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To Whom It May Concern,

Recently an opinion was requested from the Utah State Bar Ethics Committee on the propriety of zero down Chapter 7 representation and post-petition bankruptcy attorney fee agreements, including ones which contain undisclosed, usurious fees to third-party lenders. We suspect that BK Billing, a usurious lending company run by an attorney already under sanctions for similar practices, was behind the request. Other jurisdictions consider this a predatory practice which takes advantage of the poorest of the Chapter 7 debtors.

The Committee issued an opinion which misunderstands Bankruptcy Code principles, and fails to consider the impact of the Code, the Rules of Professional Conduct, and the Local Rules governing bankruptcy attorneys practicing in Utah.

On December 28, 2017, Lincoln Law filed a Request for Reconsideration of the Utah Bar Ethics Advisory Committee Opinion 17-06. A copy is attached.

We requested reconsideration to keep a level playing field for those who are not interested in becoming creditors of their own clients in an open bankruptcy.

If you have any questions or need additional information, please contact me at 801-224-8282, or atc@lincolnlaw.com

We appreciate any help you are willing to provide in these efforts to curb this illegal and unethical practice

Sincerely,

Andrew T Curtis
Attorney & Counselor at Law

To:	Utah State Bar Ethics Advisory Committee
From :	Tessa Meyer Santiago, Utah Bar No. 09324; Andrew Curtis, Utah Bar. No. 13681
Date:	December 27, 2017
RE:	Request, pursuant to Ethics Advisory Opinion Committee Rules of Procedure III (e)(1)(i)(B) for reconsideration and reversal/modification of Ethics Opinion No. 17-06, issued September 27, 2017.

REQUEST FOR RECONSIDERATION

On September 27, 2017, the Committee issued an opinion, Ethics Opinion 17-06 ("Opinion"), which speaks to four issues in the practice of consumer Chapter Seven (liquidation) bankruptcies, including zero down advertising and funding, factoring, ethical issues regarding the disclosures required for post-petition attorney fees contracts, and the reasonableness of the fees charged in those contracts.[1]

Utah Ethics Opinion 17-06 analyzes bankruptcy specific issues through the limited lens of the Utah Code of Professional Ethics. The conclusions it reaches and recommendations it provides ignore completely the very real and binding nature of the Bankruptcy Code, the Rules of Bankruptcy Procedure, and the local rules issued by the United States Bankruptcy Court for the District of Utah, all of which narrow and restrict the ethical, lawful options available to attorneys representing Chapter 7 debtors in this state. To issue this Opinion without taking into account these standards is to provide advice which actually encourages attorneys to engage in breaches of duty and conflicts of interest. For example, this Opinion advises attorneys to take actions which are prohibited by the code and rules of procedure, including unbundling services for Chapter 7 debtors, requesting clients sign post-petition agreements for representation obligations that arise prepetition, and selling accounts receivables to factoring companies without disclosing the thirty percent fee on schedules filed with the bankruptcy court.[2]

As a framework from which to consider the issues raised in this response, Respondents point out that the Committee may have been misled as to the intents of the attorney/group seeking the Opinion--which the Respondents presume is BK Billing.[3] The Committee frames the generative request as reflecting "the growing disconnect between individuals of modest means who need legal services and the ability of lawyers to serve those needs without incurring personal financial hardship," Op. para. 3, as if to suggest that allowing attorneys representing Chapter 7 debtors to unbundle the routine legal tasks required in a Chapter 7 works a boon to the individual of modest means.

[1] The Opinion has not yet been announced in the Utah Bar Journal.
[2] *See e.g. In re Ruiz*, 515 B.R. 362 (Bankr. M.D. Fla. 2014) (attorneys cannot pick and choose the services they provide to Chapter 7 debtors); *DeLuca v. Seare* (*In re Seare*), 515 B.R. 599 (B.A.P. 9th Cir. 2014) (unbundling or limited scope representation must comply with the the Bankruptcy Code, and must be offered based on an individual qualitative analysis of each debtor's case completed at intake to ensure that debtor's reasonable goals and needs are being met; it cannot be instituted as a general practice);
[3] *See* BK Billing email, titled, "BREAKING: Utah Ethics Bar on Bifurcation and Factoring," stating that the The Utah State Bar Ethics Advisory Committee had "issued an ethics opinion on the BK Billing model."

The questions posed to the Committee are a wolf-in-sheep's clothing attempt to give credence to a predatory financial lending product masquerading as acceptable and ethical legal representation. In fact, BK Billing and the very practices condoned by this Opinion are under investigation and the subject of multiple suits across the country filed by United States Trustees and clients seeking disgorgement of the fees received by attorneys through this factoring model[4] The position adopted in this Opinion is highly controversial and opposes the position taken by United States Trustees across the country. *See, e.g., United States Trustee v. Patricia M. Ashcraft, et al*., *In re Gilmore*, Case No. 6:17-bk-13682-ML, at p. 5, 29 (Bank. C. D. Cal. Dec. 12, 2017) (adversary proceeding against attorney for factoring arrangements with BK Billing, and asserting claims for contract avoidance under 11 U.S.C 528, disgorgement of fees under 11 U.S.C. 329, and civil sanctions for misrepresentation of services to be provided by attorney), relevant pages attached as Exhibit A. In *In re Gilmore*, the United States Trustee describes the practices:

1. This Complaint concerns the Defendants' Chapter 7 consumer business practices which adversely affected Mary Ann Gilmore, the debtor in this bankruptcy case, and other consumer debtors.
2. During the past year, the Defendants increased their Chapter 7 consumer client base nearly five-fold by advertising that they would file individual Chapter 7 bankruptcy cases in exchange for "no money down."
3. Under their new business model the Defendants claim to divide, or "bifurcate," their representation of Chapter 7 consumer debtor clients into two parts: a prepetition component and a post-petition component. The Defendants claim to provide the pre-petition services to clients for "free," and claim that they charge clients only for the remaining post-petition services. As part of the marketing appeal to would-be clients, the Defendants' model contemplates that the attorney's fees for post-petition services will be collected in post-petition monthly installments over the course of a year through ACH-debits of customer bank accounts.
4. Although the Defendants' model claims to charge fees only for the remaining post-petition services, in the "no money down" cases the Defendants charge debtors significantly more than they otherwise charge for a Chapter 7 case. Particularly, the fees include interest and/or other charges exceeding 40 percent. To finance the Defendants' ongoing business operations the Defendants assign their attorney's fees for collection to a third party as soon as they file the petition in exchange for 70 percent of the account balance.
5. The Defendants' business model is not protected under Ninth Circuit law. The Defendants attempted to evade the Bankruptcy Code's restrictions

[4] Respondents are aware of investigations and/or adversary proceedings in the Central and Northern Districts of California, Maryland, Tennessee, Idaho and Utah dealing with the practices approved of in this Opinion. .

> on the collection of pre-petition claims. The Defendants' business practices resulted in, among other things, substantially higher fees and interest charges to Ms. Gilmore and the filing of sworn documents that contained false information. In short, the Defendants' business model, under the guise of helping debtors, breaches the Defendants' ethical and professional duties to their clients.

In re Gilmore, p. 2.

The numbers surrounding the attorneys who mainly practice using the zero down/bifurcated model of Chapter 7 representation in Utah tell a similar story:

Firm	$0 Down Freq.	Regular Rate	Low/0 Down Rate	Avg Bal. Post Pet	% Fees Post Pet	Overall Increase	Percent Increase
Capstone Law, PLLC	96%	$1,277	$1,954	$1,896	97%	$677	53.01%
Vannova Legal, PLLC	90%	$766	$2,177	$2,109	97%	$1,410	184.01%
Law Office of Theron Morrison	78%	$756	$2,031	$1,930	95%	$1,275	168.64%
Beehive Advocates	96%	$873	$1,776	$1,641	92%	$903	103.45%
Law Office of Amy L. Butters	89%	$1,221	$2,261	$2,239	99%	$1,040	85.21%
Law Office of Ryan Simpson	85%	$779	$1,559	$991	64%	$781	100.22%

Clearly the practices for which the applicant seeks Committee approval drive up the cost of bankruptcy for the poorest of Chapter 7 debtors.[5] Attorneys offering this financial product, masked as unbundled services, stand to make up to three times as much as they would on a regular Chapter 7--with zero risk. Let it be made very clear: zero down, unbundled and factored Chapter 7 representation primarily benefits only the attorney and the financial lending company who purchases the attorney's receivables. It is of questionable benefit to the debtor.

