

Federal Bar Association
13th Annual
Bankruptcy Ethics Symposium

November 18, 2016



**Unbundling and Limited Scope
Representation: Navigating Dangerous Waters
in the Central District**

Honorable Sandra R. Klein | U.S. Bankruptcy Court
M. Jonathan Hayes, Esq. | Simon Resnik Hayes LLP

HONORABLE SANDRA R. KLEIN

APPOINTMENT:

- [Appointed April 22, 2011 by the United States Court of Appeals for the Ninth Circuit](#) (Current term expires April 21, 2025)

EDUCATION:

- University of California Los Angeles, Anderson School of Management, M.B.A., 2009, UCLA Anderson School of a Management Honor Society
- Loyola Law School, Los Angeles, CA, J.D., 1992, Magna Cum Laude, Order of the Coif, Senior Note & Comment Editor, Loyola Int'l & Comp. L.J., 1991-92
- University of Massachusetts, Lowell, MA (formerly University of Lowell, Lowell, MA), B.M., Music Education, 1982, Magna Cum Laude

CAREER RECORD:

- 1997 – 2011, United States Department of Justice
- 2009 – 2011, Acting Assistant Director of Office of Criminal Enforcement, United States Trustee Program
- 2003 – 2009, Bankruptcy Fraud Criminal Coordinator, United States Trustee Program
- 1997 – 2003, Special Assistant United States Attorney, United States Attorney's Office, Central District of California (on permanent detail from the United States Trustee Program)
- 1995 – 1997, Associate, O'Melveny & Myers, LLP, Los Angeles, CA
- 1994 – 1995, Judicial Law Clerk, Honorable Arthur L. Alarcon, United States Court of Appeals for the Ninth Circuit
- 1992 – 1994, Judicial Law Clerk, Honorable Lourdes G. Baird, United States District Court for the Central District of California

PROFESSIONAL MEMBERSHIPS:

- American Bankruptcy Institute
- American Bar Association
- Federal Bar Association
- Los Angeles County Bar Association
- National Conference of Bankruptcy Judges
- Women Lawyers Association of Los Angeles

M. JONATHAN HAYES, ESQ.

M. Jonathan Hayes ("Jon") has practiced bankruptcy law nearly all of his 36 years as an attorney. Jon is a graduate of Loyola University (B.A., 1971) and Loyola University School of Law (J.D., 1977). He is a Certified Bankruptcy Specialist, California Bar Association, Board of Legal Specialization.

In addition, Jon:

- sits on the Board of Editors of the California Bankruptcy Journal since 2001.
- is a member of the Board of Directors of the Central District Consumer Bankruptcy Attorneys Association (“cdcbaa”) where he was the President, 2013 and 2014.
- is a member of the California State Bar Board of Legal Specialization, Bankruptcy Law Advisory Commission, which prepares the bi-annual examination for candidates for legal specialization and chooses those who are entitled to be certified.
- is a Legal Representative to the Ninth Circuit Judicial Conference, 2015 to Present.
- is a member of and sits on the Board of Directors of the Los Angeles Bankruptcy Forum, 2013 to Present.

Jon has been an Adjunct Professor of Law at the University of West Los Angeles (previously University of LaVerne School of Law) for the past 27 years where he has taught Bankruptcy, Business Organizations, Contracts, Advanced Bankruptcy Issues, Commercial Law, and Taxation. Before that he was on the faculty of Whittier School of Law for four years.

Jon is the author of three books entitled, "Summary of Bankruptcy, Second Edition," published in 2012; “Bankruptcy Jurisprudence from the Supreme Court,” published in 2009; and “Melvyn ‘Deacon’ Jones: My 40 years with the Blues Legends,” privately published in 2004.

Jon maintains a blog at www.centraldistrictinsider.com. He is a regular contributor to the Supreme Court Corner at www.considerchapter13.org.

Unbundling and Limited Scope Representation:
Navigating in the Central District.

Presented by:

Judge Sandra Klein

Bankruptcy Judge Central District of California

M. Jonathan Hayes

Simon Resnik Hayes LLP

1. The big brother concept.
2. The forms treadmill concept.
3. Requirements of the Bankruptcy Code and the National Bankruptcy Rules.
4. Requirements of California law and State Bar rules.
5. Requirements in the Central District
 - a. Statement of Limited Appearance
 - b. Statement re post – payments?
6. Review Seare & Hale
7. San Diego Chapter 7 RARA?

