

# **You Have Bills to Pay? Ethics in Getting Paid in Chapter 7, 11 and 13 Cases**

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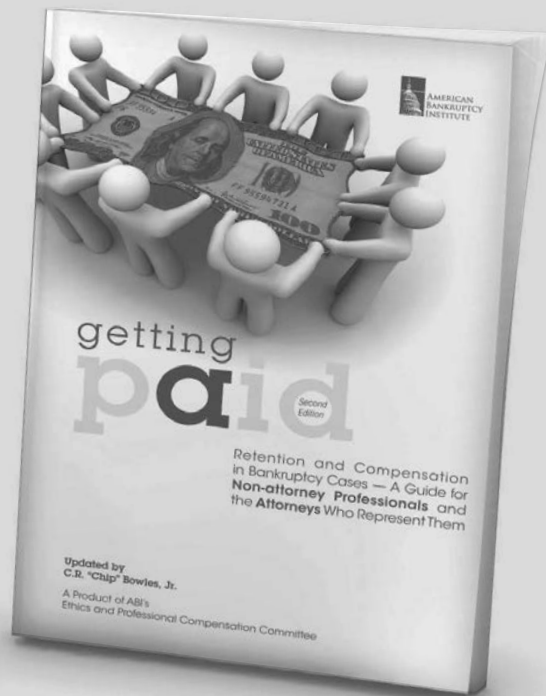
*Lakelaw; Waukegan, Ill.*



## Getting Paid

Retention and Compensation in Bankruptcy Cases—A Guide for Non-Attorney Professionals and the Attorneys Who Represent Them, Second Edition

This updated version of ABI's handbook on retention and fee issues for non-attorney professionals discusses the various aspects of the professional retention process of 11 U.S.C. §§ 327 and 1103 and the fee payment procedures of 11 U.S.C. §§ 330 and 331. The book provides updated practical advice on a wide range of issues, including the question of who is deemed a "professional" in terms of requiring bankruptcy court approval for employment, drafting of engagement agreements, and the filing and defense of interim and final fee applications. It's a must-read for anyone who plans to work for debtors or committees in a bankruptcy proceeding.



By: C.R. "Chip" Bowles, Jr.

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## You Have to Pay Bills? Ethics in Getting Paid in Chapter 7/11 Trustee Cases



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AMERICAN BANKRUPTCY INSTITUTE Central  
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**Neville Reid, Esq.**



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AMERICAN  
BANKRUPTCY  
INSTITUTE<sup>1</sup>


- Recurring Issues in Retention of Professionals That May Affect Payment
- Recurring Issues in Compensation of Professionals
- Strategies to Manage Risk of Non-Payment



## Sources of law, rules, guidelines:

- Bankruptcy Code (s. 326, 327, 328, 704)
- State law – attorney ethics code
- US Trustee Handbook
- NABT Chapter 7 Canon of Ethics
- Common law ethics rules for contingent witnesses
- AICPA Code of Professional Conduct

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## Recurring issues in trustee retention of professionals that can affect payment:

- Whether Section 327 requirements govern or “independent contractor” retention is available:
  - Standard: whether services to be rendered to the trustee are consistent with pre-petition services rendered to debtor and not peculiar to bankruptcy process (e.g., *In re Dairy Dozen-Milnor, LLP*, 441 B.R. 918 (Bankr. D. N.D. 2010))
  - Advantages of independent contractor retention vs. retention under Section 327 - practical issues (example: Section 721 operating situations)

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- Whether professional is doing “trustee work”: double payment risk
  - Duties of trustee (s.704)
  - Trustee not allowed to delegate statutory duties to professionals (Trustee Ethics Canon 27; Trustee Handbook)
  - Risk: professionals’ duties not clearly defined/authorized up front, services performed later found to be duplicative of trustee duties, professional denied payment (e.g., basic negotiation for recovery of assets, technical objections to claims)
  - Risk: trustee’s fee potentially reduced
  - Reduce risk: confer with US Trustee’s Office; specifically define professionals’ duties, role in retention order; record trustee time even though trustee “commission” does not require it, in order to identify/manage potential duplication

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- Nunc pro tunc orders – risk of losing professional, therefore cause of action, if act too late; professional uncompensated (e.g., *In re Lyons*, 439 B.R. 401 (Bankr. S.D. Texas 2010))
- Hiring trustee’s own firm: when trustee’s fiduciary duty to estate is better served by hiring outside counsel (cost; competency; need for independent judgment in light of *In re marchFIRST*, 520 F. 3d 713 (7th Cir. 2008))


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## Recurring issues in compensation of trustee's professionals:

- No cash in estate up front – hiring on contingency basis:
  - Contingency arrangements must still be “reasonable” (BC Section 328(a))
  - Non-bankruptcy formulas informative, not dispositive
- Contingency arrangement with outside firms:
  - Structure: avoid overreaching (staggered percentages preferred based on stages of litigation)

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- Contingency arrangements with own firm – built-in conflict, potentially greater risk of overreaching:
    - Guidelines: efforts to obtain other bids; issuance of pre-litigation demands to avoid litigation; contingency percentages for various stages “within market”; tailoring formula for contingency to actual benefit to the estate (e.g., *In re Filter*, 2000 WL 33710254 (Bkrcty. D.S. C. 2000))

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- Contingency deals with non-attorneys (e.g., accountants, financial advisors, experts)
  - Ethical, credibility issues:
    - Common law rule barring testimony of experts paid on a contingency basis (e.g., *Accrued Financial Services v. Prime Retail, Inc.*, 298 F. 3d 291 (4<sup>th</sup> Cir. 2002))
    - AICPA Ethics Rule 302 (denying contingency fees for examination of “prospective financial information”)
  - “De facto contingency”: non-percentage contingency arrangements
    - Concern: professional is hourly, not under contingency formula, but estate has no cash and professional has incentive to exaggerate testimony to produce a recovery
    - May go to credibility of witness, not admissibility (FRE 601; *In re Joy Recovery Technology Corp.*, 286 B.R. 54 (Bankr. N. D. Ill. 2002))
    - Practical concern: valuable asset, creditors otherwise denied recovery

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## Strategies to manage non-payment risk for professionals:

- Getting creditors to fund the litigation, with upside if successful (usually impractical)
- Settlement
- Consulting vs. testifying experts
- If claim is collateral, 506(c) carve-outs (caution: cannot prefer professionals over other administrative creditors; must evaluate risk of administrative insolvency)
- Selling the claim (if legally permissible)
- Abandoning the claim (caution: hidden risks if claim is against oversecured creditor and debtor’s post-abandonment pursuit of claim against secured creditor generates secured creditor legal defense fees potentially recoverable from estate under BC Section 506(b) if debtor loses)

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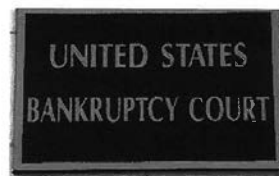
## QUESTIONS



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## SPEAKER



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(b) The trustee in a case under this title has capacity to sue and be sued.

BANKRUPTCY RULE REFERENCES: 2008, 2009, 2010, 2011, 2012, 2013, 2015 and 6009

**§ 324 Removal of trustee or examiner**

(a) The court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause.

(b) Whenever the court removes a trustee or examiner under subsection (a) in a case under this title, such trustee or examiner shall thereby be removed in all other cases under this title in which such trustee or examiner is then serving unless the court orders otherwise.

BANKRUPTCY RULE REFERENCES: 2012 and 9014

**§ 325 Effect of vacancy**

A vacancy in the office of trustee during a case does not abate any pending action or proceeding, and the successor trustee shall be substituted as a party in such action or proceeding.

BANKRUPTCY RULE REFERENCE: 2012

**§ 326 Limitation on compensation of trustee**

(a) In a case under chapter 7 or 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services, payable after the trustee renders such services, not to exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000, 5 percent on any amount in excess of \$50,000 but not in excess of \$1,000,000, and reasonable compensation not to exceed 3 percent of such moneys in excess of \$1,000,000, upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

(b) In a case under chapter 12 or 13 of this title, the court may not allow compensation for services or reimbursement of expenses of the United States trustee or of a standing trustee appointed under section 586(b) of title 28, but may allow reasonable compensation under section 330 of this title of a trustee appointed under section 1202(a) or 1302(a) of this title for the trustee's services, payable after the trustee renders such services, not to exceed five percent upon all payments under the plan.

(c) If more than one person serves as trustee in the case, the aggregate compensation of such persons for such service may not exceed the maximum compensation prescribed for a single trustee by subsection (a) or (b) of this section, as the case may be.

(d) The court may deny allowance of compensation for services or reimbursement of expenses of the trustee if the trustee failed to make diligent inquiry into facts that would permit denial of allowance under section 328(c) of this title or, with knowledge of such facts, employed a professional person under section 327 of this title.

BANKRUPTCY RULE REFERENCES: 2002, 2013, 2016, 5002 and 5004

**§ 327 Employment of professional persons**

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

BANKRUPTCY RULE REFERENCES: 2013, 2014, 2016, 5002, 5004, 6005 and 9001

**§ 328 Limitation on compensation of professional persons**

(a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.

(b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally

performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

BANKRUPTCY RULE REFERENCES: 2013, 2014, 2016, 5002, 5004, 6005 and 9001

#### **§ 329 Debtor's transactions with attorneys**

(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.

BANKRUPTCY RULE REFERENCES: 2013, 2014, 2016, 2017, 5002, 5004, 6005 and 9001

#### **§ 330 Compensation of officers**

(a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

**§ 704 Duties of trustee**

(a) The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(a)(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit

charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that—

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

(b) (1) With respect to a debtor who is an individual in a case under this chapter—

(A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and

(B) not later than 7 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.

(2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor's case should be presumed to be an abuse under section 707(b) and the product of the debtor's current monthly income, multiplied by 12 is not less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner; or

(B) in the case of a debtor in a household of 2 or more individuals, the

highest median family income of the applicable State for a family of the same number or fewer individuals.

(c) (1) In a case described in subsection (a)(10) to which subsection (a)(10) applies, the trustee shall—

(A) (i) provide written notice to the holder of the claim described in subsection (a)(10) of such claim and of the right of such holder to use the services of the State child support enforcement agency established under sections 464 and 466 of the Social Security Act for the State in which such holder resides, for assistance in collecting child support during and after the case under this title;

(ii) include in the notice provided under clause (i) the address and telephone number of such State child support enforcement agency; and

(iii) include in the notice provided under clause (i) an explanation of the rights of such holder to payment of such claim under this chapter;

(B) (i) provide written notice to such State child support enforcement agency of such claim; and

(ii) include in the notice provided under clause (i) the name, address, and telephone number of such holder; and

(C) at such time as the debtor is granted a discharge under section 727, provide written notice to such holder and to such State child support enforcement agency of—

(i) the granting of the discharge;

(ii) the last recent known address of the debtor;

(iii) the last recent known name and address of the debtor's employer; and

(iv) the name of each creditor that holds a claim that—

(I) is not discharged under paragraph (2), (4), or (14A) of section 523(a); or

(II) was reaffirmed by the debtor under section 524(c).

(2) (A) The holder of a claim described in subsection (a)(10) or the State child support enforcement agency of the State in which such holder resides may request from a creditor described in paragraph (1)(C)(iv) the last known address of the debtor.

(B) Notwithstanding any other provision of law, a creditor that makes a disclosure of a last known address of a debtor in connection with a request made under subparagraph (A) shall not be liable by reason of making such disclosure.

BANKRUPTCY RULE REFERENCES: 1017, 1019, 2001, 2002, 2008, 2009, 2010, 2011, 2013, 2014, 2015, 2015.2, 2016, 3011, 4002, 5002 and 6009

NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

CHAPTER 7 TRUSTEE CANON OF ETHICS  
ANNOTATED\*

PREAMBLE

A Chapter 7 Trustee is committed to excellence in the administration of bankruptcy cases and to carry out all duties with the utmost integrity, diligence, and professionalism. Parties are entitled to service that adheres to the highest standards of professional, moral, and ethical conduct. As a fiduciary, a Trustee occupies a significant position of trust and responsibility and is accountable to all in the bankruptcy system and the public at large.

INTEGRITY OF THE BANKRUPTCY SYSTEM

**1. A Trustee shall at all times promote and defend the integrity of the bankruptcy system.**

18 U.S.C. § 3057(a) requires a trustee to make a report to the United States Attorney when the trustee has reasonable ground to believe that a bankruptcy crime has been committed or that an investigation should be undertaken. *See In re Heinsohn*, 231 B.R. 48, 59 (Bankr. E.D. Tenn. 1999), *aff'd*, 247 B.R. 237 (E.D. Tenn. 2000) (“The directive in [18 U.S.C.] § 3057 is no less an obligation of the trustee than those that are specifically set forth in 11 U.S.C. § 704 which describe various duties of a trustee. Thus, a trustee who makes a criminal referral is simply carrying out his administrative duties[.]”). *See also In re Olympia Holding Corp.*, 305 B.R. 586, 591 (Bankr. M.D. Fla. 2004).

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\*Annotations by Hon. Steven Rhodes, Chief United States Bankruptcy Judge Eastern District of Michigan. Judge Rhodes may be contacted at 313 234 0020, [steven\\_rhodes@micb.uscourts.gov](mailto:steven_rhodes@micb.uscourts.gov).

Copyright claimed in annotations, Steven Rhodes, 2005. No copyright is claimed in the numbered Canons. ~~This document is produced only for distribution to and use by the officers and directors of the NABT for purposes of considering the adoption of the proposed Canons.~~ The annotations are largely from a forthcoming law review article on the conflicting obligations of chapter 7 trustees by Judge Rhodes.

References herein to the “Handbook” are to the Handbook for Chapter 7 Trustees published by the United States Department of Justice, July 1, 2002. References to the “1987 NABT Code” are to the NABT Code of Ethics and Standards of Personal Conduct, adopted September, 1987. References to the “2004 NABT Pledge” are to the Chapter 7 Trustees Pledge of Excellence, adopted by the NABT March, 2004.

The “standard of ‘reasonable grounds’ required to initiate an investigation is not as stringent as that required to believe a crime has in fact been committed.” *In re Parr*, 13 B.R. 1010, 1021 (E.D.N.Y. 1981).

Such reports are to be coordinated through the United States trustee. See 28 U.S.C. § 586(a)(3)(F). The procedures for complying with this obligation, including the coordination of the referral through the United States Trustee’s office, are detailed in the Handbook, Chapter 8, Section W. See also Mary Jo Heston, *The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions*, 6 Am. Bankr. Inst. L. Rev. 359 (Winter 1998); Peter Ainsworth and Robert Calo, *The U.S. Trustee Program’s Criminal Enforcement Unit*, 22 Am. Bankr. Inst. J. 30 (January 2004) (announcing the creation of the Criminal Enforcement Unit by EOUST.).

This duty is considered so important and central to the integrity of the judicial process that the referring trustee is granted absolute immunity from a subsequent civil suit for malicious prosecution. *In re Heinsohn*, *above*. Similarly, a referring trustee is also excused from any obligation of discovery or disclosure regarding the referral. *In re Stockbridge Funding Corp.*, 153 B.R. 654, 657 (Bankr. S.D.N.Y. 1993), *leave to appeal denied*, 1993 WL 205225 (“[T]he bankruptcy crimes investigation privilege shields from discovery Trustee Kittay’s and his attorney’s written and oral communications that were created or took place in connection with Kittay’s investigating potential bankruptcy crimes or reporting such potential crimes to the United States attorney or other law enforcement agencies pursuant to 18 U.S.C. § 3057(a).”).

Moreover, in fulfilling this duty, the trustee owes no duty of notice or process to the party that is subject of the referral. *In re Goodwin*, 194 B.R. 214 (B.A.P. 9th Cir. 1996).

See also Case No. 98-0004 Decision by Director Joseph Patchen (October 2, 1998), available at <http://www.usdoj.gov/ust/foia/admin-decisions/case98-0004.PDF>. (Trustee removed for repeated failure to notify the United States Trustee of criminal activity.)

The Handbook, Chapter 8, Section W.1., states, “The trustee is often in the best position to initially identify fraud or criminal activity in chapter 7 cases. When criminal activity is suspected, the trustee should notify the United States Trustee immediately.”

## **2. A Trustee shall exercise independent fiduciary judgment in the administration of any bankruptcy case.**

The cases uniformly refer to a chapter 7 trustee as a fiduciary and to the trustee’s obligations in a bankruptcy case as fiduciary obligations. See, e.g., *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 120 S.Ct. 1942, 1950 (2000); *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 349, 105 S.Ct. 1986, 1994 (1985); *Stalnaker v. DLC, Ltd.*, 376 F.3d 819, 825 (8th Cir. 2004); *In re Big Rivers Elec. Corp.*, 355 F.3d 415, 430 (6th Cir. 2004); *Dechert v. Cadle Co.*, 333 F.3d 801, 802 (7th Cir. 2003); *Hoseman v. Weinschneider*, 322 F.3d 468, 474 (7th Cir. 2003); *In re Miniscribe Corp.*, 309 F.3d 1234, 1242 (10th Cir. 2002); *Fogel v. Zell*, 221 F.3d 955, 966 (7th Cir. 2000); *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 6 (1st Cir. 1999); *In re Foremost Mfg. Co.*, 137 F.3d 919, 924 (6th Cir. 1998); *Petitioning Creditors of Melon Produce, Inc. v. Braunstein*, 112 F.3d 1232, 1240 (1st Cir. 1997); *In re Martin*, 91 F.3d 389, 394 (3d Cir. 1996); *In re Salzer*, 52 F.3d 708, 712 (7th Cir. 1995); *In re Rigden*, 795 F.2d 727, 730-1 (9th Cir. 1986); *In re JKJ Chevrolet, Inc.*, 26 F.3d 481, 485 (4th Cir. 1994); *In re L & S Industries, Inc.*, 989 F.2d 929, 934 (7th Cir. 1993); *In re Thompson*, 965 F.2d 1136, 1143 (1st

Cir. 1992); *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 883 (11th Cir. 1990); *In re Topco, Inc.*, 894 F.2d 727, 739 (5th Cir. 1990); and *In re Evangeline Refining Co.*, 890 F.2d 1312 (5th Cir. 1989).

