Louisiana Supreme Court Requirements for CLE One Hour Credit for Professionalism and One Hour Credit for Ethics

IS THERE A DIFFERENCE?

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On May 23, 1997, the Louisiana Supreme Court entered an Order (**Order**) that requires Louisiana lawyers to include one hour of "professionalism" in their fifteen hours (now 12.5 hours) of annual continuing legal education credits. The **Order** also requires Louisiana lawyers to obtain one hour of credit in "legal ethics." The **Order** represents a significant change in mandatory continuing legal education requirements. The **Order** substantially amended Rule 3(c) of the Rules for Continuing Legal Education. First, it added professionalism as a required CLE topic and second, the **Order** attempted to distinguish "legal ethics" from "professionalism." The **Order** stated, in part:

> "Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer. It includes courses on professional responsibility and malpractice. It does not include such topics as attorneys' fees, client development, law office economics, and practice systems, except to the extent that professional responsibility is discussed in connection with these topics.
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> Professionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations.
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> Legal ethics sets forth the standards of conduct required of a lawyer; professionalism includes what is more broadly expected. The professionalism CLE requirement is distinct from, and in addition to, the legal ethics CLE requirement."

The Supreme Court's definition of Ethics includes statements that one utilizes to define Professionalism, yet the **Order** mandates one hour CLE credit on each.

Louisiana has had four ethics codes, the most current one being The Rules of Professional Conduct adopted by the Louisiana Supreme Court, the Task Force, and the House of Delegates, on December 18, 1986, and made effective January 1, 1987 by order of the Supreme Court. On January 21, 2004, the Louisiana Supreme Court approved a revised set of the Louisiana Rules of Professional Conduct, effective March 1, 2004. Those Rules of Professional Conduct are set forth in Louisiana Revised Statutes, Title 37. Professions and Occupations, Chapter 4. Appendix , Articles of Incorporation of the Louisiana State Bar Association, art. XVI. **Rules of Professional Conduct.**

Some of the topics that the Supreme Court's **Order** of May 23, 1997, allocates to professionalism are topics that are themselves subjects of provisions of the **Rules of Professional Conduct,** and it appears that the **Order** has defined "professionalism" in a way that picks up some things from the court's own concept of "legal ethics." In particular, the **Order** tells us that "professionalism" includes "courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations." In fact, there are a number of duties on these topics set forth in the **Rules of Professional Conduct**. Many of those duties are "required," in the sense that their violation can result in formal discipline. But if these same duties are picked up by the term "professionalism," the line between "legal ethics" and "professionalism" becomes rather indistinct. The Louisiana Supreme Court has given Louisiana

lawyers an annual opportunity to hear about something called "professionalism" as part of their mandatory continuing legal education obligations. The court also wants Louisiana lawyers to have an annual hour of CLE credit in "legal ethics." To achieve its purposes, the court issued an **Order** that seeks to distinguish "professionalism" from "legal ethics." The result is an odd definition of "legal ethics," and a definition of "professionalism" that seems to overlap with "legal ethics" in some respects, and some uncertainty about the substantive content of "professionalism. ETHICS v. PROFESSIONALISM AND THE LOUISIANA SUPREME COURT, 1998 Louisiana Law Review; N. Gregory Smith, 58 La. L. Rev. 539.

The **Louisiana Civil Law Treatise, Louisiana Lawyering, Chapter 19. Professionalism, §19.1. The Concept of Professionalism and its Difficulties** [21 La.Civ. L. Treatise, Louisiana Lawyering §19.1] describes the problem as follows:

> **"**A lawyer's conduct toward his or her client is generally regulated by the Rules of Professional Conduct, and malpractice is generally handled by contract or tort law. His or her conduct toward the courts is also regulated by the Rules of Professional Conduct and by the power of the courts to sanction for contempt or other improper conduct. The Rules, and tort law, also impose limited constraints upon a lawyer's dealings with his or her client's opponent and opponent's counsel.
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> A perception surfaced in the latter part of the Twentieth Century that there was a significant decline in what was deemed to be appropriate conduct by the lawyer toward his client, the court, and the opponents, and that neither substantive law nor the Rules were adequate to regulate or discourage such inappropriate conduct. Thus arose the movement toward **"professionalism**." The movement has produced a multitude of "codes of **professionalism**," including "codes" by the Louisiana State Bar Association, the Louisiana Association for Justice, and by the Louisiana Supreme Court itself. [The **Louisiana Code of Professionalism**, which was generated by the Louisiana State Bar Association may be found in Rule 6.2(k), of the **Rules for Louisiana District Courts**. The **Code of Professionalism in the Courts**, which was generated by the Louisiana Supreme Court, may be found in Section 11, part G, of the General Administrative Rules of the Louisiana Supreme Court, as well as in Rule 6.3 of the Rules for Louisiana District Courts. The Louisiana Association for Justice Lawyer's Creed may be found at the Association's website, http://www.lafj.org/ la/.] The apparent aim of all of these codes is to regulate and direct conduct that is deemed inappropriate, but which is not necessarily violative of positive law or the **Rules of Professional Conduct.**
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> The movement has also led to the addition to continuing legal education requirements of mandatory presentations of " **professionalism** " as an element separate from the traditional ethics requirement. That addition has generated much dispute among the members of the Bar.
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> One dispute is whether one can distinguish " **professionalism** " from ethics, or

whether " **professionalism** " rules are mere elaborations upon the Rules of **Professional** Responsibility. Another criticism of the " **professionalism**" concept is that it may place an attorney in conflict with what many view as his or her primary responsibility—effective advocacy of the client's position. Another is that the call for **professionalism** or civility may be a romantic appeal to so-called "halcyon days." Of course those days involved a much less diverse bar.

The **professionalism** "codes" contain remarkably similar provisions, almost all of which can be subdivided into three categories of conduct: honesty, courtesy, and avoiding abuse of process. The first two—honesty and courtesy—usually do not present serious conflicts with the attorney's role as an advocate. In addition, serious violations of those duties are punishable by the court or through enforcement of the Rules of Professional Conduct.

As to the concept of honesty vis-à-vis the court, false representations to the court are generally discouraged by punishment through contempt. Examples would include misciting law or generally lying to the court. Deliberate misrepresentations to opposing counsel subjects the offender to sanctions under the Rules of Professional Conduct. One difficult area may be in non-representation, such as failing to advise opposing counsel about changes made in an otherwise standard form or in a document submitted by opposing counsel.

Uncivil conduct in the courtroom is generally punishable by contempt. "Incivil" conduct may arise at depositions as well; however, a recent statute subjects such an actor to contempt. [La. C.C.P. art. 1443.] Incivility in communications and conduct (such as punctuality and forewarnings of problems in scheduled depositions and meetings) between counsel remains a difficulty; but it is not clear what impact a code of professionalism would have on that.

The codes of professionalism that discourage abusive use of the legal process present the thorniest issues. Examples often given include: failure to stipulate, filing of frivolous motions, and ex parte communications with the court. The difficulty with making "failure to stipulate" non-professional conduct is that the requirement of the proof in lieu of stipulation often is a strategy choice by a litigant, and if the failure to stipulate is "blatant," opposing counsel has a remedy—a request for an admission, with subsequent punishment if the request is frivolously refused.

Similarly, the filing of motions that have questionable merit but some chance of succeeding may improve settlement opportunities, and may advocate novel, but arguably needed, legal positions, but if the motion is totally frivolous, both client and counsel are subject to punishment by the court. Of course, counsel must weigh any possible advantage to the client by the filing of a "borderline" frivolous motion against the cost of that motion to client.

Another abuse of process assertion can be made when a litigant seeks numerous

depositions or out of state depositions. Critiquing an attorney in such a case may be an improper interference with his or her litigation strategies and his or her view of the main issues in the case. At any rate, tort law and civil procedure rules provide relief where the abuse is blatant.

In sum, an attorney is required by the Rules of Professional Conduct to sometimes balance his or her duty as advocate to his or her duty to the system. To add another nebulous duty—"professionalism"—may be unwise, inasmuch as counsel may often overlook the impact upon the client by his or her "professionalism" to opposing counsel. An example is a plaintiff's request for a continuance because of a personal or family difficulty for plaintiff or his counsel. "Professionalism" may dictate an automatic approval by opposing counsel, without consideration of the extent to which the continuance will make it more difficult for his or her client to prove the
case, or the fact that a delay may involve additional liability, such as the accrual of judicial interest.

Thus far, the "professionalism" movement has drawn both praise and criticism from the Bar. It has seldom surfaced in judicial decisions. In one noted decision, an appellate court concluded that although a counsel's conduct was "nonprofessional," it did not rise to the level of an "ill practice" that would justify the annulling of a judgment. Power Marketing Direct, Inc. v. Foster, 906 So.2d 1276 (La. App. 2d Cir. 2005). The lack of any "teeth" in any of the various codes of professionalism and the overlap with the Rules of Professional Conduct cast doubt upon the worth of the professionalism movement. Nevertheless, it may at least assist in maintaining the honesty and civility in a system in which effective advocacy is the keystone.**"**

Although the **Louisiana Civil Law Treatise** argues that there are no "teeth" in any of the various codes of professionalism, there is at least one thing that commentators agree upon and that is that there is a significant "overlap" of those various codes of professionalism with the Rules of Professional Conduct. The Rules of Professional Conduct do have "teeth" and there are a significant number of Federal District Courts and Bankruptcy Courts nationwide that have used the Rules of Professional Conduct in a substantive manner in reported decisions. Since there is such an overlap and since it serves no real Continuing Legal Education purpose to confuse or pose questions that have no clear answers, this presenter has elected to review specific reported cases where the Rules of Professional Conduct are used substantively and then cite the corresponding Louisiana Rules of Professional Conduct that would be applicable to the case scenario.

CASE SUMMARIES

(1) **In re Muscle Improvement, Inc.**, 437 B.R. 389, United States Bankruptcy Court, C.D. California, August 31, 2010, **California Rules of Professional Conduct, Rule 3-310 (E) Disqualification for Conflicts of Interest** (Louisiana Rules of Professional Conduct, Rule 1.9. Duties to Former Clients, and Rule 1.18 Duties to Prospective Client). Local Rules incorporating the California Rules of Professional Conduct.