LIMITED SCOPE REPRESENTATION ("LSR" or "UNBUNDLING") IN CHAPTER 7:

APPLICABLE RULES/LAWS

Existing Local Rules & Forms regarding Chapter 7 in Central District of California:

LBR 2090-1(a)(3): Nothing in these rules shall be construed as prohibiting a limited scope of appearance in a chapter 7 case so long as the applicable Rules of Professional Conduct and ethics rules are followed and the attorney for the debtor, in addition to preparing the petition and schedules, provides the following services:

(A) advises the debtor about the possibility of any additional proceedings related to or arising from the underlying bankruptcy case, including any adversary proceeding, motion or other contested matter initiated by a creditor, trustee or party in interest; and

(B) appears with the debtor at the initial § 341(a) meeting of creditors or arranges for an attorney knowledgeable about all pertinent information in the case to appear with the debtor at such meeting.

Local Form 2090-1.1: Attorney Declaration re: Limited Scope of Appearance
New rule adopted in 2016.

Existing Local Rules & Forms regarding Chapters 9,11,12 & 13:

LBR 2090-1(a)(2): In Chapters 9, 11, 12 & 13, debtor's attorney presumed to appear for the case and all proceedings in the case, except as otherwise ordered or as provided for in LBR 3015-1(v)

LBR 3015-1(v): covers optional use of Attorney Rights and Responsibilities Agreement in Chapter 13

Local Form 3015-1.7: Rights and Responsibilities Agreement between Chapter 13 Debtors and their Attorneys

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

Rule 2-100 Communication With a Represented Party:

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

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

Rule 3-110 - Failing to Act Competently:

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

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

[E]ven when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention. The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client's legal needs.

Id. at 1684.

Bankruptcy decisions applying the duty of competence (under a variety of state rules of professional responsibility) to LSR have held that the scope must include services reasonably necessary to achieve the client's objectives in bankruptcy.

Rule 3-700 - Termination of Employment

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

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

Rule 4-200 - Fees for Legal Services

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

California State Law:

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

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

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

Bankruptcy Code and Rules:

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

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

11 U.S.C. §527 – mandates disclosure that a debt relief agency must provide an assisted person.

11 U.S.C. §528 - requires that a contract between a debt relief agency and assisted person be in writing and "clearly and conspicuously" explain the scope of services that the debt relief agency will provide and the fees or charges for such services.

11 U.S.C. §707(b)(4)(C) - "The signature of an attorney on a [Chapter 7] petition . . . shall constitute a certification that the attorney has . . . performed a reasonable investigation into the circumstances that gave rise to the petition"

Fed. R. Bankr. P. 2016(b) - requires an attorney to file and transmit to the U.S. Trustee a statement disclosing fees paid by the debtor to the attorney and whether the attorney shared the fees with any other entity (the statement must be filed with the court pursuant to §329). The statement must be filed within 15 days after the order for relief, or at any other time as the court may direct.

Fed. R. Bankr. P. 2017 - allows the court to scrutinize the fees paid by a debtor to an attorney. After notice and a hearing on a motion by any party in interest or on the court's own initiative, the court may examine whether fees paid to the attorney are excessive.

Fed. R. Bankr. P. 9011 - requires attorneys to sign the petition. There is an ambiguity regarding whether attorneys who represent clients in a LSR are required to sign the petition as the attorney of record (since they are not taking on the debtor's case as the attorney of record). In the Central District, LBR 1002-1(b)(1) arguably requires attorneys to comply with signature requirement of FRBP 9011(a).

ARTICLES/REPORTS

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

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

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

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

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

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

1. An initial meeting with the debtor to explain the bankruptcy process and discuss pre-bankruptcy planning (including exemptions) as well as non-bankruptcy alternatives.
2. Advice to the debtor concerning debtor's obligations and duties under the Bankruptcy Code and Rules and applicable court orders.
3. Preparation and filing of the documents and disclosures required by and performance of the duties imposed by Section 521 of the Bankruptcy Code.
4. Provision of assistance with the debtor's compliance with Section 707(b)(4) of the Bankruptcy Code.
5. Preparation and filing of the petition, the Statement of Financial Affairs, and the necessary schedules.
6. Attendance at the Section 341(a) meeting.
7. Communication with the debtor after the Section 341(a) meeting.
8. Monitoring the docket for issues related to discharge.

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

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

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

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

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

United States Bankruptcy Court
CENTRAL DISTRICT OF CALIFORNIA

In re

Case No. _____

Debtor

Chapter _____

DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR

1. Pursuant to 11 U.S.C. § 329(a) and Fed. Bankr. P. 2016(b), I certify that I am the attorney for the above named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

For legal services, I have agreed to accept \$ _____

Prior to the filing of this statement I have received \$ _____

Balance Due \$ _____

2. The source of the compensation paid to me was:

- Debtor
- Other (specify)

3. The source of compensation to be paid to me is:

- Debtor
- Other (specify)

4. I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm.

I have agreed to share the above-disclosed compensation with a other person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation, is attached.

