COMMENT

BIFURCATING CHAPTER 7 SERVICE & FEE AGREEMENTS IN ARIZONA: A LEGAL AND ETHICAL QUANDARY OR A VIABLE PRACTICE?

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CONTENTS

I. INTRODUCTION

A. The Perplexity Illustrated

Lynne is a fourth-year associate working at a law firm in Phoenix, AZ. Lynne's career as a consumer bankruptcy attorney is off to a successful start, but she is seeking to broaden her pool of potential clients. After reading an article discussing the viability of bifurcating services[1] and

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[1] Bifurcation of *services*: An attorney limits the scope of services available to the debtor at a lesser charge, or where the attorney only performs certain distinct services at a per performance fee. *See generally* Stephanie L. Kimbro, *Law A La Carte*, 29 GPSOLO 30, 32 (2012). See a more detailed discussion *infra* Part II(B)(1).

fees[2] in Chapter 7 bankruptcies, Lynne realizes that bifurcation may allow her to represent debtors who cannot otherwise afford costly bankruptcy attorney fees up front. After a month of entering into bifurcated agreements with her clients, Lynne is unexpectedly issued an Order to Show Cause from an Arizona bankruptcy judge. She finds out that earlier that week, one of her clients, Russell, appeared before the judge for a simple reaffirmation hearing. Russell did not realize that Lynne would not be accompanying him to his reaffirmation hearing to serve as his representation. Russell was clearly confused when he arrived at the hearing without his counsel present and was completely unprepared to represent himself. The situation displeased the judge and he wondered why Lynne failed to represent her client in his basic reaffirmation hearing. From the judge's perspective, Lynne was the attorney of record for the *entirety* of Russell's Chapter 7 bankruptcy proceedings until the judge determined otherwise.[3]

When Lynne arrived at the Order to Show Cause hearing, she explained to the judge that Russell wanted to keep his attorney costs down. She suggested that Russell unbundle (i.e. bifurcate) his services so that Lynne would only charge him for some of the services required in his Chapter 7 bankruptcy. Russell agreed to the arrangement, and reaffirmation hearings were not part of the agreed-upon services for which Russell requested representation. While discussing this matter with the judge, Lynne realized there was probably another issue she needed to bring to the judge's attention: Lynne and Russell also entered into a bifurcated *fee* agreement. The judge recently heard about other attorneys entering into both bifurcated *service* and *fee* agreements, like Lynne's, but the issue had not previously arisen in his courtroom for him to address, until now.

How should the judge respond? May Lynne bifurcate agreements in the future? How should Russell proceed? Do Arizona attorneys or judges have any clear guidance in this matter?

B. The Perplexity Assessed

This Comment addresses the topic of bifurcated service and fee agreements in Arizona between Chapter 7 debtors and their attorneys. Although scholarly works considering this issue conflate *service* and *fee* bifurcation, the two forms of bifurcation pose distinct concerns. Services and fees cannot be completely divorced, but this Comment uses a disjunctive approach and separately analyzes bifurcated *services* and *fees* within attorney's agreements for clarity.[4] This Comment considers the Bankruptcy Code, ethical rules, and relevant case law throughout the analysis of the issues to create a comprehensive and needed understanding for Arizona practitioners.

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[2] Bifurcation of *fees*: See a more detailed discussion *infra* Part II(B)(2).

[3] *See* Ariz. Ethics Op. 09-02 (September 2009) (explaining that the Arizona Ethical Rule (ER) 1.16 "sets forth the circumstances under which a lawyer may and shall withdraw from further representation of a client. The lawyer's responsibility to follow the law and procedures of the tribunal in attempting withdrawal is set forth in ER 1.16(c). [W]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. The lawyer [may seek] withdrawal relief from a higher tribunal. [According to ER 1.1 and 1.3,] while the lawyer is seeking relief, and if relief is not sought or granted, at all times the lawyer must continue to represent the client competently and diligently." (citations omitted)).

[4] While this Comment analyzes service and fee agreements separately, *one* contractual agreement between an attorney and debtor may account for *both* services and fees. However, services and fees pose distinct issues and will be treated as two separate agreements for clarity.

Bifurcation of *services* (i.e. unbundling) is a widely recognized practice in most areas of law.[5] But, Arizona bankruptcy attorneys face uncertainty with the issue.[6] Responding to bifurcated *services*, some bankruptcy courts have stated a preference that attorneys represent debtors throughout all aspects of a Chapter 7 bankruptcy case while others have suggested that bifurcated *service* agreements can be properly executed and have a legitimate place in the complex bankruptcy system.[7] Bifurcated *fee* agreements also have the nod of approval by only some courts.[8] The concern over how both bifurcated service and fee agreements fare against the ethical rules and Code remains at issue for many.[9]

Part II of this Comment provides relevant background about Chapter 7 bankruptcy, standard attorney service and fee agreements, as well as a summary of the ethical rules that bifurcation implicates. Part III more fully explains bifurcated service and fee agreements and the response to those agreements from bankruptcy courts across various circuits. Finally, Part IV provides guidance to Arizona practitioners and includes a proposal for the Arizona Bankruptcy Courts' consideration. If the Court adopts the proposed order, this Comment concludes that Arizona bankruptcy attorneys could more easily bifurcate service and fee agreements when representing a Chapter 7 debtor by accounting for specified legal and ethical concerns. Regardless of the Court's decision, the principles set forth in the proposed order may guide practitioners seeking to bifurcate services and fees.

II. BACKGROUND

A. Crash Course on Chapter 7 Bankruptcy

Debtors seeking bankruptcy relief under the Bankruptcy Code may choose to file under several codified chapters, including Chapter 7.[10] A debtor chooses to file under a given chapter based on a variety of factors,[11] but often chooses to file a Chapter 7 petition to place his or her future income "beyond the reach of creditors."[12] Additionally, the goal of a typical debtor entering a Chapter 7 bankruptcy is to obtain a "fresh start" unencumbered by the crippling debts that

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[5] *See* Kimbro, *supra* note 1.

[6] This Comment will elaborate on the cause for uncertainty in utilizing Chapter 7 bifurcated agreements. As a preface, the interplay between the Bankruptcy Code, ethical rules, and relevant case law creates markedly different concerns in bifurcation in bankruptcy cases than in other areas of law that attorney utilize bifurcation. Frequently unbundled legal services may include conducting legal research, negotiating, preparing exhibits, providing legal guidance or opinions. Kimbro, *supra* note 1, at 34.

[7] *In re* Egwim, 291 B.R. 559, 571–572. (Bankr. N.D. Ga. 2003).

[8] *Id.*

[9] *See infra* Part III.

[10] *See* Administrative Office of the U.S. Courts, *Bankruptcy Basics,* (Nov. 2011), https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics (providing an overview of Chapter 7 (liquidation), Chapter 9 (municipality bankruptcy), Chapter 11 (reorganization), Chapter 12 (family farmer and fisherman bankruptcy), Chapter 13 (individual debt adjustment), Chapter 15 (ancillary and other cross-border cases)). Chapter 7 provides an attractive choice to Arizona residents who "simply want to eliminate their heavy debt burden without paying any of it back." ARIZ. BANKR. L. http://www.arizonabankruptcylaw.com/7v13.html (last visited Jan. 20, 2019) (discussing situations where an individual may find a Chapter 7 filing preferable to a Chapter 13).

[11] *See* Pamela Foohey et. al., *"No Money Down" Bankruptcy*, 90 S. CAL. L. REV. 1055 (2017) (discussing why "nearly every aspect of [debtor] bankruptcies—both the benefits and the burdens of debt relief—will be different in Chapter 7 versus Chapter 13").

[12] Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26 EMORY BANKR. DEV. J. 5, 12 (2009).

brought them to bankruptcy in the first place.[13] This Comment only considers Chapter 7 bankruptcy cases.

