



COURSE 1003-D
PROTECTING YOUR FEES
IN CONSUMER BANKRUPTCY CASES

HOUR # 1

TRAPS FOR THE UNWARY
In Chapter 7 Cases

Presenter: [Morgan King](#)

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AS AN ENROLLEE you can purchase King's book, **FEES & ETHICS IN CONSUMER BANKRUPTCY CASES**, on which this course is based, with a **50% discount**. Go to BankruptcyBooks.com, select the book title, then place your order. In the "Coupon Code" box enter the password you used to view this video.

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FEES: TRAPS FOR THE UNWARY	CITES TO TEXT	CITES TO AUTHORITIES
<p>FEES: TRAPS FOR THE UNWARY</p> <p>CHAPTER 7</p> <p>No need for court appointment to represent debtor</p> <p>Customary to charge fee in advance</p> <p>Court has jurisdiction to examine fees and order attorney To disgorge if “unreasonable”</p>	<p>¶ 7.8 KING'S FEES & ETHICS IN CONSUMER BANKRUPTCY CASES 11 U.S.C. § 329</p>	
<p>FEES: TRAPS FOR THE UNWARY</p> <p>VAGUE AS TO NATURE OF THE AGREEMENT</p> <p>TYPICALLY A FIXED FEE</p> <p>COVERS BOTH PRE AND POST-PETITION SERVICES</p>	<p>¶ 4.1(a)</p>	<p>QuickTime[®] and a decompressor are needed to see this picture.</p>
<p>FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 1</p> <p>Failing to collect full fee for prepetition services before filing the petition</p> <p>Unpaid balance due is discharged</p> <p>Includes demands for payments, as well as post-dated checks.</p>	<p>¶ 4.1(c)(1)</p>	<p>In re Waldo, 417 B.R. 854 (Bankr. E.D. Tenn., 2009) Required attorney to “disgorge” all fees collected postpetition for services owed prepetition. (e.g. Post-dated checks)</p> <p>LAWYER DISGORGING FEES</p> 
<p>FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 2</p> <p>Collecting, pre-petition, fees to cover postpetition services</p> <p>Balance of fees in lawyer’s possession are property of the estate and must be disgorged.</p> <p>But attorney may charge and collect from the debtor’s postpetition income for services performed postpetition.</p>	<p>¶ 4.1(c)(2) ¶ 4.5</p>	<p>Chapter 7 Trustees’ Handbook:</p> <p>“The trustee should be alert for retainers held by debtors’ attorneys. While courts generally hold that an unearned retainer on hand at the commencement of a case constitutes estate property, <i>the trustee may have to initiate action to obtain the balance of the retainer.</i>”</p>

<p>Attorney may also accept funds from 3rd persons for postpetition services.</p> <p>Query: Can there be a “3rd party beneficiary” agreement signed prepetition by debtor’s friend, employer, or relative, that is enforceable post-petition.</p> <p>Have the prepetition retainer agreement co-signed by the 3rd party.</p>		<p>ATTORNEY AND TRUSTEE FIGHTING OVER FEES</p> 
<p>FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 3</p> <p>Failure to have a written fee agreement.</p> <p>Generally required</p> <p>Must include provisions required by BAPCPA Within 5 business days of initial conference</p> <ul style="list-style-type: none"> • Lawyer is a debt relief agency • Clear description of services to be provided • The fees to be charged for such purposes 	<p>¶ 4.10</p>	<p>Debt Relief Agencies must provide a written fee agreement.</p> <p>11 U.S.C. § 528(a)</p> 
<p>FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 4</p> <p>Failure to file amended Rule 2016(b) statement</p> <p>Fees collected postpetition:</p> <p>From debtor for postpetition services</p> <p>Paid postpetition by 3rd party</p> <p>Other events triggering compensation</p>	<p>¶ 7.4</p> <p>¶ 4.9</p> <p>¶ 2.4(g)</p>	<p>Bankruptcy Rule 2016(b)</p>
<p>FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 5</p> <p>Fee-splitting or fee-sharing</p>	<p>¶ 7.4(d)</p>	<p>11 U.S.C § 504(a)</p>

