

2019 Solo and Small Firm Conference  
Oklahoma Bar Association

**Current Issues in Bankruptcy Law**

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### Disclosure of Attorney Fees

In *In re Wright*, 591 B.R. 68 (Bankr. N.D. Okla. 2018), the United States Trustee brought to the Court's attention seventeen chapter 7 cases that one attorney filed in 2017, in which numerous filed disclosures regarding attorney fees turned out to be inconsistent, incomplete, or inaccurate. The Court held that 11 U.S.C. § 528, which pertains to "debt relief agencies", applies to attorneys representing debtors and requires a contract in writing that describes the services to be provided and the fees for those services. The Court held that Sections 329 and 2016(b) require the debtors' attorney to make an accurate and complete fee disclosure in the Disclosure of Compensation of Attorney for Debtors (Form B2030). The Court held that the debtors' attorney must make sure that the answer to Question 16 of the Statement of Financial Affairs is accurate. The Court found that the contracts, SOFA 16, and DCA often disagreed in the cases under consideration. Of concern to the Court was the debtors' attorney's failure to disclose his relationship with a third-party billing agency with which he had contracted regarding collection of attorney fees from the debtors post-petition. Another concern was that pre-petition services may have been underperformed or undercharged and shifted to post-petition. The Court held that Rule 1006(b)(3) requires all installment filing fees to be paid before a debtor may pay any further attorney fees. The Court held that an attorney may not substitute an agreement to disgorge fees for a complete explanation of the facts. The Court held that having a pure heart with no subjective intent to break the rules is no defense and that neither is blaming mistakes on staff. The Court required the debtors'

attorney to disgorge the value of all fees actually collected post-petition from the debtors by the third-party billing agency.

The Court described the debtors' attorney's arrangement with the third-party billing agency as follows (footnotes omitted):

BK Billing, LLC ("BK Billing"), a Utah limited liability company, is a finance company that provides factoring services to bankruptcy counsel in Chapter 7 cases. On May 11, 2017, [debtors' counsel] executed an Accounts Receivable Assignment Agreement (the "AR Agreement"), in which he established a factoring arrangement with BK Billing.<sup>7</sup> The AR Agreement set up a mechanism where [debtors' counsel] would sell his accounts receivable for "post-petition services" to Chapter 7 consumer debtors based on client contracts that he uploaded to the BK Billing system. [Debtors' counsel] ultimately factored, or sold, 14 client contracts to BK Billing under the AR Agreement ("the BK Billing Cases"). Under the original AR Agreement, [debtors' counsel] agreed to transfer each account receivable in exchange for 70% of the total contractual value of the account, which amount was to be received by [debtors' counsel] with 2-3 business days.<sup>8</sup> An amendment executed on July 5, 2017, increased the total amount paid to [debtors' counsel] upon the submission of an account to 75% of the value of the contract, but lowered the amount immediately available to [debtors' counsel] to 60%, and set the other 15% aside in an escrow account to be maintained by BK Billing as security for performance of the transferred accounts.

The Court made these remarks about the BK Billing model (footnotes omitted):

Several courts across the country have faced variations on this theme. Some have offered advice and recommendations in order to craft an acceptable scheme whereby attorneys may offer bifurcated services. Others have noted that various provisions added to the Code by BAPCPA appear to thwart such schemes. This Court has reviewed the cases carefully and believes that BAPCPA presents serious impediments to the legality of this kind of bifurcated services scheme, such as the BK Billing Model. The difficulty here is that no one appears in these cases to defend the model or offer an alternative argument to the Court. That seems like shaky ground to rule or comment on the validity of the model. Because the Court has disposed of these matters under section 329, it is not necessary to review them further on alternative grounds. Therefore the Court will wait until issues of bifurcation of services and fee factoring are before it in an actual

case or controversy before it weighs in on §§ 526 and 528. The Court raises these issues in the hope that counsel considering use of a similar scheme will carefully review the legal and ethical provisions of BAPCPA and state ethics rules *before* they file a petition in this district.

### Bifurcation of Chapter 7 Fees and Services

Leaving aside the disclosure infractions and factoring of fees to a third-party agency that occurred in the *Wright* case, the bifurcation of pre-petition services and fees from post-petition services and fees presents many questions:

1. If the debtor's attorney receives pre-petition payment in full for his pre-petition services, why should he not be allowed to charge and receive payment post-petition for his post-petition services?
2. The automatic stay and discharge injunction do not cover debts incurred post-petition in a chapter 7 case, so how can they prevent collection of post-petition attorney fees?
3. The debtor's pre-petition contract with the attorney is not enforceable post-petition, so why can the attorney charge for post-petition services?
4. Even though the pre-petition contract is not enforceable, isn't the attorney entitled to compensation *quantum meruit* for his post-petition services?
5. Does the attorney, by filing the bankruptcy petition, become obligated to perform some core post-petition services? After all, an attorney cannot withdraw from a case in a bankruptcy case just because he is not receiving payment.
6. However, in most federal court matters, can't an attorney charge and receive fees during the pendency of the case, even though he can't quit?

