

The Ethics of Getting Paid

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THE ETHICS OF GETTING PAID

Ethical Issues Faced by Attorneys for Debtors and Creditors When Arranging for Client Payments

Attorneys representing debtors and creditors in consumer bankruptcy cases often find that their clients are of limited means. A debtor may lack the cash both to successfully negotiate bankruptcy and to pay the filing fee, the attorney fees, and other bankruptcy expenses. Likewise, a small business or individual creditor may not have the wherewithal to protect its legal rights in a debtor's bankruptcy. There is room for attorneys to be creative in addressing these issues, but they must be careful not to run afoul of their ethical and statutory obligations to their clients.

1. Retainers

When may an attorney accept a retainer from a client?

When accepting a retainer from a client, an attorney must take care that all ethical obligations are met. There are three types of retainers.

- A *general retainer* (also known as a true or classic retainer) “is paid by a client to the lawyer to secure the lawyer’s availability during a specified period of time or for a specified matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client.” *Dowling v. Chi. Options Assocs.*, 226 Ill. 2d 277, 286 (2007).
- With a *security retainer*, “the funds paid to the lawyer are not present payment for future services; rather, the retainer remains the property of the client until the lawyer applies it to charges for services that are actually rendered. Any unearned funds are refunded to the client. The purpose of a security retainer is to secure payment of fees for future services that the lawyer is expected to perform.” *Id.*
- An *advance payment retainer* “consists of a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment. Accordingly, the lawyer deposits the retainer into his or

her general account; in fact, an advance payment retainer may not be deposited into a trust account, since a lawyer may not commingle property of a client with the lawyer's own property." *Id.* at 286–87 (citation omitted). An advance payment retainer “may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer” and must be evidenced by a writing containing certain required information. Ill. S. Ct. R. Prof'l Conduct R. 1.15(c).

An attorney takes possession of each of these retainers, but only with the security retainer does the debtor retain ownership of the funds. “The type of retainer that is appropriate will depend on the circumstances of each case. The guiding principle in the choice of the type of retainer is protection of the client's interests. *In the vast majority of cases, this will dictate that funds paid to retain a lawyer will be considered a security retainer and placed in a client trust account, pursuant to this Rule.*” *Id.* cmt. 3D (emphasis supplied).

Remember that *every* agreement between an attorney and a debtor in *any* chapter must be in the form of a written document signed by both parties and filed as an attachment to the Rule 2016(b) statement. Am. General Order No. 11-2 (Apr. 22, 2011), available at http://www.ilnb.uscourts.gov/orders/General_Orders/AmendedGeneralOrder11-2.pdf. This includes, but is not limited to, “the Court-Approved Retention Agreement as posted on the court's website, other fee or expense agreements, wage assignments, and security agreements of all kinds.” *Id.* Any retainer agreement entered into with a client must therefore be in writing, and it must detail the type of retainer being paid. R. 1.15 cmt. 3B (“Any written retainer agreement should clearly define the kind of retainer being paid.”)

Note also that the Illinois has adopted a new version of Rule 1.15 (attached as Appendix A) effective September 15, 2011, that imposes new trust fund requirements on attorneys in Illinois.

As with all attorney fees, the fees that a retainer covers must be reasonable and are subject to disgorgement to the extent they are determined to be unreasonable. Ill. S. Ct. R. Prof'l Conduct R. 1.5; 11 U.S.C. § 329.

2. Third Party Payments

When may a debtor's attorney accept compensation from someone other than the debtor?

When an individual debtor or creditor lacks funds to pay for attorney fees, they may seek to have friends or family members pay the fee instead, or they may seek to pay the fees out of funds belonging to a business the debtor controls. This requires special vigilance on the attorney's part to ensure that no conflict arises. Under ethical rules, an attorney

shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

Ill. S. Ct. R. Prof'l Conduct R. 1.8(f).

Funds paid to an attorney by a third party are subject to Rule 1.15, discussed above and attached as Appendix A, which governs safekeeping of property.

A debtor's attorney accepting payment from a third party must disclose the payment pursuant to 11 U.S.C. § 329. This was made clear in the following discussion from Judge Wedoff's seminal opinion in *McDonald Brothers Construction*:

2. Counsel for a debtor who is compensated from a source other than the estate must comply with the monitoring procedure of Section 329, but this procedure does not require court approval of a fee application.

Most of the professionals retained by a debtor in bankruptcy may receive compensation without court scrutiny as long as they are paid entirely from sources other than the estate. Legal counsel for the debtor, however, must submit all of their compensation, regardless of source, to

court scrutiny, pursuant to Section 329 of the Code.⁴ The rationale for this requirement is set forth in the legislative history of Section 329:

Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 329 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 39 (1978).

Section 329(a) addresses this concern by requiring debtors' counsel to file what is, in effect, a disclosure statement, setting forth (1) the compensation that they receive outside of the fee application process and (2) the source of the compensation.⁵ The disclosure requirement is broad in its sweep. Section 329(a) applies to all payments as well as agreements to pay compensation, whether made after the case is filed or any time during

⁴ Section 329 provides the following:

- (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.

⁵ The section literally requires disclosure of any compensation paid to a debtor's attorney for services rendered in connection with the bankruptcy case, but this language cannot reasonably be read to require "disclosure" of compensation that the court has awarded, after notice and hearing, pursuant to Section 330 or Section 331.

the year before filing, and it applies regardless of whether the services to be compensated are directly connected with the bankruptcy case or merely in contemplation of the bankruptcy filing. Moreover, this disclosure is required “whether or not such attorney applies for compensation under this title.” Thus, even if a debtor’s attorney intends to receive no compensation whatever from the estate, Section 329(a) assures that the court and other interested parties will be informed of the source and amount of the attorney’s compensation for bankruptcy services.⁶

However, the monitoring function of Section 329 does not require the debtor’s counsel to provide a statement of time and services, nor does it require court approval before counsel may use the non-estate funds they have been paid. To the contrary, the compensation of debtor’s counsel from non-estate funds is unaffected by Section 329 unless the court finds, pursuant to Section 329(b), that “such compensation exceeds the reasonable value of any [bankruptcy-related] services.” Only if the compensation is excessive does Section 329(b) authorize the court to cancel an agreement to pay debtor’s counsel from non-estate funds or to order the return of funds already paid. This aspect of Section 329 is implemented by Rule 2017, which establishes a procedure for the court to determine whether payments to a debtor’s counsel are excessive.

In re McDonald Bros. Constr., Inc., 114 B.R. 989, 995–96 (Bankr. N.D. Ill. 1990).

Failure to disclose third-party payment arrangements may also lead to disgorgement of fees paid. *In re Jeanes*, No. 01-00760, 2004 Bankr. LEXIS 989 (Bankr. N.D. Iowa June 17, 2004) (attached as Appendix B).

⁶ The disclosure requirement of Section 329(a) is effectuated by Rule 2016(b). It provides that the statement required by Section 329 must be filed within 15 days after the order for relief, unless the court otherwise directs, and that a supplemental statement shall be filed within 15 days after any payment or agreement not previously disclosed.

3. Post-Petition Collection of Fees

When may a debtor's attorney collect fees due from a debtor after a bankruptcy case has been filed?

An attorney who is owed money by a debtor for legal fees after a bankruptcy petition is filed is in a tough spot. The attorney generally cannot have a conflict of interest with the debtor. Ill. S. Ct. R. Prof'l Conduct, R. 1.7 (an attorney shall not represent a client if "there is a significant risk that the representation of [the client] will be materially limited ... by a personal interest of the lawyer"); 1.8 (subject to certain exceptions, "[a] lawyer shall not ... knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client"). An attorney should therefore avoid becoming a creditor or a debtor-client. Moreover, an attorney is barred by the automatic stay from taking any action to collect those fees. 11 U.S.C. § 362.

Among other things, attorneys should not:

- Accept post-dated checks. *Walton v. Clark & Washington, P.C.*, ___ B.R. ___, No. 8:09-mp-00010-MGW, 2011 WL 2690562, 2011 Bankr. LEXIS 2610 (Bankr. M.D. Fla. July 12, 2011) (attached as Appendix C). In *Walton*, a consumer law firm's practice was to accept postdated checks as a pre-petition retainer. The practice was challenged by the U.S. Trustee. The Court held that "[t]he postdated checks give rise to prepetition claims because they represent a right to payment that arose before the petition date. As a consequence, the act of depositing the postdated checks after a bankruptcy case has been filed violates the section 362 automatic stay. And continuing to deposit or collect on the postdated checks after a discharge has been entered violates the section 524 discharge injunction."
 - *See also In re Waldo*, 417 B.R. 854 (Bankr. E.D. Tenn. 2009).
- Apply for compensation in a chapter 13 case when the attorney has a claim against the debtor for unpaid fees from a prior chapter 13 case. *In re Ramirez*, No. 03-47872, 2006 Bankr. LEXIS 3623 (Bankr. S.D. Tex. Dec. 29, 2006) (attached as Appendix D). In *Ramirez*, the debtor's attorney had represented the debtor in a prior chapter 13 bankruptcy. After that case was disposed of, the attorney was still owed a large sum of money. The attorney later filed a

second case for the debtor, but did not disclose his large claim for unpaid attorney fees. The chapter 13 trustee objected to the attorney's fee application in the second case. The court denied the attorney fees because of his failure to disclose the outstanding fees due in the first bankruptcy case and reduced the fees for the second case because some work in that case was duplicative of work done in the first case.

- *But see In re Gutierrez*, 309 B.R. 488 (Bankr. W.D. Tex. 2004) (attached as Appendix E) (debtor's two bankruptcy cases could not be conflated and counsel's earlier representation did not give rise to conflict).

Despite these limitations, an attorney representing debtors in chapter 7 cases in the Northern District of Illinois may be able to condition future representation on future agreement to pay fees. A Standing Order of the Bankruptcy Court in this District provides:

In a case under Chapter 7 of the Bankruptcy Code where (1) the debtor's attorney has agreed to represent the debtor conditioned on the debtor entering into an agreement after the filing of the case to pay the attorney for services rendered after the filing of the case, and (2) the debtor refuses to enter into such an agreement, the court may allow the attorney to withdraw from representation of the debtor, on motion of the attorney with notice to the debtor, the trustee, and the U.S. Trustee.

Standing Order dated February 17, 2004, *available at* http://www.ilnb.uscourts.gov/orders/General_Orders/chapter_7_fees_order.pdf.

4. Charging Credit Cards

May a debtor's attorney ever charge legal fees to a debtor's credit card prior to the filing of a bankruptcy case?

An attorney representing an individual debtor is subject to the "debt relief agency" provisions of the Bankruptcy Code. 11 U.S.C. § 101(12A). Among other things,

[a] debt relief agency shall not ... advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.

11 U.S.C. § 526(a)(4). An attorney violates this provision “only when the impetus of the advice to incur more debt is the expectation of filing for bankruptcy and obtaining the attendant relief.” *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010). Advising an debtor to charge bankruptcy attorney fees on a credit card would seem to fall squarely within the prohibition in § 526(a)(4) as interpreted by the Supreme Court.

5. Collecting Fees After Conversion

May a debtor's attorney collect fees that are due after conversion from a chapter 13 to a chapter 7?

When a case is converted from a chapter 13 to a chapter 7, the debtor's attorney may find that she is still owed fees by the debtor. The Bankruptcy Code makes some provision for payment of these fees, but ultimately they will be discharged and the attorney will not be able to collect them.

In an individual chapter 13 case, “the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.” 11 U.S.C. § 330(a)(4)(B). These fees are allowable as an administrative expense. *Id.* § 503(b)(2).

When a case is converted, pre-conversion administrative expense claims are not, as other claims are, treated for all purposes as arising before the petition date. *Id.* § 348(d). This means that the pre-conversion administrative expense claims remain entitled to priority. *Id.* § 507(a)(2). Any recovery from the bankruptcy estate may be limited, however, because the pre-conversion administrative expense claims are subordinated to

any administrative expense claims that arise during the administration of the chapter 7 case. *Id.* § 726(b).

Pre-conversion administrative expense claims are treated as prepetition claims for purposes of discharge. See *Fickling v. Flower, Medalie & Markowitz, Esqs. (In re Fickling)*, 361 F.3d 172 (2d Cir. 2004) (attached as Appendix F). This means that pre-conversion attorney fee claims are discharged in a case converted to chapter 7. *Id.*; 11 U.S.C. §§ 727(b) (“a discharge ... discharges the debtor from all debts that arose before the date of the order for relief under this chapter”), 348(b) (“Unless the court for cause orders otherwise, in sections ... 727(b) ... ‘the order for relief under this chapter’ in a chapter to which a case has been converted ... means the conversion of such case to such chapter.”)

APPENDIX A*Illinois Supreme Court Rules of Professional Conduct
Rule 1.15: Safekeeping Property
(Effective September 15, 2011)*

- (a) 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. Funds shall be deposited in one or more separate and identifiable interest- or dividend-bearing client trust accounts maintained at an eligible financial institution in the state where the lawyer's office is situated, or elsewhere with the informed consent of the client or third person. For the purposes of this Rule, a client trust account means an IOLTA account as defined in paragraph (i)(2), or a separate, interest-bearing non-IOLTA client trust account established to hold the funds of a client or third person as provided in paragraph (f). Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Other, tangible property shall be identified as such and appropriately safeguarded. Complete records of client trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

Maintenance of complete records of client trust accounts shall require that a lawyer:

- (1) prepare and maintain receipt and disbursement journals for all client trust accounts required by this Rule containing a record of deposits and withdrawals from client trust accounts specifically identifying the date, source, and description of each item deposited, and the date, payee and purpose of each disbursement;
- (2) prepare and maintain contemporaneous ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the date of each deposit, the names of all persons for whom the funds are or were held, the amount of such funds, the dates, descriptions and amounts of charges or withdrawals, and the names of all persons to whom such funds were disbursed;

- (3) maintain copies of all accountings to clients or third persons showing the disbursement of funds to them or on their behalf, along with copies of those portions of clients' files that are reasonably necessary for a complete understanding of the financial transactions pertaining to them;
- (4) maintain all client trust account checkbook registers, check stubs, bank statements, records of deposit, and checks or other records of debits;
- (5) maintain copies of all retainer and compensation agreements with clients;
- (6) maintain copies of all bills rendered to clients for legal fees and expenses;
- (7) prepare and maintain reconciliation reports of all client trust accounts, on at least a quarterly basis, including reconciliations of ledger balances with client trust account balances;
- (8) make appropriate arrangements for the maintenance of the records in the event of the closing, sale, dissolution, or merger of a law practice.

Records required by this Rule may be maintained by electronic, photographic, or other media provided that printed copies can be produced, and the records are readily accessible to the lawyer.

Each client trust account shall be maintained only in an eligible financial institution selected by the lawyer in the exercise of ordinary prudence.

- (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
- (c) A lawyer shall deposit in a client trust account funds received to secure payment of legal fees and expenses, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Funds received as a fixed fee, a general retainer, or an advance payment retainer shall be deposited in the lawyer's general account or other account belonging to the

lawyer. An advance payment retainer may be used only when necessary to accomplish some purpose for the client that cannot be accomplished by using a security retainer. An agreement for an advance payment retainer shall be in a writing signed by the client that uses the term “advance payment retainer” to describe the retainer, and states the following:

- (1) the special purpose for the advance payment retainer and an explanation why it is advantageous to the client;
 - (2) that the retainer will not be held in a client trust account, that it will become the property of the lawyer upon payment, and that it will be deposited in the lawyer’s general account;
 - (3) the manner in which the retainer will be applied for services rendered and expenses incurred;
 - (4) that any portion of the retainer that is not earned or required for expenses will be refunded to the client;
 - (5) that the client has the option to employ a security retainer, provided, however, that if the lawyer is unwilling to represent the client without receiving an advance payment retainer, the agreement must so state and provide the lawyer’s reasons for that condition.
- (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
- (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

- (f) All funds of clients or third persons held by a lawyer or law firm which are nominal in amount or are expected to be held for a short period of time, including advances for costs and expenses, and funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm, shall be deposited in one or more IOLTA accounts, as defined in paragraph (i)(2). A lawyer or law firm shall deposit all funds of clients or third persons which are not nominal in amount or expected to be held for a short period of time into a separate interest- or dividend-bearing client trust account with the client designated as income beneficiary. Funds of clients or third persons shall not be deposited in a non-interest-bearing or non-dividend-bearing account. Each IOLTA account shall comply with the following provisions:
- (1) Each lawyer or law firm in receipt of nominal or short-term client funds shall establish one or more IOLTA accounts with an eligible financial institution authorized by federal or state law to do business in the state of Illinois and which offers IOLTA accounts within the requirements of this Rule as administered by the Lawyers Trust Fund of Illinois.
 - (2) Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility guidelines, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the IOLTA account balance, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include that the account is an IOLTA account.
 - (3) An IOLTA account that meets the highest comparable rate or dividend standard set forth in paragraph (f)(2) must use one of the identified account options as an IOLTA account, or pay the equivalent yield on an existing

IOLTA account in lieu of using the highest-yield bank product:

- (a) a checking account paying preferred interest rates, such as money market or indexed rates, or any other suitable interest-bearing deposit account offered by the eligible institution to its non-IOLTA customers.
 - (b) for accounts with balances of \$100,000 or more, a business checking account with automated investment feature, such as an overnight sweep and investment in repurchase agreements fully collateralized by U.S. Government securities as defined in paragraph (h).
 - (c) for accounts with balances of \$100,000 or more, a money market fund with, or tied to, check-writing capacity, that must be solely invested in U.S. Government securities or securities fully collateralized by U.S. Government securities, and that has total assets of at least \$250 million.
- (4) As an alternative to the account options in paragraph (f)(3), the financial institution may pay a “safe harbor” yield equal to 70% of the Federal Funds Target Rate or 1.0%, whichever is higher.
- (5) Each lawyer or law firm shall direct the eligible financial institution to remit monthly earnings on the IOLTA account directly to the Lawyers Trust Fund of Illinois. For each individual IOLTA account, the eligible financial institution shall provide: a statement transmitted with each remittance showing the name of the lawyer or law firm directing that the remittance be sent; the account number; the remittance period; the rate of interest applied; the account balance on which the interest was calculated; the reasonable service fee(s) if any; the gross earnings for the remittance period; and the net amount of earnings remitted. Remittances shall be sent to the Lawyers Trust Fund electronically unless otherwise agreed. The financial institution may assess only allowable reasonable fees, as defined in paragraph (i)(8). Fees in excess of the earnings accrued on an individual IOLTA account for any month shall not be taken from earnings accrued on other IOLTA accounts or from the principal of the account.

