

CHECKLIST FOR DRAFTING A RETAINER AGREEMENT
FOR CHAPTER 13 CLIENTS

See the companion Toolbox form “Agreement for Chapter 13 Bankruptcy Services”

- 1) Identify the parties to the agreement.
 - a) Attorney:
 - i) Is the agreement with a firm or with an individual attorney?
 - ii) Should there be a provision authorizing the attorney to use a substitute to cover for him/her at a hearing?
 - b) Client:
 - i) Identify both spouses if it is a joint case.
 - ii) If the clients who will be filing a joint case are experiencing marital difficulties, should the agreement deal with the potential conflict that may arise should the joint debtors divorce during the chapter 13 case?
- 2) Describe the services the attorney will provide.
 - a) EXAMPLE: “Client retains (hires) Attorney to provide legal services in a chapter 13 bankruptcy case. Services to be rendered include, but are not limited to, advice to Client before and during the case concerning the nature and effect of Chapter 13 bankruptcy; pre-petition planning and counseling; necessary consultations and interviews; analysis of information relating to Client’s financial affairs; preparation and filing of the petition, schedules, statements, and chapter 13 plan; attendance at the meeting of creditors and all court hearings (except as otherwise excluded in this Agreement); negotiations with creditors and trustee to present a confirmable plan; preparation of defense in the event of a motion to dismiss or motion for relief from stay; preparation of motions to amend the plan, add creditors, incur credit or suspend payments; preparation and filing of motions to avoid liens and other routine pleadings; review of claims and related matters; continued monitoring of all pleadings filed in the case; and preparation and filing of discharge documents; and other regular and routine services not specifically stated herein.”
 - b) Has the Court adopted (or has the Trustee suggested the use of) a Model Retention Agreement or a “Rights and Responsibilities of Chapter 13 Debtors and Attorneys” in the applicable jurisdiction? If so, that document might dictate the services to be rendered. The Retainer Agreement must be consistent with local rules, forms and custom.
 - c) Review the Rule 2016 Disclosure of Compensation of Attorney for Debtor. Some bankruptcy software programs have built-in lists of services covered and not covered by the disclosed compensation, and those provisions are automatically inserted into the form Disclosure Statement in every case. Those default provisions can and should be changed to be consistent with the terms of the Retainer Agreement.

- 3) What are the fees the attorney agrees to accept for rendering the services specified?
- a) Fee structure:
- i) If the agreement is for a flat fee, what is the amount (should be consistent with local rule or established “no-look fee”). The attorney who agrees to a flat fee does so at his/her peril. Should there be unanticipated problems, complications, litigation, etc. and the retainer agreement does not authorize the billing of additional fees for these unanticipated matters, the attorney has no basis for requesting court approval of additional fees.
 - ii) If the attorney charges by the hour, set forth the fee schedule for attorneys and paralegals; explain that fees will be charged for phone calls, email, correspondence, etc. with the client and other parties in the case; identify the minimum billing increments (.10 hour, for example).
 - iii) The agreement might be a hybrid: a flat fee for specific services, with the right to bill for additional services.
 - (1) Identify the services covered by the flat fee (consistent with local rule or other custom allowing “no-look fees”);
 - (2) Identify services for which additional compensation will be sought; Examples: Rule 2004 exams, depositions; evidentiary hearings; contested hearings; proceedings arising from client’s failure to provide complete and accurate information to attorney; etc.).
 - (3) Identify how any additional compensation will be charged (Per hour? Per service (like \$100 to attend a hearing)? Set forth the fee schedule).
- b) The fee structure in the Retainer Agreement must match the compensation disclosed in the Rule 2016(b) Disclosure of Compensation of Attorney for Debtor, and must be consistent with local rules or practice regarding what is covered by “no-look” fees.
- c) When are fees earned, and when are payments due:
- i) Require a prepaid retainer? When is it due - prior to starting any work on behalf of the client? Prior to filing petition? Or will all compensation be paid through the plan?
 - ii) If there is a prepaid retainer, is it earned when received? Or held until the Bankruptcy Court approves fees?
 - iii) Is any part of the retainer refundable? How will the retainer be applied if a petition is not filed? If case is dismissed prior to confirmation?
 - iv) What about refunds owed by the trustee to the client if a case is dismissed prior to confirmation - include authorization that any check issued by the trustee payable to the client can be deposited into attorney’s escrow account, and that the attorney can be paid prior to refunding the balance to the client?

