LUNDBERG LEGAL

317.416.0733 DONALD R. LUNDBERG, LAWYER WWW.LUNDBERGLEGAL.COM
PORT WASHINGTON, NY 11050
DON@LUNDBERGLEGAL.COM
ADMITTED TO PRACTICE IN INDIANA—NOT ADMITTED TO PRACTICE IN NEW YORK

MEMORANDUM

To: Mark Zuckerberg
From: Don Lundberg
Re: Bifurcated Representation of Debtors in Chapter 7 Cases
Date: April 15, 2022

I have not marked this memorandum as an attorney-client communication because I understand that you are contemplating sharing it with non-clients outside your law firm. You understand that it is, in fact, a privileged communication unless and until you share it with others, at which point it will lose its privileged quality.

This is legal advice to you alone. If you choose to share this memorandum with anyone outside of our attorney-client relationship, I expressly disclaim the existence of any attorney-client relationship with anyone other than you. No lawyer other than you is authorized to rely on this memorandum as my legal advice to him or her.

I am providing this memorandum at your request to address potential professional responsibility issues that could arise from three related scenarios pertaining to attorney representation of debtors in Chapter 7 bankruptcy cases. These three scenarios are:

1. The attorney and client agree that the attorney will provide representation for all work up to and including the filing of a Chapter 7 petition (and perhaps some, but not all, post-petition matters) that is sufficient to give the client the initial benefits that flow from having filed a petition. And the attorney and client contemplate that after a Chapter 7 petition is filed, they will enter into a second agreement pursuant to which the attorney will represent the client to the conclusion of the Chapter 7 case. I will refer to the first agreement as a "pre-petition" agreement, and the second agreement as a "post-petition" agreement. Together, I will refer to this two-phase representation as a "bifurcated" representation.

2. Under a bifurcated representation, the post-petition agreement contemplates that the client will pay the attorney fee for the post-petition representation by making periodic payments over time—generally 12 months.

3. Under a bifurcated agreement where the client agrees to make periodic fee payments, the attorney enters into a credit arrangement with a third party whereby the stream of fee payments by the client secures the lender's agreement to pay a portion of the total of payments to the attorney upfront and the attorney builds into the client's fee to be paid over time some or all of the borrowing costs to the attorney.

After some introductory comments, I will discuss these scenarios in that order.

I. INTRODUCTION

Debtor's attorney fees in a Chapter 7 case are subject to at least two types of regulation. The first type is the requirements imposed on debtor's counsel (and all other lawyers) by the Rules of Professional Conduct.[1] In bankruptcy cases, attorney fees (including fees charged by Chapter 7 debtor's counsel) are also governed by Sections 329 and 330 of the Bankruptcy Code. The Rules of Professional Conduct create professional responsibility standards that govern attorney fees. The Bankruptcy Code establishes the legal standards for reasonableness of attorney fees, which are subject to case-by-case evaluation. I will be setting forth my opinions about the professional responsibility issues potentially presented by the three scenarios. If the scenarios I discuss pass muster from the professional responsibility perspective, it does not necessarily mean they also pass legal muster under the Section 330 standard. However, one naturally anticipates that the reasonableness of a fee as a matter of professional responsibility will go far in assisting a court to determine the legal reasonableness of a fee under Sections 329 and 330.

The professional responsibility aspects of attorney fees are mostly regulated by Rule of Professional Conduct 1.5. The general rule, stated in Rule 1.5(a), is: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[2] Rule 1.5(a) sets forth a non-exclusive list of factors to be considered in determining the reasonableness of a fee:

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[1] All references to the Rules of Professional Conduct are to the Indiana Rules of Professional Conduct, which have been incorporated into the local rules for the U.S. District Courts for Northern and Southern Districts of Indiana. U.S. District Court for the Northern District of Indiana Local Rule 83-5(e); U.S. District Court for the Southern District of Indiana Local Rule 83-5(e).

[2] I assume that the primary expenses in a Chapter 7 case is the court filing fee and the fee charged for the required debtor education course and that these are expenses that will be incurred by the

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Prof. Cond. R. 1.5(a).

It is important to note, however, that the primary regulator of attorney fees is the marketplace for legal services. In a competitive market for legal services, where many lawyers are offering their services, and where consumers are price sensitive, the marketplace is a highly efficient regulator of price. Chapter 7 representation is an example of a marketplace marked by many sellers of legal services and by buyers who are sensitive to price. If one examines Indiana's lawyer discipline caselaw, one sees that the profession's regulator steps in when there is overreaching or legal impropriety with a fee, but rarely (perhaps never) intervenes to trump the decision of a willing and fully informed client to accept the terms of legal representation offered by an attorney. From a professional responsibility perspective, something "more" must be present before the profession's regulator will act to trump the fee charged by an attorney[3] to a willing and fully informed client.

Some of the concepts I will be discussing below turn on a client's informed consent. The modern approach to many professional responsibility issues is to reject paternalism in favor of recognizing the agency of clients and their ability to make decisions about the key aspects of the attorney-client relationship so long as they are well-informed. Thus, the Rules of Professional Conduct often set forth a professional responsibility standard that can be modified with the client's informed

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debtor without any markup by debtor's counsel. I will therefore not discuss the handling of expenses in Chapter 7 representations

[3] I will generally refer to attorney or lawyer in the singular, although this opinion will not change if the attorney practices with others in a law firm.

consent. "'Informed consent' denotes the agreement by a person [usually the client] to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the materials risks of and reasonably available alternatives to the proposed course of conduct." Prof. Cond. R. 1.0(e). In bankruptcy cases, there may be others besides the debtor, particularly creditors, who have a stake in reasonableness of attorney fees, which if not held in check would reduce the debtor's assets available for other purposes. That said, this memo will be discussing the bifurcation of representation where a pre-petition agreement defines a limited scope of services for one fee and a post-petition agreement defines another scope of services for another fee.