- (g) A lawyer or law firm should exercise reasonable judgment in determining whether funds of a client or third person are nominal in amount or are expected to be held for a short period of time. No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's or law firm's exercise of reasonable judgment under this rule or decision to place client funds in an IOLTA account or a non-IOLTA client trust account on the basis of that determination. Ordinarily, in determining the type of account into which to deposit particular funds for a client or third person, a lawyer or a law firm shall take into consideration the following factors:
- (1) the amount of interest which the funds would earn during the period they are expected to be held and the likelihood of delay in the relevant transaction or proceeding;
 - (2) the cost of establishing and administering the account, including the cost of the lawyer's services;
 - (3) the capability of the financial institution, through subaccounting, to calculate and pay interest earned by each client's funds, net of any transaction costs, to the individual client.
- (h) All trust accounts, whether IOLTA or non-IOLTA, shall be established in compliance with the following provisions on dishonored instrument notification:
- (1) A lawyer shall maintain trust accounts only in eligible financial institutions that have filed with the Attorney Registration and Disciplinary Commission an agreement, in a form provided by the Commission, to report to the Commission in the event any properly payable instrument is presented against a client trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon 30 days notice in writing to the Commission. The Commission shall annually publish a list of financial institutions that have agreed to comply with this rule and shall establish rules and procedures governing amendments to the list.

- (2) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:
- (a) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors; and
 - (b) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of overdraft created thereby.

Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

- (3) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.
- (4) Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by paragraph (h) of this Rule. Fees charged for the reasonable cost of producing the reports and records required by paragraph (h) are the sole responsibility of the lawyer or law firm, and are not allowable reasonable fees for IOLTA accounts as those are defined in paragraph (i)(8).
- (i) Definitions
- (1) “Funds” denotes any form of money, including cash, payment instruments such as checks, money orders or sales drafts, and electronic fund transfers.

- (2) “IOLTA account” means a pooled interest- or dividend-bearing client trust account, established with an eligible financial institution with the Lawyers Trust Fund of Illinois designated as income beneficiary for the deposit of nominal or short-term funds of clients or third persons as defined in paragraph (f) and from which funds may be withdrawn upon request as soon as permitted by law.
- (3) “Eligible financial institution” is a bank or a savings bank insured by the Federal Deposit Insurance Corporation or an openend investment company registered with the Securities and Exchange Commission that agrees to provide dishonored instrument notification regarding any type of client trust account as provided in paragraph (h) of this Rule; and that with respect to IOLTA accounts, offers IOLTA accounts within the requirements of paragraph (f) of this Rule.
- (4) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.
- (5) “Money market fund” is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund or the equivalent of a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act.
- (6) “U.S. Government securities” refers to U.S. Treasury obligations and obligations issued by or guaranteed as to principal and interest by any AAA-rated United States agency or instrumentality thereof. A daily overnight financial repurchase agreement (“repo”) may be established only with an institution that is deemed to be “well capitalized” or “adequately capitalized” as defined by applicable federal statutes and regulations.
- (7) “Safe harbor” is a yield that if paid by the financial institution on IOLTA accounts shall be deemed as a comparable return in compliance with this Rule. Such yield shall be calculated as 70% of the Federal Funds Target Rate as reported in the Wall Street Journal on the first business day of the calendar month, or 1.0%, whichever is higher.

- (8) “Allowable reasonable fees” for IOLTA accounts are per-check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, automated investment (“sweep”) fees, and a reasonable maintenance fee, if those fees are charged on comparable accounts maintained by non-IOLTA depositors. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA account.
- (j) In the closing of a real estate transaction, a lawyer’s disbursement of funds deposited but not collected shall not violate his or her duty pursuant to this Rule 1.15 if, prior to the closing, the lawyer has established a segregated Real Estate Funds Account (REFA) maintained solely for the receipt and disbursement of such funds, has deposited such funds into a REFA, and:
- (1) is acting as a closing agent pursuant to an insured closing letter for a title insurance company licensed in the State of Illinois and uses for such funds a segregated REFA maintained solely for such title insurance business; or
- (2) has met the “good-funds” requirements. The good-funds requirements shall be met if the bank in which the REFA was established has agreed in a writing directed to the lawyer to honor all disbursement orders drawn on that REFA for all transactions up to a specified dollar amount not less than the total amount being deposited in good funds. Good funds shall include only the following forms of deposits:
- (a) a certified check,
- (b) a check issued by the State of Illinois, the United States, or a political subdivision of the State of Illinois or the United States,
- (c) a cashier’s check, teller’s check, bank money order, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government,

- (d) a check drawn on the trust account of any lawyer or real estate broker licensed under the laws of any state,
- (e) a personal check or checks in an aggregate amount not exceeding \$5,000 per closing if the lawyer making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the REFA,
- (f) a check drawn on the account of or issued by a lender approved by the United States Department of Housing and Urban Development as either a supervised or a nonsupervised mortgagee as defined in 24 C.F.R. § 202.2,
- (g) a check from a title insurance company licensed in the State of Illinois, or from a title insurance agent of the title insurance company, provided that the title insurance company has guaranteed the funds of that title insurance agent.

Without limiting the rights of the lawyer against any person, it shall be the responsibility of the disbursing lawyer to reimburse the trust account for such funds that are not collected and for any fees, charges and interest assessed by the paying bank on account of such funds being uncollected.

APPENDIX B

In re Jeanes,
No. 01-00760, 2004 Bankr. LEXIS 989
(Bankr. N.D. Iowa June 17, 2004)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

IN RE:)
) Chapter 13
KEITH JEANES)
JO ELLEN JEANES,) Bankruptcy No. 01-00760
)
Debtors.)

ORDER RE APPLICATION FOR COMPENSATION BY DEBTORS' ATTORNEY

Attorney John W. Hofmeyer III filed an Application for the award of additional attorney's fees in the amount of \$988.33 for work performed on behalf of Debtors in this confirmed Chapter 13 case. The Chapter 13 Trustee objected to the Application. The matter was set for hearing. Hearing was held on May 26, 2004 and the matter was taken under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A).

BACKGROUND

Keith and Jo Ellen Jeanes filed a Chapter 7 petition in March, 2001 for which they paid Attorney Hofmeyer a \$1000 retainer fee. The case was converted to Chapter 13 in April 2001, and a plan was confirmed in December 2001. In November 2001, Mr. Hofmeyer submitted an application for approval of payment of additional fees, attaching an invoice totaling \$4700.97 (the "2001 Invoice"). From this total, Mr. Hofmeyer subtracted \$1074.06, which represented the amount already paid from the original retainer. Of the remaining amount of \$3626.91, Mr. Hofmeyer requested that the court allow payment of \$2500. By order dated December 20, 2001, this Court allowed \$2000 of the remaining fees and disallowed the remaining \$1626.91. The grounds for disallowance included full-fee charge for travel, vague pre-petition fees, charging for preparation of the fee application, and assessing finance charges. This Court concluded that \$3000 total (including the retainer) was allowable compensation given the nature of the case. Trustee Carol Dunbar paid the additional \$2000 on January 3, 2003.

In August 2003, Mr. Hofmeyer again petitioned the court for approval of fees, requesting an additional \$1092.54 for fees incurred in transactions related to Debtors' purchase of vehicles. With this application, Mr. Hofmeyer attached an invoice for dates December 31, 2001-July 23, 2003 (the "2003

Invoice"). The balance forward listed at the beginning of the invoice is \$0. Debtors, Mr. Hofmeyer, and Trustee came to an agreement to approve additional fees in the amount of \$797.54. The balance of \$295 was denied by this court in an order dated September 26, 2003. Trustee paid the approved fee amount on September 30, 2003. This award was in satisfaction of all fees up to the final billing date of July 23, 2003.

In March 2004, Debtors sent Trustee a letter requesting permission to use Debtors' income tax refund to pay Mr. Hofmeyer. They enclosed an invoice sent directly to Debtors by Mr. Hofmeyer requesting an additional \$1326.93 for the period ending January 31, 2004 (the "2004 Invoice"). Mr. Hofmeyer subsequently filed a formal application for fees on April 19, 2004 at the behest of Trustee. The 2004 Invoice contains all of the fees assessed for the Jeanes' case to date, excluding the charges listed on the 2003 Invoice. Unfortunately, it is not reconcilable with Mr. Hofmeyer's two previous applications. Specifically, there are new charges for 2002 listed on the 2004 Invoice that did not appear in the 2003 Invoice for the same period. Additionally, finance charges were not present in the 2003 Invoice, but they appear in the 2004 Invoice. There is no credit for the amount of fees denied in the December 2001 and September 2003 orders.

After Trustee objected to the fee application, Mr. Hofmeyer submitted a revised invoice (the "Revised Invoice") which removes interest charges, reduces the amount charged for travel time and purports to combine the 2001 and 2003 Invoices. These changes were applied to the entire invoice, including the portions which were paid in full by the Trustee pursuant to the December 2001 and September 2003 orders. The Revised Invoice total is \$988.33. The only post-July 23, 2003 charges total \$347.54. The Revised Invoice is an accounting nightmare. It contains vague descriptions and fee amounts which differ from the previous three invoices. Even more confusing, new charges for 2001 and 2003 appear on the Revised Invoice that were neither on the 2004 Invoice nor the 2003 Invoice.

APPLICATION FOR COMPENSATION

Pursuant to 11 U.S.C. § 330(a)(1)(A), this Court may award an attorney reasonable compensation for actual, necessary services rendered and expenses incurred. Federal Rule of Bankruptcy Procedure 2016 requires that an attorney seeking compensation for fees from the estate file with the court an application detailing his services rendered, time

spent, expenses incurred, and amount requested. On its own motion, this Court may award less than the amount requested. 11 U.S.C. § 330(a)(2); In re Peterson, 251 B.R. 359, 363 (B.A.P. 8th Cir. 2000). Subsection (4)(B) of § 330(a) provides that in a Chapter 13 case in which the debtor is an individual, the court may award reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case, based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in § 330(a).

This Court applies the lodestar analysis to determine the reasonableness of the attorney's requested compensation. In re Apex Oil Co., 960 F.2d 728, 732 (8th Cir. 1992). Mr. Hofmeyer's hourly rate has already been analyzed in a previous order and \$90 per hour is reasonable. In re Jeanes, No. 01-00760-W, slip op. at 3 (Bankr. N.D. Iowa Dec. 20, 2001). Mr. Hofmeyer has since raised his rate to \$100 per hour. That rate remains within the range of reasonable rates. See, e.g., In re Blessing Indus., Inc., No. 00-00140, slip op. at 2 (Bankr. N.D. Iowa May 31, 2000).

Only those amounts approved by the court may be collected from Debtor. In re Gantz, 209 B.R. 999, 1002 (B.A.P. 10th Cir. 1997). Fees are disallowed, allowed as an administrative expense to be paid from the estate, or allowed but must be paid by the debtor directly, not from the estate. Gantz, 209 B.R. at 1003. Because § 330(a) requires court approval to create the obligation to pay the attorney's fees, absent court approval neither the debtor nor the estate is ever liable. Id.; In re Digman, No. 98-00322-C, slip op. at 1-2 (Bankr. N.D. Iowa 1998). Court approval under § 330(a) is what creates the liability, not the performance of the services.

DISCLOSURE OF COMPENSATION

In addition to obtaining court approval of fees, a debtor's attorney is required to disclose the amount and source of all fees to be received on behalf of the debtor. The requirements of court approval and disclosure are separate and distinct requirements. Application for compensation under § 330 does not constitute disclosure. In re Brandenburger, 145 B.R. 624, 627 (Bankr. D.S.D. 1992). Disclosure is mandated by § 329 of the Bankruptcy Code, which provides:

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. [Emphasis added].

Section 329 requires a debtor's attorney to disclose compensation he expects to receive regardless of whether such compensation is coming from the debtor or some other source. In re McDonald Bros. Const., Inc., 114 B.R. 989, 995 (Bankr. N.D. Ill. 1990). The procedure for filing the disclosure is governed by Fed. R. Bankr. P. 2016(b), which provides:

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 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 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 15 days after any payment or agreement not previously disclosed. [Emphasis added].

Whenever an attorney's fee arrangement with a debtor changes, Rule 2016(b) requires that the attorney file a supplemental disclosure statement. Brandenburger, 145 B.R. at 627. The legislative history provides insight into the rationale for such a rule:

Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for over-reaching by the debtor's attorney, and should be subject to careful scrutiny.

H.R.Rep. No. 95-595, at 329 (1977); S. Rep. No. 95-989, at 39 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5825, 6285.

(cited in McDonald Bros. Const., Inc., 114 B.R. at 995 and Brandenburger, 145 B.R. at 627). Even if a debtor's attorney does not intend to receive compensation from the bankruptcy estate, the attorney is still required to disclose all compensation amounts and sources. McDonald Bros., 114 B.R. at 995. Compensation from third parties is subject to § 329(b), which provides:

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.

While compensation paid by third parties is not subject to the requirements of § 330, it must still be disclosed. The court has the discretion to determine whether such compensation is excessive, and to order disgorgement of such excessive compensation if found. See In re Land, 138 B.R. 66, 69-70 (D. Neb. 1992).

ANALYSIS

On December 20, 2001, this Court awarded Hofmeyer \$3,074.06. In September 2003, after a supplemental fee request and hearing, this Court awarded an additional \$797.54 in full satisfaction of fees incurred through July 2003. It is unclear why these fees, which have already been approved and paid, should now reappear on either the 2004 Invoice or the Revised Invoice. What is more disturbing is that there is no credit on the Revised Invoice for the amount of fees which were denied in the previous two fee application orders. It appears as though Mr. Hofmeyer is indirectly and surreptitiously re-petitioning the Court for payment of fees which this Court has previously denied.

Since there is a discrepancy in the 2001 charges listed, and finance charges from the first two invoices are credited on the 2004 Invoice and the Revised Invoice, the exact numbers cannot be reconciled. The amount of fees denied to date is \$1921.91. On the Revised Invoice, there is a \$1000 credit for "Relationship to client," but there is no credit for the fees which were denied. Additionally, it contains several hundred dollars in previously unlisted fees, and a \$385.43 deduction cryptically labeled "Write off balance due," which does not correspond to any other set of numbers.

The 2001 fees which appear for the first time on the Revised Invoice should have been included on the 2003 Invoice. The September 2003 Order stated that the \$797.54 award was in full satisfaction of the fees which had accrued to date, and Mr. Hofmeyer had ample opportunity to request compensation for those fees in the 2003 fee application. He has offered no explanation why those fees were not included on the 2003 Invoice.

The only new fees appearing on the Revised Invoice which would not be included in the previous two orders are those listed at the bottom of the Revised Invoice. They total \$347.54. Of these charges, \$317.54 arise from preparation of the fee application. This Court does not permit attorneys to charge debtors for the costs they incur in petitioning the court for their fees. See In re Courson, 138 B.R. 928, 933 (Bankr. N.D.Iowa 1992). Therefore, \$317.54 of the new fees are not allowable. The only new billable work is in the amount of \$30.00.

Mr. Hofmeyer can offer no explanation why the fees on the Revised Invoice total \$988.33 when the only fees incurred after July 23, 2003 are \$347.54. When asked about this discrepancy, his response was "All I know is we combined the bills." Mr. Hofmeyer's inability to explain the origin of the other \$640.79 in fees leaves no alternative but to conclude that the only possible source of those fees is from the earlier invoices, and that those fees were previously disallowed.

Since it appears as though most of the fees were previously disallowed, and the balance of the fees with the exception of \$30 for services rendered in January 2004 are for preparation of Mr. Hofmeyer's fee applications, all but \$30 of the Revised Invoice represents disallowed fees. Mr. Hofmeyer is therefore precluded from ever collecting these disallowed fees from Debtors or the estate.

The Court is troubled by Mr. Hofmeyer's reference in his letter to the Trustee and his comments at the hearing that he had entered into an arrangement whereby payment of the balance of the Revised Invoice was to be guaranteed by "a good client, third party." While Mr. Hofmeyer is not required to petition the Court for approval of compensation paid by third parties on the debtor's behalf, he is required to disclose the arrangement pursuant to § 329(a) and Rule 2016(b). Mr. Hofmeyer did not disclose the fact that he was attempting to collect the fees directly from Debtors or that he had made an informal payment arrangement with a third party, both of which violate § 329.

Even assuming Mr. Hofmeyer had complied with the disclosure requirements enumerated above, the fees for which he is seeking payment outside the bankruptcy estate still represent fees which were disallowed by this court in previous applications. These circumstances give the appearance that Mr. Hofmeyer is attempting to circumvent this Court's denial of his fees by collecting them without disclosure from a third party, or directly from Debtors without approval, or by obtaining Court approval by means of a misleading fee application. Although Mr. Hofmeyer denies that he urged Debtors to pay the 2004 Invoice out of their 2003 income tax refund, he solicited payment of disallowed fees from Debtors who had no other source of income from which to pay him. Any payment to Mr. Hofmeyer by Debtors comes from Debtors' disposable income to the detriment of unsecured creditors. It is for this precise reason that disclosure and court approval are required.

