All About Attorney Fees

A plenary session.

Moderated by the Honorable Joel D. Applebaum

Panelists: Corey M. Carpenter, Elizabeth Clark, and Caralyce M. Lassner

Joel D. Applebaum is a United States Bankruptcy Judge for the Eastern District of Michigan. Prior to taking the bench in May 2019, Judge Applebaum was a member of Clark Hill PLC, practicing in the firm's Corporate Restructuring and Bankruptcy Practice Group. He concentrated his practice in the areas of bankruptcy and corporate reorganization, creditors' rights, commercial and bankruptcy litigation, and general commercial law.

A member of the Michigan and Federal Bar Associations, and the American Bankruptcy Institute, Judge Applebaum is also a Fellow of the American College of Bankruptcy, an honorary association of bankruptcy and insolvency professionals. He has authored and lectured extensively on a wide variety of bankruptcy, creditors' rights, and general commercial law topics.

Judge Applebaum received his J.D. with honors from Wayne State University Law School, and his B.A. with honors from Michigan State University.

Corey M. Carpenter is the founder and owner of Carpenter Law, which was established in 2019. Prior to that, for over 13 years, Corey served as an associate attorney with B.O.C. Law Group, P.C. in Pleasant Ridge, Michigan. Throughout his entire career, he has represented debtors, specializing in Chapter 7 and Chapter 13 bankruptcies, as well defending consumers in civil actions throughout the State of Michigan. He graduated *magna cum laude* from Albion College with a B.A. in History in December 2000, and obtained his J.D., *cum laude* from Wayne State University Law School in 2004. He is currently a member of the State of Bar of Michigan, and admitted to practice in the United States District Courts for both the Eastern and Western Districts of Michigan.

Elizabeth Clark has been a staff attorney for Brett N. Rodgers, Chapter 13 Trustee, in Grand Rapids, Michigan since January of 2006 and has served as a panelist on Chapter 13 bankruptcy law issues for several seminars including FBA Bankruptcy Section seminars in the Western District of Michigan, Best Practices seminars throughout the Western District of Michigan, Boot Camp seminars in the Western District of Michigan, and the Hon. Steven W. Rhoades Consumer Bankruptcy Conference in the Eastern District of Michigan. She is currently the chairperson for the FBA Bankruptcy Section Steering Committee. For the last four years, she has served on the Education Subcommittee for the Consumer Section of the annual FBA Bankruptcy Section seminar. Elizabeth received her B.A. in Political Science and Communications from St. Mary's College of Notre Dame, Indiana in 2002 and graduated with her J.D. degree summa cum laude from Michigan State University College of Law in 2005. In her free time, she enjoys spending

time with her husband and three children biking, playing tennis, traveling, reading, painting, baking, and playing board games.

Caralyce M. Lassner is an attorney with Marrs & Terry, PLLC. Previously the principal in her own firm, former partner in the law firm of Scarletta Lassner, PLC, and a former associate with two well respected firms in metro Detroit. She is also Of Counsel to Anthony Y. Abueita and Of Counsel to Karen E. Evangelista, PC. She practices exclusively in the area of consumer bankruptcy. In practice for almost 20 years, she also has experience in the areas of family law, civil and contract litigation, administrative law, and estate planning. Ms. Lassner has been an active member of the Consumer Bankruptcy Association (CBA) for many years and currently serves as the organization's Secretary. Ms. Lassner has served on and chaired the planning committee for this conference for many years and currently Co-Chairs the committee. She has also previously served on the planning committee of the ICLE-CBA Consumer Bankruptcy Institute, the 2011 Federal Bar Association/CBA Trial Advocacy Workshop, and assisted in the planning and development of ICLE's 2011 Bankruptcy Boot Camp. Ms. Lassner was named the 2010 Member of the Year by CBA and as one of the 20 Up and Coming Lawyers in 2011 by "Michigan Lawyers Weekly." She formerly served as Co-Chair of the ABI Consumer Bankruptcy Committee and developed the CBA series entitled "Bankruptcy Basics Series" in 2009. Ms. Lassner is particularly interested in bankruptcy issues related to student loans, post-petition assets, and complex issues in consumer cases. In her free time, her life is ruled by three kitties and she is actively involved in two local gifting economies and various charitable organizations.

"ALL THINGS ATTORNEY FEES"

UNBUNDLING, BI-FURCATION AND FACTORING IN CHAPTER 7 BANKURUPTCIES: ETHICAL PITFALLS AND CONCERNS

By: Corey M. Carpenter
Founder and Managing Attorney of Carpenter Law

I. Basic Concepts

A. Unbundling Services v. Bi-Furcation of Services

1. **Unbundling:** While inextricably tied to Bi-Furcation on a practical level, unbundling is its own unique concept: "[u]nbundling is a process where an attorney, by agreement, provides a ***limited scope of services*** to a client, performing only specific tasks."[1]

2. **Bi-Furcation:** "Bi-Furcation, in contrast [to unbundling] happens when the attorney and client enter into ***more than one agreement for the provision of bankruptcy services***."[2]

B. Factoring: pre-arranged financing of attorney fees for Chapter 7 Debtors. See, for example, *In re Baldwin*, 640 BR 104 (W.D. Ky. 2021), which centered largely on the practical and ethical implications of factoring attorney fees. In *Baldwin*, the Court addressed in great detail the practice of an attorney that obtained a factoring line of credit from a 3rd party financer, who in that particular case, passed all costs of financing along to his clients.

[1] Quoted from Judge Tracey N. Wise's (Bankr. E.D. KY) commentary to the 95th Annual National Conference of Bankruptcy Judges (2021) (***emphasis added***).
[2] *Id*. (***emphasis likewise added***)

II. Ethical Obligations and Implications of Unbundling, Bi-Furcation, and Factoring

A. Unbundling of Services

Courts recently addressing the matter of unbundling of services have almost universally deferred to its states own ethical rules and guidelines to determine the appropriateness of unbundling services. For instance, see *In re Slabbinck,* 482 BR 576 (Bankr. E.D. Mich. 2012).[3] In *Slabbinck,* Judge Shefferly analyzed the Michigan Rules of Professional Responsibility, and held that the question of appropriateness involved two (2) primary and interconnected questions: 1) can the attorney **competently** represent a client based upon the pre-agreed unbundling of services that are set forth in the pre-and post-petition fee agreements (citing MRPC 1.1); and 2) has the debtor(s) truly given informed consent to the arrangement the attorney proposes. Judge Shefferly's roadmap, based upon available published decisions to date (and regardless of whether or not a Court ultimately upholds the specific unbundling of serviced presented before it), appears to constitute the majority view on this issue. See, for example, *In re Brown*, 631 B.R. 77 (Bankr. S.D. Fla 2021)-*allowed* bi-furcation after consulting Florida rules of professional conduct; by contrast, see, by contrast, *In re Baldwin*, 640 BR 104 (W.D. Ky. 2021)-*disallowed* a bi-furcated fee agreement and unbundling of services based upon both State and Local Rules concerning attorney conduct, as well as improper factoring agreements. Overall, it appears that each case on this issue has, and will, be decided on their own peculiar set of facts.

[3] *Slabbinck* is the most detailed and comprehensive case to date in the Eastern District of Michigan discussing the issues of unbundling of services and bi-furcation of attorney fees.

B. Bi-Furcation and Post-Petition Attorney Fee Agreements

Access to bankruptcy relief, particularly when a potential debtor is at his or her most vulnerable, is the underlying theme of all decisions that have addressed this issue, as well as the unbundling of services. How can a Chapter 7 debtor, who may be facing judgment collection, including garnishment of wages, truly gain meaningful access to bankruptcy relief, and in a meaningfully quick time frame? At present, there are essentially three (3) options: a) pay for the entire fee in advance, which alleviates the situation where an attorney may attempt to come to an agreement with his or her client to pay the balance of a pre-petition retainer agreement post-petition[4]; b) file a Chapter 13 to allow the debtor to pay fees post-petition over time; or c) bi-furcate fees into pre-and post-petition services. None of these, admittedly, present an ideal choice for debtors or debtors' attorneys; but bi-furcation may be the most flexible and ethically acceptable of the three; and is generally accepted, provided certain safeguards for the debtor are in place.

Informed Consent. **Informed Consent**. ***INFORMED CONSENT*.** This is the underlying and consistent theme in the available authority addressing bi-furcated attorney fee agreements. While, again, bi-furcation and unbundling are two distinct concepts, one cannot generally employ one method without the other; or more to the point, if, as Judge Shefferly outlined in the *Slabbinck* case, the unbundling of services fails to comply with the MRPC; OR, if informed consent is not achieved, both would likely be cause for potential disgorgement of fees pursuant to Section 329 of the Code. What, then, constitutes informed consent?

First and foremost, the attorney must specifically and conspicuously explain to the debtor what services they intend to unbundle, and the practical and legal implications of such unbundling

[4] See the companion decision for *Slabbinck* of *In re Gourlay*, 483 B.R. 496 (Bankr. E.D. Mich. 2012), which specifically prohibits the enforceability of such an agreement

(and, by extension, how they intend to bi-furcate their services pre-and post-petition). Second, debtors must be made aware of what their options are if they *choose* not to engage the attorney to perform post-petition services. This may include: a) proceeding pro-se (presumably, after the attorney is granted leave to withdraw by the court); or b) hiring another attorney to complete the remaining legal work necessary to obtain a Chapter 7 discharge. Third, the debtors must be aware of the legal consequences of not completing the post-petition in the case (either *pro se*, with their pre-petition retained attorney, or with another attorney hired post-petition), such as: the consequences of dismissal and re-filing(s); failing to cooperate with the Chapter 7 Trustee or failing to address any objections raised to discharge. Without such knowledge, informed consent is illusory.[5]

C. Ethical Concerns of Factoring

As Judge Wise noted in the *Carr* decision, the Bankruptcy Code "prohibits a 'debt relief agency' from advising a debtor to 'incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debt in a case under this title.'" *In Carr*, 613 B.R. 427, 436 (Bankr. E.D. KY 2020). In *In re Baldwin*, 640 B.R. 104 (Bankr. W.D. KY 2021), while the Court in Kentucky's Western District adopted an opinion counter to Judge Wise relative to permissibility of bi-furcation of attorney fee agreements and unbundling of services, the case largely focuses and addressed the specifics of factoring agreements signed by debtors to secure an attorney's services. Largely of concern to the Court in *Baldwin*, was that the debtors' attorney arranged factoring agreements, but also, those agreements at issue passed virtually ALL costs of

[5] See also, *In re Carr*, 613 B.R. 427 (Bankr. E.D. KY 2020), which outlines example(s) of appropriate and necessary disclosures for bi-furcation of attorney fee agreement. In *Carr*, Judge Wise ultimately held that the unbundling of services set forth in the bi-furcated attorney fee agreements in that case did *not* violate ethical guidelines and constituted informed consent.

financing along to his clients, which the Court found not only violative of Kentucky ethical rules, but also, a clear violation of Section 526(a)(4) of the Code. Whether any such agreements could ever be deemed acceptable, one thing is certain: an attorney CANNOT pass along such costs to his or her clients.

III. UST's Likely Position Going Forward As It Relates to Bi-Furcated Attorney Fee Agreements

Based upon available case law and memoranda, it appears likely that the United States Trustee will respect the use of bi-furcated fee agreements, which presents a stark difference from its position taken in the *Slabbinck* case a decade ago, where it sought disgorgement of fees for the debtors' attorney employing bi-furcated fee agreements. This shift is based upon a number of factors, the most important of which appears to be the realization that access to bankruptcy relief for deserving debtors unable to pay an entire fee pre-petition, and absent a better alternative, outweighs counter-veiling arguments in many cases. That is not to say, that the UST is going to give *carte blanche* to debtors' attorneys in this area. The UST has made clear that it will enforce the legal framework set forth by *Slabbinck* and subsequent cases that have permitted bi-furcation of attorney fee agreements, to wit: 1) the fees proposed must be reasonable; 2) the debtors must have been properly advised, so as to give proper, *and actual*, informed consent; and 3) the arrangement must be transparent and properly disclosed to the Court.

As to reasonableness, the UST will seek to look at the balance of the unbundling of services: what is being performed pre-vs. post-petition, and what are the costs for each. Also, is the debtor's attorney encouraging the debtor to seek financing to pay for post-petition fees (and in turn, possibly passing financing costs along to his or her client(s))? And aside from informed consent, which has previously been discussed, the UST will also likely insist on transparency in

any arrangement(s) agreed upon with the debtor. Whatever arrangement is in place must be properly disclosed in any Rule 2016b statement filed with the Court.

IV. ABA Suggestions to Address the Issue(s) Presented-What Are Your Thoughts?

Recently, the ABI submitted recommendations to address the financial pitfalls presented though the existing legal framework for payment of Chapter 7 attorney fees. To recap, these options include: 1) obtain full payment of fees pursuant to a pre-petition fee agreement prior to filing; 2) bi-furcate attorney fees into pre-and post-petition services; and 3) file a Chapter 13 to allow a debtor to pay for fees over time. As the ABI noted, *none* of these options are idea; nor do they optimize access to bankruptcy for those who can lease afford it.

To seeks to improve upon our current system, the ABI's Commission proffered several alternatives, which likely would require at least some amendments to the current Bankruptcy Code. These include:

1) Amending Section 523(a) to specifically exclude Chapter 7 attorney fees from discharge;
2) Allowing for an exception to discharge of Chapter 7 attorney fees, but requiring the filing of a Motion or Adversary proceeding to be filed prior to discharge, and Court review of the pre-petition retainer agreement prior to determining the dischargeability of the fee;
3) Making a Chapter 7 discharge contingent upon payment of all pre-petition attorney fees, with corresponding amendments to relevant Code provisions, with a hardship exception included; or
4) Allowing post-petition payment of pre-petition attorney fees and delaying discharge for up to six (6) months to allow for negotiation of payment of a reasonable fee if the

pre-petition fee could not be paid during that time, with corresponding Code amendments and judicial review.

What are your thoughts? Assuming any of these could be agreed upon by Congress (a big IF), what option balances the policy of increasing access to bankruptcy for those deserving debtors, while also minimizing administrative burdens on the debtors, debtors' counsel and the Courts?

Fees: Attorney or Paraprofessional?

Elizabeth Clark, Staff Attorney for Brett N. Rodgers, Grand Rapids, Michigan

What Services Should be Charged at the Lesser Rate of a Paraprofessional as Opposed to a Higher Attorney Fee Rate?

Courts have routinely looked at the nature of individual tasks on an attorney fee application to determine whether that given task should be billed at a higher attorney fee rate because it requires legal expertise or at a lower paraprofessional rate due to the task being of a routine, simple, and ministerial nature. "While attorney supervision is necessary for performance of all bankruptcy-related services, much of the general prepetition and pre-confirmation services can be performed by paralegals or legal assistants at appropriate rates for those paraprofessionals." *In re Spear,* 636 B.R. 765, 773 (Bankr. S.D. Ohio 2022); *see also In re Henson,* 637 B.R. 13, 18-19 (Bankr. S.D. Ohio 2022). After learning that the attorney was billing almost 45 hours for those services at an attorney fee rate and only 1.5 hours at a paralegal rate, the court in *Spear* applied a blended rate for some of the services. *In re Spear* 636 B.R. at 774. In explanation of this blended rate, the court stated that "counsel need to push work down to the lowest available rate for which such work can be competently performed or otherwise adjust the billing accordingly so that clients are not excessively billed for the level of the work performed." *Id.* Similar to the court in *Spear,* the court in *Vogue* looked at whether the ministerial, routine, or less difficult tasks predominated over the more complex or important tasks during the application period. *In re Vogue,* 92 B.R. 717, 719 (Bankr. E.D. Mich. 1988). The court recognized that some tasks are simple while others require significant concentration, and some conversations may be casual while others may involve critical negotiations. *Id.* The court in *Allison* found that the attorneys had reasonably apportioned tasks with the majority of services performed by associates and paralegals and with board certified partners stepping in for more active roles. *In re Allison,* 578 B.R. 782, 785 (Bankr. W.D. Mich. 2018).

While some courts may look at the overall tasks involved in the application and compare the billing of the amount of tasks that require legal work to the billing of the amount of simple, routine tasks, other courts will review specific

entries and categorize each item as being of a complicated, legal nature or of a routine, simple nature. In *Blackburn,* 623 B.R. 318, 321 (Bankr. W.D. Mich. 2020), the court considered paralegal work to include filing of an affidavit of no objection and receiving an order approving an amendment and forwarding to debtor. The court in *Ulrich* gave an expansive list of tasks that are clerical and should not be performed by attorneys: discussion of ministerial matters regarding a payroll order that does not require exercise of professional judgment, stuffing envelopes, preparing proofs of services, preparing transmittal letters that simply enclose documents, and generally voice mail messages unless they require explanations or legal advice. *In re Ulrich,* 517 B.R. 77, 81-82 (Bankr. E.D. Mich. 2014). Similar to the *Ulrich* court, the court in *Sharp* also held that leaving phone messages is clerical in nature. *In re Sharp,* 367 B.R. 582, 586 (Bankr. E.D. Mich. 2007). In *Bass,* the court concluded that the following tasks required the expertise and knowledge of legal assistance and were compensable: "preparation of the schedules, preparation and printing of documents, and corrections to schedules" along with "charges for phone calls to remind of appointment" and "reviewing trustee notices." *In re Bass,* 227 B.R. 103, 108 (Bankr. E.D. Mich. 1998).

What if, however, the attorney does not employ a paralegal staff? Can the attorney still charge an attorney fee rate for those same simple, routine tasks? The court in *Casterona,* 227 B.R. 504, 516 (Bankr. Idaho, 2001) addressed that exact issue and emphatically stated that even though the attorney had no paid staff, "this does not mean that he may charge a lawyer's rate to run to the mailbox or stand at the copier."

