagement contracts was stated to be \$150.00.

those logged entries. JT. STIPS. ¶ 5. Additionally, Clark & Washington does not routinely provide itemized statements or accountings of post-petition services to debtors. In fact, Mr. Burroughs testified that only one debtor has asked for an accounting and only after an inquiry by the U.S. Trustee's office. Ms. Stofan testified that none of the firm's Chattanooga clients has requested an accounting, nor has that office ever provided a client with an itemized statement of services rendered. JT. STIPS. ¶ 9.

As for what each of the Debtors understood, their testimony clearly evidences that each of them thought that they were paying a flat fee for their bankruptcy case. When asked how much Clark & Washington was going [**148] to charge for doing the pre-petition work and how much would be charged for the post-petition work, Ms. Lawson testified that it wasn't specified that a certain amount would be designated for either, but that "[t]hey just said everything would be in that \$800.00. Everything would be included in that." COLL. TRIAL EX. 11 [K. Lawson] at pg.15, ln.11-22; pg.18, ln.15-pg.19, ln.6. Similarly, Ms. Newman testified that she did not realize she would be charged different amounts for the work performed by Clark & Washington pre-petition and post-petition, that she understood the entire fee to cover everything. TRIAL EX. 30 pg.213, ln.4-11. Ms. Dickerson testified that she understood that the attorney fee would cover their whole bankruptcy. TRIAL EX. 17 pg.187, ln.17-pg.188, ln.10. Ms. Zick testified that she simply thought the cost of her bankruptcy was a thousand or so dollars. TRIAL EX. 25 pg.13, ln.1-8. Ms. Woods' mother testified that she and her daughter understood the fee to be \$1,250.00 for the entire bankruptcy case. TRIAL EX. 47 pg.160, ln.22-pg.161, ln.5. Ms. Sanchez testified that she and Mr. Sanchez were actually quoted \$1,250.00 as the entire fee for filing their case by the person [**149] they met with at Clark & Washington, as did Mr. Cox, Mr. Hoffman, Ms. Vittetoe, the McGees, and Ms. Womble, TRIAL EX. 37 pg.11, ln.6-19; TRIAL EX. 69 pg.220, ln.5-20; COLL. TRIAL EX. 51 pg.9, ln.9-11; TRIAL EX. 75 pg.106, ln.1-8; TRIAL EX. 82 pg.5, ln.8-18; TRIAL EX. 57 pg.32, ln.5-14. Additionally, Mr. Aaron testified at his meeting of creditors that all he remembered was that he had to pay \$350.00 in advance plus provide post-dated checks totaling \$1,250.00. TRIAL EX. 79 pg.163, ln.14-pg. 164, ln.14.

When questioned about the retainer at trial, Mr. Burroughs testified that, pursuant to the terms of the engagement contracts, any unused portions should be refunded. He then stated, however, that Clark & Washington attorneys and paralegals do not keep track of their time and do not bill at an hourly rate and that the firm has not returned any unused retainers to debtors. Additionally, Mr. Burroughs testified that the Debtors were aware, on the dates they signed their contracts, the total amount of attorneys' fee to be charged,

inclusive of both the \$150.00 pre-petition fee and the agreed upon post-petition "retainer" in the form of post-dated checks, and that receipt of payment in full [**150] of that retainer, through post-dated debtor or third-party checks, was a condition of and prerequisite to Clark & Washington filing any debtor's case. Similarly, Mr. Thomson [**667] testified that each Debtors' obligation to pay the entire amount of fees arose at the time the contract was executed and if not paid, the non-paying debtors would have been in breach of contract.

With respect to his Affidavit introduced into evidence as Trial Exhibit 97, Mr. Burroughs testified that he did not personally compile the time records attached thereto, but that paralegals in his firm estimated the time amounts based upon notes contained in a database kept by Clark & Washington, after which Mr. Burroughs reviewed the records and made revisions. No time records were kept within the database, and all time entries were based on estimates assigned by the paralegals who prepared the attachments. His testimony was corroborated by Ms. Stofan, who testified that although the "straddle" contract provides for a blended hourly rate of \$165.00 for attorneys and paralegals, she has never established an hourly rate and does not keep time records. Significantly, the time estimates were prepared pursuant to the court's [**151] directives set forth in the Pretrial Order entered on May 14, 2010, and not periodically as each case progressed. The \$165.00 "blended hourly rate" allegedly charged by Clark & Washington for post-petition services appears to be nothing more than a convenient figure to be utilized in estimating the post-petition fees in the unlikely event a debtor should request an accounting. However, as evidenced by the court's calculations set forth earlier in each Debtors' factual section, the \$165.00 "blended hourly rate" is merely a fiction. Clearly, Clark & Washington never intended to account to these Debtors for the unused portion of any attorneys' fee.

Mr. Thomson's and Mr. Burroughs' s testimony that the "straddle" contract provides a true breakdown between pre- and post-petition fees is also contradicted by the receipts issued to the respective debtors in each case which contains a blocked-off section providing the following information:

PERSONAL CHECK POLICY:

1. Checks are verified prior to filing your case
2. Your case will not be filed until the full amount due is paid in advance
3. No personal checks if you have NSF Debts
4. There will be a \$25.00 charge for each returned check

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5. No out of **[**152]** state or starter checks

6. All fees paid are not refundable

COLL. TRIAL EX. 4; TRIAL EX. 10; TRIAL EX. 16; TRIAL EX. 23; COLL. TRIAL EX. 29; TRIAL EX. 36; TRIAL EX. 42; TRIAL EX. 46; TRIAL EX. 52; TRIAL EX. 56; TRIAL EX. 62; TRIAL EX. 68; TRIAL EX. 74; TRIAL EX. 78; COLL. TRIAL EX. 83.⁶⁰ The receipts, with the exception of the Harts' and McGees', contradicts Mr. Burroughs's testimony that Clark & Washington's Knoxville office does not pursue its clients for payment on post-dated checks returned for insufficient funds. Also, with the exception of the *Hart* and *McGee* cases, item 6 contravenes the provision in each Engagement Contract that "Client is entitled to . . . receive a refund of any amount of the retainer paid in excess of the value of the post-Petition services rendered." See TRIAL EX. 9; TRIAL EX. 15; TRIAL EX. 22; COLL. TRIAL EX. 29; TRIAL EX. 35; TRIAL EX. 45; COLL. TRIAL EX. 51; TRIAL EX. 55; TRIAL EX. 61; TRIAL EX. 67; TRIAL EX. 73; COLL. TRIAL EX. 77; TRIAL EX. 100; TRIAL EX. 101.

[*668] With **[**153]** respect to post-dated checks received from debtors and written on debtor accounts, the message in *Waldo* is clear: "It is not proper for a bankruptcy attorney to accept post-dated checks from a Chapter 7 debtor client, and the use of [this] method of fee payment has been consistently rejected by bankruptcy courts." *Waldo*, 417 B.R. at 886 (citations omitted). Under no type of contract will the court condone acceptance of post-dated checks from debtors written on their accounts, to be cashed post-petition, as payment of attorneys' fees. As discussed in detail, "there are serious ethical implications in such a practice," raising "the question and the appearance" of a conflict of interest between Clark & Washington and the affected debtors. *Waldo*, 417 B.R. at 886-87.⁶¹ Clark & Washington's attempts to camouflage its flat

fee by bifurcating it into a minimal pre-petition amount and a much larger post-petition amount is disingenuous at best, especially in light of the evidence that in none of the cases presently before the court did the assigned time for services rendered come anywhere close to equaling the "retainer" amount multiplied by the \$165.00 "blended hourly rate."

The court also finds the practice of accepting post-dated checks from third parties to be suspect and borderline violative of the Bankruptcy Code's prohibition on advising debtors to incur debt in anticipation of filing for bankruptcy. *Section 526(a)* states that debt relief agencies — including attorneys — shall not do any of the following:

- (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 **[**156]** or proceeding under this title;
- (2) make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue and misleading, or that upon the exercise of **[*669]** reasonable care, should have

Transactions.

(a) A lawyer shall not . . . knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; and
- (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) The client consents thereto in a writing signed by the client.

⁶⁰ Items 4 and 6 are not a part of the PERSONAL CHECK POLICY contents set forth in the receipts issued by Clark & Washington to the Harts and the McGees. COLL. TRIAL EX. 4; COLL. TRIAL EX. 83.

⁶¹ Specifically, **[**154]** *Waldo* states the following:

As raised by many of the courts examining the issue of post-dated checks, there are serious ethical implications in such a practice, and the same is true here — that by accepting post-dated checks for dischargeable debts and not advising their clients that the debts were at least potentially dischargeable, Clark & Washington and Mr. Crawford created a conflict of interest with the Debtors under Tennessee's disciplinary rules. Rule 1.8(a) of the Rules of Professional Conduct states, in material part, as follows:

HN3 Rule 1.8 Conflict of Interest; Prohibited

Tenn. Sup. Ct. R. 8, Rule 1.8(a). **HN4** As stated in **[**155]** the official comments to Rule 1.8, "[a]s a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions, a review by independent counsel on behalf of the client is advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage." OFF. CMTS., *TENN. SUP. CT. R. 8, RULE 1.8(A)*. Accordingly, "[t]he existence of a conflict of interest does not require bad motive or intent. Most often it arises where the attorney's duty to one client conflicts with his/her duty to another or with the attorney's self-interest." *In re Martin*, 197 B.R. 120, 128 (Bankr. D. Colo. 1996).

Waldo, 417 B.R. 886.

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been known by such agency to be untrue or misleading;

(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; or

(4) advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. § 526(a); see 11 U.S.C. § 101(12A) (2006) (defining "debt relief agency" in material part as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other [**157] valuable consideration[.]"); Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1332, 176 L. Ed. 2d 79 (2010). In Milavetz, the Supreme Court held that "§ 526(a)(4)[], which is best understood to provide an additional safeguard against the practice of loading up on debt prior to filing,] prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." Milavetz, 130 S. Ct. at 1336.

Without finding conclusively that Clark & Washington has violated § 526(a)(4), the court is nevertheless troubled by the acceptance of third-party post-dated checks. With respect to the firm's procedure concerning third party checks, Mr. Burroughs testified that debtors are advised that they can ask a family member or neighbor to "gift" them the attorneys' fee, with the understanding that there is no requirement for the debtors to repay them, but that he never advised clients to take out a pre-petition loan from any source to fund the attorneys' fees. He also testified that there is no pre-petition, dischargeable debt owed to the third parties because the fee is earned and paid post-petition. Likewise, Mr. Thomson argued [**158] that acceptance of third-party post-dated checks, as well as any attempts to collect upon them, does not violate Waldo because §§ 362(a) and 524(a) do not apply to such payments made by third parties.

Messrs. Burroughs and Thomson's testimony, however, contradicts testimony offered by the various Debtors with respect to what was intended when they were advised by Clark & Washington to tender third-party post-dated checks. For example, Ms. Lawson testified that she and her husband

are reimbursing Mr. Perlioni, the family friend who wrote the post-dated checks for their bankruptcy case, with cash and that he never intended to 'gift' them the money or to pay for their attorneys' fees. COLL. TRIAL EX. 11 [K. Lawson] pg.8, ln.10-pg.10, ln.9. Similarly, Mr. Cox testified that his girlfriend provided the post-dated checks but it was never intended that she would pay for his bankruptcy case. TRIAL EX. 69 pg.223, ln.13-22; pg.230, ln.18-pg.231, ln.9. Likewise, Ms. Vittetoe testified that her mother-in-law had provided the post-dated checks, but she and Mr. Vittetoe were repaying her the \$223.80 prior to each check clearing the bank, TRIAL EX. 75 pg.108, ln.22-pg.109, ln.5; pg.110, ln.7-pg.111, [**159] ln.6, and Ms. Womble testified that she had agreed to repay her mother, from whom she had received the post-dated checks, when each one cleared the bank. Trial Ex. 57, pg.33, ln.14-21.

[*670] Even more telling as to the true nature of these third-party payments, the Luttrells testified to the following:

Q. So your attorneys told you you couldn't write your own post-dated checks?

A. [Ms. Luttrell] At first, when we met with them in December, they said that we could do our own post-dated checks, but when we met with them again in January they said that that was not going to work anymore, that we could either, I guess, I don't know if they said we could pay it all up front —

A. [Mr. Luttrell] Yeah, we could pay it up front —

A. [Ms. Luttrell] — or we could do third-party.

A. [Mr. Luttrell] — or we could do third-party.

A. [Ms. Luttrell] And that's what we chose.

A. [Mr. Luttrell] And they would hold the checks and we could bring the money in and they would, you know, get the check — we could get the checks back or whatever.

A. [Ms. Luttrell] Or they would shred them through.

...

A. [Mr. Luttrell] So we just let them run them through and we pay her sister.

Q. And have you paid her sister any payments [**160] yet?

A. [Mr. Luttrell] Yes.

A. [Ms. Luttrell] Yes. One check's went through and we paid for it.

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TRIAL EX. 63, pg.49, ln.10-pg.50, ln.9. Similarly, Mr. Aaron testified to the following:

Q. And so when you met with them did they talk to you about how you could pay your fees?

A. Yes.

Q. Okay. And what were — what did they tell you about that?

A. They told me I could pay it third-party by having, you know, one of my relatives give them five checks, they can put it through the bank or I could come up there and pay them off as — as they come due, three days before they come due.

Q. Okay. They told you — did you — did you — did the third — was the third party named James Carey?

A. Yes, ma'am.

Q. And did Mr. Carey give you the money or did he loan you the money?

A. He loaned me the checks.

Q. He loaned you the checks?

A. Yes.

Q. Did — what was your intent about the checks?

A. I'd pay them off before — you know, go ahead and pay them off as I — you know.

Q. Did Clark & Washington tell you that you could arrange it that way, where you'd come up and pick up the checks before they were cashed?

A. Yeah.

Q. Okay. They told you. Were they aware that you were just borrowing these checks —

A. Yeah.

Q. — [****161**] from Mr. Carey?

A. Yeah.

TRIAL EX. 79 pg.164, ln.4-pg.165, ln.9. In fact, as can be gleaned from the Debtors' testimony, it appears that not only did Clark & Washington know that many — if not a majority — of debtors using third-party checks were, in fact, repaying those third parties, but Clark & Washington, through its attorneys and staff, were instructing debtors to bring in post-

dated checks from third-parties while advising [****671**] them that, if they so desired, the debtors themselves could come in and replace the post-dated checks with cash prior to the dates upon which the checks were to be deposited.

To state it plainly, the court finds that a pre-petition contract which fixes or predetermines the total amount of the fee a debtor is required to pay for both pre- and post-petition services establishes a "flat fee" under the authority of *Waldo*, and the collecting of post-dated checks is prohibited, irrespective of the source. As discussed, a true "saddle" contract contemplates a billing relationship, wherein services are rendered post-petition and the client is billed an hourly rate post-petition based upon the time spent, after the services have actually been performed. None of the Engagement [****162**] Contracts in these contested matters complies with this basic concept and none complies with the court's decision in *Waldo*.⁶²

B

With respect to the second category, the inaccurate Compensation Disclosure Statements and unsigned Amended Statements of Financial Affairs filed by Clark & Washington, the court finds that although Clark & Washington has acknowledged its mistakes, the fact remains that it did not take the care and attention necessary to ensure that the documents it filed with the court were accurate and properly filed. The statutory authority and procedural rules relating to the disclosure of compensation were fully addressed in *Waldo*. The court examined the combined role played by § 329(a) and *Rule 2016(b) of the Federal Rules of Bankruptcy Procedure* [****163**] in providing a system for monitoring of attorneys' fees, allowing courts to "carefully scrutinize" compensation paid by debtors and stressed that full and accurate disclosure was "mandatory" and "[a]nything less than the full measure of disclosure" is unacceptable." *Waldo*, 417 B.R. 893 (citations omitted). As such, it is not necessary for the court to revisit these issues again in great detail other than to reiterate that *HN5* "[t]he failure to comply with the disclosure rules is a sanctionable violation, even if proper disclosure would have shown that the attorney had not actually violated any Bankruptcy Rules, and sanctions may also be imposed for negligent or inadvertent failures to

⁶² Moreover, because the fee arrangements in each of the Debtors' cases constitutes a pre-petition "flat fee" obligation, as the court has previously held, by depositing and/or cashing after discharge any payments — whether by cash or post-dated check — received from or on behalf of any of the Debtors for satisfaction of that fee, Clark & Washington and Mr. Burroughs may have violated the discharge injunction of *11 U.S.C. § 524(a) (2006)*. *Waldo*, 417 B.R. at 890.

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disclose." [Waldo, 417 B.R. at 893](#) (citations omitted).