Facts: Debtors brought an adversary proceeding against their principal creditor Allstate on a number of claims, including breach of contract and fraud. Allstate appeared through its counsel, Ms. Naimi. Debtors moved to disqualify Ms. Naimi and her firm, Advocate Solutions, Inc., from representing Allstate or its representative, John Michael, on conflict of interest grounds. The disqualification motion was based on two consultations that debtors had with Ms. Naimi prior to their bankruptcy filing, in which they discussed retaining her to represent them in these cases. At the first meeting with Ms. Naimi, the parties spent two hours discussing Ms. Naimi's prior bankruptcy experience and debtors' financial problems. John Michael also attended this meeting. After the first meeting, the debtors provided Ms. Naimi several documents relating to their financial condition. Following the first meeting, Ms. Naimi sent a retainer agreement to the debtors for signature. The retainer agreement was never signed or returned. The second meeting took place on November 23, 2009. Ms. Naimi and debtors' agents designated this meeting as a "consultation," for which Ms. Naimi billed debtors $350. Debtors' agents brought a financial consultant, Brian Avaylon, to the second meeting to discuss their financial condition. The debtors brought a file of documents. Mr. Avaylon reviewed the debtors' financial affairs with Ms. Naimi and together they examined documents in the file. Ms. Naimi advised the debtors that it would be better to attempt a workout rather than file bankruptcy cases because it would be less expensive. She also advised the debtors not to make payments to their creditors that could be considered preferential payments. Neither John Michael nor any other Allstate representative attended this meeting.

Debtors ultimately chose not to employ Ms. Naimi. Instead, they hired their present bankruptcy counsel Robert Yaspan for their chapter 11 bankruptcy cases. Allstate then hired Ms.Naimi to represent Allstate's interests in these cases. Debtors moved to disqualify Ms. Naimi and her firm from representing Allstate or John Michael on conflict of interest grounds.

Law: A court's power to disqualify an attorney from appearing in a particular case derives from the power of every court to control the conduct of attorneys practicing before it. *See, e.g.*, *Trone v. Smith,* 621 F.2d 994, 999 (9th Cir.1980); *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.,* 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371 (1999).

Ultimately, a court's decision to disqualify an attorney is based upon the need to maintain high standards of **professional responsibility**. The Federal Courts in California do not have their own **rules** of **professional conduct** for lawyers. Local Rule ("LBR") 2090–2(a) of the

Bankruptcy Court for the Central District of California, which governs the **professional responsibility** of attorneys practicing before that court, incorporates by reference the district court's local rule 83–3.1.2, which requires that attorneys comply with the California **Rules of Professional Conduct**, as interpreted by California case law. Accordingly, the court turned to the applicable California rules and case law to determine the motion.

California **Rules** of **Professional Conduct**. The California **rules** of **professional conduct**, unlike those in all other states, are not based on the Model **Rules** of **Professional Conduct** promulgated by the American Bar Association. In consequence, both the California rules and the case law thereunder may differ from what is found in other states. C**alifornia Rules on Disqualification for Conflicts of Interest** Rule 3–310 of the California **Rules** of **Professional Conduct** requires an attorney to avoid the representation of adverse interests. Rule 3–310(E) states:

> A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

The subject matter of Ms. Naimi's current representation of Allstate, a creditor and adverse party, is substantially related to the subject matter of Ms. Naimi's meetings with debtors' agents. The subject matter of the meetings included debtors' financial condition. That information was material to the prosecution of the bankruptcy case. In making its ruling, the court disregarded the first meeting with Ms. Naimi. Because John Michael attended the first meeting on behalf of Allstate, Allstate already had access to all the information that debtors disclosed at the first meeting. Thus, none of that information was confidential with respect to Allstate. With respect to the second meeting, however, the court found that Ms. Naimi likely received confidential information. Following the first meeting, Ms. Naimi requested and received documents pertaining to debtors' financial condition. At the second meeting, Mr. Avaylon showed these documents to Ms. Naimi while discussing debtors' financial condition. Additionally, Ms. Naimi charged a legal fee to debtors for this meeting at her hourly rate as an attorney. Thus, Ms. Naimi was in a position to review debtors' private documents and to listen to debtors' agents and financial consultant speak extensively about debtors' financial condition. Ms. Naimi argued that the presence of Mr. Avaylon at the second meeting prevented any information provided to her from being confidential. The court was not persuaded. Unlike John Michael, it appeared to the court that Mr. Avaylon was acting as debtors' financial consultant, rather than as a representative for a potentially adverse party, and was part of debtors' financial team. Thus, he was within the sphere of confidentiality for the debtors. Accordingly, Mr. Avaylon's presence at the second meeting did not destroy debtors' reasonable expectations of confidentiality.

RULING: The court held that an attorney must be disqualified on conflict of interest

grounds if the attorney meets with a client under circumstances in which confidential information would likely be disclosed, and the attorney subsequently represents an adverse client in a substantially related matter, even if the former client never employed the attorney. For the foregoing reasons, the court granted debtors' motion to disqualify Ms. Naimi from representing Allstate Financial Group, Inc. or its representative, John Michael. The court did not address the issue of disqualification of Ms. Naimi's law firm, Advocate Solutions, Inc., because there is no indication that her firm desires to represent Allstate without her participation.

IMPORTANCE OF THIS CASE: The Federal Courts in California do not have their own Rules of Professional Conduct. Their Bankruptcy Court Local Rules adopt the District Court Local Rules and the District Court Local Rules requires that attorneys comply with the California **Rules** of **Professional Conduct**, as interpreted by California case law.

In Louisiana Federal District Courts the Uniform Local Rules for the Eastern, Middle, and Western District of Louisiana, under **LR83.3.4E & M Rules of Conduct**, and **LR83.2.4W Rules of Conduct** in part state: "This court hereby adopts the Rules of Professional Conduct of the Louisiana State Bar Association, as hereafter may be amended from time to time by the Louisiana Supreme Court,".

The Local Rules of the Bankruptcy Court for the Western District of Louisiana in part state:
LBR 9029-3. LOCAL RULES–DISTRICT COURT :

"The generally applicable rules of the United States District Court for the Western District of Louisiana apply to bankruptcy cases and proceedings commenced in the Western District, except where they conflict with these Local Bankruptcy Rules, or where the proceedings are conducted before a District Court Judge in which case the Local District Court Rules shall apply."

Presenter could not find in the Local Rules of the Bankruptcy Court for the Eastern and Middle Districts of Louisiana a similar provision making applicable the District Court Local Rules in those bankruptcy courts; nor could presenter find in those courts Local Rules any specific Rules of Professional Conduct for attorneys practicing in those courts. Absent the specific adoption of rules of professional conduct one can only assume that the Rules of Professional Conduct of the Louisiana State Bar Association, as hereafter may be amended from time to time by the Louisiana Supreme Court, apply in those bankruptcy courts as they apply in the District Courts for those Districts.

Presently **Rules 1.9** and **1.18** of the **Louisiana Rules of Professional Conduct** would control in this situation and that rule states:

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.18. Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is

associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

(2) **Federal Deposit Insurance Company v. U.S. Fire Insurance Company**, 50 F.3d 1304, 5th Circuit Court of Appeals, April 12, 1995. **Rules of Professional Conduct, Rule 3.7. Lawyer As Witness.**

FACTS: Federal Deposit Insurance Corporation (FDIC), as successor to rights of failed savings and loan association, brought suit seeking to recover on savings and loan blanket bond issued by insurer, and to establish affirmative defenses. Insurer's motion to disqualify FDIC's law firm was granted, and on remand, the United States District Court for the Northern District of Texas, Robert B. Maloney, J., again granted motion to disqualify. FDIC appealed. The Fifth Circuit Court of Appeals, DeMoss, Circuit Judge, held that: (1) attorney, who would probably be called by FDIC at trial as witness to rebut insurer's charge of bad faith, did not have such conflict of interest as to warrant disqualification of law firm, which consented to representation; (2) appearance of impropriety did not warrant disqualification of firm; but (3) attorney who would probably be called by insurer as witness regarding when attorney discovered potential loss was required to be disqualified.

On remand, the district court again ordered that attorneys who may be called as witnesses (Kenney and Hurt), and LMHT & B (Firm) be disqualified as counsel for the FDIC. The district court based its analysis of U.S. Fire's disqualification defenses-bad faith, discovery, and takeover-on joint application of three different canons of ethics, the Texas Disciplinary Rules of Professional Conduct ("Texas Rules"), the American Bar Association Model Rules of Professional Conduct ("Model Rules"), and the ABA Model Code of Professional Responsibility ("Model Code"). Although these rules promulgate conflicting standards, the lower court concluded that all three required disqualification of the FDIC's counsel firm.

RULING: After a review of the facts by the Appellate Court and *de novo* consideration of the relevant ethical standards, The 5th Circuit found that the disqualification order of the district court was overly expansive. The district court correctly reasoned that the lawyer-witness rule requires the withdrawal of both Kenney and Hurt. However, careful examination of the asserted purposes of the rule belies the notion that, in this instance, the profession is served by disqualification of the entire law firm. Although the various relevant canons promulgate different versions of the proscription against an attorney serving as both advocate and witness, the underlying rationale common to each of them is protection of the client and the opposing party. These interests will not be served by depriving the FDIC of the right to continued representation by the law firm it has chosen. U.S. Fire failed to offer any convincing argument that its motion to disqualify LMHT & B served a purpose any more noble than dilatory maneuvering.

Presently Rule 3.7 of the Louisiana Rules of Professional Conduct would control in this situation and that rule states:

Rule 3.7. Lawyer as Witness
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

(3) **CONNECTICUT BAR ASSOCIATION, National Association of Consumer Bankruptcy Attorneys, et al v. UNITED STATES of America, Eric H. Holder, Jr., Attorney General of the United States, Diana G.Adams, United States Trustee**, 620 F.3d 81, 2nd Circuit Court of Appeals, September 7, 2010. **Connecticut and Louisiana Rules of Professional Conduct, Rule 1.5. Fees. (Fee Disclosure)**

FACTS: Plaintiffs, the Connecticut Bar Association; the National Association of Consumer Bankruptcy Attorneys (NACBA); various attorneys and Debtor, Anita Johnson, sued defendants, the United States, the Attorney General of the United States, and United States Trustee Diana G. Adams, in the United States District Court for the District of Connecticut for a judgment declaring unconstitutional various provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), and enjoining their enforcement. Plaintiffs appealed from a November 7, 2008 judgment that granted in part

defendants' motion to dismiss the complaint. Defendants, in turn, cross-appealed the judgment insofar as it granted in part plaintiffs' motion for declaratory and injunctive relief.

