

CONSUMER BANKRUPTCY PANEL: ATTORNEYS FEES IN THE NORTHERN DISTRICT OF GEORGIA

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JUDGE MASSEY: Good morning, in your materials you will see six problems. We are going to go over each one of those problems. Also, contained in the materials is a collection of fee contracts that one of our panel members has obtained from various filings in our court. We may have a few comments on these contracts, but I would like to emphasize that the panel does not endorse any of these contracts. As a matter of fact, if you look at them very closely, you are going to find some significant problems with most of them, in various respects.

In order for you to get the most out of this morning's panel presentation, you need to read the problems. On the theory that you probably haven't had a chance this morning to read them, I'm going to ask everyone to read the first problem. We'll discuss it and then I'll give you time to read the second problem and so forth. So, take a minute to look at the first problem.

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PROBLEM I

Facts

John Smith is a lawyer in the metro Atlanta area who represents consumer debtors in chapter 13 and chapter 7 cases. One morning, two ladies appeared in his office seeking bankruptcy advice. They both are widows. Smith met with each of them separately.

The first lady, Miriam, is on a set income consisting of Social Security benefits of \$900 per month. Her husband passed away eight years ago. She has a ten-year-old car (owned free and clear), very little personal property, and an eleven-year old cat that she dotes on. She lives in a small, basement apartment in her friend's home, which she rents for \$250 per month. She has no secured or priority debts, about \$20,000 in old credit card debt, and a few medical bills. She does not have sufficient income to make the minimum payments on the credit cards, so interest and penalties keep accruing at high default rates. She is receiving calls almost every day from a few of her more aggressive creditors and is terrified that she will be put in jail if she does not pay the debts. She is especially concerned that, if she goes to jail, no one will take care of her cat. She feels morally obligated to repay these debts and is ashamed and frightened to find herself in her present situation.

Smith agreed to represent Miriam in a chapter 13 case for his standard fee of \$4,500. Knowing her situation, however, he agreed to put his entire fee into the repayment plan. He proposed a plan payment of \$85.00 per month for approximately 56 months. He advised Miriam that she would have to pay the trustee, herself, every month. He assured her that this plan would "take care" of her debts at a rate she could afford and keep her creditors off of her back. She stated that she wasn't sure how it would work ("It is all so confusing!"), but she trusted Smith and was happy and relieved to know that she was doing the right thing and paying her creditors.

Questions

Would Miriam be better served by filing chapter 7 instead of chapter 13, despite her feelings of moral obligation to repay her debt? If so, what role should attorney fees play in that decision?

If Miriam is judgment-proof, her need for bankruptcy relief is questionable. Does John Smith have an obligation to explain this to her? If bankruptcy relief is not truly necessary, can any fee be reasonable?

Would it be appropriate for the trustee or even creditors to object to Smith's fee in Miriam's case?

Discussion

JUDGE MASSEY: So panelists, what do you think about this situation? Is this a case in which the debtor was well advised to be in chapter 13?

MS. TREACE: Well, one of the first questions is not only whether chapter 13 is the correct vehicle for the debtor, but rather, is bankruptcy the right remedy for the debtor? What do you think about that, Mr. Thomson?

MR. THOMSON: Yeah, the debtor is judgment proof. There's really not much that the creditors can do to her. She's on Social Security income, so they can't attach that. She doesn't really have any assets, and all she really needs is some peace of mind. So while the harassment and the creditors' calls are upsetting, a bankruptcy probably is not necessary for the debtor. Other alternatives that could be explored include consumer credit counseling, for one. It may be that she just wants the peace of mind.

The next question is what would be the fee? Would it be more appropriate at that point to either to do the case pro bono or to refer it to the American Bankruptcy Law Forum, the Gwinnett County Pro Bono Project, or a similar legal service organization that will get somebody to help this lady without charging her a fee that she can't afford and that she probably doesn't need?

JUDGE MASSEY: Do you think it makes any sense to try to negotiate with the creditors? The problem indicates there are a few medical bills and old credit card debt.

MR. AGEE: Judge, in my experience representing creditors, when you are dealing with, as the facts indicate, five credit card companies, it would be awfully hard to get all five to agree. In most cases, the debtor is going to have bureaucrats sitting at a collection table that are going to tell you right off the bat to go ahead and file your bankruptcy; otherwise, they are going to continue to call. So, I really don't think that idea has much traction, particularly when you consider that you probably have to get all five creditors on board in order to make it work.

MR. THOMSON: As a debtor's attorney, it has also been our experience that they would say, "We don't care. We'll keep calling unless you file a bankruptcy." You can tell debtors to change their number to an unlisted

number, but especially with seniors like the debtor in problem one, that's the number they've had for thirty years. Every one of their relatives has it. Every one of their friends has it. Isolation and loneliness are very big concerns, and people are not willing to cut off their phone or change their number.

MS. TOWNSON: Well, in this problem, it's obvious that Miriam feels guilty that she has incurred this debt and she really wants to pay something back. The way that this problem is set up is that this attorney has charged a \$4,500 fee, but the debtor is not paying anybody back other than John Smith. So, what are the attorney's ethical obligations to this debtor? First, explain to her that she's really not paying her creditors at all. Second, consider what the appropriate fee is under these particular circumstances. Appropriate fees will be a theme throughout the morning.

If you look at the Georgia Rule of Professional Conduct 1.5, regarding fees, it lays out several factors that are involved in determining what an appropriate fee is for a particular situation.¹ I won't list them all, but factors to consider include: How much time does the attorney expect to spend on the case? Will the attorney have to attend multiple hearings?² If you are a bankruptcy practitioner with any kind of experience, you can estimate these factors. You can't foresee everything, but you are going to have a good idea about how much time the case is going to take. Other factors that weigh on the appropriateness of a particular fee include: What is the fee in the area or in the locality?³ Is every attorney getting to charge a \$4,500 fee because we're in Atlanta even though a debtor is going to end up paying no debt back through the chapter 13 plan, and have an obligation for at least thirty-six months? That's a very long time, and in this situation, the debtor is elderly.

Moreover, you've got to look at the amount of the debt that's involved. What kind of benefit is he providing her? Does she have a \$700,000 house—a situation we will examine in a few minutes—or is it the debtor in this problem who is paying \$250 rent to her friend, which is probably a hard obligation for her to meet anyway?

Then of course, you have to look at the nature and length of the relationship. These chapter 13 cases, they last a while. If a debtor makes it to discharge, she is going to be in her case for at least thirty-six months, often

¹ GA RULES OF PROF'L CONDUCT R. 1.5(a).

² *Id.* R. 1.5(a)(1).

³ *Id.* R. 1.5(a)(3).

forty-eight months, and sometimes even longer than sixty months. That is a factor, but in this particular situation, I would certainly think it would be a pretty easy call to say that this debtor should not have paid anywhere near the \$4,500 fee for a chapter 13 case.