Clark & Washington and Mr. Burroughs do not deny that they filed inaccurate [Rule 2016\(b\)](#) compensation disclosure statements in the *Lawson, Hart, Newman, Soles, Sanchez, Dickerson, Zick, Cox, Hoffman, Luttrell, Vittetoe, McGee, and Womble* cases. Mr. Burroughs testified that following entry of the *Hart* show cause order, he discovered errors on several of the [Rule 2016\(b\)](#) Compensation Disclosure Statements, and he filed amended disclosures for all Chapter [*164] 7 cases filed by Clark & Washington post-Waldo to remove the straddle contract language, which had been inserted on the firm-wide template by its main office in Atlanta. The court's review of the Compensation Disclosure Statements in these contested matters not only confirms that the original disclosures made by Clark & Washington and Mr. Burroughs in each case were incomplete, [*672] but also that, notwithstanding Mr. Burroughs's attempts to correct them, the Amended Compensation Disclosure Statements he filed still do not reflect the true nature of the respective Debtors' Engagement Contracts. In fact, as of the date of this Memorandum, Clark & Washington and Mr. Burroughs still have not provided full and accurate disclosure of the firm's fee arrangements with some of these Debtors.

Mr. Burroughs also testified that he had a conversation with the attorney for the U.S. Trustee, who brought it to his attention that the original Statements of Financial Affairs in many of the cases were inaccurate with respect to question 9, and that following that conversation, he prepared and filed Amended Statements of Financial Affairs on behalf of the Lawsons, the Harts, Ms. Newman, the Soleses, the Sanchezes, [*165] the Dickersons, Ms. Zick, the Luttrells, Ms. Vittetoe, and Ms. Womble in an attempt to more accurately reflect the payment arrangements, but in his haste to revise and file the Amended Statements of Financial Affairs, he did not send them to the respective Debtors for execution. Accordingly, he and Clark & Washington do not deny that they filed the Amended Statement of Financial Affairs on behalf of the Debtors in the *Lawson, Newman, Soles, Sanchez, Dickerson, Zick, Cox, Hoffman, Luttrell, Vittetoe, and Womble* cases without first obtaining the Debtors' permission and handwritten signatures as required by section III.A.3 of the Administrative Procedures for Electronic Case Filing, effective May 17, 2005, as amended, which states in material part:

III. Electronic Filing

A. Signatures

....

3. Signature of Debtor on Petition, Lists, Schedules, Statements, and Other Documents

HN6 Notwithstanding paragraph 2⁶³ immediately above, any petition, list, schedule, statement, and amendment thereto that requires the debtor's signature may be filed electronically by a Registered User with the debtor's signature indicated as "/s/" followed by the typed name of the debtor, provided the debtor has actually [*166] signed a copy of the document and the filing attorney retains the signed document as required by paragraph 5⁶⁴ below.

4. Attorney Representation

Electronic filing of a verified document by an attorney is a representation for the purposes of [Fed. R. Bankr. P. 9011](#)⁶⁵ that the person or persons required [*673] to sign and verify the document did in fact sign and verify it before it was filed.

E.D. Tenn. Admin. Procs. at ¶ III.A. See JT. STIPS. ¶ 4. In explanation, Mr. Burroughs testified that he was merely

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2. Signatures on Affidavits, Declarations, Verified Documents, and Reaffirmation Agreements

HN7 Except as provided in paragraph 3 immediately below, each affidavit, unsworn declaration under penalty of perjury, verified document, or reaffirmation agreement filed or submitted for filing must contain actual handwritten signatures. The "/s/" type of signature is not permitted on these types of documents. Registered Users filing such documents should [*167] scan and file them electronically after they have been signed (and, in the case of an affidavit, signed by the notary public and affixed with a notarial seal).

E.D. Tenn. Admin. Procs. at ¶ III.A.2.

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5. Retention of Documents

HN8 With respect to the documents described in paragraph 3 above, original documents bearing the debtor's actual signature must be maintained in paper form by the filing attorney until two years after the closing of the case. On request of the court, the attorney must provide such documents for review.

E.D. Tenn. Admin. Procs. at ¶ III.A.5.

⁶⁵ **HN9** "When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original." [Fed. R. Bankr. P. 9011\(f\)](#).

437 B.R. 609, *673; 2010 Bankr. LEXIS 3022, **167

wanting to fix the errors in Clark & Washington's earlier filings and that it was never his intention to misled the court or the U.S. Trustee by filing the Amended Statements of Financial Affairs without first obtaining the Debtors' handwritten signatures.

Because there is no dispute that Clark & Washington and Mr. Burroughs filed inaccurate [Rule 2016](#) Compensation Disclosure Statements and improperly and in violation of the Administrative Procedures for Electronic Case Filing, incorporating [Rule 9011](#), the question becomes whether disgorgement is the appropriate sanction or if, as the U.S. Trustee asserts, something harsher is required to deter future noncompliance by Clark & Washington and Mr. [**168] Burroughs with respect to all of their filings.⁶⁶

HN10 [Section 105](#) outlines certain powers of the court and imposes upon the court a duty to uphold the provisions of the Bankruptcy Code in [subsection \(a\)](#) by authorizing the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." [11 U.S.C. § 105\(a\) \(2005\)](#). The court may use its [§ 105\(a\)](#) equitable powers "in furtherance of the goals of the [Bankruptcy] Code," [Childress v. Middleton Arms, L.P. \(In re Middleton Arms, L.P.\)](#), [934 F.2d 723, 725 \(6th Cir. 1991\)](#), and included within the court's [§ 105\(a\)](#) powers is the authority to find a [**169] party in contempt. [Pertuso v. Ford Motor Credit Co.](#), [233 F.3d 417, 423 n.1 \(6th Cir. 2000\)](#). Civil contempt is generally used by courts to coerce an individual into performing or obeying an order of the court and to compensate the party injured by the contemptuous actions. [United States v. Bayshore Assocs., Inc.](#), [934 F.2d 1391, 1400 \(6th Cir. 1983\)](#); [In re Walker](#), [257 B.R. 493, 497 \(Bankr. N.D. Ohio 2001\)](#) ("Compensatory contempt orders compensate the party harmed by the other party's contemptuous actions; coercive orders seek to cajole the party in contempt to act in the manner desired by the court.") (quoting [Consol. Rail Corp. v. Yashinsky](#), [170 F.3d 591, 595 \(6th Cir. 1999\)](#)). "Contempt must be shown by clear and convincing evidence that the alleged contemnor violated a definite and specific court order which required the performance or the nonperformance of an act with knowing of that court order." [In re Ashley](#), [2007 Bankr. LEXIS 3639, at *2, 2007 WL](#)

[3125128, at *1 \(Bankr. N.D. Ohio Oct. 24, 2007\)](#) (citing [Walker](#), [257 B.R. at 497](#)). Nevertheless, "[w]illfulness is not an essential element of civil contempt." [In re Crabtree](#), [39 B.R. 702, 710 \(Bankr. E.D. Tenn. 1984\)](#).

HN11 Courts are "afforded [**170] wide discretion in fashioning an equitable remedy for civil contempt[.]" [McGregor v. Chierico](#), [206 F.3d 1378, 1385 n.5 \(11th Cir. 2000\)](#), and the failure to comply with the disclosure requirements is a sanctionable violation, [**674] in itself grounds for disgorgement of fees. [Waldo](#), [417 B.R. at 893](#) (citing cases). As a result of their inaccurate disclosures in [Waldo](#), Clark & Washington was required to disgorge all fees received from the Debtors in those seven cases, making the decision to voluntarily return \$123,742.00 in numerous other cases. And yet, within days after the [Waldo](#) opinion was entered, Clark & Washington once again began filing inaccurate [Rule 2016](#) Compensation Disclosure Statements which were followed by inaccurate Amended Compensation Disclosure Statements and subsequently by unverified and unauthorized Amended Statements of Financial Affairs.⁶⁷

III

Although the majority [**171] of these issues were addressed and, in the court's mind, decided in [Waldo](#), in order to avoid any further litigation as to what is and what is not allowed concerning fee arrangements in Chapter 7 cases and the disclosure of compensation requirements in all cases filed in the Bankruptcy Court for the Eastern District of Tennessee, Northern Division, the court will summarize, reiterating much of what it has held previously.

First, the Engagement Contracts entered into between Clark & Washington and each of the fifteen Debtors creates a pre-petition obligation for payment of a lump sum or flat fee, and any portion of that lump sum or flat fee not paid to the firm pre-petition has been discharged in fourteen of these cases. The purported bifurcation of fees for pre- and post-petition services is a fiction, as is the concept that the Debtors paid a retainer to be applied against services rendered based upon the \$165.00 "blended hourly rate." It has been established that Clark & Washington does not maintain time records for its clients and that it only created the estimated time records attached to Mr. Burroughs's Affidavit entered into evidence as Collective Trial Exhibit 97 after being directed [**172] to do so by the court. Additionally, it has been established that the

⁶⁶ The U.S. Trustee has requested, as additional sanctions, the following: the disallowance of fees in their entirety, termination of Clark & Washington and Zachary Burroughs' status as Registered Users of the court's electronic case filing system, requiring all attorneys with Clark & Washington to attend continuing legal education courses supplemental to those required by the State of Tennessee, and/or the suspension of Clark & Washington and its attorneys to practice law in the United States Bankruptcy Court for the Eastern District of Tennessee.

⁶⁷ In 2009, Clark & Washington's Knoxville office filed approximately 1,900 Chapter 7 cases in this court's Northern Division, and from January 1 through the date of this Memorandum, Mr. Burroughs and the Knoxville office of Clark & Washington have filed approximately 1,000 Chapter 7 cases in the Northern Division.

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amount of fees charged greatly exceeds the \$165.00 "blended hourly rate." Furthermore, as was evident from the testimony of the respective Debtors, none of them understood that they were to be paying under a bifurcated contract, but instead, each of them understood that the attorneys' fee charged by Clark & Washington was a lump sum they were required to pay for the entire bankruptcy, to be tendered prior to filing.

Second, *HN12* in order to be a true "straddle" fee arrangement bifurcating pre- and post-petition services, the contract must clearly identify the services to be included within the pre-petition fee and the services to be included within the post-petition fee. It must also unambiguously disclose, at a minimum, that all pre-petition fees must be paid prior to filing and any unpaid pre-petition fee will be discharged and that all post-petition fees, which are not subject to the discharge, will be billed only when services are rendered and only for the specific amount of time for each activity at an agreed upon hourly rate for attorneys and a considerably lesser agreed upon hourly rate for para-professionals.⁶⁸ [*173] Attorneys may accept a pre-petition [*675] retainer to be billed against as long as the retainer is held in trust and drawn against as services are rendered, subject to time records being kept and debtors being periodically sent an itemized statement of the work performed and the retainer applied, without having to request the statement. Additionally, debtors must be made aware that they will receive any unused portion of the retainer once their case is concluded, again, without having to request it themselves.

Third, *HN13* it is unacceptable for attorneys to ask for and receive post-dated checks from debtors, irrespective of whether the checks are to be drawn on the debtors' personal accounts or a third party's account, and the payment of attorneys' fees through post-dated checks creates a conflict of interest under Rule 1.8(a) of the Tennessee Rules of Professional Responsibility. Additionally, the post-discharge deposit of any payments received from debtors or on their behalf for pre-petition fees may be, to the extent [*174] it could be considered an action to collect on a discharged debt, violative of the discharge injunction of *11 U.S.C. § 524(a)*.

Fourth, Clark & Washington and its Knoxville attorneys must file Compensation Disclosure Statements that accurately and fully reflect the fee arrangements with their clients. In the event the fee contract includes post-petition services, the nature of the anticipated services, hourly billing rate, and billing period should be disclosed. Additionally, each time an attorney receives post-petition compensation of any kind from

or on behalf of a debtor, a supplemental [Rule 2016\(b\)](#) Compensation Disclosure Statement must be filed.

Fifth, before filing any documents signed electronically by debtors, attorneys must have, in their possession, the original document containing the debtors' handwritten signature.

IV

The court finds that Clark & Washington and Mr. Burroughs have either chosen to ignore the *Waldo* decision or to utilize less than creative methods to circumvent the court's ruling in *Waldo*, not only in these fifteen cases but in other Chapter 7 cases filed in behalf of their debtor-clients since October 27, 2009. Because the sanction of disgorgement has proved [*175] an insufficient deterrent, the court will enhance the sanctions as follows:

1. Clark & Washington and Mr. Burroughs will, with the exception of the *McGee* case, No. 09-30353, be required to disgorge to the respective Debtors all attorney fees received pre- and post-petition and to return to the Debtors all post-dated checks, whether the Debtor or a third-party was the maker.
2. Clark & Washington and Mr. Burroughs will be required to disgorge \$300.00 to Joseph and April McGee in Case No. 10-30353 for their failure to file an accurate Compensation Disclosure Statement.
3. Clark & Washington and Mr. Burroughs will be sanctioned the sum of \$750.00 in all of these cases, with the exception of *McGee*, which sum is to be paid to the Clerk of the court for deposit to the United States Treasury.⁶⁹
- [*676] 4. Clark & Washington and Mr. Burroughs shall be required to certify their compliance with paragraphs 1, 2, and 3 herein within 30 days.
5. Clark & Washington and its attorneys representing debtors in Chapter 7 cases hereafter filed in the court's Northern Division, shall, commencing 10 days after the entry of the Orders accompanying this Memorandum, be required to append the following declaration under penalty of perjury as an attachment to the Compensation Disclosure Statement:

⁶⁹ The court wants to make it clear that this form of sanctions extends only to the cases presently before the court. Should the U.S. Trustee file disgorgement motions in other Chapter 7 cases filed by Clark & Washington and Mr. Burroughs pending in the court's Northern Division to the date of this memorandum, the court would not, in the absence of egregious facts differing from those presently at issue, [*176] anticipate enhancing the sanctions beyond disgorgement.

⁶⁸ Based upon the court's independent review of compensation disclosure statements in other matters, the average approved hourly rate for para-professionals in this area is \$75.00.

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I certify under penalty of perjury that prior to the signing of the employment contract by myself and the debtor[s] I was personally present while the debtor[s] read the contract; that I explained the agreed upon fee arrangement to the debtor[s]; that I inquired of the debtor[s] whether there were questions regarding the contract and fee arrangement, and answered those questions to the satisfaction of the debtor[s]; and that the compensation disclosure statement filed in this case correctly and accurately sets forth the fee agreement contained in the employment contract.

I also certify that the debtor[s], as required by Section III.A.3. of the Administrative ^[**177] Procedures for Electronic Case Filing, effective May 17, 2005, have actually signed a copy of all documents filed in this case containing an electronic signature.

The Compensation Disclosure Statement and Declaration shall both be dated and shall contain the signing attorney's handwritten signature.

6. Clark & Washington and Mr. Burroughs shall, pursuant to [Rules 9014\(c\)](#) and [7054\(b\) of the Federal Rules of Bankruptcy Procedure](#), be directed to pay all costs associated with the prosecution of these contested matters with the exception of *Hart*.

7. The obligations imposed on Clark & Washington and Mr. Burroughs in paragraph 5 above will remain in place for six (6) months unless, on motion of the United States Trustee filed prior to the expiration of the six (6) months, the court, for cause, extends this expiration date.

Orders consistent with this memorandum will be entered in each case.

FILED: August 31, 2010

BY THE COURT

/s/ RICHARD STAIR, JR.

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

 Caution
As of: August 18, 2016 9:43 AM EDT

United Student Aid Funds, Inc. v. Espinosa

Supreme Court of the United States

December 1, 2009, Argued; March 23, 2010, Decided

No. 08-1134

Reporter

559 U.S. 260; 130 S. Ct. 1367; 176 L. Ed. 2d 158; 2010 U.S. LEXIS 2750; 78 U.S.L.W. 4207; 63 Collier Bankr. Cas. 2d (MB) 428; Bankr. L. Rep. (CCH) P81,716; 52 Bankr. Ct. Dec. 254; 76 Fed. R. Serv. 3d (Callaghan) 364; 22 Fla. L. Weekly Fed. S 173

UNITED STUDENT AID FUNDS, INC., Petitioner v.
FRANCISCO J. ESPINOSA

Subsequent History: Sanctions allowed by [Espinosa v. United Student Aid Funds, Inc. \(In re Espinosa\)](#), 2011 Bankr. LEXIS 2305 (Bankr. D. Ariz., June 8, 2011)

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.
[Espinosa v. United Student Aid Funds](#), 553 F.3d 1193, 2008 U.S. App. LEXIS 28103 (9th Cir. Ariz., 2008)

Disposition: [553 F.3d 1193](#), affirmed.

Core Terms

confirmation, student loan, bankruptcy court, undue hardship, void, adversary proceeding, notice, dischargeable, provisions, summons, discharge order, jurisdictional, self-executing, requires, provides, deprivation, parties, fail to object, fail to serve, due process, courts, rights

Case Summary

Procedural Posture

The U.S. Court of Appeals for the Ninth Circuit held that confirming respondent Chapter 13 debtor's plan without finding undue hardship to discharge interest on a student loan under [11 U.S.C.S. § 523\(a\)\(8\)](#) in an adversary proceeding did not render the order void under [Fed. R. Civ. P. 60\(b\)\(4\)](#), and that, although petitioner creditor was not served a summons, it had notice of the plan and failed to object. Certiorari was granted.