After briefing and oral argument in this appeal, the Supreme Court decided *Milavetz, Gallop & Milavetz, P.A. v. United States,* --- U.S. ----, 130 S.Ct. 1324, 176 L.Ed.2d 79, which resolved a number of the questions at issue. Specifically, the Supreme Court held that the term "debt relief agency" does apply to attorneys, *see id.* at 1331-32, but only those assisting consumer debtors contemplating bankruptcy, *see id.* at 1341. The Supreme Court also construed § 526(a)(4) 's prohibition on advising clients to take on debt "in contemplation of" bankruptcy to apply only to "advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose." *Id.* at 1336. The Court explained that such advice "will generally consist of advice to 'load up' on debt with the expectation of obtaining its discharge-*i.e.,* conduct that is abusive *per se.* " *Id.* The Court concluded that when the section was so construed, it raised **no** First Amendment overbreadth or vagueness concerns. *See id.* at 1337-38. Further, the Supreme Court rejected a First Amendment challenge to the advertising requirements of §528(a)(3)-(4) and (b)(2). Concluding that the requirements pertained to speech that was **commercial in nature** and compelled only disclosures, the Supreme Court determined that the appropriate **standard of review was the rational basis test** set forth in *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985). The Supreme Court held that the advertising requirements passed this test because they "govern only professionals who offer bankruptcy-related services to consumer debtors," and, as such, reasonably relate to the government's interest in preventing deception of consumer debtors contemplating bankruptcy. *See Milavetz, Gallop & Milavetz, P.A. v. United States,* 130 S.Ct. at 1341.

LEGAL ISSUE PRESENTED:

While the Supreme Court decision in *Milavetz* did answer a number of the questions raised it did not resolve all issues. For our purposes we will focus on the constitutional attack made on the contract provisions of § 528 (a) (1)-(2) which state as follows:

> (a) A debt relief agency shall-
> (1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously-
> (A) the services such agency will provide to such assisted person; and
> (B) the fees or charges for such services, and the terms of payment;
> (2) provide the assisted person with a copy of the fully executed and completed contract....

RULING AND LAW:

The 2nd Circuit concluded that the requirements of §528(a)(1)-(2), like those of § 527(a) and (b) and §528(a)(3)-(4) and (b)(2), regulate only **commercial speech**, and therefore

plaintiffs' First Amendment challenge to this provision warranted only **rational basis review**. Plaintiffs urged the court to view this statute differently, plaintiffs submitted that § 528(a)(1)-(2)'s contract requirements impose an "affirmative consent" condition on communication between attorneys and clients, thereby burdening protected speech. The 2nd Circuit was not persuaded.

The cases plaintiffs cited applied strict scrutiny to restrictions on the sort of speech traditionally accorded the fullest First Amendment protection. For example, *Lamont v. Postmaster General,* 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965), invalidated a consent requirement to the receipt of "communist political propaganda," a form of political speech, *id.* at 302, 85 S.Ct. 1493. *Martin v. Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), struck down a statute fining Jehovah's Witnesses for leafletting, a form of religious speech. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996), held that certain restrictions on "patently offensive" television programming survived strict scrutiny despite the law's generally expansive view of artistic speech. In *Riley v. National Federation of the Blind,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669, the Supreme Court concluded that charitable solicitations also fell within the range of speech accorded strict First Amendment protection. **The Supreme Court takes a different view of attorney communications, particularly with respect to the procurement of employment, the subject of regulation by § 528(a)(1)-(2)**. The Supreme Court has stated that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. at 459, 98 S.Ct. 1912; *cf. Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion) (rejecting First Amendment challenge to state law requiring physicians to provide patients with specific information and observing that physicians' First Amendment rights are "implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State" (citation omitted)). Accordingly, the 2nd Circuit concluded that plaintiffs fail to make a case for strict scrutiny of the contract requirements of § 528(a)(1)-(2). **Plaintiffs did not-and cannot-contend that a different rational basis conclusion is warranted for §528(a)(1)-(2) than for § 527(a) and (b). Both statutes are informed by the same legitimate government concern: minimizing the ignorance, confusion, and deception that too often infect consumer debtors' decisions in pursuing bankruptcy proceedings.** The 2nd Circuit further stated that the district court had observed, these statutes impose no heavy burden on plaintiffs subject to Connecticut's **Rules** of **Professional Conduct**, which already require attorneys to communicate to their clients the "basis or rate of the fee, whether and to what extent the client will be responsible for any court costs and expenses of litigation, and the scope of the matter to be undertaken ... in writing, before or within a reasonable time after commencing the representation." *Connecticut Bar Ass'n v. United States,* 394 B.R. at 288 (quoting Conn. R. Prof. Conduct 1.5); *accord* N.Y. R. Prof. Conduct 1.5 (2009). **"Because we conclude that the contract requirements of § 528(a)(1)-(2) are supported by a rational basis, we affirm the district court's dismissal of plaintiffs' First**

Amendment challenge to this statute."

Presently **Rule 1.5** of the **Louisiana Rules of Professional Conduct** would control in this situation and that rule states:

Rule 1.5. Fees
(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by Paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client. A copy or duplicate original of the executed agreement shall be given to the client at the time of execution of the agreement. The contingency fee agreement shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; the litigation and other expenses that are to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive;
(2) the total fee is reasonable; and
(3) each lawyer renders meaningful legal services for the client in the matter.

(f) Payment of fees in advance of services shall be subject to the following rules:

(1) When the client pays the lawyer a fee to retain the lawyer's general availability to the client and the fee is not related to a particular representation, the funds become the property of the lawyer when paid and may be placed in the lawyer's operating account.
(2) When the client pays the lawyer all or part of a fixed fee or of a minimum fee for particular representation with services to be rendered in the future, the funds become the property of the lawyer when paid, subject to the provisions of Rule 1.5(f)(5). Such funds need not be placed in the lawyer's trust account, but may be placed in the lawyer's operating account.
(3) When the client pays the lawyer an advance deposit against fees which are to accrue in the future on an hourly or other agreed basis, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may transfer these funds as fees are earned from the trust account to the operating account, without further authorization from the client for each transfer, but must render a periodic accounting for these funds as is reasonable under the circumstances.
(4) When the client pays the lawyer an advance deposit to be used for costs and expenses, the funds remain the property of the client and must be placed in the lawyer's trust account. The lawyer may expend these funds as costs and expenses accrue, without further authorization from the client for each expenditure, but must render a periodic accounting for these funds as is reasonable under the circumstances.
(5) When the client pays the lawyer a fixed fee, a minimum fee or a fee drawn from an advanced deposit, and a fee dispute arises between the lawyer and the client, either during the course of the representation or at the termination of the representation, the lawyer shall immediately refund to the client the unearned portion of such fee, if any. If the lawyer and the client disagree on the unearned portion of such fee, the lawyer shall immediately refund to the client the amount, if any, that they agree has not been earned, and the lawyer shall deposit into a trust account an amount representing the portion reasonably in dispute. The lawyer shall

hold such disputed funds in trust until the dispute is resolved, but the lawyer shall not do so to coerce the client into accepting the lawyer's contentions. As to any fee dispute, the lawyer should suggest a means for prompt resolution such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Program.

(4) **In re Emanuel Joseph MINARDI,** 399 B.R. 841, Bankruptcy Court N. D. Oklahoma, January 23, 2009. Specific Issue: Responsibility of Chapter 7 Debtor Counsel to Assist Debtor with **Reaffirmation Agreements**. **Rules of Professional Conduct (Oklahoma and Louisiana): Rule 1.1. Competence, Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer** and **Rule 1.4. Communication.**

FACTS: Chapter 7 Debtor's counsel per 11 U.S.C. §329(a) and Bankruptcy Rule 2016 filed Disclosure of Compensation. The Disclosure was submitted using a standard form containing the following recitations:

> "In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:
>
> **a.** Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;
>
> **b.** Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;
>
> **c.** Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;
>
> **d.** [Other provisions as needed]
>
> *Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.*
>
> By agreement with the debtor(s), the above disclosed fee does not include the following service:
>
> ***Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding, and reaffirmation agreements." (Emphasis ADDED)***

The Disclosure reflected debtor's counsel general policy of providing no advice to his clients regarding whether to enter into a reaffirmation agreement. Debtor's counsel did not sign any reaffirmation agreements for fear that under BAPCPA he would be exposed to personal liability to a creditor by virtue of making a certification that a debtor can perform the obligations created under the agreement. This particular debtor counsel was not the only attorney who practiced before the particular Court that excluded the negotiation and review of reaffirmation agreements from the scope of services provided to debtors.

A Reaffirmation Agreement was executed by both Debtor and a representative of Nissan and met all of the requirements of § 524(c) to allow Debtor to reaffirm the debt on the debtor's Truck, except that it was not accompanied by an affidavit or declaration by debtor's counsel. Instead, the Agreement was accompanied by a motion for Court approval of the Agreement. That motion asserted that Debtor was "not represented by an attorney in connection with" the Agreement. As a result, the Court set the Agreement for hearing.

At the hearing, debtor's counsel informed the Court that, although he did explain the legal effect and consequences of entering into a reaffirmation agreement to Debtor, he did **not** assist Debtor in negotiating the Agreement. As a part of his post-hearing brief, debtor's counsel submitted a copy of the engagement letter that served as the employment contract between himself and Debtor. That letter states:

> "I [Debtor Counsel] will charge you [Debtor] a flat fee to assist you in preparing your Chapter 7 bankruptcy petition and schedules, and represent you at the first meeting of creditors. You've given me a check in the amount of $1,000.00. I may charge you up to $1,500.00 depending on the complexity of your case. The flat fee also covers negotiations with secured creditors to reduce their claims to market value, exemption planning, and preparation and filing of motions pursuant to 11 U.S.C. § 522(2)(A) for avoidance of liens on household goods. I will deposit the funds in my trust account and will earn my fee when your bankruptcy is filed. The flat fee does not cover the cost of any adversary proceedings or other actions which may be filed in connection with your bankruptcy, including dischargeability actions, judicial lien avoidances, and relief from stay actions, or negotiation of reaffirmation agreements. **You may retain me to represent you in those matters, except for reaffirmation agreements, subject to a mutually agreeable fee arrangement. You will have to negotiate your own reaffirmation agreements."**

LAW: Presiding Judge Terrence L. Michael went into great detail on the applicable law and this summary does not attempt to condense his legal conclusions because he give an excellent summary of the law on reaffirmations pre and post BAPCPA.

Sections 524(c) and (d) contain a "checklist" of requirements, which serve as "safeguards against abusive creditor practices," that must be met in order to have an enforceable reaffirmation agreement. Those requirements include, but are not limited to: 1) entry into the agreement prior to the entry of an order of discharge; 2) timely receipt by the debtor of disclosures found in § 524(k); 3) absence of rescission of the agreement by the debtor within a specified time frame; and 4) filing of the agreement with the court. An additional requirement, found in § 524(c)(3) and of particular relevance in this case, is that:

> (c) An agreement between a holder of a claim and
> the debtor ... is enforceable ... only if—

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of ***the attorney that represented the debtor during the course of negotiating an agreement under this subsection (****emphasis added)****,*** which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of—

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement.