The fees which Mr. Hofmeyer is attempting to collect from the third party are subject to the Court's examination under § 329(b). The Court may cancel any compensation agreement between Mr. Hofmeyer and the third party if it deems such compensation to be in excess of the reasonable value of services rendered. The Court has carefully analyzed the requested compensation on two separate occasions and found it to be in excess of the reasonable value of such services. Mr. Hofmeyer was compensated for the amount which the court found to be reasonable, and the remainder was disallowed.

Thus, it is obvious, for the reasons set out in this opinion, that Mr. Hofmeyer is not entitled to any additional compensation from any source. The only remaining issue is whether Attorney Hofmeyer should be required to disgorge any

or all fees he has received because of the above described violations of the Code and Rules.

In summary, Mr. Hofmeyer failed to inform the Court, at any time during these proceedings, that an alternative source of compensation existed from third parties. Mr. Hofmeyer sought payment directly from Debtors, in violation of the automatic stay, without Court approval. Finally, it appears that Mr. Hofmeyer attempted to mislead the Court, by mistake or otherwise, by adding billable time to previously completed fee applications and resubmitting fees which had previously been denied. These matters are individually and collectively serious violations of the letter and spirit of the Bankruptcy Code. This Circuit has consistently granted to the Bankruptcy Court broad power and discretion to order disgorgement of fees already paid when cause exists. In re Zepecki, 277 F.3d 1044, 1045 (8th Cir. 2002). Disgorgement of all fees is considered an appropriate remedy where an attorney fails to fully disclose his fee arrangements. In re Downs, 203 F.3d 472, 477-78 (6th Cir. 1996).

The Eighth Circuit B.A.P. likewise views the failure to fully disclose compensation agreements as a significant violation. "It is well settled that disgorgement of fees is an appropriate sanction for failure to comply with the disclosure requirements of § 329 and Rule 2016." In re Redding, 263 B.R. 874, 880 (B.A.P. 8th Cir. 2001).

Through various Court orders during the administration of this case, this Court has allowed and approved payment of \$3,797.54 to Mr. Hofmeyer. This entire amount has already been paid. It is the conclusion of this Court that Mr. Hofmeyer's failure to disclose third party compensation agreements and seeking to obtain direct payment from Debtors constitute serious violations of important policies underlying the Bankruptcy Code. Failure to comply with these provisions warrants forfeiture of some or all of Mr. Hofmeyer's compensation. It the conclusion of this Court that Mr. Hofmeyer should be directed to disgorge the sum of \$3,000 of fees already approved and paid.

WHEREFORE, for all the reasons set forth herein, the Court enters the following orders:

1. The Application for Compensation filed by Attorney Hofmeyer is DENIED as Mr. Hofmeyer has already received all compensation to which he is entitled.

2. Any agreement between Mr. Hofmeyer and any third party regarding payment of fees of Keith and Jo Ellen Jeanes is invalidated.

3. Attorney Hofmeyer is ordered to refrain from any attempts to collect attorney's fees which involve Debtors from any third party.

4. Attorney Hofmeyer is ordered to refrain from attempting to collect any attorney's fees directly from Mr. and Mrs. Jeanes as a result of this bankruptcy proceeding.

5. For the reasons set forth in this opinion, Attorney Hofmeyer is ordered to disgorge the sum of \$3,000 in previously approved attorney's fees based upon the violations set forth in this opinion.

6. Mr. Hofmeyer is ordered to pay the disgorged fees to the Chapter 13 Trustee on or before June 28, 2004. This sum shall be considered disposable income and distributed by the Trustee pursuant to the confirmed Chapter 13 Plan.

7. The Clerk's Office is directed to mail a copy of this order to Debtors at their address of: Box 155, 125 S. Jamison St. Westgate, IA 50681.

SO ORDERED this 17th day of June, 2004.

PAUL J. KILBURG
Chief Bankruptcy Judge

APPENDIX C

*In re Walton v. Clark & Washington, P.C.,
No. 8:09-mp-00010-MGW, 2010 Bankr. LEXIS 2610
(Bankr. M.D. Fla. July 12, 2011)*

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re:

Donald F. Walton,
United States Trustee
for Region 21,

Case No. 8:09-mp-00010-MGW

Plaintiff,

vs.

Clark & Washington, P.C.,

Defendant.

**MEMORANDUM OPINION ON DEFENDANT,
CLARK & WASHINGTON, P.C.'S, MOTION FOR SUMMARY JUDGMENT**

Introduction

Bankruptcy Code section 101(5) broadly defines “claim” to include virtually any right to payment. Under Bankruptcy Code section 362(a), the filing of a bankruptcy case automatically stays any act by a creditor to collect, assess, or recover a claim that arose before the petition date. And Bankruptcy Code section 524 enjoins the creditor from attempting to collect the prepetition claim if it was discharged under section 727.

The Defendant in this proceeding, a law firm specializing in Chapter 7 and 13 bankruptcies, accepts postdated checks as payment of its attorney’s fees.¹ The Defendant routinely deposits the postdated checks after a client’s bankruptcy case is filed. Under an earlier

¹The facts as recited herein are as of April 26, 2010, the date of the hearing on Clark & Washington’s motion for summary judgment (Doc. 32) and are as recited by the Court in its oral ruling from the bench on that date. (Doc. 39, p. 39, l. 3 – p. 56, l. 13). In light of the Court’s oral ruling, the Court assumes that Clark & Washington ceased using postdated checks as part of its consumer bankruptcy fee agreement at that time.

practice, the Defendant notified its clients by telephone and mail if any of the postdated checks were returned for insufficient funds. Now, the Defendant sends the client one collection letter.

The postdated checks give rise to prepetition claims because they represent a right to payment that arose before the petition date. As a consequence, the act of depositing the postdated checks after a bankruptcy case has been filed violates the section 362 automatic stay. And continuing to deposit or collect on the postdated checks after a discharge has been entered violates the section 524 discharge injunction. Moreover, the Defendant's fee arrangement creates a conflict of interest between the Defendant and its clients. Accordingly, the Defendant shall no longer accept postdated checks for deposit after the petition date as payment of Defendant's fees for Chapter 7 cases filed in this Court.

Factual Background

A. The Firm.

The Defendant, Clark & Washington, P.C., is a law firm based in Atlanta, Georgia. It has twelve offices in the Middle District of Florida. Seven of those offices are in the Tampa Division. Clark & Washington limits its practice to representing individual debtors in consumer cases filed under Chapters 7 and 13 of the Bankruptcy Code. Clark & Washington generally charges clients \$1,250 for a Chapter 7 bankruptcy case. The client is also required to pay all costs (such as filing fees, credit counseling fees, and credit report charges) in advance.

Sometime in the late 1990's, Clark & Washington began accepting postdated checks as payment of their fees. Since that time, Clark & Washington has used a variety of fee agreements. But each of those agreements was predicated on the use of postdated checks to facilitate payment of the firm's fees. At this time, the Court is only concerned with Clark & Washington's current fee agreement.

B. The Current Fee Agreement.

Clark & Washington currently requires each prospective client to execute a “Chapter 7 Attorney-Client Agreement.”² Under the Agreement, the client is entitled to a free consultation.³ That consultation primarily involves interviewing the client and gathering the information necessary to prepare the bankruptcy filing. Clark & Washington also provides other prepetition services under the Agreement, including helping the client obtain the required credit counseling certificate; advising the client about the bankruptcy process in general, the client’s responsibilities as a debtor in particular, and any relevant legal issues; and preparing and filing the bankruptcy petition and schedules.⁴

There is a charge for those services, although the charge—a negotiated flat fee typically in the amount of \$250—is relatively small in relation to the overall fee for prepetition and postpetition services.⁵ The Agreement specifically provides that any prepetition fees not paid before the bankruptcy case is filed are subject to being discharged.⁶ So Clark & Washington expressly waives its right to those fees under the Agreement.⁷

Clark & Washington also provides postpetition services, such as filing stay notices; preparing and filing any necessary papers; preparing for and attending hearings; and consulting with and advising the client.⁸ The Agreement specifically requires that the client pay Clark &

² Doc. No. 33, Exhibit E.

³ *Id.* at § I(a).

⁴ *Id.* at § I(b).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at § II(a)-(c).

Washington a retainer to be applied as payment of those postpetition services.⁹ The retainer—generally in the amount of \$1,000—consists of postdated checks.¹⁰

Typically, the client provides Clark & Washington with four or five postdated checks in equal amounts to pay the retainer. The amount and date of each check is listed on a “Chapter 7 Fee Payment Schedule” attached to the Agreement as Appendix 1.¹¹ Clark & Washington deposits the checks on the date specified on the checks (as listed on the Chapter 7 Fee Schedule). The dates specified are always after the petition date, and in some instances, they are after the discharge has been entered.

The Agreement contains the following disclosure (in all capital letters) advising potential clients that they may wish to consult with independent counsel to determine whether they may pay for postpetition services with postdated checks:

CLIENT IS ADVISED THAT THE USE OF POST-DATED CHECKS FOR POST-PETITION PAYMENT OF A PRE-PETITION CHAPTER 7 ATTORNEY FEE IS NOT ALLOWED IN THE MAJORITY OF JURISDICTIONS. TO ATTORNEY’S KNOWLEDGE, THE ACCEPTANCE OF POST-DATED CHECKS AS A RETAINER AGAINST SPECIFICALLY-SEGREGATED, POST-PETITION SERVICES HAS NOT BEEN DISALLOWED. NONETHELESS, CLIENT MIGHT WISH TO CONSULT INDEPENDENT COUNSEL IN THIS REGARD.¹²

C. The Miscellaneous Proceeding.

The U.S. Trustee objects to Clark & Washington’s fee arrangement. So the U.S. Trustee filed this miscellaneous proceeding seeking a declaration that Clark & Washington’s fee

⁹ *Id.* at § II(a).

¹⁰ *Id.*

¹¹ *Id.* at Appx. 1.

¹² *Id.* at § II(a) (emphasis in original).

arrangement: (i) violates Bankruptcy Code section 362’s automatic stay (Count I); (ii) violates Bankruptcy Code section 524’s discharge injunction (Count II); and (iii) creates a conflict of interest between Clark & Washington and its clients (Count III).¹³ Clark & Washington moved for entry of summary judgment in its favor on all three counts of the U.S. Trustee’s Complaint.¹⁴

Issues

Clark & Washington’s summary judgment motion raises three issues. First, do the postdated checks give rise to prepetition claims? Second, does Clark & Washington violate the automatic stay and discharge injunction by depositing the postdated checks after the petition date or sending collection letters if the postdated checks are returned for insufficient funds? Third, does Clark & Washington’s fee arrangement (*i.e.*, the use of postdated checks) create a conflict of interest between Clark & Washington and its clients?

Conclusions of Law

The Court has jurisdiction over this adversary proceeding under section 28 U.S.C. § 1334(b) and 11 U.S.C. §§ 544, 548, and 550. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (H), and (O).

A. The Postdated Checks Give Rise to Prepetition Claims.

Bankruptcy Code section 101(5) defines a “claim” as any “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.”¹⁵ A right to an equitable remedy also is a “claim” under section 101(5) so long as the breach giving rise to the

¹³ Doc. No. 1.

¹⁴ Doc. Nos. 32 & 33.

¹⁵ 11 U.S.C. § 105(A).

equitable remedy also gives rise to a right to payment.¹⁶ Congress intentionally defined “claim” as broadly as possible to ensure that “all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.”¹⁷

Consistent with this intent, the Supreme Court has unequivocally adopted a broad interpretation of section 101(5).¹⁸ And it has declined all invitations to exclude any right to payment from the section 101(5) definition of “claim.”¹⁹ Given this extremely broad definition, very few economic relationships fall outside the definition of “claim” under section 101(5). In fact, the only economic relationships that do are those that do not involve a right to payment.

For instance, breach of a non-compete agreement would not be a “claim” under section 101(5) where there is no adequate remedy at law (*i.e.*, money damages).²⁰ Nor would the breach of an obligation giving rise to a right to an injunction prohibiting future pollution be a “claim” where there is no alternative right to payment.²¹ Other examples of equitable remedies that do not give rise to a “claim” include a resulting trust, a partition in kind, or deed reformation.²²

¹⁶ 11 U.S.C. § 105(B).

¹⁷ H.R. Rep. No. 95-595, at 309 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6266; S. Rep. No. 95-989, at 21-22 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5807-08.

¹⁸ See, e.g., *F.C.C. v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 302-03, 123 S. Ct. 832, 839, 154 L. Ed. 2d 863 (2003) (reaffirming “the broadest available definition” of a claim); *Cohen v. de la Cruz*, 523 U.S. 213, 218, 118 S. Ct. 1212, 1216, 140 L. Ed. 2d 341 (1998); see also 2 *Collier on Bankruptcy* ¶101.05[1] (16th ed. 2010).

¹⁹ 2 *Collier on Bankruptcy* ¶101.05[1] (16th ed. 2010) (citing *NextWave Pers. Commc'ns, Inc.*, 537 U.S. at 302-03, 123 S. Ct. at 839; *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150, 2153-54, 115 L. Ed. 2d 66 (1991)).

²⁰ See, e.g., *Oseen v. Walker (In re Oseen)*, 133 B.R. 527, 530-31 (Bankr. D. Idaho 1991); *In re Cox*, 53 B.R. 829, 832-33 (Bankr. M.D. Fla. 1985).

²¹ *U.S. v. Apex Oil Co., Inc.*, 579 F.3d 734, 735-37 (7th Cir. 2009); *Torwico Elec., Inc. v. New Jersey Dep't of Env'tl. Prot. (In re Torwico Elec., Inc.)*, 8 F.3d 146, 150-51 (3d Cir. 1993).

²² *Sheerin v. Davis (In re Davis)*, 3 F.3d 113, 116-17 (5th Cir. 1993).

None of the breaches that give rise to those remedies give rise to an alternative right to payment under state law.²³

But postdated checks do give rise to a right to payment. Under article 3 of the Uniform Commercial Code,²⁴ a check is an order to an account holder’s bank to pay the amount of the check to the order of an identified person—in this case, Clark & Washington.²⁵ Ordinarily, a check is payable on demand.²⁶ But a check may be postdated, in which case the time of payment is determined by the date stated on the check.²⁷ If the postdated check is dishonored by the account holder’s bank, the account holder who signs the check is obligated to pay the amount of the check.²⁸ A postdated check is, in effect, the functional equivalent of a promissory note.

A postdated check—like a promissory note—really is nothing more than a promise to pay a certain sum of money at a specified time. For that reason, a postdated check is a “claim” under Bankruptcy Code section 101(5). What is more, the postdated check is a prepetition claim. Under the Bankruptcy Code, “contract-based claims arise at the time the contract is entered into.”²⁹ And the Agreement here is entered into before the petition date. Accordingly, the postdated checks give rise to prepetition claims.

²³ *Id.*

²⁴ Ch. 673, Fla. Stat. (2010).

²⁵ §§ 673.1041(6), .1091(2), Fla. Stat. (2010).

²⁶ § 673.1041(6), Fla. Stat.

²⁷ § 673.1131(1), Fla. Stat.

²⁸ §§ 673.1031(1)(c), .4141(2), Fla. Stat.

²⁹ *In re Griffin*, 313 B.R. 757, 762-63 (Bankr. N.D. Ill. 2004); see also *Manville Forest Prods. Corp. v. Riverwood Int’l Corp. (In re Manville Forest Prods. Corp.)*, 209 F.3d 125, 128-29 (2d Cir. 2000); *In re Caldor, Inc.*, 240 B.R. 180, 192 (Bankr. S.D.N.Y. 1999).

The fact that Clark & Washington specifies in its Agreement that the postdated checks are payment for postpetition services does not alter that outcome. For starters, a prepetition claim is not converted into a postpetition claim simply because the time for payment is triggered by a postpetition event.³⁰ “A debt can be absolutely owing prepetition even though that debt would never have come into existence except for postpetition events.”³¹ So the postdated checks are prepetition claims even though Clark & Washington may provide its services postpetition.

Moreover, allocating the postdated checks to payment of postpetition services does not somehow convert the postdated checks into executory contracts. Under the most common definition, an executory contract is a “contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”³² While the Eleventh Circuit has not specifically rejected this definition, it has adopted the “functional approach” to define executory contracts.³³ Under the functional approach, a court looks to the benefits a debtor and its estate would gain if a contract is assumed or rejected.³⁴ The Court concludes that under either definition a postdated check cannot be considered an executory contract.³⁵

³⁰ *Chiasson v. J. Louis Matherne & Assocs. (In re Oxford Mgmt.)*, 4 F.3d 1329, 1335 n.7 (5th Cir. 1993); *United States v. Gerth*, 991 F.2d 1428, 1433-34 (8th Cir. 1993); *In re APF Co.*, 270 B.R. 567, 571 (Bankr. D. Del. 2001); *In re Griffin*, 313 B.R. at 762; *In re Caldor, Inc.*, 240 B.R. at 192.

³¹ *In re Griffin*, 313 B.R. at 763 n.4 (citing *Sherman v. First City Bank of Dallas (In re United Scis. of Am., Inc.)*, 893 F.2d 720, 724 (5th Cir. 1990)).

³² Vern Countryman, *Executory Contracts in Bankruptcy (Part I)*, 57 Minn. L. Rev. 439, 460 (1973).

³³ *Sipes v. Atlantic Gulf Cmty. Corp. (In re Gen. Dev. Corp.)*, 84 F.3d 1364, 1374 (11th Cir.1996)

³⁴ *Id.*

³⁵ See, e.g., *Kaler v. Craig (In re Craig)*, 144 F.3d 593, 595-596 (8th Cir. 1998).

