IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

IN THE MATTER OF ATTORNEY PAULA J. CIALELLA CONCERNING FEE AGREEMENTS: AGREEMENTS ENTERED ON VARIOUS CHAPTER 7 PROCEEDINGS	:	Misc. No. 21-210-TPA
	:	Related to Doc. No. 2
UNITED STATES TRUSTEE, *Movant*	:	
v.	:	
PAULA J. CIALELLA, *Respondent*	:	

BRENDA J. ANTHONY, *Debtor*	:	Case No. 21-20705-TPA
	:	Chapter 7
	:	
	:	Related to Doc. Nos. 10, 16, 22, 32, 42, 52

ROBERT E. WHITE and MARY J. WHITE, *Debtors*	:	Case No. 21-20755-TPA
	:	Chapter 7
	:	
	:	Related to Doc. No. 11, 14, 22, 30, 42, 59

MEMORANDUM OPINION AND ORDER

Appearances: Larry Wahlquist, Esq. for the Movant
Ryan Cooney, Esq., for the Respondent

INTRODUCTION

These proceedings present closely intertwined issues involving Attorney Paula Cialella ("Cialella") and her use in a number of Chapter 7 bankruptcy cases of a bifurcated fee arrangement with her clients that is a novel one in this District. The *Anthony* and *White* matters are

individual bankruptcy cases in which Cialella employed the fee arrangement in question and in which the Court *sua sponte* raised the issue of whether it should be permitted, and if so under what conditions. A separate Miscellaneous Proceeding, *In the Matter of Attorney Paula J. Cialella*, Misc.. No. 21-210-TPA ("Misc. Case"), was subsequently initiated by the United States Trustee ("UST") and it raises the issue of whether Cialella should be sanctioned for her admitted failure to properly disclose the bifurcated fee arrangement in many of the cases in which she used it, in violation of *11 U.S.C. §329(a)* and *Fed.R.Bankr.P. 2016(b)*. Because the matters involve many common legal and factual questions the Court has combined its conclusions as to both in this single *Memorandum Opinion and Order*. [1]

BACKGROUND

The means of paying for consumer Chapter 7 cases presents something of a conundrum to would-be debtors and the attorneys who represent them. Individuals who are contemplating a Chapter 7 filing are obviously already under considerable financial stress, yet to gain the protection of bankruptcy they are faced with the additional burden of coming up with the filing fee. If they wish to be represented by an attorney, as most in this District do, there is also the question of paying the attorney fee. The current Chapter 7 filing fee in this District is $338 and the

---

[1] The Court has jurisdiction over this matter pursuant to *28 U.S.C. §1334.* A decision as to the allowance of attorney fees for debtors counsel represents a core matter under *28 U.S.C. §157(b)(2)(A)*. *See e.g., In Re Henderson,* 360 B.R. 477, 483 (Bankr. D. S.C. 2006).

average fee charged in 2022 by local attorneys for a routine Chapter 7 case is approximately $1,500.[2] Thus, an already financially-strapped individual may need to come up with at least $1,800, and most likely more, in order to file a Chapter 7 bankruptcy.

There are options available to assist debtors with respect to the filing fee component of this necessary fund. If the debtor is unable to pay the filing fee immediately in full it is possible to seek permission to pay the fee in up to four installments, a request that is routinely granted. *See 28 U.S.C. §1930(a)* and *Fed.R Bankr.P. 1006(b)*. If the debtor has a sufficiently low income and cannot even afford to pay the filing fee in installments it is possible to obtain a waiver of the filing fee altogether. *28 U.S.C. §1930(f)* and *Fed.R.Bankr.P. 1006(c)*. Thus, a debtor's inability to pay the full filing fee immediately is generally not an insurmountable impediment to a Chapter 7 bankruptcy filing. How to deal with the much larger attorney fee component has proven to be a more intractable problem, especially since the decision in *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

The Court in *Lamie* found that an attorney who is acting as the debtor's attorney in a Chapter 7 case is not eligible to obtain compensation from property of the bankruptcy estate unless

---

[2] For this Opinion, the Court surveyed attorney fees charged in Chapter 7 consumer bankruptcies filed in the Western District of Pennsylvania from January 1, 2016, through June 12, 2022. The Court established the average by evaluating 450 randomized cases filed in its Erie Division and 1,000 cases filed in its Pittsburgh Division. The Court pulled fee data from approximately every 10th case filed in Erie and every 20th in Pittsburgh. The Court excluded *pro se* and *pro bono* cases and cases dismissed prior to discharge. The average attorney fee in a Chapter 7 consumer case for the period surveyed is $1,303.12. As of June 12, 2022, the average fee charged in 2022 is $1,522.41.

the attorney has actually been employed by the Chapter 7 Trustee and approved by the court – a rare occurrence. Attorneys obviously want to be paid for the good work they do in representing the debtor, and in the Chapter 7 context payment is usually structured as a flat fee agreement rather than on an hourly, ongoing basis. However, if the debtor does not pay the agreed upon fee in full in advance of the filing, under *Lamie* the attorney cannot expect to be paid the balance of the fee from estate funds. In such circumstances the attorney will technically also be a prepetition creditor of the debtor for the portion of the fee that is still owed when the case is filed. That can put the attorney in a conflict position unless the claim for the unpaid fee is waived by the attorney. Even if the case is able to move forward without a waiver of the fee ever arising as an issue, the attorney would then face the additional prospect that the claim against the debtor for the unpaid fee will be discharged in the bankruptcy, thus making any attempt by the attorney to subsequently collect it after the case has closed a violation of the discharge injunction. *See e.g., In re Mansfield*, 394 B.R. 783, 787-88 (Bankr. E.D. Pa. 2008) (citing cases holding that unpaid portion of flat fee due under prepetition attorney fee contracts are prepetition debts dischargeable in bankruptcy).

A number of different strategies have been employed to address the Chapter 7 attorney fee "problem" as discussed above. One is for the attorney to just insist that the entire attorney fee must be paid in advance before the attorney will prepare and file the bankruptcy petition. If the debtor does not have the ability to make such a payment then he or she must save up until the full fee can be paid, thereby delaying the filing. This approach often works if the debtor is not facing any immediate threat from creditors, but if there is an imminent foreclosure or repossession in the picture such a delay can be quite problematic.

Another approach that some attorneys take when the debtor cannot afford to pay the entire attorney fee in advance is to file the case under Chapter 13, which allows for the postpetition payment of attorney fees as part of the plan, instead of under Chapter 7. While this can work, it ends up being much more expensive and burdensome for the debtor because Chapter 13 attorney fees are typically far larger than those in Chapter 7 and the debtor will be in bankruptcy for a longer period of time. Furthermore, using Chapter 13 primarily as a means to fund the payment of attorney fees when a Chapter 7 filing would actually be more appropriate for the debtor can be problematic as well and viewed as an undesirable distortion or abuse of the bankruptcy process. *See e.g.*, *In Re Brown,* 742 F.3d 1309 (11th Cir. 2014) (affirming finding by bankruptcy court that a Chapter 13 filing motivated not by a desire to adjust debts or preserve assets, but rather as a means to pay attorney fees, was not made in good faith; debtor would have been better off in Chapter 7); Foohey, et al., *"No Money Down" Bankruptcy*, 90 S. Cal. L. Rev. 1055 (2017) (discussing the empirical study showing that debtors who use Chapter 13 rather than Chapter 7 as a way to pay attorney fees pay $2,000 more and have their cases dismissed at a rate of eighteen times higher than if they had filed under Chapter 7).

A third strategy is for the attorney to proceed with a Chapter 7 filing even though the debtor has only partially paid the agreed upon fee in the expectation, or perhaps only hope, that the debtor will voluntarily pay the remainder of the fee at some future time though not legally required to do so once a discharge has been entered. This is obviously no sure thing and presents a risk many attorneys will avoid. A fourth approach that some attorneys have attempted is to require a check from the debtor post-dated until after the filing date in the hope that the unpaid fee will then be treated as a post-petition obligation that is not discharged in the bankruptcy. This practice,

however, has in general not fared well when brought to the attention of a court. *See e.g., In re Davis*, 2014 WL 3497587 (Bankr. N.D. Ala., July 11, 2014.) A fifth approach that has been taken, and the one which is the subject of the present cases, is a so-called "bifurcated" fee arrangement under which the attorney and the debtor enter into two separate fee agreements, one a "prefiling," or "prepetition" agreement signed before the petition is filed, and the other a "postfiling" or "postpetition" agreement signed thereafter.

In it's most basic form, the bifurcated fee approach entails the use of the prefiling agreement to provide solely for the minimum amount of legal services needed to have a skeletal petition prepared and filed, thus initiating the bankruptcy, following which the parties enter into a postfiling agreement under which the bulk of the legal work is to be done. The overall fee for the bankruptcy filing is split between the two agreements, generally weighted heavily (or even entirely) to the postfiling agreement. The theory behind this approach is that the debtor's obligation under the postfiling agreement will not be discharged in the bankruptcy and will thus remains a binding obligation of the debtor, providing some assurance to the attorney that the fee will be paid, even if over time. In some instances, including the one presented here, the attorney also enters into a factoring or financing agreement with a third-party as part of the bifurcated fee arrangement, with the third party paying the attorney a discounted amount on the postfiling agreement fee "up front" in exchange for a security interest in the attorney's account receivable and a role in collecting subsequent installment fee payments due from the debtor under the postfiling agreement.

A number of bankruptcy courts from around the country have considered whether the bifurcated fee approach is allowable under the relevant provisions of the Bankruptcy Code, the

Federal Rules of Bankruptcy Procedure, and in some instances even Local Rules and applicable rules of professional conduct. The results have been mixed, though a majority of the courts to have considered the matter have recognized that bifurcated fee arrangements are not inherently proscribed and thus may be used if certain conditions are met. This is a question of first impression in this District.

For the reasons explained below, the Court adopts this majority view and finds broadly that a bifurcated fee arrangement may be used in Chapter 7 cases in this District provided certain strict conditions are met that are designed to assure that debtors are fully informed and treated fairly, and that proper disclosure to the Court is made by the attorney as part of the bankruptcy filing. These conditions will be detailed below. On the more narrow question concerning Cialella's use of the bifurcated fee arrangement, the Court finds that she failed to meet the required conditions and as a result disgorgement of some fees is appropriate, although the agreements will not be voided for reasons explained below. In light of the importance of this issue to the attorneys and potential debtors in this District, as well as to the Court itself as an institution, the Undersigned can also report that he has spoken with the other members of the Court and that they are in agreement with the result reached herein and will adopt the same conditions in their cases should this issue arise.

FACTS

(a) Cialella's Agreement with Fresh Start Funding and Use of the Bifurcated Fee Arrangement

Cialella is a member of the Bar of this Court and she regularly files consumer bankruptcy cases on behalf of debtors, primarily cases under Chapter 7, but occasionally under

Chapter 13 as well. The Court takes judicial notice that a query on the Court's CM/ECF system as of March 1, 2022, returned a result showing that Cialella is listed as an attorney in 1,524 cases, beginning with a case filed in 2001.

For the first time, in connection with a case she filed on August 7, 2019,[3] Cialella used a bifurcated fee arrangement with a client and she has used that arrangement in 26 other cases since then. The Court did not become aware of her use of the bifurcated fee arrangement until on or about April 22, 2021, when one of its Staff Attorneys reviewed certain disclosures filed by Cialella in the *Anthony* and *White* cases. The Court promptly issued similar orders in both cases directing Cialella to supply required information about what she had been doing and directing the UST to review the material and to file a statement indicating his position on the matter. All relevant materials have been produced by Cialella and the UST has stated his position in *Anthony* and *White*. The UST also requested the Court to open the *Misc. Case* related to this matter.

The underlying material facts in this case are not disputed. After some apparent initial delay by Cialella during a time when she was being represented by another attorney, the Parties have cooperated in discovery in good faith, for which they are commended. The UST and Respondent have filed a document with the title *Jointly Stipulated Facts* ("JSF") which appears as Doc. No. 52 in the *Anthony* case and as Doc. No. 59 in the *White* case. Also on file with the Court are copies of various relevant documents that were submitted by Cialella in response to the Court's April 22nd Orders. *See* Doc. No. 22 in *Anthony* and Doc. No. 22 in *White*. In the *Misc. Case* the Parties have submitted, as part of their Consolidated Pretrial Narrative Statement, an extensive list

[3] *See In Re Bradley*, Case No. 19-23125-TPA.

of factual stipulations running some fifteen (15) single-spaced pages. *See Misc. Case* Doc. No. 16. This extensive material was supplemented by the testimony of Cialella given at a limited evidentiary hearing held on March 30, 2022. Based on all of this material, and with the consent of the Parties, the Court is able to make the factual findings that follow without the need to have conducted an extensive evidentiary hearing.

Cialella's use of the bifurcated fee arrangement in all of the cases at issue here has been of the factoring/financing type, involving an entity called Fresh Start Funding ("Fresh Start"). Beginning around late 2018 Cialella began receiving emails from Fresh Start touting the benefits of using a bifurcated fee approach, with Fresh Start advancing funds to attorneys on approved postfiling agreements. She initially ignored the emails but around February 2019 she read one and became interested. She testified that securing the up-front payment of attorney fees from potential Chapter 7 clients had always been difficult in her practice and that the Fresh Start approach sounded "promising." She met with two principals of Fresh Start in March 2019 and was reassured that the bifurcated fee approach they were offering could benefit both she and her clients.