The Opinion should be withdrawn, or, at the very least, amended to properly incorporate the duties of representation that fall upon an attorney when he or she agrees to represent a Chapter 7 debtor in the United States Bankruptcy Court for the District of Utah, and files the initiating petition. As it stands now, considering controlling law and ethical rules, Ethics Opinion 17-06 cannot function as the purported "guide to the consumer bankruptcy bar in order to aid them to serve their client while avoiding violations of the Rules of Professional Conduct." Op. para. 3.

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[5] This chart is discussed in greater detail in Section d.2.

a. **Misleading advertising for $99 or Zero Down for consumer Chapter Seven bankruptcy which fails to calculate the filing fee or post-petition work needed to receive a discharge into the advertised price.**

The Opinion is correct in that the Zero/Low Down advertising strategy materially misrepresents the costs associated with filing a Chapter 7 bankruptcy. However, the initial premises upon which the Opinion is based are flawed. These flaws permeate the Opinion, and infect the advice given. .

1. <u>Typical Chapter 7 Debtors Do Not Have to File Petitions and Schedules Within Hours of Retaining Their Attorney.</u>

First, the Opinion grossly oversimplifies the plight of the Chapter 7 debtor, and by so doing, intimates that unbundling of services and the filing of skeletal petitions is acceptable as a general practice. The Opinion begins with the proposition that "individuals who need to file Chapter Seven liquidation do so because creditors are garnishing wages or threatening foreclosure."[6] This overgeneralization creates the misperception that Chapter 7 debtors always file as quickly as possible. This misperception then justifies the practice of filing, as a general rule, a skeletal Chapter 7 petition, i.e., just the voluntary petition and a motion to pay the filing fee in installments--which then opens the way to unbundling an attorney's duties of representation in a Chapter 7 case.

In truth, an initial Chapter 7 filing is typically comprised of a voluntary Petition, a Debtor's Schedules and Statements, a credit counselling certificate, and court fees paid upon filing. It is this filing package that is contemplated by the Code and the ECF system as used by the Bankruptcy Court for the District of Utah. Under the bankruptcy code and the federal filing system, a skeletal Chapter 7 is reserved for the most dire cases, in which a debtor faces immediate loss of income or home. This skeletal filing mechanism increases the workload of the courts; creates additional motions, orders and notices, not warranted by the circumstances; and may lead to shoddy work and misrepresentation by the attorney because insufficient time exists to fully engage in the required analysis. *See In re Haynes*, 216 B.R. 440 (Bankr. D. Colo. 1997)("Before an attorney can properly advise a client as to whether they should (1) file for bankruptcy; (2) file a Chapter 7, or (3) file a Chapter 13, they must gather all the financial information from the client, analyze the information, and then explain the situation to the client . . . all that remains after that is for this information to be typed onto the forms and file the forms with the Court.")

[6] The language of this Opinion is eerily similar to the language used by BK Billing in its Welcome Memo to attorneys considering using its factoring product: "Clients want to file their case quickly--they have judgments and garnishments." *See United States Trustee v. Patricia M. Ashcraft, et al., In re Gilmore*, Case No. 6:17-bk-13682-ML, at p. 5, 29 (Bank. C. D. Cal. Dec. 12, 2017)(adversary proceeding against attorney for factoring arrangements with BK Billing, and asserting claims for contract avoidance under 11 U.S.C 528, disgorgement of fees under 11 U.S.C. 329, and civil sanctions for misrepresentation of services to be provided by attorney), relevant pages attached as Exhibit B. It gives the authors pause as to the relationship between the drafters of the Opinion and BK Billing.

However, with the invention of the third party factoring financial product, the use of the skeletal filing has skyrocketed. Attorneys offering a Zero Down financial product misuse a filing tool offered by the Court for emergency situations simply because the filing options appear to allow an attorney the technical ability to "split up" or "unbundle" services thereby increasing revenue to the firm.[7] In a firm which does not practice this funding strategy, only two cases out of the approximately 175 cases filed in the last 8 months were skeletal filings. Firms which offer the zero down product file in reverse ratios. Basing the Opinion on the premise that all Chapter 7 filers are in the precarious position akin to losing a home encourages this costly, atypical representation.[8]

2. Whether a Claim is Pre- or Post-petition Does Not Depend on the Date the Agreement Creating the Debt was Signed.

The Opinion also fatally oversimplifies the idea of prepetition and post-petition debt, and ignores the broad definition of claim contained in the bankruptcy code. *See* para. 4, where the Opinion states: "Pre-petition attorneys 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." It is a fatally flawed analysis that determines whether a debt is pre-petition or post-petition by looking at the date on which a contract was signed.[9]

a. The Bankruptcy Code's definition of "claim" includes all obligations that arise prepetition.

The Bankruptcy Code defines a claim so expansively that if the attorney could be said to contemplate that at the time the debtor filed for bankruptcy, the debtor is obligated to pay him, even an undetermined, uncertain, uncontracted for amount for services that will be rendered post-petition, then the debtor's obligation to pay those fees arises prepetition.[10] The analysis is based on the following explication of a claim under the bankruptcy code contained in *Walton v. Clark & Washington, P.C.,* 454 B.R. 537 (Bankr. M.D. Fla. 2011), at 541-543:

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[7] As soon as an attorney retains her client, and sends the factored retainer agreement to the factoring firm, she can expect 70 percent of the total amount charged in attorney fees to be transmitted to her within 24 hours.

[8] See Section d.2, *infra*, for data regarding the exponential increase in costs to debtors for choosing the Zero Down Chapter 7 model as opposed to paying the fee in full prior to filing the petition.

[9] Once again, the simplistic analysis contained in the Opinion echoes the legal justification provided by BK Billing in its Welcome Memo. *See In re Gilmore*, p. 29, "Unbundling your legal services into 'pre-filing services' and 'post-filing services' will create a legally enforceable right to be paid for your post-petition services."

[10] But see BK Billing's advice to its attorney clients that it believes creates a legally enforceable post-petition contract: "The two-contract model discloses in the pre-petition contract that a second contract must be signed post-petition and identifies the attorney's fees for the post-petition services needed to complete the bankruptcy." *In re Gilmore*, p. 29.

Congress intentionally defined "claim" as broadly as possible to ensure that "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." Bankruptcy Code section 101(5) defines a "claim" as any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." A right to an equitable remedy, such as specific performance or restitution, is also a "claim" under section 101(5) so long as the breach giving rise to the equitable remedy also gives rise to a right to payment.

Consistent with this intent, the Supreme Court has unequivocally adopted a broad interpretation of section 101(5). And it has declined all invitations to exclude any right to payment from the section 101(5) definition of "claim." Given this extremely broad definition, very few economic relationships fall outside the definition of "claim" under section 101(5). In fact, the only economic relationships that do are those that do not involve a right to payment. For instance, breach of a non-compete agreement would not be a "claim" under section 101(5) where there is no adequate remedy at law (*i.e.,* money damages). Nor would the breach of an obligation giving rise to a right to an injunction prohibiting future action be a "claim" where there is no alternative right to payment. Other examples of equitable remedies that do not give rise to a "claim" include a resulting trust, a partition in kind, or deed reformation. None of the breaches that give rise to those remedies give rise to an alternative right to payment under state law.