But even if a postdated check is an executory contract, and the Court is not persuaded that it is, the outcome of this case remains the same. Under Bankruptcy Code section 365, the trustee may assume an executory contract.³⁶ If the trustee rejects an executory contract, then the other party to the contract has an unsecured prepetition claim for damages.³⁷ The trustee in this case (or in any case involving a similar fee arrangement) would never assume Clark & Washington's fee arrangement. So in the end, the postdated checks would still give rise to prepetition claims even if they were executory contracts.

In any event, this Court concludes that the postdated checks are not executory contracts. Instead, they fall squarely within the section 101(5) definition of a "claim." And the majority of courts that have considered this issue agree.³⁸ For instance, the court in *In re Waldo* recently reached the same result in a case involving the same parties and similar facts.³⁹ While the Court is not bound by the court's decision in *In re Waldo* (the court's decision in that case does not have preclusive effect), it does find Judge Stair's thorough, well-reasoned opinion in that case instructive.

In that case, the U.S. Trustee objected to the fee arrangement that Clark & Washington used in the Eastern District of Tennessee. The fee agreements in that case were similar to those used in this proceeding, except that the debtors paid a single flat fee—generally \$1,000 or \$1,250—for both prepetition and postpetition services.⁴⁰ Like in this case, the debtors in that

³⁶ 11 U.S.C. § 365(a).

³⁷ 11 U.S.C. § 502(g).

³⁸ See, e.g., *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1126-29 (7th Cir. 2003); *In re Waldo*, 417 B.R. 854, 885 (Bankr. E.D. Tenn. 2009); *In re Mansfield*, 394 B.R. 783, 787-91 (Bankr. E.D. Pa. 2008); *In re Griffin*, 313 B.R. 757, 762 (Bankr. N.D. Ill. 2004); *In re Chandler*, 292 B.R. 583, 587 (Bankr. W.D. Mich. 2003).

³⁹ *In re Waldo*, 417 B.R. at 885.

⁴⁰ *Id.* at 861-79.

case paid the flat fee with postdated checks, which Clark & Washington deposited postpetition. The U.S. Trustee objected to Clark & Washington's fee arrangement and moved to, among other things, require Clark & Washington to disgorge the attorneys' fees it received in seven bankruptcy cases.

The court in *In re Waldo*, following the majority view, held that prepetition agreements to pay a flat fee for both prepetition and postpetition services using postdated checks (deposited postpetition) are dischargeable debts.⁴¹ According to the court, the postdated checks were prepetition debts, and all prepetition debts (including prepetition attorney's fees) are dischargeable in bankruptcy so long as the prepetition debt is not specifically excluded from discharge under section 523. Because section 523 does not specifically exclude prepetition attorney's fees, they are dischargeable in bankruptcy.⁴² In reaching that holding, the *Waldo* court specifically rejected the minority view adopted in *In re Hines*.⁴³

In particular, the *Waldo* court rejected the notion that a flat fee to pay for postpetition services creates a postpetition claim.⁴⁴ The court explained that the fact that a "creditor may hold a contingent right to payment until filing the petition does not mean counsel holds a post-petition claim."⁴⁵ Recognizing, instead, that a claim arises prepetition if the "creditor could fairly contemplate the possibility of a claim against the debtor's bankruptcy estate" as of the petition date, the court specifically found that the right to attorney's fees under Clark & Washington's fee agreement was a prepetition claim:

⁴¹ *Id.* at 885.

⁴² *Id.* at 880; *see also* 11 U.S.C. § 523.

⁴³ *In re Waldo*, 417 B.R. at 881-82 (discussing *Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th Cir. 1998)).

⁴⁴ *Id.* 882-84.

⁴⁵ *Id.* at 882 (quoting *In re Symes*, 174 B.R. 114, 118 (Bankr. D. Ariz. 1994)).

The court finds that the attorneys' fees in each case are flat fees which arose pre-petition, irrespective of when services were to be rendered. Upon the signing of each Engagement Contract, Clark & Washington and Mr. Crawford became obligated to each of the Debtors to represent them in their Chapter 7 bankruptcy cases in exchange for payment of the agreed upon flat fee, and the fact that some services were to be provided post-petition does not change the nature of the fee, nor does it change the nature of the obligation.⁴⁶

Even though Clark & Washington specifically segregated its flat fee between prepetition and postpetition services in this proceeding, the Court concludes that the reasoning in *Waldo* applies with equal force in this case. Upon execution of the Agreement, Clark & Washington was obligated to represent its clients in their Chapter 7 cases. Accordingly, allocating the postdated checks to payment of its postpetition services does not alter the true nature of the postdated checks: they are prepetition claims dischargeable in bankruptcy.

B. Clark & Washington's Fee Arrangement Violates the Automatic Stay and Discharge Injunction.

The filing of a petition under the Bankruptcy Code operates as an automatic stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."⁴⁷ The section 362 automatic stay is designed to give debtors "a breathing spell from [their] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressure that drove [the debtor] into bankruptcy."⁴⁸ The automatic stay is integral to the operation of the Bankruptcy Code—it is one of the "fundamental

⁴⁶ *Id.* at 883.

⁴⁷ 11 U.S.C. § 362(a)(6).

⁴⁸ *Ellison v. Nw. Eng'g Co.*, 707 F.2d 1310, 1311 (11th Cir. 1983) (quoting H. R. Rep. No. 95-595, at 340 (1977) as reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6297).

debtor protections” under title 11.⁴⁹ The Eleventh Circuit has characterized the automatic stay as “essentially a court-ordered injunction, [and] any person or entity who violates the stay may be found in contempt of court.”⁵⁰ The automatic stay continues to operate until the time the case is closed, dismissed, or until the time a discharge is granted or denied.⁵¹

Under its current fee arrangement, Clark & Washington deposits the postdated checks after the petition date. Clark & Washington previously called its clients and sent them various collection letters if the postdated checks were returned for insufficient funds. Now, Clark & Washington sends one collection letter. In any case, each of those acts—depositing the postdated checks, making collection calls, and sending collection letters—is a postpetition attempt to collect a prepetition claim. So each of those acts violates the automatic stay.

Once the discharge has been entered, continued attempts to collect on the postdated checks—whether depositing the postdated checks, making collection calls, or sending collection letters—violates the discharge injunction under section 524.⁵² The discharge injunction, like the automatic stay, prohibits “the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived.”⁵³ In effect, the discharge injunction “simply makes permanent what had previously been temporary” under section 362.⁵⁴

⁴⁹ *Fla. Dep’t of Rev. v. Omine (In re Omine)*, 485 F.3d 1305, 1314 (11th Cir. 2007).

⁵⁰ *Jove Eng’g, Inc. v. I.R.S.*, 92 F.3d 1539, 1546 (11th Cir. 1996) (quoting *Carver v. Carver*, 954 F.2d 1573, 1578 (11th Cir. 1992)).

⁵¹ 11 U.S.C. § 362(c)(2).

⁵² 11 U.S.C. § 524(a)(2); *In re Waldo*, 417 B.R. 854, 888-89 (Bankr. E.D. Tenn. 2009).

⁵³ 11 U.S.C. § 524(a)(2).

⁵⁴ *In re Perviz*, 302 B.R. 357, 369 (Bankr. N.D. Ohio 2003).

The purpose of the discharge injunction is “intended to insure that once a debt is discharged, the debtor will not be pressured in any way to repay it.”⁵⁵ Yet, that is precisely what Clark & Washington’s fee arrangement does. The very nature of a postdated check itself, creates a pressure to honor it. The Court recognizes that Florida’s “bad check” laws are generally known within the community and discourage individuals from not honoring postdated checks. Sending a collection letter—even if only one—likewise creates pressure to pay a discharged debt. Accordingly, continued attempts to collect on the postdated checks violate the section 524 discharge injunction.

C. The Agreement Creates a Conflict of Interest Between Clark & Washington and its Clients.

Clark & Washington’s fee arrangement also creates an impermissible conflict of interest between the firm and its clients. The Rules Regulating the Florida Bar specifically prohibit a lawyer from entering into a business transaction with a client or knowingly acquiring a security interest adverse to the client unless (i) the terms of the transaction are fair and reasonable to the client and fully disclosed in writing in a manner that can reasonably be understood by the client; (ii) the client is advised in writing of the desirability of seeking advice from independent legal counsel and given an opportunity to do so; and (iii) the client gives informed consent to the transaction in writing.⁵⁶

The Agreement constitutes a business transaction between Clark & Washington and its clients. In fact, Clark & Washington argued in support of its summary judgment motion that the postdated checks are security for the payment of postpetition fees. Clark & Washington does disclose in the Agreement that prospective clients may need to consult independent counsel

⁵⁵ H.R. Rep. No. 95-595, at 365-66 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6322; S. Rep. No. 95-989, at 80 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5866.

⁵⁶ R. Regulating Fla. Bar. 4-1.8.

regarding the firm's fee arrangement. But that disclosure is not sufficient to cure the conflict of interest.

To begin with, the disclosure is, at best, ambiguous; at worst, it may not accurately set forth what the law is. The second to last sentence of the disclosure—"To Attorney's knowledge, the acceptance of post-dated checks as a retainer against specifically-segregated, post-petition services has not been disallowed"—is particularly confusing. So it is not clear that the disclosure is made in a manner that can reasonably be understood by the client. Besides, the disclosure highlights the problem with the firm's fee arrangement: the client is walking into bankruptcy with an adverse relationship with counsel that requires another lawyer's assistance to understand. For those reasons, the Court concludes Clark & Washington's current fee arrangement creates a conflict of interest.

Conclusion

Based on the foregoing, the Court concludes that the postdated checks give rise to a prepetition claim because they represent a right to payment. As a consequence, the act of depositing the postdated checks after a bankruptcy case has been filed violates the automatic stay. And continuing to deposit or collect on the postdated checks after a discharge has been entered violates the section 524 discharge injunction. Moreover, the acceptance and deposit of postdated checks creates a conflict between the Defendant and its clients. Accordingly, the Defendant shall no longer accept postdated checks for deposit after the petition date as payment of Defendant's fees for Chapter 7 cases filed in this Court.

The Court will enter a separate final judgment in favor of the Plaintiff.

DATED in Chambers at Tampa, Florida, on _____.

Michael G. Williamson
United States Bankruptcy Judge

Denise E. Barnett, Esq.
Attorney for United States Trustee

Richard Thomson, Esq.
Glenn E. Gallagher, Esq.
Attorneys for Clark & Washington, P.C.

APPENDIX D

In re Ramirez,

No. 03-47872, 2006 Bankr. LEXIS 3623

(Bankr. S.D. Tex. Dec. 29, 2006)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	§	CASE NO.
	§	
RICARDO MORALES RAMIREZ	§	03-47872
UBALDA VELAZQUEZ RAMIREZ	§	
	§	
DEBTORS	§	

**MEMORANDUM OPINION ON MOTION TO RECONSIDER ORDER ON CHAPTER
13 TRUSTEE’S MOTION TO SET ASIDE ORDER FOR COMPENSATION**
[Docket No. 143]

**I.
INTRODUCTION**

On April 17, 2006, this Court held a hearing on the Application for Compensation of Reese W. Baker (Baker) [Docket No. 117], the attorney for Ricardo and Ubalda Ramirez (the Debtors), and the Chapter 13 Trustee’s Motion to Set Aside Order for Compensation [Docket No. 119]. [Transcript of April 17, 2006 Hearing, Docket No. 148.]

On August 21, 2006, the Court entered a Memorandum Opinion on Chapter 13 Trustee’s Motion to Set Aside Order for Compensation. [Docket No. 139.] This Memorandum Opinion denied Baker fees because of his failure to disclose outstanding fees due from the Debtors in a previously filed bankruptcy case (Case No. 02-43129). Additionally, the Court reduced Baker’s fees in the second case because some work was duplicative of work already done in the first case. On August 31, 2006, Baker filed his Motion to Reconsider Order on Chapter 13 Trustee’s Motion to Set Aside Order for Compensation (the Motion to Reconsider). [Docket No. 143.]

II. STANDARD OF REVIEW

Baker does not state the authority under which he moves for reconsideration of the Order for Compensation. Since the Motion to Reconsider was filed within 10 days after the entry of the Order for Compensation, the Court will construe the Motion to Reconsider as a motion brought under Federal Rule of Civil Procedure 59(e), as incorporated by Bankruptcy Rule 9023. *Shepard v. Int'l Paper Co.*, 372 F.3d 326, 327 n.1 (5th Cir. 2004).

As the Fifth Circuit has explained:

Motions for new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments, which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory.

Pluet v. Frasier, 355 F.3d 381, 384 n.2 (5th Cir. 2004) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). The Fifth Circuit has further stated that relief under Federal Rule 59(e) is an “extraordinary remedy that should be used sparingly.” *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (citations omitted). The Fifth Circuit has explained as follows:

A Rule 59(e) motion calls into question the correctness of a judgment. This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. Rather, Rule 59(e) serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.

Id. at 478-79 (citations and internal quotations omitted).

III. ANALYSIS OF MOTION TO RECONSIDER

The Motion to Reconsider includes the following allegations of error or mistake made by this Court in the Memorandum Opinion:

1. In Section II.2 of the Memorandum Opinion, the court found that after the payment of the amount of \$6,750 from the chapter 13 trustee to Baker, the Debtors owed Baker a balance of \$1,668.50. This finding is not correctly interpreted. [Docket No. 143, ¶ 4.]

The Court is unable to decipher precisely what Baker alludes to in arguing that this finding was not “correctly interpreted,” and the subsequent paragraphs do not appear related to this argument. The amount of \$1,668.50 was arrived at by subtracting the \$6,570.00 payment made by the Trustee in the first case from the Order Approving Fees in the first case for \$8,238.50. [Docket No. 139, pg. 3.] The math is unquestionably correct. The only other possible contention that Baker could have with this finding of fact is that the Court found that it was the Debtors who owed this amount. Perhaps Baker is contending that it is more accurate to say that the amount remained owed from the estate in the first case. However, under section 11 U.S.C. § 349(b)(3), any property of the estate is revested in the entity in which it was vested prepetition. This section would apply to debts as well as property of the estate because the estate ceases to exist. *See Clark v. Comm. State Bank*, 2001 U.S. Dist. LEXIS, at *18-20 (W.D. Tex. April 10, 2001); 11 U.S.C. § 1328(a) (in a chapter 13, a debt is not discharged until completion of the plan). Once the first case was dismissed, the Debtors still owed the debt to Baker. Therefore, there was no error in stating that this was a debt owed by the Debtors, which it assuredly was after dismissal of the case.

2. In Section II.5.b, the court stated that Baker did not list himself as a creditor who received more than \$600 in the 90 days preceding the filing of the second case. In Section II.5.c, the court recognized that Baker had disclosed the \$1,500 received prior to filing of the second case. Baker does not understand the finding in paragraph II.5.b. Baker did disclose that he had received the \$1,500 prior to the filing of the second case. If the court is finding that Baker did not disclose the receipt of \$6,750 from the chapter 13 trustee prior to the filing of the second case, such finding is erroneous. Baker did *not* receive the \$6,750 from the chapter 13 trustee until after the second

case had been filed. The disclosures on SOFA no. 3 as to amounts received *prior* to the filing of the second case are correct. [Docket No. 143, ¶ 9.]

As Baker states, the Court did acknowledge that Baker did disclose in SOFA No. 3 that he had received \$1,500.00 from the Debtors prior to filing the second case.¹ Baker has failed to take notice of the portion of SOFA No. 3 that was left blank. Not only does the question ask for the amount that was paid to the creditor within 90 days preceding the commencement of the case; it also requires that the amount still owing to that creditor be listed. Not listing any amount under that section of SOFA No. 3 gives the impression that Baker had been paid in full and that no amounts were left owed to him. In reality, as Baker himself pointed out above, the \$6,750.00 payment from the chapter 13 trustee had not yet been received, so at the time of filing the second case Baker would have had a claim against the Debtors for \$6,738.50 (\$8,238.50 - \$1,500.00). It was this lack of disclosure that the Court was highlighting in Section II.5.b of the Memorandum Opinion.

3. In Section III.B, the court cites code section 329(a). Section 329(a) requires disclosure of compensation as to be paid or agreed to be paid for services rendered or to be rendered in contemplation of or in connection with *the case* by such attorney. Code section 329(a) requires disclosure for fees for *the case*, which can only mean *the current case* and not a prior case. Section 329(a) does not require disclosure of fees for a *prior* case. Such a finding by this court that section 329(a) requires disclosure of fees paid by a chapter 13 trustee for a prior case to be disclosed in the current case is an expanded reading of section 329(a) that is not correct.” [Docket No. 143, ¶ 10] Baker continues, “Bankruptcy Rule 2016(b) requires compliance with section 329(a). If 329(a) only applies to disclosure of compensation for the case, then Rule 2016(b) is not applicable for compensation paid for a prior case by a chapter 13 trustee. [Docket No. 143, ¶ 11.]

¹ The Debtors are ultimately responsible for the accuracy of the SOFA, but in this case, Baker provided the information with respect to question no. 3 on the SOFA.

