NOTE: The following questions and sample answers are taken from questions used in past examinations. In this portion of the sample, both questions and answers have been updated to reflect the present state of the law. Although an excellent paper would discuss in detail all of the issues raised in the sample answer, a paper may receive a passing grade even though the analysis is less thorough. Historically, approximately 90 percent of the papers have received a passing score.

Bankruptcy Ethics
Question A
(Suggested Time - One-Half Hour)

You represent an individual in a Chapter 7 case who owns a vehicle pledged to secure the claim of Bank. The vehicle was purchased new in 2017. The monthly debt payments and insurance payments consume all of the individual's disposable income and actually exceed the rental payments on the Debtor's house. Even though it is not in the Debtor's best interest to keep the vehicle, the Debtor is proud of the vehicle and does not want to give it up. The Bank is willing to reaffirm the debt, but only if the original Note terms are reaffirmed. The vehicle is used primarily for pleasure and is not necessary for the Debtor's employment.

Can you support reaffirmation of the vehicle? Be sure to identify the state where you practice and indicate, if you know, whether the ethical rules in your jurisdiction are patterned after the ABA Model Code of Professional Responsibility (usually numbered as "DR 2-105," etc.), the ABA Model Rules of Professional Conduct (usually numbered as "Rule 7.4," etc.), or neither.

ANSWER

Under § 524(c) any reaffirmation agreement which is filed with the court must be accompanied by a declaration of the Debtor's attorney stating that the agreement does not impose an undue hardship on the Debtor or a dependent of the Debtor. Under the facts of this case, it appears clear that any reaffirmation would impose an undue hardship on the Debtor and, thus, the attorney could not truthfully make the required declaration. The § 524 declaration presents a conflict for the attorney between his/her duty to zealously represent the client and the duty of candor owed to the court. Since the ethical rules prohibit the lawyer from making false statements in connection with his/her representation of the client, the lawyer must decline to file the declaration. The following options are available:

1. The attorney can withdraw as the Debtor's attorney and the Debtor could present the agreement to the court pursuant to § 524(c)(6) whereby the court must make a determination that it does not impose an undue hardship on the Debtor and is in the best interest of the Debtor.
2. Convince the Debtor that the Debtor should not enter into the reaffirmation and should surrender the vehicle and purchase a less expensive means of transportation.

3. Explore the feasibility of the Debtor confirming a Chapter 13 plan and consider conversion to Chapter 13.
Bankruptcy Ethics

Question B

(Suggested Time - One-Half Hour)

You represent a husband and wife who filed joint Chapter 7 petitions. Both Debtors received their discharges several months ago, but the case has not yet been closed. You have been contacted by the husband, who explains that his wife has filed for divorce. He wants you to represent him in the divorce case.

Can you represent the husband in the divorce case? Be sure to identify the state where you practice and indicate, if you know, whether the ethical rules in your jurisdiction are patterned after the ABA Model Code of Professional Responsibility (usually numbered as "DR 2-105," etc.), the ABA Model Rules of Professional Conduct (usually numbered as "Rule 7.4," etc.), or neither.

**ANSWER**

Two related problems are presented here. First, the attorney has an obligation to both the husband and the wife to protect confidences and secrets. Further, the attorney should not use information acquired in the course of representing a client to the disadvantage of the client. This obligation continues after the termination of the employment. Here, it is likely that the attorney may have learned quite a bit about the wife's assets, interests, etc. that might be used against her in the divorce action. If so, then the representation would not be proper.

Next, the attorney must consider the potential for a conflict of interest. The analysis varies depending upon whether the attorney has completed the representation of the joint Debtors. If both Debtors are current clients, then the general rule would prohibit the proposed representation because the Debtors are directly adverse in the divorce action. Further, this conflict probably could not be waived because representation of the husband in the divorce likely would adversely affect the attorney's relationship with the wife. Here, since the Chapter 7 case has not been closed, the representation would be continuing. Even if the representation has been concluded, there may still be a conflict that prevents the representation of the husband. The lawyer must first determine whether the divorce action is substantially related to the bankruptcy and whether the obligations to the wife (the duty of confidentiality for example) will impair his/her ability to exercise independent professional judgment. Since many issues will overlap, it is likely that the matters are substantially related and thus, the attorney must make full disclosure to the wife and gain her consent before representing the husband in the divorce. However, if the duties to the wife (such as confidentiality) will adversely affect the attorney's representation of the husband, the representation should be declined.
Bankruptcy Ethics
Question C
(Suggested Time - One-Half Hour)

Your firm has represented Debtor Inc. for many years. The corporation has been slow in paying your fees, but always seems to come up with the money by the end of the year. The corporation has not made any payments in more than four months and currently owes the firm for fees and expenses extending over a six month period. Those fees relate to general corporate matters, and were not incurred in connection with or in contemplation of a bankruptcy filing. Debtor Inc. has been unable to obtain an extension on its line of credit with Bank, and Bank is threatening to take immediate action to collect all accounts receivable. Debtor Inc. wants your firm to represent it in a Chapter 11 case and is willing to use its available cash to bring your firm current and to pay a retainer sufficient for you to undertake the representation. Debtor, Inc. also has unencumbered real property that it has offered to pledge to secure the payment of both past fees and future fees.