Following the meeting, Cialella decided to implement the bifurcated fee approach Fresh Start had proposed to her and on May 10, 2019, she entered into a "Line of Credit and Accounts Receivable Management Agreement" with Fresh Start.[4] According to recitals in that agreement Fresh Start offered "a suite of related services designed to facilitate consumer bankruptcy

---

[4] As noted, Cialella's first use of the bifurcated fee approach was in the *Bradley* case (*See* n. 2 above) which was filed on August 7, 2019. Cialella's testimony was vague as to when she signed the Fresh Start agreement but copies produced in the *Anthony* and *White* cases show it was signed on May 10, 2019.

law firms offering payment terms to their Chapter 7 debtors." The agreement between Cialella and Fresh Start is fairly involved and the Court need not get into the details of the agreement for present purposes. The basic outline of the bifurcated fee arrangement as employed by Cialella with her clients, including the role of Fresh Start, is sketched out below.

After entering into the agreement with Fresh Start, when a prospective Chapter 7 client consulted with Cialella she would disclose all available payment options with them: payment of her standard fee ($1,525) in full prior to filing; payment of the fee to her in monthly installments (generally $100 per month) prior to filing until paid in full, or the bifurcated fee agreement using Fresh Start. Cialella explained to clients that the bifurcated fee arrangement would increase the fee amount they would pay by 25%.

If a client was interested in the bifurcated fee arrangement Cialella would have the client sign a Pre-Filing Agreement[5] using a form document that Fresh Start provided to Cialella for such use which she modified somewhat to reflect her own practices. The Pre-Filing Agreement first describes the legal work involved in a Chapter 7 case and breaks it down into three different categories, described as follows:[6]

---

[5] For the sake of clarity, the Court notes that when it used the capitalized terms "Pre-Filing Agreement" or "Post-Filing Agreement" in this Opinion it is referring to the specific agreement forms as supplied by Fresh Start to Cialella and used by her in the cases at issue. By contrast, the use of an uncapitalized term such as "prefiling agreement," "prepetition agreement," "post filing agreement," etc., is a generic reference to such forms as understood in the context of a bifurcated filing arrangement.

[6] The identified quotes are directly from the documents supplied by Cialella. The use of the words "you" and "your" in this material refers to Cialella's client.

Pre-Filing Services

- Meeting and consulting with you as needed prior to filing your case
- Analyzing the information from your intake questionnaire and other documents
- Providing due diligence, legal analysis and legal advice in order to help you make important legal choices and to comply with the bankruptcy code and rules
- Preparing and filing your Chapter 7 Voluntary Petition, Statement about Social Security Numbers, Pre-Filing Credit Counseling Certificate and List of Creditors to start your Chapter 7 case

Post-Filing Services

- Preparing and filing your Statement of Financial Affairs and Schedules
- Preparing and filing your Means Test calculations and disclosures
- Conducting a second signing appointment for you to review and sign your statements and schedules
- Preparing for and attending your Section 341 Meeting of Creditors
- Administering and monitoring your case and communicating with you throughout the process
- Forwarding the Trustee Questionnaire and debtor documents to the Trustee
- Noticing your employer to stop any garnishments
- Reviewing and responding to Trustee requests
- Reviewing and advising you regarding any motions for stay relief
- Reviewing and advising you regarding any reaffirmation agreements or redemption
- Reviewing and advising you regarding any creditor violations
- Any legal service required by the local rules

Supplemental Post-Filing Services

- Reviewing and advising regarding any turnover demands from the Trustee
- Attending any continued Section 341 meeting of creditors
- Reviewing and advising regarding any 2004 exam and attending related exam
- Reviewing and advising you regarding any audit by the U.S. Trustee
- Preparing and filing claims or objections to claims where appropriate
- Reviewing and advising you regarding any lien avoidance matters

The Pre-Filing Agreement also lists a fourth category of "Excluded Services" that it says are excluded from the work that Cialella was agreeing to provide unless otherwise stated in writing, with a following blank space provided for that purpose. These Excluded Services include representing the client in any adversary proceedings or other contested bankruptcy matters, representing the client in any other court, representing the client in tax or student loan matters, pursuing automatic stay violations, and preparing and filing any amendments to statements or schedules.

After these various categories of work are set forth the Pre-Filing Agreement informs the client of two payment options regarding attorney fees. Under "Option #1" ("Pay Before You File") a flat attorney fee plus filing fee is stated, which the client must pay in full before the bankruptcy will be filed. The client is also informed that he or she will only be required to sign the Pre-Filing Agreement, and that Cialella will provide the Pre-Filing Services and Post-Filing Services as were set forth above. The client is informed that Option #1 is less expensive, but that if any Supplemental Post-Filing Services are required they will be billed separately at a stated hourly rate. The record is unclear as to whether Cialella actually used the Pre-Filing Agreement form with clients who chose this conventional pay-in-advance method, or whether she instead used the same fee agreement as she would have used prior to her contract with Fresh Start.

Under "Option #2" ("File Now Pay Later") the client is first told that it will be more expensive than Option #1, but that more legal services will be included and it will allow the attorney fee to be paid in installments over 12 months after the case is filed. It then explains that only Pre-Filing Services will be provided pursuant to the Pre-Filing Agreement under Option #2, sets a flat

amount for such services, and informs the client that such amount must be paid in full before the case will be filed.[7] The Pre-Filing Agreement then goes on to explain that under Option #2 the client will have 3 choices once the case has been filed. First, the client can decide to proceed *pro se* in the bankruptcy. Second, the client can find an attorney other than Cialella to provide representation. Third, within 10 days after the bankruptcy case is filed the client can enter into a second agreement with Cialella, the Post-Filing Agreement based on a form document that Fresh Start supplied to Cialella.

Clients who go the "Option #2" route and who then choose to either represent themselves *pro se* or find another attorney once the bankruptcy case has been filed are informed that they will owe Cialella nothing further, and that she would ask the bankruptcy court to withdraw as attorney but would continue to represent them in the case "and perform all necessary services" unless and until the bankruptcy court allows the withdrawal.[8] Clients are not informed what these necessary services might be and it is unclear whether they would include, for example, any of the Post-Filing Services as described above, some of which might be required relatively soon after the case filing, before the Court might rule on a motion to withdraw appearance. For instance, completed schedules must normally be filed within 14 days after the case is opened. There is a sentence in the Option #2 material stating:

---

[7] The form document leaves a space for the attorney to fill out the fee that will be charged for Pre-Filing Services under Option #2. Cialella set that amount as $300 in the *Anthony* case and as $100 in the *White* case and most of the other cases involved here.

[8] This approach is consistent with *W.PA.LBR 9010-2(e)* which provides that in this Court an attorney may withdraw an entry of appearance only with leave of the court.

> **Under this Pre-Filing Agreement, we will <u>only provide the Pre-Filing Services listed above.</u>**

(emphasis original). This would indicate that Cialella would not file the schedules if no Post-Filing Agreement was signed by the debtor. This would appear to create a conflict with the other language stating that she would continue to represent the debtor and perform all necessary services until her withdrawal was granted. At the very least, the language creates some confusion.

In any event, there is nothing in the record to suggest that any of Cialella's clients signed the Pre-Filing Agreement and then chose to represent themselves or retained another attorney. Rather, it appears all who signed the Pre-Filing Agreement and chose Option #2 then also signed the Post-Filing Agreement.

Clients who choose Option #2 and then want to have Cialella continue to represent them after the case has been filed – which, again, appears to be what happened in all 27 cases at issue here – must sign a Post-Filing Agreement with Cialella and are informed that it will include both Post-Filing Services and Supplemental Post-Filing Services. The Pre-Filing Agreement advises what the fee would be for the Post-Filing Agreement and it gives the client the choice to pay such fee over the course of a year in weekly, bi-weekly, semi-monthly, or monthly installments, with the first such payment due no later than 30 days after the Post-Filing Agreement is signed.[9]

---

[9] The Pre-Filing Agreement used by Cialella in the relevant cases states that Fresh Start charges a fee equal to "24% of the fees that the Law Firm charges you under this Post-Filing Agreement."

After providing explanations for Options #1 and #2, as summarized above, the Pre-Filing Agreement next provides information related to Cialella's contractual relationship with Fresh Start and how it will affect the client. It states that if the client chooses Option #2 and then chooses to enter into a Post-Filing Agreement with Cialella that Cialella will borrow money from Fresh Start on a line of credit, and that Fresh Start will be authorized to electronically collect the fee installment payments from the client through a debit card or ACH transaction. The Pre-Filing Agreement then sets forth some information that the client is asked to consider in connection with the overall transaction.

The first "consideration" for the client is that the client's attorney fee will be higher if the Post-Filing Agreement is used because Cialella will perform additional work to split the engagement, because Cialella will take on risk by agreeing to payment over time, and because Fresh Start charges 25% for its "financing, payment management, credit reporting and other services" to Cialella. It states that despite this higher cost this option provides the client with the benefit of a quicker filing, gives clients the opportunity to begin rebuilding their credit score, and gives clients the additional benefit of receiving the Supplemental Post-Filing Services. Second, the Pre-Filing Agreement informs clients that Fresh Start will be acting as Cialella's agent in collecting payments from them, and that such will involve Cialella sharing information about the client with Fresh Start. Third, clients are told that Fresh Start will have a lien against the amount the client will owe under the Post-Filing Agreement and that Fresh Start can pursue a collection action against the client if payments are not made. Fourth, clients are informed that a failure to make payments due under the Post-Filing Agreement could result in a negative credit report.

The final part of the Pre-Filing Agreement is entitled "Important Information about Conflicts of Interest," and it points out a number of potential conflicts and other issues that could arise if the client chooses Option #2 and then signs a Post-Filing Agreement with Cialella. Clients are told, for instance, that Cialella may be placed in a conflict position with the client once Cialella borrows funds from Fresh Start. That is because Cialella could become liable to Fresh Start if the client fails to make required payments.[10] Clients are also informed that the sharing of information between Cialella and Fresh Start could result in a waiver of attorney-client privilege. Clients are instructed that by signing the Pre-Filing Agreement they are acknowledging that they understand these and other points explained therein and give their informed consent to waive any conflict.

After a client has signed the Pre-Filing Agreement under Option #2 and the bankruptcy case has been filed, and assuming the client wants Cialella to continue the representation, the client must then sign a Post-Filing Agreement. As was indicated above, this agreement also is based on a form supplied by Fresh Start and it contains much of the same material as appears in the Pre-Filing Agreement. There are, however, some notable differences and inconsistencies that are relevant here.

For one thing, the scope of work to be provided by Cialella in exchange for the attorney fee to be paid by the client is inconsistent with what is stated in the Pre-Filing Agreement. As previously noted, the Pre-Filing Agreement states that under the Post-Filing Agreement the client will receive both Post-Filing Services and Supplemental Post-Filing Services. The actual Post-

[10] Cialella acknowledged at the evidentiary hearing that she gave a guarantee to Fresh Start that clients would pay, and if they did not, she would remain liable for any portion of their unpaid liability.

Filing Agreement form itself, however, does not use those terms, instead setting forth the work to be performed by Cialella under the single, different heading of "The Work Involved to Complete your Chapter 7 Case." The list under that heading does largely correspond to a combination of the Post-Filing Services and Supplemental Post-Filing Services as stated in the Pre-Filing Agreement, but the following three items are omitted and are instead listed under "Excluded Services" :

- Reviewing and advising regarding any 2004 exams and attending related exam
- Reviewing and advising you regarding any audit by the UST
- Preparing and filing claims or objections to claims when appropriate

In short, the Pre-Filing Agreement and the Post-Filing Agreement are inconsistent with respect to the scope of the services to be provided to the client, with the client actually getting less services under the Post-Filing Agreement than is represented in the Pre-Filing Agreement.

Another point of inconsistency relates to what Cialella's fee would be under the Option #2 Post-Filing Agreement. In both the *White* and *Anthony* Pre-Filing Agreements Cialella did not state what that fee would be. There is a space in the form with the notation to "Enter the post-petition fee that will be paid over the next 12 months," but Cialella did not fill in an amount. In the *Anthony* Pre-Filing Agreement a block was checked indicating that the fee would be payable in 52 equal weekly payments of $128.17, which would equate to a total post-filing fee of $6,664 – an unreasonable fee on its face for a simple Chapter 7 case. In the *White* Pre-Filing Agreement she again failed to fill in the fee where the form indicated to do so, and this time a box was checked indicating 52 equal weekly payments of $183.33, which would mean an astounding post-filing fee

of $9,533. It is not clear whether Cialella or the clients checked these 52 week boxes in the Pre-Filing Agreements, but in any event it was obviously an error to do so because in both when the Post-Filing Agreements were subsequently prepared and signed they reflect the same installment payment amounts, but this time on a monthly basis for 12 months rather than a weekly basis over 52 weeks, thus reducing the total post-filing fees to what would seemingly have been $1,538 in *Anthony* ($128.17 x 12) and $2,200 in *White* ($183.33 x 12). Only "seemingly," however, because elsewhere on the same page of the Post-Filing Agreement in *Anthony* the total fee is stated as being $1,922.50, and in *White* as being what looks like $1,220. The post-filing fee that the clients would be obliged to pay to Cialella is hopelessly muddled in both cases and the Court can only conclude that the clients were given no clear indication of the actual amount they would owe.