In contrast, the retention of an attorney to file a Chapter 7 bankruptcy petition creates an economic and ethical relationship with expectations of payment from the client to the attorney that arise pre-petition. Additionally, any action taken prepetition that creates an expectation of post-petition relationship creates a prepetition obligation, and therefore draws a post-petition retainer agreement back into the realm of prepetition subject to discharge. Eg., collecting checks pre-petition for post-petition deposit, collecting documents pre-petition for post-petition scrutiny, preparing schedules pre-petition for post-petition filing, executing pre-petition promissory note for post-petition obligations, and referring in the prepetition agreement to a post-petition agreement that will be signed to compensate an attorney for work that is necessary to fulfill the pre-petition retention of that attorney.

Even the mere mention of the cost of representation for the entire case creates an expectation of payment sufficient to create a pre-petition claim. In *Clark & Washington*, at 542-43, the court analyzed post-dated checks under the expansive definition of "claim."

> Under the Bankruptcy Code, "contract-based claims arise at the time the contract is entered into." And the Agreement here is entered into before the petition date. Accordingly, the postdated checks give rise to prepetition claims. The fact that Clark & Washington specifies in its Agreement that the postdated checks are payment for postpetition services does not alter that outcome. For starters, a prepetition claim is not converted into a postpetition claim simply because the time for payment is triggered by a postpetition event. "A debt can be absolutely owing prepetition even though that debt would never have come into existence

except for postpetition events." So the postdated checks are prepetition claims even though Clark & Washington may provide its services postpetition.

And the majority of courts that have considered this issue agree. . . . In particular, the *Waldo* court rejected the notion that a flat fee to pay for postpetition services creates a postpetition claim. The court explained that the fact that a "creditor may hold a contingent right to payment until filing the petition does not mean counsel holds a post-petition claim." Recognizing, instead, that a claim arises prepetition if the "creditor could fairly contemplate the possibility of a claim against the debtor's bankruptcy estate" as of the petition date, the court specifically found that the right to attorney's fees under Clark & Washington's fee agreement was a prepetition claim:

Upon the signing of each Engagement Contract, Clark & Washington and Mr. Crawford became obligated to each of the Debtors to represent them in their Chapter 7 bankruptcy cases in exchange for payment of the agreed upon flat fee, and the fact that some services were to be provided post-petition does not change the nature of the fee, nor does it change the nature of the obligation. Even though Clark & Washington specifically segregated its flat fee between prepetition and postpetition services in this proceeding, the Court concludes that the reasoning in *Waldo* applies with equal force in this case. *Upon execution of the Agreement, Clark & Washington was obligated to represent its clients in their Chapter 7 cases*. Any payments stemming from that obligations, or rights to payments are prepetition debt and are dischargeable in bankruptcy.

Walton v. Clark & Washington, P.C., at 541-543 (emphasis added).

In re Waldo, 417 B.R. 854 (Bank. E.D. Tenn. 2009) also applied "claim" broadly in a disgorgement action brought by the U.S. Trustee on seven retainer agreements that provided for the post-petition payment of fees in a Chapter 7.[11] The *Waldo* court found that the attorney's fees were claims that arose prepetition, irrespective of when the services were rendered because all elements to form a contract were present pre-petition. Upon the signing of the agreement, attorneys were obligated to represent the debtor in a Ch. 7 case in exchange for payment. The court reasoned that merely because some services were rendered post-petition did not change nature of obligation nor nature of the fee. All the services identified in the retainer fell within the scope of a "Routine Case" under Chapter 7 of the United States Bankruptcy Code, and the debtor's obligation to pay the fees arises on the date the agreements are entered into. In line with this reasoning, the court held that the unpaid post-petition portions

[11] In *In re Waldo*, 417 B.R. 854 (Bankr. E. D. Tenn. 2009), a United States Trustee brought seven cases against attorneys who used engagement letters that require $1,250 upfront flat fee or no-look fee, that was non-refundable, and a retainer that specifically differentiates the various pre-petition and post-petition services. The clients gave the attorney post-dated checks to deposit post-petition. The court considered whether no-look agreements survive discharge when they are entered into pre-petition that divide the services into pre- and post-petition and allow for post-petition payment of fees in installments.

of a flat fee contracted for pre-petition constitutes a pre-petition obligation of a debtor which is dischargeable. The court ordered the attorneys to disgorge all attorney's fees received in the seven cases, and return to the various debtors all post-dated checks in their possession.

Of the *Chandlier* decision, so heavily touted by BK Billing as the foundation for the legitimacy of bifurcating a bankruptcy attorney's representation in a Chapter 7 case, the *Waldo* court said:

> [I]n *Chandlier,* decided by a bankruptcy court within and under the precedent of the Sixth Circuit, the court examined § 329 and its interaction with Rules 2016 and 2017, finding that while § 329 required disclosure of fees paid or to be paid, disclosure did not equate to allowance of those fees and that § 329 applied to all chapters, not merely Chapter 7, in which payment of post-petition fees were common-place and there would be an ongoing need for scrutiny by the court. *Chandlier,* 292 B.R. at 586-87. The court also analyzed Rule 1006(b)(3), § 727(b), and § 523(a), holding that exceptions to discharge for attorneys fees could be found in none of them. *Chandlier,* 292 B.R. at 587

In re Waldo, 417 B.R. 854 (Bankr. E. D. Tenn. 2009).

The *Waldo* court commented in dicta that the solutions suggested in *Chandlier*[12] seem to be workable payment options for attorneys fees in Chapter 7 cases, including the proposition that the attorney's services can be segregated into pre- and post-petition agreements which reflect the work that is done post-petition. In dicta, the court then names obvious post-petition work, such as the 341 meeting, defending exemptions, and dealing with the trustee and aggressive creditors that perhaps could be paid for post-petition. But, in Utah, the retainer agreements used by local attorneys and created by the litigation financing firm for use by local attorneys move what is naturally prepetition work to post-petition calendars to weight the post-petition retainer with pre-petition services and fees. For example, the retainer agreements consider court filing fees post-petition responsibilities, and BK Billing advises its attorney clients to make preparing a debtor's schedules and statements, generally filed with the Voluntary Petition, post-petition work.

b. An attorney's obligation under Local Rule 2091-1 always creates a prepetition right to payment for the entire Chapter 7 case.

This artificial manipulation of the work necessary to represent a Chapter 7 debtor and file her petition is for naught. If the attorney represents a Chapter 7 debtor, the bankruptcy code's

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[12] This opinion is heavily relied upon by BK Billing, the major bankruptcy litigation financing company in Utah, for the premise that a bankruptcy attorney may bifurcate/unbundle her services in a Chapter 7. *In re Chandlier*, 292 B.R. 583, 588 (Bankr. W.D. Mich. 2003) states that "Courts generally recognize that bifurcation 'lessen[s] . . . the financial burden of the debtor[s].'" The opinion suggests that to lessen the burden on the client, the attorney can "quantify pre and post petition services, and require payment of the prepetition services upfront."

In *In re Chandlier*, the question contemplated by the court was whether Bankruptcy Rule 1006 allows fees to be paid in installments, and is an attorney allowed to collect on unpaid installment fees from discharged clients. In this case, the facts are similar to the BK Billing model, in that the collection efforts were done by a party who purchased the Accounts Receivable (AR) from a placeholder attorney. Two clear points of difference are one, that the AR buyer is an attorney--who was enjoined from practicing law, and two, the local rules do not obligate the Chapter 7 attorney to represent the client throughout a Chapter 7 case. To decide the issue, the court reviewed the language of §329 and §1006 and found no language that creates an exception to discharge language of §727, if not listed as exception in §523. The court also rejected the Doctrine of Necessity, in which a trustee is allowed to pay prepetition debts to obtain services that are vital to a debtor's reorganization, as inapplicable. The court then found that the attorney violated the automatic stay by attempting to collect the installment payments from his discharged clients, and ordered the attorney to cease all collection efforts on AR purchases for fees owed under the prepetition agreements.

