BANKRUPTCY BAR ASSOCIATION FOR THE DISTRICT OF MARYLAND
22ND ANNUAL SPRING BREAK WEEKEND

GETTING PAID IN CHAPTER 7 & 13 CASES

May 5, 2018

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United States Bankruptcy Court for the District of Columbia
Honorable Robert A. Gordon
United States Bankruptcy Court for the District of Maryland

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[1] The views expressed herein are solely those of the author and are not intended to reflect the views of the U.S. Department of Justice nor of the Executive Office of the United States Trustees.

11 U.S.C. § 329(a) AND RULE 2016(b) DISCLOSURES

1. Accuracy as to Source of Payments. If a debtor's attorney fails to accurately disclose the source of payments received, this may lead to disgorgement of the fees. *See In re Park-Helena Corp.*, 63 F.3d 877, 880-81 (9th Cir. 1995) ("law firm must at least disclose the facts of the transaction, as those facts were known to the firm"); *In re Erin and Kyle L.P.*, 1997 WL 86318 (Bankr. D.D.C. Feb. 27, 1997) (source of payment was a money order made payable to a disbarred attorney, which he then endorsed to his wife's law firm which was representing the debtor).

2. Disclose Expenses to be Reimbursed. A chapter 13 debtor's attorney cannot have it both ways, treating expenses incurred as reimbursable as "services" under § 330(a)(4)(B) but not as "services" for purposes of § 327(a) and Rule 2016(b). If the agreement is that the attorney will be reimbursed for expenses, that ought to be disclosed. And the attorney will need to be able to itemize expenses (unless a flat fee covered expenses to be incurred).

3. Need for Clarity as to Services Covered and Expenses for Which Client is Responsible. Rule 1.5(b) of the District of Columbia Rules of Professional Conduct requires a written disclosure to the client of "the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible...." It is important to retain that disclosure agreement. In the Rule 2016(b) statement, an attorney needs to use care describing the fee arrangement, the services to be provided, and the expenses for which the debtor is responsible, consistent with that disclosure agreement.

4. Switching From Flat Fee to Hourly Fee. Sometimes a Rule 2016(b) statement lists a single payment as the compensation to which the attorney has agreed. Then, when the work expands, the attorney starts billing on an hourly fee basis. The attorney often had an agreement that extraordinary work would be covered by an hourly fee. The point is that the existence of that right to switch to an hourly fee ought to be disclosed in the Rule 2016(b) statement.

5. Receipt of Postpetition Payments:

a. Chapter 13 Cases. In chapter 13, various provisions govern an attorney's receipt of postpetition payments, even if the payments are only made as a deposit from which to pay future fee awards:

- Until the property of the estate revests in the debtor, the debtor's postpetition income is property of the estate. 11 U.S.C. § 1306(a).

- In D.C. and Maryland, the local form Chapter 13 plans delay revesting until completion of the plan or dismissal).

- Until confirmation, "the debtor shall remain in possession of all property of the estate." 11 U.S.C. § 1306(b).

- An attorney is not authorized to receive a payment of fees from property of the estate unless authorized by an order of the court. 11 U.S.C. § 330(a)(4)(B).[1]

- Any agreement regarding the payment of fees, even if only an agreement regarding the debtor making a deposit as a source for paying future fee awards, must be disclosed. Rule 2016(b).

Accordingly, if an attorney receives a postpetition deposit of funds from the debtor (to cover future fee awards), the funds remain property of the estate, and subject to the control of the debtor, and the attorney must disclose the arrangement. As noted in *In re Jensen*, 2008 WL 2405023, at *4 n.7 (Bankr. E.D. Pa. June 13, 2008):

> To receive such a payment without running afoul of the bankruptcy regulatory scheme, the transaction would have to be disclosed and counsel would have to maintain the funds in a trust account until the payment is allowed by the bankruptcy court. In effect, for administrative convenience, the attorney would simply be segregating funds that remained property of the debtor (and the bankruptcy estate); upon demand by the debtor, the attorney would be obliged to transfer the money in the trust account back to the debtor. If the attorney received $1,000 and was holding it in escrow on behalf of, and subject to the direction of, the debtor, she should have disclosed in a supplemental Rule 2016(b) statement that she was so holding the funds, and she ought not have collected the $1,000 towards payment of

[1] *See In re Courtois*, 222 B.R. 491, 495 (Bankr. D. Md. 1998) (court approval is required for postpetition attorney's fees to be paid from estate).

> her fees unless and until authorized by order of the court.

See also In re Taylor, 2004 WL 1746112, at *1 (Bankr. D.D.C. Aug. 4, 2004), stating:

> Any such arrangement, geared towards payment of the fees, establishes 'a source of payment' [under § 329(a)] and thus ought to be fully disclosed under Rule 2016(b). Pursuant to such disclosure, the court can scrutinize the arrangement for reasonableness. To be reasonable, the terms of the arrangement must make clear to the debtor that the funds are not to be used to pay attorney's fees unless allowed by the court, and that the funds are to be promptly refunded if the fees are not allowed prior to the close of the case, or if an order is entered disallowing the fees sought on the merits of an application.

If the case is dismissed, and the arrangement (despite the admonition in *In re Taylor* as to what would be a reasonable arrangement) did not bar treating the deposit, after dismissal, as a retainer from which non-approved fees could be collected:[2]

- Court authorization is no longer required for the attorney to be paid his or her fees from the deposit.
- The payment must still be disclosed under § 329(a) and Rule 2016(b).
- The court still retains jurisdiction under 11 U.S.C. § 329(b) to review the reasonableness of the compensation for services rendered in the case.

b. *Chapter 7 Cases*. Chapter 7 cases are different from Chapter 13:

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[2] *In re Taylor* indicated that to be reasonable an arrangement for a postpetition deposit should provide for the funds to be refunded to the debtor once the case is closed without a payment of fees having been approved. Nevertheless, there is no Local Bankruptcy Rule in D.C. or Maryland prohibiting an arrangement that treats the deposit, upon dismissal, as a retainer. But does an attorney want to go against the court's view as to what is a reasonable arrangement?

- The debtor's postpetition earnings received during the pendency of a chapter 7 case are not property of the estate.

- However, collecting postpetition payments for *prepetition* obligations is barred by the automatic stay.

- If the debtor has incurred postpetition obligations to the attorney, collecting such obligations from the debtor is not barred by the automatic stay.

- But if the services were agreed to prepetition, the debt may be treated as a prepetition debt whose collection *is* barred by the automatic stay.

Regardless, § 329(a) and Rule 2016(b) apply to such payments; they must be disclosed within 14 days of receipt; and under § 329(a) the court can review them for reasonableness.

S. Martin Teel, Jr.
United States Bankruptcy Judge
April 9, 2018

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Dear Client:

Bankruptcy Representation
Chapter 7/ Chapter 13

The law firm of Ammerman & Goldberg ("We" or the "Firm") is honored that you have selected us to represent you ("You" or "Client") as bankruptcy counsel. Our objective is to provide high quality legal services to our clients at a fair and reasonable cost. This Retainer Letter outlines the basis upon which we will provide legal services to you, and confirms our understanding with respect to payment of legal fees, costs and expenses. We apologize for the formality of this letter, but believe that it is important for our clients to have a clear understanding of our policies regarding legal fees and costs from the beginning of our relationship.

To establish our attorney-client relationship, it is our normal practice to receive a retainer fee and costs before starting to represent you. We have agreed to accept $_____ during the preparation phase of this case and the balance of $_____ before any documents are filed with the Bankruptcy Court. We prefer payments to be made in cash; Personal checks are generally not accepted.

Fee calculation:

Chapter 7 Court filing fee: ***$335.00***

Chapter 13 Court filing fee: ***$310.00***

Consumer counseling sessions I and II- & credit report

Retainer Fee:

TOTAL: **$** _____ **$** _____

Chapter 13 Fees paid in the Plan: $_____

If you wish to retain us to prepare and file for Chapter 13 bankruptcy on your behalf, attend the Meeting of Creditors and any Confirmation Hearing, and advise you generally on your rights and responsibilities in a Chapter 13 bankruptcy, our fee will be a flat fee of $4,625.00. This fee includes meetings, the preparation of the Petition and Schedules, letters, and appearance on your behalf at the original and any rescheduled Meetings of Creditors (§341 Hearing) and in Court at any Confirmation Hearings, as well as research, investigation, negotiations, telephone calls, waiting time in Court, and travel time. Excluded services are described in another part of this Agreement. Chapter 7 fees are quoted on a flat fee basis.