II. BIFURCATED REPRESENTATION IN CHAPTER 7 CASES

There really ought not to be a need to engage in an in-depth discussion of bifurcated representations in Chapter 7 cases in the Seventh Circuit, since the availability of a bifurcated approach was favorably recognized by the Court almost twenty years ago in *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125 (7th Cir. 2003). In that case, the court determined that a client's fee obligations unpaid at the time of filing the Chapter 7 petition were subject to discharge. The court went on to say there was a solution for client's who could not pay the entire fee upfront for a Chapter 7 bankruptcy: "Those who cannot prepay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins — for a lawyer's aid is helpful in prosecuting the case as well as in filing it. Legal fees incurred after filing in such situations receive administrative priority; that prospect (plus some pre-filing retainer) should be enough to summon legal assistance. And debtors retain the ability to represent themselves, when legal aid cannot be found." *Id.* at 1128. Indeed, *Bethea* acknowledges the impetus behind bifurcated representations in Chapter 7 cases: the client needs the immediate relief afforded by filing a Chapter 7 petition yet lacks the financial resources to pay for the entire representation before the petition is filed.

Nonetheless, as a professional responsibility matter, it should be useful to discuss some of the ins and outs of bifurcated representations.

As a specialized type of fiduciary agency agreement, the key aspects of an attorney-client relationship are the product of the contractual agreement between client and lawyer. Such agreements are not required to be in writing (contingency fee representation being the primary exception; see Prof. Cond. R. 1.5(c)), but written agreements are encouraged and are certainly best practice. Prof. Cond. R. 1.5(b). Regardless of whether it is a written or oral agreement, the fundamental aspects of the relationship include the scope of the representation and the cost to the client. "The scope of the representation and the basis or rate of the fee and

expenses for which the client will be responsible shall be communicated to the client will be responsible shall be communicated to the client, preferably in writing, fore or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client." Prof. Cond. R. 1.5(b).

Attorneys and clients may generally agree to limit the scope of representation. "A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Prof. Cond. R. 1.2(c). Indeed, except for general counsel relationships, many, perhaps most, legal representations are limited in scope in some fashion. When a lawyer represents a client on a particular matter, it is usually understood (or better, explicitly stated) that the representation excludes representation on unrelated matters.

There are other types of scope limitations on which the attorney and client may agree. Limited only by the concepts of reasonableness and informed client consent, as Rule 1.2(c) contemplates, legal representations may be limited in any number of ways. Although not stated in the rule, one predicate for limiting the scope of representation rests on the idea, deeply imbedded in our law and legal culture, that a client may virtually always proceed on his or her own without legal representation. Recognition of the ability of attorney and client to limit the scope of a representation was also driven in part by an appreciation of the costs of legal services and the limited ability of many clients to afford full-service representation, under the theory that some professional legal help is usually better than none. Within the scope of representation, however, the lawyer must still act competently. Prof. Cond. R. 1.2, cmt. [7].

A bifurcated representation in a Chapter 7 case is not, strictly speaking, a limited scope representation. It is more in the nature of a tiered representation, contemplating from the outset that the client will later retain the lawyer who files the petition (albeit while being free to hire another lawyer or proceed on his or her own) to complete the bankruptcy, thereby being represented by counsel throughout. The client understands at the outset what additional post-petition services will be required to complete the case and what it will cost the client to later contract to complete them. But because the client does not actually contract for those services until after the petition is filed, the client has the choice to decline hiring the petitioning counsel to complete the case and complete the case on his or her own or by hiring other counsel.

However, should the client not retain the petitioning lawyer to complete the case, it is prudent to treat the pre-petition representation as a species of limited scope representation. The Rules of Professional Conduct are permissive of this approach so long as the limited scope is reasonable and the client gives informed consent to the lawyer's limited role.

In addition to the question of whether a debtor and his or her attorney may enter into a bifurcated representation (*Bethea* and other cases[4] say yes), what are the hallmarks a bifurcated agreement must meet to pass ethical muster? First, the bifurcation must be reasonable. A reasonableness problem might arise from a bifurcated representation that resulted in the representation in either the pre-petition or post-petition phases being illusory or, more likely, limiting the lawyer's role so severely that the representation can be neither diligent nor competent.[5] But in a typical bifurcated representation, the written representation agreements will (and should) clearly articulate what services the lawyer contracts to perform in each phase, describing the legal services with sufficient particularity that it can be determined that the client (1) will receive reasonable value for the lawyer's work in each phase of the representation, (2) will if represented by the lawyer in both phases be able to navigate the Chapter 7 process with full representation, and (3) together with in-person consultation, assure that the client has been sufficiently advised of the nature and limitations of each phase of the representation such that the client's consent to the representation is informed.

A well-crafted pre-petition agreement will not suffer from defects in the competence and diligence it calls upon the lawyer to display. While it is true that in a bifurcated agreement, the debtor *could* be left unrepresented during the post-petition phase, that does not mean that the lawyer's first-phase representation suffered from a lack of competence or diligence. The lawyer will have taken the client as far as the pre-petition agreement contemplated, ethically obliged to exhibit competence and diligence in doing so. Because a debtor is free to proceed entirely pro se in Chapter 7 case, the debtor is equally free to proceed pro se for part of the

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[4] *See, e.g., Walton v. Clark & Washington, P.C.*, 469 B.R. 383 (Bankr. M.D. Fla. 2012); *In re Slabbink*, 482 B.R. 576 (Bankr. E.D. Mich. 2012); *In re Hazlett*, No. 16-30360 (Bankr. D. Utah April 10, 2019); *In re Carr*, No. 19-20873 (Bankr. E.D. Ky. January 22, 2020).

[5] Lawyers in Indiana must "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation." Prof. Cond. R. 1.1. Lawyer must also "act with reasonable diligence and promptness in representing a client." Prof. Cond. R. 1.3. This is the client-directed aspect of diligent practice. Lawyers also have an independent duty to tribunals and other parties to "make reasonable efforts to expedite litigation consistent with the interests of the client." Prof. Cond. R. 3.2. Although the Rules of Professional Conduct tease the duties of competence and diligence apart, it might reasonably be said that the duty of diligence in one aspect of the duty of competence.