Overview

[Rule 60\(b\)\(4\)](#) applied only where a judgment was premised on certain jurisdictional errors or due process violations

depriving notice or opportunity to be heard. The Bankruptcy Court's (BC) error was not jurisdictional. The failure to serve a summons violated [Fed. R. Bankr. P. 7004\(b\)\(3\)](#)'s procedural rights; it was not a violation of a constitutional right to due process. The creditor received actual notice of the filing and contents of the plan, satisfying due process. A failure to find undue hardship under [§ 523\(a\)\(8\)](#) was not a jurisdictional or notice failing that defined void judgments under [Rule 60\(b\)\(4\)](#). Given the clear and self-executing requirement for an undue hardship determination, the failure to find undue hardship before confirming the plan was a legal error. But the order remained enforceable and binding because the creditor had notice of the error and failed to object or appeal. The creditor's proof of claim for the student loan submitted it to the BC's jurisdiction on that claim. But, an assertion that bankruptcy courts were not obliged to direct a debtor to conform his plan to the requirements of [11 U.S.C.S. §§ 523\(a\)\(8\)](#), [1328\(a\)\(2\)](#), went too far.

Outcome

A unanimous court affirmed the judgment of the Court of Appeals for the Ninth Circuit. 1 opinion.

LexisNexis® Headnotes

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

HNI Under Chapter 13 of the Bankruptcy Code, a debtor may obtain a discharge of certain government-sponsored student loan debts only if failure to discharge that debt would impose an "undue hardship" on the debtor and his dependents. [11 U.S.C.S. §§ 523\(a\)\(8\)](#), [1328](#). The Federal Rules of Bankruptcy Procedure require bankruptcy courts to make this undue hardship determination in an adversary proceeding,

559 U.S. 260, *260; 130 S. Ct. 1367, **1367; 176 L. Ed. 2d 158, ***158

[Fed. R. Bankr. P. 7001\(6\)](#), which the party seeking the determination must initiate by serving a summons and complaint on his adversary. [Fed. R. Bankr. P. 7003](#), [7004](#), [7008](#).

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN2 Chapter 13 permits individual debtors to develop a plan to repay all or a portion of their debts over a period of time specified in the plan. A proposed bankruptcy plan becomes effective upon confirmation, [11 U.S.C.S. §§ 1324](#), [1325](#), and will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires, [11 U.S.C.S. § 1328\(a\)](#).

Civil Procedure > Appeals > Amicus Curiae

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Civil Procedure > US Supreme Court Review > General Overview

HN3 The United States Supreme Court does not ordinarily address issues raised only by amici.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

HN4 A discharge under Chapter 13 is broader than the discharge received in any other Chapter of the Bankruptcy Code. Chapter 13 nevertheless restricts or prohibits entirely the discharge of certain types of debts. [11 U.S.C.S. § 1328\(a\)](#) provides that when a debtor has completed the repayments required by a confirmed plan, a bankruptcy court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under [11 U.S.C.S. § 502](#), except, inter alia, any debt of the kind specified in [11 U.S.C.S. § 523\(a\)\(8\)](#). [11 U.S.C.S. § 1328\(a\)\(2\)](#). [Section 523\(a\)\(8\)](#), in turn, specifies certain student loan debts unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents. The Federal Rules of Bankruptcy Procedure require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to

Discharge > Student Loans

HN5 See [11 U.S.C.S. § 523\(a\)\(8\)](#).

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Judgments

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN6 Ordinarily, the finality of a Bankruptcy Court's orders following the conclusion of direct review would stand in the way of challenging their enforceability. [Fed. R. Civ. P. 60\(b\)](#), however, provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances. Specifically, [Rule 60\(b\)\(4\)](#) authorizes the court to relieve a party from a final judgment if the judgment is void.

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN7 A void judgment is a legal nullity. Although the term "void" describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. The list of such infirmities is exceedingly short; otherwise, [Fed. R. Civ. P. 60\(b\)\(4\)](#)'s exception to finality would swallow the rule.

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN8 A judgment is not void simply because it is or may have been erroneous. Similarly, a motion under [Fed. R. Civ. P. 60\(b\)\(4\)](#) is not a substitute for a timely appeal. Instead, [Rule 60\(b\)\(4\)](#) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN9 Federal courts considering [Fed. R. Civ. P. 60\(b\)\(4\)](#) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an "arguable basis" for jurisdiction.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

559 U.S. 260, *260; 130 S. Ct. 1367, **1367; 176 L. Ed. 2d 158, ***158

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Commencement of Adversary Proceedings

Bankruptcy Law > Procedural Matters > Jurisdiction > General Overview

HN10 11 U.S.C.S. § 523(a)(8)'s statutory requirement that a bankruptcy court find undue hardship before discharging a student loan debt is a precondition to obtaining a discharge order, not a limitation on the bankruptcy court's jurisdiction. The requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Federal Rules of Bankruptcy Procedure, Fed. R. Bankr. P. 7001(6), which are procedural rules adopted by the Bankruptcy Court for the orderly transaction of its business that are not jurisdictional.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN11 Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN12 11 U.S.C.S. § 523(a)(8) provides that student loan debts guaranteed by governmental units are not dischargeable unless a court finds undue hardship. 11 U.S.C.S. § 523(a)(8).

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

Bankruptcy Law > Individuals With Regular Income > Plans > Plan Contents

HN13 11 U.S.C.S. § 1325(a)(1) instructs bankruptcy courts to confirm only those plans that comply with the applicable provisions of the Bankruptcy Code.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN14 11 U.S.C.S. § 523(a)(8) does not limit the bankruptcy court's jurisdiction over student loan debts. Nor does the provision impose requirements that, if violated, would result in a denial of due process. Instead, § 523(a)(8) requires a court to make a certain finding before confirming the discharge of a student loan debt. It is true that this requirement is self-executing. But that means only that the

bankruptcy court must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court's failure to make the finding renders its subsequent confirmation order void for purposes of Fed. R. Civ. P. 60(b)(4).

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

HN15 11 U.S.C.S. § 1328(a) provides that, upon completion of a Chapter 13 plan, a bankruptcy court shall grant the debtor a discharge of all debts provided for by the plan except any debt of the kind specified in 11 U.S.C.S. § 523(a)(5), (8), (9). Section 1328(a) thus incorporates by reference § 523(a)(8), including that paragraph's self-executing requirement for an undue hardship determination, but does not incorporate the "does not discharge" text of § 523(a) itself.

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN16 Fed. R. Civ. P. 60(b)(4) does not provide a license for litigants to sleep on their rights.

Bankruptcy Law > ... > Plans > Plan Confirmation > Effects of Confirmation

Civil Procedure > Judgments > Relief From Judgments > Void Judgments

HN17 Fed. R. Civ. P. 60(b)(4) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute. Where a party is notified of a bankruptcy plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

HN18 A Chapter 13 plan that proposes to discharge a student loan debt without a determination of undue hardship violates 11 U.S.C.S. §§ 523(a)(8), 1328(a)(2). Failure to comply with this self-executing requirement should prevent confirmation of the plan even if the creditor fails to object, or to appear in the proceeding at all. That is because § 1325(a) instructs a bankruptcy court to confirm a plan only if the court finds, inter alia, that the plan complies with the "applicable

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provisions" of the Bankruptcy Code. *11 U.S.C.S. § 1325(a)*. Thus, the Code makes plain that bankruptcy courts have the authority -- indeed, the obligation -- to direct a debtor to conform his plan to the requirements of *§§ 1328(a)(2)* and *523(a)(8)*.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Embezzlement & False Representations

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Malicious & Willful Injury

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

HN19 *11 U.S.C.S. § 523(a)(8)* renders student loan debt presumptively nondischargeable "unless" a determination of undue hardship is made. In contrast, the debts listed in *§ 523(c)*, which include certain debts obtained by fraud or willful and malicious injury by the debtor, *§ 523(a)(6)*, are presumptively dischargeable "unless" the creditor requests a hearing to determine the debt's dischargeability.

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

HN20 Courts have the discretion, but not the obligation, to raise on their own initiative certain nonjurisdictional barriers to suit. *11 U.S.C.S. § 1325(a)* does more than codify this principle; it requires bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.

Bankruptcy Law > Discharge & Dischargeability > Exceptions to Discharge > Student Loans

Bankruptcy Law > ... > Plans > Plan Confirmation > General Overview

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Causes of Action

Civil Procedure > ... > Service of Process > Waiver of Process & Service > General Overview

HN21 Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure prevent the parties from stipulating to the underlying facts of undue hardship under *11 U.S.C.S. § 523(a)(8)*, and neither prevents the creditor from waiving service of a summons and complaint. *Fed. R. Bankr. P. 7004; Fed. R. Civ. P. 4(k)*. But, to comply with *§ 523(a)(8)*'s directive, the bankruptcy court must make an independent determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding.

Bankruptcy Law > Procedural Matters > Professional

Responsibility

HN22 Debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings, *Fed. R. Bankr. P. 9011*. The specter of such penalties should deter bad-faith attempts to discharge student loan debt without the undue hardship finding Congress required. And to the extent existing sanctions prove inadequate to this task, Congress may enact additional provisions to address the difficulties.

Lawyers' Edition Display

Decision

[***158] Bankruptcy Court's order confirming Chapter 13 debtor's plan held not void under *Fed. R. Civ. P. 60(b)(4)* for failure to meet *11 U.S.C.S. § 523(a)(8)* requirement that undue hardship supporting discharge of student-loan interest be found in adversary proceeding.

Summary

Procedural posture: The U.S. Court of Appeals for the Ninth Circuit held that confirming respondent Chapter 13 debtor's plan without finding undue hardship to discharge interest on a student loan under *11 U.S.C.S. § 523(a)(8)* in an adversary proceeding did not render the order void under *Fed. R. Civ. P. 60(b)(4)*, and that, although petitioner creditor was not served a summons, it had notice of the plan and failed to object. Certiorari was granted.

Overview: *Rule 60(b)(4)* applied only where a judgment was premised on certain jurisdictional errors or due process violations depriving notice or opportunity to be heard. The Bankruptcy Court's (BC) error was not jurisdictional. The failure to serve a summons violated *Fed. R. Bankr. P. 7004(b)(3)*'s procedural rights; it was not a violation of a constitutional right to due process. The creditor received actual notice of the filing and contents of the plan, satisfying due process. A failure to find undue hardship under *§ 523(a)(8)* was not a jurisdictional or notice failing that defined void judgments under *Rule 60(b)(4)*. Given the clear and self-executing requirement for an undue hardship determination, the failure to find undue hardship before confirming the plan was a legal error. But the order remained enforceable and binding because the creditor had notice of the error and failed to object or appeal. The creditor's proof of claim for the student loan submitted it to the BC's jurisdiction on that claim. But, an assertion that bankruptcy courts were not obliged to direct a debtor to conform his plan to the requirements of *11 U.S.C.S. §§ 523(a)(8), 1328(a)(2)*, went too far.

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[***159] **Outcome:** A unanimous court affirmed the judgment of the Court of Appeals for the Ninth Circuit. 1 opinion.

Headnotes

BANKRUPTCY §87 BANKRUPTCY §179 > STUDENT
LOANS -- DISCHARGE -- PROCEDURE > Headnote:

LEdHN[1] [1]

Under Chapter 13 of the Bankruptcy Code, a debtor may obtain a discharge of certain government-sponsored student loan debts only if failure to discharge that debt would impose an “undue hardship” on the debtor and his dependents. *11 U.S.C.S. §§523(a)(8), 1328*. The Federal Rules of Bankruptcy Procedure require bankruptcy courts to make this undue hardship determination in an adversary proceeding, *Fed. R. Bankr. P. 7001(6)*, which the party seeking the determination must initiate by serving a summons and complaint on his adversary. *Fed. R. Bankr. P. 7003, 7004, 7008*.

BANKRUPTCY §179 BANKRUPTCY §420.1 > REPAYMENT
PLAN -- DISCHARGE > Headnote:

LEdHN[2] [2]

Chapter 13 permits individual debtors to develop a plan to repay all or a portion of their debts over a period of time specified in the plan. A proposed bankruptcy plan becomes effective upon confirmation, *11 U.S.C.S. §§1324, 1325*, and will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires, *11 U.S.C.S. § 1328(a)*.

AMICUS CURIAE §1 > ISSUES RAISED > Headnote:

LEdHN[3] [3]

The United States Supreme Court does not ordinarily address issues raised only by amici.

BANKRUPTCY §87 BANKRUPTCY §179 BANKRUPTCY
§420.1 > DISCHARGE -- CHAPTER 13 -- CONFIRMED PLAN
-- STUDENT LOANS > Headnote:

LEdHN[4] [4]

A discharge under Chapter 13 is broader than the discharge received in any other Chapter of the Bankruptcy Code. Chapter 13 nevertheless restricts or prohibits entirely the discharge of certain types of debts. *11 U.S.C.S. § 1328(a)* provides that when a debtor has completed the repayments required by a confirmed plan, a bankruptcy court shall grant

the debtor a discharge of all debts provided for by the plan or disallowed under *11 U.S.C.S. § 502*, except, inter alia, any debt of the kind specified in *11 U.S.C.S. § 523(a)(8), 11 U.S.C.S. § 1328(a)(2)*. Section *§ 523(a)(8)*, in turn, specifies certain student loan debts unless excepting such debt from discharge would impose an undue hardship on the debtor and the debtor's dependents. The Federal Rules of Bankruptcy Procedure require a party seeking to determine the dischargeability of a student loan debt to commence an adversary proceeding by serving a summons and complaint on affected creditors.

BANKRUPTCY §179 > DISCHARGE -- EDUCATIONAL
BENEFIT -- UNDUE HARDSHIP > Headnote:

LEdHN[5] [5]

See *11 U.S.C.S. § 523(a)(8)*, which provides: “(a) A discharge under *section 727, 1141, 1228(a), 1228(b), or 1328(b)* of this title does not discharge an individual debtor from any debt . . . (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

“(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

“(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

“(B) any other educational loan that is a qualified education loan, as defined in *section 221(d)(1) of the Internal Revenue Code of 1986*, incurred by a debtor who is an individual.”

JUDGMENT §110 JUDGMENT §289 > BANKRUPTCY
COURT'S ORDERS -- FINALITY -- RELIEF > Headnote:

LEdHN[6] [6]

Ordinarily, the finality of a Bankruptcy Court's orders following the conclusion of direct review would stand in the way of challenging their enforceability. *Fed. R. Civ. P. 60(b)*, however, provides an exception to finality that allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances. Specifically, *Rule 60(b)(4)* authorizes the court to relieve a party from a final judgment if the judgment is void.

JUDGMENT §21 JUDGMENT §289 > VALIDITY -- FINALITY
> Headnote:

LEdHN[7] [7]

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A void judgment is a legal nullity. Although the term “void” describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. The list of such infirmities is exceedingly short; otherwise, Fed. R. Civ. P. 60(b)(4)'s exception to finality would swallow the rule.

JUDGMENT §21 JUDGMENT §289 > ERROR -- RELIEF
> Headnote:

LEdHN[8] [8]

A judgment is not void simply because it is or may have been erroneous. Similarly, a motion under Fed. R. Civ. P. 60(b)(4) is not a substitute for a timely appeal. Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard.

JUDGMENT §289 > JURISDICTIONAL DEFECT > Headnote:

LEdHN[9] [9]

Federal courts considering Fed. R. Civ. P. 60(b)(4) motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an “arguable basis” for jurisdiction.

BANKRUPTCY §179 > DISCHARGE -- STUDENT LOAN --
PROCEDURE > Headnote:

LEdHN[10] [10]

11 U.S.C.S. § 523(a)(8)'s statutory requirement that a bankruptcy court find undue hardship before discharging a student loan debt is a precondition to obtaining a discharge order, not a limitation on the bankruptcy court's jurisdiction. The requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Federal Rules of Bankruptcy Procedure, Fed. R. Bankr. P. 7001(6), which are procedural rules adopted by the Bankruptcy Court for the orderly transaction of its business that are not jurisdictional.

CONSTITUTIONAL LAW §786 > DUE PROCESS -- NOTICE --
- OPPORTUNITY > Headnote:

LEdHN[11] [11]

Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections.

BANKRUPTCY §179 > STUDENT LOANS -- DISCHARGE
> Headnote:

LEdHN[12] [12]

11 U.S.C.S. § 523(a)(8) provides that student loan debts guaranteed by governmental units are not dischargeable unless a court finds undue hardship. 11 U.S.C.S. § 523(a)(8).