For individuals, like Russell,[14] who qualify for Chapter 7 bankruptcy, their case begins by filing an official petition and schedules and statements of financial affairs with the bankruptcy court serving their areas.[15] The forms contain relevant financial histories including assets and debts.[16] A filing fee must also be paid.[17] Upon filing the petition, an automatic stay goes into effect which bars collection actions from a debtor's creditors.[18] The court then appoints a trustee to the debtor's case.[19] The trustee, among a variety of other duties, verifies the accuracy of the debtor's schedules and statements.[20] The debtor must appear at the "first meeting of creditors" (informally known as the "§ 341[21] meeting").[22] At the § 341 meeting the debtor may be questioned under oath by the trustee and creditors about assets and liabilities.[23] The trustee then takes control of non-exempt assets and may sell the assets to pay the debtor's debts.[24] A debtor may seek to redeem, surrender, or reaffirm secured debts in a formal reaffirmation hearing.[25] Creditors may challenge the debtor's right to a discharge or the dischargeability of a particular debt.[26] Additionally, debtors must also complete an approved financial management course.[27] Debtors typically receive their discharge several months after filing the case.[28] The discharge removes personal liability for dischargeable debts that existed when the bankruptcy was filed.[29] However, some debts will survive the discharge (e.g., student loans, child support, reaffirmed debt, etcetera).[30]

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[13] *Id.* Bankruptcy literature employs the term "fresh start" *ad nauseam*. It simply refers to the core sentiment in *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Justice Sutherland emphasized that the Bankruptcy Act "gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Id.*

[14] *See* narrative in Part I(A) *supra*.

[15] FED. R. BANKR. P. 1007(b)(1).

[16] *Id.*

[17] 28 U.S.C. § 1930(a)(1).

[18] 11 U.S.C. § 362 (the automatic stay stops collection actions from most creditors against the debtor or the debtor's property).

[19] Cara O'Neil, *The Role of the Bankruptcy Trustee in Chapter 7,* NOLO (Jan. 20, 2019), https://www.nolo.com/legal-encyclopedia/bankruptcy-trustee-chapter-7.html. The Chapter 7 trustee indicated here must not be confused with the U.S. Trustee discussed *infra* Part III(C)(4). The bankruptcy trustee referenced here handles a debtor's bankruptcy case on a day-to-day basis and may be "a local bankruptcy attorney or a nonlawyer who is very knowledgeable about Chapter 7 or Chapter 13 bankruptcy generally and the local court's rules and procedures in particular." *Id.* Separate from a trustee assigned to a debtor's case, the Office of the U.S. Trustee (referred to *infra* Part III(C)(4)) is part of the United States Department of Justice. The twenty-one regional U.S. Trustee offices throughout the nation are responsible for "supervising the bankruptcy trustees who actually handle cases in the bankruptcy court, to make sure that the bankruptcy laws are being followed and that cases of fraud and other crimes are appropriately handled." *Id.*

[20] *Id.*

[21] Section 341 of the Bankruptcy Code describes the meeting.

[22] 11 U.S.C. § 341.

[23] *Id.* § 343.

[24] ELIZABETH WARREN ET AL., THE LAW OF DEBTORS AND CREDITORS 58 (Aspen 6th ed. 2014).

[25] 11 U.S.C. § 521(a)(2)(A).

[26] *Id.* § 727(c).

[27] *Id.* § 727(a)(11).

[28] *Id.* § 727.

[29] *Id.* § 524(a).

[30] *Id.* § 523.

B. Standard Chapter 7 Service and Fee Agreements

1. Standard Chapter 7 Service Agreement

As with many areas of legal practice, bankruptcy attorneys do not receive a prescribed set of tasks to complete for a client's case. Rather, attorneys manage a case by considering client needs, deadlines set by the court, relevant statutes, case law, the Lawyer's Oath of Admission, and the Rules of Professional Ethics.[31] One court provided an overview of core tasks that Chapter 7 bankruptcy attorneys should complete regardless of the case: preparation of the debtor's schedules and statements, filing of required amendments, attendance at the § 341 meeting, serving as a liaison between the debtor and trustee, compliance with orders of the Court, the process of choosing what to do with property that the debtor has possession of (reaffirmation, redemption, surrendering debts), and "responding to the issues that arise in the basic milieu of a bankruptcy case."[32] Representation for these core tasks could be explicitly included within an agreement between a debtor and attorney or may simply be implied as part of standard representation.

2. Standard Chapter 7 Fee Agreement

Unlike Chapter 11 and 13, the Bankruptcy Code is relatively silent as to the payment of attorney fees in Chapter 7 cases.[33] However, the Bankruptcy Code imposes some fee requirements that attorneys must adhere to when managing a Chapter 7 case. Bankruptcy Rule 1006(b)(3) requires that debtors pay the entirety of their filing fee prior to paying their attorney or "any other person who renders services to the debtor in connection with the case"; that mandate could result in the postponement of an attorney's fee payment.[34] Bankruptcy Rule 2016(b) provides that a debtor's attorney must file a statement that discloses the compensation paid or promised to the attorney by a debtor in compliance with Section 329[35] and shall file supplemental statements as needed.[36] If the court finds an attorney's fees to be unreasonable, the court may cancel the fee

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[31] This list is illustrative but not exhaustive. For example, some firms may set requirements that their attorneys must conform to.

[32] *In re* Castorena, 270 B.R. 504, 530 (Bankr. D. Idaho 2001).

[33] Because of the present uncertainty in bifurcating agreements in Chapter 7 bankruptcies, an understandable query may arise: *Why not avoid the Chapter 7 bifurcation mess and file under Chapter 13? Well, it may not be that simple.* Since Chapter 13 allow debtors to repay debts (including attorney fees) over time under the debtors' plans, Pardo, *supra* note 12, at 12, a debtor filing a Chapter 13 must first complete a repayment plan prior to receiving a discharge. *Id.* The Chapter 13 plan prescribes how the debtor's future income will repay creditor claims. *Id.* Chapter 13 appears to serve as an optimal alternative to the otherwise questionable act of Chapter 7 bifurcated service and fee agreements. However, even if a debtor can pay attorneys' fees over a longer period of time, fees owed in "[C]hapter 13 cases could be substantially higher than in [C]hapter 7, meaning that these debtors pay more for the same relief that they could more easily (and quickly) obtain in a [C]hapter 7." Adam D. Herring, *Problematic Consumer Debtor Attorneys' Fee Arrangements and the Illusion of "Access to Justice,"* AM. BANKR. INST. J., 32, 58 (Oct. 2018). Additionally, there are greater obligations placed on debtors due to the requirements of Chapter 13 cases; for example, Chapter 13 debtors must propose, obtain confirmation of, and fund a plan that under the Bankruptcy Code. *Id.* While a Chapter 7 debtor is granted relief once given a Section 727 discharge, a Chapter 13 debtor must complete a minimum plan term of thirty-six months before being granted relief. *Id.* Finally, proceeding through a Chapter 13 bankruptcy "in which the prospect for confirmation of [and compliance with] a plan is doubtful" there are additional burdens placed on bankruptcy courts and Chapter 13 trustees. *Id.*

[34] FED. R. BANKR. P. 1006(b)(3).

[35] FED. R. BANKR. P. 2016.

[36] *Id.*

agreement and could order disgorgement of fees.[37] The court may also require an attorney to return fees already paid by the debtor to the extent that the fees were excessive.[38] Finally, and most important to the topic at hand, Section 727(b) of the Bankruptcy Code discharges (wipes away) the debtor's personal liability for debts entered into *before the date* of the bankruptcy discharge.[39] The powerful discharge requirement imposed by Section 727(b) is the impetus behind the creation of bifurcated *fee* agreements in the first place.[40] After all, attorneys do not want their hard-earned money wiped away as a discharged debt through a Section 727 discharge.