In either Chapter 7 or 13, you are responsible for costs and expenses that we incur in connection with your case. With the filing and credit counseling fees, based on the information we have at this point, we estimate that the total costs in your case will be $500.00 (including filing fee, consumer counseling fees and credit report).

To establish our attorney-client relationship, it is our normal practice to receive the full fee before starting to represent you. Due to your current circumstance, however, we will agree to allow you to pay the fee previously quoted on an installment basis as per our conversation before your case being filed, and the balance of the fee through your Chapter 13 Plan. If you have paid a retainer fee to this law firm and you subsequently elect not to proceed with a bankruptcy filing, you agree that this sum is fully earned and may be retained by us as a fee. *Please note that all payments must be in the form of cash, cashier's check or money order. Personal checks are not accepted.* It is expressly understood and agreed that we will not represent you, we will take no steps to protect your interests, and we are not your attorney until this document has been signed by both of us.

You may terminate your employment of our firm at any time. We may, subject to Court approval, terminate this Agreement and withdraw from representing you if differences arise between us concerning your case or if you do not make the payments required by this Agreement.

After your case is filed, you must pay your mortgage company(ies), homeowner's or condominium fees, auto loan(s) and any other secured or leasing creditor(s) their regular monthly payment on time, pay all taxes incurred after the date of filing (and file all necessary tax returns) and pay the trustee the monthly plan payment. Failure to do so may result in dismissal or conversion of your bankruptcy or sale of the secured property. If you fail to make these payments or pay a creditor to whom you are making payments outside the plan, the Court may dismiss your case and creditors may sue you or repossess or foreclose on your property.

If during the course of the bankruptcy you wish to sell, refinance or pledge as security real property or any of your other assets, you must let us know so that we can ask the Court for approval. If you do not do this, the property or asset may not be able to be legally transferred, refinanced or pledged, which can cause significant problems both with the transaction and with your bankruptcy case. You must provide us with a copy of the listing agreement and/or contract for sale of the property *before* such document is signed by you.

We strongly encourage you not to participate in social media (Facebook, Twitter, Tumblr, Flickr, Instagram, etc.) during the course of representation. Information found on social media websites is not private, can be discoverable, and may be potentially damaging to your interests. Understand that information shared with others verbally; in writing via email, text message or letter; or even posted online could lead to the loss of the attorney client privilege were that information to relate in any way to the legal matter that we are handling for you.

Given this, we advise you not to communicate with us on any device provided by your employer or any computer, smart phone, or other device that is shared with someone else. In addition when communicating with us, do not use your work email address or a shared email account. You should only use a private email account that is password protected and only accessed from your personal smart phone or computer.

By signing below you acknowledge that this Agreement (including the attached "small print") has been explained to you, that all of your questions have been adequately answered, and that you have received a copy of this Agreement. If you have any additional questions, please do not hesitate to call.

Very truly yours,

UNDERSTOOD AND AGREED TO:

_____

_____
Client(s)

Ammerman & Goldberg

_____
By: Harris. Ammerman, Esq.

"The Small Print"

1. ***Fees; Excluded Services.*** In consideration of work performed before the date of this Agreement and the reservation of our time to properly handle your case through conclusion, the fee/prepaid retainer will be placed in our operating account and not in an attorney trust/escrow account, and will become our property and subject to claims of our creditors. Likewise, these funds may be spent or otherwise unavailable for immediate refund. By signing below, knowing that fees paid in advance for representation could be placed in our trust/escrow account and remain your property until earned by us, you agree that the fee will be placed in our operating account. If any portion of the retainer is deemed not earned when paid, you grant us an attorney's lien on such funds to the extent of our fee. If during the course of the case we render services worth more than the initial fee, calculated at our normal hourly rate, we may apply to the Court for additional fees, to be paid through the

Chapter 13 plan.

2. ***Billing and Payment; Collections.*** All bills are due on receipt. We do not accept personal checks; all payments must be made by cash, cashier's check or money order. If legal action is taken to recover any amounts due under this Agreement, you agree to pay all costs of collection, including interest at 12% *per annum* and attorney's fees of one-third of the total amount due, even if the proceeding is brought by a member of the Firm on the Firm's behalf. We may be paid through the Chapter 13 Plan to the extent any balance due has not been paid by you. You irrevocably assign to us your interest in all payments made to the Chapter 13 Trustee, to the extent of any balance due. If your case is dismissed or converted before our fees are paid in full, you agree to allow the Chapter 13 Trustee to pay the balance due to us directly from funds that would otherwise be returned to you.

3. ***Termination; Representations, Disclosures and Disclaimers.*** Unless otherwise agreed in writing, our obligation to represent you shall terminate upon the entry of your Discharge Order or closure of the case. We cannot and have not guaranteed any specific results in any matter. We have made no representations as to the effect of the bankruptcy on your credit record or your obtaining credit in the future. We are not tax professionals, can make no representations regarding tax implications of your bankruptcy filing or any other matter related to it, and strongly recommend that you seek advice from a tax professional, such as a tax attorney or CPA, to discuss such. You hereby authorize the secure destruction of your file five years after it is closed, and agree that we shall have no liability for destroying any records, documents, or exhibits still in our possession and relating to this matter at the end of five years. All future work for you in other matters will be handled in accordance with this Agreement at our regular hourly rates unless otherwise agreed upon. Once your Chapter 13 Plan is approved, the Court will require that your payment be made

through a payroll deduction from your paycheck. Your faxed or electronic signature on a document shall be considered an original signature for all purposes.

4. ***Authorizations; Obligations to Provide Information.*** You authorize us to obtain information about your assets, credit (including credit reports), taxes, debts, income, expenses and other public and non-public information that will be used to verify and ensure the completeness of the information you provide to us. Such information may not be comprehensive or complete. It is obtained for background information and to aid our verification only. We will prepare your bankruptcy filings based upon information supplied by you. We will rely upon this information as being true, accurate, complete and correct. It is your responsibility to disclose your ownership and prior ownership of all assets and debts, regardless of value. If a creditor is not listed, the debt to such creditor may not be discharged. If false, incorrect or incomplete information is included, or information is omitted, it can cause you additional effort and expense to remedy the error, may place the bankruptcy itself in jeopardy and could result in civil or criminal liability. It is vitally important that the information included in the bankruptcy schedules be *complete and correct* to avoid any problems. You will review all documents filed as part of your bankruptcy case, and your signature on those documents signifies that you have read and understood them, and agree with their contents. In cases of joint representation of spouses, communication with one spouse will be deemed communication with both spouses. We may disclose to both spouses any facts disclosed by either spouse.

5. ***Risks in Bankruptcy.*** There are risks in filing for bankruptcy, including the possible loss of assets. The law is subject to different interpretations and there are inherent risks in how Courts will apply it, including but not limited to how to compute or calculate income, how and when to liquidate assets or property, what exemptions apply, whether

property may be sold to satisfy debts, what chapter you qualify for, how payments to creditors or a Trustee are calculated and determined, how long a case will be pending, how your good faith will be judged in filling a case, and how and to what extent your finances will be subject to audit and examination.

6. ***Non-Dischargeable Debts; Bank Accounts.*** Some debts, such as student loans, domestic support obligations (alimony, child support, etc.) and certain taxes, may not be dischargeable in your case. Liens, such as security interests, homeowner's liens and mortgages, are not released upon your discharge. You will need to make arrangements for the payment of such debts or surrender the property securing them after the conclusion of your case. Homeowner's and condominium association charges incurred after your case is filed and before foreclosure are not discharged. Notwithstanding a discharge, you will still remain personally liable on any mortgage or note for any long-term secured debt where the collateral for the loan is not surrendered. *You have been advised to close or draw down any financial account at Wells Fargo or any entity to whom you owe or may owe money.*

7. ***Obligations to Pay Mortgage and Secured Debt.*** To keep collateral securing a debt, you must pay your mortgage company, HOA/condominium fees, vehicle loan and other secured or leasing creditor the full monthly payment on time once your case is filed. You must file all tax returns on time and pay all taxes incurred after the date of filing. You must pay the Trustee the monthly Chapter 13 Plan payment once your case is filed. If you do not do these things, your case may be dismissed and/or the stay lifted, and creditors may begin foreclosure on or repossession of your property.

