

### Southeast Bankruptcy Workshop

#### Consumer Session

### **Ethics Issues for Consumer Attorneys**

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#### **ISSUE I**

#### **DEBTOR'S ATTORNEY FEE ISSUES**

#### TOPIC 1A: HOURLY BILLING VS. NO LOOK FEES

Question: Should you bill hourly or charge a "no look" fee?

- A. All fee agreements with the debtor must be disclosed pursuant to 11 U.S.C. § 329 and Fed. R. Bankr. P. 2016(b).
- B. There is sometimes a tension in Bankruptcy Code between your duties to an assisted person under 11 U.S.C. § 528(a)(1) and what you know and don't know yet about the case. That first intake with your client becomes very important because it is often times the same meeting that you decide whether to take the hourly rate or the "no look" fee in available in your district.
- C. Hourly
  - 1) The billable hour is something all lawyers generally understand. (Hours x Rate) = Fee, right? Not Quite.
  - 2) All fee requests of debtor's counsel are subject to judicial review, 11 U.S.C. 329 and 330; See also In re Walters, 868 F.2d 665, 668 (4th Cir. 1989)(any payment made to an attorney by a debtor is reviewable).
  - 3) With adoption of 11 U.SC. § 330 Congress codified a version of factors set forth in *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The factors reviewed by courts are listed at § 330(a)(3) and include: the time spent on services; the rates charged; whether the services were necessary or beneficial; whether the services were completed in a reasonable amount of time; whether the professional performing the work is board certified or demonstrated skill in the bankruptcy field; and whether the compensation sought is reasonable when compared to similarly situated professionals.
  - 4) Attorneys seeking payment hourly must file a fee application and give broad notice to all parties in interest. If your court has enacted the limited notice provisions of Fed. R. Bankr. P. 2002(h), it can greatly reduce the number of parties you must mail the application to.
  - 5) Absent a local rule or form, 28 C.F.R. pt. 58, app. A, sets forth the information an attorney should include when applying to the Court for compensation. In most cases it will not be enough to simply include a copy of your invoice. Among other information, your application should include:
    - a) The name, position, and rate for each person billing time;
    - b) A statement that the client has reviewed the invoice and/or application and approves it;
    - c) A brief description of the case and the various matters addressed by counsel;
    - d) A status of the case;
    - e) A statement of the amount of compensation paid to you to date;
    - f) The period covered by the application;
    - g) Copies of detailed invoices showing the time and expenses for which compensation is sought; and
    - h) Whether the application is interim or final and whether future applications are

expected.

- 6) If the case is of sufficient complexity, for example work on the main case and work on an adversary proceeding, it makes sense to separately categorize work on each matter.
- 7) It takes time to do this correctly.
- D. The "no look" or presumptively reasonable fee is designed to streamline this process.
  - 1) Many consumer cases present issues that debtor's counsel is well versed in and do not require overly unique services.
  - 2) Many districts have a local rule or standing order that states that debtor's counsel in a Chapter 13 may elect to take a flat fee that will be presumed to be reasonable if it is under a certain amount. While it varies by district, somewhere between \$3,500.00-\$5,000.00 appears to be the average. Some districts also provide monitoring fees for the remainder of the case.
  - 3) In exchange for less scrutiny over the details of timekeeping, Courts have adopted by local rule or standing order a set of duties expected of both counsel and the debtor when counsel elects the "no look" fee. The "no look" fee allows an attorney to be compensate in a routine case "without the requisite necessity of: (1) maintaining contemporaneous hourly time records; and (2) filing a fee application[.]" *Walton v. Dellutri Law Grp. (In re Dellutri Law Grp.)*, 482 B.R. 642, 650-51 (Bankr. M.D. Fla. 2012).
  - 4) An example of a typical list of duties assumed by counsel under the "no-look" fee is attached.
  - 5) The "no-look" is not a guaranteed fee or designed to average out an income stream for your practice. In other words, "One debtor should not be paying more for her case to justify counsel incurring more time and expense on another debtor's case." *In re Spurlock*, 642 B.R. 269, 290 (Bankr. S.D. Ohio 2022).
- E. When a fee is challenged?
  - 1) Both no-look and traditional fees may be challenged. While the "no-look" fee is "presumptively" reasonable, that presumption is still reviewable.
  - 2) Fee Applications for hourly work are reviewable since you are required to file an application to receive them.
  - When a party or the Court challenges the amount of your fee, you must be prepared to defend all of the factors set forth in § 330(a)(3). For example, in *In re Spear*, 636 B.R. 765 (Bankr. S.D. Ohio 2022), the Court found the rates were reasonable, but still made significant reductions across the board based on what the Court perceived was too much time on certain matters. In addition, the Court often made comparison to the amount being charged for certain tasks as compared to the "routine" case covered by the "no-look" fee. *Id.* At 774. Counsel needs to be aware that if you elect the hourly rate, you must be mindful of the time or amount you are charging, as compared to the what the Court may perceive as a routine case.
  - Likewise, which many districts no longer require contemporaneous time records for "no-look" fees, it may not be a bad idea to keep your time anyway. First, if there is a challenge to the amount you are requesting, it gives the practitioner an ability to show why the request is reasonable. In addition, the Model Rule 1.5, and its adoption across various jurisdictions, still require a fee to be reasonable. Whether under the "no-look" fee or hourly fee applications, the same factors in §330(a)(3) apply.
- F. When do I take the "no-look" and when do I take the hourly?

- 1) One way to read the result in *Spear* is that whether you elect the no-look fee or the hourly rate, your compensation should be about the same under either method.
- 2) In cases where you know the debtor's plan will be difficult to get confirmed, or where you anticipate extended contested matters or multiple sales, the hourly rate is likely your best bet. If you happen to fall under the "no-look" cap for your district, there should be little to no objection. If you elect the flat fee and then seek to increase it later, it may be more difficult to argue why some of what you are seeking to charge is not already included.
- 3) If you do elect the "no-look" fee, it is clear that not every case is entitled to the maximum amount. If you have an overly simple case where there is no secured debt and the only income is a pension or Social Security, reasonable compensation is likely not the same as it would be for a routine case where you are cramming down a car and need to cure a mortgage. While the maximum "no-look" fee is presumed reasonable, "the presumption may be overcome if the services provided in a case do not appear to justify the requested fee." *Spurlock* at 290.
- G. Your interests vs. your client's.

One other consideration in more complicated Chapter 13's is the interest in lawyers being paid for their valuable work vs. rendering the case not feasible. Often cases with difficult facts or contested issues for confirmation may cause a lawyer to incur fees, if paid on an hourly basis, which require the debtor to pay in more to meet the various requirements of a confirmable plan. Also, there are times that unexpected work subsequent to confirmation may cause a plan that was feasible to suddenly not be. You need to mindful that the effect of granting an application may be considered as to whether the fee requested is reasonable, and/or, may inadvertently defeat the main purpose of the bankruptcy.

#### **ISSUE I**

#### **DEBTOR'S ATTORNEY FEE ISSUES**

#### TOPIC 1B:

Question: What are the rules surrounding a Chapter 13 debtor's employment of "other professionals? When does § 327 apply in a Chapter 13 case?

- A. The employment of professionals in Chapter 13 varies by district. Those Courts that say a debtor is free to sell property without seeking an order of the Court rely on the vesting provisions of 11 U.S.C. § 1327(b). See In re Tirado, 329 B.R. 244, 250 (Bankr. E.D. Wis. 2005). Likewise, if an asset remains property of the bankruptcy state, a professional must first be employed before compensation can be allowed. Smith v. Meredith (In re Smith), 637 B.R. 758, 775 (Bankr. S.D. Ga. 2022)(personal injury lawyer partially disgorged for failure to be timely employed).
- B. There is no uniform agreement on who should be able to employ professionals. Some Courts allow the debtor based on the belief that a Chapter 13 Debtor is a debtor in possession. *See In re Goines*, 465 B.R. 704, 706 (Bankr. N.D. Ga. 2012)(collecting cases). Others, like *In re Smith*, assert only the Chapter 13 Trustee can hire a professional.
- C. What almost all of the cases appear to agree on is that any attorney who represents the debtor in any capacity must file a disclosure of their fee arrangement pursuant to Fed. R. Bankr. P. 2016 and 11 U.S.C. § 329(a).

#### **ISSUE II**

#### **UNBUNDLING – REAFFIRMATION AGREEMENTS**

Question: Attorney's retention agreement with the debtor says that attorney will represent debtor in all aspects of the case. Debtor wants to sign a reaffirmation agreement, but attorney does not think it's in the debtor's best interests, and declines to sign. What is the result?

#### 1. Disclosure Requirements

- a. 11 U.S.C. § 329(a)
  - i. Debtor's counsel must disclose any compensation paid or agreed to be paid for services rendered in connection with a bankruptcy case.
  - ii. Continuing obligation.
  - iii. Does not apply to attorneys representing non-debtors.
- b. Fed. R. Bankr. P. 2016(b)
  - i. 14 days to disclose.
  - ii. 14 days to supplement after any payment or agreement not previously disclosed.

#### 2. Retainers

- a. Reasonableness of Fees
  - i. Lodestar: reasonable rates and time spent on matter.
  - ii. Accurate time records are important.
- b. Fed. R. Bankr. P. 2017
  - i. Standing to Object to Counsel's fees
    - 1. Pre-petition Fees: Court, Debtor or Party in Interest
    - 2. Post-petition Fees: Court, Debtor or UST

#### 3. Disgorgement of Fees

- a. 11 U.S.C. § 329(b)
- b. Court may order disgorgement to debtor, trustee, or to source of payment (i.e., a third party such as the debtor's parent).
- c. Court may also cancel the agreement.

#### 4. Fee Sharing

- a. 11 U.S.C. § 504
  - i. Prohibits fee sharing in most circumstances.
  - ii. Does not apply to partners, members or regular associate in same law firm.
- b. Fed. R. Bankr. P. 2016(b)
  - i. Requires disclosure of any fee sharing agreement
- c. 18 U.S.C. § 155
  - i. Undisclosed prohibited fee sharing is a crime.
  - ii. Fined and/or imprisoned up to 1 year.

#### 5. Unbundling of Services

- a. Fee agreement that specifies the limited services to be provided
  - i. What happens when the attorney does not perform the services included in the fee?
- b. Example Reaffirmation Agreements
  - i. 11 U.S.C. § 524 (c)(3)
    - 1. Must be accompanied by a declaration of attorney representing debtor during the "course of negotiating an agreement" that states among other things that the "agreement does not impose an undue hardship on the debtor or a dependent of the debtor."
    - 2. Courts have held that representation during the course of negotiating a reaffirmation agreement on behalf of the debtor is part of the "essential duties" a debtor's attorney must perform. *In re DeSantis*, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008); *In re Egwim*, 291 B.R. 559, 573 (Bankr. N.D. Ga. 2003) (holding representation with regard to reaffirmation agreements is a "fundamental and core" obligation imposed upon a chapter 7 consumer debtor's attorney).
    - 3. Some attorneys avoid participating in reaffirmation-related services. The primary concern is a situation where a client steadfastly maintains a desire to reaffirm a debt, but the attorney cannot in good faith make the certification required by § 524(c)(3).
    - 4. Yet nearly every Rule 2016(b) disclosure provides that the fee includes preparation and filing of reaffirmation agreements.

#### 6. Bifurcated Contracts

- a. Debtors cannot pay post-petition for pre-petition work. A bifurcated fee arrangement separates pre and post-petition work into separate engagements so that post-petition work is billed and paid post-petition.
- b. United States Trustee Position No objection if:
  - i. Allowed under local law;
  - ii. Fees are fair and reasonable:
  - iii. Agreements are entered into with Debtor's fully informed consent; and
  - iv. Agreements are adequately disclosed.
- c. In many jurisdictions, attorney must still have court approval to withdraw.
- d. *In re Brown*, 631 B.R. 77 (Bankr. S.D. Fla. 2021). Court considered no or low money down engagements.
  - i. Court must evaluate the reasonable of post-petition flat fees by work and time required as opposed to comparing it to prepetition fee.
  - ii. Attorney must:
    - 1. adhere to bar rules, meet with client and properly advise client about their options;
    - 2. Assist debtor with § 521 duties; and
    - 3. Provide adequate disclosures.

- iii. Client must have 14 days to decide whether to proceed with post-petition agreement.
- iv. Factoring of fees is not allowed.
- v. Debtor must be provided both agreements at the same time.
- e. *In re Shatusky*, No. 8:22-bk-00131-RCT, 2022 WL 1599973 (Bankr. M.D. Fla. 2022)
  - i. Follows standards articulated in *In re Brown* and *In re Walton*, 469 B.R. 383 (Bankr. M.D. Fla. 2012) which are minimum requirements.
  - ii. Post-petition third-party financing option does not violate § 526(a)(4) provided attorney provides debtor with other options.
  - iii. Zero fee prepetition agreement is permissible.
  - iv. Need proper disclosure of contracts and financing, if any, with the court

# ISSUE III PICKING YOUR TEAM

Who is My Client When the Person at the Consult is Wearing Multiple Hats?

#### **WARNING: AI Generated Content included below**

#### I. Introduction.

Since I am also covering our sub-topic on AI use in connection with consumer attorney ethics, I want to go through a demonstration, using the only AI site that I have really used so far, my favorite, Perplexity AI. I have highlighted my "prompt" – i.e., what I typed in the box which

tells me "Ask anything....." The reason I prefer Perplexity is because (i) I have heard several national talking heads recommend it, saying it is the preferred one on the "West Coast" and (ii) it gives you the source materials as links, so you get 3-5 sources you can click on and read if you choose.

I have not yet used any AI searches for any client matters or questions (other than what is already happening in google, outlook or Westlaw that is technically categorized as "AI"). We are ALL using AI to some extent without even knowing it. I have only used Perplexity for several different seminar presentations, and for personal research on topics that I am exploring. It is amazing to watch when it spits out the information, and I encourage everyone to give it a try.

So first, let's review exactly what I searched and exactly what Perplexity gave me in regards to the messiness of issues we all experience with consumers whose personal financial affairs are totally interwoven with some kind of small business they own and operate. It is normally a hot mess.

#### WARNING-WARNING

#### II. AI Content Exactly as Presented and Received.

need 2 page outline with caselaw on ethics of who is client in single member LLC Sources

How Do Courts Treat LLCs for Privilege Purposes? - McGuireWoods



mcguirewoods

<u>·</u> 1

The Single-Member LLC as Disregarded Entity - Business Law Today

blt

<u>businesslawtoday</u>

<u>·</u> 2

ER 1.13 Organization as Client - State Bar of Arizona

#### azbar

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#### DΔ

#### View 2 more

#### Answer (that spit out):

Here's a 2-page outline on the ethics of who is the client in a single-member LLC, including relevant caselaw:

#### I. Introduction

- Single-member LLCs combine characteristics of corporations and partnerships
- Unique ethical considerations arise regarding attorney-client relationship

#### II. General Principles

#### A. Entity as Client

- Rule 1.13 of Model Rules of Professional Conduct: Organization as Client
- Attorney represents the entity, not individual members/managers

#### B. Disregarded Entity Status

- For tax purposes, single-member LLCs are often disregarded entities
- This can create confusion about client identity in other contexts

#### III. Key Ethical Issues

#### A. Identifying the Client

- 1. Entity vs. Individual Member
  - Default assumption is that LLC is the client, not the individual member
  - Carpenters Pension Trust v. Lindquist Family LLC (2014): Court applied corporate privilege principles to LLC
- 2. Potential for Conflation
  - Risk of blurring lines between entity and individual interests
  - Importance of clear communication about client identity

#### B. Conflicts of Interest

- 1. Concurrent Representation
  - Potential conflicts between LLC and sole member
  - Need for informed consent under Rule 1.7 if representing both
- 2. Former Client Issues
  - Rule 1.9 considerations if previously represented individual member

#### C. Confidentiality and Privilege

- 1. Attorney-Client Privilege
  - Generally belongs to the entity, not individual member
  - *Comando v. Nugiel* (NJ App. Div.): Caution against representing LLC and individual members in disputes
- 2. Upjohn Warnings
  - May be necessary when communicating with sole member about LLC matters

#### D. Pro Se Representation

- 1. Limitations on Pro Se Appearances
  - Lattanzio v. COMTA (2d Cir. 2007): LLC sole member cannot appear pro se for LLC

• *U.S. v. Hagerman* (7th Cir. 2008): Reaffirmed prohibition on pro se LLC representation

#### IV. Best Practices

#### A. Clear Engagement Letters

- Explicitly identify client (LLC vs. individual)
- Define scope of representation
- B. Maintain Entity Formalities
  - Separate LLC and personal matters
  - Avoid commingling of funds or legal services

#### C. Regular Communication

- Remind sole member of entity representation
- Address potential conflicts proactively

#### D. Careful Conflict Checks

- Consider both LLC and sole member interests
- Obtain informed consent when appropriate

#### E. Document Decision-Making

- Maintain records of LLC authorizations
- Clarify capacity in which sole member is acting

#### V. Special Considerations

#### A. Formation Stage

- Option to represent individuals or entity-to-be-formed
- State Bar Ethics Op. 02-06: Allows representation of both with consent

#### B. Closely-Held Business Context

- Higher risk of conflating individual and entity interests
- Extra vigilance required in maintaining separation

#### C. Investigations and Disputes

- Potential need for separate counsel for LLC and member
- Comando v. Nugiel: Disqualification risk in member disputes

#### D. Multi-Member to Single-Member Transition

- Reassess client identity and potential conflicts
- Consider need for new engagement letter

#### VI. Conclusion

- Ethical representation of single-member LLCs requires careful navigation
- Focus on maintaining clear boundaries between entity and individual interests
- When in doubt, err on the side of caution and seek guidance

This outline provides a structured overview of the key ethical considerations and relevant caselaw regarding client identification in single-member LLCs. The cited cases and principles highlight the importance of maintaining clear boundaries between the entity and the individual member, even when the LLC has only one owner.

#### Share

#### Rewrite

#### Keep exploring

How do courts determine who is the client in a single-member LLC What are the ethical implications of representing a single-member LLC Can a single-member LLC's sole owner waive attorney-client privilege

How do courts apply attorney-client privilege to single-member LLCs What are the key differences in client representation between single-member LLCs and

corporations Search Images

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what about in consumer banrktupcy world (my follow up wording/it captures misspellings) Sources

[PDF] Ethical Pitfalls When Representing Bankruptcy Clients



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They Filed Bankruptcy on Me Ethical Issues for Attorneys Collecting ...



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[PDF] ETHICAL ISSUES AND MALPRACTICE PREVENTION - Munsch Hardt

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#### Answer

In the consumer bankruptcy context, there are some unique ethical considerations regarding who is the client and potential conflicts of interest:

- 1. Identifying the client: In consumer bankruptcy cases, the individual debtor is typically the client. However, issues can arise when representing married couples filing jointly or when a small business owner files personally.
- 2. Conflicts between spouses: When representing married couples in a joint filing, attorneys must be aware of potential conflicts between the spouses' interests and may need to obtain informed consent or separate representation if significant conflicts exist.
- 3. Disclosure of assets: Attorneys have an ethical duty to ensure clients fully disclose all assets and liabilities. This can be challenging if clients are hesitant to disclose certain assets or transfers.
- 4. Honesty of debtors: Attorneys must be wary of dishonest debtors, as representing a client who provides false information can jeopardize the attorney's professional reputation and potentially lead to liability.

- 5. Fees and payment: Ethical issues can arise regarding payment of attorney fees, especially when fees are paid by third parties like family members. Attorneys must ensure compliance with Rule 1.8(f) of the Model Rules of Professional Conduct regarding third-party payments.
- 6. Scope of representation: Clearly defining the scope of representation is crucial, especially regarding pre-petition vs. post-petition services.
- 7. Confidentiality and privilege: Attorneys must navigate issues of attorney-client privilege, particularly when a trustee seeks information about the debtor's assets.
- 8. Withdrawal from representation: Attorneys must follow proper procedures when withdrawing from representation to avoid ethical violations.
- 9. Communication with represented parties: Attorneys must be cautious about communicating with creditors or other parties who may be represented by counsel.
- 10. Competence: Consumer bankruptcy attorneys must ensure they have sufficient knowledge and experience to handle bankruptcy cases competently.

Overall, consumer bankruptcy attorneys must be vigilant about potential ethical pitfalls, maintain clear communication with clients, and prioritize the interests of their debtor clients while fulfilling their duties to the court and the bankruptcy process.

#### Share

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#### Keep exploring

What are the most common ethical pitfalls for bankruptcy attorneys How do bankruptcy laws affect an attorney's ability to collect pre-petition fees

What are the consequences of failing to properly withdraw from a bankruptcy case

How do local bankruptcy rules differ in handling ethical issues

What steps should an attorney take to avoid conflicts of interest in bankruptcy cases Search Images

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how can lawyers help clients understand wearing corporate hat I (Example of prompt that didn't work as I expected)

#### Sources

3 Things to Consider When Wearing Your Counselor Hat - ALPS Blog



alpsinsurance

· 1

Lawyers wear many hats - LinkedIn



linkedin

· 2

Wearing Two Hats - Q2 2023 Facts & Findings - NALA





To help clients understand when a lawyer is wearing their "corporate hat" versus their "legal hat," attorneys can implement the following best practices:

- 1. Clearly communicate roles: Explicitly state which role you are acting in at the beginning of meetings or communications. For example, "I'm speaking now as a business advisor, not as legal counsel."
- 2. Separate communications: Maintain separate email threads or documents for business discussions and legal advice. This helps distinguish between the two roles and preserves attorney-client privilege for legal communications.
- 3. Educate clients: Provide guidance to company employees and officers about the dual role in-house lawyers play and how to best communicate with them in each capacity.
- 4. Use disclaimers: Include written disclaimers in emails or documents when providing business advice, stating that the communication is not legal advice and is not protected by attorney-client privilege.
- 5. Be consistent: Maintain clear boundaries between legal and business roles. Avoid switching between roles frequently during a single meeting or conversation.
- 6. Document role changes: When transitioning from legal to business advice (or vice versa), clearly document this change in meeting minutes or follow-up communications.
- 7. Remind clients regularly: Periodically remind company leadership and employees about the distinction between your legal and business roles, especially in situations where the lines may blur.
- 8. Use different titles: Consider using different job titles or email signatures when acting in different capacities to visually reinforce the distinction.
- 9. Seek outside counsel when necessary: For complex issues where roles may conflict, recommend engaging outside counsel to provide independent legal advice.
- 10. Implement formal policies: Develop and communicate clear company policies on when and how to engage with in-house counsel in their legal versus business capacities.

By consistently implementing these practices, lawyers can help their clients better understand and navigate the distinction between legal and business advice, ultimately protecting both the company's interests and the attorney-client privilege.

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Sources

A "Clear" Gaze on Piercing the Corporate Veil

flabizlaw

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#### [PDF] ETHICAL ISSUES AND MALPRACTICE PREVENTION - Munsch Hardt

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Corporate Formalities Matter... Even for Limited Liability Companies ...



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#### Answer

In consumer small business bankruptcy cases, the lack of corporate formalities can have significant implications, particularly regarding the potential for piercing the corporate veil (PCV). Here's an outline discussing these issues, supported by relevant case law:

- I. Introduction
  - Importance of corporate formalities in maintaining limited liability
  - Consequences of failing to observe corporate formalities in bankruptcy
- II. Corporate Formalities and Limited Liability
- A. Definition and Purpose
  - Corporate formalities include maintaining separate financial accounts, holding regular meetings, and keeping accurate records.
  - These formalities help distinguish the business entity from its owners, preserving limited liability.
- B. Legal Requirements
  - State laws and the Internal Revenue Service (IRS) provide guidelines for corporate formalities
  - Failure to comply can lead to personal liability for business debts.
- III. Piercing the Corporate Veil (PCV)
- A. Concept and Criteria
  - PCV allows creditors to hold business owners personally liable for business debts.
  - Criteria for PCV typically include:
    - 1. Unity of interest and ownership (alter ego)
    - 2. Fraud or improper conduct
    - 3. Injustice or inequitable result if the veil is not pierced
- B. Case Law Examples
  - 1. Bippen v. 331 5th Avenue, Inc.

• Court emphasized the need for fraud or improper purpose to pierce the corporate veil.

#### 2. Denny v. Breawick

• Highlighted the importance of observing corporate formalities to avoid PCV.

#### 3. Binsara, L.L.C. v. Bolog

• Court found lack of corporate records and commingling of funds as grounds for PCV.

#### IV. Implications in Consumer Small Business Bankruptcy

#### A. Trustee's Role

- Trustees may seek to pierce the corporate veil to access personal assets of the debtor.
- Lack of corporate formalities can provide grounds for trustees to argue for PCV.

#### B. Burden of Proof

- Trustees must demonstrate that the business was an alter ego of the owner and used for fraudulent purposes.
- Courts often require clear and convincing evidence of fraud or improper conduct.

#### C. Consequences for Debtors

- Personal liability for business debts
- Potential loss of personal assets
- Increased scrutiny from bankruptcy courts

#### V. Best Practices for Maintaining Corporate Formalities

#### A. Regular Meetings and Minutes

- Hold and document regular meetings of members or directors.
- Keep detailed minutes of these meetings.

#### B. Separate Financial Accounts

- Maintain separate bank accounts for the business and personal finances.
- Avoid commingling of funds.

#### C. Accurate Record-Keeping

- Keep thorough and accurate records of all business transactions.
- Maintain a clear distinction between personal and business expenses.

#### D. Legal and Tax Compliance

- Ensure compliance with state and federal regulations.
- File necessary documents and pay required taxes on time.

#### VI. Conclusion

- Observing corporate formalities is crucial for protecting limited liability in consumer small business bankruptcy cases.
- Failure to do so can lead to personal liability through PCV.
- Adhering to best practices helps maintain the integrity of the business entity and protects the owner's personal assets.

By following these guidelines and understanding the implications of failing to observe corporate formalities, small business owners can better protect themselves in bankruptcy proceedings.

#### Share

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What are the common reasons for a court to pierce the corporate veil in bankruptcy cases How does the lack of corporate formalities impact the chances of a successful bankruptcy filing What are the typical defenses against allegations of improper corporate formation

How do bankruptcy courts determine if a company was formed for an improper purpose What evidence is required to prove fraud in the context of corporate veil piercing

#### III. Further Non-AI Practical Thoughts.

1. <u>Not a Chapter 13</u>. I recently heard a speaker on a SubV CLE panel state that all the chapter 13 attorneys in the audience can easily learn Subchapter V. That may be correct—you can *learn* it, but do *not* be mistaken that it is a glorified chapter 13. It is a chapter 11 case in every sense of the word, only with a few tweaks that *supposedly* make it easier, faster and less costly to move through the court process.

I do not know all the ins and outs of handling chapter 13, other attorneys in our office handle those. I do not want to learn at this point in my career and so, I don't handle chapter 13 filings. Period. Don't mistake a small business debtor who is looking at a SubV filing for a chapter 13- there is much more to it. If you are going down this road, stay aware of your duties of competence.

- 2. Small businesses and individuals meet in complex ways that are not simple to deal with. The people who call or show up for consultations think they know what they are asking for, because someone told them something or they did internet research on their own. How do you as the attorney figure out who is going to be your client? Be very careful and clear and document it all. The "client" is either the LLC/the entity or the individual in his/her personal capacity, but not both. I hear lawyers all the time talk about "the client" without any precision. As the attorney, be precise.
- 3. The person you are speaking with 99% of the time does not fully appreciate the boundaries between corporate and individual. Correct and educate the client in private conversations, so that when they are in public or under oath, they begin to use the right words.
- **4.** <u>Don't put your fees at risk.</u> Disclose. Disclose. Disclose. When in doubt, disclose. Fundamental rules of engagement. For SubV, you must file an employment application and your sworn declaration. You must be a "disinterested person" under 11 USC §101(14) and not hold a "materially adverse interest" to the Estate under 11 USC §327(a). Who has paid the retainer?
- 5. How is the case being funded? Most of the small business cases we see cannot survive on only use of existing cash collateral and need additional funding. Where is this coming from? Often, from the individual / the equity interests. That is fine, but that is one reason why you can't represent both. Often, I would be counseling the individual (not my client) that they shouldn't put any more into their small business and that it needs to die; however, that is their decision. It is too expensive to have two sets of lawyers in so many settings. Like chapter 13, your attorney fees can be paid over time through the plan, but the plans often crater post-confirmation, and your fees don't get funded.

# ISSUE IV ARTIFICIAL INTELIGENCE

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#### **Ethical Concerns for AI Use in Consumer Bankruptcy**

**WARNING: AI Generated Content included below** 

#### I. Introduction.

AI is here. AI is not going away. AI use must be learned, because at some point, it will be deemed "incompetence" to *not* know how to use AI for certain tasks, as the processes develop over the coming future. AI is changing so rapidly—people who are very educated and knowledgeable in IT/AI have explained that they create an educational presentation on AI, and before they can present it, something major has changed in how one of the systems works. It is currently changing every day. The WSJ (6/25/24) ran a story about the "imposter syndrome" felt by the vast majority of C-suite leadership about feeling incompetent and left behind. There are billions of dollars at stake in investments by our super-corporations and our high-tech whiz's.

As a consumer bankruptcy attorney and often the owner of your own small firm, I understand the pressures of just keeping your head above water, much less being up to date on what you can, should and should *not* be doing with AI. Here are a few suggestions from a baby boomer who does not really care for "all things tech" and believes that technology has brought as much harm as good to humanity.

Below is an example of using AI, unedited for you to see. This comes from Perplexity AI.

WARNING-WARNING

#### II. AI Content Exactly as Presented and Received.

### need 2 page outline on legal ethics and AI use Sources

[PDF] Artificial Intelligence in Legal Practice - DRI.org



<u>dri</u>

<u>·</u> 1

Applying today's legal ethics to today's AI (part 2) - Casetext



casetext

2

Roundtable: AI and Legal Ethics - American Bar Association

#### americanbar

<u>·</u> <u>3</u>



#### View 2 more

#### Answer

Here's a 2-page outline on legal ethics and AI use:

#### I. Introduction

- Growing use of AI in legal practice
- Need to consider ethical implications

#### II. Ethical Rules and AI

- Existing rules of professional conduct apply to AI use
- Key relevant rules:
  - Competence (Rule 1.1)
  - Diligence (Rule 1.3)
  - Communication (Rule 1.4)
  - Supervision (Rules 5.1 and 5.3)
  - Confidentiality (Rule 1.6)

#### III. Competence and Diligence

- Duty to understand AI capabilities and limitations
- Responsibility to oversee and verify AI-generated work
- Obligation to stay current on AI developments in law

#### IV. Communication and Transparency

- Disclosing AI use to clients
- Explaining how AI is used in representation
- Addressing client concerns about AI

#### V. Supervision and Responsibility

- Treating AI as a non-lawyer assistant (Rule 5.3)
- Maintaining oversight and independent judgment
- Ultimate responsibility for AI-generated work product

#### VI. Confidentiality and Data Privacy

- Protecting client information used in AI systems
- Vetting AI vendors for data security practices
- Obtaining client consent for AI use when appropriate

#### VII. Accuracy and Bias

- Duty to ensure accuracy of AI-generated content
- Identifying and mitigating algorithmic bias
- Independently verifying AI outputs

#### VIII. Billing and Efficiency

- Ethical considerations around billing for AI use
- Passing on cost savings to clients
- Rethinking traditional billing models

#### IX. Unauthorized Practice of Law

• Ensuring AI is used as a tool, not replacement for lawyers

- Avoiding AI systems that may constitute UPL
- Maintaining human oversight and judgment

#### X. Specific AI Applications

- Legal research
- Document review and analysis
- Contract drafting and analysis
- Predictive analytics

#### XI. Emerging Ethical Issues

- AI-generated legal arguments and briefs
- AI judges and arbitrators
- Liability for AI errors and malfunctions

#### XII. Best Practices for Ethical AI Use

- Developing internal AI governance policies
- Training lawyers and staff on ethical AI use
- Documenting AI use in client matters
- Regular auditing and assessment of AI systems

#### XIII. The Future of AI and Legal Ethics

- Potential updates to ethics rules for AI
- Ongoing need to balance innovation and ethical duties
- Importance of lawyers' human judgment and oversight

#### XIV. Conclusion

- AI as a powerful tool that must be used responsibly
- Lawyers' core ethical duties remain unchanged
- Need for ongoing consideration of AI's ethical implications

#### Share

#### Rewrite

#### Keep exploring

How do existing legal ethics rules address the use of AI in legal practice What are the main ethical considerations when using AI in legal services How can lawyers ensure the accuracy of AI-generated work products What are the potential biases in AI systems used by legal professionals How should the billable hour model be revised with the increasing use of AI Search Images Search Videos Generate Image

#### III. Further Non-AI Practical Thoughts.

1. Start today to use it for non-client matters. Any time you are going to do a google search, instead, type "perplexity" into google and do your search in that application. Watch how it works. Play with it. Get used to using it generally. Play with the other main ones ChatGPT and Microsoft CoPilot.

- **2.** <u>Client Confidentiality</u>. Don't use yet for anything client-related, or if you choose to do so, only with either the Lexis or Thompson West (or other legal-specific) products. And only after you have read the Terms of Use. The laws and the ethics rules are evolving, so there is no need to be a cutting-edge attorney unless that is your clear and informed choice.
- **3.** Getting Paid and How Much? We all learned, over time and as the law developed, that it is unethical to bill clients for certain things, like double-counting hours for travel for two different clients at the same time. Overbilling for computer research that was faster than books. When AI takes 5 minutes for something that previously took 5 hours, what impact will this have on revenue?
- **4.** Who Can Do the Work Now? Think of how helpful AI may be for a solo practitioner who knows what they are doing. I am excited to see if AI will get to the point where it can draft more thorough and competent papers that are in my "voice" and create the ability to generate more high-quality work product at a fraction of the time.
- 5. Stay Abreast of Your (and Other) State Ethics Rulings and Legislative Guidance. A handful of states have issued established legal ethics rulings and/or guidelines regarding AI use in the profession. These include California, Vermont, Connecticut, Louisiana, Florida and Kentucky. You can be assured that all the states are looking at what the others are saying, so you should be aware of not just whether your state has any current guidance, but watch what the other states are doing. Everything is in flux, but issues of data privacy have been around for a long time and in numerous contexts, so there is nothing that new about needing to protect client information.

ABI conference materials at ABI.org have many resources available for review.

#### **ISSUE V**

#### **CREDITOR'S ATTORNEY ISSUES**

#### Topic 1A: "NON-REFUNDABLE" FEES

Question: Client pays attorney a flat fee to represent it in a matter. What is the proper treatment of fees paid in advance for services to be rendered? In particular:

- 1) should the fees be deposited into the operating account or into the trust account?
- 2) are the fees earned upon acceptance of the engagement, or at the end?
- 3) what happens if the services are not, for whatever reason, completed?

ABA Formal Opinion 505, issued on May 3, 2023 addresses these issues in depth. Big takeaways:

- 1. The fee should be deposited into the trust account, to be disbursed only after the fee has been earned.
  - a. This is because the attorney has taken possession of the funds, but not ownership;
  - b. Ownership does not happen until the service has been performed.
- 2. The fees are earned when all of the work has been performed.
- 3. The unearned portion of the fee must be returned.
  - a. The rules do not allow for a true "nonrefundable" fee.

#### **ISSUE V**

#### **CREDITOR'S ATTORNEY ISSUES**

#### Topic 1B: USE OF BOILERPLATE FORMS VS DUTY OF REASONABLE INQUIRY

Question: Law firm is hired by a creditor to sue debtors. Firm creates pleading templates, and uses them for all work, making minimal changes. Does the law firm have a duty to "customize" each complaint, or does one size fit all?

Answer: Law firm absolutely has a duty to conduct an inquiry, and cannot just rely on templates.

- 1. The Golden One Credit Union v. Fielder (In re Fielder), Adv. Pro. No. 2023-2038-C, Case No. 23-20862 (Bankr. E.D. Cal. August 2, 2023) (attached).
- 2. Reliance on templates can have negative consequences in other aspects of the practice:
  - a. *In re Bernhardt*, "Case No. 06-10626 MER (Bankr. Colo. Feb 28, 2012): Debtor's attorney who admitting using a template "for creating time entries on fee applications filed in Chapter 13 cases . . . to address the [Chapter 13 trustee's] most frequently raised objections," required to disgorge.
- 3. FRCP Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions provides, in relevant part:
  - (b) Representations to the Court. **By presenting to the court** a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—<u>an attorney</u> or unrepresented party <u>certifies</u> that to the best of the person's knowledge, information, and belief, <u>formed after an inquiry reasonable under the circumstances</u>:
  - (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
  - (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
  - (3) the factual contentions have evidentiary support or, if specifically, so identified, will likely 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 belief or a lack of information.

#### ISSUE VI DIVORCE

#### **Topic 1A: Who Gets the Lawyer?**

Question: You are representing the debtors in a joint case. After you file the petition, the debtors separate and/or divorce. Can you continue to represent both debtors, or can you pick a team, or do you need to withdraw completely?

#### Rule 1.16: Declining or Terminating Representation

- (a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. 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;  $\dots$

#### Rule 1.7 Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each affected client gives informed consent, confirmed in writing.

Rule 1.7 Analysis Flow Chart

QUERY 1	QUERY 2	Query 3
OUERY 1  Do you have a concurrent conflict of interest?  • Sub Query 1A: will the representation of 1 joint debtor be directly adverse to the other joint debtor?  • Sub Query 1B: is there a significant risk that your representation of one joint debtor will be materially limited by your responsibilities to the other joint	<ul> <li>QUERY 2</li> <li>Is the conflict waivable by the clients?</li> <li>Sub Query 2A: is the representation prohibited by law?<sup>1</sup></li> <li>Sub Query 2B: are you on both sides of the "V"?</li> <li>Sub Query 2C: do you reasonably believe that you can competently and diligently represent both debtors at the same time?</li> </ul>	Query 3  Has each client given informed, <sup>2</sup> written consent?
debtor?  If the answer to Query 1 is NO, then it is acceptable to proceed with the representation.  If YES, then → Q2	If NO, then you cannot continue the representation.  If YES, then → Q2	If NO, then you cannot continue the representation.  If YES, then you can continue the representation

<sup>&</sup>lt;sup>1</sup> Is 11 U.S.C. § 327 implicated?

<sup>&</sup>lt;sup>2</sup> Informed consent is defined as an "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." Model Rule 1.0(e).

#### ISSUE VI DIVORCE

#### Topic 1B: D-I-V-O-R-C-E

Question: A married couple consults with you about a joint filing. They leave without retaining you. Some time later, one of them comes back in and advises you that they are divorced and want to retain you to put them in an individual Chapter 13. Can you represent one of a now-divorced couple?

This scenario implicates several rules of professional conduct:

- 1. Even though the couple did not retain you, the first step of the analysis requires you to determine if the couple were prospective clients?
  - a. If the couple do not qualify as "prospective clients," then it is permissible to represent one of them after the divorce.
  - b. If the couple qualified as "prospective clients," then you have to determine if the interests of the now-single new client would be materially adverse to the interests of the now-single non-client.
- 2. If you determine that there is a conflict, is it waivable?
  - a. ABA Formal Opinion 497: "If a lawyer seeks to represent a current client in a matter that is materially adverse to a prior prospective client in the same or substantially related matter on which that prospective client consulted the lawyer, and the lawyer has received significantly harmful information from the prior prospective client, Rule 1.18(d)(1) permits representation of the current client if the current client and the prospective client give informed consent, confirmed in writing."

#### **Rule 1.18: Duties to Prospective Client**

(a) A person who <u>consults</u> with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

Notes:

- \* Interestingly, the "how" or form that the interaction or communication takes is irrelevant. The interaction or "communication" can be oral, written, or electronic; virtual or in person.
- \* Whether a communication rises to the level of a "consultation" depends on the circumstances of the interaction:
  - > if attorney specifically requests or invites people to contact them about "a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, <u>and</u> a person provides information in response," then a consultation is likely to have occurred. Rule 1.18 Comment 2.
  - > if a person calls an attorney in response to generic advertising published by the lawyer, and unilaterally provides information to the attorney with no "reasonable"

expectation" that the lawyer is willing to form an attorney-client relationship, then a consultation likely has not occurred. Id.

- > "[A] person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'" Id.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client *shall not use or reveal that information*, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) <u>shall not represent a client</u> 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).

#### Notes:

- \* Consider that Comment 4 to rule 1.18 suggests a possible way for attorneys to "inoculate" themselves from being disqualified in the future: "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose."
- \* It may also be possible for the attorney to inoculate him/herself by obtaining the prospective client's informed consent at the outset of the consultation (i.e. before any information has passed). that any information that is provided by the prospective client during the consultation "will not be disqualifying." See id. at n.40; Model Rule 1.17, comment 5.
- \* Materially adverse: ABA Formal Opinion 497"Material adverseness ... requires a conflict as to the legal right and duties of the clients, not merely conflicting or competing economic interests."
- \* Substantially related: "Matters are 'substantially related'... if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Model Rule 1.9 comment 3.
- \* The mere fact that a prospective client consulted with an attorney in a substantially related matter is alone insufficient to disqualify the lawyer from a later matter. See ABA Formal Opinion No. 492 at 5 and n.20 (June 9, 2020).
- (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.

#### **ISSUE VII**

#### **DUTY TO INVESTIGATE**

Question: Do you have an affirmative duty to investigate the source of your retainer, or payments made to you to pay your fees?

At least one Court has said YES.

Counsel must investigate the source of funds received where a *reasonable attorney* would question the client. *In re Chris Pettit & Associates*, *P.C.*, No. 22-50592-CAG, 2022 WL 17723920 (Bankr. W.D. Tx. Dec. 13, 2022).

#### ISSUE VIII FACTORING

Question: What is "factoring" in the bankruptcy context?

- A. "Bifurcated fee agreements split an attorney's total fee into two components: pre-petition work and post-petition work. Attorneys often structure these agreements such that they perform very little work under the pre-petition agreement and perform the bulk of the work necessary to help a debtor complete a bankruptcy case under the post-petition agreement in exchange for a (presumably) nondischargeable fee." *In re Smith-Freeman*, Nos. 23-20698-JAD, 40, 23-20669-CMB, 43, 23-20877-CMB, 36, 23-20900-CMB, 29, 23-20738-GLT, 46, 23-20878-GLT, 38, 2024 Bankr. LEXIS 166, at \*27 (Bankr. W.D. Pa. Jan. 24, 2024).
- B. Courts struggle with how to provide access to the courts for those people who can pay, but simply cannot pay all at once, or for clients in a predicament that requires legal attention now, like a garnishment, where waiting until the full fee is available may be too late.
- C. Whether a bifurcated fee agreement is allowed varies by district, but the trend tends to be towards allowing them. *United States Tr. v. Cialella (In re Anthony)*, 643 B.R. 789, 811 (Bankr. W.D. Pa. 2022)(collecting cases); *but see In re Baldwin*, 640 B.R. 104 (Bankr. W.D. Ky. 2021).
- D. Many firms who elect to operate using bifurcated fee arrangements have also opted to seek the services of a factoring company to aid cash flow. "In some instances, including the one presented here, the attorney also enters into a factoring or financing agreement with a third-party as part of the bifurcated fee arrangement, with the third party paying the attorney a discounted amount on the postfiling agreement fee "up front" in exchange for a security interest in the attorney's account receivable and a role in collecting subsequent installment fee payments due from the debtor under the postfiling agreement. *United States Tr. v. Cialella (In re Anthony)* at 793. These arrangements often have fees associated with them that law firms have attempted to pass on to the client.
- E. Courts have raised concerns as to whether factoring arrangements, where clients pay more overall for a bifurcated fee, present a conflict between the lawyer and client. In essence, the concern is that by charging a bifurcated client more, a lawyer may be taking advantage of a client in a vulnerable position. Some courts have allowed bifurcated agreements but banned factoring. *See In re Brown*, 631 B.R. 77, 99 n.34 (Bankr. S.D. Fla. 2021).
- F. Those courts that allow factoring concentrate on disclosure to the client of the fees involved.
- G. An example of the type of information that may need to be disclosed to your client can be found in *In re Hazlett*, No. 16-30360, 2019 Bankr. LEXIS 1166, at \*29-30 (Bankr. D. Utah Apr. 10, 2019). "While it is not a violation of the Utah Rules of Professional Conduct to sell a lawyer's accounts receivable, the client must be fully informed with respect to the transaction. The client must be offered the same discounted price. The client must consent in writing to the sale and must be informed that the legal fees for post-petition work are not dischargeable. The lawyer must inform the client that the legal financing company will collect the fee and if there were to be a dispute between the finance company and the client, the lawyer would not represent the client."

- H. In both *United States Tr. v. Cialella (In re Anthony)* and *In re Smith-Freeman;* part of the basis for disgorging fees from counsel was the inadequacy of the disclosure to the client.
- I. Often this failure is the failure to disclosure of the costs of factoring. In *Smith-Freeman*, the issue was in part the \$284.00 factoring fee the lawyer paid to his factoring company. The client would pay \$1,708.00 over time so that counsel could receive \$1425.00 now. The Court called it. "nothing but a coy device by which [debtor's counsel] forces his clients to pay financing fees to [the factoring company]." The Court ruled that fee was just overhead and not chargeable to the client.
- J. This seems to be consistent with, and a step further, that the ethics opinion cited in *Hazlett* that requires counsel to off the client the ability to pay the discounted amount. In essence, if you are charging your clients any cost of financing or factoring, you run the risk of having your fee disgorged. In isolation, having to give back \$284.00 like in *Smith-Freeman* may not seem like much, but if your firm files 20-50 cases over a several month period and you are ordered to disgorge \$284.00 in all of those cases, that cost grows very quickly.
- K. While many of these factoring companies will advertise that they take care of all of the forms and that they satisfy all requirements, ultimately, the allowance of these arrangements will vary by jurisdiction.

# **APPENDIX**

#### 28 CFR PART 58 APPENDIX A

This document is current through the June 24 2024 issue of the Federal Register, with the exception of the amendments appearing at 89 FR 51738, 89 FR 52540, and 89 FR 52364.

LEXISNEXIS' CODE OF FEDERAL REGULATIONS > Title 28 Judicial Administration > Chapter I - Department of Justice > Part 58 - Regulations Relating to the Bankruptcy Reform Acts of 1978 and 1994

## APPENDIX A TO PART 58 — GUIDELINES FOR REVIEWING APPLICATIONS FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES FILED UNDER 11 U.S.C. 330

#### (a) General Information.

- (1) The Bankruptcy Reform Act of 1994 amended the responsibilities of the United States Trustees under 28 U.S.C. 586(a)(3)(A) to provide that, whenever they deem appropriate, United States Trustees will review applications for compensation and reimbursement of expenses under section 330 of the Bankruptcy Code, 11 U.S.C. 101, et seq. ("Code"), in accordance with procedural guidelines ("Guidelines") adopted by the Executive Office for United States Trustees ("Executive Office"). The following Guidelines have been adopted by the Executive Office and are to be uniformly applied by the United States Trustees except when circumstances warrant different treatment.
- (2) The United States Trustees shall use these Guidelines in all cases commenced on or after October 22, 1994.
- (3) The Guidelines are not intended to supersede local rules of court, but should be read as complementing the procedures set forth in local rules.
- (4) Nothing in the Guidelines should be construed:
  - (i) To limit the United States Trustee's discretion to request additional information necessary for the review of a particular application or type of application or to refer any information provided to the United States Trustee to any investigatory or prosecutorial authority of the United States or a state;
  - (ii) To limit the United States Trustee's discretion to determine whether to file comments or objections to applications; or
  - (iii) To create any private right of action on the part of any person enforceable in litigation with the United States Trustee or the United States.
- (5) Recognizing that the final authority to award compensation and reimbursement under section 330 of the Code is vested in the Court, the Guidelines focus on the disclosure of information relevant to a proper award under the law. In evaluating fees for professional services, it is relevant to consider various factors including the following: the time spent; the rates charged; whether the services were necessary to the administration of, or beneficial towards the completion of, the case at the time they were rendered; whether services were performed within a reasonable time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and whether compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in non-bankruptcy cases. The Guidelines thus reflect standards and procedures articulated in section 330 of the Code and *Rule 2016 of the Federal Rules of Bankruptcy Procedure* for awarding compensation to trustees and to professionals employed under section 327 or 1103.

Michael Baker

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#### 28 CFR PART 58 APPENDIX A

Applications that contain the information requested in these Guidelines will facilitate review by the Court, the parties, and the United States Trustee.

- (6) Fee applications submitted by trustees are subject to the same standard of review as are applications of other professionals and will be evaluated according to the principles articulated in these Guidelines. Each United States Trustee should establish whether and to what extent trustees can deviate from the format specified in these Guidelines without substantially affecting the ability of the United States Trustee to review and comment on their fee applications in a manner consistent with the requirements of the law.
- **(b)** Contents of Applications for Compensation and Reimbursement of Expenses. All applications should include sufficient detail to demonstrate compliance with the standards set forth in 11 U.S.C. § 330. The fee application should also contain sufficient information about the case and the applicant so that the Court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents. The following will facilitate review of the application.
  - (1) Information about the Applicant and the Application. The following information should be provided in every fee application:
    - (i) Date the bankruptcy petition was filed, date of the order approving employment, identity of the party represented, date services commenced, and whether the applicant is seeking compensation under a provision of the Bankruptcy Code other than section 330.
    - (ii) Terms and conditions of employment and compensation, source of compensation, existence and terms controlling use of a retainer, and any budgetary or other limitations on fees.
    - (iii) Names and hourly rates of all applicant's professionals and paraprofessionals who billed time, explanation of any changes in hourly rates from those previously charged, and statement of whether the compensation is based on the customary compensation charged by comparably skilled practitioners in cases other than cases under title 11.
    - (iv) Whether the application is interim or final, and the dates of previous orders on interim compensation or reimbursement of expenses along with the amounts requested and the amounts allowed or disallowed, amounts of all previous payments, and amount of any allowed fees and expenses remaining unpaid.
    - (v) Whether the person on whose behalf the applicant is employed has been given the opportunity to review the application and whether that person has approved the requested amount.
    - (vi) When an application is filed less than 120 days after the order for relief or after a prior application to the Court, the date and terms of the order allowing leave to file at shortened intervals.
    - (vii) Time period of the services or expenses covered by the application.
  - **(2)** Case Status. The following information should be provided to the extent that it is known to or can be reasonably ascertained by the applicant:
    - (i) In a chapter 7 case, a summary of the administration of the case including all moneys received and disbursed in the case, when the case is expected to close, and, if applicant is seeking an interim award, whether it is feasible to make an interim distribution to creditors without prejudicing the rights of any creditor holding a claim of equal or higher priority.
    - (ii) In a chapter 11 case, whether a plan and disclosure statement have been filed and, if not yet filed, when the plan and disclosure statement are expected to be filed; whether all quarterly fees have been paid to the United States Trustee; and whether all monthly operating reports have been filed.
    - (iii) In every case, the amount of cash on hand or on deposit, the amount and nature of accrued unpaid administrative expenses, and the amount of unencumbered funds in the estate.

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#### 28 CFR PART 58 APPENDIX A

- (iv) Any material changes in the status of the case that occur after the filing of the fee application should be raised, orally or in writing, at the hearing on the application or, if a hearing is not required, prior to the expiration of the time period for objection.
- (3) Summary Sheet. All applications should contain a summary or cover sheet that provides a synopsis of the following information:
  - (i) Total compensation and expenses requested and any amount(s) previously requested;
  - (ii) Total compensation and expenses previously awarded by the court;
  - (iii) Name and applicable billing rate for each person who billed time during the period, and date of bar admission for each attorney;
  - (iv) Total hours billed and total amount of billing for each person who billed time during billing period; and
  - (v) Computation of blended hourly rate for persons who billed time during period, excluding paralegal or other paraprofessional time.

