

17-06

Opinion No. 17-06

Utah Ethics Opinion

Utah State Bar Ethics Advisory Opinion Committee

September 27, 2017

1. **Issues.** This opinion request involves several issues in the practice of consumer Chapter Seven (liquidation) bankruptcies. These issues include:

a. Is a lawyer's advertisement of a "\$99" or "Zero Down" for a consumer Chapter Seven liquidation bankruptcy misleading under Rule 7.1? Is it misleading to advertise that this price is good for a limited time or that a promotion with this price was extended?

b. What are the ethical constraints when requesting the client to sign a post-petition attorney fee contract which will not be discharged?

c. What disclosure must be made, if the lawyer intends to sell the rights to collect the post-petition attorney fee contract to a litigation financing company? Does a relationship with the buyer of the attorney fee contract create a conflict of interest under Rule 1.7?

d. Are the attorney fees reflected in the post-petition contract reasonable when the attorney sells her rights to those fees at a deep discount under Rule 1.5?

2. **Opinions.**

a. Without providing the consumer further information, advertisement of a "\$99" bankruptcy or a "Zero Down" bankruptcy is misleading under Rule 7.1 because the price refers only to the filing of the initial petition. The price does not include the mandatory filing fee as well as work to be done subsequent to the filing of the petition such as preparation of schedules, meeting of creditors and reaffirmation agreements. All of these subsequent activities are necessary to obtain final discharge of debt which, of course, is the purpose of a consumer bankruptcy. Unless the follow up work is done, the bankruptcy will ultimately be dismissed. The consumer will have wasted both time and money.

b. In connection with the disclosures required under Subsection 2.a above, an attorney must disclose that her fees for post-petition work will be more substantial and not dischargeable in the consumer bankruptcy. The attorney cannot "unbundle" the filing of the petition unless it is

reasonable under the circumstances to do so.

c. While it is not a violation of the rules to sell a lawyer's accounts receivable, the client must be fully informed with respect to the transaction. The client must be offered the same discounted price. The client must consent in writing to the sale and must be informed that the legal fees for post-petition work are not dischargeable. The legal financing company will collect the fee and if there is a dispute between the finance company and the client, the lawyer would not represent the client.

d. The fee charged the client (including the finance company discount) must be reasonable. Reasonable fees in consumer bankruptcy are governed by Rule 1.5(a).

3. **Discussion.** This request reflects the growing disconnect between individuals of modest means who need legal services and the ability for lawyers to serve those needs without incurring personal financial hardship. The Utah Bar Association has long recognized this disconnect. Programs have been established to serve the needs of modest means consumers. Every lawyer has a duty to perform pro bono services. Yet, individuals who need to file Chapter Seven liquidation do so because creditors are garnishing wages or threatening foreclosure. The bar cannot reasonably expect that these needs will be met pro bono. Accordingly, it is not sufficient in this opinion to merely declare practices of the consumer bankruptcy bar unethical. Rather, this opinion is intended as a guide to the consumer bankruptcy bar in order to aid them to serve their clients while avoiding violations of the Rules of Professional Conduct. While this opinion discusses the consumer bankruptcy bar, the provisions on advertising, unbundling of services where allowed by law, and full disclosure to the clients are applicable to all lawyers.

4. It takes money to do a consumer bankruptcy. There is a substantial filing fee which may be paid in installments. If the filing fee is not paid, the case will be dismissed. In order to get relief from creditors, a petition must be filed with the court. Typically, the low advertised price refers to the attorney's work in preparation of the petition. Thereafter, there is post-petition work including filing a schedule of the debtor's affairs, attending a meeting of creditors and negotiating any affirmation of debt agreements. In the hypothetical given the committee, the post-petition, attorney fees range from \$1000 to \$2000.

5. Most individuals in Chapter Seven liquidation do not have funds to pay the lawyer for post-petition work which will not be discharged in the bankruptcy.[1] Accordingly, according to the hypothetical, the lawyer informs the client that additional work must be done in order to accomplish

the goal of discharged debt. The client has the choice of hiring the filing lawyer, hiring another lawyer, or doing the work themselves pro se.

6. Pre-petition attorney fees are dischargeable as any other debt. Post-petition attorney fees are not dischargeable and must be paid even after all other debts are discharged. Care must be taken to include only fees generated post-petition in the post-petition attorney fee contract. Care must also be given to full disclosure of the necessity for further work and the amount to be charged. As individuals in consumer bankruptcy are perhaps hiring a lawyer for the first time in their lives, the lawyer has a duty of clarity in these matters.