8. ***Failure to Appear for Scheduled Meeting.*** If you do not appear on time at any scheduled proceeding or if you fail to provide us with any required documents before the Meeting of

Creditors, you agree to pay an additional $495.00 to cover our time for attending the rescheduled or additional hearing.

LOCAL RULE APPENDIX F DISCLOSURE

With the exception of adversary proceedings and U.S. Trustee audits, for which separate arrangements may be made, counsel must represent their client in all matters in the bankruptcy case as long as counsel is counsel of record. This includes defending motions, including motions for relief from stay, and bringing objections to claims and prosecuting motions on behalf of debtor. After the initial engagement, counsel may not demand payments from the debtor as a precondition to doing the work. *Note, however, that the failure to make such payment may form the basis for Counsel asking the Court for permission to withdraw as Counsel.*

Counsel must remain as counsel of record until the entry of a court order allowing the withdrawal of appearance, or until the case is dismissed or closed.

I have read and had explained to me the above "small print" disclosures, agree to fully comply with them, and understand that they form part of the retainer agreement with my attorney.

_____

CLIENT(S)

CONSUMER BANKRUPTCY LAWYER PROSPECTIVE BALANCE SHEET

Assumptions:

annual gross earnings $400,000.00 earned by bankruptcy practitioner
25% or $100,000 paid to attorney before taxes
$400,000 divided by average fee of $3,000 represents 133 new cases per annum or 11 cases per month

Expectation that costs do not exceed $300,000 for 12 months or $25,000 per month

EXPENSES

RENT (includes utilities)	$4,000.00	
2 EMPLOYEES @$40,000 EACH	$6,666.00	
INSURANCE (malpractice)	$500.00	
COPIER lease	$400.00	
PHONE/INTERNET	$2,000.00	
POSTAGE and Delivery	$1,850.00	
pacer	$400.00	
web optimization	$634.00	
Employee health insurance premiums	$600.00	
supplies	$400.00	
Bar membership dues and subscriptions	$300.00	
LexisNexis research tools	$400.00	
advertising includes Findlaw.com)	$4,000.00	
transportation	$300.00	
Employee misc benefits	$1,000.00	
REPAIRS-computer, copier, internet	$1,000.00	
Accounting Services	$300.00	
Payroll Service fees	$250.00	
total	$25,000.00	x 12 months totals $300,000.00/annum
ATTORNEY DRAW	$8,333.33	X 12 MONTHS TOTALS $100,000.00/annum

COMPARISON TO SALARY EARNED BY GOVERNMENT ATTORNEY

GS 13 $75,628.00
GS 14 $87,263-$113,444.

CONSUMER BANKRUPTCY LAWYER PROSPECTIVE BALANCE SHEET

Assumptions:

annual gross earnings $300,000.00 earned by bankruptcy practitioner
25% or $75,000 paid to attorney before taxes
$300,000 divided by average fee of $3,000 represents 100 new cases per annum or 8.3 cases per month

Expectation that costs do not exceed $225,000 for 12 months or $18,750.00 per month

EXPENSES

RENT (includes utilities)	$3,000.00	
1 EMPLOYEES @$40,000	$3,333.00	
INSURANCE (malpractice)	$500.00	
COPIER lease	$400.00	
PHONE/INTERNET	$2,000.00	
POSTAGE and Delivery	$1,850.00	
pacer	$400.00	
web optimization	$634.00	
Employee health insurance premiums	$600.00	
supplies	$400.00	
Bar membership dues and subscriptions	$300.00	
LexisNexis research tools	$400.00	
advertising includes Findlaw.com)	$2,500.00	
transportation	$300.00	
Employee misc benefits	$708.00	
REPAIRS-computer, copier, internet	$1,000.00	
Accounting Services	$300.00	
Payroll Service fees	$125.00	
total	$18,750.00	x 12 months totals $225,000.00/annum
ATTORNEY DRAW	$6,250.00	X 12 MONTHS TOTALS $75,000.00/annum

COMPARISON TO SALARY EARNED BY GOVERNMENT ATTORNEY

GS 13 $75,628.00
GS 14 $87,263-$113,444.

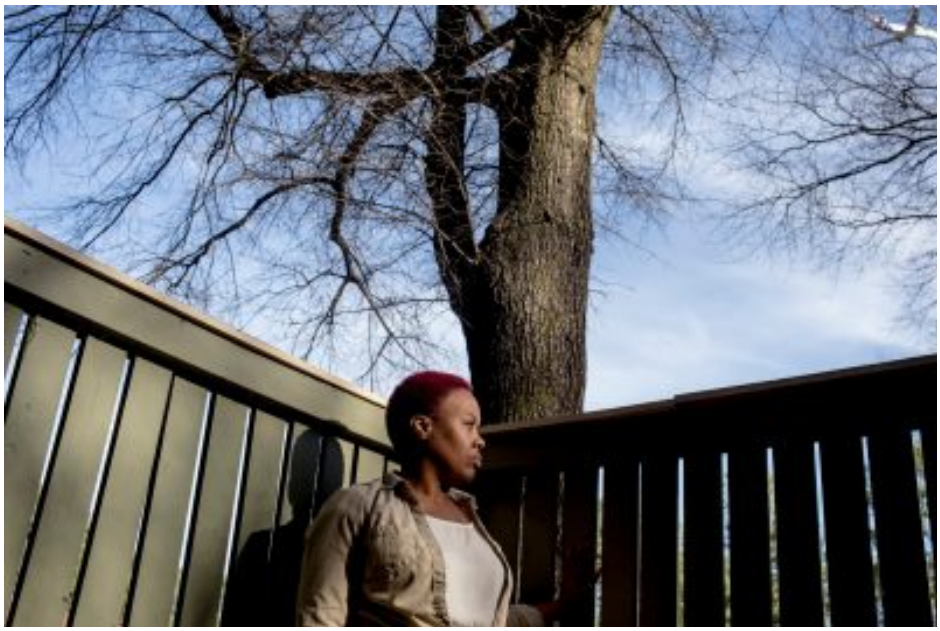
PROPUBLICA

TOO BROKE FOR BANKRUPTCY

When You Can't Afford to Go Bankrupt

There's ample evidence many people don't file for bankruptcy simply because they can't pay an attorney. It's a fixable problem.

by **Paul Kiel**, March 2, 12:30 p.m. EST



Trina Wright, who filed for bankruptcy in November 2016, outside her apartment in Whitehaven, a neighborhood in Memphis, Tennessee. (Andrea Morales for ProPublica)

This story was co-published with The Washington Post <http://wapo.st/2HVwfeW>.

A ritual of spring in America is about to begin. Tens of thousands of people will soon get their tax refunds, and when they do, they will finally be able to afford the thing they've thought about for months, if not years: bankruptcy.

It happens every tax season. With many more people suddenly able to pay a lawyer, the number of bankruptcy filings jumps way up in March, stays high in April, then declines.

For the past year, I've traveled the country trying to understand why bankruptcy often fails those it's supposed to help. I analyzed millions of filings

and interviewed dozens of judges, lawyers and people struggling with debt. The answer turns out to be simple: People are too broke to go bankrupt. Filing costs money, as does hiring an attorney, which is the best way to make sure you actually get debt relief.

"It's kind of a worthless solution if you can't pay because you don't have money," said one man who lives in a trailer park in a small town outside Indianapolis. "It's a sad realization that the legal system isn't there for us."

Scores of people considering bankruptcy told me the same thing again and again: If they had $1,000 to pay an attorney, then they probably wouldn't need to file in the first place. "It's funny how you buy bankruptcy," marveled Trina Wright of Memphis.