Which Tasks Have Courts Regarded as "Clerical" and Part of "Overhead Expenses" and Thus Are Non-Compensable?

On a related issue, in contrast to the issue of which tasks should be billed at a paralegal rate due to the routine, simple nature of the tasks, courts have also encountered the issue of which tasks should be clerical in nature and thus considered part of "overhead expenses" and non-compensable. The court in *Castorena* adopted the reasoning of the court in *In re Bank of New England Corp.,* which stated that "'[i]f the service performed by a paraprofessional consists of typing, data entry, checking court dockets or court dates, manually assembling,

collating, marking, processing, photocopying or mailing documents, the task is clerical in nature and not compensable.'" *In re Castarena,* 270 B.R. 504, 516 (Bankr. Idaho 2001) *citing In re Bank of New England Corp.,* 134 B.R. 450, 455 (Bankr. D. Mass. 1991), *aff'd* 142 B.R. 584 (D. Mass. 1992). In *Blackburn,* the court regarding the following tasks as clerical in nature and thus non-compensable: saving amended schedules to file, receiving and filing a certificate of service, and redacting and forwarding tax returns to the Trustee. *In re Blackburn,* 623 B.R. 318, 321 (Bankr. W.D. Mich. 2020). Additionally, a paralegal entry for transcriptions of attorney's notes is non-compensable as an overhead expense. *In re Allison,* 578 B.R. 782, 785 (Bankr. W.D. Mich. 2018). Non-compensable clerical services also include scheduling of an appointment, calendaring of dates, and review of notice of appearances. *In re Wheeler,* 439 B.R. 107, 110 (Bankr. E.D. Mich. 2010). While assessing which tasks were simple, routine tasks deserving of a paralegal rate and which tasks were clerical in nature and thus not compensable, the court in *Bass* set forth the following tasks as being non-compensable: verifying whether a debtor's address is correct, placing notes and letters in the file, and the calendaring and docketing of dates. *In re Bass,* 227 B.R. 103, 108 (Bankr. E.D. Mich. 1998). Additional tasks that are considered to be clerical and non-compensable are messages left or taken as to calls made, telephone calls to the Chapter 13 Trustee requesting or confirming adjournments of show cause or confirmation hearings, and calls to the court to check on case numbers. *In re Copeland,* 154 B.R. 693, 702 (Bankr. W.D. Mich. 1993).

As a general rule regarding clerical and non-compensable legal services, "[t]he fact that a fee can be attributed to a particular client does not transform it into a professional fee or service." *In re Bass,* 227 B.R. at 107-08.

How Can An Attorney Get Paid at the End of a Chapter 13 Case?

A determination of whether an attorney gets paid towards the end of a Chapter 13 Plan, either as an administrative claim through the Plan or as a direct payment from debtors after the Chapter 13 discharge, normally involves a very fact-intensive analysis of each case. It can depend upon a variety of factors, including whether the attorney is seeking compensation before the last payment under the Plan is made, whether there are funds on hand in the Chapter 13 estate when the attorney seeks compensation, and whether the debtor consents to the

compensation in the method the attorney is requesting. This area of bankruptcy law seems to be an evolving one and one that does not appear to be well-settled, at least at this point in time. While there seems to be general principles that several courts will apply, the application of those same principles will sometimes yield different conclusions from courts. Hence, the purpose of the following materials is to lay out potential options an attorney may have and the associated risks that each option poses based upon several decisions of bankruptcy courts. There is one option that appears to be the safest option insofar as it seems to present the lowest risk to the attorney based upon the cases that will be cited and summarized hereinafter in this material. One distinction should be recognized by all attorneys: there is a distinction between being awarded compensation under 11 U.S.C. § 330 as reasonable, necessary, and beneficial services to a debtor or estate and payment of that compensation as an administrative claim under 11 U.S.C. § 503.

If an attorney seeks compensation towards the end of a debtor's Chapter 13 case, he or she first needs to address whether they are seeking compensation from funds of the estate if it's feasible or as a direct payment from debtor after discharge of the Chapter 13 case in the event payment through the estate is not feasible because it extends the plan length beyond sixty months. In the event the attorney seeks compensation as an administrative claim to be paid from estate funds, the attorney should be mindful of filing the application in a timely fashion before the last payment under the Plan is made and at a time when debtor's payments until the sixtieth month are sufficient to pay that administrative claim in full. If an attorney elects for debtors to pay their additional fees after his or her Chapter 13 discharge and seeks to have those fees non-dischargeable (and the debtor agrees to this), the attorney needs to first reflect upon the language in debtor's confirmed Plan regarding administrative fees. If debtor's confirmed plan provides that administrative claims are to be paid in full through the Trustee, the attorney will most likely want to file a post-confirmation modification under 11 U.S.C. § 1329 stating that any unpaid additional attorney fees will be paid by the debtor direct after debtor's Chapter 13 discharge and shall survive discharge and should file such a modification **before the debtor makes the last payment under his or her Plan to the Trustee.** Several courts agree that such a modification cannot be proposed once that last payment under the Plan is made. Some courts

may even confirm a Plan that proposes to pay unpaid administrative claims at the end of the case direct by debtor after the Chapter 13 discharge and that those claims will survive discharge. Other courts may find such a provision in a Plan premature.

If an attorney happens to wait until after the last payment is made under the Plan and depending upon whether he or she files that application before or after the Trustee issues his or her report of plan completion, the attorney takes the risk that either the court will find the compensation sought under 11 U.S.C. § 330 as untimely and/or that such a claim is untimely as an administrative claim under 11 U.S.C. § 503. The attorney would most likely have to address issues such as the reason behind the delay and any potential prejudice to debtor, other creditors, and the Trustee if the court were to allow the fees as an administrative claim. Such prejudice would arguably be minimized if the Trustee had sufficient funds in the estate at the end of the case to pay those additional fees in total. If, however, there were insufficient funds in the estate and debtor's plan has already run the maximum sixty-month length of a plan, the attorney runs the risk that a court may find that the prejudice to the debtor outweighs the interest of the attorney being compensated for those additional fees. The attorney should keep in mind that if he or she waits until after the last payment under the plan is made, he or she could be confining himself or herself to getting paid as an administrative claim (if the court were to rule that the untimely administrative claim should be granted "for cause"). A court could find that direct payment by the debtor of those additional fees after discharge is not an option if the confirmed plan provides for administrative claims to be paid by the Trustee because several courts have held that a debtor cannot modify his or her plan after he or she completes plan payments. If the court were to determine that compensation of those fees was timely under 11 U.S.C. § 330 and qualified for compensation under 11 U.S.C. § 330 due to being reasonable, necessary, and beneficial but disallowed it as an administrative claim because the request under 11 U.S.C. § 503 was untimely and the attorney did not establish "for cause" to extend the deadline, the attorney then is most likely limited to accepting **voluntary** payments by debtor after the case is discharged.

In the event that debtor's counsel does not seek compensation for additional fees under 11 U.S.C. § 330 or their claim for compensation under 11

U.S.C. § 330 is denied by the court because it was not reasonable, necessary, or beneficial or because it was untimely, the court will most likely find that such fees are dischargeable under 11 U.S.C. § 1328. As a result, such fees are not collectable after debtor's Chapter 13 discharge. Either of these options seems to pose the highest risk for the attorney in not getting paid those additional fees. An attorney may argue that if he does not seek compensation to be paid as an "administrative claim" under 11 U.S.C. §§ 330 and 503, those fees are not an allowed claim and thus not provided for as an administrative claim under the confirmed Plan. At least one court addressed that issue (the decision included in the materials below) and determined that just like a creditor who fails to file a proof of claim in the estate, an attorney who fails to file an application for compensation is still referenced in the Plan and included within the class of administrative claims under the Plan; thus, the Plan provided for the claim, and the claim then is subject to discharge under 11 U.S.C. § 1328. While courts may vary in some of their principles applied to the construction of 11 U.S.C. §§ 330, 503, and 507, there are two principles that seem to be generally applied by several bankruptcy courts: 1) additional attorney fees approved under 11 U.S.C. § 330, regardless of whether they are considered "administrative" under 11 U.S.C. § 503, are provided for under the Plan and thus subject to discharge unless the Plan or a modification includes language that they survive discharge; and 2) a plan cannot be modified to provide for direct payment of attorney fees after discharge and the non-dischargeability of fees after the last payment under the Plan is made. If attorneys remember these two general principles and use them as guidelines in pursuit of payment of their additional fees, attorneys will most likely take steps for approval of their fees that result in the highest likelihood of their additional fees not only being awarded by the court but also eventually paid in total by either the estate or the debtor.

Relevant Cases:

In re Cripps, 549 B.R. 836 (Bankr. W.D. Mich. 2016): The court approved additional fees in both of the cases before him because they met the "lodestar analysis" under 11 U.S.C. § 330 but denied an administrative claim in the Cripps case because the attorney filed the application after the Trustee issued the report of plan completion, and the attorney did not establish "just cause" to extend the deadline. As part of the court's analysis in determining "just cause," the court

factored in that there were no funds in the estate, and approval of the fees would be prejudicial to debtors. The court allowed the administrative claim in the Mears case because the application was filed before the report of plan completion was issued but after the last payment under the Plan was made. However, the court considered, debtors had not gone beyond the applicable commitment period in the case, and debtors could still extend the plan out to pay the attorney fees. The court determined that debtors, after informed consent, could still file a post-confirmation amendment that fees will survive discharge. As is, though, the court stated, because no such prior amendment has been filed in the case, the additional fees are subject to discharge.

In re Hirsch, 550 B.R. 126 (Bankr. W.D. Mich. 2016): The court ruled that the fees in the application filed two months after dismissal of the case should be awarded compensation because both pre and post-dismissal services were beneficial to the debtor. Additionally, the court found, that the fees were entitled to "administrative claim" status because allowance of such a claim was not prejudicial to the Trustee or debtor due to the Trustee having funds on hand. Furthermore, the court stressed, the attorney could not put his own interest ahead of debtor's by filing the application before the dismissal. The court further concluded that since debtor's plan provides for an administrative claim to be paid by the Trustee, the attorney cannot pursue the fees directly from the debtor.

In re Cooper, 17-49077 (Bankr. E.D. Mich. June 28, 2018): The court concluded that in the instant pre-confirmation dismissed case, funds in the Chapter 13 estate can be used to pay attorney fees even though the application was filed after the voluntarily Motion to Dismiss was filed. It is deserving of an administrative claim status, the court noted, because there were funds on hand in the Chapter 13 estate, and debtors gave consent to the application that the funds could be used to pay the attorney instead of being disbursed to debtors.

In re Long, 568 B.R. 728 (Bankr. W.D. Mich. 2016): The court approved attorney fees sought after the Trustee issued the report of plan completion, and the attorney conceded that it was not an administrative claim. Because the debtors were willing to pay the attorney direct after discharge and the attorney was not seeking payment as an administrative claim, the court determined it did not have to decide the issue of whether the fees were "provided for" under the Plan and

thus subject to discharge. Thus, the court concluded, debtors can pay the fees as they wish, but the court was unwilling to state the fees were not subject to debtor's Chapter 13 discharge.

***In re Hanson,* 223 B.R. 775 (Bankr. Or. 1998):** The court found that even though the attorney did not file for approval of post-confirmation attorney fees by filing an application, those fees are still subject to discharge because the Plan provides for attorney fees. The court analogized the situation to the situation in which a creditor's claim is still provided for in the respective class of claims under the Plan even if the creditor does not file a proof of claim. The court further rejected the argument that post-confirmation attorney fees are post-petition claims under 11 U.S.C. § 1305.

In re Johnson, 344 B.R. 104 (B.A.P. 9th Cir. 2006): The court held that post-confirmation fees were not subject to discharge since debtor's third pre-confirmation amendment proposed that any unpaid fees shall be paid by debtor and are not subject to discharge. The court distinguishes the case from the case before the *Hanson* court insofar as the confirmed plan in *Hanson* provided for attorney fees to be paid by the Trustee.

In re Conner, 559 B.R. 526 (Bankr. N.M. 2016): The court determined that fees sought after completion of debtor's plan payments but before the entry of discharge would be allowed under 11 U.S.C. § 330 because they are reasonable, necessary, and beneficial. The court further concluded such fees would be considered an administrative claim because the delay was not inexcusable and was due to the attorney wanting to get paid for his work at the end of the case. The court, however, further stated that the fees are subject to discharge upon entry of the discharge order, which means that the debtor is not forced to pay the fees but can elect to do so or can elect to delay the discharge order in order to pay fees in the Plan. The court suggested that debtors include in their plan that any unpaid fees at the end of the case shall be paid direct by debtor and shall survive discharge.

Some Issues of Attorney Fees in Chapter 13 Bankruptcy

By Caralyce M. Lassner
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These materials will focus primarily on attorney fees in Chapter 13 cases in the Eastern District of Michigan and are not intended to be read as conclusions but as considerations for contemplation.

What Are Reasonable Attorney Fees?

The Eastern District of Michigan abides by the lodestar method of determining fees. "[T]he "lodestar" amount, [is] calculated by "multiplying the attorney's reasonable hourly rate by the number of hours reasonably expended." *In re Boddy*, 950 F2d 334 (6th Cir 1991), internal citation omitted. "The Supreme Court has made it clear that the lodestar method of fee calculation is the method by which federal courts should determine reasonable attorney's fees under federal statutes which provide for such fees." *Boddy*, supra.

The current 'no look' fee was last increased in 2008 and was increased to $3,500 in Local Bankruptcy Rule 2016(c). Though those who attended the "Bench & Bar Seminar on the New EDM Local Bankruptcy Rules" at Trott & Trott on April 11, 2008 may recall that Judge Shapero pointedly cautioned that the amended rule did not mean that the 'no look' was increasing from $3,000 to $3,500, but only accounted for an increase in the future. However, it was only a few years after that that the rule and practice became one and the same throughout the District.

Many years ago, and after the increase set forth in LBR 2016(c), this author reviewed the specific tasks performed in every Chapter 13 case and determined that, at that time, it took 14.9 – 16.2 hours of attorney services to reach confirmation in the "typical" Chapter 13 case in the Eastern District of Michigan, at least in the Detroit Division. With a 'no look' fee of $3,500, the hourly rate of counsel averages out to $216.05 - $234.90 per hour. Without adjusting the number of hours to account for additional tasks that are necessary in today's Chapter 13 cases, and a debtor's bar comprised of a

significant number of practitioners who have continued practicing in this area and in this District for well more than just the last 14 years, to hold that the 'no look' fee as the standard of reasonableness requires each of those attorneys to either lose money or lose time by continuing to practice in this area unless they seek compensation by application; in essence, expect their rates to have remained stagnant while the cost of everything has continued to increase.

Assuming the hours of attorney services required to confirm a case has not *decreased*, at an hourly rate of $250, a typical case actually runs $3,725 - $4,050 in attorney fees. At a rate of $275, that case actually runs $4,097.50 - $4,455. And at $300 per hour, that case runs $4,470 - $4,860. To ask or expect counsel to write off $225 - $1,360 per case, by electing the 'no look' fee, in a practice comprised of "typical" Chapter 13s is unreasonable as to do so creates a situation in which a practice becomes unsustainable.

Is the 'No Look' Fee Adequate in 2022?

Now, when we fast forward 14 years to 2022 and the 'no look' fee is still $3,500, the bankruptcy community should be asking: Is that reasonable? As with many questions posed to attorneys, the correct answer is: It depends.

Without even taking into account that much of the bankruptcy bar is 14 more experienced than the last time the 'no look' fee was adjusted, one need only consider that staff wages and/or salaries, office space, technology, utilities, postage, and office supply expenses have all increased significantly since 2008, to know that it is inappropriate to expect that the 'no look' fee should be the starting point of evaluating reasonableness. To do so runs contrary to *Boddy* and is an illustration of the very situation giving rise to that decision.

Why Are Attorney Fees So High in this "Simple" Case?

Notwithstanding the forgoing, regardless of counsel's level of experience or their hourly rate, whether the 'no look' fee is reasonable also depends largely on the type of case, the timing of hearings or deadlines within the case, and the level of cooperation and responsiveness one is able to secure

from the client. While it seems that a "simple" Chapter 13 case is no longer the norm these days, for the sake of this discussion, let's look at a couple of different "simple" Chapter 13 situations that, despite being "simple" result in higher attorney fees:

> ***Client One:*** Has a house with a monthly mortgage of $1,000, arrearage of $5,000, a car with a 5% interest rate on which they are current, and all other debt is general unsecured. Client makes sufficient income to maintain and cure the mortgage, pay the car directly, and propose a dividend of 10% to unsecured creditors. Client has provided all income tax returns and receives a weekly salary. Client is a single parent who works full time and has a 5 year old child. Client began making plan payments the week after the case was filed and has over 100% pay history. Client's wage order was served on the employer 2 weeks after the case was filed.
>
> The 341 is scheduled for September 7, 2022 with the confirmation hearing scheduled for October 7, 2022.
>
> The 341 is held on September 7, 2022 and the Trustee files their objections within 21 days, on September 28, 2022, and requests proof of the $100 per month babysitting expense Client reports on Schedule J and copies of the Client's 2021 W2s and 1099s. Counsel is immediately able to submit the W2s and 1099s and reaches out to the client for proof of the babysitting expense. Meanwhile, the Case Management Order requires that the client's Counsel file a confirmation hearing certificate by October 1[1] certifying how Client plans to proceed at the Confirmation Hearing and Counsel indicates an intent to seek confirmation. On October 3, client's counsel receives an email from Trustee's staff advising that the outstanding objections to confirmation are: 1. Proof of the $100 per month babysitting expense, 2. Copies of the 2021 W2s and 1099s, and 3. That the wage order is not yet working.
>
> Despite Counsel pointing out that an average expense of $23.07 per week for babysitting of a 5 year old should be a presumptively reasonable expense for a single parent who works full time and is

[1] In our imaginary situation, October 1 is not a Saturday and all dates in the hypothetical are weekdays.

within the amount of miscellaneous expense set forth in the National Standards, the Trustee will not waive the objection.