MS. TREACE: I was going to say that this case doesn't look like it would involve any litigation at all.

MR. THOMSON: This really is a chapter 7 case disguised as a chapter 13 so that the attorney's fees can get paid. If he's going to do a chapter 7 case for her, then he should charge an appropriate chapter 7 fee in this case.

MS. TOWNSON: We have this come up in chapter 13 cases not infrequently, and there are different factors to look at. It's obvious to the chapter 13 trustee pretty quickly when we are reviewing these cases before the meeting of creditors when it's a chapter 7 disguised as a chapter 13. You flip through the file, there is no secured debt, or there is a car loan with \$2,000 debt, or something like that. Then there is \$50,000 in credit card debt, and you have whatever the fee may be. We have to analyze that. As a result, the judges often call the chapter 13 trustees the gatekeepers because we review every plan. We are in a high volume area of the country. We get about five percent of all the chapter 13 cases in the country. So, we review these plans, and we have an obligation to review these fees as officers of the court, in addition to our responsibilities as trustees.

If you have a situation like Mr. Thomson is talking about—where maybe the debtor's wages were being garnished—they don't have the money for a chapter 7, they're not able to pay their rent, and they might even be homeless, which is a very different scenario than someone who just comes in with this problem's fact scenario and is judgment proof. Maybe you file a chapter 13 for them because they can't afford the fee, but you charge them \$1,200, not \$3,500 or \$4,500.

MR. AGEE: Also of concern in this problem is when the attorney says he is going to take care of the debts even though the problem emphasizes that the client was interested in paying her creditors. Well, if you do the math, over the life of the fifty-six month plan, it pays in about \$4,750 total, \$4,500 of which are the attorney's fees. Although the attorney said that he's going to take care of the debts, in reality, there were no debts taken care of and the attorney never indicated that she wasn't paying any of her creditors. It just simply went to the attorney's fees.

MS. TOWNSON: I'd like to make one last point regarding this problem. Earlier, I was talking about how I have an obligation to review the plan regarding the fees, but the Bankruptcy Code states that any party in interest, the United States Trustee's Office, the standing trustee, or the case trustee, which in this situation would be me, has an ability to object to the fee.⁴

AUDIENCE MEMBER: I wanted to address your question about negotiating with creditors. I found that when debtors come in after they've tried to do that, they have higher tax consequences as a result. Even though they were trying to stay out of the bankruptcy, they may end up in bankruptcy because of the tax consequences from receiving income after negotiating an agreement with creditors.

JUDGE MASSEY: That is a good point. The problem that this attorney was pointing out is obviously the problem of debt forgiveness income.⁵ It might not be a problem for this particular person in this hypothetical because of the amount, but if you're talking about a couple hundred thousand, it can be sizeable. Of course, when a debtor receives a discharge in a bankruptcy case, there are no tax consequences from that.⁶

PROBLEM II

Facts

The second woman, Lillian, is less emotionally fragile. Her third husband passed away two years ago and she has burned through most of his estate, maintaining the lifestyle she is sure that he would have wanted her to enjoy. Aware of Lillian's propensity for spending, her late husband set up a trust and purchased an annuity to provide Lillian with income after his death. The annuity provides Lillian \$6,000 per month; and she was able to "scrape by" with the additional income previously provided by the trust. The trust, however, is tied to the stock market and, it now generates little monthly income for Lillian (it has averaged less than \$400 per month for the last several months). Consequently, Lillian is feeling the

⁴ See 11 U.S.C. § 330(a)(2) (2006) (The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.”).

⁵ I.R.C. § 61(a)(12) (2006) (defining gross income as including the value of discharged debt).

⁶ *Id.* § 108(a)(1)(a) (excluding from the definition of gross income any discharge of indebtedness income if the discharge occurs in a “title 11 case”).

squeeze and has started falling behind on her monthly bills, including her car and mortgage. Her car is a 2007 BMW 750li worth about \$60,000 on which she owes \$55,000. Her husband purchased this car for her just before he died and, because of its sentimental value, she simply could not bear to part with it. Her house is worth \$650,000, and the mortgage on it is \$490,000. The monthly note is \$2,500 (Principal, Interest, Taxes, and Insurance). She is approximately five months behind, and the mortgagee has accelerated the loan and placed the property up for foreclosure for the following month. She also is financing the purchase of an above ground swimming pool and deck combo. She purchased it eleven months ago for \$25,000. She still owes \$20,000 on it and she estimates it is worth \$15,000 as-is. She owes \$10,000 in credit card debt.

Smith agreed to represent Lillian in a chapter 13 case, also for his standard fee. Lillian's chapter 13 payments would be \$1,995 per month. Smith's fee would be paid entirely through her plan as well, which went against his usual practice, but Smith figured if he gave her "a break" in this case, he might be able to solicit other business from Lillian in the future.

Due to the high amount of her proposed plan payment, Lillian expressed concerns that her budget would be extremely tight. She worried that she might not be able to meet her expenses if her trust income kept declining. Smith assured her that, based upon his vast experience, the market had hit bottom and soon would be turning around. In fact, he was so confident of this, he would base her proposed chapter 13 budget on this anticipated increase in the market (showing income of \$800 per month from the trust). He suggested a 100% plan which would last for approximately fifty-eight months, with direct payments to the mortgage. Since there was no employer for an Employer Deduction Order, he advised Lillian that she would have to make her plan payments, herself. Smith set the plan disbursements at \$200 per month to the car creditor, \$100 per month to the pool creditor, and the balance toward his fee until it was paid in full. Thereafter, the distributions would be made pro rata between the car, the pool, and the mortgage arrearage. Lillian agreed to the plan, although she still was concerned about her ability to make the payments. Smith assured her that, although it might be "iffy," it was worth trying, in order to save her house and car.

Questions

Is John Smith's "standard fee" of \$4,500 appropriate (i.e., reasonable under Rule 1.5 of the Georgia Rules of Professional Conduct) for both Miriam and Lillian's cases?

What role, if any, should Miriam's apparent lack of sophistication or income compared to Lillian have in determining an appropriate fee?

Discussion

JUDGE MASSEY: This problem is almost a mirror image of the first problem. The debtor has a steady income from an annuity of \$6,000 a month and some trust income that right now is about \$400 a month. She is behind maybe five or six mortgage payments on her house, and she has a very expensive car. She also has about \$30,000 in other debt. The attorney has agreed to take this case on for the same fee, \$4,500, and has computed the plan payment to be almost \$2,000 a month, which causes the client to worry about whether she can continue living the same lifestyle. The lawyer told her it could be a problem, but it's worth trying.