Chapter 7 case. The Eastern District of Michigan Bankruptcy Court carefully analyzed the competency question of a bifurcated representation and concluded:

> An individual debtor's attorney may well meet his or her duty of competence in preparing and filing a bare bones petition with the intention of preparing and filing the balance of the required documents after the petition has been filed. If the bankruptcy petition and other minimal documents necessary to avoid dismissal are prepared and filed properly by the attorney, in a manner that enables the individual debtor to move forward in such case with a reasonable prospect of completing the case and obtaining a discharge, the Court rejects the proposition that the attorney has automatically failed the duty of competence just because the attorney has not been hired to file and has not filed those documents that the law either requires or permits to be filed post-petition.

In re Slabbinck, 482 B.R. 576, 593-94 (Bankr. E.D. Mich. 2012).

A second potential professional responsibility point with bifurcated agreements is that the agreements for both phases must provide the debtor with adequate disclosure calibrated to the sophistication of the debtor such that the debtor has a complete understanding of the scope of the representation for each phase and, by entering into an agreement, makes an informed and intelligent choice. This includes clearly informing the debtor of the option to pay for the entire representation upfront.

The written fee agreements for both phases of a bifurcated representation will be a strong indicator of the quality of the consultation that occurred between lawyer and client in advance of the client's agreement to the representation; although the written agreements should only document and supplement the clarity with which the lawyer communicates orally the nature of the bifurcated agreement to the client and entertains any questions the client might have about the nature and scope of the representation. The hallmarks of effective representation agreements in a bifurcated Chapter 7 representation include a clear and readily understandable description of:

- The services that must be completed in order for the Chapter 7 case to go to discharge.
- The option available to the client to pay fees for the entire case in advance and the option to pay separately for pre-petition services and to later contract for the lawyer's representation in providing post-

petition services, clearly spelling out what services are included in each phase of representation.

- The differences in the fees to the client if the client pays for representation for the entire case upfront or pays for pre-petition services and later contracts with the lawyer for post-petition representation.
- The fact that completion of the first phase of services is not enough for the case to got to discharge.
- The client's free choice to retain the petitioning attorney to handle post-petition aspects of the case, handle post-petition matters pro se, or hire another attorney to complete the case.
- Anticipate that if the client does not retain the petitioning attorney to handle the case, the petitioning attorney will be authorized to seek leave of court to withdraw from the representation, which if allowed will leave the client in a position of proceeding unrepresented or through new counsel.

I want to address separately the question of withdrawal by petitioning counsel after the services contemplated by the pre-petition agreement are completed and the client declines to retain the petitioning lawyer to provide post-petition services. As a preliminary matter, though, it will likely be a rare occasion when petitioning counsel seeks leave to withdraw because the client will have been fully informed at the outset of the nature of both pre- and post-petition representations and engaged counsel for the pre-petition phase fully expecting (but not yet obligated) to later retain the petitioning counsel to handle the post-petition phase of the representation. If the client does not retain petitioning counsel to handle the post-petition phase of the bankruptcy, the lawyer is not only free to seek leave to withdraw, but because he or she no longer has contractual authority to act for the client, is obligated to seek leave to withdraw.[6] See Prof. Cond. R. 1.16(a)(3).

If the client chooses to use different counsel, substitution by new counsel for the petitioning attorney should be straightforward. *See* Southern District of Indiana Local Bankruptcy Court Rule B-9010-2(a). This also seems to be implicit in the Northern District. *See* Northern District of Indiana Local Bankruptcy Court Rule B-9010-2(f). If the client neither retains petitioning counsel to handle post-petition matters nor hires new counsel, and if petitioning counsel does not wish to continue the representation on other terms acceptable to the client, petitioning counsel will

[6] Petitioning counsel could, but would not be required, to handle the post-petition phase of the case on terms other than contemplated at the outset of the representation, including by completing the matter on a pro bono basis without charging any further fee.

nonetheless not be relieved of responsibility for the case unless and until he or she receives court permission to withdraw. "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Prof. Cond. R. 1.16(c).

In the Northern District Bankruptcy Court, an appearance is effective until the court orders it withdrawn. N.D. Ind. Local Bankruptcy Court Rule B-9010-2(b). A motion to withdraw that is not accompanied by an appearance by other counsel, must state grounds for withdrawal and show proof of satisfactory notice to the client of the reasons for withdrawal and the intent to do so. N.D. Ind. Local Bankruptcy Court Rule B-9010-2(f)

In the Southern District, a motion to withdraw without substituting new counsel is governed by Southern District Local Bankruptcy Rule B-9010-2(c). It requires (1) evidence of a written request from the debtor to withdraw, or (2) proof of notice to debtor of intent to withdraw.

There is some risk for lawyers who use a bifurcated approach in Chapter 7 cases that the debtor could choose not to retain the lawyer for the second phase, yet fail to hire new counsel, and the court refuse to grant a motion to withdraw appearance. That scenario should be unlikely inasmuch as the local rules on withdrawal seems to implicitly view as good cause to withdraw that the debtor has asked the attorney to withdraw, or the debtor has been given satisfactory notice of the attorney's intent to withdraw.

In the unusual circumstance where a court refuses to let a lawyer to withdraw, the lawyer is left in the unenviable position of being counsel of record for a client with whom the lawyer no longer has contractual authority to act as an agent. Nonetheless, the lawyer would then be required to continue the representation without further compensation and try to maintain as normal an attorney-client relationship as possible. *See* Prof. Cond. R. 1.16(c).

While local rules have been considered a potential impediment to bifurcated representation, it has been under local rules that differ from those in the Northern and Southern Districts of Indiana Bankruptcy Courts and, in any event, that position has been criticized. Recently, in *In re Rosenschein*, No. 21-cv-01080-JMC (U.S.D.C S.C. March 14, 2022) (copy attached), an appeal of a Bankruptcy Court order, the District Court reviewed a Bankruptcy Court order holding that the local rule on attorney appearances (different from and somewhat more restrictive than the Northern and Southern Indiana Bankruptcy Court local rules) was incompatible

with bifurcated representation. In reversing the Bankruptcy Court, the District Court expressed sympathy for the reasons underlying the impetus to bifurcate Chapter 7 representations so clients could have the needed benefits of filing a Chapter 7 petition even though they couldn't pay all fees up front but went on to address only the narrow local-rules issue decided by the Bankruptcy Court. Even under a highly deferential standard when reviewing a Bankruptcy Court's construction of its own local rules, the District Court went on to reverse the Bankruptcy Court's holding that a bifurcated representation violated the local bankruptcy court rule that the lawyer who files a bankruptcy is "deemed" to be debtor's counsel for all purposes, subject to another local rule allowing court-approved withdrawal upon client consent or cause shown.