BANKRUPTCY §420.1 > PLANS -- CONFIRMATION
> Headnote:

LEdHN[13] [13]

11 U.S.C.S. § 1325(a)(1) instructs bankruptcy courts to confirm only those plans that comply with the applicable provisions of the Bankruptcy Code.

BANKRUPTCY §194 CONSTITUTIONAL LAW
§793 JUDGMENT §21 > STUDENT LOANS -- JURISDICTION
-- DISCHARGE -- FINDING > Headnote:

LEdHN[14] [14]

11 U.S.C.S. § 523(a)(8) does not limit the bankruptcy court's jurisdiction over student loan debts. Nor does the provision impose requirements that, if violated, would result in a denial of due process. Instead, § 523(a)(8) requires a court to make a certain finding before confirming the discharge of a student loan debt. It is true that this requirement is “self-executing.” But that means only that the bankruptcy court must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court's failure to make the finding renders its subsequent confirmation order void for purposes of Fed. R. Civ. P. 60(b)(4).

BANKRUPTCY §179 > DISCHARGE -- UNDUE HARDSHIP
> Headnote:

LEdHN[15] [15]

11 U.S.C.S. § 1328(a) provides that, upon completion of a Chapter 13 plan, a bankruptcy court shall grant the debtor a discharge of all debts provided for by the plan except any debt of the kind specified in 11 U.S.C.S. § 523(a)(5), (8), (9). Section 1328(a) thus incorporates by reference § 523(a)(8), including that paragraph's self-executing requirement for an undue hardship determination, but does not incorporate the “does not discharge” text of § 523(a) itself.

JUDGMENT §283 > RELIEF > Headnote:

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LEdHN[16] [16]

[Fed. R. Civ. P. 60\(b\)\(4\)](#) does not provide a license for litigants to sleep on their rights.

JUDGMENT §283 > RELIEF -- FINALITY -- OPPORTUNITY TO LITIGATE > Headnote:

LEdHN[17] [17]

[Fed. R. Civ. P. 60\(b\)\(4\)](#) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute. Where a party is notified of a bankruptcy plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify [Rule 60\(b\)\(4\)](#) relief.

BANKRUPTCY §179 BANKRUPTCY §420.1 > STUDENT LOANS -- DISCHARGE -- PLAN REQUIREMENTS > Headnote:

LEdHN[18] [18]

A Chapter 13 plan that proposes to discharge a student loan debt without a determination of undue hardship violates [11 U.S.C.S. § 523\(a\)\(8\)](#), [1328\(a\)\(2\)](#). Failure to comply with this self-executing requirement should prevent confirmation of the plan even if the creditor fails to object, or to appear in the proceeding at all. That is because [§ 1325\(a\)](#) instructs a bankruptcy court to confirm a plan only if the court finds, inter alia, that the plan complies with the “applicable provisions” of the Bankruptcy Code. [11 U.S.C.S. § 1325\(a\)](#). Thus, the Code makes plain that bankruptcy courts have the authority--indeed, the obligation--to direct a debtor to conform his plan to the requirements of [§§1328\(a\)\(2\)](#) and [523\(a\)\(8\)](#).

EVIDENCE §281 > BANKRUPTCY -- DISCHARGEABILITY - - STUDENT LOAN -- PRESUMPTIONS > Headnote:

LEdHN[19] [19]

[11 U.S.C.S. § 523\(a\)\(8\)](#) renders student loan debt presumptively nondischargeable “unless” a determination of undue hardship is made. In contrast, the debts listed in [§ 523\(c\)](#), which include certain debts obtained by fraud or willful and malicious injury by the debtor, [§ 523\(a\)\(6\)](#), are presumptively dischargeable “unless” the creditor requests a hearing to determine the debt's dischargeability.

BANKRUPTCY §420.1COURTS §11 > RAISING ISSUES -- CORRECTING DEFECT > Headnote:

LEdHN[20] [20]

Courts have the discretion, but not the obligation, to raise on their own initiative certain nonjurisdictional barriers to suit. [11 U.S.C.S. § 1325\(a\)](#) does more than codify this principle; it requires bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.

BANKRUPTCY §87 BANKRUPTCY §420.1 > PLAN CONFIRMATION -- UNDUE HARDSHIP -- PROCEDURE > Headnote:

LEdHN[21] [21]

Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure prevent the parties from stipulating to the underlying facts of undue hardship under [11 U.S.C.S. § 523\(a\)\(8\)](#), and neither prevents the creditor from waiving service of a summons and complaint. [Fed. R. Bankr. P. 7004; Fed. R. Civ. P. 4\(k\)](#). But, to comply with [§ 523\(a\)\(8\)](#)'s directive, the bankruptcy court must make an independent determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding.

BANKRUPTCY §179 > STUDENT LOANS -- DISCHARGE -- BAD FAITH -- PENALTIES > Headnote:

LEdHN[22] [22]

Debtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings, [Fed. R. Bankr. P. 9011](#). The specter of such penalties should deter bad-faith attempts to discharge student loan debt without the undue hardship finding Congress required. And to the extent existing sanctions prove inadequate to this task, Congress may enact additional provisions to address the difficulties.

Syllabus

[*260] [***163] [**1370] A plan proposed under Bankruptcy Code (Code) Chapter 13 becomes effective upon confirmation, see [11 U.S.C. §§ 1324, 1325](#), and will result in a discharge of the [**1371] debts listed in the plan if the debtor completes the payments the plan requires, see [§ 1328\(a\)](#). A debtor may obtain a discharge of government-sponsored student loan debts only if failure to discharge that debt would impose an “undue hardship” on the debtor and his dependents. [§§ 523\(a\)\(8\); 1328](#). Bankruptcy courts must make this undue hardship determination in an adversary proceeding, see [Fed. Rule Bkrcty. Proc. 7001\(6\)](#), which the party seeking the determination must initiate by serving a

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summons and complaint on his adversary, see [Rules 7003, 7004, 7008](#). Respondent Espinosa's plan proposed repaying the principal on his student loan debt and discharging the interest once the principal was repaid, but he did not initiate the required adversary proceeding. The student loan creditor, petitioner United, received notice of the plan from the Bankruptcy Court and did not object to the plan or to Espinosa's failure to initiate the required proceeding. The Bankruptcy Court confirmed the plan without holding such a proceeding or making a finding of undue hardship. Once Espinosa paid his student loan principal, the court discharged the interest. A few years later, the Department of Education sought to collect that interest. In response, Espinosa asked the court to enforce the confirmation order by directing the Department and United to cease any collection efforts. United opposed the motion and filed a cross-motion under [Federal Rule of Civil Procedure 60\(b\)\(4\)](#), seeking to set aside as void the confirmation order because the plan provision authorizing discharge of Espinosa's student loan interest was inconsistent with the Code and the Bankruptcy Rules, and because United's due process rights were violated when Espinosa failed to serve it with [\[***164\]](#) the required summons and complaint. Rejecting those arguments, the Bankruptcy Court granted Espinosa's motion in relevant part and denied the cross-motion. The District Court reversed, holding that United was denied due process when the confirmation order was issued without the required service. The Ninth Circuit ultimately reversed. It concluded that by confirming Espinosa's plan without first finding undue hardship in an adversary proceeding, the Bankruptcy Court at most committed a legal error that United might [\[*261\]](#) have successfully appealed, but that such error was no basis for setting aside the order as void under [Rule 60\(b\)\(4\)](#). It also held that Espinosa's failure to serve United was not a basis upon which to declare the judgment void because United received actual notice of the plan and failed to object.

Held:

1. The Bankruptcy Court's confirmation order is not void under [Rule 60\(b\)\(4\)](#). [Pp. 268-276, 176 L. Ed. 2d, at 168-173.](#)

(a) That order was a final judgment from which United did not appeal. Such finality ordinarily would “stan[d] in the way of challenging [the order’s] enforceability,” [Travelers Indem. Co. v. Bailey, 557 U.S. 137, 140, 129 S. Ct. 2195, 174 L. Ed. 2d 99](#). However, [Rule 60\(b\)\(4\)](#) allows a party to seek relief from a final judgment that “is void,” but only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. United’s alleged error falls in neither category. Conceding that the Bankruptcy Court had jurisdiction to enter the

confirmation order, United contends that the judgment is void because United did not receive adequate notice of Espinosa’s proposed discharge. Espinosa’s failure to serve the summons and complaint as required by the Bankruptcy Rules deprived United of a right granted by a procedural rule. United could have timely objected to this deprivation [\[**1372\]](#) and appealed from an adverse ruling on its objection. But this deprivation did not amount to a violation of due process, which requires notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,” [Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865](#). Here, United’s actual notice of the filing and contents of Espinosa’s plan more than satisfied its due process rights. Thus, Espinosa’s failure to make the required service does not entitle United to relief under [Rule 60\(b\)\(4\)](#). [Pp. 268-272, 176 L. Ed. 2d, at 169-171.](#)

(b) Contrary to United’s claim, the confirmation order is not void because the Bankruptcy Court lacked statutory authority to confirm Espinosa’s plan absent an undue hardship finding under [§ 523\(a\)\(8\)](#). Such failure is not on par with the jurisdictional and notice failings that define void judgments qualifying for [Rule 60\(b\)\(4\)](#) relief. [Section 523\(a\)\(8\)](#) does not limit a bankruptcy court’s jurisdiction over student loan debts or impose requirements that, if violated, would result in a denial of due process. Instead, it requires a court to make a certain finding before confirming a student loan debt’s discharge. That this requirement is “ ‘self-executing,’ ” [Tennessee Student Assistance Corporation v. Hood, 541 U.S. 440, 450, 124 S. Ct. 1905, 158 L. Ed. 2d 764](#), means [\[***165\]](#) only that the bankruptcy court [\[*262\]](#) must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court’s failure to make the finding renders its subsequent confirmation order void for [Rule 60\(b\)\(4\)](#) purposes. Although the Bankruptcy Court’s failure to find undue hardship was a legal error, the confirmation order is enforceable and binding on United because it had actual notice of the error and failed to object or timely appeal. [Pp. 273-276, 176 L. Ed. 2d, at 171-173.](#)

2. The Ninth Circuit erred in holding that bankruptcy courts must confirm a plan proposing the discharge of a student loan debt without an undue hardship determination in an adversary proceeding unless the creditor timely raises a specific objection. A Chapter 13 plan proposing such a discharge without the required determination violates [§§ 1328\(a\)\(2\) and 523\(a\)\(8\)](#). Failure to comply with this self-executing requirement should prevent confirmation even if the creditor fails to object, or to appear in the proceeding at all, since a bankruptcy court may confirm only a plan that, *inter alia*, complies with the “applicable provisions” of the Code. [§](#)

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1325(a)(1). Neither the Code nor the Rules prevent parties from stipulating to the underlying facts of undue hardship or prevent the creditor from waiving service of a summons and complaint. Pp. 276-278, 176 L. Ed. 2d, at 173-174.

3. Expanding the availability of Rule 60(b)(4) relief is not an appropriate prophylaxis for discouraging unscrupulous debtors from filing Chapter 13 plans proposing to dispense with the undue hardship requirement in hopes that the bankruptcy court will overlook the proposal and the creditor will not object. Such bad-faith efforts should be deterred by the specter of penalties that “[d]ebtors and their attorneys face . . . under various provisions for engaging in improper conduct in bankruptcy proceedings,” Taylor v. Freeland & Kronz, 503 U.S. 638, 644, 112 S. Ct. 1644, 118 L. Ed. 2d 280. And Congress may enact additional provisions to address any difficulties should existing sanctions prove inadequate. Pp. 278-279, 176 L. Ed. 2d, at 174-175.

553 F.3d 1193, affirmed.

Counsel: Madeleine C. Wanslee argued the cause for petitioner.

Toby J. Heytens argued the cause for the United States, as amicus curiae, by special leave of the court.

Michael J. Meehan argued the cause for respondent.

Judges: Thomas, J., delivered the opinion for a unanimous Court.

Opinion by: THOMAS

Opinion

[*263] [**1373] Justice **Thomas** delivered the opinion of the Court.

HN1 LE dHN[1] [1] Under Chapter 13 of the Bankruptcy Code (Code), a debtor may obtain a discharge of certain government-sponsored student loan debts only if failure to discharge that debt would impose an “undue hardship” on the debtor and his dependents. 11 U.S.C. §§ 523(a)(8), 1328. The Federal Rules of Bankruptcy Procedure require bankruptcy courts to make this undue hardship determination in an adversary [*264] proceeding, see Rule 7001(6), which the party seeking the determination must initiate by serving a summons and complaint on his adversary, see Rules 7003, 7004, 7008. The debtor in this case filed a plan with the Bankruptcy Court that proposed to discharge a portion of his student loan debt, but he failed to initiate the adversary proceeding as required for such discharge. The creditor

received notice of, but did not object to, the plan, and failed to file an [***166] appeal after the Bankruptcy Court subsequently confirmed the plan. Years later, the creditor filed a motion under Federal Rule of Civil Procedure 60(b)(4) asking the Bankruptcy Court to rule that its order confirming the plan was void because the order was issued in violation of the Code and Rules. We granted certiorari to resolve a disagreement among the Courts of Appeals as to whether an order that confirms the discharge of a student loan debt in the absence of an undue hardship finding or an adversary proceeding, or both, is a void judgment for Rule 60(b)(4) purposes.

I

Between 1988 and 1989, respondent Francisco Espinosa obtained four federally guaranteed student loans for a total principal amount of \$13,250. In 1992, Espinosa filed a bankruptcy petition under HN2 LE dHN[2] [2] Chapter 13. That chapter permits individual debtors to develop a plan to repay all or a portion of their debts over a period of time specified in the plan. See Nobelman v. American Savings Bank, 508 U.S. 324, 327, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993); see also §§ 301(a), 1321; Fed. Rule Bkrcty. Proc. 3015(b). A proposed bankruptcy plan becomes effective upon confirmation, see §§ 1324, 1325, and will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires, see § 1328(a).

[**1374] Espinosa's plan listed his student loan debt as his only specific indebtedness. App. 15-18. The plan proposed to repay only the principal on that debt, stating that the remainder--the accrued interest--would be discharged once Espinosa repaid the principal. *Id.*, at 26.

[*265] As the Federal Rules of Bankruptcy Procedure require, the clerk of the Bankruptcy Court mailed notice and a copy of Espinosa's plan to petitioner United Student Aid Funds, Inc. (United), the creditor to whom Espinosa owed the student loan debt.¹ *Id.*, at 34; see Rules 2002(b), (g)(2), 3015(d). In boldface type immediately below the caption, the plan stated: “WARNING IF YOU ARE A CREDITOR YOUR RIGHTS MAY BE IMPAIRED BY THIS PLAN.” *Id.*, at 23. The plan also noted the deadlines for filing a proof of claim or an objection to the plan. *Id.*, at 26-27.

United received this notice and, in response, filed a proof of claim for \$17,832.15, an amount representing both the

¹United is a guaranty agency that administers the collection of federally guaranteed student loans in accordance with regulations promulgated by the United States Department of Education. See, e.g., 34 CFR § 682.200 et seq. (2009).

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principal and the accrued interest on Espinosa's student loans. *Id.*, at 35. United did not object to the plan's proposed discharge of Espinosa's student loan interest without a determination of undue hardship, nor did it object to Espinosa's failure to initiate an adversary proceeding to determine the dischargeability of that debt.

In May 1993, the Bankruptcy Court confirmed Espinosa's plan without holding an adversary proceeding or making a finding of undue hardship. One month later, the Chapter 13 trustee mailed United a form notice stating that "[t]he amount of the claim filed differs from the amount listed for payment in the plan" and that "[y]our claim will be paid as listed in the plan." *Id.*, at 44. The form also apprised United that if United [***167] "wishe[d] to dispute the above stated treatment of the claim," it had the "responsibility" to notify the trustee within 30 days. *Ibid.* United did not respond to that notice.

In May 1997, Espinosa completed the payments on his student loan principal, as required by the plan. Shortly thereafter, [*266] the Bankruptcy Court discharged Espinosa's student loan interest.²

In 2000, the United States Department of Education commenced efforts to collect the unpaid interest on Espinosa's student loans.³ In response, Espinosa filed a motion in 2003 asking the Bankruptcy Court to enforce its 1997 discharge order by directing the Department and United to cease all efforts to collect the unpaid interest on his student loan debt.

United opposed that motion and filed a cross-motion under *Federal Rule of Civil Procedure 60(b)(4)* seeking to set aside as void the Bankruptcy Court's 1993 order confirming Espinosa's plan. United made two arguments in support of its motion. First, United claimed that the provision of Espinosa's plan authorizing the discharge of his student loan interest was inconsistent with the Code, which requires a court [**1375] to find undue hardship before discharging a student loan debt, §§ 523(a)(8), 1328(a), and with the Bankruptcy Rules, which require the court to make the undue hardship finding in an adversary proceeding, see *Rule 7001(6)*. Second, United argued that its due process rights had been violated because Espinosa failed to serve it with the summons and complaint the Bankruptcy Rules require as a prerequisite to an

adversarial proceeding. See *Rules 7003, 7004, 7008*.