7. In the hypothetical given the committee indicated that a law firm "factoring" company will buy the notes of debtors covering post-petition attorney fee costs. It is reported that the discount on such contracts is thirty percent. In cases of non-payment, the "factoring" company will "gently" pursue payment from the client. The factoring company has no recourse to the lawyer but looks solely to the client for payment. The hypothetical indicates that a large percentage of Utah Chapter Seven bankruptcies are financed in this manner.

8. A lawyer is allowed to limit the scope of her engagement if limitation is reasonable under the circumstances and the client gives informed consent.[2]See Rule 1.2(c). Rule 1.5(b) requires that scope of the representation and the basis or rate of the fee be communicated to the client, "preferably in writing." This is particularly applicable when the lawyer agrees to perform only a portion of the services needed to accomplish the goals of a legally unsophisticated client.

These facts present the legal issue of when consumer bankruptcy attorneys such as DeLuca may limit the scope of their representation, a practice colloquially referred to as "unbundling." While unbundling is permissible, it must be done consistent with the rules of ethics and professional responsibility binding on all attorneys. Those rules allow a lawyer to limit his or her representation **only when it is reasonable under the circumstances to do so, and only when the client gives informed consent to the limitation.***In re Seare*, 493 B.R. 158 (Bankr. D. Nevada, April 9, 2013. ((Emphasis added)

9. The *Seare* Court discusses the ethical problems of "unbundling" bankruptcy services at great length. The Committee adopts this discussion as reflecting Utah ethical concerns.

Unbundling raises concerns, however. The push to limit representation may come from the attorney, who often benefits from and has superior knowledge of the possible ramifications of excluding certain services.

There are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers.... Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly.... In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

There is a particular concern in consumer bankruptcy practice that attorneys will unbundle services that are essential or fundamental to bankruptcy cases and clients' objectives.

A lawyer walks a perilous path in attempting to limit the services provided to bankruptcy debtors. Making an effective disclosure of the risks of such an arrangement, and obtaining informed consent, may be impossible in some cases. As noted, some lawyer services are so fundamental and essential to effective representation, no amount of disclosure and consent will suffice. Instructing a debtor to "go it alone" in any significant aspect of the bankruptcy case exposes counsel to possible criticism, and worse yet, a potential for sanction.

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In spite of the concerns that unbundling raises, the ABA amended Model Rule 1.2(c) in 2002 to expressly allow limited-scope representation and provide a mechanism to regulate it. Struffolino, *supra*, at 215; AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT 38 (2011) ("ANNOTATED RULES"). The ABA's goal was to "encourage attorneys to provide some assistance to low- and moderate-income litigants who could not otherwise afford full representation." Struffolino, *supra* note 17, at 215 (citing AM. BAR ASS'N, STANDING COMM. ON THE DELIVERY OF LEGAL SERV'., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 8 (2009)); ANNOTATED RULES 38 (citing AM. BAR ASS'N, LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROF'L CONDUCT, 1982-2005 at 55 (2006)). ABA Model Rule 1.2, which Nevada has adopted verbatim, states that "[a] lawyer may limit the scope of representation if the limitation is *reasonable under the circumstances* and the client gives *informed consent*." NEV. RULE OF PROF'L CONDUCT 1.2(c) (2011) (emphasis supplied).

Shortly after the ABA amended the rule, the ABA

published the *ABA Handbook*, a report on limited scope legal assistance. The *ABA Handbook* emphasizes that the majority of people in our nation are low and moderate income, and that often they cannot afford to pay lawyers in litigation. *Id.* at 3. Limited scope legal representation can make the judicial process fairer by providing greater access to justice. *Id.* at 3–4. The ABA quoted a long time limited-service practitioner for the proposition that unbundling should be client driven—" [i]n this legal relationship, 'the client is in charge of selecting one or several discrete lawyering tasks contained within the full-service package.' " *Id.* at 7 (quoting FORREST S. MOSTEN, UNBUNDLING LEGAL SERVS.: A GUIDE TO DELIVERING LEGAL SERVS. A LA CARTE 1 (2000)). …

If limited representation is selected, "the lawyer must also alert the client to reasonably related problems and remedies that are beyond the scope of the limited-service agreement." In a related ethics opinion, the Los Angeles County Bar Association put it this way,

The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to representation.

10. A lawyer should not automatically assume that "unbundling" the filing of a petition is **reasonable under the circumstances** of the case. Indeed, propriety of unbundling a petition may be the **exception rather than the usual practice**. Recent bankruptcy ethics cases demonstrate the concerns of the bankruptcy courts. In *Seare*, the majority of the client's unsecured debt was a judgment for fraud. The lawyer knew this debt was non-dischargeable. Nevertheless, he filed an unbundled and worthless Chapter Seven petition. The attorney was required to disgorge all fees and present a copy of the court's opinion to any future client when the attorney proposed to unbundle the filing of a complaint.