> The court is mindful of the concern that attempts by counsel "to limit or exclude certain types of representation, or to condition continued representation on the prepayment of additional fees, can leave debtors vulnerable and without representation during a crucial part of their case." *In re Burgess*, No. 16-03815-JW, at 8 (Bankr. D.S.C. Apr. 19, 2017). However, as the court stated above, Appellant has acknowledged that, regardless of whether the debtor signs a post-petition agreement, he is the attorney of record for the debtor until the court allows him to withdraw. This is consistent with the South Carolina Rules of Professional Conduct and withdrawal is controlled by the Bankruptcy Court pursuant to SC LBR 2091-1(a). Importantly, Appellant did not attempt to withdraw from any of the underlying cases and was successful in assisting each of the debtors. The court cannot read South Carolina's Local Rule to bind debtors and their attorneys together for the duration of a case with no possible exit strategy for either party, particularly where the local rules specifically provide a means for withdrawal. See U.S. Bankr. Ct. Rules D.S.C., LBR 2091-1(a).

Id., slip op. at 17.

How a motion to seek leave to withdraw appearance in a bifurcated Chapter 7 representation where the client does not sign an agreement for post-petition representation would be met by a Bankruptcy Court in the Northern or Southern Districts of Indiana is not known, it is clear that the petitioning attorney is obliged as a matter of both professional responsibility and local rule to continue the representation even if the court refuses to let the petitioning attorney to withdraw.

I also want to address separately an interesting question that has been given scant attention by other authorities. As noted earlier, a lawyer who enters into a pre-petition agreement with a Chapter 7 client should fully inform the client at the

outset of the representation of all aspects of the post-petition representation agreement should the client, as anticipated, retain the petitioning lawyer to handle. Because this is all part of the information exchange in advance of the formation of an attorney-client relationship, the dealings between lawyer and client are at arm's length and not between a principal (the client) and his or her fiduciary agent (the lawyer). Nonetheless, when it comes time to actually entering into the post-petition agreement, the lawyer is engaged in a transaction with a client to whom the lawyer owes a fiduciary duty. This could be considered a species of business transaction with a client, governed by Rule of Professional Conduct 1.8(a), which states:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

For this reason, and even though the client was fully informed of the terms of the post-petition agreement before any attorney-client relationship was formed, I suggest that the post-petition agreement state its terms in a manner readily understandable by the client,[7] inform the client that it is desirable for the client to have an opportunity to seek the advice of independent legal counsel before entering into the post-petition agreement,[8] and inform the client that the lawyer is not acting as the client's legal counsel related to the post-petition agreement.[9]

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[7] This should be the case anyway for other reasons.

[8] The advice to consult with independent counsel might admittedly be of little value to the client whose resources are limited. Nonetheless, Rule 1.8(a) requires such an advisement. In any event, the client was fully aware from the time pre-dating the attorney-client relationship (and, therefore, not covered by Rule 1.8(a)) of all material terms of the anticipated post-petition representation.

[9] I will point out in Section V that the one quibble I have with the template forms of a fee-financing company named Fresh Start Funding is that the pre- and post-petition agreements to not strictly

So long as the client is fully informed at the outset in understandable terms of the details of the pre-petition representation and the anticipated post-petition representation and consents to the representation on those terms, there is nothing about a bifurcated representation in a Chapter 7 case that runs afoul of the Rules of Professional Conduct.

III. Attorney Fees for Post-Petition Representation

In theory, the debtor and the post-petition attorney (almost always the petitioning counsel) could contract for the debtor pay the fee for the post-petition phase of the representation in advance of entering into the post-petition agreement. Realistically, if the debtor was unable to fund the entire representation by paying upfront, it is unlikely the client will have the funds to pay for the post-petition phase upfront. Indeed, it is the client's need for the immediate relief that comes from filing a petition coupled with the inability to pay the entire fee upfront that drives the decision to provide bifurcated representation in the first place. Thus, in almost all bifurcated cases as a matter of practical necessity, the petitioner's lawyer will agree to take payment of the post-petition phase fee over time.[10] A common example might be for the lawyer to take the post-petition fee in twelve equal monthly installments. It rarely presents a professional responsibility issue if a lawyer agrees to let a client to take time to pay the lawyer's fee. However, the lawyer who agrees to take a fee payment over time might wish to recognize in the fee (1) the cash-flow challenges presented when fees are not paid upfront; (2) the opportunity costs of delay in receiving payment; and (3) the risk of the client's default on his or her fee-payment obligation. It is well accepted within the profession and unquestioned by Indiana's professional regulator that lawyers may charge clients interest on fees paid later than a specified time after billing (typically, thirty days).[11] This is simply a recognition that lawyers are not banks and should not be involuntarily turned into free lenders by clients who choose to disregard the payment terms established by engagement agreements.

Whether fees are taken upfront, paid as billed, or taken over time, they still must comply with the reasonability requirement of Rule of Professional Conduct 1.5(a). The professional conduct standards for reasonable fees act as a guide for lawyer self-regulation and also the standard by which a fee would be scrutinized in a lawyer discipline proceeding. "Compliance with the Rules, as with all law in an

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comply with Rule of Professional Conduct 1.8(a). An argument could be made that they don't need to, but I do not believe that is the better practice.

[10] The precise terms of the payment of the second-phase fee may differ from lawyer-to-lawyer or even client-to-client.

[11] The fact that interest will be charged on late payments needs to be spelled out in the fee agreement.

open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings." Prof. Cond. R. Scope ¶ [14].