A Ninth Circuit case (*In re Hines*) recognized that Chapter 7 attorneys and debtors typically enter one of two *fee* arrangements:[41]

a. *Fee Arrangement 1:* Prior to the bankruptcy filing, an attorney will require an up-front payment from the debtor for all work anticipated during the bankruptcy.[42] Generally, these are referred to as pre-paid flat-fee agreements and they include representation for all of the matters that arise during the entirety of the bankruptcy case.[43] However, financial circumstances and the expeditious nature of a bankruptcy case can cause a debtor to encounter difficulty in paying his attorney a large up-front sum. As such, a debtor may elect to proceed through bankruptcy pro se or seek an attorney who allows for a different fee arrangement.

b. *Fee Arrangement 2*: A debtor enters into *one* fee agreement pre-petition to pay an attorney using the debtor's post-bankruptcy earnings; the debtor may put "zero-down" and pay the entirety of the fee post-petition or may pay a minimal pre-petition fee and pay the remaining fee balance post-petition.[44] Even if a debtor has agreed to pay an attorney's fees with post-petition earnings, the attorney could lose the ability to collect payment from the debtor post-bankruptcy due to the debtor's insolvency.[45] Moreover, the *Hines* court

[37] 11 U.S.C. § 329. Some courts will order complete disgorgement of unreasonable fees, others allow for a partial disgorgement. Law Offices of Nicholas A. Franke v. Tiffany (*In re* Lewis), 113 F.3d 1040 (9th Cir. 1997) (holding that a bankruptcy court is not required to determine whether fees are reasonable before ordering disgorgement of post-petition fees and that all post-petition fees were properly required to be disgorged upon failure to supplement initial disclosure); Mapother & Mapother, P.S.C. v. Cooper (*In re* Downs), 103 F.3d 472, 477–78 (6th Cir. 1996) (disgorgement and denial of fees affirmed: "In cases involving an attorney's failure to disclose his fee arrangement under § 329 or Rule 2016, however, the courts have consistently denied all fees.") (citations omitted); Arens v. Boughton (*In re* Prudhomme), 43 F.3d 1000 (5th Cir. 1995) (holding that the entire $75,000 prepetition retainer was properly ordered disgorged upon finding a pattern of nondisclosure).

[38] 11 U.S.C. § 329.

[39] *Id.* § 727 (emphasis added).

[40] If debtors enter a fee agreement with their attorney *pre-petition*, unpaid debt under Section 727 is dischargeable. Conversely, any fee agreement entered *post-petition* is not subject to a Section 727 discharge. Section 727 only discharges pre-petition debts.

[41] *See In re* Hines, 147 F.3d 1185, 1189 (9th Cir. 1998). The court also discussed an alternative approach to two typical fee arrangements that can be used when addressing attorney's fee concerns in Chapter 7 cases. Citing to a 7th Circuit Court, the *Hines* court explained that the debtor may chose to reaffirm the debt post-filing. *Id.* at 1190. A reaffirmation agreement is simply one option the debtor has when deciding how to manage dischargeable debts. Under a reaffirmation, the debtor agrees to repay all or part of a debt (otherwise dischargeable) post-filing. 11 U.S.C § 524(c); *In re Duke,* 79 F.3d 43, 44 (7th Cir. 1996). There are a variety of statutory safeguards to ensure that the debtor's decision to reaffirm debts is entirely voluntary, free of coercion. *See* 11 U.S.C § 524(c)(3).

[42] *In re* Hines, 147 F.3d at 1189.

[43] *Id.*

[44] *Id.*

[45] *Id.*

addressed whether an attorney's post-petition performance of legal services pursuant to a pre-filing fee agreement entitles that attorney to recover the fees for those post-petition services.[46] The payment would be made directly by the debtor herself, "not from the bankruptcy estate (which in a no-asset case would amount to tapping an empty barrel)."[47] The court recognized that, unpaid pre-petition attorney fee agreements in force at the time of a bankruptcy filing could give rise to a claim under the Bankruptcy Code.[48] Unless excepted from discharge under Section 523 of the Code, a debtor is discharged from debts arising pre-petition under Section 727(b).[49] Since pre-petition attorney fee agreements *are not* among the types of debts excepted from discharge, it would follow that unpaid pre-petition attorney fee agreements would qualify as a dischargeable debt. [50] The *Hines* court recognized that reasoning but ultimately held that when an attorney renders post-petition services, a debtor may be bound to pay the attorney fees for those post-petition services even if it was contracted to in a pre-petition fee agreement.[51] The court decided the case on a *quantum meruit* (or quasi-contract) theory in the interest of justice.[52] However, other courts soundly reject the *Hines* approach that binds debtors to fees agreed to pre-petition even if the services are rendered post-petition.[53]

b(2). Nuanced Version of Fee Arrangement 2: In "Fee Arrangement 2," described above in (b), the *Hines* court analyzed a fee agreement wherein the Chapter 7 debtor's attorney required a minimal amount of the attorney's fee paid pre-petition under *one* agreement made pre-petition.[54] The remaining balance of the fee was paid post-petition pursuant to the same pre-petition agreement.[55] Alternatively, the *Hines* court suggested a nuanced version of that fee arrangement in dicta.[56] The court summarized the feasibility of the nuanced arrangement as follows: "[A]n attorney might avoid the compensation

[46] *Id.* at 1189–91. The timing of "pre-petition" and "post-petition" is critical in Chapter 7 bankruptcy. Section 727(b) of the Bankruptcy Code only discharges personal liability for debts entered "pre-petition." With that in mind, the following more succinctly restates the question that the *Hines* court addressed: Can an attorney require post-petition payment for work completed post-petition if the debtor only agreed to that post-petition payment in a pre-petition agreement?

[47] *Id.* at 1189.

[48] *Id* at 1185.

[49] 11 U.S.C. § 101(5)(A) (2016).

[50] *See* 11 U.S.C. § 727(b); *In re* Hessinger & Assoc., 192 B.R. 211, 217–18 (N.D. Cal. 1996); Hessinger & Assoc. v. Voglio (*In re* Voglio), 191 B.R. 420, 422 (D. Ariz. 1996); Hessinger & Assoc. v. U.S. Trustee (*In re* Biggar), 185 B.R. 825, 829 (N.D. Cal. 1995); *In re* Symes, 174 B.R. 114, 119 (Bankr. D. Ariz. 1994); *In re* Martin, 197 B.R. 120 (Bankr. D. Colo. 1996). *But see In re* Mills, 170 B.R. 404, 412 (Bankr. D. Ariz.1994) (holding such a debt is non-dischargeable due to a conflict in the regulatory provision of §329 and the discharge provision of §523 and due to an important public policy concern regarding access to representation).

[51] *In re* Hines, 147 F.3d at 1189–1191.

[52] *Id.* at 1191 (explaining that "this is an equitable remedy implied by the law under which a plaintiff who has rendered services benefiting the defendant may recover the reasonable value of those services when necessary to prevent unjust enrichment of the defendant").

[53] Bethea v. Robert J. Adams Assocs., 352 F.3d 1125, 1128 (7th Cir. 2003). *See* Part III(B)(2); Daniel E. Garrison, *Liberating Debtor from the "Sweatbox" and Getting Attorneys Paid: Bifurcating Consumer Chapter 7 Engagements,* AM. BANK. L.J. (2018) (explaining that when an attorney utilizes bifurcate the fee agreements using separate pre-petition and post-petition agreements, the attorney can collect earnings for both).