See also Case No. 03-0004 (Decision by Director Lawrence A. Friedman, January 21, 2004), at p. 3. ("The vigorous pursuit of assets is not discretionary; it is a fiduciary and statutory obligation of a chapter 7 trustee. To adequately perform his or her duties, it is imperative that a trustee be willing to pursue assets aggressively and possess the ability to do so effectively.").

**3. A Trustee shall comply with the United States Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the local rules and orders of the districts in which they practice, the Handbook for Chapter 7 Trustees published by the Executive Office for United States Trustees, and state law as required.**

In the section captioned "Compliance," the 1987 NABT Code states, "All members (Trustees) of the National Association of Bankruptcy Trustees (NABT) shall perform their duties as defined in the United States Bankruptcy Code, the Bankruptcy Rules, and Local Rules of the districts in which they practice and shall at all times promote and defend the integrity of the bankruptcy system itself."

The 2004 NABT Pledge, paragraph 2, states that trustees should "Diligently perform his or her responsibilities according to the Bankruptcy Code and Rules, and Handbook for Chapter 7 Trustees."

**4. A Trustee shall exercise due care to preserve and protect the interests of all parties.**

*In re Hutchinson*, 132 B.R. 827, 832 (Bankr. M.D.N.C. 1991) ("A trustee also acts as a custodian of estate property in which a debtor claims an interest and, as such, has a duty to exercise reasonable diligence to preserve and protect such property.").

A trustee owes a specific duty to account to the debtor for any estate assets to which the debtor is entitled because of the debtor's exemptions. *In re Fetner*, 218 B.R. 262, 264 -5 (Bankr. D.D.C. 1997) ("It is the trustee who has the capacity to prosecute a lawsuit on behalf of the estate. While the debtor has an interest in the potential proceeds of the lawsuit, 'the trustee, as representative of the estate, nevertheless has an interest over and above the debtor's exemption.' *Wissman v. Pittsburgh Nat'l Bank*, 942 F.2d 867, 872 (4th Cir. 1991). Of course, the trustee does have a duty to reduce any recovery to cash so that the debtor may collect on his exemption.").

However, before distributing assets to a debtor, a trustee also has a duty to investigate whether exempt assets are subject to creditors' claims under 11 U.S.C. § 522(c). *In re Kaufman*, 68 B.R. 391 (Bankr. S.D.N.Y. 1986) ("[A] trustee has a duty to ascertain if an allowed exemption must be turned over to a federal or state agency which may have a superior nondischargeable tax claim under 11 U.S.C. § 523(a)(1), or turned over to a spouse or former spouse who might have a nondischargeable alimony, maintenance or support claim under 11 U.S.C. § 523(a)(5). The trustee must also ascertain if any exempt assets are subject to unavoidable liens as stated in 11 U.S.C. § 522(c)(2)."). In addition, the trustee may also set off the debtor's exemption against the

value of any claims that the estate has against the debtor. *In re Ward*, 210 B.R. 531, 538 (Bankr. E.D. Va. 1997).

The same duty arises from the estate's solvency. 11 U.S.C. § 726(a)(6) requires the trustee to distribute to the debtor any assets remaining after full distribution to other interested parties. See *In re Moon*, 258 B.R. 828 (Bankr. N.D. Fla. 2001). In appropriate circumstances, this duty may also include the obligation to consider the debtor's interest when selling estate property or when settling the estate's claims against others. *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072-73 (7th Cir. 1987).

When the debtor is a corporation, this duty is owed to shareholders. *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992 (1985) ("[T]he fiduciary duty of the trustee runs to shareholders as well as to creditors."); *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072-73 (7th Cir. 1987).

The Handbook, Chapter 6, Section B, states, "The trustee is a fiduciary charged with protecting the interests of all estate beneficiaries – namely, all classes of creditors, including those holding secured, administrative, priority, and non-priority unsecured claims, as well as the debtor's interest in exemptions and in any possible surplus property."

In addition and more generally, a trustee must recognize and respect the humanitarian purpose and spirit of bankruptcy law when administering all estate business. See *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934); *Williams v. United States Fidelity & Guar. Co.*, 236 U.S. 549, 554-55 (1915). See generally, Veryl Victoria Miles, *Assessing Modern Bankruptcy Law: an Example of Justice*, 36 Santa Clara L. Rev. 1025 (1996); Richard E. Flint, *Bankruptcy Policy: Toward a Moral Justification for Financial Rehabilitation of the Consumer Debtor*, 48 Wash. & Lee L. Rev. 515 (Spring 1991).

**5. A Trustee shall encourage debtors, creditors, attorneys, other professionals, petition preparers, and other participants in the bankruptcy process to diligently perform their bankruptcy and professional obligations.**

The Handbook, Chapter 6, Section B.6., states, "The trustee has a duty under § 704 to object to the debtor's discharge if advisable. Whenever appropriate, the trustee should examine the acts and conduct of the debtor to determine whether grounds exist for denial of discharge."

The Handbook, Chapter 6, Section C, states, "The trustee is responsible for reviewing the sufficiency of the petition, matrix (list of creditors' names and addresses) and statements and schedules."

The Handbook, Chapter 6, Section D, states, "The trustee should review this disclosure of compensation and make an independent determination whether the fee paid or agreed to be paid is excessive. If the fee is questionable, the trustee or the United States Trustee should move, pursuant to § 329(b) and FRBP 2017(a), to have the court review the fee for reasonableness."

The Handbook, Chapter 6, Section E., states, "The trustee should report potential violations of § 110 to the United States Trustee."

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The 2004 NABT Pledge, paragraph 2, states that trustees should “Encourage debtors, creditors, attorneys, and other participants in the bankruptcy process to diligently perform their respective responsibilities according to the highest standards of professional, moral and ethical conduct.”

The 2004 NABT Pledge, paragraph 7, states that trustees should “Work to ensure that debtors comply with their obligations under the Bankruptcy Code and Rules.”

### **6. A Trustee who observes conduct by debtors, creditors, attorneys, other professionals, petition preparers, or parties in interest that is fraudulent, abusive, or criminal, shall report any such conduct to the appropriate authorities.**

The Handbook, Chapter 8, Section W.1. states, “ In all cases where the trustee suspects criminal activity after questioning at the § 341(a) meeting, the trustee should immediately notify the United States Trustee so that the recording of the § 341(a) meeting may be properly secured and stored to preserve its later use in a criminal proceeding.”

The 2004 NABT Pledge, paragraph 8, states that trustees should “Promote and preserve the integrity of the bankruptcy system by helping to detect fraudulent or abusive conduct.”

## PROFESSIONAL CONDUCT AS TRUSTEE

### **7. A Trustee shall not accept or continue an appointment in a case if the Trustee is not competent to perform the required duties.**

The duty of competence is explicitly established in the bankruptcy code. Section 321(a)(1) provides, “A person may serve as trustee in a case under this title only if such person is - (1) an individual that is competent to perform the duties of trustee[.]”

Competence means “expertise and experience in the matter for which the person has been appointed or elected.” *In re Greenberg*, 189 B.R. 906, 909 n.6 (Bankr. E.D. Pa. 1995). *See also In re Lowery*, 215 B.R. 140, 141-2 (Bankr. N.D. Ohio 1997) (“[A trustee] obviously has the skill and expertise to perform [the Code’s defined duties] by virtue of being a member of the United States Trustee’s panel of trustees.”). Thus one court stated, “A trustee must be competent to perform all of those duties [the statutory duties under 11 U.S.C. § 704] with at least a modicum of proficiency. A person who is not competent to perform *all* of these duties is not eligible to be appointed trustee.” *In re McKenna*, 93 B.R. 238, 241 (Bankr. E.D. Cal. 1988). *In re Frederick Petroleum Corp.*, 92 B.R. 273, 275 (Bankr. S.D. Ohio 1988), the court noted, “Section 321 requires only that the person elected be an individual who is competent to perform the duties of trustee[.]” After reviewing the complex circumstances of the case, the court then refused to approve the elected trustee, stating, “this case is one for which a person found competent to serve as trustee must be someone possessing extensive bankruptcy expertise and experience. This is not a case in which the Court should appoint an individual unversed in the various causes of actions and issues which are peculiar to bankruptcy.” *Id.* at 275-76. *See also, In re Kam Kuo Seafood Corp.*, 42 B.R. 558, 561 (Bankr. S.D.N.Y. 1984) (“One who seeks to assume the mantle of trustee but who has evidenced a lack of understanding of the role of a fiduciary should not be confirmed

in that position over objection.”); *In re Cardinal Industries, Inc.*, 113 B.R. 378, 379 (Bankr. S.D. Ohio 1990).

In the section captioned “General Ethics,” the 1987 NABT Code states:

A Trustee shall not handle a matter which he knows or should know that he is not competent to handle without employing competent attorneys, accountants, or other professionals to assist him. A Trustee shall not inexcusably neglect a matter or responsibility entrusted to him.

A Trustee shall have pride in his professional endeavors. His obligation to act competently call for higher motivation than that arising from fear of civil liability or disciplinary penalty.

**8. A Trustee shall act with full candor to the court and shall not make any knowingly false statement.**

A trustee has a duty to be candid with the court and not to make any material misrepresentations to the court. The cases have addressed this duty in a wide range of circumstances. See, e.g., *In re Topco, Inc.*, 894 F.2d 727, 739 n.16 (5th Cir. 1990) (status of oil and gas leases in a motion to sell the leases); *In re Evangeline Refining Co.*, 890 F.2d 1312 (5th Cir. 1989) (citing *Callaghan v. Reconstruction Fin. Corp.*, 297 U.S. 464, 468, 56 S.Ct. 519, 521, 80 L.Ed. 804 (1935)) (trustee’s fee application); *In re Dinova*, 212 B.R. 437 (B.A.P. 2d Cir. 1997) (motion to dismiss for failure to appear at meeting of creditors); *In re Clinton S. Hardesty Const.*, 116 B.R. 773 (Bankr. D. Hawaii 1990) (conflict of interest regarding motion for reimbursement of expenses); *In re San Juan Hotel Corp.*, 847 F.2d 931(1st Cir. 1988) (“[J]udicial immunity [from personal liability] is contingent upon ‘candid disclosure’ to the court[.]”); *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 9 (1st Cir. 1999) (When asking the court to approve a settlement, “a trustee’s obligation to disclose requires only an honest and relatively complete accounting of what he knows, not an account that is letter perfect or born of omniscience.”); *Bennett v. Williams*, 892 F.2d 822, 823 (9th Cir. 1989) (immunity granted for candid disclosure regarding qualifications of property manager); *In re Kashani*, 190 B.R. 875, 884 (B.A.P. 9th Cir. 1995) (Candid disclosure is a condition of immunity from suit.); *In re Kam Kuo Seafood Corp.*, 42 B.R. 558, 562 (Bankr. S.D.N.Y. 1984) (“The discharge of [the trustee’s] duties requires candor before all courts and fair dealing.”). See also, *In re Granite Partners, L.P.*, 219 B.R. 22, 46 (Bankr. S.D.N.Y. 1998) (Chapter 11 trustee’s fees reduced for willful failure to disclose to the court his attorney’s conflict of interest.); *In re Micro-Time Management Systems, Inc.*, 102 B.R. 602, 608 (Bankr. E.D. Mich. 1989) (Chapter 11 trustee’s fees reduced for willful failure to disclose to the court his own conflict of interest.).

Dean Nancy Rapoport explained the practical basis for this duty in the context of attorneys that is equally applicable to trustees:

The fastest way to offend a judge or a colleague is to lie. To make matters worse, judges and colleagues have long memories. If a lawyer’s word is meaningless, that lawyer will soon find herself outside the loop, both in and out of the courtroom. No judge will give her the benefit of the doubt in a legal argument, and no colleague will agree to anything that the lawyer wants unless that agreement is in writing. Law is a system of repeat

players, and those who don't play by the rules soon have to move to another playground to survive.

Nancy B. Rapoport, *Avoiding Judicial Wrath: the Ten Commandments for Bankruptcy Practitioners*, 5 J. Bankr. L. & Prac. 615, 619 (September/October 1996) (In a section entitled "Thou Shalt Not Lie") (footnote omitted.).

The trustee is sometimes called "an officer of the court." *King v. United States*, 379 U.S. 329, 336, n.7, 85 S.Ct. 427 (1964); *In re Lehal Realty Associates*, 101 F.3d 272, 276 (2d Cir. 1996); *In re Beck Industries, Inc.*, 725 F.2d 880, 888 (2d Cir.1984); *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323, 1330 n. 8 (2d Cir. 1993); *In re Unclaimed Freight of Monroe, Inc.*, 244 B.R. 358, 369 (Bankr. W.D. La. 1999). Some courts specifically rely on that premise in asserting this duty. See, e.g., *In re Topco, Inc.*, above; *In re Evangeline Refining Co.*, above; *In re Unclaimed Freight of Monroe, Inc.*, above.

**9. A Trustee shall act with good faith and fair dealing.**

The trustee has an obligation of good faith and fair dealing in carrying out the trustee's other duties. *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996); *In re C.F. Foods, L.P.*, 2004 WL 2166270, \*5 (E.D. Pa. 2004). This duty may be focused especially in the contexts of settlement and contract. See also Restatement 2d Contract § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.")

**10. A Trustee shall perform all responsibilities diligently.**

Section 704 of the bankruptcy code provides, "The trustee shall - (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest[.]"

The Fourth Circuit has made it clear that these arguably distinct duties must be read together. "In order to close an estate expeditiously, a bankruptcy trustee must expeditiously perform each task necessary to close the estate, including the liquidation of the estate." *In re Hutchinson*, 5 F.3d 750, 753-54 (4th Cir. 1993).

The Ninth Circuit has characterized this duty as the trustee's "main duty." *In re Riverside-Linden Inv. Co.*, 925 F.2d 320, 322 (9th Cir. 1991). See also *In re Thompson*, 965 F.2d 1136, 1145 (1st Cir. 1992); *In re Bell*, 225 F.3d 203, 221-22 (2d Cir. 2000); *In re First Central Financial Corp.*, 377 F.3d 209, 216-17 (2d Cir. 2004) (quoting *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572, 105 S.Ct. 2833, 86 L.Ed.2d 447 (1985)); *American Bankers Ins. Co. of Florida v. Maness*, 101 F.3d 358, 367 (4th Cir. 1996); *In re Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir. 1995); *In re United Ins. Management, Inc.*, 14 F.3d 1380, 1386 (9th Cir. 1994); *Bennett v. William*, 892 F.2d 822, 823 (9th Cir. 1989); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461 (6th Cir.1982).

Rule 3009 of the Federal Rules of Bankruptcy Procedure similarly provides, "In a chapter 7 case, dividends to creditors shall be paid as promptly as practicable."

All of this is consistent with the Supreme Court's observation that the overriding purpose of bankruptcy liquidation is "the expeditious reduction of the debtor's property to money, for equitable distribution to creditors." *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 508, 106 S.Ct. 755, 763 (1986) (citing *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227, 50 S.Ct. 142, 143, 74 L.Ed. 382 (1930).).

The opening paragraph of the 2004 NABT Pledge states, "Chapter 7 Trustees are committed to excellence in the administration of bankruptcy cases and carry out their duties with the utmost integrity, diligence, and professionalism."

Further, paragraph 10 of the 2004 NABT Pledge states that a trustee should "[d]iligently perform his or her responsibilities according to the Bankruptcy Code and Rules, and Handbook for Chapter 7 Trustees."

Diligence is essential to preserve estate assets and maximize the distribution to creditors. *See In re Kitchen Lady, Inc.*, 144 B.R. 544 (Bankr. M.D. Fla. 1992) (Trustee's fees reduced because "the trustee has not efficiently administered this estate, and the delay has reduced the benefit he has otherwise provided to the estate."); *In re H.E. Graf, Inc.*, 125 B.R.604 (Bankr. E.D. Cal. 1991) (Trustee's fees and expenses denied in part because the trustee's delay resulted in unnecessary bond premium payments.). *See also, In re United Insurance Management, Inc.*, 14 F.3d 1380 (8th Cir. 1994) (Trustee's claim of equitable tolling of statute of limitations denied due to trustee's lack of diligence.); *In re Pelullo v. Edwards & Angell*, 1999 WL 993965, \*3 (E.D. Penn. 1999) (Dismissal of the trustee's suit was justified because, "The Bankruptcy Court certainly has no obligation to tolerate the blatant inability of the Trustee to meet its deadlines.").

28 C.F.R. § 58.6, establishing the procedures for suspension and removal of trustees, provides that grounds for action include, "(2) Failure to perform duties in a timely and consistently satisfactory manner[.]"

**11. A Trustee shall investigate, identify, and administer assets in a timely and thorough manner to maximize the value of the estate.**

Many cases refer to the trustee's "duty to maximize the value of the estate." *See, e.g., Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992 (1985); *Dechert v. Cadle Co.*, 333 F.3d 801, 803 (7th Cir. 2003) ("[The trustee] has a duty to seek to maximize the value of his claim [against a third party.]" ); *In re Central Ice Cream Co.*, 836 F.2d 1068, 1072 (7th Cir. 1987); *In re Martin*, 91 F.3d 389, 394 (3d Cir. 1996); *In re Salzer*, 52 F.3d 708, 712 (7th Cir. 1995); *In re San Joaquin Roast Beef*, 7 F.3d 1413, 1415 (9th Cir. 1993); *In re Prasil*, 215 B.R. 582, 585 (B.A.P. 8th Cir. 1998). *See also In re Vouzianas*, 259 F.3d 103, 110 (2d Cir. 2001) ("[T]he trustee is obliged to maximize the return of assets.").