Baker has stated only half of the relevant language of § 329(a). The section does indeed refer to “services rendered or to be rendered *in contemplation of or in connection with* the case by such attorney, and the source of such compensation.” 11 U.S.C. § 329(a). However, the first sentence of that same section states that “[a]ny attorney representing a debtor in *a* case under this title, or in connection with such *a* case.” (Emphasis added). Therefore, it is by no means clear, as Baker argues, that § 329(a) is limited to requiring disclosures related to the current case and no prior cases. Rather, the plain meaning of the first sentence of § 329(a) would include *any* case under title 11, not just the *present* case. See *In re Combe Farms, Inc.*, 257 B.R. 48 (Bankr. D. Idaho 2001). Additionally, the Memorandum Opinion, in discussing § 329(a), was outlining the broad policy of the Bankruptcy Code which favors transparency and disclosure whenever possible, particularly from Debtor’s counsel. Indeed, this is one of the major themes of the Bankruptcy Code, and § 329(a) is just one example. Alternatively, under the circumstances in this case, it could be argued that “in contemplation of or in connection with the case” as used in § 329(a) would include the previously filed case.² As discussed in both the Memorandum Opinion and further below, Baker was denied a portion of his requested fees because some of the work done in the second case was duplicative of work that was already done for the first case. Therefore, when

² The meaning of “in contemplation of” was discussed in *Mayeaux*:

A fee payment is made “in contemplation of” a bankruptcy case if the underlying professional services were rendered at a time when the debtor was contemplating bankruptcy. This subjective test is based upon the state of mind of the debtor, “i.e., whether, in making the transfer, the debtor is influenced by the possibility or imminence of a bankruptcy proceeding.”

In re Mayeaux, 269 B.R. 614, 622 (Bankr. E.D. Tex. 2001) (quoting *Wootton v. Ravkind (In re Dixon)*, 143 B.R. 671, 675 n.3 (Bankr. N.D. Tex. 1992)).

Baker was using work product that generated in the first case, such use brought the first case within the scope of fees for the second case. Thus, at the time the second case was filed, Baker's services in the first case had been rendered "in connection with" the second case.³

4. The Court has cited cases discussing payment of attorneys fees by a debtor post petition (section III.B., pages 8 and 9). These cases do not seem to have applicability. The debtor did not transfer any funds to Baker post petition. The chapter 13 trustee paid Baker under the terms of an existing court order. To the extent that the court is considering that the fees paid to Baker by the chapter 13 trustee were the same as funds paid by the Debtors, such an interpretation is not correct. [Docket No. 143, ¶ 12.]

Baker is referring to *In re Mayeaux*, 269 B.R. 614 (Bankr. E.D. Tex. 2001), which held that, outside of any problems under § 329(a), a chapter 13 debtor does not have the authority to transfer estate property post-petition to pay attorney's fees. A careful reading of the Memorandum Opinion would show that the holding of this case was only cited for background purposes. The real reason that the Court cited this case was as an example of the Bankruptcy Code's strict disclosure rules and the underlying policy reasons that full disclosure is required—such as public perception that attorneys benefit at the expense of creditors. Further, this case was not relied upon in any other part of the Memorandum Opinion and, therefore, there is no need to reconsider any conclusion in the Memorandum Opinion.

5. The court also found that Baker failed to timely disclose the \$1,500 paid prior to the filing of the second case. The rule 2016(b) statement was not filed until later. Since the \$1,500 was disclosed in SOFA no. 3 and 9, the funds were paid for a prior case, and the funds were received prior to the filing of

³ The court in *Mayeaux* only determined that the payments at issue in that case did not need to be disclosed under § 329(a) because the court found that it was "payment for a debt antecedent to the filing of the petition initiating this bankruptcy case rather than a payment of fees or compensation." *Mayeaux*, 269 B.R. at 569. This Court in the Memorandum Opinion disagreed with the holding in *Mayeaux*, and found that the debts here were fees or compensation that was "in contemplation of" the bankruptcy case.

the second case, the case of *Newton* (as cited by this court) supports the fact that no further disclosure was required by Baker.

Baker has misinterpreted the Court's citation of *In re Newton*, 292 B.R. 563 (Bankr. E.D. Tex. 2003). [Docket No. 139, pg. 9.] The Court, in discussing *Newton*, was referring to the fees that "were paid after the second filing, and thus payment was not antecedent to the second filing." *Id.* (emphasis in original). This portion of the Memorandum Opinion does not make any mention of the \$1,500 that Baker initially disclosed on the SOFA; the discussion is limited to those fees which were not originally disclosed and were paid after the second filing.

6. The court cited section 327(a). This section is not applicable to chapter 13 cases. The requirements of section 327(a) are applicable for a trustee. The code does not include the debtor as a trustee. The court cited the case of *Gutierrez* and the finding of the court that section 327 does not apply to chapter 13 cases. That finding is correct. The court went on to cite Texas Disciplinary Rules of Professional Conduct. The Texas rules mandate disclosure of any interest that is materially adverse to the representation. In the case at bar, on the filing date and until Baker voluntarily elected to apply the \$1,500 in funds paid prior to the filing of the second case to the case at bar, Baker was owed less than \$200. An obligation of less than \$200 is not generally considered material. In this case, less than \$200 should not be considered material. [Docket No. 143, ¶ 17.]

Baker is correct that *In re Gutierrez*, 309 B.R. 488 (Bankr. W.D. Tex. 2004), held that § 327(a) has no application in the context of chapter 13 because it is limited, by its plain language, to attorneys hired only by the trustee and not the debtor. *Id.* at 500-501. However, *Gutierrez* only reached this issue after first analyzing whether holding a claim against the estate and concurrently representing the debtor was a conflict of interest under Texas Disciplinary Rules of Professional Conduct 1.06(b)(2). *Id.* at 497-498. Although *Gutierrez* found that, under the facts of that case, a debtor's attorney holding an unsecured claim for fees from a previously filed case did not rise to the

level of adversely limiting the attorney's representation in the second case, this Court in the Memorandum Opinion was not willing to be so generous. This Court believed that Baker's unsecured claim for fees from the first case did create a potential conflict of interest that was not properly addressed. The court in *Gutierrez* noted:

A lawyer believing that Rule 1.06(b)(2) may be implicated might, in an abundance of caution, want to put to rest any concerns about conflicts of interest and could easily obtain a written waiver laying out the relevant issues for the client, and maintain that waiver in its files. A "belt and suspenders" lawyer might even attach such a consent form to its Rule 2016 disclosure.

Gutierrez, 309 B.R. at 499. Here, Baker did not waive his claim—an argument that he made at trial and that this Court has already rejected—and he did not obtain a written waiver from the Debtors. Therefore, even if Baker is correct and he was only owed less than \$200, this Court initially found—and now finds no grounds to reconsider—that such a claim against the estate made Baker a creditor and was a current conflict of interest under Texas Disciplinary Rules of Professional Conduct 1.06(b)(2). The Court simply did not rely at all upon § 327(a) in reaching its conclusion. The failure to disclose this conflict and the violation of Rule 1.06(b)(2) provided part of the basis upon which the Court decided to not allow certain fees requested by Baker.

7. In reviewing the reasonableness of the fees, this court did not appear to account for many services in the second case that were not duplicative of the services in the first case. In reality, there were few, if any, duplicative services. The services are set forth in detailed invoices. For example, the fees for the relief from stay by Sterling Bank in the second case are not duplicative. If counsel had taken no actions, the stay would have been lifted. Counsel got no fees for the sale and disposition of assets category. These fees were not duplicative. The fees for claim objections were not duplicative. The fees for meeting with the clients and completing the plan of reorganization was not duplicative—there was no confirmed plan in the first case. [Docket No. 143, ¶ 20.]

The Memorandum Opinion clearly states under Section III.D that the reduction in fees from Baker's fee application was a result of (1) weighing the lodestar factors; (2) the fact that some requested fees were duplicative of the first case; and (3) Baker's failure to make adequate and timely disclosures of the monies received from the Debtor. [Docket No. 139, pg. 21.] The Court never stated in the Memorandum Opinion that all of the fees Baker highlights in the Motion to Reconsider were duplicative, but rather specifically listed certain fees that it deemed were duplicative. This means that any fees that were not awarded in the Memorandum Opinion and were not discussed as being duplicative were disallowed due to Baker's failure to disclose. Therefore, Baker's argument that certain non-duplicative services were not taken into account is not persuasive.

IV. CONCLUSION

The remainder of the arguments raised by Baker in the Motion to Reconsider are either too vague to be interpreted (*e.g.*, "The court has misapplied certain facts from the hearing" [Docket No. 143, ¶ 2]) or simply rehash arguments that were already made by Baker at the April 17, 2006 hearing (*e.g.*, he had "effectively waived" any fees in the first case because he did not seek to recover anything [Docket No. 143, ¶ 18]). Therefore, for reasons stated above, this Court denies in its entirety Baker's Motion to Reconsider. An order will be entered simultaneously on the docket with this Memorandum Opinion.

Signed on this 29th day of December of 2006.



Jeff Bohm
U.S. Bankruptcy Judge

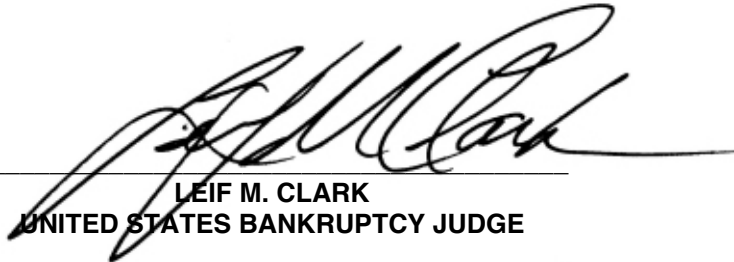
APPENDIX E

In re Gutierrez,

309 B.R. 488 (Bankr. W.D. Tex. 2004)



SIGNED this 05 day of May, 2004.


 LEIF M. CLARK
 UNITED STATES BANKRUPTCY JUDGE

United States Bankruptcy Court
 Western District of Texas
 San Antonio Division

IN RE

LUCIA P. GUTIERREZ

DEBTOR

BANKR. CASE No.

03-53047-C

CHAPTER 13

MEMORANDUM DECISION ON TRUSTEE'S OBJECTION TO PROOF OF CLAIM FILED BY DEBTOR'S ATTORNEY

CAME ON for hearing the foregoing matter. The debtor, Lucia P. Gutierrez, and Marion A. Olson, chapter 13 Trustee in this case ("Trustee"), filed a Joint Motion to Reconsider Order Granting Trustee's Objection to Proof of Claim Filed by Debtor's Attorney and Request for Hearing on December 9, 2003 ("Joint Motion") (Doc. #16). The court granted the Joint Motion on January 26, 2004 (#19) and set the Trustee's Objection to Proof of Claim for hearing on March 9, 2004. After consideration of the pleadings and hearing the arguments of counsel and the Trustee, the court made an oral ruling on the record denying the Trustee's Objection and reserved the right to put the ruling in writing for the benefit of the local bar and chapter 13 Trustee's office. This constitutes the court's written decision thereon.

Facts

The facts are not in dispute. The debtor filed a voluntary chapter 13 petition on June 2, 2003. In the debtor's schedules, the Law Offices of J. Todd Malaise, debtor's counsel ("counsel"), is listed as a creditor holding an unsecured priority claim of \$2,000 on Schedule E (for fees incurred in representing the debtor in this case) and an unsecured nonpriority claim of \$1,195, for attorney's fees for representing the debtor in a prior chapter 13 case that were not paid in that case.¹ On August 20, 2003, the court confirmed the debtor's plan and approved debtor counsel's fees for representation in this case (#11).

On September 30, 2003, the Trustee filed an Objection to the law firm's pre-petition unsecured claim for unpaid fees from the prior case (#13). The Trustee contended that the amount that counsel *had* received in the prior case, \$755, was a reasonable fee for a case that had lasted approximately seven months, and that the claim filed for the balance should be disallowed as unreasonable under 11 U.S.C. § 502(b)(4). *See* Trustee's Obj. to Proof of Claim Filed by Debtor's Attorney ¶ 5. The Trustee also claimed that the attorney now representing the debtor should not be able to assert a claim against the debtor for unpaid fees from a prior case because to do so would create a conflict of interest not permitted by section 327(a) of the Code. *See id.* The court granted the Trustee's Objection on November 4, 2003 (#14), there having been no timely response filed to the objection.

On December 9, 2003, the debtor, debtor's counsel, and the Trustee filed a joint motion to

¹ That prior case was filed on November 2, 2001, in a joint case with the debtor's husband, and confirmed on January 22, 2002, and the court awarded attorney's fees of \$2,000 (Case No. 01-55127-C). That case was later dismissed on February 24, 2003 due to the debtor's failure to abide by the terms of the Agreed Order with the chapter 13 Trustee, and the case was closed on September 9, 2003. It was listed in this case on the debtor's voluntary petition, Form B1, as a prior bankruptcy filed within the last 6 years. Counsel was also listed on the debtor's schedules, but only on Schedule E, in the prior case as an unsecured priority creditor for \$2,000 for outstanding attorney's fees.

reconsider the order sustaining the objection. Debtor's counsel said that they had not received the objection and so had not responded. The Trustee agreed to reconsideration because it preferred a ruling on the merits, given the ramifications for chapter 13 practice in this division. *See* Joint Mot. to Reconsider Order Granting Trustee's Obj. to Proof of Claim Filed by Debtor's Attorney and Req. for Hearing (#16). The court granted hearing, and heard arguments from both the Trustee and debtor's counsel.

Summary of the Arguments

At the hearing, the Trustee argued that the claim for fees from the previous case should be disallowed first of all by virtue of section 502(b)(4), which states that “the court, after notice and a hearing, shall determine the amount of such claim as of the date of the filing of the petition, and shall allow such claim . . . except to the extent that – if such claim is for services of an insider or attorney of the debtor, *such claim exceeds the reasonable value of such services.*” 11 U.S.C. § 502(b)(4) (emphasis added). The amount of fees actually paid to the attorney in the previous case was, in the Trustee's view, sufficient and reasonable compensation given the outcome of the case, and no more should be awarded. In addition, the Trustee suggested that the court should really evaluate the reasonableness of fees being charged to the debtor over the two successive cases, viewing both cases as a single effort to reorganize. Under such an approach, the total fees being charged by the attorney for assisting the debtor, over two cases, would be \$4,000, an amount which, said the Trustee, would exceed the reasonable value of the services rendered.

The Trustee also argued that Section 327(a) should be applied in chapter 13 cases, and that the fact that counsel filed a proof of claim as an unsecured creditor for outstanding fees from a prior case meant that he could not be a “disinterested person.” The Trustee then asserted that this conflict of interest should either prevent counsel from asserting a claim from a prior case, or disqualify counsel from being employed

to represent the debtor in this case. As further support, the Trustee pointed to the state bar's disciplinary rules regarding conflicts of interest, which rules, in his view, should disqualify the attorney from asserting a claim in this case (or, alternatively, disqualify the attorney from representing the debtor in this case). *See* TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.06 cmt. 5 (1989), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. (Vernon Supp. 1995) (State Bar Rules art X [[section]]9)) (“The lawyers [sic] own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated.”).² While there is a large amount of case law in chapter 11 and 7 cases which hold that an attorney who has such a claim is not a “disinterested person”³ under Section 101(14),⁴ the Trustee admitted that there is not much relevant case law in the chapter 13 context.

In response, debtor’s counsel claimed that he clearly had a “claim” under Section 101(5), because the court had allowed his fees in the previous case. He argued that his status as both a priority creditor in the present case and an unsecured creditor as a result of his claim from the previous case could not set up

² Rule 1.06(b)(2) states two situations in which a “lawyer shall not represent a person if the representation of that person: (1) involves a substantially related matter in which that persons [sic] interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers [sic] firm; or (2) reasonably appears to be or become adversely limited by the lawyers [sic] or law firm's responsibilities to another client or to a third person or by the lawyers [sic] or law firms [sic] own interests.”

³ *See, e.g., In re Advanced Imaging Techs., Inc.*, 2003 WL 23354457 (Bankr. W.D. Wash. 2003) (holding that a law firm's disclosed security interest in a pre-petition retainer, used to secure future fees, did not disqualify the firm from representing the debtor-in-possession in its chapter 11 case under section 327(a)); *In re Guard Force Mgmt., Inc.*, 185 B.R. 656, 664 (Bankr. D. Mass. 1995) (holding that an attorney was not “disinterested” at the time the debtor filed a motion for authority to employ him as counsel in second chapter 11 case, and, thus, the attorney was not authorized to represent the chapter 11 debtor because the attorney was a creditor of the debtor at time of the petition based on money owed to the attorney for pre-petition services rendered with respect to a state court case during the debtor's first chapter 11 case); *In re Pierce*, 809 F.2d 1356, 1362 (8th Cir. 1987) (holding that the attorney for chapter 7 debtors was not “disinterested” because he was a pre-petition creditor of these estates due to the fact that he held a mortgage on the debtors' real property to secure payment of pre-petition and post-petition services, making him a creditor and, thus, not entitled to compensation).

⁴ “Disinterested person” means a person that – (A) is not a creditor ... and (E) does not have an interest materially adverse to the interest of the estate ... for any [] reason. 11 U.S.C. § 101(14).

any greater conflict of interest than had already been created by his status as a priority creditor in the current case alone, even if he had asserted no claim from the prior filing. The fee from the prior case was *prima facie* reasonable, he said, given that it had been allowed in the prior case. See *Order Confirming the Debtor's Plan Awarding a Fee to the Debtor's Attorney, and Related Orders* (#11), at 6; see also 11 U.S.C. § 330(a)(4)(B) (“court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section”).

Debtor’s counsel responded, with regard to the section 327(a) disqualification argument that, first of all, if section 327(a) applied at all, it would only operate to prohibit him from representing the debtor in this case, and would have no independent effect on the reasonableness of his claim from the prior case (*i.e.*, section 327(a) is irrelevant to the section 502(b)(4) inquiry). But he added that section 327(a) should not in fact be applied to debtor’s counsel in chapter 13 cases, primarily because of the extraordinary impracticality of such a rule. In addition, he suggested that perhaps the Supreme Court’s ruling in *Lamie*, decided this term, meant that debtor’s lawyers in chapter 13 cases were not bound by section 327(a) and its disinterestedness requirement in the first place.