If you did the math on this problem, you would find the portion of the plan payment that would be the car payments is approximately \$1,100 to \$1,200 a month. Adding the mortgage payment of \$2,500 to the plan payment and subtracting that from the debtor's monthly income of \$6,400, she would still have about \$1,900 a month to left over to live on. So, the question here is: What about this fee? Is this a fair fee? Is it reasonable under the applicable professional conduct rules and under § 330?⁷

MR. THOMSON: I would like everyone to understand that problem one was written in tandem with problem two. One of the problems with this fee is that this attorney is taking a one size fits all approach. He has a standard fee for a chapter 13 no matter what. This fee very much could be a reasonable fee based upon the facts in this case, where the prior fee, in my opinion, was not a reasonable fee. But the one size fits all approach is not proper. The fee should be structured according to the nature, extent, and quality of the services that have to be provided to the specific client.

MS. TOWNSON: For many, many years in the Northern District of Georgia, and in almost every jurisdiction in our country, we had something called a "flat fee," or a "no look fee." This meant that as long as a debtor's attorney didn't charge over a certain amount—it was \$2,500 at one point—then the attorney didn't have to file a fee application. In September 2006, which was about a

⁷ 11 U.S.C. § 330 (compensation of officers).

year after BAPCPA⁸ was enacted, the Northern District of Georgia Bankruptcy Court decided that they wanted to take a few months and examine how the changes in the law were going to affect the workload of debtors' attorneys representing individual clients. So, after about a year, the trustees, debtors' lawyers, creditors' lawyers, and judges all came together, and the court abolished the no look fee.⁹

The whole point of doing this was to recognize that there should not be a standard fee. However, we still see it a lot, and it is something that we are constantly battling against. We tell debtors' attorneys that one case may be worth \$2,000 while another case is worth \$7,000, which is definitely possible in chapter 13. Or, a case might be worth \$6,000. We understand that. But debtors' attorneys have to look at it that way.

JUDGE MASSEY: What do you do about the client who can't come to grips with the amount of debt?

MS. TREACE: Well, one of the things that struck me about this case is that it reminds me that attorneys are not only advocates and litigators, but they are also counselors and advisors to their client. You have to sometimes bring your client down to reality. Keeping this car and this house may not be in her best interest or the reasonable and proper thing to do.

MS. TOWNSON: But she has a sentimental attachment to this BMW, apparently. In my previous life, I represented debtors for several years. Of course, Mr. Thomson deals with it every day. This is life. This is reality. This is someone sitting across the table, crying; they are very upset and very emotional. They may have expectations that are very difficult to rein in, and in this situation, I think that is a key or at least a factor.

MR. THOMSON: I often find that clients understand the fact that perhaps they're living beyond their means or their house is too much house for them, but letting go is a very gradual process. When filing the chapter 13, one of the benefits is that in many ways it's so flexible. They want to give it one last shot, and when they see that it's not working, they can say, "At least I tried."

⁸ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-08, 119 Stat. 23 (codified as amended at 11 U.S.C. §§ 101-1532 (2006)).

⁹ General Order No. 9, Chapter 13 Debtors' Attorneys' Fees, (Bankr. N.D. Ga., Sept. 9, 2003) *available at* http://www.ganb.uscourts.gov/geninfo/genorders/ord_09.pdf.

It's very difficult for somebody to walk into an attorney's office and say, "I'm losing my house." Instead, they say that the last thing they can do is lose their house. When the attorney explains that "you can't afford this," more often than not, they are not going to accept that advice graciously.

MR. AGEE: From a creditor's standpoint, I agree with what Ms. Treace said earlier. It's awfully important as a counselor that you discuss this, because otherwise you are going to be looking at a nice, friendly creditor's attorney, like myself, who has been accused in previous life of leaving debtors with only beans and rice to eat.

Ms. Treace and Mr. Thomson raised an interesting point because it's so much better for the client to know from the outset what they are getting into instead of getting this hammered at them in a § 341 meeting¹⁰ and then confirmation. Believe me, even though the debtor might be paying one-hundred cents on the dollar for her debts, she will benefit from having good faith, and moreover, except for cause, a debtor can't extend her plan beyond three years, or at least that has been the case under the Code in the past. So, it's really important that debtors' attorneys discuss this up front before the debtor is ambushed by a creditor's attorney at confirmation.

MR. THOMSON: One of the things that bothers most about this problem is that the debtor's plan is not feasible. The debtor can't afford it, the case will probably fail, and, on top of that, the attorney is front-loading all the fees. Front-loading is where the attorney has devised the plan to make minimal payments to the secured creditors until the attorney's fee is paid in full. So, the attorney is taking by far the lion's share of all the payments in this case. For example, this very expensive vehicle is getting about \$200 a month, which might not even cover its depreciation. If this case falls apart in eight months, the attorney may have been paid, but the creditors may not have been paid. As a result, the debtor will be out of bankruptcy in a worse position than when she started because of the interest and back payments, which have accrued during the life of her case.

MR. AGEE: And having said that, it's interesting that at the very end of the problem, the attorney assured the debtor that although it may be iffy, he recommends that she try this in order to save the house and the car.

¹⁰ 11 U.S.C. § 341 (providing for a meeting of creditors and equity security holders).

JUDGE MASSEY: Mr. Thomson, what about this problem of getting paid early in the case and having that be a factor in the actual feasibility of the case? How do you draw the line?

MR. THOMSON: My feeling is that the attorney's first duty is to the client. He needs to put together not only a plan that the client understands and consents to, but also one that ultimately protects the client's best interests. If that means having the attorney's fee paid over time, in order to keep the plan payments low and still provide adequate protection to the secured creditors, then, I believe that's the attorney's obligation. Unless there is an actual conflict that arises between the debtor and the attorney, where the attorney has to take steps to protect himself, I think it's the attorney's obligation to always look out for the client's interests ahead of his own; especially, when you are talking about an economic interest like the attorney's fee.

MR. AGEE: I would like to commend the practitioners in the Northern District of Georgia. I practice mostly in the Rome division, but in all four divisions in the Northern District, including Atlanta, creditors' attorneys and debtors' attorneys work really well in getting that issue resolved. When the issue does arise, we really try to work to spread it out; debtors' attorneys give a little and then the creditors give a little. So, I think overall it works well, at least within the Northern District of Georgia.

PROBLEM III

Facts

John Jones represents Bob Doe in a chapter 13 case. In order to achieve confirmation of Bob's plan, Jones had to object to several Proofs of Claim, file four motions to avoid judicial liens, track down several missing payments from Bob's employer to the trustee, have the § 341 meeting reset twice (due to Bob being in the hospital), file three amendments to the plan and schedules, and argue for confirmation over the trustee's numerous objections. Jones charged Bob a flat fee of \$3,500, which, if billed by the hour, Jones would have used up prior to confirmation. Jones has received \$2,500 of the fee through disbursements by the trustee. Bob's case was confirmed 11 months ago.