People who hire lawyers to help them file under Chapter 7 have their debts wiped away almost without fail, national filing data shows. And debtors with attorneys fare far better than those who go it alone, filing pro se. Studies show clear benefits for those who successfully wipe out their debts, from higher credit scores <*https://www.propublica.org/article/equifax-makes-bankruptcy-change-that-affects-hundreds-of-thousands*> to higher incomes <*http://www.nber.org/papers/w20520*>. Moreover, this sort of targeted relief can help buoy the broader economy <*https://www.vox.com/2014/5/8/5691234/amir-sufi-explains-how-old-consumer-debt-holds-back-todays-economy*>.

Those who can't afford attorneys often turn to bad options with predictably bad outcomes. Some try to wrangle the complicated bankruptcy forms on their own, risking costly mistakes. Others are lured by unregulated "petition preparers" who promise bankruptcy on the cheap. In Los Angeles, I found a whole industry of petition preparers <*https://www.propublica.org/article/how-to-get-away-with-bankruptcy-fraud*> who often flout bankruptcy laws because of a lack of enforcement.

"If we had adequate access to our legal system," a judge there told me, vulnerable people with debt "would not be this wonderful ripe field for picking by the fraud artists."

In the South, debtors often avoid the up-front costs by filing bankruptcy under Chapter 13 <*https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13/*>. Unlike Chapter 7, which clears debts after a few months, Chapter 13 is a payment plan that usually lasts five years. Lawyers in the South will often start a Chapter 13 for $0 down, allowing their much larger fees (usually $3,000 to $4,000) to be paid through the plan. This provides immediate protection to low-income debtors <*https://projects.propublica.org/graphics/bankruptcy-data-analysis#South*>, but most are unable to keep up with the payments. Once their cases are dismissed, their debts return.

Faced with options like these, many people simply try to muddle through <http://cepr.org/active/publications/discussion_papers/dp.php?dpno=10533>, often under the threat of having their wages seized by creditors <https://www.propublica.org/article/so-sue-them-what-weve-learned-about-the-debt-collection-lawsuit-machine>.

Over the past decade, the number of consumer bankruptcies filed each year has ranged from about 800,000 to 1.5 million. That's a small share of the millions of financially struggling households, and researchers have long argued that many more people would benefit from filing <http://econweb.ucsd.edu/~miwhite/white-jleo-reprint.pdf>. And while the reasons someone may or may not file for bankruptcy can be complex, it's clear that an important ingredient is affordability.

So if attorney fees can determine whether, and how, someone declares bankruptcy, can anything be done about them? The good news, I found, is that the answer is yes. The bad news is that none of the fixes are easy.

In a Chapter 7 case, attorney fees, like any other debt, are wiped out. As a result, most bankruptcy lawyers require that clients pay in full before filing. There's ample evidence <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540216> that people struggle to gather the money <https://voxeu.org/article/bankruptcy-costs-and-america-s-household-debt-crisis> to do this. It's what you'd expect in a country where nearly half of adults say that if they were hit with an emergency expense of $400, they wouldn't have the cash on hand to cover it <https://www.federalreserve.gov/publications/2017-economic-well-being-of-us-households-in-2016-economic-preparedness.htm>. Black Americans are particularly likely to have low savings, resulting in a variety of bad outcomes <https://www.propublica.org/article/why-small-debts-matter-so-much-to-black-lives> such as being unable to save up to file for bankruptcy <https://features.propublica.org/bankruptcy-inequality/bankruptcy-failing-black-americans-debt-chapter-13/>.

A 2005 bankruptcy bill made the problem worse. In the name of preventing people from cheating their lenders, the bill heaped new requirements on debtors and their lawyers. The scope of such abuses was questionable, but the burdens of the new requirements drove up attorney fees nationwide by about 50 percent <https://www.gao.gov/assets/280/277572.pdf>. The average attorney fee for a Chapter 7 today tops $1,100, with court fees adding $335 more. The result? Fewer filings, especially by low-income people <http://cepr.org/active/publications/discussion_papers/dp.php?dpno=10533>.

The cleanest solution would be to change the law to allow more flexibility in how debtors pay their lawyers for Chapter 7 cases.

Crafting "a mechanism where people could pay their attorney fees over time would make Chapter 7 more accessible," said Judge Elizabeth Perris, who retired in 2015 after serving as a bankruptcy judge in Oregon for over 30 years.

Perris co-chairs The American Bankruptcy Institute Commission on Consumer Bankruptcy <*https://consumercommission.abi.org/*>, a panel of experts working on potential improvements to the system to be released later this year.

Perris said the panel will likely make a specific proposal about attorney fees, but whether Congress will take action is less certain. "We're not naïve," said Perris. "We understand it might be difficult to get legislative changes through."

The idea has at least one influential backer in Congress. When I asked Sen. Elizabeth Warren, D-Mass., a bankruptcy scholar herself, about it, she responded, "There's a lot for a family to consider when making the painful decision of whether, when, and how to file for bankruptcy. Whether they can pay their lawyer in installments should not be one of them."

In the interim, there are some lawyers who try workarounds: One of the oldest is for clients to hand over a stack of postdated checks before filing. After the case is filed, these checks are deposited over several months, resulting in a jerry-rigged installment plan. Most judges have decided that arrangement violates the law, but not all <*https://www.documentcloud.org/documents/3728955-2015-Opinion-Northern-District-of-Georgia.html#document/p24*>.

In a 2015 opinion <*https://www.documentcloud.org/documents/3728955-2015-Opinion-Northern-District-of-Georgia.html#document/p24*> approving the use of postdated checks, Chief Judge C. Ray Mullins of the U.S. Bankruptcy Court for the Northern District of Georgia wrote, "To deprive struggling debtors of willing counsel in such a time of need is markedly opposite of the intentions of the Bankruptcy Code."

In the Southern District of Alabama, the chief bankruptcy judge, Henry Callaway, is working on a different fix. Troubled by the fact that more than 70 percent of bankruptcies in the district are under Chapter 13, he's drafting a rule that would allow lawyers to break their fees into two parts for a Chapter 7 filing instead. The first would cover services rendered before the bankruptcy petition is filed; the second, services afterward. Because the second agreement is signed after the petition, it has a different legal status and isn't wiped out like other debts. Unlike in a Chapter 13 case, where debt relief is conditioned on completing a payment plan, this would give clients relief and then allow payments to lawyers over time.

With a rule, he hopes, local attorneys will be more willing to try something different. "Lawyers are not going to do something unless they're sure they're not going to get in trouble for it," he said.

It is, to be sure, a convoluted arrangement. But some judges consider it legal, including a federal appellate court <*http://caselaw.findlaw.com/us-7th-circuit/1061463.html*> and bankruptcy judges in Florida <*https://www.documentcloud.org/documents/3701810-Middle-District-of-Florida-Decision-Two-*

Contract.html> and Michigan *<http://www.mieb.uscourts.gov/apps/courtOpinions/opinions/12-48448.pdf>*. Its growing popularity has already spawned a cottage industry to facilitate payments.

BK Billing launched in 2016 to manage the two-part agreements for lawyers, usually with clients paying $0 up front. The company helps attorneys craft what they say are legally defensible client agreements and processes the payments.

So far, the company has worked with a "few hundred" attorneys in more than 40 states, said David Stidham, the CEO. But because few judges have decided whether such arrangements are legal, there is wide uncertainty about the BK Billing model. "It's so wild west right now," he said.

Sean Mawhinney, the company's president, said he used the two-part Chapter 7 arrangement when he practiced as a bankruptcy attorney in Utah, where BK Billing is based. Offering Chapter 7 for $0 down made a huge difference for clients, he said, especially those who were having their wages garnished.

"If they can stop the bleeding and get their case filed quickly, then they can make a reasonable payment to the attorney," he said.

But, of course, BK Billing is a business, and its services come with a cost that can cause problems of its own. To reduce the risk of clients defaulting, BK Billing pays attorneys up front and charges a 25 percent fee. So, if an attorney normally charges $1,000, BK Billing will pay the attorney $750 and then collect $1,000 from the debtor over the following year.

To account for the fee, attorneys are then tempted to charge more. But Stidham said attorneys must be "willing to take a discount." Attorneys told me, however, that it was hard to resist boosting their fee.