In bankruptcy cases, debtor's counsel's fees must also be reasonable under the somewhat different criteria for reasonableness in Section 330(a) of the Bankruptcy Code, which must consider the nature, extent and value of legal services and take into account factors that include (but aren't limited to):

> (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 service was 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, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
>
> (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

11 U.S.C. 330(a)(3). The fee charged by debtor's counsel must be disclosed to the court under Section 329(a), and the fee is subject to the court's review for reasonableness under Section 329(b). As noted earlier, reasonableness under Section 330 is a legal question to be decided by the court on which I do not state an opinion. However, whether a fee is proper as a matter of professional responsibility, about which I do comment, is something a court would generally want to consider.

Indiana's professional regulator, the Disciplinary Commission, has not intervened to question attorney fees charged consistent with a representation agreement entered into by a fully informed client that is the product of a competitive marketplace for legal services. This is clearly aligned with an understanding that being a legal professional in private practice requires a lawyer to also be a competent businessperson and who attend to the business of covering overhead and making a living else there will be no economic capacity to stay in

business and serve future clients. So long as the fee charged by the lawyer is reasonable, it is also, perforce, reasonable for the lawyer to expect payment of the fee on the terms stated or else to be fairly compensated for the costs inherent in allowing clients to pay for services over time.

There is no Indiana caselaw questioning the notion that a lawyer and client may agree that the lawyer may be reasonably compensated for the costs and risks of not being timely paid for the work the lawyer does for the client. In fact, a lawyer's ability to work with clients to structure fee payments on terms the client can afford is implicitly recognized by Indiana Rule of Professional Conduct 7.2, cmt. [2](18) where it states that, among the many subjects of advertising, lawyer advertising may address is "whether credit cards or other credit arrangements are accepted."

So long as it is reasonable under Rule 1.5(a), there is no professional responsibility prohibition on a lawyer changing a client who wishes to pay over time a greater fee than the client who pays upfront or pays promptly when the fee is due.

IV. LAWYER FINANCING AND CLIENT FEES

Although, as stated above, a lawyer may, if it is done transparently and reasonably, charge more to the client who wishes to make payments toward a fixed fee over time than the client who pays the fixed fee in advance, allowing clients to pay their fees over time and after services are rendered presents operational challenges for a lawyer. It strains the lawyer's cash flow and liquidity, and it diverts the lawyer's resources from representing clients to managing client payments. Finally, by accepting payments over time, the lawyer incurs the risk of default by the client. Those considerations will necessarily impact the lawyer's overhead and the fees the lawyer must charge clients.

In a bifurcated representation, the lawyer may, of necessity have to allow clients to pay over time, but may not wish to incur the risk and resource drain of directly extending payment terms to the client and collecting according to those terms. Instead, the lawyer may wish to enter into an arrangement with a third party to advance funds to the lawyer in exchange for accepting repayment as the client makes payments toward his or fee obligation. One prominent third party active in the space of extending credit to lawyers who agree that their Chapter 7 clients may make post-petition fee payments over time is Fresh Start Funding ("FSF"). I have reviewed the key documents that are used by FSF.

Whether it is FSF or some other third-party creditor, the arrangement must pass muster under the Rules of Professional Conduct. The FSF business model is, in summary terms, as follows: the Chapter 7 lawyer enters into a Line of Credit and Accounts Receivable Management Agreement and a separate Line of Credit Note

with FSF. Pursuant to these documents, FSF provides asset-based, working capital financing to the lawyer; it manages the payment obligations of qualified clients; and it provides favorable credit reporting for clients who succeed in keeping their payment commitments to help the clients rebuild their creditworthiness. The financing aspect of FSF's suite of services is a recourse line of credit secured by a collateral assignment of receivables as security for repayment. Each time the lawyer extends post-petition payment terms to a Chapter 7 client who meets basic underwriting requirements, FSF allows the lawyer to draw on the line of credit 65% of the amount of the total of post-petition fee payments. FSF retains 25% as its fee for the financing, management services, credit reporting, and other related services, and 10% of the post-petition fee is credited to a holdback account which operates as a pooled risk fund for client payment delinquencies and defaults in order to reduce the risk that the lawyer will have to come out of pocket to cover client delinquencies and defaults.

In my opinion, the FSF financing model is proper as a matter of professional responsibility because it meets certain requirements to be discussed below and the nature of the fee is fully disclosed to the court on the Form B2030 Attorney Disclosure of Compensation.

1. Fee Sharing

Under the FSF model, the qualified post-petition client makes payments to FSF and FSF remits 75% to the participating lawyer (subject to the 10% holdback account). A question arises whether this is impermissible fee-sharing with a nonlawyer as prohibited by Indiana Rule of Professional Conduct 5.4(a), which states: "A lawyer or law firm shall not share legal fees with a nonlawyer [with exceptions not applicable here]." It does not violate that rule because the FSF model does not share legal fees. This is not a sharing of fees, but rather it merely uses the stream of income from clients as the source of payments to FSF that the lawyer is otherwise obligated to make for each post-petition arrangement accepted pursuant to the underwriting guidelines. Under that model the lawyer is obligated due to the recourse provision to pay FSF regardless of whether the client makes good on the payment arrangements. This is no more fee sharing between the lawyer and FSF than any payments made by a lawyer to a creditor from legal fees paid by clients. While it is true that the lawyer's payment to FSF is *measured* as a percentage of the fee paid by the client, the lawyer is obligated to pay FSF whether or not the client pays. FSF's claim is for the funds advanced and not a claim to a share of the fees. This point was addressed in New York County Bar Association Opinion 2018-5 at note 9:

> This opinion does not read Rule 5.4(a) to forbid funding arrangements in which the lawyer's debt obligation is secured by current or future accounts receivable but repayment is not contingent on the receipt or amount of fees. For example, a recourse debt that is not contingent on the amount of legal fees – e.g., a promise to repay a loan with interest over a particular period of time – does not constitute impermissible fee sharing simply because the debt is secured by accounts receivable in one or more matters. In the case of a recourse loan, there is no implicit or explicit understanding that the debt will be repaid only if legal fees are obtained in particular matters, and the creditor may seek repayment out of all of the law firm's assets.