### (4) Project Billing Format.

- (i) To facilitate effective review of the application, all time and service entries should be arranged by project categories. The project categories set forth in Exhibit A should be used to the extent applicable. A separate project category should be used for administrative matters and, if payment is requested, for fee application preparation.
- (ii) The United States Trustee has discretion to determine that the project billing format is not necessary in a particular case or in a particular class of cases. Applicants should be encouraged to consult with the United States Trustee if there is a question as to the need for project billing in any particular case.
- (iii) Each project category should contain a narrative summary of the following information:
  - **(A)** a description of the project, its necessity and benefit to the estate, and the status of the project including all pending litigation for which compensation and reimbursement are requested;
  - (B) identification of each person providing services on the project; and
  - **(C)** a statement of the number of hours spent and the amount of compensation requested for each professional and paraprofessional on the project.
- (iv) Time and service entries are to be reported in chronological order under the appropriate project category.
- (v) Time entries should be kept contemporaneously with the services rendered in time periods of tenths of an hour. Services should be noted in detail and not combined or "lumped" together, with each service showing a separate time entry; however, tasks performed in a project which total a de minimis amount of time can be combined or lumped together if they do not exceed.5 hours on a daily aggregate. Time entries for telephone calls, letters, and other communications should give sufficient detail to identify the parties to and the nature of the communication. Time entries for court hearings and conferences should identify the subject of the hearing or conference. If more than one professional from the applicant firm attends a hearing or conference, the applicant should explain the need for multiple attendees.
- **(5)** Reimbursement for Actual, Necessary Expenses. Any expense for which reimbursement is sought must be actual and necessary and supported by documentation as appropriate. Factors relevant to a determination that the expense is proper include the following:
  - (i) Whether the expense is reasonable and economical. For example, first class and other luxurious travel mode or accommodations will normally be objectionable.

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- (ii) Whether the requested expenses are customarily charged to non-bankruptcy clients of the applicant.
- (iii) Whether applicant has provided a detailed itemization of all expenses including the date incurred, description of expense (e.g., type of travel, type of fare, rate, destination), method of computation, and, where relevant, name of the person incurring the expense and purpose of the expense. Itemized expenses should be identified by their nature (e.g., long distance telephone, copy costs, messengers, computer research, airline travel, etc.) and by the month incurred. Unusual items require more detailed explanations and should be allocated, where practicable, to specific projects.
- (iv) Whether applicant has prorated expenses where appropriate between the estate and other cases (e.g., travel expenses applicable to more than one case) and has adequately explained the basis for any such proration.
- (v) Whether expenses incurred by the applicant to third parties are limited to the actual amounts billed to, or paid by, the applicant on behalf of the estate.
- (vi) Whether applicant can demonstrate that the amount requested for expenses incurred in-house reflect the actual cost of such expenses to the applicant. The United States Trustee may establish an objection ceiling for any in-house expenses that are routinely incurred and for which the actual cost cannot easily be determined by most professionals (e.g., photocopies, facsimile charges, and mileage).
- (vii) Whether the expenses appear to be in the nature nonreimbursable overhead. Overhead consists of all continuous administrative or general costs incident to the operation of the applicant's office and not particularly attributable to an individual client or case. Overhead includes, but is not limited to, word processing, proofreading, secretarial and other clerical services, rent, utilities, office equipment and furnishings, insurance, taxes, local telephones and monthly car phone charges, lighting, heating and cooling, and library and publication charges.
- (viii) Whether applicant has adhered to allowable rates for expenses as fixed by local rule or order of the Court.

#### Exhibit A — Project Categories

Here is a list of suggested project categories for use in most bankruptcy cases. Only one category should be used for a given activity. Professionals should make their best effort to be consistent in their use of categories, whether within a particular firm or by different firms working on the same case. It would be appropriate for all professionals to discuss the categories in advance and agree generally on how activities will be categorized. This list is not exclusive. The application may contain additional categories as the case requires. They are generally more applicable to attorneys in chapter 7 and chapter 11, but may be used by all professionals as appropriate.

Asset Analysis and Recovery: Identification and review of potential assets including causes of action and non-litigation recoveries.

Asset Disposition: Sales, leases (§ 365 matters), abandonment and related transaction work.

Business Operations: Issues related to debtor-in-possession operating in chapter 11 such as employee, vendor, tenant issues and other similar problems.

Case Administration: Coordination and compliance activities, including preparation of statement of financial affairs; schedules; list of contracts; United States Trustee interim statements and operating reports; contacts with the United States Trustee; general creditor inquiries.

Claims Administration and Objections: Specific claim inquiries; bar date motions; analyses, objections and allowances of claims

Employee Benefits/Pensions: Review issues such as severance, retention, 401K coverage and continuance of pension plan.

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Fee/Employment Applicants: Preparation of employment and fee applications for self or others; motions to establish interim procedures.

Fee/Employment Objections: Review of and objections to the employment and fee applications of others.

Financing: Matters under §§ 361, 363 and 364 including cash collateral and secured claims; loan document analysis.

Litigation: There should be a separate category established for each matter (e.g., XYZ Litigation).

Meetings of Creditors: Preparing for and attending the conference of creditors, the § 341(a) meeting and other creditors' committee meetings.

Plan and Disclosure Statement: Formulation, presentation and confirmation; compliance with the plan confirmation order, related orders and rules; disbursement and case closing activities, except those related to the allowance and objections to allowance of claims.

Relief From Stay Proceedings: Matters relating to termination or continuation of automatic stay under § 362.

The following categories are generally more applicable to accountants and financial advisors, but may be used by all professionals as appropriate.

Accounting/Auditing: Activities related to maintaining and auditing books of account, preparation of financial statements and account analysis.

Business Analysis: Preparation and review of company business plan; development and review of strategies; preparation and review of cash flow forecasts and feasibility studies.

Corporate Finance: Review financial aspects of potential mergers, acquisitions and disposition of company or subsidiaries.

Data Analysis: Management information systems review, installation and analysis, construction, maintenance and reporting of significant case financial data, lease rejection, claims, etc.

Litigation Consulting: Providing consulting and expert witness services relating to various bankruptcy matters such as insolvency, feasibility, avoiding actions, forensic accounting, etc.

Reconstruction Accounting: Reconstructing books and records from past transactions and bringing accounting current.

Tax Issues: Analysis of tax issues and preparation of state and federal tax returns.

Valuation: Appraise or review appraisals of assets.

# **Statutory Authority**

Authority Note Applicable to 28 CFR Ch. I, Pt. 58

# History

[61 FR 24889, 24890, May 17, 1996]

Annotations

### **Notes**

#### **[EFFECTIVE DATE NOTE:**

61 FR 24889, 24890, May 17, 1996, which added Appendix A to Part 58, became effective January 30, 1996.]

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#### **Notes to Decisions**

Bankruptcy Law: Case Administration: Examiners, Officers & Trustees: Compensation

Bankruptcy Law: Case Administration: Examiners, Officers & Trustees: United States Trustee

Bankruptcy Law: Case Administration: Professional Services: Compensation: General Overview

Bankruptcy Law: Case Administration: Professional Services: Compensation: Debtor's Counsel

Bankruptcy Law: Case Administration: Professional Services: Compensation: Interim Compensation

Bankruptcy Law: Case Administration: Professional Services: Compensation: Limitations

Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: Reasonable Fees

**Evidence: Procedural Considerations: Burdens of Proof: Allocation** 

Bankruptcy Law: Case Administration: Examiners, Officers & Trustees: Compensation

In re GB Herndon & Assocs., 2013 Bankr. LEXIS 3123 (Bankr. D.D.C. Aug. 2, 2013).

**Overview:** Special counsel employed pursuant to <u>11 U.S.C.S. § 327(e)</u> was only entitled to fees and expenses that were reasonable and that were incurred with regard to special counsel duties; thus, requested fees were reduced due to failure to demonstrate the services were for special counsel tasks, over-lawyering, lumping of time, and vague time entries.

• Bankr. D.D.C. R. 2016-1(a)(7) requires that a fee application indicate the amount of time spent in performing each service. The United States Trustee's Guidelines require that tasks be described with sufficient detail that the nature of the tasks are clear and justified, and that the time allotted to each task can be identified. 28 C.F.R. pt. 58, app. a, (b)(4). *Go To Headnote* 

In re Bennett, 2012 Bankr. LEXIS 5635 (Bankr. E.D. Ky. Dec. 5, 2012).

**Overview:** Court allowed only \$1,500 of \$6,295 fee sought by counsel to Chapter 13 debtors as many entries included in substantiating materials were unintelligible, related to other proceedings and clients, or were improperly lumped together. As application did not comply with standards imposed by 11 U.S.C.S. § 329 and 11 U.S.C.S. § 330, reduction was proper.

• A thorough explanation of what constitutes the required "sufficient detail" within the meaning of 11 U.S.C.S. § 329 and Fed. R. Bankr. P. 2016 is as follows: A fee application should also contain sufficient information about the case and the applicant so that the Court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents. 28 C.F.R. pt. 58, app. A, §§ (b). The application is to (i) set forth the names/hourly rates of professionals and paraprofessionals who billed time; (ii) report time and service entries in chronological order; (iii) keep time and service entries contemporaneously with the services rendered in time periods of tenths of an hour; and (iv) report services rendered in detail and not combined or "lumped" together, providing a separate time entry for each service. Go To Headnote

#### In re 530 W. 28th St., L.P., 2009 Bankr. LEXIS 4101 (Bankr. S.D.N.Y. Dec. 11, 2009).

**Overview:** Bankruptcy court reduced the amount of attorney fees and expenses counsel request under 11 U.S.C.S. § 330 because some services counsel performed did not benefit an Official Committee of Unsecured Creditors he represented or the debtor's Chapter 11 bankruptcy estate, and because schedules counsel filed contained vague or incomplete entries.

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- An applicant who seeks payment of fees from a bankruptcy court bears the burden of proof on his claim for compensation. Even in the absence of an objection, a bankruptcy court has an independent duty to scrutinize a fee request. The applicant must submit contemporaneous time records, although a computerized printout summary, in lieu of the original time slips, will suffice. Standards for time records are contained in the United States Bankruptcy Court for the Southern District of New York's fee guidelines, as amended, and in the guidelines issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A (2007). Go To Headnote
- Generally, fee applications, standing alone, must contain sufficient detail to demonstrate compliance with 11 U.S.C.S. § 330. Guidelines Issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A, para. (b). Any uncertainties due to poor record keeping are resolved against the applicant. Time records must be broken down by project. 28 C.F.R. pt. 58, app. A, para. (b)(4)(i). Entries concerning communications (e.g., telephone calls, letters) should identify the parties and the nature of the communication. 28 C.F.R. pt. 58, app. A, para. (b)(4)(v). Entries relating to conferences or hearings should identify the subject of the hearing, and explain, where appropriate, why more than one professional from the applicant participated, 28 C.F.R. pt. 58, app. A, para. (b)(4)(v), and multiple project services rendered on the same day should be listed in separate entries unless the aggregate daily time does not exceed one half hour. 28 C.F.R. pt. 58, app. A, para. (b)(4)(v). Alternatively, an applicant may "lump" his daily project entries provided he indicates parenthetically the amount of time spent on each activity. Go To Headnote
- "Lumping" refers to the practice of aggregating time entries involving two or more discrete tasks without identifying the time spent on each task. Lumping makes it difficult to determine if the timekeeper spent a reasonable amount of time on each discrete task. As a result, the timekeeper fails to sustain its burden of proving that its fees are reasonable. The guidelines issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A, permit lumping only where the aggregate time does not exceed 30 minutes. 28 C.F.R. pt. 58, app. A, para. (b)(4)(v). Go To Headnote

#### In re Brous, 370 B.R. 563, 2007 Bankr. LEXIS 1964 (Bankr. S.D.N.Y. 2007).

**Overview:** Chapter 7 Trustee sought maximum commission allowable under 11 U.S.C.S. § 326. The court concluded, however, that the use of 11 U.S.C.S. § 326 was not appropriate, except as a limit, and that the Trustee, like other professionals, had to generally establish his right to compensation under the "lodestar" method incorporated into 11 U.S.C.S. § 330.

- A fee applicant bears the burden of proof on his claim for compensation. Even in the absence of an objection, a court has an independent duty to scrutinize the fee request. The applicant must submit contemporaneous time records, although a computerized printout summary, in lieu of the original time slips, will suffice. The standards for time records are contained in the U.S. Bankruptcy Court for the Southern District of New York's Fee Guidelines, as amended, and the Executive Office of United States Trustees Guidelines, 28 C.F.R. pt. 58, app. A (2007). Go To Headnote
- Generally, fee applications, standing alone, must contain sufficient detail to demonstrate compliance with 11 U.S.C.S. § 330. Executive Office of United States Trustees Guidelines (UST Guidelines), 28 C.F.R., pt. 58, app. A (2007), (b). Any uncertainties due to poor record keeping are resolved against the applicant. Time records must be broken down by project. UST Guideline (b)(4)(i). Entries concerning communications (e.g., telephone calls, letters) should identify the parties and the nature of the communication. UST Guideline (b)(4)(v). Entries relating to conferences or hearings should identify the subject of the hearing, and explain, where appropriate, why more than one professional from the applicant participated. UST Guideline (b)(4)(v). Finally, multiple project services rendered on the same day should be listed in separate entries unless the aggregate daily time does not exceed one half hour. UST Guideline (b)(4)(v). Alternatively, and consistent with the practice followed here prior to the adoption of the UST Guidelines, the applicant may "lump" his daily project entries provided he indicates parenthetically the amount of time spent on each activity. Go To Headnote

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• "Lumping" refers to the practice of aggregating time entries involving two or more discrete tasks without identifying the time spent on each task. Lumping makes it difficult to determine if the timekeeper spent a reasonable amount of time on each discrete task. As a result, the timekeeper fails to sustain its burden of proving that its fees are reasonable. The Executive Office of United States Trustees Guidelines (UST Guidelines), 28 C.F.R., pt. 58, App. A (2007), permit lumping only where the aggregate time does not exceed 30 minutes. UST Guideline (b)(4)(v). Go To Headnote

Bankruptcy Law: Case Administration: Examiners, Officers & Trustees: United States Trustee

In re Ford, 446 B.R. 550, 23 Fla. L. Weekly Fed. B 9, 54 Bankr. Ct. Dec. (LRP) 99, 2011 Bankr. LEXIS 557 (Bankr. M.D. Fla. 2011).

**Overview:** Even a professional seeking nothing more than to keep a pre-petition retainer as full compensation had to comply with requirement under 11 U.S.C.S. § 330 and <u>Fed. R. Bankr. P. 2016(a)</u> to file a detailed fee application and obtain court approval. Attorney had to file fee applications in the cases that were the subject of U.S. Trustee's Motion.

• A bankruptcy court cannot assume that the retainer amount will always be less than the reasonable value of the services rendered in a chapter 11 case. Rather, a professional employed to represent the debtor in possession in a chapter 11 case may be awarded compensation for services rendered in a case under title 11 only after notice and a hearing. This includes any amounts received as a retainer for the services. Without the professional filling a fee application, the notice and hearing requirement cannot be met. Importantly, without such compliance, the United States Trustee cannot perform his statutory obligation to review applications filed for compensation under 11 U.S.C.S. § 330. 28 U.S.C.S. § 586(a)(3)(A); also Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C.S. § 330, 61 Fed. Reg. 24890 (May 17, 1996), reprinted 28 C.F.R. pt. 58, app. And a court cannot conduct its own independent review of a professional's fees and services. These are all prerequisites for a professional to obtain compensation in a bankruptcy case. Go To Headnote

Bankruptcy Law: Case Administration: Professional Services: Compensation: General Overview

In re GB Herndon & Assocs., 2013 Bankr. LEXIS 3123 (Bankr. D.D.C. Aug. 2, 2013).

**Overview:** Special counsel employed pursuant to <u>11 U.S.C.S. § 327(e)</u> was only entitled to fees and expenses that were reasonable and that were incurred with regard to special counsel duties; thus, requested fees were reduced due to failure to demonstrate the services were for special counsel tasks, over-lawyering, lumping of time, and vague time entries.

Bankr. D.D.C. R. 2016-1(a)(7) requires that a fee application indicate the amount of time spent in performing
each service. The United States Trustee's Guidelines require that tasks be described with sufficient detail
that the nature of the tasks are clear and justified, and that the time allotted to each task can be identified.
28 C.F.R. pt. 58, app. a, (b)(4). Go To Headnote

In re Ford, 446 B.R. 550, 23 Fla. L. Weekly Fed. B 9, 54 Bankr. Ct. Dec. (LRP) 99, 2011 Bankr. LEXIS 557 (Bankr. M.D. Fla. 2011).

**Overview:** Even a professional seeking nothing more than to keep a pre-petition retainer as full compensation had to comply with requirement under 11 U.S.C.S. § 330 and Fed. R. Bankr. P. 2016(a) to file a detailed fee application and obtain court approval. Attorney had to file fee applications in the cases that were the subject of U.S. Trustee's Motion.

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• A bankruptcy court cannot assume that the retainer amount will always be less than the reasonable value of the services rendered in a chapter 11 case. Rather, a professional employed to represent the debtor in possession in a chapter 11 case may be awarded compensation for services rendered in a case under title 11 only after notice and a hearing. This includes any amounts received as a retainer for the services. Without the professional filing a fee application, the notice and hearing requirement cannot be met. Importantly, without such compliance, the United States Trustee cannot perform his statutory obligation to review applications filed for compensation under 11 U.S.C.S. § 330. 28 U.S.C.S. § 586(a)(3)(A); also Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C.S. § 330, 61 Fed. Reg. 24890 (May 17, 1996), reprinted 28 C.F.R. pt. 58, app. And a court cannot conduct its own independent review of a professional's fees and services. These are all prerequisites for a professional to obtain compensation in a bankruptcy case. Go To Headnote

#### In re 530 W. 28th St., L.P., 2009 Bankr. LEXIS 4101 (Bankr. S.D.N.Y. Dec. 11, 2009).

**Overview:** Bankruptcy court reduced the amount of attorney fees and expenses counsel request under 11 U.S.C.S. § 330 because some services counsel performed did not benefit an Official Committee of Unsecured Creditors he represented or the debtor's Chapter 11 bankruptcy estate, and because schedules counsel filed contained vague or incomplete entries.

- An applicant who seeks payment of fees from a bankruptcy court bears the burden of proof on his claim for compensation. Even in the absence of an objection, a bankruptcy court has an independent duty to scrutinize a fee request. The applicant must submit contemporaneous time records, although a computerized printout summary, in lieu of the original time slips, will suffice. Standards for time records are contained in the United States Bankruptcy Court for the Southern District of New York's fee guidelines, as amended, and in the guidelines issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A (2007). Go To Headnote
- Generally, fee applications, standing alone, must contain sufficient detail to demonstrate compliance with 11 U.S.C.S. § 330. Guidelines Issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A, para. (b). Any uncertainties due to poor record keeping are resolved against the applicant. Time records must be broken down by project. 28 C.F.R. pt. 58, app. A, para. (b)(4)(i). Entries concerning communications (e.g., telephone calls, letters) should identify the parties and the nature of the communication. 28 C.F.R. pt. 58, app. A, para. (b)(4)(v). Entries relating to conferences or hearings should identify the subject of the hearing, and explain, where appropriate, why more than one professional from the applicant participated, 28 C.F.R. pt. 58, app. A, para. (b)(4)(v), and multiple project services rendered on the same day should be listed in separate entries unless the aggregate daily time does not exceed one half hour. 28 C.F.R. pt. 58, app. A, para. (b)(4)(v). Alternatively, an applicant may "lump" his daily project entries provided he indicates parenthetically the amount of time spent on each activity. Go To Headnote
- "Lumping" refers to the practice of aggregating time entries involving two or more discrete tasks without identifying the time spent on each task. Lumping makes it difficult to determine if the timekeeper spent a reasonable amount of time on each discrete task. As a result, the timekeeper fails to sustain its burden of proving that its fees are reasonable. The guidelines issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A, permit lumping only where the aggregate time does not exceed 30 minutes. 28 C.F.R. pt. 58, app. A, para. (b)(4)(v). Go To Headnote

Bankruptcy Law: Case Administration: Professional Services: Compensation: Debtor's Counsel

In re Bennett, 2012 Bankr, LEXIS 5635 (Bankr, E.D. Kv, Dec. 5, 2012).

**Overview:** Court allowed only \$1,500 of \$6,295 fee sought by counsel to Chapter 13 debtors as many entries included in substantiating materials were unintelligible, related to other proceedings and clients, or were improperly lumped together. As application did not comply with standards imposed by <a href="mailto:11 U.S.C.S.">11 U.S.C.S.</a> § 329 and 11 U.S.C.S. § 330, reduction was proper.

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• A thorough explanation of what constitutes the required "sufficient detail" within the meaning of 11 U.S.C.S. § 329 and Fed. R. Bankr. P. 2016 is as follows: A fee application should also contain sufficient information about the case and the applicant so that the Court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents. 28 C.F.R. pt. 58, app. A, §§ (b). The application is to (i) set forth the names/hourly rates of professionals and paraprofessionals who billed time; (ii) report time and service entries in chronological order; (iii) keep time and service entries contemporaneously with the services rendered in time periods of tenths of an hour; and (iv) report services rendered in detail and not combined or "lumped" together, providing a separate time entry for each service. Go To Headnote

In re Ford, 446 B.R. 550, 23 Fla. L. Weekly Fed. B 9, 54 Bankr. Ct. Dec. (LRP) 99, 2011 Bankr. LEXIS 557 (Bankr. M.D. Fla. 2011).

**Overview:** Even a professional seeking nothing more than to keep a pre-petition retainer as full compensation had to comply with requirement under 11 U.S.C.S. § 330 and Fed. R. Bankr. P. 2016(a) to file a detailed fee application and obtain court approval. Attorney had to file fee applications in the cases that were the subject of U.S. Trustee's Motion.

• A bankruptcy court cannot assume that the retainer amount will always be less than the reasonable value of the services rendered in a chapter 11 case. Rather, a professional employed to represent the debtor in possession in a chapter 11 case may be awarded compensation for services rendered in a case under title 11 only after notice and a hearing. This includes any amounts received as a retainer for the services. Without the professional filling a fee application, the notice and hearing requirement cannot be met. Importantly, without such compliance, the United States Trustee cannot perform his statutory obligation to review applications filed for compensation under 11 U.S.C.S. § 330. 28 U.S.C.S. § 586(a)(3)(A); also Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C.S. § 330, 61 Fed. Reg. 24890 (May 17, 1996), reprinted 28 C.F.R. pt. 58, app. And a court cannot conduct its own independent review of a professional's fees and services. These are all prerequisites for a professional to obtain compensation in a bankruptcy case. Go To Headnote

### In re CCT Communs., Inc., 2010 Bankr. LEXIS 2947 (Bankr. S.D.N.Y. Aug. 24, 2010).

**Overview:** With respect to a fee application under 11 U.S.C.S. § 330, one law firm was permitted nunc pro tunc approval of its retention because the delay in executing a retention order was due to circumstances beyond its control. However, with respect to a different firm, retention was not retroactive because that firm took no action to seek such authority.

- With respect to fee applications under 11 U.S.C.S. § 330, the fee applicant bears the burden of proof on his claim for compensation. Even in the absence of an objection, the court has an independent duty to scrutinize the fee request. The applicant must submit contemporaneous time records, although a computerized printout summary, in lieu of the original time slips, will suffice. In the United States Bankruptcy Court for the Southern District of New York, the standards for time records are contained in the court's Fee Guidelines, as amended, and the guidelines issued by the Executive Office of United States Trustees. 28 C.F.R. pt. 58, app. A (UST Guidelines). Generally, fee applications, standing alone, must contain sufficient detail to demonstrate compliance with § 330. UST Guidelines, (b). Any uncertainties due to poor record keeping are resolved against the applicant. Go To Headnote
- With respect to fee applications under 11 U.S.C.S. § 330, time records must be broken down by project. 28 C.F.R. pt. 58, app. A, § (b)(4)(i). Entries concerning communications (e.g., telephone calls, letters) should identify the parties and the nature of the communication. 28 C.F.R. pt. 58, app. A, § (b)(4)(v). Entries relating to conferences or hearings should identify the subject of the hearing, and explain, where appropriate, why more than one professional from the applicant participated. Finally, multiple project services rendered on the same day should be listed in separate entries unless the aggregate daily time does not exceed one half hour. Alternatively, and consistent with the practice followed prior to the adoption

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of the Guidelines issued by the Executive Office of United States Trustees, the applicant may "lump" his daily project entries provided he indicates parenthetically the amount of time spent on each activity. <u>Go To Headnote</u>

<u>In re Grubb, 2009 Bankr. LEXIS 4083 (Bankr. E.D. Va. Dec. 11, 2009)</u>, amended, <u>2010 Bankr. LEXIS 339 (Bankr. E.D. Va. Jan. 23, 2010)</u>.

**Overview:** Law firm that represented Chapter 13 debtors failed to show it was entitled to payment of \$ 2,569 in supplemental fees under Bankr. E.D. Va. Standing Order 08-1 for representing the debtors. The debtors' case was a routine Chapter 13 case and the law firm had already been paid a "no-look" fee of \$ 3,000 and supplemental fees in the amount of \$ 700.

• While compliance with the procedural requirements of Bankr. E.D. Va. Standing Order 08-1 is mandatory, counsel are free to apply for a fee at variance with the policy. If an attorney knows from the inception of the case that unusual issues are present, the attorney may contract with the client for a higher fee, but in that event must submit a formal fee application. Additionally, if the need arises in the course of the case for services that were not reasonably anticipated when the "no-look" fee was requested and approved, the attorney may file an application for additional compensation. Bankr. E.D. Va. Interim Proc. 2016-1(C)(8). It has been recognized that significant litigation can occur in connection with a case that might require the rendition of legal services outside the normal routine. In all such instances, the "no look" fee becomes inapplicable and a formal fee application must be filed in its stead that details the contemporaneous time entries of counsel throughout the case along with an itemization and appropriate documentation of expenses for which counsel seek reimbursement. The fee application must comport with the guidelines promulgated by the Office of the United States Trustee. Those guidelines are set forth at 28 C.F.R. pt. 58, app. A. Go To Headnote

Bankruptcy Law: Case Administration: Professional Services: Compensation: Interim Compensation

In re Bennett, 2012 Bankr. LEXIS 5635 (Bankr. E.D. Ky. Dec. 5, 2012).

**Overview:** Court allowed only \$1,500 of \$6,295 fee sought by counsel to Chapter 13 debtors as many entries included in substantiating materials were unintelligible, related to other proceedings and clients, or were improperly lumped together. As application did not comply with standards imposed by 11 U.S.C.S. § 329 and 11 U.S.C.S. § 330, reduction was proper.

• A thorough explanation of what constitutes the required "sufficient detail" within the meaning of 11 U.S.C.S. § 329 and Fed. R. Bankr. P. 2016 is as follows: A fee application should also contain sufficient information about the case and the applicant so that the Court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents. 28 C.F.R. pt. 58, app. A, §§ (b). The application is to (i) set forth the names/hourly rates of professionals and paraprofessionals who billed time; (ii) report time and service entries in chronological order; (iii) keep time and service entries contemporaneously with the services rendered in time periods of tenths of an hour; and (iv) report services rendered in detail and not combined or "lumped" together, providing a separate time entry for each service. Go To Headnote

Bankruptcy Law: Case Administration: Professional Services: Compensation: Limitations

In re Bennett, 2012 Bankr. LEXIS 5635 (Bankr. E.D. Ky. Dec. 5, 2012).

**Overview:** Court allowed only \$1,500 of \$6,295 fee sought by counsel to Chapter 13 debtors as many entries included in substantiating materials were unintelligible, related to other proceedings and clients, or were improperly

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lumped together. As application did not comply with standards imposed by 11 U.S.C.S. § 329 and 11 U.S.C.S. § 330, reduction was proper.

• A thorough explanation of what constitutes the required "sufficient detail" within the meaning of 11 U.S.C.S. § 329 and Fed. R. Bankr. P. 2016 is as follows: A fee application should also contain sufficient information about the case and the applicant so that the Court, the creditors, and the United States Trustee can review it without searching for relevant information in other documents. 28 C.F.R. pt. 58, app. A, §§ (b). The application is to (i) set forth the names/hourly rates of professionals and paraprofessionals who billed time; (ii) report time and service entries in chronological order; (iii) keep time and service entries contemporaneously with the services rendered in time periods of tenths of an hour; and (iv) report services rendered in detail and not combined or "lumped" together, providing a separate time entry for each service. Go To Headnote

### Civil Procedure: Remedies: Costs & Attorney Fees: Attorney Expenses & Fees: Reasonable Fees

In re 530 W. 28th St., L.P., 2009 Bankr. LEXIS 4101 (Bankr. S.D.N.Y. Dec. 11, 2009).

**Overview:** Bankruptcy court reduced the amount of attorney fees and expenses counsel request under 11 U.S.C.S. § 330 because some services counsel performed did not benefit an Official Committee of Unsecured Creditors he represented or the debtor's Chapter 11 bankruptcy estate, and because schedules counsel filed contained vague or incomplete entries.

• "Lumping" refers to the practice of aggregating time entries involving two or more discrete tasks without identifying the time spent on each task. Lumping makes it difficult to determine if the timekeeper spent a reasonable amount of time on each discrete task. As a result, the timekeeper fails to sustain its burden of proving that its fees are reasonable. The guidelines issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A, permit lumping only where the aggregate time does not exceed 30 minutes. 28 C.F.R. pt. 58, app. A, para. (b)(4)(v). Go To Headnote

#### In re Brous, 370 B.R. 563, 2007 Bankr. LEXIS 1964 (Bankr. S.D.N.Y. 2007).

**Overview:** Chapter 7 Trustee sought maximum commission allowable under 11 U.S.C.S. § 326. The court concluded, however, that the use of 11 U.S.C.S. § 326 was not appropriate, except as a limit, and that the Trustee, like other professionals, had to generally establish his right to compensation under the "lodestar" method incorporated into 11 U.S.C.S. § 330.

• "Lumping" refers to the practice of aggregating time entries involving two or more discrete tasks without identifying the time spent on each task. Lumping makes it difficult to determine if the timekeeper spent a reasonable amount of time on each discrete task. As a result, the timekeeper fails to sustain its burden of proving that its fees are reasonable. The Executive Office of United States Trustees Guidelines (UST Guidelines), 28 C.F.R., pt. 58, App. A (2007), permit lumping only where the aggregate time does not exceed 30 minutes. UST Guideline (b)(4)(v). Go To Headnote

#### **Evidence: Procedural Considerations: Burdens of Proof: Allocation**

In re CCT Communs., Inc., 2010 Bankr. LEXIS 2947 (Bankr. S.D.N.Y. Aug. 24, 2010).

**Overview:** With respect to a fee application under 11 U.S.C.S. § 330, one law firm was permitted nunc pro tunc approval of its retention because the delay in executing a retention order was due to circumstances beyond its control. However, with respect to a different firm, retention was not retroactive because that firm took no action to seek such authority.

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#### 28 CFR PART 58 APPENDIX A

• With respect to fee applications under 11 U.S.C.S. § 330, the fee applicant bears the burden of proof on his claim for compensation. Even in the absence of an objection, the court has an independent duty to scrutinize the fee request. The applicant must submit contemporaneous time records, although a computerized printout summary, in lieu of the original time slips, will suffice. In the United States Bankruptcy Court for the Southern District of New York, the standards for time records are contained in the court's Fee Guidelines, as amended, and the guidelines issued by the Executive Office of United States Trustees. 28 C.F.R. pt. 58, app. A (UST Guidelines). Generally, fee applications, standing alone, must contain sufficient detail to demonstrate compliance with § 330. UST Guidelines, (b). Any uncertainties due to poor record keeping are resolved against the applicant. Go To Headnote

In re 530 W. 28th St., L.P., 2009 Bankr. LEXIS 4101 (Bankr. S.D.N.Y. Dec. 11, 2009).

**Overview:** Bankruptcy court reduced the amount of attorney fees and expenses counsel request under 11 U.S.C.S. § 330 because some services counsel performed did not benefit an Official Committee of Unsecured Creditors he represented or the debtor's Chapter 11 bankruptcy estate, and because schedules counsel filed contained vague or incomplete entries.

• An applicant who seeks payment of fees from a bankruptcy court bears the burden of proof on his claim for compensation. Even in the absence of an objection, a bankruptcy court has an independent duty to scrutinize a fee request. The applicant must submit contemporaneous time records, although a computerized printout summary, in lieu of the original time slips, will suffice. Standards for time records are contained in the United States Bankruptcy Court for the Southern District of New York's fee guidelines, as amended, and in the guidelines issued by the Executive Office of United States Trustees, 28 C.F.R. pt. 58, app. A (2007). Go To Headnote

### **Research References & Practice Aids**

### **Hierarchy Notes:**

28 CFR Ch. I

28 CFR Ch. I, Pt. 58

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As of: June 25, 2024 6:07 PM Z

### In re Spear

United States Bankruptcy Court for the Southern District of Ohio, Western Division

January 10, 2022, Decided

Case No. 21-30649, Chapter 13

#### Reporter

636 B.R. 765 \*; 2022 Bankr. LEXIS 65 \*\*
In re: SHEILA R. SPEAR, Debtor.

## **Core Terms**

no-look, pre-confirmation, spent, preparation, provide a service, proof of claim, attorney's fees, bankruptcy court, pawn shop, per hour, prepetition, inheritance, cases, paralegal, *fee application*, confirmation, Catfisher, routine, billed, funds, legal services, expended, factors, jewelry, circumstances, counseling, number of hours, perform work, certificate, experienced

### **Case Summary**

#### Overview

HOLDINGS: [1]-Attorney fees in the amount of \$9,491.50 requested by a <u>Chapter 13</u> debtor's attorneys under 11 U.S.C.S. § 330 for pre-petition and pre-confirmation services were excessive due to the number of hours the attorneys spent on routine matters that could have been spent by a paralegal. Fees in the amount of \$5,400 were allowed; [2]-The attorneys were not entitled to \$4,925 in fees related to services to the debtor related to "catfishing" scams, and the amount awarded was reduced to \$1,800. There was no benefit to the debtor and the estate beyond any successful persuasion to convince the debtor not to engage with the schemers; [3]-Overall, total fees were reduced from \$19,046.50 to \$10,166.25.

#### Outcome

Application for compensation granted in part and denied in part.

### LexisNexis® Headnotes

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

# **HN1** Compensation, Debtor's Attorney

Bankruptcy courts have an independent duty to monitor and determine the reasonableness of attorney fees related to bankruptcy cases regardless of whether any party objects to the <u>fee application</u>. The bankruptcy court has a duty to review <u>fee applications</u> which the Bankruptcy Code does not expressly lay out but which derives from the court's inherent obligation to monitor the debtor's estate and to serve the public interest.

Michael Baker

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636 B.R. 765, \*765; 2022 Bankr. LEXIS 65, \*\*65

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

### HN2 Compensation, Limitations on Compensation

In a bankruptcy case fees are not a matter for private agreement. There is an inherent public interest that must be considered in awarding fees. Even if no objection has been raised by creditors or parties in interest, the bankruptcy court has both the power and the obligation to review <u>fee applications</u>. This responsibility serves to guard the integrity of and public trust in the federal bankruptcy courts.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

## HN3 Compensation, Debtor's Attorney

The integrity of the bankruptcy system is at stake in the issue of a bankruptcy judge's performance of the duty to review <u>fee applications</u> sua sponte. The public expects, and has a right to expect, that an order of a court is a judge's certification that the result is proper and justified under the law. Nothing better serves to allay public perceptions that high professional fees unduly drive up bankruptcy costs than the recognition that a bankruptcy judge, before a <u>fee application</u> is approved, is obliged to review it carefully and find it personally acceptable, irrespective of the (always welcomed) observation of the United States Trustee or other interested parties.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

### HN4 Compensation, Debtor's Attorney

Any payment made to an attorney for representing a debtor in connection with a bankruptcy proceeding is reviewable by the bankruptcy court notwithstanding the source of payment.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

# HN5 ≥ Attorney Fees & Expenses, Reasonable Fees

In <u>Chapter 13</u> cases, courts determine the reasonableness of attorney fees under 11 U.S.C.S. § 330 using the lodestar method. The lodestar method of fee calculation is the method by which federal courts should determine reasonable attorney's fees under federal statutes which provide for such fees. When employing the lodestar method, courts generally start with the number of hours reasonably expended on the matter multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The focus of this calculation is on determining what is a reasonable number of hours for the work performed and a reasonable billing rate for the attorneys who performed the work.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

# **HN6** ★ Attorney Fees & Expenses, Reasonable Fees

The lodestar calculation (hourly rate multiplied by the number of hours incurred) does not necessarily end the determination of what is a reasonable attorney fee. Other factors may and should also be considered and may warrant an increase or a decrease in the fees awarded. These factors are commonly referred to as the Johnson

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factors. These factors include: 1) the novelty and difficulty of the issues; 2) the skill required to perform the services properly; 3) the preclusion of other employment resulting from counsel's acceptance of the matter; 4) the customary fee for such matters; 5) whether the fee is fixed or contingent; 6) time limitations imposed by the client or otherwise dictated by the circumstances; 7) the amount at issue and the results obtained; 8) the experience, reputation, and ability of the attorneys; 9) the undesirability of the case; 10) the nature and length of the professional relationship between counsel and the client; and 11) awards in similar cases or under similar circumstances.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

### HN7 2 Compensation, Limitations on Compensation

The 1994 amendments generally incorporated the Johnson factors into 11 U.S.C.S. § 330(a)(3), which governs fee awards to professionals in bankruptcy cases. 11 U.S.C.S. § 330(a)(3). In addition, except as otherwise allowed, the court shall not allow compensation for—(i) unnecessary duplication of services; or (ii) services that were not—(I) reasonably likely to benefit the debtor's estate; or (II) necessary to the administration of the case. 11 U.S.C.S. § 330(a)(4)(A).

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

### HN8 2 Compensation, Debtor's Attorney

For many years, the U.S. Bankruptcy Court for the Southern District of Ohio has approved an attorney fee amount which is presumed to be reasonable for most services provided to a debtor in a <u>Chapter 13</u> case, known as the nolook fee. Bankr. S.D. Ohio R. 2016-1(b)(2)(A) describes the services which debtor's counsel is generally to provide in exchange for the no-look fee.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

### HN9 Compensation, Debtor's Attorney

Attorneys in the Southern District of Ohio may opt out of the no-look fee for services provided to a debtor in a <u>Chapter 13</u> case and instead itemize their time. In that circumstance, counsel is to file an itemized <u>fee application</u> within 60 days after the confirmation order is entered. Bankr. S.D. Ohio R. 2016-1(b)(2)(C).

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

# <u>HN10</u>[♣] Attorney Fees & Expenses, Reasonable Fees

Certainly a bankruptcy judge's experience with fee petitions and his or her expert judgment pertaining to appropriate billing practices, founded on an understanding of the legal profession, will be the starting point for any analysis of whether attorney fees are reasonable.

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Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

### HN11[基] Compensation, Debtor's Attorney

A bankruptcy court should be mindful that not all services should carry the same compensation. The fact that an experienced attorney elects to perform routine ministerial services which could be performed by others far less experienced does not increase the value and should not increase the cost to the estate for these services. The hourly fee awarded should be adjusted when a significant percentage of the total work completed is of such a routine nature. Compensation for routine work should be discounted. The appropriate rate the attorney will command for paralegal services will ordinarily parallel the paralegal's credentials and the degree of experience, knowledge, and skill the task at hand calls for. When an experienced attorney does clerk's work, he or she should be paid clerk's wages. Thus, counsel need to push work down to the lowest available rate for which such work can be competently performed or otherwise adjust the billing accordingly so that clients are not excessively billed for the level of the work performed.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

### HN12 Compensation, Debtor's Attorney

Routine matters in a <u>Chapter 13</u> case are illustrated by the tasks provided for by the no-look fee in Bankr. S.D. Ohio R. 2016-1(b)(2)(A).

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

### **HN13** Compensation, Debtor's Attorney

Attorney fees in each case are governed by 11 U.S.C.S. § 330 and regardless of the presumed reasonableness of fees charged under the no-look fee or otherwise. The no-look fee does provide the court with a presumptively reasonable fee sought in any <u>Chapter 13</u> case. However, the court does not view the U.S. Bankruptcy Court for the Southern District of Ohio's no-look fee as either a floor or a ceiling for attorney fees in a <u>Chapter 13</u> case, but rather, a framework with which to analyze the reasonableness of fees sought in each particular case.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

# **HN14** ★ Attorney Fees & Expenses, Reasonable Fees

The results obtained are an important consideration in determining the reasonableness of attorney fees sought. This factor requires the court to consider if the party seeking the fees failed to prevail on a claim or claims that were not related to the claim upon which the party succeeded. If the party failed to succeed on all claims, the court considers whether that party nevertheless achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award. When a party moving for attorney fees is partially successful, the court may take such partial success into consideration in making its award of attorney fees. The level of a plaintiff's success is relevant to the amount of fees to be awarded.

Counsel: [\*\*1] For First Financial Bank, Creditor: Matthew McKelvey, Dinsmore & Shohl LLP, Cincinnati, OH.

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For Sheila R Spear, Debtor: G. Timothy Dearfield, DEARFIELD LAW FIRM, LLC, Kettering, OH; Matthew Dearfield, Dearfield Law Firm LLC, Mason, OH.

Judges: Guy R. Humphrey, United States Bankruptcy Judge.

Opinion by: Guy R. Humphrey

### **Opinion**

# [\*767] MEMORANDUM ORDER GRANTING IN PART AND DENYING IN PART <u>APPLICATION</u> FOR ATTORNEY *FEES* PRE-CONFIRMATION (DOC. 41)

#### I. Introduction

This matter is before the court on the <u>Application</u> for Attorney <u>Fees</u> Pre-Confirmation filed by G. Timothy Dearfield on August 24, 2021 (doc. 41) (the "Application"). The <u>Application</u> seeks attorney <u>fees</u> in the amount of \$19,046.50 for legal work performed by Mr. Dearfield and his law firm through confirmation of the debtor's <u>Chapter 13</u> plan.

### II. Facts and Procedural Background

The debtor filed her <u>Chapter 13</u> case on April 19, 2021. She is a registered nurse and employed by a local hospital. She also owns a sole proprietorship which is engaged in the business of making and selling greeting cards that operates under the name "Crafty Cards by Sheila." The debtor scheduled no income or expenses associated with the sole proprietorship and no evidence was introduced as to this [\*\*2] sole proprietorship having an impact on the complexity or administration of this <u>Chapter 13</u> case.

The debtor's petition and schedules reflect that she has primarily consumer debts, with approximately \$218,000 in secured debt and \$410,000 in unsecured debt. <u>Doc. 13 at 1.</u> She owns her residence valued at \$213,000, which accounts for most of her secured debt, and \$294,000 in personal property, including an \$8,000 car, a \$62,000 IRA, and an inherited certificate of deposit in the amount of \$215,700, in addition to other miscellaneous personal property. *Id.* at 3, 4, 8, 12-13. Her unsecured debt consists primarily of credit card debt and \$75,000 owed to her father. *Id.* at 15-23.

On its Disclosure of Compensation of Attorney For Debtor and <u>Application</u> For Allowance Of <u>Fees</u> In <u>Chapter 13</u> Case, Local Bankruptcy Form 2016-1(b), Dearfield stated that it agreed to be paid \$10,000 for its services, with \$3,687.00 having been received prior to the filing of the Disclosure, and a balance due of \$6,313.00. [\*768] <u>Doc. 13</u>. Unless otherwise noted, the court will refer to the law firm and its professionals collectively as "Dearfield."

The debtor's amended <u>chapter 13</u> plan provides for a 50% dividend to unsecured creditors and payments to the [\*\*3] debtor's residential lender and a pawn shop as secured creditors. The plan is to be funded through monthly payments of \$2,100, which are to be stepped up to \$2,700 in May of 2022; and the debtor's turnover of the funds held in the certificate of deposit, minus \$29,000 which she was entitled to retain in the event that she lost her job, in which case she was to fund the monthly plan payments through that \$29,000. <u>Doc. 24</u>. If she does not lose her job, she is to pay the \$29,000 to the <u>Chapter 13</u> Trustee by May 1, 2022. The plan provides for attorney fees to Dearfield in the amount of \$12,500.00, with \$8,813.00 to be paid through the plan payments. The plan was confirmed on September 11, 2021. <u>Doc. 44</u>.

The Application includes a total of 84.7 hours expended, for total fees of \$19,046.50 broken down as follows:

Timothy Dearfield @ \$275/hour 45.1 hours \$12,402.50 Matthew Dearfield @ \$175/hour 35.2 hours \$6,160.00

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Julie Terry @ \$110/hour 4.4 hours \$484,00 84.7 \$19,046.50

The Application does not seek the reimbursement of expenses.

Pursuant to a prior order (doc. 50), the court held a hearing on the Application on November 4, 2021, attended by the John G. Jansing, the *Chapter 13* Trustee, Scott G. Stout, [\*\*4] staff attorney to the *Chapter 13* Trustee, and Timothy Dearfield. In its review of the Application prior to the hearing, the court grouped the services provided by Dearfield as described in the Application into the following categories, with the following sums of time and fees for each category.

Services Performed	Hours Spent	Fees Billed
General pre-petition and pre-confirmation legal services	44.6	\$9,491.50
Preparation for and attendance at the Creditors Meeting	6.9	\$1,797.50
Research and corresp regarding "Catfisher" scam	19.7	\$4,925.00
Research, corresp, communications, and filing of	10.25	
Proof of Claim on a pawn shop claim		\$1,891.25
Research and work relating to the debtor's inheritance	3.55	\$941.25
Totals	85	\$19,046.50

See Order Setting Hearing On Application For Compensation (doc. 46). These categories and summaries were provided to Dearfield in advance of the hearing and Dearfield did not take issue with the categories and summaries at the hearing.

One exhibit was introduced and admitted at the hearing — the Affidavit of Sheila R. Spear (doc. 48) - the debtor. The Affidavit consists of one page and states that the debtor supports the Application. No party presented sworn testimony in support of the [\*\*5] Application, but Mr. Dearfield did provide his statements as counsel in support of and explaining the representation which he and his firm provided to the debtor and for which the fees are sought. As he is an officer of the court, the court accepted Dearfield's statements in support of the Application in lieu of sworn testimony.

[\*769] Timothy Dearfield stated that the extraordinarily high number of hours spent on this <u>Chapter 13</u> case was largely attributable to his need to consult with the debtor concerning her proclivity to engage with individuals online who had fleeced her out of substantial sums of money and who Dearfield feared would continue to do so without his vigilant counseling of her. Dearfield's time concerning this activity is reflected in the time labeled "Catfisher scam," which is the term which Dearfield used in the Application for this scheme to which the debtor fell prey. Thus, in addition to the normal bankruptcy legal tasks, such as completing the petition, schedules, and statement of financial affairs, counseling the debtor concerning her financial circumstances, and attending the creditors meeting, Dearfield provided counseling and advice to the debtor in an attempt to [\*\*6] prevent the debtor from re-engaging with these individuals who were siphoning off her funds. Beyond that aspect of the case, Dearfield did not illuminate any other work performed that was out-of-the-ordinary for a <u>Chapter 13</u> bankruptcy case. The only other items of note the court discerned in reviewing the Application related to counseling the debtor and providing in the plan for her inheritance and filing a secured proof of claim for the pawn shop which loaned the debtor money and took jewelry as collateral for the loan. The <u>Chapter 13</u> Trustee filed no response to the Application and stated during the hearing that the Trustee supports the Application.

#### III. Legal Analysis

### A. The Duty of Bankruptcy Courts to Independently Review Fee Applications

<u>HN1[\*]</u> Bankruptcy courts have an independent duty to monitor and determine the reasonableness of attorney fees related to bankruptcy cases regardless of whether any party objects to the <u>fee application</u>. <u>Cupps & Garrison</u>,

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LLC v. Rhiel (In re Two Gales, Inc.), 454 B.R. 427, 432-33 (B.A.P. 6th Cir. 2011); In re Busy Beaver Bldg. Ctrs., 19 F.3d 833, 841 (3d Cir. 1994) ("[T]he bankruptcy court has a duty to review fee applications... which the Code does not expressly lay out but which we believe derives from the court's inherent obligation to monitor the debtor's estate and to serve the public interest.") (emphasis [\*\*7] in original). The debtor's apparent support of the fees does not eliminate the court's obligation. HN2[\*] In Dery, the Sixth Circuit explained, "In a bankruptcy case fees are not a matter for private agreement. There is an inherent public interest that must be considered in awarding fees." Dery v. Cumberland Cas. & Sur. Co. (In re 5900 Assocs.), 468 F.3d 326, 329-30 (6th Cir. 2006) (quoting In re Inslaw, Inc., 106 B.R. 331, 333 (Bankr. D.D.C. 1989)); see also Cupps & Garrison, 454 B.R. at 433 ("Even if no objection has been raised by creditors or parties in interest, the bankruptcy court has both the power and the obligation to review fee applications."). This responsibility serves to guard the integrity of and public trust in the federal bankruptcy courts. As one bankruptcy court stated:

[T]he integrity of the bankruptcy system . . . is at stake in the issue of a bankruptcy judge's performance of the duty to review <u>fee applications</u> sua sponte. The public expects, and has a right to expect, that an order of a court is a judge's certification that the result is proper and justified under the law. . . Nothing better serves to allay [public perceptions that high professional fees unduly drive up bankruptcy costs] than the recognition that a bankruptcy judge, before a <u>fee application</u> is approved, is obliged to [review it carefully] . . . and find it personally acceptable, [\*770] irrespective [\*\*8] of the (always welcomed) observation of the UST or other interested parties.

In re Evans, 153 B.R. 960, 968 (Bankr. E.D. Pa. 1993) (quoting In re Del. River Stevedores, 147 B.R. 864, 869-70 (Bankr. E.D. Pa. 1992)). See also In re Walters, 868 F.2d 665, 668 (4th Cir. 1989) (citation omitted) (HN4 Telephone) (HN4 Telephone) representing a debtor in connection with a bankruptcy proceeding is reviewable by the bankruptcy court notwithstanding the source of payment.").

### B. Legal Overview of Attorney Fee Applications in Chapter 13 Cases

In addressing the compensation of the officers of a bankruptcy estate, including attorneys, *Bankruptcy Code § 330* states in pertinent part:

- (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to <u>sections</u> 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under <u>section</u> 332, an examiner, an ombudsman appointed under <u>section</u> 333, or a professional person employed under <u>section</u> 327 or 1103—
  - (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
  - (B) reimbursement for actual, necessary expenses.
  - (2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for [\*\*9] the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

#### 11 U.S.C. § 330(a).

HN5 | In Chapter 13 cases, courts determine the reasonableness of attorney fees under § 330 using the lodestar method. In re Boddy, 950 F.2d 334, 337 (6th Cir. 1991) ("The Supreme Court has made it clear that the lodestar method of fee calculation is the method by which federal courts should determine reasonable attorney's fees under federal statutes which provide for such fees."). When employing the lodestar method, courts generally start with the number of hours reasonably expended on the matter multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983); Blanchard v. Bergeron, 489 U.S. 87, 94, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989); Boddy, 950 F.2d at 337. "This calculation provides an objective basis on which to

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make an initial estimate of the value of a lawyer's services." <u>Hensley, 461 U.S. at 433</u>. The focus of this calculation is on determining what is a reasonable number of hours for the work performed and a reasonable billing rate for the attorneys who performed the work. <u>City of Riverside v. Rivera, 477 U.S. 561, 567-68, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986)</u>.

HN6 1 The lodestar calculation (hourly rate multiplied by the number of hours incurred) does not necessarily end the determination of what is a reasonable attorney fee. Other factors may and should also be considered and may warrant an increase or a decrease in the fees awarded. Hensley, 461 U.S. at 434. These [\*\*10] factors, originating with Johnson v. Ga. Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) are commonly referred to as the Johnson factors. These factors include: 1) the novelty and difficulty of the issues; 2) the skill required to perform the [\*771] services properly; 3) the preclusion of other employment resulting from counsel's acceptance of the matter; 4) the customary fee for such matters; 5) whether the fee is fixed or contingent; 6) time limitations imposed by the client or otherwise dictated by the circumstances; 7) the amount at issue and the results obtained; 8) the experience, reputation, and ability of the attorneys; 9) the undesirability of the case; 10) the nature and length of the professional relationship between counsel and the client; and 11) awards in similar cases or under similar circumstances. Boddy, 950 F.2d at 338 (citing Harman v. Robertson, 772 F.2d 1150, 1152 n.1 (4th Cir. 1985)); Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan, 995 F. Supp. 2d 835, 848 (S.D. Ohio 2014). See also Blanchard, 489 U.S. at 91 n.5 (discussing the Johnson factors). HN7 1 The 1994 amendments generally incorporated the Johnson factors into § 330(a)(3), which governs fee awards to professionals in bankruptcy cases. See 11 U.S.C. § 330(a)(3); In re Phillips, 291 B.R. 72, 84 (Bankr. S.D. Tex. 2003) (noting the mention of the Johnson factors in congressional documents). In addition, except as otherwise allowed, "the court shall not allow compensation for—(i) unnecessary duplication of services; or (ii) services that were not—(I) reasonably likely to benefit the debtor's [\*\*11] estate; or (II) necessary to the administration of the case." 11 U.S.C. § 330(a)(4)(A).