[54] *See* Part II(B)(2)(a) *supra.*

[55] *Id.*

[56] The alternative fee arrangement is merely a nuanced form of the arrangement discussed in (b) as the subheading indicates.

quandary" by entering into a contract with the debtor to only provide pre-petition bankruptcy services.[57] The attorney would initially only receive compensation for those pre-petition services.[58] Then, the same attorney could later contract to a separate post-petition agreement with the same debtor to provide for the necessary post-petition services.[59] The Court was simply considering that an attorney who enters one fee agreement with the debtor pre-petition and then enters a completely separate (second) fee agreement post-petition, may avoid the result of discharged pre-petition fees, post-petition. For the remainder of this Comment, the phrase "bifurcated fee agreement" refers to the nuanced bifurcated fee agreement just described.

C. Adding Ethical Rules in the Mix[60]

Even if principles of substantive bankruptcy law permit bifurcation of service and fee agreements, the legal community cannot overlook the intersection of bifurcation with attorneys' ethical rules. The ethical rules "define the nature of relationships between the lawyer [and client]" while providing "guidance for practicing in compliance with the Rules."[61] While some ethical rules are permissive and allow for discretion to exercise professional judgement, other rules are mandatory and "define proper conduct for purposes of professional discipline."[62] As such, bifurcation must be reconciled with the ethical rules before being condoned by the legal community.[63] The relevant ethical rules that implicate bifurcated service and fee agreements are discussed below in turn. Part III of this Comment will provide a more detailed analysis of *how* these ethical rules affect Chapter 7 bifurcated service and fee agreements.

1. Ethical Rules Implicating Bifurcated Services

Model Rule of Professional Conduct ("MPRC") 1.1(a) states that an attorney must provide competent representation to a client, defined as: "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[64] A comment to Rule 1.1 explains that requisite factors can include the complexity and specialized nature of a matter.[65] That comment is

[57] *In re* Hines, 147 F.3d at 1189–1190.
[58] *Id.*
[59] *Id.*
[60] This subsection provides an overview of the primary ethical rules implicated when entering Chapter 7 service and fee agreements. For purposes of this subsection, citations are to the American Bar Association's Model Rules of Professional Conduct. The State Bar of Arizona has adopted the ABA rules through its own Rules of Professional Conduct. *See* American Bar Association, Model Rules of Professional Conduct (2018), https://www.azbar.org/ethics/rulesofprofessionalconduct.
[61] American Bar Association, Model Rules of Professional Conduct: Preamble & Scope (2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.
[62] *Id.*
[63] Part IV will fully discuss how bankruptcy courts have responded to bifurcation and the ethical rules discussed within this subsection.
[64] ANN. MOD. RULES PROF. COND. § 1.1; *see also* ARIZ. SUP. CT. R. 42, R.P.C. ER 1.1. For reference, Arizona Supreme Court Ethical Rules numbering mirror the Model Rules of Professional Conduct numbering.
[65] ANN. MOD. RULES PROF. COND. § 1.1 cmt. 1.

particularly relevant to bifurcated services due to the complexity of bankruptcy proceedings as a general matter.

MRPC 1.2(c) states, in pertinent part, that if an attorney limits the scope of his or her services, the limit must be reasonable, and the client must provide informed consent.[66] A comment to the Restatement (Third) of the Law Governing Lawyers elaborated on that notion:

> Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly . . . . The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.[67]

An Idaho bankruptcy court further elaborated on the concept of limited scope (bifurcated) agreements in relation to bankruptcy:

> An attorney, in accepting an engagement to represent a debtor in a [Chapter 7] bankruptcy case, will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required. Compliance with [Rules of Professional Conduct] is mandatory and must be proved.[68]

MRPC 1.3 requires attorneys to diligently represent clients.[69] Notably, a comment to the rule calls on attorneys to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[70] In the context of Chapter 7 bankruptcy, a client seeks to obtain a discharge and the client's attorney is expected to zealously advocate to that end.[71]

Finally, MRPC 1.4 affects all communications within the client-lawyer relationship,[72] including discussions regarding bifurcated service agreements. MRPC 1.4(b) calls attorneys to "explain . . . matter[s] to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[73] Therefore, attorneys entering bifurcated service agreements with clients must fully explain consequences that could result when excluding certain aspects of attorney representation in Chapter 7 bankruptcies.

2. Ethical Rules Implicating Bifurcated Fees:

MRPC 1.2 (limited scope representation) may also affect bifurcated *fee* agreements. For example, if attorney Lynne splits a fee agreement pre- and post-petition with debtor Russell, Lynne

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[66] *Id.* § 1.2(c).
[67] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19, cmt. b.
[68] *In re* Castorena, 270 B.R. 504, 530 (Bankr. D. Idaho 2001).
[69] ANN. MOD. RULES PROF. COND. § 1.3.
[70] *Id.* § 1.3 cmt. 1.
[71] *See generally In re* Collmar, 417 B.R. 920 (Bankr. N.D. Ind. 2009).
[72] *See* ANN. MOD. RULES PROF. COND. § 1.4.
[73] *Id.* § 1.4(b).

may only be bound to represent Russell for pre-petition services *if* Russell contracts to the pre-petition fee agreement but not the post-petition fee agreement. In that situation, the bifurcation of *fees* created a bifurcation of *services*. Therefore, the ethical rules implicating bifurcated service agreements would likewise affect bifurcated fee agreements.

MRPC 1.4(b) requires an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Therefore, attorneys must ensure debtors truly understand what they bargain for when contracting to two separate fee agreements pre- and post-petition—a potentially jeopardized financial "fresh start" post-bankruptcy since the post-petition fee agreement would be non-dischargeable.

MRPC 1.7 can impact bifurcated fee agreements as it governs conflicts of interest with current clients.[74] A Colorado Bankruptcy Court recognized that the main objective of a Chapter 7 bankruptcy is to "obtain the broadest possible discharge of pre-petition debts."[75] Moreover, Section 727(b) of the Bankruptcy Code "discharge[s] the debtor from all debts [including attorney's fees] that arose *before the date* of the order for relief."[76] The interplay of these rules may create a conflict of interest between the client and attorney—the *debtor* seeks to discharge as much debt as possible (including attorney fees), but the *representing attorney* as a creditor of the debtor has "the self-interest [of] excepting the pre-petition attorney fee obligation from discharge."[77] Therefore, from the moment of bankruptcy filing, a conflict may arise between the attorney's duty to the debtor and her own self-interest in getting paid.[78]

III. BIFURCATED SERVICE AND FEE AGREEMENTS

A. Understanding Bifurcated Agreements

Bifurcated service and fee agreements have emerged in the world of Chapter 7 bankruptcy. Bifurcation of *services* refers to an attorney limiting the scope of services available to the debtor at a lesser charge, or where the attorney only performs certain distinct services at a per performance fee.[79] Bifurcation of *fees* refers to an attorney entering into one pre-petition fee agreement with the debtor for the work an attorney does prior to the bankruptcy filing.[80] After the filing, the debtor may choose to enter into a second a post-petition agreement, generally with the same attorney, for the remaining work in the bankruptcy.[81] Common rationales that support bifurcated agreements include proving otherwise pro se debtors with some level of representation at a lower cost, allowing attorneys to freely contract with their clients, and using the separate agreements to avoid the discharge of unpaid pre-petition attorney fees.[82]

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[74] *See* ANN. MOD. RULES PROF. COND. § 1.7.
[75] *In re* Martin, 197 B.R. 120, 129 (Bankr. D. Colo. 1996).
[76] *Id.* at 127 (emphasis added).
[77] *Id.*
[78] *Id.* This ethical rule (1.7) is less implicated in the type of bifurcated fee agreement addressed in this Comment. Instead, this rule would more heavily implicate the fee arrangement briefly discussed in Part II(B)(2)(b).
[79] Amber Hollister, *Limiting the Scope of Representation: Unbundling Legal Services*, 71-JUL OR. ST. B. BULL. 9, 9 (2011).
[80] Walton v. Clark & Washington, P.C., 469 B.R. 383, 385–86 (Bankr. M.D. Fla. 2012).
[81] *Id.*
[82] Garrison, *supra* note 53, at 68 ("Bifurcation . . . allows attorneys to be paid post-petition and to access working-capital financing solutions, and mitigates the systemic burdens created by pro se debtors. Such a "win-win" scenario is too rare an occurrence to ignore.") Despite the contention that bifurcation is a "win-win," not all courts agree as discussed *infra* Part III(B).