However, the more accurate formulation of this duty is that the trustee is required to maximize the *distribution* of the estate. *In re Feiler*, 218 F.3d 948, 952 (9th Cir. 2000) ("[T]he trustee's duty is to maximize the assets of the bankruptcy estate to allow maximum recovery for the debtor's creditors."); *In re Luongo*, 259 F.3d 323, 340 (5th Cir. 2001) ("The trustee's duty is to maximize the estate for the purposes of distribution to the creditors."); *McCuskey v. Central Trailer Services, Ltd.*, 37 F.3d 1329, 1331 (8th Cir. 1994) (The trustee "has the duty to pursue all actions to maximize the estate for liquidation and distribution to all creditors."); *In re Esco Manuf. Co.*, 33 F.3d 509 (5th Cir. 1994) ("A trustee has a duty to preserve the estate's assets in order to

maintain the most advantageous liquidation of the estate for the interest of its creditors.”); *In re Moon*, 258 B.R. 828, 832 (Bankr. N.D. Ill. 2001) (“A bankruptcy trustee is a fiduciary of the estate’s creditors, and his duty to collect and conserve the assets of the estate and to maximize distribution to the creditors is a fiduciary obligation.”); *In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986) (“The trustee also has a fiduciary obligation to conserve the assets of the estate and to maximize distribution to creditors.”); *In re Farmer*, 786 F.2d 618, 621 (4th Cir. 1986) (“The trustee acts for all the creditors so as to maximize the distribution from the estate.”); *In re Dow Corning Corp.*, 255 B.R. 445, 523 (F.D. Mich. 2000) (“A chapter 7 trustee’s fiduciary duty goes to both the creditors and the debtor in order to maximize the value of the estate.”).

This means that the trustee is required to maximize the value of the estate and to minimize the administrative expenses of the estate. *In re Riverside-Linden Inv. Co.*, 925 F.2d 320, 322 (9th Cir. 1991); *In re 105 East Second Street Associates*, 1999 WL 179371, \*4 (S.D.N.Y. 1999) (“Every trustee is obligated to maximize distribution, and one way to do so is by conserving the estate’s assets.”); *In re Bean*, 251 B.R. 196 (E.D.N.Y. 2000); *In re Acadiana Elec. Serv., Inc.*, 66 B.R. 164, 168 (Bankr. W.D. La. 1986); *In re C. Keffas & Son Florist, Inc.*, 240 B.R. 466, 474 (Bankr. E.D.N.Y. 1999).

As the Seventh Circuit explained, the trustee’s “duty is to endeavor to maximize the value of the estate. . . which is to say the *net* assets. The performance of this duty will sometimes require [the trustee] to forbear attempting to collect a particular asset, because the costs of collection would exceed the asset’s value.” *In re Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir. 1995) (citations omitted.). The court further explained that this duty is “not merely care, diligence, and skill in the prosecution of the estate’s claims. It is also care, diligence, and skill in deciding which claims to prosecute, and how far.” *Id.*

*See also, Peoples Bank and Trust Co. v. Burns*, 95 Fed.Appx. 801, 806, 2004 WL 834776, \*4 (6th Cir. 2004) (“In exercising his discretion for the benefit of the bankruptcy estate and its creditors, the Trustee was obliged to undertake a cost-benefit analysis before moving to avoid the post-petition transfers.”); *Surf N Sun Apts., Inc. v. Dempsey*, 253 B.R. 490, 494 (M.D. Fla. 1999); *In re First Cent. Financial Corp.*, 269 B.R. 502, 518 (Bankr. E.D.N.Y. 2001); *In re Haugen*, 104 B.R. 233, 241 (Bankr. D.N.D. 1989) (“[A] trustee, cognizant of his fiduciary role, must avoid spurious lawsuits as well as those which, while having theoretical legal merit, would be unduly expensive to the estate, involve undue risk to the estate or likely result in minimal recovery for the estate.”); *In re C. Keffas & Son Florist, Inc.*, 240 B.R. 466, 475 (Bankr. E.D.N.Y. 1999) (“[T]he standard for measuring the trustee’s performance of the duty under section 704(1) is an *ex ante* model utilizing a cost-benefit analysis that must take fully into consideration the net opportunity costs that the creditors ‘in the money’ will suffer if the case remains open and no distribution is made before approval of the trustee’s final report[.]”); *In re Arnold*, 176 B.R. 13, 15 (E.D. Tex. 1995)

Although the duty to maximize the estate is an important duty, the bankruptcy code mentions it explicitly only in the context of cash deposits. Section 345 states, “A trustee in a case under this title may make such deposit or investment of the money of the estate for which such trustee serves as will yield the maximum reasonable net return on such money, taking into account the safety of such deposit or investment.” *See In re Accomazzo*, 226 B.R. 426, 429-30 (D. Ariz. 1998):

The scope of the trustee’s duty to invest funds, and whether or not that duty was breached, is not subject to a mechanical calculation. Rather, the practical considerations involved in defining a trustee’s duty to maximize the return on the bankruptcy estate’s

funds are: 1) the sum of funds subject to investment, 2) the duration of the trustee's administration of the estate, 3) the time required by the trustee to manage the transfer of funds, and 4) the frequency with which a trustee needs to access those funds. When the practical considerations weigh in favor of investing the funds, absent other compelling justifications, a trustee may be found negligent for failing to do so.

See also *U.S. Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294 (3rd Cir.1994); *Judge v. Pincus, Verlin, Hahn & Reich, P.C. (In re J & J Record Distributing Corp.)*, 84 B.R. 364, 369 (E.D. Penn. 1988); *In re Koch*, 195 B.R. 794 (Bankr. M.D. Fla. 1996); *In re Moon*, 258 B.R. 828 (Bankr. N.D. Fla. 2001); *In re H.E. Graf, Inc.*, 125 B.R.604 (Bankr. E.D. Cal. 1991) (Trustee's fees and expenses denied in part because trustee failed to invest estate funds in interest bearing account.).

The trustee's duty to investigate the financial affairs of the debtor is specifically identified in section 704(4), but fulfilling this duty is clearly only a means to the end of maximizing the estate. *Commodity Futures Trading Com'n v. Weintraub*, 471 U.S. 343, 352, 105 S.Ct. 1986, 1992 (1985); *Mele v. First Colony Life Ins., Co.*, 127 B.R. 82, 86 (D.D.C. 1991); *In re Island Amusement, Inc.*, 74 B.R. 18, 20 (Bankr. D.P.R. 1987) (The trustee's failure "to request and examine the debtor's books and records in fifteen months is a violation of his duties under Section 704(4).").

Thus, in *Commodity Futures Trading Com'n v. Weintraub*, the Supreme Court observed, "In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors." *Id.*

Similarly, the trustee's duty to review and object to the debtor's exemptions if appropriate is also a means to the end of maximizing the distribution of the estate. *In re Bell*, 225 F.3d 203, 221 (2d Cir. 2000) ("The duty to review and, if necessary object to, claimed exemptions is nowhere specifically mentioned--although it is subsumed within the general duty to 'investigate the financial affairs of the debtor.'"); *In re Edmonston*, 107 F.3d 74, 76 -77 (1st Cir. 1997) ("As 'the representative of the estate,' 11 U.S.C. § 323(a) (emphasis added), the chapter 7 trustee is under a duty to 'collect and reduce to money the property of the estate.' *Id.* § 704(1). . . Thus, the statutory duty to administer nonexempt property of the chapter 7 estate implicitly empowers the trustee to screen and oppose exemption claims which may not be allowable.") (Citations and footnotes omitted.); *In re Cheatham*, 309 B.R. 631, 633 (Bankr. M.D. Ala. 2004) ("It is also the duty of the Trustee to examine the debtor's claim of exemption and, when appropriate, make an objection."); *In re Atlas*, 183 B.R. 978, 980 (Bankr. S.D. Fla. 1995) ("A trustee's authority to object to exemptions listed on a debtor's schedules is clear under the Bankruptcy Code, and is integral to every trustee's official duty to marshal and liquidate property of a bankruptcy estate. . . The trustee must, where necessary, initiate actions, including objections to claimed exemptions, to determine whether scheduled assets are property of the estate or are properly claimed as exempt.") (citations omitted.); *In re Wilson*, 4 B.R. 605, 606 (Bankr. E.D. Wash. 1980) ("One of the primary duties of a Chapter 7 trustee (11 U.S.C. § 704(1)) is to collect and reduce to cash 'property of the estate' (11 U.S.C. § 541) for its eventual distribution, by means of a dividend, to those entitled to receive it. 11 U.S.C. § 726. To facilitate the trustee in collecting property of the estate Congress has vested him with certain powers. . . Another important duty of the trustee in a Chapter 7 case is to examine the debtor's claim of exemptions and file an objection if grounds exist . . . If the trustee is successful in his objection the property claimed exempt does not pass to the debtor but remains property of the estate for eventual distribution.").

The Handbook, Chapter 2, Section D, states that a trustee's performance review takes into account, "5. professional costs incurred by the trustee and maximization of funds distributed to creditors; . . . 8. the trustee's judgment in determining whether to administer assets[.]"

The Handbook, Chapter 6, Section A, states, "A chapter 7 case should be administered to maximize and expedite dividends to creditors and facilitate a fresh start for the debtors entitled to a discharge."

The 2004 NABT Pledge, paragraph 1, states that a trustee should "Identify and administer assets in a timely and comprehensive manner to produce maximum benefits for creditors and relief to debtors."

**12. A Trustee shall conduct a meaningful meeting of creditors with a decorum that conveys the significance of the proceedings, dignity and respect for the participants, and sensitivity to the diversity of the participants.**

28 C.F.R. § 58.6(a) provides that a trustee may be removed or suspended for, "(10) Failure to attend in person or appropriately conduct the 11 U.S.C. 341(a) meeting of creditors[.]"

The Handbook, Chapter 2, Section D, states that a trustee's performance review takes into account, "3. the trustee's performance in § 341(a) meetings . . ."

The Handbook, Chapter 7, states, "The trustee may not delegate the duty to preside at the § 341(a) meeting."

The Handbook, Chapter 7, states, "The trustee must conduct the meeting in an orderly, yet flexible manner, and to provide for questioning of the debtor as to matters affecting the debtor's financial affairs and conduct. The trustee's demeanor toward all parties should be appropriate and professional."

The 2004 NABT Pledge, paragraph 2, states that trustees should "Conduct meaningful § 341 (a) meetings of creditors and maintain a professional atmosphere that conveys the significance of the proceedings."

**13. A Trustee shall exercise due care regarding property in the Trustee's control.**

In a case involving a bankruptcy trustee, the Supreme Court stated, "By the common law every trustee or receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate unless relieved of such duty by agreement, statute, or order of court." *U.S. ex rel. Willoughby v. Howard*, 302 U.S. 445, 450, 58 S.Ct. 309, 312 (1938) (footnote omitted.).

On the other hand one court of appeals characterized this duty as "statutorily inspired." *In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 6 (1st Cir. 1999). The statutory inspiration identified by the court was 11 U.S.C. § 701(4), which requires the trustee to "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest."

The requirement is to “exercise that degree of care required of an ordinarily prudent person serving in such capacity, taking into consideration the discretion allowed.” *Sherr v. Winkler*, 552 F.2d 1367, 1375 (10th Cir 1977). See also *In re Rigden*, 795 F.2d 727, 727-30 (9th Cir.1986); *In re Alpern*, 246 B.R. 567, 577 (Bankr. N.D. Ill. 2001) (“Upon taking possession, the trustee owes a duty to the debtor to exercise ordinary care to protect the property.”) (citing *In re Reich*, 54 B.R. 995, 1003 (Bankr. E.D. Mich. 1985).); *In re Bowman*, 181 B.R. 836 (Bankr. D. Md. 1995); *In re Barrows*, 171 B.R. 455, 457 (Bankr. D.N.H. 1994). Another court stated:

The standard of care applicable to bankruptcy trustees in their official capacity, both as to affirmative and negative duties, is the exercise of due care, diligence, and skill. These are to be evaluated in the light of the information that was, or reasonably should have been, available at the time of the challenged conduct. . . The measure is that of ‘an ordinarily prudent [person] in the conduct of his private affairs under similar circumstances and with a similar object in view.’”

*In re NWFx, Inc.*, 267 B.R. 118, 159 (Bankr. W.D. Ark. 2001) (citing *In re Haugen Const. Serv., Inc.*, 104 B.R. 233, 234 (Bankr. D.N.D.), *aff’d* 876 F.2d 681 (8th Cir. 1989); *United States v. Aldrich (In re Rigden)*, 795 F.2d 727, 730-31 (9th Cir. 1986), cited in *Armstrong v. Harris (In re Harris)*, 886 F.2d 1011, 1013 (8th Cir. 1989) and quoting *In re Haugen Const. Serv., Inc.*, 104 B.R. at 240.); *In re Rollins*, 175 B.R. 69, 74 (Bankr. E.D. Cal. 1994); *In re Dalen*, 259 B.R. 586, 604 (Bankr. W.D. Mich. 2001); *In re Kinross Mfg. Corp.*, 174 B.R. 702, 705 (Bankr. W.D. Mich. 1994); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451, 461 (6th Cir.1982) (quoting *In re Johnson*, 518 F.2d 246, 251 (10th Cir.1975); *In re Lundborg*, 110 B.R. 106, 109 (Bankr. D. Conn. 1990).

The Handbook, Chapter 6, Section B.2., states, “The trustee has the duty and responsibility to insure and safeguard all estate property and property that comes into the trustee’s hands by virtue of his appointment.”

**14. A Trustee shall make decisions that are in the best interests of the estate.**

The 2004 NABT Pledge, paragraph 2, states that trustees should “Act as a fiduciary who administers assets and makes decisions that are in the best interests of the estate.”

**15. A Trustee shall not have ex parte contacts with the court except as permitted by law.**

Bankruptcy Rule 9003(a) provides, “Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.”

**16. A Trustee may have direct contact with a party represented by an attorney without consent of the attorney, unless prohibited by law.**

Model Rule of Professional Conduct 4.2 (American Bar Association 2002) states, "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 3 states, "The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule." Comment 4 states, "Parties to a matter may communicate directly with each other[.]"

Formal Opinion 95-396 of The American Bar Association Committee on Ethics and Professional Responsibility (July 28, 1995) states, "Initiation of the contact by the represented person does not remove the bar."

Opinion 1989-110 of the California State Bar, Standing Committee on Professional Responsibility and Conduct states, "Although a trustee may be an attorney, his or her role as trustee is as the representative of the estate of the debtor - i.e., a party to the proceeding who has the capacity to sue and be sued. Hence, under the clear language of both the rule and Discussion, the Trustee, as a party, is permitted to communicate directly with other parties to the proceeding."

#### DISINTERESTEDNESS AND CONFLICTS

**17. A Trustee shall promptly resign from any case in which the Trustee is an insider, creditor, or an equity security holder of the debtor, or in which the Trustee has an interest materially adverse to the bankruptcy estate.**

The Supreme Court has defined a bankruptcy trustee's duty of loyalty as the duty to forebear from "all opportunities to advance self-interest." *Mosser v. Darrow*, 341 U.S. 267, 271, 71 S.Ct. 680 (1951). The Restatement (Third) of Trusts §170(1) is to the same effect, "The trustee is under a duty to administer the trust solely in the interest of the beneficiaries." See also Uniform Trust Code, § 802(a) (National Conference of Commissioners on Uniform State Laws (July, 2002)). See also, G. Bogert, *Law of Trusts and Trustees* §§ 543 (rev.2d ed.2003).

As Justice Jackson proclaimed in *Mosser v. Darrow*, "Equity tolerates in bankruptcy trustees no interest adverse to the trust." *Id.* 341 U.S. at 271, 71 S.Ct. at 682.

The Tenth Circuit stated that a bankruptcy trustee "must completely efface self-interest. His loyalty and devotion to his trust must be unstinted. Its well-being must always be his first consideration. These principles are inveterate and unbending." *Wootten v. Wootten* 151 F.2d 147, 149-50 (10th Cir. 1945) (citing *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546, (1928); *Johnston v. Loose*, 201 Mich. 259, 167 N.W. 1021, 1023 (1918); *Ball v. Hopkins*, 268 Mass. 260, 167 N.E. 338, 341. (1929)).

The Second Circuit agreed, stating, "[T]he law of trusts requires that the trustee, in his role as trustee, be disinterested and prohibits him from obtaining interests adverse to the estate. As with any trustee, a bankruptcy trustee owes a duty of loyalty to the beneficiaries of the trust." *In re Palm Coast, Matanza Shores Ltd. Partnership*, 101 F.3d 253, 258 (2d Cir. 1996) (Citing Austin

W. Scott, *Scott on Trusts*, §§ 170 (3rd ed. 1967). See also *In re Massaro*, 235 B.R. 757 (Bankr. D.N.J. 1999) (citing *Scott On Trusts* §§ 170 (4th ed.1987)).

The First Circuit characterized the duty of loyalty as “the most fundamental duty owed.” *In re Baylis*, 313 F.3d 9, 20 (1st Cir. 2002) (citing 2A A. Scott, *The Law of Trusts* §§ 170 (W.F. Fratcher ed., 4th ed. 2001)).

The bankruptcy code addresses this duty in its requirement that the trustee be “disinterested.” 11 U.S.C. § 701(a)(1) is explicit in its requirement that an *appointed* trustee must be disinterested. *In re BH & P Inc.*, 949 F.2d 1300, 1310 (3d Cir. 1991) (“An interim trustee appointed by the United States Trustee must, under the terms of the Bankruptcy Code, be a ‘disinterested person.’”).

Section 702 relating to elected trustees contains no such explicit requirement; however, because of the importance of the duty of loyalty, the requirement is nonetheless imposed. *In re Greenberg*, 189 B.R. 906, 911 (Bankr. E.D. Pa. 1995) (“[A] Chapter 7 trustee, without regard to how he gained his office, cannot serve with a disabling conflict of interest. Nevertheless, after balancing the harms and benefits of the trustee’s continued service, the court declined to find cause to remove the trustee.”). *But see In re Colony Press, Inc.*, 83 B.R. 862, 867 n. 3 (Bankr. D. Mass. 1988) (dicta).

To be disinterested, a trustee must not be a creditor, an equity security holder or an insider of the debtor. 11 U.S.C. § 101(14)(A).