As dicta, a sympathetic Court suggested several processes that it believed would not violate the automatic stay: a) prepaying in full in advance of filing; b) breaking the representation into pre- and post-petition services, and paying the pre-petition in full; c) reaffirm the prepetition agreement, and seek payment from third party guarantors, but not from the debtor. It is the second suggestion that has been adopted by BK Billing as supporting its financial factoring product.

broad reading of “claim” places the attorney’s representation of the debtor into the category of a prepetition debt--no matter the date of the second retainer agreement. In Utah, that obligation exists by local rule. When an attorney files a Chapter 7 petition for a client, the attorney is obligated, by ethics and Local Rule 2091-1 to continue in her representation of that client until discharge is entered and the case is closed, or until the Court relieves the attorney of her representation obligation. Thus, arising with the the beginning of Chapter 7 representation is the expectation that the attorney will be hired for her services throughout the case, and that the debtor will pay the attorney for those services. Ergo, a prepetition claim is formed. Even if the retainer agreement is dated post-petition, all conditions exist for the creation of a pre-petition claim on the estate.

Respondents add that the Opinion also fails to recognize the inevitable chilling effect of this financial product on the legal representation provided by the attorney. If unbundling is allowed, the attorney is incentivized to restrict his representation to as few services as possible to avoid a situation in which his prepetition representation of his client creates an obligation to represent that client throughout his case, thereby creating a prepetition debt that is dischargeable in its entirety.

Ultimately, the Zero Down advertising strategy encourages an attorney to function as nothing more than a petition preparer. Zero dollars of pre-petition legal services provides a client little legal analysis, and certainly not the legal advice and scrutiny of a debtor’s financial affairs that allows an attorney to provide the requisite informed advice regarding the appropriate relief available to the Debtor under the bankruptcy code. The advertising strategy also materially misrepresents an attorney’s duties to represent a Chapter 7 client, when that duty to represent arises, and what the non-dischargeable costs of that representation actually are. Loss-leader advertising strategies may work for McDonalds and used car lots, but, as shown above, they cannot be used in Chapter 7 representation without violating bankruptcy rules and the professional ethics binding on each attorney who represents Chapter 7 debtors in the district of Utah.

b. What are the Ethical constraints that impact an attorney’s ability to ask a Chapter 7 debtor client to sign a post-petition attorneys fee contract which will not be discharged?

The Opinion advocates that an attorney representing a Chapter 7 client may unbundle his services, and by so doing, encourage his client to enter into a post-petition agreement for those additional services needed to obtain discharge. Unbundling is ethical if the client is charged only for that work that is actually done post-petition, and that the attorney fully discloses that additional work is necessary to complete the bankruptcy. Op. para. 6. If the attorney clarifies those two issues[13], the Opinion considers the request and actual practice of entering into a second, post-petition retainer agreement ethical.

It is not.

Unbundling services, and requesting that an already retained Chapter 7 client sign a post-petition contract violates the fundamental premise that an attorney cannot advise his or her client to incur debt post-petition. It is also allows attorneys to mislead their clients into thinking that the attorney's representation of them is terminated upon the filing of the petition; hence the need for the second contract. And, by allowing the attorney to remove herself from the pool of debtor's creditors, it thwarts one of the primary goals of bankruptcy, which is ensuring "the fair and equitable treatment of of the creditors of a debtor in bankruptcy."[14] Finally, any act by the attorney to encourage the debtor to sign the post-petition agreement, that is taken after the petition is filed, is most likely, a violation of the automatic stay. In sum, there are so many ethical constraints against a post-petition attorney fee contract, that, as long as the code and local rules remain as they are, it is highly unlikely it can ever be an ethical and acceptable practice for attorneys representing Chapter 7 debtors in the district of Utah.

1. Attorneys are statutorily prohibited from advising their clients to incur debt in contemplation of filing bankruptcy..

Bankruptcy attorneys are considered Debt Relief Agencies under the Bankruptcy Code. *See* 11 U.S.C. 528. As such, they are prohibited from advising clients to incur new debt when they are contemplating bankruptcy. *See* 11 U.S.C. 526(a)(4) providing that "a debt relief agency shall not advise an assisted person of prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor." *In re Wark*, 542 B.R. 522, 531, n. 27 (Bankr. D. Kan. 2015). At the very least, a post-petition retainer that includes a financing component violates the spirit of the 2005 Amendment which added the provision prohibiting attorneys from advising their clients to go into debt to file for bankruptcy. If the post-petition retainer includes a financing fee and/or a promissory note from the factoring company, the attorney who pushes that product on his client is in direct violation of 11 U.S.C. 526(a)(4).

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[13] Again, the language used by the Opinion is similar to the materials provided by BK Billing to its "attorney clients": "Attached to your welcome email is an example of a two-contract retainer agreement used by attorneys to bifurcate pre-filing and post-filing fees. . . . . The key is proper disclosure! Clients need to be fully advised of the specific services their attorney will perform as part of the pre-petition agreement and the post-petition agreement." *See In re Gilmore*, p. 29.

[14] *In re Westby,* 473 B.R. 392, 401 (Bankr. D.Kan.2012); *see also Schwab v. Reilly,* 560 U.S. 770, 791-92, 130 S.Ct. 2652, 177 L.Ed.2d 234 (2010) ("The Code limits exemptions in this fashion because every asset the Code permits a debtor to withdraw from the estate is an asset that is not available to his creditors. Congress balanced the difficult choices that exemption limits impose on debtors with the economic harm that exemptions visit on creditors.")

2. <u>In the District of Utah, Absent A Court Order, Attorneys Must Represent Their Clients From Date of Hire Through The End Of the Chapter 7 Case.</u>

The Opinion takes the position that an attorney may "unbundle" the filing of the petition if it is reasonable to do so under the circumstances, <u>and</u> the attorney discloses that the fees for performing the post-petition services are substantially more. *See* Op. para. 8. However, under the local rules, an attorney is obligated to represent the Debtor from the petition to the close of the case. Therefore, in Utah, the presumption exists that when an attorney agrees to represent a Chapter 7 client, the representation is through discharge. In the face of this presumption, it is unreasonable to unbundle a Chapter 7 bankruptcy, such that the attorney prepares only the petition, and then allows the Debtor to proceed pro se after the filing. The presumption also exists that it will never be reasonable for an attorney to stop representing a client because they cannot pay the fees associated with the Chapter 7 representation the attorney has agreed to provide.[15]

a. Utah Attorneys Are Ethically Bound To Represent A Client To The End of A Chapter 7 Case.

Bankruptcy Local Rule 2091-1 mandates that an attorney who is retained to represent a client in a Chapter 7 case "must represent and advise the debtor in all aspects of the case, including the meeting of creditors, motions filed against the debtor, and post-confirmation matters." The proposed amendment to the rule adds to a lawyer's scope of Chapter 7 representation, "reaffirmation agreements, agreed orders, and other stipulations with creditors or third parties" to the objections of counsel representing Chapter 7 debtors. The current local rule goes on to require that "[t]he debtor's attorney must also represent the debtor in adversary proceedings filed against the debtor unless, pursuant to this rule, the Court has excused the attorney from this requirement. <u>The scope of representation cannot be modified by agreement</u>. The court may deny fees or otherwise discipline an attorney for violation of this rule." (emphasis added). There is not a similar provision in the local rules of the District of Nevada governing attorneys practicing in the United States Bankruptcy Court for the District of Nevada. Yet, this Opinion relies heavily on the analysis contained in *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. April 9, 2013). The reliance is misplaced as attorneys in Nevada do not operate under the constraints imposed by Local Rule 2091-1.

Utah Rule of Professional Conduct 1.5 mirrors the Local Rule 2091-1. It provides that "An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for

[15] It is widespread practice for the retainer agreement used by Zero Down practitioners to use language such as, failure to pay the post-petition attorneys fee amount within a certain amount of time after filing may result in the court dismissing your case, and the attorney withdrawing from your case.

further assistance in the midst of a proceeding or transaction." Utah R. Prof. Conduct 1.5 Comment [5]. Under 1.5, an attorney cannot charge a client zero dollars for limited representation that will leave the client stranded mid-bankruptcy.