Following the material on post-filing fees, the next five pages of the Post-Filing Agreement provide extensive information to the client. This includes information about Fresh Start and about conflicts of interest that could potentially arise and the consequences thereof – much of it a basic repeat of what appears in the Pre-Filing Agreement on these subjects but in somewhat more detail. The Post-Filing Agreement then goes on to include additional informational material that is not in the Pre-Filing Agreement. Much of this additional material is boilerplate that might be included in any standard bankruptcy fee agreement (*e.g.* client's duty to provide information, to cooperate with the Chapter 7 trustee, etc.) and is unobjectionable. There is, however, one provision that requires comment because it is in conflict with the Pre-Filing Agreement.

The first item under the heading of "Additional Important Terms" in the Post-Filing Agreement is as follows:

- ***Unbundling or Limited-Scope Representation***. By signing below, you acknowledge that prior to you signing this agreement, the Law Firm expressed that it was ready, willing and able to represent you for your entire chapter 7 case, even though you chose the *File Now Pay Later* option which requires you to sign this Post-Filing Agreement. You further represent that you did not enter into the first agreement with the Law Firm with the intention of having the Law Firm simply file your case and then withdraw, but instead to facilitate you making payments over time for your attorney fee so that you can have an attorney represent you through the entire chapter 7 process.

While the meaning of this provision is not crystal clear, in the Court's view one reasonable reading of it is that the client is being asked to acknowledge that when he or she signed the Pre-Filing Agreement and chose Option #2 it was done with the intent in advance that once the bankruptcy was filed a subsequent Post-Filing Agreement would be signed with the attorney. That, however, is inconsistent with the Pre-Filing Agreement which gives the client three choices once the case is filed (proceed *pro se*, find another attorney, or sign the Post-Filing Agreement) and expressly states that the choice is "completely up to you." The Court is not sure why this provision is even in the Post-Filing Agreement, but its inclusion raises a suspicion as to how much of a free choice the client actually has in deciding whether to enter into the Post-Filing Agreement once the bankruptcy is filed.

In the last part of the Post-Filing Agreement the client is asked to provide information about a debit card and a bank account, as well as social security number, e-mail address, cell phone number, and date of birth. This confidential information is to be used by Fresh Start, as an agent of Cialella, to collect the fee installment payments owed by the client.

After a Post-Filing Agreement is signed, Cialella would forward it to Fresh Start, which would then determine whether to accept it as an "Approved Account." If Fresh Start accepts a particular Post-Filing Agreement as an Approved Account it then "advances" to Cialella 75% of the fee due under the Post-Filing Agreement, with 60% of that amount actually provided to her within 3 to 5 business days and 15% placed into a holdback account. The holdback account is a device used to accrue funds that can be used to make payments to Fresh Start in the event a client becomes delinquent under a Post-Filing Agreement. Cialella is personally obligated to Fresh Start as part her agreement with that company, but Fresh Start represented to her that the amount in the holdback account is usually enough to cover any missed client payments such that it is unlikely she will ever have to make a payment to Fresh Start. There are minimum balance and vesting requirements associated with the holdback account and periodic distributions are made to Cialella out of the account as circumstances warrant.

Fresh Start collects and keeps the client installment payments made under the Post-Filing Agreement. Fresh Start is thereby reimbursed for the funds advanced to Cialella and on top of that receives an additional 25% for advancing the funds to Cialella and for its "services" in collecting and managing the accounts receivable.[11] As was mentioned above, Fresh Start has a security interest in Cialella's accounts receivables under Post-Filing Agreements that have become Approved Accounts and even has the ability to undertake collection efforts against clients for failure to pay, up to and including a lawsuit, though Fresh Start has agreed not to file any suit for collection while Cialella is still representing the client.

---

[11] Cialella testified that all but two of the 27 clients who chose the bifurcated fee arrangement have made full payment under the Post-Filing Agreements. For the two clients who did not pay in full, Fresh Start will be paid out of the hold back fund – money that otherwise would have gone to Cialella.

The Parties have stipulated that the "standard" fee charged by Cialella to represent a debtor in a Chapter 7 case where the fee is paid up front is $1,525, which does not include the filing fee of $338. Thus, a debtor who pays up front would have a total cost of $1,853. The debtors who chose the "File Now Pay Later" option had varied payment structures, but the most common arrangement had the debtor paying $100 under the Pre-Filing Agreement and then agreeing to pay somewhere between $2200 and $2300 under the Post-Filing Agreement. These amounts included the filing fees. Thus, it was typical for these debtors to pay an additional amount of between approximately $350 to $450 for the ability to use the File Now Pay Later Option, a 19-24% premium over the pay in advance option, which corresponds closely with the 25% fee being charged by Fresh Start.

(b) *Cialella's Failure to Disclose Her Use of the Bifurcated Fee Arrangement*

Cialella has acknowledged that she failed to disclose her use of the bifurcated fee arrangement and the involvement of Fresh Start in 20 of the 25 cases involved in the *Misc. Case*. *See* Cialella's *Response* in *Misc. Case*, Doc. No. 5. The relevant facts regarding those non-disclosures is laid out in great detail in the stipulated facts section of the Consolidated Pretrial Narrative Statement filed by the Parties in the *Misc. Case*. Rather than go through the exercise of repeating all of that material here, the Court incorporates and adopts it as if fully set forth herein.

The stipulated facts largely speak for themselves, but based on Cialella's testimony at the evidentiary hearing, and its own review and assessment of the relevant materials, the Court

will add a few additional comments. First, aside from the lack of disclosure, it is apparent that Cialella was not well-informed on how the Pre-Filing Agreements and Post-Filing Agreements should be filled out. Cialella herself admitted that there was no excuse for the inconsistencies between the two agreements in a particular case, as well as between the agreements and other materials that were filed in connection with the case such as the Form B2030 and the Statement of Financial Affairs. She conceded that she had spread herself too thin and was relying on a staff member to prepare documents and then not properly reviewing them. That is obviously not an approach to be emulated, especially considering that she was utilizing a novel bifurcated fee arrangement and therefore could rightly have been expected to be vigilant in complying with her duties to the clients and the Court.

The Court could perhaps understand some initial complications in filling out all the necessary documents at the very start of Cialella's use of the bifurcated fee program since many of the forms would have been new to her. However, as an attorney she had a responsibility to quickly become familiar with how to properly fill them out, and the fact that there were still significant issues with the documents in the *Anthony* and *White* cases,[12] both filed almost two years after she had entered the agreement with Fresh Start, indicates she inexcusably failed to meet that responsibility.

Second, the disclosures that were made raise some questions as to whether Cialella properly "screened" clients to make sure they were suitable candidates for the bifurcated fee

---

[12] The long list of disclosure problems in the two cases can be found in the *Jointly Stipulated Facts* filed by the Parties and will not be repeated here.

agreement approach. As amply documented in the facts to which the Parties have stipulated, many of the clients actually showed a "negative income" in Schedule J after post-petition attorney fee payments required under the Post-Filing Agreement were factored in, leading to the question of how Cialella anticipated that the clients would be able to make such payments, and thus, how she could advise them to agree to do so. On the other hand, Cialella testified that 25 out of 27 clients have in fact fully paid the post-petition installments, which raises questions about the accuracy of the negative income representation.

Third, the Court believes that Fresh Start is far from blameless in this matter. It appears that Fresh Start convinced Cialella to adopt its bifurcated fee program by giving her an unrealistically sunny appraisal of the legal status of the program despite being fully aware that the use of such program has been the subject of challenges by the UST in a number of different bankruptcy courts, and might well be the subject of such a challenge if attempted in this Court. Cialella's testimony was to the effect that Fresh Start gave her a copy of one such case[13] and told her that the UST office in Washington, D.C. had issued some sort of positive statement on the use of bifurcated fee agreements.[14] Cialella failed to undertake her own research on this matter, and that too reflects poorly on her, but it does not absolve Fresh Start. Fresh Start also apparently failed to assist Cialella to help make sure she was properly filling out the Fresh Start form agreements with

---

[13] Fresh Start supplied her with a copy of the *Hazlett* case which is discussed *infra*.

[14] As far as the Court is aware, the Office of the United States Trustee in Washington did not issue any sort of statement on its use of bifurcated fee arrangements in Chapter 7 cases at any tine prior to the evidentiary hearing when Cialella testified, so it is unclear as to what she was referring. In a serendipitous development occurring since then, the UST did issue "Guidelines for United States Trustee Program (USTP) Enforcement Related to Bifurcated Chapter 7 Fee Agreements" on June 10, 2022. These "Guidelines" are discussed further, *in fra*.

her clients and making proper disclosures. Finally, despite promising to provide legal representation to Cialella in the event the bifurcated fee arrangement was ever challenged, Fresh Start did so in somewhat of a half-hearted fashion, causing her to seek alternative counsel at the earliest opportunity.

LEGAL DISCUSSION

The first issue presented is whether the Court should even allow the use of a bifurcated fee arrangement in Chapter 7 cases, and if so under what conditions. A second issue is what consequences should there be to Cialella if it is found that the bifurcated fee agreements she used failed to meet the applicable standards, or for her admitted failure to properly disclose the bifurcated arrangement.

(a) Bifurcated Fee Arrangement

Although the use of a bifurcated fee arrangement in Chapter 7 cases is a matter of first impression in this District, this same question has arisen in cases elsewhere, especially in the last decade or so since *Lamie* was decided, and this Court therefore has the benefit of the analysis and conclusions reached by these other courts. Overall, it appears that most of the courts to have considered the issue during this time period have found that the use of a bifurcated fee arrangement is not *per se* prohibited, though it is fraught with the possibility of abuse and must therefore be closely scrutinized and conditioned. A minority of courts seem to have a more negative view, verging on an outright prohibition of the practice. It will be instructive to first consider several of these other decisions in some detail to get a sense of their general reasoning.

(i) Case law

In re Slabbinck, 482 B.R. 576 (Bankr. E.D. Mich. 2012) is one of the early post-*Lamie* cases to involve a bifurcated fee arrangement. In that case the court considered the use of a bifurcated fee arrangement as against a challenge raised by the UST.[15] The debtors in the case had signed a prepetition agreement with the attorney whereby the attorney would provide various services including consultation and advice and preparation of the bankruptcy petition and other documents necessary for the filing of a bankruptcy case in exchange for a fee of $1,000 payable before the case was filed. That same agreement provided that the attorney would not represent the debtor once the case was filed unless a new agreement was signed. The case was filed and two days later the debtors signed a postpetition agreement with the same attorney pursuant to which they employed the attorney to complete the bankruptcy case for a fee of $2,000 that was payable in monthly installments. There was no third-party factor involved in this case.

The UST in *Slabbinck* filed a motion pursuant to *11 U.S.C. §329(b)* which provides that if a bankruptcy court finds that compensation paid or agreed to exceeds the reasonable value of the services provided it may cancel the agreement or order the return of any payment made under the agreement to the extent necessary. The UST made two main arguments in support of this motion. One argument was that the two agreements were in substance really only a single agreement that created a prepetition debt that was dischargeable in the bankruptcy. The other was

---

[15] For the sake of convenience the Court will continue using the designation of "UST" to refer to the United States Trustee in the various cases to be discussed, even while recognizing that these are different individuals than the "UST" involved in the present case, though all hold a similar position.

that if the two agreements were treated as separate agreements it amounted to an impermissible "unbundling" of legal services by the attorney that should not be allowed.

After an extensive discussion the court in *Slabbinck* rejected both of these arguments. It found that the facts showed the pre-petition agreement and post-petition agreement were actually two separate agreements, with a clear delineation as to what services would be provided under each. On the unbundling question the court could find nothing under the Bankruptcy Code or the applicable attorney ethical rules (Michigan) that would *per se* prohibit an attorney from dividing a bankruptcy representation into prepetition and postpetition segments. The court went on to conclude that whether the practice should be permitted in a given case would depend on whether such a bifurcation would violate the attorney's duty of competency, and also whether the attorney had provided an adequate consultation for the debtors as far as explaining to the debtors what the bifurcated arrangement entailed, and whether the debtors had given informed consent to the bifurcated arrangement. The court concluded that there was sufficient evidence of record to determine that the attorney had met the duty of competency because it found that nothing in the law required that in every case a debtor's attorney had to represent the debtor in all matters in the case, both prepetition and postpetition, in order to meet the requirement of attorney competency.[16] As to the adequate consultation and informed consent elements, however, the court found that the record before it was insufficient to determine whether those elements had been met. The court therefore

---

[16] The W.PA.LBR include a provision setting forth the minimally required services to be performed in a Chapter 13 case by an attorney who chooses to be paid under its "No-Look Fee" procedure. *See W.PA.LBR 2016-1(q)*. Unfortunately, unlike many other bankruptcy court local rules, there is not currently a similar provision setting forth what is expected of attorneys representing debtors in Chapter 7 cases. The Court would suggest that this may be a topic for future consideration by its Local Rules Committee.

gave the attorney 10 days to file an affidavit to address those two matters and gave the UST 10 days to respond. There was no follow-up published opinion or order as to the final outcome after the affidavit and response were submitted.