Recently, Bob came to Jones's office, very upset. Bob stated that he had been hospitalized for several days. After he was released and returned home, he found an order from the bankruptcy court stating

that his case had been dismissed on the trustee's motion. Bob acknowledged that he was a couple of months behind to the trustee because he had missed a lot of work due to illness. But Bob denied ever receiving the trustee's motion and the notice of hearing. (The hearing had taken place while Bob was in the hospital, and since Jones had not heard from Bob, Jones announced "no opposition" at the calendar call.) Jones reviewed the pleadings and discovered that, due to clerical error, Bob's service copies of the motion and notice had been mailed to the wrong address. Bob is extremely concerned that his vehicle is no longer protected by the automatic stay.

Jones advised Bob that he could file a motion for the court to vacate the dismissal, but that it probably would be a few weeks before the case was reinstated and the stay was back in place. Based on that advice, Bob agreed that filing another case probably was the better course of action. Bob was unhappy to learn that he would have to pay a new credit counseling fee and court costs. He became irate when Jones told him that he would charge him another fee of \$3,500 to file the new case. After all, the dismissal wasn't his fault—he never got notice. Plus, he already paid Jones \$2,500! What was that money for? Bob stomped out of Jones's office, promising bar complaints and malpractice suits.

Questions

Should John Jones have been more aggressive in trying to vacate the dismissal of Bob Doe's previous case, especially given the clerical error in service of the motion to dismiss?

How much of Jones's flat fee of \$3,500 was actually earned in Doe's first case? All of it, given all the work Jones did to get the plan confirmed? Not all of it, given that the case was dismissed only 11 months into the plan?

Is it appropriate for Jones to charge Doe \$3,500 to file the new case when, arguably, much of the initial leg work was already done in the first case?

Discussion

JUDGE MASSEY: This problem presents a scenario that comes up quite a bit. It's a situation where there is one case that gets dismissed, and it is shortly followed by a second case where the same lawyer represents the debtor.

MS. TOWNSON: To me, the first thought I had in this scenario was whether the debtor really needs to reopen the case. Is that going to be feasible or even the best course of action for this particular debtor?

There are eight bankruptcy judges in the Northern District of Georgia. There are approximately 360 bankruptcy judges in the country. There are some judges, in this scenario, who would permit the case to be reopened in twenty-four hours, some judges allow motions to shorten the amount of time for the hearing, and some judges will conduct a telephonic hearing. But the real issue in this problem is notice to the creditors. It's really up to the judge to determine how much notice to the creditors is necessary in this situation. Ultimately, if you are not going to be able to get the case reopened for three weeks and this debtor can't go to work because his car is repossessed, then you have provided no benefit to the creditors.

MR. THOMSON: I have a problem with the attorney saying nothing can be done and that it will take me a month. Instead, he could have phoned the creditor's attorney and said that the case shouldn't have been dismissed. He could have gotten on the phone with the chapter 13 trustee and ask the trustee to consent because service was improper, because he didn't have proper communication and didn't know the debtor was in the hospital, and so he didn't know about this motion. There should have been more to it than telling the debtor that he can't get this case reopened for four weeks. In the meantime, the debtor's vehicle is at risk, and therefore, the debtor needs to file a petition and get a case number right away. There should have been more discussion.

Again, it may well be that the decision to file a new case is the best decision, but I don't think there was enough analysis and frank and forthright discussion with the client about what the alternatives were. The client has to make decisions regarding his case, and he can't do that unless the attorney gives him adequate information. In this case, I don't think the attorney met his obligation to the client in advising him as to what the alternatives are and what the situations would be. Only after satisfying this obligation can the client make an informed decision.

MS. TOWNSON: Georgia Rule of Professional Conduct 1.4 deals with communication, and obviously, there is an obligation to communicate with your client and explain things to them.¹¹

¹¹ GA. RULES OF PROF'L CONDUCT R. 1.4.

MR. THOMSON: This problem pointed out even more lapses by the attorney. Apparently, the attorney just showed up at the motion to dismiss hearing without communicating with the client. The client was in the hospital, and one doesn't know what efforts the attorney took to communicate with the client, but in this fact pattern, it appears that he just showed up, saw the client wasn't there, and allowed the case to be dismissed.

MR. AGEE: Of concern to me was the fact that apparently there was no communication, written or telephonic, trying to get in touch with the debtor. So, as Mr. Thomson says, the attorney just shows up and gives a no opposition answer to the calendar call.

MR. THOMSON: That results in the second part of this problem. Is the second case really only a continuation of the first case where the attorney should have taken action to preserve the first case, or is it legitimately a second case? If it's a continuation of the first case, how much should the fee that's already been paid in the first case be taken into account when the attorney charges a fee in the second case?

MR. AGEE: And by the way, when the attorney is up on the next case on a motion to extend the stay within the thirty days of the second filing, the judge is probably going to ask the attorney what happened at the first hearing on a motion to dismiss or relief from stay. If the attorney's response is simply that the debtor didn't show up, judges, at least in the Rome division, are very prompt to ask, "What did you do to contact them?" It's the attorney's responsibility to write the debtor, call them, or get some communication, and it's not acceptable just to say, "I haven't communicated with them because they didn't call my office."

MS. TOWNSON: I think it's very relevant also to look at why that case was dismissed, not just that the debtor lost their job or there was bad service. What if the case was dismissed because the attorney possibly dropped the ball along the way? Judge Massey entered an opinion very recently that dealt with this type of scenario.¹² The first case probably shouldn't have been dismissed, or all the issues should have been handled during that case. Don't you think that's an important factor, Mr. Thomson?

MR. THOMSON: Absolutely. Again, if the second case is purely just a continuation of the first case—which shouldn't have been dismissed, then the

¹² *In re McElroy*, No. 09-61362 (N.D. Ga. Feb. 23, 2009).

attorney should take a really hard look at what he will charge as a fee in the second case. It may not be appropriate to charge any fee. Or, it may be that there was some work that still needs to be done, and he should charge the appropriate fee for that. But again, it's a tough call. It's a tough situation. It does come up. What is an appropriate fee for a refile? Perhaps the debtor's attorney did everything he could and performed to the best of his ability and the case was dismissed anyway.

MS. TREACE: Would you say the length of time between the first case and the second case is an important factor in deciding?

MR. THOMSON: Absolutely. The length of time eviscerates the continuation theory. If it's three years later, it's really not a continuation of the prior case. If they received an order of dismissal, which is what happened here, that probably is a continuation of the first case.