The Bankruptcy Court rejected both arguments, granted Espinosa's motion in relevant part, denied United's cross-motion, and ordered all claimants to cease and desist their collection efforts. United sought review in the District Court, which reversed. That court held that United was denied [*267] due process because the confirmation order was issued without service of the summons and complaint the Bankruptcy Rules require.

Espinosa appealed to the Court of Appeals for the Ninth Circuit, which issued an initial *per curiam* opinion remanding the case to the Bankruptcy Court to consider correcting an apparent clerical error in its discharge order.⁴ *530 F.3d 895, 899 (2008)*. The Bankruptcy Court corrected the error, after which the Court [***168] of Appeals resubmitted the case and reversed the judgment of the District Court. The Court of Appeals concluded that by confirming Espinosa's plan without first finding undue hardship in an adversary proceeding, the Bankruptcy Court at most committed a legal error that United might have successfully appealed, but that any such legal error was not a basis for setting aside the confirmation order as void under *Rule 60(b)*. *553 F.3d 1193, 1198-1202 [*268] (2008)*.⁵ In addition, the Court of Appeals

⁴The one-page discharge order contained a paragraph that purported to exclude "'any debt . . . for a student loan'" from the discharge. *530 F.3d 895, 896 (CA9 2008)*. That provision appeared irreconcilable with the confirmation order, which contemplated the discharge of the interest on Espinosa's student loan debt. Suggesting that the Bankruptcy Court may have automatically generated the discharge order without tailoring it to the terms of the confirmation order, the Court of Appeals remanded the case to the Bankruptcy Court to consider amending the discharge order to conform to the confirmation order. *Id.*, at 899; see *Fed. Rule Civ. Proc. 60(a)* (authorizing a court to "correct a clerical mistake or a mistake arising from oversight or omission"). On remand, the Bankruptcy Court found that the text of its discharge order excepting Espinosa's student loan debt from discharge "was inserted because of a clerical mistake" and struck that language from the order. App. 48.

Although certain amici press the point, United has not challenged the substance of the Bankruptcy Court's amendment to the order or asked us to consider whether such amendment was proper under *Rule 60(a)*. See Brief for Petitioner 42; Reply Brief for Petitioner 20. Thus, we express no view on those issues. See *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 97, n. 4, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991) (noting that *HN3 LEHJN[3]* [3] "we do not ordinarily address issues raised only by amici").

⁵In so doing, the Court of Appeals disagreed with two other Courts of Appeals. See *In re Mersmann*, 505 F.3d 1033, 1047-1049 (CA10 2007) (en banc); *Whelton v. Educational Credit Management Corp.*,

²The discharge order contained an apparent clerical error that the courts below considered and addressed in adjudicating these proceedings. See n. 4, *infra*.

³After Espinosa completed payments under the plan, United assigned Espinosa's loans to the Department under a reinsurance agreement. After these proceedings began, United requested and received a recall of the loans from the Department. App. to Pet. for Cert. 63.

559 U.S. 260, *268; 130 S. Ct. 1367, **1375; 176 L. Ed. 2d 158, ***168

held that although Espinosa's failure to serve United with a summons and complaint before seeking a discharge of his student loan debt violated the Bankruptcy Rules, this defect in service was not a basis upon which to declare the judgment void because United received actual notice of Espinosa's plan and failed to object. See *id.*, at 1202-1205.⁶

[**1376] We granted certiorari. 557 U.S. 903, 129 S. Ct. 2791, 174 L. Ed. 2d 289 (2009).

II

HN4 LEdHN[4] [4] A discharge under Chapter 13 “is broader than the discharge received in any other chapter.” 8 *Collier on Bankruptcy* P1328.01, p. 1328-5 (rev. 15th ed. 2008). Chapter 13 nevertheless restricts or prohibits entirely the discharge of certain types of debts. As relevant here, § 1328(a) provides that when a debtor has completed the repayments required by a confirmed plan, a bankruptcy court “shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except,” *inter alia*, “any debt . . . of the kind specified in [§ 523(a)(8)].” § 1328(a)(2). Section 523(a)(8), in turn, specifies certain student loan debts “unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents.”⁷ As noted, the Bankruptcy Rules require [*269] a party seeking to determine the dischargeability of a student loan debt to commence an

adversary proceeding by [***169] serving a summons and complaint on affected creditors. See *supra*, at 266, 176 L. Ed. 2d, at 167. We must decide whether the Bankruptcy Court's order confirming Espinosa's plan is “void” under *Federal Rule of Civil Procedure* 60(b)(4) because the Bankruptcy Court confirmed the plan without complying with these requirements.⁸

A

The Bankruptcy Court's order confirming Espinosa's proposed plan was a final judgment, see *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1300 (CA11 2005), from which United did not appeal. **HN6 LEdHN[6]** [6] Ordinarily, “the finality of [a] Bankruptcy Court's orders following the conclusion of direct review” would “stan[d] in the way of challenging [their] enforceability.” *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 140, 129 S. Ct. 2195, 2198, 174 L. Ed. 2d 99, 103 (2009). *Rule* 60(b), however, provides an “exception to finality,” *Gonzalez v. Crosby*, 545 U.S. 524, 529, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005), that “allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances,” [*270] *id.*, at 528, 125 S. Ct. 2641, 162 L. Ed. 2d 480. Specifically, *Rule* 60(b)(4)—the provision under which United brought this motion—authorizes the court to relieve a party from a final judgment if “the judgment is void.”⁹

432 F.3d 150, 154 (CA2 2005).

⁶Three Courts of Appeals have reached the opposite conclusion on similar facts. See *In re Ruehle*, 412 F.3d 679, 682-684 (CA6 2005); *In re Hanson*, 397 F.3d 482, 486 (CA7 2005); *In re Banks*, 299 F.3d 296, 302-303 (CA4 2002).

⁷*Section* 523 provides: **LEdHN[5]** [5] **HN5** “(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

.....

“(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--

“(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

“(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

“(B) any other educational loan that is a qualified education loan, as defined in *section* 221(d)(1) of the *Internal Revenue Code* of 1986, incurred by a debtor who is an individual.”

⁸Because United brought this action on a motion for relief from judgment under *Rule* 60(b)(4), our holding is confined to that provision. We express no view on the terms upon which other provisions of the Bankruptcy Rules may entitle a debtor or creditor to postjudgment relief.

⁹Subject to certain exceptions, *Bankruptcy Rule* 9024 makes *Rule* 60(b) applicable to Chapter 13 proceedings. One such exception provides that “a complaint to revoke an order confirming a plan may be filed only within the time allowed by” 11 U.S.C. § 1330. *Fed. Rule Bkrcty. Proc.* 9024. *Section* 1330(a) imposes a 180-day time limit for a party to seek revocation of a confirmation order “procured by fraud.” Courts of Appeals disagree as to whether a *Rule* 60(b)(4) motion should be treated as a “complaint to revoke” a plan subject to § 1330's time limit and substantive limitation to motions based on fraud. Compare *Whelton*, *supra*, at 156, n. 2, with *In re Fesq*, 153 F.3d 113, 119, and n. 8 (CA3 1998). We need not settle that question, however, because the parties did not raise it in the courts below. And even under a theory that would treat United's *Rule* 60(b)(4) motion as a “complaint to revoke” the plan, United's failure to file its motion within § 1330(a)'s 180-day deadline and its failure to seek relief on the basis of fraud did not deprive those courts--and does not deprive us--of authority to consider the motion on the merits because those limitations are not jurisdictional. See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); *Reed Elsevier, Inc. v. Muchnick*, *ante*, at 167, 130 S.

559 U.S. 260, *270; 130 S. Ct. 1367, **1376; 176 L. Ed. 2d 158, ***169

[**1377] **HN7 LEdHN[7]** [7] A void judgment is a legal nullity. See Black's Law Dictionary 1822 (3d ed. 1933); see also *id.*, at 1709 (9th ed. 2009). Although the term “void” describes a result, rather than the conditions that render a judgment unenforceable, it suffices to say that a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. See *Restatement (Second) of Judgments* 22 (1980); see generally *id.*, § 12. The list of such infirmities is exceedingly short; otherwise, *Rule 60(b)(4)*'s exception to finality would swallow the rule.

HN8 LEdHN[8] [8] “A judgment is not void,” for example, “simply because it is or may have been erroneous.” *Hoult v. Hoult*, 57 F.3d 1, 6 (CA1 1995); 12 J. Moore et al., *Moore's Federal Practice* § 60.44[1][a], pp. 60-150 to 60-151 (3d ed. 2007) (hereinafter Moore's). Similarly, a motion under *Rule 60(b)(4)* is not a substitute for a timely appeal. *Kocher v. Dow Chemical Co.*, [*271] 132 F.3d 1225, 1229 (CA8 1997); see *Moore's* § 60.44[1][a], at 60-150. Instead, [***170] *Rule 60(b)(4)* applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard. See *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (CA1 1990); *Moore's* § 60.44[1][a]; 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2862, p. 331 (2d ed. 1995 and Supp. 2009); cf. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376, 60 S. Ct. 317, 84 L. Ed. 329 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 171-172, 59 S. Ct. 134, 83 L. Ed. 104 (1938). The error United alleges falls in neither category.

1

HN9 LEdHN[9] [9] Federal courts considering *Rule 60(b)(4)* motions that assert a judgment is void because of a jurisdictional defect generally have reserved relief only for the exceptional case in which the court that rendered judgment lacked even an “arguable basis” for jurisdiction. *Nemaizer v. Baker*, 793 F.2d 58, 65 (CA2 1986); see, e.g., *Boch Oldsmobile, supra*, at 661-662 (“[T]otal want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and . . . only rare instances of a clear usurpation of power will render a judgment void” (brackets and internal quotation marks omitted)).

This case presents no occasion to engage in such an “arguable basis” inquiry or to define the precise circumstances in which a jurisdictional error will render a judgment void because United does not argue that the Bankruptcy Court's error was jurisdictional. Reply Brief for Petitioner 5, 11. Such an

argument would fail in any event. First, **HN10 LEdHN[10]** [10] § 523(a)(8)'s statutory requirement that a bankruptcy court find undue hardship before discharging a student [*1378] loan debt is a precondition to obtaining a discharge order, not a limitation on the bankruptcy court's jurisdiction. See, e.g., *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). Second, [*272] the requirement that a bankruptcy court make this finding in an adversary proceeding derives from the Bankruptcy Rules, see *Rule 7001(6)*, which are “procedural rules adopted by the Court for the orderly transaction of its business” that are “not jurisdictional.” *Kontrick v. Ryan*, 540 U.S. 443, 454, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004) (internal quotation marks omitted).

2

Although United concedes that the Bankruptcy Court had jurisdiction to enter the order confirming Espinosa's plan, United contends that the court's judgment is void under *Rule 60(b)(4)* because United did not receive adequate notice of Espinosa's proposed discharge of his student loan interest. Specifically, United argues that the Bankruptcy Court violated United's due process rights by confirming Espinosa's plan despite Espinosa's failure to serve the summons and complaint the Bankruptcy Rules require for the commencement of an adversary proceeding. We disagree.

Espinosa's failure to serve United with a summons and complaint deprived United of a right granted by a procedural rule. See *Fed. Rule Bkrcty. Proc. 7004(b)(3)*. United could have timely objected to this deprivation and appealed from an adverse ruling on its objection. But this deprivation did not amount to a violation of United's constitutional right to due process. **HN11 LEdHN[11]** [11] Due process requires notice “reasonably calculated, under all the [***171] circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950); see also *Jones v. Flowers*, 547 U.S. 220, 225, 126 S. Ct. 1708, 164 L. Ed. 2d 415 (2006) (“[D]ue process does not require actual notice . . .”). Here, United received *actual* notice of the filing and contents of Espinosa's plan. This more than satisfied United's due process rights. Accordingly, on these facts, Espinosa's failure to serve a summons and complaint does not entitle United to relief under *Rule 60(b)(4)*.

[*273] B

Unable to demonstrate a jurisdictional error or a due process violation, United and the Government, as *amicus*, urge us to expand the universe of judgment defects that support *Rule*

Ct. 1237, 176 L. Ed. 2d 18.

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[60\(b\)\(4\)](#) relief. Specifically, they contend that the Bankruptcy Court's confirmation order is void because the court lacked statutory authority to confirm Espinosa's plan absent a finding of undue hardship. In support of this contention, they cite the text of *HN12 LEdHN[12]* [12] [§ 523\(a\)\(8\)](#), which provides that student loan debts guaranteed by governmental units are not dischargeable “unless” a court finds undue hardship. (Emphasis added.) They argue that this language imposes a “‘self-executing’ limitation on the effect of a discharge order” that renders the order legally unenforceable, and thus void, if it is not satisfied. Brief for United States as *Amicus Curiae* 18 (quoting *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440, 450, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004)). Brief for Petitioner 23-24. In addition, United cites *HN13 LEdHN[13]* [13] [§ 1325\(a\)\(1\)](#), which instructs bankruptcy courts to confirm only those plans that comply with “the . . . applicable provisions” of the Code. Reading these provisions in tandem, United argues that an order confirming a [*1379] plan that purports to discharge a student loan debt without an undue hardship finding is “doubly beyond the court's authority and therefore void.” *Id.*, at 13.

We are not persuaded that a failure to find undue hardship in accordance with [§ 523\(a\)\(8\)](#) is on par with the jurisdictional and notice failings that define void judgments that qualify for relief under [Rule 60\(b\)\(4\)](#). As noted, *HN14 LEdHN[14]* [14] [§ 523\(a\)\(8\)](#) does not limit the bankruptcy court's jurisdiction over student loan debts.¹⁰ *Supra*, at 272, 176 L. Ed. 2d, at 170-171; see *Hood*, 541 U.S., at 447, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (noting [*274] that “[b]ankruptcy courts have exclusive jurisdiction over a debtor's property”). Nor does the provision impose requirements that, if violated, would result in a denial of due process. Instead, [§ 523\(a\)\(8\)](#) requires a court to make a certain finding before confirming the discharge of a student loan debt. It is true, as we explained in *Hood*, that this requirement is “‘self-executing.’” *Id.*, at 450, 124 S. [*172] Ct. 1905, 158 L. Ed. 2d 764.¹¹ But that

means [*275] only that the bankruptcy court must make an undue hardship finding even if the creditor does not request one; it does not mean that a bankruptcy court's failure to make the finding renders its subsequent confirmation order void for purposes of [Rule 60\(b\)\(4\)](#).¹²

[**1380] Given the Code's clear and self-executing requirement for an undue hardship determination, the

discharge an individual debtor from any debt,” including the student loan debts specified in [paragraph \(8\)](#) (emphasis added); see Brief for United States as *Amicus Curiae* 18; see also Reply Brief for Petitioner 1-2. That is not what we concluded in *Hood* and, in this case, would be irrelevant in any event.

In *Hood*, we described as “‘self-executing’” [paragraph \(8\)](#)'s instruction that student loan debt not be discharged “unless” an undue hardship determination is made. 541 U.S., at 450, 124 S. Ct. 1905, 158 L. Ed. 2d 764. The “does not discharge” language in [§ 523\(a\)](#), which applies generally to every enumerated paragraph in that section--and to which we never referred in *Hood*--was not relevant to our analysis. That is evident from the authority we cited to support our description of [§ 523\(a\)\(8\)](#)'s condition as “‘self-executing.’” *E.g.*, *id.*, at 450, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (citing S. Rep. No. 95-989, p. 79 (1978), which states that “[p]aragraph (8) . . . is intended to be self-executing” insofar as “the lender or institution is not required to file a complaint to determine the nondischargeability of any student loan” (emphasis added)).

In any event, the “does not discharge” language in [§ 523\(a\)](#) is inapplicable to this case. [Section 523\(a\)](#) provides that “[a] discharge under [section 727](#), [1141](#), [1228\(a\)](#), [1228\(b\)](#), or [1328\(b\)](#) of [the Code] does not discharge an individual debtor from” the debts described in [§ 523\(a\)](#)'s enumerated paragraphs. But Espinosa did not seek a discharge under “[section 727](#), [1141](#), [1228\(a\)](#), [1228\(b\)](#), or [1328\(b\)](#).” He sought a discharge under *HN15 LEdHN[15]* [15] [§ 1328\(a\)](#), which provides that, upon completion of a Chapter 13 plan, a bankruptcy court “shall grant the debtor a discharge of all debts provided for by the plan . . . , except any debt . . . of the kind specified in . . . paragraph . . . (5), (8), or (9) of [section 523\(a\)](#).” (Emphasis added.) [Section 1328\(a\)](#) thus incorporates by reference [paragraph \(8\) of § 523\(a\)](#), including that paragraph's self-executing requirement for an undue hardship determination, but does not incorporate the “does not discharge” text of [§ 523\(a\)](#) itself.

