III. FACILITATING EFFECTIVE ACCESS TO BANKRUPTCY

A. Paying for Bankruptcy

§ 3.01 Chapter 7 Attorney's Fees

(a) The dischargeability of prepetition attorney's fees in chapter 7 hinders access to the bankruptcy system and access to justice. Congress and all stakeholders to the bankruptcy system should take steps to lower barriers to access, including:

(1) consistent with the Commission recommendation at § 5.06 Bankruptcy Forms, creating easy-to-understand online data input forms that would generate asset and liability compilations that could be reviewed by a bankruptcy professional to make preparation of schedules less time-consuming;

(2) increasing provision of pro bono bankruptcy representation for low-income debtors;

(3) reducing filing fees for low-income debtors, even if represented by paid counsel;

(4) allowing video attendance at § 341 meetings and scheduling these meetings outside of regular working hours, with safeguards ensuring that the named debtor is the one appearing; and

(5) providing low-income debtors legal representation through a governmental office, akin to public defenders' offices.

(b) Congress should amend the Bankruptcy Code to allow postpetition payment for attorney services rendered prepetition. Different mechanisms have different costs and benefits. The Commission believes two mechanisms merit consideration:

(1) Excepting fee agreements from the automatic stay and delaying the discharge of fees for a period of time, such as six months, with other coordinating amendments to the Bankruptcy Code to ensure no change to other creditors' access to their collateral during the delay.

(2) Making prepetition attorney's fees nondischargeable in a chapter 7 with judicial review of the fee agreement.

Background. How consumers pay for legal representation in bankruptcy is one of the most important issues facing the bankruptcy system. Consumers who cannot pay either cannot access the bankruptcy

system or must file pro se, and studies show pro se filers get inferior outcomes.[1] Another study suggests consumers are increasingly using "no money down" chapter 13 cases that allow payments of their attorney's fees through the chapter 13 plan, although such filers end up paying more and are less likely to receive a bankruptcy discharge.[2] A bankruptcy system that works only for those who can pay for legal representation does not further the American ideal of equal justice under law.

The current situation is the result of legal rules that begin with the U.S. Supreme Court's decision in *Lamie v. United States Trustee*,[3] which held that attorney's fees for work done on behalf of chapter 7 debtors during the bankruptcy case cannot be treated as an administrative expense and therefore cannot be paid from estate assets. Next, almost every published decision has held that any agreement to pay attorney's fees is a prepetition fee agreement subject to the automatic stay and the bankruptcy discharge.[4] Putting this case law together, an attorney who is owed money for work done before filing the bankruptcy petition is no different than any other unsecured creditor. Additionally, the Eleventh Circuit has held that an attorney cannot advise a client to incur debt from another person to pay the attorney fee for bankruptcy representation.[5]

Under this state of the law, an attorney offering representation to potential chapter 7 debtors has four fee options, each of which produces undesirable results:

> *Option 1:* The attorney can delay filing a chapter 7 case until the debtor has paid up front all of the anticipated fees in the case. There are three problems with this common approach. First, it deprives the debtor of immediate relief, which might especially frustrate the debtor's goal in filing bankruptcy if there is ongoing or imminent collection activity, such as wage garnishment or seizure of collateral. Second, if the debtor is unable to complete the prepetition payments, no case will be filed, and the debtor will likely lose at least some portion of the funds deposited with the lawyer as payment for whatever services — legal or administrative — were provided. Third, if the debtor does complete the required prepetition payment, and the case requires unanticipated services after filing, the attorney will have the same difficulties in collecting additional fees as in cases filed without prepayment.

1 One study found chapter 7 debtors who were represented by an attorney were over nine times as likely to get a discharge as chapter 7 debtors who filed pro se. Angela K. Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1974 tbl.3b (2011).

2 *See* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, *"No Money Down" Bankruptcy*, 90 S. Cal. L. Rev. 1055, 1075 tbl.1, 1093 tbl.5 (2017).

3 540 U.S. 526 (2004).

4 *See* Bethea v. Robert J. Adams & Associates, 352 F.3d 1125 (7th Cir. 2003); *see also In re* Beschloss, 2018 WL 2138276, at *2 (Bankr. S.D.N.Y. 2018) ("[W]hether [a prepetition] obligation to pay the law firm's fees was based on an initial retainer agreement . . . on quantum meruit for the work that they performed, or . . . on a promise to pay even if the debtor got a discharge . . . [t]hey are all subject to discharge.").