JUDGE MASSEY: In the case that Ms. Townson referred to, the time between the dismissal of the first case and the second case was eleven days.¹³ The first case had lasted a couple of years, and the fee was \$3,500, which was paid fairly early in the case. In the second case, the plan proposed to pay the law firm \$3,800, which was \$300 more than in the first case. But at that point, the debtors only had \$13,000 in unsecured debt and \$10,000 in debt secured by an automobile because the real property had been given up by the debtors.¹⁴

Just as an aside, let me say something about the announcement of no opposition. In this case, Mr. Jones announced no opposition because his client wasn't there. How did he know there was no opposition when he hadn't spoken to his client? I hear that all the time. A lot of times I hear it not because I attend the calendar calls but because I'm going back and listening to problems that come up.

I had a case quite recently involving a motion to dismiss. The creditor had taken the position that it was entitled to dismissal with prejudice, but the lawyer had announced at the calendar call no opposition to the confirmation of the plaintiff. If that lawyer had said no opposition to the motion to dismiss, which might have been what he meant but not exactly what he said, then I don't know how he could have known that. Was the reason that he announced

¹³ *Id.*

¹⁴ *Id.*

no opposition because the client wasn't there? Was the \$2,500 fee that was taken in the case to start off with reasonable?

MR. THOMSON: From the scenario, it looks like the fee was reasonable. In fact, the \$3,500 that they agreed to appears to be reasonable. It may be even slight in my opinion. My concern in this case was that the bulk of the work done in the first case is probably not going to be anything near the amount of work in the second case. Perhaps the new \$3,500 fee that he wants to charge is meant to augment the fee in the second case to account for services that he didn't get paid for in the first case. I have a concern about the propriety of that.

JUDGE MASSEY: So, when the cases are close together, attorneys at least need to think about them as a single unit when determining what a proper fee is with respect to both cases.

PROBLEM IV

Facts

John Jones also represents Mary Roe in a chapter 13 case. He charged her his flat fee of \$3,500 and he has been paid all of it through the trustee. Mary's case went without a hitch. She is funding an automobile and a moderate amount of credit card debt in her plan. It was confirmed 10 months ago and, other than the initial intake and the 341 Meeting, Jones has had little, if any, contact with Mary.

The same day that he met with Bob, Mary came to Jones's office. She told him that she wrecked her car in an accident and that the insurance company would not pay anywhere near what she still owed on it. It hardly seemed fair that she would have to pay for a car she no longer had. Further, her hours had been cut drastically at work and the chapter 13 deduction from her pay was causing her hardship—she was having trouble keeping up with her rent and utilities. She needed Jones to explain her options to her. Jones advised her that she could convert her case to chapter 7, but that she would have to pay him \$2,000 before he would do it. Mary left, fretting that she didn't know where she could get that kind of money, especially with the EDO in place.

Questions

How much of Jones's flat fee of \$3,500 was actually earned in Roe's case, given that her case progressed without incident until she came to Jones to discuss conversion?

Does Jones have an obligation to convert Mary's case to chapter 7 without payment? Can an attorney condition the conversion of a case upon the payment of a fee?

Discussion

JUDGE MASSEY: In this case, the debtor has been in bankruptcy about ten months when she had an accident that totaled her car. The plan had been confirmed, so the obligation of the plan was to pay the secured debt. Once the plan is confirmed, the lawyer can't get back the car and switch the debt from secured to unsecured, because that's switching the risk back to the client. So in this case, the debtor goes back to see her lawyer and tells the lawyer that not only does she not have a car, but her hours have been cut back. She really can't afford to be in this case, and the lawyer responds that she can be in a chapter 7 and it would cost her two grand. We don't know how much of the \$3,500 fee is merely a guess. What about charging an additional \$2,000 for effectively converting the case for whatever can be done in the chapter 7? Did the attorney earn the \$3,500 fee?

MS. TOWNSON: Comment 2 to Rule 1.5 of the Georgia Rules of Professional Conduct says that an attorney can require advance payment of a fee but must return any unearned portion.¹⁵ So, I think the second part of that sentence would be applicable. Our general order here in the Northern District of Georgia references 11 U.S.C. § 329(b), which states that the court may require a return of excess fees.¹⁶ In this situation, Mr. Thomson, what do you think would happen?

MR. THOMSON: This problem bothers me for a couple of reasons. The attorney may not have earned the entire \$3,500 fee, but he's holding this lady's feet to the fire to pay in order to convert. The problem is that she has a loss of

¹⁵ GA. RULES OF PROF'L CONDUCT R. 1.5 cmt. 2 ("A lawyer may require advance payment of a fee, but is obliged to return any unearned portion.").

¹⁶ 11 U.S.C. § 329(b) (2006) (Attorneys representing a debtor in Bankruptcy must file with the court a statement of the compensation paid to them. Under 11 U.S.C. § 329(b) "If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive. . .").

hours at work, her income has been reduced dramatically, and she has an employer deduction order in place. So, a large portion of her income is being paid to the chapter 13 Trustee. It's creating a hardship for her, but the attorney is going to hold off on the conversion until he gets paid his fee. He's been paid \$3,500 in this case. Is he obligated to continue representing her in filing the motion to convert the case? My position would be, at the very least, that he has to try to protect her interest and to file the motion to convert, regardless of whether she paid the fee. She probably overpaid in the chapter 13 phase of the case, so the attorney definitely has an obligation to file the motion to convert. He can always file a motion to withdraw once he's done the conversion, but at least he's protected her. The employer deduction order would stop and she would no longer be in a position of hardship. Now, the caveat that I have to that is the best way to get a court to review your fees is to file a motion to withdraw from the case. What has the attorney done? What has the attorney been paid? What does the attorney deserve?

MS. TREACE: When the attorney took the case, he remains in the case until the court excuses him. If the case needs to be converted, then that's what he needs to do. To hold the case hostage by demanding \$2,000 seems to be pitting himself against his client, which is a huge conflict.

MS. TOWNSON: Mr. Thomson, what about the scenario where the debtor has a house that they have resided in for a year, and they want to surrender the house to convert to chapter 7, but they're not in dire circumstances as is this debtor? Do you take a different approach in charging a fee for the conversion in that scenario?

MR. THOMSON: I would if the client has been in a case, all of the services have been performed, he's gotten through confirmation, and gone past the bar date. Now the debtor lost her job or, for whatever reason, doesn't want to continue with the chapter 13 and wants to convert if she is eligible. That's a different situation, and I don't have a problem with charging a fee at that point, but then because the fee has already been earned, the attorney completed all the services. In our problem, though, it's questionable that the fee was earned and if the debtor is in a hardship. For that, I think you have to put the debtor's interest over your own economic interest.

MR. AGEE: Would it be practical to convert the case and then file the motion?

MR. THOMSON: It would be practical, but in this case, I wouldn't do it because there's really nothing to the chapter 7 case. It's really just a matter of

probably attending the § 341 meeting of creditors, advising the client of their duties under chapter 7, and waiting for the discharge.