¹⁰ [Sections 1328\(a\)](#) and [523\(a\)\(8\)](#) provide that student loan debt is dischargeable in a Chapter 13 proceeding if a court makes a finding of undue hardship. In contrast, other provisions in Chapter 13 provide that certain other debts are *not* dischargeable under any circumstances. See, e.g., [§§ 523\(a\)\(1\)\(B\), \(C\)](#) (specified tax debts); [§ 523\(a\)\(5\)](#) (domestic support obligations); [§ 523\(a\)\(9\)](#) (debts “caused by” the debtor's unlawful operation of a vehicle while intoxicated). We express no view on the conditions under which an order confirming the discharge of one of these types of debt could be set aside as void.

¹¹ The Government suggests that [§ 523\(a\)\(8\)](#)'s “self-executing” nature derives in part from the text of [§ 523\(a\)](#), which states that “[a] discharge under [section 727](#) . . . or [1328\(b\)](#) of this title *does not*

¹² United relies on our decisions in *United States ex rel. Wilson v. Walker*, 109 U.S. 258, 3 S. Ct. 277, 27 L. Ed. 927 (1883), and *Valley v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 41 S. Ct. 116, 65 L. Ed. 297 (1920), to argue otherwise. Those authorities are not controlling because they predate [Rule 60\(b\)\(4\)](#)'s enactment and because we interpreted the statutes at issue in those cases as stripping courts of jurisdiction--either over the parties, *id.*, at 354-356, 41 S. Ct. 116, 65 L. Ed. 297, or the res, *Wilson*, *supra*, at 265-266, 3 S. Ct. 277, 27 L. Ed. 927 --and United concedes that the statutory limit in this case is not jurisdictional. See *supra*, at 272, 176 L. Ed. 2d, at 170.

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Bankruptcy Court's failure to find undue hardship before confirming Espinosa's plan was a legal error. See Part III, *infra*. But the order remains enforceable and binding on United because United had notice of the error and failed to object or timely appeal.

United's response--that it had no obligation to object to Espinosa's plan until Espinosa served it with the summons and complaint the Bankruptcy Rules require, Brief for Petitioner 33--is unavailing. **HN16** *LEdHN*[16] [16] [Rule 60\(b\)\(4\)](#) does not provide a license for litigants to sleep on their rights. United had actual notice of the filing of Espinosa's plan, its contents, and the Bankruptcy Court's subsequent confirmation of the plan. In addition, United filed a proof of claim regarding Espinosa's student loan debt, thereby submitting itself to the Bankruptcy Court's jurisdiction with respect to that claim. See *Langenkamp v. Culp*, 498 U.S. 42, 44, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990) (*per curiam*). United therefore forfeited its arguments regarding the validity of ser [***173] vice or the adequacy of the Bankruptcy Court's procedures by failing to raise a timely objection in that court.

[*276] **HN17** *LEdHN*[17] [17] [Rule 60\(b\)\(4\)](#) strikes a balance between the need for finality of judgments and the importance of ensuring that litigants have a full and fair opportunity to litigate a dispute. Where, as here, a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires, that party has been afforded a full and fair opportunity to litigate, and the party's failure to avail itself of that opportunity will not justify [Rule 60\(b\)\(4\)](#) relief. We thus agree with the Court of Appeals that the Bankruptcy Court's confirmation order is not void.

III

In issuing its judgment, however, the Court of Appeals looked beyond the narrow question whether the Bankruptcy Court's order confirming Espinosa's plan was void under [Rule 60\(b\)\(4\)](#). It canvassed other bankruptcy court decisions within the Circuit that presented a different question--whether a bankruptcy court presented with a debtor's plan that proposes to discharge a student loan debt, in the absence of an adversary proceeding to determine undue hardship, should confirm the plan despite its failure to comply with the Code and Rules. The Court of Appeals noted that some Bankruptcy Courts had declined to confirm such plans "even when the creditor fail[ed] to object to the plan." 553 F.3d at 1205. The court disapproved that practice and overruled those cases, stating that bankruptcy courts *must* confirm a plan proposing the discharge of a student loan debt without a determination of undue hardship in an adversary proceeding unless the creditor timely raises a specific objection. *Ibid*. This, we

think, was a step too far.

As Espinosa concedes, Tr. of Oral Arg. 31, 36, **HN18** *LEdHN*[18] [18] a Chapter 13 plan that proposes to discharge a student loan debt without a determination of undue hardship violates [§§ 1328\(a\)\(2\)](#) and [523\(a\)\(8\)](#). Failure to comply with this self-executing requirement should prevent confirmation of the plan even if the creditor fails to object, or to appear in the proceeding [*277] at all. See [***1381] *Hood*, 541 U.S., at 450, 124 S. Ct. 1905, 158 L. Ed. 2d 764.¹³ That is because [§ 1325\(a\)\(1\)](#) instructs a bankruptcy court to confirm a plan only if the court finds, *inter alia*, that the plan complies with the "applicable provisions" of the Code. [§ 1325\(a\)](#) (providing that a bankruptcy court "shall confirm a plan" if the plan "complies with the provisions of" Chapter 13 and with "other applicable provisions of this title"); see *Johnson v. Home State Bank*, 501 U.S. 78, 87, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991); see also [§ 105\(a\)](#) (authorizing bankruptcy courts to issue "any order, process, or judgment that is necessary or appropriate [***174] to carry out" the Code's provisions).¹⁴ Thus, contrary to the Court of Appeals' assertion, the Code makes plain that bankruptcy courts have the authority--indeed, the obligation--to direct a debtor to conform his plan to the requirements of [§§ 1328\(a\)\(2\)](#) and [523\(a\)\(8\)](#).¹⁵

¹³ This is essential to preserve the distinction between Congress' treatment of student loan debts in [§ 523\(a\)\(8\)](#) and debts listed elsewhere in [§ 523](#). **HN19** *LEdHN*[19] [19] [Section 523\(a\)\(8\)](#) renders student loan debt presumptively nondischargeable "unless" a determination of undue hardship is made. In contrast, the debts listed in [§ 523\(c\)](#), which include certain debts obtained by fraud or "willful and malicious injury by the debtor," [§ 523\(a\)\(6\)](#), are presumptively dischargeable "unless" the creditor requests a hearing to determine the debt's dischargeability. The Court of Appeals' approach would subject student loan debt to the same rules as the debts specified in [§ 523\(c\)](#), notwithstanding the evident differences in the statutory framework for discharging the two types of debt.

¹⁴ In other contexts, we have held that **HN20** *LEdHN*[20] [20] courts have the discretion, but not the obligation, to raise on their own initiative certain nonjurisdictional barriers to suit. See *Day v. McDonough*, 547 U.S. 198, 202, 209, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) (statute of limitations); *Granberry v. Greer*, 481 U.S. 129, 134, 107 S. Ct. 1671, 95 L. Ed. 2d 119 (1987) (habeas corpus petitioner's exhaustion of state remedies). [Section 1325\(a\)](#) does more than codify this principle; it *requires* bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue.

¹⁵ Bankruptcy courts appear to be well aware of this statutory obligation. See, e.g., *In re Mammel*, 221 B. R. 238, 239 (*Bkrcty. Ct. ND Iowa 1998*) ("[W]hether or not an objection is presently lodged in this case, the Court retains the authority to review this plan and deny confirmation if it fails to comply with the confirmation

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[*278] We are mindful that conserving assets is an important concern in a bankruptcy proceeding. We thus assume that, in some cases, a debtor and creditor may agree that payment of a student loan debt will cause the debtor an undue hardship sufficient to justify discharge. In such a case, there is no reason that compliance with the undue hardship requirement should impose significant costs on the parties or materially delay confirmation of the plan. *HN21 LEdHN[21]* [21] Neither the Code nor the Rules prevent the parties from stipulating to the underlying facts of undue hardship, and neither prevents the creditor from waiving service of a summons and complaint. See *Fed. Rule Bkrcty. Proc. 7004*; *Fed. Rule Civ. Proc. 4(k)*. But, to comply with § 523(a)(8)'s directive, the bankruptcy court must make an independent determination of undue hardship before a plan is confirmed, even if the creditor fails to object or appear in the adversary proceeding. See *supra*, at 275, 176 L. Ed. 2d, at 171.

IV

United argues that our failure to declare the Bankruptcy Court's order void will encourage unscrupulous debtors to abuse the Chapter 13 process by filing plans proposing to dispense with the undue hardship requirement in the hopes the bankruptcy court will overlook the proposal and the creditor will not object. In the event the objectionable provision is discovered, [*1382] United claims, the debtor can withdraw the plan and file another without penalty.

We acknowledge the potential for bad-faith litigation tactics. But expanding the availability of relief under *Rule 60(b)(4)* is not an appropriate prophylaxis. As we stated in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992), *HN22 LEdHN[22]* [22] “[d]ebtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings,” *id.*, at 644, 112 S. Ct. 1644, 118 L. Ed. 2d 280; see *Fed. Rule Bkrcty. Proc. 9011*. The specter of such penalties should deter bad-faith attempts to discharge student loan debt without the undue hardship finding Congress required. And to the extent existing sanctions [*279] prove inadequate to this task, Congress may enact additional provisions to address the difficulties United predicts will follow our decision.

* * *

The judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

standards of the Code”).

References

11 U.S.C.S. § 523(a)(8)

4 Collier on Bankruptcy P523.14 (Matthew Bender)

4 Federal Litigation Guide §§46.18, 46.19 (Matthew Bender)

L Ed Digest, Bankruptcy § 179; Judgment § 289

L Ed Index, Bankruptcy; Rules of Civil Procedure

Supreme Court's views as to validity, construction, and application of *Federal Rules of Bankruptcy Procedure. 157 L. Ed. 2d 1273*.

Supreme Court's construction and application of *Rule 60(b) of Federal Rules of Civil Procedure*, allowing relief from judgment or order. *116 L. Ed. 2d 1045*.



Positive

As of: August 18, 2016 9:45 AM EDT

*In re Sekema*United States Bankruptcy Court for the Northern District of Indiana, Hammond Division

January 7, 2015, Decided

CASE NO. 14-40145

Reporter

523 B.R. 651; 2015 Bankr. LEXIS 239

IN THE MATTER OF: DENNIS EUGENE SEKEMA
JAMIE MARIE SEKEMA, Debtors**Core Terms**

sanctions, requirements, claimant, bankruptcy court, orders, filer

and that inquiry must lead to the conclusion that the presenter's position is warranted by existing law or a non-frivolous argument. [Fed. R. Bankr. P. Rule 9011\(b\)\(2\)](#). This duty extends not just to the position being advanced but also to whether any obvious affirmative defenses bar the case.

Bankruptcy Law > Procedural Matters > Professional Responsibility

Case Summary**Overview**

HOLDINGS: [1]-Consumer debt buyers who filed proofs of claims in this Chapter 13 case that were clearly barred by Indiana's six-year statute of limitations, [Ind. Code 34-11-2-9](#), were sanctioned under [Fed. R. Bankr. P. 9011\(b\)\(2\)](#) because there was no evidence that either claimant undertook any investigation into the obvious statute of limitations defense to the claims they each filed, which were more than a decade old, much less a reasonable one; [2]-Fine of \$1,000 was assessed as an amount large enough to get the attention of the debt buyers and deter them (and others) from similar misconduct in the future, and yet not so large as to be unduly burdensome.

HN2 A proof of claim is no different from any other matter presented to the bankruptcy court. They too are subject to [Fed. R. Bankr. P. 9011](#) and sanctions may be imposed for filing claims in violation of the rule's requirements.

Civil Procedure > Sanctions > Baseless Filings > General Overview

HN3 Whether or not the obligations imposed by [Fed. R. Civ. P. 11](#) have been fulfilled is an objective determination. The investigation it requires does not have to be exhaustive, simply reasonable under the circumstances. Furthermore, the duty to investigate defenses does not extend to every defense that could be possibly be asserted, but only to those that are obvious.

Bankruptcy Law > Procedural Matters > Professional Responsibility

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Outcome

Claimants sanctioned.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Professional Responsibility

HN1 [Fed. R. Bankr. P. 9011](#) is the bankruptcy equivalent of [Fed. R. Civ. P. 11](#). Anyone who presents (whether by signing, filing, submitting or later advocating) a particular position to the court (a petition, pleading, written motion, or other paper) has an affirmative obligation to conduct a reasonable investigation into both the law and the facts before doing so

HN4 Whether or not the court imposes sanctions for violating [Fed. R. Bankr. P. 9011](#), together with the nature of any sanction, is a matter committed to its discretion. [Fed. R. Bankr. P. Rule 9011\(c\)](#). Discretionary choices are not left to the court's inclination, but to its judgment, and that judgment should be guided by sound legal principles. In fashioning an appropriate sanction, the primary goal should be deterrence; in other words, to avoid the repetition of such conduct or comparable conduct by others similarly situated. [Fed. R. Bankr. P. Rule 9011\(c\)\(2\)](#). Furthermore, in crafting that deterrent, the court can consider how non-bankruptcy law addresses other misconduct by debt collectors. The Fair Debt

523 B.R. 651, *651; 2015 Bankr. LEXIS 239, **239

Collection Practices Act allows the recovery of actual damages, attorney fees and additional statutory damages up to \$1,000 for violations of its requirements. [15 U.S.C.S. § 1692\(k\)](#).

Counsel: For Dennis Eugene Sekema, Debtor: Christopher R. Schmidgall [**1], Merrillville, IN.

For Jamie Marie Sekema, Joint Debtor: Christopher R. Schmidgall, Merrillville, IN.

Trustee: David A. Rosenthal, Demotte, IN.

Trustee: David A. Rosenthal, Lafayette, IN.

U.S. Trustee: Nancy J. Gargula, South Bend, IN.

Judges: Robert E. Grant, Chief United States Bankruptcy Judge.

Opinion by: Robert E. Grant

Opinion

[*652] DECISION REGARDING SANCTIONS

On January 7, 2015.

"A deluge has swept through U.S. bankruptcy courts of late. Consumer debt buyers — armed with hundreds of delinquent accounts purchased from creditors — are filing proofs of claim on debts deemed unenforceable under state statutes of limitations." [Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1255 \(11th Cir. 2014\)](#). This case is part of that problem.

Debtors filed a petition for relief under chapter 13 on March 24, 2014. Jefferson Capital Systems, LLC and Resurgent Capital Services (on behalf of LVNV Funding, LLC) each filed a proof of claim. Jefferson Capital's claim indicated that it had been acquired from Fingerhut and had been charged off on May 11, 2001, which was also the date of the last transaction.¹ The Resurgent/LVNV claim stated it had been acquired from Sears National Bank and was charged off on December 27, 1998.² The debtors objected to both [**2] [*653] claims as barred by Indiana's 6-year statute of

limitations. [See, I.C. 34-11-2-9](#). Despite being served with the objection and notice of the opportunity to respond, neither creditor filed a response; the objections were sustained and both claims were denied. [See, 11 U.S.C. § 502\(b\)\(1\)](#) (claim unenforceable against the debtor); Orders Sustaining Objection to Claim, dated Sept. 21, 2014. The court, on its own initiative, subsequently issued orders to show cause and a notice of hearing, directed to each claimant, to consider whether the claims violated [Rule 9011\(b\)\(2\) of the Federal Rules Bankruptcy Procedure](#), due to the failure to conduct a reasonable pre-filing inquiry. [See, Orders to Show Cause](#), dated Oct. 21, 2014. Once again, despite having been served, neither claimant responded to the order to show cause or attended the scheduled hearing. The question of sanctions was then taken under advisement.

HN1 [Rule 9011](#) is the bankruptcy equivalent of [Rule 11 of the Federal Rules of Civil Procedure](#). Anyone who presents ("whether by signing, filing, submitting or later advocating") a particular position to the court ("a petition, pleading, written [**3] motion, or other paper") has an affirmative obligation to conduct a reasonable investigation into both the law and the facts before doing so and that inquiry must lead to the conclusion that the presenter's position is warranted by existing law or a non-frivolous argument. [See, Fed. R. Bankr. P. Rule 9011\(b\)\(2\)](#). [See also, Frantz v. United States Powerlifting Federation, 836 F.2d 1063, 1064 \(7th Cir. 1987\); Fred A. Smith Lumber Co. v. Edidin, 845 F.2d 750, 751 \(7th Cir. 1988\); McGhee v. Sanilac County, 934 F.2d 89, 93 \(6th Cir. 1991\); Slater v. Skyhawk Transp., Inc., 187 F.R.D. 211, 220 \(D.N.J. 1999\); Terminix Int'l Co. v. Kay, 150 F.R.D. 532, 538 \(E.D. Pa. 1993\)](#). This duty extends not just to the position being advanced but also to "whether any obvious affirmative defenses bar the case." [Matter of Excelllo Press, Inc., 967 F.2d 1109, 1112-13 \(7th Cir. 1992\)](#) (quoting [White v. General Motors Corp., Inc., 908 F.2d 675, 682 \(10th Cir. 1990\)](#) cert. denied, 498 U.S. 1069, 111 S. Ct. 788, 112 L. Ed. 2d 850 (1991) (emphasis added)). [See also, F.D.I.C. v. Calhoun, 34 F.3d 1291, 1299 \(5th Cir. 1994\); Matter of Leeds Bldg. Products, Inc., 181 B.R. 1006, 1010 \(Bankr. N.D. Ga. 1995\)](#).