7. If there are any such mandatory post-petition services, are they limited to preparation and filing of required schedules and statements and attendance at the meeting of creditors, or do they include other things such as cooperation with the trustee, reaffirmation agreements, motions to avoid liens, and opposition to motions to dismiss?
8. Assuming bringing and defending adversary proceedings are not such mandatory post-petition services, can the attorney become obligated to perform them anyway if he knew or should have known that they would be needed on the facts of the particular case and failed before filing the case to obtain his client's informed (emphasis on informed) consent to unbundling them?
9. Even if an attorney can charge and receive payment for post-petition services and fees, wouldn't he be prohibited from undercharging for pre-petition services and making up by overcharging for post-petition services?
10. Even if an attorney can charge and receive payment for post-petition services and fees, can he shift fees from pre- to post-petition by deferring preparation of schedules and statements until after the case is filed?
11. How can attorney who has not prepared schedules and statements know whether filing the bankruptcy case is advisable?
12. Is there some level of pre-petition investigation and analysis that makes it responsible for the attorney to file a "bare-bones" case?

### Forty Questions to Trap Bankruptcy Surprises

These are some questions that I have developed over the years to make it less likely that debtor clients will experience unpleasant surprises in their bankruptcy cases. As time permits, I will discuss in my oral presentation why these questions are important. Many will be obvious, some perhaps less so.

1. Do you have homeowner association dues?
2. Do you have a safe deposit box?
3. Did you reside in another county in past 3 yrs?
4. Any postdated checks/automatic bank drafts?
5. How many people in your house counting you?
6. Do you have any connection to a trust?
7. Previously consulted an attorney about bkcy?
8. Do you have any bounced checks out?
9. Have you filed bankruptcy before?
10. Did you pay over \$5000 down on your home?
11. Do you own an IRA that was inherited?
12. Do you expect a tax refund?
13. Are you a family farmer?
14. Does your home property exceed 1 acre?
15. Have you ever used your home for business?
16. Do you owe any 401k loans?

17. Are you a veteran or active military?
18. Have you missed filing any tax returns?
19. Did you ask for a hearing regarding any of your tax debts?
20. Did you file any tax returns late?
21. Do you owe student loans?
22. Do you owe back child or spouse support?
23. Do you have any cosigners or guarantors?
24. Are your wages being garnished?
25. Are there any suits or judgments against you?
26. Does your home have over \$125000 equity?
27. Has your income decreased in past 6 months?
28. Have you made or renewed any loans in past 90 days?
29. Does your mortgage have a balloon payment?
30. Do you reside outside Oklahoma?
31. Besides clothes, furniture, and appliances, do you own or possess anything that  
you have not told your attorney about?
32. Have you charged on your credit cards in past 90 days, including cash advances &  
balance transfers?
33. Is there an ex-spouse who is liable on any debts that you were ordered by a  
divorce court to pay?
34. In past 3 yrs., have you paid/given any money or property to relatives, friends, or  
business associates?

35. In past 3 yrs., has your name been on anyone else's house, land, vehicle, account, or other thing?
36. In past 3 yrs., have you received a lump sum over \$1500 (e.g. inheritance, loan, settlement, sale, refund)?
37. Are you expecting any inheritance, settlement, payment, or other lump sum or property?
38. Are you accused of, or did you commit, fraud, willful injury, drunk driving injury, or embezzlement?
39. Do you keep money in an account at a bank or credit union to which you owe a debt?
40. Do you owe multiple loans or credit cards to any single creditor?



## **BRIAN HUCKABEE**

Brian Huckabee is a Tulsa, Oklahoma, attorney with a practice concentrated in bankruptcy and business law. He has handled thousands of business, tax and consumer bankruptcy cases in the past three decades, consisting primarily of chapter 7 and 13 cases, but also including numerous chapter 11 business reorganizations and chapter 12 farm bankruptcies. He represents debtors but has credit union and creditor clients. He serves as an Adjunct Settlement Judge in the United States Bankruptcy Court for the Northern District of Oklahoma. He is a member of the Board of Governors of the Bankruptcy and Reorganization Section of the Oklahoma Bar Association. He is a frequent speaker at continuing legal education events. He is licensed in all of Oklahoma's federal judicial districts, but he concentrates in the Northern and Eastern Districts. He is a member of the Bankruptcy Section of the Tulsa County Bar Association. He received a Bachelor of Arts degree with Honors from Oklahoma State University in 1978 and a Juris Doctorate degree from University of Oklahoma in 1981. He has been married for 37 years. He has two grown children. He attends Harvard Avenue Christian Church in Tulsa.