This provision means that "if the debtor is represented by counsel, the agreement ***must*** be accompanied by an affidavit of the debtor's attorney" attesting to the referenced items before the agreement will have legal effect. *In re Schott,* 282 B.R. at 6 n. 5 (emphasis added). Section 524(d) adds additional requirements if a debtor " ***was not represented by an attorney during the course of negotiating such agreement.*** " § 524(d) (emphasis added). In that situation, the court is required to hold a hearing during which it must make certain disclosures to the debtor regarding the voluntary nature and legal effect of the agreement. When the debt is not a consumer debt secured by real property, the court must also determine whether the agreement imposes an undue hardship and is in the best interest of the debtor. *Id.;* § 524(c)(6). *See also In re Schott,* 282 B.R. at 6 n. 5. Strict compliance with these requirements is mandatory, and an agreement that fails to fully comply is void and unenforceable. *Sweet v. Bank of Okla. (In re Sweet),* 954 F.2d 610, 612 (10th Cir.1992) ("The reaffirmed debt is enforceable only if certain enumerated conditions are met, including compliance with § 524(d)."); *In re Jamo,* 283 F.3d 392, 398 (1st Cir.2002) (courts require strict compliance with conditions enumerated in statute); *In re Laynas,* 345 B.R. 505, 510–11 n. 4 (Bankr.E.D.Pa.2006).

Section 524(k) requires the following disclosures, among others, to be given to the debtor in conjunction with the reaffirmation of a debt:

3. ***If you were represented by an attorney during the negotiation of your reaffirmation agreement,*** the attorney must have signed the certification in Part C.

4. ***If you were not represented by an attorney during the negotiation of your reaffirmation agreement,*** you must have completed and signed Part E.

* * *

6. ***If you were represented by an attorney during the negotiation of your reaffirmation agreement,*** your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D.

7. ***If you were not represented by an attorney during the negotiation of your***

> ***reaffirmation agreement,*** it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home. **§ 524(k)(3)(J)(i)** (emphasis added).

When combined with the statutory language of § 524(c), these mandatory disclosures make it clear that ***whether an attorney represented a debtor during the course of negotiating a reaffirmation agreement*** is of critical importance in determining when and if the agreement becomes effective, and whether the Court has any remaining obligations under § 524(d) with respect to the agreement after it is filed. *See In re Donald,* 343 B.R. 524, 527 (Bankr.E.D.N.C.2006) ("Whether or not the debtors were represented by their attorney 'during' the negotiation of the reaffirmation agreement is relevant to whether or not the court has the authority to approve or disapprove the agreement."). If a debtor was represented during the course of negotiating a reaffirmation agreement, but debtor's counsel is unable or unwilling to make the required certifications, then the agreement does not satisfy § 524(c)(3) and is unenforceable. *See In re Husain,* 364 B.R. 211, 214 (Bankr.E.D.Va.2007) ("The Bankruptcy Code contemplates that counsel's failure to certify a reaffirmation agreement terminates further consideration of the client's ability to reaffirm the debt."); *In re Rodriguez,* No. 08–12039, 2008 WL 2509373 at *1 (Bankr.E.D.Va. June 23, 2008) ("Court review of the agreement is not required unless counsel first makes all three certifications as required in § 524(c)(3)."); *In re Isom,* No. 07–31469, 2007 WL 2110318 at *3 (Bankr.E.D.Va. July 17, 2007) ("Counsel's failure to execute the necessary certification ends the reaffirmation process. The Court is not authorized to approve the Reaffirmation Agreement without counsel's endorsement. The failure of Debtor's counsel to endorse Part C of the Reaffirmation Agreement, in and of itself, renders the agreement unenforceable."). If the debtor was not represented by an attorney, the Court must hold an additional hearing under §524(d) and make certain findings under § 524(c)(6) before the agreement is enforceable. FN22. *In re Schott,* 282 B.R. at 6 n. 5.

Finding a debtor to be represented in a bankruptcy case, the Court would ordinarily conclude that duly employed counsel gave the debtor the required cautionary disclosures and assisted the debtor with negotiating any reaffirmation agreements. Failure to sign the declaration under § 524(c)(3) would normally be taken as a clear signal to the Court that, in counsel's opinion, the agreement imposes an undue hardship on the debtor or a dependent of the debtor, or is otherwise not in the debtor's best interest, and therefore should not be enforceable. Except in unusual circumstances, the Court will treat counsel's decision whether to endorse a reaffirmation agreement as definitive. Judge Michael noted that § 524(m) was recently added to the Code, which requires court review if the debtor's budget indicates that a

"presumption of undue hardship" exists. *See* BAPCPA, Pub.L. No. 109–8, 119 Stat. 23, § 203 (2005). *See also In re Calabrese,* 353 B.R. 925, 926 (Bankr.M.D.Fla.2006) ("A presumption of undue hardship occurs when the debtor does not have sufficient funds to make the required reaffirmation payments."). In that case, the debtor or counsel will be given an opportunity to explain to the Court why a particular agreement does not impose an undue hardship on the debtor, despite a showing in the record that the debtor cannot afford to make the required payment. § 524(m). *See In re Wilson,* 363 B.R. 220, 224 (Bankr.D.N.M.2007); *In re Laynas,* 345 B.R. 505, 512 (Bankr.E.D.Pa.2006) (review under § 524(m) is required even where debtor is represented by counsel).

Judge Michael determined that there was no showing that the presumption applied in this case. Debtor's counsel did not file a motion to withdraw as counsel for Debtor and continued to appear before the Court on behalf of Debtor in an unrelated matter. Although he remained as counsel of record in the case, counsel did not assist Debtor in the negotiation of the Agreement. Counsel suggested that Debtor had effectively acted without counsel, or *pro se,* in the presentation of the Agreement to the Court, and that the Agreement may be rehabilitated by a hearing under § 524(d) and subsequent Court approval.

After careful consideration, Judge Michael concluded that counsel's attempt to limit his services to exclude negotiation of reaffirmation agreements is an impermissible limitation on his representation of Debtor. (emphasis added) The Court based its conclusion on two foundations. **First**, and most importantly, the decision to reaffirm an otherwise dischargeable debt plays a critical role in the bankruptcy process—so critical, that assistance with the decision must be counted among the necessary services that make up competent representation of a Chapter 7 debtor. **Second**, the Code lays the responsibility for advising a debtor about the reaffirmation process and evaluating the effect of each agreement at the feet of debtors' counsel. Judge Michael would not relieve counsel of this responsibility.

The importance of the decision to reaffirm debt in the quest for a "fresh start"

The bankruptcy discharge under Chapter 7 is often referred to as a debtor's "fresh start," and operates as an injunction against creditors from collecting discharged debts as a personal liability. Because a debtor may wish to retain property on which a creditor holds a lien or security interest, §524(c) makes provision for the reaffirmation of such debt. The United States Court of Appeals for the First Circuit described the reaffirmation process as follows:

> Although reaffirmation is consensual in nature, the myriad safeguards erected by Congress reflect its recognition that a debtor's decision to enter into a reaffirmation agreement is likely to be fraught with consequence. In point of fact, reaffirmation represents the only vehicle through which an otherwise dischargeable debt can survive the successful completion of Chapter 7 proceedings. Moreover, once a debt is

> reaffirmed, the creditor can proceed to enforce its rights as if bankruptcy had not intervened. Because reaffirmation constitutes a debtor-invoked exception to the tenet that underpins the bankruptcy system the "fresh start" principle-a reaffirming debtor must be afforded some protection against his own (potentially) short-sighted decisions. Section 524(c) reflects Congress's intent to provide this protection, thereby safeguarding debtors against unsound or unduly pressured judgments about whether to attempt to repay dischargeable debts. To cloak debtors in this protective garb, courts generally have insisted that reaffirmation agreements strictly comply with the conditions enumerated in the statute. By like token, courts have insisted upon a showing that a reaffirmation agreement is not the product of abusive creditor practices. *In re Jamo,* 283 F.3d 392, 398 (1st Cir.2002).

One of the safeguards provided under § 524(c) is that where a debtor is represented by an attorney, he or she must evaluate whether an agreement to reaffirm a debt will impose an undue hardship on the debtor and inform the court of that assessment. § 524(c)(3). If the attorney determines that no such hardship is imposed on the debtor, then he or she should sign the statement set out in Part C of the official reaffirmation agreement form. *See* § 524(k)(5)(A). The statement, which is based on the declaration required under § 524(c)(3), reads:

> I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

See also In re Melendez, 224 B.R. 252, 258 (Bankr.D.Mass.1998) (describing interplay between § 524(c)(3) and Rule 9011). **Where the attorney is unable to endorse that statement, the agreement will not be enforceable.** (Emphasis added)

Judge Michael stated that attorneys that practiced before his Court were governed by the **Oklahoma Rules of Professional Conduct** ("Oklahoma Rules"). Bankr.N.D. Okla. Local Rule 9010–1(E). Primary among those rules is that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." **Oklahoma Rule 1.1.** The Oklahoma Rules also require that "[a] lawyer shall: ... reasonably consult with the client about the means by which the client's objectives are to be accomplished." **Oklahoma Rule 1.4(a)(2).** Courts have not hesitated to find negotiation of reaffirmation agreements among a set of core services that must be provided to a consumer debtor in order to provide competent representation in a Chapter 7 context:

> *In re DeSantis,* 395 B.R. 162, 169 (Bankr.M.D.Fla.2008); *In re Carvajal,* 365 B.R. 631, 632 (Bankr.E.D.Va.2007) ("[O]nce [counsel] makes an appearance in a bankruptcy case, he has made an appearance for all matters in that bankruptcy case and must appear with respect to them unless otherwise excused by the court.

> Reaffirmation agreements are an integral part of chapter 7 representation of debtors. By accepting a chapter 7 case, counsel is accepting all aspects of the case including counseling with respect to reaffirmation agreements, negotiations with creditors with respect to reaffirmation agreements, and representing debtors in court with respect to reaffirmation agreements."); *Hodges v. Armada (In re Hodges),* 342 B.R. 616, 620–21 (Bankr.E.D.Wash.2006) ("[T]he post filing services are within what an attorney could reasonably and commonly expect in the handling of a Chapter 7 bankruptcy; responding to the U.S. Trustee inquiries, dealing with stay relief requests, and discussion of reaffirmation agreements."); *In re Egwim,* 291 B.R. 559, 573 (Bankr.N.D.Ga.2003) ("[T]his Court considers the fundamental and core obligations necessarily imposed by an engagement to represent a consumer debtor in a chapter 7 bankruptcy case to include representation with regard to reaffirmation or surrender of real estate securing obligations to creditors and representation with regard to the grant of the discharge and any exceptions thereto. As discussed above, these matters are at the very center of the bankruptcy case."); *In re Castorena,* 270 B.R. 504, 530 (Bankr.D.Idaho 2001) ("[W]hen accepting an engagement to represent a debtor in relation to a bankruptcy proceeding, an attorney must be prepared to assist that debtor through the normal, ordinary and fundamental aspects of the process. These include ... counseling in regardto § 521(2) and the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors, and assisting the debtor in accomplishing those aims."). *See also Redmond v. Lentz & Clark (In re Wagers),* 340 B.R. 391, 398 (Bankr.D.Kan.2006) ("A Chapter 7 debtor's attorney must also continue to help the debtor postpetition in order to insure the debtor receives as much of a fresh start as he or she is entitled to, and to fulfill the debtor's probable and reasonable expectations under their prepetition contract."); *In re Isom,* No. 07–31469, 2007 WL 2110318 at *3 (Bankr.E.D.Va. July 17, 2007) ("Counsel in this matter has not been granted leave to withdraw from the representation of her client. Accordingly, at Hearing the Court found that the Debtor, at all relevant times, was represented by counsel in this case.").