Having provided the 2021 W2s and 1099s to the Trustee on September 28, Counsel rechecks the document portal to insure there were no errors and confirms that the documents were downloaded by the Trustee.

Counsel reaches out to Client to find out why the wage order hasn't taken effect yet and Client advises that the HR person at their employer is out for the rest of the week on vacation and will have to follow up when that person returns.

Counsel is faced with 2 choices at this point: Appear on the contested call with the Court on October 7 or agree to adjourn the matter to a date in November. Based on Counsel's experience, the Court will likely agree that the Client must provide proof of the babysitting income and/or the Court will agree with the Trustee's concerns regarding the wage order not having taken effect and will deny confirmation – which will result in an adjournment.

So how does this relate to the issue at hand? That Counsel has already spent the time preparing the case for confirmation but due to the timing of the hearings and the deadlines established in the case, but is not able to resolve the issues prior to the Confirmation hearing, so the case will be adjourned to another date. The effect of these factors will result in Counsel having to do the same confirmation work again prior to the adjourned date to insure that a) the current issues have been resolved, and b) that no new issues have arisen in the interim. A second confirmation hearing date alone will require *at least* one additional hour of work on the case. This causes attorney fees to increase in an otherwise "simple" case.

Client Blue: Has a house with a monthly mortgage of $1,500, arrearage of $10,000, a car with a 5% interest rate on which they are current, $2,500 in priority tax debt, and all other debt is general unsecured. Client makes sufficient income to maintain and cure the mortgage, pay the car directly, and propose a dividend of 10% to unsecured creditors. Client receives a weekly salary and provides copies of 2020 and 2021 income tax returns that show Client owing a total of $2,500 for the two years and Client reports the returns were timely filed. Client began

making plan payments the week after the case was filed and has over 100% pay history. Client's wage order was served on the employer 2 weeks after the case was filed.

The IRS and State of Michigan are included on the matrix as a creditor and notice party respectively. The 341 is scheduled for September 7, 2022 with the confirmation hearing scheduled for October 17, 2022. The IRS files a Proof of Claim on October 7 in the amount of $10,000, which is reflected to be an estimated amount because the 'returns have not been filed' for 2020 and 2021. Client's Counsel forwards copies of the signed returns to local counsel for the IRS. The Trustee's staff notes the unfiled returns reported on the Proof of Claim and advises that the case cannot be confirmed without the returns being filed. Client's Counsel and the Trustee stipulate to adjourn confirmation to November 28, 2022 to allow time for the returns to be processed and an Amended Proof of Claim to be filed.

An Amended Proof of Claim is filed by the IRS on October 21 and is consistent with the amount provided in the Client's plan. On November 14, 2022, the State of Michigan files a Notice of Unfiled Income Tax Returns for 2020 and 2021. Client's Counsel forwards copies of the signed returns to assigned counsel for the State of Michigan for processing. On November 21, Counsel follows up with counsel for the State and is advised that more information is needed. Counsel obtains the information from Client on November 22 and forwards it to counsel for the State. As of November 25[2], the State has not withdrawn it's Notice of Unfiled Income Tax Returns. Counsel and the Trustee stipulate to adjourn confirmation again, this time to January 9, 2023.

The State withdraws it's Notice of Unfiled Income Tax Returns on December 16, 2022. The case is confirmed on January 9, 2023 without further delay.

So how does this relate to the issue at hand? As in the prior scenario, Counsel has already spent the time preparing the case for the confirmation hearing despite the fact that the IRS' Proof of Claim would prevent confirmation on that date, because the Case Management Order requires it.

[2] Which *is* a regular workday, not Black Friday, in this hypothetical.

Then, the Notice of Unfiled Tax Returns filed 2 weeks prior to the adjourned confirmation date, will require Counsel prepare the case for the hearing a second time to again seek an adjournment. And these delays, caused by legitimate reasons, though not earth-shattering, cause attorney fees to increase in an otherwise "simple" case.

Of note is that these issues don't even begin to contemplate the client who has a change in circumstances after filing but prior to confirmation, such as job loss or illness, or more complex issues, or financial history. Or a client who claims to be committed to the success of a case but becomes a bit of a Houdini once the case is filed.

Consider the following situations or issues that don't seem all that complex but can add substantial time to an otherwise "simple" case:

- A client who wants to sell their home,
- The need to file an application to employ,
- A client who has been in a car accident and where there are insurance proceeds,
- The need to file a motion to approve settlement,
- A client who needs to replace their vehicle,
- A client whose employer has effectuated the wage order but failed to remit the payments to the Chapter 13 Trustee,
- A client whose vehicle needs substantial repair and the cost results in the client missing plan payments,
- A client who has a roommate but the roommate has stopped paying their portion of expenses or has moved out,
- A Motion for Relief because of a job loss,
- A client who has had an increase in their family size without an increase in income,
- A client whose lease is up and needs to move or just sign a new lease,
- A Motion to Dismiss for failure to make plan payments or provide documents,
- A client whose child support income has ceased, or
- A client who is laid off for a specific period of time.

The list is endless because while bankruptcy is a legal process, life is not.

Often there are also competing external forces dictating how much work is required on a file. Things like the client ignoring or failing to comply with requests of counsel in a prompt manner, which may require multiple phone calls, emails, letters, or even repeats of prior conversations. A client not recalling verbal or written instructions on their rights and responsibilities also contribute to increased attorney fees. Additionally, resolving issues with the Trustee can cause an increase in the work required on a file such as the Trustee requesting items that do not or will not impact the client's ability to perform under the plan or the amount of funding required by the plan, perhaps requiring proof of certain expenses in cases where debtors are under median or where the totality of the household budget is within or below the national standards. It may also be something as mundane as returning a stipulation or order to counsel for changes multiple times because new or different language is desire as the stipulation or order moves it's way through the Trustee's internal process.

Are "Debtor" and "Debtor's Counsel" Synonymous?

Emphatically: No. This section is included to remind all parties to a case that Debtor and Debtor's counsel are not synonymous. The Debtor hires Counsel, Counsel does not stand in Debtor's shoes, and all parties should remain mindful of that when evaluating:

1. An application that reflects multiple requests from counsel to his or her client, the Debtor;
2. An application that reflects multiple reminders to the client to make plan payments and/or insure the wage order is working;
3. An application that reflects intentional vagueness when referencing interactions with clients when the application is otherwise more detailed;
4. Whether an Application for Compensation, which is filed for services *already performed* on behalf of the client, has a negative impact on plan funding;

5. Whether Counsel fulfilled his or her professional responsibilities to the client, not to the Court or the bankruptcy process.

In recent times, it has been this author's observation that the presumption appears to be that counsel has failed to take action or advise his or her client, not that the client has been less than cooperative or forthcoming. And, as a final point on the subject (which rolls perfectly into the next segment), note that counsel cannot necessarily be as candid about what he or she has advised his or her client with regard to plan funding, actions needed, etc. at the risk of inadvertently revealing what the client has said, without violating that attorney-client privilege.

Something else to keep in mind is that there seems to be a higher level of candor of Counsel to the court and trustee expected within this practice compared to other causes of actions in state and federal courts, both as to the client's case and situation as well as to actions Counsel has taken or not taken with regard to the client. This fact could also be a contributing factor to increased attorney fees as Counsel may feel compelled to take actions in pre-emptive defense of self while protecting the attorney-client relationship. All are wise to remember that the attorney-client relationship is not absolved because the cause of action at bar is a bankruptcy.

An Inherent Conflict?

The considerations of the last section are highlighted because we all, debtor's attorneys included, tend to be only aware of the inherent conflict that exists for a counsel representing a debtor in the abstract. This is a real and ongoing conflict that arises between our clients' interests, our duty of candor to the tribunal, our interest in being fairly compensated for our time and knowledge, the risk we accept by filing cases with little or no money up front, and the risk of being asked or expected to potentially violate attorney-client privilege both in the course of representing our clients as well as in drafting or defending our Applications for Compensation.

On top of the inherent conflicts outlined above, there seems to be a recent movement by some of the bench to require more and more work to be completed by non-attorneys on a client's behalf. For years, it has been

understood that attorneys cannot charge for time it takes to serve a plan or file something through ECF however, it has become more common that objections or issues are also being raised regarding more and more tasks that some believe should be completed by non-attorneys and therefore is not billable by counsel. Parties should fully consider that such a belief is contrary to the attorney-client relationship that debtors are fully capable of forming.

Clients may not be in the best place it their lives when they seek protection under Title 11 but they are the same folks who have negotiated the purchase or sale of homes, purchased vehicles, gotten married, had families, accepted jobs with pay and benefits that they have deemed acceptable. And just while there are some predatory lenders in the marketplace or less than honorable employers, there are some among within the legal profession that will take advantage of a desperate potential client, but the majority of us are just trying to help these folks get to the other side of the situation they are in. This author submits that the former are the exception rather than the rule.

To put it differently, the bankruptcy court and system are not an insurance agency and Counsel are not "network providers". To decide that a certain task, that Counsel has determined is best done by Counsel, must be performed by support staff, or that a client is limited in how many times or how frequently he or she may contact their attorney ,or how many times or in what manner Counsel may communicate with a client reduces Counsel to minions of a system designed to limit the representation counsel can provide. Further, it dictates how information may be disseminated and how many "chances" a client has to understand the information. And lastly, it opens Counsel up to the potential of grievances for not providing the personal services client retained Counsel to perform.

Final Considerations

Recently a month-long report was generated by a small firm using it's billing software. The firm has both attorneys and support staff. The report showed that on average, the attorneys were billing approximately 3 times the amount billed by the support staff. On the one hand, this might give the impression that the attorneys are doing more work on files than the support staff and should be utilizing the support staff more effectively. However, as

one attorney of the firm notes, it is quite the contrary. The support staff are doing all the tasks that are non-billable, like calling clients or sending repeated follow up emails, answering client calls and simple questions, providing information to clients on how to connect to hearings via telephone or zoom, redacting documents, organizing documents, etc., plus some of the billable tasks. It is because they are performing the non-billable tasks that their time gives the impression that they are doing only 1/3 of the workload. To believe the first impression is a false conclusion.

As is all the rage to say in current times: Thanks for coming to my TedTalk.

In re Carr

613 B.R. 427 (Bankr. E.D. Ky. 2020)
Decided Jan 22, 2020

CASE NO. 19-20873

2020-01-22

IN RE Chanda S. CARR, Debtor

Dolores L. Dennery, Covington, KY, J. Christian A. Dennery, Dennery PLLC, Covington, KY, for Debtor.

Tracey N. Wise, Bankruptcy Judge

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Dolores L. Dennery, Covington, KY, J. Christian A. Dennery, Dennery PLLC, Covington, KY, for Debtor.

MEMORANDUM OPINION AND ORDER ON CHAPTER 7 FEE PRACTICES

Tracey N. Wise, Bankruptcy Judge

May an attorney limit the scope of their bankruptcy services to a prepetition analysis of a debtor's bankruptcy options and filing the debtor's skeletal chapter 7 petition? In short, if done properly, yes.

Much has been written about attorneys' attempts to "unbundle" services and "bifurcate" their fee arrangements in chapter 7 proceedings. By these efforts, counsel seek to avoid the result occasioned by *Lamie v. United States Trustee* , 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004), *Rittenhouse v. Eisen* , 404 F.3d 395 (6th Cir.), *cert.* 430 *denied* *430 546 U.S. 872, 126 S.Ct. 378, 163 L.Ed.2d 165 (2005), and § 329;[1] to wit, that agreements by chapter 7 debtors to pay a portion of their attorneys' fees post-petition are unenforceable dischargeable debts.

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 -1532. References to the Federal Rules of Bankruptcy Procedure appear as "Rule ____."

In this case, the Court sought information from J. Christian A. Dennery, Esq. and Dennery, PLLC (collectively, the "Attorneys"), *sua sponte* , upon the Court's review of the Attorneys' "Disclosure of Compensation of Attorney for Debtors" [ECF No. 19 (the "Fee Statement")]. The Fee Statement discloses that the Attorneys received $300 from chapter 7 Debtor Chanda S. Carr prepetition and were to be paid $1,185 post-petition. After the Court determined that Debtor did not schedule any debt owed to the Attorneys, the Court reviewed other chapter 7 cases involving the Attorneys and discerned that they had filed many cases with similar fee disclosures. As a result, although the Court had no concerns about the quality of the Attorneys' representation of chapter 7 debtors, the Court entered a series of orders [ECF Nos. 28, 37, 42] which, *inter alia* , (i) required the Attorneys to file their written engagement agreement and other documents relating to their representation of Debtor, (ii) required the Office of the United States Trustee ("UST") to respond to the Attorneys' filings, (iii) set a hearing to discuss the Attorneys' fee practices, and (iv) authorized the filing of post-hearing memoranda. The matter is now ripe for review and decision.

THE ATTORNEYS' CHAPTER 7 FEE PROCEDURES

I. The Attorneys' general engagement practices for chapter 7 cases.

A. The Disclosures.

From the Attorneys' submissions[2] and the colloquy at the hearing, the Court concludes that the Attorneys have a clearly defined process for contracting with debtor-clients in chapter 7 cases. When a prospective debtor contacts the Attorneys, they schedule and hold an initial meeting to discuss the bankruptcy process. At that time, the Attorneys also obtain the names of creditors and other background information sufficient to assess the debtor's bankruptcy options, if any.

[2] Dolores L. Dennery, Esq., a member of Dennery, PLLC, signed the Declaration that the Attorneys tendered in response to the Court's initial inquiry. The declaration details her meetings with Debtor and the law firm's business practices for chapter 7 engagements. [ECF No. 36-1.]

If a chapter 7 case is deemed appropriate, the Attorneys present the debtor with two payment options for retaining the Attorneys via a written disclosure [*e.g.* , ECF No. 35 at 2-3 (the "Disclosure")] that the Attorneys and the debtor review together. First, the Attorneys advise that they can provide services to the debtor for a flat fee paid prepetition (typically $800) plus the chapter 7 filing fee ($335) for a total prepetition payment of $1,135. Alternatively, if the debtor cannot afford this option, the Attorneys offer an arrangement in which the Attorneys accept payment prepetition and post-petition pursuant to separate contracts (the "Dual Contract Option"). The Attorneys report that most of their clients
431 choose the second option.[3] *431 The Disclosure explains that, under the Dual Contract Option, the debtor generally pays the Attorneys $300 prepetition (or $400 for joint debtors) for initial limited prepetition services, which include preparing and filing the petition and the list of creditors (the "Skeletal Chapter 7 Case"), the Rule 2016(b) compensation disclosure, and an application requesting the Court's authorization for the debtor to pay the chapter 7 filing fee in installments. The Disclosure also expressly states what services the Attorneys will not provide under a prepetition fee agreement:

[3] The Disclosure states that the Attorneys "reserve the right not to offer payment plans to persons whom we determine are not likely to succeed in bankruptcy, or [are] unable to afford the monthly payments." [ECF No. 35 at 2.]

> **Excluded Services and Client responsibilities** : Unless you retain us to complete your case, you will be solely responsible for, among other things: (1) filing the balance of the documents required to complete your petition; (2) timely providing documents to the US Trustee and to the Chapter 7 Trustee; (3) attending the "meeting of creditors;" (4) reaffirming debts with secured creditors; and (5) timely making installments [*sic*] payments on the filing fee. **Beware: the failure to timely file documents and/or make installment payments can result in a dismissal of your case.**

[*Id.* at 2 (emphasis in original).] The Disclosure also states that the Attorneys are willing to provide post-petition services to the debtor, subject to the post-petition execution of a second agreement:

> **Post-Petition Services.** You are under no obligation to retain us after the filing of the skeletal petition - you will be free to retain any other attorney of your choice, or continue the case on your own (*pro se*). If you decide to retain us, we will enter into a separate agreement that covers the routine services required to complete the case. (The "post-filing routine services"). By this proposal, we are offering to provide post-filling [*sic*] routine services for $1,185.00, which includes the filing fee of $335.00.

[*Id.*]

The Disclosure advises that, if the debtor selects the Dual Contract Option, the debtor must pay the Attorneys $98.75 per month for 12 months for the "post-filing routine services" (including the filing fee), which totals $1,185. It explains the consequences of the overall arrangement with respect to the dischargeability of the legal fees:

> **PLEASE NOTE THAT** : Any balance on the attorney fees that remains outstanding at the time the skeletal petition is filed will be discharged and unenforceable against you. However, any agreement for post-filing services will create a debt that is not affected by the bankruptcy filing. **You will remain personally liable for any amounts due on account of post-filing services and could be sued for any default under the chapter 7 payment plan.**

[*Id.* at 3 (emphasis in original).] The Disclosure sets forth the proposed payment schedule and states: "**If you cannot follow this schedule, you should not enter a Chapter 7 Payment Plan.** " [*Id.* (emphasis in original).]

B. The First Contract (prepetition).

If a debtor chooses the Dual Contract Option, the Attorneys present the first engagement agreement to them for execution [*e.g.* , ECF No. 35 at 4-7 (the "First Contract")]. That four-page document expressly identifies the prepetition services to be provided:

> (b) Petition Preparation and Filing. Attorney shall: (i) prepare the petition; (ii) review the petition with the client; and after Attorney receives the completed credit counseling certificate shall file: (A) the petition; (B) a creditor matrix; (C) an application for payment of court

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> fees in installments; and (D) a statement of attorney compensation, which discloses to the court the terms of this agreement and any related proposal and/or statement of work....