The fact that FSF assists the lawyer as part of its suite of services to collect fees from post-petition clients and applies those fee collections to the lawyer's indebtedness does not change the analysis. That is simply the contractual method by which the lawyer and FSF agree the lawyer will use as a source of repayment, but not to the exclusion of the lawyer's obligation to repay FSF regardless of whether the client pays. As one Texas court stated: "One does not ordinarily consider paying a pre-existing debt with sums earned by fees generated rendering services as sharing those fees." *State Bar of Texas v. Tinning*, 875 S.W.2d 403, 410 Tex. App. 1994).

In this regard, it is important to consider the purpose of the fee-sharing prohibition in Rule 5.4(a). As the title to that rule implies, it is to guard against the influence of those who have an interest in the lawyer's fee on the lawyer's professional judgment. The FSF model is categorically *unlike* a lender extending credit to a lawyer with repayment contingent upon the outcome of a litigation. In that circumstance (but not here), the lender has "skin in the game" and the arrangement creates risk that the lender will attempt to influence the lawyer's professional judgment in handling the litigation in order to protect its financial interest in the outcome of the litigation. When, under the recourse provision, the lawyer is obligated to repay the creditor in the agreed amount, the creditor is agnostic about the conduct of the underlying legal representation, which is left to the lawyer's exercise of professional judgment.

2. Fee Reasonableness

As discussed earlier, lawyer's fees must be reasonable as a general proposition (Rule of Professional Conduct 1.5(a)) and in bankruptcy representations (Section 330). Are the fees of a lawyer who works with FSF unreasonable because the cost to the lawyer of working with FSF (including the cost of credit and the payment-collection services) factors in setting a higher fee for the client than if the

client paid for the entire Chapter 7 representation in advance of filing the petition? In the preceding section, I discussed how it was not unreasonable for a lawyer to set the terms of client fees in contemplation of such overhead considerations as time value of money, the effect on cash flow, and the risk of default.

A lawyer's decision to shift those costs from internal ones to external ones by contracting with FSF or some other lender and building those overhead costs into client fee charges does not change the reasonableness analysis. So long as the overall fee to the client, taking into consideration all aspects of what the fee covers, including the client's ability to make fee payments over time without having to pay any funds up front (such as by paying a fee retainer), is commercially reasonable, there is no material difference in terms of reasonableness.

Lawyer's fees charged to clients always incorporate the lawyer's overhead incurred to stay in business. It is reasonable for a lawyer's client fee charges to reflect all of the costs of doing business, including the cost to the lawyer of credit to remain in business. How the costs of credit are teased out of a fixed fee for post-petition Chapter 7 services is imprecise. Lawyers don't break down their client fees by specifying the many overhead components that contribute to it. It is clear, though, that passing on the costs of credit as one of many overhead items to be covered by the lawyer's fees charged to clients (generally the sole source of lawyer income) is not unreasonable so long as the fee (considering all circumstances) is reasonable. See ABA Formal Opinion 484 at 10-11. See also Utah Opinion 17-06.

It certainly cannot be said categorically that recognizing the overhead costs of financing as an element of the fees charged to clients is unreasonable. Every fee charged to a client must stand on its own as reasonable under Rule 1.5(a) and in Chapter 7 cases under Section 330. However, in fairness, the reasonableness of a lawyer's fee that incorporates the costs of the client's right to pay fees over time should not be assessed for reasonableness in comparison to an entirely different fee arrangement—where a client pays the entire fee in advance of services being provided. It is true that both fees must be reasonable, but they must be reasonable for what each is and what each is not—rather than in comparison to each other.

3. Fee Disclosure to the Client

In ordinary circumstances, when a lawyer obtains funds through credit arrangements and builds the costs of that credit into the fees he or she charges a client, the lawyer has no particular duty to particularize for the client the cost of credit as one of many components that contribute to the lawyer's fee any more than

the lawyer has a duty[12] to inform clients that an increased rent is a component of the client's fee. It may be different, however, when the fee to be charged to the client is presented as an alternative to the client paying a lesser fee if it is paid entirely up front, and when the lawyer is looking to the client's stream of payments to, in the first instance, make payments on extended credit. It may also be different under the duty described earlier under Rule of Professional Conduct 1.8(a) for a lawyer who enters into a contract with an existing client (in this case, for post-petition services) to fully describe the terms of the transaction to the client.

For this combination of reasons, it is prudent and, for conflict-of-interest considerations discussed next, required as a matter of professional responsibility, for the lawyer to clearly spell out for the client in a bifurcated Chapter 7 representation the line-of-credit arrangements made by the lawyer to facilitate the ability to accept post-petition fee payments over time. I have examined the FSF Pre-Filing Agreement and Post-Filing Agreement templates and believe those client agreements robustly disclose the relationship between the participating lawyer and its Chapter 7 client and the consequences of the relationship for the client.[13]

4. Conflicts of Interest

A fee financing arrangement like under the FSF model opens up the possibility of conflicts of interest.

One type of conflict of interest, already discussed, involves transacting business or engaging in some other adverse financial relationship with a current client governed by Rule 1.8(a). There is no need to discuss that point further.

Another possible conflict of interest is a so-called material limitation conflict governed by Rule of Professional Conduct 1.7(a)(2), which states: "Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Here it is the possibility that the client's default will result in a financial loss to the lawyer that could cause the lawyer to place his or her personal financial interests ahead of the client's.

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[12] A lawyer who increases fees to existing clients might choose to identify increased overhead as a reason, but that is a matter of the lawyer's choosing, not because it is required.

[13] I have one quibble with the FSF fee templates for pre- and post-petition representation: I believe they should expressly inform the client, consistent with Rule of Professional Conduct 1.8(a), of the desirability seeking advice from independent counsel about the post-petition agreement and to inform the client that the lawyer is not representing the client's interests with respect to entering into the post-petition agreement.

