

CHAPTER 1: INTRODUCTION

A. Purpose of this Handbook

The road to obtaining court approval of your retention and being paid by a debtor as its chapter 11 counsel is different from the road you normally take when you are retained and paid by a nondebtor client. Receiving payment from a chapter 11 debtor—the light at the end of the tunnel of the retention process—requires you to meet very specific requirements. These requirements arise from both the

PRACTICE POINTER

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Bankruptcy Code¹ and Bankruptcy Rules,² as well as the court³ and the U.S. Trustee (an oversight arm of the government), and are enforced by the court, the U.S. Trustee, the creditors' committee (if one has been appointed), and all parties in interest in the bankruptcy case. The

good news for your client is that these requirements exist to protect it by ensuring that the services you render maximize the value of the debtor's estate, are necessary, and are in the best interests of the debtor's estate. The good news for you is that the road to payment, although seemingly difficult at first, is navigable if you have sufficient knowledge to stay the course.

The purpose of this handbook is to guide attorneys who are generally unfamiliar with the chapter 11 process through the apparent maze

¹ The “Bankruptcy Code” or the “Code” discussed herein refers to title 11 of chapter 11 of the U.S. Code. *See* 11 U.S.C. § 101 *et seq.* “Section or §” refers to a section of the Code.

² The “Bankruptcy Rules” or the “Rules” discussed herein refer to the Federal Rules of Bankruptcy Procedure. “Rule ____” refers to one of the Rules.

³ The “court” discussed herein refers to the U.S. Bankruptcy Court in the jurisdiction where the case is pending.

of obtaining court approval of the retention as debtor's bankruptcy counsel and, ultimately, payment for services rendered to the debtor.⁴ In addition to the retention and payment procedures, discussed in detail in this handbook, counsel for a chapter 11 debtor should be aware of the importance of two overriding issues: securing a retainer and diligently conducting conflicts and "connections" checks throughout the case. This handbook discusses both topics.

As a note of caution, this handbook is primarily intended for attorneys who represent a chapter 11 debtor as its bankruptcy counsel (*i.e.*, counsel who will assist the debtor in the chapter 11 process). If you represent a debtor⁵ seeking relief under another chapter of the Code (for example, a chapter 7 liquidation or a chapter 13 individual bankruptcy), or if you represent a creditors' committee or a nonattorney professional, the issues raised by such retentions are outside the scope of this handbook.⁶ In addition, while this handbook contains a brief overview of retention and payment procedures if you are seeking to become the debtor's special counsel or an attorney retained by the debtor in the ordinary course, such issues are not the focus of this handbook, and the handbook does not cover them in detail.

⁴ Particularly if your practice does not focus on bankruptcy law, you must determine at the outset of the engagement whether or not you are sufficiently competent to handle the representation. Although this handbook begins with a discussion of the engagement letter, you must, as an initial matter, familiarize yourself with the chapter 11 process such that you are able to represent the debtor fully and fairly.

⁵ All references to "debtor" in this handbook, unless otherwise noted, refer to a chapter 11 debtor.

⁶ For information regarding such representations, *see, e.g.*, Dreher, Hon. Nancy C., "Retention and Payment of the Chapter 7 Attorney," *Bankruptcy Law Manual* §10:6 (updated Dec. 2007); Bowles Jr., C.R., "The Other *Lamie* Shoe: Is Employment Regulated by 11 U.S.C. §327(a)?" 23 *Am. Bankr. Inst. J.* 22 (Oct. 2004) (discussing regulation of chapter 13 debtor's counsel); 3 *Collier on Bankruptcy* ¶ 327.06 (15th ed. rev. 2005); Cook, Michael L., and Lubben, Stephen J., *Retention, Payment, Ethical and Other Obstacles for Non-Legal Professionals in Chapter 11 Reorganizations*, Practising Law Institute Commercial Law and Practice Course Handbook Series 549 (Nov. - Dec. 1999).

This handbook includes samples of the following materials attached as appendices: (1) an engagement letter; (2) a retention application; (3) a verified statement; (4) an order approving the retention application; (5) time entries; (6) an interim fee application; and (7) a motion to retain ordinary-course professionals and related affidavit.

B. Overview of Retention and Payment

The first steps in the representation of a debtor take you along the same path as the representation of a client outside of chapter 11: you must conduct a conflicts search to determine whether a conflict or ethics barrier prevents you from taking on the representation. Assuming such barriers do not exist, the next step is to execute an engagement letter. It is at this point that your debtor representation diverges from a nondebtor representation. In a typical nondebtor representation, you generally bill your client and the client pays you without any further oversight or review. When you represent a debtor, however, there is a strict oversight process that requires compliance with certain procedures. These procedures are based on requirements set forth in the Code and the Rules, as augmented by applicable local rules in the jurisdiction where the debtor files its petition and the judge's individual rules.⁷

Chapter 2 of this handbook focuses on the process by which the court approves your retention, the necessity of that approval and the requirements you must meet. Specifically, if the debtor does not request court approval to retain you, or if the court denies its request, you will not be paid for services rendered to the debtor and expenses you incur in doing so.

⁷ You must consider all the requirements discussed in this handbook in conjunction with and in addition to any local rules and/or the judge's individual rules.

Chapter 3 discusses the process that you must follow in requesting court approval of payment for fees and expenses you incur in connection with your representation of the debtor. This process has many steps. Despite the fact that you may file your fee application⁸ months after commencement of the bankruptcy, you need to implement and maintain diligent timekeeping practices beginning the day the debtor files for bankruptcy.⁹

Finally, Chapter 4 provides a brief overview of the retention and payment process if you represent the debtor as its special counsel under §327(e) or as an ordinary-course professional under §363(c)(1). If you are retained to represent a debtor as its bankruptcy counsel, you should be aware of the retention and payment processes for these professionals because you will be working closely with them throughout such processes. While this chapter does not address all issues associated with such retentions, it sets forth an overview of the most significant issues.

⁸ All references to “fee applications” in this handbook include requests for both fees and expenses.

⁹ The date that the debtor files its petition for relief under chapter 11 of the Code is called the “petition date.”