5 *See* Cadwell v. Kaufman, 886 F.3d 1153 (11th Cir. 2018) (applying § 526(a)(4) of the Bankruptcy Code).

Option 2: The attorney can file a chapter 7 case without receiving full payment of the anticipated fees, hoping that the debtor will voluntarily pay the fees from non-estate assets postpetition. This option presents a low likelihood that the attorney will be paid. The debtor has no financial incentive to pay the fees because the bankruptcy is accomplishing the debtor's goals without payment, and the attorney has no ability to take any collection action — even suggesting voluntary repayment — because the claim for fees is subject to the automatic stay and the discharge injunction.

Option 3: The attorney can bifurcate the legal services to be provided, first entering into an agreement with a nominal fee covering only prepetition services and then entering into a postpetition agreement for the bulk of the fees to cover postpetition services. Because it occurs postfiling and creates postfiling obligations, the automatic stay and the bankruptcy discharge do not apply to the postpetition agreement. Thus, the attorney theoretically can demand payment and engage in collection activity after discharge. This option, however, has at least five drawbacks. First, local rules or practice may not allow the unbundling of postpetition services.[6] Second, even if unbundling is allowed, the court may find that the fees allocated to prepetition services are unreasonably low and the fees for postpetition services are unreasonably high. Third, the client may decline to enter into the second fee agreement, requiring the attorney to withdraw from the representation, leaving the debtor unrepresented and leaving the attorney with no ability to obtain additional payment for the services already rendered. Fourth, where the client enters into a postpetition contract, there is no incentive for the client to pay for the postpetition services other than a threat of collection action, which the attorney may be reluctant to engage in, both because of its expense and because it may generate unfavorable reviews of the attorney, online and otherwise. Fifth, the attorney may assign the right to be paid under the postpetition agreement to a third-party collector, incurring significant charges and increasing the fee charged to the client to offset these charges. As illustrated by later discussion of options that merit congressional consideration, the Commission expressly disapproves of attorney fee factoring agreements between debtors' attorneys and third-party collectors.[7]

Option 4: The debtor can file the case under chapter 13 instead of chapter 7. If the debtor makes any payments required by the chapter 13 plan, at least a portion of the attorney fees will be paid. Also, the debtor has an incentive to make payments because, absent the uncommon occurrence of a "hardship" discharge, the court will grant a discharge only if the debtor makes all plan payments. But this option also has drawbacks. First, chapter 13

6 The Commission has made a recommendation on unbundling at § 3.02 Unbundling of Legal Services.

7 Alleging multiple disclosure and ethics issues, the U.S. Trustee has filed several suits against attorneys who were bifurcating and factoring client accounts for filing chapter 7 using the services of a national company. *See, e.g., In re* Wright, 591 B.R. 68 (Bankr. N.D. Okla. 2018); *see also* Complaint, U.S. Trustee for the Central Dist. of Cal. v. Ashcraft, Adversary Proceeding 6:17-ap-01721 (Bankr. C.D. Cal. Dec. 12, 2017); Daniel Gill, "Firm Sued by U.S. Trustee Over Billing Practices in Chapter 7" (Dec. 19, 2017), available at https://www.bna.com/firm-sued-us-n73014473436/ (last visited Dec. 27, 2018) (summarizing the complaint and including responses from the company).

imposes additional costs on the debtor, both in higher fees and in the requirement that the debtor devote all disposable income to paying claims under the plan. Second, if the court does dismiss the case, the debtor will not only fail to receive a discharge but also will lose any fees paid to the attorney and chapter 13 trustee, as well as other costs the debtor has incurred in filing. Third, it may be unethical for an attorney to file a chapter 13 case for a client when chapter 7 provides the relief that the client needs, simply because the attorney prefers the more secure fee payment in chapter 13.

Table 1 summarizes the effects of these four options on debtors and their attorneys, setting out for each option (a) how much the option increases the likelihood of debtor payments, (b) how much it increases the attorney's costs, and (c) how much it diminishes the debtor's relief.