Debtor's counsel argued that Oklahoma Rule 1.2 allows him to exclude particular services, specifically negotiation of reaffirmation agreements, from his representation of debtors, as long as they consent to the limitation. Oklahoma Rule 1.2(c) states that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The Court does not read this rule as granting an attorney permission to exclude whatever services he or she may find too time-consuming, onerous, or fraught with potential liability. The limitation of services is subject to two important conditions precedent: 1) the limitation must be *reasonable under the circumstances;* and 2) the debtor must give *informed consent.* These conditions are further explained in the comments to Oklahoma Rule 1.2. **Agreements Limiting Scope of Representation:**

> [6] The scope of services to be provided by a lawyer may be limited by agreement

with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are to [sic] costly or that the lawyer regards as repugnant or imprudent.

[7] ***Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.*** If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. ***Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation,*** the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1. 1. **Oklahoma Rule 1.2, Comments (emphasis added).**

Oklahoma Rule 1.0 further defines the relevant terms as follows:

(e) "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.

(h) "Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

The court held that it was unreasonable to conclude that a typical debtor that seeks out the assistance of an attorney to navigate through a bankruptcy case will not require further assistance in making such a critical decision as whether to reaffirm a debt. Similarly, if a debtor, in consultation with counsel, determines that reaffirmation of a debt is the best course, it is not reasonable that he or she will then be left to proceed without assistance to negotiate favorable terms with the creditor. Having found counsel's limitation of services in a Chapter 7 bankruptcy case to be unreasonable, Judge Michael did not reach the question of informed consent.

The Code places responsibility for reaffirmation agreements with debtors' counsel.

As originally enacted in 1978, the Bankruptcy Code required courts to hold a hearing in every bankruptcy case of an individual, at which debtors were required to appear. **11 U. S. C. §524(d) (1978).** If a debtor wished to reaffirm any pre-petition debt, the court had to inform him or her of the legal effect and consequences of reaffirmation, and approve any agreement as being in the debtor's best interest and not imposing an undue hardship. In 1984, §524(c) was amended to limit the requirement for court approval to those agreements where the debtor was *pro se.* In place of court approval, the 1984 Amendment introduced a requirement that "the attorney that represented the debtor during the course of negotiating an agreement under [§ 524 (c)]" file a declaration or affidavit stating that the agreement represented a "fully informed and voluntary agreement by the debtor" and did "not impose an undue hardship on the debtor or a dependent of the debtor." This marked the beginning of a shift of the responsibility for oversight and approval of reaffirmation agreements from courts to debtors' counsel. In 1986, Congress eliminated the requirement in § 524(d) that the court hold a hearing in every case. In 1994, § 524(d) was further amended to clarify that hearings are only required when a debtor is not represented by an attorney in the negotiation of the agreement. In conjunction with the elimination of the requirement to hold a hearing for represented debtors, §524(c)(3)(C) was added, which requires that counsel include a statement that he or she has "fully advised the debtor of the legal effect and consequences of" the agreement and any default thereof. **Thus, the transfer of responsibility to debtors' counsel for both oversight and approval of reaffirmation agreements was complete. (emphasis added).**

Problems persisted because the term "undue hardship" was not well defined, and concerns soon developed that debtors' counsel were approving reaffirmation agreements for debt that their clients clearly could not pay. Courts disagreed over what role they would play in that situation. While some courts found a statutory basis to disapprove an agreement filed by a represented debtor, other courts, having more confidence in the diligence of attorneys in carrying out their duties limited the review of agreements with a § 524(c)(3) declaration to the standard set out in Rule 9011. For example, the court in *In re Melendez* discussed the situation where counsel signed the statement under §524(c)(3) despite clear evidence in the record that debtors were financially unable to make the payments required under the agreement and would face a substantial hardship going forward. 224 B.R. at 259. at 260.

The relevant portion of **Rule 9011** states:

> **(b) Representations to the court**
> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
> * * *
> (3) the allegations and other factual contentions have evidentiary support or, if

specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Under this rule, debtors' counsel "represents and attests to the court that he or she has conducted 'an inquiry reasonable under the circumstances' into whether the obligation imposed by the reaffirmation would impose an undue hardship on the debtor or the debtor's dependents." Likewise, "an attorney by affixing his signature to the declaration or affidavit required by § 524(c)(3) certifies that attorney's participation in the reaffirmation process and the accuracy of the representations contained therein to the best of the attorney's knowledge, information and belief." Through this mechanism, courts have maintained a measure of oversight of the reaffirmation agreement process without directly intervening in the approval or disapproval of specific agreements when debtors are represented by counsel.

The fact that courts have continued to monitor the reaffirmation process through Rule 9011 does not relieve counsel of the obligation under the Code to advise clients regarding what debt, if any, to reaffirm, and then to evaluate whether the agreements reached will impose an undue hardship. Counsel, having undertaken the representation of a debtor in a Chapter 7 case, may not escape these responsibilities. Quite the opposite. Courts have continued to emphasize that "if the debtor is represented by counsel, the agreement ***must*** be accompanied by an affidavit of the debtor's attorney" *In re Schott,* 282 B.R. at 6 n. 5 (emphasis added), and that "a represented debtor ***cannot*** reaffirm a debt unless the debtor's attorney provides the declaration or affidavit required under 11 U.S.C. § 524(c)(3)." *In re Egwim,* 291 B.R. 559, 566 (Bankr.N.D.Ga.2003) (emphasis added). *See also In re Jamo,* 283 F.3d 392, 403 (1st Cir.2002) ("Absent counsel's approbation, no valid reaffirmation could occur."); *In re Isom,* No. 07–31469, 2007 WL 2110318 at *2 (Bankr.E.D.Va. July 17, 2007) ("The Bankruptcy Code does not offer a mechanism, however, for the Court independently to approve a reaffirmation agreement under circumstances in which the debtor's attorney has not executed the certification under Part C."); *In re Calabrese,* 353 B.R. 925, 926 (Bankr.M.D.Fla.2006) ("If the debtor is represented by an attorney, according to § 524(k)(5), the attorney ***must*** attest that the reaffirmation agreement is in the best interests of the debtor, and that the agreement does not impose an undue hardship on the debtor.") (emphasis added); *In re Davis,* 106 B.R. 701, 703 (Bankr.S.D.Ala.1989) ("[T]he court must now ***only*** approve agreements when the debtor was not represented by an attorney during the course of negotiating the reaffirmation agreement.") (emphasis added).

Attorney of record for Debtor, has a duty under the Code to represent Debtor in the negotiation of any reaffirmation agreements he wishes to enter. An agreement filed by Debtor that does not contain the declaration required by §524(c)(3) is not effective.

At its core, the refusal of debtor's attorney of record to negotiate reaffirmation agreements on

behalf of debtors is not based on economics concerning his fee, but is instead rooted in "the potential liability to the creditor for the reaffirmed debt if the Debtor defaulted on it." As support for his concern, debtor's counsel cited to an article titled *Nine Traps and One Slap: Attorney Liability under the New Bankruptcy Law,* 79 Am. Bankr.L.J. 283 (2005), published shortly after the passage of BAPCPA. The authors, Catherine E. Vance & Corinne Cooper, of *Nine Traps* raise the specter of attorney liability in the following passage:

> Among the substantial changes BAPCPA makes to reaffirmation agreements is a bizarre requirement for debtors' attorneys. In addition to the certification that has long been required in every reaffirmation agreement, if the agreement triggers the statutory presumption of hardship, the attorney has to go further, and give assurance that the client can perform the promise to pay the debt. BAPCPA provides:
>
> > If a presumption of undue hardship has been established with respect to [a reaffirmation] agreement, such certification shall state that in the opinion of the attorney, the debtor is able to make the payment. [§ 524(k)(5)(B)]
>
> Obviously, this creates a serious problem for the attorney. If the client wants to reaffirm a debt, that is the client's decision, even if doing so flies in the face of the attorney's sound legal advice. After all, attorneys can't *force* their clients to do anything. But BAPCPA disregards this reality and goes a step further by requiring the attorney to certify that the debtor—who has a demonstrated *inability* to pay a reaffirmed debt—is somehow able to pay it. And the penalty for being wrong could be severe: liability to the creditor for what the debtor owes.

Judge Michael disagreed with the authors' interpretation of the attorney's declaration. Judge Michael's ruling states:

> "***By signing Part C of a reaffirmation agreement, counsel has already made the statement that the agreement does not impose an undue hardship on the debtor. See §524(c)(3), (k)(5)(A). An endorsement of the additional statement under §524(k)(5)(B) is merely a statement to the court that 1) a presumption is established under § 524(m) that the agreement will impose an undue hardship on the debtor, thereby alerting the Court to its obligation to conduct a further review under that section; and 2) despite the presumption created under § 524(m), counsel believes that circumstances exist, which should be set out for the Court in Part D of Form 240A, that the agreement will not, in fact, be an undue hardship on the debtor, and that the debtor is able to make the scheduled payments. If counsel can make these statements, he or she should sign and check the appropriate boxes on the form. If counsel is unable to make these statements, then Part C should not be signed. The dire consequences predicted by the authors of Nine Traps apparently have yet to rear their ugly heads: BAPCPA had been the law of the land for over three years, and this court is unaware of a single reported decision holding counsel personally liable for a debtor's failure to make payments under the terms of a***

reaffirmation agreement. In any event, the potential existence of such liability does not supercede counsel's duties under the Bankruptcy Code or the Oklahoma Rules of Professional Conduct." (emphasis added).