B. Responses from Bankruptcy Courts

While some bankruptcy courts deem versions of bifurcated agreements valid, a question remains as to whether such agreements violate attorney obligations under legal and ethical rules.

1. Bifurcated service agreement:

The American Bar Association and most state bars recognize the value of providing unbundled legal services to tackle the nation's access to justice problem.[83] However, the bankruptcy context poses distinct complications not implicated in some other legal practices. Additionally, legal opinions regarding the mandatory services that an attorney must provide for a debtor in a Chapter 7 case vary between circuits.

In *Egwim*, a Georgia bankruptcy court assessed the validity of a limited scope agreement between Chapter 7 debtors and their attorney.[84] The attorney filed a Rule 2016(b) statement indicating that he would serve as counsel for all matters in their bankruptcy *excluding* adversarial or contested matters.[85] When a creditor brought an adversarial matter against the debtors, the attorney refused to represent the debtors.[86] The court held that such a limitation was *not* valid.[87] The court reasoned that since debtors in a Chapter 7 bankruptcy seek to obtain a discharge and retain exempt property, attorneys must represent debtors in all matters to that end to provide *competent representation* as required by MPRC 1.1.[88] The court recognized the complex legal requirements debtors may face in their bankruptcy and concluded that those complexities place heightened requirements on a Chapter 7 debtor's attorney to achieve the basic, fundamental objectives of representing a debtor.[89] The court explained that if a "lawyer does nothing more than prepare the petition, statement, schedules, and related documents and attend the § 341 meeting, the lawyer has done little more than a petition preparer."[90] The court emphasized that providing the debtor with that marginal level of preparation and advice would be akin to the debtor proceeding through a case pro se. In dicta, however, the court recognized that contractual limitations might be valid for Chapter 7 services that are not necessary to reach the debtors' ultimate Chapter 7 objective.[91] However, the court reiterated than Chapter 7 limited scope arrangements are not optimal.[92]

An Indiana bankruptcy court reviewed a limited scope agreement to assess whether a Chapter 7 attorney could contractually exclude reaffirmation agreements from the scope of representation.[93] The court held that such an agreement was not valid on ethical grounds under Indiana Rule of Professional Conduct 1.2(c) (limited scope representation).[94] The court reasoned that the exclusion of reaffirmation services was not a "reasonable limitation" of representation.[95]

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[83] Kimbro, *supra* note 1, at 32 (2012). Courts refer to bifurcated services as "unbundling" or "limited scope representation." For purposes of this Comment, all terms are synonymous.
[84] *In re* Egwim*,* 291 B.R. 559, 571–572 (Bankr. N.D. Ga. 2003).
[85] *Id.* at 564–65.
[86] *Id.* at 565.
[87] *Id.* at 559.
[88] *Id.* at 568–70.
[89] *Id.* at 568.
[90] *Id.* at 572.
[91] *Id.* 569–570.
[92] *Id.*
[93] *In re* Collmar, 417 B.R. 920 (Bankr. N.D. Ind. 2009).
[94] *Id.* at 922.
[95] *Id.* at 923.

The court explained that when debtors file bankruptcy, they do so to obtain the ultimate relief the chapter provides.[96] Therefore, reaffirming debt, a key part of reordering financial affairs and obtaining ultimate relief, is "so critical, that assistance with the decision is part of the services that make up the *competent representation* of a [C]hapter 7 debtor."[97]

On the other hand, a Michigan bankruptcy court asserted that mandating attorneys to represent their client (the debtor) in *all* legal services in a Chapter 7 case, stifles the contractual freedom between debtors and attorneys.[98] In *Slabbinck*, the debtors agreed to unbundle their Chapter 7 services, but the record did not indicate that any services were actually omitted.[99] Rather, the legal services agreement was merely separated into two different agreements.[100] One service agreement accounted for pre-petition legal services, and a separate agreement accounted for the remaining post-petition services.[101] The debtors were not bound to continue using the same firm for post-petition services if they chose not to.[102] The court held that the bifurcated agreement between the Chapter 7 debtor and his attorney was valid.[103] The court reasoned that neither the Bankruptcy Code nor the ethical rules require an attorney to represent a debtor in all matters pertaining to a Chapter 7 bankruptcy to achieve *competent* representation.[104] As such, even if the attorney only preformed pre-petition services for the debtor, there would be no issue in the eyes of the court.[105] The court in *Slabbinck* held that, so long as the proper disclosures are given, limited scope agreements have a valid place in Chapter 7 bankruptcy.[106] And while the court noted it is optimal to have one attorney perform all pre- and post-petition services a debtor may need, it may prove to be an unnecessary financial roadblock in some situations.[107] So long as the attorney meets a duty of competence in the defined legal work bargained for, the attorney does not violate a duty of competence.[108]

Despite varying interpretations between courts regarding bifurcated service agreements and the ethical rules, courts generally emphasize the importance of obtaining a debtor's fully informed consent for any limited scope agreement.[109] Some courts suggest than an attorney may address the informed consent process through well-drafted limited-scope engagement forms.[110] However, rather than using a form with standard boilerplate language, an attorney must adjust the agreement on a case-by-case basis to address each client's unique legal needs.[111] Further, it may be necessary to provide the client with a clear verbal explanation of the repercussions of entering

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[96] *Id.* at 922–23.
[97] *Id.* at 924 (emphasis added).
[98] *In re* Slabbinck*,* 482 B.R. 576, 592 (Bankr. E.D. Mich. 2012).
[99] *See id.* at 581.
[100] *Id.* at 579.
[101] *Id.*
[102] *Id.*
[103] *Id.* 597.
[104] *Id.* at 585.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 592.
[108] *Id.* at 593.
[109] *See id*. at 595. The court addressed the disclosures a debtor should be provided with to make an informed decision about the limited scope of representation agreement. Relevant disclosures include: required post-petition documents (e.g. schedules of assets and liabilities, statement of financial affairs and other documents) and consequences of failing to file them, consequences of dismissal and serial filings on the automatic stay, requirement of the § 341 meeting, and the result of failure to cooperate with a Chapter 7 trustee.
[110] *See id.* at 584.
[111] Kimbro, *supra* note 1, at 32.

into a limited scope agreement.[112] Nonetheless, some courts have recognized that despite robust disclosures given to Chapter 7 debtors, attorneys may nonetheless be unable to obtain effective informed consent due to the complexity of bankruptcy court proceedings.[113] In turn, an agreement may be void because a "limitation [of legal services] must be carefully considered and narrowly crafted, and be the result of educated and informed consent."[114]

2. Bifurcated fee agreement:

The Ninth Circuit analyzed the issue of bifurcated fee agreements in *Hines* and subsequent case law. In *Hines*, the court explained that there would be a "massive breakdown" in the bankruptcy system if attorneys' compensation from post-petition services fell within Section 363 (automatic stay) or Section 727 (discharge).[115] Relying on *Hines,* the *Sanchez* court similarly found that "a deferred payment arrangement gives the attorney an undischarged claim to reasonable compensation for post-petition services."[116] In *Martin*, a Colorado bankruptcy court disagreed.[117] The court in *Martin* reasoned that under a bifurcated fee agreement, a conflict of interest arises once an attorney files the debtor's bankruptcy petition.[118] The conflict is rooted in the relationship of the attorney as creditor and the client as debtor. Thus, the conflict impermissibly impairs the attorney-client relationship.[119] Moreover, the court urged debtors to utilize other solutions that are more creative:

> There are any number of creative solutions which can assist indigent debtors who have difficulty raising funds for legal representation prior to filing a bankruptcy case. Debtors commonly defer payment of other debts or borrow from family and friends in order to pay attorneys . . . . If a debt for fees will be dischargeable, some attorneys accept payment by a third-party guarantor. Some courts authorize reaffirmation of the debt.[120]

In *Walton,* a Florida bankruptcy court thoroughly reviewed a two-contract fee agreement procedure. Rather than executing one pre-petition agreement that stipulated all fees paid to the attorney, the debtor in *Walton* entered into separate (bifurcated) fee agreements for pre- and post-petition services. [121] The court held the bifurcated fee agreements did not conflict with the Bankruptcy Code or ethical rules under the following model:

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[112] *Id.*
[113] *Id.* at 33.
[114] *In re* Castorena, 270 B.R. 504, 531 (Bankr. D. Idaho 2001).
[115] *In re* Hines, 147 F.3d 1185, 1191 (9th Cir. 1998).
[116] *In re* Sanchez, 241 F.3d 1148, 1148 (9th Cir. 2001).
[117] *In re* Martin*,* 197 B.R. 120, 127 (Bankr. D. Colo. 1996).
[118] *Id.* at 129.
[119] *Id.*
[120] *Id.* (citing *In re* Perez, 177 B.R. 319 (Bankr. D. Neb. 1995)). The feasibility of these "creative solutions" is questionable. Beyond paying to initiate the Chapter 7 (filing fee of $335), the average attorney fees for a Chapter 7 case range from $1,500 to $2,000 in metropolitan cities like Los Angeles, for example. Attorney fees vary depending on factors like case complexity, the attorney's experience level, the surrounding market prices, and more. John O'Connor, *How Much Does It Cost to File Bankruptcy?*, NAT'L BANKR. F. (2017) https://www.natlbankruptcy.com/how-much-does-it-cost-to-file-bankruptcy-2/.
[121] Walton v. Clark & Washington, P.C., 469 B.R. 383, 385 (Bankr. M.D. Fla. 2012).

1. The attorney attaches disclosures as separate cover pages on each agreement and describes the procedure in detail. The debtor acknowledges that he or she received and read the "two contract procedure" disclosures.
2. The attorney communicates three options for the debtor's post-petition legal services: (i) proceed pro se (ii) retain the same attorney that completed the pre-petition work, or (iii) retain a different attorney.
3. The attorney allows the debtor a reasonable amount of time to select an option, during which the attorney continues to provide representation. The attorney agrees to continue to provide representation, even if not selected as post-petition counsel, until allowed to withdraw by court order.[122]

In *Slabbinck*, the court similarly held that a bifurcated fee agreement could be valid when properly crafted.[123] Like *Walton,* the contract in *Slabbinck* was bifurcated into two separate agreements.[124] The debtors signed the pre-petition agreement before the bankruptcy filing, and then signed the post-petition agreement after the bankruptcy case filing.[125] The court acknowledged that once the debtor received their discharge, the debtor would only be obligated to make payments on the post-petition agreement.[126] The court recognized the unfavorable and perverse effects that may come from outright disallowing bifurcated agreements.[127] Lower-income debtors could face the daunting task of paying in advance for all the legal services needed in their Chapter 7 case.[128] Further, the inability to pay attorney fees upfront could foreclose debtors' access to representation.[129] Therefore, financially restricted individuals could only "avail themselves of bankruptcy relief by filing either pro se or with the help of a bankruptcy petition preparer."[130]

C. Relevant Perspectives

This section considers service and fee bifurcation in Chapter 7 bankruptcies from the perspectives of debtors, their attorneys, the United States Congress, and the Office of the United States Trustee. While the impact of bifurcation on these groups is notable, other actors may also have relevant perspectives on the issue (e.g. local bankruptcy trustees, bankruptcy judges law firms, *pro bono* debt relief clinics, debtors' family members, etc.). [131]

1. The Debtor

Many debtors proceed through Chapter 7 bankruptcy pro se to avoid the overwhelming cost of attorney's fees.[132] Despite the potential monetary savings *pro se* debtors enjoy, the complexity of the bankruptcy system may stall an honest, but unfortunate debtor's ability to obtain

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[122] *Id.* at 386–87.
[123] *In re* Slabbinck, 482 B.R. 576, 597 (Bankr. E.D. Mich. 2012).
[124] *Id.* at 579.
[125] *See id.*
[126] *Id.* at 586.
[127] *Id.* at 593.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 597.
[131] See Section III(b) *supra* for a discussion of responses to bifurcated agreements by bankruptcy courts. Additionally, the United States Bankruptcy Court of the Southern District of Alabama took the approach of issuing a Local General Order. The wisdom of that approach and further analysis of the Alabama order will be discussed *infra* Part IV.
[132] Pardo, *supra* note 12, at 17.

a "fresh start."[133] Evidence reveals unfavorable outcomes in courts disproportionately impact on pro se debtors.[134] A 2011 study evaluated the effect of attorney representation and concluded that debtors represented by attorneys are "more likely to have debts discharged and avoid dismissal for technical deficiencies [than non-represented debtors]."[135] Continuing research affirms that notion and indicates, "virtually all represented debtors obtain discharges, while over 29% of pro se debtors [fail to]."[136] Bifurcation of services and fees are considered by some courts, attorneys, and scholars as a solution to increasing access to attorney representation. Using bifurcated *service* agreements, the attorney breaks down the tasks associated with the debtor's Chapter 7 case and provides representation only for specified portions of the debtor's legal needs—naturally, the less work the attorney does, the less money the debtor pays.[137] Bifurcated *fee* agreements similarly provide monetary relief—if the debtor is unable to pay attorney fees up front, bifurcation allows the debtor to finance the cost and pay using post-discharge earnings.[138]

2. The Attorney

As attorney Lynne recognized, bifurcating services and fees may increase her pool of potential clients by decreasing the cost of representation and decreasing the cost of up-front attorney fees. Bifurcation of services allows an attorney and client to work together by dividing the tasks needed in a Chapter 7 case. Bifurcation of fees better ensures attorneys will obtain payment for the legal work completed for debtors and not lose any rights to that payment via the debtor's discharge. Despite the potential benefits an attorney can enjoy utilizing bifurcation, the legal and ethical concerns persist.

3. Congress

Courts have deferred to Congress to address the issue of payment of legal services post-bankruptcy, but no action has resulted.[139] Some courts conclude:

> Public policy concerns cannot trump the plain language of the Bankruptcy Code. Moreover, the public policy concerns are not one-sided. On the other side [of ensuring that attorneys receive payment for their work] is the public interest in providing an honest debtor with a fresh start unhindered by debt. If Congress wishes to amend the code to provide an exception for the debt owed to an attorney

[133] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).
[134] Pardo, *supra* note 12, at 5 (outlining a study of a diverse sample of debtors in the Western District of Washington-finding that 15 percent of pro se litigants failed to receive a discharge. Only 1.04 percent represented clients failed to receive a discharge. Grounds for dismissal included: failure to file information, failure to attend meeting of creditors, failure to pay filing fee, substantial abuse, voluntary dismissal, duplicate filing, etc.).
[135] Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881 (2016).
[136] Daniel E. Garrison, *Liberating Debtor from the "Sweatbox" and Getting Attorneys Paid: Bifurcating Consumer Chapter 7 Engagements,* AM. BANK. L.J. (2018) (citing Pamela Foohey et. al., *Life in the Sweatbox*, NOTRE DAME L. REV. (2018). .
[137] Kimbro, *supra* note 1, at 32.
[138] Walton v. Clark & Washington, P.C., 469 B.R. 383, 386 (Bankr. M.D. Fla. 2012).
[139] *In re* Martin, 197 B.R. 120, 127 (Bankr. D. Colo. 1996).