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

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

- d. Representation of the debtor in adversary proceedings and other contested bankruptcy matters;
- e. [Other provisions as needed]

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

CERTIFICATION	
I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceeding.	
_____	_____
<i>Date</i>	<i>Signature of Attorney</i>

	<i>Name of law firm</i>

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address	FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA - SAN FERNANDO VALLEY DIVISION	
In re:	CASE NO.: CHAPTER: 7
Debtor(s).	DEBTOR'S ATTORNEY'S DISCLOSURE OF COMPENSATION ARRANGEMENT IN INDIVIDUAL CHAPTER 7 CASE [LBR 2090-1(a)(3)]

1. **Compensation Arrangement.** Pursuant to 11 U.S.C. § 329(a), FRBP 2016(b), and LBR 2090-1(a)(3) and (4), I disclose that:
 - a. I am the attorney for the Debtor.
 - b. Compensation that was paid to me, within one year before the petition was filed, or was agreed to be paid to me, for services rendered or to be rendered on behalf of the Debtor in contemplation of or in connection with this bankruptcy case, is as follows:
 - i. For legal services, I have agreed to accept an hourly rate of \$ _____; or a flat fee of \$ _____
 - ii. Prior to filing this disclosure I received \$ _____
 - iii. The balance due is \$ _____

2. **Source of Compensation Paid Postpetition (Postpetition Compensation).**
 - a. **Already Paid.** The source(s) of the Postpetition Compensation paid to me was:

Debtor(s) Other (specify): _____
 - b. **To be Paid.** The source(s) of the Postpetition Compensation to be paid to me is:

Debtor(s) Other (specify): _____

3. **Sharing of Compensation Paid Postpetition.**

I have not agreed to share Postpetition Compensation with any other person unless they are members or regular associates of my law firm within the meaning of FRBP 9001(10).

I have agreed to share Postpetition Compensation with other person or persons who are not members or regular associates of my law firm within the meaning of FRBP 9001(10). Attached as Exhibit A is a copy of the agreement and a list of the names of the people sharing in the Postpetition Compensation.

This form is mandatory. It has been approved for use in the United States Bankruptcy Court for the Central District of California.

4. **Limited Scope of Services.** A limited scope of appearance is permitted under LBR 2090-1(a)(3), unless otherwise required by the presiding judge. In return for the fee disclosed above, I have agreed to provide the required legal services indicated below in paragraph "a", and, if any are indicated, the additional services checked in paragraph "4.b".

a. **Services required to be provided:**

- i. Analysis of the Debtor's financial situation, and advice to the Debtor in determining whether to file a bankruptcy petition;
- ii. Preparation and filing of any petition, lists, schedules and statements and any other required case commencement documents; and
- iii. Representation of the Debtor at the initial § 341(a) meeting of creditors.

b. **Additional legal services I will provide:**

- i. Any proceeding related to relief from stay motions.
- ii. Any proceeding involving an objection to the Debtor's discharge pursuant to 11 U.S.C. § 727.
- iii. Any proceeding to determine whether a specific debt is nondischargeable under 11 U.S.C. § 523.
- iv. Reaffirmation of a debt.
- v. Any lien avoidance under 11 U.S.C. § 522(f)
- vi. Other (specify):

5. If in the future I agree to represent the Debtor in additional matters, I will complete and file the Attorney's Disclosure of Postpetition Compensation, LBR form F 2016-1.4.ATTY.COMP.DISCLSR.

DECLARATION OF ATTORNEY FOR THE DEBTOR

I declare under penalty of perjury that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the Debtor in this bankruptcy case

Date: _____

Signature of attorney for the Debtor

Printed name of attorney

Printed name of law firm

DECLARATION OF THE DEBTOR

I/we declare under penalty of perjury that my attorney has explained to me/us the limited scope of representation as outlined above. I/we understand that I/we have paid or agreed to pay solely for the required services listed in paragraph 4a, and the additional services (if any) that are checked off in paragraph 4b above, and that I/we am representing myself/ourselves for any other proceedings unless a new agreement is reached with an attorney.

