

**GUIDANCE ON BIFURCATED FEES & UNBUNDLED SERVICES  
IN CHAPTER 7 CASES FROM  
CHIEF U.S. BANKRUPTCY JUDGE SUZANNE H. BAUKNIGHT**

**I. The Issue Defined:**

- a. In a chapter 7 case, because of exigent circumstances (e.g., a pending foreclosure, repossession, or wage garnishment), a debtor might not be able to pay the entire attorney's fee before filing the petition. The debtor's counsel might desire to offer a bifurcated attorney's fee with the debtor paying some portion of the fee prepetition and the remainder postpetition. Such bifurcated fees usually also involve unbundling the services that are required in chapter 7 for a debtor to obtain a discharge.
- b. A prepetition agreement for the debtor to pay only a portion of the attorney's fee before filing will result in the discharge of the remainder of the attorney's fee under *Lamie v. United States Trustee*, 540 U.S. 526 (2004) (holding that Chapter 7 debtor's counsel cannot be paid from property of the bankruptcy estate and the balance of any attorney's fee owed at the time of the filing is dischargeable).
- c. Courts across the country have explained that bifurcated fees and unbundled services create potential problems under the Bankruptcy Code, the Bankruptcy Rules, and the Rules of Professional Conduct.

**II. Bankruptcy Code Requirements Implicated by Bifurcation/Unbundling:**

- a. 11 U.S.C. § 329 mandates disclosures.
- b. 11 U.S.C. § 330 requires that all fees paid be reasonable (time spent, rates charged, necessity or benefit of services, timely performance of services, skill and experience of professional, and reasonableness in light of customary compensation).
- c. 11 U.S.C. § 362 prohibits violations of the automatic stay from collection activity.
- d. 11 U.S.C. § 524 prohibits violations of the discharge injunction from collection activity concerning discharged debt.
- e. 11 U.S.C. § 526(a)(4) prohibits counsel from advising a debtor or potential debtor to incur more debt in contemplation of filing a case or to pay for services performed as part of preparing for or representing a debtor in a case.
- f. 11 U.S.C. § 526(c)(2)(B) creates a duty for a debt relief agency to file information required by § 521 such that counsel must help the debtor to file the necessary documents (which includes the provision of tax returns before the meeting of creditors).
- g. 11 U.S.C. § 528(a)(1) requires a written contract with the debtor explaining services and fees and the terms of payment within 5 days after the client's first visit and before the petition filed.

**III. Rules Requirements Implicated by Bifurcation/Unbundling:**

- a. Fed. R. Bankr. P. 2016(b): requires disclosure of all compensation paid or agreed to be paid; the rule is mandatory, not permissive.
- b. Fed. R. Bankr. P. 2016(b): requires supplementation of disclosure within 15 days after any payment or agreement not previously disclosed.

- c. Form B2030 Disclosure of Compensation: all aspects of any compensation agreement should be explained; the Instructions state: “A copy of the retainer agreement, if any, should be attached to form.”
- d. Local rules provide limitations on unbundling of services. E.D. Tenn. LBR 2091-1(a) (requiring debtor’s counsel to obtain leave of court upon showing of cause to withdraw from representation of a debtor in a bankruptcy case).
- e. Fed. R. Bankr. P. 1006(b)(3): prohibits receipt of further attorney’s fees before all installments of the filing fee are paid in full.