MS. TOWNSON: In *In re Egwim*, Judge Bonapfel issued an opinion that gives a really good analysis of what it takes to get out of a case and about what an attorney's obligations are in a case.¹⁷ I think it's well worth reading.

MR. AGEE: If the attorney failed or refused to convert the case, has the attorney abandoned his client in this particular case?

MR. THOMSON: I think in the Northern District of Georgia, you would have to file a motion to withdraw.

AUDIENCE MEMBER: Now, when you're talking about how much of your fee you have earned, in a situation where you practice with some sort of volume, and you charge a flat fee to all of your clients, we all know that over the course of a couple of years practice, you're going to get \$3,500 bucks from some client that has you running around the maypole a hundred times and you're going to get 3,500 bucks from somebody whose name you don't hear for five years after you get the case in motion. That's sort of the point of the flat fee. Otherwise, we are sitting there keeping time sheets on consumer cases.

MS. TOWNSON: I disagree with you.

JUDGE MASSEY: I don't agree with you at all. And let me tell you why I don't agree with you. I think you have just described what often happens with regard to the way you would do a business plan for a law firm. You're looking for a certain amount of money and expect a certain amount of money to come in on some cases, and in other cases you know that you're not going to get paid. Although you have done some work, and maybe some good work, the case gets dismissed before there's anything paid to the trustee, or the money is paid back to the debtor. But when we are talking about whether or not a fee is earned in a particular case, the fact that you charged a so-called "flat fee" is simply irrelevant. Determining whether a fee is reasonable or not requires looking only at that particular case. So, if you had a case in which you knew that there was going to be no problems, the flat fee was \$10,000, and the going rate in the area is \$3,500, the fee is unreasonable.

¹⁷ *In re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga. 2003) (analyzing whether an attorney satisfied the standards of professional conduct when his fee agreement limited his representation of a client to exclude contested matters and adversary proceedings).

AUDIENCE MEMBER: I agree with that, but I don't think you know going into a chapter 13 case what it's going to be because you don't know what's going to happen in the client's life.

JUDGE MASSEY: That's what we are talking about here today—factual situations. If you do your homework, you'll find you know more than you think you know.

AUDIENCE MEMBER: I understand that, but when you bring the client in, and you tell him it's all the law you can eat for \$3,500, you have to have a sort of the seat-of-the-pants idea of the case. If a case gets dismissed early on, it just seems to me that you have to count on your own good judgment about what you think is fair. I agree with what Mr. Thomson says: that hopefully we are doing this because it's a help to the profession and for the good of the families that come into our office. But, yeah, we'd like to make a living at the same time.

JUDGE MASSEY: But if your judgment is good, then you just answered your question. We are talking about when your judgment is bad.

AUDIENCE MEMBER: It is good, but I don't get to come back after a flat fee case and ask for more money.

JUDGE MASSEY: You don't have to make it a flat fee to start off with.

AUDIENCE: Well, that's true. But if you don't get past confirmation, and before you know it you were in the case for four months, you have \$2,200. I don't know that you necessarily owe any money back. I think the seat-of-the-pants judgment comes in if you see them a second time.

PROBLEM V

Facts

Sally Spender had a problem. First, she accumulated \$75,000 in credit card debt. Most of her expenditures occurred over a five-year period, except for the \$10,000 she incurred during an ill-fated trip to Harrah's Casino in Cherokee, N.C. on December 31, 2008. Unfortunately, Sally lost her \$65,000-a-year job in November, 2008 and is now working part-time at Publix, making \$10.00 an hour. She made her last mortgage payment and car payment in November 2008. She purchased a 2009 Honda CRV in September, 2008 for \$30,000, and New Cars Rock ("NCR") financed the vehicle. Sally had to buy

a new vehicle because she had a car accident, in which she totaled her 2006 Jeep Cherokee. She was injured in the accident and has a pending claim. David Diamond represents her in that matter. David does not know that Sally may soon file a bankruptcy case.

Sally is supposed to receive \$800 per month in child support, but her ex-husband also recently lost his job and stopped paying Sally in December 2008. Sally's mother is now giving her \$1,000 per month to assist her with her living expenses.

Facing foreclosure, Sally went to attorney Billy Bankruptcy (he changed his last name from Smith upon graduation from law school) to find out what her options were. Though her budget would be very tight, Billy recommended that Sally file a chapter 13 case and charged her a \$4,000 flat fee for the case. Sally brought her sister, Heidi Murphy, with her to the initial consultation, because Heidi, too, was facing foreclosure. Unfortunately, Billy told Heidi that because she had no income, she did not qualify for chapter 13 relief. However, he told Heidi that she could try to file a chapter 13 case on her own, and he was kind enough to help her complete her plan and schedules, except for schedules I and J. He did not charge a fee and Heidi filed her case pro se.

When Sally arrived for her meeting of creditors, she was surprised to learn that Billy would not be there to represent her. Instead, a woman named Mary Faye Fee, found Sally and told her that Billy had hired her to represent Sally at the hearing. Sally did not remember having a conversation with Billy about anyone other than Billy representing Sally during her case. Unfortunately, Mary Faye did not seem to know much about Sally's case and only had a couple of pieces of paper related to Sally's case.

Credit Limit Unlimited ("CLU"), to whom Sally owed \$15,000, objected to confirmation of Sally's plan (she proposed to pay 0% to her unsecured creditors) because Sally incurred \$10,000 of the debt gambling, only sixty-five days before she filed her petition while she knew she was insolvent. CLU also filed an adversary proceeding against Sally. Billy did not think his \$4,000 fee included representing Sally in the adversary proceeding. The bankruptcy judge disagreed, so Billy settled the adversary quickly, perhaps too quickly, as he agreed that the entire \$10,000 gambling debt was nondischargeable.

Sally's plan was finally confirmed and all was well with the world, or so it seemed. Sally did not make any mortgage payments postpetition, and since no one objected to confirmation, she did not tell Billy. The mortgage company filed a motion for relief from stay,

but Billy did not attend the hearing. His fee agreement specifically excluded postconfirmation matters. Sally did not attend because she thought Billy would represent her, even though she had no money to pay to the mortgage company. As a result, the automatic stay was lifted.

Sally tried to get the Superior Court to arrest her ex-husband for nonpayment of child support, but was unable to have him served. She explained to Billy that she could not continue in her chapter 13 case unless he assisted her in collecting her child support payments. Billy declined, stating that the original \$4,000 fee did not include that service.

Sally's personal injury claim was still pending, but was not close to settling or having a trial date set. Billy knew that he or David Diamond needed to file a Motion to Approve Special Counsel, but did not think that the original \$4,000 fee included performing this service.