Date: _____

Date: _____

Signature of Debtor 1

Signature of Debtor 2 (Joint Debtor)(if applicable)

Printed name of Debtor 1

Printed name of Debtor 2

Attorney or Party Name, Address, Telephone & FAX Nos., State Bar No. & Email Address	FOR COURT USE ONLY
UNITED STATES BANKRUPTCY COURT CENTRAL DISTRICT OF CALIFORNIA - **SELECT DIVISION**	
In re:	CASE NO.: CHAPTER:
Debtor(s).	ATTORNEY'S DISCLOSURE OF POSTPETITION COMPENSATION ARRANGEMENT WITH DEBTOR [11 U.S.C. § 329(a); FRBP 2016(b)]

1. This disclosure is made by the undersigned attorney as counsel for the Debtor:
 - This disclosure is the undersigned's initial compensation disclosure in this case.
 - This disclosure supplements a previously-filed compensation disclosure in this case.

2. **Postpetition Compensation Arrangement.** Pursuant to 11 U.S.C. § 329(a) and FRBP 2016(b), I disclose that I am the attorney for the Debtor and that compensation was paid to me after the petition was filed, and/or was agreed postpetition to be paid to me, for services rendered or to be rendered on behalf of the Debtor in connection with this case.:

For legal services, I agreed postpetition to accept:

hourly rate \$ _____ or flat fee \$ _____

Amount I received postpetition, if any: \$ _____

Balance due \$ _____

3. **Date of Payment:** The postpetition compensation was paid to me, and/or the postpetition compensation agreement was entered into, on *(date)*: _____.

This form is optional. It has been approved for use in the United States Bankruptcy Court for the Central District of California.

4. **Source of Postpetition Compensation.**

a. **Already Paid.** The source(s) of the compensation paid to me postpetition was:

Debtor Other (*specify*):

b. **To be Paid.** The source(s) of the compensation agreed postpetition to be paid to me is:

Debtor Other (*specify*):

5. **Sharing of Compensation.**

I have not agreed to share the above-disclosed postpetition compensation with any other persons unless they are members or regular associates of my law firm within the meaning of FRBP 9001(10).

I have agreed to share the above-disclosed postpetition compensation with other persons who are not members or regular associates of my law firm within the meaning of FRBP 9001(10). A copy of the agreement, together with a list of the names of the people sharing in the postpetition compensation, is attached.

6. **Chapter 7 Cases Only.** In chapter 7 bankruptcy cases, a limited scope of appearance is permitted under LBR 2090-1(a)(3), unless otherwise required by the presiding judge. I have been retained by the Debtor for purposes of a limited appearance. In return for the compensation disclosed above, I have agreed to provide the following legal services:

a. Any proceeding related to stay motions under 11 U.S.C. § 362.

b. Any proceeding involving an objection to the Debtor's discharge pursuant to 11 U.S.C. § 727.

c. Any proceeding to determine whether a specific debt is nondischargeable under 11 U.S.C. § 523.

d. Reaffirmation of a debt.

e. Any lien avoidance under 11 U.S.C. § 522(f).

f. Adversary proceedings (other than those brought under 11 U.S.C. §§ 523 and 727) and other contested bankruptcy matters.

g. Other provisions as needed (*specify*):

7. **Cases Other than Chapter 7.** In return for the above-disclosed fee, I have agreed to render legal services for the bankruptcy case, including:

a. Representation of the Debtor in adversary proceedings and other contested bankruptcy matters;

b. Other provisions as needed (*specify*):

8. **Excluded Services.** By agreement with the Debtor, the compensation disclosed above does not include fees to provide the following services (*specify*):

DECLARATION OF ATTORNEY FOR THE DEBTOR

I declare under penalty of perjury that the foregoing, together with any prior compensation disclosures filed by the undersigned, constitutes a complete statement of any agreement or arrangement for payment to me for representation of the Debtor in this bankruptcy case and all amounts received in respect of such representation.

Date: _____

By: _____
Signature of attorney for the Debtor

Name: _____
Printed name of attorney

Printed name of law firm

DECLARATION OF THE DEBTOR

(To be completed only if the attorney's representation is in chapter 7 and of limited scope.)

I/we declare under penalty of perjury that my attorney has explained to me/us the limited scope of representation as outlined above. I/we understand that I/we have paid or agreed to pay solely for the required services listed in paragraph 6, and that I/we am representing myself/ourselves for any other proceedings, unless a new agreement is reached with an attorney.

Date: _____

Date: _____

Signature of Debtor 1

Signature of Debtor 2 (Joint Debtor)

Printed name of Debtor 1

Printed name of Debtor 2 (Joint Debtor)

DeLuca v. Seare (In re Seare) , 515 B.R. 599 (9th Cir. BAP Aug, 2014)

Issue: Did the court properly sanction the chapter 7 debtor's attorney for not representing the debtor in a non-dischargeability action?

Holding: Yes, for many reasons but most importantly for not properly defining the goals of the representation at the outset and for not getting informed consent to the "unbundling."