Comparisons of Existing Options to Pay Chapter 7 Attorney Fees

Table 1

	Effectiveness in encouraging fee payment	*Cost to the attorney*	*Negative effect on the debtor*
Option 1: Delay filing until anticipated fees are paid	*High* Debtor has high incentive to pay the fees, because otherwise there will be no filing.	*Low* Any administrative cost in holding funds before filing can be covered by a higher fee.	*High* The delay in filing may cause harm to the client, and the attorney may deduct expenses from any refund if the case is not filed.
Option 2: Chapter 7 filing without prepayment	*Low* The debtor is under no legal obligation to pay the fees; the automatic stay and discharge prevent the attorney from asking for fee payment.	*High* Failure of the debtor to make completely voluntary payments results in no possibility of payment for the services provided.	*Low* There is no negative effect. Unless the debtor chooses to pay the fee, without prompting, the debtor obtains the legal services without charge.
Option 3: Bifurcated representation	*Moderate* Although excepted from discharge, fees under the post-filing contract may be difficult to collect.	*Moderate* The attorney incurs costs of collection if the debtor fails to complete payments and may have to defend the bifurcation if it is challenged as unethical.	*Moderate* The debtor is subject to collection of unpaid fees and may incur liability for costs of collection. The unpaid fees may be assigned for collection, increasing costs to the debtor.
Option 4: File chapter 13	*High* The debtor is encouraged to complete plan payments to obtain a discharge and avoid the need for refiling after dismissal.	*Moderate* The court may dismiss the case for failure to make plan payments before payment of attorney fees. Collecting unpaid fees would impose costs and reputation risk.	*High* The attorney fees are higher than a chapter 7; failure to complete plan payments results in a loss of fee and expense payments and no discharge is obtained.

The Ninth Circuit summarized the inadequacy of these alternatives for payment of the debtor's attorney fees in chapter 7:

> [B]ecause no existing solution is totally satisfactory, it is only the rarity of litigated disputes in this area (as a practical matter) that avoids a real chilling of competent counsel's willingness to represent Chapter 7 debtors. Needless to say, the optimum solution to the problem would call for action by Congress to provide express statutory authority and an express procedure for the compensation of Chapter 7 debtors' attorneys who render postpetition services.[8]

Attorneys serve as the gateway for the bankruptcy system. Whether persons get the bankruptcy relief they seek very much depends on whether the system incentivizes competent counsel to serve with fair compensation.

Recommendation — System Changes to Make Bankruptcy Less Expensive. In the Commission's deliberations, several commissioners expressed the view that the root problem stems from a system that is poorly designed for the needs of the average consumer whose financial affairs are simple and whose bankruptcy cases are straightforward. Over 90% of chapter 7s are no-asset cases that provide no distribution to unsecured creditors,[9] but these cases are all administered under a heavily judicialized procedure using the same statute, rules, and forms as are used by all individuals regardless of wealth. Moreover, the many amendments to the Bankruptcy Code have made it a complex law to navigate, making it more imperative than ever for consumers to have expert and expensive legal assistance.

Part of the solution to make it easier for consumers to pay for their bankruptcies is to lower the cost of filing bankruptcy. The Commission's charge — to recommend "improvements to the consumer bankruptcy system that can be implemented within its existing structure" — limited what it could recommend. Were it not for this limitation, some commissioners might have had an interest in exploring measures such as a new consumer-only bankruptcy law or administering the consumer bankruptcy system through a government agency. Other commissioners believe such measures are not necessary, but the Commission as a whole agreed that solutions that would require a complete overhaul of the bankruptcy system were beyond the Commission's charge. The recommendations in this section reflect the task that was set before the Commission and should not be interpreted either as a rejection or an endorsement of more radical solutions.

The Commission agreed on several measures that would lower costs and can be implemented within the existing structure of the bankruptcy system:

> (1) As the Commission has recommended elsewhere, the AO, the Federal Judicial Center (FJC), and the Advisory Committee on Rules of Bankruptcy Procedure should work with both nonprofit and for-profit private actors to develop software that allows for easier data entry on bankruptcy forms.[10] Such software would lower the costs to attorneys, which in

8 Gordon v. Hines, 147 F.3d 1185, 1190 (9th Cir. 1998).

9 Dalié Jiménez, *The Distribution of Assets in Consumer Chapter 7 Bankruptcy Cases*, 83 Am. Bankr. L.J. 795, 819 (2009).

10 *See* § 5.06 Bankruptcy Forms.

the competitive market for consumer bankruptcy lawyers presumably would be passed through to debtors in the form of lower fees.

(2) Legal aid organizations and private attorneys should increase the availability of pro bono representation for bankruptcy debtors.