**HN8** For many years, the Bankruptcy Court for the Southern District of Ohio has approved a fee amount which is presumed to be reasonable for most services provided to a debtor in a **Chapter 13** case, known as the "no-look fee." Local Bankruptcy Rule 2016-1(b)(2)(A) describes the following as the services which debtor's counsel is generally to provide in exchange for the "no-look fee":

- (A) No-Look Fee. Upon confirmation of the plan, fees may be allowed up to \$3,700 ("no-look <u>fee"</u>) without further <u>application</u> or specific itemization for services rendered. The no-look fee includes the general legal services performed in a <u>chapter 13</u> case listed below, whether performed preconfirmation or postconfirmation:
  - (i) initial client interview, preparation and signing of any retainer or representation agreement, analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether, and under what chapter, to file a petition in bankruptcy;
  - (ii) advising the debtor concerning his or her obligations and duties pursuant to the Code, the Rules, these Local Rules, applicable court orders, and provisions of his or her *chapter 13* plan;
  - (iii) preparation [\*\*12] and filing of any document required by § 521 of the Code, including Official Form 122C-1 and Official Form 122C-2 (if applicable), the petition, schedules, statement of financial affairs and any amendments thereto that may be required;
  - (iv) preparation and filing of the <u>chapter 13</u> plan, and any preconfirmation amendments thereto that may be required; provided, legal services performed relative to avoidance of wholly unsecured mortgages / liens, avoidance of judicial liens impairing an exemption in real property, or avoidance of nonpossessory,

nonpurchase-money security interests in exempt property within a <u>chapter 13</u> plan are not covered by the no-look fee and may be compensated through a separate <u>application</u> for <u>fees</u>; however, in such event, no additional compensation will be allowed for the preparation and [\*772] filing of a motion pursuant to Rule 5009(d).

(v) preparation and filing of payroll orders and amended payroll orders, except amended payroll orders prepared in connection with the modification of a plan or the temporary suspension of payments;

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(vi) representation of the debtor at the § 341 meeting of creditors and confirmation hearing, and at any adjournments thereof;

filing of address changes for the debtor; [\*\*13] (vii)

- (viii) review of claims;
- (ix) review of notice of intention to pay claims;
- (x) preparation and filing of objections to non-real estate and nontax claims, exclusive of any hearings;
- (xi) preparation and filing of first motion to suspend or temporarily reduce plan payments;
- (xii) representation of the debtor in addressing any routine tax return or tax refund inquiries by the trustee, exclusive of any motion, objection, or hearing;
- (xiii) filing of a notice of final cure payment, when filed by the debtor, exclusive of any hearings;
- (xiv) preparation and filing of debtor's certification regarding issuance of discharge order;
- (xv) routine phone calls and questions;
- (xvi) file maintenance and routine case management; and
- (xvii) any other duty as required by local decision or policy.

The amount of the no-look fee may be changed from time to time by general order.

LBR 2016-1(b)(2)(A). The no-look fee has been increased a number of times over the years. Effective February 24, 2021, and after recommendation by the Attorney Advisory Committee for the United States Bankruptcy Court for the Southern District of Ohio, the no-look fee was increased by the court to \$4,350. Bankr. S.D. Ohio General Order 50-1

Attorneys in [\*\*14] the Southern District of Ohio may, however, opt out of the no-look fee and instead itemize their time. In that circumstance, counsel is to file an itemized <u>fee application</u> within 60 days after the confirmation order is entered, as Dearfield did in this case. See LBR 2016-1(b)(2)(C).

#### C. Analysis of the Application Under the Law

As an initial matter, based upon the court's experience with and knowledge of attorney rates in Dayton and the Southern District of Ohio, the court finds that the rates charged by Dearfield for Timothy Dearfield's, Matthew Dearfield's, and Julie Terry's services are reasonable and within the market rate for attorneys and paralegals of comparable experience and skills for Dayton and the Southern District of Ohio. Timothy Dearfield is an experienced bankruptcy practitioner, having practiced for 33 years, including many cases and proceedings before this court. Matthew Dearfield also provided services to the debtor and has been practicing with the Dearfield firm since he graduated from law school in 2018. Julie Terry, the paralegal who provided services to the debtor, is [\*773] very experienced, having 19 years of experience as a paralegal. See Application at 8.

Since the court has determined [\*\*15] that the hourly rates charged by Dearfield are reasonable for the Dayton and Southern District of Ohio market, the court's focus turns to the other component of the lodestar method — that being the total number of hours expended for the services provided — and, particularly, whether the total number of hours expended is reasonable under the circumstances. Dearfield expended a total of approximately 85 hours in representing the debtor through confirmation of the plan.

The court first notes that Dearfield did not provide an independent expert on the reasonableness of the fees. Accordingly, the court must determine the reasonableness of the <u>fees</u> based upon the <u>Application</u>, Timothy Dearfield's statements at the hearing, the debtor's and <u>Chapter 13</u> Trustee's support of the Application, and the

<sup>&</sup>lt;sup>1</sup> Timothy Dearfield's hourly rate is \$275 per hour. Matt Dearfield's hourly rate is \$175 per hour. Julie Terry's hourly rate is \$110 per hour. In calculating the reductions for certain portions of the *fee application*, the court used the average or blended hourly attorney rate of \$225, disregarding Ms. Terry's hourly rate.

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court's own review of the Application and experience with billings for *Chapter 13* cases within the Southern District of Ohio and Dayton.<sup>2</sup>

In order to determine whether the total number of hours expended is reasonable, the court will analyze the fees sought based upon the different categories of services which Dearfield provided to the debtor.

#### 1. General pre-petition and pre-confirmation [\*\*16] legal services: \$9,491.50

The first and largest group of services, in terms of the fees sought, is for general prepetition and pre-confirmation legal services in the total amount of \$9,491.50. These services include a total of 44.6 hours incurred by Dearfield, with 1.5 hours spent by paralegal Julie Terry and the remainder spent by Timothy and Matthew Dearfield.

Excluding the separate services which the court discusses below, the court was not able to discern from the Application, and Timothy Dearfield did not identify at the hearing, any additional prepetition or pre-confirmation general bankruptcy services which the firm provided to the debtor beyond the general services expected of <u>Chapter 13</u> counsel described by Local Bankruptcy Rule 2016-1(b)(2)(A) for purposes of the no-look fee. As noted, the court recently approved an increase to the no-look fee for such services, increasing that number to \$4,350. That amount would equate to 21.75 hours at \$200 per hour, 17.4 hours at a rate of \$250 per hour, or 14.5 hours at \$300 per hour. While attorney supervision is necessary for performance of all bankruptcy-related services, much of the general prepetition and preconfirmation services can be performed by paralegals or legal [\*\*17] assistants at appropriate rates for those para-professionals. In this case Ms. Terry's services were billed out at the rate of \$110 per hour, but she only spent 1.5 hours on the general pre-confirmation services, while Timothy and Matthew Dearfield spent the vast majority of that time (almost 45 hours). In reviewing a <u>fee application</u> under these circumstances, another bankruptcy court stated:

<u>HN11</u>[1] The Court should be mindful that not all services should carry the same compensation . . . . The fact that an experienced attorney elects to perform routine ministerial services which could be performed by others far less experienced does not increase the value and should not increase [\*774] the cost to the estate for these services.

In re Union Cartage Co., 56 B.R. 174, 178 (Bankr. N.D. Ohio 1986). See also In the Matter of Ferkauf, Inc., 42 B.R. 852, 858 (Bankr. S.D.N.Y. 1984) ("[T]he hourly fee awarded should be adjusted when a significant percentage of the total work completed is of such a routine nature. Compensation for routine work should be discounted."); Busy Beaver, 19 F.3d at 852 ("[T]he appropriate rate the attorney will command for paralegal services will ordinarily parallel the paralegal's credentials and the degree of experience, knowledge, and skill the task at hand calls for.") (citation omitted); In re Vogue, 92 B.R. 717, 718 (Bankr. E.D. Mich. 1988) ("[W]hen an experienced attorney does clerk's work, [\*\*18] he or she should be paid clerk's wages."). Thus, counsel need to push work down to the lowest available rate for which such work can be competently performed or otherwise adjust the billing accordingly so that clients are not excessively billed for the level of the work performed.

Based upon the court's review of the Application and the statements of Timothy Dearfield, the court is unable to identify how the general prepetition services which Dearfield provided were greater in quantity or quality than the services to be provided under the no-look fee at an amount of \$4,350.4 Those services appear from the Application

<sup>&</sup>lt;sup>2</sup> <u>HN10</u> "[W]e observe that certainly a bankruptcy judge's experience with fee petitions and his or her expert judgment pertaining to appropriate billing practices, founded on an understanding of the legal profession, will be the *starting point* for any analysis." *In re Busy Beaver Bldg. Ctrs.*, 19 F.3d 833, 854 (3d Cir. 1994) (emphasis in original).

<sup>&</sup>lt;sup>3</sup> Judge Kendig has identified the routine legal matters to which Chapter 7 trustees attend in <u>In re Kieffer, 306 B.R. 197, 207 (Bankr. N.D. Ohio 2004)</u>. <u>HN12[1]</u> Routine matters in a <u>Chapter 13</u> case are illustrated by the tasks provided for by the no-look fee in Local Bankruptcy Rule 2016-1(b)(2)(A).

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to have been in the nature of routine services described by Local Bankruptcy Rule 2016-1(b)(2)(A). In general, the number of hours that Dearfield's attorneys incurred for the general pre-confirmation services is excessive. As noted, the \$4,350 no-look fee would equate to 21.75 hours at \$200 per hour, 17.4 hours at a rate of \$250 per hour, and 14.5 hours at \$300 per hour for those services. The combination of the number of hours the attorneys spent (43.1) on these routine matters, in combination with their rates, resulted in an excessive bill for those services. As noted, the court does not have any concern [\*\*19] over the rates charged by the professionals, but the court does take issue with the number of hours spent and what appears to the court as hours spent by attorneys which could have been more efficiently and economically spent by a paralegal or billed at a paralegal rate. However, the court is willing to allow Dearfield's fees totaling \$5,400 for those general prepetition services, which would equate to 24 hours at the blended attorney rate of \$225 per hour, and which is \$1,650 in excess of the no-look fee. This will result in a reduction of the Application in the amount of \$3,491.50 with respect to those services.

#### 2. Preparation for and attendance at the Creditors Meeting: \$1,797.50

While the court broke out the time and services incurred by Dearfield relating to [\*775] preparation for and attendance at the creditors meeting held pursuant to § 341, those services would normally be included as part of the services included in the no-look fee. See LBR 2016-1(b)(2)(A)(vi). However, given Timothy Dearfield's explanation during the hearing that additional services were required to counsel the debtor regarding her "catfishing" proclivities and the fact that the debtor did have the inheritance and pawn shop issues to address, [\*\*20] the court will approve an additional \$900 for the creditors meeting preparation, which equates to an additional \$225 per hour for four hours. The court will deduct the additional \$897.50 billed for those services.

### 3. Research and correspondence regarding the "Catfisher" scam: \$4,925.00

The second largest group of services, in terms of the fees sought, is for services provided to the debtor relating to the "catfisher" scam. Dearfield spent 19.7 hours for a total of \$4,925 in fees related to these services.

HN14 The results obtained are an important consideration in determining the reasonableness of attorney fees sought. Boddy, 950 F.2d at 338; In re Addleman, Case No. 17-16032, 2018 WL 5797709, at \*9, 2018 Bankr. LEXIS 3370, at \*27 (Bankr. N.D. Ohio Nov. 2, 2018). This factor requires the court to consider if the party seeking the fees failed to prevail on a claim or claims that were not related to the claim upon which the party succeeded. If the party failed to succeed on all claims, the court considers whether that party nevertheless "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award[.]" Hensley, 461 U.S. at 434. When a party moving for attorney fees is partially successful, the court may take such partial success into consideration in making its award of attorney fees. Id. at 430 ("[T]he level of [\*\*21] a plaintiff's success is relevant to the amount of fees to be awarded."); Blum v. Stenson, 465 U.S. 886, 900, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) (similar).

The court is concerned about the amount of time spent with respect to the catfishing services because it has been unable to discern any legal remedy sought that relates to this matter. The court does not disagree with the need for limited time spent in educating the debtor to avoid such schemes. And the court might be willing to approve increased fees if those fees detailed efforts to recover the funds lost to the schemers. However, the <u>Chapter 13</u> plan confirmed for the debtor's case and the time records and statements of Timothy Dearfield at the hearing do not

In referring to the \$4,350 no-look fee approved by the Bankruptcy Judges for <u>Chapter 13</u> bankruptcy cases in the Southern District of Ohio, the court is not opining as to any legal implications relating to the "no-look fee" or as to the appropriateness of that amount for fees in any particular <u>Chapter 13</u> case before the court. <u>HN13[1]</u> Fees in each case are governed by <u>11 U.S.C.</u> § 330 and <u>Boddy</u>, regardless of the presumed reasonableness of fees charged under the no-look fee or otherwise. The no-look fee does provide the court with a presumptively reasonable fee sought in any <u>Chapter 13</u> case. However, the court does not view the District's no-look fee as either a floor or a ceiling for attorney fees in a <u>Chapter 13</u> case, but rather, a framework with which to analyze the reasonableness of fees sought in each particular case.

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evince any efforts or steps taken to recover those funds for the bankruptcy estate, with the exception of an email prepared and sent to the "catfishers." The court understands that a justifiable decision may have been made that recovery of those funds would be extremely difficult and unlikely and that the cost of pursuing such a recovery would be prohibitive. However, the court cannot justify almost \$5,000 in fees for the services related to the catfishing scheme when those services did not include a plan and steps to recover such funds. In [\*\*22] other words, there was no benefit to the debtor and the estate for such services and no "success" in that endeavor, beyond any successful persuasion to convince the debtor not to engage with the schemers. For these reasons, in addition to the court's allowing \$5,400 for the general prepetition and preconfirmation services, the court will award \$1,800 for those services, equating to eight (8) hours at a blended attorney rate of \$225 per hour.

# [\*776] 4. Research, correspondence, communications, and filing of the Proof of Claim for the Pawn Shop Claim: \$1,891.25

Timothy Dearfield's statements during the hearing revealed that the debtor asked the firm to file a proof of claim on behalf of a pawn shop evidencing a loan made by the pawn shop secured by jewelry which the debtor pawned to the creditor. The purpose of such work was to ensure that the creditor would be paid through the plan, allowing the debtor to recover the pawned jewelry upon completion of the payments to the creditor. This is confirmed by the Application and the proof of claim and amended proof of claim prepared by Dearfield and filed on behalf of the creditor. Timothy Dearfield stated at the hearing that the jewelry had great sentimental [\*\*23] value to the debtor.

Dearfield spent a total of 10.25 hours related to the pawn shop matter, for a total of \$1,891.25 in fees: 8.45 hours for Matthew Dearfield, 1.3 hours for Timothy Dearfield, and .5 hours for Julie Terry. The time spent on this matter involved the preparation of the proof of claim and the amended proof of claim and "research regarding treatment of pawn claims in *Chapter 13*." The jewelry is represented as having a total value of \$2,533.12 on the proof of claim and pawn shop documents attached to the amended proof of claim. The proof of claim simply states that \$2,533.12 is owed to the creditor. The *Chapter 13* Trustee objected to the original proof of claim because documentation concerning the security agreement, collateral, and perfection of the lien was not attached to the proof of claim. An amended proof of claim was filed in response to the Trustee's objection, the only purpose of which appears to have been to attach the pawn shop documents which were omitted from the original proof of claim. The court will allow 5 hours of time at the blended attorney rate of \$225 per hour, for a total of \$1,125, for this work, reducing the amount charged for those services by [\*\*24] \$766.25. The court believes that three hours for research and two hours for preparation and filing of the proof of claim should have been sufficient for these tasks to have been accomplished and more accurately reflects the value and benefit of these services for jewelry valued at approximately \$2,500.

#### 5. Research and work relating to the debtor's inheritance: \$941.25

The last category of work was for research and work related to addressing the debtor's inheritance. The court finds this work to be appropriate in amount, time, and value and benefit to the bankruptcy estate, and therefore approves all of the time and fees associated with that work.

### 6. Summary and General Assessment of the Work Performed and Results Obtained

Based upon the foregoing, the court approves fees for the prepetition and pre-confirmation services provided to the debtor as follow: 1) \$5,400 for general pre-petition and pre-confirmation legal services (24 hours @ \$225); 2) \$900 for additional work related to the creditors meeting (4 hours @ \$225); 3) \$1,800 for research and counseling concerning the catfishing scheme (8 hours @ \$225); 4) \$1,125 for research and the drafting of the pawn shop claim (5 hours @ \$225); [\*\*25] and 5) \$941.25 for work related to the debtor's inheritance, for a total of \$10,166.25.

The court appreciates that the debtor and the <u>Chapter 13</u> Trustee support the Application. And the court appreciates the time and services provided by Dearfield to the debtor, including the counseling efforts with the debtor to educate her as to the [\*777] motives, methods, and operations of those individuals who were successful

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in getting her to part with funds for their benefit. Those services were appropriate and beneficial to the debtor and the bankruptcy estate. In addition, Dearfield performed the general bankruptcy services and services related to obtaining the return of the pawned jewelry and accounting for the debtor's inheritance. However, while those services may have exceeded the typical services performed for a debtor in a <u>Chapter 13</u> case to some degree, the court finds that the services were not more than four times the services in value or benefit than the services provided by counsel under the no-look fee. Thus, the reasonable amount of time required to provide those services should not have been more than four times the amount of time that counsel typically provide in a no-look fee case. [\*\*26]

This court must assess the fees requested by Dearfield in the larger framework of all the <u>Chapter 13</u> cases which come before the court. Succinctly, while this debtor may be more solvent than the typical debtor due to her inheritance of the certificate of deposit and may have consented to the use of some of her inherited funds to compensate Dearfield to the extent of \$19,046.50 for pre-confirmation services, these are not acceptable reasons for the excessive fees requested here. When this court compares the services provided in this case by Dearfield with the services provided by other counsel in other <u>Chapter 13</u> cases, the court finds that the total fees requested in this case are not in line with the other cases and with <u>Chapter 13</u> services provided by counsel in Dayton and the Southern District of Ohio. For the reasons stated in this decision, the court finds that some fees in excess of the nolook fee are justified, but not almost \$15,000 over the recently increased \$4,350 no-look fee. While the case may have involved some additional complexity beyond the typical <u>Chapter 13</u> case due to the debtor's circumstances, the amount of time and fees billed were excessive for the services [\*\*27] provided.

#### **IV. Conclusion**

Based upon the Application, the November 4, 2021 hearing, the evidence introduced at the hearing, and the statements of Timothy Dearfield, and for the reasons set forth above, the court allows fees in favor of Dearfield in the total amount of \$10,166.25.

Accordingly, the Application for Compensation is granted in part and denied in part. Dearfield is awarded the amount of \$10,166.25 in fees for its prepetition and preconfirmation legal services.

#### IT IS SO ORDERED.

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

### IT IS SO ORDERED.

/s/ Guy R. Humphrey

Guy R. Humphrey

United States Bankruptcy Judge

Dated: January 10, 2022

**End of Document** 



### In re Spurlock

United States Bankruptcy Court for the Southern District of Ohio, Western Division

August 1, 2022, Decided

Case No. 21-31957, Chapter 13

#### Reporter

642 B.R. 269 \*; 2022 Bankr. LEXIS 2153 \*\*; 2022 WL 3041256

In re: SARAH B. SPURLOCK, Debtor.

### **Core Terms**

no-look, cases, flat fee, fee structure, maximum, attorney's fees, itemization, preparation, billed, fee application, confirmation, paraprofessional, unsecured creditor, lodestar, bankruptcy court, spent, consumer, bankruptcy case, motor vehicle, circumstances, paralegal, routine, notice, reasonable fee, compensated, monitoring, believes, factors, monthly, courts

### **Case Summary**

#### Overview

HOLDINGS: [1]-In a Chapter 13 case that essentially involved the stretching out of payments on a motor vehicle, the debtor's counsel was not entitled to a fee award of the maximum amount under the applicable a no-look fee structure because reasonable compensation for the case based on the time counsel actually spent on various tasks resulted in a lesser award, and the evidence did not support an award of the maximum no-look fee; [2]-Although the applicable no-look fee structure complied with 11 U.S.C.S. § 330, the bankruptcy court was still obligated to determine if the requested fee was reasonable by conducting a lodestar analysis.

#### Outcome

Attorney fees of \$4,320 awarded.

### LexisNexis® Headnotes

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

### HN1[ Compensation, Debtor's Attorney

Interpreting the No-Look Fee Rule in accordance with 11 U.S.C.S. § 330, the U.S. Court of Appeals for the Sixth Circuit's In re Boddy decision, and the Ohio Rules of Professional Conduct, the bankruptcy court for the Southern District of Ohio determines that the No-Look Fee Rule adopted by the Southern District of Ohio requires attorneys who opt-in to the flat fee structure to assess the facts and issues presented by each individual case to determine a

Michael Baker

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reasonable flat fee, which may be equal to or lower than the maximum allowable flat fee. In the alternative, counsel may itemize their fees pursuant to <u>S.D. Ohio Bankr. R. 2016-1(b)(2)(C)</u>. The No-Look Fee Rule does not entitle attorneys to receive an identical fee in every case or eliminate the requirement that a fee be reasonable and tied to actual and necessary work for the benefit of the estate or the debtor.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

### HN2 Compensation, Debtor's Attorney

No look fees, also called presumptive fees, are court-sanctioned flat fee ranges that are presumed to be reasonable attorney fees in Chapter 13 cases.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

### HN3 Compensation, Debtor's Attorney

The Bankruptcy Court for the Southern District of Ohio has approved a no-look fee structure and established a flat fee range which is presumed to be reasonable for most services provided to a debtor in a Chapter 13 case.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

### **HN4** Compensation, Debtor's Attorney

The applicant seeking attorney fees always carries the burden of proof to establish that the fees are warranted and should be approved. The bankruptcy court must award only the fees that are proven to be actual, necessary, and reasonable.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

### HN5 Attorney Fees & Expenses, Reasonable Fees

Courts determine the reasonableness of attorney fees by calculating an initial estimate using the lodestar method, multiplying the number of hours reasonably expended on the matter by a reasonable hourly rate, considering the attorney's experience level and comparable rates in the local market. A major factor in determining what is a

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reasonable hourly rate for purposes of Lodestar is whether the rate charged is comparable to rates charged by comparable attorneys in the area. After the lodestar analysis, courts consider other factors, often referred to as the Johnson factors, that may warrant an increase or decrease in the fees awarded. These factors include: 1) the novelty and difficulty of the issues; 2) the skill required to perform the services properly; 3) the preclusion of other employment resulting from counsel's acceptance of the matter; 4) the customary fee for such matters; 5) whether the fee is fixed or contingent; 6) time limitations imposed by the client or otherwise dictated by the circumstances; 7) the amount at issue and the results obtained; 8) the experience, reputation, and ability of the attorneys; 9) the undesirability of the case; 10) the nature and length of the professional relationship between counsel and the client; and 11) awards in similar cases or under similar circumstances.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

### HN6 Compensation, Debtor's Attorney

No-look fees allow counsel in a chapter 13 case to receive a specific fee for a defined bundle of services without the requisite necessity of: (1) maintaining contemporaneous hourly time records; and (2) filing a fee application and giving notice under 11 U.S.C.S. § 330 of the Bankruptcy Code and the applicable Bankruptcy Rules. The no-look fee is a presumptively reasonable fee based on local hourly rates, and the general amount of work required by a typical chapter 13 case.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Legal Ethics > Client Relations > Attorney Fees > Fee Agreements

Bankruptcy Law > ... > Retention of Professionals > Compensation > Limitations on Compensation

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

### HN7 2 Compensation, Debtor's Attorney

Thus, no-look fee structures are not prohibited in the U.S. Court of Appeals for the Sixth Circuit, but courts must continue to ensure fees are reasonable and awarded only for actual, necessary services. 11 U.S.C.S. § 330. The Ohio Rules of Professional Conduct require attorneys to collect only reasonable fees and avoid collecting fees that are clearly excessive. Ohio Rules of Prof. Conduct 1.5(a).

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

### HN8 Compensation, Debtor's Attorney

The U.S. Bankruptcy Court for the Southern District of Ohio will not interpret <u>S.D. Ohio Bankr. R. 2016-1(b)</u> regarding attorney fees as allowing an identical flat fee in every case without regard to the work presented by the case. Each debtor's fees must be reasonable and appropriate under the applicable attorney fee requirements of federal and state law. Accordingly, the court interprets this district's no look fee structure as allowing a range of "no-

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look" flat fees up to a maximum of \$4,350 as a means of giving counsel flexibility to assess a case and determine an appropriate flat fee. If counsel do not feel able to do so, they may choose to itemize their time and be compensated on that basis.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

Legal Ethics > Client Relations > Attorney Fees > Flat Fees

### HN9 Attorney Fees & Expenses, Reasonable Fees

While a flat attorneys' fee up to the maximum amount will be presumed reasonable, the presumption may be overcome if the services provided in a case do not appear to justify the requested fee. Additionally, if an attorney repeatedly requests the same fee in every case without regard to the differing facts or circumstances, the presumption may be overcome.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

### HN10 Compensation, Debtor's Attorney

Fees in Chapter 13 need to be reasonable and necessary, with counsel exercising independent billing judgment.

Bankruptcy Law > ... > Retention of Professionals > Compensation > Debtor's Attorney

# HN11[1] Compensation, Debtor's Attorney

If events arise post-confirmation requiring significant attorney time, such as the need to file a modification of the debtor's Chapter 13 plan, <u>Local Bankruptcy Rule 2016-1(b)(3)</u> allows for a separate fee application for such services.

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

# <u>HN12</u> Attorney Fees & Expenses, Reasonable Fees

Counsel may not be compensated for defending a fee application.

**Counsel:** [\*\*1] For Sarah B. Spurlock, Debtor: Courtney A Cousino, Fesenmyer Law Offices, LLC, Columbus, OH; Thomas M Fesenmyer, Fesenmyer Law Offices, LLC, Dayton, OH.

Judges: Guy R. Humphrey, United States Bankruptcy Judge.

Opinion by: Guy R. Humphrey

## **Opinion**

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642 B.R. 269, \*269; 2022 Bankr. LEXIS 2153, \*\*1

# [\*271] MEMORANDUM ORDER CONCERNING DEBTOR COUNSEL'S APPLICATION FOR COMPENSATION (DOC. 1)

#### I. Introduction

This matter is before the court on the Application for Allowance of Fees in Chapter 13 Case (doc. 1 at 52) (the "Application") filed by Thomas Fesenmyer ("Fesenmyer"), counsel for the debtor, Sarah B. Spurlock ("Debtor"). Fesenmyer seeks a flat fee award of \$4,350 in attorney fees, the maximum no-look fee in this district, for representing the Debtor throughout this Chapter 13 case. See LBR 2016-1(b)(2)(A), as amended by General Order 50-1. The Debtor in this case seeks only to address a secured debt on a motor vehicle through her Chapter 13 Plan; she owns no other significant assets and owes no other secured or priority debts. If not for her desire to preserve the equity in her motor vehicle, this case may have been filed under Chapter 7. Nevertheless, Fesenmyer argues that he is entitled to receive the maximum allowable flat fee for his work in this case. The guestion presented by these [\*272] circumstances [\*\*2] is whether Local Bankruptcy Rule 2016-1(b)(2)(A) (the "No-Look Fee Rule") entitles attorneys to receive the highest allowable flat fee, currently \$4,350, for every Chapter 13 case filed by an attorney, without regard to the facts or circumstances of the case. HN1 [1] Interpreting the No-Look Fee Rule in accordance with § 330, the Sixth Circuit's In re Boddy decision, and the Ohio Rules of Professional Conduct, the court determines that the No-Look Fee Rule adopted by the Southern District of Ohio requires attorneys who opt-in to the flat fee structure to assess the facts and issues presented by each individual case to determine a reasonable flat fee, which may be equal to or lower than the maximum allowable flat fee. In the alternative, counsel may itemize their fees pursuant to Local Bankruptcy Rule 2016-1(b)(2)(C). The court determines that the No-Look Fee Rule does not entitle attorneys to receive an identical fee in every case or eliminate the requirement that a fee be reasonable and tied to actual and necessary work for the benefit of the estate or the debtor.<sup>2</sup>

Here, the court does not find that the actual and necessary work required to effectively represent the Debtor in this case supports an award of the maximum allowable flat fee as reasonable compensation. Therefore, [\*\*3] for the reasons that follow, the court approves attorney fees for this case in the total amount of \$4,320. This sum represents an adjusted \$3,660 flat fee for representing the Debtor during this Chapter 13 case and an additional \$660 for time spent preparing a confirmation statement.

### II. Facts and Procedural Background

The Debtor filed her Chapter 13 petition on November 18, 2021. Doc. 1. She is a below median income debtor.<sup>3</sup> On her schedules, she indicated ownership of one automobile, a 2015 Honda Civic, with a value of \$10,400 (the "motor vehicle"). Doc. 1 at 15-16. She filed a Chapter 13 Plan on December 1, 2021 (doc. 13) (the "Plan"). The Plan pays the fully secured claim on the motor vehicle. The Plan does not provide for any of the other types of relief — for example, lien avoidance or curing arrearages on secured debt — that are commonplace in many Chapter 13 cases. The Debtor will pay approximately \$15,000 (\$250 x 60) over the life of the Plan, assuming that the Plan period extends to 60 months.<sup>4</sup> To address the motor vehicle claim, the Plan provides for an estimated secured claim of

<sup>&</sup>lt;sup>1</sup> 950 F.2d 334, 337 (6th Cir. 1991)

<sup>&</sup>lt;sup>2</sup> See <u>In re Pochron, No. 21-31410, 2022 Bankr. LEXIS 1041, at \*7-14, 2022 WL 1085459, at \*3-5 (Bankr. S.D. Ohio Apr. 8, 2022)</u> (explaining the circumstances in which a debtor's attorney may be compensated for work that benefits that debtor but not necessarily the estate).

<sup>&</sup>lt;sup>3</sup> See Plan, § 2.3. See also 11 U.S.C. § 1325(b)(4)(A)(ii) (defining the applicable commitment period for below median debtors as three years).

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\$1,958.00 to be paid at the *Till interest* rate of 5.5% with minimum monthly payments of \$100.00. [\*\*4] <sup>5</sup> The Plan accounts for the attorney fee of \$4,350 and shows that the Debtor paid \$625 up front. The remaining \$3,725.00 is to be paid through the Plan in monthly payments of at least \$125.00. At the rate of \$125 per [\*273] month, the \$3,725 balance would be paid in 30 months. The Plan provides a 3% dividend to non-priority unsecured creditors.

The court entered an Order on February 23, 2022 which summarized the Plan and raised issues about whether the Plan was confirmable and whether the \$4,350 fee was reasonable and necessary. Doc. 20. Fesenmyer filed a Debtor's Statement in Support of Confirmation and No-Look Fee (doc. 23) (the "Statement in Support") and the Trustee's counsel filed the Chapter 13 Trustee's Memorandum Concerning Court's Order (doc. 24) (the "Trustee's Memorandum").

The Statement in Support advised the court that "[t]he Debtor's motivation in filing this case is to protect equity in her 2015 Honda Civic,<sup>6</sup> repay as much debt as feasible, and reorganize her financial situation on a good faith basis[.]" Statement in Support at 5. Upon review of the Statement in Support, the court determined that confirmation of the Debtor's Chapter 13 Plan was appropriate, and the Plan was confirmed [\*\*5] (docs. 25, 26). However, the court proceeded with a hearing on whether the maximum no-look fee of \$4,350 was a reasonable attorney fee for this Chapter 13 case.<sup>7</sup>

The court conducted a hearing on April 7, 2022 on the Application (the "Hearing"), participated in by Fesenmyer; his co-counsel, Courtney A. Cousino; Scott G. Stout, counsel for the Chapter 13 Trustee; and John G. Jansing, the Chapter 13 Trustee. Fesenmyer, and an expert witness, Nannette Dean, testified.

#### III. Debtor Counsel's and Trustee's Positions

In response to the court's concerns, Fesenmyer asserted in the Statement in Support that the maximum allowable flat fee of \$4,350 was justified in this case. After noting the benefits of a court's use of a no-look structure for Chapter 13 cases, Fesenmyer described the services which he [\*\*6] has performed and those that he anticipates performing for the Debtor as the case progresses. He attached an itemization of his fees for the case and walked the court through it.

The Trustee's Memorandum also noted the benefits of a no-look fee structure in Chapter 13 cases and provided:

<sup>&</sup>lt;sup>4</sup> Fesenmyer testified at the Hearing that the Plan length is currently 60 months for feasibility purposes, but that the debtor would "strive to pay off" the amounts due under the Plan "as soon as she can." Transcript of the April 7, 2022 Hearing, Doc. 36 at 40.

<sup>&</sup>lt;sup>5</sup> The "Till" rate is a "coerced loan theory" rate that is commonly used in Chapter 13 cases for computing interest to be paid to secured creditors. Till v. SCS Credit Corp., 541 U.S. 465, 478-79, 124 S. Ct. 1951, 158 L. Ed. 2d 787 (2004). The Plan provides a Till rate of 5.5%. See ¶ 7.

<sup>&</sup>lt;sup>6</sup> A number of Chapter 13 cases that have been recently filed in this court address car loans and appear intended to address equity in a debtor's vehicle. This recent phenomenon of Chapter 13 cases being filed to protect debtors' interests in motor vehicles arises from the fact that car prices and values are very high as a result of the supply chain issues which have confronted the industry recently. Don Lee, *In another pandemic fallout, used car prices are way up*, L.A. Times, July 25, 2022; Michael Wayland, *Americans Are Paying Record-High Prices for New Vehicles*, CNBC, July 13, 2022 (last viewed July 21, 2022), <a href="https://www.cnbc.com/2022/07/13/americans-are-paying-record-high-prices-for-new-vehicles.html">https://www.cnbc.com/2022/07/13/americans-are-paying-record-high-prices-for-new-vehicles.html</a>; Michael Wayland, *Used-Car Prices are Down from Record Highs, Easing the Impact of Inflation*, CNBC, May 6, 2022 (last viewed July 21, 2022), CNBC, <a href="https://www.cnbc.com/2022/05/06/used-car-prices-are-down-from-record-highs-easing-the-impact-of-inflation.html">https://www.cnbc.com/2022/05/06/used-car-prices-are-down-from-record-highs-easing-the-impact-of-inflation.html</a> (last viewed July 28, 2022).

<sup>&</sup>lt;sup>7</sup> The court has scheduled hearings on similar Chapter 13 cases that primarily involve the restructuring of a car loan to determine the appropriateness of the no-look fee. See e.g. the order in *In re Putteet*, Case No. 21-31952, doc. 30 (The attachment to those orders lists the cases the court originally scheduled for hearing. The court's concern with the fees in some of those cases has been resolved. Hearings on the unresolved cases are upcoming.).

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The Chapter 13 Trustee believes that Debtors deserve a competent bankruptcy bar to represent them in this very complicated area of the law. To the extent that a no look fee in Chapter 13 cases acts as an incentive and/or allows [\*274] the bankruptcy bar to be successful in its representation of Chapter 13 Debtors, the Trustee supports the no-look fee.

However, the Trustee does agree that the issue of approving fees is the province of the court and no one else, 11 U.S.C. §330(a)(4)(B).

In this case, it is the Trustee's position that the plan was filed in good faith and should be confirmed with the attorney fees to be set by the court.

Doc. 24 at 2-3.

#### IV. Hearing

Fesenmyer testified and introduced two exhibits into evidence — the Statement in Support and counsel's itemization of fees for the case (the "Fee Itemization") (doc. 31). The Fee Itemization was the same one that was attached to the Statement in Support.

Fesenmyer testified in support [\*\*7] of the fees requested in the Application and Fee Itemization. He stated that he was admitted to practice in the State of Ohio in 2001 after attending Capital University Law School. Doc. 36, Transcript of the Hearing (Tr.) at 11. Fesenmyer currently bills \$250 an hour, has represented debtors in Chapter 13 cases for over 20 years, and has filed over 4,000 bankruptcy cases. Tr. 12, 13, 52, 54.

Fesenmyer performed all the legal work for the Debtor in this case. Tr. 14. He does not employ paralegals because he cannot afford to do so. Tr. 13. He charges between \$500 and \$625 for Chapter 7 bankruptcy cases and charges the same amount up front for Chapter 13 cases, with the balance of the no-look fee being paid from Chapter 13 plan payments. Tr. 15. He has used itemized billing in two business cases and prior to the Hearing had never used itemized billing for any non-business Chapter 13 cases. Tr. 33, 34.

He charges a flat fee in all his consumer Chapter 13 cases because he believes it helps all constituents involved, including the court and the Chapter 13 Trustee, and because it gives debtors certainty as to what their attorney fees will be for the case. Tr. 15, 33. He also believes that he [\*\*8] could not help as many clients as he does if he billed hourly, as they almost all would pay higher fees and that he earns the no-look fee in a typical Chapter 13 case. Tr. 15, 16. While he provides debtors with the option to pay an hourly fee, they, like this Debtor, usually opt to pay a flat fee. Tr. 15. All of his clients sign a contract which sets forth the flat fee. *Id.* However, no such fee agreement was introduced in evidence in this case, and the Debtor did not appear or testify at the Hearing.

Fesenmyer testified as to the normal amount of time he spends on a Chapter 13 case and the tasks he performs in representing a Chapter 13 debtor. Tr. 16-20. He believes that he is entitled to the maximum allowable flat fee in every case based on the time that he spends on a typical Chapter 13 case. Tr. 33.

The itemization of fees in this case for pre-petition and preconfirmation services was based on contemporaneous time entries, which he testified he keeps in every case. Exhibit B; Tr. 35-36. Fesenmyer estimated his time for anticipated future services based on his experience. Exhibit B at 3; Tr. 44. Fesenmyer billed five hours for researching and preparing the Statement in Support, with [\*\*9] two hours spent on the confirmation issues and three hours spent on the no-look fee issues. Exhibit B at 3, Tr. 42-43.

The Debtor also called Nannette Dean ("Dean"), a Columbus, Ohio bankruptcy attorney, to testify as an expert witness in support of the fees. Dean testified she attended Capital University Law School [\*275] and was admitted to the practice of law in Ohio in 1995. Tr. 47. She has been practicing in bankruptcy court since 1996 and has experience in both medium and small law firms. *Id.* Dean frequently represents both Chapter 13 and Chapter 7 debtors and has also represented creditors in bankruptcy court. Tr. 48. She is a regular presenter at bankruptcy seminars, was on the Executive Board of the Credit Education Coalition, and is a member of the Attorney Advisory Committee, Consumer/Small Business Subcommittee for the United States Bankruptcy Court for the Southern

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District of Ohio (the "Attorney Advisory Committee"). *Id.* Dean was a member of the Attorney Advisory Committee at the time it recommended that this district increase the maximum allowable flat fee to the current \$4,350. Tr. 65.

Dean has a "base rate" of \$1,000 for Chapter 7 cases, defined as a Chapter 7 case with no [\*\*10] anticipated "issues," such as securing a reaffirmation agreement. Tr. 64. Her "base rate" for Chapter 7 cases involving real estate is \$1,250. Tr. 65. Dean filed a dozen bankruptcy cases in the last year, including three Chapter 13 cases.8 Tr. 63-64. In one of the three Chapter 13 cases ("Maurer"), she charged a debtor \$3,700, the prior maximum flat fee amount, because she had quoted that figure when Mr. Maurer first came into her office before the maximum flat fee increased to \$4,350. Tr. 65-66. Maurer was a below median income case involving a \$747 monthly payment by the debtor to the Chapter 13 Trustee; a secured Harley Davidson motorcycle, with payments to be made under the plan; a second vehicle that was not secured by a creditor and had equity; and an estimated 22% dividend to unsecured creditors, with \$26,892 anticipated to be paid into the plan. Tr. 66-67. The second Chapter 13 case in the last year she filed involved an above median income debtor for which she took the maximum \$4,350 flat fee. Tr. 69. It was a 100% plan under which the debtor paid \$2,000 each month to the Chapter 13 Trustee and involved a Jeep Liberty automobile with a \$200 monthly payment and a \$1,000 monthly [\*\*11] distribution to Dean for attorney fees. Tr. 68. The third case ("Hernandez") involved an above-median income couple with initial plan payments to the Trustee of \$1,660 which stepped up to \$1,714, with a total of \$102,786 to be paid into the plan and a 45% dividend to unsecured creditors. In Hernandez, Dean took a \$4,350 flat fee. The plan involved a 2020 pickup truck, a 2013 sport utility vehicle, a "Can-Am four wheeler," and real estate. Tr. 68-69.

Dean's testimony suggested that she views the No Look Fee Rule as establishing a single flat fee for Chapter 13 cases, rather than a range of allowable flat fees up to the current maximum, \$4,350. Dean testified that the "no-look" flat fee is reasonable to cover all legal services in most Chapter 13 cases, but that "the difficulty with the no-look fee is in defining a typical case." Tr. 49. She does not "know that there is such a thing as a typical case, but for the majority of cases, the no-look fee will cover counsel's fee for the entire case." *Id.* She believes that the no-look flat fee is intended to cover the standard work that an attorney is required to perform in every Chapter 13 case and is intended to "give a presumption that the [\*\*12] fee was reasonable for a typical case." Tr. 50. She admitted that sometimes a Chapter 13 case can be handled by counsel in less time than what is anticipated by the "typical" Chapter 13 case for which the no-look flat fee provides but stated that those cases are "rare." Tr. 63.

[\*276] She believes that the "pros" of the no-look fee structure are that it provides certainty for the debtor, debtor's counsel, the court, and the Chapter 13 Trustees in knowing what the attorney fees for the case will be, in calculating plan payments, and in determining feasibility of the plans. Tr. 50. "[W]ithout some certainty in the fee, people either just ignore . . . issues [needing attention from counsel] and then your plans fail or we just don't get paid for that." Tr. 62. She also noted that the no-look fee structure saves resources because attorneys do not have to itemize fees or spend time preparing fee applications, and the court and Chapter 13 Trustees need not spend time reviewing fee applications. Tr. 50. She concluded that the failure to appropriately compensate debtors' counsel would have a detrimental impact on debtors' ability to retain competent bankruptcy counsel. Tr. 61.

She testified that the [\*\*13] biggest "con" of the no-look fee structure is that debtor's counsel "doesn't necessarily get paid for the full value of the work that they perform." Tr. 50. She also believes that attorneys "who have more experience, more knowledge, don't necessarily get increased compensation for that experience and knowledge. You're getting the same rate as the brand new lawyer just out of law school." Tr. 50-51.

Dean opined that Fesenmyer's \$250 hourly rate was "very" reasonable and reviewed Fesenmyer's itemization and generally found the charges on the itemization to be reasonable. Tr. 52. She opined that the 6.2 hours which Fesenmyer spent for "the file preparation and petition signing process" reflected on lines 1-11 of the itemization was "probably light" because although "[t]his is technically a simple car case," "when you have a simple car case, you have actually analyzed this case twice" - once under the framework of Chapter 7 and once under the framework of Chapter 13. Tr. 53.

<sup>&</sup>lt;sup>8</sup> Dean's filings "in the last year with the pandemic were down 60 percent." Tr. 70. That is consistent with the district-wide case filing information provided below.

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She stated that the time spent seeking approval of the requested flat fee in this case was "a factor that bodes in favor of the no-look fee as being reasonable" and that the requested flat fee is reasonable compensation [\*\*14] for this case. Tr. 58. She also opined that Fesenmyer's services will benefit the bankruptcy estate and are necessary for the administration of the case. Tr. 62.

No other evidence was introduced by Fesenmyer as to fees applied for or awarded in other Chapter 13 cases in Dayton or the Southern District of Ohio.

#### V. Background

Because this case concerns the scope and application of the district's No Look Fee Rule, the court finds it appropriate to review the history and use of court-sanctioned flat fees in this district and elsewhere in the United States. HN2 To look fees, also called presumptive fees, are court-sanctioned flat fee ranges that are presumed to be reasonable attorney fees in Chapter 13 cases. See In re Biggs, No. 20-11716, 2021 Bankr. LEXIS 2224, at \*1, 2021 WL 3566035, at \*1 (Bankr. S.D. Ala. Jan. 19, 2021) (quoting In re Dellutri Law Grp., 482 B.R. 642, 650 (Bankr. M.D. Fla. 2012)) and In re Villaverde, No. 11-37442-BKC-LMI, 2016 Bankr. LEXIS 941, at \*1, 2016 WL 1179343, at \*1 (Bankr. S.D. Fla. 2016) ("A no look fee is a flat fee, usually adopted within a district by local rule or guideline . . . It is a presumptively reasonable fee based on local hourly rates, and the general amount of work required by a typical chapter 13 case.") (internal quotation marks omitted); see also BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "fixed fee" as "[a] flat charge for a service; a charge that does not vary with the amount of time or effort required to complete the services."). [\*\*15] No-look fee structures [\*277] allow attorneys to charge a flat fee up to a maximum amount for a set of basic services involved in Chapter 13 representation that are typically detailed in the local rule or general order adopting the structure. See Villaverde, No. 11-37442-BKC-LMI, 2016 Bankr. LEXIS 941, at \*2-3, 2016 WL 1179343, at \*1 (describing the Chapter 13 flat fee procedure in the Southern District of Florida). Attorneys who opt to charge a flat fee in accordance with a no-look fee structure are not required to file formal fee applications. See e.g. id.; Dellutri, 482 B.R. at 650-51.

#### A. The No-Look Fee Structure in the Southern District of Ohio

FIN3 Since at least 1991, the Bankruptcy Court for the Southern District of Ohio has approved a no-look fee structure and established a flat fee range which is presumed to be reasonable for most services provided to a debtor in a Chapter 13 case. As reflected by the archived Local Bankruptcy Rules on the Court's website, the maximum allowable flat fee since that time has been as follows:

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Yea r	No Look Amount	Location	Case Filings (for the District) <sup>9</sup>	Chapter 13
199 1	\$850	S.D. Ohio	No data	
199 7	\$850	Columbus & Cincinnati	26,947	
199 7	\$900	Dayton		
199 9	\$850	Columbus & Cincinnati	26,544	
199 9	\$900	Dayton		
200 0	\$1,200	S.D. Ohio	26,168	
200 2	\$1,500	S.D. Ohio [**16]	36,842	
200 5	\$1,500	S.D. Ohio	60,814 <sup>10</sup>	
200 6	\$3,000 <sup>11</sup>	S.D. Ohio	17,021	
200 9	\$3,500	S.D. Ohio	32,666	
201 3	\$3,500	S.D. Ohio	21,803	
201 8	\$3,700	S.D. Ohio	17,017	
202 0	\$3,700	S.D. Ohio	12,033	
202	\$4,350	S.D. Ohio	9,354 <sup>12</sup>	

<sup>&</sup>lt;sup>9</sup>These are the total case filings, under all Chapters of the Bankruptcy Code, taken from Table F-2 concerning bankruptcy court filing https://www.uscourts.gov/statistics-reports. Years 1997, 1999, and 2000 are for the 12-month period ended September 30. Years 2002, 2005 and 2021 are for the 12-month period ending December 31. The Chapter 13 filings for this District are taken from the same tables contain Bankruptcy Code.

<sup>&</sup>lt;sup>10</sup> The passage of the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* ("BAPCPA") resulted in an extraordinary num 2005 prior to the effective date of BAPCPA in an apparent attempt by debtors to avoid filing under the changes made to the Bankruptcy 60,814 cases filed in 2005, 49,233 (81%) were Chapter 7 cases and 11,501 (19%) were Chapter 13 cases. There were also a negligible nul 12 cases filed that year.

<sup>11</sup> The doubling of the no-look fee in 2006 may have reflected the increased responsibilities imposed upon debtors' counsel by BAPCPA.

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<sup>12</sup> Of the 9,354 cases filed in the Southern District of Ohio in 2021, 7,041 (75%) were Chapter 7 cases and 2,293 (25%) were Chapter 13 case

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# [\*278] 1. Changes in the Chapter 13 Practice Compelled by BAPCPA and Subsequent Attorney Fee Changes in the District

The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") resulted in a number of changes to the practice of bankruptcy, particularly in consumer cases. Perhaps the lynchpin of BAPCPA was the adoption of a "means test" applied to debtors whose debts "are primarily consumer debts" to determine whether they may file a Chapter 7 liquidation case, or rather, must file a Chapter 13 case to pay their creditors over a period of time. Generally, if debtors file under Chapter 7 and do not "pass" the means test (i.e., their disposable income exceeds a certain threshold) their cases may be dismissed. See 11 U.S.C. § 707(b)(2). If the debtors whose debts are primarily consumer debts have an "above median" income and file a Chapter 13 case, they generally must submit their disposable income to the Chapter 13 trustee for distribution to their creditors over a sixty-month "applicable [\*\*17] commitment period." 11 U.S.C. § 1325(b)(4). If the debtors have a "below median" income, they may submit their disposable income to the Chapter 13 trustee for distribution to their creditors over a thirty-six-month "applicable commitment period." Id. In short, BAPCPA infused a new regimen in consumer bankruptcy for determining the chapter of the Code under which debtors may file.

In addition, BAPCPA added a number of other requirements for consumer debtors and bankruptcy counsel, including: a) a requirement to provide annual tax returns to trustees [11 U.S.C. §§ 521(e)(2)(A)(i) and 1308]; b) a requirement that all individual debtors take a prebankruptcy credit briefing course and file a certificate evidencing that such a course was completed [11 U.S.C. § 109(h)]; c) a similar requirement that all individual debtors take a post-petition financial management course and file a certificate evidencing that such a course was completed [11 U.S.C. §§ 727(a)(11) and 1328(g)]; and d) a provision making all persons, including attorneys, who provide assistance to consumer debtors "debt relief agencies" with specific responsibilities placed upon those agencies. 11 U.S.C. §§ 526, 527, and 528. After BAPCPA was enacted, the court doubled the maximum no-look fee from \$1,500 to \$3,000 in 2006. See fn. 10, infra.

Prior to [\*\*18] 2018, the court served all initial Chapter 13 plans on creditors and parties-in-interest and only required counsel to serve amended plans. However, in 2018, in order to reduce costs, the court began requiring debtors' counsel to serve all Chapter 13 plans on creditors and parties-in-interest. At that time, the court increased the maximum no-look fee from \$3,500 to \$3,700.

It is fair to conclude, over the last 17 years, Chapter 13 debtor counsels' tasks have increased and the Chapter 13 practice has become more complex. However, during this BAPCPA era, the court, with the assistance of many others, including the court's judges, this district's Chapter 13 trustees, the Local Bankruptcy Rules Committee, the court's law clerks, members of the bar, and court staff, has implemented a number of measures to assist practitioners in streamlining the Chapter 13 process within this district. These steps, while certainly not eliminating counsel's additional burdens, have served to mitigate them.