RULING:

Debtor's attorney of record had undertaken a duty to provide core services and to represent Debtor before the Court until withdrawal was allowed. Included in those core services was the requirement that debtor's attorney represent and advise the Debtor with respect to reaffirmation agreements. The Reaffirmation Agreement that was filed, did not meet the mandatory requirements of §524(c) due to the absence of a declaration by debtor's counsel was therefore not effective. If Debtor still wished to reaffirm the debt to Nissan, he could seek the assistance of his counsel. Whether debtor's counsel endorsed a new agreement would be based on whether he could make each of the declarations set out in Part C of Form 240A. Parts (1) and (3) of the declaration state that he provided various disclosures and advice to Debtor. Part (2) of the declaration involves an evaluation, under the standard set forth in Rule 9011—"an inquiry reasonable under the circumstances,"—that the agreement does not impose an undue hardship on Debtor or a dependent of Debtor. If debtor's counsel was able to make those declarations, the agreement could then be filed with the Court, which would satisfy an essential element toward making the agreement effective. If debtor's counsel wished to stand by his refusal to assist Debtor in the negotiation of a new agreement, or was otherwise unwilling or unable to complete his duties under the Code, he could petition the Court to withdraw from representation of Debtor. The Court wished to dispel any notion that a debtor's attorney "must" sign every reaffirmation agreement requested by a debtor. If the attorney feels a particular agreement will impose an undue hardship on the debtor or a dependent of the debtor—regardless of what the math says in Part D—then he or she should not sign Part C of Form 240A. *See In re Isom,* No. 07–31469, 2007 WL 2110318 at *4 ("But no counsel should ever feel compelled to execute an attorney certification against counsel's better judgment.").

The Agreement between Debtor and Nissan did not include the required declaration by debtor's attorney of record. As such, the Agreement does not meet the requirements of § 524(c)(3), was not effective, and could not be enforced. Pursuant to Rule 4008(a), the parties were given until a date certain to file any additional reaffirmation agreements in this case.

Judge Michael's ruling in **In re Emanuel Joseph MINARDI** (399 B.R. 841, Bankruptcy Court N. D. Oklahoma, January 23, 2009.) has been followed in: **In re Collmar**, 417 B.R. 920, Bankruptcy Court N.D. Ind., October 2009; **In re Phillips**, 210 WL 398908, Bankruptcy Court, M.D. North Carolina, January 2010; **In re Barron**, 441 B.R. 131, Bankruptcy Court D. Arizona, December 2010; **In re Delaney**, 2011 WL 1749596, Bankruptcy Court C. D. Illinois, May 2011; **In re Shepard**, 453 B.R. 416, Bankruptcy Court D. Colorado., June 8,

2011.

Bankruptcy Judge Stacey Jernigan, N.D. Texas, has provided a lengthy discussion of the proper process for entering into a reaffirmation agreement **In re Grisham**, 436 B**.** R. 896**,** September 7, 2010. In its discussion, the court noted that among the situations requiring a bankruptcy court to conduct a hearing upon a proposed reaffirmation agreement is one in which the debtor is not represented by counsel during the course of negotiation such agreement. *Id. At 8-9.* As part of this discussion, the court stated that it was "dismayed" that some agreements were being filed by debtors who were represented in the bankruptcy case itself without their attorneys' certifications. *Id. At 9.* It went on to state that this situation required the court to hold a hearing so that the court could make the findings required by §534(c)(6) in cases where the debtor was not represented by counsel during the course of negotiating agreements, *id.,* thereby seeming to allow for the possibility that agreements would be enforceable in such cases without the attorneys' certification. Ultimately, however, the court found this behavior by attorneys to be "Unacceptable," stating that "[i]t should be considered a basic part of chapter 7 debtor-representation that an attorney advise his client as to something as fundamental and significant as a reaffirmation agreement and assist him in negotiation of same." *Id.* At 902. Addressing the assertion by some attorneys that they do not feel comfortable signing reaffirmation agreements when they do not feel them to be in their client's best interests, the court stated that, first, as a trusted advisor, the attorney should try harder to dissuade the client from entering into an agreement the attorney feels is not in the client's best interest. *Id. At 10-11.* In addition, since the form certification does not require the attorney to certify that the agreement is in the debtor's best interest, it would be "the more ethical and honorable course of action" for the attorney to sign the required certification and, if a hearing is required because the presumption of undue hardship has been triggered, to explain the situation, and perhaps even that the attorney did not believe the agreement to be in the debtor's best interest, to the court.

Official Forms Attached: Form 27-Reaffirmation Agreement Cover Sheet; Form B240A-Reaffirmation Documents; Form B240C-Order on Reaffirmation Agreement; and WDLA Form Order Setting Hearing to Review Reaffirmation Agreement

Presently Rule 1.1, Rule 1.2 and Rule 1.4 of the Louisiana Rules of Professional Conduct would control in this situation and those rules state:

Rule 1.1. Competence

(a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer is required to comply with the minimum requirements of continuing legal

education as prescribed by Louisiana Supreme Court rule.

(c) A lawyer is required to comply with all of the requirements of the Supreme Court's rules regarding annual registration, including payment of Bar dues, payment of the disciplinary assessment, timely notification of changes of address, and proper disclosure of trust account information or any changes therein.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to the provisions of Rule 1.16 and to paragraphs (c) and (d) of this Rule, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, religious, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning
or application of the law.

Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

(5) **In re Martinez**, 393 B.R. 27, Bankruptcy Court D. Nevada, August 1, 2008, **Specific Issue: Sanctions** against Creditor and Creditor Counsel under Rule 9011 where **Motion to Lift Stay** is granted on Debtors' home based on creditor and debtor counsel stipulation with incorrect legal description. **Rules of Professional Conduct (Nevada and Louisiana), Rule 1.2** ***Scope of Representation and Allocation of Authority Between Client and Lawyer***, **Rule 1.4.** ***Communication***, **Rule 1.16.** ***Declining or Terminating Representation*****; and Rule 3.1.** ***Meritorious Claims and Contentions*****.**

FACTS: A husband and wife filed chapter 13 bankruptcy owning three houses. They planned to surrender two and live in one. Each house had multiple loans against it. Wells Fargo had liens securing loans on several of the houses, including a lien on the house debtors intended to keep.

The chapter 13 trustees held weekly pre-confirmation meetings the morning before the afternoon chapter 13 plan confirmation hearings and claims objections. In any particular week, there were rarely fewer than a hundred chapter 13 cases scheduled for confirmation; on occasion, there have been more than 250. On any given day, it was not unusual to find many, if not most, of Las Vegas's chapter 13 practitioners at these pre-confirmation meetings. As a result, these meetings are apparently not unlike a bazaar, with all the attendant bargaining and confusion.

On February 28, 2008, at one of these chapter 13 pre-confirmation meetings, a lawyer from the Cooper Castle Law Firm, LLC (Cooper Castle) representing Wells Fargo Bank (Wells Fargo), presented George Haines (Haines), counsel for the debtors, with a stipulation lifting the automatic stay on one of the debtors' properties. Haines signed it. The lawyer from Cooper Castle then promptly submitted it to the court for an order on the stipulation. The requested order was entered on February 29. Both the lawyer from Cooper Castle and Haines thought at the time that the stipulation related to a property the debtors intended to surrender. Both were mistaken. The stipulation contained the legal description of the home that debtors intended to keep. In the buzz of the bazaar, both lawyers failed to match up the documents with their clients' intent. When the mistake was pointed out to the lawyer from Cooper Castle,

he ultimately acknowledged it.

When asked to sign a stipulation vacating the order on the mistaken stipulation, the lawyer refused. He claimed that his client, Wells Fargo, would not consent to vacating the mistaken stipulation. As a result, on March 17, the debtors sought an order shortening time for the court to hear a motion to vacate the stipulation. The reason shortened time was requested was simple: if Wells Fargo would not consent to vacating the mistaken stipulation, then Wells Fargo presumably intended to take advantage of the mistake and foreclose on the debtors residence. The court agreed to hear the motion on March 24. Cooper Castle did not oppose the debtors' request for a hearing on shortened time. Despite being ordered to file a written response, it did not do so. A lawyer from Cooper Castle did, however, appear at the hearing. His appearance consisted primarily of his statement that his client, Wells Fargo, would not allow him to consent to vacate the stipulation.

After hearing the evidence, the court vacated the order on the stipulation. It then issued an order to show cause why the lawyer from Cooper Castle, the Cooper Castle law firm, and Wells Fargo should not be sanctioned for their individual and collective conduct in refusing to aid the debtors in rectifying the admitted mistake.

LAW: Rule 9011 regulates an attorney's representations to the bankruptcy court. Of particular import to this case, Rule 9011 holds that:

(b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass, or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law....

Even though no filing was made, the appearance and opposition to the debtor's motion essentially vouched for and advocated the validity of the mistaken stipulation and order. The court had previously held, this "later advocating" of a position in a document is "conduct [that] runs afoul of Rule 9011. It is the *presentation* of a claim or contention, whether by signing it or later advocating it, that triggers Rule 9011.... Under the terms of Rule 9011, presentation occurs 'by signing, filing, submitting, or *later advocating [ ]* a petition'...." Bankr.R. 9011(b)(1) (emphasis added).

When Cooper Castle and its lawyers learned of the lack of a basis to oppose the debtors' motion, they should have declined to oppose it. Instead, they each took the passive approach to client representation, seemingly doing whatever the client requested, regardless of whether it was reasonable or justified by the facts. A lawyer may not do this. **Rule 3.1 of Nevada's Rules of Professional Conduct** states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law----

Cooper Castle and its lawyer separately defended on the basis that they were each simply following client's orders. They contended that it would put an unwarranted and unnecessary barrier between them and their client were this court to rule that they had an obligation to say "no" to their client. This position calls into question the proper role of lawyers and their clients before the court. **Rule 1.2(a) of Nevada's Rules of Professional Conduct** states, in part:

> "a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

Comment 13 to this rule, as promulgated by the American Bar Association, states that
If a **lawyer** comes to know or reasonably should know that a client expects assistance not permitted by the Rules of **Professional** Conduct or other law or if the **lawyer** intends to act contrary to the client's instructions, the **lawyer** must consult with the client regarding the limitations on the **lawyer's** conduct. See Rule 1.4(a)(5).
AM. BAR ASS'N, ANNOTATED

Rule 1.4(a)(5) of Nevada"s Rules of Professional Conduct states, in part:

> **Rule 1.4. Communication**
>
> (a) A lawyer shall:
>
> > (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

This consultation is important; under the *Restatement of Law Governing **Lawyers**,* As between client and **lawyer**, a **lawyer** retains authority that may not be overridden by a contract with or an instruction from the client:

(1) to refuse to perform, counsel, or assist future or ongoing acts in the representation that the **lawyer** reasonably believes to be unlawful.

RESTATEMENT (THIRD) OF LAW GOVERNING **LAWYERS** § 23 (2000). The comments to this section confirm that "Unlawful acts include all those exposing a **lawyer** to civil or criminal liability, including procedural sanctions, or discipline for violation of **professional** rules."

Counsel should have counseled Wells Fargo to agree to vacate the mistaken stipulation, and informed them that any other course of conduct was unreasonable and one in which they could not participate. Instead, they followed Wells Fargo's instructions without apparent regard to their professional obligations. In short, rather than remain as independent professionals counseling Wells Fargo, Cooper Castle and its lawyers instead chose to become unthinking agents for Wells Fargo's ends.