Because the FSF advances to the lawyer are with recourse as to the lawyer, it means that if the client does not make the fee payments, the lawyer is liable for the debt from funds other than the client's fees. Thus, the lawyer has more at stake than simply having to forego income from one client's fee payments.

Many, probably most, material-limitation conflicts are waivable by the client if the client gives informed consent after a full disclosure of the conflict.

> Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Prof. Cond. R. 1.7(b). In my professional opinion, it is reasonable for a lawyer working with FSF or under a similar model to believe that his or her representation of the client will be competent and diligent notwithstanding the lawyer's relationship with FSF; thus, a client conflict waiver is not categorically excluded by Rule 1.7(b)(2). I am unaware of any legal prohibition on a client conflict waiver in these circumstances. There is no aspect of the FSF funding model that entails the participating lawyer's assertion of a claim by one client against another.[14] Lastly, I have reviewed the FSA Pre-Filing Agreement and Post-Filing Agreement and believe they accomplish a clear communication to prospective clients about the relationship with FSF such that the client who gives informed consent to the representation after receiving those disclosures does so in an informed manner.

It is also important to keep in mind that the FSF model is not presented to the client as the only choice. The client gives informed consent to that option only after being clearly informed that the client has the option to accumulate the funds to pay for the entire Chapter 7 representation upfront. In addition, of course, the client always has the option to go elsewhere for legal representation on terms more acceptable to the client.

5. Disclosure of Client Information

The underwriting criteria in the FSF model require the participating lawyer to provide certain client information to FSF for evaluation before FSF will extend

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[14] I am assuming for purposes of this opinion that the debtor's attorney does not have a financial interest in the third-party funding entity.

credit to the lawyer under this model. A lawyer must keep information relating to representation of a client confidential with two primary exceptions: [15] (1) the lawyer is impliedly authorized to disclose information as necessary to carry out the representation; and (2) the lawyer may disclose information with the client's informed consent. Prof. Cond. R. 1.6(a). In a Chapter 7 bankruptcy a great deal of information about the client's representation is impliedly authorized to be disclosed as a matter of public record through the filing of the documents necessary to pursue the case. While disclosure to the court is impliedly necessary to carry out the representation, it cannot be said that there is also implied client consent to disclose the client information to FSF to determine whether the client meets its underwriting criteria. For this reason, express client consent will be required before a lawyer who works with FSF may disclose client information to FSF. I have reviewed the FSF Pre-Filing Agreement and Post-Filing Agreement and conclude that both agreements do an adequate job of explaining the need to disclose certain client information to FSF in order to facilitate the client's choice to pay for post-petition services over time, the disclosure's implication for waiver of the attorney-client privilege,[16] and documentation of the client's informed consent to disclose that information with FSF.

6. Fee Disclosure to the Tribunal

11 U.S.C. § 329(a) and Fed. Bank. P. 2016(b) require debtor's counsel to disclose the debtor's attorney's compensation. In order to comply with these provisions and also Rules of Professional Conduct 3.3 (requiring candor to tribunals) and 3.4(c) (requiring lawyers to not knowingly disobey an obligation under the rules of a tribunal), the disclosure of debtor's counsel's compensation under a bifurcated representation must be complete and transparent, including disclosure that the debtor was offered the option to pre-pay all legal fees before filing the petition and the option to bifurcate the engagement into pre- and post-petition work. The disclosure of compensation must also inform the court (in cases where it is applicable) that debtor's counsel has entered into recourse line of credit and the essential terms thereof. Ordinarily, in a bifurcated representation, there will need to be an initial fee disclosure filed when the petition is first filed and an amended fee disclosure filed when and if the client retains the petitioning lawyer to handle the post-petition phase of the representation. I have reviewed the compensation

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[15] There are other exceptions to client confidentiality in Rule 1.6(b), but those exceptions are not pertinent here.

[16] All of the client information filed or to be file with the bankruptcy court will itself result in a waiver of the attorney-client privilege for that information. Thus, disclosure of the same information to FSF does not waive a privilege that has already been waived for other reasons.

disclosure template suggested by FSF and find that it completely discloses the details of the compensation agreement between lawyer and client.

V. OTHER AUTHORITY

The Bankruptcy Courts in the Northern and Southern Districts of Indiana have not yet, to my knowledge, expressly focused on bifurcated representations in Chapter 7 cases and related questions pertaining to client fees. Should they do so, they will not be writing on a blank slate. In addition to *Bethea*, discussed earlier, several courts have weighed in.

In the Bankruptcy Court for the Northern District of Illinois, after raising concerns about an approach unlike the one discussed here, the court stated:

> A second potential solution to the problem posed by *Bethea* would be for the debtor and the bankruptcy attorney to enter into a pre-petition retention contract requiring the attorney to perform either no post-petition services or very limited ones not including redemption work; then these parties could potentially enter into a post-petition contract for post-petition services the attorney has not already agreed to perform, creating a new post-petition claim. The trick here is that the post-petition contract must really be a post-petition contract. That is, the legally operative events — the offer, acceptance, and exchange of consideration (either a promise to pay or an act of payment in exchange for a promise to render services) — must in fact occur after the date of the Chapter 7 filing to qualify as a claim arising post-petition and falling outside the scope of § 362(a)(6). From a professional responsibility standpoint, Chapter 7 debtors' attorneys should proceed with caution again, as they can limit the scope and objectives of their representation of the debtors only if they explicitly disclose those limits and obtain the clients' consent thereto. See Ill. Sup.Ct. Rules, Art. VIII, Rule of Professional Conduct 1.2(c); N.D. Ill. Local Rule of Professional Conduct 83.51.2(c).

In re Griffin, 313 B.R. 757, 769-770 (Bankr. N.D. Ill. 2004). As discussed above, limiting the scope of representation and obtaining informed client consent is central to a bifurcated representation being appropriate from a professional responsibility perspective.

After rejecting an approach to avoiding discharge of the client's pre-petition fee obligation involving post-dated checks, the Bankruptcy Court for the Middle District of Florida considered bifurcation, calling it a two-contract procedure. After quoting *Bethea*, the court stated:

Put another way, there is nothing inherently wrong with a lawyer giving terms to clients for the payment of legal services. As a consequence, the Court must uphold the validity of the modified two-contract procedure absent some compelling reason not to do so.