Of primary importance in streamlining Chapter 13, one uniform Chapter 13 Plan has been developed for the entire district, which is a PDF fillable form with check-mark and drop-down boxes to be completed by [\*\*19] counsel. See LBR 3015-1(a)(1); General Order 22-1 (District Wide Mandatory [\*279] Form Chapter 13 Plan and Amending Local Bankruptcy Rule 3015-1(a)(1)) (Effective December 1, 2016). The intention was and is to standardize and simplify the practice for Chapter 13 practitioners, the Chapter 13 trustees, and the court. In addition, the court has

<sup>&</sup>lt;sup>13</sup> From at least 2013 through 2016, each filing location in the Southern District of Ohio (Columbus, Cincinnati, and Dayton) had its own fillable form Chapter 13 plan. See archived Local Bankruptcy Rules (LBR 3015-1). As of December 1, 2016, the District adopted one uniform District-wide fillable Chapter 13 Plan. See Bankr. S.D. Ohio General Order 22-1 (December 1, 2016 General Order Adopting District-Wide Plan and Amending LBR 3015-1(a)(1)). In 2017, shortly after the court's adoption of a uniform plan for the District, the Federal Rules of Bankruptcy Procedure were amended to require all districts in the country to either adopt a new uniform national plan or to adopt a district-wide plan which included certain provisions. See <u>Fed. R. Bankr. P.</u>

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provided debtors' counsel with a number of fillable forms available on the court's website. First, the Local Bankruptcy Rules Forms include: a Disclosure of Compensation of Attorney for Debtor and Application for Allowance of Fees in Chapter 13 Case (LBR Form 2016-1(b)); an Interim Application For Allowance of Compensation (LBR Form 2016-1(a)(1)(A)); a Debtor's Certification Regarding Issuance of Discharge Order (LBR Form 4002-1); and a Statement of Death (LBR Form 1016-1). In addition, fillable forms for motions routinely filed in Chapter 13 cases are included on the court's website including a motion to avoid wholly unsecured mortgages; a motion to avoid judicial liens; a motion to avoid nonpossessory, nonpurchase money security interests; and a motion to redeem a motor vehicle. 14 A variety of additional form motions are also included under Judge Humphrey Policies and Procedures on the court's website, [\*\*20] including form motions to sell property and to retain proceeds from such a sale; to retain funds received from third-parties, such as employment bonuses and tax refunds; and for approval of settlements, compensation of special counsel, distribution of the settlement proceeds, and for retention of a portion of those settlement proceeds. 15 In addition, the court adopted and implemented a mortgage modification mediation program with detailed procedures and forms<sup>16</sup> and a form order authorizing debtors to enter into loan modification agreements is also included under the aforementioned Judge Humphrey Policies and Procedures. Thus, while BAPCPA did increase counsel's responsibilities, the court has participated with others to streamline and simplify the Chapter 13 practice for the benefit of debtors, creditors, the Chapter 13 Trustees, counsel, and the court.

#### 2. The Current No-Look Fee Structure and Attorney Compensation Procedures

The No-Look Fee Rule describes the following as the services which debtors' [\*\*21] counsel is generally to provide in exchange for a flat "no-look fee":

- **(A)** No-Look Fee. Upon confirmation of the plan, fees may be allowed *up to* \$3,700 [currently \$4,350]<sup>17</sup> ("no-look [\*280] fee") without further application or specific itemization for services rendered. The no-look fee includes the general legal services performed in a chapter 13 case listed below, whether performed preconfirmation or postconfirmation:
  - (i) initial client interview, preparation and signing of any retainer or representation agreement, analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether, and under what chapter, to file a petition in bankruptcy;
  - (ii) advising the debtor concerning his or her obligations and duties pursuant to the Code, the Rules, these Local Rules, applicable court orders, and provisions of his or her chapter 13 plan;
  - (iii) preparation and filing of any document required by § 521 of the Code, including Official Form 122C-1 and Official Form 122C-2 (if applicable), the petition, schedules, statement of financial affairs and any amendments thereto that may be required;
  - (iv) preparation and filing of the chapter 13 plan, and any preconfirmation amendments thereto [\*\*22] that may be required; provided, legal services performed relative to avoidance of wholly unsecured mortgages / liens, avoidance of judicial liens impairing an exemption in real property, or avoidance of nonpossessory,

3015.1. To the extent those provisions were not already included in the form plan, the court revised its form uniform District Chapter 13 Plan to include them.

<sup>&</sup>lt;sup>14</sup> See https://www.ohsb.uscourts.gov/local-form-motions-and-orders (last visited July 21, 2022).

<sup>&</sup>lt;sup>15</sup> See https://www.ohsb.uscourts.gov/judge-humphrey-policies-and-procedures (last visited July 21, 2022).

<sup>&</sup>lt;sup>16</sup> See https://www.ohsb.uscourts.gov/mortgage-modification-mediation-program (last visited July 21, 2022).

<sup>&</sup>lt;sup>17</sup> Effective February 24, 2021, after a recommendation by the Attorney Advisory Committee, the court approved an increase of the maximum no-look flat fee to \$4,350. General Order 50-1.

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nonpurchase-money security interests in exempt property within a chapter 13 plan are not covered by the no-look fee and may be compensated through a separate application for fees; however, in such event, no additional compensation will be allowed for the preparation and filing of a motion pursuant to *Rule 5009(d)*.

- (v) preparation and filing of payroll orders and amended payroll orders, except amended payroll orders prepared in connection with the modification of a plan or the temporary suspension of payments;
- (vi) representation of the debtor at the § 341 meeting of creditors and confirmation hearing, and at any adjournments thereof;
- (vii) filing of address changes for the debtor;
- (viii) review of claims;
- (ix) review of notice of intention to pay claims;
- (x) preparation and filing of objections to non-real estate and nontax claims, exclusive of any hearings;
- (xi) preparation and filing of first motion to suspend or temporarily reduce plan payments;
- (xii) representation of the debtor in the submission [\*\*23] of the annual tax refund pursuant to the Mandatory Form Chapter 13 Plan, exclusive of any subsequent inquiry, amendment, status report, motion, objection or hearing; 18
- (xiii) filing of a notice of final cure payment, when filed by the debtor, exclusive of any hearings;
- (xiv) preparation and filing of debtor's certification regarding issuance of discharge order;
- (xv) routine phone calls and questions;
- (xvi) file maintenance and routine case management; and
- [\*281] (xvii) any other duty as required by local decision or policy.

LBR 2016-1(b)(2)(A) (emphasis added). In essence, the no-look flat fee serves as base compensation for the set of Chapter 13 legal services that are routinely performed in most cases, though time and effort required to perform those services may vary depending on the relative complexity of the case. The maximum flat fee amount may be changed from time to time by general order. *Id.* 

In addition to this base flat fee compensation, counsel in the Southern District of Ohio frequently seek additional compensation for services that are not included in the services covered by the base flat fee. See LBR 2016-1(b)(3). Those services include, but are not limited to, motions to modify a Chapter 13 plan; motions to avoid a certificate [\*\*24] of judgment and other liens; motions to avoid wholly unsecured junior mortgages; motions to retain and use non-exempt tax refunds, personal injury recoveries, social security recoveries, insurance recoveries, workers compensation recoveries, inheritances, life insurance proceeds, and other recoveries from third-parties; motions to sell property — frequently the debtor's home — and to retain the proceeds from the sale; applications to incur credit; objections to mortgage and tax proofs of claim; responses to and defense of motions to dismiss; and responses to and defense of and motions for relief from the automatic stay. See LBR 2016-1(b)(3); Tr. 49-50. Attorneys in the Southern District of Ohio may also opt out of the no-look fee structure and file a fee application with itemized time within sixty days of confirmation order entry. See LBR 2016-1(b)(2)(C).

#### B. No-Look Fee Structures in Other Jurisdictions

<sup>&</sup>lt;sup>18</sup> This subsection was also amended by General Order 50-1.

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No-look fee structures used in other jurisdictions vary greatly. Some are sanctioned through local bankruptcy rules, <sup>19</sup> general orders, <sup>20</sup> or individual judicial determinations. <sup>21</sup> For instance, the Bankruptcy Court for the Northern District of California has a local rule which permits the court to adopt guidelines for attorney [\*\*25] fees. <u>Bankr. N.D. Cal. R. 9029-1</u>. As authorized, the bankruptcy judges for this district have adopted guidelines establishing presumptive fees for routine services in Chapter 13 cases. <sup>22</sup>

In addition to variances as to how no-look fee structures are established in different jurisdictions, the approved flat fee ranges and the services covered by a no-look flat fee vary greatly. The Middle District of Florida's Chapter 13 no-look fee [\*282] structure has a maximum flat fee of \$4,500 and covers "all bankruptcy-related matters required for the successful confirmation and completion of a debtor's case." The Eastern District of Michigan has a no-look fee structure that allows attorney fees and expenses up to \$3,500 for "preconfirmation services." Bankr. E.D. Mich. R. 2016-1(c).

In some jurisdictions, including this district, there is one no-look fee structure. In other jurisdictions, there are multiple no-look fee structures depending on the nature of the Chapter 13 case. By example, the no-look fee structure for the Eastern District of Washington permits up to \$4,000 for consumer cases but up to \$5,000 for business cases. The Western District of Louisiana authorizes a no-look flat fee of up to "\$4,000 in ordinary cases" and a "fixed fee capped at \$2,250 [\*\*26] in cases in which the total amount to be paid-in to the Trustee by the debtor . . . is \$7,200 or less." Bankr. W.D. La. General Order 2022-1. As of January 29, 2020, the maximum no-look fee in the Central District of Illinois became \$4,250, except that the maximum fee for "fee-only" cases is \$3,000. Standing Order Regarding Attorney Fees for Debtor's Counsel in Chapter 13 Cases in the Central District of Illinois (All Divisions) (Bankr. C.D. Ill. Jan. 29, 2020). The implementing order makes clear that attorneys "may charge less than \$4,250 and are encouraged to consider doing so in small or simple cases." Id.

The Northern District of Ohio has also used a no-look fee structure for a significant period of time. See <u>In re Williams</u>, 357 B.R. 434 (B.A.P. 6th Cir. 2007); <u>In re Karipides</u>, No. 17-61935, 2018 Bankr. LEXIS 3228, 2018 WL 5099658 (Bankr. N.D. Ohio Oct. 18, 2018). <sup>26</sup> In 2019 the Canton location adopted Administrative Order 19-06,

<sup>&</sup>lt;sup>19</sup> See <u>Bankr. E.D. Ky. R. 2016-2</u>; <u>Bankr. N.D. Ala. 2016-1(I)</u>; Bankr. W.D. Pa. R. 2016-1(f); Bankr. E.D. Mich. R. 2016-1(c) and (d); <u>Bankr. E.D. Wash. R. 2016-1(e)</u>.

<sup>&</sup>lt;sup>20</sup> See Bankr. W. D. La. General Order. 2022-1; M.D. Fla. Misc. Proc. No. 07-mp-00002-MGW, Doc. 40 (Aug. 21, 2017) and Walton v. Whitcomb (In re Whitcomb), 479 B.R. 133, 141 (Bankr. M.D. Fla. 2012) describing this order as the United States Bankruptcy Court for the Middle District of Florida's "'soup to nuts' no-look Chapter 13 attorney compensation structure, which follows the Newman Procedures," originating out of In re Newman, No. 00-06154-8W3, 01-12534-8W3, 2003 Bankr. LEXIS 105, at \*8-14, 2003 WL 751327, at \*4-6 (Bankr. M.D. Fla. Feb. 18, 2003).

<sup>&</sup>lt;sup>21</sup> See In re Tcherneva, 638 B.R. 676 (Bankr. E.D.N.Y. Feb. 28, 2022).

<sup>&</sup>lt;sup>22</sup> See also <u>Bankr. O.S.C. R. 2016-1</u> providing for an "expedited fee approval procedure" through which counsel may obtain approval of fees in a Chapter 13 case without the filing of a formal fee application and hearing when the attorney and the debtor(s) agree in writing that the fee for representation will be equal to or less than the amount set forth in Chambers Guidelines at the time of the filing of the case." <u>In re Smith, 624 B.R. 781 (Bankr. D.S.C. 2021)</u>.

<sup>&</sup>lt;sup>23</sup> See Bankr. M.D. Fla. Misc. Proc. No. 07-mp-00002-MGW, Doc. 40.

<sup>&</sup>lt;sup>24</sup> The rule further provides that these fees: "shall be compensation for all services and associated expenses excluding filing fees and credit counseling/education program fees in connection with the case that are ordinary, necessary and reasonably foreseeable." <u>Bankr. E.D. Wash. R. 2016-1(e)(1)</u>. However, counsel may file a supplemental application for fees with "a certification by the attorney that the compensation applied for was not reasonably foreseeable with an explanation as to why it was not foreseeable and is outside that contemplated by the agreed flat [no-look] fee." <u>Bankr. E.D. Wash. R. 2016-1(e)(4)</u>.

<sup>&</sup>lt;sup>25</sup>The Order describes "fee-only" cases as "those that pay only the attorney's and trustee's fees-and no other administrative expense, priority, or secured claims-through the plan and provide no meaningful dividend to unsecured creditors."

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effective for Chapter 13 cases filed on and after January 1, 2020.<sup>27</sup> The order provides for two separate Chapter 13 no-look flat fee caps — one in the amount of \$2,950 for "smaller" cases and another in the amount of \$3,900 for "larger" cases.<sup>28</sup> A "smaller case" is presumably **[\*283]** one that does not qualify as a "larger" case. A "larger" case is one that:

the percentage to be paid to unsecured, non-priority creditors [\*\*27] equals or exceeds 30% as a percentage and five thousand dollars (\$5,000) or ten thousand dollars (\$10,000) without regard to the percentage distribution[.]

In the smaller cases, the fee may be paid with a \$600 or less up-front fee paid by the debtor, plus \$2,050 or less paid through the Chapter 13 plan payments, plus a \$600 case termination fee and a \$300 "extended commitment fee," all as provided by and described by the order. Similarly, the fees for the "larger" cases may be paid with a \$600 or less up-front fee paid by the debtor, plus \$3,000 or less paid through the Chapter 13 plan payments, plus a \$600 case termination fee and a \$300 "extended commitment fee."  $Id.^{29}$ 

The Eastern District of Kentucky has one no-look fee structure with a maximum flat fee of \$4,000.<sup>30</sup> To opt-in to the no-look fee structure, counsel must sign and comply with the "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" included on the Court's website as Local Form 2016-2(a)(i). The services to be rendered by counsel in exchange for an allowed flat fee include:

- (i) all services rendered up to and including confirmation of a plan as set forth in the Rights [\*\*28] and Responsibilities of Chapter 13 Debtors and Their Attorneys;<sup>31</sup>
- (ii) services rendered in post-confirmation matters referenced in the Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys; and
- (iii) representation in any two (2) post-confirmation matters from the following list:
  - Responding to a motion to dismiss the case for failure to make plan payments, including a motion to modify:
  - Responding to a motion for relief from stay;
  - Filing a motion to modify the plan (including a motion to suspend plan payments);
  - · Addressing a trustee's motion to modify the plan;
  - Filing an application to incur debt; or
  - · Filing a motion to sell property.

<sup>&</sup>lt;sup>26</sup>The court has also posted annual summaries of professional fees awarded for 2014-2019 on its website in the form of an Electronic Court Filing / Case Management report. See <a href="https://www.ohnb.uscourts.gov/content/professional-fees-awarded">https://www.ohnb.uscourts.gov/content/professional-fees-awarded</a>.

<sup>&</sup>lt;sup>27</sup> Bankr. N.D. Ohio Admin. Order 19-06.

<sup>&</sup>lt;sup>28</sup> Counsel for the debtor may request additional fees and expenses "exceeding the amount set forth in paragraph 3 upon formal application under <u>Bankruptcy Rule 2016(a)</u> and in accordance with the Guidelines for Compensation and Expenses of Professionals prescribed under Local Bankruptcy Rule 2016-1 ("Guidelines"), with notice and a hearing. Allowance of fees and expenses greater than amounts specified in paragraph 3 of this Order shall be by separate order of the Court. Debtor's counsel may not receive a post-petition retainer or payment from the debtor other than as specified in this Order without leave of court. Requests for additional compensation will be considered in extraordinary circumstances even if including services within the literal terms of this order." Bankr. N. D. Ohio Admin. Order 19-06, ¶ 4.

<sup>&</sup>lt;sup>29</sup> Like the Eastern District of Kentucky and the Southern District of Indiana, the Order also requires the filing with the court of an executed copy of the "Rights and Responsibilities of Chapter 13 Debtors and their Attorneys." Bankr. N. D. Ohio Admin. Order 19-06.

<sup>30</sup> Bankr. E.D. Ky. R. 2016-2.

<sup>&</sup>lt;sup>31</sup> The "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys" lists twenty-eight enumerated items to which counsel are to attend in representing debtors in Chapter 13 cases.

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(iv) All expenses incurred in connection with the above, excluding filing fees and reimbursement of actual costs for required prepetition credit counseling.

#### Bankr. E.D. Ky. R. 2016-2(b).

The no-look fee structure does not include:

- (i) Defense of any adversary proceeding;
- (ii) Representation in any unanticipated litigation or contested proceeding(s) arising from the debtor's failure to provide complete and accurate information to the attorney; or
- (iii) Representation in any matter not otherwise addressed in the Rights and [\*284] Responsibilities of Chapter 13 Debtors and Their [\*\*29] Attorneys.

#### E.D. Ky. R. 2016-2(c).

The Southern District of Indiana's practice with respect to no-look fees in Chapter 13 cases is very similar to the Eastern District of Kentucky.<sup>32</sup> It establishes a \$4,000 maximum no-look flat fee, and counsel also are required to sign and comply with a similar "Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys."<sup>33</sup>

Finally, the Western District of Pennsylvania also has a no-look fee structure with a \$4,000 maximum flat fee. W.P.A. LBR 2016-1. The flat fee encompasses all "matters necessary to properly and timely complete the bankruptcy case[.]" W.P.A. LBR 2016-1(g). However, counsel may opt out of the no-look fee and itemize their fees and expenses if they desire and may also seek additional fees through the Chapter 13 plan if such fees can be paid "without decreasing the percentage or amount originally to be paid to other creditors through the plan" and proper application for allowance of those fees is filed with and approved by the court. W.P.A. 2016-1(f), (g), (h), and (i). Counsel may also be awarded additional fees which result in a diminution of the dividend paid to unsecured creditors if counsel can establish [\*\*30] that the additional services "provide a benefit to the estate" and the court determines that the benefit to the estate "warrants a diminution in the dividend paid to unsecured creditors." W.P.A. LBR 2016-1(j).

#### C. Current Chapter 13 Billing Practices in Dayton

Counsel have sought award of a \$4,350 flat fee in the majority of Chapter 13 cases filed in the Dayton location since the maximum fee was increased to that amount for cases "filed on or after February 24, 2021[.]" General Order 50-1. However, counsel have pursued alternative billing arrangements as well. In other cases counsel have billed a flat fee that is less than the maximum amount.<sup>34</sup> In some cases counsel have itemized fees, with those fees

<sup>&</sup>lt;sup>32</sup> Bankr. S.D. Ind. R. 2016-1(c)(2) and Bankr. S.D. Ind. Gen. Order 22-0004 (Order Setting Maximum Fee For Chapter 13 Cases Under Local Rule B-2016-1(c)).

<sup>&</sup>lt;sup>33</sup> See <a href="https://www.insb.uscourts.gov/content/rights-and-responsibilities-chapter-13-debtors-and-their-attorneys">https://www.insb.uscourts.gov/content/rights-and-responsibilities-chapter-13-debtors-and-their-attorneys</a> (last viewed August 1, 2022). In addition, "Counsel may apply for additional fees if Counsel opted for the fee award process set out in subparagraph (b)(2) of this rule, but later determines that the Presumed Reasonable Fee is not sufficient. The application shall request only the amount in excess of the Presumed Reasonable Fee and be accompanied by time records supporting the total fees sought by Counsel in the case or by an affidavit explaining why the Presumed Reasonable Fee is inadequate and describing the services rendered in the case. The Clerk shall provide notice of the total fees requested." Bankr. S.D. Ind. R. 2016-1(c)(3).

<sup>&</sup>lt;sup>34</sup> See e.g. *In re Jones*, No. 21-12648 (Doc. 14) (\$3,000); *In re Walker-Baskin*, No. 21-30966 (Doc. 5) (\$3,250); *In re Shank*, No. 21-31255 (Doc. 26), (\$3,700); *In re Howard*, No. 21-31265 (Doc. 25), (\$3,600); *In re Atkinson*, No. 21-31604 (Doc. 10), (\$3,700); *In re Harris*, No. 21-31639, (\$3,200); *In re Fletcher*, No. 21-31949 (Doc. 23), Bankr. S.D. Ohio (\$2,500); *In re Beckley*, No. 21-32034 (Doc. 32) (\$3,700); *In re Artkamp*, No. 22-30120 (Doc. 17) (\$3,500); *In re Brooks*, No. 22-30138 (\$3,500); *In re [\*\*31] Brown*, No. 22-30206 (Doc. 28), (\$3,700); *In re Kilby*, Case No. 22-30217 (Doc. 16) (\$3,700); *In re Pelfrey*, No. 22-30900 (Doc. 9) (\$3,700) *In re Geisler*, No. 21-31971 (Doc. 30) (\$3,262.50), *In re Ashe*, No. 21-32132 (Doc. 19) (\$3,900).

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exceeding the \$4,350 no-look fee.<sup>35</sup> In other **[\*285]** cases, although not completed, counsel have itemized fees for less than the \$4,350 maximum no-look fee.<sup>36</sup> And of course, in addition to the flat fees taken by counsel in Dayton cases, counsel frequently apply for and are awarded additional attorney fees for the matters that are not included within the scope of the no-look fee structure.

#### VI. Legal Analysis

#### A. Independent Review of Attorney Fee Applications in Chapter 13 Cases

Bankruptcy courts guard the public interest and the integrity of the bankruptcy system when carrying out the independent duty to review and determine the reasonableness of attorney fees in Chapter 13 cases. <u>Spear, 636 B.R. at 769</u>. This duty exists even in the absence of an objection or when the debtor appears to support the fee application. <u>Id.</u>; see also <u>Dery v. Cumberland Cas. & Sur. Co. (In re 5900 Assocs.), 468 F.3d 326, 329-30 (6th Cir. 2006)</u> (discussing the importance of judicial fee review in bankruptcy cases). As another bankruptcy court explained, "A chapter 13 debtor's lack of sophistication and usually desperate situation make it difficult for him or her to shop around or negotiate for attorney's fees. And where, as here and in most chapter 13 cases, the debtor is paying less than 100% to unsecured creditors under the plan, every dollar paid to debtor's counsel is a dollar less for unsecured creditors." <u>In re Biggs, No. 20-11716, 2021 Bankr. LEXIS 2224, at \*3, 2021 WL 3566035, at \*1 (Bankr. S.D. Ala. Jan. 19, 2021)</u>; see also <u>In re Ulrich, 517 B.R. 77, 80 (Bankr. E.D. Mich. 2014)</u> (quoting <u>In re Pettibone Corp., 74 B.R. 293, 299 (Bankr. N.D. III. 1987)</u>) (similar).

Bankruptcy Code § 330 addresses the compensation of attorneys and states in relevant part:

- (a)(1) After notice to the parties in interest and the United [\*\*32] States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to . . . a professional person employed under section 327 or 1103
  - (A) reasonable compensation for actual, necessary services rendered by the . . . attorney and by any paraprofessional person employed by any such person; and
  - (B) reimbursement for actual, necessary expenses.
- (2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

11 U.S.C. § 330(a). HN4 The applicant seeking attorney fees always carries the burden of proof to establish that the fees are warranted and should be approved. In re Hutter Constr. Co., 126 B.R. 1005, 1011-12 (Bankr. E.D. Wis. 1991); In re Dekeyzer, No. 20-11271-ta13, 2021 Bankr. LEXIS 956, at \*6, 2021 WL 1344715, at \*3 (Bankr. D.N.M. Apr. 9, 2021). "This burden is not to be taken lightly given that every dollar expended on legal fees results [in] a dollar less that is available for distribution to the creditors." In re Dille, No. 18-42994, 2021 Bankr. LEXIS 538, at \*6, 2021 WL 864201, at \*2 (Bankr. W.D. Mo. Mar. 8, 2021) (citing Ulrich, 517 B.R. at 80). "Thus, the bankruptcy court must award only the fees that are proven to be actual, necessary, and reasonable." Thomas v. [\*286] Namba (In re Thomas), 2009 Bankr. LEXIS 4529, at \*13, 2009 WL 7751299, at \*5 (B.A.P. 9th Cir. July 6, 2009) (citing In re Roderick Timber Co., 185 B.R. 601, 606 (B.A.P. 9th Cir. 1995)).

<sup>&</sup>lt;sup>35</sup> See e.g. *In re Thomas*, No. 21-30359 (Docs. 28, 33) (\$5,374.46 & \$200); *In re Collins*, No. 21-31731 (Doc. 34), (\$8,267); *In re Pochron*, No. 21-31410 (Doc. 51) (fee reduced by the court \$7,731.50); *In re Nihart*, No. 21-31155 (Doc. 87) (fee reduced by the court \$6,294.00).

<sup>&</sup>lt;sup>36</sup> See e.g. *In re Bilpuch*, No. 21-30764 (Doc. 25) (\$2,617.50); *In re Erbaugh*, No. 21-30885 (Doc. 27) (\$2,705.23); *In re Marzette*, No. 21-31951 (Doc. 40) (\$2,000).

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HN5 Courts determine the reasonableness of attorney fees by calculating an initial estimate using the lodestar method, multiplying the number of hours [\*\*33] reasonably expended on the matter by a reasonable hourly rate, considering the attorney's experience level and comparable rates in the local market. Spear, 636 B.R. at 770 (citing In re Boddy, 950 F.2d 334, 337 (6th Cir. 1991)); see also In re Atwell, 148 B.R. 483, 488-89 (Bankr. W.D. Ky. 1993) ("A major factor in determining what is a reasonable hourly rate for purposes of Lodestar is whether the rate charged is comparable to rates charged by comparable attorneys in the area.") (internal citations omitted). After the lodestar analysis, courts consider other factors (often referred to as the Johnson factors) that "may warrant an increase or decrease in the fees awarded." Spear, 636 B.R. at 770-71 (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). These factors include:

1) the novelty and difficulty of the issues; 2) the skill required to perform the services properly; 3) the preclusion of other employment resulting from counsel's acceptance of the matter; 4) the customary fee for such matters; 5) whether the fee is fixed or contingent; 6) time limitations imposed by the client or otherwise dictated by the circumstances; 7) the amount at issue and the results obtained; 8) the experience, reputation, and ability of the attorneys; 9) the undesirability of the case; 10) the nature and length of the professional relationship between counsel and the client; and 11) awards in [\*\*34] similar cases or under similar circumstances.

<u>Id.</u> (collecting cases and discussing incorporation of these factors into 11 U.S.C. § 330(a)(3)); see also <u>Houlihan</u> <u>Lokey Howard & Zukin Capital v. Unsecured Creditors' Liquidating Tr. (In re Commer. Fin. Servs.), 427 F.3d 804, 811 (10th Cir. 2005)</u> (citing <u>Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)</u>) (discussing the <u>Johnson</u> factors for evaluating attorney fee awards in bankruptcy cases).

#### B. Relationship Between § 330 and The No-Look Fee Rule

As discussed, "no-look" or "presumptively reasonable" fee amounts have been adopted by bankruptcy courts for many years. See e.g. In re Williams, 357 B.R. 434, 439 n.3 (B.A.P. 6th Cir. 2007). HN6 \(\tau\) No-look fees allow "counsel in a [c]hapter 13 case to receive a specific fee for a defined bundle of services without the requisite necessity of: (1) maintaining contemporaneous hourly time records; and (2) filing a fee application and giving notice under \(\frac{\gamma}{3}\) 30 of the Bankruptcy Code and the applicable Bankruptcy Rules." In re Biggs, No. 20-11716, 2021 Bankr. LEXIS 2224, at \*2, 2021 WL 3566035, at \*1 (Bankr. S.D. Ala. Jan. 19, 2021) (quoting [\*287] In re Dellutri Law Grp., 482 B.R. 642, 650 (Bankr. M.D. Fla. 2012)). "The no-look fee is a presumptively reasonable fee based on local hourly rates, and the general amount of work required by a typical chapter 13 case." In re Villaverde, No. 11-37442-BKC-LMI, 2016 Bankr. LEXIS 941, at \*2, 2016 WL 1179343, at \*1 (Bankr. S.D. Fla. Mar. 25, 2016) (citing In re Younger, 360 B.R. 89, 94 (Bankr. W.D. Pa. 2006)). Courts establishing no-look fees reason that bankruptcy cases allow for a flat rate to be charged to clients across the board because much of the work performed in such cases is routine from case-to-case. Id.

Rationales supporting a no-look fee structure include administrative convenience to the courts and counsel, a degree of certainty for debtors as to the cost of bankruptcy legal services, and certainty to counsel and the Chapter 13 trustee as to what the attorney fees will be for purposes of the debtors' Chapter 13 plans. Another court has stated:

The use of a "no look" fee prevents the development of a cottage industry of filing and ruling on fee applications. It provides certainty to debtors as to the amount that they will pay and to the attorney as to the amount that he or she should receive. It allows the chapter 13 trustee to calculate plan payments knowing what the fee will usually be without the need to constantly adjust the payment to account for additional fees. It allows

<sup>&</sup>lt;sup>37</sup> For law review articles discussing the no-look fee, see Bruce M. Price, "No Look" Attorneys Fees and the Attorneys Who Are Looking: An Empirical Analysis of Presumptively Approved Attorneys' [\*\*35] Fees in CH. 13 Bankruptcies and a Proposal for Reform, 20 Am. Bankr. Inst. L. Rev. 291 (2012); Hon. David S. Kennedy, Vanessa A. Lantin, and Brent Heilig, Attorney Compensation in Chapter 13 Cases and Related Matters, 13 J. Bankr. L. & Prac. 6 (2004); Lois R. Lupica, The Costs of BAPCPA: Report of the Pilot Study of Consumer Bankruptcy Cases, 18 Am. Bankr. Inst. L. Rev. 43 (2010). See also Keith M. Lundin, Lundin on Chapter 13, § 136.6 (Debtors' Attorney's Fees before BAPCPA), ¶ 28 (last visited July 21, 2022).

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unsecured creditors to know what percentage they will be receiving on their claims, since any amount paid as attorney's fees usually reduces the amount paid to unsecured creditors.

<u>Biggs, No. 20-11716, 2021 Bankr. LEXIS 2224, at \*3, 2021 WL 3566035, at \*2</u>. See also <u>In re Smith, 624 B.R. 781</u> (<u>Bankr. D.S.C. 2021</u>) (discussing the purposes and [\*\*36] benefits of no-look fees in Chapter 13); <u>In re Brent, 458</u> <u>B.R. 444, 450 (Bankr. N.D. III. 2011)</u> (similar). Dean testified as to these benefits:

The pros of the no-look fee is that it provides some certainty. It provides certainty for the debtor. It provides certainty for debtor's counsel, it provides certainty for the Court and the Trustees in calculating plans and determining feasibility. It certainly saves a lot of resources in terms of the time required to itemize fees, file fee applications, review applications, approve those fees, and that time, not just for debtor's counsel, but for the Chapter 13 Trustee's office, for the Court who has to then review all of those things, as well.

Tr. 50.

Drawbacks to no-look fee structures include the failure to tailor or individualize the fees for each debtor because, despite the fact that many tasks are the same in every Chapter 13 case filed in a particular district, each Chapter 13 requires a different amount of time and skills. As Dean testified: "The difficulty with the no-look fee is in defining a typical case. I don't know that there is such a thing as a typical case, but for the majority of cases, the no-look fee will cover counsel's fee for the entire case." Tr. 49.

Perhaps the most significant [\*\*37] concern about no-look fee structures is whether they violate the Bankruptcy Code. One commentator summarized this argument as follows:

The biggest criticism of presumptive fees is that they violate the plain language of the Code. As no-look fees are set by local rules and guidelines, they must not conflict with federal bankruptcy law. In its requirements for the award of fees, *section 330* arguably permits fee approval only after notice and a hearing. As no-look fees do not require review of a traditional fee application by [\*288] the court, they do not seem to meet this requirement. Further, *Federal Rule of Bankruptcy Procedure Rule 2016* specifically requires that a fee application including certain detailed information be submitted when an individual seeks compensation from the estate. The entire premise of presumptive fees is that they do not require a detailed fee application, again seemingly running counter to the federal guidelines.

Bruce M. Price, "No Look" Attorneys' Fees and the Attorneys Who Are Looking: An Empirical Analysis of Presumptively Approved Attorneys' Fees in Ch. 13 Bankruptcies and a Proposal for Reform, <u>20 Am. Bankr. Inst. L. Rev. 291, 296 (2012)</u> [hereinafter Price] (citations omitted).

While the court does not believe that no-look fee structures as a whole violate the [\*\*38] Bankruptcy Code or the Bankruptcy Rules, courts must be careful to ensure this practice remains within the bounds required by the Code and Bankruptcy Rules. Within the Sixth Circuit, in addition to justifying no-look fee structures within the confines of § 330, no-look fees must also be squared with <u>Boddy</u>. Citing <u>Boddy</u>, Price states: "Only the Sixth Circuit insists that each fee application be individually reviewed under the lodestar method in all circumstances." <u>Id. at 297</u>. The Sixth Circuit Bankruptcy Appellate Panel addressed the tension between <u>Boddy</u> and no-look fees in <u>In re Williams</u>, 357 <u>B.R. 434 (B.A.P. 6th Cir. 2007)</u>. Although that case involved a Chapter 7 case, the court still had the opportunity to opine on no-look fees within the Circuit, stating:

The Panel recognizes that this type of standardization, or uniform fee guideline, promotes efficiency by relieving the courts of the administrative burden of reviewing numerous attorney's fee applications; encourages predictability and efficiency for all involved in a chapter 7 or 13 case; and saves time for the court, trustees and the attorneys who represent debtors. The Panel also believes that "no look" fees are permissible and should be encouraged in appropriate circumstances. See <u>Boddy</u>, 950 F.2d at 338 ("[W]e do not hold that [\*\*39] the bankruptcy court can never consider the 'normal and customary' services rendered. . . . .")

<u>Id. at 439 n. 3</u>. <u>HN7</u> Thus, no-look fee structures are not prohibited in the Sixth Circuit, but courts must continue to ensure fees are reasonable and awarded only for "actual, necessary services." 11 U.S.C. § 330. The Ohio Rules

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of Professional Conduct require attorneys to collect only reasonable fees and avoid collecting fees that are clearly excessive. See *Ohio Rules of Prof. Conduct 1.5(a)*.

The court is, however, concerned that implementation of a no-look fee structure in a district may have the effect of stifling creative and alternative billing practices by encouraging the use of the no-look flat fee. The flip-side to administrative convenience for counsel and the court is an engrained uniformity, and perhaps rigidity, in billing practices for the district. Dean noted that "... we do have a rule that allows us to do that and gives the presumption that that is a reasonable fee." Tr. 77-78. There is a risk that attorneys will not tailor the requested flat fee to each individual case. As one author explained:

No-look fees also have critics. The most obvious criticism is that, in setting an amount under which fees will not be reviewed, attorneys will be encouraged [\*\*40] to request that amount in every case, whether or not the actual time expended warrants it. For example, if the presumptive fee is \$1,000, the fear is that all attorneys will request \$1,000, whether or not they would be entitled to that much under a lodestar analysis. Another fear is that the principle of efficiency [\*289] could be taken too far; in trying to complete each case in the fewest hours possible, the quality of work may suffer.

Price at 296 (citations omitted). The court views the practice of attorneys requesting an identical fee equal to the maximum no-look fee in every Chapter 13 case without regard to the issues presented by the case as a red flag. Counsel must review each case and exercise independent billing judgment when determining an appropriate flat fee if one is used.

Dean perhaps hit the nail on the head with respect to grappling with the appropriateness of no-look fee structures when she testified that "[t]he difficulty with the no-look fee is in defining a typical case." Tr. 49. Both Dean's testimony and Fesenmyer's testimony emphasized that the maximum no-look fee appropriately provided reasonable attorney fees for the "typical" Chapter 13 case. Fesenmyer, Tr. 16, 32-33; Dean, Tr., [\*\*41] 49. However, at no time did either define what the "typical" Chapter 13 case was, and Dean testified that "I don't know that there is such a thing as a typical case . . . . " Tr. 49. She further stated that:

Probably the most difficult part of being debtor's counsel is having that crystal ball and knowing what this particular client is going to take. Some clients, for lack of a better term, are more needy than others, and you get a phone call or an email every week and sometimes you don't hear from them, but that's pretty rare.<sup>38</sup>

Tr. 59. She explained that "there are some cases that you can do a Chapter 13 for less than the no-look fee," but that "[t]he difficulty is having that crystal ball and knowing which case that's going to be [.]" Tr. 61. It is apparent that, since not all Chapter 13 cases involve identical amounts of time and expense to administer, such logic results in a situation in which either: a) counsel is underpaid and the debtor reaps the benefit to the extent counsel has not been compensated for all of counsel's time; or b) the debtor is over-paying and counsel is reaping the benefit of the debtor's payment for more time than counsel incurred. Fesenmyer and Dean testified [\*\*42] that the former is the more typical situation than the latter — that is, counsel provide more time and services than they would be compensated for under the lodestar approach. See Fesenmyer, Tr. 15-16, 33, 43, & 45; Dean, Tr. 50-51, 77. Dean noted that counsel do not "necessarily get paid for the full value of the work they perform" and that lawyers who have more experience and knowledge earn the same as attorneys with less experience and knowledge. Tr. 50-51.<sup>39</sup>

<sup>&</sup>lt;sup>38</sup> Dean testified that she would not reduce her fee below the no-look fee if it is a "client that I know is going to call me or send me an e-mail once a week . . . because I'm still going to spend the time to earn the no-look fee." Tr. 75.

<sup>&</sup>lt;sup>39</sup> Judge Lundin makes a similar argument with respect to applying the lodestar method to Chapter 13 fees: "Applying normal lodestar methodology can penalize the efficient volume counsel by reducing the fee in each case while rewarding the inefficient practitioner with higher fees." Keith M. Lundin, Lundin on Chapter 13, § 136.6 (Debtors' Attorney's Fees before BAPCPA), ¶ 24 (Revised June 17, 2004). However, the no-look fee should have somewhat of a "leveling" effect in that more experienced counsel should be able to administer a Chapter 13 case more efficiently than less experienced counsel, resulting in more experienced counsel receiving a higher hourly effective rate for the same services which may take less experienced counsel more time, resulting in their effective rate being lower.

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As to the situation in which counsel can undertake his or her duties in less than the time represented by the maximum no-look fee, Dean testified:

[\*290] Now, if you know for sure that the debtor is not going to have 4,350 in fees, should you charge 4,350? Probably not. I wouldn't. But we do have a rule that allows us to do that and gives the presumption that that is a reasonable fee.

Tr. 77-78. The court is concerned with this characterization of the no-look fee structure as creating a single flat fee that covers a "typical" Chapter 13 case and can be charged without review in every case.

Similarly, at times Fesenmyer and Dean appeared to suggest that using an identical no-look flat fee in all Chapter 13 cases would balance things out [\*\*43] for counsel — counsel would lose income on the more complicated or dismissed cases but make money on the simpler or completed cases, with the cases overall balancing themselves out. Fesenmyer asked the following question of Dean:

Do you believe that the no-look fee is a balance to the system, inasmuch that many cases, as suggested earlier today, approximately 25 percent of cases, may fail, and hopefully 70 plus percent of cases will succeed? So, do you believe there's a balance to the system in such that being the fact that most bankruptcy practitioners are either solo practitioners or in small firms, that over the course of the, let's say, one-year period when you're talking about the balancing approach regarding the cases that fail and the cases that succeed, the no-look fee gives us a balance and gives the whole process a balance as it relates to charging the no-look fee in every case? If you understand.

Tr. 76-77. Dean responded that she "would agree with that." Tr. 77. Dean's testimony at times also seemed to implicitly suggest as much: "The rule is put in place, the presumption, to give the presumption that that's a reasonable fee in an average case." Tr. 63. Dean later clarified [\*\*44] her testimony to state that "I think the debtor needs to pay the reasonable value of the services rendered on their case." Tr. 77.

Such a "balancing" position cannot be justified under § 330, <u>Boddy</u>, or professional ethical obligations. One debtor should not be paying more for her case to justify counsel incurring more time and expense on another debtor's case. <u>HN8</u> This court will not interpret Local Bankruptcy Rule 2016-1(b) as allowing an identical flat fee in every case without regard to the work presented by the case. Such an interpretation would be discordant with Sixth Circuit precedent. See <u>Boddy</u>, <u>950 B.R. at 337</u> ("The trustee argues that Chapter 13 cases are so routine that the bankruptcy court should not have to consider the actual work performed by a debtor's attorneys . . . the establishment of a fixed fee for certain "normal and customary" services is directly contrary to the plain "actual, necessary services rendered" language of 11 U.S.C. § 330."). Each debtor's fees must be reasonable and appropriate under the applicable attorney fee requirements of federal and state law. Accordingly, the court interprets this district's no look fee structure as allowing a range of "no-look" flat fees up to a maximum of \$4,350 as a means of giving counsel flexibility [\*\*45] to assess a case and determine an appropriate flat fee. If counsel do not feel able to do so, they may choose to itemize their time and be compensated on that basis.

HN9 While a flat fee up to the maximum amount will be presumed reasonable, the presumption may be overcome if the services provided in a case do not appear to justify the requested fee. Additionally, if an attorney repeatedly requests the same fee in every case without regard to the differing facts or circumstances, the presumption may be overcome. See <a href="In Techerneva">In Techerneva</a>, 638 B.R. 676, 689 (Bankr. E.D. N.Y. 2022)</a> ("[A]ttorneys who routinely [\*291] charge the maximum flat fee allowed regardless of the complexities of each case and provide the bare minimum of services required by Chapter 13 cases run afoul of their ethical obligations and may find their fees disgorged."); <a href="In Te Wesseldine">In Te Wesseldine</a>, 434 B.R. 31, 40 (Bankr. N.D. N.Y. 2010) ("This case presents an opportunity for the Court to reiterate that Administrative Order 09-07 [establishing presumptively reasonable flat fees] is not designed to remove the discretion of the bar in establishing a reasonable fee depending on the complexity of a particular case."). In such an instance, the court will permit counsel to submit evidence in support of the requested fee. See <a href="Icherneva">Icherneva</a>, 683 B.R. at 689 (citing <a href="In Te Beale">In Te Beale</a>, 553 B.R. 69, 81 (Bankr. E.D. Va. 2016) ("The specific circumstances [\*\*46] of a case may cause a court to order an itemized fee application and to perhaps reduce the amount of attorney's fees to be awarded."). If no or insufficient evidence is provided, the "no look" flat fee may be adjusted as appropriate based on the court's own judgment and experience determining reasonable fees in Chapter 13 cases.

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#### C. Dismissed and Repeat Chapter 13 Filings and Relationship to No-Look Fee

Debtors often do not succeed in reorganizing their financial affairs through Chapter 13 and those cases are dismissed. However, in an effort to retain homes, vehicles, or other property they wish to retain, they often file second, third and sometimes even more Chapter 13 cases. Such "repeat" cases are so prevalent that when Congress passed BAPCPA, it included provisions limiting the availability of the automatic stay to certain repeat filers. See 11 U.S.C. § 362(c)(3) and (4).

As emphasized by Fesenmyer and Dean, when Chapter [\*\*47] 13 cases get dismissed, frequently counsel are not paid all of their fees to which they are entitled because most of their fees are paid through the Chapter 13 plan payments in the early stages of the cases. Fesenmyer, Tr. 44-45; Dean, Tr. 51. Thus, Dean characterized this aspect of counsel's risk with fees in a Chapter 13 case as counsel's being "insurers" of their client's cases, stating:

The biggest risk is that counsel doesn't get paid, and that, unfortunately, happens all too often. With the way attorney's fees are paid, counsel becomes the insurer, for lack of a better term, of the case. We have to do the work whether we get paid or not. If we haven't been paid and a motion to dismiss is filed, we can't withdraw at that point. We still have to represent the debtor. We can do everything under the sun in terms of analyzing budgets and looking at bank statements and counseling debtors, and sending them to 17 credit counseling classes and budgeting classes, but we can't pay. And no matter what we do, there's a limit. Ultimately, it's up to the debtor to pay. And if the Debtor is sick and they don't have sick time and there's not enough in their paycheck to pay, we're the ones that [\*\*48] don't get paid first. They're going to pay the conduit, [\*292] they're going to pay the secured claim. They are not going to pay me.

Tr. 51.

However, while the court appreciates the fee payment risks which Fesenmyer and Dean emphasize when cases are dismissed, this argument fails to recognize several mitigating factors with that risk. First, while counsel undoubtedly cannot foresee all future events, they can assess that risk with each client and determine whether they will represent the debtor, and, if so, the amount they require the client to pay up front in order to engage in the representation. Second, under the form Chapter 13 Plan and Chapter 13 practices within the district, attorney fees are generally front-loaded so that the attorneys are paid prior to unsecured creditors. See Plan, Doc. 13, ¶¶ 5.1 & 5.1.7. The result is when the case gets dismissed, some or all of their fees may have been already paid, in addition to any fees which they received from the debtor at the commencement of the retention. Third, when counsel file subsequent cases for the same debtor, their fees start anew without credit for payments made in prior cases. In such cases, while counsel need to update the information [\*\*49] as to the debtors' assets, debts, employment, and other circumstances, counsel are not starting the subsequent cases from a blank slate. Thus, while such situations

<sup>&</sup>lt;sup>40</sup> Much data has been collected and many articles have been written on the phenomenon of repeat Chapter 13 filings. See Susan L. DeJarnatt, *Once is Not Enough: Preserving Consumers' Rights to Bankruptcy* Protection, <u>74 Ind. L. J. 455 (April 1, 1999)</u>; John Golmant and Tom Ulrich, *Bankruptcy Repeat Filings*, <u>14 Am. Bankr. Inst. L. Rev. 169 (April 1, 2006)</u>; Katherine Porter, *Repeat Studies of Repeat Filers: How We Should Learn About Law*, <u>89 Am. Bankr. L.J. 159</u> (April 1, 2015); Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Filers*, <u>89 Am. Bankr. L.J. 241</u> (April 1, 2015); Sara S. Greend, Parina Patel and Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, <u>101 Minn. L. Rev. 1031 (Feb. 1, 2017)</u>.

<sup>&</sup>lt;sup>41</sup> However, in some cases, usually in order to render their clients' plans feasible, counsel agree under the Chapter 13 plan to allow their fees to be paid pro rata with other Class 2 claims (e.g. secured creditors with no designated monthly payments and domestic support obligation arrearages assigned or owed to a governmental unit). See Plan, Doc. 13, ¶ 5.2; *In re Hunter*, No. 22-30950 (Doc. 7, Plan, § 5.1.7); and *In re Mathes*, No. 22-30758 (Doc. 6, Plan, ¶ 5.1.7).

<sup>&</sup>lt;sup>42</sup> See *In re Breckler*, Nos. 19-33346 and 22-30425 (both cases handled by same counsel); *In re Combs*, Nos. 20-32459 and 22-30644 (same); *In re McCullough*, Nos. 20-31337 and 21-31612; *In re Clark*, Nos. 20-32786 and 22-30370 (same); *In re Reed*, Nos. 20-31942 & 22-30951 (same).

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are not a boon to counsel, this court discounts the argument that a higher no look fee is justified in all Chapter 13 cases because some Chapter 13 cases are dismissed before counsel is paid the balance owed on that fee.

Having determined that the district's no-look fee structure does not run afoul of § 330 or <u>Boddy</u> as interpreted by the court, the court turns to determining whether the requested fee in this case is reasonable compensation and conducts a lodestar analysis for the work described in Fesenmyer's fee application.

#### D. Application of § 330 and Boddy to the Fee Application in the Present Case

The court does not take issue with Fesenmyer's \$250 hourly rate. Based upon Fesenmyer's and Dean's testimony and the court's own knowledge of rates charged by counsel with comparable experience, the court finds that rate to be reasonable and appropriate. See <u>In re Henson, 637 B.R. 13 (Bankr. S.D. Ohio Feb. 25, 2022)</u> (analyzing the billing rate for a lawyer performing consumer bankruptcy work).

Having determined that [\*\*50] Fesenmyer's rate is appropriate, the task under <u>Boddy</u> and the lodestar method requires an analysis of the hours billed to determine whether those hours were reasonably incurred. Fesenmyer testified that he does not employ a paralegal because he cannot afford to do so. Accordingly, he testified, consistent [\*293] with his invoice, that any work that could be done by a paralegal is billed at the rate of \$75 an hour. The court finds this rate appropriate for a paralegal in the Dayton, Ohio area.

Of course, once the issue of appropriate rates is determined, the difficulty with the lodestar analysis is in determining what is a reasonable amount of time for the tasks performed. The leading Chapter 13 Treatise, as discussed by the Ninth Circuit in Eliapo, states that "[t]hree or four hours of attorney time and a like number of hours of paralegal time in an experienced debtors' attorney's office can produce excellent results in a "typical" Chapter 13 case." Law Offices of David A. Boone v. Derham-Burk (In re Eliapo), 468 F.3d 592, 599 (9th Cir. 2006) (quoting Lundin on Chapter 13 § 136.6 (Debtors' Attorney's Fees before BAPCPA), ¶ 24 (Revised June 17, 2004)); see also In re Szymczak, 246 B.R. 774, 779-80 (Bankr. D.N.J. 2000) ("With the arrival of specialized computer software for bankruptcy and because of the increased use of skilled bankruptcy paralegals, [\*\*51] debtors' attorneys are now able to file and confirm chapter 13 cases with minimal investment of attorney time . . . . It is likely chapter 13 cases are being filed and confirmed with fewer than five hours of attorney time."). There is no comparable statement discussing attorney fees after BAPCPA, but this court doubled the no-look fee in 2006. However, after BAPCPA, the Southern District of Texas pegged the amount of work required as 6.4 hours for attorney time and 7.5 hours for paralegal time. See In re Chapter 13 Fee Applications, Memorandum Opinion and Order Amending Local Procedures for Chapter 13 Fee Applications, Bankr. S.D. Texas, Misc. Case No. 06-00305 (Oct. 3, 2006); In re Contreras, Nos. 18-30995, 16-34693, 16-35750, 18-33054, 2019 Bankr. LEXIS 1331, 2019 WL 1868622 (Bankr. S.D. Tex. Apr. 25, 2019); see also In re Smith, 624 B.R. 781, 793 (Bankr. D.S.C. 2021) ("Not every case will require the same amount of time and work to complete and much of the necessary work is 'form-based' and can be accomplished by trained non-lawyers, such as paraprofessionals.").

These sources suggest an experienced Chapter 13 practitioner could handle an average Chapter 13 case using eight (8) hours of attorney time and eight (8) hours of paraprofessional time, if not less. Using those numbers and Fesenmyer's \$250 per hour rate, then an average Chapter 13 case would support a fee [\*\*52] of \$2,600 (8 x \$250 = \$2,000 plus 8 x \$75^{44} = \$600, totaling \$2,600). Using a rate of \$300 per hour, a Chapter 13 case requiring an average amount of work would support a fee of \$3,000 (8 x \$300 = \$2,400 plus 8 x \$75 = \$600, totaling \$3,000). As detailed, other local rules and procedures in various jurisdictions previously discussed suggest a higher figure for an average case is appropriate.

<sup>&</sup>lt;sup>43</sup> Based upon the court's findings in <u>Henson</u>, an attorney of Fesenmyer's experience could command a rate in the range of \$300 per hour in the Dayton legal market. <u>In re Henson</u>, 637 B.R. 13, 17 (Bankr. S.D. Ohio 2022).

<sup>&</sup>lt;sup>44</sup>The court recognizes that paralegal rates in the Dayton legal market generally range from \$75 - \$130, depending on the paralegal's skill level and experience and the complexity of the work performed.

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The court considered various views on fees as described in this decision. However, in the end, even recognizing this case is less complex than many Chapter 13 cases, the court is not analyzing the fees based on a one-size fits all formula. HN10 Fees in Chapter 13 need to be reasonable and necessary, with counsel exercising independent billing judgment. A range of fees is appropriate and that will vary from case to case. Therefore, the court considered the complexity of the case and used § 330, Boddy, and the Johnson factors to adjust the lodestar award based on the Itemization and other evidence presented at the Fees Houlihan Lokey Howard & Zukin Capital v. Unsecured Creditors' Liquidating Tr. (In re Commer. Fin. Servs.), 427 F.3d 804, 811 (10th Cir. 2005) (citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)) (discussing and applying the Johnson factors to determine reasonable attorney compensation); Cahill v. Walker & Patterson, P.C., 428 F.3d 536, 540 (5th Cir. 2005) (similar).