[*Id.* at 4.] The First Contract explicitly discloses the "excluded services" that the Attorneys will not provide thereunder. It also states that "the representation created by this agreement shall naturally terminate immediately after the filing of the skeletal petition." [*Id.*]

The First Contract also discloses the post-petition work the Attorneys are willing to perform if the debtor opts to engage them post-petition. The First Contract advises that the debtor should engage an attorney post-petition even if they do not retain the Attorneys. It also summarizes the terms under which the Attorneys would agree to provide that post-petition work and states that the debt created by a post-petition agreement would not be dischargeable. The Attorneys discuss each term of the First Contract with the debtor in person, answer any questions, have the debtor initial each paragraph thereof as it is discussed, and have the debtor sign the document at its end.

After the parties execute the First Contract, the Attorneys will prepare, finalize and file the Skeletal Chapter 7 Case, the credit counseling certificate, and an application to pay the filing fee in installments. However, the Attorneys advised at the hearing (and the record in this case confirms)

that, while the First Contract states that the Attorneys will file a "statement of attorney compensation" with the petition, this is not the Attorneys' typical practice. Rather, they usually wait to file their Fee Statement until they determine whether they are retained post-petition. This alleviates the need to file an initial Fee Statement with the petition (reporting the prepetition fee paid only) and an amended Fee Statement, as Rule 2016(b) requires, if the debtor retains the Attorneys for post-petition services.

C. The Second Contract (post-petition).

If the debtor elects to retain the Attorneys' services post-petition (which, the Attorneys report, almost always occurs), the Attorneys and the debtor have a post-petition meeting. In other words, and importantly, the debtor will not sign a prepetition contract and a post-petition contract on the same date. At the post-petition meeting, the Attorneys and the debtor review the next contract, titled a "Statement of Work and Promissory Note" [*e.g.* , ECF No. 35 at 8-11 (the "Second Contract")]. As with the First Contract, the Attorneys have the debtor initial all paragraphs and sign the Second Contract at its end.

The Second Contract delineates the "routine" post-petition chapter 7 work the Attorneys agree to perform:

> **Scope of Post-Filing Routine Services** : Attorney shall: (1) meet with client; (2) review available documentation and information; (3) transmit required documents to the UST and to the chapter 7 trustee: (4) file any documents, lists, statements, applications required to complete the petition after reviewing such with client; (5) appear at the meeting of creditors; (6) draft and file not more than one responsive pleading to a motion for relief from stay; (7) take reasonable measures to retrieve any and all monies garnished within 90 days of the bankruptcy filing; (8) review and execute any reaffirmation or assumption of lease agreements; (9) arrange for the required financial management course; and (10) pay the filing fee of $335.00. (the "post-filing routine services").

[*Id.* at 8.] The Second Contract specifically
433 excludes certain "non-routine" services *433 (e.g., dischargeability actions, motions to avoid judicial liens) that are outside the scope of the representation thereunder and states that the Attorneys will perform "non-routine services" for an hourly fee.[4]

> [4] According to both the First Contract and the Second Contract, for non-routine services, the Attorneys charge $200/hour for attorney time and $85/hour for paraprofessional/administrative time.

The Second Contract provides that the debtor agrees to make equal payments to the Attorneys over 12 months at the rate of $98.75 per month (which includes interest on the financed portion of the legal fee at the rate of 7.55% per annum). The Attorneys also obtain the debtor's permission to run a credit check, given that the Attorneys are agreeing to finance the legal fees over time.

The Second Contract states that the Attorneys will advance the money to pay the debtor's chapter 7 filing fee but that the debtor is ultimately

responsible for the filing fee and the costs related to their case. The Second Contract provides for the application of a debtor's payments to the Attorneys as follows:

> **Application of Payments.** Payments received by [the Attorneys] will be applied in the following order: (i) to the installment payments on filing fees if any remaining due and owing; (ii) to interests and charges; and (iii) to the Principal due under this Agreement.

[*Id.* at 9.] It advises that the Attorneys will collect post-petition payments from the debtor's bank account. The Attorneys confirmed at the hearing that they do not accept credit card payments from debtors or enter into factoring agreements (i.e., sell or assign the debtor's post-petition debt to a third party in exchange for a discounted lump-sum payment).

Because the Attorneys are accepting a prolonged payment plan, and because (in the Attorneys' experience) Dual Contract Option cases typically require more effort than up-front-flat-fee chapter 7 cases, the total legal fee charged to the debtor for a Dual Contract Option case exceeds that of an up-front-flat-fee case by $350.

II. Debtor's engagement of the Attorneys in this case.

The Attorneys' interactions with Debtor were consistent with their standard chapter 7 practices outlined above. On June 13, 2019, Debtor had a lengthy initial meeting with the Attorneys to discuss filing for bankruptcy relief. The Attorneys used the Disclosure to lay out Debtor's options for chapter 7 representation. The Attorneys provided a hard copy of the Disclosure to Debtor and had Debtor sign it. Debtor also initialed and signed the a First Contract with the Attorneys for services in accordance with the Dual Contract Option.[5] Debtor paid a $300 fee for the preparation and filing of the Skeletal Chapter 7 Case, the application to pay the chapter 7 filing fee in installments, the credit counseling certificate, and the Fee Statement. And, Debtor provided information to the Attorneys to begin the process. The First Contract stated that the Attorneys were willing to provide Debtor with post-petition services subject to the post-petition execution of a second agreement. The Attorneys expressly advised Debtor that she had no obligation to engage them to perform additional post-petition services, and Debtor initialed the First Contract to
434 acknowledge this disclosure.*434 The Attorneys filed Debtor's Skeletal Chapter 7 Case, credit counseling certificate, and application to pay the filing fee in installments on Saturday, July 6, 2019, but did not file the Fee Statement. Two days later, on July 8, the Court entered an Order requiring Debtor to file her schedules and related missing paperwork within 14 days of the petition date (July 20). On Sunday, July 21, the Attorneys moved for an extension of time within which to file the missing schedules and other initial documents, and the Court granted that motion the following day.

> [5] The Attorneys did not tender copies of their contracts with Debtor that the Attorneys had signed. The Attorneys explained at the hearing that the Attorneys and Debtor signed the agreements in counterparts, and that Debtor received copies of the documents that the Attorneys signed.

On July 25, 2019, at her second meeting with the Attorneys, Debtor initialed and signed a Second Contract and thereby retained the Attorneys to provide post-petition services in her case. On August 14, 2019, the Attorneys filed Debtor's required schedules and other documents, including the Fee Statement. As noted above, the Court's review of the Fee Statement started the chain of events that led to this opinion.

While the Court's investigation regarding the Attorneys' fee practices proceeded, Debtor's chapter 7 case continued to move forward. On October 10, 2019, the Attorneys filed a certificate

confirming that Debtor completed a financial management course. On November 5, a creditor filed a reaffirmation agreement with Debtor, which indicates that the Attorneys represented Debtor during the negotiation of that agreement. And, on December 20, Debtor received a chapter 7 discharge.

ANALYSIS

The Court has jurisdiction herein and venue is proper. 28 U.S.C. §§ 1334(b), 1408, 1409. The review of the Attorneys' fee arrangement with a chapter 7 debtor is a core proceeding regarding which the Court may enter final orders. 28 U.S.C. § 157(b)(2)(A).

Attorney fees owed under prepetition agreements are not excepted from a debtor's chapter 7 discharge pursuant to § 523. *Rittenhouse v. Eisen* , 404 F.3d 395, 396 (6th Cir. 2005). In *Rittenhouse* , the Sixth Circuit held that this conclusion follows inescapably from the Code's text, and stated that it isn't a court's role to alter legislative policies:

> Appellant asserts that if debts created by pre-petition agreements to pay attorney fees are not [*sic*] discharged, the benefits of bankruptcy will not be available to those who need it most, i.e., those who are unable to pay attorney fees in advance of filing. Appellant argues that in order to pay an attorney, the potential bankrupt would have to unjustly withhold payments due to suppliers of necessities, such as public utilities, to the detriment of the general public. Although that argument may have merit, it raises a policy question which is properly addressed to Congress, not to the court. "The judiciary's job is to enforce the law Congress enacted, not to write a different one that judges think superior."

Id. at 397 (quoting *Bethea v. Robert J. Adams & Assocs.* , 352 F.3d 1125, 1128 (7th Cir. 2003)). The Sixth Circuit released its opinion in *Rittenhouse* not long after the Supreme Court held that a chapter 7 debtor's counsel cannot be paid from estate property absent authorization under § 330(a)(1) and any prepetition attorney's fee due is dischargeable. *Lamie v. United States Tr.* , 540 U.S. 526, 537, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). As a result, an attorney that takes a post-petition action to collect on unpaid prepetition fees as a personal liability of the debtor violates either the automatic stay in § 362(a) or the discharge injunction in § 524. *In re Gourlay* , 483 B.R. 496, 500 (Bankr. E.D. Mich. 2012), *aff'd* 496 B.R. 857
435 (E.D. Mich. 2013).*435 The ramifications of *Lamie* and *Rittenhouse* are multifaceted for potential chapter 7 debtors and their lawyers. Many commenters have discussed the practical realities and corresponding difficulties these decisions produced.[6] Others have critiqued common work-around methods that were created in response.[7] And many courts, including some within the Sixth Circuit, have analyzed those work-around methods to determine whether they comply with the Code and applicable ethical requirements.[8]

6 *See* , *e.g.* , Katherine M. Porter, et al., " 'No Money Down' Bankruptcy," 90 S. Cal. L. Rev. 1055, 1077 (2017) ; Daniel E. Garrison, "Liberating Debtors from 'Sweatbox' and Getting Attorneys Paid: Bifurcating Consumer Chapter 7 Engagements," AM. BANKR. INST. J., June 2018, at 16; Hon. Maureen A. Tighe, "Seeking Innovation to Address Low-Income Access to Bankruptcy," AM. BANKR. INST. J., Nov. 2018, at 38.

7 *See* , *e.g.* , Adam D. Herring, "Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of 'Access to Justice,' " AM. BANKR. INST. J., Oct. 2018, at 32.

8 *See* , *e.g.* , *In re Waldo* , 417 B.R. 854 (Bankr. E.D. Tenn. 2009) ; *In re Lawson* , 437 B.R. 609 (Bankr. E.D. Tenn. 2010) ; *In re Slabbinck* , 482 B.R. 576 (Bankr. E.D. Mich. 2012) ; *In re Abdel-Hak* , No. 12-46329-MBM, 2012 WL 5874317, 2012 Bankr. LEXIS 5393 (Bankr. E.D. Mich.

November 16, 2012) ; *In re Gourlay* , 483 B.R. 496 (Bankr. E.D. Mich. 2012), *aff'd* 496 B.R. 857 (E.D. Mich. 2013) ; *In re Michel* , 509 B.R. 99 (Bankr. E.D. Mich. 2014) ; *In re Mansfield* , 394 B.R. 783 (Bankr. E.D. Pa. 2008) ; *In re Wright* , 591 B.R. 68 (Bankr. N.D. Okla. 2018) ; *In re Hazlett* , No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019).

The Code requires a debtor's attorney (including counsel representing chapter 7 debtors) to disclose compensation "paid or agreed to be paid ... for services rendered or to be rendered in contemplation of or in connection with" a bankruptcy case. 11 U.S.C. § 329(a) ; *Henderson v. Kisseberth (In re Kisseberth)* , 273 F.3d 714, 720 (6th Cir. 2001) ("An attorney in a bankruptcy case has an affirmative duty to disclose fully and completely all fee arrangements and payments."). This disclosure statement typically must be filed within 14 days of the order for relief. FED. R. BANKR. P. 2016(b).

The bankruptcy court, in turn, has an independent duty to examine the fees for reasonableness under § 329(b). *See* , *e.g.* , *In re Ortiz* , 496 B.R. 144, 148 (Bankr. S.D.N.Y. 2013) ("The Court has an 'independent duty to review any fee application, even in the absence of an objection from an interested party.' " (citation omitted)); *Burd v. Walters (In re Walters)* , 868 F.2d 665, 668 (4th Cir. 1989) ("any payment made to an attorney for representing a debtor in connection with a bankruptcy proceeding is reviewable by the bankruptcy court [under § 329] notwithstanding the source of payment."). In *In re Netoche Brigham Fair* , Case No. 15-33400-SGJ-13, 2016 WL 3027264, 2016 Bankr. LEXIS 2043 (Bankr. N.D. Tex. May 18, 2016), the court reasoned:

> The honest and comprehensive disclosure of compensation payments plays a vital role in maintaining the integrity of the bankruptcy system. Moreover, it is only upon full and complete disclosure of compensation payments under section 329(a) of the Bankruptcy Code and Rule 2016 that this court is able to review and determine whether such payments were excessive under section 329(b) of the Bankruptcy Code and Rule 2017.... Because of the importance of this process, a bankruptcy court retains the power, authority, and duty to police the disclosure and reporting requirements set forth in the Bankruptcy Code and Rules with its sanctioning powers, including the power to order the disgorgement

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> of all sums received by counsel and the forfeiture of all compensation paid to counsel in a particular case.

Id. at *13, 2016 Bankr. LEXIS 2043, 2016 WL 3027264, at *48-49 (footnotes omitted)). The Sixth Circuit has explained that "bankruptcy courts have broad and inherent authority to deny any and all compensation where an attorney fails to satisfy the requirements of the Code and Rules." *Kisseberth* at 721 (citation omitted).

There is no express guidance from the Sixth Circuit (or from courts in this District) on dual contracts for the representation of debtors in chapter 7 cases. Absent such authority, as a matter of first impression in the District, this opinion assesses whether the Attorneys' compensation arrangement with Debtor is permissible.

I. The Attorneys' representation of Debtor under dual contracts satisfies the requirements in the Code, the Bankruptcy Rules, and applicable ethical rules.

A. The Attorneys and Debtor executed written contracts in compliance with § 528(a)(1).

A debtor's attorney is considered a "debt relief agency" under the Code. 11 U.S.C. § 101(12A) ; *see also Milavetz, Gallop & Milavetz v. United States* , 559 U.S. 229, 235-36, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010). Section 528(a) therefore required the Attorneys to satisfy certain obligations:

> (a) A debt relief agency shall—
>
> (1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously—
>
> (A) the services such agency will provide to such assisted person; and
>
> (B) the fees or charges for such services, and the terms of payment;
>
> (2) provide the assisted person with a copy of the fully executed and completed contract[.]

11 U.S.C. § 528(a).

There is no dispute that the Attorneys and Debtor executed the First Contract at their initial meeting, before the Attorneys filed Debtor's petition. It "clearly and conspicuously" outlined the services that the Attorneys would perform, the fees charged for those services, and the payment terms. Debtor received a fully-executed copy of the First Contract and a copy of the Disclosure that further detailed the Dual Contract Option. There also is no dispute that, at a subsequent, post-petition meeting, Debtor and the Attorneys executed the Second Contract that also "clearly and conspicuously" outlined the post-petition services that the Attorneys would perform, the fees charged for those services, and the payment terms. Debtor also received a fully-executed copy of the Second Contract. The Court concludes that the Attorneys complied with their obligations under § 528(a).

B. The Attorneys did not advise Debtor to incur debt to pay for legal services and did not factor Debtor's post-petition obligation.

The Code prohibits a "debt relief agency" from advising a debtor to "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a 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)(4). "[T]he statute contains two distinct prohibitions—one about *437 incurring debt in anticipation of bankruptcy filings generally, and the other about incurring debt to pay for bankruptcy-related legal services more specifically." *Cadwell v. Kaufman* , 886 F.3d 1153, 1156 (11th Cir. 2018).

With respect to the first prohibition, the Attorneys did not improperly advise Debtor to incur debt in contemplation of bankruptcy. *See generally Milavetz, Gallop & Milavetz, P.A. v. U.S.* , 559 U.S. 229, 130 S.Ct. 1324, 176 L.Ed.2d 79 (2010) (concluding that a debt relief agency violates the first prohibition if it advises a debtor to incur debt for an invalid purpose designed to manipulate the bankruptcy process). As to the second prohibition, the Eleventh Circuit explained that it "is aimed at one specific kind of misconduct—in essence, a bankruptcy lawyer saying to his client, 'You should take on additional debt to pay me!' " *Cadwell* , 886 F.3d at 1159. As a result, "an attorney violates Section 526(a)(4) if he instructs a client to pay his bankruptcy-related legal fees using a credit card." *Id.* at 1155. This prohibition does not prevent a debtor from paying their counsel's legal fees directly over time. Here, the

Attorneys required Debtor to pay for services under the Second Contract monthly via bank account automatic withdrawals. Accordingly, the Dual Contract Option does not raise concerns under § 526(a)(4).

In addition, the Attorneys do not enter into agreements whereby they sell client accounts receivable; thus, the Court needs not address the propriety of factoring attorneys' fees in this case.[9]

> [9] The Kentucky Bar Association has not issued an ethics opinion on this issue, although other bar associations have done so. *Compare* Ariz. Op. 98-05 (finding, *inter alia* , that it is unethical for a lawyer to sell client accounts receivable to a factor because proper informed consent cannot be obtained) *with* Utah Ethics Opinion No. 17-06 (revised) ("It is not unlawful for lawyers to sell or encumber their accounts receivable, whether or not the work has been accomplished.... This is equally true for consumer bankruptcy lawyers.").

C. The Attorneys did not take payment of post-petition legal fees prior to full payment of the chapter 7 filing fee, and therefore there is no violation of Rule 1006(b)(3).