Analysis

I. Section 502(b)(4)

Section 502(b)(4) permits disallowance of a pre-petition claim for attorney's fees if those fees are found to be unreasonable. If the issue is confined thusly, the resolution of this matter appears to be simple. Fees allowed by court order in a prior case are, as debtor’s counsel noted, *prima facie* reasonable, even if the case fails post-confirmation. However, this *prima facie* showing can be rebutted in a subsequent

case when the request for payment of those fees is presented as a claim in the subsequent case. This is so because the attorney who represents a chapter 13 debtor obtains an award of fees for services in that case, not all of which may have been fully or completely performed at the time of confirmation. When the unpaid portion of that fee award is presented as a claim in a later case, it must withstand scrutiny under the standards that have always applied to attorneys' fees under non-bankruptcy law. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(b).⁵ Section 502(b)(4) applies to *all* claims for attorneys' fees owed by a debtor prior to the filing of the case in which the claim is made, whether that claim be for representing the debtor in a prior bankruptcy case, or for representing the debtor in any other capacity (personal injury, state court litigation, probate matters, tax advice, etc. etc.). *See, e.g., In re Willis*, 143 B.R. 428, 433-34 & n.8 (Bankr. E.D. Tex. 1992) (stating that, because the bankruptcy court is not required to unfailingly apply the terms of a Texas contingency fee contract if its terms and conditions under the circumstances are unreasonable, the claim of a debtor's pre-petition personal injury attorney was denied as premature due to the settlement not being finalized at the time of the claim for fees). Thus, the court is obligated, when an objection is made, to examine the facts and circumstances of the prior case to determine whether the unpaid portion of the fee as allowed in the previous case should be allowed as reasonable in light of the ultimate outcome of the case.

Built into a court's finding in a prior case that a given attorney fee is "reasonable" is the court's

⁵ *See also, e.g., DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 433-34 (5th Cir. 2003) (holding that the district court's awarding of attorneys' fees, in a breach of contract and tortious interference case, was reasonable and not an abuse of discretion in light of the court's consideration of various factors such as the relative inexperience of the attorney, the complexity of the case, the hours billed, the hourly rate, and determination of the lodestar amounts as set forth in the non-bankruptcy context in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974)).

understanding that the attorney for the debtor has signed on to represent the debtor *throughout the case*.⁶ That may be for as long as five years in this district.⁷ Granted, in most cases, much of the attorney's work is done at the front end of the case (schedules and statement of affairs, plan, attendance at the first meeting of creditors, confirmation, and related client conferences).⁸ However, the fee awarded in chapter 13 cases in this district is a flat fee, not an hourly fee. Thus, it cannot be said to have been "earned" at the front end.⁹

That same fee, when examined as a claim in a later bankruptcy filing, *can* be evaluated in light of the overall standards that would be applied to any attorney's fee, regardless how it is calculated – namely, the reasonableness standards imposed by the Disciplinary Rules of Professional Conduct applicable to

⁶ See, e.g., *In re Zamora*, 274 B.R. 268, 270 (Bankr. W.D. Tex. 2002) (stating that, in a chapter 13 case which was later converted to a chapter 7, counsel was expected to have a continuing duty to perform various services for the debtor post-conversion even though the debtor likely would not be paid, this court allowed the debtor to assign to counsel any remaining funds that the chapter 13 trustee had in its possession). Section 330(a)(4)(B) authorizes "reasonable compensation" to the chapter 13 debtor's attorney. See 11 U.S.C. § 330(a)(4)(B). This court noted that the fees that a chapter 13 debtor's counsel charges are not exactly pre-petition claims, even though some of the work was done pre-petition. See *Zamora*, 274 B.R. at 270 n.4. Fees incurred during the chapter 13 phase of the case would be allowed in the converted chapter 7 phase as an administrative expense claim under section 503(b)(2) and awarded under section 330(a). See *id.*

⁷ See, e.g., 4 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §294.1, at 294-14 (3d ed. 2000 and Supp. 2002) (stating that the practice in some jurisdictions is that once the chapter 13 debtor's attorney commences representation, the initial fee requires the lawyer to represent the debtor through discharge which is typically three to five years later).

⁸ See, e.g., BANKR. CT. W.D. TEX. L.R. 2016(c)(3) (2000) (it is presumed that in the routine non-business chapter 13 case, the attorney's fee includes such legal services as all conferences with the debtor, preparation of petition and schedules, attendance at the § 341 meeting and confirmation/discharge hearings, and preparation of routine motions); see also *In re Lampman*, 276 B.R. 182, 185 (Bankr. W.D. Tex. 2002) (in a case in which the debtor voluntarily dismissed his chapter 13 case and sought to pay his attorney out of undistributed funds remaining in the chapter 13 trustee's possession, at least in this district, though chapter 13 debtor's counsel typically incurs most of its fees pre-confirmation, the fees are not allowed as an administrative expense claim until confirmation, and thus, without an allowed claim, the debtor's attorney cannot obtain distribution out of funds on hand for work already performed).

⁹ The court appreciates that it has become common practice for attorneys to request *additional* fees for some services that may be rendered later in the case, such as applications to modify a plan to accommodate changes in the debtor's circumstances, or applications to incur new debt. The practice does not change the basic principle which controls the award of attorney's fees as a flat fee, however. The attorney is obligated to represent his or her client throughout the case, even were the court to disallow requests for additional fees for additional services.

lawyers who practice in Texas.¹⁰ This could well mean that the attorney's fee, otherwise allowed as an administrative claim prospectively in a chapter 13 case expected to succeed¹¹ might not, in retrospect, be reasonable in a case that does not ultimately succeed.

Thus, there are legitimate grounds for a trustee in the current case to object to a claim for such attorney's fees, even though they were allowed as "reasonable" in the prior case. Having said that, however, it is readily apparent that it will be the rare case in which the trustee will actually be able to prevail on such an objection, for a number of reasons. First of all, few courts would be inclined to find that a fee was not earned simply because the case failed, without more.¹² Too many factors well out of the control

¹⁰ Those standards include: whether the fee is one customarily charged for similar services, the amount involved and results obtained, and whether the fee is fixed or contingent. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.04(b).

¹¹ Indeed, attorneys' fees in chapter 13 cases are generally paid out over time from the debtor's monthly payments into the plan, so the success of the case is often a condition of the lawyer being paid at all. *See also* 11 U.S.C. § 330(a)(4)(B) (the court may allow to debtor's counsel in a chapter 13 case a "reasonable compensation ... for representing the interests of the debtor ... based on consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this [*i.e.*, § 330] section").

¹² The language of the amendment and the legislative history of § 330(a)(4)(B) demonstrate Congress' intent that debtors' counsel in chapter 12 and 13 cases be paid under a different standard than the customary "benefit to the estate" standard applied to professionals under other chapters. *See* 140 CONG. REC. S4640-01, at S4646-47 (daily ed. Apr. 21, 1994) (statement of Mr. Heflin for Sen. Metzenbaum) (the purpose of the language inserted by amendment 1645 to the Senate Bill was to, *inter alia*, add a new § 330(a)(4)(B), setting a different standard for allowing reasonable compensation for a chapter 13 debtor's attorney "for representing the interests of *the debtor* . . . based on a consideration of the benefit and necessity of such services to *the debtor* and the other factors set forth in this section.") (emphasis added); *see also* *Bankruptcy Reform: Hearing on H.R. 5116 Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary*, 103d Cong. 550-51 (2d Sess. 1994) (analysis of the National Association of Consumer Bankruptcy Attorneys) (NACBA's comments on section 310 (professional fees), of S.540 of the Bankruptcy Amendments of 1994, indicate that the emphasis on the "benefit and necessity of such services to the debtor" language in § 330(a)(4)(B) represented an important new standard to be used by courts; NACBA did not oppose this provision overall because this amendment contained language "ensuring that chapter 12 and 13 individual debtors' attorneys may be awarded compensation for their work in protecting the debtor's interest in a bankruptcy case."); *Lamie v. United States Trustee*, 124 S.Ct. 1023, 1033-34, 157 L.Ed.2d 1024, 72 USLW 4152 (2004) (stating that amendment 1645, which added § 330(a)(4)(B), was part of a bankruptcy reform Act designed to curtail abuses in fee awards, mostly in big chapter 11 cases, detailed in 140 CONG. REC. S14,597-02 (daily ed. Oct. 7, 1994) (statement of Sen. Metzenbaum)).

of the attorney can lead to the failure of a chapter 13 case.¹³ Thus, a rule that links reasonableness of fees directly with whether a debtor's plan proceeds to completion would in effect make the attorney the guarantor of the plan's success, even though the attorney is in no position to assure that success.¹⁴ If it were to appear that the case failed *because* the attorney failed to do his or her job properly, however, then a court might well (and justifiably) find that the fee was not reasonable after all. That, in this court's experience at least, is the rare case, and is not the case here.

II. The Conflation Theory as an Alternative Basis for Determining Reasonableness

The Trustee argues in this case that a court ought to be able to evaluate the reasonableness of fees charged in the prior case by viewing *both* cases as essentially *one* case (in fact, if not in law). If the second case is really a continuation of a larger effort to reorganize the debtor's financial affairs, goes the argument, then the attorney (who is usually the same attorney) should not be able to profit by the debtor's inability to "do it right" the first time.¹⁵ There is case law to support this "conflation" (or fusion of a prior failed and

¹³ See, e.g., 4 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §294.1, at 294-18 (3d ed. 2000 and Supp. 2002) (stating that the low percentage of fees collected in Chapter 13 cases is not indicative of the quality of representation, "but [of] the reality that many Chapter 13 cases convert or are dismissed before attorneys' fees have been paid in full, especially in districts where it is the custom to pay all or most of the fee through the plan."); see also *infra* n.15.

¹⁴ See, e.g., 4 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §294.1, at 294-18 (stating that districts, such as the Western District of Oklahoma and the Eastern District of California, that require debtors' attorneys to take their fees in "dribs and drabs through confirmed plans tie the payment of fees to the risk of success of Chapter 13 cases."); cf. *Bankruptcy Reform: Oversight Hearing on Bankruptcy Reform Legislation Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary*, 1994 WL 442145 (Aug. 17, 1994) (testimony of Philip J. Hendel on behalf of the Commercial Law League of America) (stating that the section 310 language "reasonably likely to benefit the debtor's estate" should be eliminated from § 330(a)(4)(A)(ii)(I) because it effectively makes the "professional the guarantor of the success of decisions made regarding the handling of issues within a case.").

¹⁵ One could conceive, for example, of a case in which a fee of \$2,000 was allowed to counsel in the first case, the fee being paid out over, say, two years, then the case failing due to, say, a change in the debtor's employment status. To prevent the debtor from losing his or her home, the debtor might well file a new chapter 13 case, in which counsel would then, once again, seek allowance of a \$2,000 fee. Under that scenario, the debtor would pay \$4,000 to reorganize his or her affairs, the extra fee incurred by virtue of the debtor's having been laid off. A variation on this scenario would create a claim in the second bankruptcy case: the first case fails before the attorneys' fees are paid out under the plan,

subsequent case) approach to successive chapter 13 cases, though not in the context of fees. *See In re Thomas*, 123 B.R. 552, 554-55 (Bankr. W.D. Tex. 1991) (holding that a five-year chapter 13 plan could not be confirmed because the total term would exceed five years when combined with the plan payments made in the immediately preceding chapter 13 case which had been dismissed).

Even if the rationale of *Thomas* were to be applied in this context, however, it would not affect the court's ruling on the attorney's pre-petition claim for services from the *previous* case. The right place to apply this conflation argument, if it is to be applied at all, is in the evaluation of what ought to be awarded as a reasonable fee in the *new* case, not as a *post hoc* factor to reduce the claim for unpaid fees from the previous case. The claim for fees left unpaid from the previous case can only be reduced to the extent that the fees sought are found not to be "reasonable," and that evaluation can only be applied to the services for which those fees were charged – the work done for the *previous* case. We are not called upon here (and so do not reach) the entirely independent question whether fees in the *new* case can or should be judged in light of the fees already awarded for services performed in the preceding case, as those fees have already been allowed in this case.

III. Conflict of Interest

The Trustee's real argument – and the one that has debtors' lawyers concerned – is that an attorney should not be permitted to recover fees from a prior case and still proceed as counsel for the debtor in the current case because of conflict of interest rules. Either the claim for unpaid fees from the previous case must be abandoned, or the attorney cannot proceed as counsel for the debtor in the current case. In reality,

leaving an unpaid fee due the attorney. That fee is then sought by way of a proof of claim filed in the second case (though now it is sought as an ordinary unsecured claim, not an administrative claim).

this argument is not a basis for objecting to the allowance of the attorney's claim under section 502(b)(4). It is rather a way of arguing that the attorney should be disqualified from representing the debtor at all in the subsequent case unless he or she abandons his or her claim from the previous case, because of the alleged conflict. Not surprisingly, the debtors' bar is concerned about the precedent this might set.¹⁶

In support of the contention that this "disinterestedness" issue is relevant to an objection to a claim for attorneys' fees from a prior case, the Trustee relies first on Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, as well as bankruptcy case law suggesting that, if an attorney has a conflict of interest, it should not be able to recover on a claim for fees – even if it be a claim for fees from a previous case.¹⁷

We start this analysis where the Trustee starts – with non-bankruptcy law. Rule 1.06 of the Texas Disciplinary Rules provides that a lawyer is not to represent "opposing parties to the same litigation," TEX.

¹⁶ A debtor whose case has failed may find it difficult, if not impossible, to find another lawyer to handle a later, successive filing (unless, of course, the debtor is simply "touring the bar" as part of an effort to abuse the bankruptcy process – the court uses other, heavier remedies to deal with that sort of tactic, such as bars to refiling or sanctions). A new attorney must start from scratch, as it were. What is more, the successive filing may well be time-critical – a foreclosure is impending – limiting how much time the debtor (usually an unsophisticated consumer of legal services) has to find a replacement. If the first case has failed for reasons that can and should (in equity) be fixed by a successive filing, then the logical attorney to handle the second filing is usually the same attorney who was representing the debtor in the first case. Of course, the attorney could well insist on having its outstanding fees paid from the previous case before filing the new case, but the court hardly wants to encourage that sort of sharp practice. What is more, both the Code and state bar rules militate against an attorney's doing that sort of thing. *See, e.g.*, TEX. DISCIPLINARY R. PROF. CONDUCT R. 1.04(a). That means, then, that the attorney who has fees left over from the first case has little choice in the second case but to either file a proof of claim for those unpaid fees, or to abandon the claim altogether.

¹⁷ *See, e.g., In re Am. Avia Assocs.-SEA*, 150 B.R. 24, 27-28 (Bankr. S.D. Tex. 1992) (holding that, after citing to Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct, the employment of special state court litigation counsel under section 327(e), who were hired pre-petition on a contingency fee basis, was in the best interest of the estate because the law firm did not thereby hold an interest adverse to the chapter 11 debtor or the estate); *see also In re Sterling Chem. Holdings, Inc.*, 293 B.R. 701, 703 (Bankr. S.D. Tex. 2003) (stating that compliance with Rule 1.06, among other state bar ethics rules, was a prerequisite to employment that must be ethically and professionally satisfied by counsel, and in certain circumstances with the permission of clients or former clients, prior to accepting employment in a chapter 11 case).

DISCIPLINARY R. PROF. CONDUCT 1.06(a), or to represent a person if such representation “involves a substantially related matter in which that person’s [here, the debtor’s] interests are materially and directly adverse to the interests of another client of the lawyer . . .”, TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(b)(1), or if such representation “reasonably appears to be or [would] become adversely limited by the lawyer’s responsibilities to another client . . . or the lawyer’s own interests.” TEX. DISCIPLINARY R. PROF. CONDUCT 1.06(b)(2). Clearly, in the context of successive bankruptcies, Rule 1.06(a) is not triggered. Neither is Rule 1.06(b)(1) – there is not “another client” involved. At best, only Rule 1.06(b)(2) might apply – and even then only to the extent that the rule proscribes representation that might become adversely limited by the lawyer’s own interests.

The Rule 1.06(b)(2) standard tests whether the lawyer’s representation of the debtor in the new chapter 13 case reasonably appears to be adversely limited by the law firm’s own interest, as reflected in the outstanding unsecured claim from the previous chapter 13 case. *See, e.g., In re Hunt Int’l Res. Corp.*, 1992 WL 235580, at *14 (Bankr. N.D. Tex. 1992) (stating, in a chapter 11 case, that “[a]n actual conflict of interest has been defined as ‘an active competition between two interests, in which one interest can only be served at the expense of the other’”) (quoting *In re BH & P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J. 1989), *rev’d in part*, 119 B.R. 35 (D.N.J. 1990)). There is little in a lawyer’s having an unsecured claim from leftover fees from a previous case that creates a lawyer’s own interest that would be materially adverse to the interests of the debtor client, save potentially in two narrow circumstances.

It could first be argued that a lawyer might be inclined to encourage his or her client to file a new chapter 13 case primarily to enhance the chances of getting paid – and so might be inclined not to recommend the chapter 7 alternative because that choice would have the effect of discharging the attorney’s claim

from the earlier case. However, absent evidence to indicate that chapter 7 *is* the proper alternative, the conflict is, in most normal cases, illusory. A second chapter 13 filing is almost always motivated by a debtor's desire to obtain benefits only available under chapter 13 – the ability to treat arrearages from a home mortgage under a plan, the ability to extend payment terms on a vehicle, or the ability to bind a tax entity to the payout terms of a chapter 13 plan (to say nothing of being free from having to defend dischargeability complaints). Even when chapter 13 is not readily the appropriate alternative, the attorney will still have discharged his or her duty by advising the client of the alternatives, as is already required. The attorney in such a circumstance would probably be well advised to include a specific disclosure that, in chapter 7, the unpaid fees from the prior case would be discharged, though the rules as written do not expressly require such an additional disclosure. So long as the debtor has been properly advised of the alternatives, and is given a fair chance to select which chapter under which to proceed, no real conflict will have been generated.