The trustee must also not have an interest materially adverse to the estate by reason of any relationship to, connection with, or interest in the debtor, or for any other reason. 11 U.S.C. § 101(14)(E). Thus a trustee is not disinterested if the trustee has any “interest or relationship that would even faintly color the independence and impartial attitude required by the Code.” *In re BH & P Inc.*, 949 F.2d 1300, 1308 (3d Cir.1991); *In re Crivello*, 134 F.3d 831 (7th Cir. 1998); *In re Paolino*, 80 B.R. 341 (Bankr. E.D. Pa. 1987) (Trustee who became affiliated with law firm representing defendant in suit brought by debtor was no longer disinterested.).

The Handbook, Chapter 5, Section C, offers this non-exclusive list of actual or potential conflicts:

1. the trustee represents or has represented the debtor, a creditor, an equity security holder, or an insider in other matters;
2. the debtor or creditor is an employee of the trustee or of a professional providing services to the trustee in the case;
3. the trustee is appointed to serve as trustee for a corporate debtor and for a debtor who is an insider, officer, director or guarantor of the corporate debtor;
4. the estate has a potential cause of action against the trustee, an employee of the trustee, a client of the trustee or the trustee’s firm or other person or entity with whom the trustee has a business or family relationship;
5. the trustee was an officer, director, or employee of the debtor or of the debtor’s investment banker within two years before the commencement of the case;
6. the trustee is a creditor or an equity security holder of the debtor; or

7. the trustee had been an investment banker for a security of the debtor within three years before the commencement of the case or the trustee has represented such an investment banker in connection with the offer, sale, or issuance of a security of the debtor.

The Handbook, Chapter 5, Section C, address the issue in the context of jointly administered cases, "FRBP 2008 allows the appointment of one trustee in jointly administered cases. The existence of interdebtor claims in jointly administered cases must be examined closely because such claims do not automatically disqualify the trustee. See, e.g., *In re BH & P Inc.*, 949 F.2d 1300 (3rd Cir. 1991). However, these cases should be monitored because conflicts can develop and require the appointment of separate trustees."

**18. A Trustee shall not accept or continue an appointment that may adversely affect representation of a bankruptcy estate without resolving all adverse effects.**

In the section captioned "Conflict of Interest," the 1987 NABT Code states, "A Trustee may not serve in any case in which his interests, the interests of other bankrupt estates in which he is the Trustee, his personal interests, or those of his clients conflict with the best interests of the bankruptcy estate."

The Handbook, Chapter 5, Section C, states, "If a trustee discovers a conflict of interest or a lack of disinterestedness after accepting the appointment, the trustee should immediately file a notice of resignation in the case. Conflict waivers by either the debtor or creditor are not effective to obviate the trustee's duty to resign."

**19. A Trustee shall not sell or transfer estate property to the Trustee, the Trustee's employees, or any parties with whom the Trustee has a connection that might affect or appear to reasonably affect the ability of the Trustee to perform responsibilities in an unbiased manner.**

In the section captioned "Self-Dealing," the 1987 NABT Code states, "Property held by a Trustee as fiduciary shall not be sold or transferred, by loan or otherwise, to the Trustee or its directors, officers, or employees, or to individuals with whom there exists such a connection or organization in which there exists such an interest, as might affect the exercise of the best judgment of the Trustee in selling or transferring such property."

**20. A trustee shall only invest funds of a bankruptcy estate in a financial institution approved by the United States Trustee, but not in any financial institution or other investment in which the Trustee has any ownership interest or control.**

See generally, the Handbook, Chapter 9, Section A.

In the section captioned "Self-Dealing," the 1987 NABT Code states, "Trustees shall not invest funds of a bankruptcy estate in any financial institution, stock, bond, or other investment in which

the Trustee exercises any ownership interest or control, except in a federally insured bank approved by the bankruptcy court.”

#### ADMINISTRATION OF OFFICE AND SUPERVISION OF EMPLOYEES

**21. A Trustee shall maintain and actively participate in an appropriate and comprehensive system of office operations and internal accounting to track case administration and progress, account for all estate property, and generate accurate reports.**

The 2004 NABT Pledge (March, 2004), paragraph 4, states that trustees should “Actively participate in every facet of the trustee operation and maintain efficient systems that accurately track case administration, chart the progress of cases, account for all property that comes into the trustee’s possession, and generate accurate reports.”

The 2004 NABT Pledge, paragraph 5, states that trustees should “Maintain an appropriate and reasonably comprehensive system of internal controls over accounting and office operations to safeguard estate assets and trust funds.”

Section 704(2) of the bankruptcy code provides that the trustee shall “be accountable for all property received[.]” See also Case No. 03-0002 (Decision of Director Lawrence A. Friedman, January 21, 2004, available at <http://www.usdoj.gov/ust/foia/admin-decisions/casc03-0002.pdf>) (A trustee must “adhere to the high accounting and cash management standards that are expected of a fiduciary. Cash management and accounting are core trustee responsibilities.”).

This duty encompasses both accountability for the preservation of the assets and accountability for the distribution of the assets. The first duty is to maintain the assets, *In re Chicago Art Glass, Inc.*, 155 B.R. 180, 187 (Bankr. N.D. Ill. 1993) (The duty is “to carefully preserve the assets in his possession, upon pain of surcharge, from deterioration or dissipation.”).

One treatise asserts this expanded description of this duty:

This duty is a statement of responsibility and liability; it means that the trustee must make a legally acceptable disposition of each item of property received. . . . If the trustee gives up property to another, it must be in recognition of a legally enforceable right of a higher rank than that of the trustee. If property is sold, it must be sold for a reasonable price under all of the circumstances. . . . No item may have vanished or have been put beyond the trustee’s control to dispose of it. If any item of property clearly belongs to the estate that has little or no value and benefit to the estate, it should be abandoned as burdensome to the estate under the provisions of Code §§ 554(a), rather than leaving its disposition to inference.

The ability of the trustee to meet the duty of accountability to the satisfaction of parties in interest or the Court requires that good records be kept. Without exception, money received should be deposited in a bank account. Duplicate deposit slips should be made and retained. A cash receipts list should be kept, giving dates, sources, descriptions of transactions, and amounts. All paid checks drawn by the trustee and bank statements should be retained.

The trustee should keep a record of makes, models, and serial numbers or vehicle identification numbers of manufactured products. Appropriate identification listings should be made with respect to other property.

All disbursements of funds should be by bank check, except in rare circumstances. If the trustee must make an out-of-pocket cash payment, a receipt should be obtained.

If property of the estate is surrendered to a third party or placed in the hands of a third party for storage or repair, a receipt for it should be obtained.

Norton Bankruptcy Law and Practice (2d Ed. 2004) §§ 65:9.

The second duty is to properly apply those assets to creditors' claims. *In re Wade*, 991 F.2d 402, 406 (7th Cir. 1993) ("A trustee must 'fully administer' creditors' claims against the bankrupt estate. The trustee controls the assets of the estate, which will be applied to satisfy these claims to the extent assets exist.").

This accountability is a financial accountability, and it extends not only to losses incurred directly by the estate but also to profits the trustee earns at the expense of the estate. *Mosser v. Darrow*, 341 U.S. 267, 71 S.Ct. 680, 95 L.Ed. 927 (1951); *In re San Juan Hotel Corp.*, 847 F.2d 931, 936-38 (1st Cir.1988); *In re Ferrante*, 51 F.3d 1473,1477-78 (9th Cir. 1995); *In re E Z Feed Cube Co., Ltd.*, 115 B.R. 684, 689 (Bankr. D. Or. 1990) ("When a trustee intentionally or negligently makes improper disbursements from the estate, his accounts are to be surcharged and he is personally liable to reimburse the estate for the amounts so disbursed."). See also *In re Harp*, 66 B.R. 740, 755-56 (Bankr. N.D. Ala. 1993); *In re Weber*, 99 B.R. 1001, 1013 (Bankr. D. Utah 1989). The duty to account is also a continuing duty and any breach is a continuing breach. *In re Foodsource, Inc.*, 130 B.R. 549, 563 (N.D. Cal. 1991).

The importance of this duty is underscored in section 322(a), which requires the trustee to file "a bond in favor of the United States conditioned on the faithful performance of such official duties." Effectively, the bond serves as collateral for this obligation. *In re Louis Rosenberg Auto Parts, Inc.*, 209 B.R. 668, 674 n. 11 (Bankr. W.D. Pa. 1997).

This duty of accountability is enforced through the reporting requirement of section 704(9), which requires the trustee to "make a final report and file a final account of the administration of the estate with the court and with the United States trustee." See also, Rule 5009, F.R.Bankr.P., which states, "If in a chapter 7 . . . case the trustee has filed a final report and final account *and has certified that the estate has been fully administered*, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered." (Emphasis added.)

The final report and final account serves two purposes. The first is "to insure that trustees disclose and [are] held accountable for their handling of the estate." *In re San Juan Hotel Corp.*, 847 F.2d 931, 939 (1st Cir. 1988).

Second, when the trustee makes this filing and is discharged, the case is closed. Section 350(a) states, "After an estate is fully administered and the court has discharged the trustee, the court shall close the case." 11 U.S.C. § 350(a). See *In re Wade*, *id.* at 407. ("Chapter 7 cases come to an end in a final report indicating the distribution of proceeds from liquidated assets.").

The Handbook, Chapter 8, Section T, states, "To help ensure that case administration and closure are not unduly delayed, the trustee must implement a system to review the progress of each case and must be able to demonstrate that this review is performed on a regular basis. It is recommended that the review be conducted monthly, but it must be conducted not less than quarterly. Evidence of the review must be preserved and made available for review by the United States Trustee, upon request, or during the course of an audit or review of the trustee's operation."

**22. A Trustee shall have a system in place to timely respond to reasonable inquiries on behalf of debtors, creditors, attorneys, the court, and other interested persons.**

See 11 U.S.C. § 704(7).

18 U.S.C. § 154 provides, "A person who, being a custodian, trustee, marshal, or other officer of the court— . . . (2) knowingly refuses to permit a reasonable opportunity for the inspection by parties in interest of the documents and accounts relating to the affairs of estates in the person's charge by parties when directed by the court to do so; . . . shall be fined under this title and shall forfeit the person's office, which shall thereupon become vacant."

The Handbook, Chapter 6, Section B.7., states, "The trustee should reply in an expeditious manner to inquiries from creditors and other parties in interest."

**23. A Trustee shall have a system in place to screen new cases for lack of disinterestedness and to identify circumstances that arise during the case creating a lack of disinterestedness.**

Bankruptcy Rule 2008 provides:

The United States trustee shall immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee's bond. A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as trustee in a chapter 7, chapter 12, or chapter 13 case that does not notify the court and the United States trustee in writing of rejection of the office within five days after receipt of notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court and the United States trustee in writing of acceptance of the office within five days after receipt of notice of selection or shall be deemed to have rejected the office.

The Handbook, Chapter 5, Section C, states, "A trustee must be knowledgeable of § 701(a)(1), § 101(14), and § 101(31), as well as any other applicable law or rules, and must decline any appointment in which the trustee has a conflict of interest or lacks disinterestedness. A trustee should have in place a procedure to screen new cases for possible conflicts of interest or lack of disinterestedness upon being appointed."

See also Case No. 98-0004, Decision by Director Joseph Patchen, October 2, 1998, available at <http://www.usdoj.gov/ust/foia/admin-decisions/case98-0004.PDF>. (Trustee removed for repeated failure to resign promptly in two cases.)

**24. A Trustee shall timely file all required reports and shall cooperate with required government audits and examinations.**

28 C.F.R. § 58.3, establishing the qualifications for membership on the panel of trustees, states, "(b) The qualifications for membership on the panel are as follows: . . . (7) Be willing to provide reports as required by the United States Trustee."

28 C.F.R. § 58.6(a) provides that a trustee may be removed or suspended for "(8) Failure to file timely, accurate reports, including interim reports, final reports, and final accounts[.]"

The Handbook, Chapter 9, Section B states, "To properly perform the trustee's duties and effectively administer an asset case, the trustee must establish an appropriate accounting system and maintain financial records on a contemporaneous basis for each estate."

The Handbook, Chapter 2, Section D, states that a trustee's performance review takes into account, "7. the trustee's cooperation in furnishing reports and requested information to the United States Trustee[.]"

The Handbook, Chapter 9, Section E states, "The trustee will be advised at least two weeks in advance of when the audit, examination, or review will be conducted. The trustee must have all records available and make every effort to ensure that all appropriate employees are on hand."

**25. A Trustee shall supervise the work of employees and be responsible for their work product.**

A trustee is permitted and even encouraged to delegate duties to a paraprofessional. *In re Jenkins*, 188 B.R. 416, 421 (B.A.P. 9th Cir. 1995), *aff'd*, 130 F.3d 1335 (9th Cir. 1997) ("Congress intended to encourage trustees to delegate their duties where such delegation would lower costs of administration."). See also *In re Orthopaedic Technology, Inc.*, 97 B.R.596 (Bankr. D. Colo. 1989). ("[T]rustees should be encouraged to use paraprofessionals wherever practical[.]").

The trustee must supervise and be responsible for that work. "The trustee shall oversee the entire trustee operation and shall actively supervise employees and independent contractors in the performance of their cash management and accounting duties." Handbook, Chapter 9, Section D1a. See also *In re Abraham*, 163 B.R. 772, 779 (Bankr. W.D. Tex. 1004) ("The trustee can *not* delegate the ultimate responsibility or the decisionmaking that is part and parcel of her office.") (emphasis in original).

In the section captioned, "Integrity and Competence," the 1987 NABT Code states, "A Trustee often delegates tasks to clerks, secretaries, and other lay person. Such delegation is proper if the Trustee maintains a direct relationship with the debtor [sic], supervises the delegated work, and has complete responsibility for the work product."

28 C.F.R. § 156(a) provides that a trustee may be removed or suspended for “(7) Failure to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases[.]”

See also Case No. 02-0005, Decision by Director Lawrence A. Friedman (February 28, 2003) available at <http://www.usdoj.gov/ust/foia/admin-decisions/case02-0005.pdf>. (The trustee was removed from the panel of trustees in part for failing to properly supervise an associate. The associate had suggested to a software vendor and to several real estate brokers financial arrangements that the U.S. Trustee characterized as “kickbacks.”)

### EMPLOYMENT OF PROFESSIONALS

#### **26. A Trustee shall employ competent professionals who are disinterested, unless otherwise authorized by law.**

See 11 U.S.C. § 327(a); *In re BH & P, Inc.*, 949 F.2d 1300, 1314 n.14 (3d Cir. 1991); *In re 22 Acquisition Corp.*, 2004 WL 870813 at \*3 (E.D. Pa. 2004); *In re Woodworkers Warehouse, Inc.*, 303 B.R. 740, 742 (Bankr. D. Del 2004); *In re Creative Restaurant Management, Inc.*, 139 B.R. 902, 909 (Bankr. W.D. Mo. 1992); *In re Doors & More, Inc.*, 126 B.R. 43 (Bankr. E.D. Mich. 1991); *In re Vettori*, 217 B.R. 242 (Bankr. N.D. Ill. 1998).

#### **27. A Trustee shall supervise the work of employed professionals.**

Section 327(a) permits the trustee, with court approval, to employ professionals “to represent or assist the trustee in carrying out the trustee’s duties under this title.” This, however, does not permit a trustee to delegate to a professional the trustee’s duties under section 704. *In re Holub*, 129 B.R. 293, 296 (Bankr. M.D. Fla. 1991), adopted this standard:

In general, professional time is limited to those tasks performed while representing the trustee in the prosecution of contested matters and adversary proceedings, attendance at court hearings in the capacity of attorney or other professional when the trustee has an interest, the preparation of professional related applications, and the performance of other specialized services that cannot be performed practically or lawfully by the trustee without engaging the services of a professional.

See also *In re J.W. Knapp Co.*, 930 F.2d 386, 387 (4th Cir. 1991) (Services for “computing distribution, reviewing checks, preparing checks and reviewing and organizing returned checks” are trustee services and are not compensable to the trustee’s attorney.); *In re Island Amusement, Inc.*, 74 B.R. 18, 20 (Bankr. D.P.R. 1987); *In re Kitchen Lady, Inc.*, 144 B.R. 544, 547 (Bankr. M.D. Fla. 1992) (Fees for attorney for trustee reduce because services included “basic negotiation for recovery of assets; the initial review of the debtor’s financial affairs; and technical objections to claims. Those services are clearly within the scope of the duty of the trustee as opposed to the services required of an attorney for the trustee.”); *In re Perkins*, 245 B.R. 835 (Bankr. D. Mont. 2000) (holding that filing a routing objection to a duplicative claim is trustee service, not legal service.); *In re Vlachos*, 6B.R. 473 (Bankr. S.D. Ohio 1986). *But see In re Howard Love Pipeline*

*Supply Co.*, 253 B.R. 781 (Bankr. E.D. Tex. 2000) (holding that prosecuting an objection to a claim is the practice of law for which the trustee is authorized to retain an attorney).

Nor may a trustee delegate essential decision making responsibility. *In re Computer Learning Centers, Inc.*, 285 B.R. 191, 207 (Bankr. E.D. Va. 2002) (“[T]he trustee must remain in control of the administration of the case and may not delegate essential decision-making responsibility.”)

The Handbook, Chapter 8, Section M.4., states:

The trustee is a fiduciary and representative of the estate. Trustees cannot avoid or abdicate their responsibilities by employing professionals and delegating to them certain tasks. It is critical that the trustee oversees the work performed by professionals and exercises appropriate business judgment on all key decisions. The trustee must actively supervise estate professionals to ensure prompt and appropriate execution of duties, compliance with required procedures and reasonable and necessary fees and expenses.

The Handbook, Chapter 8, Section N.4., states, “The trustee has a fiduciary obligation to review professional fee applications and to object when appropriate.”

28 C.F.R. § 156(a) provides that a trustee may be removed or suspended for “(7) Failure to adequately monitor the work of professionals or others employed by the trustee to assist in the administration of cases[.]”