Rule 1006, which implements 28 U.S.C. § 1930, requires bankruptcy filing fee installments to be paid within 120 days after a debtor files a bankruptcy petition. The Rule specifically prohibits a debtor's attorney from receiving any fee payments before the filing fee is fully paid:

> *Postponement of attorney's fees.* All installments of the filing fee must be paid in full before the debtor or chapter 13 trustee may make further payments to an attorney or any other person who renders services to the debtor in connection with the case.

FED. R. BANKR. P. 1006(b)(3).

The Second Contract provides that Debtor's monthly payments first will be applied to the amounts owed on her filing fee and then to the interest and principal due under the Second Contract. Debtor's full filing fee was paid by September 22, 2019. The Attorneys confirmed at the hearing that they did not apply payments received from Debtor towards the legal fees owed for post-petition services until after the full amount of Debtor's filing fee was paid. This
438 arrangement complies with Rule 1006(b)(3).*438

D. The Attorneys were not among Debtor's creditors as of the petition date, which renders *Rittenhouse* inapplicable.

The Attorneys received $300 from Debtor prepetition. In exchange for that payment, they performed specific prepetition legal services under the First Contract. The parties' fee-for-services contractual relationship ended, by its terms, after the Attorneys provided those services. Debtor owed the Attorneys no additional money in exchange for contracted-for services on the petition date. Therefore, Dennery, PLLC properly was not listed as a creditor on Debtor's bankruptcy schedules because Debtor did not owe a debt to the Attorneys as of the petition date, and they had no claim against Debtor. Thus, the issue in *Rittenhouse* —that a pre-petition agreement to pay attorney fees does not fall within an exception to a chapter 7 discharge under § 523—is not an issue in this case.

E. The Attorneys disclosed a reasonable compensation arrangement with Debtor.

On August 14, 2019, the Attorneys filed the Fee Statement required by Rule 2016(b) and § 329(a). The Disclosure accurately stated that Debtor paid the Attorneys $300 prepetition and that Debtor promised to pay them $1,185 post-petition (which includes the $335 filing fee). The UST does not contend that the compensation charged to Debtor for the Attorneys' services is unreasonable.[10] Michael L. Baker, Esq., the appointed Chapter 7

Trustee in this case, does not contend that the amounts Debtor agreed to pay the Attorneys for services are unreasonable. The Court, which is familiar with the fees charged for consumer-related chapter 7 cases in this District, also concludes that the fees the Attorneys charged Debtor are reasonable. But this does not end the inquiry.

> [10] Given its role in the bankruptcy system, the Court solicited and received input from the UST, both before and after the scheduled hearing, concerning the Attorneys' chapter 7 fee arrangements. Based on the record and Debtor's testimony at her first meeting of creditors, the UST advised it "does not believe that the arrangement in general between the Debtor and counsel is unreasonable" and that Debtor testified at her § 341 meeting "that she had, in fact, understood and consented to [Counsel's] practice, as explained in their disclosures and agreements." [ECF No. 49 at ¶¶ 2-5.] Finally, UST advised that, while as a policy matter it "avoids fee regulation if the attorney performs the services contracted for consistent with applicable law," UST did not find the Attorneys' fee to be unreasonable. [*Id.* ¶ 6.]

First, UST correctly notes that attorneys appearing in bankruptcy cases before this Court may not withdraw from representing a debtor absent the Court's approval. Joint Ky. Civ. Prac. R. 83.6 (made applicable by KYEB LR 1001-3). In this case, while the First Contract states that it will terminate upon the completion of the services the Attorneys agreed to provide thereunder, they did not move to withdraw from representing Debtor after they filed the Skeletal Chapter 7 Case. Because Debtor retained the Attorneys again post-petition and they did not attempt to withdraw from this case (with or without the Court's approval) before the Second Contract's execution, the Attorneys did not violate the local rule. The Court leaves for another day the issues that may be raised in other cases upon the post-petition filing of a Motion to Withdraw.

Next, Trustee Baker commented on the Attorneys' fee practices at the hearing and filed a post-hearing brief summarizing his concerns with those practices. [ECF No. 50.] Trustee challenges the 439 structure of the *439 fee arrangements. He essentially avers that the Attorneys did more work prepetition than post-petition and, therefore, should have been paid more prepetition for that prepetition work. But this argument is based on an assumption that the Court does not accept.

Trustee notes that the Attorneys met with Debtor prepetition for a significant period (what Debtor described as several hours at her § 341 meeting), far longer than their second, post-petition meeting. He contends that a bankruptcy practitioner must conduct a meaningful initial client interview to understand a potential debtor's options, to provide appropriate advice, and to prepare even a Skeletal Chapter 7 Case and a list of known creditors. His brief effectively assumes that the Attorneys satisfied this obligation to Debtor but argues that they shifted the cost burden for some portion of that initial meeting so that it became a post-petition obligation for Debtor. As a result, Trustee Baker concludes that the Attorneys' payment arrangement with Debtor is flawed.

Trustee Baker compares the amount of work done prepetition (based on the time the Attorneys spent with Debtor) with the amount of work Mr. Baker expects was necessary in this case post-petition. He then assumes that an arrangement to make greater total payments post-petition must be compensating the Attorneys for more extensive prepetition work. The record does not support this assumption.

Under the Second Contract, the Attorneys agreed to have a post-petition meeting with Debtor; to review Debtor's documents and any additional information provided; to prepare and file any documents or other materials required to satisfy

Debtor's obligations under the Code that correlate with filing the petition, including the preparation and filing of Debtor's Schedules; to provide necessary information to the UST and to Trustee Baker on Debtor's behalf; to pay the $335 filing fee; to prepare Debtor for, travel to, and attend the § 341 meeting of creditors; and to perform several other tasks. In exchange, the Attorneys agreed to accept $800 as a fee for these post-petition services (plus $335 for advancing the filing fee).

Trustee Baker assumes, in effect, that the Attorneys must charge Debtor a comparable hourly rate for prepetition and post-petition work. This is incorrect. The Attorneys essentially agreed to perform prepetition services for one flat rate and post-petition services for a second flat rate. No party has argued that either flat rate was unreasonable.

Moreover, Trustee Baker does not estimate or provide evidence of the amount of time the Attorneys expended to perform either the pre- or post-petition work. To the extent any evidence in the record bears on this issue, the Second Contract states that the Attorneys bill $200/hour for attorney time and $85/hour for paralegal time. It does not appear unreasonable to the Court that the amount of time the Attorneys may need to devote to post-petition services for Debtor under the Second Contract easily could meet or exceed four hours of attorney time (let alone any time spent by a paraprofessional to assist with document preparation or perform other appropriate tasks). As no party challenges the reasonableness of the post-petition fee, there is no basis to find that the Attorneys will not have to perform sufficient legal work to earn their post-petition fee, or that they are being paid post-petition for prepetition work.

Finally, the Court takes issue with one aspect of the Attorneys' performance of their disclosure requirements under the Code and the Rules. The
440 Fee Statement *440 did not provide detail to explain Debtor's two contracts. Had the Attorneys been more forthcoming on the Fee Statement concerning the payment arrangements discussed herein, it would have eliminated substantial confusion. In the future, the Attorneys' fee statements must be more specific about the existence and scope of dual contracts in the same case.

F. The structure of Debtor's fee agreements with the Attorneys complies with Kentucky's Rules of Professional Conduct.

The United States District Court for the Eastern District of Kentucky, by Local Rule 83.3, has determined that the Kentucky Supreme Court Rules govern attorneys practicing before courts in this District. The Kentucky Rules of Professional Conduct provide: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Ky. S.C.R. 3.130 (1.2). "Reasonable" in this context "denotes the conduct of a reasonably prudent and competent lawyer." Ky. S.C.R. 3.130 (1.0(h)). " ‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Ky. S.C.R. 3.130 (1.0(e)). The Kentucky Supreme Court has held that "limited-representation agreements ... are permissible so long as they are reasonable under the circumstances and otherwise comport with our rules of practice and procedure[.]" *Persels & Assocs., LLC v. Capital One Bank* , 481 S.W.3d 501, 504 (Ky. 2016). No party in this proceeding, including UST, argues that the Attorneys improperly limited the scope of representation of Debtor under Kentucky's Rules of Professional Conduct in the manner effected through the Dual Contract Option.

The first requirement under Kentucky Supreme Court Rule 3.130 (1.2) is that the limitation on the scope of the Attorneys' representation had to be

reasonable. Debtor approached the Attorneys for bankruptcy representation. At their lengthy initial meeting, based on information that Debtor provided, the Attorneys concluded that it would be appropriate for her to file a chapter 7 case. The Attorneys told Debtor about the two alternatives they offered for chapter 7 representation and explained each one. Debtor chose the Dual Contract Option. Offering the First Contract was a reasonable action that afforded Debtor access to bankruptcy and the benefit of the automatic stay. The Attorneys explained that additional post-petition work was required in her bankruptcy case, and that she should retain counsel to assist with that post-petition work. The Attorneys discussed that they could perform that post-petition work for Debtor under a second fee agreement. A short time thereafter, Debtor had another meeting with the Attorneys, retained them under the Second Contract to perform post-petition services, and agreed to pay the post-petition fees pursuant to a specific monthly payment plan. On these facts, the Court concludes that it was reasonable for the Attorneys to limit the scope of the initial representation to Debtor as effected through the Dual Contract Option.

The second requirement under Kentucky Supreme Court Rule 3.130 (1.2) is that, to limit the scope of their services to those set forth in the First Contract, the Attorneys must have obtained Debtor's informed consent in writing. As detailed above, the Attorneys provided a comprehensive written explanation of the Dual Contract Option to Debtor via the Disclosure. They walked through
441 the Disclosure's *441 terms with Debtor in person. When discussing the terms of the Disclosure, the First Contract, and the Second Contract with Debtor, the Attorneys had Debtor sign each document. No evidence suggests that Debtor did not understand the scope of and limitations on the First Contract or any other aspect of the fee arrangements. There is no suggestion that the Attorneys coerced Debtor to choose the Dual Contract Option. Instead, to obtain access to bankruptcy, Debtor availed herself of the Attorneys' willingness to segregate their legal services through dual contract fee arrangements. The Court finds that the Attorneys obtained Debtor's informed consent in writing. As a result, the Court finds that the Attorneys' limited scope engagement by Debtor did not violate Kentucky Supreme Court Rule 3.130 (1.2).

The Attorneys' arrangement with Debtor also satisfies other applicable ethics rules. As explained above, the Attorneys took appropriate steps to gather information from Debtor to assess her needs and provide competent representation, which ultimately led to Debtor obtaining a chapter 7 discharge. Ky. S.C.R. 3.130 (1.1). No party argues that the agreed-upon arrangement for services resulted in the Attorneys failing to act on Debtor's behalf with reasonable diligence and promptness. Ky. S.C.R. 3.130 (1.3). The Attorneys entered into agreements for reasonable fees with Debtor as required. Ky. S.C.R. 3.130 (1.5). Those written contracts and the Disclosures allowed Debtor to make informed decisions regarding her representation in the bankruptcy case. Ky. S.C.R. 3.130 (1.4(b)).

The Court is aware of authority stating that certain conduct in a bankruptcy proceeding is so fundamental to the representation of a debtor that a reasonable lawyer cannot limit the scope of representation to avoid providing those services. *See* , *e.g.* , *In re Ortiz* , *supra* , 496 B.R. at 149-50 (interpreting New York ethics rules and citing multiple cases for the proposition that counsel's attendance at the § 341 meeting is a " 'fundamental and core obligation' of any attorney representing a debtor."). While other courts may reach decisions on how attorneys may limit the scope of their representation of clients based on ethical rules applicable in those cases, the Court finds that the Attorneys' actions and the Dual Contract Option in this case comply with Kentucky's ethical requirements.

In sum, based on the record, the Court finds no ethical problem with or resulting from the agreed-upon fee structure for the Attorneys' representation of Debtor.

II. The Dual Contract Option comports with persuasive case law on separate fee agreements.

It appears to the Court that the Attorneys made great efforts to propose separate fee arrangements that comport with case law in which other attorneys have successfully formulated such arrangements. For example, in *In re Slabbinck* , 482 B.R. 576 (Bankr. E.D. Mich. 2012), the bankruptcy court approved a fee arrangement in which counsel provided legal services to chapter 7 debtors using separate prepetition and post-petition agreements. Upon review of pertinent Michigan ethical rules and related authority, the court held that the arrangement was not improper and that the attorney could be compensated for post-petition chapter 7 services under a post-petition agreement.

Similarly, in *In re Hazlett* , No. 16-30360, 2019 WL 1567751 (Bankr. D. Utah Apr. 10, 2019), a law firm provided chapter 7 services to a debtor whereby the attorney received no prepetition fee and agreed to accept $2,400 post-petition in ten monthly installments. The debtor and the firm executed both a prepetition and a post-petition
442 *442 agreement, and the firm had the debtor sign documents that explained the bankruptcy process, contained pertinent disclosures, and offered warnings about the failure to take necessary actions. After the UST representative in that region objected to the arrangement and moved for sanctions, the bankruptcy court denied the motion. The court determined that no applicable law or ethical rules barred the fee arrangement. Further, the court found that the arrangement was acceptable because it was in the debtor's best interests, the firm provided sufficient disclosures and obtained informed written consent from the client, and the firm's fees charged for the services provided were reasonable and necessary.

Finally, a bankruptcy court accepted an arrangement involving prepetition and post-petition contracts in *Walton v. Clark & Washington, P.C.* , 469 B.R. 383 (Bankr. M.D. Fla. 2012), stating that "there is nothing inherently wrong with a lawyer giving terms to clients for the payment of legal services." *Id.* at 386. The prepetition contract presented to the debtor (under which the law firm would prepare and file the chapter 7 petition) detailed the law firm's two-contract system and the client's post-petition options (proceed *pro se* , retain the law firm, or retain a different attorney or firm). The debtor then would have a two-week period in which to decide which option to pursue, during which time the firm would continue to serve as the debtor's counsel—and the firm would remain in place until the court approved its withdrawal.

Here, the Attorneys assiduously followed the best practices drawn from these cases. They made full disclosures to Debtor so that Debtor could make an informed decision. Their efforts, reasonable fee arrangement, and willingness to provide access to the courts in this manner allowed Debtor to retain and pay for legal counsel and receive a chapter 7 discharge.

CONCLUSION

Not all multiple fee arrangements will pass muster. Different circumstances involving different debtors may require different processes or even render an arrangement like the one discussed herein an improper practice. But in this instance, the Attorneys proceeded reasonably and after having obtained Debtor's informed consent in writing. They accepted reasonable fees for prepetition work under their prepetition contract and agreed to a reasonable payment arrangement for their fees for post-petition work under their post-petition contract.

As a result, it is ORDERED that the Court will take no action under § 329(b) to disrupt the fee arrangements in this case.

It is further ORDERED that the Attorneys are instructed to provide greater clarity about multiple contract fee arrangements in their Rule 2016(b) disclosures in future cases.

No. 12-48448
United States Bankruptcy Court, E.D. Michigan, Southern Division.

In re Slabbinck

482 B.R. 576 (Bankr. E.D. Mich. 2012)
Decided Nov 1, 2012

No. 12–48448.

2012-11-1

In re Remi Leonard SLABBINCK and Susan Loucille Slabbinck, Debtors.

William R. Orlow, Pleasant Ridge, MI, for Debtors. Wendy Turner Lewis, Detroit, MI, Trustee.

PHILLIP J. SHEFFERLY

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William R. Orlow, Pleasant Ridge, MI, for Debtors. Wendy Turner Lewis, Detroit, MI, Trustee.

Opinion Regarding United States Trustee's Motion For Relief Under Section 329 Of The Bankruptcy Code

PHILLIP J. SHEFFERLY, Bankruptcy Judge.

Introduction

This opinion deals with a motion filed by the United States Trustee ("UST") under § 329 of the Bankruptcy Code, seeking cancellation of an agreement to pay a fee to a Chapter 7 debtor's attorney and disgorgement of a fee paid to that attorney. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a).

Facts

The following facts are not in dispute.

On April 2, 2012, the Debtors filed this Chapter 7 case. Prior to filing the petition, the Debtors met with and hired the B.O.C. Law Group, P.C. 579 ("BOC"). BOC is *579 a law firm that specializes in representing individual debtors in bankruptcy cases. The Debtors signed two separate agreements with BOC. The first agreement is titled "Chapter 7 Fee Agreement" ("Pre–Petition Agreement") (docket entry no. 23, Ex. 1). The second agreement is titled "Post–Petition Chapter 7 Fee Agreement" ("Post–Petition Agreement") (docket entry no. 23, Ex. 2).

The Debtors signed the Pre–Petition Agreement on March 1, 2012. The Pre–Petition Agreement states that the Debtors agree to employ BOC "TO REPRESENT CLIENT(S) IN FILING A VOLUNTARY CHAPTER 7 BANKRUPTCY PETITION." The Pre–Petition Agreement then describes the pre-petition services that BOC agrees to provide to the Debtors, including "CONSULTATION AND ADVICE" and preparation of the bankruptcy petition and certain other documents necessary for the filing of a bankruptcy case. The Pre–Petition Agreement states that the fee for these pre-petition services is $1,000.00. The Pre–Petition Agreement contains a separate paragraph informing the Debtors that BOC will not represent the Debtors once the bankruptcy case is filed, unless a new agreement is signed.

CLIENT EXPRESSLY UNDERSTANDS THAT [BOC] WILL NOT REPRESENT CLIENT AFTER FILING THE BANKRUPTCY PETITION UNLESS A SEPARATE POST–

PETITION FEE AGREEMENT IS SIGNED. CLIENT WILL BE PROVIDED WITH A COPY OF THE SAME AND CLIENT ACKNOWLEDGES HIS/HER/THEIR INTENTIONS TO EMPLOY [BOC] FOR POST–PETITION COMPLETION OF THE CHAPTER 7 BANKRUPTCY FOR A FEE OF $2000.00.