Late last year, the U.S. Trustee for the Central District of California filed a complaint against a local firm *<https://www.documentcloud.org/documents/4347342-Complaint-by-US-Trustee.html>* for, among other alleged violations, doubling its fees after moving to BK Billing's model. The U.S. Trustee, the arm of the Justice Department that oversees the bankruptcy system, called the fees unconscionable and is seeking fines against the firm, which argues *<https://www.documentcloud.org/documents/4378115-Response-to-Complaint-by-US-Trustee.html>* that its fees are reasonable for the extra services it provides.

Compared with these complicated maneuvers, another solution to the problem of attorney fees seems blessedly simple: Make legal help with bankruptcies free. But civil legal aid organizations, which are the main source of this kind of assistance, are also financially strapped.

"We don't have enough resources to provide bankruptcy services in all of our counties," said Steven McGarrity, executive director of Community Legal Aid

<https://www.communitylegalaid.org/whoweare>, which serves clients in central northeast Ohio.

This year, his group, along with legal-services organizations in 11 other states, will begin using a new tool called Upsolve <https://upsolve.org/> to help more poor debtors file. Developed by a nonprofit in New York, Upsolve is a kind of TurboTax for bankruptcy, walking debtors through the process of gathering the necessary documentation and asking questions in plain language. The software populates the small stack of forms necessary to file, and then a lawyer reviews them. Cases are filed pro se, but if complications arise, the debtor can get help from the lawyer.

"It was a way for us to expand the volume of people we can help without a lot of resources on our end," said McGarrity.

Perhaps in the future, free help will be available to all who need it. Or maybe Congress will rewrite the law to allow debtors to pay attorneys over time. In the meantime, people struggling with debt will keep on doing what they've always done: waiting and hoping for relief.

Paul Kiel

Paul Kiel covers business and the economy for ProPublica, reporting on the foreclosure crisis, consumer debt and other financial issues.

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Signal: 347-573-3039

IN THE UNITED STATES BANKRUPTCY
FOR THE DISTRICT OF MARYLAND

In Re:
John Q. Publix — Chapter 13
(converted to Chapter 7)
Debtor — Case No.

****

MOTION DIRECTING CHAPTER 13 TRUSTEE TO PAY COUNSEL FEES

COMES NOW Harris S. Ammerman, Esq. and requests that the Court direct the Chapter 13 trustee to pay him for attorney's fees following debtor's conversion to Chapter 7 prior to confirmation.

1. Counsel filed debtor's Chapter 13 case on 2/6/15. It was converted to Chapter 7 on 8/27/15 prior to confirmation.
2. According to the Chapter 13 trustee's ledger, Mr. Branigan has collected $6,400.00 in plan payments that have not been disbursed.
3. Counsel's 2016(b) statement shows that the balance of his attorney's fees totaling $1,489.00 were to have been paid in the Plan.
4. In conformity with the recent ruling by Judge Rice in the Brandon case (14-23735), counsel requests that his fees be paid for services rendered.

WHEREFORE, counsel prays that this Court:

(a) Order the Chapter 13 trustee Mr. Branigan to pay $1,489.00 to counsel from the funds being held in escrow and for such other relief as is just and proper.

Respectfully submitted,

/s/Harris S. Ammerman #04141
Harris S. Ammerman, Esq.
1115 Massachusetts Ave. Nw
Washington, D.C. 20005
202- 638 0606

CERTIFICATE OF SERVICE

I hereby certify that the above Motion was served on this 30th day of September, 2015 electronically to those recipients authorized to receive a Notice of Electronic Filing by the Court, and/or first class mail, postage prepaid to

Timothy Branigan, trustee
PO Box 1902
Laurel, Md. 20725-1902

/s/Harris S. Ammerman

Signed: February 21 2018

S. Martin Teel, Jr.
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLUMBIA

IN RE: [redacted]

Case No. [redacted]
Chapter 13

Debtor(s)

ORDER GRANTING ALLOWANCE OF ATTORNEY'S FEES

The Court has reviewed the application for allowance of attorney's fees and disclosure statement of counsel for the Debtor(s) in the within matter, and hereby enters its Order approving the award of attorney's fees to counsel for the Debtor(s) in the amount of $4,516.00 as an administrative priority claim.

cc:

Harris S. Ammerman, Esq.
1115 Massachusetts Avenue, NW
Washington, DC 20005

Nancy Spencer Grigsby
185 Admiral Cochrane Drive
Suite 240
Annapolis, MD 21401

End of order

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLUMBIA

IN RE: Arlyne F. Bryant

Case No. 17-00522
Chapter 13

Debtor(s)

APPLICATION FOR ALLOWANCE OF ATTORNEY'S FEES FOR SERVICES PERFORMED TO BE PAID AS ADMINISTRATIVE PRIORITY BY THE CHAPTER 13 TRUSTEE

The undersigned "Applicant", as attorney for the Debtor(s) herein, makes the following statements pursuant to 11 U.S.C. Section 329 for allowance of attorney's fees in the amount of $4,625.00 of which $109.00 has been paid for services rendered for the benefit of the Debtor(s) and the bankruptcy estate, and in support thereof states as follows:

1. Applicant has served as counsel to the Debtor(s) throughout the pendency of the Chapter 13 proceedings. The fees sought in this application result from services rendered for or on behalf of the Debtor(s).

2. The source of the compensation promised is the debtor(s). The applicant has not shared or agreed to share such compensation with any person, other than members of the applicant's law firm.

3. The services for which the fees are now sought by Applicant were described in the 2016(b) "Disclosure of Compensation" which was filed with the initial pleadings of the case.

4. The services for which the fees are now sought by Applicant are reasonable and necessary services and are summarized as follows:

a. Examining the Debtor(s) financial situation and rendering advice and information;

b. Gathering and Performing due diligence to obtain all necessary documents and paperwork for the Debtor(s) case, including, but not limited to, payment advices for the six months prior to the filing of the case, four year federal and state tax return copies; other documents relating to income; all recent correspondence from creditors; copies of deeds to all real property; copies of recent bank account statements from the Debtor(s); and copies of all credit reports; loan agreements and other documents necessary in preparing the petition properly; and utilizing the internet to determine whether any judgments were filed against the debtor(s) and valuations of real property and other property of the debtor(s);

c. Assisting the Debtor(s) in completing the course in credit counseling, ensuring that such course was completed prior to the filing of the debtor(s) case, and filing the certificate of course completion with the Court;

d. Reviewing debtor(s) personal income tax returns and rendering advice and information regarding the debtor(s) discharge implications and tax liabilities;

e. Drafting, reviewing with the Debtor(s) and filing the Petition, the Schedules, Statement of Financial Affairs, the Current Monthly Income Analysis and Form, the Certifications, a Chapter 13 Plan with the proper calculations, drafting and filing amendments, and all other documents and pleadings necessary in this case and paying for the postage and copying expenses incurred with each plan;

f. Traveling to and from the court house to represent the Debtor(s) at the meeting of creditors, the confirmation hearing, and all other court appearances;

g. Reviewing all the claims filed in the case and telephone conferences with claimants, as necessary, for clarification of claims, misfiled or misclassified claims and telephone conferences with the Internal Revenue Service Office of Special Procedures located in Baltimore, Md. regarding their proof of claim in debtor(s) case;

h. Answering the many telephone calls and responding to the many email correspondence from the Debtor(s) and creditors regarding the status of the case, and various in-person meetings and consultations with the Debtor(s);

i. Assisting the debtor in obtaining confirmation of the plan and in carrying out the plan;

j. Directing correspondence to the Debtor(s) throughout the case, including, but not limited to, reminders of Section 341 meeting, Trustee's DSO and Questionnaire forms, confirmation hearing(s), plan payments and other items as needed;

k. Drafting and filing this application for allowance of compensation and the cost of postage and copying in sending notice to all creditors and parties in interest;

5. Counsel is not applying for fees for the following services which will be incurred following confirmation of the debtor(s) plan:

a. Continuously monitoring the case during its entire duration for any pleadings,

or documents filed or sent to the debtor(s) pertaining to the Chapter 13 case, including reviewing the Notice of Assignment of Claims, and the Chapter 13 Trustee's semi-annual reports;

b. Assisting the Debtor(s) in completing the course in personal financial management and filing the certificate of course completion with the Court;

c. Assisting with preparation and filing of the Debtor(s) Affidavit Requesting Chapter 13 Discharge;

d. Assisting with preparation and filing of the annual statement of the Debtor(s) income and expenditures of the debtor(s) and other information as required by the Bankruptcy Code, because counsel's representation does not terminate after the Chapter13 plan is confirmed

6. Counsel seeks the above cited compensation pursuant to 11 U.S.C. Sections 330(a), 507(a)(2), and 503(b)(2). Pursuant to Section 330, in determining the amount of reasonable compensation to be awarded to a professional person, the Court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including,

(A) the time spent on such services;
(B) the rates charged for such services;
(C) whether the services were necessary to the administration of, or beneficial at the time at which the services were rendered toward the completion of, a case under this title;
(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
(E) with respect to a professional person has demonstrated skill and experience in the bankruptcy field
(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

These factors will be addressed in the lodestar analysis below.