Standard: abuse of discretion

Judge Bruce Markell, Nevada

Kirscher, Taylor, Jury

Opinion by Kirscher, concurrence by Jury

Here the chapter 7 debtor had sued his former employer prepetition in District Court for sexual harassment but later he admitted that he had "embellished" the claims. Based on that, the District Court dismissed the case and entered judgment against him for attorneys fees of \$67,000. The debtor then filed chapter 7 using attorney DeLuca. The employer filed a 523 complaint against the debtor and DeLuca told the debtor to find someone else to defend him. The debtor filed an answer in pro per and attended the status conference. At that time, Judge Markell issued an OSC against DeLuca re why he should not be sanctioned for "Failing to Represent Debtor in the . . . Adversary Proceeding." DeLuca responded saying that his 19 page retainer agreement expressly excluded adversary proceedings from the representation. In fact the debtor initialed every page of the retainer agreement although apparently no one from the DeLuca office went through it with him. Also DeLuca tried to dodge responsibility by saying that he had no reason to believe that a complaint may be on the way. The court clearly did not believe that and said that it was so obvious it was coming there might not have been a reason for filing the case in the first place. After an evidentiary hearing, the court ordered DeLuca to return the \$2,000 fee and "that for the next two years DeLuca provide a copy of the Sanctions Opinion to future adversary clients whose case he declines." DeLuca appealed.

The BAP affirmed. In a very long opinion, the BAP looked first (as did Markell) at the Nevada Rules of Professional Responsibility. "Specifically, the court found that as a result of a lack of communication at the initial consultation DeLuca failed in his primary

duty — ascertaining Debtors' objectives and defining the goals of the representation." The big problem according to Markell and the BAP is that DeLuca spent very little time with the client at the outset and left the rest to his staff. The "unbundling" "decision" was not made with any thought - it was part of the preprinted retainer agreement. The retainer agreement said that representation in adversary proceedings would be extra. "The bankruptcy court held that DeLuca had further violated NRPC 1.2(c) because he did not obtain Debtors' informed consent in limiting the scope of his representation." When DeLuca later told the debtor he would not represent him in the adversary, he "changed" the basis of the agreement.

Markell also found and the BAP agreed that DeLuca violated section 707(b)(4)(C) by failing to "perform a reasonable investigation." He also violated 526(a) and 528(a) by "failing to accurately explain that he would not represent Debtors in an adversary proceeding and the risks Debtors could face in bankruptcy." He violated 528(a) because he did not sign the retainer agreement and

"because the Retainer Agreement did not 'clearly and conspicuously' explain the scope of services and fees. Id. Specifically, DeLuca excluded services using technical terms like 'nondischargeability allegations' and 'adversary proceedings,' which a layperson would not likely understand. Further, the standard form contract did not relate these services to a client's particular case, and, without clarification from DeLuca about which additional services were likely to be needed, Debtors had no way of knowing which exclusions were likely to apply and what the chances were of facing increased legal fees."

Judge Jury's concurrence says the unbundling is a "minefield" but makes an effort to explain when it is appropriate. "If done correctly, unbundling may be key to competent consumer bankruptcy attorneys providing much needed representation to debtors at an affordable price. Without the ability to unbundle adversaries, the flat fee which a consumer attorney would need to charge for basic bankruptcy representation might become prohibitive and exacerbate the already existing problem of pro se filings." It was "the initial intake interview that tripped DeLuca up because he did not properly define the goal of the representation of [the debtor]." "All the other ethical and statutory violations found by the bankruptcy judge flowed from this initial deficiency in the limited scope representation." She ended with her "suggestions for such attorneys to avoid violating ethical rules and the Bankruptcy Code when they limit the scope of representation of consumer debtors."

Hale v. U.S. Trustee, 509 F.3d 1148 (9th Cir. 2007)

Issue: Did the Bankruptcy Court properly sanction an attorney whose practice was to help *pro se* debtors file bankruptcy for a fee of \$250?

Holding: Yes.

Appeal from District Court

Judge Susan P. Graber

Tom Hale is an attorney in Idaho who “assisted [the debtor] in filing a bankruptcy petition.” The Bankruptcy Court ordered the fees disgorged (\$250) and sanctioned him \$2,000. It refused him a jury trial on the issue of reasonableness of his fees. The District Court affirmed.