<p>Generally prohibited</p> <p>May share fees with a “member, partner, or regular associate”</p> <p>“Trafficking” in bankruptcy cases</p> <ul style="list-style-type: none"> • Attorney signs up case then refers it out to outside firm, but keeps a portion of the fee. • Marketing entity generates the cases and refers them to attorneys having exclusive areas, and charges those attorneys a fee for each case referred. ?????? • Paying attorney to appear at 341 hearing • One inexperienced attorney paid another more experienced attorney to advise his client on bankruptcy issues • Sharing office space, equipment and supplies – one attorney signed up the client and had the other handle the case on a “fifty-fifty” fee split agreement • Contingency fees • Kick-back to the client or referral source • Bonus paid to office staff on a per-case basis. <p>KEY QUESTION: What is a “regular associate” of a firm?</p> <p>ANOTHER QUESTION: Is “outsourcing” the preparation of petitions and schedules a form of fee-splitting?</p> <p>Some case law acknowledges need to hire “temps” to help on a case. But yet clear what the elements of allowable temp</p>		<p>QuickTime[®] and a decompressor are needed to see this picture.</p> <p>Use of outsourced services should be disclosed</p> <p>Lawyer should personally interact with client</p> <p><u>In re Datta</u>, Case No.: 8-08-72740-ast (Bankr. E.D.N.Y. 7/2/2009) (Bankr. E.D.N.Y., 2009); <u>In re Zuniga</u>, 332 B.R. 760 (Bankr. S.D. Tex., 2005)</p> <p>Outsourcing of paralegal service was allowed, with cautionary words to attorney regarding adequate supervision and assuring that the paralegal does not provide legal advice.</p> <p><u>In re Van Dyke</u>, 296 B.R. 591 (Bkrctcy.Mass. 2003)</p>
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employment are.		
<p style="text-align: center;">FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 6</p> <p>Unsupervised paralegal</p> <p>An issue related to that of “outsourcing” is paralegals practicing law without a license.</p> <p>Giving advice prohibited Must be closely supervised Who handles the initial office meeting?</p>	<p>¶ 7.2(f)</p>	<p>Lawyer should personally interact with client</p> <p>In re Datta, Case No.: 8-08-72740-ast (Bankr. E.D.N.Y. 7/2/2009) (Bankr. E.D.N.Y., 2009); In re Zuniga, 332 B.R. 760 (Bankr. S.D. Tex., 2005)</p> <p>Outsourcing of paralegal service was allowed, with cautionary words to attorney regarding adequate supervision and assuring that the paralegal does not provide legal advice.</p> <p>In re Van Dyke, 269 B.R. 591 (Bkrcty.Mass. 2003)</p>
<p style="text-align: center;">FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 7</p> <p>Source of the funds</p> <ul style="list-style-type: none"> • Client’s credit card? • Debit card? • Credit card from 3rd person? • Loan from mom or dad? • Payment “in kind” • Postdated checks • A creditor (conflict of interest?) • Assignment (e.g., tax refund) <p>√ No law against paying a discharged debt</p>	<p>¶ 7.4(c)</p> <p>In kind ¶ 7.4(c)(3)</p> <p>Assigned tax refund ¶ 4.3(f)</p>	<p style="text-align: center;">QuickTime[®] and a decompressor are needed to see this picture.</p> <p>Assignment of tax refund is property of the estate.</p> <p>In re Wagers, 514 F.3d 1021 (10th Cir., 2007) (follows Lamie)</p>
<p style="text-align: center;">FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 8</p> <p>The limited-engagement retainer</p> <p>Attorney agrees to provide services through the meeting of creditors.</p> <p>Deems motions, reaffirmation agreements,</p>	<p>¶ 4.11</p>	

<p>adversary proceedings and amendments to schedules to be separate additional services, charged separately.</p> <p>Weight of authority is that such agreements are not permissible.</p> <p>Local practice varies widely on this issue.</p>		
<p style="text-align: center;">FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 9</p> <p>Failure to get court appointment to represent debtor in civil case</p> <p>e.g. Client’s personal injury case</p> <p>Your fee in such a case is property of the estate, because the case is property of the estate.</p> <p>Supreme Court held that a debtor’s attorney cannot be paid out of the estate.</p>	<p>¶ 4.4</p>	<p>Lamie v. U.S. Trustee 540 U.S. 526, 124 S.Ct. 1023 (2004)</p> <p>Attorneys fees in pre-petition litigation are property of the estate</p> <p>In re Stylianou, Case No. 01-16121 (AJG) (Bankr. S.D.N.Y. 8/21/2009) (Bankr. S.D.N.Y., 2009)</p>
<p style="text-align: center;">FEES: TRAPS FOR THE UNWARY</p> <p>TRAP # 10</p> <p>Lack of, or inadequate, time & billing log.</p> <ul style="list-style-type: none"> • Must keep contemporaneous time, not “reconstructed time” • Must bill in increments of .10 • Must avoid “estimating” or “rounding off.” 	<p>¶ 6.3</p>	

“SUBMIT REQUESTED ISSUES”

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