7. Compensation is sought under the twelve lodestar criteria originally enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The Fourth Circuit expressly adopted such criteria in Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981) and expressly made them applicable to bankruptcy cases in Harman v. Levin, 722 F.2d 1150 (4th Cir. 1985). The applicability of these criteria to bankruptcy cases was explicitly recognized in In Re Morgan, 48 B.R. 1248 (Bankr. D. Md. 1985) and reiterated in In Re Leonard Jed Co., 103 B.R. 706 (Bankr. D.Md.

1989) and In re Young, 285 B.R. 168 (Bankr. D. Md. 2002). The lodestar criteria are as follows:

(a) time and labor required;
(b) novelty and difficulty of the issues;
(c) skill required to perform the legal services properly;
(d) preclusion of other employment by counsel due to acceptance of the case;
(e) the customary fee;
(f) whether the fee is fixed or contingent
(g) time limitations imposed by the client or circumstances;
(h) the amount involved and results obtained;
(i) the experience, reputation and ability of counsel;
(j) the "undesirability" of the case;
(k) the nature and length of the professional relationship between counsel and client; and
(l) awards in similar cases.

TIME AND LABOR REQUIRED

8. Applicant respectfully submits and hereby affirms to the Court that the fees and costs requested by this application were both reasonable and necessary.

9. Applicant has been paid a total of $109.00 in fees and expenses in this case, which payment only covered a portion of applicant's time.

NOVELTY AND DIFFICULTY OF ISSUES

10. This case presented issues of a complex nature or which required counsel to respond on an expedited basis.

SKILL REQUIRED TO PERFORM LEGAL SERVICES PROPERLY

11. As more fully set forth above, Counsel had complex issues to address during the debtor(s) case. A significant degree of skill and care was needed to properly respond to these questions, and to the subject matter of the case.

PRECLUSION OF OTHER EMPLOYLMENT

12. Counsel devoted substantial time to this case in order to handle the numerous matters which required his attention. However, Counsel did not decline any cases solely because of the time devoted to this case.

CUSTOMARY FEE/AWARDS IN SIMILAR CASES

13. Counsel's request for compensation is based on rates charged by Counsel for non-

bankruptcy services and are in line with or lower than those charged by other firms in the area for similar cases.

FEE IS NON CONTINGENT

13. Counsel did not undertake this case on a contingency basis. Debtor(s) employment of counsel was based upon an hourly rate of counsel.

TIME LIMITATIONS IMPOSED BY CLIENT AND CIRCUMSTANCES

14. As more fully set forth above, some matters required Counsel to respond on an expedited basis.

AMOUNT INVOLVED AND RESULTS OBTAINED

15. This case involves certain assets and substantial liabilities and numerous creditors. The debtor(s) Chapter 13 Plan provides for the debtor(s) to retain assets and pay creditors over a period of years. The Plan has satisfied the statutory requirements of confirmation.

EXPERIENCE, REPUTATION AND ABILITY OF COUNSEL

16. Counsel is highly experienced and qualified in bankruptcy matters.

"UNDESIRABILITY" OF THE CASES

17. In undertaking representation of the Debtor(s), Counsel is necessarily subjected to delays in obtaining payment of compensation, which delay does not commonly occur outside of bankruptcy proceedings.

NATURE AND LENGTH OF PROFESSIONAL RELATIONSHIP

18. Counsel devoted significant time in this case to assist the debtor(s) in the bankruptcy process, which time was kept to a minimum.

19. No agreement or understanding exists between Applicant and any other person for the division or sharing of compensation for services rendered or costs advanced in connection with Applicant's representation of the debtor(s).

20. Further, that the fees charged for the services described are reasonable based upon the customary fees charged and generally approved by this Court for services of this nature provided by comparably skilled professionals.

21. The debtor(s) have requested that the services be provided by counsel and that this Court allow the payment of the requested attorney's fees and approve the payment of

the fees as an administrative expense through the Chapter 13 Plan.

22. Applicant avers that the approval of the requested fees will not affect distribution to creditors under the plan.

WHEREFORE, Applicant prays that this Court approve the Attorney's fees prayed for herein in the amount of $4,516.00 to be paid by the Chapter 13 Trustee as an administrative expense through the Chapter 13 Plan.

Respectfully submitted,

/s/Harris S. Ammerman, Bar #187450
Harris S. Ammerman, Esq.
1115 Massachusetts Ave. NW
Washington, D.C. 20005
(202) 638 0606

CERTIFICATE OF SERVICE

I, Harris S. Ammerman, hereby certify that on this 18th day of October 2017 a copy of the foregoing Application for Allowance of Attorney's Fees, Notice and Order was mailed first class postage prepaid and sent via electronic filing to the trustee Nancy Spencer Grigsby, 185 Admiral Cochrane Drive, Suite 240, Annapolis, MD 21401, US Trustee's Office, 115 S. Union Street, Rm. 210, Alexandria, VA 22314, debtors, creditors, and all parties of interest.

/s/Harris S. Ammerman, Bar #187450
Harris S. Ammerman, Esq.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLUMBIA

IN RE: [redacted] Case No. [redacted]
Chapter 13

:
Debtor(s)

PLEASE TAKE NOTICE THAT WITHIN TWENTY (21) DAYS AFTER THE DATE OF THIS NOTICE you must file and serve a written objection to the Application for Attorney's Fees, together with a proposed order. The objection must be filed with the Clerk of the Bankruptcy Court, US Courthouse, 3rd and Constitution Avenue, NW, Washington, DC 20001, and served (by delivery or mailing a copy) upon the undersigned.
The objection must contain a complete specification of the factual and legal grounds upon which it is based. You may append affidavits and documents in support of your objection.

IF YOU FAIL TO MAKE A TIMELY OBJECTION, THE APPLICATION MAY BE GRANTED BY THE COURT WITHOUT HEARING. THE COURT MAY GRANT THE APPLICATION WITHOUT HEARING IF THE OBJECTION FILED STATES INADEQUATE GROUNDS FOR DENIAL. PARTIES IN INTEREST WITH QUESTIONS MAY CONTACT THE UNDERSIGNED.

/s/Harris S. Ammerman ,**#187450**
Harris S. Ammerman, Esq.
1115 Massachusetts Avenue, NW
Washington, DC 20005
(202) 638 0606,

Payment and Collection of Attorneys' Fee in Chapter 7 Consumer Cases

1. The Bankruptcy Code requires that Debtor's attorneys be completely transparent with the court and the debtor about the amount and payment of fees.

    a. 11 U.S.C. § 329 requires any attorney representing a debtor to file with the court a statement of any compensation received within one year of the filing of a bankruptcy petition and the source of the compensation. Said compensation must be reasonable for the value of the services rendered or the court may cancel the agreement and order the return of the fee.

    b. 11 U.S.C. § 526(a) prohibits (1) an attorney from failing to perform any service that the attorney informed the debtor the attorney would perform or (2) an attorney from making any statement or counseling or advising a debtor to make a statement in a document filed in the case "that it untrue or misleading, or that upon the exercise of reasonable care, should have been known by [the attorney] to be untrue or misleading".

    c. 11 U.S.C. § 528 requires that a fully executed written contract or retainer agreement be provided to a debtor within five (5) days after the first date on which any bankruptcy assistance is provided which explains the services to be provided and the fees or charges for such services.