## GIFTS, SPEAKING, AND CONTRIBUTIONS

### **28. A Trustee shall not receive anything of value if it is intended or offered to influence the official actions of the Trustee in the performance of the Trustee’s duties and responsibilities.**

18 U.S.C. § 152 provides, “A person who - (6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11; . . . shall be fined under this title, imprisoned not more than 5 years, or both.”

The Handbook, Chapter 5, Section D, states, “Neither a trustee nor any employee of the trustee may solicit or accept any gratuity, gift, or other remuneration or thing of value from any person, if it is intended or offered to influence the official actions of the trustee in the performance of the trustee’s duties and responsibilities.”

There is an important qualification on this prohibition. The Handbook, Chapter 9, Section c.3., states, “Some banking institutions have contractual arrangements with computer service providers whereby the bank provides certain computer hardware and software to the chapter 7 trustee for use free of charge in consideration for depositing bankruptcy estate funds with the bank. The trustee’s use of computer equipment is not prohibited provided it is reasonable and necessary for, and devoted exclusively to, the trustee’s administration of chapter 7 cases. In addition, selection of a banking institution or computer service provider should be based upon customary business

considerations, such as competitive interest rate, quality and service, and not on premiums or personal gain.”

**29. A Trustee shall not give anything greater than a nominal value to a Judge, employee of the U.S. Trustee program, or employee of the United States Courts.**

In the section captioned, “Integrity and Competence,” the 1987 NABT Code states, “A Trustee shall not give or lend anything of value to a Judge, official, or employee of the United States Courts.”

**30. A Trustee may accept reimbursement of expenses and a reasonable honorarium for speaking at educational seminars or conferences.**

**31. A Trustee may not solicit for charitable or political purposes in any manner resulting in the reasonable perception that it is intended to or would have the effect of influencing the official actions of the Trustee.**

**PERSONAL CONDUCT**

**32. A Trustee shall demonstrate integrity and good moral character.**

In *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), Chief Justice Cardozo stated, “A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior.”

28 C.F.R. § 58.3(b)(1), which establishes the qualifications for appointment to the panel of chapter 7 trustees, states, “The qualifications for membership on the panel are as follows: . . . (1) Possess integrity and good moral character[.]”

The director of the EOUST has stated:

Because chapter 7 trustees are held to very high standards of conduct, they must maintain a reputation that is above reproach. Thus, in addition to adhering to all the requirements for case administration that are prescribed by the Bankruptcy Code, the Bankruptcy Rules, and local rules, 28 C.F.R. § 58.6(a)(3), trustees must conduct themselves in a manner that does not cast doubt on their honesty, integrity, or ability to faithfully administer bankruptcy cases.

Case No. 02-007, Decision by Director Lawrence A. Friedman (November 15, 2002), available at <http://www.usdoj.gov/ust/foia/admin-decisions/case02-0007.pdf>. See also Case No. 02-0007 (“[I]t is important that trustees possess integrity and good moral character.”); Case No. 02-0005 (“They must conduct themselves in a manner that does not cast doubt on their integrity, or ability

to faithfully administer bankruptcy cases.”); Case No. 97-A-1, Decision by Director Kevyn D. Orr, August 21, 1997, available at <http://www.usdoj.gov/ust/foia/admin-decisions/case97-A-1.pdf>.

**33. A Trustee shall display proper temperament.**

The regulations of the Department of Justice require the trustee to be courteous to all parties. 28 C.F.R. § 58.3(b) states, “The qualifications for membership on the panel are as follows. . . (3) Be courteous and accessible to all parties with reasonable inquiries or comments about a case for which such individual is serving as private trustee[.]” See *Brooks v. United States*, 127 F.3d 1192, 1194 n. 1 (9th Cir. 1997).

The 2004 NABT Pledge, paragraph 6, states that a trustee should “Always be courteous in dealings with debtors, creditors, and other parties of interest.” See also *In re McLean*, 6 B.R. 327, 328 (Bankr. E.D. Va. 1980).

The trustee must also display proper temperament. 28 C.F.R. § 58.6(a) states that the reasons for terminating or suspending the assignment of cases to a panel trustee include, “Failure to display proper temperament in dealing with judges, clerks, attorneys, creditors, debtors, the United States Trustee and the general public[.]”

As one court observed, “Civility and cooperation is necessary for the system to work[.]” *In re Farmer*, 237 B.R. 210, 213 (Bankr. M.D. Fla. 1999).

The Handbook, Chapter 2, Section D, states that a trustee’s performance review takes into account, “9. the trustee’s demeanor in administering his or her cases, including dealing with the debtor’s creditors, parties in interest, and other parties pertinent to the trustee performing his or her duties.”

The Handbook, Chapter 7, Section A, states (in the context of a meeting of creditors), “The trustee’s demeanor toward all parties should be appropriate and professional.”

**34. A Trustee shall not violate a disciplinary rule to which the Trustee is subject.**

A trustee has a duty to comply with the standards of conduct of the trustee’s profession. The director of the EOUST stated, “If [trustees] engage in misconduct in the course of their professional activities it may justify their removal from the chapter 7 panel. 28 C.F.R. § 58.6(a)(11).” Case No. 02-007, Decision by Director Lawrence A. Friedman, November 15, 2002, available at <http://www.usdoj.gov/ust/foia/admin-decisions/case02-0007.pdf> [at pp. 6-7].

28 C.F.R. § 58.6(a) provides that a trustee may be removed or suspended for, “(11) Action by or pending before a court or state licensing agency which calls the trustee’s competence, financial responsibility or trustworthiness into question[.]”

In the section captioned “Misconduct,” the 1987 NABT Code states, “A Trustee shall not: 1. Violate a disciplinary rule.”

**35. A Trustee shall not engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or illegal conduct involving moral turpitude.**

The trustee has a duty to be financially responsible. 28 C.F.R. § 58.6(a)(11).

In the section captioned "Misconduct," the 1987 NABT Code states, "A Trustee shall not: 2. Engage in illegal conduct involving moral turpitude. 3. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The Handbook, Chapter 10, Section A, States, "If the nature of the trustee's actions reflect dishonesty, deceit, fraud, or serious mishandling of estate funds, a single substantiated incident justifies immediate action by the United States Trustee to protect the bankruptcy estates."

**36. A Trustee shall act at all times in a manner that promotes public confidence in the bankruptcy system.**

"As a fiduciary, a standing trustee occupies a significant position of trust and responsibility and is accountable for his actions not just to the United States Trustee, but also to the bankruptcy community and the public at large." Case No. 00-0001, Decision by Director Kevyn D. Orr, April 28, 2000, available at <http://www.usdoj.gov/ust/foia/admin-decisions/case00-0001.pdf>.

Canon 2A, Code of Conduct for United States Judges, states, "A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

*United States v. Fousek*, 912 F.2d 979 (8th Cir. 1990); *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328, 332 (D.C. Pa. 1982); *In re Mercury*, 280 (Bankr. S.D.N.Y. 2002).

**37. A Trustee shall be free of prejudice and the appearance of prejudice against any individual, entity, or group of individuals or entities.**

A trustee must treat parties with impartiality and without bias. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 586, 110 S.Ct. 1339, 1356 (1990) ("Trust law . . . long has required trustees to serve the interests of all beneficiaries with impartiality."); *In re Big Rivers Elec. Corp.*, 355 F.3d 415, 441 (6th Cir. 2004); *Richman v. Straley*, 48 F.3d 1139, 1143 (10th Cir. 1995); *In re Blue Mountain Investments, Ltd.*, 186 B.R. 508, 516 (D. Kan., 1995) ("[A] trustee has the capacity to prosecute a lawsuit on behalf of the estate, and . . . the duty to administer the estate impartially for the good of each and all of the creditors.") (*quoting Wissman v. Pittsburgh Nat'l Bank*, 942 F.2d 867, 870 (4th Cir. 1991)); *In re Steele*, 26 B.R. 233, 235 (Bankr. W.D. Ky. 1982) ("The trustee must be scrupulously impartial, not manipulatively clever.").

The impartiality addressed here is to be distinguished from the lack of impartiality that results from a conflict of interest with parties. See *In re Bowman*, 181 B.R. 836, 843 (Bankr. D. Md.

1995) (“The duty of impartiality is sometimes not separately classified but swept within the duty of loyalty.”). As one court stated:

A chapter 7 trustee occupies a unique position. He is charged with impartially administering the estate entrusted to him. He is the representative of all the creditors, not merely some of them. At times he must propose actions that may be detrimental to particular creditors or oppose requests that may be favorable to others. He does so not because he is presented with opportunity or a weak or unsophisticated creditor, but because he is required to do so by the Bankruptcy Code in order to achieve the balance among the creditors established by Congress in the Bankruptcy Code.

*In re Computer Learning Centers, Inc.*, 268 B.R. 468, 473 (Bankr. E.D. Va. 2001).

Another court specifically found that conduct demonstrating bias against a debtor established an “interest materially adverse to the interest of the estate,” and thus a lack of disinterestedness under bankruptcy code sections 101(14) and 327(a). *In re Vebeliunas*, 231 B.R. 181, 186 (Bankr. S.D.N.Y. 1999) (Bias against the debtor was found because before meeting the debtor, the trustee’s counsel stated that he did not believe “anything the debtor said in this case[.]”). The court articulated the danger of bias against the debtor:

[T]he trustee’s professionals cannot be allowed under any circumstances to lack disinterestedness through bias against a debtor given the responsibilities of the trustee in regard to a natural debtor, specifically, to examine into and object to inappropriate proofs of claim (which can inure to a debtor’s benefit if the claim is not dischargeable or if there may be a surplus); to investigate into the debtor’s financial affairs; if advisable, to oppose the debtor’s discharge; and, if there be a surplus, to deliver it to the debtor.

The regulations of the United States Trustee Program broadly and specifically provide that a trustee must “[b]e free of prejudices against any individual, entity, or group of individuals or entities which would interfere with unbiased performance of a trustee’s duties.” 28 C.F.R. § 58.3(b)(4). See also *In re Myers*, 147 B.R. 221, 244 (Bankr. D. Or. 1992) (“Engaging in discriminatory conduct is far outside any parameters of administering bankruptcy cases.”). See also Case No. 00-0001, Decision by Director Kevin D. Orr, April 28, 2000, available at <http://www.usdoj.gov/us/foia/admin-decisions/casc00-0001.pdf> (“[T]he qualifications required by the United States Trustee Program set forth in 28 C.F.R. §§ 58.3(b)(4) demand standing trustees to be free of prejudice or bias.”). See *In re Myers*, 147 B.R. 221, 244 (Bankr. D. Or. 1992).

A trustee must also treat all parties fairly. *In re O. P. M. Leasing Services, Inc.*, 670 F.2d 383, 386 n.2 (2d Cir. 1982); *In re Michelex Ltd.*, 195 B.R. 993, 1009 (Bankr. W.D. Mich. 1996) (“A trustee, whether interim or permanent, is a fiduciary who is obligated to treat all parties fairly.”); *In re Poage*, 92 B.R. 659, 662 (Bankr. N.D. Tex. 1988).

The Code of Conduct for United States Judges, Canon 2C, states, “A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.”

**ET Section 302****Contingent Fees**

**.01 Rule 302—Contingent fees** A member in public practice shall not

- (1) Perform for a contingent fee any professional services for, or receive such a fee from a client for whom the member or the member's firm performs,
  - (a) an audit or review of a financial statement; or
  - (b) a compilation of a financial statement when the member expects, or reasonably might expect, that a third party will use the financial statement and the member's compilation report does not disclose a lack of independence; or
  - (c) an examination of prospective financial information;or
- (2) Prepare an original or amended tax return or claim for a tax refund for a contingent fee for any client.

The prohibition in (1) above applies during the period in which the member or the member's firm is engaged to perform any of the services listed above and the period covered by any historical financial statements involved in any such listed services.

Except as stated in the next sentence, a contingent fee is a fee established for the performance of any service pursuant to an arrangement in which no fee will be charged unless a specified finding or result is attained, or in which the amount of the fee is otherwise dependent upon the finding or result of such service. Solely for purposes of this rule, fees are not regarded as being contingent if fixed by courts or other public authorities, or, in tax matters, if determined based on the results of judicial proceedings or the findings of governmental agencies.

A member's fees may vary depending, for example, on the complexity of services rendered.

[As adopted May 20, 1991.]

**Interpretation under Rule 302—Contingent Fees**

**.02 302-1—Contingent fees in tax matters** This interpretation defines certain terms in Rule 302 [ET sec. 302 par. .01] and provides examples of the application of the rule. When practicing before the IRS or other taxing authorities, members should ensure compliance with any requirements that are more restrictive.

**Definition of Terms**

- (a) Preparation of an original or amended tax return or claim for tax refund includes giving advice on events that have occurred at the time the advice is given if such advice is directly relevant to determining the existence, character, or amount of a schedule, entry, or other portion of a return or claim for refund.

**ET §302.02**

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**1802**

**Responsibilities to Clients**

- (b) A fee is considered determined based on the findings of governmental agencies if the member can demonstrate a reasonable expectation, at the time of a fee arrangement, of substantive consideration by an agency with respect to the member's client. Such an expectation is deemed not reasonable in the case of preparation of original tax returns.

**Examples**

The following are examples, not all-inclusive, of circumstances where a contingent fee would be permitted:

1. Representing a client in an examination by a revenue agent of the client's federal or state income tax return.
2. Filing an amended federal or state income tax return claiming a tax refund based on a tax issue that is either the subject of a test case (involving a different taxpayer) or with respect to which the taxing authority is developing a position.
3. Filing an amended federal or state income tax return (or refund claim) claiming a tax refund in an amount greater than the threshold for review by the Joint Committee on Internal Revenue Taxation (\$1 million at March 1991) or state taxing authority.
4. Requesting a refund of either overpayments of interest or penalties charged to a client's account or deposits of taxes improperly accounted for by the federal or state taxing authority in circumstances where the taxing authority has established procedures for the substantive review of such refund requests.
5. Requesting, by means of "protest" or similar document, consideration by the state or local taxing authority of a reduction in the "assessed value" of property under an established taxing authority review process for hearing all taxpayer arguments relating to assessed value.
6. Representing a client in connection with obtaining a private letter ruling or influencing the drafting of a regulation or statute.

The following is an example of a circumstance where a contingent fee would not be permitted:

1. Preparing an amended federal or state income tax return for a client claiming a refund of taxes because a deduction was inadvertently omitted from the return originally filed. There is no question regarding the propriety of the deduction; rather the claim is filed to correct an omission.

[Revised, March 2011, by the Professional Ethics Executive Committee, effective May 31, 2011.]

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**You Have Bills to Pay? Ethics in  
Getting Paid in Chapter 7, 11 and 13 Cases**

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**A Judge's Perspective on a Few Issues Relating to Attorney Fees<sup>1</sup>**

Attorneys in every area of practice spend a great deal of time documenting their relationships with their clients and documenting the charges for services that they render for their clients. Bankruptcy attorneys are not unique in that sense. However, bankruptcy attorneys have substantial additional documentation and procedural requirements imposed by the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the United States Trustee guidelines, and local rules adopted by bankruptcy courts that govern both the substance and the procedure for fee applications. As a result of these obligations, bankruptcy judges, perhaps more than any other judges, spend an enormous amount of time reviewing, analyzing and ruling on fee applications. The materials prepared by the other panelists cover many of the legal and ethical issues that arise from these fee applications. This brief portion of the panel's materials will share a few of my perspectives on attorney fee issues that regularly come before me, particularly in consumer cases.

To give these perspectives some context, it helps to first review the framework for fee applications. Obviously, there are many provisions in the Bankruptcy Code, bankruptcy rules and local bankruptcy rules that govern applications for compensation by professionals in bankruptcy cases. But there is one Bankruptcy Code section that sets substantive requirements for the court to consider in reviewing a fee application and determining whether to award the requested fees. Section 330(a)(1)(A) *permits* the court, after notice and hearing, to award compensation to professional persons, provided that such compensation is reasonable and is for actual, necessary services rendered by such professional person. Section 330(a)(3) then states

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<sup>1</sup> These materials were prepared by Bankruptcy Judge Phillip J. Shefferly with the assistance of Barbara Bailey, Law Clerk, Bankruptcy Court, Eastern District of Michigan.

that the court *shall* consider all “relevant factors” including a number of non-exclusive factors that are then listed in that section. Not surprisingly, the list of required factors includes the time spent on the services, the rates charged for the services, whether the services were necessary or beneficial to the administration of the case, whether the services were performed within a reasonable amount of time given the complexity, nature and importance of the issues, whether the professional person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field, and whether the compensation is reasonable based upon customary compensation charged by skilled practitioners in matters other than bankruptcy cases. Section 330(a)(3) does not indicate what weight the court should give to each of these factors nor how they relate to one another in importance.

So why recite § 330(a)(3)’s factors here? Because it is important to understand that an application for fees is a request for relief from a court, just like any other request for relief. If a party moving for relief believes that they are entitled to such relief, they need to persuade the court. That’s true for attorneys applying for fees just like it is for any other party requesting a form of judicial relief. “The burden of proof is on the professional requesting compensation for his or her services from the bankruptcy estate.” In re Sharp, 367 B.R. 582, 585 (Bankr. E.D. Mich. 2007) (citing In re New Boston Coke Corp., 299 B.R. 432 (Bankr. E.D. Mich. 2003)). “This burden is not to be taken lightly, especially given that every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors or use by debtor.” In re Pettibone Corp., 74 B.R. 293, 299 (Bankr. N.D. Ill. 1987) (citation omitted). An attorney, or any other professional person seeking fees, should treat the application the same way that they would treat any other request for judicial relief, touching on all of the factors set forth in § 330(a)(3) and explaining why those factors support the request for fees.

In addition to the factors set forth in § 330(a)(3), there is a substantial body of case law that has developed for bankruptcy courts to consider when determining what is reasonable compensation for services rendered. In In re Boddy, 950 F.2d 334 (6th Cir. 1991), the Sixth Circuit Court of Appeals instructs the court to use what is known as a “lodestar analysis” that requires the court to multiply the attorney’s reasonable hourly rate by the number of reasonable hours expended in performing the legal work. Sometimes, that is easier said than done.