#### E. Analysis of Fesenmyer's Itemized Time

#### 1. Preconfirmation General Work.

The following time [\*\*53] entries were for preconfirmation general services provided to the Debtor relating to her bankruptcy case: 11/11/21 (.2), 11/12/21 (.3), 12/15/21 (.2), and 2/22/21 (.2). Counsel spent .9 hours on these tasks for a total of \$225. The court finds this time spent on this case to be reasonable and billed at an appropriate rate.

#### 2. Preparation of Schedules and Chapter 13 Plan.

The following time entries were the preparation of the Debtor's schedules, Statement of Financial Affairs, and Chapter 13 Plan: 11/15/21 (3.0), 11/16/21 (.5), 11/18/21 (1.0). Counsel spent 4.5 hours on these tasks for a total of \$1,125. The court finds that this time was reasonably incurred; however, the court concludes that all of this time should not have been billed at an attorney rate. The court concludes that a reasonable allocation of time for preparing these schedules and this Chapter 13 plan is two hours of paralegal time and 2.5 hours of attorney time. This would adjust that amount down from \$1,125 to \$775 (2.0 x \$75= \$150, plus 2.5 x \$250 = \$625, for a total of \$775).

## 3. Meetings with Debtor.

The following time entries cover when Fesenmyer met in person or virtually with the Debtor: 11/8/21 (.5) and 11/18/21 [\*\*54] (1.3). Counsel spent 1.8 hours on these tasks for a total of \$450. The court finds this time to be appropriate and reasonable.

#### 4. Preparation for and Attendance at Creditors' Meeting.

The following time entries were spent on preparing for and attending the meeting of creditors: 11/25/21 (.1) and 1/4/22 (1.0). The court concludes the 1.1 hours (\$275) is appropriate and reasonable.

#### 5. Claim Review.

The court finds the amount of time which Fesenmyer spent reviewing proofs of claim and assignments of proofs of claim is excessive. He recorded 3.4 hours (\$850) to review 17 proofs of claim and two notices of transfer of claims. The claims totaled \$152,091.76, including a \$101,530.40 claim filed by the United States Department of Education for student loans, a secured claim filed by Fifth Third Bank in the amount of \$2,140.89 for the Debtor's car loan, and 13 other nonpriority unsecured debts totaling \$48,420.47. The Debtor's Chapter 13 Plan provides for a 3% dividend

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to unsecured creditors, or a total distribution to unsecured creditors of \$4,500.<sup>45</sup> Fesenmyer acknowledged that **[\*295]** the Chapter 13 Trustee takes primary responsibility for reviewing proofs of claim and that the Debtor has not filed any **[\*\*55]** objections to these claims. The only exception that Fesenmyer mentioned to the Chapter 13 Trustee's primacy over claim objections is for secured claims. The court finds the amount of time Fesenmyer incurred in reviewing claims to be excessive and that the proofs of claim could have been reviewed more efficiently. The court will award two (2) hours of attorney time (\$500) for the review of the proofs of claim.

#### 6. Postconfirmation Work/Future Case Review/Monitoring.

The court will allow one hour of attorney time (.25 hours each year for four years) (\$250) and two hours of paraprofessional time to review and provide the Debtor's tax return to the Chapter 13 Trustee. The court finds that much of this work should be billed at the paraprofessional rate because it can be performed by a paraprofessional with limited oversight by counsel. The court will also allow the attorney time allocated to reviewing the Notice of Intent to Pay Claims (.5) and preparing the Debtor's certification regarding the issuance of the Debtor's discharge (.4), totaling .9 hours or \$225 between those two items.

The court takes issue with the 17.4 hours (18 minutes x 58 months) which Fesenmyer is projecting he will spend [\*\*56] doing a monthly review of his client's case (\$4,350 over the life of the case). The unreasonableness of that proposition is evident from the fact that it is the same amount as the maximum court-approved no-look fee for an entire Chapter 13 case. Post-confirmation review of a client's case is included in the no look fee [LBR 2016-1(b)(2)(A)(xvi)]. Even if such work is done periodically, it should be performed by a paraprofessional or very "lightly" by counsel, not by an attorney at the attorney's billing rate for legal services. 46

The issue of compensating counsel for monthly post-confirmation Chapter 13 case monitoring was well analyzed in *In re Clinkscale, 525 B.R. 399, 403-07 (Bankr. W.D. Mich. 2015)*. In that case, counsel argued that he had a professional and ethical obligation to monitor his Chapter 13 clients' cases on a monthly basis and was entitled to be compensated for that monitoring. The Chapter 13 trustee argued that counsel is never entitled to fees for such monitoring. The trustee stated that the "Trustee and/or creditors routinely keeps Debtor(s)' counsel apprised of the current developments in a Chapter 13 proceeding with mailing out six month disbursement reports, filing of a notice of intent to pay an unscheduled creditor . . . ." The court rejected both [\*\*57] arguments and approaches, finding both arguments to be "paternalistic," and concluded that:

The difficulty with both approaches is that neither recognizes the case-specific requirements of the lodestar analysis and the court's function in reviewing fee petitions. The <u>Boddy</u> court's concept of the "reasonable hours worked on a case" counsels against any policy-based ruling from the court, in favor of a rule of reason dependent upon the circumstances of any particular case.

Keeping in mind that [debtor's counsel] bears the burden of proving his entitlement to any administrative fee, the court reaches the following decision regarding [\*296] the monitoring entries within the Fee Petitions: although monitoring activities may be reasonable in some cases, and at some intervals, [debtor's counsel] has provided no case-specific information upon which the court may approve fees for this category of services. The court will not allow compensation for this activity on the present record.

<sup>&</sup>lt;sup>45</sup> Fesenmyer asserted that the dividend in this case could increase as a result of a tax refund or other income. However, the court accords no weight to such statements as they are purely speculative. Further, this Debtor's income and budget are very limited and the court's experience is that in such situations, if there is a non-exempt tax refund or other additional income during the case, the Debtor likely will need that income to provide for her well-being. This court routinely approves such requests to retain and use such supplemental income and approves separate counsel fees for such requests.

<sup>&</sup>lt;sup>46</sup> HN11[1] If events arise post-confirmation requiring significant attorney time, such as the need to file a modification of the debtor's Chapter 13 plan, Local Bankruptcy Rule 2016-1(b)(3) allows for a separate fee application for such services.

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<u>Id. at 407</u>; see also <u>In re Szymczak, 246 B.R. 774, 783 (Bankr. D.N.J. 2000)</u> ("In reviewing Applicant's time records, it appears the Debtors were billed every time Applicant picked up the telephone, uttered the Debtors' name, or looked at the Debtors' case; even where nothing meaningful occurred. [\*\*58] More importantly, time was billed at full attorney rates where the work could and should have been performed by a secretary or a paralegal. This court is highly skeptical of this practice, and especially discourages it in chapter 13 cases.").

As in <u>Clinkscale</u>, counsel has not provided "case-specific information upon which the court may approve such fees," and accordingly, the court finds such work cannot be used to justify the no look fee in this case.

#### 7. Administrative/Paraprofessional Time.

The following time entries appear to be time which Fesenmyer billed at a paraprofessional rate (\$75/hour) and which he has described as administrative work: 11/11/21 (.5), 11/15/21 (.1), 11/15/21 (.1), 11/16/21 (.1), 11/16/21 (.1), 11/16/21 (.1), 11/16/21 (.1), 11/16/21 (.1), 11/16/21 (.2). The total of this work is \$300 (4.0 hours at \$75/hour). The court finds these allocations to be reasonable and appropriate. However, the court is shifting two hours from attorney time related to preparation of the schedules (2 x \$75 = \$150) and, thus, adds that time to this category. In addition, the court is also shifting two hours of attorney time for providing the Trustee with annual tax [\*\*59] returns (.5 hrs per year for four years) (\$150) to this category. The total adjusted administrative/paraprofessional time, then, is eight hours.

#### 8. Drafting of Statement in Support.

Fesenmyer billed five hours of time for drafting the Statement in Support. He testified that he spent two hours of that time on the confirmation issues and three hours on supporting his request for the maximum no-look fee in this case. He also billed on February 23, 2022 .5 hours for review of the court's February 23, 2022 order requiring the filing of the Statement in Support. The court does not doubt that he spent time reviewing the court's order and a total of five hours on drafting that brief. However, the Supreme Court has determined that <a href="https://linear.com/hm21">https://linear.com/hm21</a> [ counsel may not be compensated for defending a fee application. <a href="https://linear.com/Baker Botts L.L.P. v. ASARCO LLC">Baker Botts L.L.P. v. ASARCO LLC</a>, 576 U.S. 121, 135, 135 S. Ct. 2158, 192 L. Ed. 2d 208 (2015). Accordingly, the court will credit the two hours spent supporting confirmation of the Plan plus .2 hours for reviewing the court's order relating to that issue, but not the balance of the time. 47

#### F. Summary of Lodestar Calculation

In summary, the court finds the following time and fees as reasonable and necessary: [\*297]

<sup>&</sup>lt;sup>47</sup> For the same reasons, counsels' time incurred in preparing for and participating in the Hearing to defend the Application is not compensable.

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# **Attorney Services**

Preconfirmation General Services
Preparation of Schedules, SOFA, [\*\*60] and Plan
Preparation for and attendance at Creditors' Mtg
Claim Review
Meetings with Debtor
Providing of Annual Tax Returns to Trustee
Review of Trustee's Notice of Intent to Pay Claims and Prep. of Debtor's Certif. re Issuance of Discharge Order
Post-confirmation Monitoring
Totals for Attorney Services

Attorney Hours Adjusted to \$300/hour

Paraprofessional Services
Total Attorney & Paraprofessional Fees

Additional Work for this case — Drafting Statement in support of Confirmation and review of the Court's 2/23/22 Order Total Allowable Fees for this Case on Debtor's Fee Application at \$300/hour

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#### G. Relationship to the District's No-Look Fee

Based upon the evidence introduced at the Hearing, including Fesenmyer's and Dean's testimony and the Fee Itemization provided by Fesenmyer, the court finds that this case presented fewer complexities and required less work than many Chapter 13 cases. The evidence did not support an award of the maximum no-look fee. While a "typical" Chapter 13 case, akin to the mythical jackalope, does not exist, it is clear that some Chapter 13 cases are more involved than others and may justify [\*\*61] a higher fee. Counsel must assess each case on its own to determine whether the maximum flat fee of \$4,350 or a different fee within the allowed range is appropriate. The court's expectation is that counsel will exercise independent professional billing judgment with respect to each case. Likewise, the court will evaluate each case to determine the reasonableness of the fees requested. Although no formula exists, the maximum flat fee may be justified in plans that address mortgage loans, land contracts, significant tax issues, significant secured claim or domestic support obligation arrearages, or other unusual issues requiring special plan provisions. Under any definition, this is not such a case. Instead, the court finds that this is a less complex case involving a single asset - a motor vehicle - with a \$2,000 secured lien. As noted in the Statement in Support, but for the increased values for used motor vehicles at the present time, this case may have been handled as a Chapter 7 case with a significantly lower attorney fee. Other courts have found that under such [\*298] circumstances, a lesser fee is warranted. 48 While the \$4,350 maximum no-look fee is appropriate for some of the Chapter [\*\*62] 13 cases filed in this district, the court finds that it is not appropriate for this case. Rather, the court finds that a no-look fee in the amount of \$3,660 is appropriate for this case, essentially just involving the stretch-out of payments on a motor vehicle. This case can be effectively and efficiently administered within the 10.2 hours of attorney time allowed, and 8 hours of paraprofessional work. This is more time than allocated by other authorities for similar Chapter 13 cases, and the court finds that cases of this nature do not justify an award of the maximum no-look fee.

#### VII. Conclusion

This court must assess the fees requested in the larger framework of all the Chapter 13 and other bankruptcy cases which come before the court and within the strictures of § 330 and Boddy. The no-look fee range allows attorneys to benefit from a streamlined process for fee approval in Chapter 13 cases, but any attorney who elects to use it must be careful to exercise billing judgment and select a flat fee appropriate to the issues in the case. Upon considering the evidence in this case, including Fesenmyer's and Dean's testimony and [\*\*63] the itemization provided by Fesenmyer, this court has concluded that Chapter 13 cases that seek only to stretch out a car payment over an extended period of time or cure a default on a car loan cannot command the maximum no-look fee. Instead, counsel should consider the work required and choose a flat fee supported by the case if they wish to opt-in to the no-look fee structure.

The court finds that, excluding the time spent preparing the Statement in Support, the reasonable compensation for the Debtor's case is \$3,660, based on a reasonable hourly rate of \$300, with 10.2 hours of attorney time and 8 hours of paraprofessional time. However, since the time spent preparing the Statement in Support as relates to

<sup>&</sup>lt;sup>48</sup> See W.D. La. General Order 2022-1 (fee of \$2,250 for cases in which the fees paid into the Trustee by the debtor are less than \$7,200); Bankr. C.D. III. Standing Order Regarding Attorney Fees for Debtor's Counsel in Chapter 13 Cases in the Central District of Illinois (All Divisions) (Jan. 29, 2020) (a fee of \$3,000 for "fee-only" cases and providing that attorneys ". . . are encouraged to [charge less than the no-look fee] in small or simple cases."); *In re Attorney Fees and Administration in Cases in the Canton Court* (Bankr. N.D. Ohio Oct. 8, 2019) (provides \$2,950 for "smaller" cases as those that do not pay either \$5,000 and a 30% dividend, or \$10,000 "without regard to the percentage distribution"); M.D. Fla. Misc. Proc. No. 07-mp-00002-MGW, Doc. 40, ¶ 5 (providing a \$4,500 no-look fee for all services through completion of the case, but noting that "[t]he Court's establishment of a Presumptively Reasonable Fee does not mean that a chapter 13 debtor's attorney cannot agree to represent debtors for a lower fee. The Court urges attorneys to do so in appropriate cases when circumstances suggest that the result will be a less substantial expenditure of the attorney's time.").

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642 B.R. 269, \*298; 2022 Bankr. LEXIS 2153, \*\*63

confirmation of the Debtor's Plan is compensable, including the allocable time spent reviewing the court's February 23, 2022 Order, the court will add an additional \$660 to that amount, and award a total of \$4,320 as allowable compensation for this case.

The court does not find that Fesenmyer provided substandard or deficient services in any manner. To the contrary, Fesenmyer has proven to be a very competent and compassionate practitioner, always striving to provide his clients [\*\*64] with quality, effective services. And the court lauds Fesenmyer for presenting counsel's position on the issues presented by this case and similar cases. The court's decision is not a reflection upon Fesenmyer's representation, [\*299] but rather a determination of the appropriate reasonable compensation for the services provided in this case.

IT IS SO ORDERED.

IT IS SO ORDERED.

Dated: August 1, 2022

/s/ Guy R. Humphrey

Guy R. Humphrey

United States Bankruptcy Judge

**End of Document** 

Local Form 2016-2(a)(i)

# United States Bankruptcy Court EASTERN DISTRICT OF KENTUCKY

# Rights and Responsibilities of Chapter 13 Debtors and Their Attorneys

It is important for debtors who file a bankruptcy case under chapter 13 to understand their rights and responsibilities. It is also important that the debtors know what their attorneys' responsibilities are, and understand the importance of communicating with their attorney to make the case successful. Debtors should know that they may expect certain services to be performed by their attorney, and they should understand that the attorney may charge for those services.

It is also important that attorneys understand what is expected of them if they represent debtors in chapter 13 cases in the Eastern District of Kentucky. An attorney representing a debtor in a chapter 13 case is expected to provide competent representation, which requires the knowledge of chapter 13 law and practice, skill, thoroughness and preparation reasonably necessary for the representation.

In order to assure that debtors and their attorneys understand their rights and responsibilities in the bankruptcy process, the following guidelines provided by the Court are hereby agreed to by the debtors and their attorneys. Unless the Court orders otherwise:

#### THE DEBTOR AGREES TO -

- 1) Discuss with the attorney the debtor's objectives in filing the case, and inform the attorney of any imminent deadlines.
- 2) Provide complete, truthful, and accurate information at all times.
- 3) Timely provide the attorney with all documents requested by the attorney.
- 4) Promptly respond to all communications from the attorney.
- 5) Cooperate with the attorney in preparing all required bankruptcy papers and documents, thoroughly reviewing drafts of documents, and promptly advising the attorney of corrections or additions needed.
- 6) Understand that the trustee might disagree with the attorney, or that the Court might make a ruling adverse to the debtor, and that the attorney cannot guarantee the outcome of the bankruptcy proceedings.
- 7) Comply with all orders of the Bankruptcy Court.
- 8) Make plan payments as required; turn over tax refunds, bonuses, or other lump sum payments if required by the plan or Court order.
- 9) If the plan calls for payments to be made by the debtor directly to any creditor, make all payments in a timely manner.
- 10) Keep records of all plan payments made and all mortgage payments made while in chapter 13.
- 11) Attend the 341 meeting of creditors with proof of social security number and a photo ID.

Local Form 2016-2(a)(i)

- 12) File all tax returns; pay postpetition taxes that come due.
- 13) Keep the attorney and the trustee informed of the debtor's address and telephone number.
- 14) Inform the attorney of any wage garnishments, repossessions, or collection efforts which occur or continue after the filing of the case.
- 15) Contact the attorney promptly if at any time during the case the debtor:
  - a. receives lottery winnings, an inheritance, lawsuit settlements or awards, or other unanticipated money;
  - b. files a lawsuit or consults with another attorney about filing a lawsuit, or is considering a settlement in lieu of filing a lawsuit;
  - c. loses his/her job or has other significant financial problems;
  - d. has questions about or does not understand a matter related to the case;
  - e. wants to sell any property; or
  - f. wants to borrow money, incur debt, or refinance a loan.
- 16) Complete the required instructional course in personal financial management.
- 17) If the debtor has a domestic support obligation, contact the attorney when plan payments have been completed and inform the attorney whether all DSO payments have been made.

#### THE ATTORNEY AGREES TO -

- 1) Meet with the debtor to review the debtor's debts, assets, income and expenses.
- 2) Counsel the debtor regarding the option of filing either a chapter 7 or chapter 13 case, discuss both procedures with the debtor, and answer the debtor's questions.
- 3) Ascertain that the debtor is eligible to file a bankruptcy petition under chapter 13.
- 4) Advise the debtor of the requirements to obtain prepetition credit counseling and a postpetition financial management course from approved providers.
- 5) Obtain from the debtor and review the debtor's deeds, mortgages, tax returns, paystubs, car titles, and other appropriate documentation. If the petition is filed before the documents are received and reviewed, advise the debtor of the potential risks of doing so.
- 6) Timely prepare the debtor's petition, statements, schedules, plan, and related documents. Verify that the information contained therein is consistent with the documentation provided by the debtors.
- 7) Take reasonable steps to verify that all creditors are scheduled and are given appropriate notice
- 8) Review the completed bankruptcy petition, statements, schedules, and all related documents with the debtor; make necessary changes and additions; obtain the debtor's signature; promptly file the petition/statements/schedules.
- 9) Explain what payments will be made directly by the debtor and what payments will be made through the debtor's chapter 13 plan, with particular attention to mortgages, vehicle loan payments, and student loans.
- 10) Explain to the debtor how, when and where to make chapter 13 plan payments; inform the debtor when the plan payment amount changes.
- 11) Advise the debtor of the necessity of maintaining insurance on collateral.

Local Form 2016-2(a)(i)

- 12) Advise the debtor not to sell any property without prior Court approval, or give away any money or property. Advise the debtor not to borrow money, incur debt, or refinance any loans without prior Court approval.
- 13) Advise the debtor of the necessity of filing all tax returns and of paying all postpetition taxes.
- 14) Explain to the debtor which debts will not be dischargeable upon completion of the plan, with particular attention to student loans. If the debtor is not entitled to a discharge, explain the consequences.
- 15) Advise the debtor of the requirement to attend the 341 meeting of creditors, and instruct the debtor as to the date, time and place of the meeting and the necessity of bringing a photo ID and acceptable proof of SSN to the meeting.
- 16) Attend the 341 meeting and any court hearings, either personally or through another attorney.
- 17) If an attorney not employed by debtor's attorney's law firm will be attending the 341 meeting or any court hearing, provide to that attorney sufficient information to allow for proper representation.
- 18) Serve the chapter 13 plan and any amended plan on all creditors and other parties on a timely basis.
- 19) Timely address objections to plan confirmation including the Trustee's Report and Recommendation as to Confirmation, and where necessary, prepare, file, and serve responses or amended plans.
- 20) Where appropriate, prepare, file and serve necessary amended statements and schedules, in accordance with information provided by the debtor.
- 21) Timely review secured and priority claims; timely file amended plans to address claims if necessary; where appropriate, timely file and serve objections to improper or invalid claims. With respect to claims secured by a debtor's residence, timely review Notices of Payment Changes, Notices of Postpetition Fees, Notices of Final Cure Payment, and Responses to Notices of Final Cure Payment; if necessary, take appropriate action.
- 22) Timely file proofs of claims on behalf of creditors if necessary for the protection or benefit of the debtor.
- 23) Upon information received from the debtor, contact creditors who continue to communicate with the debtor after filing, and if necessary, file appropriate pleadings.
- 24) Prepare, file and serve appropriate pleadings necessary to accomplish the goals of the chapter 13 case, including but not limited to:
  - a. motions to extend the automatic stay;
  - b. motions for turnover of repossessed property necessary to an effective reorganization;
  - c. motions to avoid liens on real or personal property;
  - d. motions to deem mortgage current or notices of final cure payment;
  - e. affidavit that debtor is current on post-confirmation DSO payments; and
  - f. financial management certificate.
- 25) Take appropriate action to address a trustee's motion to dismiss for lack of feasibility of the plan.
- 26) Monitor all pleadings filed in the case.
- 27) Communicate with the debtor to discuss pending issues or matters in the case.
- 28) Comply with local and federal rules, and all Court orders.

Local Form 2016-2(a)(i)

#### THE ATTORNEY'S COMPENSATION:

The attorney may accept, in lieu of filing a fee application, a presumptively reasonable fee in an amount up to and including \$3,500, provided the plan is confirmed. This fee includes:

- all services rendered up to and including confirmation of a plan;
- · services rendered in post-confirmation matters referenced above; and
- representation in two (2) post-confirmation matters from the following list:
  - . Responding to a motion to dismiss the case for failure to make plan payments;
  - . Responding to a motion for relief from stay;
  - . Filing a motion to modify the plan to address a delinquency (including a motion to suspend plan payments);
  - . Addressing a trustee's motion to modify the plan;
  - . Filing an application to incur debt; or
  - . Filing a motion to sell property.
- all expenses incurred in connection with the above, excluding filing fees and reimbursement of actual costs for required prepetition credit counseling.

The presumptively reasonable fee does not include:

- · Defense of any adversary proceeding;
- Representation in any unanticipated litigation or contested proceedings arising from the debtor's failure to provide complete and accurate information to the attorney;
- Representation in any matter not otherwise addressed herein.

The attorney's representation of the debtor continues through the time the debtor receives a discharge, the case is dismissed, the case is converted, or the court approves the attorney's withdrawal from representation (whether based on a request of the attorney or of the debtor). Therefore, the debtor's attorney is expected to provide, in addition to the services described herein, such other legal services as are necessary for the administration of the chapter 13 case. However, the attorney may seek additional compensation for such services.

Any compensation sought in excess of the presumptively reasonable fee of \$3,500 must be requested by filing an application for compensation pursuant to the applicable Federal Rules of Bankruptcy Procedure and applicable Local Rules.

Dated:			
Debtor			

	Local Form 2016-2(a)(i)
ATTORNEY FOR DEBTOR	
DATED:	

# CHAPTER 13 SYMPOSIUM 2021

# SESSION FOUR

# My Clients Love Me but Hate Each Other

**Moderator:** Marie-Ann Greenberg, Esq. - Chapter 13 Standing Trustee Newark Vicinage **Speakers:** Hon. Rosemary Gambardella, Michael A. Artis, Esq., Joseph M. Casello, Esq. & Virginia E. Fortunato, Esq.

Delve into and consider your ethical obligations when you have a joint bankruptcy case where after filing your clients initiate divorce proceedings. What to consider, what steps to take, and who can you represent, if anyone?

## Rules of Professional Conduct

# I. RPC 1.7 Conflict of Interest: General Rule

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

- (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (3) the representation is not prohibited by law; and
- (4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

# Rule 1.7 prohibits two types of representations:

- 1. Those will be directly adverse to another current client of the lawyer;
- 2. Those involving significant risk that the representation will be materially limited by the lawyers responsibility to another person or former client to third party by a personal interest of the lawyer.

The Rule does not specifically ban this representation; however, the representation will be permitted if four conditions are satisfied:

- 1. Each affected client gives informed consent, confirmed in writing, after full disclosure and consultation;
- 2. The lawyer reasonably believes that the lawyer will be able to provide confident and diligent representation to each client;
  - 3. The representation is not prohibited by law; and
- 4. The representation does not involve the assertion of claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

## II. What is Informed Consent?

In 2004, the New Jersey Supreme Court adopted the recommendation the Pollock Commission and added RPC 1.0 to the Rules of Professional Conduct. Subsection (e) defines **informed consent** to mean "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 a reasonably available alternative to the proposed course of conduct." RPC 1(e)

The New Jersey Supreme Court has held an "attorney should be able to advise the client in such a way as to protect the client's interests, utilizing his professional training, ability and judgment to the utmost. Consequently, if any conflicting interest could arise which would stand in the way of that kind of unstinting zeal, then the client must be so informed." In re: Dolan 76 N.J. 1,9 (1978). The Court went on to state that it will not tolerate client consents to a conflict of interest "which are less than knowing, intelligent and voluntary." Dolan at 13. A lawyer claiming that his or

her client consented knowingly and voluntarily to a conflict must show that he or she consulted with the client and informed the client fully of any potential problems inherent in the conflicting representation.

#### A. When Given

The lawyer must demonstrate that the consultation took place at a stage in the representation that allowed the client sufficient time to consider the information supplied by the lawyer and to reflect on his or her options. <u>Dolan</u> at 13. In Dolan consent was obtained on the day of a closing. The Supreme Court found that the consent was obtained at 11<sup>th</sup> hour and "amounted to little more than a perfunctory effort" to comply with the requirement.

#### B. What Needs to Be Disclosed?

In a Chapter 13 setting, once joint debtors have decided to separate or divorce, what issues must be addressed with both clients?

- 1. Potential for discharging debts owing to one another
- 2. Ability to fund a plan if one party is required to pay support to the other;
- 3. Privilege issues;
- 4. Costs of separate representation;
- 5. Potential for severing estates:
  - (a). Review of Claims filed
    - (b). Potential Conversion to Chapter 7

# III. Reasonable Beliefs of the Lawyer

The rules of professional conduct define reasonable and reasonable belief. Reasonable when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer (RPC 1.0 (i)). Reasonable Belief when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable (RPC 1.0 (j)). These paragraphs place the responsibility on the lawyer to reasonably believe that neither representation will be adversely affected. The lawyer must actually believe that each client can be represented competently and under the circumstances, a reasonable prudent and competent lawyer would hold the same belief. "The lawyer cannot rely upon a subjective belief ...; a reasonably prudent lawyer must be able to draw the same conclusion under the circumstances." Debevoise Committee Report.

# IV. The Representation Is Not Prohibited By Law

Rule 2014 of the Federal Rules of Bankruptcy Procedure do not appear to prohibit representation under these circumstances. The Rule requires a party seeking employment under sections 327, 1103 or 1114 of the Code to make application. Debtor's attorneys in Chapter 13 cases are not retained pursuant to section 327 so it appears that rule may be inapplicable. Rule 2016(b) does not appear to prohibit the representation as it only requires disclosure of compensation.

# V. Representation Does Not Involve the Assertion of a Claim by One Client Against Another Client

This final condition makes it clear that a lawyer may not represent the parties on opposite sides of the litigation matter even with the consent of clients. This is perhaps the most troubling to a bankruptcy attorney. Given that upon the filing of a divorce complaint, one client may seek pendente lite support or assert equitable distribution claims or potentially TEVIS claims against the other party, query whether those post-petition claims fall within potential claims that could be discharged in a bankruptcy case and whether those claims would trigger Rule 1.7 (b)(4) in preventing the attorney from continuing representation of both parties.

#### CASELAW & OTHER HELPFUL RESOURCES TO CONSIDER

<u>See Collier, Family Law and the Bankruptcy Code</u> 1-77 - 80 ¶ 1.08 - Ethics of Representing Both Spouses in Bankruptcy (2010). "Attorneys in bankruptcy cases are held to very high standards of disclosure and loyalty and, as one court pointed out, 'the Bankruptcy Code does not contain provisions allowing a waiver of [conflict of interest] standards, as might be available outside bankruptcy.'" Id. at 1-80.

<u>In re Carr</u>, 224 B.R. 785 (Bankr. D. Idaho 1998) (hearing needed to determine if attorney for debtor's former spouse, who was creditor of the debtor, had conflict that would preclude representing trustee; <u>In Re Vann</u>, 128 B.R. 285, 288-290 (Bankr. D. Colo. 1991), *aff'd in part and remanded for limited purpose*, 136 B.R. 863 (D. Colo. 1992), *aff'd*, 986 F.2d 1431 (10<sup>th</sup> Cir. 1993) (table) (text 1992 U.S. App. Lexis 34727) (attorney ordered to disgorge almost \$125,000.00 in fees and costs for representing the debtor

and non-debtor spouse after spouses were separated and had adverse interests in bankruptcy case).

<u>See Bd. Of Attys. Prof'l Responsibility v. Zablocki</u>, (<u>In re Zablocki</u>) 2001 WI 115, 247 Wis. 2d 994, 635 N.W.2d 288 (2001) (attorney's license suspended for representing wife if divorce, and in representing both parties in joint bankruptcy case without obtaining waiver of conflict of interest from each).

<u>In re Rusty Jones, Inc.</u>, 134 B.R. 321, 346 (Bankr. N.D. Ill. 1991) (conflicts of interest standards are applied more strictly in bankruptcy than in other areas of law).

# Lundin On Chapter 13 § 26.1 Special Problems for Lawyers in Chapter 13 Cases

14. "Debtors' counsel must be especially sensitive to the conflict issues that arise in the not so uncommon disintegration of a joint Chapter 13 case when spouses separate for divorce." See FN 31. In re Carpenter, No. 10-13256-PB11, 2011 WL 250746 (Bankr. S.D. Cal. Jan., 24, 2011) (Since debtor's spouse's case had been dismissed based on statutory debt limits, any potential conflict for debtor's firm representing both spouses evaporated; law firm was not disqualified in instant case.); In re Josephson, No. 04-60004-13, 2008 WL 113861 (Bankr. D. Mont. Jan. 9, 2008) (Continuing to represent joint debtors after divorce and filing plan amendments without obtaining one debtor's signature or consent violated Bankruptcy Rule 9011; half of fee received was disgorged).

https://lundinonchapter13.com/NACTT2020/Chapter13CaseLawUpdateSection/26.

# 2007 Formal Ethics Opinion 7 - Adopted July 13, 2007

<u>Continuing Chapter 13 Representation of Husband and Wife After Divorce</u> - Opinion rules that a lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied.

# 2000 Formal Ethics Opinion 2: North Carolina - Adopted January 18, 2001

# Representation of remaining spouse after filing joint Chapter 13 Bankruptcy Petition - Opinion rules that a lawyer who represented a husband and wife in a joint Chapter 13 Bankruptcy case may continue to represent one of the spouses after the other spouse disappears or becomes unresponsive, unless the attorney is aware of any fact or circumstances which would make the continued representation of the remaining spouse an actual conflict of interest with the prior representation of the other spouse.

# Freivogel on Conflicts: Waiver/Consent Forms

http://www.freivogelonconflicts.com/waiverconsentforms.html - Page 6 of the article provides a sample form re: estate planning - Simultaneous Representation of Husband and wife which could easily be adapted to joint representation of two spouses.

In re Star Broadcasting, Inc., 81 B.R. 835, 17 B.C.D. 1 (Bankr. N.J. 1988) ("In addition to the standards in Section 327(a) and case law interpreting that section, many courts have relied on the Rules of Professional Conduct for guidance in determining whether a conflict of interest exists in a law firm's representation of parties to a bankruptcy proceeding.") ("This court recognizes that it would be unreasonable and unnecessarily cumbersome to always require different counsel in related Chapter 11 cases, however, whether such an actual disqualifying conflict exists must be considered in light of the particular facts of each case." (citation omitted.)

<u>See In re Nolan</u>, Case No. 04-35987, 1, 15, 17 (Bankr. D.N.J. July 10, 2006) (unpublished opinion) (dual representation of husband and wife in separate and simultaneous filings). "This court recognizes that the potential for conflicts in dual representation alone is not enough to find that the representation is improper." <u>See In re BH&P, Inc.</u>, 949 F.2d 1300, 1316-17 (3d Cir.1991) (In a case addressing conflict of interest issues with regards to estate Trustee and Trustee's professionals, Third Circuit stated: "denomination of a conflict as 'potential' or 'actual' and the decision concerning whether to disqualify a professional based upon that determination in situations not yet rising to the level of an actual conflict are matters committed to the bankruptcy court's sound exercise of discretion."). "Attorneys often represent both husband and wife in separate bankruptcy filings and may even represent ex-spouses in their separate filings without a conflict arising. However, when the facts of the case show that there an actual conflict, such representation is problematic. And while it is also true that in certain situations a conflict may be waived by the parties after full disclosure and informed consent, waiver of a conflict is not available in all instances. *RPC* 1.7(b)."

"These same concerns are present when an attorney seeks to represent ex-spouses filing separate bankruptcy petitions. One spouse is likely to have a claim against the other for money owed pursuant to the divorce agreement. In such a situation, the conflict could not be waived since RPC 1.7(b)(4) requires that 'the representation does not involve the assertion of a claim by one client against another client.'"

A Caution about Severing Your Chapter 13 Case from Your Spouse. Blog Post by the Law Offices of Chance M. McGhee, 8207 Callaghan Road, Suite 250, San Antonio, TX 78230. The article provides a very good general discussion re: Conflicts of interest from coming divorce, the need to withdraw or require independent advice, and severing cases.

https://www.chancemcgheelaw.com/sanantoniobankruptcyblog/2017/09/01/a-caution-about-severing-your-chapter-13-case-from-your-spouse/

# APPLICABLE BANKRUTPCY CODE SECTIONS

- 1. Obligations under 11 U.S.C §329 and F.R. Bankr. P. 2016(b):
  - a. fees must be reasonable, and value must be given to client;
  - b. pursuant to D.N.J LBR 2016-5(b), a chapter 13 debtor's attorney may charge a standard fee of up to \$4,750, and supplemental fees must be sought by fee application using the appropriate form;
  - c. an attorney must file with the petition Local Form *Disclosure of Chapter 13 Debtor's Attorney Compensation* within 14 days after the order for relief and must include whether the attorney has shared or agreed to share the compensation with any other entity; and
  - d. a supplemental attorney disclosure statement must be filed and transmitted to the U.S. Trustee within 14 days after any payment not previously disclosed.
- 2. Obligations under the "Debt Relief Agency" Code Provisions:
  - a. 11 U.S.C §526 restrictions on debt relief agencies;
  - b. 11 U.S.C §527- disclosures; and
  - c. 11 U.S.C §528- requirements for debt relief agencies:
    - i. Yes, you must have a written contract or retainer agreement; and
    - ii. Yes, you must have the informed consent of each client in writing if you want to continue representation of husband and wife after divorce.
- 3. Obligations pursuant to Rule 9011:
  - a. an attorney must make a reasonable inquiry into the client's financial affairs and must research the facts and the law;
- 4. Obligations pertaining to CM/ECF procedures and the attorney's duty to obtain a wet signature on all electronically filed documents;
- 5. State ethical obligations pursuant to State Rules of Professional Conduct
  - a. RPC 1.1 competency;
  - b. RPC 1.3 diligence;
  - c. RPC 1.4- communication;
  - d. RPC 1.7 conflict of interest;
  - e. RPC 3.3 candor towards the tribunal;
- 6. Other Issues that may arise:
  - a. D.N.J. LBR 1015-1. Joint Administration
  - b. Should the joint case be severed?
  - c. Should the joint case be converted?
  - d. Should the joint case be dismissed?

Case 23-02038

Filed 08/02/23

UNITED STATES BANKRUPTCY COURT 1 EASTERN DISTRICT OF CALIFORNIA 2 3 In re: 4 MEGAN CHRISTINE FIEDLER, Case No. 23-20862 5 Debtor. Adv. Pro. No. 2023-02038-C 6 7 THE GOLDEN ONE CREDIT UNION, a California Corporation, 8 Plaintiff, 9 MEGAN CHRISTINE FIEDLER, an 10 individual, 11 Defendant. 12 13 ORDER TO SHOW CAUSE 14 1.5 This Order directs Plaintiff The Golden One Credit Union, Karel Rocha, Esq., and the law firm of Prenovost, Normandin, Dawe 17 & Rocha, each to SHOW CAUSE why Federal Rule of Bankruptcy 18 Procedure 9011(b) was not violated by the filing of the Complaint 19 in this adversary proceeding and why sanctions should not on that 20 account be imposed against The Golden One Credit Union, Karel Rocha, and Prenovost, Normandin, Dawe & Rocha. 21 22 This Order also directs The Golden One Credit Union to SHOW CAUSE why this court should not make an award under 11 U.S.C. 23 24 § 523(d) to Defendant, Megan Christine Fielder. 25 Federal Rule of Bankruptcy Procedure 9011(b) 26 27 The requirements of Rule 9011(b) have been explained at length by this court in In re Estate of Taplin, 641 B.R. 236, 28

Doc 20

Filed 08/01/23 Case 23-02038 Doc 20

245-52 (Bankr. E.D. Cal. 2022), the analysis of such case is incorporated herein.

The attorney filing the complaint, Karel Rocha, Esq., certified that he had made "an <u>inquiry reasonable under the circumstances</u>" before filing the complaint. Fed. R. Bankr. P. 9011(b).

Karel Rocha further certified that the factual contentions in the Complaint have evidentiary support. Fed. R. Bankr. P. 9011(b)(3).

Karel Rocha further certified that the legal contentions in the Complaint were warranted by existing law or nonfrivolous argument for change to existing law. Fed. R. Bankr. P. 9011(b)(2).

Karel Rocha further certified that the Complaint was not filed for an improper purpose. Fed. R. Bankr. P. 9011(b)(1).

#### The Filed Complaint

This adversary proceeding alleging one count of nondischargeable fraud under 11 U.S.C. § 523(a)(2) was filed April 25, 2023, against the Defendant chapter 7 debtor with respect to a \$9,000 loan made November 3, 2022, for the stated purpose of refinancing credit card debt.

The Defendant's chapter 7 case was filed March 21, 2023. The Meeting of Creditors was April 18, 2023. The deadline for filing nondischargeability actions was fixed for June 20, 2023.

The Complaint filed April 25, 2023, alleged in 22 paragraphs that because no payment was made on December 20, 2022, when the first payment came due, it follows that the debtor must have

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committed actual fraud at the inception of the loan back on November 3, 2022, by making false representations regarding her intent to make payments. It is alleged she knew on November 3, 2022, that her representations regarding intent to pay were false. Plaintiff further alleged that the debt is not a "consumer debt" as defined in the Bankruptcy Code.

The defendant, representing herself, filed on May 8, 2023, a document titled "Defendant's Statement of Undisputed Facts in Support of Her Motion for Bankruptcy," which this court later deemed to constitute an Answer. Dkt. #8.

She explained that she obtained the \$9,000 loan on advice of one of Plaintiff's loan officers who represented that it would help her resolve her \$11,000 credit card debt and that she immediately paid all the loan proceeds to her credit card. By mid-December, however, after she had to incur more credit card debt to avoid a default on another debt (apparently her car loan owed to Plaintiff, which is the only secured debt identified on the schedules), she explained that she realized that Plaintiff's advice had not helped solve her financial problems and, in mid-December, she began to explore bankruptcy. The bankruptcy attorney she consulted in December advised her to stop paying unsecured debt so as to save funds to be able to pay the bankruptcy filing fee and the bankruptcy attorney's fee.

#### Proceedings

This court held a pretrial status conference on June 28, 2023.

At the conference, Plaintiff' counsel, aside from the naked

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fact of subsequent nonpayment when due on December 20, 2022, upon inquiry from this Court was not able to point to any evidence of fraud at the inception of the loan on November 3, 2022.

Concluding that discovery would not be warranted on this \$9,000 unsecured debt, and there having been no contention that a reasonable opportunity for further investigation or discovery was either necessary or appropriate, this court dispensed with other pretrial procedures and set trial for July 18, 2023.

At trial, Plaintiff would be able to proffer its evidence (presumably, at a minimum, a Credit Union witness and the Credit Union loan file, which it should have identified as part of its Rule 9011 "inquiry reasonable under the circumstances"). Likewise, Defendant could testify under oath, be cross-examined, and proffer other pertinent evidence, so that this court could determine whether to believe her assertions in defense.

Three business days after the pretrial status conference, Plaintiff filed a Request for Dismissal on July 5, 2023.

This court dismissed the adversary proceeding on July 7, 2023, reserving jurisdiction over issues under 11 U.S.C. § 523(d) and over issues arising under Federal Rule of Bankruptcy Procedure 9011. Dkt #17.

#### Rule 9011 Issues

The timing of the Request for Dismissal invites three inferences: (1) that the Complaint was not well-founded; (2) that there was not a pre-filing "inquiry reasonable under the circumstances" in light of the timing the filing of the Complaint 56 days before the filing deadline; and (3) that the Complaint

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was filed for the improper purpose of implementing a strategy of suing impecunious consumers on small claims on little or no pretext so as to extract payments by way of default judgment or "settlement" in lieu of trial because of the high transaction costs of defending litigation.

The 22 paragraph Complaint alleging fraud specifies only two concrete facts: (1) the \$9,000 loan on November 3 and (2) nonpayment of the first installment on its December 20 due date.

Those two factual allegations, without more, amount to nothing more than one of the most elementary logical fallacies in the books - post hoc ergo propter hoc (because this, then that: otherwise stated, George Washington married Martha Custis and, in due course, became Father of His Country).

Not only is Plaintiff's sole reliance on the naked post-hocergo-propter-hoc fallacy insulting to a trained legal mind, it flunks the specificity pleading requirements of Rule 7009 and, even if accepted as true by a trier of fact, could not plausibly support entry of a default judgment for fraud. Fed. R. Bankr. P. 7009, incorporating Fed. R. Civ. P. 9(b).

# <u>Inquiry Reasonable Under the Circumstances</u>

The fact that only two concrete facts that could be mustered to support the Complaint were fallacious per se on a Complaint that Rule 7009 requires be pled with specificity suggests that Rule 9011 was violated by not making an "inquiry reasonable under the circumstances" required by Rule 9011.

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Improper Purpose

The fact that the only two concrete facts alleged cannot support a cause of action for nondischargeable fraud likewise supports an inference of improper purpose of trying to bludgeon payment in "settlement" on a flimsy cause of action so lacking in merit that it could not support a default judgment.

## Unwarranted Legal Contention

Paragraph 14 of the Complaint alleges: "The Defendant's obligations to Plaintiff are not consumer debts as defined in 11 U.S.C. § 101(8) to the extent that they were based upon fraud and willful, malicious, and tortious injury to Plaintiff."

This court is unaware of any support in decisional law that a debt incurred "primarily for a personal, family, or household purpose" is nevertheless not a "consumer debt" if motivated by fraudulent intent. 11 U.S.C. § 101(8). Hence, it appears that paragraph 14 is not warranted by existing law.

To be sure, Rule 9011(b)(2) tolerates "nonfrivolous argument for change to existing law" as a safe harbor. But it does not tolerate frivolous argument.

In context paragraph 14 appears to serve only the purpose of attempting to elude Plaintiff's potential liability for fees and costs under of 11 U.S.C. § 523(d) that follow from a § 523(a)(2) fraud complaint on a "consumer debt" that winds up being discharged and in which the Plaintiff's position is not "substantially justified."

The purpose of paragraph 14 appears to be frivolous because any consumer debt that is judicially determined to "based upon

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fraud and willful, malicious, and tortious injury to Plaintiff" in a § 523(a) nondischargeability action will, by definition, be excepted from discharge. Hence, the allegation of paragraph 14 serves no purpose, except possibly to intimidate (which, itself, is an improper purpose). In short, it appears unlikely that paragraph 14 could qualify for the safe harbor as a nonfrivolous argument for change to existing law.

### Considerations for Rule 9011 Sanctions

Rule 9011(b) requires all litigants to "stop and think" before making legal or factual contentions. Estate of Taplin, 641 B.R. at 246; In re LeGrand, 638 B.R. 151, 156 (Bankr. E.D. Cal. 2022); Adv. Comm. Note to 1997 Amendment to Rule 9011.

Rule 9011(c) exposes attorneys, law firms, and parties to an "appropriate sanction" for violations of Rule 9011(b). Fed. R. Bankr. P. 9011(c)(2). "Appropriate sanctions" under Rule 9011(c)(2) include monetary or nonmonetary sanctions, as well as attorneys' fees and other expenses.

Although represented parties, such as Plaintiff in this case, are protected from monetary sanctions for violations of Rule 9011(b)(2), they are not protected from nonmonetary sanctions for such violations. Fed. R. Bankr. P. 9011(c)(2)(A).

Represented parties, however, are not protected from monetary sanctions for violation of Rule 9011(b)(1).

Any party may be held accountable under Rule 9011(c) if it is "responsible for the violation" of Rule 9011(b).

As the Complaint was voluntarily dismissed by Plaintiff before this Order to Show Cause is being issued, this court will

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be limited to nonmonetary sanctions for Rule 9011 violations. Fed. R. Bankr. P. 9011(c)(2).

#### 11 U.S.C. § 523(d) Award

When a nondischargeability action is filed under § 523(a)(2) with respect to a "consumer debt" as defined at § 101(8) but does not result in excepting the debt from discharge, the court "shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified" unless "special circumstances would make an the award unjust." 11 U.S.C. § 523(d) (emphasis supplied).

When this court dismissed the Complaint, it expressly reserved jurisdiction over issues under § 523(d). Accordingly, it intends to consider whether the position of Golden One was "substantially justified" and whether "special circumstances" would make unjust an award to the Defendant under that provision.

It is noted that the Defendant has supplied evidence of her hourly rate of income from employment from which this court plausibly could estimate the time, effort, and cost entailed in preparing her written response to the complaint and travel time entailed in traveling to the Sacramento courthouse to represent herself in her defense.

She is welcome, but not required, to provide more specific information about her costs. For example, she may have incurred time to consult with her counsel in her parent chapter 7 case about how best to defend herself in this adversary proceeding; while local rules permit debtors' counsel, as here, to exclude

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adversary proceedings for their attorney-client contracts, conscientious counsel nevertheless often devote some time to advising clients how to represent themselves. If she can document any such time, this court will entertain it if it makes a § 523(d) award.

Similarly, the Defendant is welcome, but not required, to attend the hearing that will occur on the question of whether to make a § 523(d) award. If she chooses to do so, then her time and expense in so doing would be eligible for inclusion. If her bankruptcy counsel can provide evidence documenting time devoted to advising the Defendant about this adversary proceeding, such evidence will be considered.

### **Hearing**

In view of the foregoing, IT IS ORDERED THAT Karel Rocha and the law firm of Prenovost, Normandin, Dawe & Rocha, and an Officer of Plaintiff Golden One Credit Union shall appear in person in the Sacramento Courtroom of the undersigned Bankruptcy Judge on August 22, 2023, at 10:00 a.m. to SHOW CAUSE why they have not violated Federal Rule of Bankruptcy Procedure 9011(b) in this adversary proceeding and why sanctions limited to "what is sufficient to deter repetition of such conduct or of comparable conduct by others similarly situated" per Rule 9011(c)(2) should not be imposed.

AND, IT IS ORDERED THAT Plaintiff Golden One Credit Union, represented by one of its Officers and by counsel, shall appear in person in the Sacramento Courtroom of the undersigned Bankruptcy Judge on August 22, 2023, at 10:00 a.m. to SHOW CAUSE

### **2024 SOUTHEAST BANKRUPTCY WORKSHOP**

Filed 08/01/23 Case 23-02038 Doc 20 why this court should not make an award under 11 U.S.C. § 523(d). There will be no remote appearances by Zoom, Court Call, or other remote means and no appearance by an appearance attorney. The Golden One Credit Union must attend in the person of an Officer it designates under the standards specified by Federal Rule of Civil Procedure 30(b)(6) for deposition of a party-opponent. The Defendant is permitted, but not required, to attend. Any expense she incurs in that respect, as well as any expense her bankruptcy counsel can document, will be eligible for inclusion in any § 523(d) award. IT IS: SO ORDERED. Dated: August 02, 2023 United States Bankruptcy Judge 

# AMERICAN BANKRUPTCY INSTITUTE

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1	INSTRUCTIONS TO CLERK OF COURT SERVICE LIST	
2	The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:	
4 5 6	Karel Rocha 2122 N. Broadway Suite 200 Santa Ana, CA 92706	
7	Prenovost, Normandin, Dawe & Rocha 2122 N. Broadway Suite 200 Santa Ana, CA 92706	
9 10 11	Courtney Linn The Golden 1 Credit Union P.O. BOX 15966 SACRAMENTO, CA 95852	
12	Megan Christine Fiedler 2949 Alder Drive Camino, CA 95709	
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#### 2024 SOUTHEAST BANKRUPTCY WORKSHOP

Continuing Chapter 13 Representation of Husband and Wife after Divorce (North Carolina Ethics Opinions, 2007)

# Continuing Chapter 13 Representation of Husband and Wife after Divorce

Adopted: July 13, 2007

Opinion rules that a lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied.

### Inquiry #1:

Husband and Wife hire Attorney A to file a Chapter 13 bankruptcy petition. While the proceeding is pending, Husband and Wife separate and ultimately divorce. Husband and Wife want Attorney A to continue to represent them jointly and they want to continue to pay creditors pursuant to the Chapter 13 plan. Husband and Wife have reached an agreement on how they will make the mortgage payment and the Chapter 13 plan payments. They believe that they can resolve amicably any other issues that may come up in the case. Attorney A has discussed the potential conflict of interest that might arise due to his common representation. Husband and Wife indicated that they cannot afford to hire other lawyers and that they consent to the common representation.

May Attorney A continue to represent Husband and Wife under these circumstances until an issue upon which they cannot agree arises?

### Opinion #1:

Yes. Rule 1.7(b) permits a lawyer to represent two or more clients, despite a concurrent conflict of interest, provided the following conditions can be met:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Assuming the common representation is not prohibited by bankruptcy law and Husband and Wife do not, at this juncture, have any claims to assert against each other in the bankruptcy proceeding, Attorney A may proceed with the common representation provided he reasonably believes that he



#### AMERICAN BANKRUPTCY INSTITUTE

Continuing Chapter 13 Representation of Husband and Wife after Divorce (North Carolina Ethics Opinions, 2007)

can provide competent and diligent representation to both Husband and Wife and he has the informed consent of both clients.

### Inquiry #2:

Should Attorney A get something in writing about the issue?

### Opinion #2:

Yes, the consent of each client must be confirmed in writing. Rule 1.7(b)(4). While the signature of the client on the written confirmation of consent is not required by the rule, asking a client to sign a statement confirming consent may help the client to understand the importance of the lawyer's disclosures relative to the conflict and the meaning of the consent.

### Inquiry #3:

The law of privilege and disclosure requirements for a bankruptcy proceeding may be different than the ethical constraints on Attorney A arising out of the Rules of Professional Conduct. In light of this, is Attorney A required to ask the bankruptcy court for permission to stay in the case?

### Opinion #3:

Whether the rules of the bankruptcy court or federal bankruptcy law require Attorney A to obtain the consent of the court is a question of law outside the purview of the Ethics Committee. Attorney A must examine the court rules and federal law to determine whether the court's consent is required. If it is not required, Attorney A may proceed with the common representation subject to the conditions set out in Opinion #1.

