

Chapter 1

Are You a Professional?

A. Statutory Professionals

The Bankruptcy Code¹ requires court approval of the employment of “attorneys, accountants, appraisers, auctioneers, or other professional persons.” This section is applicable to professionals employed by chapter 7 or 11 trustees, debtors in possession and any committees appointed in a bankruptcy case. These individuals and entities are subject to the requirements of §§ 327 and 1103 of the Code. The Rules² specifically provide that an order approving the employment of “attorneys,

Rules:

The following is a non-exclusive list of factors to be considered in determining whether a person or firm employed by the estate is a professional:

1. The person or firm controls, manages, administers, invests, purchases or sells assets that are significant to the estate’s reorganization;
2. The person or firm is involved in negotiating the terms of a plan of reorganization;

¹ See 11 U.S.C. § 327 for the employment of professionals by bankruptcy trustees and chapter 11 debtors in possession; *see also* 11 U.S.C. §1103, which governs employment of professionals by committees. Statutes and Rule positions are highlighted in bold and are set forth in applicable part in Appendix C.

² Fed. R. Bankr. P. 2014.

3. The person's or firm's employment is directly related to the type of work carried out by the estate or to the routine maintenance of the estate's business operations;
4. The person or firm is given discretion or autonomy to exercise professional judgment related to the administration of the estate, i.e., the qualitative approach;
5. The extent of the person's or firm's involvement in the administration of the estate, i.e., the quantitative approach;
6. The services involve some degree of special knowledge or skill so that the employment would be considered a "professional" within the ordinary meaning of the term. This test is equally applicable to persons or entities to be employed by a committee; and
7. The amount of compensation the person a firm is being paid for its services.

accountants, appraisers, auctioneers, agents or other professional persons...shall be made only on application of the trustee or committee."

While certain professionals, such as attorneys, accountants, appraisers and auctioneers, are specifically identified in the Code and Rules as professionals who are required to have their employment approved by the court, the term "other professional persons" is not defined by either the Code or the Rules.

B. Other Individuals and Groups Generally Treated as Professionals by Bankruptcy Courts

Courts that have considered the scope of the Code's employment and compensation approval provisions have formulated various tests for determining who are "other professional persons" under 11 U.S.C. § 327. The courts have generally limited application of these provisions to persons and firms in those occupations that play a central role in the administration of the bankruptcy case. Courts also have generally held that in order for persons or firms to be considered professionals, they must have some specialized education or training. Some courts also have looked to whether a specialized service performed by the person or firm benefits the estate or the committee.

Applying this and other tests, courts have found the following to be professionals under U.S.C. §§ 327 and 1103: (1) investment bankers; (2) bookkeepers; (3) mediators; (4) real estate agents; (5) environmental waste remediation companies; (6) consultants who negotiated the sale and financing of a corporate debtor's assets; (7) environmental consultants; (8) oil and gas consultants; (9) management consultants; (10) financial advisors; (11) crisis managers; (12) employment agencies; (13) pension plan administrators; (14) public relations firms; (15) lobbyists; and (16) architects.

Whether courts adopt a broad or narrow interpretation of who is a professional is generally a matter of local practice, and bankruptcy counsel who practice before the court in question should be consulted. On one hand, courts do not want to be flooded with applications concerning the employment of people who could be considered professionals by training or by education, but whose roles are essentially provided in the ordinary course of the estate's business and are not essential to either the administration of the bankruptcy case or the debtor's reorganization efforts.³ On the other hand, an after-the-fact determination by the court that a person or firm is a professional whose employment should have been approved could be disastrous to the person or firm that rendered professional services to the debtor. Courts may disallow or greatly reduce compensation to that person or firm if it later determines that the person or firm should have obtained court approval prior to its employment. From the standpoint of anyone who may be a professional, it is safer to err on the side of obtaining court approval of the employment than risk your compensation to the uncertain state of the law.⁴

3 See Chapter 8 for a discussion of "ordinary course" professionals.

4 See *In re American Tissue Inc.*, 331 B.R. 169 (Bankr. D. Del. 2005)(discussing impact of contract and provision with entity determined not to be a professional, which required court approval of entity's retention).

C. Are Officers and Employees of the Debtor Considered Professionals?

Generally, the officers of the estate have been held not to be professionals whose employment required bankruptcy court approval, although some courts have reached a contrary result.⁵ One of the leading treatises on bankruptcy law concludes that the correct analysis is that executives of the estate should not be treated as professionals for purposes of 11 U.S.C. § 327. Otherwise, the selection of estate management would directly involve the bankruptcy court in the daily operations of the debtor's management and business—a situation that the Code seeks to avoid.

An issue often arises concerning whether “in-house” attorneys’ or accountants’ retention must be approved under 11 U.S.C. § 327. Under 11 U.S.C. § 327(b), as long as these individuals are paid a salary by the debtor, they generally do not need to have their employment approved by the court under 11 U.S.C. § 327.⁶ However, in certain circumstances, officers and in-house employees have been determined to be professionals.⁷ If major changes are to be made in “in-house” accountants or attorneys, court approval should be sought.⁸ If, however, these professionals are not salaried employees of the debtor, (*i.e.*, are employed by a non-debtor), their retention may be subject to approval under 11 U.S.C. § 327 or, in the case of estate officers, employed by third parties that have contracts with the estate under 11 U.S.C. § 363 and are discussed in Chapter 3, even if the attorney or accountant was otherwise acting as an in-house professional for the estate.

D. When Should a Professional Begin Work?

An important and frequently asked question is whether a professional should begin work before his or her employment is approved by the court. As discussed in Chapter 4, generally a professional can begin work before his/her employment is approved, or even before an employment application is filed, if the employment application is to be filed within a few days of the professional beginning work. Please note that under Bankruptcy Rule 6003, generally hearings on employment applications cannot be granted until 21 days after a bankruptcy petition is filed. However, if there is a significant delay in the filing of the employment application, the court

⁵ See *In re Madison Management Group Inc.*, 137 B.R. 275 (Bankr. N.D. Ill. 1992).

⁶ See *Matter of Park Terrace Townhouses*, 852 F.2d 1019 (7th Cir. 1988).

⁷ See, e.g., *In re Florida Airlines Inc.*, 110 B.R. 570 (M.D. Fla. 1990).

⁸ See *U.S. ex. rel. Harrison v. Estate of Deutscher*, 115 B.R. 592 (M.D. Tenn. 1990).

may not approve the employment of the professional as of the day they began work, but at some later date, which would greatly limit the amount of compensation the professional could be awarded. Therefore, professionals should take steps to ensure that their employment applications have been or will shortly be filed before they begin working for estates' committees.