    d. F.R.Bankr.P. 2016(b) requires that every attorney for a debtor file the statement required by § 329, stating the amount of the fee, the amount which has been paid prior to filing, the remaining amount due and owing and whether the fee is being shared. The attorney must file a supplemental statement within 14 days after any payment or agreement not previously disclosed.

    e. Rule 19-301.15(c) of the Maryland Attorneys' Rules of Professional Conduct requires that a lawyer shall deposit all fees paid to him or her into a trust account and withdrawal of those funds is permitted only when actually earned.

    f. Rule 19-301.2(c) of the Maryland Attorneys' Rules of Professional Conduct allows a lawyer to "limit the scope of the representation in accordance with applicable Maryland Rules if (1) the limitation is reasonable under the circumstances, (2) the client gives informed consent, and (3) the scope and limitations of any representation,

beyond an initial consultation or brief advice provided without a fee, are clearly set forth in writing . . ." "Informed consent" is defined by Rule 19-301.0(f) as "denotes agreement by a person to a proposed course of conduct after the attorney has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

g. In *Torres v. Chang (In re Chang),* Case No 11-10862-WIL, Adv. Pro. 13-00284, 2014 WL 4929062 (Bankr. D. Md., Sept. 30, 2014), the Court held that violations of the applicable ethical rules may constitute a basis for disgorgement of fees under Section 329. *Torres,* 2014 WL 492062 at 4 – 5.

h. If the retainer agreement under Section 528 and the 2016(b) Statement states that the parties have agreed to a set amount, or flat fee, then the amount that has not been paid prior to the filing cannot be collected post-petition because it is a violation of the stay.

i. *Rittenhouse v. Eisen*, 404 F.3d 395, 396 (6th Cir. 2005). When Debtor's counsel attempted to collect fees post-petition, the court held that attorney's fees are dischargeable as they are not one of the exceptions under 11 U.S.C. § 523.

ii. Fernandez v. Chang, (*In re Fernandez*) No. 12-15790PM, 2014 WL 32201 (Bankr. D.Md. Jan 6, 2014). Judge Mannes imposed compensatory and punitive damages against debtor's counsel for willful violation of 11 U.S.C. § 362(a) when counsel attempted to collect part of her flat fee post-petition.

iii. Bethea v. Robert J. Adams & Associates, 352 F. 3d 1125, 1127 (7th Cir. 2003). The attorneys negotiated a retainer agreement with the debtors that provided for installment payments for bankruptcy services. Some of the installments were due post-petition – indeed several payments were purportedly due post-discharge. The debtors argued that the attorneys' subsequent collection efforts violated the discharge injunction. *See* 352 F. 3d at 1127. The Court noted in dicta that even if the attorneys had executed the retainer agreements post-petition, "the most a court could do is give administrative priority to post-petition fees for work in the action's prosecution." *Id.* At 1129. If the debtor's estate were insufficient to pay administrative claims, the fees would be discharged. *Id.* In reaching its conclusion, the Seventh Circuit

declined to follow the Ninth Circuit's holding in *In re Hines,* 147 F. 3d 1185 (9th Cir. 1998), which held that an attorney may collect his fees post-petition without violating the automatic stay or discharge injunction, noting that the Ninth Circuit's approach contradicted the Bankruptcy Code. *Id.*

iv. In *In re Michel*, 509 B.R. 99 (Bankr. E.D. Mich 2014). The U.S. Trustee filed a motion to disgorge Debtor's counsel fees under § 329 because Counsel had received half of his fee prior to filing and half of it after the § 341 meeting. Debtor's Counsel argued that the remainder of the fee was actually a post-petition debt because it was for post-petition work. The Court disagreed, pointing out that the retainer agreement "draws no distinction between pre-petition services and post-petition services to be rendered, and does not apportion the . . . flat fee." *Id.* at 106.

2. <u>Is it ever permissible for representation to be limited in such a way that Debtor's counsel can collect fees post-petition in a chapter 7?</u>

a. Bankruptcy Judges undoubtedly prefer that Debtors are represented in all aspects of every case by competent counsel. However, some courts recognize the reality that not all debtors can afford to pay an attorney to represent them in all aspects of a case. Other courts are adamant that certain aspects of a case are integral to bankruptcy and representation cannot depend on additional payment.

b. The case of *In re Slabbinck* 482 B.R. 576 (Bankr. E.D.Mich., 2012) presents a law firm ("BOC") that provides representation for pre-petition services including consultation and advice and preparation of a petition and certain other documents necessary for the filing of a bankruptcy case for a flat fee.

i. The retainer agreement contains a separate clause informing a Debtor that the firm will not represent Debtor once the case is filed unless he or she signs a new agreement and pays an additional fee. Following the filing of the case, the Debtor is free to hire another attorney or proceed *pro se*. In this case, the Debtors signed both agreements and paid both pre- and post-petition fees. The U.S. Trustee ("UST") filed a Motion seeking an order requiring the firm to disgorge either the pre-petition fee or the post-petition fee. The UST presented two arguments. First, the UST relied on *Rittenhouse*, stating that

the post-petition fee is dischargeable and collection thereof is a violation of the stay. Second, the UST argued that if the Court allowed the two retainer agreements to stand separately, it would be an "impermissible 'unbundling' of the legal services essential to the representation of a debtor in a Chapter 7 bankruptcy case." *Id* at 581.

ii. BOC agreed that pre-petition attorney's fees are dischargeable, but argued that these post-petition fees are valid as they are for post-petition work. BOC further argued 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." *Id.* at 581. In support of its argument, the firm relied on *In re Mansfield*, 394 B.R. 783 (Bankr. E.D. Penn 2008) where, although it agreed that legal fees are not excepted from discharge, the Court seemed to agree that post-petition fees are, at least sometimes, acceptable. "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 . . .) arises when the postpetition services are performed. Viewed thusly, a client's debt for post-petition services is a postpetition debt which is not subject to the automatic stay or the Chapter 7 discharge injunction. . . ." *Id.* at 792.

iii. The *Slabbinck* Court ultimately held that unbundling was permitted as long as it was done properly and a pre- and post-petition payment would be acceptable. However, the Court determined that, based upon the record before it, it could not determine whether the Debtors' attorneys had provided the Debtors with fully informed consent regarding the consequences of failing to file schedules, the consequences of dismissal, and the failure to attend a § 341 meeting. Accordingly, the Court required the Debtors' attorney to file an affidavit addressing the issue of fully informed consent. *Id.* at 595-96.

iv. In the case of *In re Grimmett,* 2017 WL 2437231, No. 16-01094 JDP (Bankr. D. Idaho, June 5, 2017), *aff'd, Weeks Law, PLLC v. Geiger (In re Grimmett),* No. 17-00266 ELJ at Doc. 16 (D. Idaho Feb. 16, 2018), the Court ordered disgorgement of fees

from debtor's counsel associated with BK Billing in part because the fee agreement required post-petition payments in order to ensure counsel's continued participation and allowed counsel or BK Billing to collect fees directly from the debtor's debit card.

3. Fee Agreement Excluding Services for § 341 meeting of creditors

In the case, *In re Johnson,* 291 B.R. 462 (Bankr. Minn. 2003), Debtor's counsel gave his clients the option of paying a reduced fee if they would attend the § 341 meeting *pro se.* All of his clients elected this option and his retainer agreement reflected the arrangement. However, he failed to amend his 2016(b) language, which stated that he would represent his clients at the § 341 meeting. The Court found that the § 341 meeting is a "core event in a bankruptcy case" and even if his 2016(b) were correct he could not exclude the § 341 meeting from representation. *Id.* at 468. *See also In re Ruiz,* 515 B.R. 362 (Bankr. M.D. Fla. 2014), *In re Ortiz,* 496 B.R. B.R. 144, 149-50 (Bankr. S.D.N.Y. 2013), *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001), and *Bone v. Judah (In re Josey)*, 195 B.R. 511, 514 (Bankr. N.D. Ga.1996).