To obtain the informed consent of clients to a common representation, a lawyer must "communicate adequate information and explanation appropriate to the circumstances." Rule 0.1(f)(definition of "informed consent.") In the current situation, Attorney A must explain to Husband and Wife the effect, if any, that the law of privilege and disclosure requirements in a bankruptcy proceeding might have on the common representation. In addition, Attorney A must inform each client of the right to information about the representation. As noted in comment [31] to Rule 1.7, "[t]he lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." See 2006 FEO 1.



# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 492

June 9, 2020

# Obligations to Prospective Clients: Confidentiality, Conflicts and "Significantly Harmful" Information

A prospective client is a person who consults a lawyer about the possibility of forming a client-lawyer relationship. Model Rule 1.18 governs whether the consultation limits the lawyer or the lawyer's firm from accepting a new client whose interests are materially adverse to the prospective client in a matter that is the same or substantially related to the subject of the consultation, even when no client-lawyer relationship results from the consultation. Under Model Rule 1.18 a lawyer is prohibited from accepting a new matter if the lawyer received information from the prospective client that could be significantly harmful to the prior prospective client in the new matter. Whether information learned by the lawyer could be significantly harmful is a fact-based inquiry depending on a variety of circumstances including the length of the consultation and the nature of the topics discussed. The inquiry does not require the prior prospective client to reveal confidential information. Further, even if the lawyer learned information that could be significantly harmful to the prior prospective client in the new matter, the lawyer's firm can accept the new matter if the lawyer is screened from the new matter or the prospective client provides informed consent, as set forth in Model Rule 1.18(d)(1) and (2).

#### I. Introduction

Prospective clients often consult with a lawyer in anticipation of forming a client-lawyer relationship. These consultations give clients and lawyers an opportunity to get to know one another, to ascertain whether they will like working together, and to discuss preliminary matters like conflicts, fee arrangements, and the client's legal needs. During these consultations it is likely that the prospective client will reveal information necessary for each to decide whether to proceed. Some of that information could create a conflict of interest that would prevent the lawyer from undertaking a future representation.

This opinion provides guidance on the types of information that could give rise to such disqualifying conflicts, what the prospective client should be asked to demonstrate in support of a claim that the lawyer has a conflict of interest in a subsequent matter, what precautions the lawyer and the lawyer's firm might take to avoid receiving disqualifying information during an initial consultation with a prospective client, and how to minimize the consequences of receiving such information.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2019. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

<sup>&</sup>lt;sup>2</sup> Unless otherwise indicated, "prospective client" (sometimes referred to in case law as a "former prospective client") refers to an individual who has consulted with the lawyer about the possibility of forming a client-lawyer relationship with respect to a matter, but no client-lawyer relationship is subsequently established.

Prior to 2002, the Model Rules did not address obligations owed to individuals who consulted with a lawyer but never established a client-lawyer relationship with the lawyer.<sup>3</sup> In 2002, as part of the Ethics 2000 amendments, the ABA adopted Model Rule 1.18, which establishes a lawyer's obligations to a "prospective client." Earlier, the ABA had provided guidance on ethical obligations to prospective clients in Formal Opinion 90-398 (1990).<sup>5</sup>

### II. Analysis

### A. Who is a "Prospective Client"?

Under Model Rule 1.18(a), a "prospective client" is "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." Comment [2] to Model Rule 1.18 explains:

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.<sup>7</sup>

Comment [2] clarifies, however, that not every contact between a lawyer and an individual regarding legal services makes that individual a "prospective client:"

[A] consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."

<sup>&</sup>lt;sup>3</sup> See, e.g., ART GARWIN, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013 (2013).

<sup>&</sup>lt;sup>4</sup> *Id.* at 397-406. The only change to Rule 1.18 after 2002 was made in 2012, when the word "consults" was substituted for "discusses" in Rule 1.18(a) and in the Comments. This was not intended as a substantive change. The amendment clarified that communications that could constitute a "discussion" or a "consultation" could be written, oral or electronic. *See* MODEL RULES OF PROF'L CONDUCT R. 1.18 cmt. [2] (2019) [hereinafter MODEL RULES]; ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 309 (9th ed. 2019)

<sup>&</sup>lt;sup>5</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 90-358 (1990) ("Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation or use under Model Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client.").

<sup>&</sup>lt;sup>6</sup> MODEL RULES R. 1.18 (2019). As discussed below a client-lawyer relationship may be formed during the consultation. The lawyer should take the precautions discussed in this opinion to avoid that result if that is not the lawyer's intention.

<sup>&</sup>lt;sup>7</sup> MODEL RULES R. 1.18(b) cmt. [2].

Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

Thus, a person who communicates information unilaterally to a lawyer after reviewing the lawyer's website or other advertising describing the lawyer's education and experience does not *for that reason alone* become a "prospective client" within the meaning of Model Rule 1.18.9 Additionally, as the last sentence of Comment [2] notes, if the person consulting with the lawyer does not have a reasonable intent to retain the lawyer, but instead is merely attempting to disqualify the lawyer from representing anyone else in the matter, the person is not a "prospective client." <sup>10</sup>

### **B.** The Obligation to Protect Confidential Information

Model Rule 1.18(b) imposes a duty of confidentiality with respect to information learned during a consultation, even when no client-lawyer relationship ensues. It provides:

Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."<sup>11</sup>

This duty includes protecting all information learned during the consultation, unless the lawyer has the informed consent of the prospective client to condition the consultation on the lawyer *not* maintaining the confidentiality of the information communicated. As stated by Comment [5] to Model Rule 1.18, "[a] lawyer may condition a consultation with a prospective

<sup>&</sup>lt;sup>8</sup> *Id*.

<sup>&</sup>lt;sup>9</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 (2010) ("not all initial communications from persons who wish to be prospective clients" result in such status); Ariz. State Bar, Advisory Op. 02-04 (2002) (no duty of confidentiality owed to person who unilaterally sends unsolicited information to a lawyer); Fla. Bar, Advisory Op. 07-3 (2009) (a person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information); San Diego County Bar Ass'n, Advisory Op. 2006-1 (2006) (no duty of confidentiality owed to someone who sends information to a lawyer after obtaining the email address of the lawyer from a state bar website); Va. State Bar Op. 1842 (2008) (lawyer has no duty of confidentiality to person who unilaterally transmits unsolicited information in voice mail or email); Wis. State Bar Prof'l Ethics Comm., Formal Op. EF-11-03 (2011) (person seeking representation who sends unsolicited confidential information through email to a lawyer does not thereby establish a client-lawyer relationship or a duty of confidentiality).

<sup>&</sup>lt;sup>10</sup> Bernacki v. Bernacki, 1 N.Y.S.3d 761, 764 (Sup. Ct. 2015) (husband in a divorce sent an email to his wife titled "Attorneys Which [sic] Whom I Have Sought Legal Advice" and then listed "twelve of the most experienced matrimonial attorneys in the county," each of whom the husband asserted "would conflict themselves out" or be subject to disqualification); RESTATEMENT OF THE LAW (THIRD), THE LAW GOVERNING LAWYERS § 15 cmt. c [hereinafter RESTATEMENT THIRD] ("a tribunal may consider whether the prospective client disclosed confidential information to the lawyer for the purpose of preventing the lawyer or the lawyer's firm from representing an adverse party rather than in a good faith endeavor to determine whether to retain the lawyer").

MODEL RULES R. 1.18(b). See also N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1 (2013) (discussing the scope of protected information under Rule 1.18(b)); D.C. Bar Op. 374 (2018) (information from prospective client is protected from disclosure to the same extent as client information is protected by D.C. Rule 1.6)); RESTATEMENT THIRD, supra note 10, § 59 cmt. c (2000) ("Information acquired during the representation or before or after the representation is confidential so long as it is not generally known . . . and relates to the representation. Such information, for example, might be acquired by the lawyer in considering whether to undertake a representation.").

client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." Model Rule 1.0(e) defines "informed consent."

# C. Disqualifying Conflicts Based on the Acquisition of "Significantly Harmful" Information

Model Rule 1.18(c) provides for potential disqualification arising out of the consultation:

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* . . . . <sup>14</sup>

The phrase "significantly harmful" qualifies the lawyer's duties toward prospective clients where no client-lawyer relationship is established and distinguishes these duties from duties owed to clients. Comment [1] explains:

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, *prospective clients should receive some but not all of the protection afforded clients*.<sup>15</sup>

The notion that "prospective clients" receive "some but not all of the protections afforded clients" can be illustrated by comparing the application of Model Rule 1.9 with Model Rule 1.18 with respect to possible conflicts of interests. Under Model Rule 1.9, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interest are materially adverse to the interests of the former client" unless certain conditions are met. <sup>16</sup> As Comment [3] to Model Rule 1.9 explains, for former clients the question is whether confidential information *could have been* shared, not whether confidences were in fact shared, regardless of the harmful quality of the information. The Comment reads, in part,

<sup>&</sup>lt;sup>12</sup> MODEL RULES R. 1.18 cmt. [5].

<sup>&</sup>lt;sup>13</sup> MODEL RULES R. 1.0(e).

<sup>&</sup>lt;sup>14</sup> MODEL RULES R. 1.18(c) (emphasis added).

<sup>&</sup>lt;sup>15</sup> MODEL RULES R. 1.18 cmt. [1] (emphasis added). *See also* Wis. State Bar Prof1 Ethics Comm., Formal Op. EI-10-03 (2011) (the "more lenient standard [in Rule 1.18] reflects the attenuated relationship with prospective clients"); N.Y.C. Bar Ass'n Comm. on Prof1 Ethics, Formal Op. 2013-1, *supra* note 11 ("The 'significantly harmful' test makes the [Rule 1.18(c)] restriction less exacting than the corresponding restriction on representations that are materially adverse to a former client."). A person and a lawyer may, of course, have as many consultations and discussions as they mutually find beneficial in order to determine whether to enter into a client-lawyer relationship. In such circumstances, however, the lawyer is more likely to receive information that could be "significantly harmful" in a later representation adverse to the prospective client.

<sup>16</sup> MODEL RULES R. 1.9(a).

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A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in a subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and the information that would in ordinary practice be learned by a lawyer providing such services.<sup>17</sup>

A former client need not reveal confidential information to satisfy the "substantial relationship" test. "Matters are 'substantially related' for purposes of [Model Rule 1.9] if they involve the same transaction or legal dispute or *if there otherwise is a substantial risk* that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." As described by Judge Posner in in *Analytica v. NPD Research*:

[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if the lawyer *could have obtained confidential information* in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client . . . . <sup>19</sup>

Model Rule 1.18 is different than Model Rule 1.9 because it imposes the additional requirement, not found in Model Rule 1.9, that the prospective client have communicated information that "could be significantly harmful" in a subsequent matter. As a result, the mere fact that a prospective client consulted with a lawyer in a substantially related matter is not sufficient, alone, to disqualify the lawyer from a later matter. Nor is it sufficient to conclude that a conflict exists merely because a prospective client volunteers information to a lawyer because, as noted above, the unilateral transmission of information to a lawyer does not create a Model Rule 1.18 duty, nor will Model Rule 1.18 protect someone who contacts a lawyer with the intent to disqualify the lawyer from representing other parties in the matter. 21

With respect to what must be shown to establish that a person is entitled to the protections of Model Rule 1.18, evidence beyond the mere fact of a consultation is generally required.<sup>22</sup> The

<sup>&</sup>lt;sup>17</sup> MODEL RULES R. 1.9 cmt. [3]. *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 ("Under Rule 1.9(a), the bar against adverse representation is automatic; if the relevant parties' interests are materially adverse and the matters are the same or substantially related, the bar applies whether or not the lawyer received any information, harmful or otherwise from the former client.") (footnote omitted); Analytica Inc. v. NPD Research, 708 F.2d 1263, 1267 (7th Cir. 1983) ("If the 'substantial relationship' test applies . . . it is not appropriate for the court to inquire into whether actual confidences were disclosed [by the former client].").

<sup>&</sup>lt;sup>18</sup> MODEL RULES R. 1.9 cmt. [3] (emphasis added).

<sup>&</sup>lt;sup>19</sup> Analytica, Inc., 708 F.2d at 1266 (emphasis added).

<sup>&</sup>lt;sup>20</sup> Bernacki v. Bernacki, 1 N.Y.S.3d 761, 764 (Sup. Ct. 2015) (prospective client's "reference to the information as 'confidential' without more is insufficient"); RESTATEMENT THIRD, *supra* note 10, § 15, cmt. c (after a consultation with a prospective client, "a lawyer is not always prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter").

<sup>&</sup>lt;sup>21</sup> See MODEL RULES R. 1.18 cmt. [2]. See also supra note 9 (collecting opinions).

<sup>&</sup>lt;sup>22</sup> See Thomson v. Duker, 346 S.W.3d 390, 396 (Mo. Ct. App. 2011) (Rule 1.18 requires "at least some disclosure, either by the objecting prospective client or by the lawyer, of the scope of information discussed" during the consultation) (cites omitted); RESTATEMENT THIRD, supra note 10, § 15(c) (the prospective client "bears the burden

fact that the prospective client must come forward with some evidence concerning the contents of the consultation with the lawyer does not mean, however, that the prospective client must disclose confidential information or detail the substance of the discussions. The cases and other authorities support the conclusion that only certain disclosures are required, for example, the date, duration and manner of communication (*i.e.*, in person, email, over the phone, etc.), and a summary description of the topics discussed.<sup>23</sup>

With respect to the "significantly harmful" test, information disclosed by the person invoking the protection of Model Rule 1.18 need not demonstrate that the harm is certain to occur in order to demonstrate a conflict. Instead, the Model Rule addresses information that "could be significantly harmful," a standard that "focuses on the *potential* use of the information." Post-hoc promises by the lawyer not to use the information do not change the standard from one of potential use or harm to a standard that requires actual use or harm. <sup>25</sup>

Information that is typically viewed as "significantly harmful" includes, for instance, "views on various settlement issues including price and timing"; "personal accounts of each relevant event [and the prospective client's] strategic thinking concerning how to manage the situation"; an "18-minute phone call" with a "prospective client-plaintiff [during which a firm] "had 'outlined potential claims" against defendant and "discussed specifics as to amount of money needed to settle the case"; and a presentation by a corporation seeking to bring an action of "the underlying facts and legal theories about its proposed lawsuit." Other recognized categories of significantly harmful information include: "sensitive personal information" in a divorce case; "premature possession of the prospective client's financial information"; knowledge of "settlement position"; a "prospective client's personal thoughts and impressions regarding the facts of the case and possible litigation strategies," and "the possible terms and structure of a proposed bid" by one corporation to acquire another. and "the possible terms and structure of a proposed bid" by one corporation to acquire another.

of persuading the tribunal that the lawyer received information "that could be significantly harmful to the prospective client in the matter"); but see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, supra note 9 (a lawyer's website that "specifically encourages a website visitor to submit a personal inquiry about a proposed representation on a conveniently provided electronic form" may be deemed to invite the submission of confidential information and therefore provide information to the lawyer that could be "significantly harmful" to the prospective client in a subsequent adverse representation).

<sup>&</sup>lt;sup>23</sup> The format could be similar to what is known as a "privilege log," submitted to a court in connection with a claim of privilege. The information which is the subject of the privilege claim is not disclosed. Rather information sufficient to establish the claim of privilege is ordinarily all that is required. Federal Rule of Civil Procedure 26(b)(5) (requiring that privilege logs "describe the nature of the documents, communications, or tangible things not produced or disclosed --- and do so in a manner that, without revealing information itself privileged or protected will enable other parties to assess the claim [of privilege or other protection]." In appropriate instances, protected information can be disclosed to courts *in camera*. *See* O Builders Associates, Inc. v. Yuna Corp. of N.J., 19 A.3d 966, 978 (N.J. 2011) ("the parties may protect the confidentiality of their information by, among other means, requesting that the record be subject to a protective order . . . and the movant may further request that the application be considered *in camera*") (cites omitted); Keith v. Keith, 140 So.3d 1202, 1211-1212 (La. Ct. App. 2014) (discussing the use of *in camera* proceedings in Rule 1.18 decisions).

<sup>&</sup>lt;sup>24</sup> N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (emphasis in original).

<sup>&</sup>lt;sup>26</sup> Id. at 8, note 9 (cites omitted).

<sup>&</sup>lt;sup>27</sup> Wis. State Bar Prof'l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 4-5 (cites omitted).

<sup>&</sup>lt;sup>28</sup> See N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11, at 7 (discussion of "Scenario 3").

The Restatement also offers helpful guidance. Section 15(2) of the Restatement provides for disqualification of a lawyer who, in discussing "the possibility of . . . forming a client-lawyer relationship" received "from the prospective client confidential information that could be significantly harmful to the prospective client" in a matter." <sup>29</sup> Further, in the words of the North Dakota Supreme Court:

Information may be "significantly harmful" if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies or potential weakness. "Significantly harmful" may also be the premature possession of information that could have a substantial impact on settlement proposals and trial strategy; the personal thoughts and impression about the facts of the case; or information that is extensive, critical, or of significant use.<sup>30</sup>

As an illustration, the Restatement discusses an initial meeting between a lawyer and a prospective client seeking a divorce. The prospective client and the lawyer have an hour-long conversation in which they discuss the prospective client's "reasons for seeking a divorce and the nature and extent of his and Spouse's property interests." The prospective client decides not to retain the lawyer because "the suggested fee [is] too high." Thereafter, the spouse seeks to hire the lawyer. The Restatement concludes that the lawyer received "significantly harmful information" from the prospective client and cannot represent the opposing spouse. <sup>31</sup>

On the other hand, and as the New Jersey Supreme Court explained in *O Builders & Associates v. Yuna Corp*, "significantly harmful" information under Rule 1.18 "cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive and -specific."<sup>32</sup>

So, for example, information that causes embarrassment or inconvenience "does not seem to be 'significant'" while information relating to "[c]ivil or criminal liability would seem to easily

<sup>&</sup>lt;sup>29</sup> RESTATEMENT THIRD, *supra* note 10, § 15 (2000). The language "information that could be significantly harmful to that person" in Rule 1.18(c) tracks the Restatement's language.

<sup>&</sup>lt;sup>30</sup> Kuntz v. Disciplinary Bd. of Supreme Court of North Dakota, 869 N.W.2d 117, 125 (N.D. 2015) (comparing duties under North Dakota Rule 1.18 with duties under North Dakota Rule 1.9, which are analogous to the corresponding Model Rules) (cites omitted). *See also In re* Carpenter, 863 N.W.2d 223 (N.D. 2015) ([a] lawyer can also violate Rule 1.18(b) if the lawyer misuses information gathered in connection with a consultation with a prospective client; discipline imposed for using information about owners of mineral rights learned as part of a consultation with a prospective client for the benefit of a subsequent client in a substantially related matter).

<sup>31</sup> RESTATEMENT THIRD, *supra* note 10, § 15(2), at 142 (2000). *See also* Sturdivant v. Sturdivant, 241 S.W.3d. 740, 742 (Ark. 2006) (prospective client provided "significantly harmful information" when he told divorce attorney "everything he knew regarding the children and his concerns about his former wife"). *See also* Wis. State Bar Prof'l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 4-5 (collecting cases); N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11, at note 9 (collecting cases).

<sup>&</sup>lt;sup>32</sup> O Builders Associates, Inc. v. Yuna Corp. of N.J., 19 A.3d 966, 978 (N.J. 2011) (cites omitted). *See also Kuntz*, 869 N.W.2d at 125.

qualify."<sup>33</sup> Specific instances in which information was deemed *not* to be "significantly harmful" include: a lawyer who "avoided learning the details of the case in half-hour consultation"; a brief consultation that occurred ten years earlier and concerned a "tenuously related matter"; and a one-day "beauty contest" consultation where the prospective client's in-house lawyer "regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client."<sup>34</sup>

Context is important. In *Marriage of Perry*, for instance, the court concluded that information had been disclosed during the consultation but did not disqualify the lawyer pursuant to Montana's Rule 1.18 because the prospective client "did not establish that any information [she disclosed to the challenged counsel] in telephone calls several years earlier could have any impact on the proceeding, particularly since [the challenged counsel] "was not associated as counsel until three years into the proceeding, by which time substantially more information had been disclosed." Further, information that may be on its face "significantly harmful," may not be such if the court determines that it was generally known by the parties. <sup>36</sup>

# D. Limiting Information During an Initial Consultation and Avoiding Imputation of Conflicts.

In order to avoid receiving "significantly harmful information" from a prospective client, lawyers should warn prospective clients against disclosing detailed information. Comment [4] to Model Rule 1.18 states that a lawyer "should limit the initial consultation [with a prospective client] to only such information as reasonably appears necessary" for the purpose of "considering whether or not to undertake a new matter." This caution, however, is not intended to discourage lawyers from engaging in a thorough discussion with prospective clients in order to ascertain whether the lawyer wants to take on the representation. It is simply a reminder that the more information learned in a consultation, the more likely that the lawyer may be precluded from representing other parties in a substantially related matter. Comment [5] provides that a lawyer "may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." If an agreement between the lawyer and the prospective client "expressly"

<sup>&</sup>lt;sup>33</sup> John M. Burman, *Waiving a Conflict of Interest and Revoking That Waiver Part III – Conflicts Involving Prospective and Former Clients*, 34 WYO. LAW. 45, note 53 (2011) (emphasis added).

<sup>&</sup>lt;sup>34</sup> RESTATEMENT THIRD, *supra* note 10, § 15 cmt. c, Reporters Note (cites omitted).

<sup>&</sup>lt;sup>35</sup> Marriage of Perry, 293 P.3d 170, 176 (Mont. 2013) but see Wis. State Bar Prof'l Ethics Comm., Formal Op. EI-10-03, supra note 15 ("the fact that information may be discoverable at some point in current or future litigation, does not by itself mean that the information should not be considered significantly harmful. [It] may be a factor in the analysis, but is not... determinative.").

<sup>&</sup>lt;sup>36</sup> Mayers v. Stone Castle Partners, 1 N.Y.S.3d 58, 62 (1st Dept. 2015) (information not significantly harmful because it was generally known, the adversary was aware of some of the details of the relevant transaction, and the motion to disqualify opposing counsel was made "a year into the litigation").

<sup>&</sup>lt;sup>37</sup> MODEL RULES R. 1.18 cmt. [4].

<sup>&</sup>lt;sup>38</sup> MODEL RULES R. 1.18 cmt. [5]. With prospective clients who are inexperienced in legal matters, the burden will be on the lawyer to demonstrate that the discussions conformed to the agreed limitations or that the prospective client provided informed consent to the use of the information provided during the consultation. How the lawyer meets this burden depends on the circumstances. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11 ("the adequacy [of the lawyer's explanation and disclosure] will depend on the relevant facts, particularly the sophistication of the consenting party and [the party's] familiarity with the retention of legal representation and

so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client."<sup>39</sup> This may include, for example, an explicit caution on a website intake link saying that sending information to the firm will not create a client-lawyer relationship and the information may not be kept privileged or confidential.

Once a lawyer receives confidential information from a prospective client that disqualifies the lawyer from future adverse representations imputation of the conflict to other lawyers in a firm may be avoided through screening, in some circumstances. Model Rule 1.18(d) reads:

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.<sup>40</sup>

# E. Resolving Disputes Related to "Significantly Harmful" Information

Finally, when the basic facts are contested, courts or disciplinary authorities may benefit from reviewing documents and/or holding a hearing to assess the facts and, if necessary, determine the credibility of the lawyer and of the person invoking Model Rule 1.18.<sup>41</sup> However, evidentiary hearings may not be necessary and, when conducted, should avoid forcing the prospective client to reveal confidential information.<sup>42</sup>

conflict waivers. For example, if the prospective client is an organization that frequently retains lawyers, particularly one with in-house legal advisors, it may need to be told little more than that the law firm would be free to use or reveal information received in the consultation or to represent others with materially adverse interests in the same or any related matter . . . in the event the organization does not retain the firm.").

<sup>&</sup>lt;sup>39</sup> MODEL RULES R. 1.18 cmt. [5] (emphasis added). *See also* N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2013-1, *supra* note 11, at 5 (noting that the consent must be informed and confirmed in writing and recommending other steps to ensure the effectiveness of the waiver); MODEL RULES R. 1.0 cmt. [6] (discussing how adequacy of disclosure and explanation by the lawyer may depend on the sophistication of the client); Wis. State Bar Prof'l Ethics Comm., Formal Op. EI-10-03, *supra* note 15, at 6 (discussing how to avoid later disqualification through informed consent of the prospective client).

<sup>&</sup>lt;sup>40</sup> MODEL RULES R. 1.18(d) (emphasis added). For the requirements of informed consent see Model Rule 1.0(e) and Comments [6] and [7] to Rule 1.0. Informed consent under Rule 1.18 may occur in different contexts. "Informed consent" may be obtained at the outset of a consultation containing a condition that any information provided by the prospective client "will not be disqualifying," as set forth in Comment [5] to Model Rule 1.18. "Informed consent" may also allow a lawyer who has received "significantly harmful" information from a prospective client to represent an adverse party pursuant to Model Rule 1.18(d) above. In the former scenario, providing adequate disclosure at the outset of a consultation with a prospective client poses challenges for the lawyer who may not know much about the prospective client's matter and may know even less about the opposing party's potential claims.

<sup>&</sup>lt;sup>41</sup> See, e.g., Marriage of Perry, 293 P.3d 170, 176-77 (Mont. 2013) (trial court held an evidentiary hearing and examined notes taken by the lawyer concerning the communications with the prospective client before ruling on whether "significantly harmful information" had been disclosed).

<sup>&</sup>lt;sup>42</sup> See Richman v. Eighth Judicial Dist. Court, No. 60676, 2013 WL 3357115 at \*6 (Nev. May 31, 2013) (trial court did not abuse its discretion by ruling on affidavits and documents without an evidentiary hearing).

### IV. Conclusion

A lawyer who receives information that "could be significantly harmful" from a prospective client and then represents a client in the same or a substantially related matter where that client's interests are materially adverse to those of the prospective client violates Model Rule 1.18(c) unless the conflict is waived by the prospective client. Whether information that "could be significantly harmful" has been disclosed by a prospective client is a fact-specific inquiry and determined on a case-by-case basis. The test focuses on the potential harm in the new matter. The prospective client must provide some details about the time, manner and duration of communications with the lawyer and also some description of the topics discussed, but need not disclose the contents of the discussion or confidential information. Whether information conveyed is "significantly harmful" in the subsequent matter will depend on, for example, the duration of the discussion, the topics discussed, whether the lawyer reviewed documents, and whether the information conveyed is known by other parties, as well as the relationship between the information and the issues in the subsequent matter.

# AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

## Formal Opinion 497

February 10, 2021

## **Conflicts Involving Materially Adverse Interests**

Rules 1.9(a) and 1.18(c) address conflicts involving representing a current client with interests that are "materially adverse" to the interests of a former client or prospective client on the same or a substantially related matter. But neither Rule specifies when the interests of a current client are "materially adverse" to those of a former client or prospective client. Some materially adverse situations are typically clear, such as, negotiating or litigating against a former or prospective client on the same or a substantially related matter, attacking the work done for a former client on behalf of a current client, or, in many but not all instances, cross-examining a former or prospective client. Where a former client is not a party to a current matter, such as proceedings where the lawyer is attacking her prior work for the former client, the adverseness must be assessed to determine if it is material. General economic or financial adverseness alone does not constitute material adverseness.

### Introduction

ABA Model Rule of Professional Conduct 1.9(a) addresses conflicts between current clients and former clients of a lawyer. It reads:

(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.

(Emphasis added).

Model Rule 1.18 addresses prospective clients and its paragraph (c) similarly requires analysis when a lawyer subsequently represents another person with "interests materially adverse to those of the prospective client." Rule 1.18(c) provides:

(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,

<sup>&</sup>lt;sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

<sup>&</sup>lt;sup>2</sup> Typically, the lawyer does not perform legal work for a prospective client, and therefore it is unlikely the lawyer would "attack" work done for a prospective client.

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).

(Emphasis added). This Opinion addresses how to construe the language "interests [that] are materially adverse to the interests of the former client" in Rule 1.9(a) and similar language used in Rule 1.18(c).

# I. The origins of the "materially adverse" standard

The language "interests [that] are materially adverse to the interests of the former client" has roots in Canon 6 of the ABA's 1908 Canons of Ethics. Canon 6 prohibited, in relevant part, "the subsequent acceptance of retainers or employments from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

Under the ABA Model Code of Professional Responsibility, "there was no direct corollary to" Model Rule 1.9(a). <sup>3</sup> Instead, "former client conflicts were sometimes treated under Canon 9 of the Code under the appearance of impropriety standard." The current language was crafted by the 1977 Commission on the Evaluation of Professional Standards, frequently referred to as the Kutak Commission. Initial ideas appear in the Commission's January 1980 and May 1981 Reports, but the current formulation was not proposed until the August 1982 draft, with non-substantive wording changes made in advance of final adoption of Rule 1.9 in August 1983. <sup>5</sup> Rule 1.18 was adopted in 2002 and appears simply to have borrowed the language "materially adverse to those [the interests] of the former client" from Rule 1.9(a).

As adopted in 1983, Comment [1] to Rule 1.9 stated that "[t]he principles in Rule 1.7 determine whether the interests of the present and former client are adverse." Citing this language, ABA Formal Op. 99-415 (1999) concluded that "a lawyer must look to Rule 1.7 to determine . . . whether the interests of the parties are materially adverse."

Rule 1.7 prohibits the representation of interests that are "directly" as opposed to "materially" adverse. As a result, ABA Op. 99-415 concluded that "only direct adverseness of interest meets the threshold of 'material adverseness' sufficient to trigger the prohibitions established in Rule

<sup>&</sup>lt;sup>3</sup> Peter Geraghty, *Ethics Tip - August 2017*, A.B.A. (Aug. 1, 2017). https://www.americanbar.org/groups/professional\_responsibility/services/ethicssearch/ethicstipaugust2017/. <sup>4</sup> *Id*.

<sup>&</sup>lt;sup>5</sup> The January 1980 and May 1981 drafts proposed that lawyers be prohibited from representing clients in the same or substantially related matters where the interest of the client "is adverse in any material respect to the interest of the former client." *See, e.g.*, A.B.A. COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS DISCUSSION DRAFT, <a href="https://www.americanbar.org/content/dam/aba/administrative/professional-responsibility/kutak\_1-80.pdf">https://www.americanbar.org/content/dam/aba/administrative/professional-responsibility/kutak\_1-80.pdf</a> (Jan. 30, 1980); A.B.A. COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS PROPOSED FINAL DRAFT <a href="https://www.americanbar.org/content/dam/aba/administrative/professional-responsibility/kutak\_5-81.pdf">https://www.americanbar.org/content/dam/aba/administrative/professional-responsibility/kutak\_5-81.pdf</a> (May 30, 1981); A.B.A. COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS REPORT TO THE HOUSE OF DELEGATES, <a href="https://www.americanbar.org/content/dam/aba/administrative/professional-responsibility/kutak\_8-82.pdf">https://www.americanbar.org/content/dam/aba/administrative/professional-responsibility/kutak\_8-82.pdf</a> (last <a href="www.visited-Jan. 26, 2021">wisited Jan. 26, 2021</a>). *See also* A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982 – 2013, 901 (Art Garwin ed. 2013) [hereinafter A LEGISLATIVE HISTORY] (Rules as adopted).

<sup>&</sup>lt;sup>6</sup> A LEGISLATIVE HISTORY, *supra* note 5, at 901.

1.9." However, as part of the Ethics 2000 revisions to the Rules, Comment [1] to Rule 1.9 was changed. The sentence relied upon in ABA Op. 99-415 in Comment [1] to Rule 1.9—that Rule 1.7 governed the issue of adverseness—was deleted, without specific explanation.<sup>8</sup>

#### II. Subsequent interpretation of the language "materially adverse to the interests of the former client" in Rule 1.9

Subsequent to the Ethics 2000 amendments, courts, regulatory authorities, and ethics scholars have interpreted the meaning of "material adverseness" in Rule 1.9. These authorities have generally concluded that "material adverseness" includes, but is not limited to, matters where the lawyer is directly adverse on the same or a substantially related matter. While material adverseness is present when a current client and former client are directly adverse, material adverseness also can be present where direct adverseness is not.

However, "material adverseness" does not reach situations in which the representation of a current client is simply harmful to a former client's economic or financial interests, without some specific tangible direct harm. In Gillette Co. v. Provost, the court concluded that "[w]ith respect to the 'material adverse' prong of Rule 1.9, representation of one client is not 'adverse' to the interests of another client, for the purposes of lawyers' ethical obligations, merely because the two clients compete economically." As noted in New York State Bar Association Ethic Opinion 1103, "[j]ust as competing economic interests do not create [a Rule 1.7 conflict] so they do not create a 'material adverse' interest within the meaning of Rule 1.9(a)."10 Thus, a lawyer does not have a Rule 1.9 conflict solely because the lawyer previously represented a competitor of a current client whose economic interests are adverse to the current client. Material adverseness, referred to by the Gillette court, "requires a conflict as to the legal right and duties of the clients, not merely conflicting or competing economic interests."11

As the Court of Appeals for the Eighth Circuit explained in Zerger & Mauer LLP v. City of Greenwood:

<sup>&</sup>lt;sup>7</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-415 (1999).

<sup>&</sup>lt;sup>8</sup> The minutes of the Commission's December 12, 1998, meeting note that one member observed: "that the organization and content of the comment to Rule 1.9 should be revised." He noted the illogical organization of the comment, the irrelevance of some comments (e.g., Comments [4] and [5] regarding legal history), the use of the term 'material adversity' with no explanation, and the incomplete definition of 'substantial relationship'. See Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), Meeting Minutes Friday Dec. 11 & Saturday Dec. 12, 1998, A.B.A. (last visited Jan. 26, 2021),

https://www.americanbar.org/groups/professional responsibility/policy/ethics 2000 commission/121198mtg/. The next reference to Rule 1.9's Comment [1] by the Ethics 2000 Commission was in the Minutes from the May 7, 2000 meeting: "A member noted that two stricken sentences in Comment [1] were relied on in a recent ethics opinion, 99-415. The Commission felt that no action was necessary in response." But there was no explanation about why the two sentences (including the reference to "direct adversity") were stricken. See Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), Meeting Minutes Friday May 5 – Sunday May 7, 2000, A.B.A. (last visited Jan 26, 2021),

https://www.americanbar.org/groups/professional responsibility/policy/ethics 2000 commission/050500mtg/.

<sup>&</sup>lt;sup>9</sup> Gillette Co. v. Provost, 2016 WL 2610677 (Mass. Feb. 11, 2019).

<sup>&</sup>lt;sup>10</sup> N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1103 (2016).

<sup>&</sup>lt;sup>11</sup> See Gillette Co., 2016 WL 2610677, at \*3.

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Generally, whether a former client and current client have materially adverse interests is not a difficult question, as the situation usually involves a new client suing a former client. However, the question is more complicated when a former client, "although not directly involved in the [current] litigation may be affected by it in some manner. When such is the case . . . a fact-specific analysis is required in order to evaluate 'the degree to which the current representation may actually be harmful to the former client.' This analysis focuses on 'whether the current representation may cause legal, financial, or other identifiable detriment to the former client." <sup>12</sup>

Such detriment has it limits, otherwise the concept of materiality would have no meaning. Further, in the absence of direct adverseness, generalized financial harm or a claimed detriment that is not accompanied by demonstrable harm to the former or prospective client's interests does not constitute "material adverseness."

The following are types of situations where "material adverseness" may be found.

### A. Suing or negotiating against a former client

Suing a former client or defending a new client against a claim by a former client (*i.e.*, being on the opposite side of the "v" from former client) on the same or on a substantially related matter is a classic example of representing interests that are directly adverse and therefore "materially adverse" to the interests of a former client.<sup>13</sup> In assessing whether a lawyer has represented parties on both sides of the "v," the analysis of who or what the lawyer at issue formerly represented may

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<sup>&</sup>lt;sup>12</sup> Zerger & Mauer LLP v. City of Greenwood, 751 F.3d 928, 933 (8th Cir. 2014) (internal citations omitted). *See*, *e.g.*, Plotts v. Chester Cycles LLC, 2016 WL 614023 \*7-8 (D. Ariz. Feb. 16, 2016) (stating that "[w]hile the existence of possible personal liability [as to a former client] would establish material adversity [in a substantially related matter], the non-existence of personal liability does not necessarily dictate a different result."). In *Plotts*, an adverse financial impact on an entity in which the former client had an ownership interest and that had been the subject of the prior representation constituted material adverseness. *See also*, *In re* Carpenter, 863 N.W. 2d 223 (N.D. 2015). In *Carpenter*, an individual met with a lawyer about representation in a matter adverse to the Christian Science Church of Boston. Through extensive research, the prospective client had discovered that the mineral rights to 300 acres of North Dakota land had been left by a decedent to the Church and hoped for a fee or other compensation from the Church for bringing the information to its attention. The individual briefed the attorney on his research and conclusions. The attorney, after declining to represent the individual, promptly took the information that he had been given and contacted the Church, offering to represent it with respect to the mineral rights. The lawyer's representation of the Church was found to be "materially adverse" to the prospective client's interests. Carpenter was found to have violated Rule 1.18 and was suspended for 90 days.

<sup>&</sup>lt;sup>13</sup> See, e.g., Persichette v. Owners Insurance Co., 462 P.3d 581, 585-86 (Colo. 2020) (law firm representing plaintiff in lawsuit against former client was "materially adverse" to the interests of such former client); Anderson & Anderson LLP v. North American Foreign Trading Corp., 3 N.Y.S.3d 284 (Sup. Ct. 2014) ("direct adversity in litigation meets the definition of 'materially adverse interests."); Jordan v. Philadelphia Housing Authority, 337 F. Supp. 2d 666, 672 (E.D. Pa. 2004) ("There is no situation more 'materially adverse' than where a lawyer's former client is in a suit against lawyer's current client . . ."); Disciplinary Counsel v. Broyles, 49 N.E.3d 1238 (Ohio 2015) (lawyer disciplined for representing bank at a default hearing in a foreclosure case and then seeking to vacate the default on behalf of the property owners).

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be important.<sup>14</sup> In addition, being across the table, so to speak, from a former client and negotiating against that former client in transactional matters typically constitutes "material adverseness."<sup>15</sup>

## B. Attacking lawyer's own prior work

Another type of "material adverseness" exists when a lawyer attempts to attack her own prior work. For example, one court held that a lawyer cannot challenge a patent that the lawyer previously obtained for a former client. Another court found that a lawyer may not challenge a real estate restrictive covenant for a new client that the lawyer previously drafted for the prior seller of the land. When a lawyer represents a current client challenging the lawyer's own prior work done for a former client on the same or a substantially related matter, the situation creates a materially adverse conflict.

Even when lawyers are not directly attacking their own prior work, but instead seeking to undermine that work or the result achieved for a former client, material adverseness may exist. These situations, however, do not lend themselves to a "bright line" test of when there is and is not material adverseness. An examination of the facts in three cases provides guidance as to what circumstances may constitute material adverseness.

In Zerger & Mauer, <sup>19</sup> the City of Greenwood prosecuted and settled a nuisance claim against Martin Marietta involving the latter's truck traffic to a local quarry. As part of the settlement, the City could designate the specific route that Martin Marietta's trucks took on the way to the quarry. The law firm of Zerger & Mauer represented the City in this litigation. Thereafter, Zerger & Mauer brought a private nuisance action against Martin Marietta on behalf of various individuals with property interests along the route designated by the City for Martin Marietta's traffic to the quarry. The City was not a part of the private nuisance action but sought to disqualify Zerger & Mauer from representing the private plaintiffs in that case. The court disqualified the firm, finding that it

<sup>&</sup>lt;sup>14</sup> Delso v. Trustees for the Retirement Plan for Hourly Employees of Merck, 2007 WL 766349 \*10-11(D. N.J. Mar. 6, 2007) (finding no past attorney-client relationship between current lawyer for plaintiff and the defendant); *see also* Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2005-61 (2005) (concluding that there was likely no conflict as law firm represented seller, not corporation being sold).

<sup>&</sup>lt;sup>15</sup> Sylvia Stevens, *Conflicts Part II: Former Client Conflicts*, OR. STATE BAR BULLETIN (Dec. 2009) ("Where the current and former clients are opposing parties in litigation or in a transaction, the adversity of their interests is obvious."), <a href="https://www.osbar.org/publications/bulletin/09dec/barcounsel.html">https://www.osbar.org/publications/bulletin/09dec/barcounsel.html</a>.

<sup>&</sup>lt;sup>16</sup> Franklin v. Callum, 146 N.H. 779, 782-83 (2001) (plaintiff's lawyer disqualified because case "may require her to interpret" an agreement drafted by one of her partners for a non-party to the litigation). Typically, the lawyer does not perform legal work for a prospective client, so it is unlikely the lawyer could "attack" work done for such a client.

<sup>&</sup>lt;sup>17</sup> Sun Studs, Inc. v. Applied Theory Associates, 772 F.2d 1557, 1566-68 (Fed. Cir. 1985); Nasdaq, Inc. v. Miami International Holdings, 2018 WL 6171819 \*4-6 (D. N.J. Nov. 26, 2018) (failure to disqualify law firm "would allow the same law firm that argued for the patentability of Nasdaq's inventions to represent parties adverse to Nasdaq in this suit who are arguing those very same patents are invalid.") (internal quotations omitted).

<sup>&</sup>lt;sup>18</sup> North Carolina Bar Association v. Sossomon, 197 N.C. App. 261, 266-67, 676 S.E.2d 910 (2009) (lawyer who previously represented seller of land in drafting of restrictive covenant disciplined for, in part, violation of Rule 1.9 for materially adverse representation on the very same matter by attempting to negotiate a waiver of the restrictive covenant from the former client for a new client, without getting a waiver of the conflict of interest or even disclosing that he was representing the other party).

<sup>&</sup>lt;sup>19</sup> 751 F.3d 928 (8th Cir. 2014).

was "advocate[ing] a position that contradicts a term in [the City's] settlement." The court also found that Zerger & Mauer's current clients "have an interest in . . . disrupting Martin's use of the [City's] designated route" and "there is a very real possibility that other routes will come into play." The City also "may demand that its former counsel not advocate positions that pose the serious threat of once again embroiling [it] in protracted litigation." The court upheld the lower court's finding that the interests of the City and the private plaintiffs "remain[ed] materially adverse."

National Medical Enterprises, Inc. v. Godfrey,<sup>24</sup> is another example of circumstances in which a non-party, non-witness former client nevertheless had materially adverse interests to a lawyer's current client.<sup>25</sup> In this case, a lawyer represented a former hospital administrator for National Medical Enterprises (NME). NME was accused of mistreating patients and defrauding insurers in a criminal investigation and parallel civil actions. The former client (the hospital administrator) had denied any wrongdoing, had not been charged with any crime, and had been dismissed from dozens of civil actions. About seventeen months after the lawyer and his firm withdrew from the representation of the former client, the lawyer's firm brought an action against NME on behalf of some ninety former patients making the same types of allegations of physical and mental abuse at various NME facilities, including facilities under the administrative responsibility of the former client. The claims brought against NME did not include any allegations of misconduct by the former client. The lawyer for the former client was screened from the action against NME. The appellate court, reversing the district court, found the requisite adverseness to exist and ordered NME's law firm disqualified citing the risk of renewed allegations or inquiries into the former client's conduct as a result of the new action.<sup>26</sup>

Not every situation involving adverseness constitutes material adverseness. There is a threshold below which adverseness is not material. In *Simpson Performance Products, Inc. v. Robert W. Horn, PC.*, <sup>27</sup> for instance, seat belt manufacturer Simpson Performance Products (SSP) hired lawyer Horn to investigate and evaluate and the possibility of a lawsuit by SPP against NASCAR when NASCAR alleged that SSP's defective product was partially responsible for the death of Dale Earnhardt at the NASCAR Daytona 500 in 2001. To preserve a good relationship with NASCAR, SSP decided not to bring suit to challenge NASCAR's allegations that SSP's product was at fault. Thereafter, however, the retired founder of the company hired lawyer Horn to represent the founder in a suit against NASCAR on his own. When SSP refused to pay Horn, he sued SSP for unpaid fees. In response, SSP alleged that Horn violated Rule 1.9(a). The court found no material adverseness existed because the record demonstrated that the manufacturer's

<sup>&</sup>lt;sup>20</sup> *Id.* at 934.

<sup>&</sup>lt;sup>21</sup> *Id*.

<sup>&</sup>lt;sup>22</sup> *Id*.

 $<sup>^{23}</sup>$  *Id* 

<sup>&</sup>lt;sup>24</sup> 924 S.W.2d 123 (Tex. 1996)

<sup>&</sup>lt;sup>25</sup> It is not entirely clear from the court's opinion whether the former client would be a witness in the proceedings at issue, but the court's analysis of material adverseness does not rely on potential testimony of the former client or cross-examination by the client's former law firm.

<sup>&</sup>lt;sup>26</sup> See also III. State Bar Ass'n Comm. on Prof'l Conduct Advisory Op. 16-03 (2016) (representation of a second spouse in child support proceedings was "materially adverse to the interests" of the first spouse, a former client previously represented by lawyer, because recovery for current client could reduce husband's ability to pay support to former client).

<sup>&</sup>lt;sup>27</sup> 92 P.3d 283, 287-89 (Wyo. 2004).

relationship with NASCAR had not been adversely affected by the founder's lawsuit—the very reason SSP declined to sue NASCAR—and that the "company is doing just fine." <sup>28</sup>

## C. Examining a former client

Rule 1.9(c)(1) prohibits using information from a former client "to the disadvantage of the former client." If a lawyer must use information relating to the former representation to the disadvantage of a former client to competently examine the former client, the lawyer has a conflict, unless that information has become "generally known."<sup>29</sup> However, even if a lawyer ethically can use the information or does not need to use information, the lawyer still may have a conflict of interest in examining a former client under Rule 1.9(a) if the former client's interests are "materially adverse" to the current client *and* the current matter is substantially related to the prior matter. Courts have sometimes found "material adverseness" when the lawyer proposes to examine a former client, where no information from the prior representation will be used.<sup>30</sup>

In ABA Opinion 92-367, this Committee considered the question of whether examining a current client in another client's matter created a conflict under ABA Model Rule 1.7. Discussing adverseness, the Opinion stated that "[i]t should be emphasized that the degree of adverseness of interest involved . . . will depend on the particular circumstances in which the question arises." In order to avoid this conflict, the current client could retain separate counsel from a different firm just for the cross-examination and screen the conflicted lawyer from the examination. <sup>31</sup> Similarly in the former client examination situation a lawyer may avoid the potential conflict altogether by having the current client retain separate counsel to examine the former client, and screen the lawyer

<sup>&</sup>lt;sup>28</sup> Comment [1] to Wyoming Rule 1.9 contained the sentence adopting Rule 1.7's "directly adverse" provision as the standard for the term "materially adverse" in Rule 1.9 that had been deleted from the Model Rules in 2002. The Court's analysis of "materially adverse" does not appear to hinge on that comment and the discussion in *Simpson* of the materially adverse issue has been noted by one commentator as unusual in its "care and precision." FREIVOGEL ON CONFLICTS, FORMER CLIENT, PART I, *available at* <a href="http://www.freivogelonconflicts.com/formerclientparti.html">http://www.freivogelonconflicts.com/formerclientparti.html</a> (last visited Jan. 27, 2021).

<sup>&</sup>lt;sup>29</sup> See Supreme Ct. of Ohio Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2013-4 (2013) (lawyer may impeach former client with criminal conviction only if conviction is "generally known" under Rule 1.9(c)); Utah State Bar Ethics Advisory Opinion Comm. Op. 02-06 (2002) (permitting lawyer to cross examine former client if matters are not substantially related and lawyer does not disclose or use information from former client to such client's disadvantage); Ill. State Bar Ass'n Comm. on Prof'l Conduct Advisory Op. 05-01 (2006) (same). See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479 (2017) for an explanation about what information is "generally known."

<sup>&</sup>lt;sup>30</sup> In Illaraza v. Hovensa LLC, 2012 WL 1154446 \*6-10 (D. V.I. Mar. 31, 2012), the plaintiffs' lawyer was disqualified from representing plaintiffs in action against their employer and others for wrongful discharge and defamation stemming from an incident in which plaintiffs and another employee-manager were prosecuted for grand larceny for stealing employer's property. The charges against the two plaintiffs were dismissed, but the third individual pled guilty to possession of stolen property. The plaintiffs' lawyer had represented the employee-manager in his criminal case. In the wrongful discharge and defamation action, the plaintiffs contended in their summary judgement submission that the employee-manager defamed them. The court found that this constituted "material adverseness" that could not be alleviated by various promises by the plaintiffs' lawyer not to use confidential information against the former client, employee-manager. The court rejected the lawyer's offer not to cross examine her former client on any topics in which the lawyer had confidential information.

<sup>&</sup>lt;sup>31</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-367 (1992).

with the conflict from participating in the examination of the former client or sharing with separate counsel any information from the prior representation.<sup>32</sup>

# III. Waiver of materially adverse conflicts

If a reasonable lawyer reviewing the situation would conclude that the representation of a current client is "materially adverse" to a former client, the lawyer may still represent the current client, even if the current and prior matters are "substantially related," provided the lawyer obtains the informed consent of the former client (or prospective client), to waive the potential conflict of interest and that consent is confirmed in writing. Thus, even if a lawyer is hired to sue a former client on behalf of a current client, or negotiate against a former client, or take the deposition of a former client on a substantially related matter, the lawyer may ask for the former client's informed consent to waive the conflict and permit the lawyer's representation of the current client. Informed consent to waive a conflict under Rule 1.9(a) will not, however, waive the lawyer's obligation to maintain the confidentiality of all information learned during the prior representation. To allow the use or disclosure of information protected by Rule 1.6, the former client also must provide informed consent pursuant to Rule 1.6(a).

Similarly, if a lawyer seeks to represent a current client in a matter that is materially adverse to a prior prospective client in the same or substantially related matter on which that prospective client consulted the lawyer, and the lawyer has received "significantly harmful" information from the prior prospective client, <sup>35</sup> Rule 1.18(d)(1) permits representation of the current client if the current client and the prospective client give informed consent, confirmed in writing. Alternatively, the firm of the lawyer who received the "significantly harmful" information from the prospective client can represent the current client if the information-receiving lawyer is screened from the current representation and is apportioned no part of the fee from the representation and written notice is promptly provided to the prospective client pursuant to Rule 1.18(d)(2).<sup>36</sup>

### IV. Conclusion

"Material adverseness" under Rule 1.9(a) and Rule 1.18(c) exists where a lawyer is negotiating or litigating against a former or prospective client or attacking the work done for the former client on

<sup>&</sup>lt;sup>32</sup> See N.Y. City Bar Ass'n Formal Ethics Op. 2017-6 (suggesting that lawyer may associate with separate counsel to subpoena a current client).

<sup>&</sup>lt;sup>33</sup> MODEL RULES OF PROF'L CONDUCT R. 1.9, cmt. [3] (2020). "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

<sup>&</sup>lt;sup>34</sup> Informed consent may also need to be obtained from the lawyer's current client if there is a "significant risk" that the lawyer's representation of such client "will be materially limited" by the lawyer's responsibilities to the former client. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2).

<sup>&</sup>lt;sup>35</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 492 (2020) for a discussion of "significantly harmful information."

<sup>&</sup>lt;sup>36</sup> In addition, the information-receiving lawyer must have taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client." MODEL RULES OF PROF'L CONDUCT R. 1.18(d)(2).

behalf of a current client in the same or a substantially related matter. <sup>37</sup> It also exists in many but not all instances, where a lawyer is cross-examining a former or prospective client. "Material adverseness" may exist when the former client is not a party or a witness in the current matter if the former client can identify some specific material legal, financial, or other identifiable concrete detriment that would be caused by the current representation. However, neither generalized financial harm nor a claimed detriment that is not accompanied by demonstrable and material harm or risk of such harm to the former or prospective client's interests suffices.

# AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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<sup>&</sup>lt;sup>37</sup> Typically, the lawyer does not perform legal work for a prospective client and therefore there are unlikely to be situations where the lawyer "attacks" work done for such a client.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 505 May 3, 2023

# Fees Paid in Advance for Contemplated Services

Under the Model Rules of Professional Conduct, a fee paid to a lawyer in advance for services to be rendered in the future must be placed in a client trust account and may be withdrawn only as earned by the performance of the contemplated services. This protects client funds and promotes client access to legal services in the event the representation terminates before all contemplated services have been rendered. All fees must be reasonable, and unearned fees must be returned to the client. Therefore, it is not accurate to label a fee "nonrefundable" before it actually has been earned, and labels do not dictate whether a fee has been earned.

This opinion examines a lawyer's obligations under the ABA Model Rules of Professional Conduct with respect to fees paid in advance for legal work to be performed by the lawyer in the future. In particular, this opinion seeks to clarify the proper handling and disposition of fees paid in advance for legal work to be performed in the future, including where the lawyer must deposit and maintain the funds and when the lawyer may treat them as earned. The opinion also explains when a lawyer must refund all or a portion of fees paid in advance and discusses whether such a payment may be, or can even be labeled, "nonrefundable." The answers are derived from the application of several Model Rules, including: 1.5(a), 1.15(b), 1.15(c), 1.15(d), and 1.16(d).

Fees for services may be paid after completion of the services, of course. However, for certain matters, many lawyers request or require that funds in a certain amount be paid to the lawyer at the outset of the representation to secure payment for the lawyer's later work. Under the Model Rules such fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned. This is to protect the client from the risk that the lawyer may not be able to refund the prepaid fee in the event the representation terminates before the contemplated work is completed. The Model Rules protect the lawyer from the risk of nonpayment by allowing advance fees to be received and protect the client by requiring that the funds are kept safe and separate from the funds of the lawyer or firm.

# I. Terminology

As a preliminary matter, it is useful to define terms commonly used to label certain client-lawyer fee arrangements: advances, retainers, flat or fixed fees, and "nonrefundable" or "earned-on-receipt" fees.

<sup>&</sup>lt;sup>1</sup> This opinion is based on the American Bar Association Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2022. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling. This is especially noteworthy for this opinion as jurisdictions have adopted substantially different rules relating to the management of client property including fees paid in advance for legal work to be performed in the future.

### A. Advances v. Retainers

Fees paid by a client to a lawyer in advance for legal work to be performed by the lawyer in the future are sometimes referred to as an "advance fee," an "advanced fee," an "advance fee payment," an "advance fee deposit," a "fee advance," or simply an "advance." Advances are also sometimes called "special retainers," "security retainers," or simply "prepaid fees." To be consistent and clear, this opinion will use the term "advance" when discussing fees paid to the lawyer for legal work to be performed in the future.

When a client pays an advance to a lawyer, the lawyer takes possession – but not ownership – of the funds to secure payment for the services the lawyer will render to the client in the future.

This opinion will also refer to the term "retainer" fee. Neither the term "retainer" nor "retainer fee" is found in the Model Rules of Professional Conduct. Regrettably, many lawyers use the term loosely to mean any sum of money paid to the lawyer at or near the commencement of representation.<sup>2</sup> Whereas an advance is a deposit of money with the lawyer to pay for services to be rendered in the future, there is another type of payment that is not for services. Rather, "[t]he purpose of [a retainer] is to assure the client that the lawyer will be contractually on call to handle the client's legal matters." This type of agreement and payment is variously referred to as a "general retainer," "classic retainer," "true retainer," "availability retainer," or an "engagement retainer." Because all of these terms mean the same thing, this opinion will use the term "general retainer" to refer to this arrangement. A general retainer is paid – and deemed earned – upon the promise of availability to represent a client, whether or not services are actually needed or requested by the client. Thus, a general retainer has been conceptualized as a form of an option

<sup>&</sup>lt;sup>2</sup> There is widespread agreement that the word "retainer" has been used so inconsistently that is has practically lost all definable meaning. BLACK'S LAW DICTIONARY (11th ed. 2019) ("Over the years, lawyers have used the term 'retainer' in so many conflicting senses that it should be banished from the legal vocabulary.") (quoting Mortimer D. Schwartz & Richard C. Wydick, PROBLEMS IN LEGAL ETHICS 100, 101 (2d ed. 1988)).

<sup>&</sup>lt;sup>3</sup> CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 506 (West 1986).

<sup>&</sup>lt;sup>4</sup> Some jurisdictions have commendably sought to define terms and draw distinctions in their court rules. *See* Ariz. Rules of Prof'l Conduct R. 1.5 cmt. [7] ("The 'true' or 'classic' retainer is a fee paid... merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed..."). *See also* Fla. State Bar R. 4-1.5(e)(2) (defining "retainer," "flat fee," and "advance fee") and Iowa R. Civ. P. 45.8-10 (defining "general retainer," "special retainer, and "flat fee").

<sup>&</sup>lt;sup>5</sup> It is sometimes said that retainers come in two varieties: "general retainers" and "special retainers." A special retainer is simply an advance going by another, unfortunately misleading, name. *See* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. REV. 1, 5-6 (1993) ("A special retainer is an agreement between lawyer and client in which the client agrees to pay the lawyer a specified fee in exchange for specified services to be rendered. The fee may be calculated on an hourly, percentage or other basis and may be payable either in advance or as billed.") (footnotes omitted). The Committee is of the opinion that a special retainer is the same thing as an "advance." To be consistent and clear, this opinion will use the term "advance" when referring to such arrangements, although some of the cited sources and authorities may use the term "special retainer."

<sup>&</sup>lt;sup>6</sup> "Because the general retainer is not a payment for the performance of services, but rather is compensation for the lawyer's promise of availability, the fee is earned by the lawyer at the time the retainer is paid and thus should not be deposited into a client trust account. The general retainer is not an advance deposit against future legal services, which instead would be separately calculated and charged should the lawyer actually be called upon by the client to

contract.<sup>7</sup> In other words, hourly time is not billed against a general retainer and a general retainer is not a flat fee for a specific amount of the lawyer's time – it is solely to reserve the lawyer's availability. An important result of these related features is that the money paid by the client in connection with a general retainer should not be placed in a trust account since it is considered earned upon the commencement of the contract.<sup>8</sup>

Some authorities treat the term "general retainer" or "true retainer," etc., as synonymous with "nonrefundable." This is not correct. A general retainer may, by custom, be considered earned when paid, but this does not mean that it is forever exempt from scrutiny under the Rules. It may be determined to be an unreasonable fee, or even unearned if the lawyer does not make himself or herself available. For example, if a company retains a lawyer to handle a hostile takeover bid should one arise and the lawyer does not, in fact, accept the engagement, then the fee, which may have been paid many months earlier and treated as the lawyer's own property, may be determined to be unreasonable and/or unearned and therefore the subject of an order requiring it to be returned, refunded, or repaid to the client. Other circumstances requiring refund might include the death, disability, suspension, or disbarment of the lawyer. Like all fees, a general retainer must be reasonable under the circumstances.<sup>9</sup>

General retainers "are quite rare," and have "largely disappeared from the modern practice of law." However, attempts to cast what is actually an advance payment of fees for services to be performed later as a general retainer are very much present today. Given the rarity and unusual nature of a general retainer, and the fact that very few clients would actually need or benefit from one, the nature of the fee and lawyer's obligations and client's benefits under such an agreement must be explained clearly and in detail, including the fact that fees for legal services performed will be charged in addition to the general retainer, and use of the term should be restricted to its traditional definition.

perform the legal services in the future." Gregory C. Sisk, *Duties to Effectively Represent the Client*, § 4-4.4(b) (A Retainer for Lawyer Availability), *in* LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION (West 2016).

<sup>&</sup>lt;sup>7</sup> Lester Brickman, *The Advance Payment Dilemma: Should Payments be Deposited to the Client Trust Account or to the General Office Account*, 10 CARDOZO L REV. 647, 649 n.13 (1989). *See also In re* O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011).

<sup>&</sup>lt;sup>8</sup> This opinion does not attempt to exhaustively discuss general retainers. Though they can and do have legitimate uses, for years they have been criticized, disfavored, and narrowly construed based on contract law, public policy, and contemporary ethics principles. *See, e.g.*, Charles J. McClain, Jr., *The Strange Concept of the Legal Retaining Fee*, 8 J. LEGAL PROF. 123 (1983) (common law of retainers "rests on rather shaky conceptual foundations" full of "inconsistencies and contradictions" and "contributing yet another irritant to the already strained relations between the legal profession and the public at large"); Pamela S. Kunen, *No Leg to Stand on: The General Retainer Exception to the Ban on Nonrefundable Retainers Must Fall*, 17 CARDOZO L. REV. 719 (1996) (discussing "historical and descriptive misconceptions" and arguing that, in many instances, such retainers generate the fiduciary obligations attending other lawyer-client fee agreements); and Joseph M. Perillo, *The Law of Lawyers' Contracts Is Different*, 67 FORDHAM L. REV. 443, 449-453 (1998).

<sup>&</sup>lt;sup>9</sup> Model Rules of Prof'l Conduct R. 1.5(a); Restatement (Third) of the Law Governing Lawyers § 34 (2001) [hereinafter Restatement].

<sup>&</sup>lt;sup>10</sup> Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. LEGAL PROF. 113, 116 (2009). *See also In re* O'Farrell, 942 N.E.2d at 804 n.5.

<sup>&</sup>lt;sup>11</sup> Provanzano v. Nat'l Auto Credit, Inc., 10 F. Supp. 2d 44, 51 (D. Mass. 1998).

<sup>&</sup>lt;sup>12</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(b); RESTATEMENT, *supra* note 9, § 38.

This opinion focuses on advance fees paid by individual clients, usually for a single legal matter (or related matters) that will not recur on a regular basis. Examples include a divorce, defense of criminal charges, and discharge from employment or other civil matters not handled on a contingent fee basis. However, some clients may need legal services of a certain type on a repeat basis and may contract for such services. For example, the client and lawyer may enter into a renewable one-year agreement providing for a monthly payment to handle any or all collections arising out of one or more of the client's businesses. Some lawyers and clients may use the term "retainer" or "general retainer" to refer to such an arrangement. Such arrangements may be perfectly appropriate although they may not meet the definition of a general retainer even if "availability" is said to be a part of the arrangement. Perhaps the arrangement may best be understood as a fixed fee agreement, except that instead of handling one matter for a set fee no matter what services end up being required, the lawyer is handling several matters (subject to whatever limitations the parties place on the number, type, geography, etc., of the matters).<sup>13</sup>

### **B.** Flat or Fixed Fees

Some lawyers prefer to charge their clients a flat or fixed fee for discrete legal services they provide. Examples include closing the purchase of a single-family home, incorporating a small business, drafting a will, or providing a defined, limited-scope service, such as drafting a motion. A flat fee is one that "embraces all work to be done, whether it be relatively simple and of short duration, or complex and protracted." <sup>14</sup>

If a flat or fixed fee is paid by the client in advance of the lawyer performing the legal work, the fees are an advance. Use of the term "flat fee" or "fixed fee" does not transform the arrangement into a fee that is "earned when paid." "Flat" or "fixed" does not even mean that the fee must be paid at the commencement of the representation, although most lawyers who do not have an existing relationship with a client may want to ensure payment and may, therefore, ask for the fee to be paid in advance before committing to the representation. If they do, as will be emphasized below, then that fee must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Several courts and ethics opinions endorse the option of dividing the representation into segments such that certain portions of a flat fee advance are considered earned before completion

<sup>14</sup> ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1389 (1977).

<sup>&</sup>lt;sup>13</sup> As we have noted, courts scrutinize purported general retainers to ensure that the lawyer is not attempting to circumvent the ethics rules requiring refund of unearned fees upon termination of the representation. The same is true with what are sometimes called "hybrid" fees or retainers. Such a fee is "a putative general retainer that is denominated as both for availability and for services," and it is likely to be considered by courts to be "fully refundable to the extent not earned by services rendered." Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. Cin. L. Rev. 11, 22 (1995). *See also* N.Y. City Bar Formal Op. 2015-2 (Nonrefundable Monthly Fee in a Retainer Agreement) (2015), *citing* Agusta & Ross v. Trancamp Contracting Corp., 193 Misc.2d 781, 785-86 (N.Y. Civ. Ct. 2002) for the proposition that "enforcement of a hybrid retainer 'should be subject to close scrutiny, governed by a rebuttable presumption that any moneys retained by counsel are for services, rather than availability."

of all the contemplated work.<sup>15</sup> Some jurisdictions have codified this approach in their rules.<sup>16</sup> Thus, if agreed to, the lawyer may remove such earned portions of a flat fee advance from trust prior to the completion of the full scope of the legal services to be performed as certain "milestones" or stages of the representation are reached or completed. This approach allows the lawyer to be paid in part before the end of the representation and provides some assistance in determining the refund amount in case of early termination. Of course, "extreme 'front-loading' of payment milestones in the context of the anticipated length and complexity of the representation" may not be reasonable.<sup>17</sup>

# C. So Called "Nonrefundable" and "Earned Upon Receipt" Fees

Some lawyers use labels like "nonrefundable retainer," "nonrefundable fee," or "earned on receipt" in the body or title of a fee agreement. These are not actual types of fees. And use of these descriptors does not, in and of itself, make a fee arrangement a general retainer. In fact, these terms are most often used in an attempt to make an advance fee nonrefundable.

The Model Rules of Professional Conduct do not allow a lawyer to sidestep the ethical obligation to safeguard client funds with an act of legerdemain: characterizing an advance as "nonrefundable" and/or "earned upon receipt." This approach does not withstand even superficial scrutiny. A lawyer may not charge an unreasonable fee. See Model Rule 1.5(a) ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."). Comment [4] to Rule 1.5 provides this additional guidance: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." See also, Model Rule 1.15(c) and others discussed in connection with Hypothetical 1 below. Therefore, under the Model Rules, an advance fee paid by a client to a lawyer for legal services to be provided in the future cannot be nonrefundable. Any unearned portion must be returned to the client. Labeling a fee paid in advance for work to be done in the future as "earned upon receipt" or "nonrefundable" does not make it so.<sup>18</sup>

Hypothetical scenarios illustrating these concepts and applying the Model Rules are discussed in Section IV below.

<sup>&</sup>lt;sup>15</sup> See, e.g., New Hampshire Bar Assoc. Ethics Committee Practical Ethics Article, *Practical Suggestions for Flat Fees or Minimum Fees in Criminal Cases* (Jan. 17, 2008). See also In re Mance, 980 A.2d 1196, 1202, 1204-1205 (D.C. 2009), citing Alec Rothrock, *The Forgotten Flat Fee; Whose Money is it and Where Should it be Deposited?*, 1 FLA. COSTAL L.J. 293, 323 (1999) for the proposition that some opinions "allow the lawyer to withdraw fees according to milestones 'based upon passage of time, the completion of certain tasks, or any other basis mutually agreed upon between the lawyer and client.""

<sup>&</sup>lt;sup>16</sup> See, e.g., Colo. Rules of Prof'l Conduct R. 1.5(h) (defining a flat fee, explaining proper handling, setting forth required contents of the agreement, and appending an authorized form agreement).

<sup>17</sup> In re Mance, supra note 15.

<sup>&</sup>lt;sup>18</sup> See, e.g., In re O'Farrell, 942 N.E.2d 799, 803 (Ind. 2011) ("Regardless of the term used to describe a client's initial payment, its type is determined by its purpose, i.e., what it is intended to purchase."); Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (labels not conclusive); In re Wintroub, 277 Neb. 787, 801; 765 N.W.2d 482 (2009) (citing cases from several jurisdictions for the proposition that "a lawyer may not retain an unearned fee, even if the fee agreement clearly provides that the fee is nonrefundable"); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Turner, 918 N.W.2d 130, 147 (Iowa 2018) (simply labeling payment of advance fees as "nonrefundable" does not relieve attorney from obligation to deposit them into trust accounts).

# II. Model Rule of Professional Conduct 1.15: The Anti-commingling Rule and the Need to Protect Client Funds, Including Advances

Rules of professional conduct exist for the protection of the public. That purpose is well served when the rules are designed and enforced to prevent concrete financial harm to clients. The anti-commingling principle, embodied in Rule 1.15, is a longstanding and effective component in the client protection arsenal. This is why, since their inception in 1908, the American Bar Association's model codes and rules of ethics have prohibited lawyers from commingling their property (including funds) with the property of clients and third parties.<sup>19</sup>

Under the general anti-commingling rule, Model Rule 1.15(a), client property, which includes unearned fees paid in advance, must be held in an account separate from the lawyer's own property. In 2002, Model Rule 1.15 was amended to address specifically the issue of advance fees in a new paragraph (c): "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Therefore, advances must be placed into a lawyer's trust account until those fees are earned.

The Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission"), which recommended the addition of this paragraph, did so in response to reports "that the single largest class of claims made to client protection funds is for the taking of unearned fees." Accordingly, paragraph (c) "provides needed practical guidance to lawyers on how to handle advance deposits of fees and expenses." Stated simply, under the Model Rules advance fees must be placed in a Rule 1.15-compliant trust account, to be disbursed to the lawyer only after the fee has been earned.

Some jurisdictions have authorized lawyers to treat advances as the lawyer's property upon payment, so long as the client signs a fee agreement designating the sum as "nonrefundable" or

<sup>&</sup>lt;sup>19</sup> See ABA CANONS OF PROFESSIONAL ETHICS, Canon 11 (1908); ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 9-102 (1969); ABA MODEL RULES OF PROF'L CONDUCT R. 1.15 (1983, revised 2002). One treatise explains the nature and breadth of this key obligation:

One of the core fiduciary duties of a lawyer is to safeguard the property that the lawyer receives from the client or from other sources but that belongs to the client or third persons. Property received from a client may include funds to be applied to a transaction, a payment in satisfaction of a judgment or settlement, an advance deposit against lawyer's fees, valuable documents to be analyzed, or property of evidentiary value. Under Rule 1.15(a) of the Model Rules of Professional Conduct, "[a] lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property." The lawyer therefore must keep the property in a secure location and segregate those assets from the lawyer's own property. Gregory C. Sisk, Duties to Effectively Represent the Client, § 4-5.6 (The Duty to Safeguard Client Funds and Property), in Legal Ethics, Professional Responsibility, and the Legal Profession (West Academic Publishing, 2016).

<sup>&</sup>lt;sup>20</sup> *In re* Kendall, 804 N.E.2d 1152, 1161 (Ind. 2004). Also, Rule 1.15(a)'s predecessor was applied to advance fees. Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003) (failure to place advance fee in a trust account violated DR 9-102(A)).

<sup>&</sup>lt;sup>21</sup> A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 342 (ABA 2006).

<sup>&</sup>lt;sup>22</sup> *Id*.

"earned on receipt" or some other variation on this theme.<sup>23</sup> This approach departs from the safekeeping policy of the Model Rules described herein and creates unnecessary risks for the client.<sup>24</sup>

### III. Model Rule of Professional Conduct 1.16: Declining or Terminating Representation

Model Rule 1.16(d) requires that, upon termination of representation, a lawyer shall refund "any advance payment of fee or expense that has not been earned or incurred." This Rule, and Rule

<sup>23</sup> See, e.g., Or. Rules of Prof'l Conduct R. 1.5(c)(3). That jurisdiction's version of Rule 1.15(c) contains an exception to the anti-commingling rule for advance fees when "the fee is denominated as 'earned on receipt,' 'nonrefundable' or similar terms and complies with Rule 1.5(c)(3)." Or. Rules of Prof'l Conduct R. 1.15-1(c). A considerable minority of U.S. jurisdictions have authorized this variant approach to advances by rule, ethics opinion, or judicial decree. See, e.g., State Bar of Ariz. Op. 99-02 (1999) (non-refundable, earned-upon-receipt fee is ethical if reasonable under Rule 1.5 and client is fully informed about and expressly agrees to such a fee, preferably in writing; such a fee does not go into a lawyer's trust account); Fla. Rules of Prof'l Conduct R. 4-1.5(e)(2)(B) and Comment (nonrefundable flat fee is the property of the lawyer and should not be held in trust); Wash. State Rules of Prof'l Conduct R. 1.5(f)(2) (if agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt and shall not be deposited into a trust account); and N.Y. St. Bar. Assn. Comm. Prof'l Ethics Op. 816 (2007) (reaffirming 1985 opinion concluding that "fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in client trust account"). Such jurisdictions typically provide, via rule or otherwise, that advance fees must be refunded if unreasonable or work remains to be done even if language to the contrary is used and the funds have been taken by the lawyer pursuant to a rule and/or agreement. <sup>24</sup> See *In re* Long, 368 Or. 452, 455–56, 474-75, 491 P.3d 783, 788–89, 798-99 (2021), cert. denied 142 S. Ct. 2685 (2022), in which the court candidly discussed the rule and its fallout:

Respondent's limited financial resources also led to his extensive use of fee agreements that allowed him to access advance fees before completing the promised services. . . . The [Oregon] Rules of Professional Conduct allow for alternative fee agreements, under which advance fees become the lawyer's property at the time the fees are received—that is, before the lawyer has performed the promised services. RPC 1.5(c)(3). In those instances, the advance fees are not placed in the lawyer's trust account and are sometimes referred to as "earned on receipt." Fees may be "earned on receipt" only pursuant to a written fee agreement disclosing that "the funds will not be deposited into the lawyer trust account" and that "the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed." *Id.* [¶] According to respondent, because he frequently had pressing personal and business costs, he would not have been able to operate his legal practice if he could access a client's fees only after he completed the promised services. . . . [¶] Although respondent's handling of those advance fees did not itself violate a Rule of Professional Conduct, it nevertheless left respondent's clients vulnerable. "Earned on receipt" fee agreements shift the risk of loss to the client. If the client relationship ends before the lawyer has performed the services needed to keep the advance fees, then the lawyer is required to return the fees for the uncompleted work. If the lawyer has already spent the advance fees and has no other financial resources upon which to draw, then the lawyer may be unable to provide the client with the required refund. [¶] That is what happened to many of respondent's clients. . . . [¶] Respondent's misconduct caused extensive injuries, which were not merely financial. Many of respondent's clients had limited financial means and needed their advance fees returned before they could afford to hire new lawyers. When respondent failed to return those advance fees, some clients simply went without legal representation.

1.15, work in tandem to achieve the regulatory objective of protection of the public from financial harm caused by inattentive or unscrupulous lawyers.<sup>25</sup>

Advances are unearned because they are payment today for work to be performed in the future. They were unearned upon receipt and remain unearned until the work is performed. The Model Rules mandate that advances belong to the client, must be preserved until they are actually earned, and must be refunded if the representation terminates before the fees are earned.

As a practical matter it may be somewhat more difficult to determine what has been earned and what is unearned when a representation ends before completion of the contemplated services when the client pays a flat or fixed fee instead of an hourly rate. However, courts routinely apportion the services completed and sum earned when a representation terminates before a lawyer has completed all of the contemplated work.<sup>26</sup>

# IV. Hypothetical Scenarios Involving Client Payments at the Commencement of a Specific Representation.

### **Hypothetical 1 ("Nonrefundable Retainer")**

A lawyer is consulted by a client seeking to terminate her marriage. The lawyer informs the client that the lawyer requires a \$6,000 "retainer" to cover the filing of a divorce complaint, preparing a motion to enjoin the transfer of assets and a possible motion for a protective order, attending hearings relative to those motions, and any negotiations or related work until the lawyer expends 20 hours. The client was also informed that additional "retainers" may be required to complete the matter, and that the retainers will be credited toward payment for the lawyer's services at the reasonable rate of \$300 per hour. The lawyer's fee agreement states, in pertinent part:

Client agrees to pay Lawyer a nonrefundable retainer fee of \$6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason.

Client further agrees that should Lawyer expend more than 20 hours on Client's matter, Client shall pay additional retainers as requested by Lawyer which shall be

<sup>&</sup>lt;sup>25</sup> Nothing tarnishes the profession's reputation like a lawyer who takes an advance fee for legal services to be performed in the future, does not complete the work contemplated by the fee arrangement, and does not refund the money, perhaps because he or she cannot. Once the money has been spent by the lawyer, it may never be recovered by the client (or by the client protection fund which may have reimbursed the client). Even if a civil judgment or disciplinary order of restitution is entered it may do little good if the lawyer is impecunious, judgment-proof, or bankrupt. Discipline in that case may offer a measure of public protection through deterrence, but it does not recompense the client. That client's access to justice may also be impeded. The client may be unable to pay another advance fee and may, therefore, be unrepresented if legal aid or pro bono assistance is unavailable. Model Rules 1.15 and 1.16 exist to protect a client from these consequences.

<sup>&</sup>lt;sup>26</sup> See, e.g., In re O'Farrell, 942 N.E.2d 799, 808 (Ind. 2011) (quantum meruit available upon client termination of flat fee agreement). *Cf.* Plunkett & Cooney, PC v. Capitol Bancorp Ltd, 212 Mich. App. 325, 331; 536 N.W.2d 886 (1995) (discharged lawyer with fixed-fee agreement entitled to compensation for services rendered calculated by percentage of services required under contract, unless lawyer and client have agreed to other terms for valuing work completed).

applied to Lawyer's billing for this matter at a rate of \$300 per hour and to any costs or expenses incurred in the representation.

Three weeks after signing the agreement and paying the \$6,000, Client notified Lawyer that she wanted to reconcile with her husband and asked for an itemization of Lawyer's time and expenses and a refund of any unearned fees. Lawyer had filed the complaint, but it had not been served. Lawyer had also prepared but had not filed a motion to enjoin the transfer of certain assets. Lawyer had spent 5.5 hours on the file and \$150 to file the complaint, but responded to the Client that no refund was due because the \$6,000 was a nonrefundable fee.

Question: Does Lawyer owe Client a refund for any of the \$6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes, Lawyer owes Client a refund. First, the \$6,000 paid by Client to the Lawyer are fees paid in advance not a general retainer. Under this agreement, Lawyer is rendering legal services at the rate of \$300 per hour. This is true from the outset as is established by simply reading the portion of the agreement quoted above and performing some simple math. The \$6,000 entitles Client to 20 hours of Lawyer's work on the matter.

Second, lawyer was required to have placed the \$6,000 of advanced fees into the Lawyer's client trust account. Model Rule 1.15(c) provides that: "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by Lawyer only as fees are earned or expenses incurred." The so-called nonrefundable fee here is an advance payment of fees that may only be withdrawn from the client trust account as earned by Lawyer. The facts of this hypothetical are silent as to whether Lawyer placed the \$6,000 in the trust, operating, or personal account and as to whether it was spent in whole or in part. Lawyers may be disciplined for treating advance fees as their own property before the fees are earned, i.e., before the contemplated legal services are rendered.<sup>27</sup> Commingling and perhaps misappropriation may have occurred here if Lawyer deposited the \$6,000 into an account other than a client trust account and spent it.

In this scenario, assuming that the legal work performed was appropriate and useful, Lawyer has earned \$1,650.00 in legal fees. Lawyer also spent \$150 for the expense of filing the complaint. Failure to return the balance of \$4,200 is a violation of Model Rule 1.16(d) (upon termination of representation, a lawyer shall refund any advance payment of fee or expense that has not been earned or incurred). Comment [4] to Rule 1.16(d) explains the fundamental legal principle underlying this requirement: "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services." Lawyer's failure to provide an accounting for the fees paid in advance also constitutes a violation of Rule 1.15(d).

<sup>&</sup>lt;sup>27</sup> "A lawyer misappropriates client funds in violation of DR 1–102(A)(3), (4), (5), and (6)DR 1–102(A)(3), (4), (5), and (6) when special retainers and flat fees paid in advance are treated as money belonging to the lawyer and not maintained in a trust account until the fee has been earned." Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 475 (Iowa 2003). *See also In re* Fazande, 290 So. 3d 178, 185 (La. 2020) (lawyer violated Rule 1.15(c) by failing to deposit into his client trust account advance fees and costs).

Model Rule 1.5(a) provides: "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Comment [4] to Rule 1.5 states: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d)." Thus, keeping the balance (\$4,200) violates Rule 1.5(a) on these facts. Because Rule 1.5 precludes a lawyer from agreeing to an unreasonable fee, it is also violated by the Lawyer's inclusion of the following provision in the fee agreement: "Client agrees to pay Lawyer a nonrefundable fee of \$6,000. Client understands that no portion of this fee shall be refunded or returned to Client for any reason."<sup>28</sup>

Finally, because a lawyer may, in fact, be required to refund an advance payment of fees in various situations, characterizing such an advance as "nonrefundable" may also amount to a violation of Rule 1.4 (communication) and Rule 8.4(c) (misrepresentation) as the mischaracterization of the funds may have a chilling effect on a client seeking a refund of unearned fees upon termination of the representation.<sup>29</sup>

Lawyer and the fee agreement use the words "retainer" and "fee" interchangeably. In this hypothetical it appears that the word "retainer" is used incorrectly to refer to the advance payment of legal fees at the initiation of a matter, or, really, at any time during the representation as is suggested by the agreement's provision that additional "retainers" may be required.

## **Hypothetical 2 (Purported General Retainer)**

The facts are the same as in Hypothetical 1, except that the lawyer's standard fee agreement states, in pertinent part:

Client agrees to pay Lawyer a non-refundable engagement fee of \$6,000 which shall be deemed earned upon receipt by Lawyer. This engagement fee is for the purpose of retaining Lawyer and assuring the availability of Lawyer in this matter. Client understands that no portion of the engagement fee shall be refunded or returned to Client for any reason.

Client further agrees that should Lawyer expend more than 20 hours, Client shall pay upon request an additional retainer in an amount determined by Lawyer which shall be applied to Lawyer's billing for this matter at a rate of \$300 per hour and to any costs or expenses incurred in the representation.

<sup>&</sup>lt;sup>28</sup> In re Kendall, 804 N.E.2d 1152, 1160 (Ind. 2004) ("We hold that the assertion in a lawyer fee agreement that such advance payment is nonrefundable violates the requirement of Prof. Cond. R. 1.5(a) that a lawyer's fee 'shall be reasonable."). See also N.Y. City Bar Ass'n Formal Opinion 1991-3 (in light of reasonableness requirement, duty to refund unearned fees, and client's "essentially absolute" right to discharge counsel, "a lawyer may not properly denominate or characterize a fee as 'nonrefundable' or otherwise use words that could reasonably be expected to convey to the client the understanding that a fee paid before the services are performed will not be subject to refund or adjustment under any possible circumstance").

<sup>&</sup>lt;sup>29</sup> See, e.g., In re Sather, 3 P.3d 403, 415 (Colo. 2000) (knowing use of misleading language, i.e., describing flat advance fee as "nonrefundable," violated Colo. RPC 8.4(c)) and Ala. State Bar Op. RO-93-21 (1993) ("Any indication by the lawyer that the fee is non-refundable is inaccurate and inherently misleading and would violate Rule 1.4(b) Communication; Rule 1.5(b) Fees; and Rule 8.4(c) Misrepresentation."). See also Mo. Sup. Ct. Advisory Comm. Formal Op. 128 (Amended 2018) (in various situations "the description of the fee as 'nonrefundable' is misleading").

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Again, the facts are the same: Lawyer spent 5.5 hours and a filing fee for the complaint, and Client reconciles and seeks a refund. Lawyer declines to refund any portion of the fee, claiming it is nonrefundable.

Question: Does Lawyer owe Client a refund for any of the \$6,000 paid to Lawyer and are any rule violations established by this scenario?

Answer: Yes. The answer and analysis for Hypothetical 1 apply here as well. The only difference ("retainer" and "engagement fee" language) makes no difference at all. The fee arrangement still has the same basic structure and, for the reasons discussed above, the \$6,000 is clearly an advance payment for the future performance of legal services, not an actual "retainer" because the lawyer contemplates billing time against the advance.<sup>30</sup> Accordingly, the \$6,000 must be held in trust until earned and any unearned portion properly refunded to the client.

Under the Model Rules, there are no magic words that a lawyer can use to change what is actually an advance payment for fees into a general retainer: "an attorney cannot treat a fee as 'earned' simply by labeling the fee 'earned on receipt' or referring to the fee as an 'engagement retainer." Notwithstanding the use of the terms "engagement fee," "retainer," and "availability," the fee in Hypothetical 2 is still not a general retainer fee and is, therefore, not deemed earned on receipt. The purpose of the fee dictates its character and treatment irrespective of labels or terminology used.

Courts examine the transaction and agreement very carefully to ensure that the purported general retainer is not an attempt to charge and retain unearned advance fees.<sup>32</sup> Accordingly, a lawyer claiming to have a general retainer must be prepared to demonstrate a valuable benefit to the client and/or an actual detriment to the lawyer.<sup>33</sup> It is easy to recite that the lawyer is prioritizing the client's work, turning away other work, keeping up on the relevant law, etc. However, it must be shown that such things were not only actually done, but that they were necessary for the representation and not part of the lawyer's basic responsibilities.<sup>34</sup>

<sup>&</sup>lt;sup>30</sup> Cf. In re Lais, No. 91-O-08572, 1998 WL 391171, at \*14-15 (Cal. Bar Ct. July 10, 1998) (characterization as "fixed, non-refundable retaining fee' paid 'for the purpose of assuring the availability of [respondent] in this matter" was "not determinative" and the fee was not a "true" (general) retainer, but actually payment for the first 10 hours of lawyer's services).

<sup>&</sup>lt;sup>31</sup> In re Sather, 3 P.3d 403, 412 (Colo. 2000). See also note 18, supra.

<sup>&</sup>lt;sup>32</sup> Richmond, *supra* note 10, at 116: "As a practical matter, general retainers are rare. . .. The types of representations that justify or require general retainers are also scarce. Courts hearing fee related controversies are therefore properly skeptical of general retainer claims." *See also* RESTATEMENT, *supra* note 9, § 34 ("Engagement-retainer fees agreed to by clients not so experienced should be more closely scrutinized to ensure that they are no greater than is reasonable and that the engagement-retainer fee is not being used to evade the rules requiring a lawyer to return unearned fees.")

<sup>&</sup>lt;sup>33</sup> Att'y Grievance Comm'n of Maryland v. Stinson, 428 Md. 147, 183-185, 50 A.3d 1222, 1244-1245 (2012) (purported engagement fee for "willingness and availability" to represent client not a true general retainer where no benefit to client or detriment to lawyer established and lawyer "produced no useable work").

<sup>&</sup>lt;sup>34</sup> See Stinson, 50 A.3d at 1243 (benefits offered to the client in exchange for the nonrefundable fee were "nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client. . . . A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services."), citing Lester Brickman & Lawrence A. Cunningham, Nonrefundable Retainers Revisited, 72 N.C. L. REV. 1, 24 (1993), and Iowa Sup. Ct. Bd. of Pro. Ethics & Conduct v. Frerichs, 671 N.W.2d 470, 477 (Iowa 2003).

#### **Hypothetical 3 (Flat Fee)**

A client seeks to hire a lawyer for representation in a criminal matter. The fee agreement provides: "Client shall pay Lawyer the sum of \$15,000 for representation in the matter of State v Client, and that no part of the flat fee shall be refunded for any reason. Client understands that the flat fee is the agreed upon amount due Lawyer regardless of the time expended on the matter or how it is resolved." Client signed the agreement and paid the full \$15,000. Lawyer deposited the \$15,000 into his firm's operating account. Lawyer reviewed the police report, left a message for the prosecutor and law enforcement officer, appeared on behalf of the defendant at the arraignment, and filed an appearance with the court. A few weeks after the arraignment, Client discharged Lawyer and requested an accounting and partial refund. Lawyer refused, stating that the flat fee was earned when it was paid.

As we noted above, flat fees paid in advance of performing the work are subject to Rule 1.15(c) and the other rules set forth in the analyses in Hypotheticals 1 and 2. In other words, the foregoing rules regarding safekeeping, refundability, and reasonableness apply.

Flat fees are not general retainers and must not be treated as such. That the price set for the representation is not based on hours worked but is instead based on the completion of certain described services does not mean that the fee must be considered earned on receipt or nonrefundable when there is work yet to be done. Of course, if the flat fee is paid *after* the work is completed, the funds are earned and are not deposited into the trust account.

#### V. Conclusion

The Model Rules protect a client's right to terminate the fiduciary relationship with a lawyer and have the money to which the client is entitled available to obtain successor counsel if desired. Rule 1.15 requires that fees paid in advance must be held in a trust account until the services for which the fees will be paid are actually rendered, thereby allocating various risks to lawyer and client. The lawyer does not have to bear the risk of nonpayment after the work is completed; Rule 1.15 provides a process for withdrawal of earned fees and even for disputes, should they arise. And the client does not have to bear the risk that the funds will be spent, attached by the lawyer's creditors, or otherwise dissipated before the legal work is performed due to a lawyer's unwillingness or inability to do so.

Other ethics opinions and resources discuss good billing practices and fee agreement drafting tips. However, we offer the following suggestions in relation to the matters addressed in this opinion. Use plain language. Thus, instead of "retainer" say "advance" and explain that it is a "deposit for fees."<sup>35</sup> Explain that the sum deposited will be applied to the balance owed for work on the matter, and how and when this will happen. For example, the fee agreement could provide

<sup>&</sup>lt;sup>35</sup> GEOFFREY C. HAZARD, JR., PETER R. JARVIS, TRISHA THOMPSON & W. WILLIAM HODES, THE LAW OF LAWYERING §9.07 (4th ed. 2022-2 Supp. 2014). Of course, the applicable Rules of Professional Conduct must be consulted, and it may be prudent or required to use certain terms. However, accurately translating legal terms of art is not only helpful to the client but also assists with interpretation and enforcement. So, if the term "advance" or "special retainer" is used in the applicable rules, the lawyer will want to use it in the fee agreement. However, consider also adding an explanation that it is functionally a deposit to cover fees for work in the future.

that on a monthly basis the client will be invoiced for the time expended by the lawyer and state when the sum reflected in the invoice will be withdrawn from the trust account. When the arrangement is for hourly billing, explain that if the deposit exceeds the final billing any balance will be remitted to the client. If the advance fee is fixed and the representation may continue for some time or involve several stages, consider dividing the representation into reasonable segments and providing for withdrawal of a reasonable portion of the deposited fee as the representation progresses and the fee becomes partially earned. <sup>36</sup> Finally, it may be wise to recognize the reality that many relationships do not last and include a provision explaining what will happen if the representation is terminated before the matter is completed.<sup>37</sup>

#### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

321 N. Clark Street, Chicago, Illinois 60654-4714 Telephone (312) 988-5328 CHAIR: Lynda Shely, Scottsdale, AZ ■ Mark A. Armitage, Detroit, MI ■ Melinda Bentley, Jefferson City, MO ■ Matthew Corbin, Olathe, KS ■ Robinjit Kaur Eagleson, Lansing, MI ■ Doug Ende, Seattle, WA ■ Hon. Audrey Moorehead, Dallas, TX ■ Wendy Muchman, Chicago, IL ■ Keith Swisher, Scottsdale, AZ ■ Charles Vigil, Albuquerque, NM

CENTER FOR PROFESSIONAL RESPONSIBILITY: Mary McDermott, Lead Senior Counsel

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<sup>&</sup>lt;sup>36</sup> See supra notes 15 & 16.

<sup>&</sup>lt;sup>37</sup> Again, see Colo. R. Prof'l Conduct R. 1.5(h) and accompanying flat fee form providing helpful language for dividing a representation into increments and explaining a method of calculating the fees the lawyer has earned should the representation terminate prior to completion of the tasks or events specified in the agreement.



# IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: December 13, 2022.

CRAIG A. GARGOTTA
CHIEF UNITED STATES BANKRUPTCY JUDGE

# UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

IN RE:	§	
	§	<b>CASE NO. 22-50592-CAG</b>
CHRIS PETTIT & ASSOCIATES, P.C.	§	
AND CHRISTOPHER JOHN PETTIT,	§	
	§	(JOINTLY ADMINISTERED)
	Š	` ,
DEBTORS	Š	CHAPTER 11
	§	

# ORDER DENYING FIRST AND FINAL APPLICATIONS FOR COMPENSATION AND EXPENSES OF MARTIN & DROUGHT, P.C. AND DISGORGING AMOUNTS PAID TO MARTIN & DROUGHT, P.C.

Came on for consideration two fee applications filed by Martin & Drought, P.C. ("M&D") for its representation of jointly administered Debtors Christopher John Pettit and Chris Pettit & Associates, P.C ("CP&A"). M&D filed its First and Final Application for Compensation of Fees and Expenses of Martin & Drought, P.C. within the Chris Pettit & Associates, P.C. Chapter 11

Case ("CP&A Fee Application") in case number 22-50591, the lead case.<sup>1</sup> (CP&A ECF No. 468). M&D similarly filed its First and Final Application for Compensation of Fees and Expenses of Martin & Drought, P.C. within the Christopher John Pettit Chapter 11 Case ("CP Fee Application") in case number 22-50592.<sup>2</sup> (CP ECF No. 91). M&D filed both the CP&A Fee Application and the CP Fee Application (collectively, the "Fee Applications") on September 27, 2022.

Both Fee Applications drew objections from the United States Trustee ("UST") (CP&A ECF No. 535; CP ECF No. 102)<sup>3</sup> and the Chapter 11 Trustee ("Trustee") (CP&A ECF No. 539; CP ECF No. 104).<sup>4</sup> The Noltes, parties in interest, filed objections and joined the objection filed by the UST. (CP&A ECF No. 608; CP ECF Nos. 103, 120). All objections ask the Court to deny the fees requested in the Fee Applications. Because the Court finds that M&D's disclosures in both cases were incomplete and inadequate, the Court DENIES the Fee Applications and DISGORGES all amounts received by M&D to the Chapter 11 Trustee to be held for the benefit of the creditors.

#### **JURISDICTION**

As a preliminary matter, the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (B). Venue is proper under 28 U.S.C. §§ 1408 and 1409. This case is referred to this Court by the Standing Order of Reference entered in this District.

<sup>&</sup>lt;sup>1</sup> ECF denotes electronic filing number. All references to the docket in the lead case, 22-50591, will read CP&A ECF No. In text references will call case number 22-50591 the CP&A case or lead case.

<sup>&</sup>lt;sup>2</sup> ECF denotes electronic filing number. All references to the docket in case number 22-50592 will read CP ECF No. . In text references will call case number 22-50592 the Pettit case.

<sup>&</sup>lt;sup>3</sup> Where UST's objections ("UST's Objections") advance the same (or substantially the same) argument, the Court will refer to the UST's objection in the lead case, case number 22-50591.

<sup>&</sup>lt;sup>4</sup> Where the Trustee's objections ("Trustee's Objections") advance the same (or substantially the same) argument, the Court will refer to the Trustee's objection in the lead case, case number 22-50591.

#### FACTUAL AND PROCEDURAL HISTORY

# **Pre-Filing Background**

Before voluntarily filing for bankruptcy on behalf of himself and his law firm, Christopher John Pettit practiced law in San Antonio, Texas. Pettit, individually or through CP&A, represented clients as an attorney, tax advisor and preparer, financial advisor, 1031 exchange intermediary, and served as trustee for various trusts. Pettit and CP&A's practice included estate planning, tax return preparation and tax filing, creation of trusts and estate plans, personal injury, probate, family law, and other matters.

Beginning in March 2022, various state court lawsuits named Pettit and CP&A as defendants. (*See, e.g.* Trustee's Exs. 19, 21, and 23). Plaintiffs in these suits were former clients of Pettit and/or CP&A. (*Id.*). The former clients alleged causes of action including breach of fiduciary duty, conversion, fraud, felony theft, fraudulent inducement, and unjust enrichment. (*Id.*). Gerald T. Drought—a named partner at M&D—defended Pettit and CP&A in the state court actions. (*Id.*). Pettit and CP&A, jointly and severally, signed agreed judgments in (at least some of) the state court actions brought by former clients. (*See, e.g.* Trustee's Exs. 20, 22, and 24). Drought also signed the agreed judgments as attorney for Pettit and CP&A. (Trustee's Exs. 22 and 24). The agreed judgments submitted as evidence on this matter exceed \$35 million. (Trustee's Exs. 20, 22, and 24). These agreed judgments are respectively dated March 18, April 5, and May 27. (*Id.*). Plaintiffs in the May 27 agreed judgment are Frank and Emma Persyn Family Limited Partnership, Henry J. Persyn, Frank G. Persyn, Jr., Laura Kubesh, and Leslie Ann Persyn. (Trustee's Ex. 24).

### **Early Bankruptcy Litigation**

On May 10, M&D, by and through attorney Michael G. Colvard, began advising Pettit and CP&A regarding bankruptcy. (CP&A ECF No. 468, at ¶ 1.8; CP ECF No. 91, at ¶ 1.8). Debtors filed separate, voluntary petitions for Chapter 11 bankruptcy relief on June 1. (CP&A ECF No. 1; CP ECF No. 1). Colvard was the attorney of record in both cases at the time of filing.

No more than two days later, Sharon Brimhall—another former client—filed a motion to appoint a Chapter 11 Trustee on June 3. (CP&A ECF No. 11; CP ECF No. 13). Brimhall alleged that "Pettit and CP&A have absconded with estate assets which were deposited with them in a fiduciary capacity" and that "Pettit and CP&A were defendants in at least 12 separate lawsuits in which the plaintiffs [sic.] are alleging that Pettit and CP&A have stolen funds in trusted to them." (CP&A ECF No. 11, at ¶¶ 5,7). Brimhall then referenced agreed judgments in the cases. (*Id.* at ¶ 7). Brimhall argued that cause existed to appoint a trustee because "[b]oth Pettit and CP&A engaged in a pattern of fraud, dishonesty, incompetence, or gross mismanagement of their affairs before the commencement of the case." (*Id.* at ¶ 10). At the hearing on the motion to appoint a trustee, counsel for Brimhall informed the Court that Brimhall and several other creditors were in the process of filing an involuntary petition on behalf of Debtors before Debtors voluntarily filed. (Hearing Audio, June 8, 2022 at 2:14 p.m.). At the hearing, Colvard told the Court that

considering the status of the pending litigation and matters that were before Mr. Pettit, we considered that bankruptcy was the one forum where everything could be brought to a head, where the assets could be liquidated, claims could be resolved, and there could be a resolution in terms of distribution to the creditors.

(*Id.* at 2:35–36 p.m.). Colvard also advised the Court that Pettit intended to waive his discharge. (*Id.* at 2:37 p.m.). Debtors did not oppose the appointment of a trustee. The Court approved the appointment of a trustee at the hearing and issued the appropriate orders thereafter. (CP&A ECF

No. 13; CP ECF No. 14). Ultimately, the Court approved Eric Terry's appointment as Chapter 11 Trustee on June 22. (CP&A ECF No. 83).

At the same hearing, the Court considered Debtor's Emergency Motion for Order Authorizing Joint Administration pursuant to Bankruptcy Rule 1015 and Local Rule 1015. (CP&A ECF No. 9; CP ECF No. 11). The Court also approved joint administration and entered its Order Granting Motion for Joint Administration on June 21, designating 22-50591 as the lead case. (CP&A ECF No. 78; CP ECF No. 44).

On July 6, the UST filed a Notice of Appointment of Committee of Unsecured Creditors. (CP&A ECF No. 148). The Frank and Emma Persyn Family Limited Partnership is a member of the Unsecured Creditors Committee. (*Id.*).

#### Disclosures in In re CP&A

On the second day of CP&A's bankruptcy, CP&A submitted its Application of Debtor to Employ Counsel ("CP&A Application to Employ") (CP&A ECF No. 7). The CP&A Application to Employ asked the Court to approve employment of M&D, with Colvard as lead counsel, as Debtor's counsel. Attached as Exhibit 1 was an Affidavit of Disinterest, sworn by Colvard. (CP&A ECF No. 7, Ex. 1). The affidavit states that "[M&D] will seek compensation in this case at the hourly rates normally charged by [M&D]." (*Id.* at 2). For Colvard, that rate is \$500 per hour. (*Id.*). The Affidavit of Disinterest also states:

[M&D] provided pre-bankruptcy legal services to Debtor unrelated to bankruptcy preparation or planning, principally focusing on state court proceedings and settlement prospects of creditor efforts, seeking debt recovery. [M&D] received compensation for those pre-bankruptcy state court related proceedings and was not owed any pre-petition fees or expenses in relation thereto. [M&D] received separate retainers for bankruptcy related services to be used in the planning, counseling, review of matters and for the pre-bankruptcy legal services unrelated to state court proceedings. The prepetition bankruptcy retainers were partially consumed in satisfaction of legal services provided for planning, preparation and filing the

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<sup>&</sup>lt;sup>5</sup> The CP&A Application to Employ was admitted as M&D's Ex. 6, Trustee's Ex. 7, and UST's Ex. 5.

bankruptcy petition. No [M&D] pre-petition [sic.] were outstanding on the filing date.

(*Id.*). The Affidavit of Disinterest also states M&D "represents no interest adverse to this Debtor's estate, holds no interest adverse to Debtor's estate, and is a disinterested party within this proceeding." (*Id.* at 1).

No party in interest objected to M&D's employment as CP&A's counsel. The Court granted the CP&A Application to Employ on June 27. (CP&A ECF No. 128).

On June 30, CP&A filed its first set of Schedules and Statement of Financial Affairs ("June 30 Schedules", "June 30 SOFA", or "June 30 Schedules and SOFA") (CP&A ECF No. 136).<sup>6</sup> The June 30 SOFA Part 2, Question 3 instructs CP&A to "[l]ist payments or transfers—including expense reimbursements—to any creditor, other than regular employee compensation, within 90 days before filing this case unless the aggregate value of all property transferred to that creditor is less than \$7,585." (CP&A ECF No. 136, at 113). CP&A admitted it made payments or transferred property to "[v]arious [c]reditors." (*Id.*). Instead of listing dates, CP&A stated "[a]n accounting of payments made within 90 days is being prepared, but comprehensive information is not currently available and will be supplemented upon completion of the accounting, to be provided as amendment to SOA 2.3 as soon as available." (*Id.*). CP&A did not list M&D in response to Part 2, Question 3 on the June 30 SOFA.

Part 6, Question 11 of the June 30 SOFA prompts CP&A to

List any payments of money or other transfers of property made by the debtor or person acting on behalf of the debtor within 1 year before the filing of this case to another person or entity, including attorneys, that the debtor consulted about debt consolidation or restructuring, seeking bankruptcy relief, or filing a bankruptcy case.

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<sup>&</sup>lt;sup>6</sup> The June 30 Schedules and SOFA were admitted as M&D's Ex. 12, Trustee's Ex. 2, and UST's Ex. 4.

(*Id.* at 117). CP&A listed a May 16, 2022 payment to M&D for \$20,000 with the description "Retainer – Bankruptcy for Chris Pettit & Associates." (*Id.*).

Included with the June 30 Schedules and SOFA is a Disclosure of Compensation of Attorney for Debtor ("June 30 Disclosure of Compensation") pursuant to Federal Rule of Bankruptcy Procedure ("Rule(s)") 2016(b). Colvard answered Question 1 as follows:

Pursuant to 11 U.S.C. § 329(a) and Fed. Bankr. P. 2016(b), I certify that I am the attorney for the above named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

(*Id.* at 138). As to Question 2, Colvard checked the "other" box as the source of his compensation. Because selecting other requires debtor's counsel to specify, Colvard identified "Chris Pettit" as the source of his compensation. (*Id.*).

#### Disclosures in In re Pettit

Unlike in the CP&A case, Pettit filed his first set of Schedules and Statement of Financial Affairs ("June 1 Schedules", "June 1 SOFA", or "June 1 Schedules and SOFA") along with his voluntary petition on June 1. (CP ECF No. 1).<sup>7</sup> Part 3, Question 6 of the June 30 SOFA asks if Pettit, during the 90 days before filing for bankruptcy, paid any creditor a total of more than \$600. (*Id.* at 149). Pettit checked the "yes" box and listed payments to 19 creditors within the 90-day lookback period. (*Id.* at 149–52). Pettit did not list payment to M&D. (*Id.*).

 $<sup>^7</sup>$  The June 1 Schedules and SOFA were admitted as M&D's Ex. 9, Trustee's Ex. 4, and UST's Ex. 1.

Part 7 of the June 1 SOFA asks about payments within one year of filing for bankruptcy. Question 16 asks if Pettit, within one year of filing bankruptcy, or anyone else acting on Pettit's behalf paid or transferred any property to anyone Pettit consulted about seeking bankruptcy or preparing a bankruptcy petition. (*Id.* at 157). Pettit listed two payments to M&D: one on May 16 for \$10,000 and a second on May 25 for \$50,000. (*Id.*). Similarly, Question 17 asks Pettit whether, within one year of filing for bankruptcy, he or anyone else acting on his behalf paid or transferred any property to anyone who promised to help Pettit deal with his creditors or to make payments to his creditors. (*Id.*). The question instructs Pettit to "not include any payment . . . listed on line 16." (*Id.*). Pettit answered no. (*Id.*).