(3) Although the law currently allows a court to waive the filing fee for debtors within 150% of the poverty line,[11] that law should be expanded to reach more individuals and allow the payment of partial filing fees in appropriate cases.

(4) Consistent with its recommendation on stand-in counsel,[12] the Commission recommends the bankruptcy system should allow trustees, using video technology, to conduct section 341 meetings remotely and should encourage trustees to offer section 341 meetings outside of regular working hours. Attendance at the section 341 meeting, required in every bankruptcy case, can be a burden for poorer debtors who cannot easily take time off work. In this situation, the bankruptcy process can contribute to the debtor's financial distress instead of alleviating it. Also, in rural areas, the section 341 meeting can require hours of travel that the debtor does not have available or cannot financially afford. Expanded use of video attendance at section 341 meetings requires the balancing of interests of debtors, debtors' attorneys, trustees, and creditors, as well as the overall integrity of the bankruptcy system.

(5) Congress should provide for legal representation of low-income debtors in the bankruptcy process in a manner that the federal public defender currently provides in the criminal justice system.

Recommendations — Statutory Amendments. The Commission debated over several meetings the question of whether and how to amend the Bankruptcy Code to address the payment of attorney's fees in chapter 7 bankruptcies. Culling ideas from the committee report it had received, as well as proposals from individual commissioners, the Commission eventually narrowed its discussion to four options:

Option 1: The first option would be to make chapter 7 attorney's fees nondischargeable without any additional procedures. Under this option, Congress would add a new paragraph to section 523(a) to except from discharge amounts due under any agreement for payment of chapter 7 fees. Nondischargeability would be automatic, and the attorney could enforce the agreement in any court with jurisdiction over the matter, much as domestic support obligations may be enforced under current law. An exception to the automatic stay would be added to allow for postpetition payment of chapter 7 attorney fees along with coordinating amendments to other sections to deal with other issues.

Best option

11 *See* 28 U.S.C. § 1930(f). Individual debtors also may pay the filing fee in installments. *Id.* § 1930(a).

12 *See* § 3.05 Stand-in Counsel.

By allowing an attorney to discuss fee payment with the debtor during and after the bankruptcy case and to take collection action if necessary, attorneys would have more incentive to file a chapter 7 case before the full fee was paid. This proposal would simply render unpaid legal fees in chapter 7 cases nondischargeable, and the attorney would be in the same position as with a nonbankruptcy client's promise to pay fees. Section 329, the rules of professional ethics, and contract law would provide safeguards against unreasonable fees.

Option 2: The second option would add procedural protections to the first option. These protections would provide for judicial review of fee agreements at the outset of a case to ensure reasonable charges. The attorney would need to move for nondischargeability during the bankruptcy case, and a debtor could recover fees and costs in response to an unjustified request for nondischargeability. This option would be implemented principally through amendments to sections 329 and 523(a), along with coordinating amendments elsewhere in the Bankruptcy Code.

Option 3: The third option would be to make the bankruptcy discharge contingent on a chapter 7 debtor's completion of payments under a prepetition fee agreement. Debtors would have an incentive to pay the attorney's fee because otherwise they would not receive a discharge. There would be a procedure to allow discharge if the debtor showed an inability to pay. A new exception to the automatic stay would allow postpetition payment of attorney's fees, as well as allow discussion of repayment between attorney and debtor. This option would be implemented principally through an amendment to section 727, along with coordinating changes elsewhere in the Bankruptcy Code.

Option 4: The fourth option would authorize attorneys for chapter 7 debtors to enter into prepetition fee agreements under which the debtor could make voluntary payments postpetition. Entry of discharge would be delayed for a brief period of time, such as six months from case commencement, to permit discussion and potential payment of a reasonable fee. This option could be implemented principally through an amendment to section 727 and an amendment to Federal Rule of Bankruptcy Procedure 4004 on the issuance of a discharge order. Section 362 would need to be amended to allow postpetition collection of attorney's fees paid voluntarily. Protection against unreasonable fees would be under section 329, which would require judicial approval of any fee agreement. Coordinating amendments would be necessary elsewhere, especially to ensure that no prejudice occurs to whatever rights a secured creditor has to access its collateral during the delay in discharge. Although this option would not assure attorneys of payment of their fees, it would provide a mechanism allowing payment of the fees to be requested and received postpetition.