11. *In re Minardi*, 399 B.R. 841 (Bankr. N.D. Oklahoma) concerned a lawyer's attempt to limit services to exclude negotiation of reaffirmation agreements. The court found that 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 Seven debtor." Particularly, the Court held that an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation.

12. The Idaho Bankruptcy Court provides that "an attorney,

in accepting an engagement to represent a debtor in a bankruptcy, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed, and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required." *In re Grimmert*, 2017 WL 2437231 (United States Bankr. D. Idaho June 5, 2017) citing *In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001).

13. If a consumer bankruptcy lawyer presents unbundled legal services, she must comply with Rule 7.1's limitations on false or misleading communications. A representation is false or misleading if it "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." Rule 7.1(a). It would be materially misleading if a bankruptcy lawyer unbundled services and did not explain in detail, preferably in writing, what additional services would be needed to accomplish the client's goal. Just as in *Seare*, it would not be sufficient to remain silent when it is well known that an adversary proceeding is likely to occur. Further, statements indicating that the one-time fee is "for a limited time" or has "been held over" are misleading[3] if not accurate.

14. It is not unlawful for lawyers to sell or encumber their accounts receivable, whether or not the work has been accomplished. Sale or encumbrance of accounts receivable is not sharing fees with a non-lawyer. (Rule 5.4(a)). This is equally true for consumer bankruptcy lawyers. The Texas Court explained:

The main thrust of Leibowitz's argument is that loans such as those at issue in this case fundamentally violate public policy as articulated in the disciplinary rules, which as a general rule prohibit lawyers from sharing legal fees with non-lawyers. However, Texas case law allows an attorney to assign accounts receivable, consisting of current or future, earned or unearned, attorney fees as property securing a transaction. *See Hennigan v. Hennigan*, 666 S.W.2d 322, 325 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.) (concluding that future attorney's fees constitute "accounts" under section 9.106 of the Uniform Commercial Code).⁸ Moreover, as previously stated by this Court, there is a significant difference between sharing legal fees with a non-lawyer and paying a debt with legal fees. *See State Bar of Tex. v. Tinning*, 875 S.W.2d 403, 410 (Tex.App.-Corpus Christi 1994, writ denied)

15. There are a number of potential pitfalls, however, in litigation funding. All of these pitfalls must be discussed with the client. Because of a regular relationship with the funding company, the possibility of a current conflict of interest between the lawyer's interest, the client's interest

and the interest of the funding company in being paid, the lawyer must comply with Rule 1.6(b). The client must give informed consent, confirmed in writing when waiving any such conflicts.

16. The lawyer has but one client and must maintain confidentiality and loyalty towards that client. "Although litigation funding companies are not subject to lawyers' rules of professional conduct, the lawyers whose clients receive funding are." Hazard, Hodes, & Jarvis, "The Law of Lawyering" 8.26 (2014 Supplement.) Chief among the pitfalls are client confidentiality and protecting the independence of the attorney. Further we call attention to Utah Ethics Advisory Opinion 13-05 which discusses the extent to which a lawyer may involve herself in assisting in the application for financial assistance.

17. Finally, the hypothetical raises questions as to the reasonableness of the consumer bankruptcy lawyer's fees. If the lawyer is willing to do the work with a thirty percent discount, we question (but do not resolve) whether the total fee is reasonable. There are, however, guidelines. The consumer bankruptcy lawyer, like all other lawyers, is subject to the reasonable fee provisions of Rule 1.5 which include the time and labor required, the novelty and difficulty of the questions involved and the skill required performing the legal services properly. Other factors include the likelihood that accepting this matter would preclude taking other employment by the lawyer. A reasonable fee might be the fee customarily charged in the locality for similar services. Finally, the reasonableness of a fee depends upon the experience, reputation and ability of the lawyer performing the service.

Notes:

[1] This is a major difference between Chapter 7 liquidation and Chapter Thirteen reorganization. Legal fees for Chapter 13 may be paid as part of the debtor's plan for reorganization. The lawyer, however, has a duty of competence and diligence under Rule 1.1 and 1.3 to effectively counsel the client as to the risks and benefits of relief under both chapters. It would be a violation of those rules if the attorney placed the client in Chapter Thirteen merely to enhance his ability to collect his fee.

[2] "Informed Consent" denotes the agreement by a person to a proposed course of action after the lawyer has communicated adequate information and explanation of the material risks of and reasonably available alternatives to the proposed course of action. See Rule 1.1(f).

[3] Those statements may be unlawful under the Utah Consumer Sales Practices Act. See U.C.A. 13-11-4(d). Such

statements are Misconduct pursuant to Rule 8.4 as they involve criminal conduct reflecting adversely upon a lawyer's honesty and the lawyer engages in conduct involving dishonesty, fraud, deceit or misrepresentation.