> who has prepared and filed a bankruptcy petition it may, but it is not the Court's role to create such an exception.[140]

4. The Trustee

As the "statutory watchdog of the bankruptcy system," the U.S. Trustee Program (USTP) is familiar with bifurcation in the Chapter 7 context.[141] In a recently published article in the *American Bankruptcy Institute Law Journal*, Adam Herring, Associate General Counsel for Consumer Law at the Executive Office for U.S. Trustees in Washington, D.C., addressed the legal and ethical concerns implicit in the "creative" arrangements (referencing bifurcation) being utilized in Chapter 7 cases. The impetus of the article centered on the importance of maintaining a fair and effective consumer bankruptcy system.[142] To that end, Herring recognized that the legal community must be aware of and follow two truths: "*First*, the economic concerns of consumer lawyers must never trump professional obligations. *Second*, access to justice should be about the client."[143]

Regarding the first concern of professional obligations, Herring addressed the problematic nature of bifurcating a *service* agreement pre- and post-petition.[144] The concept that a debtor can choose to proceed pro se post-petition is an illusory choice according to Herring.[145] The debtor and attorney sign the pre-petition agreement expecting to continue their relationship post-petition.[146] Obtaining a substitute counsel or proceeding pro se post-petition would be tenuous.[147] Moreover, *fee* bifurcation is problematic in that "$0 down" or minimal fee models may run afoul of Section 329(b) of the Bankruptcy Code governing reasonableness of fees.[148] The minimal fee pre-petition models likely severely undervalue the cost of services an attorney performs pre-petition in hopes to reserve the charge to the debtor post-petition (as non-dischargeable).[149]

To Herring's second concern, the access to justice argument relates to both bifurcated service and fee agreements. Clifford J. White III, Director of the Executive Office for U.S. Trustees, recently explained that "too often, the phrase 'access to justice' is misused to excuse bad lawyering, or to justify twisting the Bankruptcy Rules for the financial gain of the lawyers."[150] While the USTP recognizes the importance of the ability of consumer debtors to successfully file bankruptcy cases, the office is cognizant that "creative" schemes (like bifurcation) can "come at the expense of the debtor and the true goal of the consumer bankruptcy system: the debtor's fresh start."[151]

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[140] *Id.* (citing *In re* Biggar, 185 B.R. 825, 829 (N.D. Cal. 1995)). *But see In re* Hines, 147 F.3d 1185, 1189–91 (9th Cir. 1998).
[141] Herring, *supra* note 33, at 32. Herring similarly conflates bifurcated service and fee agreements, but the article nonetheless serves to address both.
[142] *Id.*
[143] *Id.*
[144] *Id.* Splitting a service agreement into two agreements, pre- and post-petition creates an "unbundled" or "bifurcated" service agreement.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* The particular fee arrangement Herring references is "Fee Arrangement 2" discussed in Part II(B)(b) *supra.*
[149] *Id.*
[150] Clifford J. White III, Director, Remarks at the 53rd Annual Seminar of the National Association of Chapter 13 Trustees (June 28, 2018).
[151] Herring, *supra* note 33, at 32.

IV. A PROPOSAL CRAFTED TO ELIMINATE THE BIFURCATION PERPLEXITY

With competing perspectives on the topic of bifurcation, Arizona practitioners need guidance for navigating the complex issue of bifurcation. The District of Arizona should take a proactive approach and provide uniform guidance to practitioners. Arizona attorneys practicing before the bankruptcy court in the District of Arizona may then ensure that they are complying with their legal and ethical obligations before entering bifurcated service or fee agreements with their clients.

Conflicting case law and differing opinions about bifurcation from courts across circuits demonstrates the need for guidance and uniformity. Bifurcation in the context of bankruptcy is complex and carries severe ramifications for bankruptcy attorneys and debtors if a judge believes the service and/or fee agreement was improper.[152] While the optimal solution to the problem (at least for bifurcating fees) would "call for action by Congress to provide express statutory authority and an express procedure for the compensation to Chapter 7 debtors' attorneys who render post-petition services," Congress has failed to address the issue in a way that would provide uniformity across jurisdictions.[153] Instead, individual jurisdictions simply act as they deem appropriate. Therefore, in the alternative, Arizona should consider a judicial response that recognizes the legal and ethical issues prevalent in bifurcated agreements in Chapter 7 cases.

A. An Order and Guiding Example

The Bankruptcy Court for the District of Arizona should consider issuing an order that summarizes the expectations for attorneys representing Chapter 7 debtors choosing to bifurcate service and/or fee agreements.[154] An order would allow the court to account for the ethical rules, Bankruptcy Code, as well as include any other considerations deemed relevant. An order would keep attorneys from speculating about the results of entering into bifurcated agreements and provide continuity in consumer debtor representation. Some Arizona judges have already begun progressing in that direction. For example, The Honorable Paul Sala[155] issues orders that account for attorneys who could misunderstand their obligations to Chapter 7 debtors regarding reaffirmation proceedings. Judge Sala's orders setting hearings on reaffirmation agreements include standard language pertaining to reaffirmation hearings[156] then concludes with the

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[152] Despite the holding in *Hines*, not all Ninth Circuit courts agree that bifurcation is permissible. *See In re* Hessinger & Assoc., 192 B.R. 211, 217–18 (N.D. Cal. 1996); Hessinger & Assoc. v. Voglio (*In re* Voglio), 191 B.R. 420, 422 (D. Ariz. 1996); Hessinger & Assoc. v. U.S. Trustee (*In re* Biggar), 185 B.R. 825, 829 (N.D. Cal. 1995); *In re* Symes, 174 B.R. 114, 119 (Bankr. D. Ariz. 1994); *In re* Martin, 197 B.R. 120 (Bankr. D. Colo. 1996).

[153] *In re* Hines, 147 F.3d 1185, 1190 (9th Cir. 1998).

[154] The United States Bankruptcy Court for the District of Arizona did consider Proposed Rule 9019-7A in 2016. That proposition included provisions related to limited scope representation (bifurcated services) and "Attorneys Receiving Less Than Full Payment of Fees Prior to Filing Chapter 7 Cases" (bifurcated fees). The proposed rule was not adopted. *See Proposed Rule 9010-7A*, United States Bankruptcy Court, http://www.azb.uscourts.gov/proposed-rule-9010-7a, (last visited Aug. 19, 2019). The proposed order this Comment presents in Party IV(B)(1) more fully incorporates the case law and ethical rules pertaining to the issue of bifurcation and properly addresses bifurcation using a disjunctive approach (services and fees). Although this Comment presents a proposed order, a proposed local rule could similarly serve the same purpose of providing Arizona practitioners with clear guidance.

[155] Bankruptcy judge for the United States Bankruptcy Court, District of Arizona.

[156] The order includes information such as the matter before the Court, a reference to 11 U.S.C. § 524 (the statutory provision regarding reaffirmation agreements), the date and time of the hearing, the address of the court where the hearing will take place, and a direction to the Clerk's Office. United States Bankruptcy Court of the District of Arizona, Judge Paul Sala's Reaffirmation Hearing Order.

following key language: "IT IS FURTHER ORDERED directing counsel to appear at the hearing along with Debtor." That language provides direct notice to counsel regarding representation expectations and serves as a streamlined form of notice. The proposed order in this Comment builds on the spirit of Judge Sala's reaffirmation orders but seeks to communicate attorney representation expectations more broadly rather than piecemeal through individual judges and proceedings. However, even if the Court dismisses this Comment's recommendation, the principles set forth throughout Part IV may guide practitioners seeking to bifurcate services and fees in compliance with legal and ethical duties.