Slabbinck thus stands for the proposition that a bifurcated fee arrangement can be done if there are actually two separate agreements involved that clearly delineate the services and fees under each, and if the attorney adequately explains the arrangement to the client, who makes an informed consent to proceed. In reaching this decision the *Slabbinck* court candidly acknowledged that its decision was influenced by its "strong preference," gained through practical experience, for Chapter 7 debtors to be represented by an attorney because represented debtors generally fare better in completing their case and obtaining a discharge, and the fact that allowing a bifurcated fee approach advanced that goal. As the court stated:

> ... a pre-petition agreement to pay an attorney gives rise to a dischargeable debt. A post-petition agreement does not. ... For the Court to insist on an all or nothing approach, in the name of promoting attorneys' competence, will have the perverse effect of depriving needy individual debtors who cannot afford to pay in advance for all of the legal services they may need in a Chapter 7 case, from hiring an attorney to provide them with any of the legal services that they may need in a Chapter 7 case. Just because those individuals cannot afford to pay for all of an attorney's fee in advance
>
> should not mean that such individuals can only avail themselves of bankruptcy relief by filing either *pro se* or with the help of a bankruptcy petition preparer.

482 B.R. at 597.

Another case in which the use of a bifurcated fee arrangement was approved, though under strict conditions, was *In re Hazlett*, 2019 WL 1567751 (Bankr. D. Utah, April 10, 2019),

reconsideration denied, 2020 WL 2026637 (Bankr. D. Utah, February 13, 2020). In that case the debtor was offered 3 different billing options by a law firm for representation in a chapter 7 case: (1) an "up-front retainer option" requiring a $2400 up-front payment; (2) a " $500-down option" requiring entry into a pre-filing agreement with a $500 payment up front for preparing and filing the petition following which the debtor would either proceed *pro se*, hire another attorney to complete the case, or enter into a post-filing agreement with the law firm to complete the case; or (3) a "zero-down option" requiring entry into a pre-filing agreement with no payment up front for preparing and filing the petition following which the debtor would either proceed *pro se*, hire another attorney to complete the case, or enter into a post-filing agreement with the law firm to complete the case for a fee of $2400 payable in ten equal monthly installments. The debtor did not have the ability to pay any retainer and so chose the zero-down option. He signed the pre-filing agreement and then following the case filing he signed a post-filing agreement which the law firm then submitted to a factor called BK Billing.

The Chapter 7 case proceeded normally, a trustee's no-asset report was issued, the debtor was discharged, and the case was closed in due course. Several months after the case was closed the UST moved to reopen it and then filed a motion for sanctions against the law firm that had represented the debtor. In that motion the UST objected to the marketing of the zero-down option, the bifurcation of the bankruptcy services into pre- and post-petition components with separate agreements for each, performing the pre-petition services for allegedly no fee, the reasonableness of the $2,400 post-petition fee, the factor collecting the fee from the debtor, and the use of an electronic signature in bankruptcy.

The *Hazlett* court began by noting that there was no clear guidance in that district as to whether a bifurcated fee arrangement was permissible, but that cases from other jurisdictions allowed such an approach, so that the debtor's attorney had a reasonable basis for concluding it would be allowed if a client was unable to pay a full retainer prior to the bankruptcy filing.[17] The court then proceeded to consider each point raised by the UST in opposition to the bifurcated fee arrangement and the use of BK Billing as a factor and rejected all of them, concluding:

> ... the Court finds that the use of bifurcated fee agreements in consumer Chapter 7 cases to effectuate affordable legal services are not *per se* prohibited by the Bankruptcy Code and applicable law, they do not *per se* implicate ethical issues, and they are not *per se* unfair.

2019 WL 1567751, at *9. The court went on, however, to set forth four "essential practices," or "prime directives," that debtor attorneys would be held to when using a bifurcated fee arrangement.

First, any method of payment offered to a client must be based on the client's best interests and not the attorney's financial interests. Second, all legal fees, including any finance charges or installment payments, must be reasonable and necessary. Under this principle, any pricing differential between a conventional fee and a bifurcated fee must be based on reasonable and quantifiable factors that the attorney should be prepared to justify if ever challenged. Third, all fee arrangements must be fully revealed in the Form B2030 Disclosure of Compensation which the

---

[17] The *Hazlett* court cited to a number of cases in support of this conclusion, including the Circuit Court decisions of *In re Hines*, 147 F.3d 1185 (9th Cir. 1998) and *Bethea v. Robert J. Adams & Assoc.*, 352 F.3d 1125 (7th Cir. 2003). *See* 2019 WL 1567751 at *7, note 34, for a complete list of the cited cases. While these cases pre-date *Lamie, supra*, they remain relevant to the issue currently before the Court even though their value is lessened to an extent.

attorney is required to file within 14 days of the petition under *Fed.R.Bankr.P. 2016(b)*. That means all details of the pre-filing and post-filing agreements must be disclosed, including interest charges and installment payment obligations. Fourth, if the debtor elects to proceed *pro se*, or to hire another attorney, the filing attorney must immediately take the proper steps regarding substitution or withdrawal of counsel. The court concluded by stating that it was "neither encouraging nor prohibiting the use of bifurcated fee agreements in consumer Chapter 7 cases," but if such were used the attorney would be held to these standards.

Another example of a case approving the use of a bifurcated fee approach on strict conditions is *In re Brown*, 631 B.R. 77 (Bankr. S.D. Fla. 2021). In that case the UST filed motions objecting to the business practices of two law firms in connection with bifurcated fee arrangements they offered to clients in consumer Chapter 7 cases. Once again, the attorneys in the *Brown* case used a bifurcated fee arrangement broadly similar to that used by Cialella in the present case, with separate pre-filing and post-filing agreements and defined services under each. The UST raised objections to the bifurcated fee arrangement that were very similar to the objections raised in *Hazlettt,* and also argued that the practice violated *11 U.S.C. §526* ("Restrictions on debt relief agencies").[18] The *Brown* court provided the following helpful capsulization of the matters in question in the case:

> The issues before the Court may be summarized as follows:
>
> • Should bifurcation of fees be allowed at all?
> • What is a reasonable prepetition fee versus a postpetition fee?

---

[18] The Supreme Court has held that attorneys advising or representing consumer debtors in bankruptcy cases are debt relief agencies under the bankruptcy Code. *See Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 237 (2010).

• What happens if the Debtor doesn't sign a postpetition fee agreement?
• What disclosures should be made to the debtor about a bifurcated fee arrangement?
• What disclosures must be made to the court about the bifurcated fee arrangement?
• Can the law firm advance filing fees on behalf of the debtor?

631 B.R. at 91.

As to the first of these questions the *Brown* court noted that the UST was not taking the position that fee bifurcation in Chapter 7 cases should be prohibited and the court found that to "make sense" because, it noted, fee bifurcation regularly occurs in Chapter 7 and other bankruptcy cases. In making this statement the court pointed to the common practice of debtor attorneys in Chapter 7 case charging an up-front flat fee for the basic services associated with a bankruptcy (*e.g.*, preparing all required documents and attending the meeting of creditors) while excluding representation for such things as representation in adversary proceedings or certain motions unless the debtor pays an additional fee. In the view of the *Brown* court this already well-accepted practice was itself a species of fee bifurcation, and thus it found no reason to outright prohibit the practice under review.

On the question about the reasonableness of fees in a pre-filing, post-filing arrangement the court reached a somewhat mixed result. The UST pointed to the fact that the attorneys were charging only a nominal fee for the pre-filing work, or even no fee at all, and argued that they were then making up for it by increasing the size of the post-filing fee. The court agreed that using the post-filing agreement to pay for pre-filing services would be unacceptable since that would merely be trying to do indirectly what is prohibited directly. On the other hand, the court found the UST's argument to fall short because it measured the reasonableness of the post-filing fee solely by comparing it to the pre-filing services and charges. The court held that "the

reasonableness of the prepetition fees and the postpetition fees must be analyzed on the basis of the services provided with respect to each flat fee, not compared to each other." 631 B.R. at 93. The court further noted that in evaluating the reasonableness of a flat fee it was proper to take into account not only work that was actually done, but also work that could potentially have been required under the scope of services to be provided, unless a particular service could not possibly have arisen in the case. For instance if dealing with student loan issues is within the scope of services to be provided, but the debtor has no student loans, than such work would not be considered in determining whether the flat fee was reasonable.

The *Brown* court also incorporated a competency component into the evaluation of the reasonableness of the fee, and in particular it noted that there was an issue as to what minimum level of services had to be included in a pre-filing agreement, regardless whether the debtor ever ended up signing a post-filing agreement . If the pre-filing agreement does not include the minimal necessary services it could call into question the attorney's obligation to provide competent representation under state attorney rules of practice, the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, and the court's local rules. The court summed up the minimum that an attorney must do to represent a client under a pre-filing agreement as follows:

> These statutes and rules collectively require sufficient inquiry by the attorney, not staff, when initially meeting with a client to ascertain whether filing bankruptcy is the appropriate relief, determining under what chapter a bankruptcy case could or should be filed, and additionally compel the attorney to adequately inform a potential debtor of the consequences of that choice. Further, the attorney must assist the debtor with all of the debtor's obligations under *section 521* unless he or she is permitted to withdraw. The attorney must prepare and file all documents necessary to commence the bankruptcy case, which includes, at a minimum, the petition, the creditor's matrix, any

> motion to waive or pay the filing fee in installments, the statement of attorney compensation, and the Debtor Credit Counseling Certificate, or, if applicable, a motion to waive the need to file or file late, the certificate (collectively the "Minimum Required Documents"). And finally, the attorney must attend the *section 341* meeting of creditors unless he or she is permitted to withdraw prior to the meeting.

631 B.R. at 97–98.

The next question on the court's list in *Brown* is what happens if the debtor does not sign a post-filing agreement. Curiously, the court does not seem to have answered that question directly. It did note that a requirement for the debtor to sign a post-filing agreement immediately after the petition is filed does not give debtors a meaningful opportunity to consider their options. It suggested that a 14-day period after the filing before the debtor would have to sign a post-filing agreement was appropriate, or in the alternative a 14-day period to rescind following the signing of the agreement. It also assumed that even if the debtor did not sign a post-filing agreement the attorney would be under an obligation to continue the representation until permitted to withdraw by the court.

The *Brown* court engaged in a considerable discussion on what disclosures would be required to use a bifurcated fee arrangement, both to the debtor and to the court. It found disclosure to be a "fundamental premise" of fee bifurcation. Debtors must be informed of what services will and will not be provided. The list of services may include services that may or may not be performed, and services that at the time of retention are clearly not required, so long as the agreement makes clear that some of the listed services will not arise in the particular case. The pre-filing agreement must disclose that regardless whether the post-filing agreement is signed the attorney must continue to represent the debtor unless allowed to withdraw. The debtor must also

be informed that fees under a post-filing agreement are not discharged in the bankruptcy. The court also required that debtors be given a separate disclosure form indicating that they are choosing the bifurcated fee option, and which shows the difference in cost between it and a flat fee paid in advance of the filing. Such disclosure form, as well as a copy of a post-filing agreement, must be provided to the debtor when the pre-filing agreement is signed. Proper disclosure of a bifurcated fee arrangement must also be made to the court, and if the debtor ends up signing a post-filing agreement that provides for installment fee payments such payments must be reflected in the debtor's Schedule J.

On the last question about filing fees, the court found that a law firm's payment of the filing fee for the debtor with post-petition repayment by the debtor would violate the Bankruptcy Code, *11 U.S.C. §§362, 524,* and *526*, as well as state bar rules. Instead, held the court, "[a] bifurcation agreement, like any other fee arrangement, should only give the debtor the three choices allowed by federal law: pay the fee up front, complete the paperwork to pay the filing fee in installments, or, if applicable, seek waiver of the filing fee." 631 B.R. at 103.

The next example to be considered here is a case in which the court expressed a decidedly more negative view of bifurcated fee agreements, *See In re Baldwin*, 2021 WL 4592265 (Bankr. W.D. Ky. October 5, 2021), *reconsideration denied*, 2022 WL 107376 (Bankr. W.D. Ky. January 11, 2022). This involved 11 bifurcated fee cases filed by an attorney. The judge writing the opinion noted that the decision rendered would affect all the attorneys practicing bankruptcy law in the district, so he had met with all of the other judges of the court and they agreed with his conclusions as set forth in the opinion. The *Baldwin* court began by stating the familiar problem of

how a debtor's attorney in a Chapter 7 case who is not paid up front can get paid once a case has been filed without violating the discharge injunction and identified the bifurcated fee approach as one way of trying to "avoid" that problem.