The 9th Circuit affirmed also. It said, “For a \$250 fee, [Hale] agreed to analyze Debtors’ financial situation and prepare their bankruptcy petition and required exhibits, but disclaimed representing them at the meeting of creditors.” “In addition, the agreement specified that Hale’s representation ‘d[id] not include the following services: Adversary proceedings, appeals, and/or conversions, non-dischargeability proceedings, or any other representation.’ Hale refers to this practice as providing ‘unbundled’ legal services to ‘pro se’ debtors.” The petition disclosed the arrangement and the payment of the fee. Hale did not sign the petition or schedules. *Sua sponte* the Bankruptcy Court ordered an accounting of the fees. Hale provided information which the court found unsatisfactory. Hale redid it and asked the judge to recuse himself. The judge denied that request and set a hearing on the reasonableness of the fees. Hale filed a request for jury which the judge denied. It becomes apparent in this case that this is a long standing dispute between the attorney, the UST and the judges of this particular court. “[I]n the 12 months immediately preceding this Decision . . . , Hale filed 226 cases. A random review of some of Hale’s more recently filed cases indicates that his overall approach remains the same.”

The UST then filed a Motion for sanctions. It alleged that the attorney; “failed to provide Debtors with legal representation covering the normal, ordinary, and fundamental aspects of their case; failed to obtain Debtors’ informed consent to limit his representation of them; and failed to create accurate and complete documents for filing in Debtors’ case.” It asked the court to “order Hale to sign all bankruptcy petitions of future debtor clients

and represent them in all normal, ordinary, and fundamental aspects of their cases, including attendance at the 11 U.S.C. § 341 meeting of creditors.”

At the hearing the debtors testified that they thought Hale was their attorney, did not understand what was going on, and hired new counsel when Hale told them their case needed to be dismissed (apparently hoping that that would end the sanctions and disgorgement). The schedules apparently had numerous deficiencies also. The Bankruptcy Court ordered disgorgement, sanctions of \$2,000, and numerous other requirements including signing all new petitions and appearing at the first meeting of creditors.

The 9th Circuit affirmed. First the 7th Amendment does not permit a jury trial here because the Supreme Court in *In re Wood*, 210 U.S. 246 (1908) said the Bankruptcy Code authorizes “a bankruptcy court to examine the reasonableness of a debtor’s attorney fees and to disgorge fees that the court deemed excessive.” As to the disgorgement, the bankruptcy court’s finds were not clearly erroneous. Note the panel clearly believed that the services performed were substandard. As to the sanctions, Hale argued that 9011 was not complied with because of a perceived lack of notice and because he did not sign anything. The 9th Circuit said, “In an effort to avoid liability, Hale did not sign Debtors’ bankruptcy petition. He had an extensive history—and an ongoing practice—of similar violations.” “Although the court effectively barred Hale from assisting pro se debtors in a limited manner that allows the debtors to remain pro se, the court ordered those sanctions in response to specific and repeated acts of incompetent and irresponsible representation. Under the specific facts of this case, we cannot say that the bankruptcy court abused its inherent power to impose sanctions.”

Re Wood and Henderson, 210 U.S. 246 (1908)

Issue: Where the Bankruptcy Code gives “the court” power to re-examine (and avoid) prepetition transactions between the debtor and his attorneys, may the bankruptcy referee do that in a summary proceeding even when the attorneys are outside of the state and not subject to personal jurisdiction in the state?

Holding: Yes.

Justice William R. Day, 6-3

Brewer dissenting, joined by Peckham and Moody

The debtor gave his attorneys \$9,775 “in contemplation of the filing of a petition in bankruptcy against him, within four months of the filing thereof, for legal services to be rendered thereafter by said [attorneys].” The attorneys were located in Arkansas and the bankruptcy case was filed in Colorado. The “transaction” took place in Arkansas. After the case was filed, the trustee asked the bankruptcy referee to order the attorneys to show cause “why an order should not be made determining and adjudicating the reasonable value of the services rendered by the said attorneys for the said bankrupt.” The attorneys did not appear and the referee determined “that the transaction was valid as to the sum of \$800, found to be the reasonable value of the services, and the trustee was ordered to proceed to recover the excess.” The attorneys then challenged the personal and subject matter jurisdiction of the referee. The District Court affirmed the referee as did the Court of Appeals.

Section 60d of the Bankruptcy Code provided that transactions between the debtor and his attorney “shall be re-examined by the court on the petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.” The attorneys argued that they had the right to be sued and defend themselves in Arkansas and that it was improper to permit the referee to make this determination by a simple motion.

The Supreme Court affirmed the referee. It said that this is in the nature of an administrative hearing. “[Section 60d] does not undertake to provide for a plenary suit, but for an examination and order in the course of the administration of the estate, with a view to permitting only a reasonable amount thereof to be deducted from it because of payments of money or transfers of property to attorneys or counselors in contemplation of bankruptcy proceedings.”