One problem that commonly arises when trying to apply the lodestar approach is the starting point for a reasonable hourly rate. Typically, an application will set out the hourly rate for each professional, but without much explanation as to how that rate was determined. Common sense suggests that the hourly rates are determined in many cases by the years of practice and the area of concentration of practice by the professional seeking fees. But if an objection to an hourly rate is raised by a creditor or a trustee, the applicant seeking fees needs to meet their burden of proof by showing specifically what makes the particular hourly rate reasonable. Unfortunately, in most cases where such an objection is made, the record is not well developed. While the court can certainly draw on its experience in reviewing many fee applications and hourly rates, and have some sense as to whether the particular hourly rate in question is within the range of reasonableness, the best practice is for the applicant to provide some evidentiary support with the application, to explain how the hourly rate was chosen and why it is reasonable. For example, a comparison with the rates charged by attorneys of similar skill and experience in the same marketplace. Again, treat the application the same way that you would treat any other request for judicial relief, marshaling the facts that support the specific

request.<sup>2</sup> While the hourly rate provides one example of a factor that the applicant needs to address in the application, the same analysis holds true for all of the factors that the court is required to consider under § 330(a)(3).

There is another very important reason why a professional person seeking fees should provide as much explanation as possible regarding each of the factors under § 330(a)(3) that support their application. Even where no objection has been raised by any party to an application for fees, the bankruptcy court still has an independent obligation to review the fee application and ensure that the applicant has met their burden of proof to show an entitlement to an award of fees. In re Two Gales, Inc., 454 B.R. 427, 433 (6th Cir. B.A.P. 2011). The Sixth Circuit Bankruptcy Appellate Panel has also stated that even where a bankruptcy case has been dismissed, or where there exists a private agreement between a debtor and its attorney, the bankruptcy court still has a statutorily imposed duty to review the application and determine whether there is an entitlement to be paid. Id. at 433.

As a practical matter, that means that the bankruptcy judge must review each and every fee application, whether contested or not, to determine whether the requested fees should be awarded. Just because a party does not object to the application does not mean that the applicant is home free. I still have to review the application and the applicant must still meet their burden. The best advice I can give is that the applicant for fees should do everything possible in the application to assemble the facts necessary to meet their burden to prove an entitlement to the fees requested under § 330(a)(3) of the Bankruptcy Code and under the lodestar analysis used in the Sixth Circuit.

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<sup>2</sup> In the Eastern District of Michigan, Local Bankruptcy Rule 2016-1 contains a number of specific requirements for a fee application. They may seem burdensome to the applicant, but they are all designed to help the applicant meet their burden of proof in establishing an entitlement to compensation under § 330 of the Bankruptcy Code.

As all of you well know, it is not uncommon to have litigation over fee applications, whether in Chapter 7, 11 or 13. But I want to share my perspective on one recurring type of fee application litigation that is especially frustrating for a court: a debtor's objections to their own attorney's application for fees in Chapter 13 cases. Many times these objections are raised simply by way of a letter sent by the debtor to the court and the debtor's attorney, which is then docketed as an objection to the application. The court sets a hearing once the objection is made, typically with two or three weeks' notice. When the case is called on my Chapter 13 docket, the debtor and the attorney both appear. Unfortunately, all too often, I soon learn that the debtor and the debtor's attorney have not even spoken to one another about the application, let alone have made any effort to try to resolve the objection. This surprises me because a consumer debtor objecting to a fee application from their own attorney is in many ways no different than any other type of consumer complaining about a bill that they receive from anyone in a service business, whether an attorney, a doctor, a dentist, or an accountant. From my perspective, most debtor's complaints about a bill, or an objection to a fee application, can and should be resolved by direct communication between the attorney and the debtor outside of the courtroom.

This is especially true given the nature of the objections that consumer debtors typically raise. In my experience, there are two categories of objections that consumer debtors most often make to their own attorney's fee application. First, many times the objection is simply that the debtor does not feel the attorney is responsive enough in returning phone calls or other communications. An age old problem. Second, many times the objection is simply that the debtor does not fully understand the fee agreement that she has entered into because it has not been adequately explained by their attorney. Both of these types of objections reflect a lack of communication between the debtor and the attorney. Both of these types of objections are easily

resolvable by the attorney filing the fee application. Both of these types of objections should rarely, if ever, go before the judge.

Getting paid for one's services as an attorney is important. But so is reputation. Therefore, it's important for attorneys to understand the impression they create both with the court and with other parties in the courtroom if they are routinely appearing before the court to litigate with their own clients over their requests for fees. Obviously, the debtor's objections are not always meritorious, and some objections do need to be resolved by the court. But be prudent in how you handle objections to your fee application by your own client. If at all possible, resolve them outside of the courtroom. It should be a rare case when you are appearing before the judge to have the judge resolve your own client's objections to your request for fees.

Since my portion of the assignment for this ABI panel on fees and ethics was to give some of my perspectives as a judge, I want to spend the balance of my section of the materials discussing my perspective on what I believe is a very significant problem in the consumer bankruptcy world: the economic challenges that exist both for attorneys and individuals in getting legal services to people who have no assets or income, but are most in need of a fresh start.

As strange as it may seem to non-lawyers, it costs money to file bankruptcy. Through loss of jobs, medical emergencies, foreclosures, and other hardships in life, many people are simply too poor to pay for legal services file a Chapter 7 bankruptcy case. Yet the cost for such individuals to file even a no asset Chapter 7 bankruptcy case continues to escalate. According to the Consumer Bankruptcy Fee Study: Final Report, 20 Am. Bankr. Institute L. Review 17, at 30 (2012) conducted by Professor Lois R. Lupica, the mean Chapter 7 attorney fees for no asset

bankruptcy cases have increased post BAPCPA by 48%. So how do truly destitute individuals in need of Chapter 7 bankruptcy relief come up with the money to pay an attorney?

One place an individual cannot get money to pay a Chapter 7 bankruptcy attorney is from the bankruptcy estate itself. In Lamie v. United States Trustee, 540 U.S. 526 (2004), the United States Supreme Court held that a Chapter 7 debtor's attorney is not included within the class of persons eligible for compensation to be paid out of the bankruptcy estate. The Supreme Court reached this holding after reviewing the text of §§ 327 and 330 of the Bankruptcy Code, but then turned to some of the policy arguments that were raised by the attorney seeking to be paid in that case.

It appears to be routine for debtors to pay reasonable fees for legal services before filing for bankruptcy to ensure compliance with statutory requirements. See generally Collier Compensation, Employment and Appointment of Trustees and Professionals in Bankruptcy Cases ¶ 3.02[1], p. 3-2 (2002) (“In the majority of cases, the debtor’s counsel will accept an individual or a joint consumer chapter 7 case only after being paid a retainer that covers the ‘standard fee’ and the cost of filing the petition”). So our interpretation accords with common practice.

This “practice” works well enough for those individuals who have funds sufficient to enable them to pay an attorney to file a Chapter 7 case in full before the petition is filed. But what if they don't have enough funds? Can they promise to pay the attorney out of wages that they earn after the bankruptcy petition is filed? The answer in both the Sixth and Seventh Circuit is no. The reason is because a promise made by an individual pre-petition to pay their attorney post-petition is a dischargeable debt in a Chapter 7 case.

The issue of whether pre-petition attorney fees are dischargeable in bankruptcy is *res nova* in this circuit. We join three other circuits in concluding that pre-petition attorney fees are dischargeable, and we affirm the order of the district court.

11 U.S.C. § 727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 U.S.C. § 523(a).

A debt for pre-petition legal services is not one of the non-dischargeable debts enumerated in § 523(a).

Rittenhouse v. Eisen, 404 F.3d 395, 396 (6th Cir. 2005) (citing In re Fickling, 361 F.3d 172 (2d Cir. 2004); Bethea v. Adams & Associates, 352 F.3d 1125 (7th Cir. 2003); and In re Biggar, 110 F.3d 685 (9th Cir. 1997)).

Understandably, any attorney that does not get paid before a petition is filed, and understands that they cannot get paid post-petition based upon a pre-petition agreement, is going to be reluctant to represent an individual debtor in a Chapter 7 case. So what do truly impoverished individuals do? One option is to do nothing. But this is not a satisfactory result, either for the individual who remains saddled with debt and unable to get out from under it, or for society, which now has an individual who is much less likely to be a productive, contributing member of society.

A second option is for such individual to file a pro se Chapter 7 case and hope for the best. In the Eastern District of Michigan, prior to BAPCPA in 2005, about 1% of individual Chapter 7 cases were filed without an attorney. That number escalated to about 10% by 2012 and remains about the same level today. However, it is well documented that the likelihood of getting a Chapter 7 discharge is significantly less for a Chapter 7 debtor filing pro se.

Still other individuals wind up with help from a bankruptcy petition preparer. In my experience, the proliferation of bankruptcy petition preparers is an unmitigated disaster, both for the individuals they are supposedly helping, and for the administration of the cases in which they are involved. Recognizing that there are very few services that a non-attorney can provide as a bankruptcy petition preparer to an individual filing a bankruptcy case, the Eastern District of Michigan entered an administrative order on April 20, 2010 creating a presumptive maximum fee of \$100.00 for assistance by a bankruptcy petition preparer in this district. Unfortunately,

many bankruptcy petition preparers end run that rule by charging significantly higher fees and then having the individual debtor for whom they have prepared bankruptcy papers conceal the fact of such payment in the papers they file with the court. Many of the individuals supposedly being helped by these bankruptcy petition preparers wind up lying on their forms filed with the court, and ultimately get into more serious trouble when that fact comes to light. Many of them lose their discharge. For an extended discussion of the problems that bankruptcy petition preparers have created for individuals in the Eastern District of Michigan who wish to file bankruptcy but cannot afford an attorney, see In re Hutchinson, case no. 12-44688, ECF No. 101 (2013 WL 639051), and In re Wicker, case no. 10-49759, ECF No. 43.

The clear trend is that there are more pro se cases and more bankruptcy petition preparer cases being filed than ever before. Unfortunately, these cases have a much lower rate of discharge and a much higher rate of dismissal than Chapter 7 cases where the individual is represented by an attorney.<sup>3</sup>

Recently, there has been a great deal of attention given to those situations where an individual debtor in need of Chapter 7 relief may be able to pay *some* money up front, pre-petition, but does not have enough money to pay pre-petition an entire fee for all of the legal services that a Chapter 7 case may entail. This raises ethical issues for consumer attorneys who may be willing to accept a smaller pre-petition fee to at least file the bankruptcy case for the debtor, with the express understanding that the smaller pre-petition fee does not cover all of the services that the debtor may need. Is this permissible? Can an attorney agree to limit the scope

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<sup>3</sup> In the Eastern District of Michigan, during 2010 and 2011, just over 1% of all individual Chapter 7 cases filed by an attorney were dismissed prior to discharge. On the other hand, during the same time frame, approximately 25% of all individual Chapter 7 cases filed without an attorney were dismissed prior to discharge. During those same years, approximately 98% of individual Chapter 7 cases filed by an attorney received a discharge, while only approximately 69% of Chapter 7 cases filed without an attorney received a discharge.

of their representation commensurate with the amount of money that the debtor has available to pay for the filing of the bankruptcy case? Or are there some services that are so integral to a Chapter 7 bankruptcy filing that it is never permissible for an attorney to limit the scope of representation to exclude services, even where the debtor does not have the ability to pay for all of the services that the debtor may need?

Some of the other panelists' materials discuss the split of cases around the country on this issue and also discuss various alternatives that have been utilized by consumer debtors and their attorneys in these types of circumstances. Although the case law on this issue is still evolving, the Bankruptcy Court for the Eastern District of Michigan has recently addressed some of the issues that arise out of agreements between debtors and their attorneys to limit the scope of representation in Chapter 7 cases. In In re Gourlay, 483 B.R. 496 (E.D. Mich. 2012), the debtor and the attorney agreed upon a flat fee of \$900.00 to file a Chapter 7 case, but the debtor only had the ability to pay \$100.00 pre-petition, with the balance to be paid under the agreement in installments post-petition. Because the agreement between the debtor and the attorney created a pre-petition debt for the remaining \$800.00 of the attorney fee, the promise to pay the balance of the attorney fee became a dischargeable debt in the debtor's Chapter 7 case and was cancelled by the court under § 329(b) of the Bankruptcy Code. The court also noted that, in such circumstances, the automatic stay of § 362 prevents the attorney from even asking the debtor to make any of the post-petition installment payments once the bankruptcy petition was filed.

Another type of limited scope of representation agreement was before the court in In re Slabbinck, 482 B.R. 576 (Bankr. E.D. Mich. 2012). In that case, the attorney and the individual entered two separate fee agreements, one pre-petition and a separate one post-petition. Each of the agreements spelled out specifically the services to be performed and the cost of those

services. The issue before the court was whether the unbundling of the legal services for the individual between pre-petition services on the one hand, and post-petition services on the other hand, was per se violative of § 329 of the Bankruptcy Code.

Noting that the Bankruptcy Code does not have a provision that expressly prohibits the unbundling of legal services for an individual filing bankruptcy, Slabbinck turned to the applicable state law rules of professional conduct for attorneys, and then examined the two separate fee agreements in light of those rules. Because the United States District Court for the Eastern District of Michigan has expressly determined that the Rules of Professional Conduct adopted by the Michigan Supreme Court apply to members of the bar who practice in the District Court and Bankruptcy Court, Slabbinck then reviewed the Michigan Rules of Professional Conduct (“MRPC”), as well as ethics opinions decided under the MRPC. The court in Slabbinck then held that

an agreement to limit an attorney’s legal services in connection with an individual Chapter 7 bankruptcy case by unbundling the pre-petition legal services from the post-petition legal services, is not per se prohibited by the MRPC and does not necessarily warrant any relief under § 329 of the Bankruptcy Code. That does not mean that all agreements to unbundle legal services are permissible, but only that such agreements are not always barred. Although § 329 of the Bankruptcy Code does not set forth specific criteria governing the unbundling of legal services in a Chapter 7 case, it is clear that, minimally, the MRPC require that (1) the attorney competently represents the individual debtor despite any limitation on the scope of services; (2) the attorney provides adequate consultation to the individual debtor concerning any limitation on the scope of the attorney’s representation and the legal matter in question; and (3) the individual debtor makes a fully informed and voluntary decision to consent to such limitation.

After stating its holding, the Slabbinck opinion expressed the court’s very strong preference to see individuals hire an attorney to represent them in all aspects of a Chapter 7 bankruptcy case from start to finish. Clearly, that is the best of all worlds, and the path that is most likely to lead to a successful Chapter 7 case. However, Slabbinck also observed that some

individuals simply cannot afford to pay all of their fees for a Chapter 7 up front, and that an agreement to limit the scope of representation and unbundle certain pre-petition services from certain post-petition services was still preferable to having an individual file a bankruptcy case on their own, pro se, or with the supposed help of a bankruptcy petition preparer.

On April 21, 2013, the American Bankruptcy Institute issued the Final Report of the ABI National Ethics Task Force. The Task Force was commissioned in 2011 to answer the question of whether there is a need for national ethics rules, standards, and general practice guidelines in the bankruptcy context. One of the issues that jumped out to the Task Force, and that is dealt with in detail in its report, is the propriety of a limited service representation agreement for an individual filing a Chapter 7 bankruptcy case. The report looks carefully at the issue of unbundling of legal services for an individual seeking Chapter 7 relief, and contains significant empirical data supporting the notion that Chapter 7 attorney fees continue to escalate. The report notes that there are well founded concerns for protecting the interests of consumer debtors, but also recognizes the usefulness of having an individual have access to at least some legal representation when considering filing a Chapter 7 bankruptcy case, rather than no representation or help only from a bankruptcy petition preparer. Ultimately, the Task Force report recommends certain best practices and endorses the adoption of a proposed rule permitting the unbundling of legal services for an individual filing Chapter 7, with specifically described criteria for a limited scope of representation agreement between an attorney and a debtor. It's worth reading. The report touches on all of the sensitive issues involved, but also provides recommendations for how these issues can be addressed.

There are many legal and ethical issues that arise for attorneys seeking fees for legal services related to bankruptcy. Many of them are well-covered by the other panelists' materials.

Still others are beyond the scope of the panel. When asked to share some of my own perspectives, the most striking problem that occurred to me is the fundamental issue of those numerous individuals who just cannot afford to file a Chapter 7 bankruptcy case, yet are in need of relief from their debts. Unless and until Congress amends the Bankruptcy Code to provide a means of payment for the legal services needed in a Chapter 7 bankruptcy case, it is likely that many poor individuals in need of Chapter 7 bankruptcy relief will continue to struggle with how to obtain the necessary legal representation to effectively obtain that relief.

# **You Have Bills to Pay? Ethics in Getting Paid in Chapter 7, 11 and 13 Cases**

## **I. Sources of Applicable Ethical Rules**

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## 1. Sources of Applicable Rules and Complexity of the Issue

Bankruptcy lawyers are subject to overlapping ethical obligations, the violation of which can particularly impact their ability to be paid for legal services. “In bankruptcy court the basic ethical rules are overlaid with additional, not necessarily different, standards drawn from trust or fiduciary law.”<sup>1</sup> Indeed, because of the unique features of bankruptcy law, ethics governing bankruptcy counsel have been described as “complex and demanding.”<sup>2</sup>

For example, “[d]efinitions may be different, more specific, or applied differently in bankruptcy court than they are in state or even federal district court.”<sup>3</sup>

Another complication in understanding the scope of the ethical standards is that some courts apply both the state and Bankruptcy Code standards, while other courts indicate that the standards are the same. Thus, depending upon the locality of practice, there may be additional or overriding standards imposed by the bankruptcy court. All professionals must be aware not only of the standards imposed in their own locales but also, should the particular case take them to another jurisdiction, those imposed in the other locale.<sup>4</sup>

One of the most important distinctions between bankruptcy and non-bankruptcy ethics issues is that bankruptcy lawyers’ fees are subject to scrutiny by the Court and other parties, so that ethical errors can result in denial or disgorgement of attorneys’ fees. Because counsel for debtors, trustees and creditors’ committees must be approved by the Court, they have considerable disclosure obligations and then the Court conducts a review of compensation.<sup>5</sup> To

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<sup>1</sup> *Collier on Bankruptcy* ¶ 8.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (“*Collier*”).