At the center of each of these options is the necessity of some sort of mechanism to allow postpetition collection of chapter 7 attorney's fees. Each option has costs and benefits as summarized in Table 2.

Comparisons of Proposed Amendments to Allow Postpetition Collection of Chapter 7 Attorney's Fees

Table 2

	Effectiveness in encouraging fee payment	*Cost to the attorney*	*Negative effect on the debtor*
Option 1: Attorney's fee excepted from discharge, no procedural protections	*Moderate* Although excepted from discharge, fees may be difficult to collect.	*Moderate* The attorney would incur costs of collection for unpaid fees.	*Moderate* The debtor is subject to fee-collection action but obtains discharge of other debts. The debtor's principal protection against unreasonable fees is only section 329.
Option 2: Attorney's fee excepted from discharge, with procedural protections	*Moderate* Although excepted from discharge, fees may be difficult to collect.	*High* Attorney would have to initiate a procedure in the bankruptcy case.	*Moderate* The debtor is subject to fee collection but obtains discharge of other debts. Judicial review in every case offers additional protection against unreasonable fees.
Option 3: Delay discharge until attorney's fees are paid	*High* Debtor will likely complete fee payments to obtain the general discharge.	*Low* The attorney need only file a notice of nonpayment in the bankruptcy case. Collection action is likely not needed.	*High* The penalty for not paying fees is loss of discharge.
Option 4: Delay discharge for six months	*Low to moderate* The debtor is under no legal obligation to pay the fees	*High* Judicial proceedings are required before collection efforts can begin.	*Low* The attorney may repeatedly suggest voluntary fee payment

The Commission decided that options two and four merit congressional consideration. The Commission's numerical listings of the two possibilities in the table or in its formal recommendation above is not meant to imply a preferred ranking.

What the Commission has listed as option two is the creation of a discharge exception for a prepetition fee agreement for a chapter 7. This option would require several changes, specifically:

- A new subsection would be added to section 329 providing (a) that on motion of an attorney for an individual debtor in a chapter 7 case, stating that the attorney has fully advised the client about the effect of the agreement, the court could approve a prepetition agreement for the debtor to pay the attorney's fees as specified in the contract; and (b) that such a contract would not be treated as an executory contract under section 365. In approving a fee agreement, the bankruptcy court could include in its order provisions

(1) prohibiting an increase in fees based on delay in payment under the contract,

(2) prohibiting or limiting interest on the installment payments,

(3) requiring enforcement of the agreement only through the bankruptcy court, specifically prohibiting arbitration,

(4) prohibiting assignment, factoring, or other collection by a third party, and

(5) imposing other conditions to avoid abusive or unnecessary collection practices.

- Section 362(b) would be amended to add a new exception from the automatic stay allowing an attorney to discuss with the debtor the payment of fees under a fee agreement approved under section 329.

- Section 523(a) would be amended to add an exception from discharge for amounts due under a postpetition fee agreement approved under section 329.

- Section 523(c)(1) would be amended to provide that the new exception from discharge for attorney fees will only be effective upon an order entered by the court presiding over the bankruptcy case on request of the attorney or firm to whom the fees are owed, based on a determination by the court that the outstanding fees were incurred reasonably and in compliance with any conditions imposed by the bankruptcy court.

- Section 523(d) would be amended to include the new exception from discharge as one for which the debtor may obtain payment of costs and reasonable attorney fees if the position of the attorney is not substantially justified.

- Section 1328(a)(2) would be amended to include the new exception from discharge in chapter 13.

- Section 526(a)(4) would be amended to exclude agreements for payment of chapter 7 legal fees, allowing an attorney to recommend entry into such an agreement.

- Federal Rule of Bankruptcy Procedure 2016(b) would be amended to require the filing of any motion to approve a prepetition agreement for the debtor's payment of fees for the attorney's services under section 329 at the same time as the statement required by the rule.

- Federal Rule of Bankruptcy Procedure 4007(a) and (c) would be amended to provide that the new discharge exception for chapter 7 attorney fees may be implemented by motion rather than through an adversary complaint, and that the motion must be filed within five years of the entry of discharge in the case.

- Federal Rule of Bankruptcy Procedure 7001(6) would be amended to allow determinations of the nondischargeability of obligations under court-approved fee agreements to be made by motion rather than adversary proceeding.