Section 60d is *sui generis*, and does not contemplate the bringing of plenary suits or the recovery of preferential transfers in another jurisdiction. It recognizes the temptation of a filing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provisions for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor question the transaction, re-examine it with a view to a determination of its reasonableness.

The section makes no provision for the service of process, and, in that view, such reasonable notice to the parties affected should be required as is appropriate to the case, and an opportunity should be given them to be heard.

Congress has the right to establish a uniform system of bankruptcy throughout the United States; and, having given jurisdiction to a particular district court to administer and distribute the property, it may, in some proper way, in such a case as this, call upon all interested to appear and assert their rights.

The majority commented that “It may be that this order, though binding upon the parties, cannot be made finally effectual until a judgment is rendered in a jurisdiction where it can be executed.” “We reach the conclusion that no re-examination can be had in this transaction, except in the district court of the United States administering the estate.”

The dissent argued that the debt that the attorneys might owe is similar to a preference and should be enforced “in the same way and by the same tribunals that have jurisdiction of any other proceeding to recover money or property given by way of preference.” They should not be required to come to Colorado to defend themselves. The biggest complaint was the majority’s recognition that the trustee may have to go to Arkansas anyway to enforce the order.

Notes:

1. *Sui generis* means *of its own kind/genus* or unique in its characteristics, an idea, an entity or a reality that cannot be included in a wider concept.

Conrad, Rubin & Lesser v. Pender, 289 U.S. 472 (1933)

Issue: Does the bankruptcy referee have jurisdiction to order a law firm to return part of a retainer to the estate when the payment was made to the firm for the purpose of avoiding the bankruptcy completely?

Holding: Yes. The code provides for re-examination pay prepetition payments made in contemplation of bankruptcy.

Chief Justice Charles Evans Hughes

The debtor paid \$2,500 on November 5, 1930 to a law firm to help it negotiate a settlement with its creditors, raise the funds to pay the settlement and give it advice re an equity receivership proceeding or an assignment for the benefit of creditors type proceeding. It is alleged there was no intent to file a bankruptcy petition. An involuntary petition was filed against the debtor 12 days after the payment to the firm. The code provided at the time for “re-examination of payments or transfers when made by a debtor (1) 'in contemplation of the filing of a petition by or against him,' (2) 'to an attorney . . . ,' and (3) 'for services to be rendered.' Such payments or transfers are only to 'be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.” The firm argued that the payment was not in contemplation of bankruptcy and therefore the referee had no jurisdiction to “re-examine” it. They argued the purpose of the payment was to avoid bankruptcy. The referee ordered \$2,000 of the retainer returned to the estate. The District Court and Court of Appeals affirmed agreeing that the payment was “in contemplation of bankruptcy.”

The Supreme Court affirmed.

The manifest purpose of the provision is to safeguard the assets of those who are acting in contemplation of bankruptcy, so that these assets may be brought quickly and without unnecessary expense into the hands of the trustee, and to provide a restraint upon opportunities to make an unreasonable disposition of property through arrangement for excessive payments for prospective legal services.

Undoubtedly, while the question thus relates to the debtor's motive, the nature of the services which he seeks and for which he pays may be taken into consideration as it may throw light upon his motive.

[N]egotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling cause of the payment.

Notes:

1. Justice Charles Evans Hughes was appointed by President Taft in 1910 as an Associate Justice. He resigned in 1916 to be the Republican candidate for President, an election he lost to Woodrow Wilson. Prior to that he was the Governor of New York. In 1930, he was appointed Chief Justice by Herbert Hoover which he served until 1941 when he resigned.
2. As an attorney, Hughes founded the law firm now known as Hughes, Hubbard & Reed.

Revised: 01/24/13
Name, Address, Telephone No. & I.D. No.

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

In Re

BANKRUPTCY NO.

Last four digits of Soc.Sec. or Debtor.
Individual-Taxpayer I.D.(ITIN)/Complete EIN:

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
RIGHTS AND RESPONSIBILITIES OF CHAPTER 7 DEBTORS
AND THEIR ATTORNEY**

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

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

**I.
Services Included in the Initial Fee Charged**

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

1. Meet with the debtor to review the debtor's assets, liabilities, income and expenses.
2. Analyze the debtor's financial situation, and render advice to the debtor in determining whether to file a petition in bankruptcy.
3. Describe the purpose, benefits, and costs of the Chapters the debtor may file, counsel the debtor regarding the advisability of filing either a Chapter 7, 11 or 13 case, and answer the debtor's questions.
4. Advise the debtor of the requirement to attend the Section 341(a) Meeting of Creditors, and instruct the debtor as to the date, time and place of the meeting.
5. Advise the debtor of the necessity of maintaining liability, collision and comprehensive insurance on vehicles securing loans or leases.