According to the Debtors' affidavit (docket entry no. 23, Ex. 3), the Debtors "understood" that the $1,000.00 that they paid under the Pre–Petition Agreement was for services rendered to them by BOC prior to filing their bankruptcy case. They "further understood" that they would be "required to retain legal counsel subsequent to the filing of their Bankruptcy Petition to receive legal services for any necessary work required post-petition." The Debtors state in their affidavit that they paid BOC $1,000.00 on March 16, 2012, satisfying in full their obligation under the Pre–Petition Agreement. The Debtors go on to explain in their affidavit that "although they were in no way obligated to do so, Debtors knowingly and voluntarily decided to retain B.O.C. Law Group, P.C. to perform all necessary post-petition services on behalf of the Debtors."

After filing their Chapter 7 petition on April 2, 2012, the Debtors met again with BOC and signed the Post–Petition Agreement on April 4, 2012. The Post–Petition Agreement states that the Debtors agree to employ BOC "to represent [them] in completing a Chapter 7 Bankruptcy, Case number: 12–48448–PJS." The Post–Petition Agreement then describes the post-petition services that BOC agrees to provide to the Debtors in connection with the completion of their bankruptcy case, including the preparation and filing of schedules, statement of financial affairs and other documents, and attendance at the § 341 meeting of creditors. The Post–Petition Agreement states that the fee for these post-petition services is $2,000.00, to be paid at the rate of $166.67 per month beginning on April 13, 2012. In their affidavit, the Debtors state that they "knowingly and voluntarily executed" the Post–Petition Agreement, they are satisfied with BOC's representation of them in their bankruptcy case, 580 and they "wish to continue*580 paying" BOC for services rendered to them postpetition under the Post–Petition Agreement.

On April 16, 2012, BOC filed a Fed. R. Bankr.P.2016(b) statement (docket entry no. 13). The Rule 2016(b) statement describes the "compensation paid or agreed to be paid" by the Debtors as follows:

+----------+ ¦ ¦[X] *FLAT FEES—SEE FEE AGREEMENTS* ¦ +-+----------¦ ¦ ¦ ¦ +----------+

+----------+ ¦ ¦ ¦For legal services rendered in contemplation ¦ ¦ ¦ ¦ ¦A. ¦of and in connection with this case, exclusive¦ ¦ ¦ ¦ ¦ ¦of the filing fee paid for services: ¦ ¦ ¦ +----------+

+----------+ ¦ ¦ ¦ ¦Pre–Petition ¦$1,000.00¦ +-+----+----------+----------+-¦ ¦ ¦ ¦ ¦Post–Petition¦$2,000.00¦ +-+----+----------+---------¦ ¦ ¦ ¦ ¦Total ¦$3,000.00¦ +----------+

+----------+ ¦ ¦B. ¦Prior to filing this statement, received ¦$1,000.00¦ +--+----+----------+---------¦ ¦ ¦C. ¦The unpaid balance due and payable is ¦$2,000.00¦ +----------+

On June 7, 2012, the UST filed a motion (docket entry no. 21) seeking an order requiring BOC to disgorge any amounts paid by the Debtors under either the Pre–Petition Agreement or Post–Petition Agreement. On June 28, 2012, BOC filed a response (docket entry no. 23) accompanied by the Debtors' affidavit, and then filed a brief (docket entry no. 29) on July 17, 2012.

The Court held a hearing on August 9, 2012. At the hearing, BOC provided the Court and the UST with a copy of its Itemized Record of Services. The Itemized Record of Services shows that BOC provided seven hours of pre-petition services, totaling $1,237.50, the fee for which was reduced to $1,000.00 pursuant to the Pre–Petition Agreement. It further shows that BOC provided 10.7 hours of post-petition services, totaling $2,062.50, the fee for which was reduced to $2,000.00 pursuant to the Post–Petition Agreement.

Positions of the UST and BOC

The UST's motion is brought under § 329 of the Bankruptcy Code. Section 329(a) requires that any attorney representing a debtor in a bankruptcy case must

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.

Section 329(b) provides that if the compensation paid or agreed to be paid "exceeds the reasonable value" of the services rendered or to be rendered, "the court may cancel any such agreement, or order the return of any such payment, to the extent excessive[.]"

The UST makes two basic arguments in support of its request for relief under § 329. First, the UST argues that the Pre–Petition Agreement and the Post–Petition Agreement in substance constitute one agreement between the Debtors and BOC for BOC to represent the Debtors in their Chapter 7 case. According to the UST, taken together, these agreements create a pre-petition debt that is dischargeable in the Debtors' Chapter 7 case under controlling precedent in the Sixth Circuit, *Rittenhouse v. Eisen,* 404 F.3d 395, 396 (6th Cir.2005). In the UST's view, the creation of two separate documents, the Pre–Petition Agreement 581 and the Post–Petition Agreement, is a fiction *581 intended as a "workaround" of the holding of *Rittenhouse.* Second, the UST argues that, if the Court treats the Pre–Petition Agreement and Post–Petition Agreement separately, then the Court should still grant the UST's motion because BOC's breaking up of the services that it agreed to render to the Debtors between pre-petition services and post-petition services is an impermissible "unbundling" of the legal services essential to the representation of a debtor in a Chapter 7 bankruptcy case.

BOC concedes that *Rittenhouse* holds that a pre-petition agreement to pay attorney fees is not one of the exceptions to a Chapter 7 discharge under § 523 of the Bankruptcy Code. But BOC argues that *Rittenhouse* does not apply to a post-petition agreement to pay attorney fees, and that the Post–Petition Agreement in this case is unaffected by *Rittenhouse.* BOC further argues that there is nothing in the law prohibiting it from unbundling the legal services that it renders to an individual pre-petition, and being compensated for those services pre-petition, from the legal services that it renders to such individual post-petition, and being compensated for those services post-petition under a post-petition agreement for payment.

Dischargeability of attorney fees

In *In re Gourlay,* No. 12–46096, 483 B.R. 496, 2012 WL 4791034 (Bankr.E.D.Mich. Oct. 9, 2012), the Court recently applied *Rittenhouse* to a UST motion under § 329. In that case, there was only one fee agreement between the individual debtor and the debtor's attorney, and it was signed pre-petition. The fee agreement in that case provided for a $1,000.00 flat fee for the debtor to file a Chapter 7 bankruptcy case and for the attorney to represent the debtor in such case. The Rule 2016(b) statement indicated that the fee agreement called for the debtor to make a down payment of $100.00 pre-petition, and then pay the balance of the flat fee of $900.00 in post-petition installment payments. *Id.* at *1. In *Gourlay,* the Court held that the pre-petition agreement of the

debtor to pay $900.00 of the flat fee post-petition was a pre-petition dischargeable debt that the attorney could not enforce. *Id.* at *3. As a result, the Court granted the UST's motion under § 329 cancelling the debtor's agreement to make post-petition installment payments. In reaching its holding, the Court in *Gourlay* quoted the following passage from *Rittenhouse:*

"The issue of whether pre-petition attorney fees are dischargeable in bankruptcy is *res nova* in this circuit. We join three other circuits in concluding that pre-petition attorney fees are dischargeable, and we affirm the order of the district court.

"11 U.S.C. § 727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 U.S.C. § 523(a). A debt for pre-petition legal services is not one of the non-dischargeable debts enumerated in § 523(a)."
Id. at *3 (quoting *Rittenhouse,* 404 F.3d at 396 (citing *In re Fickling,* 361 F.3d 172 (2nd Cir.2004); *Bethea v. Robert J. Adams & Associates,* 352 F.3d 1125 (7th Cir.2003); and *In re Biggar,* 110 F.3d 685 (9th Cir.1997))).

The facts in this case are different. Unlike *Gourlay,* this case involves two separate agreements, one of which the Debtors signed before their bankruptcy case was filed, and the other of which the Debtors signed after their bankruptcy case was filed. It is undisputed that the Debtors paid BOC the entire $1,000.00 required
582 by the Pre–Petition Agreement prior to the *582 time that they filed their bankruptcy case. There is no debt for unpaid pre-petition fees that would be subject to the discharge. It is only the Debtors' obligation to make post-petition payments under the Post–Petition Agreement that is at issue in this case.

This factual distinction is important because the *Rittenhouse* holding is predicated on the discharge of pre-petition debts that a Chapter 7 debtor receives under § 727 of the Bankruptcy Code and the specific exceptions to discharge enumerated in § 523(a). *Rittenhouse* did not rule on the enforceability of an obligation to pay attorney fees under an agreement made *after* a bankruptcy case is filed. The only reference in *Rittenhouse* to a post-petition agreement to pay attorney fees is the court's observation that "§ 329 covers also post-petition attorney fees, which are not dischargeable." 404 F.3d at 397. Moreover, in support of its holding that there is no exception to discharge for a pre-petition agreement to pay attorney fees, *Rittenhouse* expressly relied upon *Bethea v. Robert J. Adams & Associates,* 352 F.3d 1125 (7th Cir.2003). In *Bethea,* the Seventh Circuit Court of Appeals held that a pre-petition agreement to pay attorney fees is dischargeable, but distinguished a pre-petition agreement from a post-petition agreement, and noted that a post-petition agreement to pay attorney fees is not dischargeable.

For what it may be worth, however, we do not share the view that taking § 727(b) at face value necessarily injures deserving debtors. Those who cannot prepay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins-for a lawyer's aid is helpful in prosecuting the case as well as in filing it.
Id. at 1128;*see also In re Lawson,* 437 B.R. 609, 664 (Bankr.E.D.Tenn.2010) (suggesting that a retainer agreement that " 'expressly designat[es] pre-petition services, which are paid pre-petition, and post-petition services, which shall be paid post-petition' " is one "potentially allowable method" for payment of Chapter 7 debtor's attorney fees) (quoting *In re Waldo,* 417 B.R. 854, 895 (Bankr.E.D.Tenn.2009)).

The UST does not quarrel with *Bethea's* and *Rittenhouse's* distinction between a pre-petition agreement to pay attorney fees and a post-petition agreement to pay attorney fees. Instead, the UST asserts that the two agreements signed by the Debtors in this case are in substance a single

agreement, one that is entirely pre-petition in nature. The UST argues that the Pre–Petition Agreement was a contract to enter into the Post–Petition Agreement, making it all a pre-petition agreement.

As noted, the Debtors signed the Pre–Petition Agreement on March 1, 2012, before their bankruptcy case was filed. It describes the services that BOC would perform pre-petition up to the filing of the case. It contains an explicit statement that BOC will not represent the Debtors once the bankruptcy case is filed "unless a separate post-petition fee agreement is signed." The Pre–Petition Agreement contains a statement by the Debtors acknowledging "their intention to employ [BOC] for post-petition completion" of their Chapter 7 bankruptcy case, but it does not either state or imply that the Debtors have any obligation to sign a post-petition agreement to hire BOC to represent them after their petition is filed. Further, the Pre–Petition Agreement expressly states that BOC does not have an obligation to represent the Debtors post-petition, and will not do so unless the
583 Debtors sign a separate agreement after *583 the bankruptcy case is filed. In their affidavit, the Debtors state "[t]hat although they were in no way obligated to do so, Debtors knowingly and voluntarily decided to retain" BOC after their bankruptcy petition was filed, and that they "knowingly and voluntarily" entered the Post–Petition Agreement with BOC on April 4, 2012, after their bankruptcy petition was filed.

The UST's assertion that the Pre–Petition Agreement and the Post–Petition Agreement are essentially a single, pre-petition agreement giving rise to an entirely pre-petition debt, is not borne out by the facts. The two separate agreements clearly delineate the services that will be rendered pre-petition from the services that will be rendered post-petition, and clearly delineate the amount that the Debtors agreed to pay to BOC for its pre-petition services and the amount that they agreed to pay for its post-petition services. BOC's Itemized Record of Services shows that its pre-petition services and post-petition services were performed according to the terms of the respective agreements, and the fees for those services were likewise charged in accordance with the terms of the respective agreements. The Debtors' uncontroverted affidavit shows that the Debtors knew when they filed their bankruptcy petition that they did not have to hire BOC to represent them to complete their bankruptcy case. Their affidavit further shows that their decision to hire BOC to perform the services necessary to complete their Chapter 7 case was a voluntary choice that they made and acted upon after their bankruptcy case was filed. There is nothing in either of the two agreements or the Debtor's affidavit that supports a finding that the Debtors were somehow obligated or coerced to sign the Post–Petition Agreement or that supports the UST's assertion that the separateness of the two agreements is a "fiction." The Debtors' obligation to pay BOC under the Post–Petition Agreement was incurred post-petition. As such, it is not governed by *Rittenhouse* and is not a dischargeable pre-petition debt under § 727(b) of the Bankruptcy Code. Because the undisputed facts do not support the UST's contention that the Pre–Petition Agreement and the Post–Petition Agreement constitute a single, pre-petition agreement creating an entirely pre-petition debt, the Court rejects the UST's first argument.

Unbundling of pre-petition and post-petition legal services

The UST's second argument is tougher. Here, the UST argues that it was improper for BOC to unbundle the legal services that it would perform for the Debtors into pre-petition services and post-petition services. In support, the UST does not cite to any section of the Bankruptcy Code or decision of the Supreme Court or the Sixth Circuit Court of Appeals that controls or directly addresses the question of whether an attorney may unbundle the legal services for an individual Chapter 7 debtor into pre-petition services and post-petition
584 services.[1] Instead, the UST relies upon *584 *In re*

Egwim, 291 B.R. 559 (Bankr.N.D.Ga.2003). In *Egwim,* a Chapter 7 debtor's attorney filed a Rule 2016(b) statement indicating that the agreed upon fee was "$475 for representation of the [d]ebtors in the case, of which $240 had been paid prior to the filing of the statement, leaving a balance of $235 to be paid 'prior to or at the 341 hearing.' " *Id.* at 564. The Rule 2016(b) statement recited that the attorney "agreed to render legal service for all aspects of the bankruptcy case," and then went on to describe certain of the tasks that were included, but expressly stated that the agreed upon fee did not include representation of a debtor in "adversary and/or contested matters." *Id.* at 564–65 (emphasis omitted). A creditor brought an adversary proceeding objecting to discharge. Another creditor filed a motion for relief from stay. The debtor's attorney did not represent the debtor either in response to the adversary proceeding or the motion. The court issued an order sua sponte requiring the attorney to show cause why the court should not impose sanctions because of such failure. *Id.* at 566. The debtor's attorney appeared at the hearing and explained that he believed that the limitation on the services listed in his fee agreement was appropriate, and that sanctions were not warranted.

[1] Although § 329 of the Bankruptcy Code authorizes a bankruptcy court to scrutinize the reasonableness of an attorney fee, it does not identify required services that an attorney for a Chapter 7 debtor must always perform.

In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), adding §§ 526–528 to the Bankruptcy Code, "to correct perceived abuses of the bankruptcy system. Among the reform measures [BAPCPA] implemented are a number of provisions that regulate the conduct of 'debt relief agenc[ies]'— *i.e.,* professionals who provide bankruptcy assistance to consumer debtors." *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 130 S.Ct. 1324, 1329, 176 L.Ed.2d 79 (2010) (citing 11 U.S.C. §§ 101(3), (12A)). The purpose of these provisions was "to improve bankruptcy law and practice." *Id.* at 1330. These provisions introduced a new term to the Bankruptcy Code, "debt relief agency," in § 101(12A). *Milavetz* held that an attorney who provides bankruptcy assistance to an assisted person is a debt relief agency within the meaning of BAPCPA. *Id.* at 1333. Neither the UST nor BOC cite to or rely upon any of these provisions to support in any way their positions on the UST's motion in this case. Therefore, the Court expresses no view about these provisions.

Ultimately, the *Egwim* court held that no sanctions or other disciplinary measures were warranted. However, the court took the opportunity to discuss in detail a number of issues regarding the responsibilities of attorneys representing individual debtors in Chapter 7 cases. Specifically, the court considered whether it is *ever* permissible for an attorney to exclude certain services from the attorney's representation of a Chapter 7 debtor even when there is an agreement that limits such representation. The court noted that the two primary objectives for Chapter 7 debtors are to discharge their debts and retain their exempt assets. *Id.* at 566–67. With those two objectives in mind, the *Egwim* court looked to the Georgia Rules of Professional Conduct, because the bankruptcy case was filed in Georgia. *Id.* at 569–71.

Georgia Rule 1.1 states that "[a] lawyer shall provide competent representation," which the *Egwim* court interpreted as meaning that the attorney was required "to provide services that are necessary to achieve the basic, fundamental objectives of the representation." *Id.* at 572. The court concluded that

[t]he engagement of an attorney to represent a consumer in a bankruptcy case necessarily includes services required to accomplish those objectives. If obstacles arise to the accomplishment of those objectives, such as an objection to discharge, competent representation under Georgia Rule 1.1 requires the lawyer to provide representation essential to the client's pursuit of the purposes of the representation.
Id. at 569–70.

The *Egwim* court recognized an exception to this obligation where there is "a valid, professionally appropriate contractual limitation on the scope of services between attorney and chapter 7 debtor[.]" *Id.* at 570. In determining what constitutes a valid and professionally appropriate limitation, the court looked again to Georgia Rules of Professional
585 Conduct, as *585 well as the Restatement (Third) of the Law Governing Lawyers and *In re Castorena,* 270 B.R. 504 (Bankr.D.Idaho 2001). After reviewing these sources, the *Egwim* court held that a valid, professionally appropriate contractual limitation on the scope of services has three requirements: (i) "the attorney must consult with the client about the limited representation"; (ii) "the client must provide informed consent" in writing; and (iii) "the limitation must be reasonable in the circumstances or, in the terms of the Georgia Rule, the engagement must not be so limited as to prevent competent representation." *Id.* at 571.