HN2 A proof of claim is no different from any other matter presented to the bankruptcy court. They too are subject to [Rule 9011](#) and sanctions may be imposed for filing claims in violation of the rule's requirements. [See, In re Cassell, 254 B.R. 687, 691 \(6th Cir. BAP 2000\)](#) ("Proofs of claim must meet the standards of [Rule 9011]"); [In re Rogers, 391 B.R. 317, 323 \(Bankr. M.D. La. 2008\)](#) ("[Bankruptcy Rule 9011](#) can be used to sanction a creditor that files a proof of claim without proper prefiling investigation and support, or that otherwise violates [Rule 9011](#)." (collecting cases)); [In re Dansereau, 274 B.R. 686, 688-89 \(Bankr. W.D. Tex. 2002\); In](#)

¹ The claim did not provide information concerning the date of the last payment. [See, Fed. R. Bankr. P. Rule 3001\(c\)\(3\)\(A\)\(iv\)](#).

² The claim did not provide information concerning the date of the last payment or the last transaction. [See, Fed. R. Bankr. P. Rule 3001\(c\)\(3\)\(A\)\(iii, iv\)](#).

523 B.R. 651, *653; 2015 Bankr. LEXIS 239, **3

re Knox, 237 B.R. 687, 697 (Bankr. N.D. Ill. 1999). See also, *Adair v. Sherman*, 230 F.3d 890, 895 n.8 (7th Cir. 2000) ("debtors facing fraudulent proofs claim should seek sanctions under [Rule 9011(b)].").

HN3 Whether or not the obligations imposed by Rule 11 have been fulfilled "is an objective determination." *Brown v. Federation of State Medical Boards of the U.S.*, 830 F.2d 1429, 1435 (7th Cir. 1987). See also, *In re Ronco*, 838 F.2d 212, 217 (7th Cir. 1988) ("litigation must be grounded in an objectively reasonable view of the facts and the [**4] law"). The investigation it requires does not have to be exhaustive, simply "reasonable under the circumstances." Furthermore, the duty to investigate defenses does not extend to every [**654] defense that could be possibly be asserted, but only to those that are "obvious." Consequently, the court must undertake an objective inquiry into the obviousness of the debtors' statute of limitations defenses to the claims filed by Resurgent/LVNV and Jefferson Capital and whether those claimants undertook a reasonable investigation into that issue before filing the claims.

Debtors' statute of limitations defense to both claims was blindingly obvious. It does not take a rocket scientist to figure out that December 1998 (the Jefferson Capital claim charge off date) or May 2001 (the Resurgent/LVNV claim charge off date) are well beyond six years before the March 2014 date the debtors filed this case. A third grader could do the math. Moreover, coming to the conclusion that the claims might be time-barred did not require either claimant to look beyond the information it already possessed. See, *Leeds Bldg. Products*, 181 B.R. at 1010 (defense is obvious when it needs no discovery to establish); *Excello Press*, 967 F. 2d at 1113-15 (reasonable pre-filing investigation into defenses [**5] does not require pre-filing discovery of information beyond filer's control). They provided it themselves when they completed the required claim form, before it was ever filed. Under these circumstances, neither filer could proceed further without doing something to inquire into that defense. Of course, the hearing and the pre-hearing filings required by the orders to show cause were designed to elicit that information, and to give the claimants the opportunity to explain what systems and procedures they may have in place to avoid filing timebarred claims. They did not take advantage of the opportunity and so there is nothing that could allow the court conclude that either claimant undertook any investigation into the obvious statute of limitations defense to the claims they each filed, much less a reasonable one. Filing those claims violated Rule 9011(b)(2).³

³The court is aware of published decisions that have declined to impose sanctions for filing time-barred claims. Yet, most of those

HN4 Whether or not the court imposes sanctions for violating Rule 9011, together with the nature of any sanction, is a matter committed to its discretion. *Fed. R. Bankr. P. Rule 9011(c)* ("the court may . . . impose an appropriate sanction"). Discretionary choices are not left to the court's inclination, but to its judgment, and that judgment should be guided by sound legal principles. *Frantz*, 836 F.2d at 1066. In an fashioning appropriate sanction, the primary goal should be deterrence; in other words, to avoid the "repetition of such conduct or comparable conduct by others similarly [**7] situated." *Fed. R. Bankr. P. Rule 9011(c)(2)*. See also, *White*, 908 F.2d 675 [**655] at; *In re Rimsat, Ltd.*, 229 B.R. 914, 921 (Bankr. N.D. Ind. 1998), aff'd, 230 B.R. 362 (N.D. Ind. 1999), aff'd, 212 F.3d 1039 (7th Cir. 2000). Furthermore, in crafting that deterrent, the court believes it can consider how non-bankruptcy law addresses other misconduct by debt collectors. See, *BMW of North America v. Gore*, 517 U.S. 559, 583-84, 116 S.Ct 1589, 1603, 134 L. Ed. 2d 809 (1996). The Fair Debt Collection Practices Act allows the recovery of actual damages, attorney fees and additional statutory damages up to \$1,000 for violations of its requirements. 15 U.S.C. § 1692(k). That seems to be an appropriate place to begin.⁴ Here, the court cannot award the debtor any damages or attorney fees because the sanctions inquiry was initiated by the court, not by a motion. So it is limited to fashioning some type of penalty payable to the court.⁵ *Fed. R. Bankr. P. Rule*

decisions were not applying Rule 9011 or considering the filer's duty to make a reasonable inquiry. They were considering such things as whether § 105 or some other provision of the Bankruptcy Code created an independent cause [**6] of action against the filer or whether the claim was "false and fraudulent," which is much different from the reasonable inquiry Rule 9011(b) requires. See e.g., *In re Keeler*, 440 B.R. 354 (Bankr. E.D. Penn. 2009) (no action under § 105); *In re McGregor*, 398 B.R. 561 (Bankr. N.D. Miss. 2008) (no cause of action under the Bankruptcy Code); *In re Simpson*, 2008 Bankr. LEXIS 2457, 2008 WL216317 (Bankr. N.D. Ala. 2008) (§105); *In re Varona*, 388 B.R. 705 (Bankr. E.D. Vir. 2008) (claim must be false and fraudulent). The court knows of only one decision that considered the issue under Rule 9011, and it declined to impose sanctions. See, *In re Andrews*, 394 B.R. 384 (Bankr. E.D. N.C. 2008). It appears, however, that there the claimed violation of the rule was the failure to attach supporting documentation, not the failure to conduct a reasonable inquiry into an obvious affirmative defense. Coincidentally, the rule change that court felt was needed, *id.* at 388, was made in 2012 and is now part of Bankruptcy Rule 3001(c)(3).

⁴The court has considered the Fair Debt Collection Practices Act only as a guide to the type of penalties Congress has fashioned for debt collectors. Whether the claimants' conduct violates that statute is not an issue in this case, which is solely concerned with the requirements of Rule 9011.

⁵Given that neither filer has paid attention to the other notices that

523 B.R. 651, *655; 2015 Bankr. LEXIS 239, **6

[9011\(c\)\(2\)](#). A \$1,000 fine should be large enough to get the attention of Jefferson Capital, Resurgent, and LVNV and deter them (and others) from similar misconduct in the future, and yet it is not so large as to be unduly burdensome. *Kapco Manufacturing Co., Inc. v. C & O Enterprises, Inc.*, 886 F.2d 1485, 1496 (7th Cir. 1989) ("A sanction without teeth may lack sufficient bite"). That number also reflects an appreciation of the system-wide burdens created by this type of misconduct — problems others have often been commented upon — as well as the time the court has had to devote to the [Rule 9011](#) inquiry, and so should serve to deter others who may be similarly [**8] situated from repeating the same mistake. While the court recognizes that [Rule 9011](#) requires the least severe sanction that is adequate to serve as an effective deterrent, *Vollmer* 248 F.3d at 710-11, it has no reason to believe that a lesser sanction would effectively deter either these claimants or others in their position.

Appropriate orders will be entered.

/s/ Robert E. Grant

Chief Judge, United States Bankruptcy Court

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in 523 B.R. 651.]

[*none] **ORDER IMPOSING SANCTIONS**

On January 7, 2015.

This matter having come before the court to consider whether Resurgent Capital Services and LVNV Funding, LLC violated the requirements of [Bankruptcy Rule 9011\(b\)\(2\)](#), the issues having been determined and a decision rendered, it is

THEREFORE ORDERED that Resurgent Capital Services and LVNV Funding, LLC shall, [**9] jointly and severally, pay the clerk of this court the sum of \$1,000 within fourteen (14) days of this date.

/s/ Robert E. Grant

Chief Judge, United States Bankruptcy Court

ORDER IMPOSING SANCTIONS

On January 7, 2015

This matter having come before the court to consider whether Jefferson Capital Systems, LLC violated the requirements of [Bankruptcy Rule 9011\(b\)\(2\)](#), the issues having been

determined and a decision rendered, it is

THEREFORE ORDERED that Jefferson Capital Systems, LLC shall pay the clerk of this court the sum of \$1,000 within fourteen (14) days of this date.

/s/ Robert E. Grant

Chief Judge, United States Bankruptcy Court

have been served upon them, the court has no reason to believe that some kind of non-monetary sanction or admonition would suffice.

No Shepard's Signal™
As of: August 18, 2016 9:50 AM EDT

In re Graves

United States Bankruptcy Court for the Middle District of North Carolina, Greensboro Division

September 10, 2012, Decided; September 12, 2012, Filed

Case No. 12-10313C-13G

Reporter

2012 Bankr. LEXIS 4250; 2012 WL 4026811

IN RE: Barry O'Neil Graves, Debtor.

Core Terms

new value, services, preferential transfer, attorney's fees, services provided, post-petition

Case Summary

Procedural Posture

Movant bankruptcy administrator filed a motion seeking a determination of whether a law firm charged a Chapter 13 debtor a reasonable fee, and whether the debtor's attorney was disinterested. The motion was prompted by the fact the debtor's statement of financial affairs showed that he paid the attorney \$1,400 less than 90 days before he declared bankruptcy for "attorney fee from previous case."

Overview

The debtor hired a law firm to assist him in declaring Chapter 13 bankruptcy in February 2010, and when the case was dismissed in July 2010 he owed the law firm \$1,400 in unpaid fees. In February 2012, the debtor asked the law firm to represent him in a second Chapter 13 case, and consistent with its policy that it would not represent debtors who still owed the firm fees, it collected the \$1,400 it was owed for representing the debtor in the first case. The firm prepared a bankruptcy petition in the second case and filed that petition on March 8, 2012, and after the debtor declared bankruptcy the bankruptcy administrator sought a determination that the law firm had to surrender the \$1,400 it collected from the debtor because the payment was a preferential transfer under 11 U.S.C.S. § 547. The court found that the payment was a preferential transfer because it was made less than 90 days before the debtor declared bankruptcy, at a time he was presumed under § 547(f) to be insolvent, to satisfy a debt he owed before he declared bankruptcy.

Outcome

The court entered an order which prohibited distribution of fees to the law firm until the firm paid the trustee \$1,400. The

court rejected firm's claim that it was entitled to keep the payment pursuant to 11 U.S.C.S. § 547(c)(4) because it provided subsequent new value for the payment.

LexisNexis® Headnotes

Bankruptcy Law > ... > Preferential
Transfers > Elements > General Overview

HN1 A bankruptcy trustee must prove seven elements to successfully establish and recover a transfer as preferential: (1) a transfer, (2) of an interest in property of a debtor, (3) to or for the benefit of a creditor, (4) for or on account of an antecedent debt, (5) which was made while the debtor was insolvent, (6) made on or within 90 days before the date of the filing of a bankruptcy petition, and (7) that enabled the creditor to receive more than it would otherwise have received if the transfer had not been made and the case had proceeded under Chapter 7 of the Bankruptcy Code. 11 U.S.C.S. § 547(b).

Bankruptcy Law > ... > Preferential
Transfers > Elements > Debtor Insolvency

HN2 11 U.S.C.S. § 547(f) provides that for purposes of § 547, a debtor is presumed to be insolvent on and during the 90 days immediately preceding the date of the filing of a bankruptcy petition.

Bankruptcy Law > ... > Avoidance > Exemptions From
Avoidance > Subsequent New Value

HN3 11 U.S.C.S. § 547(c)(4) exempts a transfer to a creditor from recovery by a trustee as a preference to the extent that, after such transfer, such creditor gave new value to or for the benefit of a debtor. A creditor must establish three elements in order to successfully assert a "subsequent new value" defense to a preference-avoidance claim: (1) the creditor must have received a transfer that is otherwise voidable as a preference; (2) the creditor, after receiving a preferential transfer, must have advanced new value to the debtor on an unsecured basis; and (3) the debtor must not have fully compensated the

2012 Bankr. LEXIS 4250, *4250

creditor for the new value as of the date the debtor filed its bankruptcy petition. While new value may include services provided by an attorney or other creditor, postpetition goods or services provided to a debtor do not qualify as "new value" for purposes of the new value exception to a preferential transfer claim.

Counsel: [*1] For Barry O'Neil Graves, Debtor: John T. Orcutt, Raleigh, NC.

Trustee: Anita Jo Kinlaw Troxler, Greensboro Chapter 13 Office, Greensboro, NC.

Judges: WILLIAM L. STOCKS, United States Bankruptcy Judge.

Opinion by: WILLIAM L. STOCKS

Opinion

OPINION AND ORDER

This case came before the court on July 24, 2012, for hearing on the Motion of the United States Bankruptcy Administrator for Examination of Debtor's Transactions with Debtor's Attorney and Request for Determination of Reasonable Fee and Whether Counsel is Disinterested ("Motion") (Docket #25). Robert E. Price, Jr., appeared on behalf of the Bankruptcy Administrator ("BA"), Edward C. Boltz appeared as attorney for the Debtor and Jennifer R. Harris appeared on behalf of the Chapter 13 Trustee, Anita Jo Kinlaw Troxler. Having considered the Motion and the evidence and arguments offered at the hearing, the court makes the following findings and conclusions pursuant to [Rules 9014](#) and [7052 of the Federal Rules of Bankruptcy Procedure](#).
MATTER BEFORE THE COURT

The Motion was prompted by the undisputed fact that in February of 2012, the Debtor's attorney of record, John T. Orcutt, received a payment of \$1,400 from the Debtor which is described in the Debtor's statement of [*2] financial affairs as payment for "attorney fee from previous case." The BA asserts that such payment was a preferential transfer under [section 547 of the Bankruptcy Code](#) and, among other things, argues that if the attorney is not disqualified as a result of having received such payment, that the attorney's fee in this case should be reduced by the amount of the \$1,400 payment. The Debtor's attorney denies that the payment was a preferential transfer but argues alternatively that if the payment were a preferential transfer, such transfer is not avoidable because new value was provided by the firm following the transfer within the meaning of [section](#)

[547\(c\)\(4\)](#).

FACTS

The Orcutt firm represented the Debtor in a previous chapter 13 case that was commenced in February of 2010 in the United States Bankruptcy Court for the Eastern District of North Carolina (Case No. 10-01448-8-JRL). That case was dismissed in July of 2010. At the time of the dismissal, the Debtor had paid only a portion of the attorney fee of the Orcutt firm and a balance of \$1,400 remained unpaid. In approximately February of 2012, the Debtor again sought the services of the Orcutt firm for a bankruptcy filing. The policy [*3] of the Orcutt firm is that the firm will not file a chapter 13 case for a debtor who did not pay the full amount of the firm's attorney fee in a previous case unless the debtor first pays any unpaid balance from the previous case. Consistent with this policy, the \$1,400 received by the Orcutt firm in February represented the unpaid balance of the fee owed by the Debtor from his previous case. After receiving this payment, the Orcutt firm accepted employment by the Debtor and commenced the present chapter 13 case on behalf of the Debtor on March 8, 2012. In doing so, the Orcutt firm performed various services related to the commencement of this case such as conferring with and advising the Debtor regarding his financial situation, preparing the schedules, formulating a proposed plan and filing the required documents with the court. The Orcutt firm has applied for the base attorney fee of \$3,500, of which \$155 has been received from the Debtor. (Docket #2). The \$3,500 fee sought in this case encompasses the above-described services that were provided by the Orcutt firm in commencing this case. Although a plan has been confirmed in this case, the confirmation order provides that the determination [*4] of the allowance of an attorney fee shall be by separate order of the court.