The attorney involved in *Baldwin* disclosed in the various Form B2030s filed in the cases that the debtors had agreed to pay $0 for legal services in connection with getting a skeletal petition filed. This disclosure went on to describe the bifurcated fee arrangement and explained that the post-filing agreement that the debtors had signed after the filing called for a fee of $2,500, to be paid in installments over a period of up to 12 months. The attorney in *Baldwin* also used a third-party factor and that was also disclosed and generally described, although the identity of the factor, which happened to be Fresh Start, does not seem to have been initially disclosed. The court, upon becoming aware of these disclosures, issued an order to show cause, conducted a hearing on the matter, and then ordered the attorney to file a copy of all relevant documents. Once that was done the court issued an order directing the UST to review the matter and file a memorandum expressing an analysis of the relationship between the attorney and his clients under the bifurcated fee arrangement and any ethical or other issues thereby presented.

The *Baldwin* court found multiple reasons why the bifurcated fee arrangement before it was objectionable. The attorney had advanced the client's filing fee in 10 of the 11 cases under the expectation of recovering the fee as part of the payments to be made under the post-filing agreement. The court agreed with the decision in *Brown* and found that to be in violation of the Bankruptcy Code, as well as a violation of a Kentucky Rule of Professional Conduct on permissible advancement of costs. The court next found that the attorney's contractual relationship with Fresh Start created conflicting financial incentives for the attorney and amounted to overreaching. The

court noted that the attorney could cut out the factor and allow the debtor to pay the attorney fee installments directly to the attorney, which would mean the attorney would not get the quick 60% advance from Fresh Start, but also that the clients would avoid the significant extra costs involved with factoring. The court also found that a local rule of the court providing that an attorney who files a bankruptcy petition for a debtor remains the responsible attorney of record for the debtor until the case is closed or the attorney is relieved of the duty by court order prohibited the type of arrangement the attorney was using.

Next, the *Baldwin* court found that the bifurcated fee agreement being used by the attorney did not provide adequate disclosure to the debtors. The court agreed with the UST that the agreements did not give a sufficient explanation of the consequences of a default by the debtor, the entirety of the relationship between the attorney and Fresh Start, and the payment terms of the contract between the attorney and Fresh Start. Again, in addition to a provisions in the Bankruptcy Code (*11 U.S.C. §528*), the court also pointed to a Kentucky Rule of Professional Conduct as the source of such duty. It also found that the bifurcated fee agreements did not provide sufficient disclosure to the court in a number of respects, including the failure to disclose what Fresh Start would be receiving out of post-filing installment payments to be made by the debtors. Finally, the court found that the factoring agreement with Fresh Start raised issues of fee splitting, and that the higher fee charged to clients who chose the bifurcated fee arrangement delayed their ability to improve their financial position and were unreasonable.

The *Baldwin* court's conclusion was that the bifurcated fee agreements involving the attorneys, Fresh Start, and the affected debtors were in violation of the Bankruptcy Code, the Federal

Rules of Bankruptcy Procedure, and the Kentucky Rules of Professional Conduct and as such "are not to be used by any attorney practicing bankruptcy law in the United States Bankruptcy Court for the Western District of Kentucky." The court suggested as an alternative that Chapter 13 should be considered for debtors who cannot afford to pay the attorney fee prior to filing.[19]

The issue of bifurcated fee agreements in Chapter 7 bankruptcies continues to come before courts, even since the evidentiary hearing was held in the present case in late March of this year. A brief mention of two of the most recent cases may be useful.

In late 2021 the U.S. Bankruptcy Court for the District of Minnesota issued an *en banc* order requiring attorneys who were using a bifurcated fee arrangement in a Chapter 7 case to file an application within 14 days of filing the petition for the court to review the arrangement and determine if it is reasonable and meets requirements under the state's rules of professional conduct.[20]

---

[19] Using Chapter 13 as an alternative or default vehicle for compensating consumer bankruptcy attorneys has been criticized by both courts and commentators. *See, e.g., In Re Arlem*, 461 B.R. 550, 558 (Bankr. W.D.Mo. 2011) ("A Chapter 13 plan which pays only the administrative expenses of the proceeding, primarily debtors' counsel fees, and makes no payment to any creditor, secured or unsecured, violates the spirit and purpose of Chapter 13 and is not proposed in good faith."); *In Re Puffer*, 674 F.3d 78, 83 (1st Cir. 2012) ("... fee-only arrangements may be vulnerable to abuse by attorneys seeking to advance their own interests without due regard for the interest of debtors ...."); *Foohey, No Mong Down Bankruptcy*, cited *supra* at p. 5.

[20] A review of the *PA Rules of Professional Conduct* leads this Court to conclude, while generally applicable, those *Rules* are not specifically implicated by the use of bifurcated fee agreements in this case for the purpose of its resolution. The UST apparently agrees with the Court's observation in this regard since he does not raise the issue in his pleadings. Nevertheless, even in Pennsylvania, any attorney contemplating a bifurcated fee arrangement involving a third-party factor may encounter numerous ethical considerations, especially those concerning fee sharing with nonlawyers and conflict of interest issues. *See generally* PA Rules of Professional Conduct 5.4, 1.7. 1.8 (PA. SUP. CT. 2021). *See also* Laura N. Coordes, *The Benefits and Ethical Concerns of Nonlawyer Fee-Sharing,* XLI, No. 7, AM. BANKR. INST. J. 24 (2022).

Pursuant to the order referenced in *In re Siegle*, 639 B.R. 755 (Bankr. D. Minn. May 19, 2022), a Chapter 7 debtor's attorney filed such an application which described his use of a bifurcated fee arrangement where the debtor had signed a pre-petition agreement limiting the initial services the attorney would provide to a "partial petition," at which point she could then either complete the case *pro se*, hire another attorney, or enter into a post-petition agreement with the attorney. The debtor in *Siegel* elected to enter into a post-petition agreement with the attorney.[21]

The court disapproved the application and found that the agreements were void and could not be enforced against the debtor. The court found that the agreements violated *11 U.S.C. §§526(a)(2)*, *526(a)(3)*, and *528(a)* in that they contained false or misleading statements – notably statements indicating that the attorney's obligation to provide legal services for the debtor would terminate once he had filed the partial petition unless a post-petition agreement were signed by the debtor. As the court, based on local rules and applicable precedent, stated:

> Upon filing a petition, counsel agrees to represent the debtor and provide all reasonably necessary bankruptcy services throughout the case, until and unless permitted to withdraw through substitution or court approval, and authorization to withdraw is neither automatic nor presumed. An agreement that purports to withhold such services, or to condition such services upon execution of an additional fee agreement, is fundamentally untrue and misleading, in violation of § 526(a)(2) and (3).

Id. at 760. The *Siegle* court further found that the misstatements rendered the agreements void pursuant to *11 U.S.C. §526(c)(1)*, a provision which states that any contract for bankruptcy assistance between a debt relief agency and an assisted person that does not comply with the material requirements of *Sections 526* and *528* "shall be void."

---

[21] There does not seem to have been a third-party factoring agreement in the bifurcated fee arrangement in *Siegle*.

The other very recent case of note is *In re Suazo*, 2022 WL 2197567 (Bankr. D. Col. June 17, 2022). This was another decision involving an attorney's use of the Fresh Start bifurcated fee and factoring agreement approach, using form agreements that appear to have been very similar to the ones involved in the present case. The debtor there was given the same three options after the initial filing of acting *pro se* going forward, hiring another attorney, or signing a post-petition agreement.

While declining to rule on the question of whether bifurcated fee agreements in Chapter 7 are *per se* barred, the *Suazo* court found the agreements that were used in the case to be misleading in a number of respects, and therefore void. It found that the Bankruptcy Code and an applicable local rule required attorneys representing individual debtors in consumer cases to help the debtor file all necessary documents in the bankruptcy case, not just a bare bones petition to get the case filed, and that therefore the pre-petition agreement was misleading by implying the attorney could somehow avoid that obligation if the debtor did not sign a post-petition agreement. The court further found the pre-petition agreement to be misleading by failing to allow the debtor a fourth option after the case was filed, *i.e*., having the attorney continue to represent the debtor without a post-petition agreement until the court permitted the attorney to withdraw. The court also found the "two contract model" as employed to be "illusory," citing to the same provision that this Court finds troubling in that it appears to require the debtor to agree in advance to enter into the post-petition agreement. *See* the discussion at p. 18-19.

Finally, the *Suazo* court held that the pre-petition agreement violated *11 U.S.C. §528(a)(1)*, which requires attorney retention agreements to explain "clearly and conspicuously"

what services will be provided and what the charges will be, the court finding the pre-petition agreement to be a "model of misleading confusion." Turning next to the post-petition agreement, the *Suazo* court found it to be misleading as well for many of the same reasons as were noted in connection with the pre-petition agreement.

The *Slabbinck*, *Hazlett*, *Brown*, *Baldwin*, *Siegle*, and *Suazo* cases provide a broad overview of the recent decisions on the question of using a bifurcated fee arrangement in a consumer Chapter 7 setting. As can be seen, they establish that there is a general trend among the courts finding that a bifurcated fee arrangement is not in principle intrinsically prohibited, but that each individual use thereof must be fully disclosed by the attorney and can be subjected to intense scrutiny by the court to make sure it is acceptable. It can also be said as a general matter that most of the cases involving a third-party factor, such as Fresh Start, present additional concerns and invite even more scrutiny by the courts. There is no need to examine any of the other bifurcated fee cases in detail here since the cases already discussed address all of the main issues and the outcomes in these other cases have been similar. For some other such cases, see, *In re Prophet*, 2022 WL 766390 (D.S.C. March 14, 2022), *In re Carr*, 613 B.R. 427 (Bankr. E.D. KY. 2020), *In re Wright*, 591 B.R. 68 (Bankr. N.D. Okl. 2018), *In re Milner*, 612 B.R. 415 (Bankr. W.D. Okl. 2019), *In re Allen*, 628 B.R. 641 (8th Cir. BAP 2021), *In re Rosema*, 2022 WL 2662869 (Bankr. W.D. Mo. July 8, 2022), and, *In re Shatusky*, 2022 WL 1599973 (Bankr. M.D. Fla. March 18, 2022).

(ii) *UST Guidelines*

In addition to the extensive recent case law on bifurcated fee arrangements, as noted earlier the Office of the United States Trustee has also recently weighed in on the matter with its

Guidelines for United States Trustees Program (USTP) Enforcement Related to Bifurcated Chapter 7 Fee Agreements ("Guidelines") published on June 10. 2022.[22] After giving a brief background on the issue, the *Guidelines* summarize the UST's position as follows:

> Absent contrary local authority, it is the USTP's position that bifurcated fee agreements are permissible so long as the fees charged under the agreements are fair and reasonable, the agreements are entered into with the debtor's fully informed consent, and the agreements are adequately disclosed.

Guidelines at p. 2. This appears to be a change in position from at least some other prior cases wherein the UST had sought to ban the use of a bifurcated fee arrangement under all circumstances. In any event, these *Guidelines* are not binding on the Court, though they are certainly worthy of consideration.

With respect to the fairness and reasonableness of attorney fees the *Guidelines* identify the three most common fee-related issues it encounters in the bifurcated agreement context. The first is whether there is a proper allocation of prepetition and postpetition fees and services, with the *Guidelines* taking the position that fees earned for prepetition services must either be paid prepetition, or waived, because the debtor's obligation to pay such fees is dischargeable. Also, the *Guidelines* state that bifurcation must not foster cutting corners in preparing a case for filing by eliminating or postponing all or some such services until after the petition is filed so that the attorney can bill for them postpetition. This suggests that the UST will challenge bifurcated fee arrangements that have a very low, or even "zero dollar," prepetition fee agreement component since it is fairly obvious that the attorney could not provide even the minimally-required prepetition services for such a low fee.

---

[22] The *Guidelines* may be accessed at https://www.justice.gov/ust/bifurcated-fee.

A second fee-related issue is the reasonableness of the overall fee, the *Guidelines* stating that it would be inappropriate for an attorney to offer a debtor a fee of $1500 if paid in advance, but $2,000 if they pay over time postpetition. The third fee-related issue cited in the *Guidelines* is directed to third-party factoring or finance agreements, such as Fresh Start. The *Guidelines* provide that such agreements warrant significant additional scrutiny, a sentiment to which this Court can readily agree. They also state that it is improper for an attorney using third-party financing to pass the cost of that financing along to the client – an absolute statement that seems less clear to the Court. Finally, the *Guidelines* note that third-party agreements can raise issues of conflict of interest and implicate state ethical rules – again something to which this Court can agree.

On the issue of proper disclosure to the debtor and fully informed debtor consent the Guidelines direct UST attorneys to look to a number of factors. One is whether the attorney has clearly disclosed the services that will be provided prepetition and postpetition and the corresponding fees for each segment of the representation. A second is whether the attorney has disclosed the obligation to continue representing the client, even in the absence of a postpetition agreement, unless and until the court permits withdrawal. A third is whether the attorney has disclosed that the client is being provided with the option to choose a bifurcated agreement, any difference in fees between that and a traditional pay up front agreement, and the client's postpetition options. The final factor mentioned is whether the agreement includes clear and conspicuous provisions explaining the options, costs and consequences of entering into a bifurcated fee agreement and providing the debtor with an option to rescind. The *Guidelines* also note that these factors are not exclusive, should not be applied "mechanically," and that local rules and jurisprudence must be considered.