Included with the June 1 Schedules and SOFA is a Disclosure of Compensation of Attorney for Debtor ("June 1 Disclosure of Compensation") pursuant to Rule 2016(b). Colvard answered Question 1 as follows:

Pursuant to 11 U.S.C. § 329(a) and Fed. Bankr. P. 2016(b), I certify that I am the attorney for the above named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

(*Id.* at 178). As to Question 2, Colvard checked the "debtor" box as the source of his compensation, thereby identifying Pettit. (*Id.*).

The next day, on June 2, Pettit filed his Application of the Debtor to Employ Counsel ("Pettit Application to Employ") (CP ECF No. 10).8 Other than the caption, the Affidavit of

<sup>&</sup>lt;sup>8</sup> The Pettit Application to Employ was admitted as M&D's Ex. 5, Trustee's Ex. 10, and UST's Ex. 2.

Disinterest attached to the Pettit Application to Employ is identical to the same attached to the CP&A Application to Employ. (*Compare* CP ECF No. 10, Ex. 1 with CP&A ECF No. 7, Ex. 1). Attached as Exhibit 1, the affidavit states that "[M&D] will seek compensation in this case at the hourly rates normally charged by [M&D]." (CP ECF No. 10, Ex. 1, at 2). For Colvard, that rate is \$500 per hour. (*Id.*). The Affidavit of Disinterest also states:

[M&D] provided pre-bankruptcy legal services to Debtor unrelated to bankruptcy preparation or planning, principally focusing on state court proceedings and settlement prospects of creditor efforts, seeking debt recovery. [M&D] received compensation for those pre-bankruptcy state court related proceedings and was not owed any pre-petition fees or expenses in relation thereto. [M&D] received separate retainers for bankruptcy related services to be used in the planning, counseling, review of matters and for the pre-bankruptcy legal services unrelated to state court proceedings. The prepetition bankruptcy retainers were partially consumed in satisfaction of legal services provided for planning, preparation and filing the bankruptcy petition. No [M&D] pre-petition [sic.] were outstanding on the filing date.

(*Id.*). The Affidavit of Disinterest also states M&D "represents no interest adverse to this Debtor's estate, holds no interest adverse to Debtor's estate, and is a disinterested party within this proceeding." (*Id.* at 1).

On July 19, Pettit amended his Schedules A, B, C, D, G, and his SOFA ("July 19 Schedules", "July 19 SOFA", or "July 19 Schedules and SOFA") (CP ECF No. 59). Pettit answered Part 7, Question 17 differently in the July 19 SOFA than in the June 1 SOFA. (*Compare* CP ECF No. 59, at 42 *with* CP ECF No. 1, at 157). In his amendment, Pettit answered "yes" when asked if, within one year before filing for bankruptcy, he or anyone else acting on his behalf paid or transferred any property to anyone who promised to help Pettit deal with his creditors or to make payments to his creditors. (CP ECF No. 59, at 42). Specifically, Pettit listed payments between March 17 and May 13, 2022 to M&D in the amount of \$70,000 for "Payment of Legal"

<sup>&</sup>lt;sup>9</sup> The July 19 Schedules and SOFA were admitted as M&D's Ex. 10, Trustee's Ex. 5, and UST's Ex. 3.

Fees in relation [sic.] to representation within several State Court Cases between March – June 2022." (*Id.*).

# **UST Complains regarding Disclosures of Compensation**

The UST and Colvard met on July 13. At the meeting, the UST and his representative informed Colvard that the UST considered his disclosures of compensation inadequate because it did not clearly state the fee structure and the nature of the Applicant's prepetition compensation.

#### Revelation of IOLTA Payments to M&D and M&D's Withdrawal as Counsel

On August 4, the Court held a hearing regarding whether the Court should authorize a budget for Pettit's living expenses because he had no access to cash and no job. The Court denied Pettit's request for any spending money. (*See* CP&A ECF No. 293). During the August 4 hearing, counsel for creditors Verstuyfts and Seiferts put on evidence of bank statements from an IOLTA account. The exhibit showed that M&D received funds from the NM IOLTA account. Thereafter, on August 10, party in interest Beyer Living Trust sent M&D a demand letter. (*See* CP&A ECF No. 332, at 3).

Then, on August 23, M&D filed its Motion of Martin & Drought P.C. for Authority to Withdraw as Joint Debtors' Counsel ("Motion to Withdraw") (ECF No. 330). 11 Several parties opposed M&D's withdrawal as counsel at a contested hearing on August 29. The Court granted the Motion to Withdraw over the objections.

Contemporaneously with the Motion to Withdraw, M&D filed a Supplement to Affidavit of Disinterest under Bankruptcy Rule 2016(b) ("Supplemental Affidavit of Disinterest") (CP&A)

<sup>&</sup>lt;sup>10</sup> IOLTA stands for Interest on Lawyers' Trust Accounts. When a lawyer handles money that belongs to clients, the lawyer is to deposit the money into an IOLTA account. This serves to segregate the client's money from the lawyer's or law firm's use. Deposit into an IOLTA account also allows the funds to earn interest for the client. Comm'n on Int. Laws.' Tr. Accts., *IOLTA*: *Overview*, AM. BAR ASS'N, https://www.americanbar.org/groups/interest lawyers trust accounts/overview/.

<sup>&</sup>lt;sup>11</sup> The Motion to Withdraw was admitted as M&D's Ex. 15, Trustee's Ex. 12, and UST's Ex. 7.

ECF No. 332)<sup>12</sup> on August 23. In summary form, the Supplemental Affidavit of Disinterest states M&D had no knowledge "that retainer funds paid to [M&D] by Christopher Pettit or CP&A were derived from the Wells Fargo NM IOLTA, or that funds used to pay [M&D] retainers may have originated from CP&A client funds" prior to the revelations at the August 4 hearing. (CP&A ECF No. 332, at 2). Since the August 4 hearing, M&D reviewed the wire transfers it received for representing Pettit and CP&A (both in state court and bankruptcy court), the April 2022 NM IOLTA statement introduced at the hearing, and the May 2022 NM IOLTA statement, provided to M&D by the Trustee. (*Id.* at 1). Reviewing the May 2022 NM IOLTA statement revealed two more transfers to M&D: one on May 11 for \$40,000, and a second on May 16 for \$10,000. (*Id.* at 1–2).

M&D next stated it received a total of five wire transfers for its representation of Pettit and CP&A, both in the state court matters and bankruptcy: \$10,000 on March 10; \$20,000 on April 13; \$40,000 on May 11; \$10,000 on May 16; and \$50,000 on May 25. (*Id.* at 2). The first three transfers, totaling \$70,000, "were intended as payments / retainers for prepetition attorney services in relation to pending State Court matters for which [M&D] became employed in March 2022." (*Id.*). The remaining two transfers totaling \$60,000 "were received as bankruptcy retainer / payments intended to compensate for [M&D] bankruptcy related services." (*Id.*). M&D states that the "prepetition bankruptcy retainers were partially consumed in satisfaction of legal services provided by [M&D]". (*Id.* at 4).

M&D then made the following disclosure:

A review of the Wells Fargo NM IOLTA bank statements for April and May 2022, without further documentation, does not provide conclusive information or certainty regarding the source of funds or the originating accounts funding the [M&D] payments of:

i. April 30, 2022 wire transfer of \$20,000.00;

<sup>&</sup>lt;sup>12</sup> The Supplemental Affidavit of Disinterest was admitted as M&D's Ex. 14, Trustee's Ex. 13, and UST's Ex. 6.

ii. March 30, 2022 wire transfer of \$10,000.00; and,

iii. May 25, 2022 wire transfer of \$50,000.00.

The wire transfer dated May 25, 2022, in the amount of \$50,000.00 does not appear to have originated from the Wells Fargo NM IOLTA.

(*Id.* at 3). The Court observes that the paragraph purporting to list all "wire transfers as retainer deposits or payments from Debtors" to M&D does not list March 30 or April 30 payments. (*Compare id.* at 2 *with id.* at 3). Colvard testified at the hearing on this matter that M&D received five wire transfers totaling \$130,000.

M&D next acknowledged that the May 11 wire transfer of \$40,000 "appears to have originated from a deposit into the Wells Fargo NM IOLTA account on the same day, which deposit may constitute CP&A client funds." (*Id.* at 3). M&D states this is the money referenced in the Beyer Living Trust demand letter dated August 10. (*Id.*).

Lastly, M&D stated that, though it did not previously know, "M&D is now aware that transfers to [M&D] totaling \$70,000.00, made by three separate wire transfers received on April 13, May 11, and May 16, 2022, were paid out of funds maintained within the Wells Fargo NM IOLTA Account, and that the \$40,000.00 transfer on May 11, 2022 appears to have originated from CP&A client funds." (*Id.* at 4). M&D then states that "a lack of 'disinterest' under 11 U.S.C. § 327(a) may exist or may arise." (*Id.* at 4). M&D also acknowledges that receipt of funds subject to claims of third parties creates a conflict of interest between M&D, Pettit, CP&A, and/or the creditors asserting claims to the funds under Tex. Disciplinary R. Pro. Conduct 1.06(b)(1) and/or (2).

In summary form, M&D in its Supplemental Affidavit of Disinterest disclosed the following information regarding payments for representation of Pettit and CP&A, both in state court and bankruptcy:

Date of Receipt	Amount	Source of Funds	Representation
March 10, 2022	\$10,000	Unknown	State Court
March 30, 2022	\$10,000	No information	No information
		provided	provided
April 13, 2022	\$20,000	NM IOLTA	State Court
April 30, 2022	\$20,000	No information	No information
		provided	provided
May 11, 2022	\$40,000	NM IOLTA;	State Court
		demanded by Beyer	
		Living Trust	
May 16, 2022	\$10,000	NM IOLTA	Bankruptcy
May 25, 2022	\$50,000	Unknown; M&D	Bankruptcy
		contends likely not	
		NM IOLTA	

(See generally CP&A ECF No. 332).

The Court has no direct evidence of the NM IOLTA statements, other than the April 2022 statement admitted during the August 4 hearing. The Court has no direct evidence of the wire transfers received by M&D. Rather, the only evidence before the Court is Colvard's testimony regarding his review of the wire transfers and NM IOLTA statements and these disclosures.

## **The Fee Applications**

M&D filed its Fee Applications<sup>13</sup> on September 27, 2022. Both Fee Applications only seek compensation from June 1 through June 22: the period from the date of petition until the appointment of Eric Terry as Trustee. (CP&A ECF No. 468, at 1–2; CP ECF No. 91, at 1). The CP&A Application requests compensation in the amount of \$28,200, reimbursement of expenses in the amount of \$2,547.71, and fees and expenses associated with filing the CP&A Fee Application in the amount of \$1,500, for a total award of \$32,247.71. (CP&A ECF No. 468, at 1). The CP Fee Application requests compensation in the amount of \$31,100, reimbursement of expenses in the amount of \$1,910.69, and fees and expenses associated with filing the CP&A Fee

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<sup>&</sup>lt;sup>13</sup> The CP&A Fee Application was admitted as M&D's Ex. 2. Likewise, the CP Fee Application was admitted as M&D's Ex. 1.

Application in the amount of \$1,500, for a total award of \$34,410.68. (CP ECF No. 91, at 1). Both Fee Applications state that M&D received \$60,000 as a prepetition retainer and allocated \$40,000 to the Pettit case and \$20,000 to the CP&A case. (CP&A ECF No. 468, at ¶ 1.1; CP ECF No. 91, at ¶ 1.1). Both Fee Applications also indicate that M&D incurred prepetition fees not sought in both cases: \$5,100 in CP&A and \$16,350 in Pettit. (CP&A ECF No. 468, at ¶ 1.8; CP ECF No. 91, at ¶ 1.8). Likewise, both Fee Applications state that M&D incurred fees after June 23 not sought in both cases, though the amounts are not specified. (CP&A ECF No. 468, at ¶ 1.8; CP ECF No. 91, at ¶ 1.8). Amounts sought in the Fee Applications are to be reduced by "any unused and available retainer funds to the extent not returned to the estate or former CP&A clients." (CP&A ECF No. 468, at 11; CP ECF No. 91, at 11).

To support its requests, M&D argues in both Fee Applications that the factors set forth in *In re First Colonial Corp.* regarding compensation under 11 U.S.C. § 330 for professionals. *See* 554 F.2d 1291, 1298–99 (5th Cir. 1997). Attached to both Fee Applications is a Declaration of Counsel under Rule 2016, sworn by Colvard. (CP&A ECF No. 468, Ex. 1; CP ECF No. 91, Ex. 1). These sworn statements do not address any payments made to M&D by the Debtors. Rather, the sworn statements say that the contents of the Fee Applications are true and correct. (CP&A ECF No. 468, Ex. 1; CP ECF No. 91, Ex. 1). Lodestars and application summaries are also attached to both Fee Applications. (CP&A ECF No. 468, Ex. 2–3; CP ECF No. 91, Ex. 2–3).

Parties in interest had twenty-one days to object. Both Fee Applications drew objections from the UST (CP&A ECF No. 535; CP ECF No. 102) and the Trustee (CP&A ECF No. 539; CP

<sup>&</sup>lt;sup>14</sup> The phrase "not returned to the estate or former CP&A clients" presumably refers to the Court's Order Granting Motion for Approval of Procedure for i) Turnover of Property to the Estate ii) for Determination of Interests in Property iii) For Other Relief ("Turnover Order") (CP&A ECF No. 540). The Turnover Order establishes procedures for the return of property to the estate received by third parties as professional retainer funds, for parties in interest to lay claim to those funds, and for judicial determination if the parties cannot agree. (*Id.*).

ECF No. 104). In the Pettit case, the Noltes objected and thereafter joined the objection filed by the UST. (CP ECF Nos. 103, 120). In the CP&A case, the Noltes also joined the objection filed by the UST. (CP&A ECF No. 608). Each objection asks the Court to deny M&D's fee requests, though each party does not advance the same argument. M&D responded to none of the objections.

The Court set the Fee Application and their objections for hearing on November 9. The Court heard argument from M&D, the Trustee, the UST, and the Noltes. Colvard represented M&D. Newly-employed counsel for Pettit was present to protect Pettit's interests but did not take a position on the Fee Applications. The Court heard testimony from Colvard and Pettit and admitted documentary evidence from M&D, the Trustee, and the UST. Thereafter, the Court took the matter under advisement.

#### **PARTIES' ARGUMENTS**

The UST's Objections focus on incomplete disclosure. (CP&A ECF No. 535, at ¶ 1). The UST contends that M&D did not completely disclose its connections with the Debtors, that it had received payment(s) for representing the Debtors prior to bankruptcy, and the source of those payment(s), as required by 11 U.S.C. § 329(a), Rule 2014, and Rule 2016(b). (*Id.*). The UST further argues that M&D did not timely supplement its disclosures. (*Id.*). Citing caselaw both within and beyond this circuit, the UST asks the Court to deny M&D's request for compensation. (*Id.*).

The Trustee's Objections request that the Fee Applications should not be allowed on a final basis, as the Trustee has not determined whether to pursue potential claims against M&D. (CP&A)

<sup>&</sup>lt;sup>15</sup> The UST does not oppose M&D's request for out-of-pocket expenses in either case. (CP&A ECF No. 525, at 8; CP ECF No. 102, at 9).

<sup>&</sup>lt;sup>16</sup> The Noltes filed an Exhibit and Witness list (CP&A ECF No. 603; CP ECF No. 119) but moved no exhibits into evidence.

ECF No. 539, at ¶28). 17 The Trustee argues that M&D had actual knowledge of Pettit's professional misconduct based on the agreed judgments admitting to breach of fiduciary duty, fraud, fraudulent inducement, conversion, and unjust enrichment. (Id. at  $\P$  19). According to the Trustee, this knowledge imposed upon M&D a duty to report Pettit to the State Bar of Texas pursuant to Tex. Disciplinary R. Pro. Conduct 8.03(a). (Id.). Instead of reporting Pettit, M&D agreed to represent the Debtors both in state court and bankruptcy and continued to accept payment without investigating the source of funds. (Id. at ¶ 20). Like the UST, the Trustee argues that M&D did not completely disclose its pre-petition payments for representing the Debtors or the nature of such payments. (Id. at  $\P$  22–23). The Trustee stressed he still has not received a reconciliation statement from M&D regarding payment for state court and bankruptcy representation of the Debtors, so the Trustee still has no understanding of what M&D was actually paid. (*Id.* at ¶ 23). Further, discussing the standard for compensating estate professionals, the Trustee states he "has serious concerns with respect to what value was actually provided to [the estates] by M&D during the Application Period given the continuous lack of disclosure regarding compensation" and ongoing issues with the Debtors' schedules, SOFAs, and creditor matrices. (Id. at ¶ 26; see also CP ECF No. 104, at ¶ 27). As such, the Trustee argues that M&D has not met its burden to be awarded "any amounts during the Application period given its lack of compliance with the Bankruptcy Code and Bankruptcy Rules." (CP&A ECF No. 539, at ¶ 26) (emphasis in original).

The Noltes joined the UST's Objections. (CP&A ECF No. 538; CP ECF No. 103). The Noltes supplemented their objection to argue that M&D engaged in "misconduct," which included neglect, filing multiple documents containing material misrepresentations, and filing incomplete

<sup>&</sup>lt;sup>17</sup> In the alternative, the Trustee asks that "any order entered on the [Fee Applications] on a final basis [] provide any that any and all potential claims of the Trustee against M&D [be] reserved, preserved, and not affected in any form or fashion by such final approval of the [Fee Applications]." (CP&A ECF No. 539, at ¶ 28).

documents. (CP&A ECF No. 538, at  $\P$  1). The Noltes allege M&D actually knew numerous filings had omissions and misrepresentations. (*Id.*). For these reasons, the Noltes ask for total denial of the Fee Applications. (*Id.* at  $\P$  7).

M&D filed no response(s) to the objections. At the hearing, M&D argued that it believed it made forthcoming and complete disclosures based on the information available to it at the time and supplemented when new information came to light. As for the payments for state court representation, M&D argued that it did not disclose the payments because it did not believe disclosure was required under 11 U.S.C. § 329. To support this position, Colvard explained that M&D assigned separate matter numbers and maintained separate files for the state court and bankruptcy representations of the Debtors. With respect to the wire payments, Colvard stated that the wires received only indicated a Wells Fargo account as their source with no further specification, so he and M&D believed Pettit personally was the source of funds. M&D also noted that no party objected to its competence or rates. Therefore, M&D asked the Court to award the amounts requested in its Fee Applications.

#### **ANALYSIS**

Few matters before bankruptcy courts are as distasteful as the duty to examine transactions between a debtor and its attorney. The disagreeable nature of the task increases when the attorney is a prominent member of the bar. Colvard has practiced bankruptcy in this community for more than 42 years. Colvard has earned a reputation for highly competent and skilled representation as an expert in the field. The Court holds Colvard in high regard. Nevertheless, the Court must dispassionately evaluate fees requested by even the most respected attorneys when those fees are challenged.

Fulfilling this duty, though unpleasant, is also one of the most integral parts of the bankruptcy system. In the words of the United States Bankruptcy Court for the Eastern District of Pennsylvania:

One of the surest means for the bankruptcy system to come under public disrepute is for the perception to take hold that it allows attorneys to milk the last cent out of debtors while leaving creditors nothing. Also disturbing is the prospect that attorneys may be able to extract a premium from debtors who are desperate to file in order to save an asset that is on the brink of being lost. These concerns, among others, have led Congress and the Courts to enact and enforce strict regulations on the payment of attorney's fees in bankruptcy. One of the cornerstones of the regulatory structure is the necessity for attorneys to fully and honestly disclose their transactions with clients. This disclosure requirement is embodied in 11 U.S.C. § 329(a) and implemented through Bankruptcy Rule 2016(b).

*In re Levin*, 1998 WL 732878, \*2 (Bankr. E.D. Pa., Oct. 15, 1998). The Court, therefore, undertakes its review of the Fee Applications keeping in mind the importance of public confidence in the bankruptcy system.

#### I. Strict Standards of Disclosure

Debtors' transactions with attorneys are governed by 11 U.S.C. § 329, which provides:

- (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.
- (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—
  - (1) the estate, if the property transferred—
    - (A) would have been property of the estate; or
    - (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
  - (2) the entity that made such payment.

In other words, debtors' attorneys are required to report to the Court all compensation paid or agreed to be paid for services rendered "in contemplation of or in connection with" the case, if such payment or agreement as made within a year of filing for bankruptcy.

Section 329 is buttressed by Rule 2016(b). Rule 2016(b) requires that

[e]very attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

In additional to the requirements in Section 329, Rule 2016(b) sets a 14-day time limit. Fed. R. Bankr. P. 2016(b). First, any Section 329 statement regarding compensation must be made within 14 days after filing bankruptcy. *Id.* Second, attorneys must file supplemental statements within 14 days after any payment or agreement not previously disclosed. *Id.* 

The Bankruptcy Code and Rules authorize Courts to inspect these transactions and undo them. Under Section 329(b), if the "compensation exceeds the reasonable value of any such services," the court may disgorge such payment. 11 U.S.C. § 329(b); *see also Matter of Prudhomme*, 43 F.3d 1000, 1002 (5th Cir. 1995). Rule 2017 complements Section 329(b). Rule 2017(a) provides

[o]n motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

In other words, the enforcement provisions of Section 329(b) and Rule 2017(a) empower the Court "to act upon that disclosure by determining whether such payments were excessive and by ordering return of all or any part of such payments." *In re Mayeaux*, 269 B.R. 614, 621 (Bankr. E.D. Tex. 2001).

This review process—along with the public confidence it instills in bankruptcy administration—is wholly dependent on complete and forthright compliance with the disclosure requirements by a debtor's attorney. *Id.* (quoting *Arens v. Boughton*, 176 B.R. 781, 783 (W.D. La. 1993), *aff'd*, 43 F.3d 1000 (5th Cir. 1995) ("It is the duty of debtor's counsel to aid this review by providing the bankruptcy court with all information necessary to make an adequate review of the relevant transaction.")). The remedy for anything short of full disclosure is denial of compensation and disgorgement of sums already paid. *Prudhomme*, 43 F.3d at 1003 (after discussing nondisclosure, holding "concealment [is] misconduct justifying disgorgement"). No exceptions are made for slipshodness or good faith. *Matter of Kero-Sun, Inc.*, 58 B.R. 770, 780 (Bankr. D. Conn. 1986) (citing *Gen. Motors Acceptance Corp. v. Undike (In re H. L. Stratton, Inc.)*, 51 F.2d 984, 987–88 (2d Cir. 1931)). This strict-liability principal is the law across the country. *See, e.g. In re Downs*, 103 F.3d 472, 477 (6th Cir. 1996) (citing *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569, 575 (Bankr. N.D. Tex. 1986); *In re Inv. Bankers, Inc.*, 4 F.3d 1556, 1565 (10th Cir. 1993) (citations omitted); *Futuronics Corp. v. Arrut (Matter of Futuronics Corp.)*, 655 F.2d 463, 469 (2d Cir. 1981)).

Here, all parties agree that M&D received compensation for representing the Debtors in the months before they filed for bankruptcy. Therefore, there are two issues regarding disclosure

of these amounts. <sup>18</sup> First is whether M&D was required to disclose such compensation. Second is whether any required disclosures were adequate.

# A. M&D was Required to Disclose Compensation Received for the State Court Representation

As explained above, section 329(a) requires debtors' attorneys to report all compensation paid or agreed to be paid for services rendered "in contemplation of or in connection with" the case. 11 U.S.C. § 329(a). Section 329(a) uses the disjunctive 'or,' meaning that "in contemplation of" and "in connection with" are distinct ideas. *Mayeaux*, 269 B.R. at 622 (citations omitted). Both must be reported. 11 U.S.C. § 329(a).

### 1. Payments "In Contemplation Of" Bankruptcy

Payment is made "in contemplation of" bankruptcy if the underlying professional services were rendered at time when the debtor was subjectively considering bankruptcy. *Mayeaux*, 269 B.R. at 622. As one court put it, the question is "whether, in making the transfer, the debtor is influenced by the possibility or imminence of a bankruptcy proceeding." *Wootton v. Ravkind (In re Dixon)*, 143 B.R. 671, 675 n.3 (Bankr. N.D. Tex. 1992).

Paying attorneys to avoid bankruptcy is "in contemplation of" bankruptcy. Interpreting the predecessor statute to section 329(a), the Supreme Court wrote:

[I]t is insisted, in the instant case, that the payment to appellants could not properly be regarded as made in contemplation of bankruptcy, and hence within the jurisdiction to re-examine, because the payment was for the purpose of engaging appellants to conduct negotiations with creditors in order to arrange for an extension of time, and, if necessary, for the operation of the business under the creditors' supervision, and thus to avoid a forced liquidation and ultimately to restore the business to a sound basis. We find no ground for saying that the fact that such purposes were in view establishes, as matter of law, that the payment was not in contemplation of bankruptcy. On the contrary, negotiations to prevent bankruptcy may demonstrate that the thought of bankruptcy was the impelling

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<sup>&</sup>lt;sup>18</sup> No party disputes that the work Mr. Colvard personally performed is "in connection with" or "in contemplation of" the bankruptcies.

cause of the payment. A man is usually very much in contemplation of a result which he employs counsel to avoid.

Conrad, Rubin & Lesser v. Pender, 289 U.S. 472, 478 (1933) (emphasis added) (citations omitted) (internal quotations omitted). Courts across the country maintain the Supreme Court's broad language from 1933 by finding payments for all sorts of legal work preceding bankruptcy subject to review. See, e.g. Wootton, 143 B.R. at 675 n.3 (compensation for representation in criminal litigation and related civil suits involving forfeiture while debtor was insolvent was "in contemplation of" bankruptcy); Brown v. Luker (In re Zepecki), 258 B.R. 719, 724–25 (8th Cir. B.A.P. 2001) (payment for attorney to conduct a sham 1031 exchange in order to remove assets from what would become the bankruptcy estate was "in contemplation of" bankruptcy).

Negotiating with or litigating against creditors is undoubtedly "in contemplation of" bankruptcy. The Fifth Circuit in *Prudhomme* held that debtors who hired an attorney to represent them in disputes with their largest creditor after they had been unsuccessful restricting debt made payments "in contemplation of" bankruptcy. *Prudhomme*, 43 F.3d at 1004. Other courts have reached similar results. *See In re Perrine*, 369 B.R. 571, 585 (Bankr. C.D. Cal. 2007) (finding real estate transfer to attorney 97 days prior to attorney, after exhausting efforts to litigate against largest creditor, for the stated purpose of "securing continued representation . . . in future litigation including without limitation, with creditors" was "in contemplation of" bankruptcy). Again, one contemplates bankruptcy by seeking to avoid it. *Conrad* 289 U.S. at 478.

Here, the payments made to M&D for representing the Debtors in state court litigation were "in contemplation of" bankruptcy, so they needed to be disclosed. On June 2, M&D stated in its Affidavits of Disinterest that

[M&D] provided pre-bankruptcy legal services to Debtor unrelated to bankruptcy preparation or planning, principally focusing on state court proceedings and settlement prospects of creditor efforts, seeking debt recovery. [M&D] received

compensation for those pre-bankruptcy state court related proceedings and was not owed any pre-petition fees or expenses in relation thereto.

(CP&A ECF No. 7, Ex. 1, at 2; CP ECF No. 10, Ex. 1, at 2). The agreed judgments—which are based on allegations oft-repeated in this case, exceed \$35 million, and were signed between 75 and four days before filing of bankruptcy—severely undermine M&D's contention that the services were unrelated to the bankruptcy. (*See* Trustee's Exs. 20, 22, and 24). Of particular importance to the Court's decision is the May 27 agreed judgment in favor of the Persyns. (Trustee's Ex. 24). The Debtors, by and through Drought of M&D, agreed to this judgment 17 days after the Debtors engaged Colvard of M&D for bankruptcy representation.

In other words, M&D admitted it had received compensation to litigate against "creditor efforts, seeking debt recovery" in state court. (CP&A ECF No. 7, Ex. 1, at 2; CP ECF No. 10, Ex. 1, at 2). M&D continued representation in litigation in debt recovery suits *for weeks after* it began bankruptcy representation. Unlike the numerous cases where other legal work predating bankruptcy was found to be "in contemplation of" bankruptcy, here, the litigation against at least one creditor resulting in a multimillion-dollar judgment was contemporaneous with the bankruptcy representation.

Though it is not evidence, Colvard's representations to the Court further support concluding the prepetition state court payments were "in contemplation of" bankruptcy. On the eighth day of these bankruptcies, Colvard told the Court that

considering the status of the pending litigation and matters that were before Mr. Pettit, we considered that bankruptcy was the one forum where everything could be brought to a head, where the assets could be liquidated, claims could be resolved, and there could be a resolution in terms of distribution to the creditors.

(Hearing Audio, June 8, 2022 at 2:35–36 p.m.). Arguing now that the state court representation is unrelated to the bankruptcy strains credulity.

M&D accepted money for litigating against debt recovery efforts, continued to do so after beginning bankruptcy representation, and admitted to such representation in its earliest filings in these cases. These payments were "in contemplation of" bankruptcy.

### 2. Payments "In Connection With" Bankruptcy

While "in connection with" inquiries employ a subjective standard, courts apply an objective standard when evaluating if legal services rendered by debtor's counsel were "in connection with" the bankruptcy case. *Mayeaux*, 269 B.R. at 623. If it can be objectively determined that the services had or will have an effect on the bankruptcy case, then such services are deemed to have been rendered in connection with the bankruptcy case and the attorney has a duty to disclose any compensation received or to be received for such services. *Id.* (citations omitted). Moreover, services which are the "precipitating cause" of bankruptcy are "in connection with" the bankruptcy. *In re Ostas*, 158 B.R. 312, 321 (N.D.N.Y. 1993) (citing *In re Command Servs. Corp.*, 85 B.R. 230, 232 (Bankr. N.D. N.Y. 1988)); *see also In re Laferriere*. 286 B.R. 520, 529 (Bankr. D. Vt. 2002) (prepetition legal "work had a direct impact on the ultimate filing of the Debtors' bankruptcy case.").

Though *Prudhomme* did not acknowledge the disjunctive nature of the phrases in section 329(a), the Fifth Circuit looked to objective factors. Those were: (1) the debtors' financial condition when first consulting their attorney; (2) the fact that the debtors were seeking representation to resolve disputes with their largest creditor; and (3) the fact that the debtors were unsuccessful in resolving such disputes in a non-bankruptcy context, thus leading to the bankruptcy filing. *Prudhomme*, 43 F.3d at 1004.

Again, *Prudhomme* places significant import on litigation and negotiation efforts, especially with creditors or regarding a business' affairs. *Id.* Other courts do as well. *Mayeaux*,

269 B.R. at 624–25 (negotiation and litigation efforts with largest unsecured creditor was "in connection with" bankruptcy, especially when Debtor's counsel conceded that the litigation was a primary reason for bankruptcy); *Laferriere*, 286 B.R. at 529 ("work related to defending two lawsuits brought by an unsecured creditor" were services "rendered in connection with" bankruptcy); *In re Rheuban*, 121 B.R. 368, 377 (Bankr. C.D. Cal. 1990) (connection with chapter 11 reorganization is "only reasonable inference" that can be drawn from firm's representation of debtor in criminal and civil matters regarding Debtor's business relationships "is directly related to the financial and business affairs" of debtor). Furthermore, legal work relating to asset that will become part of the estate is "in connection with" bankruptcy. *See In re Hill*, 5 B.R. 541, 542 (Bankr. C.D. Cal. 1980) ("Clearly, removal of judgment liens from the debtor's homestead is connected with the case.").

Here, the payments M&D received for its pre-petition non-bankruptcy representation of the Debtors were "in connection with" bankruptcy, so they needed to be disclosed. Allegations raised in state court provide the overarching theme of these bankruptcies. Nearly every dispute involves accusations that Pettit misappropriated money held in trust for his clients. The argument over M&D's fees is no exception: M&D received payments from Pettit's / CP&A's NM IOLTA account for legal work. The ever-repeated allegations which dominate argument in this case strongly militate toward finding the state court representation was in connection with the bankruptcies.

Claims of theft are not the only fact supporting this finding. M&D admitted it had received compensation to litigate against "creditor efforts, seeking debt recovery." (CP&A ECF No. 7, Ex. 1, at 2; CP ECF No. 10, Ex. 1, at 2). That litigation resulted in agreed judgments totaling more than \$35 million. (Trustee's Exs. 20, 22, and 24). Three of those agreed judgments were entered

within 75 days of the bankruptcy. (*Id.*). Although it is not evidence, Colvard told the Court early on that the purpose of filing bankruptcy was to resolve all the creditor claims after the mounting litigation. (*See* Hearing Audio, June 8, 2022 at 2:35–36 p.m.).

Testimony elicited from Pettit demonstrates that M&D performed legal work beyond defending the Debtors in state court and representing the Debtors in bankruptcy. Pettit testified that Drought provided legal advice regarding the closing of what the Court colloquially calls the Sin Reposo transaction. (See Hearing Audio, November 9, at 4:40–41 p.m.). Pettit stated, and no party disputes, that he sold properties to Sin Reposo to fund the settlement with former client Dr. Ortiz. Sin Reposo's attorney prepared the real estate closing documents. (Id. at 4:41 p.m.). After asked by Colvard who specifically from M&D represented Pettit in the Sin Reposo transaction, Pettit replied "Mr. Drought was not involved in the closing, but he reviewed the legal documents." (Id. at 4:42 p.m.). Colvard then asked if Pettit was "actually represented in relation to the Sin Reposo transactions by someone other than [himself]?" (Id.). Pettit responded that he didn't "know how to answer that. Gerald Drought helped [him] review documents." (Id.). Pettit clarified that Drought helped him review the closing documents before the closing. (Id.). Pettit negotiated the transactions on his own. (Id. at 4:43 p.m.). Drought did not make any changes or modifications to the documents Sin Reposo's counsel prepared. (Id.). Though Pettit said he considered the Sin Reposo transaction a "done deal," Pettit also testified that he would have considered changes to the closing documents had Drought suggested any. (*Id.* at 4:43–45 p.m).

Reviewing real estate closing documents is providing legal advice. This remains true even if the attorney does not recommend changes. Not recommending changes is the attorney's professional opinion that the document as written serves the client's interests, just as much as suggesting alterations reflects the attorney's opinion that the document as written could better

serve the client's interests. The properties conveyed in the Sin Reposo transaction would have been property of Pettit's estate. By reviewing the closing documents, Drought performed legal work with respect to these assets, liquidated months before bankruptcy, to satisfy a settlement with former-client and now-judgment creditor Dr. Ortiz.

In summary form, for three months prior to bankruptcy, M&D provided legal services to Pettit and CP&A. These legal services were designed to negotiate with, litigate against, and satisfy settlements with former clients who accused Pettit of stealing multiple millions of dollars from them. No party disputes this. When the Debtors signed agreed judgments of roughly \$35 million, M&D filed bankruptcy petitions for the Debtors. To say this prepetition representation was not objectively connected to these bankruptcies is suspect. M&D was therefore obligated to disclose payments it received for these services.

# 3. M&D did Not Adequately Disclose Payments for Work "In Contemplation Of" or "In Connection With" These Bankruptcies

The question, then, becomes whether M&D adequately disclosed the compensation it received for representing the Debtors before and during their bankruptcies. Debtors' attorneys have an obligation to provide the court with all information necessary to review adequately the transactions in question. *Mayeaux*, 269 B.R. at 621 (quoting *Arens*, 176 B.R. at 783, *aff'd*, 43 F.3d 1000 (5th Cir. 1995)). Counsel must disclose in the Rule 2016(b) statement the nature of his or her fee arrangement with the debtor; including further details regarding compensation in other filings is insufficient. *In re Smitty's Truck Stop*, 210 B.R. 844, 849 (10th Cir. B.A.P. 1997) (disgorgement ordered where applicant failed to disclose retainer in 2016 disclosure statement even though retainer was disclosed in SOFA) (citing *Prudhomme*, 43 F.3d at 1003). A contrary rule allowing piecemeal disclosure across filings "would nullify the § 329 and Rule 2016(b) disclosure requirements, which are designed to enable courts to oversee the fee arrangement

between debtor and its counsel. More importantly, it is not the court's job to search through the record to find all relevant facts relating to an attorney's employment." *Smitty's Truck Stop*, 210 B.R. at 849 (citations omitted).

The Rule 2016(b) disclosure statement also requires counsel to disclose the source of funds paid for their services. Off. Bankr. Form B2030, question 2. An attorney must investigate the source of funds received where a reasonable lawyer would question the client. *In re Parlex Assoc., Inc.*, 435 B.R. 195, 211–214 (Bankr. S.D. N.Y. 2010) (collecting cases and denying fees because attorney did not satisfy duty to investigate where a reasonable lawyer would suspect his retainer was paid from proceeds of fraudulent conveyance and attorney did not investigate); *see also In re Grasso*, 586 B.R. 110, 146 (Bankr. E.D. Pa. 2018) ("[W]hen an attorney has reason to doubt his client, blind reliance ceases to be reasonable."). Failing to disclose to the source of funds is grounds for denial and disgorgement. *Id.* at 850 (denying fee application and disgorging money paid where Debtor's counsel did not truthfully disclose the source of funds paid to him until third relevant filing).

Disclosures must be complete, forthright, and easy to understand. *See id.* Concealment is unacceptable. *Prudhomme*, 43 F.3d at 1003. "Negligent or inadvertent omissions do not vitiate the failure to disclose." *In re Park-Helena Corp.*, 63 F.3d 877, 881 (9th Cir. 1995) (internal quotations omitted).

Neither the Court, nor creditors or other parties-in-interest, should be forced to be detectives, clairvoyants, or soothsayers to figure out exactly what counsel's arrangement is with his clients (or other parties-in-interest) in a bankruptcy case. As one court aptly stated: 'Coy or incomplete disclosures which leave the court to ferret out pertinent information from other sources are not sufficient.'

United States Tr. v. Cialella (In re Cialella), 643 B.R. 789, 819 (Bankr. W.D. Pa. 2022) (quoting In re Saturley, 131 B.R. 509, 516 (Bankr.D.Me.1991)). If disclosures do not clear this high bar,

denial and disgorgement is the appropriate remedy. *Prudhomme*, 43 F.3d at 1003. If the conduct is egregious, the court may also impose sanctions. *Baker v. Cage (In re Whitley)*, 737 F.3d 980, 987 (5th Cir. 2013).

M&D's disclosures were unclear at best. Colvard's testimony suggesting M&D properly disclosed its bankruptcy retainers for each case required the Court to piece together bits of information across multiple documents. For example, M&D argued it disclosed in the June 1 Schedules receipt of two wire transfers in the amounts of \$10,000 and \$50,000. After reading the June 1 Disclosure of Compensation in Pettit June 30 Disclosure of Compensation in CP&A, the Court and parties in interest should have been able to surmise that M&D allocated \$20,000 to CP&A and \$40,000 to Pettit for their respective bankruptcy representation.

Further, M&D expected the Court and parties in interest to deduce these monies were retainers. M&D did state it received retainers for its bankruptcy work in the Pettit Application to Employ and CP&A Application to Employ, each filed on June 2. But M&D also made statements suggesting it received a flat fee. In the June 1 Disclosure of Compensation, M&D stated it had agreed to accept \$40,000 and had already received \$40,000, with no balance due, for representing Pettit. Similarly, in its June 30 Disclosure of Compensation, M&D told the Court it had agreed to accept \$20,000 and had already received \$20,000, with no balance due, for representing CP&A. The UST argued the way these disclosures of compensation are worded suggests M&D agreed to accept flat fees. The Court is inclined to agree. At the least, M&D could have worded the disclosures of compensation differently to clarify. M&D could have said it had agreed to accept an hourly rate, had already received a retainer (indicating its amount), and that balances due would accrue at the hourly rate once the retainer was exhausted. Using the word "retainer" would have better indicated the existence of a retainer.

More examples of inconsistent or confusing 'disclosures' exist in the record. The Court believes these examples illustrate the pattern of incomplete disclosure without expounding further. The Code and Rules require debtor's counsel to be clear about its financial relationship with the debtor. The burden does not lie with anyone else to figure out what that relationship is. M&D's proposition that the Court and parties in interest sift through the hundreds of pleadings in these cases to understand M&D's disclosures of compensation is unacceptable.

Moreover, one of the disclosures was mistaken at best, false at worst. M&D identified Pettit as the source of the \$60,000 identified in the disclosures of compensation. Since those disclosures on June 1 and June 30, the record evidence shows Pettit diverted money from the NM IOLTA account held in trust for his clients to M&D. Colvard stated that the wire transfers to M&D only revealed that the transfers were from a Wells Fargo account, so M&D had no reason to believe the money came from a source other than Pettit. When cross-examined by the Trustee, Colvard admitted he did not review the wire information at the times of receipt. Rather, Colvard reviewed the wires between the August 4 revelation and preparing his Supplemental Affidavit of Disinterest. When cross-examined by the UST, Colvard stated he did nothing before filing his disclosures of compensation to investigate the source of funds other than talking with Pettit.

If ever there were a case where a reasonable lawyer should question the source of his client's funds, it is these cases. M&D knew former clients accused Pettit of using funds he held in trust for the clients "for his own benefit and purpose." (*See, e.g.* Trustee's Ex. 19, at ¶ 8; *see also* Trustee's Ex. 21, at ¶ 18 ("Pettit . . . stole all of the \$908,148.87 [escrow funds] for his personal benefit and use."); Trustee's Ex. 21, at ¶ 19 ("Defendants willfully, fraudulent took or converted to their own use the Plaintiff's money, which Defendants acquired unlawfully and while in a position of trust.")). M&D signed agreed judgments on Debtors' behalf in response to these

allegations. (Trustee's Ex. 20, 22, and 24). Following these allegations, a lawyer has good reason to question whether the monies paid to him or her are client funds. Under the circumstances, M&D had a duty to investigate the source of funds. M&D did not. M&D unreasonably relied on Pettit's word instead. This unreasonable reliance resulted in providing false information to the Court.

Colvard testified he did not learn M&D received money from the IOLTA account until the August 4 hearing. M&D—by and through Colvard—did not file its Supplemental Affidavit of Disinterest revealing that retainer funds originated in the NM IOLTA until August 23. Accepting Colvard's testimony as true, Rule 2016(b) required a supplemental statement within 14 days, by August 18. M&D supplemented too late.

In addition to being late, the Supplemental Affidavit of Disinterest still leaves the Court with questions regarding M&D's compensation. The Court is unclear whether M&D received a total of five or seven wire transfers while representing the Debtors. The Supplemental Affidavit of Disinterest states M&D "received five prepetition wire transfers as retainer deposits or payments from Debtors." (CP&A ECF No. 332, at 2). M&D disclosed these wires were received on March 10, April 13, May 11, May 16, and May 25. (*Id.*). Close review of the document, however, reveals two other wire transfers on March 30 and April 30. (*Id.* at 3). Colvard testified the firm received five wires. Therefore, the Supplemental Affidavit of Disinterest is internally inconsistent and, at least to some degree, does not comport with Colvard's testimony. Perhaps the March 30 and April 30 wires are a typographical error. Even so, carelessness in face of such a demanding standard and after M&D drew intense scrutiny after August 4 is unacceptable.

Additionally, M&D still has not disclosed the source of some the funds it received. Specifically, M&D has not disclosed the source of funds for the March 10 and May 25 wires. M&D stated that the May 25 transfer "does not appear to have originated from the Wells Fargo

NM IOLTA," but the firm has yet to affirmatively disclose the source to the Court. (*Id.* at 3). If indeed M&D received wires on March 30 and April 30, all M&D has told the Court is that the NM IOLTA statements do "not provide conclusive information or certainty regarding the source of funds." (*Id.*). Colvard did not testify further regarding these wire's source(s).

In short, M&D's initial disclosures required the Court to hunt for clues across multiple pleadings and then guess the nature of the firm's fee agreement with the Debtors. M&D failed to investigate the source of the funds it received, despite knowing Pettit was credibly accused of using money held in trust for his own benefit. A reasonable lawyer who knew of these allegations and also knew his or her client primarily lived at Disney World, drove multiple luxury SUVs, and owned several multimillion-dollar homes would investigate; yet M&D took Pettit at his word until evidence came out proving M&D received money from the NM IOLTA. Nineteen days later, M&D's (late) Supplemental Affidavit of Disinterest still leaves unclear how many payments M&D received and fails to disclose the source of some of these payments. All these errors are on top of failure to disclose (until August 23) the payments for prepetition representation regarding the state court litigation. Any effort at disclosure M&D made was inadequate. For these reasons, the Court denies the Fee Applications and orders M&D disgorge to the Trustee any consideration received for representing the Debtors.

#### II. The Court Will Not Reach Other Issues.

The parties primarily raised two other issues in their moving papers: 1) the reasonableness and necessity of M&D's requested fees and 2) whether M&D's Rule 2014 disclosures were sufficient. The Court will not reach these issues. Questions concerning the reasonableness and necessity of M&D's requested fees are resolved by denying the Fee Applications for insufficient disclosure.

Rule 2014(a) requires debtor's counsel to file a verified statement (or affidavit) along with the attorney's employment application which sets forth counsel's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the UST, or any person employed by the UST. Fed. R. Bankr. P. 2014(a). Debtor's counsel has a continuing duty to supplement 2014(a) disclosures. *Id.* Rule 2014, and its companion section 327, do not explicitly provide for the remedies requested by the objecting parties. Fed. R. Bankr. P. 2014; 11 U.S.C. § 327. To the extent Rule 2014 is connected to the statutes at the heart of this disputes, issues regarding M&D's compliance with Rule 2014 are resolved by denying the Fee Applications.

#### **CONCLUSION**

In conclusion, the Court finds that the appropriate remedy for M&D's pattern of nondisclosure in these cases is to deny the Fee Applications and disgorge any amounts paid to the Trustee for the benefit of the creditors. Denial and disgorgement may seem harsh, but public confidence in the bankruptcy system depends on forthright disclosure. This consequence is well documented across decades of case law throughout numerous jurisdictions. The Court's message to debtor's counsel is clear: disclose.

IT IS THEREFORE ORDERED that the First and Final Application for Compensation of Fees and Expenses of Martin & Drought, P.C. within the Chris Pettit & Associates, P.C. Chapter 11 Case (CP&A ECF No. 468) is DENIED.

IT IS FURTHER ORDERED that the First and Final Application for Compensation of Fees and Expenses of Martin & Drought, P.C. within the Christopher John Pettit Chapter 11 Case (CP ECF No. 91) is DENIED.

IT IS FURTHER ORDERED that all money or other consideration Martin & Drought, P.C. received for its representation of Debtors within one year of filing for bankruptcy is DISGORGED

to Eric Terry in his capacity as Chapter 11 Trustee to hold for the benefit of creditors. This includes payments not yet discovered or not yet brought to the attention of this Court. Disgorgement of money discussed in this Order shall occur within 30 days of entry of this Order. Disgorgement of any other compensation shall occur upon discovery or disclosure to this Court, whichever is earlier.

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# **Faculty**

**Michael B. Baker** is a solo practitioner with The Baker Firm, PLLC in Covington, Ky., and has represented a variety of debtors and creditors in chapter 7, 11 and 13 in the areas of bankruptcy and civil litigation. He also routinely represents chapter 7 trustees in various asset cases. Mr. Baker received his J.D. *cum laude* in 2007 from Northern Kentucky University Salmon P. Chase College of Law.

Laura Day DelCotto is a founding member of DelCotto Law Group, a boutique law practice in Lexington, Ky., focusing on bankruptcies, restructurings, and various types of commercial, debtor/creditor and bankruptcy litigation. She has a broad base of experience in the representation of debtors, debtors-in-possession, borrowers in out-of-court distressed financial situations, and secured and unsecured lenders, along with other parties in interest. Ms. DelCotto is a member of the American College of Bankruptcy is AV-rated by Martindale-Hubbell. She has multiple listings in *The Best Lawyers in America* and has been included as a Top 10 *Kentucky Super Lawyer* since 2017. Ms. DelCotto currently serves as Chair of the Kentucky Bar Association Well-being Committee and is a Fellow in the American College of Bankruptcy. She is also Board Certified in Business Bankruptcy Law by the American Board of Certification. Ms. DelCotto is one of the founders of IWIRC's Central Kentucky chapter. She received her undergraduate degree *magna cum laude* from The University of the South at Sewanee and her J.D. with distinction from the University of Kentucky College of Law. She is also certified in Ayurvedic Lifestyle by the Chopra Center, and is a speaker/teacher in educational and corporate wellness programs.

Jackson E. Duncan, III is a senior attorney with McCalla Raymer Leibert Pierce, LLC in Birmingham, Ala., and has more than 20 years of legal expertise in representing financial institutions. He has experience throughout the ambit of consumer and commercial lending, from loan origination and closings to loan workouts, foreclosure, liquidation, guarantor collection and counterclaims defense. Mr. Duncan has appeared on behalf of secured creditors, trustees and other nondebtor parties in chapter 7, 11, 12 and 13 cases in all bankruptcy districts within the state of Alabama. His experience includes first-chair litigation counsel in complex adversary proceedings for both consumer and commercial cases, and his clients in chapter 11 cases include banks, financial institutions, institutional lenders, landlords, manufacturers, trustees and other organizations. Mr. Duncan also represents community banks regarding the drafting of loan documents in complex transactions, including construction and development projects. In addition, he has served as local counsel to large capital investors and hedge funds in multi-tiered financing projects. Mr. Duncan is a member of ABI and the Mortgage Bankers Association of Alabama, Alabama Bankers Association and Huntsville-Madison County Bar Association. He received his undergraduate degree from the University of Alabama Culverhouse College of Business in 1992, his M.B.A. from the University of Alabama Manderson Graduate School of Business in 1993, and his J.D. in 1996 from the University of Alabama School of Law.

**Tara E. Nauful** is special counsel with Best Law, P.A. in Charleston, S.C. and is a certified specialist in Bankruptcy–Debtor/Creditor Law by the South Carolina Supreme Court. In private practice for almost 30 years, she represents clients in all aspects of the financial services arena, including restructuring and workouts, bankruptcy, and financial services litigation. Ms. Nauful is a certified mediator,

and she has been certified by the South Carolina Supreme Court as a specialist in Bankruptcy/Debtor-Creditor law since 1998. She is listed in *The Best Lawyers in America* in the fields of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law, and Bankruptcy Litigation, and she is AV-rated by Martindale-Hubbell. In addition to her practice, Ms. Nauful is a frequent author and speaker on bankruptcy and legal ethics. She is admitted to practice in South Carolina, North Carolina and Georgia. Ms. Nauful received her B.A. in 1989 from the University of Virginia and her J.D. from the University of South Carolina in 1992.

Hon. Lori V. Vaughan is a U.S. Bankruptcy Judge for the Middle District of Florida in Orlando, sworn in on Feb. 25, 2020. She started her career as a law clerk to Hon. Karen S. Jennemann. Judge Vaughan then practiced bankruptcy law for 21 years at two law firms, representing debtors, creditors and trustees in jurisdictions across the country. Most recently, she was a shareholder at Trenam Law in Tampa, Fla., and before that, she practiced at Foley & Lardner, the last year of which she spent practicing out of its New York office. Judge Vaughan previously served as president of the Tampa Bay Bankruptcy Bar Association, chair of the Bankruptcy/UCC Committee of the Florida Bar's Business Law Section, and board member for the International Women's Insolvency & Restructuring Confederation. She has also sat on the boards of the USF Financing Corp. and USF Property Corp. Before taking the bench, Judge Vaughan was recognized by *Florida Super Lawyers* as being among the top 100 Lawyers in Florida, the top 50 Lawyers in Tampa Bay and the top 50 Women Lawyers in Florida. She also has been recognized by *Chambers USA* and *The Best Lawyers in America*. Judge Vaughan received her B.A. with high honors from Eckerd College in 1995 and her J.D. with honors from the University of Florida, College of Law in 1998.