A **lawyer** representing a client whose business contributes to a **lawyer's** income necessarily faces a difficult question every day:

> Will the **lawyer** remain an independent **professional** or instead become a fancy butler serving the needs of a more powerful principal? *See* Rob Atkinson, *How the Butler Was Made To Do It: The Perverted* ***Professionalism*** *Of The Remains Of The Day,* 105 YALE L.J. 177, 184 (1995).

The court acknowledged that it could not force a party to undertake such introspection; however, to the extent the questions posed by such introspection are answered by the law governing **lawyers**, the court can compel compliance. As a result, the court found that Cooper Castle and the **lawyer** appearing from that firm each violated their duties under Rules 1. 2, 1.4 and 1.16.

Rule 1.16 (a)(1) of Nevada"s Rules of Professional Conduct states, in part:

> **Rule 1.16. Declining or Terminating Representation**
>
> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> > (1) the representation will result in violation of the rules of professional conduct or other law;

Sanctions are supported by the court's inherent authority to regulate practice before it. *Miller*

v. Cardinale (In re DeVille), 361 F.3d 539 (9th Cir.2004); *Knupfer v. Lindblade (In re Dyer),* 322 F.3d 1178, 1192–96 (9th Cir.2003). *See also* **11 U.S.C. § 105.**

RULING:
The court found that Cooper Castle and its lawyer who appeared in this case failed to maintain their professional independence from Wells Fargo. In particular, the court found they each violated Rule 9011, and Rules 1.2, 1.4 and 1.16 of Nevada's Rules of Professional Conduct. Their client, Wells Fargo, who also violated Rule 9011, produced evidence that demonstrated the lack of a coherent or consistent policy regarding correcting mistakes, and when pressed to reconcile their position with other similar situations, it concocted fabricated differences, thereby acting in bad faith.

Against this background, the court found sanctions were warranted to deter future similar conduct by these parties as well as others and to secure future compliance with standards of civil and expeditious litigation. The court, therefore, sanctioned Cooper Castle with a public reprimand, and its lawyer who appeared in this matter with a private reprimand. The court sanctioned Wells Fargo for its bad faith conduct in this matter by ordering it to pay debtors their attorneys' fees incurred in scheduling and appearing at the hearing to vacate the mistaken stipulation. Further, Wells Fargo may not collect from the debtors any fees (by way of direct billing or by way of adding it to the debt owed to Wells by the debtors) incurred in connection with the motion to vacate the mistaken order.

Presently Louisiana Rules of Professional Conduct: Rule 1.2. *Scope of Representation and Allocation of Authority Between Client and Lawyer*; Rule 1.4. *Communication*; Rule 1.16. *Declining or Terminating Representation*; and Rule 3.1. *Meritorious Claims and Contentions* would control in this situation and those rules state:

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

> (a) Subject to the provisions of Rule 1.16 and to paragraphs (c) and (d) of this Rule, a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, religious, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Rule 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. Upon written

request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding.

Rule 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

B27 (Official Form27) (12/09)

United States Bankruptcy Court
Western District Of Louisiana

In re:

Case No.:
Chapter:

REAFFIRMATION AGREEMENT COVER SHEET

This form must be completed in its entirety and filed, with the reaffirmation agreement attached, within the time set under Rule 4008. It may be filed by any party to the reaffirmation agreement.

1. Creditor's Name:

2. Amount of the debt subject to this reaffirmation agreement:
$ _____ on the date of bankruptcy $ _____ to be paid under reaffirmation agreement

3. Annual percentage rate of interest: _____% prior to bankruptcy
_____% under reaffirmation agreement (____ Fixed Rate ____ Adjustable Rate)

4. Repayment terms (if fixed rate): $ _____ per month for _____ months

5. Collateral, if any, securing the debt: Current market value: $_____
Description:

6. Does the creditor assert that the debt is nondischargeable? ☐ Yes ☐ No
(If yes, attach a declaration setting forth the nature of the debt and basis for the contention that the debt is nondischargeable.)

Debtor's Schedule I and J Entries		Debtor's Income and Expenses as Stated on Reaffirmation Agreement	
7A. Total monthly income from Schedule I, line 16	$_____	7B. Monthly income from all sources after payroll deductions	$_____
8A. Total monthly expenses from Schedule J, line 18	$_____	8B. Monthly expenses	$_____
9A. Total monthly payments on reaffirmed debts not listed on Schedule J	$_____	9B. Total monthly payments on reaffirmed debts not included in monthly expenses	$_____
		10B. Net monthly income (Subtract sum of lines 8B and 9B from line 7B. If total is less than zero, put the number in brackets.)	$_____

11. Explain with specificity any difference between the income amounts (7A and 7B):

12. Explain with specificity any difference between the expense amounts (8A and 8B):

If line 11 or12 is completed, the undersigned debtor, and joint debtor if applicable, certifies that any explanation contained on those lines is true and correct.

_____	_____
Signature of Debtor (only required if line 11 or 12 is completed)	Signature of Joint Debtor (if applicable, and only required if line 11 or 12 is completed)

Other Information

☐ Check this box if the total on line 10B is less than zero. If that number is less than zero, a presumption of undue hardship arises (unless the creditor is a credit union) and you must explain with specificity the sources of funds available to the Debtor to make the monthly payments on the reaffirmed debt:

Was debtor represented by counsel during the course of negotiating this reaffirmation agreement?
☐ Yes ☐ No

If debtor was represented by counsel during the course of negotiating this reaffirmation agreement, has counsel executed a certification (affidavit or declaration) in support of the reaffirmation agreement?
☐ Yes ☐ No

FILER'S CERTIFICATION

I hereby certify that the attached agreement is a true and correct copy of the reaffirmation agreement between the parties identified on this Reaffirmation Agreement Cover Sheet.

_____
Signature

_____
Print/Type Name & Signer's Relation to Case

Check one.
☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
See Debtor's Statement in Support of Reaffirmation, Part II below, to determine which box to check.

UNITED STATES BANKRUPTCY COURT

Western District of Louisiana

In re _____, Case No. _____
Debtor

Chapter _____

REAFFIRMATION DOCUMENTS

Name of Creditor: _____

☐ Check this box if Creditor is a Credit Union

PART I. REAFFIRMATION AGREEMENT

Reaffirming a debt is a serious financial decision. Before entering into this Reaffirmation Agreement, you must review the important disclosures, instructions, and definitions found in Part V of this form.

A. Brief description of the original agreement being reaffirmed: _____
For example, auto loan

B. ***AMOUNT REAFFIRMED***: $_____

The Amount Reaffirmed is the entire amount that you are agreeing to pay. This may include unpaid principal, interest, and fees and costs (if any) arising on or before _____, which is the date of the Disclosure Statement portion of this form (Part V).

See the definition of "Amount Reaffirmed" in Part V, Section C below.

C. The ***ANNUAL PERCENTAGE RATE*** applicable to the Amount Reaffirmed is _____%.

See definition of "Annual Percentage Rate" in Part V, Section C below.

This is a *(check one)* ☐ Fixed rate ☐ Variable rate

If the loan has a variable rate, the future interest rate may increase or decrease from the Annual Percentage Rate disclosed here.

D. Reaffirmation Agreement Repayment Terms *(check and complete one)*:

☐ $_____ per month for _____ months starting on_____.

☐ Describe repayment terms, including whether future payment amount(s) may be different from the initial payment amount.

E. Describe the collateral, if any, securing the debt:

Description: _____
Current Market Value $_____

F. Did the debt that is being reaffirmed arise from the purchase of the collateral described above?

☐ Yes. What was the purchase price for the collateral? $_____

☐ No. What was the amount of the original loan? $_____

G. Specify the changes made by this Reaffirmation Agreement to the most recent credit terms on the reaffirmed debt and any related agreement:

	Terms as of the Date of Bankruptcy	Terms After Reaffirmation
Balance due *(including fees and costs)*	$_____	$_____
Annual Percentage Rate	_____%	_____%
Monthly Payment	$_____	$_____

H. ☐ Check this box if the creditor is agreeing to provide you with additional future credit in connection with this Reaffirmation Agreement. Describe the credit limit, the Annual Percentage Rate that applies to future credit and any other terms on future purchases and advances using such credit:

PART II. DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

A. Were you represented by an attorney during the course of negotiating this agreement?

Check one. ☐ Yes ☐ No

B. Is the creditor a credit union?

Check one. ☐ Yes ☐ No

C. If your answer to EITHER question A. or B. above is "No," complete 1. and 2. below.

1. Your present monthly income and expenses are:

   a. Monthly income from all sources after payroll deductions (take-home pay plus any other income) $_____

   b. Monthly expenses (including all reaffirmed debts except this one) $_____

   c. Amount available to pay this reaffirmed debt (subtract b. from a.) $_____

   d. Amount of monthly payment required for this reaffirmed debt $_____

   If the monthly payment on this reaffirmed debt (line d.) ***is greater than*** *the amount you have available to pay this reaffirmed debt (line c.), you must check the box at the top of page one that says "Presumption of Undue Hardship." Otherwise, you must check the box at the top of page one that says "No Presumption of Undue Hardship."*

2. You believe that this reaffirmation agreement will not impose an undue hardship on you or your dependents because:

   Check one of the two statements below, if applicable:

   ☐ You can afford to make the payments on the reaffirmed debt because your monthly income is greater than your monthly expenses even after you include in your expenses the monthly payments on all debts you are reaffirming, including this one.

   ☐ You can afford to make the payments on the reaffirmed debt even though your monthly income is less than your monthly expenses after you include in your expenses the monthly payments on all debts you are reaffirming, including this one, because:

   Use an additional page if needed for a full explanation.

D. If your answers to BOTH questions A. and B. above were "Yes," check the following statement, if applicable:

☐ You believe this Reaffirmation Agreement is in your financial interest and you can afford to make the payments on the reaffirmed debt.

Also, check the box at the top of page one that says "No Presumption of Undue Hardship."

PART III. CERTIFICATION BY DEBTOR(S) AND SIGNATURES OF PARTIES

I hereby certify that:

(1) I agree to reaffirm the debt described above.

(2) Before signing this Reaffirmation Agreement, I read the terms disclosed in this Reaffirmation Agreement (Part I) and the Disclosure Statement, Instructions and Definitions included in Part V below;

(3) The Debtor's Statement in Support of Reaffirmation Agreement (Part II above) is true and complete;

(4) I am entering into this agreement voluntarily and am fully informed of my rights and responsibilities; and

(5) I have received a copy of this completed and signed Reaffirmation Documents form.

SIGNATURE(S) (If this is a joint Reaffirmation Agreement, both debtors must sign.):

Date _____ Signature _____
Debtor

Date _____ Signature _____
Joint Debtor, if any

Reaffirmation Agreement Terms Accepted by Creditor:

Creditor _____ _____
Print Name *Address*

_____ _____ _____
Print Name of Representative *Signature* *Date*

PART IV. CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY)

To be filed only if the attorney represented the debtor during the course of negotiating this agreement.