The final issue addressed in the *Guidelines* relates to the attorney's disclosure of the bifurcated arrangement to the court and the public. The *Guidelines* take the position that the nature of bifurcated fee arrangements requires the attorney to make a "detailed disclosure" to meet Bankruptcy Code standards. Again, this Court agrees with that position and if it ever becomes aware that an attorney has not properly disclosed a bifurcated fee arrangement it will not hesitate to raise the issue even in the absence of an enforcement action by the UST.

(iii) Standard for the WDPA

After having carefully considered the relevant facts in this case, and the thoughtful opinions of other courts on this same issue, the Court is now in a position to proceed. One approach would be to simply rule on the discrete Cialella matter itself without attempting to offer any direction to other attorneys in this District who may be considering the use of a bifurcated fee approach. That was done, for example, by the Court in *Suazo*. The Court, however, does not believe that would be the best way to go. It seems inevitable that other attorneys will try using a bifurcated fee, and in fact there is another pending matter on this same issue now before the Court. *See In the Matter of Shepherd,* Misc. No. 22-205. Since this is a matter likely to recur, it seems best to set forth some general standards so that attorneys will know what is expected of them in the future should they decide to venture into this area.[23]

---

[23] The "Cases and Controversies" provision of the U.S. Constitution, Art. III, Section 2, requires that there be an actual dispute between parties before a court prior to it rendering judgment in a matter. In this case clearly there is an actual dispute between the United States Trustee and Cialella so the Court is confident the "case and controversy" requirement is met and its decision herein is not an improper advisory opinion even though future standards to be considered in

The Court is in general agreement with the majority view which will allow for the use of a bifurcated fee arrangement in Chapter 7 cases provided certain strict requirements are met to ensure that: (1) the debtor is being treated fairly and has freely consented to such arrangement after full disclosure; (2) the arrangement is fully disclosed to the Court; and, (3) the arrangement does not put the debtor's attorney in a potential conflict of interest position or otherwise implicate ethical concerns. The Court has arrived at this position based on two broad premises. First, it agrees that there is nothing in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure that can be read to prohibit the use of bifurcated fee agreements on a blanket or *per se* basis. Thus, the courts must examine the use of such agreements on a case-by-case basis and allow them provided standards of reasonableness, fairness and disclosure are met.

Second, the Court's own experience confirms the observation that a strict adherence to a model requiring a debtor to make full payment of attorney fees in advance of a Chapter 7 filing can result in a denial of bankruptcy relief to many individuals who are most in need of such relief. Requiring a financially-strapped debtor to "save up" the attorney fee before a case can be filed has a salutary encouragement of self-discipline about it, and in many instances it has just such an effect, to the benefit of the debtor. Many individuals in need of filing bankruptcy, however, simply cannot do that, or are facing exigent circumstances that make it a practical impossibility. Such individuals may be forced to forego bankruptcy entirely, perhaps to their great detriment, or to proceed on a *pro*

---

bifurcated fee cases are being identified. The standards applied here will generally be applied in future cases of like circumstances under the principle of *stare decisis* by not simply the Undersigned, but by all Judges in the Western District of PA unless overridden or enhanced by a binding future appellate decision, an amendment to applicable statutory law, implementation of formal Local Rule by this Court, or, for some other reason, though each case will be decided based on its own facts of course.

se basis, which can tax both the resources and patience of the Court.[24] The Court respectfully disagrees with the observation in *Baldwin* that Chapter 13 should serve as an alternative route for debtors in this position.

The Court therefore believes there should be room for bifurcated fee arrangements in Chapter 7 practice so long as satisfactory safeguards are observed. A number of the cases to have previously addressed the issue have given some broad indications of what conditions must be met for a bifurcated fee arrangement to be allowed, but the Court believes it would be better for attorneys to be given a more comprehensive roadmap of what will be expected of them when a bifurcated fee arrangement is used than has heretofore been provided. The Court's approach here, then, will be first to set forth in detail what those safeguard standards should minimally be, and then to examine the bifurcated agreements as were employed by Cialella to determine whether such standards were met.

For the sake of clarity and convenience, the Court has organized these standards into seven basic principles, with a brief comment and more specific implementing requirements under each one. As a further aid to affected attorneys, the Court will set these forth in a separate *Attachment "A"* to this Memorandum Opinion and Order rather than bury them in the body of the Opinion where they will be more difficult to find. *Attachment "A"* should be deemed to be incorporated by reference herein as if fully set forth and to represent the findings of the Court regarding expectations for the use of a bifurcated fee arrangement in Chapter 7 cases in this District.

---

[24] The Court candidly acknowledges its strong agreement with the sentiment expressed by the *Slabbinck* court that all else being equal it is better for a debtor to have legal representation than for the debtor to proceed *pro se*, in the interests of the debtor as well as of the Court.

The standards as set forth in Attachment "A" are demanding ones. The Court anticipates that they will not be easy to meet, and that attorneys who seek to use bifurcated fee agreements will need to make a strong commitment in time and effort in order to comply with them. Attorneys who use a bifurcated fee approach on a casual or sporadic basis without that strong commitment are likely to run afoul of the standards, and furthermore, since they have now been published for all to know, will not have the mitigating excuses as did Cialella.

The Court also stresses that the standards as set forth on Attachment "A" are not necessarily exhaustive of what the Court may consider in future cases of this type, nor are they intended to be applied in a strictly mechanical fashion. Each case is unique and all relevant circumstances must be taken into account, even if not explicitly addressed in Attachment "A." It is even possible that one or more of the requirements set forth therein could be found wanting in a case, but yet based on the totality of circumstances, the bifurcated arrangement will be approved.

(iv) Standards as applied to Cialella

Cialella's use of the bifurcated fee arrangement in the cases under review failed to meet the standards expected by the Court in a number of ways. Most obviously, and as admitted by Cialella herself, she completely failed to meet the requirements for disclosure to the Court in 20 cases, thus violating Implementing Requirements ("IR") #s 13 and 15. IR #s 1 and 2 were violated in all of the cases because the pre-filing agreements do not inform the debtor of the cost of an up front payment option and there is no statement by Cialella in either her original or amended Form B2030s that debtors were advised that an up front fee payment would be their best option, that the

debtors were unable to do so, and that Cialella believes a bifurcated arrangement is in their best interest. IR#4 was violated because the required disclosures were not provided to the Debtors. IR# 5 was violated, at least in the *Anthony* and *White* cases, and likely in other cases as well, in that the scope of services was not consistent as between the Pre-Filing Agreement and the Post-Filing Agreement.

Continuing on, IR #12 has been violated in many of the cases in that the debtors paid fees that were more than 20% larger under the bifurcated arrangement than they would have under an up front arrangement and Cialella offered no evidence to overcome the presumption that this was unreasonable. IR# 17 was violated because neither the original nor the amended Form B2030s filed by Cialella contain a statement indicating that she personally explained the use of the factor to her clients, and how it could put her in a conflict of interest position, and that they nevertheless gave their informed consent to proceed with it. Finally, IR# 19 was violated because in many of the cases it appears that the filing fee was advanced on behalf of the client with the expectation of recovering it through post-petition payments.

On a more broad-based view, Cialella also violated the Court's expectations as to an untested use of a bifurcated fee arrangement because of the numerous inconsistencies and informational errors in the agreements themselves and the materials filed in connection with the various petitions. The UST has done an excellent job of categorizing all of those inconsistencies and errors in the factual stipulation to which Cialella has agreed. As previously explained by the court in *Siegel*, supra, such internal inconsistencies and errors could also be analyzed as violation of the debt relief agency provisions under the Bankruptcy Code. *See*, generally, 639 B.R. at 758-60.

By Cialella's own admission she has no excuse for the deplorable state of these filings even absent the bifurcated fee issue.

This may be a good time to take a slight detour and discuss the possible ethical implications of a bifurcated fee arrangement. One involves conflict of interest, particularly when a third-party factor is used. *Pa. R.P.C. 1.7(a)* states the general rule that a lawyer shall not represent a client if the representation involves a "concurrent conflict of interest," which includes a significant risk that the representation of the client will be materially limited by a personal interest of the lawyer. Some courts have found factoring agreements in the bifurcated fee setting to potentially violate that rule where the client/debtor's financial ability to make the payments required under the post-filing agreement, as evidenced, for example, by the debtor's Schedules I and J, is questionable. *See, e.g., In re Descoteau,* 2022 WL 1434230 (Bankr. D. Id., May 5, 2022) (where debtor's Schedules showed he could not afford post-petition installment payments due under bifurcated fee arrangement court found that attorney had signed debtor up for a plan that was financially harmful to the debtor but which was beneficial to the attorney, a conflict of interest violating *Rule 1.7(a)*[25]).

Other common provisions in rules of professional conduct have been suggested as being potentially violated by a bifurcated fee arrangement. For instance, in *In re Kolle*, 2021 WL 5872265 (Bankr. W.D. Mo., December 10, 2021) the court found the factor-based bifurcated fee arrangement at issue before it to either be violative of, or at least be potentially violative of Missouri professional rules of conduct dealing with attorney competence (compare *Pa.R.P.C. 1.1*), limitation

[25] With the exception of California, all of the states have adopted the American Bar Association Model Rules of Professional Conduct, with some local variation. For that reason, decisions applying the rules in those other adopting states are, broadly speaking, informative when considering ethical issues under the Pa.R.P.C.

on the scope of engagement (compare *Pa. R.P.C. 1.2(c)*), communication with clients (compare *Pa.R.P.C. 1.4*), attorney fees (compare *Pa.R.P.C. 1.5*), confidentiality (compare *Pa.R.P.C. 1.6*), conflict of interest (compare *Pa.R.P.C. 1.7* and *1.8*), trust accounts and property of others (compare *Pa.R.P.C. 1.15*), professional independence of lawyer (compare *Pa.R.P.C. 5.4*), candor towards the tribunal (compare *Pa.R.P.C.3.3*), and misconduct (compare *Pa.R.P.C. 8.4*).

The Court's purpose here is not to make any determination as to whether Cialella violated any provisions of the Pennsylvania Rules of Professional Conduct, and it makes no findings in that regard. However, it is clear to the Court that the use of a bifurcated fee arrangement, especially if it involves a third-party factor such as Fresh Start's role in the present matter, may present numerous ethical issues.[26] By noting that here, it is the Court's intention to sensitize attorneys who may be considering the bifurcated fee approach to this aspect of such a decision which may come into play even if the attorney is careful to meet the implementing requirements as set forth in Attachment "A."

Returning now to the main thread of the discussion, for all of the reasons outlined above the Court, could potentially just declare that the bifurcated fee agreements in the cases under review are void pursuant to *11 U.S.C. §§526(c)* and/or *329* and impose the draconian remedy of ordering a complete disgorgement by Cialella of all fees that were paid to her by the debtors under those agreements. After careful consideration, however, the Court is not going to take that approach in this instance for several reasons.

---

[26] *See* n. 20, supra.

First, it is by no means clear that the relevant legal authority would compel a complete disgorgement under the facts presented. A number of cases have made the point that finding a contract to be void does not invariably mean that complete disgorgement must follow. For instance, after finding a fee agreement to be void under *Section 526(c)(1)*, the court in *In re Gutierez,* 356 B.R. 496 (Bankr. N.D. Cal. 2006) nevertheless rejected a request by the debtor for a return of fees he had paid to the attorney, stating that it "does not read 11 U.S.C. § 526(c)(1) as requiring reimbursement of attorneys' fees already paid .... Rather, it reads 11 U.S.C. § 526(c)(1) as preventing an attorney who fails to comply with the requirements of 11 U.S.C. §§ 526, 527, or 528 from obtaining a court order compelling the debtor to pay additional attorneys ...." *See also In re Milner*, 612 B.R. 415, 443–44 (Bankr. W.D. Okla. 2019) (court found fee agreement void but did not order disgorgement because debtor had satisfactory outcome in bankruptcy), *In re Robinson*, 368 B.R. 492 (Bankr. E.D. Va. 2007) (reduction in requested fee of 20% would be taken where contract failed to meet requirements of *11 U.S.C. §528(a)(1)*).

Second, the context in which this decision is being rendered makes a wholesale voiding of the agreements and total disgorgement of fees problematic. This entire matter first came into dispute on April 22, 2021, when the Court issued orders in the *Anthony* and *White* cases noting that the existence of a bifurcated fee arrangement had been disclosed in the cases and directing Cialella to provide documentation concerning such arrangements. As of that date Cialella had already used that same bifurcated fee arrangement in 25 other Chapter 7 cases filed in this Court, 23 of which had already resulted in discharges for the debtors and a closure of the case. Only two of those other 25 cases remained open when the April 22nd Orders were filed *(Behrens*, Case No. 21-20229, and *Davis*, Case No. 21-20493), and both of them subsequently resulted in discharges and

closures, with *Behrens* closed on August 10, 2021, and *Davis* closed on August 25, 2021.[27] All of those 25 cases are thus now fully resolved, and all resulted in discharges for Cialella's clients. In the *Anthony* and *White* cases the debtors have also received their discharges and in fact both cases were closed at one point before being reopened *sua sponte* by the Court due to the pendency of the within matter. Setting all else aside, the debtors in these cases have obtained their fresh starts. Given this clear benefit to the debtors, and the work performed by Cialella, it does not strike the Court as equitable to require a complete disgorgement of fees.