Clearly, Utah attorneys representing Chapter 7 debtors in Utah cannot unbundle services--even if consented to by the client in a retainer agreement between the parties. Absent the approval of the Court, an attorney cannot unbundle his representation of the client, such that the attorney prepares only the petition and leaves the client without representation mid-bankruptcy case. And, the filing of the petition commits an attorney to represent his client throughout the Chapter 7 case, including providing all the services described above.

b. Local Attorneys Use Fee Retainers That Consistently Violate These Rules.

The retainers used by local unbundling Chapter 7 attorneys blatantly ignore these constraints governing their representation of Chapter 7 debtors. Two-contract models models make clients "re-hire" the attorney for work which, under the rules, the attorney is already committed to provide. The retainer provided to its attorney clients by BK Billing fully anticipates that the client will sign a second retainer, in a particular amount, for a certain set of services. In fact, the client is asked to acknowledge that he will receive a second retainer post-petition for a certain amount "to represent my interests, including "preparation and amendment, if necessary of schedules," attendance at 341 Meetings, motions for relief from stay, review of redemption and reaffirmation agreements." Some retainers contain prepetition threats that if the client doesn't pay the post-petition fees, the attorney will sever representation. For example, "The Post-Filing Fixed Fee shall be due and payable five days after the bankruptcy petition is filed with the Court. . . . In the event the client fails to timely pay the Post-Filing Fixed Fee, [attorney] may file a motion with the Bankruptcy Court requesting permission to withdraw as Client's counsel." Note that <u>all</u> the elements necessary to enter into a contract are present in the language of these prepetition agreements. Under the analysis of *Clark & Washington*, the attorney and the client using this pre-petition contract have created a claim in the attorney against the debtor for payment for services that dates to the execution of the prepetition contract. Therefore, persisting with the legal fiction that the post-petition retainer creates a post-petition debt that is not subject to discharge is a breach of an attorney's duties to represent her Chapter 7 client, and of her duties to fully disclose the true nature of the representation under the governing bankruptcy code and rules.

Even more concerning is contractual language that contractually limits representation to the preparation of the petition. One retainer states: "You understand and acknowledge that the Services contained herein do not contemplate a complete bankruptcy filing. You understand that you must either engage a professional to assist you in completing your bankruptcy filings or complete them yourself or your case will automatically be dismissed without a discharge." This truncated-by-contract representation of Chapter 7 debtors is simply not allowed. Attorneys in Utah cannot limit the extent of services in this manner without violating the rules by which they are bound to practice. Yet, in the "unbundling" approved by this Opinion, this type of misrepresentation and manipulation of clients is rampant.

The Opinion concludes the issue of unbundling by stating that it would be a material misrepresentation of Rule 1.7 to not explain in detail what work remains to be done to obtain the debtor's discharge. Op. para. 13. The conclusion suggests, then, that if a retainer fully discloses the work still to be done, there has been no misrepresentation of material facts. This is far short of the disclosure of material facts necessary for a client to agree to unbundling. The Opinion should also state that it is a material misrepresentation to fail to inform the client that the local rule requires the attorney to represent the client until discharge, and that no contractual alteration of that relationship is allowed. Failure to include those two relevant facts in the retainer agreement clearly violates Rule 1.7.

3. <u>The Bankruptcy Code Requires the Fair and Equitable Treatment of All Creditors In A Debtor's Bankruptcy</u>.

The bankruptcy code requires that all creditors of the same priority be treated equally in the repayment of their prepetition claims. *See* Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973), reprinted in B APP. COLLIER ON BANKRUPTCY, at App. Pt. 4-219, 4-322 (15 th rev. ed.), establishing the equality of distribution among creditors, and a fresh start for debtors as two of the goals of bankruptcy. The code prohibits the preferential treatment of one creditor over another, and considers payments on prepetition debts to certain insiders to be voidable by the trustee. *See* 11 U.S.C. 547.

Unbundling an attorney's services has the net effect of picking the attorney out of the pool of a debtor's creditors, and creating a special exemption for the attorney. This exemption exists only because of the attorney's special, insider relationship with her client. No other creditor has the ability to create an enforceable, post-petition obligation out of a prepetition debt. And, an attorney can only create this special exemption that works against the goals of the bankruptcy code if she abuses her position as the client's fiduciary by encouraging the client to assume debt to file for bankruptcy, and to sign a post-petition contract for what is a prepetition debt. The Opinion encourages this insider manipulation of the Chapter 7 debtor by his attorney. *But see*, *In re Johnson*, 575 F.3d 1079, 1083 (10th Cir. 2009) stating that, after filing, the bankruptcy code "protects debtors from harassment and also ensures that the debtor's assets can be distributed in an orderly fashion, thus preserving the interests of the creditors as a group."

4. <u>An Attorney Cannot Request That A Current Chapter 7 Client Sign A Post-Petition Agreement Without Violating the Automatic Stay and Other Ethical Duties</u>.

This Opinion states that it is proper for an attorney to request that a client sign a post-petition agreement that is not dischargeable. This statement is made in a theoretical space. The crucial inquiry is what does that request look like in practice? When, where and how is this request made? Only when moored in the practical can the question of whether a request to sign a post-petition agreement be correctly decided.

First, if, at the time of filing the petition, the debtor knows that he will have to sign a second agreement for a sum certain to finish off the work that was started by his retaining the attorney to file his petition, then the obligation to pay for those services arose prepetition and the attorney's expectation that she will be retained for the post-petition services also arose prepetition. Ergo, the post-petition contract is an extension of the first contract and a dischargeable, prepetition debt.

Second, if the attorney's request was written into the pre-petition contract for the pre-petition work, then the bankruptcy code considers the post-petition work and debtor's obligation to pay for that work a prepetition claim. No post-petition agreement is necessary, and, if signed, is merely an extension of a prepetition obligation to represent and to pay for the representation.

Given the expansive definition of claim and the code's silence on special treatment for debtor's attorneys fees under Chapter 7, the only way to make the post-petition agreement an agreement that truly arises post-petition is to refrain from any mention of it in the prepetition negotiations and contracts. This, however, violates the duty to clarify "the necessity for future work and the amount to be charged." Op. para. 6. And, it violates the prohibition against contractually amending the scope of an attorney's representation of a debtor which, by local rules, extends through discharge.

Third, any requests to sign the second agreement made <u>after</u> the petition date violate the automatic stay. The automatic stay prohibits any act which has the effect of allowing the creditor to "collect, assess or recover a claim against the debtor" that arose before the filing of the Chapter 7 petition. 11 USC 362(a)(6). The scope of the stay is broad, and encompasses "almost any type of formal or informal action taken against the debtor or the property of the [bankruptcy] estate." 3 Collier on Bankruptcy ¶ 362.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). Subsection (a)(6) certainly prohibits an attorney sending the client an email, phone call, or voicemail requesting the client sign the second agreement referenced in the prepetition discussions/contract; drafting and sending a cover letter indicating that the contract needs to be signed or the attorney will terminate representation; sending a follow up letter/email triggered by the filing indicating that the representation has concluded and if the client wants to have representation through discharge then the post-petition agreement needs to be signed; or an email introducing the client to the factoring company and requesting that the client sign the loan agreement with the factoring company in order to continue representation. The automatic stay also prohibits the enforcement of a second post-petition retainer agreement that was executed pre-petition, or the use of any collection mechanism (post-dated checks, ACH Agreement, setting up credit card payments) on the post-petition agreement that was instigated pre-petition.

If there are any actual scenarios in which an attorney's request that her client sign a post-petition retainer or make post-petition payments of attorney fees can be made and carried out without violating the automatic stay, Respondents requests the revised Opinion enumerate those scenarios.

5. Other Ethical Restraints to Providing the Client Enough Information to Make A Fully Informed Decision Regarding Unbundling.

Respondents take issue with the statement that a post-petition agreement is proper as long as a debtor knowingly chooses to continue pro se after the initial filing. *See* Op. para. 5, opining that "The client has the choice of hiring the filing lawyer, hiring another lawyer, or doing the work themselves pro se." (emphasis added) The client's choice is not a fully informed choice unless and until her attorney fully complies with the duties to fully disclose and explain the conflicts and interests the client is being asked to waive. The table attached as Exhibit B contains at least 46 issues that arise when an attorney decides to use the Zero Down model, which includes unbundling services.