<sup>2</sup> See, Bowles and Rapoport, *Has the DIP’s Attorney Become the Ultimate Creditors’ Lawyer in Bankruptcy Reorganization Cases?*, Am. Bankr. Inst. L. Rev. Vol. 5, No. 1 (Spring 1997), at p. 48.

<sup>3</sup> *Collier*, ¶ 8.01[4][c].

<sup>4</sup> *Collier*, ¶ 8.01[4][c] (and cases cited therein); see also *Collier*, ¶ 8.02[1] (“Because many attorneys have practices in overlapping jurisdictions, belong to national firms with multiple offices, have licenses in more than one state and often appear *pro hac vice* in courts where they are not licensed, they will be subject to the ethical standards and laws of the jurisdiction in which they primarily practice and also of any court and state in which they appear.”)

<sup>5</sup> See, e.g., 11 U.S.C. § 327 (Professionals may be employed who do not hold or represent adverse interests and who are disinterested); 11 U.S.C. § 328 (Compensation considerations, including time spent, rate, whether services were necessary, whether compensation is reasonable); Bankruptcy Rule 2014 (Requiring disclosure of all connections with the debtor, creditors and other parties in interest); Bankruptcy Rule 2016 (Requiring disclosure of

determine the propriety of compensation, courts evaluate counsel's conduct in the case, any benefit from the services, any misconduct or unethical conduct, application of the compensation rules, the time spent on the services, rates charged, and the customary fees charged by others.<sup>6</sup> Accordingly, the importance of being aware of ethical issues and related professionalism issues in bankruptcy matters cannot be overstated.<sup>7</sup> Indeed, "[t]he ethical paths into and within the bankruptcy court arena are not only potentially more hazardous than in general litigation, but the results of any detour can be more onerous due to the bankruptcy court's separate obligation to oversee payments of fees to professionals. Thus, a misstep may result not only in disqualification and nonpayment of requested fees, but also disgorgement of fees already received."<sup>8</sup>

The Bankruptcy Court's power to impose sanctions extends beyond its oversight of compensation, and can result in imposition of fines and other penalties.<sup>9</sup> For example, § 521 requires a debtor to cooperate with any trustee in the case, and imposes sanctions for failure to do so. At least one court has relied on this provision to impose sanctions on the debtor's counsel.<sup>10</sup>

Counsel participating in bankruptcy matters should also be familiar with certain other federal statutes which impose ethical and similar professional obligations. For example, § 1927 of Title 28 provides sanctions against any attorney "who so multiplies the proceedings in any

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compensation); Bankruptcy Rule 2017 (Examination of debtor's transactions with debtor's attorney, both before and after the bankruptcy filing, requiring the court to determine the reasonable value of the services rendered).

<sup>6</sup> See, *Collier*, ¶ 2017.11 and cases cited therein.

<sup>7</sup> See Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, Am. Bankr. Inst. L. Rev. Vol. 6, No. 1 (Spring 1998), at p. 47 ("[S]tate ethics codes provide little guidance to bankruptcy lawyers on such subjects as conflicts of interest and duties of lawyers towards their 'official entity' clients in bankruptcy cases. Acceptable ethical behavior *outside* the realm of bankruptcy often doesn't work *inside* the realm of bankruptcy.") (citations omitted; emphasis in original).

<sup>8</sup> *Collier*, at ¶ 8.01[1]

<sup>9</sup> See Rapoport, Nancy, "Through Gritted Teeth and Clenched Jaw: Court-Initiated Sanctions Opinions in Bankruptcy Courts," 41 St. Mary's Law Journal 701 (2010).

<sup>10</sup> See, *In re Stinson*, 269 B.R. 172 (Bankr. S.D. Ohio 2001).

case unreasonably and vexatiously” and provides that the attorney may have to personally satisfy the expenses incurred as a result.<sup>11</sup> Section 105(a) of the Bankruptcy Code is another source of authority for the Court’s power over attorneys.<sup>12</sup>

Finally, counsel should review the local rules, orders or other directives of the bankruptcy court and the district court in which they are practicing, as these rules may also govern attorney conduct. For example, the United States Bankruptcy Court for the Northern District of Ohio has issued guidelines for compensation and expense reimbursement of professionals. In addition, Local Rule 2090-1 provides that attorneys admitted to practice in the Bankruptcy Court are bound by the Ohio Rules of Professional Conduct, as well as the disciplinary rules applicable in the District Court. Similarly, the Southern District of Ohio local rule 2090-2 provides that the Ohio Rules of Professional Conduct apply,<sup>13</sup> as do the Model Federal Rules of Disciplinary Enforcement as adopted by the U.S. District Court for the Southern District of Ohio. And, local rule 2016-1 provides guidance for fee applications, as well as an optional form.

In the Eastern District of Michigan, Local Rules 2014-1 and 2014-2 govern retention applications of professionals, and Local Rule 2016-1 provides the requirements for fee applications. Local Rule 9029-3 also provides that the Civility Principles adopted by the District Court are adopted by the Bankruptcy Court as well, and Local Rule 9010-1(a)(2) provides that attorneys are expected to be familiar with all applicable rules and lists guidelines for Court appearances. These are just some examples; it is important to review the local rules of each Court before you file any pleadings or appear in Court.

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<sup>11</sup> See *Collier*, ¶ 8.02[5][a].

<sup>12</sup> *Id.*

<sup>13</sup> It is interesting to note that the Rule also specifically provides that service upon a debtor as required by the Local Rules and Federal Rules of Bankruptcy Procedure shall not constitute a violation of the Ohio Rules of Professional Conduct as an unauthorized contact with a represented person.

Further, individual judges enter orders concerning particular issues, so counsel should check each Court's website as well as individual judge's page prior to appearing before any particular judge. Last but not least, the U.S. Trustee's Office has also issued fee guidelines that apply in addition to the local rules.<sup>14</sup>

## 2. Summary of Bankruptcy Code Sections and Bankruptcy Rules Applicable to Fees

The primary Code sections and Rules that pertain to retention and fees are as follows:

§ 327 Employment of Professional Persons: This requires court approval of retention of attorneys, accountants, auctioneers and other professionals that do not hold or represent an interest adverse to the estate, and that are disinterested<sup>15</sup> persons. In operating cases, regularly-employed business professionals may be retained or replaced. A person who represents a creditor is not disqualified unless there is an objection and the Court finds there is an actual conflict of interest. Finally, a trustee may employ the debtor's counsel for a special purpose, if it is in the best interest of the estate and the attorney does not hold any adverse interest.

§ 328 Limitation on Compensation of Professional Persons: This provides that trustees (which includes debtors-in-possession) and creditor's committees may, with Court approval, retain professionals on reasonable terms and conditions, but "the court may allow compensation different" from those terms, if those terms prove to be improvident. This essentially authorizes the Bankruptcy Court to pre-approve a professional's fees prior to services being performed, and requires the Court to specifically find that those terms were improvidently approved before altering them at a later time.<sup>16</sup>

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<sup>14</sup> See, [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/feeguide.htm](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm).

<sup>15</sup> See 11 U.S.C. § 101(14) (definition of "disinterested person").

<sup>16</sup> See, e.g., *In re Airspect Air, Inc.*, 385 F.3d 915, 920-921 (6<sup>th</sup> Cir. 2004)(internal citations omitted).

The statute further provides that trustees who serve as attorneys for the estate may not be compensated as counsel when providing trustee services. Finally, subsection (c) authorizes a court to deny compensation and reimbursement of expenses if, during the course of the proceedings, the professional is no longer a disinterested person or holds or represents an interest adverse to the estate.

§ 329 Debtor's Transactions with Attorneys: This section requires all debtor attorneys to disclose their compensation, when payments were or are to be made, and the source of such compensation. Subsection (b) authorizes the Court to *cancel* any such agreement or order return of such payment if the compensation exceeds the reasonable value of the services.

§ 330 Compensation of Officers: This section requires notice and a hearing on compensation requests, and limits any award to reasonable compensation for actual and necessary services and expenses. This “reasonableness” test applies when the compensation terms are not “pre-approved” under section 328(a).<sup>17</sup> The statute further provides that the Court is specifically authorized to award less than is requested, and says that in determining the amount of compensation, the Court shall consider the nature, extent and value of such services, taking into account all relevant factors including time spent, rate charged, whether the services were necessary or beneficial, whether the time spent was commensurate with the complexity, importance and nature of the problem, whether the person is board certified or otherwise has demonstrated skill and experience in bankruptcy, and whether compensation is reasonable based on comparable fees in other cases.

Bankruptcy Rule 2014 Employment of Professional Persons: This Rule provides that only a trustee (which includes debtor-in-possession) or a committee may apply, and the application will

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<sup>17</sup> See, e.g., *Airspect*, 385 F.3d at 920 (internal citations omitted).

specify the necessity for the employment, name of person, reasons for selection, the professional services to be rendered, the proposed arrangement for compensation, and all of the person's "connections" (which is not defined)<sup>18</sup> with the debtor, creditors, and other parties in interest.

Bankruptcy Rule 2016 Compensation for Services Rendered and Reimbursement of Expenses:

This rule sets forth the requirements for fee applications, such as services rendered, payments made, the source of compensation, and whether it has been or will be shared. The Rule also provides detail for the required disclosures of debtors' attorneys.

3. Differing Interpretations of Section 328

As noted above, section 328 provides that the Court may essentially pre-approve the terms and conditions for a professional's retention, but the Court may modify those terms and conditions if it turns out those terms were improvident in light of developments that could not have been anticipated.<sup>19</sup> However, the standards for determining whether or not a specific retention order constitutes pre-approval under Section 328, and thus whether subsequent fee applications are subject to the "improvidently granted" standards of § 328(a) or the reasonableness standards of § 330, vary.<sup>20</sup>

For example, the Third Circuit has held that a retention order must expressly and unambiguously state specific terms and conditions, such as rates, contingency arrangements, etc., that are approved pursuant to section 328(a), or else the retention compensation will be handled under section 330.<sup>21</sup> The Ninth Circuit's standard is even stricter, requiring the retention

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<sup>18</sup> The ABI National Ethics Task Force recently issued its Summary of Findings and Recommendations ([see www.abiworld.org](http://www.abiworld.org)) which, *inter alia*, proposes revisions to Rule 2014 based on the many challenges encountered under the present rule. The report is highly recommended reading for all bankruptcy lawyers.

<sup>19</sup> *Collier*, ¶ 328.01.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, citing *Zolfo, Cooper & Co. v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253, 262 (3<sup>rd</sup> Cir. 1995).

application to also unambiguously specify that it seeks approval under § 328, otherwise subsequent fee applications will be subject to review under § 330.<sup>22</sup>

In contrast, the Sixth Circuit concluded that these standards are too constrictive and instead, held “that whether a court ‘pre-approves’ a fee arrangement under § 328 should be judged by the totality of the circumstances, looking at both the application and the bankruptcy court’s order.”<sup>23</sup> In making this determination, courts may consider “whether the debtor’s motion for appointment specifically requested fee-approval, whether the court’s order assesses the reasonableness of the fee, and whether either the order or the motion expressly invoked § 328.”<sup>24</sup> Thus, for example, the Sixth Circuit found that the Bankruptcy Court had properly reviewed a financial advisor’s fee application under § 328, where the original retention application had sought its retention for the chapter 11 proceedings, at a rate of \$10,000.00 per month, which the Debtor had argued was a reasonable and appropriate fee for the services to be performed, and then the Court’s retention order had granted that application “in its entirety” and on the terms set forth therein.<sup>25</sup> The Sixth Circuit recognized that the Bankruptcy Court “could have been more precise in its initial order, the totality of the circumstances indicates that it pre-approved RCS [the financial advisor]’s fees.”<sup>26</sup>

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<sup>22</sup> *Id.*, citing *In re Circle K Corporation*, 279 F.3d 669, 671 (9<sup>th</sup> Cir. 2002)

<sup>23</sup> *Airspect*, 385 F.3d at 921-922.

<sup>24</sup> *Id.* at 922.

<sup>25</sup> *In re Fashion Shop of Kentucky, Inc.*, 2009 WL 3416000 \*1 (6<sup>th</sup> Cir. 2009).

<sup>26</sup> *Id.*

**You Have Bills to Pay? Ethics in Getting Paid in Chapter 7, 11 and 13 Cases**

**IIB. Ethics in Getting Paid in Chapter 7 Cases – Debtor’s Perspective**

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In the majority of cases, attorneys who file Chapter 7 cases for debtors are paid in full for their services prior to filing the bankruptcy case. The U.S. Supreme Court in *Lamie v. United States Trustee* stated that “§ 330(a)(1) does not authorize compensation awards to debtors’ attorneys from estate funds, unless they are employed as authorized by § 327.”<sup>1</sup> Additionally, as attorney fees are not an exception to discharge under § 523, pre-petition debts for legal fees are subject to the discharge under § 727.<sup>2</sup> Therefore, debtors’ attorneys cannot ask their clients for payment on the retainer once the bankruptcy case is filed without either violating the automatic stay of § 362 or the discharge injunction under § 727. Of course, nothing prevents a debtor from voluntarily paying their attorney after the case is filed<sup>3</sup>, but the attorney cannot ask for payment.

A major concern for debtors’ attorneys, then, is how they can be paid in full prior to filing a Chapter 7 while still timely filing the case to stop creditor harassment. In order to pay a bankruptcy attorney before filing, debtors may have to forego payments for necessities, like utilities<sup>4</sup>, use a bankruptcy petition preparer, or file a *pro se* bankruptcy case.<sup>5</sup> However, there is an alternative for destitute debtors: they could “tender a small retainer for prepetition work and later hire and pay counsel once the proceeding begins – for a lawyer’s aid is helpful in prosecuting the case as well as in filing it.”<sup>6</sup> Of course, the post-petition fee agreement must actually be a post-petition fee agreement. In other words, “the legally operative events – the offer, acceptance, and exchange of consideration (either a promise to pay or an act of payment in

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<sup>1</sup> *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004).

<sup>2</sup> See *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1127 (7th Cir. 2003), cert. denied, 124 S.Ct. 2176 (2004) and *Rittenhouse v. Eisen*, 404 F.3d 395, 397 (6th Cir. 2005).

<sup>3</sup> 11 U.S.C. § 524(f).

<sup>4</sup> *Rittenhouse*, 404 F.3d at 397.

<sup>5</sup> *Bethea*, 352 F.3d at 1127.

<sup>6</sup> *Id.* at 1128.

exchange for a promise to render services) – must in fact occur after the date of the Chapter 7 filing...”<sup>7</sup>

Assuming that a debtor’s attorney enters into a valid post-petition fee agreement, there is still a professional responsibility concern regarding whether an attorney can properly limit the scope of their representation of a debtor. The starting point is the applicable rules of professional conduct for the state and district court in which the bankruptcy case is filed. Attorneys must provide competent representation to their clients.<sup>8</sup> Some courts narrowly define competence in the context of a Chapter 7 bankruptcy as doing everything that is necessary to achieve the debtor’s objective in obtaining a discharge and retaining exempt property.<sup>9</sup> In order to help clients achieve their goals, attorneys cannot select which aspects of the bankruptcy to assist their clients to the exclusion of others.<sup>10</sup>

Competent representation must be reconciled with an attorney’s ability to limit the scope of their representation. Debtors’ attorneys can limit their representation in a Chapter 7 case if “they explicitly disclose those limits and obtain the clients’ consent thereto.”<sup>11</sup> “For a limitation on services to be valid, ‘that limitation must be carefully considered and narrowly crafted, and be the result of educated and informed consent.’”<sup>12</sup> In order to determine whether the debtor gave informed consent, “[t]he key to recovery for postpetition services, therefore, lies in the terms of the attorney’s fee agreement.”<sup>13</sup> If attorneys and clients can contract for certain services to the exclusion of others, then competence is “most appropriately evaluated by looking at the actual

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<sup>7</sup> *In re Griffin*, 313 B.R. 757, 779-80 (Bankr.N.D.Ill 2004).

<sup>8</sup> Ill.Sup.Ct. Rules, Art. VIII, Rule of Professional Conduct 1.1.

<sup>9</sup> *In re Slabbinck*, 482 B.R. 576, 592-3 (Bankr.E.D.Mich. 2012) (citing *In re Egwim*, 291 B.R. 559, 572 (Bankr.N.D.Ga. 2003)).

<sup>10</sup> *In re Collmar*, 417 B.R. 920, 923 (Bankr.N.D.Ind. 2009).

<sup>11</sup> *Griffin*, 313 B.R. at 770 (citing Ill.Sup.Ct. Rules, Art. VIII, Rule of Professional Conduct 1.2(c); N.D. Ill. Local Rule of Professional Conduct 83.51.2(e)).

<sup>12</sup> *Slabbinck*, 482 B.R.at 585 (quoting *In re Egwim* at 572).

<sup>13</sup> *Slabbinck*, 482 B.R. at 586 (quoting *In re Mansfield*, 394 B.R. 783 (Bankr.E.D.Penn. 2008)).

work that was agreed to be performed and then was performed by the attorney, not by looking at the remaining work that will have to be done to complete the case when the individual has not hired the attorney to perform those services and the attorney has not performed those services.”<sup>14</sup>

Nothing in the Bankruptcy Code requires an attorney to represent a debtor in all matters to achieve a discharge or retain their exempt property<sup>15</sup>, although local rules may indicate otherwise.<sup>16</sup> Nonetheless, an attorney who is not retained for post-petition services could file a motion to withdraw from the case if the pre-petition fee agreement only covered pre-petition services and post-petition services were conditioned upon debtor entering into a new agreement after the case was filed.<sup>17</sup> Debtors’ attorneys may face an uphill battle in convincing the court to allow them to withdraw as some courts find that “[w]here the reason is the client’s payment of fees, leave to withdraw will ordinarily be granted only where an unreasonable burden on counsel exists and withdrawal is justified based on considerations of fairness, reasonableness, and proper protection of the debtor’s rights based on the circumstances of the case.”<sup>18</sup>

Debtors’ attorneys should be cognizant of their state’s rules of professional conduct to make sure that the debtor has informed consent if they enter into a pre-petition fee agreement where debtor’s attorney will not represent them after the case is filed unless retained at that time. The fee agreement for pre-petition work should clearly outline the pre-petition services in detail as well as outline the post-petition services that will not be performed by the attorney and the ramifications and risks of proceeding without an attorney after the case is filed.