4. Excluding Reaffirmation Agreements in Retainer Agreements

a. As noted by the Court in *In re Carvajal,* 365 B. R. 631, 632, (Bankr. E.D. Va. 2007) (Mayer, J.), "once [counsel] makes an appearance in the bankruptcy case, he has made an appearance for all matters in that bankruptcy case and must appear with respect to them unless otherwise excused by the court. Reaffirmation agreements are an integral part of the chapter 7 representation of debtors. By accepting a chapter 7 case, counsel is accepting all aspects of the case including counseling with respect to reaffirmation agreements, negotiations with creditors with respect to reaffirmation agreements, and representing debtors in court with respect to reaffirmation agreements." The Court went on to state, "This is not to say that counsel is not to be paid for these services. It is expected that counsel will be paid for all services he renders. If these services are not included in the flat fee, he may charge additional fees agreeable with the client. However, whether fees are paid or not paid by the client does not permit counsel to fail [or] stop representing his client through all aspects of the case. If there are difficulties with the attorney-client relationship, including non-payment of fees, counsel may seek leave to withdraw. The court is not favorably inclined to permitting counsel to withdraw solely because a reaffirmation agreement is involved in the case particularly where there are or may be other matters to be addressed." *Id.; accord In re Rodriguez,* No. 08-12039- RGM, 2008 WL 2509373 at *1 (Bankr.

E.D. Va. June 23, 2008). "[C]ounsel cannot shirk this important responsibility by unilaterally withdrawing from the [reaffirmation] process and abandoning the client." *In re Isom,* No. 07-31469 KRH, 2007 WL 2110318 at *3 (Bankr. E.D. Va., July 17, 2007).

b. In *In re Minardi*, 399 B.R. 841 (Bankr. N.D.Okla., 2009), Counsel's retainer agreement specifically excluded representation in the negotiation of reaffirmation agreements. At a show cause hearing, the court determined that this was not permissible, stating, "First, and most importantly, the decision to reaffirm an otherwise dischargeable debt plays a critical role in the bankruptcy process--so critical, that assistance with the decision must be counted among the necessary services that make up competent representation of a Chapter 7 debtor. Second, the Code lays the responsibility for advising a debtor about the reaffirmation process and evaluating the effect of each agreement at the feet of debtors' counsel. The Court will not relieve counsel of this responsibility." *Id.* at 848.

c. The Court in *In re Collmar*, 417 B.R. 920 (Bankr. N.D. Ind., 2009) echoed this sentiment that representation during reaffirmation is a critical part of a Debtor's fresh start. "Congress not only included it among the duties imposed upon a debtor by the Bankruptcy Code, 11 U.S.C. § 521(a)(2) (concerning the filing and performance of the statement of intention regarding debts secured by property of the estate), it also contemplated that debtor's counsel would play a significant role in the process. See, 11 U.S.C. §§ 524(c)(3), (k)(3)(J), (k)(5) (concerning certifications debtor's counsel is to make in connection with a reaffirmation agreement)." *Id.* at 923.

d. The Court in *In re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga., 2003), agreed with *Minardi* that reaffirmation is a critical part of a bankruptcy, but takes it a step further by specifically addressing fees, stating that, "The fact that an attorney cannot limit representation does not mean that the attorney cannot charge separately for matters beyond the originally anticipated scope of work or defined services included in a 'flat fee.' For example, an attorney may properly charge a client a flat fee for preparing the chapter 7 petition and related documents and attending the § 341 meeting, while charging additional amounts, on either a flat fee or hourly basis, for other work such as negotiation of reaffirmation agreements, . . . The question then is whether the attorney can condition provision of services on payment of the required fees. Must a lawyer filing a chapter 7 bankruptcy case for a client provide services to the client who cannot (or will not) pay for them?" *Id.* at 573. The Court answered this question by stating,

"The lawyer is not required, of course, to provide services without compensation. Nevertheless, until the lawyer is permitted to withdraw, the failure or refusal of the client to pay for services does not justify failure to provide representation of the client." *Id.* at 575.

5. **Debtor's Counsel Excluding Adversary Proceedings from Engagement Agreement**.

   a. Most Courts agree that Debtor's counsel may limit representation in adversaries and charge additional fees for representation. However, several cases make it clear that there is a correct method which must be followed.

   b. In *Egwim*, the Rule 2016(b) statement indicated that the fee, part of which was paid prepetition and part of which was due post-petition but prior to the § 341 meeting, provided for "all aspects of the bankruptcy case" but expressly excluded representation in adversaries or contested matters.

      i. When debtor's counsel failed to respond to a motion for relief from the stay and an adversary objecting to discharge, the court issued a show cause order, *sua sponte*, asking why sanctions should not be imposed. After determining no sanctions were appropriate, the court discussed whether it is ever permissible for an attorney to exclude services in a chapter 7 case.

      ii. Under the Georgia Rules of Professional Procedure, an attorney is to provide competent representation. "A consumer who is considering filing a chapter 7 bankruptcy petition has two primary objectives: elimination of debt and retention of property. The 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. Representation in every aspect of the case must continue unless there is a "valid, professionally appropriate contractual limitation on the scope of services" *Id.* at 570. The court determined that such a limitation on services had three requirements:

         a. The attorney must explain to the client about the limited consultation;

         b. The client must provide informed consent in writing; and

c. The "limitation must be reasonable in the circumstances or, … the engagement must not be so limited as to prevent competent representation.@ *Id.* at 571.

c. These requirements were not met in *In re Seare*, 515 B.R. 599 (B.A.P. 9th Cir. 2014), which provides an excellent discussion of when representation can be limited and how best to do so.

i. Seare involved a debtor with a judgment against him for fraud stemming from a sexual harassment claim against a hospital. When the Debtor's wages were garnished, he sought bankruptcy assistance from an attorney who assumed that the judgment by the hospital was for routine medical debt. The retainer agreement clearly stated that there would be an additional fee for representation in adversary proceedings. The court found that Debtor's counsel violated certain ethical rules and sections of the code and imposed sanctions. The basis for the court's ruling was that Debtor's counsel had an obligation to ascertain Debtor's goals and objectives. While the attorney's boilerplate retainer agreement was not a problem in and of itself, reliance on that boilerplate was unreasonable in this case because the Debtor's primary goal involved ridding himself of the garnishment and the underlying debt, a debt which was likely to trigger an adversary.

ii. Further, Debtor's counsel refused to represent the Debtor in the adversary. The retainer agreement stated only that there would be additional fees charged for adversaries, not that counsel had no obligation to represent Debtor in any adversary proceeding. So, even if the Debtor did understand the likelihood of an adversary filing, he believed he had representation.

iii. The Bankruptcy Court sanctioned Debtors counsel and counsel appealed. The BAP affirmed, stating, "Consumer bankruptcy attorneys can unbundle their services in Nevada, particularly, adversary proceedings. However, unbundling, or limited scope representation, needs to comply with the rules of ethics and the Bankruptcy Code. A qualitative analysis of each individual debtor's case must be done at intake to ensure that his or her reasonable goals and needs are being met. That calculus was not applied in this case." *Id.* at 622.

iv. The concurring opinion in this case contains a very helpful listing and discussion of six steps a debtor's counsel should take "to allow […] consumer bankruptcy attorneys to unbundle adversary proceeding representation without violating ethical rules." *Id.* at 623-24.

d. In *Danvers Sav. Bank v. Cuddy* (*In re Cuddy)*, 322 B.R. 12 (Bankr.Mass., 2005), the Court considered a Motion to Withdraw filed by Debtor's Counsel based on Debtor's failure to replenish their retainer.

i. Debtor's Counsel entered their appearance in the main case after the Chapter 7 petition had been filed. When an adversary proceeding was filed by a creditor objecting to discharge of a debt, Counsel filed a limited entry of appearance, requesting an extension of time to answer and, later, a general entry of appearance. Counsel then requested to withdraw, citing as a basis Debtor's failure to pay an additional retainer for representation in the adversary.

ii. The Court denied the request to withdraw, relying primarily on the three fundamental requirements of *Egwim* and finding that they had not been met. The Court also believed that attorneys should be held to a high ethical standard and assist those that they have promised to help and, pointed out that, in representing debtors, attorneys are also helping the court. The Court provided an interesting analogy: "The image that has come to my mind most insistently while working on this opinion is this: A professional swim instructor takes on a new student with this understanding: You have paid me my initial fee. For that money I will lead you to the swimming pool, show you how to enter the water, and explain the basic elements of swimming. If, however, you should begin to drown, or if some other serious problem arises, I will leave you to your own resources unless you pay me more money." *Id.* at 18.