Some of these include ensuring the client is capable of fully understanding a conflict waiver; ensuring a client is capable of making payments under a finance agreement (even this discussion creates the anticipation of payment, and therefore a prepetition debt); providing time to the client before taking money from the IOLTA to consult with another attorney; disclosing that if the case is dismissed that all funds in the IOLTA will be returned to lender even if no further work is completed; agreeing not to earn interest on the filing fee portion; advising that this fee agreement arose pre-petition and a reaffirmation agreement may be required to enforce collection; advising that the post-petition agreement may actually be unnecessary as the claim could have arisen prepetition; advising that, post-petition, you will continue as their bankruptcy attorney even if the second retainer is not signed because the local rule requires it; advising that it is not in their best interests to sign the post-petition agreement; explaining fully the written conflict of interest waiver in the retainer and ensuring the client understands it and not entering the deal if the client (and their co-debtor client if there is one) does not understand it; advising that the retainer agreement does not cover the full expected representation and is not in compliance with the local rule; providing a retainer agreement that describes all the work necessary to obtain the client's end goal of Chapter 7 discharge, and then refusing to provide that work in the agreement; and advising the client that a 2nd opinion from an attorney should/must be sought and provide adequate options (conflict arises at this point).

Only if all these actions are taken can the client's consent to use the Zero Down financial product, including a post-petition retainer agreement, be considered fully informed. Given the preceding obligations, it is unlikely that an attorney will be able to thoroughly disclose sufficient information for a client to knowingly enter into an unnecessary post-petition retainer agreement.

Solutions

There are permissible solutions under the bankruptcy code and the code of professional conduct to the issue of providing Chapter 7 representation to clients who cannot afford to pay the entire fee before filing. The attorney can represent clients pro bono, as is done in other areas of legal practice. Or, the client and the attorney can enter into a reaffirmation agreement, for the outstanding balance on the fee. This reaffirmation agreement will be scrutinized by the Court for reasonableness and the debtor will be protected from any apparent conflict of interest between his rights to a prepetition discharge, and the interest of the attorney in being paid for prepetition work.[16] What is not ethical or permissible is the unbundling of Chapter 7 services without full disclosure that the attorney is obligated to represent the client through to discharge, the encouragement to incur debt, the promotion of high interest rate factoring products, and the threat of leaving a client marooned without representation for failure to sign the second agreement.

c. **What disclosure must be made if the contract will be assigned to a third party litigation financing company. Does the relationship with the buyer of the attorneys fee contract create a conflict of interest under Rule 1.7.**

1. <u>Factoring of Attorney's Fees in Chapter 7 Promotes Fraud on the Court</u>.

The Opinion condones the factoring of attorney invoices in Chapter 7 cases. *See Op.*, para. 14. ("It is not unlawful for lawyers to sell or encumber their accounts receivables.") To the contrary, ABA Rule 5.4(a), adopted in Utah, provides that "a lawyer shall not share legal fees with a nonlawyer" except in certain circumstances, such as payments made to a lawyer's estate, purchase prices of deceased lawyer's practice, employee compensation plans, and court-awarded fees with a non-profit. ABA Rule 5.4(a)(1)-(4). Because of the way the bankruptcy code monitors attorneys fees and the way Zero Down practitioners report these fees, the factoring violates the prohibition on sharing fees with non-lawyers. This is a violation of the Utah Rule of Professional Conduct, as well as a violation of the duties of disclosure existing under 11 U.S.C. 329.

The sale of the Chapter 7 debtor invoices violates the fundamental rule that a lawyer may not share fees with a non-lawyer. Factoring may work in other legal disciplines, but the bankruptcy code requires full disclosure of all fees received by the attorney, and the source of those fees. Most attorneys who factor report the total legal fees stated on the retainer and paid by the client

[16] In *In re Symes*, 174 B.R. 114 (Bankr. D. Ariz. 1994), the court rejected any perceived "irreconcilable conflict among the regulatory provision of 11 U.S.C. § 329, Rules 2016 and 2017, and the broad discharge of section 727(b) and lack of a specific exception of such fees from discharge in section 523(a)." Further, the *Symes* court discounted the public policy arguments that led the court in Mills"' to hold similar claims nondischargeable. Specifically, the court rejected the defendants' claim that dischargeability provides a great threat to the ability of Chapter 7 debtors to obtain legal representation. With the ability of attorneys to provide pro bono services, or alternatively the opportunity for the debtor to reaffirm the debt under the court's strict supervision, the court denied that the breakdown of the entire Chapter 7 system was imminent; see also, Discharging Attorney-Fee Debt, 2000 Santa Clara L.R. Vo. 40: 575-607.

to be the amount received by the attorney. But, in fact, the attorney receives 30 percent less than he reports to the court because he has split the fee amount with the factoring company. This split of attorneys fees does not fall within any of the approved circumstances in which fee-sharing is permitted. Furthermore, the relationship established between the attorney and BK Billing, the dominant factoring company, jeopardizes the professional independence of the attorney.

2. Attorneys Fees, Including the Source and Any Sharing, Must Be Fully Disclosed to the Court, and to the Client.

The Opinion purports to answer the question of what disclosures must be made if the contract is assigned to a third party litigation financing company, but, again, does not answer that question fully or practically. It fails to take into consideration the duties of disclosure arising under the bankruptcy code and incumbent upon any attorney representing a Chapter 7 debtor.

First, attorneys are bound by the code to charge only “a reasonable fee” which fee must be disclosed in its entirety to the court on Form B2030. The compensation earned by attorneys “must be within the parameters of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure.” *In re Waldo*, at 895. Section 329(a) and Rule 2016(b) impose a non-waivable, independent duty on attorneys to disclose their fee arrangements. Rule 2016(b) requires that “[e]very attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether *the attorney has shared or agreed to share the compensation with any other entity*. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.” This disclosure is made on Form B2030. A failure to disclose a fee arrangement – any fee arrangement – without more is sanctionable. *In re Park-Helena Corp.*, 63 F.3d 877, 881 (9th Cir. 1995); *In re Gay,* 390 B.R. 562, 570 (Bankr. D. Md 2008).

Therefore, every attorney representing a Chapter 7 debtor must report the following information: a) the attorneys fees paid by the debtor, b) the identity of any third-party with whom the fee is shared, c) any debt that is owed to attorneys, and d) any post-petition payments that are part of the debtor’s monthly expenses. The attorney also has the responsibility to file an amended Rule 2016 statement, now Form B2030, disclosing any fees that have been received/shared but not previously disclosed.[17] Failure to disclose the fee-sharing arrangement with any person not a

[17] Federal Rule of Bankruptcy Procedure 2016 (b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the

member of the law firm subjects the attorney to sanctions, including disgorgement of all fees paid by the debtor. *See, for example*, *In re Egwu*, Memorandum Opinion Denying the Law Offices of Frank B. Cahn's Application for Attorney's Fees and Overruling the Law Offices of Frank B. Cahn's Objection to Plan, Case No. 10-30652-RAG (Bankr. D. Md October 19, 2010), in which the court ordered disgorgement of all fees paid under Chapter 13 plan for failure to disclose that attorney was sharing fees with contract attorney who covered confirmation hearings for attorney of record.

By and large, attorneys in the district of Utah financing their cases through a litigation factoring company fail to file the initial B2030 with the petition stating they have received $0 or $99 in attorney fees and, on the B2030 that lists the fees received post-petition, fail to disclose that they shared the fee amount reported on the B2030 filed in the Chapter 7 case with a factoring company. Rarely, if ever, is the third party financing company listed as the source of attorney's fees. Rarely, if ever, is the reported amount discounted to reflect the thirty percent taken by the financing company.[18] This failure to file the initial $0 compensation B2030, and to disclose the source of an attorney's fees received in the bankruptcy on any B2030 is fraud on the court. It also robs the court of its ability to determine the reasonableness of the fees received by the attorney in the case.