The third reason for avoiding a remedy that would require a complete disgorgement of fees is one of fairness to Cialella. As was indicated above, the acceptability of bifurcated fee agreements in this District is a matter of first impression in this case. It would be overly harsh to punish Cialella by requiring a full return of fees based on the violations of standards under the Bankruptcy Code not previously applied in this District or of standards that the Court has now set forth, but which had not yet been promulgated at the time she entered into the agreements and filed the cases. While the Court has found that Cialella violated the IRs set forth in Attachment "A" in a number of respects, with one exception those violations were perhaps not so severe that she should have been aware of them as an obvious problem even before the issuance of this Opinion.[28]

---

[27] The undisputed testimony indicates that Cialella was not paid in full for her services in the *Behrens* case.

[28] The exception to which the Court refers is her admitted failure to disclose the bifurcated fee arrangement in 20 of the cases, something she clearly should have known was improper even at the time the cases were filed, and which the Court will address below.

The final reason for not voiding the agreements and requiring a complete disgorgement of fees is somewhat related to the third in that it is difficult to place the blame entirely on Cialella when in the Court's view she was not well-served by Fresh Start. The Court well understands the challenges faced by attorneys who practice in the area of representing consumer bankruptcy debtors in Chapter 7 cases, particularly with the large reduction in the number of bankruptcy filings over the last several years. In these circumstances the prospect of obtaining clients who might otherwise be unable to pay for a bankruptcy by use of the Fresh Start bifurcated fee arrangement would prove a powerful lure. Fresh Start was in a position to know that the program it was selling presents some serious legal and ethical issues, and that attorneys who used it in Districts where the status of such program was still unresolved would likely face close scrutiny at some point. In light of that, Fresh Start had, if not a legal, at least a moral obligation to work closely with Cialella to oversee and help make sure she fully understood how best to proceed when she used a bifurcated fee arrangement. The available evidence, including the numerous instances of confusion and inconsistency identified by the UST, indicates to the Court that Fresh Start failed in that regard. While Fresh Start's failure does not excuse Cialella, it does factor into the Court's decision as to imposition of an appropriate remedy.

For these reasons, and even assuming the bifurcated fee agreements in the affected cases may be considered technically void under the Bankruptcy Code or the standards set forth in Attachment "A," the Court does not believe a complete disgorgement of fees is an appropriate remedy.[29] A partial disgorgement of fees might certainly be justified upon a finding of voidness,

---

[29] As indicated above, the Court does not believe that a complete disgorgement of fees is required as a matter of law once a finding of voidness is made. However, even assuming there were

and the matter could certainly be approached in that fashion. In the end, however, the Court believes the better approach under the circumstances presented is not under the rubric of "voidness," but rather as to a remedy of a partial disgorgement for an admitted failure to properly disclose the bifurcated fee arrangement. The end result will be the same in any event – Cialella will be penalized by having to return a portion of the monies she received from the debtors – but in the Court's view it is more accurate to characterize the return of fees as a partial disgorgement due to a failure to disclose rather than because the fee agreements were void.

(b) *Cialella's failure to disclose to the Court*

The final issue to discuss then is the remedy to be imposed for Cialella's admitted failure to disclose the bifurcated fee arrangement in 20 cases in which it was used. This is the primary focus of the *Misc. Case*. As was noted above, the Court feels no hesitancy in imposing a monetary penalty for the failure to disclose because complete disclosure is a well-known obligation that has long been imposed on debtor attorneys in bankruptcy and not something new that has just been adopted.

There are a number of sources for this duty of disclosure. *11 U.S.C. §329(a)* requires the attorney to file a "statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition." *Fed.R.Bankr.P.*

---

such a requirement, it would appear that *quantum meruit* might be invoked so as to allow Cialella to retain at least a portion of the attorney fees based on the services she provided and the benefits obtained by the debtors. *See, e.g., In re Thorpe*, 755 F. App'x 177, 181 (3d Cir. 2018) (predicting that Pennsylvania law would allow attorney who acted wrongfully to nevertheless recover under *quantum meruit* theory unless precluded from doing so by doctrine of unclean hands).

2016 (b) restates this duty and further provides that the attorney has a duty to supplement the statement within 14 days after any payment or agreement not previously disclosed. *11 U.S.C. §526(a)(2)* prohibits a debt relief agency, which includes attorneys, from making any statement in a document filed with the bankruptcy court that is untrue or misleading. *See also* Official Form B2030 ("Attorney's Disclosure of Compensation") and Official Form 107, Part 7 ("Statement of Financial Affairs for Individuals Filing for Bankruptcy").

The duty of disclosure is motivated by two concerns: (1) debtors can be exploited by overreaching attorneys; and, (2) creditors can be denied their proper share of the bankruptcy estate. *In re Stewart*, 970 F.3d 1255, 1259 (10th Cir. 2020). The disclosure requirement helps bankruptcy judges to perform their core and traditional role of overseeing lawyers who represent bankruptcy debtors. *Id*. at 1258. The net result of this longstanding duty of disclosure, as summed up by one court, is as follows:

> Neither the Court, nor creditors or other parties-in-interest, should be forced to be detectives, clairvoyants, or soothsayers to figure out exactly what counsel's arrangement is with his clients (or other parties-in-interest) in a bankruptcy case. As one court aptly stated: "Coy or incomplete disclosures which leave the court to ferret out pertinent information from other sources are not sufficient. (Citations omitted). Anything less than the full measure of disclosure leaves counsel at risk that all compensation may be denied." *In re Saturley*, 131 B.R. 509, 516 (Bankr.D.Me.1991) ....

In re Kaib, 448 B.R. 373, 379 (Bankr. W.D. Pa. 2011). *See also In re Lewis*, 113 F.3d 1040, 1045 (9th Cir. 1997) ("An attorney's failure to obey the disclosure and reporting requirements of the Bankruptcy Code and Rules gives the bankruptcy court the discretion to order disgorgement of attorney fees."); *In re Whitley*, 737 F.3d 980, 982 (5th Cir. 2013) (a bankruptcy judge has the

authority to discipline attorneys who violate the disclosure requirements of the Bankruptcy Code and Rules).

There is not a uniform view on how a bankruptcy court should exercise its power to discipline an attorney for breaching the duty of disclosure. Some courts, stressing the importance of the disclosure obligation to the system as a whole, have held that the penalty to be imposed on an attorney for a failure to disclose must "sting," and that a full disgorgement of fees should be the default remedy such that there must be "sound reasons" for anything less. *Stewart, supra*, 970 F.3d at 1267. Other courts have held that there is no automatic fee forfeiture for an attorney's violation of bankruptcy disclosure obligations, and that instead the bankruptcy court is vested with wide discretion to determine the appropriate action. *In re Sofanelli*, 230 B.R. 54, 71 (M.D. Pa. 1999) (citing *In re Crivello*, 134 F.3d 831 (7th Cir. 1998)).

Requiring full disgorgement of fees in the 20 cases in which Cialella failed to disclose the bifurcated fee arrangement and the existence of Fresh Start as a factor would potentially total $43,641.25. This consists of all amounts that Cialella received from the debtors pre-petition ($2,860) and all amounts that were due post-petition under the Post-Filing Agreements ($43,641.25).[30] That would be a severe result, which even the UST characterized as "a bit too

[30] There were some minor discrepancies in the amounts between what the Pre-Filing and Post-Filing Agreements state on the one hand, and what the Amended Form B2030s filed by Cialella after this matter was initiated state on the other. The details as to those discrepancies are available in Stipulated Facts Nos. 10 - 29 that appear in the *Consolidated Pretrial Statement* filed by the Parties in the *Misc. Case.* The Court has adopted the figures from the Amended Form B2030s for present purposes. Also, Cialella testified that two of the 27 bifurcated fee clients have not paid their post-filing installments in full in the approximate total amount of $2,000. Fresh Start is able to recoup this out of the holdback fund so it will come out of Cialella's pocket. As previously noted, Cialella stated at the evidentiary hearing that she does not intend to pursue collection against these non-paying clients.

draconian." The Court agrees that under the facts presented a lesser disgorgement is appropriate.

Attorney Cialella testified that prior to her contract with Fresh Start the only fee options she could provide for potential Chapter 7 debtors who could not afford to immediately pay the approximate $1,835 needed to file a case (her typical fee plus the filing fee) was to save up the necessary funds over time and file the cases when that was done. Alternatively, the client could start paying her monthly installments, typically of $100, until the necessary funds had been paid, with her in the meantime also providing representation to the clients for any debt-related issues that might arise. The Fresh Start bifurcated fee option, as sold to her in e-mails and in the Zoom meeting she had with the two Fresh Start partners, appeared to be another workable alternative she could offer her clients.

The Court finds that in contracting with Fresh Start Cialella was largely motivated by a desire to aid her clients by offering them another option and not simply looking to financially benefit herself. Cialella testified that she did not receive any complaints from clients about Fresh Start, and actually received "thanks" from a few clients to whom she had provided the bifurcated fee option. All of the clients in the bifurcated fee cases have received a discharge. Cialella stopped submitting agreements to Fresh Start when the Court issued its Orders in the *White* and *Anthony* cases, however, she has not terminated her contract with Fresh Start while waiting for a determination as to whether the bifurcated fee arrangement is permissible.

Cialella acknowledged serious issues of non-disclosure in many of the bifurcated fee cases. She accepted full responsibility for her failure to properly disclose in 20 of her cases,[31] attributing the problem to her failure to pay appropriate attention to those filings, being spread too thin, and relying on a staff member to properly prepare documents without adequately reviewing them herself. She testified that she has taken steps to help ensure the non-disclosure problem does not recur, for instance, rearranging the physical layout of her office so that she is in better contact with her paralegal. She also testified that she has provided the UST with amended disclosure documents in all of the affected cases. Pending the Court's ruling in this matter, the documents have not formally been filed on the case dockets because the cases have all been closed and reopening fees would have to be paid in order to complete those filings.

The Court concludes that the remedy to be imposed for Cialella's failure to adequately disclose must be significant enough to vindicate the importance of the full-disclosure requirement and to "sting" the violator so as to act as a deterrent to her and others against future disclosure violations while at the same time not being overly harsh and punitive. The Court believes that this can be accomplished by requiring Cialella to reimburse the debtors in each of the 20 affected cases the difference between the amount she had originally disclosed that they had

---

[31] The admittedly improper disclosure was not the same in each of the 20 cases and the Court does not believe it necessary to fully document each of the cases here. The specifics of non-disclosure in each case are set forth in the stipulated facts contained in the *Consolidated Pretrial Statement*. For example, in the *Bradley* case Cialella originally disclosed that the Debtor had paid her $1,500 pre-petition for attorney fees and owed a balance of $0. Nothing was said about the bifurcated fee arrangement or Fresh Start. When Cialella filed her amended disclosures with the UST it was revealed that there was a bifurcated fee arrangement involving Fresh Start, that the debtor paid $100 pre-petition under the Pre-Filing Agreement, and, that the debtor had agreed to pay $2,300 under the Post-Filing Agreement.

agreed to pay her and what they had actually agreed to pay her as revealed in the amended disclosures she provided to the UST after the *Misc. Case* was filed, up to a maximum payment of $1,000 in each case to avoid a windfall to any of the debtors. The reimbursement as so described is as follows in each of the cases:

Debtor/Case	***Fee First Identified***	***Actual Fee Charged***	***Reimbursement Amount***
Bradley (19-23125-TPA)	$1500	$2400	$900
Grooms (19-23696-GLT)	$1500	$2400	$0[32]
Harding 19-23792-JAD)	$1500	$2400	$900
Bonivich (19-23859-GLT)	$1500	$2400	$900
Keller (19-24084-CMB)	$1500	$2400	$900
Partin (19-24178-GLT)	$1500	$2400	$900
Leshinsky (19-24334-TPA)	$1500	$2400	$900
Maiorano (20-20167-GLT)	$1500	$2400	$900
Kordish (20-20316-JAD)	$1500	$2400	$900
Nelson (20-20437-GLT)	$500	$1087.50	$587.50
Cohen (20-10215-TPA)	$1500	$2125	$625
Lohr (20-20871-GLT)	$1500	$2300	$800
Metzger (20-21083-JAD)	$0	$2300	$1000

[32] *Grooms* is one of the debtors who has not paid in full under the Post-Filing Agreement, owing $1,340. This amount completely offsets what would have been the $900 reimbursement had he paid in full.

Panella (20-21207-CMB)	$1500	$2300	$800
Jefferson (20-21362-GLT)	$625	$1050	$425
Altman (20-21467-GLT)	$0	$2300	$1000
Cascavilla (20-21571-CMB)	$0	$2300	$1000
Wolf (20-22937-CMB)	$1360	$1675	$315
Behrens (21-20229-TPA)	$1525	$2300	$227.25[33]
Davis (21-20493-CMB)	$1525	$2,303.75	$778.75

The foregoing results in a total disgorgement of $13,758.50 in fees, which the Court believes strikes the appropriate balance as discussed above. Cialella will be directed to refund the indicated amounts to the respective debtors within 60 days, along with an explanation to them as to why she is doing so.