One might alternatively argue that the debtor's lawyer would be unlikely to object to a claim held by that very lawyer, creating a materially adverse interest. Yet, debtors seldom object to unsecured claims of *any* creditor in most cases, unless the claim is one likely to jeopardize the ability of the debtor to proceed to confirmation at all. Tax claims, for example, are often the target of objections¹⁸ because such claims enjoy priority status and must be paid in full over the life of the plan. *See* 11 U.S.C. §§ 507(a)(8), 1329(a)(1). Secured claims too might be subject to a debtor's objections if the amount of the claim affects

¹⁸ *See, e.g., In re Ramos*, 208 B.R. 655, 656 (W.D. Tex. 1996) (holding that, after chapter 13 debtors filed an objection to the proof of claim of the Internal Revenue Service, not as to the amount but instead disputing the section 507(a)(8) priority status of the tax, the section 507(a)(8) priority period was deemed equitably tolled during the debtor's first case to the extent that the debtor could not file a second case without giving the IRS' tax claim priority treatment under the debtors' chapter 13 plan).

plan feasibility. Ordinary unsecured claims, by contrast, are paid whatever is available after the satisfaction of priority and secured claims. Reducing the amount of any given unsecured claim may increase the payout to other unsecured creditors as a whole, but in the usual case, that is an issue of greater importance to the chapter 13 trustee (or other unsecured creditors). From the debtor's point of view, the payout (at least as a matter of law) is largely irrelevant.¹⁹ Thus, this argument too turns out to be a stalking horse insofar as its potential for generating a conflict of interest cognizable under Rule 1.06(b)(2) is concerned.

Neither of the foregoing scenarios, in this court's view, generates "active competition" between two interests such that one interest could only be served at the expense of the other. *In re Hunt Int'l Res. Corp.*, 1992 WL 235580, at *14 (Bankr. N.D. Tex. 1992).

Yet, even if a conflict could be said to exist, it is relatively easily cured by the client's informed consent. *See* TEX. DISC. R. PROF. CONDUCT 1.06(c). If the lawyer *reasonably believes* that the representation of the debtor in the second case will not be materially affected by the lawyer's holding a claim against the debtor for unpaid fees from the previous case, and the debtor has *consented* to the representation after full disclosure of all relevant issues,²⁰ then the lawyer may nevertheless proceed despite a technical conflict under Rule 1.06(b)(2). *See id.*

In this case, the court does not believe that Rule 1.06(b)(2) is implicated on the facts of the case now before the court, so counsel had no need to obtain the curative consent contemplated by this rule. A

¹⁹ Indeed, it can be noted that the only obligations normally assigned to the trustee in bankruptcy that are specifically delegated to the debtor in a chapter 13 case are those set out in section 1303 (most relate to use or sale of property of the estate). A debtor must pay over to the trustee all net disposable income, but usually the trustee assumes the task of reviewing and, when necessary, objecting to claims. Too, debtor's counsel is paid compensation based upon the benefit and necessity of such services *to the debtor*. *See* 11 U.S.C. § 330(a)(4)(B).

²⁰ The existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. *See* TEX. DISC. R. PROF. CONDUCT 1.06(c)(2).

lawyer believing that Rule 1.06(b)(2) may be implicated might, in an abundance of caution, want to put to rest any concerns about conflicts of interest and could easily obtain a written waiver laying out the relevant issues for the client, and maintain that waiver in its files. A “belt and suspenders”²¹ lawyer might even attach such a consent form to its Rule 2016 disclosure. *See* FED.R.BANKR.P. 2016(b).

The bankruptcy court in *Hunt Int’l* did note that obtaining consent or waiver of a conflict of interest may be more difficult in a bankruptcy case, due primarily to the fact that the party giving that consent has fiduciary duties to the larger creditor body that may make giving such consent difficult or impossible. *See In re Hunt Int’l Res. Corp.*, 1992 WL 235580, at *13 (Bankr. N.D. Tex. 1992). However, *Hunt Int’l* was a chapter 11 case, where the obligations on both the client and counsel are substantially different from those in the chapter 13 context. A debtor in a chapter 11 case takes on the fiduciary duties and responsibilities of a debtor-in-possession, a legal entity exercising most of the powers of a trustee. The chapter 13 debtor, though he or she remains in possession of property of the estate, and has the authority to use, sell, or lease that property, still does not assume anything approaching the breadth of trustee duties that a chapter 11 debtor-in-possession does. *Compare* 11 U.S.C. § 1107(a)²² *with* 11 U.S.C. § 1306(b). What is more, the attorney for the chapter 13 debtor is compensated principally on the basis of the benefit and necessity of its services to the debtor, as distinct from the creditor body or the trustee. *See* 11 U.S.C.

²¹ “Belt and suspenders” refers to an overly cautious approach, usually by an attorney on behalf of a client, to protect an interest in more ways than one. *See, e.g., In re Smith’s Bankrupt Estate*, 508 F.2d 1323, 1325 n.1 (5th Cir. 1975). Generally, this type of approach is done in an overabundance of caution, but sometimes courts may view it as an overreaching attempt by the client to have his cake and eat it too. *See, e.g., In re Beck*, 248 B.R. 229, 235 (Bankr. W.D.N.Y. 2000).

²² Note that section 1107(b) provides that the fact that the lawyer representing the debtor-in-possession is not automatically disqualified from such representation solely by virtue of that same lawyer’s having represented the debtor pre-petition. The qualifier “solely” is important: should that same lawyer hold a pre-petition claim against the estate, *that* might render the lawyer no longer disinterested within the meaning of section 327(a).

§ 330(a)(4)(B). The principle fiduciary duties (collection of funds set aside pursuant to the plan for distribution to creditors, distribution of those funds, review of claims, monitoring debtor performance for the benefit of the creditor body) are placed not on the debtor at all, but on the chapter 13 trustee.²³ The legitimate concerns expressed in *Hunt Int'l* simply do not translate into the chapter 13 context.

The real question is whether section 327(a) applies to the retention of debtor's counsel in a chapter 13 case – and that question was not before the court in *Hunt Int'l*. If it does, then all the consent in the world would not vitiate that section's proscriptions on the retention of certain professionals deemed not to be “disinterested.” Section 327 superimposes a higher federal conflict of interest standard on professionals than that imposed by state law. *See* 11 U.S.C. § 327(a); *see also* 11 U.S.C. § 1103(b) (applying similar rule to professionals retained by creditors' committees in chapter 11 cases). But section 327 by its terms applies only to professionals retained by “the trustee” (which, in the chapter 11 context includes the debtor-in-possession).²⁴ There is no similar proscription or limitation on the retention of professionals by *the debtor*. The debtor in a chapter 7 case or in a chapter 11 case could retain whomever they wished, without regard to section 327(a).²⁵ Of course, the lawyer for the debtor in a chapter 7 or chapter 11 case also

²³ Congress of course intended that some trustee powers be expressly reserved to the debtor, and that other trustee powers should be shared with the trustee. *See* 11 U.S.C. § 1303; *see also* 124 CONG. REC. H11106 (daily ed. Sep. 28, 1978) (remarks of Rep. Edwards) & S17423 (remarks of Sen. DeConcini). The primary *fiduciary* duties in a chapter 13 case, however, are still placed on the chapter 13 trustee.

²⁴ *See, e.g., In re Busetta-Silvia*, 300 B.R. 543, 549-50 n.11 (Bankr. D.N.M. 2003) (stating that, in a case in which the court denied the fee application of a chapter 13 debtor's counsel because pre-petition legal services were not entitled to an administrative expense priority under the plan but were instead treated as any other unsecured, non-priority claim, subsections 327(b) & (c) mention chapter 7 and 11, but do not refer to chapter 13 cases, and subsection 327(a) precludes attorneys with pre-petition claims from representing a chapter 11 debtor-in-possession or the trustee in either a chapter 7 or 11 case).

²⁵ *See, e.g., id.* (stating that there is no “disinterestedness” test which prohibits an attorney with a pre-petition claim from representing the debtor, as opposed to the trustee, in a chapter 7 or 13 case).

cannot recover payment for his or her services out of the estate. *See Lamie v. United States Trustee*, 124 S.Ct. 1023, 1031 (Jan. 26, 2004).

The rules change, however, in chapters 12 and 13.²⁶ Under *those* chapters, the debtor's lawyer, even though clearly not retained by "the trustee" (and so clearly not bound by section 327(a)), nonetheless gets paid out of property of the estate. *See* 11 U.S.C. § 330(a)(4)(B); *see also* 11 U.S.C. § 1306 (property of the estate in chapter 13 includes the debtor's post-petition earnings).²⁷ The Trustee suggests that the debtor's attorney in a chapter 13 case *should* be subject to the same standard of disinterestedness in the interest of preserving the integrity of the process and to avoid unseemly conflicts. The court declines the invitation to extend the reach of section 327(a) beyond its plain language.²⁸ Congress was no doubt aware of the anomaly of paying the debtor's attorney with property of the estate, yet not binding that attorney by the strictures of section 327(a). The unique language of section 330(a)(4)(B) confirms that much.²⁹

²⁶ *See* 11 U.S.C. § 330(a)(4)(B).

²⁷ It is usually out of this additional tranche of property that the debtor's lawyer in a chapter 13 case is paid, and usually out of the first 12 to 24 payments, as a priority claim. If unsecured creditors are paid less than 100%, they are certainly, as a matter of economics, funding the debtor's lawyer out of property that would otherwise be distributed to them. *See* 11 U.S.C. § 1325(b) (on objection of an unsecured creditor, plan must devote all of debtor's net disposable income over three year period to payment of creditor claims).

²⁸ *See, e.g., Busetta-Silvia*, 300 B.R. at 549-50 (granting the validity of a chapter 13 debtor's counsel's argument that the "disinterestedness" requirement of section 327(a) does not apply to debtor's counsel in chapter 13 cases because chapter 13 counsel do not need to obtain court approval of their employment while chapter 11 counsel are required to obtain a court order before representing the estate or debtor-in-possession); *see also In re Scribner*, No. 401-44799, slip op., at Conclusion of Law ¶¶ 6-11, at <http://www.txnb.uscourts.gov/opinions/bjh/> (Bankr. N.D. Tex. 2002) (concluding that, in a chapter 13 case where the debtor's counsel had a pre-petition claim in his fee application, after conducting a "plain language" analysis of §§ 329(a) and 330(a)(4)(B), most of the pre-petition fees incurred "in contemplation of" the case were disallowed but permitted fees rendered "in connection with" the case).

²⁹ Congress substantially overhauled section 330 in 1994. It did not alter the basic structure of section 330(a)(1), which explicitly refers to "a professional person employed under section 327," but struck the words "or to the debtor's attorney" that followed. That express deletion required an express new provision, section 330(a)(4)(B), to preserve the ability of debtor's counsel in chapter 12 and 13 cases to be paid *out of the estate*. The new section, however, contains *no* reference to section 327(a) (though it easily could have), and creates an independent standard for paying debtor's counsel in chapter 13 cases, quite different from the newly revised standards for professionals employed under section

Finding no ambiguity in the statute to justify judicial intervention, the court declines to invent a limitation not present in the statute itself.

What this means, then, for debtor's lawyers in a chapter 13 case, is that the only conflict of interest rules with which they must, as a matter of law, comply are the conflict of interest rules to which they are bound by virtue of the rules of the state that has licensed them to practice.³⁰ Thus, the familiar body of law that traditionally applies to test whether a professional can be retained in a bankruptcy case at the expense of the estate does not apply to whether a lawyer can be retained by a debtor in a chapter 13 case even though done so at the estate's expense.³¹ Instead, only the law of the state which licenses that particular attorney (and in the usual case in this district, that will be Texas) will provide the standard for whether that attorney has a disqualifying conflict of interest. Unlike their counterparts under other chapters, the attorney representing a debtor in a chapter 13 case may, to the extent that state bar rules permit, obtain consent from his or her client to vitiate any technical conflicts of interest, because the proscriptions of section 327(a) do not apply to them.

For all of the foregoing reasons, the court finds that the attorney who has represented a debtor in a prior chapter 13 case will not be disqualified from representing the debtor in a subsequent case simply

327 found in section 330(a)(3) and (4)(A). *See* discussion *supra* at note 4; *see also* § 224(b), Bankruptcy Reform Act of 1994, Pub. L. 103-394 (Oct. 22, 1994); *Lamie v. United States Trustee*, 124 S.Ct. 1023, 1031 (Jan. 26, 2004);.

³⁰ It is worth noting that, in the Western District of Texas at least, a lawyer must be licensed to practice in a state in order to be admitted to practice in federal court. *See* W.D. TEX. L.R. AT-1(a) (2002) (stating that any person licensed to practice in Texas and in good standing may apply to be admitted to practice in the Western District of Texas). There is no means for independent admission to practice in federal court absent state licensing.

³¹ *See, e.g.*, 1 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY §25.4, at 25-7 (3d ed. 2000 and Supp. 2002) (stating that, while the pre-1994 Bankruptcy Code did not suggest that chapter 13 debtors' attorneys' fees were to be treated differently than those of other chapters, The Bankruptcy Reform Act of 1994 rewrote § 330, making it explicit that a chapter 13 debtor's counsel *can* qualify for fees from the estate for representing the debtor's interests, even though the benefits of that representation are not necessarily shared by the creditors or the estate).

by virtue of the existence and assertion of a claim for unpaid fees from the previous case. The state bar rules do not impose such a *per se* rule, and, even if such a *per se* rule could be divined from section 327(a), it would not apply in the chapter 13 context because section 327(a) does not control the retention of debtor's counsel in a chapter 13 case.³²

Conclusion

For the reasons stated above, the Trustee's Objection should be denied and counsel's proof of claim for \$1,195 should be allowed.

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³² Note carefully that, although section 327(a) does not control, state bar rules still do. An attorney with an actual materially adverse interest would still be barred from representing the debtor in the new case, by virtue of state bar rules, and would be obligated to disclose the existence of such a conflict under Rule 2016 of the Bankruptcy Rules. If the attorney can, under those rules, justifiably obtain the informed consent of the client to nonetheless proceed, prudent practice would suggest that counsel attach such written and informed consent to the Rule 2016 disclosure.

APPENDIX F

Fickling v. Flower, Medalie & Markowitz, Esqs.
(In re Fickling), 361 F.3d 172 (2d Cir. 2004)

361 F.3d 172, 42 Bankr.Ct.Dec. 188, Bankr. L. Rep. P 80,059
(Cite as: 361 F.3d 172)



United States Court of Appeals,
Second Circuit.

In Re: John FICKLING, Debtor.
John Fickling, Debtor-Appellee,

v.

Flower, Medalie & Markowitz, Esqs., Appellant.

No. 03-5018.

Argued Nov. 17, 2003.

Decided March 3, 2004.

Background: Law firm that had represented debtor in Chapter 11 case, prior to entry of order of conversion, sued for determination that legal fees and expense reimbursements associated with its representation of debtor during postpetition, pre-conversion Chapter 11 case were not discharged when debtor's case was involuntarily converted to Chapter 7 and Chapter 7 discharge was entered. The United States Bankruptcy Court for the Eastern District of New York, [Melanie L. Cyganowski, J.](#), [277 B.R. 168](#), denied motion. Law firm appealed. The District Court, [Joanna Seybert, J.](#), affirmed, and law firm appealed.

Holdings: The Court of Appeals, [John M. Walker, Jr.](#), Chief Judge, held that:

- (1) the Bankruptcy Code does not contain an exception to discharge for pre-conversion administrative expense claims;
- (2) treating the subject debt as dischargeable under Chapter 7 would not ignore the section of the Code giving bankruptcy courts the power to review claims for attorney fees; and
- (3) debtor's alleged fraud was not a basis for exempting law firm's claim from discharge.

Affirmed.

West Headnotes

[1] [Bankruptcy 51](#) [3341](#)

[51 Bankruptcy](#)

[51X Discharge](#)

[51X\(C\) Debts and Liabilities Discharged](#)

[51X\(C\)1 In General](#)

[51k3341 k. In General. Most Cited](#)

[Cases](#)

[Bankruptcy 51](#) [3411](#)

[51 Bankruptcy](#)

[51X Discharge](#)

[51X\(E\) Effect of Discharge](#)

[51k3411 k. In General. Most Cited Cases](#)

[\(Formerly 51k3251\)](#)

[Bankruptcy 51](#) [3594](#)

[51 Bankruptcy](#)

[51XIV Reorganization](#)

[51XIV\(C\) Conversion or Dismissal](#)

[51k3594 k. Effect; Proceedings in Converted Case. Most Cited Cases](#)

[\(Formerly 51k3251\)](#)

While, in the usual Chapter 7 case, term “order for relief,” as used in section of the Bankruptcy Code governing discharge, refers to the filing of the Chapter 7 petition, where there has been a conversion that language refers to the conversion of the case to a Chapter 7 case. Bankr.Code, [11 U.S.C.A. §§ 301, 727\(b\)](#).