Despite recognizing that Georgia Rule 1.2(c) allows an attorney to limit the scope of representation, the *Egwim* court quoted extensively from *In re Castorena* in questioning whether, in the context of representing an individual Chapter 7 debtor, an attorney could ever have a valid, professionally appropriate contractual limitation.

"The ability to adequately explain the lay of the bankruptcy landscape, including all its variations, contingencies and permutations, in order to obtain a truly informed consent is suspect."

...

"To send a debtor into a bankruptcy *pro se,* on the theory that he has had 'enough' advice and counseling in the document preparation stage to safely represent himself, is except in the extraordinary case so fundamentally unfair so as to amount to misrepresentation."

...

"An attorney, in accepting an engagement to represent a debtor in a chapter 7 bankruptcy case, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required. Compliance with [Rules of Professional Conduct 1.1, 1.2 and 1.4] is mandatory, and must be proved."
Id. at 571–72 (emphasis omitted) (quoting *Castorena,* 270 B.R. at 529–30).

Egwim then held as follows:

In summary, the principles and authorities addressed above establish that an attorney representing a chapter 7 debtor ordinarily may not limit the scope of that engagement. Absent compliance with the standards discussed above, an attempt to limit the engagement is a violation of Georgia's Rules of Professional Conduct and subjects counsel to professional discipline. For a limitation on services to be valid, "that limitation must be carefully considered and narrowly crafted, and be the result of educated and informed consent."
Id. at 572 (emphasis omitted) (quoting *Castorena,* 270 B.R. at 531).

BOC counters that it may bifurcate the services that it offers into pre-petition and postpetition segments so long as its client has been advised and consents to such arrangement. Like the UST, BOC does not cite to any section of the Bankruptcy Code or other controlling authority. Instead, BOC

relies upon *In re Mansfield,* 394 B.R. 783 (Bankr.E.D.Pa.2008). The fee agreement between the debtor and the attorney in *Mansfield* closely resembles the fee agreement in *Gourlay.* In *Mansfield,* the debtor agreed pre-petition to a flat fee of $2,000.00, of which $1,000.00 was to be paid up front, with the balance to be paid in monthly installments after the debtor filed his Chapter 7 petition. *Id.* at 784–85. The *Mansfield* court reached the same conclusion that this Court
586 reached in *Gourlay:* *586

> [T]he Court concludes that a debtor's obligation under a fee agreement to pay a fixed or flat fee to his attorney for legal services rendered pre- and postpetition in a Chapter 7 case, regardless of how the fee is scheduled to be paid, is a prepetition debt that is dischargeable under 11 U.S.C. § 727(b).

Id. at 785;*Gourlay,* 2012 WL 4791034, at *3. Like *Gourlay,Mansfield* pointed to § "727(b), which discharges a debtor from 'all debts that arose before the date of the order for relief' unless such debt is excepted under § 523 [of the Bankruptcy Code]." *Id.* at 787 (quoting 11 U.S.C. § 727(b)). Since § 523(a) contains no exceptions for pre-petition attorney fees, the debtor's obligation in *Mansfield* to pay the post-petition installment payments was held to be a dischargeable debt. *Id.* at 791.

BOC cites *Mansfield* not for its unremarkable holding that pre-petition agreements to pay attorney fees are dischargeable, but instead for its extended discussion of post-petition agreements to pay attorney fees. After reaching its holding, the *Mansfield* court reviewed various cases that have explored the possible ways for a Chapter 7 debtor's attorney to be paid for services in representing a Chapter 7 debtor.[2] Drawing on cases that have focused on the definition of "claim" under § 101(5)(A) of the Bankruptcy Code as a "right to payment," and that have explained that a "right to payment" in the context of legal services does not ordinarily arise until the services are performed, the *Mansfield* court explained in *dicta* the distinction between an attorney's right to payment for legal services performed pre-petition and an attorney's right to payment for legal services performed post-petition.

[2] Other cases that have discussed generally the different ways in which attorneys for individual Chapter 7 debtors can be paid include: *Bethea,* 352 F.3d at 1128–29;*Gordon v. Hines (In re Hines),* 147 F.3d 1185, 1189–90 (9th Cir.1998); *In re Lawson,* 437 B.R. at 664;*In re Chandlier,* 292 B.R. 583, 588 (Bankr.W.D.Mich.2003), *aff'd Rittenhouse v. Eisen,* 404 F.3d 395 (6th Cir.2005). *See also* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report,* Am. Bankr. Inst. L. Rev., vol. 20, no. 1, 17, 37–39, 105 (West 2012).

It follows that an attorney's right to payment for legal services performed postpetition pursuant to a fee agreement which, in some manner, segregates prepetition fees from postpetition fees (as opposed to flat fee agreement pursuant to which an attorney agrees to perform both prepetition and postpetition services for a lump or fixed sum) arises when the postpetition services are performed. Viewed thusly, a client's debt for postpetition services is a postpetition debt which is not subject to the automatic stay or the Chapter 7 discharge injunction (unless the work is rendered pursuant to a flat fee agreement as discussed above). The key to recovery for postpetition services, therefore, lies in the terms of the attorney's fee agreement. The fee agreement must segregate the fee(s) for prepetition work from 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.

To recapitulate, legal fees which are segregated from prepetition legal fees and incurred for postpetition legal services constitute a postpetition debt and are, therefore, an obligation of the Chapter 7 debtor (as opposed to the estate) which he or she has an obligation to pay out of his or her postpetition earnings or exempt assets.

587 *587 *Id.* at 792–93 (citations and footnote omitted).

Neither the UST's citation to *Egwim* nor BOC's reliance upon *Mansfield* controls the Court's decision on the UST's motion in this case. But they do provide the Court with two important starting points. First, the court in *Egwim* based its ruling that unbundling legal services was impermissible in that specific case, on its review and analysis of the state law rules of professional conduct that applied to the lawyer in that case. 291 B.R. at 572. Second, the court in *Mansfield* based its statement that unbundling of legal services may be permissible by reference to the specific agreement that is made between the client and the lawyer in a given case: "The key to recovery for postpetition services [ ] lies in the terms of the attorney's fee agreement." 394 B.R. at 793. Consistent with both *Egwim* and *Mansfield,* to resolve the UST's motion in this case, the Court must examine both the rules of professional conduct that govern BOC in this case and the terms of the two agreements made by the Debtors and BOC in this case.

BOC filed the Debtors' bankruptcy case in the Eastern District of Michigan. "Ethical rules involving attorneys practicing in the federal courts are ultimately questions of federal law. The federal courts, however, are entitled to look to the state rules of professional conduct for guidance." *El Camino Res. Ltd. v. Huntington Nat'l Bank,* 623 F.Supp.2d 863, 876 (W.D.Mich.2007) (citing *In re Snyder,* 472 U.S. 634, 645 n. 6, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985) and *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Alticor, Inc.,* 466 F.3d 456, 457–58 (6th Cir.2006), *vacated in part on other grounds,* 472 F.3d 436 (6th Cir.2007)). The U.S. District Court for the Eastern District of Michigan has determined that "[t]he Rules of Professional Conduct adopted by the Michigan Supreme Court ... apply to members of the bar of this court and attorneys who practice in this court as permitted by LR 83.20." Local R. 83.22(b) (E.D. Mich.). Local R. Bankr.P. 9010–11(a)(1) provides that an "appearance before the court on behalf of a person or entity may be made only by an attorney admitted to the bar of, or permitted to practice before, the United States District Court for the Eastern District of Michigan, under E.D. Mich. LR 83.20." The Michigan Rules of Professional Conduct ("MRPC") therefore govern BOC's conduct.

There are several MRPC that are relevant here. Rule 1.1 states that "[a] lawyer shall provide competent representation to a client." Rule 1.2(b) addresses the scope of an attorney's representation of a client, and states that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." The Official Comment to this rule contains an additional explanation of the rule, but also cautions that any agreement regarding the scope of representation must not permit the attorney to violate the obligation to provide competent representation contained in Rule 1.1:

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client....

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1....

Rule 1.4(b) imposes a duty upon an attorney regarding communications with a client by stating that "[a] lawyer shall explain a matter to the extent
588 reasonably *588 necessary to permit the client to make informed decisions regarding the representation." The Official Comment to Rule 1.0

also defines "consult" or "consultation" as "denot[ing] communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

Rule 1.5 governs attorney fees and sets forth certain requirements for attorney fee agreements. Rule 1.5(b) states that "[w]hen 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." The Official Comment to this rule makes it clear that an attorney has a duty to explain to a client any limitation upon services to be provided that is set forth in a fee agreement. The Official Comment goes on to recognize that a fee agreement may properly limit the services to be rendered, provided that such limitation is both explained and does not improperly curtail services in a way contrary to the client's interest:

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.

Without question, the MRPC and the Official Comments allow an attorney and a client to take into consideration the client's ability to pay and to agree to limit the scope of representation. But such agreement may only be made where it does not require the attorney to violate the attorney's duty of competence and where the agreement to limit the scope of representation has been fully explained by the attorney to the client to the extent reasonably necessary to permit the client to make an informed decision regarding such limitation. As noted in the Official Comment to Rule 1.5, an attorney should not enter into an agreement with a client to limit the scope of representation up to a stated dollar amount when it is foreseeable that more extensive services will likely be required "unless the situation is adequately explained to the client."

There are two ethics opinions issued by the State Bar of Michigan Standing Committee on Professional and Judicial Ethics that discuss the application of the MRPC in Chapter 7 bankruptcy cases. In Michigan Ethics Opinion RI–184, 1994 WL 27231 (Jan. 19, 1994), the Committee addressed the question of whether a retainer agreement between an attorney and an individual Chapter 7 debtor may permissibly limit the scope of representation to exclude representation of such debtor in a later adversary proceeding. The Committee stated that, when read together, Rules 1.2(b), 1.4(b) and 1.5(b)

lead to the conclusion that if the lawyer intended to exclude representation of the debtor in bankruptcy adversary proceedings, the lawyer should have so specified and given the client the opportunity to seek counsel who may offer representation on other terms. It is not the client's responsibility to know, without it being explained, that adversary proceedings may occur and the consequences arising from them. Therefore, if a 589 retainer agreement is silent or ambiguous*589 on the subject of representing a debtor client in bankruptcy adversary proceedings, the lawyer would be required to provide that representation.

More recently, Michigan Ethics Opinion RI–348, 2010 WL 3011700 (July 26, 2010) addressed the question of whether an attorney for an individual Chapter 7 debtor may exclude representation with respect to a reaffirmation agreement. [3] In that opinion, the Committee reviewed the applicable MRPC, drew on its analysis from Opinion RI–

184, and emphasized that any limitation on representation is only permissible if it is adequately explained to the client and the client consents to such limitation after "adequate consultation." The adequate consultation must, "at a minimum," include information on "the risks to the client that the proposed limitations would create," as well as the "technical aspects," "legal ramifications" and "material risks" of reaffirming a dischargeable debt. The opinion concluded

> that the limitation excluding representation as to reaffirmation, if permissible under applicable law, which may vary among jurisdictions, would not of itself result in a violation of Rule 1.1 and is permitted under Rule 1.2(b). In seeking to so limit the scope of the representation, the lawyer will need to obtain the client's consent after consultation, and in connection with obtaining consent, must explain the material risks of reaffirmation and available alternatives, as required by Rule 1.4.

[3] On December 16, 2009, the Bankruptcy Court for the Eastern District of Michigan entered Administrative Order No. 09–32, adopting Guideline 13, which states that an attorney for a debtor in a Chapter 7 case may not exclude from representation services relating to a reaffirmation agreement. Although not cited by either the UST or BOC, the Bankruptcy Court adopted Guideline 13 pursuant to its power to regulate the practice of law in the Bankruptcy Court, setting forth a specific standard of practice regarding a specific issue. There are three relevant points about this Guideline. First, it was not a ruling based upon a request for relief under § 329 in a specific case. Second, it was issued by the entire Bankruptcy Court after the Bankruptcy Court solicited, received and considered input from the Consumer Bankruptcy Association. Third, it provides an example of the MRPC being the floor, but not necessarily the ceiling, of professional conduct that the Court seeks to encourage.

After reviewing the authorities cited by the UST and BOC, as well as the MRPC, the Official Comments to the MRPC, and Michigan Ethics Opinions RI–184 and RI–348, the Court is persuaded that an agreement to limit an attorney's legal services in connection with an individual Chapter 7 bankruptcy case by unbundling the pre-petition legal services from the post-petition legal services, is not per se prohibited by the MRPC and does not necessarily warrant any relief under § 329 of the Bankruptcy Code. That does not mean that all agreements to unbundle legal services are permissible, but only that such agreements are not always barred. Although § 329 of the Bankruptcy Code does not set forth specific criteria governing the unbundling of legal services in a Chapter 7 case, it is clear that, minimally, the MRPC require that (1) the attorney competently represents the individual debtor despite any limitation on the scope of services; (2) the attorney provides adequate consultation to the individual debtor concerning any limitation on the scope of the attorney's representation and the legal matter in question; and (3) the individual debtor makes a fully informed and voluntary decision to consent to such limitation.

Did BOC's separation of pre-petition and post-petition legal services in this case comply with the MRPC?

The remaining issue then is whether the specific
590 unbundling of BOC's legal services *590 in the Pre–Petition Agreement and the Post–Petition Agreement in this case complies with the MRPC. The first question is whether BOC's limitation on its pre-petition services prevented it from acting competently.

The attorney's competence

Although "competence" is not defined in the MRPC, the Official Comment to Rule 1.1 provides relevant factors in determining whether a lawyer is able to provide competent representation, such as the lawyer's training, experience, preparation for and study of a matter, and the ability to "determin [e] what kind of legal problems a situation may involve." The level of competency heightens as the complexity and specialized nature of the matter increase. These factors relate primarily to the particular attorney rendering a legal service rather than a description of the service itself. But the UST in this case does not suggest that BOC is not competent because it lacks the requisite skill, experience and ability to represent the Debtors. Instead, the UST's argument in this case targets whether the unbundling of legal services between services that are performed prepetition or post-petition necessarily precludes a finding of competence where the attorney is representing an individual Chapter 7 debtor.

In contrast to the factors identified in the Official Comment to the XRPC, which focus on the attributes of the attorney, such as training, experience, preparation and ability, *Egwim* defined competency in another way. *Egwim* defined competency of an attorney in an individual Chapter 7 case by reference to what *Egwim* described as the two primary objectives of such individual: obtaining a discharge and retaining exempt property.

Competent representation of a chapter 7 debtor requires that the attorney represent the debtor in all matters in the case that are necessary to the pursuit of the client's primary objectives, including the receipt of a discharge of debts and retention of exempt property. Representation to pursue those goals necessarily involves the provision of services to the debtor in adversary proceedings and contested matters that affect the debtor's interests. The scope of that representation ordinarily cannot be limited.
Egwim, 291 B.R. at 579.

Under *Egwim,* competency demands that an attorney for an individual Chapter 7 debtor must perform *all* of the legal services needed for that individual to obtain a discharge and retain their exempt property, whether those legal services are performed pre-petition or post-petition. A definition of competence that mandates that the attorney perform all of the legal services in a Chapter 7 case intuitively has great appeal to the Court. But is it legally correct to say that an attorney for a Chapter 7 individual debtor who performs only some legal services but not others is acting incompetently? To answer this question, it helps to understand what exactly an individual debtor must do in a Chapter 7 case.

The Bankruptcy Code and the Federal Rules of Bankruptcy Procedure impose a number of requirements that an individual debtor must fulfill in a Chapter 7 case to achieve the two objectives identified in *Egwim.* Some of those requirements can be met before the bankruptcy case is filed. Others cannot, and instead must be performed by the debtor after the bankruptcy petition is filed. For example, § 521(a)(1) of the Bankruptcy Code requires a debtor to file various documents. Those documents can be prepared before the bankruptcy case is filed. However, § 521(a)(3) requires a debtor to cooperate with the trustee. That can only be done after the bankruptcy case is filed. Section
591 521(a)(4)*591 requires a debtor to surrender property of the estate to the trustee. That too can only be done after a bankruptcy case is filed. Similarly, § 343 requires a debtor to appear and submit to an examination under oath at a meeting of creditors to be held under § 341 within a reasonable time after the order for relief. Obviously, performance of that duty cannot take place until after the bankruptcy case is filed. Section 727 sets forth further requirements that must be met in order for an individual debtor to obtain a discharge. Many of these requirements relate to an individual debtor's conduct and duties after the petition has been filed (e.g., § 727(a)(4), (6) and (11)). Because of the ongoing post-petition

duties that the Bankruptcy Code imposes on an individual Chapter 7 debtor, it is not possible for all of the attorney's services to be performed pre-petition in every case (e.g., how can an attorney represent the debtor at the § 341 meeting before the petition is filed?). Aside from the duties that an individual debtor *must* perform only after a petition has been filed, the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure also *permit* an individual debtor to perform other duties either at the time of filing the petition or after the petition has been filed. For example, Fed. R. Bankr.P. 1007(c) permits some of the debtor's required documents to be filed 14 days after the petition, and permits still other documents to be filed within a fixed number of days after the § 341 meeting. Further, the rule authorizes extensions of even those deadlines.