CONCLUSION

The Court is sympathetic to the plight of both debtors and attorneys when it comes to financing consumer Chapter 7 cases. Ideally this is something that would be the subject of legislation to address the problems they face, but those problems have been evident for a considerable period of time and no such legislation has been enacted, nor is any on the near-term horizon. By this opinion the Court hopes to bring some semblance of order to a difficult area. The Court recognizes the validity of a bifurcated fee approach in principle, though in practice attorneys

[33] *Behrens* is the other debtor who has not paid in full under the Post-Filing Agreement, owing $547.75. The reimbursement to him is reduced by that amount.

who wish to use it will have work to do in meeting the strict standards for successful implementation.

It should also be fairly apparent from this Opinion that any bifurcated fee approach involving a third-party factor, at least as epitomized by the current Fresh Start model, may be a bridge too far since unlikely to ever meet the expected standards. The form agreements provided by Fresh Start to its attorney customers for use with their clients are rife with inconsistencies and ambiguities, many of which were noted in this Opinion and by courts in other cases. Although Fresh Start itself is not a party in this action, it obviously has a significant interest in the outcome of the case, and it is the Court's expectation that Fresh Start, and any similar entities in the field, will take to heart the findings made herein and use them as a basis for reevaluating and improving their programs and forms if it intends to do business in the WDPA. Attorneys who choose to engage in a bifurcated fee approach on their own, without the use of a third-party factor, will also need to be creative and innovative. The bifurcated fee approach is here being recognized in principle, but a practical realization of it has yet to be demonstrated.

AND NOW, this ***26th*** day of ***September, 2022***, and for the reasons stated above, it is hereby ***ORDERED, ADJUDGED*** and ***DECREED*** that Attorney Paula Cialella, Esq. shall disgorge fees and costs previously received by her to make refund payments ***on or before January 15, 2023,*** as follows:

(1) $227.25 to the debtor in the following case by sending him a check to his last known address: *Behrens*, Case No. 21-20229-TPA.

(2) $315 to the debtor in the following case by sending her a check to her last known address: *Wolf*, Case No. 20-22937-CMB.

(3) $425 to the debtor in the following case by sending her a check to her last known address: *Jefferson*, Case No. 20-21362-GLT.

(4) $587.50 to the debtor in the following case by sending her a check to her last known address: *Nelson*, Case No. 20-20437-GLT.

(5) $625 to the debtor in the following case by sending her a check to her last known address: *Cohen*, Case No. 20-10215-TPA.

(6) $778.75 to the debtor in the following case by sending her a check to her last known address: *Davis*, Case No. 20-21362-GLT.

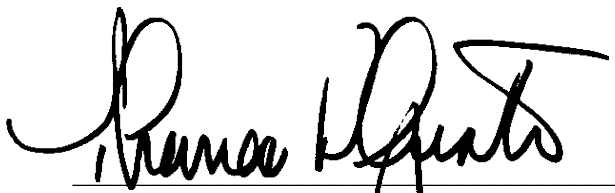
(7) $800 to the debtors in each of the following cases by sending them a check to their last known address: *Lohr*, Case No. 20-20871-GLT; and *Panella*, Case No. 20-21207-CMB.

(8) $900 to the debtors in each of the following cases by sending them a check to their last known address: *Bradley*, Case No. 19-23125-TPA; *Harding*, Case No. 19-23792-JAD; *Bonivich*, Case No. 19-23859-GLT; *Keller*, Case No. 19-24084-CMB; *Partin*, Case No. 19-24178-GLT; *Leshinsky*, Case No. 19-24334-TPA; *Maiorano*, Case No. 20-20167; and *Kordish*, Case No. 20-20316-JAD.

(9) $1,000 to the debtors in each of the following cases by sending them a check to their last known address: *Metzger*, Case No. 20-21083-JAD; *Altman,* Case No. 20-21467-GLT; and *Cascavilla*, Case No. 20-21571-CMB.

(10) Along with the payment checks as required in Paragraphs 1 through 9, above, Cialella shall also include a cover letter signed by her and explaining the reason why the payment is being made.

It is ***FURTHER ORDERED*** that, along with the payment checks as required in Paragraphs 1 through 9, above, Cialella shall also include a cover letter signed by her and explaining the reason why the payment is being made and ***on before January 22, 2023,*** Cialella shall file a ***Certification of Service*** setting forth detailed information as to her compliance with this Order and indicating whether any of the payment checks were returned as undeliverable or have not been negotiated by the payee.



Thomas P. Agresti, Judge
United States Bankruptcy Court

Case administrator to serve:
Sy Lampl, Esq.
Ryan Cooney, Esq.
Larry Wahlquist, Esq.
Paula Cialella, Esq.
Debtors
John Lacher, Esq., Lynch Law Group, 501 Smith Drive, Ste. 3, Cranberry Twp., PA 16066

Attachment "A" – Chapter 7 Bifurcated Fee Standards for the Western District of Pennsylvania

PRINCIPLE 1 – The use of a bifurcated fee arrangement should be a last resort, not a first choice.

Comment: Although it will allow bifurcated fee agreements for the reasons stated in the Memorandum Opinion, the Court does not believe them to be an ideal or a panacea. For debtors who have frequently gotten themselves into financial difficulty by taking on long-term debt, doing just that again to obtain bankruptcy relief should be a step that is not lightly taken. The Court expects attorneys to always lead with the assumption that payment in advance is the best course for a Chapter 7 debtor and to use a bifurcated fee arrangement only when that is not feasible.

Implementing Requirements:

(1) The written materials provided to a Chapter 7 debtor by the attorney prior to the entry into any fee agreement must include as an option the full up-front payment of the attorney fee, which amount is stated therein.

(2) The attorney's Form B2030 Disclosure Statement filed in a Chapter 7 case using a bifurcated fee arrangement must include a statement to the effect that the attorney met with the debtor before any fee agreement was signed, informed the debtor that an up-front payment of the fee would be the preferred method of payment if the debtor could reasonably do so, is satisfied that the debtor cannot reasonably do so, and believes the use of the bifurcated fee arrangement is in the best interest of the debtor.

PRINCIPLE 2 – The client must be given full disclosure of the bifurcated fee arrangement, including all drawbacks, before entering into such agreement.

Comment: Full disclosure to the debtor in connection with a bifurcated fee arrangement is of the utmost importance to this Court, as well as under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Pennsylvania Rules of Professional Conduct. Any bifurcated fee arrangement found to have been effected with an incomplete or misleading material disclosure to the Debtor may not be recognized or may subject the attorney to a sanction.

Implementing Requirements:

(3) Both pre-filing and post-filing bifurcated fee agreements must be in writing and both must be provided to the debtor for review prior to the filing of the bankruptcy case.

(4) Either the agreements themselves, or a separate "disclosure statement" to be signed by the

debtor, must fully and conspicuously disclose the essential features of the bifurcated arrangement and must highlight and specify any additional cost that the debtor will incur by choosing a bifurcated fee arrangement rather than paying the entire fee up front, as well as the fact that the fee under a post-filing agreement will not be discharged in the bankruptcy Such disclosures should include the (a) total payments if paid up front, (b) total payments if paid over time, together with: (i) finance charge, (ii) annual percentage rate, (iii) a schedule of any other fees that may be charged (separate from the legal representation); and (c) any other material terms that differ between the two arrangements (i.e., obligations under postpetition agreement will not be discharged).

(5) The services to be provided under the pre-filing and post-filing agreements must be clearly set forth, and there must be consistency across both agreements. Furthermore, the following legal services form the minimal threshold for a presumptively reasonable limitation of the scope of representation: an initial client meeting to explain the analysis, preparing and filing of the schedules and Statement of Financial Affairs, and assisting the debtor with the fulfillment of *Section 521* duties.

(6) If a factor or similar entity is involved the debtor must be informed in writing of all remedies the factor will have if the debtor defaults in payments under the post-filing agreement.]

PRINCIPLE 3 - The client's choice whether to continue the representation with a post-filing agreement must be freely made and without any financial penalty for not doing so.

Comment: The theoretical underpinning for allowing the use of a bifurcated fee arrangement is that the post-filing agreement, which will lead to a non-discharged debt owed by the debtor, is a separate agreement freely entered by the debtor after the bankruptcy case has been filed, and not the product of any compulsion or improper influence.

Implementing Requirements:

(7) The pre-filing and post filing agreements must inform the debtor that it is strictly the debtor's decision whether to enter into a post-filing agreement with the attorney, or instead to act *pro se* or retain a different attorney.

(8) The pre-filing and post-filing agreements must clearly inform the debtor that notwithstanding anything in the agreements to the contrary, if the debtor chooses not to enter into a post-filing agreement the attorney must still continue to represent the debtor in the bankruptcy, at no additional cost to the debtor, unless and until the Court approves the attorney's withdrawal from the case.

(9) To help ensure that the debtor's entry into such agreement was the product of a free choice and not based on undue pressure by the attorney the debtor must be given at least 14 days after the case filing to sign a post-filing agreement, or a 14-day period in which the post-filing agreement can be rescinded.

(10) The attorney must continue fully representing the debtor until the Court approves the withdrawal.

PRINCIPLE 4 – While the overall cost to the client for a bifurcated fee arrangement can be larger than for an up-front payment, it must remain reasonable.

Comment: The Court recognizes that it is proper for a client to be charged more for a bifurcated fee arrangement than for an up-front payment due to the time value of money and the risk of non-payment undertaken by the attorney. Such increased cost, however, must be reasonable, must be within the debtors apparent financial ability, and must be communicated in advance to the client to ensure informed consent.

Implementing Requirement:

(11) If the total amount of fees charged in a bifurcated fee arrangement is challenged, the Court will compare that amount to what the attorney and market normally charge to similarly situated clients who pay an up front fee.

(12) If the total amount of fees charged in the bifurcated fee arrangement is less than 20% more than what an up front fee would be, it will be presumed reasonable, but if greater than that it, will be presumed unreasonable with the burden on the attorney to overcome such presumption.

PRINCIPLE 5 – The Court must be fully informed about the bifurcated fee arrangement on the petition date and the attorney must be prepared to defend such arrangement if challenged by the Court or the UST.

Comment: The Court has a duty to oversee fee agreements between debtor attorneys and their clients in Chapter 7 cases which it takes very seriously. The Court cannot effectively perform that duty unless the attorneys make a complete and candid disclosure of the fee agreements they have with their clients. This is especially important with respect to bifurcated fee arrangements where the potential for abuse is high.

Implementing requirements:

(13) The Form B2030 filed by the attorney must clearly set forth when a bifurcated fee arrangement is being used and must set forth in narrative form the history of the interactions between the attorney and client concerning such arrangement, including the dates on which the pre-filing and post-filing agreements were signed by the debtor, and the key terms of the arrangement.

(14) If the debtor signed a pre-filing agreement but then chose not to sign a post-filing agreement that must be disclosed and the attorney must report his or her understanding of the client's intent for future representation in the case.

(15) If the debtor has agreed to make installment payments under a post-filing agreement the amount of such anticipated installment payments must be clearly set forth and included in Schedule J with a clear designation of what they are for.

PRINCIPLE 6 -- A bifurcated fee arrangement that includes a factor or similar entity will be presumed unreasonable, with the burden on the attorney of proving its reasonableness in the event of any challenge.

Comment: The use of a factor by the attorney places a third-party directly into the midst of the attorney-client relationship and opens up the clear possibility of conflict of interest, confusion, discord and fee overreach all being introduced into that relationship. The Court considers the risk to be so great that if ever challenged it will presume a bifurcated fee arrangement that includes a factor to be unreasonable, with the burden on the attorney to prove otherwise.

Implementing requirements:

(16) If a factor is involved the Form B2030 must reflect that event, must name the factor and disclose the anticipated amount the factor will be receiving from the debtor.

(17) If a factor is involved the Form B2030 must also include a statement by the attorney to the effect that he or she personally explained the factor arrangement with the debtor before the debtor signed any agreements, that such explanation included the possibility that the attorney could potentially be put into a position of conflict of interest as a result of using the factor, and that the debtor gave informed consent to the use of the factor.

(18) If a factor is involved, counsel must specifically certify that the net effect of applicable *PA Rules of Professional Conduct* on any bifurcated fee arrangement has been reviewed and why the same is not implicated prior to entry of the arrangement.

PRINCIPLE 7 – In no case may the attorney advance filing fees with the expectation of making a recovery from post-petition debtor payments.

Comment: The court agrees with the *Brown* and *Baldwin* cases that as part of a bifurcated fee arrangement an attorney may not advance the fee on behalf of the debtor with the expectation of recovering the fee through post-petition payments by the debtor. As was discussed above, there are a number of options available to a Chapter 7 debtor who cannot afford to pay the filing fee immediately and one of those, rather than an advance by the attorney, should be used.

Implementing Requirement:

(19) In any case with a bifurcated fee arrangement where the attorney has advanced the filing fee the Form B2030 must disclose that fact and must also include a statement by the attorney to

the effect that he or she has no expectation of making any recovery of that filing fee from post-petition payments made by the debtor.

(20) The work done pursuant to the pre-filing agreement must bear a reasonable relation to the work and services required to be performed under the Bankruptcy Code and Local Rules to reasonably and effectively represent the debtor.