- v) How much of the agreed-upon fees will be due and payable if the case is dismissed or converted before the fee has been paid in full through the plan? Prorate the fee depending on stage of case at time of dismissal or conversion? Or is it all due and payable?
- 4) Payment of expenses and costs:
 - a) How will the initial filing fee be paid? If paid through attorney's escrow account, should the payment be disclosed on Statement #9 of the Statement of Financial Affairs?
 - b) How will additional filing fees, such as for amending schedules or adding creditors, be paid?
 - c) How will the cost for obtaining credit counseling be paid: directly by the client to the agency? Or through the attorney's escrow account? Disclose the payment on Statement #9 of the Statement of Financial Affairs.
 - d) How will charges for obtaining credit reports, performing asset searches, etc. be paid (as part of the initial retainer? Billed separately to be paid prior to filing? Or added into the compensation that will be paid through the plan?).
 - e) How will expenses such as copying and postage be paid (included as "overhead" in attorney's compensation? Billed separately? What is the cost per page for copying?).
- 5) Describe the services or matters that are outside of the scope of representation. These are matters in which the attorney is not representing the client (as opposed to services that are not covered by an agreed-upon fee). If the client wishes the attorney to provide services in these matters, a separate retention agreement will be required.
 - a) Examples:
 - i) Adversary proceedings (does the applicable jurisdiction allow attorneys to exclude adversary proceedings from the scope of representation?);
 - ii) Appeals;
 - iii) Matters in courts other than Bankruptcy Court (Examples: divorces; personal injury causes of action; administrative proceedings).
 - b) Other Considerations:
 - i) Does the applicable jurisdiction allow attorneys to "unbundle" services and limit the scope of representation only up to the filing of the petition, appearing at the 341 meeting, or up to confirmation? (Even if the limited representation is allowed, it is not recommended in representing chapter 13 debtors).
 - ii) Does representation of the client in the chapter 13 case obligate the attorney to continue representation if case needs to convert to 7? Is a new retainer agreement necessary? Or are services rendered in the converted chapter 7 case covered in this agreement?
- 6) Termination of representation:
 - a) Client may terminate the attorney's representation at any time.

- b) Termination by the attorney before the filing of the petition:
 - i) Describe the grounds on which the attorney may terminate representation prior to filing the petition. Client's failure to pay the retainer? Client's failure to provide information requested?
 - ii) Does the attorney need to give written notice to the client to effectuate the termination?
 - iii) Or provide that the Agreement is void if within X days after execution client does not provide attorney with requested information, or does not keep follow-up appointment, or does not pay, etc.?
 - c) After filing, representation should continue until the case is dismissed, discharged, or court approves attorney's withdrawal.
 - i) Does the applicable jurisdiction allow the attorney to withdraw without court approval?
 - ii) As discussed above, can the attorney "unbundle" services and terminate representation upon the occurrence of an event such as confirmation?
 - d) What reasons would justify the attorney's withdrawal after filing the petition? Examples: client is non-responsive; uncooperative; untruthful; etc.; or "circumstances would render Attorney's continuing representation unlawful or unethical."
- 7) Client Duties: Describe what the client should be contractually obligated to do. (Examples: "Provide complete, truthful, and accurate information at all times; timely provide Attorney with all documents requested by Attorney; promptly respond to all communications from Attorney; cooperate with Attorney in preparing all required bankruptcy papers and documents, thoroughly reviewing drafts of documents, and promptly advising Attorney of corrections or additions needed; keep Attorney informed of Client's address and telephone number; inform Attorney of any significant financial changes that occur during the chapter 13 case.")
- 8) The written agreement constitutes the entire agreement; Client has read and understands the agreement.
- 9) The agreement must comply with the DRA provisions of 11 U.S.C. §§ 526, 527, and 528 of the Bankruptcy Code.
 - a) Client acknowledges that the date of the Agreement is the date the attorney first provided bankruptcy assistance.
 - b) Client acknowledges receipt of "Combined Notice Required by 11 U.S.C. §§ 527(a)(1) and 342(b)(1)," the "11 U.S.C. §§ 527(b) Notice," and the "Notice Required By 11 U.S.C. § 527(c)."
 - c) Client acknowledges receipt of the Retainer Agreement.
- 10) Other provisions to consider:

- a) Retention and disposition of files: Describe how long the attorney retains files; specify that closed files may be securely discarded after the specified period of time.
- b) Signature and ECF: Client's signature on the Agreement authorizes the attorney to file documents on behalf of the client via the Bankruptcy Court's Electronic Case Filing System.
- c) Methods of communication (phone, mobile phone, mail, email, texting, etc.):
 - i) Have the client specify how s/he wants to receive communications;
 - ii) Include a disclaimer that electronic communication may not be confidential.
- d) General disclaimer: Attorney cannot guarantee results.
- e) Stern warning: Client understands that providing false or incomplete information in the bankruptcy case could subject the client to criminal action.
- f) Attorney's Lien: Describe the extent of any applicable attorney's lien allowed under applicable state law.
- g) Collection: In the event of a default in payment, will interest accrue on the unpaid balance of fees owed? Is the client liable for collection costs, including reasonable attorneys' fees?

Sources:

Lawyers' Professional Indemnity Company (of Canada),

www.practicepro.ca/financesbooklet;

Lawyers Mutual Insurance Company of Kentucky, www.lmick.com/resources.html;

Marc S. Stern & Joel Pelofsky, Letters for Bankruptcy Lawyers (American Bar Association 2005), www.ababooks.org;

Leon D. Bayer et al., Best Practices for Filing Chapter 13 (Aspatore Books, 2011 ed.) (Chapter 7 Retainer Agreement at Appendix A), www.Aspatore.com;

"Rights and Responsibilities for Chapter 13 Debtors and Their Attorneys," Local Form #14 (U.S. Bankruptcy Court, Eastern District of Kentucky), www.kyeb.uscourts.gov.