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Limiting the Scope of Representation in Chapter 7 Cases

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Limited Services in Consumer Cases (Unbundling)

A. Overview: Limited Services Engagements

Bankruptcy courts have struggled with the question of whether to allow lawyers to limit the scope of the services provided to consumer debtors and, when allowed, the extent to which the court will allow the "unbundling" of legal services to the debtor. Unbundling is the practice of limiting the scope of services that an attorney will provide—"dividing comprehensive legal representation into a series of discrete tasks, only some of which the client contracts with the lawyer to perform." Amber Hollister, *Limiting the Scope of Representation: Unbundling Legal Servs.*, 71 Or. St. B. Bull. 9, 9 (2011). Bankruptcy courts typically look to state professional conduct rules as a starting point for this inquiry. Rule 1.2(c) of the Model Rules of Professional Conduct provide: "A lawyer may limit the scope of the representation if the limitation is ***reasonable under the circumstances*** and the client gives ***informed consent***." The equivalent Texas rule provides: "A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation." Tex. R. Prof. Conduct 1.02(c). The comments to this rule provide that "the client may not be asked to agree to representation so limited in scope as to violate Rule 1.01." Rule 1.01 governs the diligence and competency of representation.

Under the Louisiana Rules of Professional Conduct, a lawyer "may limit the scope of the representation" if the client consents. *See* La. Rules of Professional Conduct Rule 1.2(c) (2004). The limitation, however, must be "reasonable under the circumstances," and the client must provide "informed consent." *Id.* The Louisiana Supreme Court recently considered these requirements in the context of an insurance-defense lawyer who agreed to represent the insured doctor in a medical malpractice case. The lawyer limited the scope of his representation by taking settlement direction only from the insurance company pursuant to the insurance contract. *In re Zuber*, 101 So. 3d 29 (La. 2012). According to the court:

> A prudent lawyer hired by an insurer to defend an insured will communicate with the insured concerning the limits of the representation at the earliest practicable time. For example, basic information concerning the nature of the

> representation and the insurer's right to control the defense and settlement under the insurance contract reasonably could be incorporated as part of any routine notice to the insured that the lawyer has been retained by the insurer to represent him.

Id.

B. Unbundling in Consumer Cases

In the bankruptcy context, the inquiry has focused both on the question of informed consent and, more fundamentally, on the question of whether unbundling certain critical services is inherently "unreasonable" in a consumer bankruptcy case. These unbundling cases typically arise in consumer Chapter 7 cases where lawyers take more modest fees and expressly limit the services provided post-petition to exclude, for example, representation in connection with adversary proceedings or reaffirmation agreements. Unfortunately, the cases do not provide clear rules for practitioners. For example, many courts allow Chapter 7 lawyers to contractually exclude the representation of the debtor in an adversary proceeding involving dischargeability. .*See, e.g., In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013) ("The court agrees that adversary proceedings can be unbundled, so long as the limitation complies with the applicable rules and statutes, and that a lawyer may charge additional fees for adversary proceedings"). However, in the *Seare* case the court ultimately concluded that the unbundling of the lawyer's representation of the debtor in a nondischargeability proceeding was unreasonable under the circumstances of that case:

> Even if, however, the decision to unbundle adversary services were made during the initial consultation, that decision would be unreasonable because an adversary proceeding was a near certainty. Had DeLuca even cursorily investigated the nature of the Judgment, he would have uncovered that it was based on Seare's fraudulent conduct. DeLuca should have known that representing Seare in an adversary proceeding was reasonably necessary to achieve the Debtors' reasonably anticipated result—a discharge of the St. Rose Debt. The Debtors' expectation of a complete discharge was reasonable in light of the facts that (1) DeLuca did not inform them otherwise; and (2) they are not bankruptcy experts.

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