Sally decided to surrender her house and to convert her case to chapter 7. She paid Billy an additional \$1,000 for the conversion, even though she had already paid him \$3,500 for the chapter 13 case. Sally sought to reaffirm the debt with NCR so she could keep her CRV. Billy's standard chapter 7 fee agreement specifically excluded representing debtors regarding reaffirmation agreements. Sally signed the reaffirmation agreement anyway and the bankruptcy judge scheduled a hearing regarding the agreement. Billy filed a Motion to Withdraw from the case so that he would not have to face the judge again concerning the scope of his representation.

Questions

Is Billy Bankruptcy's assistance of Heidi permissible under the Georgia Rules of Professional Responsibility or the Bankruptcy Code?

What legal or ethical issues are raised by Billy Bankruptcy's and Mary Faye Fee's conduct? Is the use of a contract attorney permissible under these facts? Even if the debtor has consented, is it advisable?

May Billy Bankruptcy limit the scope of his representation to exclude dischargeability proceedings, postconfirmation matters, nonbankruptcy matters, or conversion?

Is it realistic to think that a debtor understands the exclusion of such services?

May Billy Bankruptcy condition the filing of a conversion on the payment of additional fees?

What legal/factual basis does Billy Bankruptcy have to justify withdrawal?

Discussion

JUDGE MASSEY: So, this problem raises a lot of different concerns. The last one, being a very important one, is that the lawyer excluded in his fee agreement advising the client with respect to a reaffirmation agreement and when that matter came up, the judge scheduled a hearing on that, and, at that particular time, the lawyer filed a motion to withdraw. What about the ethical problems raised by a contract attorney who's never met the debtor before?

MS. TOWNSON: This happens far too often in our district. As a chapter 13 trustee, we conduct a meeting of creditors, and my staff attorneys and I conduct all those hearings and there's some contract lawyers at the meeting of creditors that are very good and know a lot about the case. But far too often we find otherwise. Our Rights and Responsibility Statement, which is a required document to be provided to every debtor by the debtor's attorney, specifically states that if the attorney plans to use another attorney or hire another attorney to attend the meeting of creditors, the attorney that is attending the meeting of creditors must know as much as the original attorney does about the case.¹⁸ Moreover, the debtor must know who the other attorney is going to be, that the attorney will be with the debtor that day, and that the attorney will properly represent the debtor.

MS. TREACE: A lot of business is handled at these 341 meetings.

MS. TOWNSON: There is a lot of business at the meetings of creditors. Unfortunately sometimes the attorney that is present that day might not even speak with the debtor before the meeting. This attorney could actually be a member of a firm. Mr. Thomson is in a big firm, and he knows how busy these meetings can be. There can be three rooms of meetings of creditors all happening at the same time. Fortunately, Mr. Thomson's firm sends lots of attorneys down to the meetings of creditors. But even then, we may see an attorney that works for that firm and doesn't have an opportunity to even speak with the debtor before the meeting. The debtor is scared and doesn't know

¹⁸ General Order No. 6, Compensation of Attorneys in Chapter 13 Cases, (Bankr. N.D. Ga. Sept. 26, 2006) available at http://www.ganb.uscourts.gov/geninfo/genorders/general_order_6-2006.pdf.

what to do. During the call of the calendar, the debtor might be meeting his or her attorney for the first time. When the staff attorney or the trustee begins questioning the debtor, all kinds of unnecessary information can come out. If this debtor had been properly counseled, he could avoid these gaffes. He wouldn't be lying, but he would know to avoid elaborating and just say "yes" or "no."

MR. THOMSON: Unfortunately, a lot of law firms think of a § 341 meeting of creditors as just a nuisance. The mentality is that they just have to go through the motions and if something has to be fixed, then it can be taken care of later. The same thing applies whether it's a contract attorney or an in-house attorney.

An attorney should not just pick up the file, go down to the court, introduce himself to the client, and sit there while the client skewers himself by volunteering too much information. When the § 341 meeting of creditors is prepared for and conducted properly, the attorney really assists his client. The attorney should head off a number of objections and explain things that are not apparent from the schedules. Our job as attorneys is essentially to gather facts and present those facts in a persuasive fashion. If an attorney is just showing up at the meeting without any knowledge of the client or of the file, then the § 341 meeting of creditors does become just a waste of everyone's time. That problem exists both with the contract attorney or the in-house attorney.

I know the Rights and Responsibility statement requires that the debtor be informed and agree in writing if the attorney plans to use or might use a contract attorney to represent the client in any aspect of the case.¹⁹ Sometimes, there is an issue of fee shifting. I don't really see that as an issue where you hire a contract attorney to handle the § 341 meeting of creditors. But the client has to be informed and agree ahead of time for the attorney to hire a contract attorney.

MS. TOWNSON: If you did consider that to be some sort of fee sharing, Georgia Rule of Professional Conduct 1.5(e) lays out the requirements if you are associating with another attorney.²⁰ This happens more often in the personal injury world. Almost every fee agreement states that the attorney may associate other attorneys.

¹⁹ *Id.*

²⁰ GA. RULES OF PROF'L CONDUCT R 1.5(e).

MR. AGEE: What also concerns me in the chapter 7 world is the reaffirmation agreement. If a contract attorney shows up and signs the reaffirmation agreement, then what type of burden is that putting on themselves and the law firm? Normally I like to have the reaffirmation signed at the § 341 meeting. Under BAPCPA, what's going to happen one day when someone challenges the stand-in attorney signing that reaffirmation or Part C of attorneys declaration? Let me also say as an aside that from the creditor's side, this applies for creditors' attorneys, who stand in for other firms at relief-from-stay hearings. These stand-in attorneys need to know what is going on in that case. Judge Bonapfel, for example, is very quick to remind you that you are not just standing in; you're here to represent a client. So, you need to have the knowledge of what's going in the case so you can provide the court with necessary information.

MS. TOWNSON: There is a recent case on this in the Middle District of Georgia, which has to do with a mortgage company.²¹ A lot of mortgage companies use national counsel, some of which are in the Atlanta area, or they use Georgia counsel located in the Atlanta area. So, when there are hearings in the Middle, Southern, or Northern District of Georgia, they will associate local counsel. In that case, the motion for relief from stay ended up being denied because the attorney that was there on behalf of the mortgage company didn't really know a whole lot about the situation and had had no direct contact with the lender. The attorney's only knowledge came from discussions with the Atlanta law firm.

MR. THOMSON: The contract attorney is not insulated from liability simply because they are simply filling in for somebody else. Moreover, the debtor's attorney that hires the contract attorney is not necessarily insulated from the malpractice that the contract attorney might commit. So, it carries both responsibilities and liability if you engage in that practice. I'm not saying the practice is wrong; it's a necessary evil in many instances. It's just a matter again of adequately preparing for the case.