It is patently clear why the attorneys financing with the third party litigation financing company fail to disclose the source of the fees. The amount received in fees is thirty percent less than the amount of fees charged the client. The discrepancy is sure to be noticed and called into question by the client. Also, the fees are typically received in full by the attorney before the court receives the filing fees paid in full. Therefore, the client is in contempt of the order entered by the court allowing the filing fee to be paid in installments--which motion is typically/systemically filed along with the skeletal Chapter 7 petition. The order granting the debtor's motion to pay in installments specifically states that the debtor is to make no payments to attorneys or any other parties before the filing fees have been paid in full.[19] Factoring attorney's fee agreements to third party litigation financing companies always causes the order of the court to be violated. And, if, there is a post-petition obligation for fees, attorneys must disclose the balance owing for attorneys fees on debtor's schedules. The bankruptcy code requires that the remaining balance and/or post-petition debt for legal fees be listed on the debtor's schedules, namely Schedule F, listing prepetition debt, and Schedule J, listing post-petition monthly obligations. It is a breach of the rules to fail to disclose the balance owing

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particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

[18] It is clear that the thirty percent discount given to BK Billing is not for legal services provided. See, BK Billing's Welcome packet, stating that the thirty percent fee charged by BK Billing "is taken up with our fees and costs, and covers any debtor defaults on their post-petition fee agreement." *In re Gilmore,* p. 30.

[19] Form B103A states that "until the filing fee is paid in full, the debtor must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case."

on attorney's fees on the debtor's schedules. Zero Down practitioners generally fail to list the post-petition obligation on the B2030 filed in the Chapter 7, thereby avoiding the court's scrutiny of the fees charged.

In conclusion, as stated by the *Waldo* court, disclosure does not equal allowance. Merely because the Bankruptcy Rules allow for the reporting of the fees in Rule 2016 does not make those fees permissible under the Code or the Federal Rules of Bankruptcy. Similarly, merely because the ethical rules allow for factoring in other areas of law does not make factoring in Chapter 7 bankruptcy through a system of artificially unbundled, pre-and post-petition retainer agreements permissible.

3. Factoring With BK Billing In Particular Creates An Insurmountable Conflict of Interest Between the Client and Her Attorney

In addition to the failure to properly disclose the financing relationship to the bankruptcy court, the financing relationship itself contains an inherent conflict of interest that violates Professional Rule of Conduct 1.7. The Opinion recognizes that in 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" will arise. The solution is to have the client "give informed consent, confirmed in writing when waiving any such conflicts." Op. para. 15. But, the opinion fails to identify what specific conflicts exist, and what information must be disclosed to the client in order for the client to make an intelligent waiver of the conflicts inherent in the relationship between the attorney and the third party financing company. See Exhibit B, indicating the full extent of the waivers required.

Perhaps the rose-colored view on the waiver of the conflict of interest is grounded in a lack of facts concerning the extent of the influence of the litigation financing company operating throughout Utah. When considering the actual scope of the litigation financing company's advice and influence, it is patently clear that consistently using the litigation company and its financial products creates a conflict of interest between the attorney's financial interest and ability to provide legal representation and the client's financial interest in getting legal representation at a reasonable rate.

An attorney who consistently factors with BK Billing, the major financing entity in Utah, creates a business relationship in which the attorney uses retainer agreements provided by the financing entity.[20] BK Billing also works closely with Utah attorneys to provide advice and instruction on how to retain and service clients in order to exploit perceived loopholes in the bankruptcy code, how to avoid creating prepetition debt, and instructions to attorneys on what services should be provided pre- and post-petition--all with the express purpose of avoiding creating a prepetition debt and therefore being able to factor the post-petition invoice. *See, for example*, p. 29 of *In re*

[20] See, for example, p. 29 of *In re GIlmore*, in which BK Billing refers to its sample two contract retainer agreements attached for its "attorney clients" use.

Gilmore, attached as Exhibit 1, indicating that BK Billing is providing a "two-contract retainer agreement used by attorneys to bifurcate pre-filing and post-filing fees." The financing business also provides advice and support on how to grow the attorney's practice through the financing business's products. The company goes so far as to host business growth seminars at the National Association for Consumer Bankruptcy Attorneys (NACBA) at which this growth strategy was touted. It is BK Billing who "perfected" and continues to push the Zero Down litigation financing model amongst Utah attorneys. It stands to make an average of $600 per case filed by attorneys using its product, not including penalties and late fees.

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities toward third parties. It will always be a conflict of interest for an attorney to recommend a financing arrangement in which the attorney charges an undisclosed premium of thirty percent over and above his attorney's fees amount in order to get the client to file for Chapter 7 bankruptcy within 24 hours, thereby ensuring a steady flow of payments from the third party financing company to the attorney. The financial incentive for the attorney is such that, even if not warranted, the self-interest in receiving a cash payment from BK Billing upon transmittal of a signed retainer agreement forecloses the attorney's ability to consider and offer financing and filing alternatives that would otherwise be available to the client. It is highly likely that a regular, long-term use of BK Billing's product materially interferes with the lawyer's independent professional judgment in considering alternative courses of action that reasonably should be pursued on behalf of the client.

4. <u>The Pursuit of the Clients By BK Billing is Not "Gentle" and is Rife With Conflicts of Interests and Material Misrepresentations.</u>

The Opinion indicates that in the hypothetical given to the Committee, the factoring company "will 'gently' pursue payment from the client." Op. para. 6. If the factoring company alluded to in the hypothetical is BK Billing, BK Billing's pursuit of the client is not gentle. Despite its advertising, BK Billing uses every tactic used by debt collectors to collect on the factored agreements (including agreements signed prepetition). These tactics include phone calls, emails, and negative reports on the freshly discharged debtor's credit report in the name of BK Billing.

What is problematic is that BK Billing performs these collection efforts in the name of the client's attorney. *See In re Gilmore*, p. 30, where BK Billing explains to its attorney clients that "The debtor is always your client. BK Billing handles and manages the accounts receivables on that fee agreement on your behalf." The collection efforts, therefore, are undertaken on the part of the attorney--who has already been paid in full by BK Billing. It is impossible that a client may knowingly consent to being pursued by the collections arm of his attorney, who has already been paid in full. It is unethical for an attorney to request that his client agree to being the target of such collection efforts. Yet, the Opinion condones by extension these very acts.

d. **Are attorney fees reflected in the post-petition contract reasonable when the attorney sells her rights to the fees at a deep discount.**

The Opinion purports to be concerned about "individuals with modest means who need legal services and the ability for lawyers to serve those needs without incurring personal financial hardship." It suggests that a factoring relationship is ethical if the client is offered the same discounted rate. However, it stops short of actually resolving the issue of whether attorneys charging their clients a 30 percent financing charge on top of their attorney's fees is reasonable. See para. 17, "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.

Perhaps the Committee would be better able to reach a conclusion as to reasonableness, if it considered the following:

1. It is unethical for an attorney to encourage a debtor to incur debt when contemplating bankruptcy. [21] Every factoring arrangement is an invitation by a debtor's attorney for her client to incur bankruptcy-related debt.

2. Zero Down practitioners charge inflated attorneys fees with unconscionably high interest rates and loan origination fees that far exceed 30 percent. Respondents have analyzed the B2030 filings of the top six users of the Zero Down factoring product in the District of Utah from 2016 through April 2017. The overall average increase is $696 or 85%, with the firms with heavy use of the product showing the greatest increase in rates increasing their rates considerably more … up to $1,410 or by nearly 200% (see table below).