#### IV. **Ethical Requirements Implicated by Bifurcation/Unbundling:**

- a. Tennessee Rule of Professional Conduct 1.0(b) (Terminology) – “‘Confirmed in writing’ when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.” Tenn. Sup. Ct. R. 8, RPC 1.0(b).
- b. Tennessee Rule of Professional Conduct 1.0(e) (Terminology) – “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Tenn. Sup. Ct. R. 8, RPC 1.0(e).
- c. Tennessee Rule of Professional Conduct 1.1 (Competence): “Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Tenn. Sup. Ct. R. 8, RPC 1.1.
- d. Tennessee Rule of Professional Conduct 1.2 (Scope of Representation & Allocation of Authority Between Client & Lawyer): A lawyer may limit the scope of representation if the limitation is reasonable under circumstances and the client gives informed consent.  
Does a bifurcated agreement with unbundling constitute a limitation reasonable under the circumstances given the goals of bankruptcy and “core services” needed to accomplish those goals?
- e. Tennessee Rule of Professional Conduct 1.4(b) (Communications): “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Tenn. Sup. Ct. R. 8, RPC 1.4(b).
- f. Tennessee Rule of Professional Conduct 1.5(b) (Fees): Fee agreements must communicate to the client, “preferably in writing” the scope of representation and the basis or rate of the fee. “An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay.” Cmt. 5 to Tenn. Sup. Ct. R. 8, RPC 1.5 (emphasis added).
- g. Tennessee Rule of Professional Conduct 1.7(a)(2) (Conflicts of Interest: Current Clients): Unbundling can result in a significant risk that the representation will be materially limited by a personal interest of the lawyer.

- h. Tennessee Rule of Professional Conduct 7.1(a) (Communication Concerning a Lawyer's Services): Failure to disclose the dischargeability of an unpaid prepetition fee might violate the prohibition of false or misleading communications about the lawyer's services.

**In consideration of the requirements of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, and the Rules of Professional Conduct, and after review of numerous decisions of other courts, some of which permit bifurcation and unbundling with safeguards and others of which outright prohibit bifurcation and unbundling, Chief Judge Bauknight will permit bifurcation and unbundling with the following requirements but only for those individual debtors with exigent circumstances necessitating bankruptcy protection before they are unable to pay the entire attorney's fee.**

1. Written informed consent (provided to the Court with the Rule 2016 disclosures): The propriety of a bifurcation/unbundling is directly proportional to disclosure and information provided to the client with documentation that the client made an informed and voluntary election for bifurcation/unbundling.
2. Informed consent for bifurcation of the fee must minimally set forth the following options:
  - a. The client may wait to file the petition until the attorney's fee is paid in full;
  - b. The client may continue pro se after the petition is filed, with the attorney seeking court to permission to withdraw if the client chooses to handle postpetition matters pro se;
  - c. The client may hire new counsel to handle postpetition matters; and
  - d. The client may decide postpetition to retain counsel for counsel to handle postpetition matters.
3. Informed consent for unbundling bankruptcy services must minimally include:
  - a. A thorough client interview by the attorney before offering bifurcation or unbundling to the client to determine core services and potential obstacles to the client receiving the chapter 7 discharge and
  - b. An explanation to the client of the consequences of unbundling of services, including:
    - Failure to comply with §§ 521 and 542;
    - Potential dismissal and the effect of serial filings on the automatic stay;
    - Failure to attend the meeting of creditors; and
    - Failure to cooperate with the trustee.
4. Accurate pre- and postpetition agreements without contradictory provisions are required. Notably, the split between the pre- and postpetition fees must be reasonable, and the fee for prepetition services should not be "slipped into" the postpetition fee.
5. The attorney's fee may not be factored.
6. The postpetition agreement must be executed postpetition and no earlier than the second day after the petition is filed.
7. Bifurcation/unbundling must be based on the client's best interest, not the lawyer's financial interests.
8. Fees must be reasonable and necessary and the same amount as would be charged to an otherwise similar client who can pay the entire fee prepetition.
9. Timely, accurate, and complete Rule 2016(b) disclosures, (including required supplementation) which must fully explain the pre- and postpetition agreements, including providing a copy with the filed Form B2030.
10. The Statement of Financial Affairs must include accurate and complete information at question 16.

11. If the client chooses not to retain counsel for postpetition matters, counsel must comply with the Local Rule regarding withdrawal and/or substitution. (Chief Judge Bauknight will treat a fully informed, appropriate prepetition agreement with no postpetition retention as cause under the local rule.)
12. The court filing fee must be paid in full before counsel may receive postpetition payments, and the client should be informed of the requirement so that Rule 1006(b)(3) is not violated.