ANALYSIS

1. The Debtor's February 2012 transfer of \$1,400 to the Orcutt Firm is a preference under [11 U.S.C. § 547\(b\)](#)

HNI The Trustee must prove seven elements to successfully establish and recover a transfer as preferential: (1) a transfer, (2) of an interest in property of the debtor, (3) to or for the benefit of a creditor, (4) for or on account of an antecedent debt, (5) the transfer was made while the debtor was insolvent, (6) made on or within 90 days before the date of the filing of the bankruptcy petition, and (7) that enabled the creditor to receive more than it would otherwise have received if the transfer had not been made and the case had proceeded under Chapter 7 of the Bankruptcy Code. [11 U.S.C.A. § 547\(b\)](#). The undisputed facts reflect that the February 2012 transfer is a preference: the Debtor made a \$1,400 transfer to the Orcutt Firm, a creditor, on account of an

2012 Bankr. LEXIS 4250, *4

antecedent debt owed by the Debtor. The transfer was made within the ninety days before the date of the bankruptcy filing while the Debtor is presumed, and appears to have in fact been insolvent. See *HN2* 11 U.S.C. § 547(f); *In re Nationwide Tower Co.*, 2008 Bankr. LEXIS 1738, 2008 WL 2472935 (Bankr. W.D. Ky. 2008) [*5] (statutory presumption that the debtor has been insolvent on or during the 90 days immediately preceding the date of the filing of the bankruptcy petition). Further, in examining the Claims Register in the Debtor's bankruptcy, it is clear that the transfer enabled the Orcutt Firm to receive more than it would have received had it been scheduled as an unsecured creditor in the Debtor's bankruptcy (the estimated dividend to unsecured creditors is zero percent). Accordingly, all elements of a preference are present in this case, and the transfer is avoidable unless one of the affirmative defenses in *section 547(c)* applies.

2. The Orcutt Firm is not entitled to assert a *section 547(c)(4)* new value defense

HN3 *Section 547(c)(4)* exempts a transfer to a creditor from recovery by the Trustee as a preference "to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor...." 11 U.S.C. § 547(c)(4). A creditor must establish three elements in order to successfully assert "subsequent new value" defense to preference-avoidance claim: (1) creditor must have received a transfer that is otherwise voidable as preference; (2) creditor, after receiving this preferential [*6] transfer, must have advanced new value to debtor on an unsecured basis; and (3) debtor must not have fully compensated creditor for this new value as of date that bankruptcy petition is filed. *Id.*; *In re Winstar Commc'ns, Inc.*, 554 F.3d 382 (3d Cir. 2009). While new value may include services provided by an attorney or other creditor, post-petition goods or services provided to a debtor do not qualify as "new value" for purposes of new value exception to a preferential transfer claim. *In re Smith Min. and Material, LLC*, 405 B.R. 589 (Bankr. W.D. Ky. 2009); *Bergquist v. Anderson-Greenwood Aviation Corp.* (In re Bellanca Aircraft Corp.), 850 F.2d 1275, 1284 (8th Cir. 1988) (post petition goods or services provided to a debtor in possession do not qualify as "new value" for purposes of § 547(c)(4); *In re Phoenix Restaurant Group, Inc.*, 317 B.R. 491 (Bankr. M.D. Tenn. 2004); *Field v. Maryland Motor Truck Assoc. Workers Compensation Self-Insurance Group* (In re George Transfer, Inc.), 259 B.R. 89, 96 (Bankr. D. Md. 2001) ("Unfortunately for the defendant, its refund to the debtors does not qualify under *Section 547(c)(4)* as 'new value' because it was made postpetition. Indeed, this Court [*7] has found no case decided under *Section 547(c)(4)* that permitted a transferee to successfully defend an action for the recovery of a preference based upon a subsequent advance that was made postpetition."), citing *Schwinn Plan Comm. v. AFS Cycle & Co. Ltd.* (In re Schwinn Bicycle Co.), 205 B.R. 557 (Bankr.

N.D. Ill. 1997); *Clark v. Frank B. Hall & Co. of Colo.* (In re Sharoff Food Serv., Inc.), 179 B.R. 669, 678 (Bankr. D. Colo. 1995); *Wallach v. Vulcan Steam Forging* (In re D.J. Mgmt. Grp.), 161 B.R. 5 (Bankr. W.D.N.Y. 1993); *Wolinsky v. Central Vermont Teachers Credit Union* (In re Ford), 98 B.R. 669 (Bankr. D.Vt. 1989); *Warsco v. Ryan* (In re Richards), 92 B.R. 369 (Bankr. N.D. Ind. 1988); *Cullen v. TDK Elec. Corp.* (In re Antinarelli Enter., Inc.), 76 B.R. 247 (Bankr. D. Mass. 1987); *Official Labor Creditors Comm. v. Jet Florida Sys., Inc.* (In re Jet Florida Sys., Inc.), 80 B.R. 544 (S.D. Fla. 1987).

The foregoing cases make it clear that the Orcutt firm is not entitled to a new value defense based upon services that were provided after the petition in this case was filed. Under the particular circumstances of this case, the same is true of the services that were provided before the petition [*8] was filed. The services provided by the Orcutt firm between the time they received the \$1,400 payment and the filing of the petition were in connection with the commencement of the Debtor's chapter 13 case. The \$3,500 presumptive base fee elected by the Orcutt firm in this case includes compensation for those services as well as the usual and ordinary usual post-petition services required of an attorney representing a debtor in a chapter 13 case. The firm's election to receive the presumptive fee amounts to an election to treat all of its services as part of its post-petition *section 503(b)(2)* claim. All of the services having been included in the firm's *section 503(b)(2)* claim, none of the services provided by the Orcutt firm are available as a basis for a new value defense. The result is that the \$1,400 payment received by the firm is an avoidable preferential transfer under *section 547* of the bankruptcy Code.

It is, therefore, ORDERED that no fees shall be distributed to the Orcutt firm in this case until the firm has paid the sum of \$1,400 to the Trustee.

This 10th day of September, 2012.

/s/ William L. Stocks

WILLIAM L. STOCKS

United States Bankruptcy Judge

[KRPC 1.1](#)

This document reflects changes received through April 1, 2016

[Kansas Court Rules](#) > [KANSAS SUPREME COURT RULES](#) > [RULES RELATING TO DISCIPLINE OF ATTORNEYS](#) > [RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT](#) > [CLIENT-LAWYER RELATIONSHIP](#)

RULE 1.1 Competence

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

Comment

Legal Knowledge and Skill

- [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
- [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.
- [3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.
- [4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

- [5] Competent handling of a particular 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. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.
- [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances,

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including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

- [7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.
- [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

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End of Document

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This document reflects changes received through April 1, 2016

Kansas Court Rules > KANSAS SUPREME COURT RULES > RULES RELATING TO DISCIPLINE OF ATTORNEYS > RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT > CLIENT-LAWYER RELATIONSHIP

RULE 1.5 Fees

- (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
 - (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) whether the fee is fixed or contingent.
- (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
- (c) A lawyer's fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney.
- (d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. All such expenses shall be deducted before the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the client's share and amount and the method of its determination. The statement shall advise the client of the right to have the fee reviewed as provided in subsection (e).
- (e) Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter and the court shall have the authority to determine whether the contract is reasonable. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.
- (f) A lawyer shall not enter into an arrangement for, charge, or collect:
 - (1) Any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or
 - (2) a contingent fee for representing a defendant in a criminal case; or
 - (3) a contingent fee in any other matter in which such a fee is precluded by statute.

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- (g) A division of fee, which may include a portion designated for referral of a matter, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division.
- (h) This rule does not prohibit payments to former partners or associates or their estates pursuant to a separation or retirement agreement.

Basis or Rate of Fee

- [1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

- [2] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.
- [3] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

- [4] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Paragraph (g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive.
- [5] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Disputes over Fees

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- [6] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. The fact that a fee may be lower than the customary fee charged in the locality for similar service shall not be a basis for finding the fee to be unreasonable.

History

[Am. effective March 11, 1999.]

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This document reflects changes received through April 1, 2016

[Kansas Court Rules](#) > [KANSAS SUPREME COURT RULES](#) > [RULES RELATING TO DISCIPLINE OF ATTORNEYS](#) > [RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT](#) > [CLIENT-LAWYER RELATIONSHIP](#)

RULE 1.7 Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client;
 - (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

Comment

- [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(f) and (b).
- [2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).
- [3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.
- [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer had obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to

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represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

- [5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

- [6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.
- [7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

- [8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Responsibilities to Former Clients and Other Third Persons

- [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

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- [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).
- [11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.
- [12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(k).

Interest of Person Paying for a Lawyer's Service

- [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

- [14] Ordinarily, clients may consent to representation notwithstanding conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.
- [15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).
- [16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.
- [17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same

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litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(n)), such representation may be precluded by paragraph (b)(1).

Informed Consent

- [18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(f) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).
- [19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

- [20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(o) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

- [21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

- [22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not

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reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

- [23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.
- [24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.
- [25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

- [26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].
- [27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

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[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interest can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

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Organizational Clients

- [34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.
- [35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

History

[Am. effective July 1, 2007.]

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End of Document

[KRPC 1.15](#)

This document reflects changes received through April 1, 2016

[Kansas Court Rules](#) > [KANSAS SUPREME COURT RULES](#) > [RULES RELATING TO DISCIPLINE OF ATTORNEYS](#) > [RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT](#) > [CLIENT-LAWYER RELATIONSHIP](#)

RULE 1.15 Safekeeping Property

- (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state of Kansas. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.
- (b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
- (d) Preserving identity of funds and property of a client.
 - (1) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable accounts maintained in the State of Kansas with a federal or state chartered or licensed financial institution and insured by an agency of the federal or state government, and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:
 - (i) Funds reasonably sufficient to pay bank charges may be deposited therein.
 - (ii) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
 - (2) The lawyer shall:
 - (i) Promptly notify a client of the receipt of the client's funds, securities, or other properties.
 - (ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
 - (iii) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to the client regarding them.
 - (iv) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.
 - (v) Produce all trust account records for examination by the Disciplinary Administrator upon request of the Disciplinary Administrator in compliance with Rule 216A.

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- (3) Except as provided in subsection (3)(iv), any lawyer or law firm that creates or maintains an account for funds of clients or third persons that are nominal in amount or that are expected to be held for a short period of time and on which interest is not paid to the clients or third persons shall comply with the following provisions:
- (i) Such an account shall be established and maintained with a federal or state chartered or licensed financial institution located in Kansas and insured by an agency of the federal or state government. Funds shall be subject to withdrawal upon request and without delay.
 - (ii) If the account bears interest, the rate of interest payable shall not be less than the rate paid by the institution to regular, nonattorney depositors. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm so long as there is no impairment of the right to withdraw or transfer principal immediately.
 - (iii) If the account bears interest, lawyers or law firms that deposit client funds in such an account shall direct the depository institution:
 - (aa) to remit at least quarterly, to the Kansas Bar Foundation, Inc., interest or dividends, as the case may be, on the average monthly balance in the account or as otherwise computed in accordance with the institution's standard accounting practice; and
 - (bb) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of the interest applied; and
 - (cc) to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.
 - (iv) A lawyer or law firm that elects not to comply with Rule 1.15(d)(3)(iii):
 - (aa) shall file a Notice of Declination with the Clerk of the Appellate Courts on or before the beginning of the next annual registration period under Supreme Court Rule 208; or
 - (bb) notwithstanding the foregoing, may file a Notice of Declination with the Clerk of the Appellate Courts at such other time, after July 1, 1992, that a decision to decline is effected.
 - (v) Every lawyer who has not previously registered or who is required to register under Supreme Court Rule 208 shall be provided the opportunity, at the time of initially registering, to elect or decline to comply with Rule 1.15(d)(3)(iii) (the IOLTA program) on such forms as the Clerk of the Appellate Courts may prescribe.
 - (e) Every Kansas lawyer engaged in the private practice of law in Kansas shall, as a part of his or her annual registration, certify to the following: "I am familiar with and have read Kansas Supreme Court Rule 226, KRPC 1.15, and I and/or my law firm comply/complies with KRPC 1.15 pertaining to preserving the identity of funds and property of a client."
 - (f)
 - (1) Every federal or state chartered or licensed financial institution referred to in KRPC 1.15(d)(1) shall be approved as a depository for lawyer trust accounts if it files with the Disciplinary Administrator an agreement, in a form provided by the Disciplinary Administrator, to report to the Disciplinary Administrator in the event any properly payable instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days' notice in writing to the Disciplinary Administrator. The Disciplinary Administrator shall annually publish a list of approved financial institutions.
 - (2) The overdraft notification agreement shall provide that all reports made by the financial institution shall contain the following information:
 - (i) the identity of the financial institution;
 - (ii) the identity of the lawyer or law firm;
 - (iii) the account number;

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- (iv) either (i) the amount of the overdraft and the date created; or (ii) the amount of returned instrument(s) and date returned.

The information required by the notification agreement shall be provided within five (5) banking days of the date the item(s) were paid or returned unpaid.

- (3) Every lawyer admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.
- (4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule. The Disciplinary Administrator's Office shall reimburse the financial institution for the reasonable cost of producing the reports and records required by this rule should the lawyer or law firm fail to do so.
- (5) This rule shall not create any cause of action for any person or organization against the financial institution based upon the failure of the financial institution to provide the notices required by this rule.

Comment

- [1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Rule 1.15(a) requires that trust funds be deposited in an account separate and apart from the lawyer's, at a financial institution in the state of Kansas. Interest earned on client's funds shall not be retained by an attorney. The lawyer or law firm must deposit trust funds in one or more of the following insured accounts:
 - 1. a separate interest-bearing account for each matter, on which the interest will be paid to the client or a third party; or
 - 2. a pooled noninterest-bearing account for the deposit of all trust funds that are not invested for the benefit of the client or third person if the lawyer or law firm elects to decline under Rule 1.15(d)(3)(iv); or
 - 3. a pooled interest-bearing account for the deposit of all trust funds that are nominal in amount or that are expected to be held for a short period of time, with interest earnings paid to the Kansas Bar Foundation under the IOLTA program (Interest on Lawyer Trust Account); or
 - 4. a pooled interest-bearing account for the deposit of all trust funds that are nominal in amount or expected to be held for a short period of time, with interest earnings credited proportionately to the client or third party for the benefit of whom the funds are held.
- [2] Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.
- [3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.
- [4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client and, accordingly, may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.
- [5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

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- [6] A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.
- [7] Rule 1.15 of the Kansas Rules of Professional Conduct requires that lawyers in the practice of law who are entrusted with the property of law clients and third persons must hold that property with the care required of a professional fiduciary. The basis for Rule 1.15 is the lawyer's fiduciary obligation to safeguard trust property and to segregate it from the lawyer's own property, and not to benefit personally from the possession of the property.
- [8] Rule 1.15 specifically requires a lawyer to preserve "complete records" concerning the law firm's trust accounts. It also obligates a lawyer to "promptly render a full accounting" for the receipt and distribution of trust property. A violation of Rule 1.15 subjects a lawyer to professional discipline.
- [9] Paragraph (e) requires lawyers who are engaged in private practice, as a part of their annual lawyer registration, to certify compliance with Rule 1.15 concerning their trust account(s).

History

[Am. effective June 1, 1992; Am. effective April 30, 1993; Am. effective March 11, 1999; Am. effective July 1, 2007.]

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KRPC 3.3

This document reflects changes received through April 1, 2016

Kansas Court Rules > KANSAS SUPREME COURT RULES > RULES RELATING TO DISCIPLINE OF ATTORNEYS > RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT > ADVOCATE

RULE 3.3 Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
 - (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

- [1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(n) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.
- [2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

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

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commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

- [4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

- [5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.
- [6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness' testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.
- [7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].
- [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(e). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.
- [9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

- [10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so

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requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

- [11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

- [12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

- [13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

- [14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

- [15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

History

[Am. effective July 1, 2007.]

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[KRPC 4.2](#)

This document reflects changes received through April 1, 2016

[Kansas Court Rules](#) > [KANSAS SUPREME COURT RULES](#) > [RULES RELATING TO DISCIPLINE OF ATTORNEYS](#) > [RULE 226 KANSAS RULES OF PROFESSIONAL CONDUCT](#) > [TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS](#)

RULE 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

- [1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.
- [2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
- [3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
- [4] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.
- [5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.
- [6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.
- [7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or

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has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

- [8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.
- [9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

History

[Am. effective July 1, 2007.]

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