Please answer the following questions:

1. Can Debtor, Inc. retain you to represent it in its Chapter 11 case?

2. Can Debtor, Inc. use its available cash to pay you?

3. Can Debtor, Inc. pledge its unencumbered real property to secure your past and future fees?

Be sure to identify the state where you practice and indicate, if you know, whether the ethical rules in your jurisdiction are patterned after the ABA Model Code of Professional Responsibility (usually numbered as "DR 2-105," etc.), the ABA Model Rules of Professional Conduct (usually numbered as "Rule 7.4," etc.), or neither.

ANSWER

1. Section 327 permits a debtor to employ an attorney that is disinterested as defined under § 101(14) and does not hold or represent an interest adverse to the estate. Technically creditor status would cause the attorney not to be disinterested under § 101(14). Thus to represent Debtor, Inc. either you must waive your pre-petition fees or be paid in full prior to the filing of the bankruptcy petition. The acceptance of payments, however, may disqualify you as well. While you may be disinterested as technically defined under the Code, the acceptance of a preference may cause you to hold or represent an interest adverse to the estate and thus still disqualify you under § 327. This is a fact issue that would be determined by the court on a case-by-case basis and would depend upon the amount of the preference and perhaps the likelihood that the creditors would not be paid in full.

2. The cash that Debtor proposes to use to pay you may be considered collateral of the Bank. If these funds are considered proceeds of the accounts and can be traced to the
retainage, the payment of a retainer to the attorney may be subject to the interests of the Bank and constitute use of cash collateral in a Chapter 11 case.

3. With respect to the pledging of assets, most courts have permitted security interests intended to secure post-petition services. The most notable of these is In re Martin decided by the First Circuit in 1987. Securing pre-petition fees would mean that the firm is a creditor and thus not disinterested. Whether a pledge of assets to secure post-petition fees allowed would be determined on a case-by-case basis in which the following factors are important:

1. Reasonableness of the arrangement.
2. Whether the fee arrangement was negotiated.
3. Whether the security was commensurate with the magnitude and value of the future services.
4. Whether the security was a necessary means to insure engagement.
5. Whether there are signs of overreaching.
6. The nature and extent of any potential conflict of interest.
7. The likelihood that the potential conflict may turn into an actual conflict.
8. Whether the potential conflict may influence the attorney's subsequent decision making.
9. Whether the arrangement appears improper to other parties in interest.
10. Whether the existence of the security interest threatens to hinder or delay effectuation of a plan.
11. Whether fundamental fairness may be unduly jeopardized.
You represent Bank, which has a duly perfected security interest in the inventory and accounts receivable of Debtor Inc. Debtor Inc. has not asserted any challenge to the perfection of your security interest, but has not been willing to acknowledge that this interest is unavoidable. You, as counsel for Bank, are not aware of any facts that would support an avoidance claim of Bank's interest. A Trustee has been appointed in Debtor Inc.'s case and is in the process of liquidating assets. The Trustee has refused to give Bank relief from stay and asserts that the Bank is fully secured.

The Trustee has initiated multiple preference actions against various trade creditors. The local rules require local counsel to represent any corporation in Bankruptcy Court. Your firm has been contacted by several preference defendants to represent them on the preference actions which have been brought against them. Each of the actions was brought as a separate adversary proceeding, and all are unrelated to each other.

Discuss the issues. What can you do? Be sure to identify the state where you practice and indicate, if you know, whether the ethical rules in your jurisdiction are patterned after the ABA Model Code of Professional Responsibility (usually numbered as "DR 2-105," etc.), the ABA Model Rules of Professional Conduct (usually numbered as "Rule 7.4," etc.), or neither.

1) May you represent the Bank and one of the trade creditors?

2) May you represent more than one of the trade creditor?

ANSWER

1. A lawyer should exercise independent professional judgment on behalf of a client. This means that the lawyer must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues employment of multiple clients. He should resolve all doubts against the propriety of the representation and should not represent in litigation multiple clients with different interests if that would adversely affect the representation. If the interests vary only slightly and he can retain his independent judgment on behalf of each client, the client must be given the opportunity to evaluate his need for representation free from potential conflict and obtain other counsel if the client so desires. Thus, the attorney must make full disclosure to the clients and obtain their consent to the multiple representation. It would also be important for the attorney to consider the disruptive effect that withdrawal might have if the potential conflicts of interest become actual conflicts.

There always exists a conflict between a secured creditor and an unsecured creditor. In this case, even though the security interest of Bank appears to be uncontested, it has not been determined to be valid and thus is subject to attack by other creditors. Additionally, the value
of the collateral has yet to be determined and the parties may have different interests as to how the property would be sold. Thus, it would be problematic for a firm to represent both an unsecured and a secured creditor unless all issues regarding the security interests and the value of its collateral have been previously determined.

2. As for representing more than one of the trade creditors, it is likely that their interests would be very similar, although the goal of each creditor is to maximize the preference recovery from the other creditors and minimize the preference recovery from that creditor. Once the amount of the claims is determined, however, the interests would be identical. Whether you could represent more than one defendant in a preference action would be determined on a case-by-case basis. Important factors would be:

1. The amount of the preference claim in relation to the other potential clients; and

2. The common defenses that the parties may have.

If the amounts are relatively equal and the defenses are the same, then it is likely that the attorney would be able to represent each without impairing his independent professional judgment. A practical problem exists in small communities where there may be more claims than attorneys. In such instances, competent local counsel may be very difficult to find unless local attorneys represent multiple clients.