I hereby certify that: (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Check box, if the presumption of undue hardship box is checked on page 1 and the creditor is not a Credit Union.

Date _____ Signature of Debtor's Attorney_____

Print Name of Debtor's Attorney _____

Reset Save As... Print

PART V. DISCLOSURE STATEMENT AND INSTRUCTIONS TO DEBTOR(S)

Before agreeing to reaffirm a debt, review the terms disclosed in the Reaffirmation Agreement (Part I above) and these additional important disclosures and instructions.

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps, which are detailed in the Instructions provided in Part V, Section B below, are not completed, the Reaffirmation Agreement is not effective, even though you have signed it.

A. DISCLOSURE STATEMENT

1. **What are your obligations if you reaffirm a debt?** A reaffirmed debt remains your personal legal obligation to pay. Your reaffirmed debt is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Your obligations will be determined by the Reaffirmation Agreement, which may have changed the terms of the original agreement. If you are reaffirming an open end credit agreement, that agreement or applicable law may permit the creditor to change the terms of that agreement in the future under certain conditions.

2. **Are you required to enter into a reaffirmation agreement by any law?** No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments that you agree to make.

3. **What if your creditor has a security interest or lien?** Your bankruptcy discharge does not eliminate any lien on your property. A ‘‘lien’’ is often referred to as a security interest, deed of trust, mortgage, or security deed. The property subject to a lien is often referred to as collateral. Even if you do not reaffirm and your personal liability on the debt is discharged, your creditor may still have a right under the lien to take the collateral if you do not pay or default on the debt. If the collateral is personal property that is exempt or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the collateral, as the parties agree or the court determines.

4. **How soon do you need to enter into and file a reaffirmation agreement?** If you decide to enter into a reaffirmation agreement, you must do so before you receive your discharge. After you have entered into a reaffirmation agreement and all parts of this form that require a signature have been signed, either you or the creditor should file it as soon as possible. The signed agreement must be filed with the court no later than 60 days after the first date set for the meeting of creditors, so that the court will have time to schedule a hearing to approve the agreement if approval is required. However, the court may extend the time for filing, even after the 60-day period has ended.

5. **Can you cancel the agreement?** You may rescind (cancel) your Reaffirmation Agreement at any time before the bankruptcy court enters your discharge, or during the 60-day period that begins on the date your Reaffirmation Agreement is filed with the court, whichever occurs later. To rescind (cancel) your Reaffirmation Agreement, you must notify the creditor that your Reaffirmation Agreement is rescinded (or canceled). Remember that you can rescind the agreement, even if the court approves it, as long as you rescind within the time allowed.

6. **When will this Reaffirmation Agreement be effective?**

a. **If you *were* represented by an attorney during the negotiation of your Reaffirmation Agreement and**

i. **if the creditor is not a Credit Union**, your Reaffirmation Agreement becomes effective when it is filed with the court unless the reaffirmation is presumed to be an undue hardship. If the Reaffirmation Agreement is presumed to be an undue hardship, the court must review it and may set a hearing to determine whether you have rebutted the presumption of undue hardship.

ii. **if the creditor is a Credit Union**, your Reaffirmation Agreement becomes effective when it is filed with the court.

b. **If you *were not* represented by an attorney during the negotiation of your Reaffirmation Agreement**, the Reaffirmation Agreement will not be effective unless the court approves it. To have the court approve your agreement, you must file a motion. See Instruction 5, below. The court will notify you and the creditor of the hearing on your Reaffirmation Agreement. You must attend this hearing, at which time the judge will review your Reaffirmation Agreement. If the judge decides that the Reaffirmation Agreement is in your best interest, the agreement will be approved and will become effective. However, if your Reaffirmation Agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home, you do not need to file a motion or get court approval of your Reaffirmation Agreement.

7. **What if you have questions about what a creditor can do?** If you have questions about reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement. If you do not have an attorney helping you, you may ask the judge to explain the effect of this agreement to you at the hearing to approve the Reaffirmation Agreement. When this disclosure refers to what a creditor "may" do, it is not giving any creditor permission to do anything. The word "may" is used to tell you what might occur if the law permits the creditor to take the action.

B. INSTRUCTIONS

1. Review these Disclosures and carefully consider your decision to reaffirm. If you want to reaffirm, review and complete the information contained in the Reaffirmation Agreement (Part I above). If your case is a joint case, both spouses must sign the agreement if both are reaffirming the debt.

2. Complete the Debtor's Statement in Support of Reaffirmation Agreement (Part II above). Be sure that you can afford to make the payments that you are agreeing to make and that you have received a copy of the Disclosure Statement and a completed and signed Reaffirmation Agreement.

3. If you were represented by an attorney during the negotiation of your Reaffirmation Agreement, your attorney must sign and date the Certification By Debtor's Attorney (Part IV above).

4. You or your creditor must file with the court the original of this Reaffirmation Documents packet and a completed Reaffirmation Agreement Cover Sheet (Official Bankruptcy Form 27).

5. *If you are not represented by an attorney, you must also complete and file with the court a separate document entitled "Motion for Court Approval of Reaffirmation Agreement" unless your Reaffirmation Agreement is for a consumer debt secured by a lien on your real property, such as your home.* You can use Form B240B to do this.

C. DEFINITIONS

1. **"Amount Reaffirmed"** means the total amount of debt that you are agreeing to pay (reaffirm) by entering into this agreement. The total amount of debt includes any unpaid fees and costs that you are agreeing to pay that arose on or before the date of disclosure, which is the date specified in the Reaffirmation Agreement (Part I, Section B above). Your credit agreement may obligate you to pay additional amounts that arise after the date of this disclosure. You should consult your credit agreement to determine whether you are obligated to pay additional amounts that may arise after the date of this disclosure.

2. **"Annual Percentage Rate"** means the interest rate on a loan expressed under the rules required by federal law. The annual percentage rate (as opposed to the "stated interest rate") tells you the full cost of your credit including many of the creditor's fees and charges. You will find the annual percentage rate for your original agreement on the disclosure statement that was given to you when the loan papers were signed or on the monthly statements sent to you for an open end credit account such as a credit card.

3. "**Credit Union"** means a financial institution as defined in 12 U.S.C. § 461(b)(1)(A)(iv). It is owned and controlled by and provides financial services to its members and typically uses words like "Credit Union" or initials like "C.U." or "F.C.U." in its name.

Form osetreaf

United States Bankruptcy Court
Western District of Louisiana

Case No.:
Chapter:
Judge:

In Re: Debtor(s) (name(s) used by the debtor(s) in the last 8 years, including married, maiden, trade, and address):

Social Security No.:

ORDER SETTING HEARING TO REVIEW REAFFIRMATION AGREEMENT

AS REQUIRED BY 11 USC §524(c)(6)(A), §524(d), or §524(m)

The above captioned case is a pending Chapter 7 case. The Debtor(s) have filed in the record of this case what purports to be a reaffirmation agreement with a Creditor whose name and address are set forth below:

The agreement is deficient in the following particulars:

PLACE A CHECK MARK IN BOX BESIDE DEFICIENCY BELOW THAT BEST DESCRIBES

☐ **1.** The Reaffirmation Agreement is not accompanied by a Declaration or Affidavit of the attorney that represented the Debtor(s) during the course of negotiating the agreement as required by 11 USC §524(c)(3).

☐ **2.** The Reaffirmation Agreement does not have the disclosure and/or other documents/pleadings required by 11 USC §524(c)(2) & (k).

☐ **3.** The Disclosure filed per 11 USC §524(c)(2) & (k) indicates that what is left of the Debtor's monthly income after deduction of the Debtor's monthly expenses as shown on the debtor's completed and signed statement required by subsection (k)(6)(A) is less than the scheduled payments on the reaffirmed debt. This inadequacy of funds presents a presumption that the reaffirmation agreement would cause an undue hardship on the debtor(s) and requires a review by the Court and disapproval by the Court of the Reaffirmation Agreement if the Presumption is not rebutted.

☐ **4.** The Reaffirmation Agreement has not been executed by the Creditor as required by 11 USC §524(c).

☐ **5.** The Reaffirmation Agreement was made after the Discharge was granted contrary to the requirement of 11 USC §524(c)(1), and has been filed in the record of this case. In order for this Agreement to be approved, a hearing must be held within 30 days of the entry of the Order granting the discharge and not less than 14 days notice of same must be given to the debtor and trustee as required by 11 USC §524(d) and Bankruptcy Rule 4008.

The foregoing considered:

IT IS HEREBY ORDERED:

I. A HEARING IS TO BE HELD on **at in the United States Bankruptcy Court,**

to determine if the deficiencies to the filed Reaffirmation Agreement set forth above have been cured allowing the approval of the Agreement, or to determine if the presumption of "undue hardship" can be overcome allowing approval of the Agreement, or for the Court to review the agreement with debtor(s) who were not represented in the negotiations of such agreement by counsel to determine if the Agreement can be approved.

II. If the deficiencies set forth above have not been cured before the hearing date, then Debtor(s) who executed the Reaffirmation Agreement described herein **SHALL ATTEND** the hearing. Failure to attend the hearing will result in the Court denying approval of the deficient Reaffirmation Agreement described herein.

III. The Bankruptcy Clerk of Court is **ORDERED** to give Notice of this hearing by sending not less than fourteen (14) days prior to the hearing a copy of this Order to the Debtor(s), the Counsel for Debtor(s), the Creditor, and the Trustee in this case.

Date:

/s/_____

JUDGE, U.S. BANKRUPTCY COURT

B240C (Form B240C)(12/09)

United States Bankruptcy Court
Western District of Louisiana

In Re: Case No.
Chapter

ORDER ON REAFFIRMATION AGREEMENT

The debtor(s) _____has (have) filed a motion for approval of the reaffirmation agreement dated _____made between the debtor(s) and creditor _____. The court held the hearing required by 11 U.S.C. § 524(d) on notice to the debtor(s) and the creditor on _____ (date).

COURT ORDER:

- ☐ The court grants the debtor's motion under 11 U.S.C. § 524(c)(6)(A) and approves the reaffirmation agreement described above as not imposing an undue hardship on the debtor(s) or a dependent of the debtor(s) and as being in the best interest of the debtor(s).
- ☐ The court grants the debtor's motion under 11 U.S.C. § 524(k)(8) and approves the reaffirmation agreement described above.
- ☐ The court does not disapprove the reaffirmation agreement under 11 U.S.C. § 524(m).
- ☐ The court disapproves the reaffirmation agreement under 11 U.S.C. § 524(m).
- ☐ The court does not approve the reaffirmation agreement.

# # #