JUDGE MASSEY: Lets go back to the exclusion of certain types of services. Suppose there is a chapter 7 case agreement which states that "it shall not be the responsibility of the attorney to obtain the reaffirmation hearing date and the attorney shall not be obligated in any way to assist client or creditor in the

²¹ *In re Simmons*, No. 05-52298-JDW, 2008 WL 3069666 (Bankr. M.D. Ga. July 31, 2008).

reaffirmation agreement process.” Can the attorney exclude reaffirmations agreements in representing a debtor in a chapter 7?

MS. TOWNSON: Historically, before BAPCPA, debtors’ attorneys had an obligation to review the reaffirmation agreement with the debtor and to tell the debtor whether they thought it was a good idea. If the debtor decided to sign that reaffirmation agreement, then everyone would sign off on that agreement and everyone would be happy. Since the law changed in 2005, when a debtor’s attorney signs that reaffirmation agreement, she is signing on to her belief that she really believes the debtor can make those payments. If the debtor ends up not making those payments on, for example, a vehicle which is subsequently repossessed, the attorney may have some personal liability. That said, in a recent case in the Northern District of Oklahoma a practitioner who was a regular filer of chapter 7 cases in the bankruptcy court began including in his chapter 7 fee agreements, following BAPCPA, a provision that specifically excluded negotiation of reaffirmation agreements, because he didn’t want the liability, period.²² As a result, debtors who wanted to reaffirm a debt could only do so by going in front of the bankruptcy judge. So, these debtors who are really represented by an attorney would become pro se. In the case, the judge went through the entire history that I just laid out and basically said, “I’m sorry, but if you’re representing debtors in chapter 7 cases, you will have to go and represent them regarding the reaffirmation agreement. Sorry the law changed. Sorry you have this duty. But you have this duty so either you follow through or don’t file any more chapter 7 cases in my court.”²³

MR. AGEE: Given that holding, if you don’t agree that that debtor can afford to reaffirm a debt or it’s a bad deal, then you’re coming up to a conflict if the debtor wishes to reaffirm the debt. Am I going to be able to take this case? Otherwise I am directly opposite to what the debtor’s desires are.

Chapter 7 is designed both to discharge as much debt as possible and to keep that piece of property that the debtor needs. The debtor is also expecting to keep that vehicle.

Yesterday in Rome there was a case that exemplifies this issue. A debtor who was represented by an attorney showed up before Judge Bonapfel on a

²² *In re Minardi*, 399 B.R. 841 (Bankr. N.D. Okla. 2009) (holding attorney fee agreement which excluded negotiation of reaffirmation agreement from attorney’s services was an impermissible limitation on attorney’s representation of debtor).

²³ *See id.*

reaffirmation agreement. The debt was \$37,000 on a car worth \$12,000. But it was a co-debtor, and the debtor was there almost in tears indicating that her mother had bailed her out, and kept herself and the two boys alive, if you would, since her husband had walked out. The debtor could not impair her mother's credit because her mother was getting ready to retire. They could not bear the fact that by not reaffirming the car debt then the company would come against the mother or go after the car. The debtor was absolutely emphatic that she had to go through this reaffirmation agreement. Judge Bonapfel decided that he could not allow this reaffirmation agreement. I just sat in back of the courtroom thinking about this attorney, where was this attorney in this process? If in fact the debtor indicated that she went into this bankruptcy with the strong desire that she had to keep up with the car, the attorney was not doing his job.

MS. TREACE: It gets back to what we were talking about in the beginning—the duty to counsel the client.

MR. THOMSON: You mention that it creates conflict, but not an insurmountable conflict. The debtor comes in and wants to reaffirm, and as the attorney you advise her that this is not a good deal. The purpose of bankruptcy is to get you a fresh start. That reaffirming this debt will burden you after the discharge with something you probably can't pay for. What do we do then? Do we withdraw? No, we have a choice to not sign the certificate. We don't certify, so when the creditor files the reaffirmation with the court the debtor will have an opportunity to appear at a hearing to explain to the judge why they feel that the reaffirmation will not be a hardship. I would urge any attorney in that situation to be at that hearing as well to explain to the judge what happened and that you don't agree with it and let the judge hash it all out. So, it's not the type of conflict where you have to withdraw from the case. Because there are steps and a mechanism that is in place that can work an attorney through that problem.

MS. TOWNSON: Not in the Northern District of Oklahoma, however.

MR. AGEE: I agree with Mr. Thomson. But it could be that the relationship between that attorney and that debtor is not ideal, because the debtor may feel like the attorney is at odds with what they want to accomplish. I agree with Mr. Thomson's analysis and that you do have a process you can go through to avoid the conflict.

MR. THOMSON: And most of that begins with the attorney's initial conversation with the debtor.

JUDGE MASSEY: Do you find, Mr. Thomson, that debtors have difficulty understanding all these conflicts.

MR. THOMSON: Yes. They come in with preconceived notions. They come in with information that their cousin gave them or their cousin's cousin: "Well, so and so filed and they got to keep their house. How come I can't file and not pay anything." So, there is a lot of misinformation out there. Attorneys do have to sit down and sort through everything with the clients so they understand what remedies are available in their situation.

AUDIENCE MEMBER: Have there been any reported cases of debtors' attorneys suffering bad consequences for signing off on these new reaffirmation agreements?

MS. TREACE: I don't think there are.

MR THOMSON: I don't think so.

AUDIENCE MEMBER: I worry it's a ticking time bomb, and we are one day going to get taken to the cleaners.

MS. TOWNSON: I think I read somewhere that there are no decisions at this point, maybe it was in this case I referenced. I don't think there are any decisions at this particular time.

JUDGE MASSEY: I would doubt it is a ticking time bomb. What I think you have to do is to make it clear when you're signing such an agreement that it is based on the information the debtors provided in the schedules. That's the only information you can go on. Is it an undue hardship? What do you mean by undue hardship. That's the problem really. It's not a defined term. But if the debtor has, based on the schedules, \$300 of excess income every month and wants to reaffirm a debt that's a hundred dollars, I would say that's not an undue hardship.

JUDGE MASSEY: Another problem occurs when the plan provides for adequate protection payments that are too low in order for the attorney to get paid. That is a fairly common situation.

MR. AGEE: I think that Mr. Thomson brought it up in the second problem. The genesis of this is where attorneys are stacking early in order to get their

fee, knowing that the adequate protections are too low and that it could raise an objection at a confirmation hearing. But this issue is especially important as we get further away from the hour of October 17, 2005, when BAPCPA was enacted, and you see these cases dismissed and the debtor refiles. I have had two cases recently in Rome where the debtor files, the case is dismissed, the debtor refiles, and at the § 341 meeting the creditor announces a claim that is almost the same as was brought in the initial bankruptcy. The debtor asks where did all the money go during the last two years, when I have been in chapter 13 and made eighteen payments? What they have to be told is that the payments went basically for attorney's fees. So that is something I have already seen raise its little ugly head and we're going to have to deal with it.