The Court, as set forth above, previously expressed two key concerns with the original two-contract procedure. Both of those concerns, however, have been substantially addressed by the modifications Clark & Washington made to its two-contract procedure. To begin with, under the modified two-contract procedure, the prepetition agreement now (i) more fully sets out the costs and fees associated with filing the client's case; and (ii) specifies the client's three options for postpetition legal services. Moreover, Clark & Washington's initial Rule 2016 disclosure statement explicitly specifies that the prepetition fee is $250 and that the contract between the client and the firm does not include postpetition services. Finally, the two-contract procedure contemplates the firm filing a supplemental disclosure that sets out the additional $1,000 fee in the event the client retains Clark & Washington for postpetition services.

* * *

The [Trustee's] first two concerns are valid. But neither of them warrants precluding Clark & Washington from implementing its modified two-contract procedure. To begin with, Clark & Washington has already addressed the U.S. Trustee's concern that clients will be left unrepresented. Under the modified two-contract procedure, the firm agrees to continue representing the client during the two-week "cooling off" period. And if the client opts to retain another firm or continue pro se, Clark & Washington will continue to represent the client until the Court enters an order allowing the firm to withdraw. In order to leave no doubt, the Court will require Clark & Washington to include in its initial Rule 2016 statement that the firm will represent the client until the Court enters an order allowing the firm to withdraw from representation. So that adequately resolves the U.S. Trustee's first concern.

The second concern—inadequate disclosure—is admittedly more problematic. In fact, Clark & Washington concedes the disclosures in its modified two-contract procedure could be improved. For starters, it has agreed—and the Court will require—that the firm move the "Two—Contract Procedure" disclosure from the end of each contract to a

> separate cover page. In addition, the firm has agreed to have their clients sign and acknowledge that they have received and read the two-contract procedure disclosures. These modifications resolve the U.S. Trustee's second concern.
>
> As for the U.S. Trustee's third concern, the Court is not persuaded that the two-contract procedure is objectionable simply because there may be other alternatives. In this regard, the U.S. Trustee contends that there are other approaches that would allow individuals with modest means to obtain legal representation. Yet the U.S. Trustee does not identify any of those other approaches. And in any event, that is not the standard. Clark & Washington is not precluded from using one fee arrangement simply because other arrangements may exist.
>
> Conclusion
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> In the end, there is no prohibition against a debtor making postpetition installment payments for postpetition services.

Walton v. Clark & Wash., P.C., 469 B.R. 383, 386-87 (Bankr. M.D. Fla. 2012)

The Bankruptcy Court for the Eastern District of Michigan has provided one of the most thorough discussions of the professional responsibility issues raised by bifurcated Chapter 7 representations. Although the Court's entire analysis is worth studying, it stated in summary:

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

> attorney's representation and the legal matter in question; and (3) the individual debtor makes a fully informed and voluntary decision to consent to such limitation.

In re Slabbinck, 482 B.R. 576, 589 (Bankr. E.D. Mich. 2012).

After discussing various professional responsibility considerations, the *Slabbinck* Court concluded:

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

Id. at 597.

In *In re Hazlett*, No 16-30360 (Mem. Dec. April 10, 2019) (copy attached), the Bankruptcy Court for the District of Utah concluded that bifurcated representations in Chapter 7 cases where not prohibited by either the Bankruptcy Code or the Utah Rules of Professional Conduct. The court also discussed and expressed reservations (but did not prohibit) the debtor's counsel's sale of its receivable at a discount to a company called BK Billing. *Id.* at 21-23. This is a different model from the use of FSF's services, which does not entail the sale of the post-petition client's receivable to FSF, but rather the lawyer engages FSF to manage collection of the post-petition client's fee payments with recourse to the lawyer if the client defaults.

The Bankruptcy Court for the Eastern District of Kentucky has also approved the bifurcation of Chapter 7 representations, which it called a Dual Contract Option, if done properly. *In re Carr*, 613 B.R. 427 (Bankr. E.D. Ky. 2020). The Court concluded that bifurcated representation did not violate the Bankruptcy Code. Discussing the Kentucky Rules of Professional Conduct, which like Indiana's follow the ABA Model Rules of Professional Conduct, the Court concluded:

The first requirement under Kentucky Supreme Court Rule 3.130 (1.2) is that the limitation on the scope of the Attorneys' representation had to be reasonable. Debtor approached the Attorneys for bankruptcy representation. At their lengthy initial meeting, based on information that Debtor provided, the Attorneys concluded that it would be appropriate for her to file a chapter 7 case. The Attorneys told Debtor about the two alternatives they offered for chapter 7 representation and explained each one. Debtor chose the Dual Contract Option. Offering the First Contract was a reasonable action that afforded Debtor access to bankruptcy and the benefit of the automatic stay. The Attorneys explained that additional post-petition work was required in her bankruptcy case, and that she should retain counsel to assist with that post-petition work. The Attorneys discussed that they could perform that post-petition work for Debtor under a second fee agreement. A short time thereafter, Debtor had another meeting with the Attorneys, retained them under the Second Contract to perform post-petition services, and agreed to pay the post-petition fees pursuant to a specific monthly payment plan. On these facts, the Court concludes that it was reasonable for the Attorneys to limit the scope of the initial representation to Debtor as effected through the Dual Contract Option.

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

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

Id. at 440-41.

VI. CONCLUSION

If implemented with sensitivity to the several professional responsibility considerations discussed above, it is not contrary to the letter or spirit of the Rules of Professional Conduct for debtor's counsel in a Chapter 7 case to bifurcate the representation into two phases—one leading up to and including the filing of a petition that is legally sufficient to bestow on the debtor the benefits of filing. I further opine that it is not contrary to the letter and spirit of the Rules of Professional Conduct for Chapter 7 debtor's counsel to incorporate into his or her fee for providing post-petition services the indirect or the direct costs to the lawyer of permitting the client to pay for post-petition services over a specified period of time.