Firm	$0 Down Freq.	Regular Rate	Low/0 Down Rate	Avg Bal. Post Pet	% Fees Post Pet	Overall Increase	Percent Increase
Capstone Law, PLLC	96%	$1,277	$1,954	$1,896	97%	$677	53.01%
Vannova Legal, PLLC	90%	$766	$2,177	$2,109	97%	$1,410	184.01%
Law Office of Theron Morrison	78%	$756	$2,031	$1,930	95%	$1,275	168.64%
Beehive Advocates	96%	$873	$1,776	$1,641	92%	$903	103.45%
Law Office of Amy L. Butters	89%	$1,221	$2,261	$2,239	99%	$1,040	85.21%
Law Office of Ryan Simpson	85%	$779	$1,559	$991	64%	$781	100.22%

The same firms charge markedly less when a debtor pays in full prior to filing. See, for example, Vannova Legal, charging $766 if paid in full before filing, and $2177 if using the zero down financing product. The legal tasks in a Chapter 7 are set. Therefore, the high zero down, unbundled representation fee does not reflect increased workload, or more

[21] *In re Wark*, 542 B.R. 522, 531, n. 27 (Bankr. D. Kan. 2015)

difficult tasks. The only variable is the timing of the payment i.e., whether the fees will be paid prepetition, or post-petition.

3. Zero Down practitioners provide minimal legal representation at a high cost. For example, one of the highest filing attorneys in Utah provides "zero down" bankruptcy representation at a cost of $2,100 for fees, and $600 as a finance charge to the debtor for using BK Billing, his factoring agent of choice. For the $2,100, the debtor met with the attorney once (pre-retainer), and then never again.[22] His schedules, petitions, and other paperwork were all prepared remotely; his petition and schedule were signed by him remotely; his 341 meeting was attended by a contract attorney; his petitions and schedules contain a myriad of inaccuracies and false statements, and when he had questions, he was told to "do his best." In this particular scenario, the factoring is accomplished outside of the attorney's fees, and the client would receive no reduction in attorneys fees as a result of the factoring of the account. The client does, indisputably, receive skeletal legal representation that arguably fails to fulfill the attorney's duty under the retainer agreement, the bankruptcy code, and the rules of professional conduct. But, in this scenario, this attorney does not have a discounted rate to offer his client.[23] The solution of the Opinion is unavailable.

The factoring product championed largely by BK Billing is designed to prey on the debtor's weakened financial state and on the attorney's self-interest in creating a steady stream of income in an area of her practice that was previously less stable. The Bar needs to take a firm stand on the ethics of charging exorbitant fees for legal services that would cost half as much if only the debtor weren't so poor.

<u>The Fees Charged Are Unreasonable.</u>

Utah Rule of Professional Conduct 1. 5(a) states that a lawyer shall not make any agreement for, charge, or collect an unreasonable fee. The reasonableness of a fee is based on the time and labor required, and the novelty and difficulty of the questions involved, as well as the fee customarily charged in the locality for similar services. See Rule 1.5(a)((1)-(8). The basis of this fee must be communicated in writing to the client. See Rule 1. 5(b); 11 U.S.C. 527 (b)(1) ("The law requires an attorney . . . to give you a written contract specifying what the attorney will do for you and how much it will cost.")

The zero down, bifurcated, factored model violates these requirements.

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[22] But see, *In re Haynes*, 216 B.R. at 443, determining that an ethical pre-petition analysis takes on average 6 hours of representation.

[23] It is revelatory that the firms/attorneys that practice the Zero Down model of Chapter 7 financing were, by and large, not practicing bankruptcy law five years ago. Their entry into the bankruptcy section of the law coincides with the ability to charge triple the regular fees with absolute certainty of being paid.

First, the attorney provides the exact same legal services to his paid-in-full clients and his pay-later clients--but with staggeringly different price tags. The pay-later client is being charged a convenience fee in the hundreds of dollars which is called “attorneys fees” by the attorney. The difference is price is not disclosed to the client as a financing charge. Instead it is labelled attorneys fees. This is deceptive, misleading and, as no additional work is done for the increase in fees, indicates the fees charged to Zero Down clients is per se and egregiously unreasonable, and out of sync with the fee normally charged in the surrounding areas for the similar services.

Second, the attorney’s retainer misleads her client into thinking that the attorney provides prepetition services for free, creating the impression that the client is getting a break. What is not disclosed is the fact that, in comparison to the going rate for Chapter 7 services in the community, the attorney is egregiously overcharging the client for routine and very simple post-petition tasks, like attending a 341 meeting, and responding to creditor calls. The retainer agreement provided by BK Billing to attorneys using its product contains the following language: “I understand that [attorney] is not going to charge me for the time spent prior to the filing of my Chapter 7 case preparing and filing my petition. I also understand that [attorney] may incur costs for such items as credit report and tax transcripts for which it will not seek reimbursement.” If the prepetition services were truly non-charged and the attorney was not seeking reimbursement for costs incurred, the fees for post-petition services would surely decrease to account for the legal tasks and expenses for which the attorney is not seeking compensation. But, as shown above, the cost of post-petition Chapter 7 legal representation have increased exponentially from the costs of a conventional filing in which all fees are paid pre-petition. *See In re Haynes*, at 443 (finding a $600 flat fee for post-petition services to be unsustainable when considering the firm knew it earned $600 in fees for an entire case)(“[H]ow can it justify a fee of $600 for only part of the case, i.e., the post-petition part? It cannot.”). If the fees paid by the client are truly only for the post-petition services provided by the attorney, the fee charged is again, egregiously unreasonable.

Third, the attorneys fee is not solely for legal services provided by the attorney. The retainer agreement provided by BK Billing to attorneys using its products, and those used by other firms that have faced scrutiny in the courts, is silent as to how the fees charged relate to the services provided, and how the fees are split with the factoring company. The retainer agreement is also silent as to the basis of the fees charged for the 30 percent is paid directly to the factoring company.

BK Billing admits that its 30 percent cut is used to cover its administrative costs, and the costs of collection, including the costs of default across its entire portfolio. *See In re Gilmore*, fn. 13. Certainly, under the bankruptcy code, if a particular client pays its fees in full, the amount allocated to default for that client should be refunded to the client. If the default amount is a fee assessed based on the default rate across all BK Billing accounts, then the client is being charged a fee unrelated to any work done in its case, including legal work and account collecting work. This is impermissible under 11 U.S.C. 329, which requires that compensation cannot exceed “the reasonable value of such service.” Generally, this nature of this thirty percent non-legal services fee is not disclosed to client. Nor, is it deducted from the amount reported on the B2030 by the attorney. Instead, the entire amount, including the 30 percent withheld by BK Billing for administrative costs and possible default across its portfolio of accounts, is being reported as attorneys fees received by the attorney from the client.

At best, the factoring terms need to be fully disclosed to clients, including the fact that any unpaid fees are, in all likelihood, entirely dischargeable; at worst, it is a financial product being sold by the attorney as attorney’s fees, which product has caused a surge in the number of extremely-expensive-for-the-debtor-but-lucrative-for-attorney-and-factoring-company Chapter 7 cases that are filed using this financing product. This financial product masquerading as attorney fees commits fraud on the client, violates the attorney’s professional duty to disclose the basis of the fee charged in the retainer, and causes any fees charged under this model for post-petition Chapter 7 bankruptcy services to be per se unreasonable.

CONCLUSION

Attorneys representing Chapter 7 debtors in the United States Bankruptcy Court for the District of Utah cannot unbundle services, cannot request their clients sign post-petition agreements if the attorney already represents the client and has filed the Chapter 7 petition, cannot charge a factoring fee and call it attorney fees, cannot charge a reasonable fee for legal services which includes an undisclosed factoring fee slated to cover potential default, cannot share attorneys fees with a non-lawyer financing company, and cannot condone the collections efforts of the factoring company in the attorney’s name when the attorney has already been paid in full. Any one of these actions, as well as those other enumerated above, violate the Bankruptcy Code, the Rules of Professional Conduct, and the fiduciary relationship of an attorney with Chapter 7 clients.

As Ethics Opinion 17-06 condones all of the above behavior, the Opinion should be withdrawn, or, at the very least, amended to properly incorporate the duties of representation that fall upon an attorney when he or she agrees to represent a Chapter 7 debtor in the United States Bankruptcy Court for the District of Utah, and files the initiating petition. As it stands now, considering controlling law and ethical rules, Ethics Opinion 17-06 cannot function as the purported “guide to the consumer bankruptcy bar in order to aid them to serve their client while avoiding violations of the Rules of Professional Conduct.” Op. para. 3.