Under the *Egwim* standard of competence (i.e., performing all of the legal services needed by the debtor whether pre-petition or post-petition), those individuals who can afford to pay an attorney in full in advance of filing a bankruptcy petition will be able to have competent counsel represent them throughout the case in connection with all of their duties, both pre-petition and postpetition. But there are many individuals, including the Debtors, who wish to file Chapter 7 but do not have sufficient funds to pay an attorney in full in advance of filing the petition for all of the legal services that will be necessary for such individuals to perform all of their duties, both pre-petition and post-petition, needed for them to obtain a discharge and protect their exempt property, the two goals defined in *Egwim*. Under *Rittenhouse,* it is clear that such individuals in the Sixth Circuit cannot solve that problem by promising pre-petition to pay for any legal services to be performed after the bankruptcy petition is filed because that pre-petition promise is a dischargeable debt. But if the attorney's duty of competence requires that the attorney perform all of the legal services that the debtor will need, both pre-petition and post-petition, then every bankruptcy attorney will understandably demand full payment up front for all of the legal services that may be needed in a Chapter 7 case both pre-petition and post-petition, including defense of adversary proceedings, defense of objections to exemptions and discharge, advice and counseling in connection with the § 341 meeting, and advice and counseling throughout the entire bankruptcy case for the debtor to meet the debtor's duty to cooperate with the trustee.

The combination of the *Egwim* definition of competence, and the *Rittenhouse* holding that a pre-petition agreement to pay legal fees is dischargeable, puts the individual who does not have the resources to pay an attorney in full in advance between a rock and a hard place. Without the funds to pay an attorney in full prior to the petition, and without the ability to use post-petition income to pay the attorney, an individual debtor in these circumstances is relegated to
592 having to file pro se or use *592 a bankruptcy petition preparer, which in many cases is worse than pro se. If the law provides that competent representation of a Chapter 7 debtor requires in every case that the debtor's attorney represent the debtor in all matters in the case, both pre-petition and post-petition, many needy debtors will simply not be able to afford an attorney to handle their case. The Court concludes that the law does not so provide.

First, there is no cited provision in either the Bankruptcy Code or the MRPC holding that competent representation of a Chapter 7 debtor requires that the attorney represent the individual debtor in *all* matters necessary to pursue the client's ultimate objectives. It seems obvious that an individual debtor will be best served by having an attorney represent them in all facets of a Chapter 7 case, pre-petition and post-petition, start to finish. But the Court declines to use the UST's motion in this case as the vehicle to impose such a requirement for all Chapter 7 cases.

Second, defining competence by insistence that an attorney perform all of the legal services that may be needed by an individual Chapter 7 debtor intrudes upon the freedom of an individual client to contract with an attorney of their choice to perform specific legal services for them. An individual may well choose to hire one attorney, experienced in filing Chapter 7 bankruptcy cases, to file a Chapter 7 bankruptcy case for such individual, and then choose post-petition to hire a different attorney experienced in litigation, to defend an adversary proceeding under § 523 or § 727, or litigate a contested matter. The law does not prohibit such choice.

Third, defining competence by insistence that an attorney representing the debtor must perform all of the legal services in a Chapter 7 case ignores the span of legal services that is built into Chapter 7 by the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. It makes no sense to define competence in a way that pretends that all of the post-petition services a debtor may need, either can or should be performed pre-petition. In most Chapter 7 cases, all of the required documents are filed with the petition. That is certainly optimal in the Court's view, but it is not always the case. There are many cases where an attorney files a bare bones bankruptcy petition quickly, out of necessity, to stay an action by a creditor before there is a sufficient opportunity pre-petition to completely prepare all of the required documents to obtain a Chapter 7 discharge. There are still other cases where, for one reason or another, the attorney does not prepare and file all of the schedules of assets and liabilities, statement of financial affairs and other required documents until after a bankruptcy petition has been filed. The debtors in many of these cases go on to timely file all of their required documents, attend the § 341 meeting and otherwise fulfill all of the requirements needed to obtain a discharge and retain their exempt property. The Court declines to adopt a definition of competency that necessarily implies that an attorney for a debtor in these circumstances has not acted competently just because some of the attorney's work was done after the petition was filed.

Fourth, if competence were so defined, and thus required all of these overlapping services to *always* be bundled together, many needy individuals would simply be shut out of access to bankruptcy. Defining competence as always meaning all of the pre-petition and post-petition services that an individual Chapter 7 debtor may possibly need, and then insisting that the individual debtor pay for all of these services up front before filing a petition, unnecessarily throws up a financial roadblock 593 *593 for individual debtors seeking access to Chapter 7 relief. If an individual in need of Chapter 7 relief can only afford pre-petition to pay for an attorney to file a bare bones case, and does not want to file a pro se petition, the Court sees no reason why it should deprive that individual of the right to use their pre-petition funds to hire an attorney to file a petition and then decide postpetition whether to use their post-petition income to hire an attorney post-petition to complete their Chapter 7 bankruptcy case. Such individuals are still much better served by being able to at least hire an attorney to file a bankruptcy petition rather than having to file the petition pro se or pay a bankruptcy petition preparer, only to then hire an attorney post-petition to finish their Chapter 7 cases.

Fifth, defining competency of a Chapter 7 debtor's attorney by insistence on the attorney handling all aspects of the Chapter 7 case leads to the anomalous result that competence is a higher standard for an attorney filing a Chapter 7 case than for an attorney filing a Chapter 13 case. Individuals often file Chapter 13 cases without all of their schedules, statement of financial affairs and other required documents. In many Chapter 13 cases, these documents are prepared postpetition and the cost for the legal services incurred for the preparation and filing of these documents is paid for by the individual debtor post-petition. It is hard

for the Court to find a principled basis to hold that an attorney who files a bare bones Chapter 7 petition for a pre-petition fee, with the balance of the schedules and other documents to be filed post-petition, is automatically acting less competently than an attorney who files a bare bones Chapter 13 petition for a pre-petition fee, with the balance of the schedules and other documents to be filed post-petition. The only difference in these two scenarios is that the attorney in the Chapter 13 case has a source of payment (i.e., the debtor's post-petition income) for the post-petition services while the attorney in the Chapter 7 case does not.

The Court disagrees with the *Egwim* court's definition of competence for an attorney representing an individual debtor in a Chapter 7 bankruptcy case. The Court agrees that it is critical that an individual who hires an attorney pre-petition be properly advised by that attorney about all of the risks, rewards, rights and responsibilities in a Chapter 7 bankruptcy case before they file a bankruptcy petition. But it is no less important that they have adequate legal representation during the case until its conclusion. Competence in providing pre-petition legal services to an individual Chapter 7 debtor is not best construed as requiring an attorney to do *all* of the work that a Chapter 7 bankruptcy may eventually require before the petition is filed. Competence does not demand that an attorney perform all Chapter 7 legal services pre-petition when the law either permits or requires the debtor to take some actions post-petition, and the debtor needs post-petition legal representation at the very time that the debtor is taking those actions. Rather, competence of a Chapter 7 debtor's attorney is most appropriately evaluated by looking at the actual work that was agreed to be performed and then was performed by the attorney, not by looking at the remaining work that will have to be done to complete the case when the individual has not hired the attorney to perform those services and the attorney has not performed those services. An individual debtor's attorney may well meet his or her duty of competence in preparing and filing a bare bones petition with the intention of preparing and filing the balance of the required documents after the
594 petition has been filed. If the *594 bankruptcy petition and the other minimal documents necessary to avoid dismissal are prepared and filed properly by the attorney, in a manner that enables the individual debtor to move forward in such case with a reasonable prospect of completing the case and obtaining a discharge, the Court rejects the proposition that the attorney has automatically failed the duty of competence just because the attorney has not been hired to file and has not filed those documents that the law either requires or permits to be filed post-petition.

In this case, the UST does not allege that there are any facts, other than the fact that BOC unbundled its pre-petition legal services from its post-petition legal services, to show that BOC did not meet its duty of competence in providing pre-petition advice and consultation to the Debtors, and preparing and filing their bankruptcy petition, cover sheet, statement of social security number, and matrix. The UST does not allege, and there is no evidence in the record to indicate, that the documents that BOC did prepare and file with the Debtors' petition were in any way deficient, or left the Debtors in a position where they could not then timely complete their post-petition duties necessary to obtain a discharge and protect their exempt property. In fact, the Debtors' file shows that they obtained a discharge on July 17, 2012 without any objection or delay. Absent any evidence that BOC's pre-petition services were performed in a deficient or untimely manner, the Court finds that BOC's separation of its legal services in this case between pre-petition services and postpetition services by itself did not breach BOC's duty of competence under the MRPC.

Adequacy of the attorney's consultation

The next question in determining whether BOC has complied with the MRPC in this case is whether BOC provided adequate consultation to the Debtors. Michigan Ethics Opinion RI–348, addressing the unbundling of reaffirmation agreements, states that adequate consultation requires the attorney to explain that the attorney is limiting the scope of representation *and* to explain the technical aspects of reaffirmation agreements, and the legal ramifications, material risks and available alternatives. When an attorney unbundles post-petition services, Michigan Ethics Opinion RI–348 further instructs that adequate consultation means the attorney must explain to the client the limitation of representation, plus what is likely to happen post-petition, including the technical aspects, legal ramifications, material risks and available alternatives.

The Pre–Petition Agreement describes BOC's pre-petition services in detail. It also contains an express statement by the Debtors that they understand that BOC will not represent them after filing the bankruptcy petition "unless a separate post-petition fee agreement is signed," and states that BOC "fully advised" the Debtors of their "bankruptcy options and fully disclosed the fees required to file this case." The Debtors' affidavit also contains statements by the Debtors that are relevant in determining whether BOC fully explained to the Debtors the limitations on the scope of its representation. In paragraph 7 of their affidavit, the Debtors state that they "understood through counsel with B.O.C. ... that [they] were required to retain legal counsel subsequent to the filing of [their] Bankruptcy Petition to receive legal services for any necessary work required post-petition." In paragraph 14 of their affidavit, the Debtors state that they believe that BOC "adequately advised [them] as to their legal options as it relates to this Bankruptcy Petition, including all aspects of payment of attorney fees."
595 Neither the Debtors *595 nor the UST allege that the Debtors were in any way coerced into signing the Post–Petition Agreement. The Debtors do not suggest in any way that BOC did not adequately explain to them BOC's limitation on the scope of its representation or the legal matter in question. In fact, the Debtors' affidavit contains a number of statements affirmatively expressing their satisfaction with BOC's representation. For example, in paragraph 11 of their affidavit, the Debtors state that BOC has represented them in a "prompt and professional manner;" and in paragraph 14, that BOC "has represented them competently and professionally."

The Pre–Petition Agreement and the Debtors' affidavit unequivocally show that the Debtors believe that BOC adequately informed them about the limitations on BOC's representation of them pre-petition and the unbundling of BOC's legal services between pre-petition services and postpetition services. They also show that the Debtors believe that BOC adequately informed them about the technical aspects of a Chapter 7 case, and the legal ramifications, material risks and available alternatives once the petition was filed and BOC's representation ended under the Pre–Petition Agreement. But the standard under the MRPC is not whether the clients *believe* that their attorney provided adequate consultation, but whether the attorney *in fact* adequately advised the clients concerning these matters. The evidence in the record regarding the Debtors' satisfaction with BOC is important, but it is not, by itself, sufficient to enable the Court to make a finding one way or the other about whether BOC met this standard. That is not to say that BOC failed to provide adequate consultation to the Debtors, but only that it is impossible on this record to ascertain whether its consultation was adequate.

Informed consent

The absence of evidence on the adequacy of BOC's consultation with the Debtors is important for another reason too. Without knowing what was explained by BOC to the Debtors, it is equally impossible to ascertain whether the Debtors' consent to the unbundling of legal services, and to BOC's limitation on its pre-petition services, was a

fully informed consent. In paragraph 8 of their affidavit, the Debtors state that "although they were in no way obligated to do so, Debtors knowingly and voluntarily decided to retain B.O.C. ... to perform all necessary post-petition services on behalf of the Debtors." In paragraph 9 of their affidavit, the Debtors state that they "knowingly and voluntarily executed" the Post–Petition Agreement. Finally, in paragraph 13 of their affidavit, the Debtors state that they "wish to continue paying B.O.C." the balance due and owing under the Post–Petition Agreement in the amount of $1,333.32 as of the date of their affidavit. These statements all strongly evidence the Debtors' consent to BOC's unbundling of legal services between pre-petition and post-petition. That much is clear. But what is not clear from this record is whether that consent was a fully informed consent after BOC provided adequate consultation to the Debtors. For instance, did BOC explain to the Debtors that if they did not file all of their required documents post-petition, such as schedules of assets and liabilities, statement of financial affairs and other documents, then they would not obtain a Chapter 7 discharge despite filing their bankruptcy petition, cover sheet, statement of social security number, and matrix? Did BOC explain the consequences of dismissal and serial filings on the automatic stay? Did BOC explain to the Debtors that a failure to attend the § 341 meeting would mean no discharge? Did BOC explain to the Debtors*596 that failure to cooperate with the Chapter 7 trustee could provide a basis to object to their discharge? The record before the Court is insufficient to answer those questions.

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The Court has already found that BOC did not violate its duty of competence under the MRPC by the act of unbundling or breaking out the legal services it would perform pre-petition from those that it would perform post-petition. But the record is insufficient for the Court to determine whether BOC provided adequate consultation to the Debtors. Although the Debtors state unequivocally that they consented to the limitations on BOC's pre-petition legal services, and that they chose voluntarily to sign the Post–Petition Agreement to have BOC perform the necessary postpetition legal services to complete their Chapter 7 bankruptcy case, that is not enough under the MRPC. The MRPC require that for the Debtors' consent to be meaningful, it must be a fully informed consent. To enable the Court to determine whether BOC provided adequate consultation to the Debtors concerning BOC's limitation on its services pre-petition, and whether the Debtors' consent to such limitation was fully informed, for purposes of the UST's motion, the Court requires BOC to file an affidavit within ten days to address these two issues. The UST shall have ten days thereafter in which to file any objection or response to the affidavit. The Court will then enter an order regarding the UST's motion.

Conclusion

The Court has a very strong preference to see individual debtors hire an attorney to represent them in all aspects of a Chapter 7 bankruptcy case, from start to finish, including the preparation and filing of the petition and all required documents together with all of the steps necessary to complete the case after the petition has been filed. In the Court's experience, an individual Chapter 7 debtor's chances of success are greatly enhanced if they have an attorney represent them throughout the entire process.[4] Further, it is beyond challenge that individual debtors are also invariably better served by having an attorney represent them in preparing as many as possible of their required documents before their petition is filed and then filing those documents together with their petition. This practice lessens the chance of inconsistency or error, and minimizes the likelihood of problems for a debtor down the road. However, the Court understands that some individual debtors simply cannot afford to pay up front for all of the services required to both file and complete a Chapter 7 case prior to the time that they file their Chapter 7 bankruptcy case. The law does not prohibit such

individuals from paying a smaller fee to an attorney to get their case filed and then, once the case is filed, either proceeding pro se or entering into a new agreement either with the same attorney or with another attorney to represent them in completion of their case, with the payment for any postpetition legal services to be paid out of such individual's future *597 earnings.[5] As *Rittenhouse* makes clear, a pre-petition agreement to pay an attorney gives rise to a dischargeable debt. A post-petition agreement does not. 404 F.3d at 396–97. For the Court to insist on an all or nothing approach, in the name of promoting attorneys' competence, will have the perverse effect of depriving needy individual debtors who cannot afford to pay in advance for *all* of the legal services they may need in a Chapter 7 case, from hiring an attorney to provide them with *any* of the legal services that they may need in a Chapter 7 case. Just because those individuals cannot afford to pay for all of an attorney's fee in advance should not mean that such individuals can only avail themselves of bankruptcy relief by filing either pro se or with the help of a bankruptcy petition preparer.

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[4] Although an individual Chapter 7 debtor may represent himself or herself pro se, the likelihood of success for a debtor without an attorney decreases dramatically. During 2010 and 2011, only 1.2% and 1.4%, respectively, of all individual Chapter 7 cases filed by an attorney in the Bankruptcy Court for the Eastern District of Michigan were dismissed without a discharge, while 26.3% and 21.8%, respectively, of pro se individual Chapter 7 cases were dismissed without a discharge. During the same time period, 97.8% and 97.5%, respectively, of individual Chapter 7 cases filed by an attorney received a discharge, while only 67.8% and 75%, respectively, of pro se individual Chapter 7 cases received a discharge.

[5] Of course, in the Eastern District of Michigan, when an attorney files a petition for an individual debtor, that attorney becomes the debtor's counsel of record pursuant to Local Bankruptcy Rule (E.D.M.) 9010–1(a) and (b). If an individual debtor does not pay in full the fee for all of the attorney's legal services before the petition is filed, and instead pays a smaller fee just to have the attorney get the case filed, with the intention of deciding post-petition whether or not to hire such attorney to complete the case under a separate post-petition agreement, the attorney who filed the case is still the counsel of record, with all of the responsibilities that are imposed upon the debtor's counsel of record, unless the attorney obtains permission of the court to withdraw as counsel of record pursuant to Local Bankruptcy Rule (E.D.M.) 9010–1(g).

As long as a Chapter 7 debtor's attorney competently performs those services that the debtor has hired the attorney to perform, provides an adequate consultation to the debtor concerning any limitations placed upon the services to be rendered in connection with the filing of a case, and obtains such individual's fully informed consent to such limitations, the attorney may unbundle the pre-petition services from the post-petition services by entering into a separate pre-petition agreement describing the services to be rendered and the fee to be paid prior to filing bankruptcy, and a separate post-petition agreement describing the services to be rendered and the fee to be paid post-petition. Stated another way, the Court holds that if the attorney's legal services for an individual debtor are unbundled between pre-petition services and post-petition services, in strict conformance with the MRPC, such unbundling of legal services does not by itself warrant any relief under § 329 of the Bankruptcy Code.

In this case, the Court will enter an order on the UST's motion, consistent with this opinion, after the Court reviews the affidavit that BOC is required to file and any objections to it that the UST may file.