The Commission also believes that what it has listed as option four merits congressional consideration. This option would delay the discharge for six months and would require the following changes:

- Section 526(a)(4) would be amended to exclude agreements for payment of chapter 7 legal fees, allowing an attorney to recommend entry into such an agreement for voluntary payment.

- Section 362(b) would be amended to add a new exception from the automatic stay for payment of chapter 7 debtors' attorney fees and for discussion between the attorney and client for voluntary payment.

- Section 329 of the Bankruptcy Code would be amended to add a new subsection providing (a) that on motion of an attorney for an individual debtor in a chapter 7 case, stating that the attorney has fully advised the client about the effect of the agreement, the court may approve a prepetition agreement for the debtor's payment of fees for the attorney's services as specified in the contract; and (b) that such a contract will not be treated as an executory contract under section 365. In approving a fee agreement, the bankruptcy court could require provisions

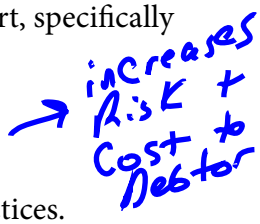
  (1) prohibiting an increase in fees based on delay in payment under the contract,

  (2) prohibiting or limiting interest on the installment payments,

  (3) requiring enforcement of the agreement only through the bankruptcy court, specifically prohibiting arbitration,

  (4) prohibiting assignment, factoring or other collection by a third party, and

  (5) imposing other conditions to avoid abusive or unnecessary collection practices.



- Either section 727 or Federal Rule of Bankruptcy Procedure 4004 would be amended to provide that if the court approves a prepetition fee agreement under section 329, the discharge would be delayed. The Commission believes a delay of six months would be appropriate.

- Federal Rule of Bankruptcy Procedure 2016(b) would be amended to require the filing of any motion to approve a prepetition agreement for the debtor's payment of fees for the attorney's services under section 329 of the Code at the same time as the statement required by the rule.

- Section 365 would be amended to prohibit the trustee from assuming or rejecting a contract for payment of chapter 7 debtors' attorney fees.

- Section 503(b) would be amended to provide that the reasonable unpaid postpetition fees for the debtor's attorney, as approved by the court under section 329, would be an administrative expense in an asset case.

- Coordinating amendments would need to be made to ensure that the delay in discharge does not prejudice the rights of secured creditors given that section 362(c) provides that the automatic stay terminates at discharge. Such an amendment might state that if discharge was delayed under this procedure and absent a court order to the contrary, a secured creditor could proceed at a given point in time — so many days after the meeting of creditors — or at the time discharge would have been entered had the delay not occurred.

Under this proposal, any fees unpaid after the expiration of the delay would be subject to discharge. As with other prepetition debts, the debtor could voluntarily continue to pay the unpaid amount after entry of discharge. It is not part of the Commission's recommendation that any unpaid fees would be subject to reaffirmation.

§ 3.02 Unbundling of Legal Services

Bankruptcy courts should adopt local rules that address unbundling, specifying what services a lawyer may and may not exclude from the legal representation being provided. The courts should ensure that these local rules are consistent with applicable rules of professional responsibility.

Background. "Unbundling," more formally known as "limited-scope representation" or "limited-services representation," occurs when a lawyer specifies to a client limits on what the lawyer will do for the client. Unbundling is common in consumer bankruptcy cases where a lawyer often accepts a flat fee and wants to make clear to the client that the fee does not cover services for unanticipated and possibly expensive contingencies, such as a trial over the debtor's eligibility for a discharge. Unbundling also can be a tool to address the rising costs of a consumer bankruptcy filing.[13]

Theoretically, unbundling is a matter of contract between the lawyer and the client. In reality, unbundling raises serious ethical concerns about whether the client meaningfully consented to a limited representation given the lawyer's immense informational advantage about what services the client will need and the client's expectation the lawyer will act in the client's best interest. Model Rule of Professional Conduct 1.2(c) allows a lawyer to limit the scope of a representation if the limitation is reasonable and the client gives informed consent.

13 *See* Pamela Foohey, et al., *supra* note 2, at 1066 (2017) (finding median chapter 7 fees using 2013-16 data of $1229 and median chapter 13 fees of $3217). The mean figures from the ABI Consumer Bankruptcy Fee Study using 2007-08 data and adjusted for inflation are $1195 for chapter 7 asset cases and $2858 for chapter 13. *See* Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17, 30 (2012) (reporting figures of $1,072 for chapter 7 asset cases and $2,564 for chapter 13 cases).