6. Timely prepare, file and serve, as required, the debtor's petition, schedules, Statement of Financial Affairs, and any necessary amendments to Schedule C.
7. Provide documents pursuant to the Trustee Guidelines and any other information requested by the Chapter 7 Trustee or the Office of the United States Trustee.
8. Provide an executed copy of the Rights and Responsibilities of Chapter 7 Debtors and their Attorneys to the debtor.
9. Appear and represent the debtor at the Section 341(a) Meeting of Creditors, and any continued meeting, except as further set out in Section II.
10. File the Certificate of Debtor Education if completed by the debtor and provided to the attorney before the case is closed.
11. Attorney shall have a continuing obligation to assist the debtor by returning telephone calls, answering questions and reviewing and sending correspondence.
12. Respond to and defend objections to claim(s) of exemption arising from attorney error(s) in Schedule C.

II.
Services Included as Part of Chapter 7 Representation,
Subject to an Additional Fee

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

1. Representation at any continued meeting of creditors due to client's failure to appear or failure to provide required documents or acceptable identification;
2. Amendments, except that no fee shall be charged for any amendment to Schedule C that may be required as a result of attorney error;
3. Opposing Motions for Relief from Stay;
4. Reaffirmation Agreements and hearings on Reaffirmation Agreements;
5. Redemption Motions and hearings on Redemption Motions;
6. Preparing, filing, or objecting to Proof of Claims, when appropriate, and if applicable;
7. Representation in a Motion to Dismiss or Convert debtor's case;
8. Motions to Reinstate or Extend the Automatic Stay;
9. Negotiations with Chapter 7 Trustee in aid of resolving nonexempt asset, turnover or asset administration issues.

III.

Additional Services Not Included in the Initial Fee Which Will Require a Separate Fee Agreement

The following services are not included as part of the representation in a Chapter 7 case, unless the attorney and debtor negotiate representation in these post-filing matters at mutually agreed upon terms in advance of any obligation of the attorney to render services. Unless a new fee agreement is negotiated between debtor and attorney, attorney will not be required to represent the debtor in these matters:

1. Defense of Complaint to Determine Non-Dischargeability of a Debt or filing Complaint to Determine Dischargeability of Debt;
2. Defense of a Complaint objecting to discharge;
3. Objections to Claim of Exemption, except where an objection arises due to an error on Schedule C;
4. Sheriff levy releases;
5. Section 522(f) Lien Avoidance Motions;
6. Opposing a request for, or appearing at a 2004 examination;
7. All other Motions or Applications in the case, including to Buy, Sell, or Refinance Real or other Property;
8. Motions or other proceedings to enforce the automatic stay or discharge injunction;
9. Filing or responding to an appeal;
10. An audit of the debtor's case conducted by a contract auditor pursuant to 28 U.S.C. Section 586(f).

IV.

Duties and Responsibilities of the Debtor

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

1. Fully disclose everything you own, lease, or otherwise believe you have a right or interest in prior to filing the case;
2. List everyone to whom you owe money, including your friends, relatives or someone you want to repay after the bankruptcy is filed;
3. Provide accurate and complete financial information;
4. Provide all requested information and documentation in a timely manner, in accordance with the Chapter 7 Trustee Guidelines;
5. Cooperate and communicate with your attorney;

6. Discuss the objectives of the case with your attorney before you file;
7. Keep the attorney updated with any changes in contact information, including email address;
8. Keep the attorney updated on any and all collection activities by any creditor, including lawsuits, judgments, garnishments, levies and executions on debtor's property;
9. Keep the attorney updated on any changes in the household income and expenses;
10. Timely file all statutorily required tax returns;
11. Inform the attorney if there are any pending lawsuits or rights to pursue any lawsuits;
12. Appear at the Section 341(a) Meeting of Creditors, and any continued Meeting of Creditors;
13. Bring proof of social security number and government issued photo identification to the Section 341(a) Meeting of Creditors;
14. Provide date-of-filing bank statements to the attorney no later than 7 days after filing of your case;
15. Pay all required fees prior to the filing of the case;
16. Promptly pay all required fees in the event post filing fees are incurred;
17. Debtor must not direct, compel or demand their attorney to take a legal position or oppose a motion in violation of any Ethical Rule, any Rule of Professional Conduct, or Federal Rule that is not well grounded in fact or law.

Dated:

Debtor

Dated:

Debtor

Dated:

Attorney for Debtor(s)