[2] [Bankruptcy 51](#) [3343.4](#)

[51 Bankruptcy](#)

[51X Discharge](#)

[51X\(C\) Debts and Liabilities Discharged](#)

[51X\(C\)1 In General](#)

[51k3343 Particular Debts or Liabilities](#)

[51k3343.4 k. Post-Petition Debts or Liabilities. Most Cited Cases](#)

[\(Formerly 51k3341\)](#)

[Bankruptcy 51](#) [3594](#)

[51 Bankruptcy](#)

361 F.3d 172, 42 Bankr.Ct.Dec. 188, Bankr. L. Rep. P 80,059

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51XIV Reorganization

51XIV(C) Conversion or Dismissal

51k3594 k. Effect; Proceedings in Converted Case. [Most Cited Cases](#)

(Formerly 51k3341)

Bankruptcy Code does not contain an exception to discharge for pre-conversion administrative expense claims. Bankr.Code, 11 U.S.C.A. §§ 348(d), 503(b), 727.

[3] Bankruptcy 51 3343.4

51 Bankruptcy

51X Discharge


51X(C) Debts and Liabilities Discharged

51X(C)1 In General

51k3343 Particular Debts or Liabilities

51k3343.4 k. Post-Petition Debts or Liabilities. [Most Cited Cases](#)

(Formerly 51k3341)

Bankruptcy 51 3594


51 Bankruptcy

51XIV Reorganization

51XIV(C) Conversion or Dismissal

51k3594 k. Effect; Proceedings in Converted Case. [Most Cited Cases](#)

For purposes of discharge, all claims, including claims for administrative expenses, that arise after the filing of a Chapter 11 petition but prior to conversion to Chapter 7, and that are not expressly exempted by the section of the Bankruptcy Code governing exceptions to discharge, are subject to discharge. Bankr.Code, 11 U.S.C.A. §§ 348(b), 503(b), 523, 727(b).

[4] Bankruptcy 51 3343.2

51 Bankruptcy

51X Discharge

51X(C) Debts and Liabilities Discharged

51X(C)1 In General

51k3343 Particular Debts or Liabilities

51k3343.2 k. Costs and Fees. [Most Cited Cases](#)

(Formerly 51k3360)

Bankruptcy 51 3594


51 Bankruptcy

51XIV Reorganization

51XIV(C) Conversion or Dismissal

51k3594 k. Effect; Proceedings in Converted Case. [Most Cited Cases](#)

Section of the Bankruptcy Code giving bankruptcy courts the power to review claims for attorney fees did not conflict with Code section governing discharge and, thus, any alleged conflict between the two provisions did not require the bankruptcy court to refrain from treating debt owed to law firm for its representation of debtor prior to conversion of case from Chapter 11 to Chapter 7 as dischargeable under Chapter 7; each phrase of the fee review provision retained a function in a Chapter 7 case even where prepetition attorney fees were treated as discharged pursuant to the discharge provision. Bankr.Code, 11 U.S.C.A. §§ 329, 727(b)

[5] Statutes 361 206

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k204 Statute as a Whole, and Intrinsic Aids to Construction

361k206 k. Giving Effect to Entire Statute. [Most Cited Cases](#)

Canons of statutory interpretation may require court to disfavor a reading of a statute that would render a particular clause entirely superfluous, but they do not require court to read every clause of a general statutory provision to apply to every conceivable situation covered by its language.

[6] Constitutional Law 92 2473

92 Constitutional Law

92XX Separation of Powers

92XX(C) Judicial Powers and Functions

92XX(C)2 Encroachment on Legislature

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92k2472 Making, Interpretation, and Application of Statutes

92k2473 k. In General. [Most Cited](#)

Cases

(Formerly 92k70.1(2))

Judiciary's job is to enforce the law Congress enacted, not to write a different one that judges think superior.

[7] Bankruptcy 51 3322

51 Bankruptcy

51X Discharge

51X(B) Dischargeable Debtors

51X(B)2 Determination of Dischargeability

51k3320 Revocation or Modification

51k3322 k. Application, Hearing, and Determination. [Most Cited Cases](#)

Bankruptcy 51 3343.2

51 Bankruptcy

51X Discharge

51X(C) Debts and Liabilities Discharged

51X(C)1 In General

51k3343 Particular Debts or Liabilities

51k3343.2 k. Costs and Fees. [Most](#)

Cited Cases

(Formerly 51k3360)

Bankruptcy 51 3594

51 Bankruptcy

51XIV Reorganization

51XIV(C) Conversion or Dismissal

51k3594 k. Effect; Proceedings in Converted Case. [Most Cited Cases](#)

Debtor's alleged fraud in connection with fees owed law firm was not a basis for exempting from discharge the law firm's claim for fees and expenses incurred in representing debtor prior to conversion of case from Chapter 11 to Chapter 7; law firm failed to file a timely objection to discharge on the ground of fraud, and it forfeited the right to seek revocation of debtor's discharge on the ground of

fraud when it failed to seek revocation within one year of the order for discharge, as required by statute. Bankr.Code, 11 U.S.C.A. § 727(c)(1), (d)(1), (e)(1).

[8] Bankruptcy 51 3321

51 Bankruptcy

51X Discharge

51X(B) Dischargeable Debtors

51X(B)2 Determination of Dischargeability

51k3320 Revocation or Modification

51k3321 k. Grounds. [Most Cited](#)

Cases

Creditor may seek to “revoke” a debtor's discharge on the ground of fraud. Bankr.Code, 11 U.S.C.A. § 727(d)(1).

*173 [Jeffrey Herzberg](#), Zinker, Gelfand & Herzberg, LLP, Smithtown, NY, for Appellant.

[Jeffrey K. Cymbler](#), Angel & Frankel, P.C. ([Rick A. Steinberg](#), on the brief), New York, NY, for Debtor-Appellee.

Before: [WALKER](#), Chief Judge, [CALABRESI](#) and [STRAUB](#), Circuit Judges.

[JOHN M. WALKER, JR.](#), Chief Judge.

Appellant Flower, Medalie & Markowitz, Esqs. (“FMM”), a law firm that represented debtor-appellee John Fickling during his bankruptcy proceeding, seeks to recoup the fees it earned and expenses it incurred prior to the conversion of Fickling's case from Chapter 11 to Chapter 7. Both the bankruptcy court and the district court concluded that such fees and expenses were properly discharged and therefore not recoverable from the debtor. We affirm.

BACKGROUND

On October 23, 1992, Fickling filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy

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Court for the Eastern District of New York. At the time of that filing, Fickling was represented by FMM. He paid FMM a \$38,000 retainer fee, but appears not to have entered into any other fee arrangement with the firm. On November 13, 1996, the bankruptcy court converted Fickling's Chapter 11 case to a Chapter 7 case-despite Fickling's objections to the conversion, which were made on his behalf by FMM.

Thereafter, FMM sought to withdraw as counsel for Fickling because it did “not wish to incur further losses in the legal representation of the Debtor, as there is tremendous uncertainty whether [FMM] will ever be compensated for its time and *174 effort” The court granted FMM's application on March 18, 1997.

On April 14, 1997, the bankruptcy court issued an order releasing Fickling from all dischargeable debts and enjoining any “creditors whose debts are discharged” from “engaging in any act to collect such debts as personal liabilities.” The order recited that the court had not received any objections to discharge.

On March 16, 2001, FMM filed a motion against Fickling in his personal capacity (not against his estate) for the attorneys' fees it earned and expenses it incurred prior to the conversion from Chapter 11 to Chapter 7, over and above the \$38,000 retainer fee and certain paid expenses. FMM argued that the unpaid fees and expenses amounting to \$120,095 constituted a non-dischargeable debt. Fickling filed an objection to the motion.

The bankruptcy court denied FMM's motion in its entirety on the ground that the debt owed to FMM by Fickling had been properly discharged pursuant to 11 U.S.C. § 727. On March 31, 2003, the United States District Court for the Eastern District of New York (Joanna Seybert, *Judge*) affirmed that ruling.

DISCUSSION

[1] This appeal turns on whether the discharge provision of Chapter 7, 11 U.S.C. § 727, applies to fees earned and expenses incurred by a debtor's attorney after the filing of a Chapter 11 petition but before the conversion of the Chapter 11 case to a Chapter 7 case. Section 727 of the Bankruptcy Code provides that a Chapter 7 debtor may be discharged from all debts, except for those specified in 11 U.S.C. § 523, “that arose before the date of the order for relief under this chapter” 11 U.S.C. § 727(b). While in the usual Chapter 7 case the “order for relief” refers to the filing of the Chapter 7 petition, *see* 11 U.S.C. § 301, in this case, where there has been a conversion, that language refers to the conversion of the case to a Chapter 7 case. 11 U.S.C. § 348(b). Reading §§ 727(b) and 348(b) together, then, all debts that arose after the filing of the Chapter 11 petition but before the conversion (except those listed in § 523) are treated as pre-petition debts, and are therefore dischargeable.

Appellant does not dispute that its claim against Fickling arose prior to the conversion. Nor does it argue that claims for attorneys' fees and expenses incurred after the filing of the Chapter 11 petition but prior to the conversion to Chapter 7 are exempt from discharge under § 523.^{FN1} Nonetheless, FMM offers two reasons why this court should not apply the plain language of § 727(b) and § 348(b): (1) FMM's debt is an “administrative expense” under 11 U.S.C. § 503(b) and therefore exempt from discharge pursuant to 11 U.S.C. § 348(d); and (2) to treat the debt as dischargeable under Chapter 7 would be to ignore the implications of 11 U.S.C. § 329, which gives the bankruptcy court the power to review claims for attorneys' fees. FMM also argues that even if its claim was properly discharged pursuant to § 727(b), equity requires that the claim be revived. We consider each argument in turn.

^{FN1}. Section 523 of the Code exempts a host of claims from discharge, including, *inter alia*, certain claims for taxes, § 523(a)(1), for the return of fraudulently-ob-

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tained property, § 523(a)(2), for alimony and child support, § 523(a)(5), and for some forms of personal injury, § 523(a)(9).

I. “Administrative Expense” Exemption

FMM argues that even though its claim does not qualify for exemption from discharge*175 under the terms of § 727(b), the claim constitutes an “administrative expense” under § 503(b), and therefore is exempt from discharge pursuant to § 348(d). Section 348(d) provides:

A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted [to a Chapter 7 case], *other than a claim specified in section 503(b) of this title*, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

11 U.S.C. § 348(d) (emphasis added). The claims “specified in section 503(b)” are described as “administrative expenses,” and include certain claims for attorneys’ fees. See 11 U.S.C. § 503(b)(2). FMM reads § 348(d) as exempting all pre-conversion^{FN2} administrative expenses from pre-petition treatment for all purposes. FMM further reasons that because § 727(b) only applies to those debts that are deemed to have arisen pre-petition, § 727(b) cannot apply to discharge a pre-conversion debt for attorneys’ fees.

FN2. By “pre-conversion,” we mean those claims that arose after the filing of the Chapter 11 petition but before the conversion of the case to Chapter 7.

[2][3] Assuming for purposes of FMM’s argument that its claim qualifies as a claim for “administrative expenses,”^{FN3} we cannot agree that § 348(d) exempts pre-conversion administrative expense claims from discharge. Just because § 348(d) does not *require* that pre-conversion administrative expense claims be treated “for all purposes” as if they had arisen pre-petition does not mean that such claims may *never* be treated as if

they had arisen pre-petition. That is especially true where, as here, other provisions of the Bankruptcy Code mandate pre-petition treatment for a particular purpose, *i.e.*, discharge, without exception for pre-conversion administrative expense claims. See §§ 727(b) and 348(b). Appellant’s proposed construction of § 348(d) not only reads too much into the language of the provision, but would create an unwarranted conflict between § 348(d), on the one hand, and §§ 727(b) and 348(b), on the other.

FN3. Section 503(b)(2) defines “administrative expense” to include “compensation and reimbursement awarded under section 330(a) of this title.” Section 330(a), in turn, allows for payment of fees to attorneys who have been employed by the bankruptcy trustee pursuant to 11 U.S.C. § 327 to represent the debtor. 11 U.S.C. § 330(a); *Lamie v. United States Trustee*, 540 U.S. 526, 124 S.Ct. 1023, 1031-32, 157 L.Ed.2d 1024 (2004). It appears that FMM was hired by the trustee in accordance with this procedure. See Appendix at 23-24 (Order Authorizing Retention of Counsel by Debtor-in-Possession).

Accordingly, we reject FMM’s argument that § 348(d) creates an exception to discharge for administrative expense claims. Section 348(d) may give administrative expense claims priority of payment upon distribution, but it says nothing about their susceptibility to discharge. See *In re Toms*, 229 B.R. 646, 653-54 (Bankr.E.D.Pa.1999); see also 3 Collier on Bankruptcy, ¶ 348.05[3], at 348-20 (15th ed. rev.2003). For purposes of discharge, all claims, including claims for administrative expenses, that arise after the filing of the Chapter 11 petition but prior to the conversion to Chapter 7, and that are not expressly exempted by § 523, are subject to discharge. FMM’s claim against Fickling falls squarely into this category.

II. Section 329 and Fee Review

[4] FMM’s second argument is that the plain language of § 727(b) cannot be given effect be-

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cause it conflicts with 11 U.S.C. § 329. Section 329 requires that every debtor's attorney submit to the bankruptcy court a statement of fees and *176 expenses “paid or agreed to be paid ... for services rendered or to be rendered.” 11 U.S.C. § 329(a). It also directs the bankruptcy court to review that statement to determine whether the fees “exceed[] the reasonable value” of the specified services, and gives the court the power to adjust the fees if they are found to be excessive. 11 U.S.C. § 329(b).

Appellant argues that § 329 evidences Congress's intent to exempt pre-petition ^{FN4} attorneys' fees claims from discharge under § 727(b) because review by the court of attorneys' fees “agreed to be paid ... for services ... to be rendered,” 11 U.S.C. § 329(a)-a category of fee that necessarily includes pre-petition attorneys' fees in Chapter 7 cases—simply is inconsistent with the prospect of discharge. If pre-petition claims for attorneys' fees and expenses in a Chapter 7 case have been or will soon be discharged, FMM argues, the review contemplated by § 329 would be pointless. This, FMM contends, is an impermissible result. *See State St. Bank & Trust Co. v. Salovaara*, 326 F.3d 130, 139 (2d Cir.2003) (courts should disfavor a reading of a statute that renders a particular clause superfluous).

FN4. For the remainder of the opinion, we use the term “pre-petition” to refer to claims that arose after the filing of the Chapter 11 petition but before the conversion to Chapter 7. Such claims are treated under § 348(b) as if they had arisen pre-petition, and, as discussed above, we reject FMM's argument that § 348(d) exempts the claims here in question from pre-petition treatment.

We disagree with the premise of FMM's argument; no portion of § 329 is rendered superfluous by according § 727(b) its plain meaning. We agree with the Seventh Circuit that “ § 329 has plenty to do in Chapter 7 cases,” even if pre-petition claims for legal fees are subject to discharge. *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1127

(7th Cir.2003) (emphasis in original). At the very least, the supposedly superfluous language (“compensation ... agreed to be paid ... for services ... to be rendered”) covers not just pre-petition attorneys' fees, but also post-petition attorneys' fees, which are not dischargeable under Chapter 7. *See* 11 U.S.C. §§ 348(b), 727(b); *see also In re Sanchez*, 241 F.3d 1148, 1150-51 (9th Cir.2001) (post-petition fees are not dischargeable).

[5] Canons of statutory interpretation may require us to disfavor a reading of a statute that would render a particular clause entirely superfluous, *see State St. Bank & Trust Co.*, 326 F.3d at 139, but they do not require us to read every clause of a general statutory provision to apply to every conceivable situation covered by its language. Because each phrase of § 329 retains a function in a Chapter 7 case even where pre-petition attorneys' fees are treated as discharged pursuant to § 727(b), there is no basis for FMM's assertion that § 329 conflicts with § 727(b). And since the plain language of § 727(b) compels a finding that FMM's claim is dischargeable, we must affirm.

[6] FMM urges that this conclusion will leave the poorest of debtors without legal representation. It asserts that no cautious attorney will agree to represent a Chapter 7 petitioner without full payment up front if the attorney knows that any fees incurred after the filing of the petition for services rendered pre-petition will be subject to discharge. Some commentators share FMM's policy concerns, ^{FN5} but the statute is clear, and “the judiciary's job is to enforce the law Congress enacted, not to write a different one that judges think superior.” *Bethea*, 352 F.3d at 1128.

FN5. *See, e.g.*, Kerry Haydel Ducey, Note, *Bankruptcy, Just for the Rich? An Analysis of Popular Fee Arrangements for Pre-Petition Legal Fees and a Call to Amend*, 54 Vand. L.Rev. 1665 (2001).

*177 III. Fraud

[7][8] Finally, we reject FMM's argument that

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its fees should not have been discharged because Fickling made fraudulent representations in connection with those fees. Appellant contends that Fickling induced FMM to refrain from filing interim fee applications by falsely assuring the firm that its fees would be paid from the proceeds of a condemnation proceeding. *See* Appellant's Brief at 6-8. In FMM's view, this alleged fraud exempts FMM's claim from discharge.

Even assuming a factual basis for this argument, FMM does not cite any statute or case law to support it, and we can find none. FMM frankly admits that it failed to file a timely objection to discharge on the ground of fraud. *See id.* at 18; 11 U.S.C. § 727(c)(1). Moreover, although a creditor can seek to “revoke” a discharge on the ground of fraud, *see* 11 U.S.C. § 727(d)(1) (“On request of ... a creditor ... the court shall revoke a discharge ... if ... such discharge was obtained through fraud of the debtor”), FMM forfeited the right to do so when it failed to seek revocation within one year of the order of discharge, as required by statute. *See* 11 U.S.C. § 727(e)(1); *In re Emery*, 132 F.3d 892, 894-95 (2d Cir.1998) (§ 727(e) sets limitations period for § 727(d) actions).

CONCLUSION

For the foregoing reasons, the opinion of the district court is hereby AFFIRMED.

C.A.2 (N.Y.),2004.

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