In consumer bankruptcy, unbundling can allow some potential consumer filers access to legal assistance they otherwise would not be able to afford. But, unbundling can be a two-edged sword. Unbundling can leave debtors with no help when needed. Such debtors then often seek legal advice from those who cannot provide it, such as the court clerk's office, their trustee, or even the judge. The question is whether justice is better served by allowing access to only some basic legal services, such as preparation of the bankruptcy petition and schedules, or leaving the debtor without any legal help. Always lurking in the background is whether the typical consumer debtor can give informed consent to a limited representation in a complex bankruptcy matter.

As costs have risen and competitive pressures on attorneys have climbed, issues about unbundling seem to be increasing in the bankruptcy system. Numerous articles try to parse the boundary lines for practitioners about when unbundling is appropriate.[14] In remarks to bankruptcy trustees, the director of the U.S. Trustee Program (USTP) twice recently has expressed concern over the deleterious effects that excessive unbundling can have on consumer bankruptcy filers.[15]

Unbundling also plays a role in attempts to bifurcate bankruptcy attorney fees into smaller amounts the consumer must pay in full before filing bankruptcy and larger amounts that the consumer can pay in installments after filing. For bifurcation to be effective, the prepetition agreement must necessarily limit the scope of the attorney's postpetition representation. The Commission has a separate proposal on payment of attorney's fees that should minimize, if not eliminate, the motivations to bifurcate attorney's fees,[16] but bifurcation of fees is another example of how issues about unbundling are playing an increasing role in how consumers access the bankruptcy system.

In considering unbundling in consumer bankruptcy, the Commission was aware that it was not writing on a blank slate. The Final Report of the American Bankruptcy Institute's National Ethics Task Force has a twenty-five-page section describing best practices for limited-scope representations in consumer bankruptcy cases. The Task Force described its goal as addressing the following concerns:

> In considering the issue of Limited Services Representation, the Task Force recognizes the necessity of reconciling the need to protect debtors from receiving inadequate and ineffective representation, even for a limited fee, and the interest of providing

14 Alexander Laughlin, *Unbundling as a Means of Financing Bankruptcy Fees and Working Without a "Wet" Signature*, Am. Bankr. Inst. J., Oct. 2017, at 30; Zach Mosner, *Unbundling and Ghostwriting: Who Ya Gonna Call?*, Am. Bankr. Inst. J., Sept. 2016, at 14; Gary E. Sullivan & Jessica M. Zorn, *Bankruptcy and Unbundling: Oil and Water*, 77 Ala. Law. 344 (2016); Carrie E. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, Am. Bankr. Inst. J., Oct. 2013, at 14.

15 U.S. Dep't of Justice, "Remarks of Director Cliff White Before the 2018 Annual Conference of the National Association of Bankruptcy Trustees" (Aug. 16, 2018), https://www.justice.gov/ust/speeches-testimony/nabt_annual_conference_08162018; U.S. Dep't of Justice, "Remarks of Director Cliff White Before the 53rd Annual Seminar of the National Association of Chapter 13 Trustees" (June 28, 2018), https://www.justice.gov/ust/speeches-testimony/director-addresses-53rd-annual-seminar-national-association-chapter-13-trustees.

16 *See* § 3.01 Chapter 7 Attorney's Fees.

> debtors with the option of limited legal representation in lieu of self-help resources or non-legal assistance.[17]

The Commission agrees with these goals. In preparing this report, the Commission drew on the Task Force's report. The Commission commends to practitioners, assuming it is consistent with any applicable local rule, the Task Force's model agreement for use with clients, which tries to plainly lay out the services the attorney will provide and includes a checkbox format the client can readily understand.[18]

Recommendation. As noted above, the rules of professional conduct allow an attorney to limit the scope of representation so long as any limitations are reasonable. The Commission first considered drafting a model local rule that jurisdictions could use to draw lines between the services an attorney could and could not unbundle. At the extremes, the issues are easy. For example, it seems clearly unreasonable for an attorney to disclaim responsibility to take basic steps to ensure the debtor receives a discharge, because a discharge is typically the whole point of filing a bankruptcy petition. On the other hand, it clearly seems reasonable for the attorney to specify that the flat fee for filing the bankruptcy case does not include defending the debtor at a trial on dischargeability.