1. A Guiding Example from Alabama

As of April 1, 2018, the Chief Bankruptcy Judge of the United States Bankruptcy Court of the Southern District of Alabama Local General Order No. 19 became effective. The Order conjunctively addresses both service and fee bifurcation.[157] In the Order, the Court articulates the local rule expectations regarding separate pre- and post-petition agreements in Chapter 7 cases. The Order consists of the following language:

> A debtor and his or her counsel may agree to separate prepetition and postpetition contracts for legal services in a Chapter 7 bankruptcy case. The contracts shall comply with Alabama Rules of Professional Conduct 1.1 and 1.2, Bankruptcy Code §§ 526-28, and any other applicable standards. The prepetition agreement must allow the debtor at least ten days postpetition to decide whether to enter into a postpetition legal services contract and must provide that the attorney will remain as counsel of record until allowed to withdraw. The postpetition contract must cover all remaining aspects of the case except for adversary proceedings. All compensation paid or agree to be paid must be disclosed pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016 (b). Pursuant to Bankruptcy Rule 1006(b)(3), no attorney's fees shall be paid or accepted postpetition until the filing fee has been paid in full.
>
> If the debtor's counsel has not agreed to post petition representation and the debtor fails to enter into an agreement for postpetition legal services, the court may allow the attorney to withdraw from the representation of the debtor on the attorney's motion with service on the debtor, trustee, and bankruptcy administrator. Motions to withdraw may be considered on an expedited basis without being set for hearing.[158]

[157] This order assesses service and fee bifurcation conjunctively. Dissimilarly, the proposed format for an order in this Comment uses a disjunctive approach for clarity in addressing the issue. United States Bankruptcy Court of the Southern District of Alabama, Local General Order No. 19 (2018). *See also* Part IV(B) *infra*.

[158] United States Bankruptcy Court of the Southern District of Alabama, Local General Order No. 19 (2018).

B. District of Arizona Specific Order[159]

The Alabama Bankruptcy Court Order is illustrative. It sets out requirements for bifurcated agreements and expectations of key concerns of bifurcation. However, this Comment urges the United States Bankruptcy Court for the District of Arizona to use a disjunctive approach if issuing an order.[160] An ideal order would address services and fees separately since each pose distinct concerns.

1. A Proposed Order

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

PROPOSED LOCAL GENERAL ORDER NO. ___

AGREEMENTS FOR UNBUNDLING LEGAL SERVICES AND FEES IN CHAPTER 7 CASES

In a Chapter 7 bankruptcy case, a debtor and counsel may agree to unbundle (a) legal *services* and (b) pre-petition and post-petition contracts for legal *fees*. These agreements must comply with Arizona Rules of Professional Conduct ("Ethical Rules"), the Bankruptcy Code, and any other applicable standards.

(a) Unbundling Legal Services.
- **(1) Ethical Rules.** In unbundling legal *services*, counsel must particularly consider Arizona Ethical Rules 1.1, 1.2, 1.3, and 1.4.
- **(2) Exclusions Prohibited.** Counsel may not exclude representation for § 341 meetings, reaffirmation proceedings, or [insert additional functions deemed imperative by the court] from any service agreement.

(b) Unbundling Legal Fees.
- **(1) Ethical Rules.** In unbundling legal *fees* pre-petition and post-petition, counsel must particularly consider Arizona Ethical Rules 1.1, 1.2, 1.3, 1.4, and 1.7.
- **(2) Disclosure of Compensation.** All compensation paid or agreed to be paid must be disclosed pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b).
- **(3) Rule 1006(b)(3).** Pursuant to Bankruptcy Rule 1006(b)(3), no attorney's fees shall be paid or accepted post-petition until the filing fee has been paid in full.
- **(4) Fee Contract.**
  - **(A) Discharged Fee Contract.** When counsel agrees to complete services for debtor in a *pre-petition* fee contract, debtor is not bound to pay counsel's fees for *post-petition* completion of those services. A pre-petition fee contract is subject to discharge pursuant to 11 U.S.C. § 727.

[159] Although this Comment proposes an order, a local rule could serve the same purpose.
[160] To reiterate, this Comment approaches bifurcation using a disjunctive approach and assesses services and fees as separate issues. While scholarly works relating to bifurcation blend the service and fee agreement issues together, each poses separate concerns. The Bankruptcy Code regarding attorney procedural obligations is relatively straightforward as discussed in Part III, however, the ethical concerns are less clear.

(B) Avoiding a Discharged Fee Contract. Counsel may execute a two-contract fee agreement—one fee contract for pre-petition services entered pre-petition, and a second fee contract for post-petition services entered post-petition. Executing separate fee contracts in this manner also *per se* creates an unbundled service agreement (*see* **(a)** above).

(i) Framework. Counsel must tailor each fee contract to address a client's legal needs. The following language serves as a general framework for pre-petition and post-petition fee contracts:

(a) Counsel discloses separate cover pages on each fee contract describing the separate pre-petition and post-petition fee contract procedure in detail. The debtor acknowledges receipt and understanding of the "two-contract procedure" disclosures. The following disclosure is made on each cover page: "Any contractual fee agreement you, [insert debtor's name here], enter into with your attorney *post-bankruptcy* will not be discharged pursuant to 11 U.S. Code § 727. Therefore, you, [insert debtor's name here], will be obligated to pay all attorney fees that you agree to in a post-petition contract."

(b) Counsel communicates three options for the debtor's post-petition legal services in the pre-petition fee contract: (i) proceed pro se, (ii) retain the same attorney that completed the pre-petition work, or (iii) retain a different attorney.

(c) Counsel allows the debtor at least 21 days post-petition to select an option, during which time counsel continues to provide representation (including the mandatory services listed in (a)(2)).

(1) If counsel has not agreed to post-petition representation or the debtor fails to enter into a contract for post-petition representation, the court may allow the attorney to withdraw from the representation of the debtor on the attorney's motion with service on the debtor, trustee, and bankruptcy administrator. The court may consider motions to withdraw on an expedited basis without being set for hearing. Counsel is advised that the (a)(2) mandate—some services cannot be excluded when representing debtors—may result in partial unpaid fees for legal services while the decision for continued post-petition representation is being made.

(C) Withdrawal. In any bankruptcy case, the contracting attorney shall remain counsel of record until permitted by the court to withdraw.

This order is effective _____, 2020.
Dated:

V. CONCLUSION

Arizona attorneys remain wary of using bifurcation in their Chapter 7 bankruptcy practices. Due, in part, to Congress' failure to create a uniform standard, decisions regarding the permissibility of bifurcation are shaped on a jurisdiction-by-jurisdiction basis across the United States. As demonstrated by the varying opinions across circuits, a primary concern with bifurcation

is the intersection of such practice with attorneys' ethical obligations and Bankruptcy Code requirements. Nonetheless, some courts have found that bifurcation is permissible and has a legitimate place in the complex bankruptcy scheme. Policy concerns discussed in such opinions include: the impact on debtors navigating their Chapter 7 case pro se, the concept that attorneys should be able to freely contract with clients, and the concern of discharged attorney fees.

The optimal response to this area of uncertainty is the issuance of an order that communicates the expectations for attorneys choosing to utilize bifurcation. Since bifurcation in the context of bankruptcy is unclear territory with differing opinions, an order would create more consistency and predictability within the District of Arizona. The District of Arizona has an illustrative example from the Southern District of Alabama—some modifications to that order would provide a comprehensive and clear standard for Arizona attorneys. If Arizona courts remain silent on the issue of bifurcated service and fee agreements in Chapter 7 bankruptcies, Arizona bankruptcy attorneys may nonetheless glean helpful guidance from the principles discussed in this Comment.