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06-04

Clerk of the Supreme Court
110 East Main Street
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Madison, WI 53701-1688

Re: In the matter of review of amendments to SCR 20:1.15 Safekeeping Property; SCR 20:1.0 Definitions; SCR 21:16 Discipline; and SCR 12.04 Wisconsin Lawyers' Fund for Client Protection

To the Justices of the Wisconsin Supreme Court:

I am a member of the Trust Account Working Group of the State Bar of Wisconsin, and fully endorse the conclusions and recommendations that group is submitting by separate memorandum in connection with this Court's review of the above rules. I write the Court separately as a practicing bankruptcy lawyer and former chair of the Bankruptcy, Insolvency, and Creditors' Rights Section of the State Bar of Wisconsin to provide additional comment about the interplay between SCR 20:1.15 and bankruptcy practice. The views expressed below are solely my own.

With rare exception, lawyers who represent debtors in Chapter 7 cases typically charge a flat fee for an agreed-upon bundle of services. The services generally include advice about the advisability of filing bankruptcy and the options available under Chapter 7 and 13 of the Bankruptcy Code; the preparation of the debtor's petition, schedules, and statement of financial affairs; attendance at the debtor's first meeting of creditors; and the negotiation of reaffirmation agreements with creditors. The services are fairly standardized, and, in the typical consumer bankruptcy case, a fairly standardized flat fee is charged, often between $1,200 and $1,800, depending on such factors as the complexity of the case and the time that may be involved traveling from the city in which the lawyer's office is located to the location of the initial creditors meeting. For business debtors in Chapter 7, bankruptcy lawyers typically charge a higher flat fee.

The Bankruptcy Code and Rules provide a specific framework for disclosure of fees paid or agreed to be paid and for potential bankruptcy court review of the reasonableness of such fees. Under Bankruptcy Code § 329 and Federal Rule of Bankruptcy Procedure 2016(b), any attorney representing a debtor in a bankruptcy case must file with the bankruptcy court, within 14 days of the commencement of the case, a statement disclosing any compensation paid

in the year prior to the filing, or any agreement for payment made in that time, and the source of any payment made. If the attorney receives any additional payment after the bankruptcy case is filed, a supplemental statement must be filed within 14 days of the payment. Any party in interest may object to the reasonableness of the fees. If the bankruptcy court finds the fees to exceed the reasonable value of the services provided, it may cancel the fee agreement and order the payment of any unreasonable fees to the bankruptcy estate (if the fees would otherwise have become property of the bankruptcy estate) or to the source of the fees.

These procedures enable close review of bankruptcy fees. The Chapter 7 trustee appointed in each bankruptcy case is made aware of the fees paid. In addition, the United States Trustee's Office, a branch of the Justice Department charged with monitoring bankruptcy cases, monitors Rule 2016(b) statements and requests explanations from attorneys whenever the fees charged appear disproportionate to the complexity of the case. If doubts remain, either the Chapter 7 trustee or the U.S. Trustee will bring the matter before the bankruptcy judge for a review of the reasonableness of the fee.

Most bankruptcy cases do not result in any challenge to the attorney's fee. The fee is disclosed; there is opportunity for objection; but, usually, there is no objection. In these circumstances the bankruptcy court does not affirmatively rule upon the reasonableness of the attorney's fee.

Significant practical problems would be posed by a legal requirement that an attorney could not be paid (and deposit into the attorney's own business account) a flat fee in anticipation of a bankruptcy case. Under § 541 of the Bankruptcy Code, the filing of a bankruptcy petition creates the bankruptcy estate, which consists of all of the debtor's property, wherever located. Unless the debtor is able to claim an applicable exemption, under Bankruptcy Code § 542 any person possessing property of the bankruptcy estate must promptly turn it over to the Chapter 7 trustee to be administered for the benefit of creditors. If bankruptcy lawyers were required to retain in their trust accounts any "unearned" portion of the flat fees their clients had paid them, upon the filing of the bankruptcy cases, it would be their duty under Bankruptcy Code § 542 to remit those funds, promptly, to the trustees in the cases -- and risk going unpaid for all postpetition services. Since postpetition services -- at a minimum, appearance at the first meeting of creditors -- are a necessity in every bankruptcy case, a rule that prohibited bankruptcy lawyers from receiving flat fees prepetition from their clients and depositing such fees into the attorneys' checking accounts, would mean that bankruptcy lawyers could not be assured of any payment for postpetition services. Such a rule, far from protecting clients' interests, would make it more difficult for people in financial distress to secure legal representation.

It was to avoid practical problems such as this that the State Bar of Wisconsin and the Office of Lawyer Regulation proposed, in 2006, that fees that are subject to judicial scrutiny for reasonableness be exempt from the requirement of SCR 20:1.15 that unearned advanced fees

either be deposited into a trust account or else subject to the alternative protection for advanced fees available under SCR 20:15(b)(4m). However, SCR 20:15(b)(4m), as ultimately adopted, is potentially ambiguous. It states that a lawyer may deposit a flat fee into the lawyer's checking account, "provided that a court of competent jurisdiction must ultimately approve the lawyer's fee," or the lawyer complies with the various procedures for the alternative protection including agreement to fee arbitration. As noted above, the bankruptcy process requires disclosure of bankruptcy fees, facilitates their scrutiny, and provides a mechanism for bankruptcy court review of reasonableness. But bankruptcy court review only occurs if requested. Thus it is not clearly the case that the bankruptcy court "must ultimately approve the lawyer's fee." In consequence of this ambiguity, it is unclear whether bankruptcy lawyers must give the SCR 20:15(b)(4m) notices if they seek to charge flat fees in bankruptcy cases and deposit them into their business account before all of the services are provided. In real life, from what I've gathered, virtually no bankruptcy lawyers do so. Notwithstanding this, I have heard the suggestion made that SCR 20:15(b)(4m) may require the two-notice procedure, with provision for fee arbitration, if a lawyer seeks to charge a flat fee in a bankruptcy case and deposit it into the lawyer's business account before the case is filed. This was not the intent of this rule. Nor, given the existing procedures for bankruptcy court review of debtors' lawyers' fees, is it appropriate to superimpose the cumbersome two-notice procedure and mandatory provision for fee arbitration.

If the Court has occasion to clarify or modify the text of SCR 20:1.15, it would be helpful to clarify that lawyers may deposit flat fees into their business accounts where the fees are subject to review for reasonableness in the proceeding to which they relate, without need for compliance with the two-notice fee arbitration procedure.

Thank you for consideration of these comments.

Very truly yours,

Leonard G. Leverson

LGL/dk