Once the Commission moved away from the extremes, the issues became increasingly difficult. For example, what if the debtor said the principal purpose of the bankruptcy was to discharge a debt that a competent attorney would know raises discharge issues?[19] Also, commissioners from different states expressed views about what their state bars required as well as the appropriateness of unbundling specific services given local conditions. What might make sense in a rural environment where attorneys are far apart might not be a reasonable place to draw a line in a dense urban area where consumers have access to more alternatives for legal representation. The local costs of filing and other local barriers to justice also need to be considered.

Unlike the National Ethics Task Force, which promulgated a model rule,[20] the Commission decided that the better course was to encourage the promulgation of local rules addressing unbundling. The Task Force's report noted that "dozens" of judicial districts already have local rules.[21] These local rules, together with the Task Force's model rule, provide excellent starting points for jurisdictions to implement a local rule on unbundling or update an existing rule.

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17 Final Report of the ABI National Ethics Task Force 51 (2013) (available at https://abi-org.s3.amazonaws.com/Endowment/Research_Grants/Final_Report_ABI_Ethics_Task_Force.pdf) (last visited Dec. 27, 2018).

18 *Id.* at 60-63.

19 *Cf. In re Seare*, 515 B.R. 599 (B.A.P. 9th Cir. 2014) (upholding sanctions and rejecting the attorney's attempt to limit the representation because a cursory investigation would have led the attorney to know defending an adversary proceeding for fraud would be necessary to accomplish the client's objective).

20 *See* Final Report, *supra* note 17, at 57-59. Recognizing the differing requirements in differing states, the Task Force's model rule begins with the qualifier "If permitted by the governing Rules of Professional Conduct . . . ."

21 *Id.* at 52.

The Commission's recommendation should not be misinterpreted as indifference to the importance of addressing unbundling issues. The Commission recommends that every jurisdiction have a local rule that provides certainty to attorneys about what services can be unbundled and the procedures for unbundling. The local rulemaking process allows the professional community to come together, consider local conditions and state rules of professional responsibility, then implement appropriate client protections without unduly blocking access to the bankruptcy system and harming the persons they are meant to protect.

§ 3.03 Presumptively Reasonable Attorney's Fees in Chapter 13s

(a) In chapter 13 cases, courts should adopt presumptively reasonable flat fees that cover typical attorney work until confirmation.

(b) Courts should adopt an "a la carte" fee structure for work performed after confirmation.

(c) Courts should consider consumer bankruptcy specialist certification as a factor in setting presumptively reasonable fees.

(d) Courts should review presumptively reasonable fees on a regular basis to determine whether they are promoting the goals of efficiency, a qualified bar, the diligent practice of law, and fairness to debtors.

Background. Attorneys must disclose the amounts they receive as compensation for a bankruptcy case, and attorney compensation is subject to court oversight. Section 329 and Federal Rule of Bankruptcy Procedure 2016(b) require attorneys to disclose all compensation received in the year prior to filing a bankruptcy case and the total compensation the debtor has promised to pay. The court can disallow prepetition compensation to the extent it exceeds the reasonable value of the services. Under section 330(a)(4)(B), the court can allow reasonable postpetition compensation to the debtor's lawyer in chapter 13 cases.[22] Rule 2016(a) directs the attorney seeking such compensation "to file an application setting forth a detailed statement of (1) the services rendered, time expended, expenses incurred, and (2) the amounts requested."

With chapter 13 cases being filed at rates of 300,000 to more than 400,000 annually,[23] a detailed scrutiny of the "services rendered, time expended, and expenses incurred" in each and every case is not realistic. Consequently, local rules or norms have largely replaced individual review of fee applications by using presumptively reasonable fees, often called "no look" fees. If the attorney requests payment at or below the presumptive amount, the bankruptcy court generally approves the request without a hearing.

22 The Supreme Court has ruled that in chapter 7, the Bankruptcy Code does not permit postpetition compensation from estate assets for the debtor's lawyer. *See* Lamie v. U.S. Trustee, 540 U.S. 526 (2004). The consequences of the *Lamie* decision and the Commission's recommendations regarding payment of the attorney's fees in a chapter 7 are discussed at § 3.01 Chapter 7 Attorney's Fees.

23 *See* Administrative Office of the U.S. Courts, Just the Facts: Consumer Bankruptcy Filings, 2006-2017 (Mar. 8, 2018), www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 (last visited Jan. 21, 2019).