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<sup>14</sup> *Slabbinck*, 482 B.R.at 593.

<sup>15</sup> *Id.* at 592

<sup>16</sup> Rule 2090-5(B) of the Local Rules for the United States Bankruptcy Court for the Northern District of Illinois: “Counsel who represents the debtor upon the filing of a petition in bankruptcy is deemed to appear as attorney of record on behalf of the debtor for all purposes in the bankruptcy case, including any contested matter and any audit, but is not deemed to appear in any adversary proceeding filed against the debtor.”

<sup>17</sup> Northern District of Illinois Bankruptcy Standing Order dated February 17, 2004 and Rule 2091-1(B) of the Local Rules for the United States Bankruptcy Court for the Northern District of Illinois.

<sup>18</sup> *In re Egwim*, 291 B.R. 559, 579 (Bankr.N.D.Ga. 2003) (citing *In re Pair*, 77 B.R. 976, 979 (Bankr.N.D.Ga. 1987).

**You Have Bills to Pay? Ethics in Getting Paid in Chapter 7, 11 and 13 Cases**

III. Ethics in Getting Paid in Chapter 11 Cases

a. Debtor's Counsel

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Chapter 11 Debtor's Counsel

There are three essential components to being paid as Chapter 11 debtor-in-possession's counsel: (1) proper retention; (2) handling of the matter consistently with the Bankruptcy Code and all other applicable ethical and other rules; and (3) proper fee applications to the Court.

(1) Retention Issues as Debtor's Counsel in Chapter 11 Proceedings

The first step in being paid as Chapter 11 DIP counsel is being properly retained. This means compliance with the retention requirements of Bankruptcy Code §§ 327, 328, and 329, and Bankruptcy Rules 2014 and 2016, as well as all applicable local rules. In particular, the Code requires the filing of a retention application with appropriate disclosures (more fully discussed below). An example of a retention application is included in the appendix.

Section 327(a) provides that approved counsel may not hold or represent an interest adverse to the estate and must be disinterested (§ 327(a)). The term "adverse interest" is not defined in the Code, but Courts have generally relied upon the following definition:

...(1) to possess ... an economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.<sup>1</sup>

The term "disinterested" is defined at § 101(14), to mean a person who is not a creditor, insider, officer, director, etc. and does not have an interest materially adverse to the estate or any particular class of creditors or equity security holders. Given this definition, "Courts have recognized that there is an overlap in the two prongs of section 327(a), persons holding or representing an 'interest adverse' to the estate and persons who are not 'disinterested,' and observe that "they form one hallmark with which to evaluate whether professionals seeking

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<sup>1</sup> *In re Fretter*, 219 B.R. 769, 777 (Bankr. N.D. Ohio 1998), quoting *In re Roberts*, 46 B.R. 815, 827 (Bankr. D. Utah 1985), *rev'd in part on other grounds*, 75 B.R. 402 (D. Utah 1987); *Roger J. Au & Son, Inc. v. Aetna Insurance Co.* (*In re Roger J. Au & Son, Inc.*), 64 B.R. 600, 604 (N.D. Ohio 1986).

court-approved retention (or to remain retained by the estate) meet the absence of adversity requirements embodied in the Bankruptcy Code.”<sup>2</sup>

It should be noted that the requirements of § 327(a) are in the present tense, so the focus is on counsel’s present status as to the estate, not any interests it may have held or represented in the past.<sup>3</sup>

In connection with retention, Bankruptcy Rule 2014 provides that an order approving retention may only be made on application, a copy of which must be transmitted to the U.S. Trustee. The Rule also requires the application to state specific facts showing the necessity for employment, name of person(s) to be employed, the reasons for the selection, the professional services to be rendered, the proposed arrangement for compensation, and, to the best of applicant’s knowledge, “all of the person’s connections with the debtor, creditor, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States trustee.” The term “connections” is not defined.

It has been said that “Bankruptcy Rule 2014 provides the mechanism for enforcing the provisions of section 327(a) by requiring disclosure of the attorney’s relationships with parties in interest in the case.”<sup>4</sup> “Disclosure ‘goes to the heart of the integrity of the bankruptcy system’... Therefore, the duty to disclose under Bankruptcy Rule 2014 is considered sacrosanct because the complete and candid disclosure by an attorney seeking employment is indispensable to the court’s discharge of its duty to assure the attorney’s eligibility for employment under section 327(a) and to make an informed decision on whether the engagement is in the best

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<sup>2</sup> *Collier*, ¶ 327.04[2][a] (internal citations omitted).

<sup>3</sup> *See, e.g., Bank Brussels Lambert v. Coan (In re Arochem Corp.)*, 176 F.3d 610, 623 (2d Cir. 1999).

<sup>4</sup> *In re EToys, Inc.*, 331 B.R. 176, 189 (Bankr. Del. 2005).

interest of the estate.”<sup>5</sup> Accordingly, failure to properly disclose all connections is sufficient to warrant disqualification of counsel<sup>6</sup> or denial of some or all of counsel’s fees.<sup>7</sup> Disclosure is not limited to those that pose a conflict but instead, require disclosure of all contacts so the Court can analyze whether any of the connections rise to the level of a conflict.<sup>8</sup> And, a knowing failure to disclose conflicts that would have barred retention could constitute a fraud on the court, warranting relief from the retention order under Federal Rule 60(b)(6).<sup>9</sup>

The ABI National Ethics Task Force noted in its recent report<sup>10</sup> that the present form of Rule 2014 does not limit the extent of disclosure and in fact, most courts have held that professionals have little, if any, discretion in disclosing whether a “connection” is “relevant” to the application, thus leading to considerable confusion about the appropriate level of disclosures.<sup>11</sup> Accordingly, the Task Force has recommended revisions to Rule 2014 that will incorporate concepts of materiality and relevance with respect to the disclosures, designed to require disclosure of personal and professional relationships relevant to determining whether there is any bias or influence on professional judgment.<sup>12</sup>

Counsel should also familiarize themselves with their court’s interpretation of section 328 and whether or not pre-approval should be sought (as discussed in Part I of these materials). In this regard, it should be noted that section 331 authorizes professionals retained

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<sup>5</sup> *Id.* (internal citations omitted).

<sup>6</sup> *See, e.g., In re Universal Building Products*, 486 B.R. 650, 663-664 (Bankr. D.Del. 2010)(internal citations omitted).

<sup>7</sup> *See, e.g., In re Sportsman’s Link, Inc.*, 2102 WL 2998410 (Bankr. S.D. Ga. 2012)(After finding that counsel was disinterested notwithstanding subsequently-revealed connections, Court reduced fees as a penalty for improper disclosures).

<sup>8</sup> *Id.* at \*3 (internal citations omitted).

<sup>9</sup> *Id.* at 187-188 (internal citations omitted).

<sup>10</sup> The ABI National Ethics Task Force Summary of Findings and Recommendations, found at [www.abiworld.org](http://www.abiworld.org).

<sup>11</sup> *Id.* at p. 2-3.

<sup>12</sup> *Id.* at p. 3-8.

under §§ 327, 1103 to seek interim compensation under § 330, rather than waiting to the end of the case, every 120 days. So, chapter 11 debtors' attorneys in particular often seek retention under section 327 only, so as to be permitted to seek interim compensation during the case.

Finally, it is important to seek retention as soon as possible. Most courts read the Code as requiring retention approval before services are rendered.<sup>13</sup> While it is generally accepted that as courts of equity, the Bankruptcy Courts may enter *nunc pro tunc* retention orders that date back to an earlier time, there are varying standards for when they will be entered and therefore, best practices dictate that the retention application should be filed as promptly as possible.<sup>14</sup> Of course as a practical matter, a chapter 11 debtor's proposed counsel cannot seek approval before filing the petition and even some first day motions, and so it is often the case that such retention asks the Court to exercise its equity power to approve the retention as of the date of the petition, so that counsel's fees can properly paid for its initial efforts.

## (2) Handling the Matter

Even if properly approved as counsel, compensation can still be denied as a result of various events during the case. For example, for retention approved under § 328, § 328(c) provides that compensation may be disallowed if during the employment, the professional is not a disinterested person or represents or holds an interest adverse to the interest of the estate. This section "was placed in the Code to provide the court with an optional 'penalty' for professionals who entered into a conflict of interest with the estate," so as to require a continuing duty to disclose<sup>15</sup> and giving the court discretionary authority to deny fee applications in whole or in

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<sup>13</sup> *Collier*, ¶ 327.03[3] (internal citations omitted).

<sup>14</sup> *Id.* (internal citations omitted).

<sup>15</sup> *In the Matter of CF Holding Corp.*, 164 B.R. 799, 806 (Bankr. D.Conn. 1994)(internal citations omitted).

part.<sup>16</sup> Courts have also concluded that professionals have the obligation to disclose another professional's loss of disinterestedness, and failure to do so warrants a reduction in their fees.<sup>17</sup>

Similarly, § 330(a)(2) expressly authorizes the Court to award less than is requested. Several factors are set forth in the statute to be considered in determining the reasonableness of fees, including whether the services were necessary or beneficial at the time.<sup>18</sup> While this necessarily means that the Court is using 20-20 hindsight to some degree, courts recognize that many of the attorneys who appear before them are experienced and knowledgeable and so can fairly be expected to exercise foresight and judgment in performing services. "The pertinent question is not whether the services performed by the professional conferred an actual benefit upon the estate; but whether, when viewed under the circumstances in existence at the time, the services were reasonably calculated to benefit the estate."<sup>19</sup> Thus, for example, a firm's fees were partially disallowed where the Court found that counsel should have known that certain services were not beneficial and were not reasonably likely to benefit the estate.<sup>20</sup> Accordingly, while you can never predict with certainty the outcome of any efforts, it is important to reasonably assess the likelihood before performing services for which you will seek compensation.

One of the other issues that can affect debtor's counsel being paid is when the Chapter 11 debtor changes its status, either by converting to Chapter 7 or having a trustee appointed. In *Lamie v. U.S. Trustee*, 540 U.S. 526, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004), the Supreme Court held that § 330(a) does not authorize payment to a debtor's attorney for services performed

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<sup>16</sup> *Id.* at 807 (internal citations omitted).

<sup>17</sup> *Id.* at 807-808 (internal citations omitted).

<sup>18</sup> § 330(a)(3).

<sup>19</sup> *In re Kennedy Mfg.*, 331 B.R. 744, 748 (Bankr.N.D. Ohio 2005) (internal citation omitted).

<sup>20</sup> *See, e.g., In re Saint Vincents Catholic Medical Centers of New York*, 2007 WL 2492787 (Bankr. S.D.N.Y. 2007) (The Court reduced the requested fees for several categories of services based on lack of benefit).

after the debtor's Chapter 11 case was converted and an estate trustee was appointed. The Court concluded that appointment of the trustee meant that the debtor was no longer the debtor-in-possession and so terminated the attorney's service under § 327 as an attorney for the debtor-in-possession. Since the attorney was not employed by the Trustee and approved under § 327, then § 330(a) did not authorize compensation from estate funds.

This same reasoning has been held to preclude the payment of debtor's fees from estate property for services rendered after the appointment of a chapter 11 Trustee. In *In re International Gospel Party Boosting Jesus Groups, Inc.*,<sup>21</sup> the District Court affirmed the Bankruptcy Court's decision that *Lamie* applied to prevent an award of fees to the debtor's counsel after appointment of a chapter 11 trustee, despite the fact that in that case, there were surplus funds in the estate. "The language of section 330(a) is unambiguous in its exclusion of debtor's attorneys, and makes no exception for cases involving surplus funds." *Id.* at 15. The Court also found, however, that the Bankruptcy Court's order permitting payment of the fees from the surplus upon dismissal under § 349(b)(3)<sup>22</sup> of the Code was erroneous since there was no proper "cause." "Quite simply, the bankruptcy court lacked authority to accomplish through section 349(b) what it could not accomplish through section 330(a)." <sup>23</sup>

### (3) Fee Applications

As noted in section I of these materials, there are a variety of Code sections, Bankruptcy Rules, local rules, guidelines and other directives with respect to fee applications that must be followed. Many of these require, for example, what is commonly referred to as "task coding," or

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<sup>21</sup> 487 B.R. 12 (D.Mass. 2013).

<sup>22</sup> That section provides that dismissal revests the property of the estate in the entity in which the property was vested prior to the bankruptcy filing.

<sup>23</sup> *Id.* at 16 (internal citations omitted).

separating time entries by task. Since going back through numerous invoices to determine this takes a considerable amount of time, it is important to know your jurisdiction's rules *before* beginning work and recording your time. That way, you can set up your billing system to require separate entries for separate tasks, making that component far easier. Another issue commonly addressed is travel time; for example, only one-half of travel time may be billed for matters in the Northern District of Ohio. A sample fee application is included in the appendix.

Finally, counsel needs to be familiar with any local rules or customs concerning whether or not time spent preparing the fee application is itself compensable. For example, the Judges in the Northern District of Ohio, Western Division, do not typically allow fees for preparing the fee application. Indeed, § 330(a)(6) provides that any compensation awarded for preparing the application should be based on the level and skill reasonably required to prepare the application, so that even where allowed, care should be taken in staffing the preparation of the application.

## **You Have Bills to Pay? Ethics in Getting Paid in Chapter 7, 11 and 13 Cases**

### **IV. Ethics in Getting Paid in Chapter 13 Cases**

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czuniga@lakelaw.com

Section 330(a)(4)(B) of the Bankruptcy Code governs Chapter 13 professionals and Rule 2016(a) requires that professionals file fee applications. Most courts use the “lodestar method” to analyze the reasonableness of attorney fees by determining a reasonable billing rate and multiplying by the reasonable number of hours a task should take.<sup>1</sup> Nonetheless, the lodestar method is not required as many districts have implemented systems where debtors’ attorneys can be awarded a presumptively reasonable fee, “sometimes called ‘no look’ fees because they are awarded without the kind of detailed application and itemization of services that Rule 2016(a) would otherwise demand.”<sup>2</sup> The average fees for a Chapter 13 case vary across the country, but typically, the debtor pays a small portion of the total fees so that the attorney will prepare and file the Chapter 13 petition. Unlike in a Chapter 7, the remaining balance of attorney fees is paid by the debtor’s post-petition income via plan payments that are distributed by the trustee.

Chapter 13 cases can be attractive for debtors due to the difficulty of payment in full before filing a Chapter 7. Attorneys have gotten creative and begun filing what is colloquially referred to as the “fee only plan”. The fee only plan proposes to pay the trustee and attorney their administrative fees, no secured or unsecured priority creditors and a *de minimis* dividend to general unsecured creditors. The emergence of fee only Chapter 13 plans is due in part to the Supreme Court’s decision in *Lamie v. United States Trustee* and the enactment of BAPCPA in 2005, which made the process for filing bankruptcy “more complicated – increasing the need for legal advice and, in turn, the cost of filing for bankruptcy.”<sup>3</sup>

Courts must consider whether the debtor proposing the fee only plan meets the good faith requirement of § 1325(a)(3). As Congress did not define “good faith” in the Bankruptcy Code,

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<sup>1</sup> *In re Brent*, 458 B.R. 444, 450 (Bankr.N.D.Ill 2011)(citing *In re Eliapo*, 468 F.3d 592, 598 (9th Cir.2006)).

<sup>2</sup> *Brent* at 450 (citing *In re Williams*, 357 B.R. 434, 439 n. 3 (6th Cir. BAP 2007)).

<sup>3</sup> *In re Puffer*, 674 F.3d 78, 84 (1st Cir. 2012) (Lipez, J., concurring), *on remand*, 478 B.R. 101 (Bankr.Mass. 2012).

courts apply a totality of circumstances test.<sup>4</sup> Most circuit courts have outlined a subjective, holistic non-exhaustive list of factors for determining good faith.<sup>5</sup> The majority of courts that have addressed the issue of fee only plans have found that the plans fail to meet the good faith requirement of § 1325(a)(3), although some on additional grounds.<sup>6</sup>

Some courts have refused to apply the factors to analyze the good faith of the debtors because “a plan whose duration is tied only to payment of attorney’s fees simply is an abuse of the provisions, purpose, and spirit of the Bankruptcy Code.”<sup>7</sup> These courts point out that Chapter 13 was designed for debtors to propose repayment plans and fee only plans are “Chapter 7 cases hidden within Chapter 13 petitions, blur[ring] the distinction between the chapters into a meaningless haze.”<sup>8</sup> Additionally, to allow debtors to file a Chapter 13 to pay attorney fees over time would judicially invalidate the time limitations of § 727(a)(8).<sup>9</sup> Given that the debtors in fee only Chapter 13 plans are well suited for Chapter 7 otherwise, these plans “unnecessarily raise the cost of filing a bankruptcy petition for debtors who do not need or are ill suited for Chapter 13; and subvert the Supreme Court’s holding in *Lamie v. U.S. Trustee* prohibiting the payment of post-petition attorney’s fees from a debtor’s Chapter 7 bankruptcy estate.”<sup>10</sup> Furthermore, “[s]uch filings have the inherent effect of placing the interests of the attorney above those of his

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<sup>4</sup> *Puffer*, 674 F.3d at 82.

<sup>5</sup> See *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988) and *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1990)

<sup>6</sup> See *In re Dicey*, 312 B.R. 456 (Bankr.N.H. 2004) (debtor’s plan proposed in bad faith where filed 2 weeks after judgment for intentional torts of assault and battery entered against him which would have been non-dischargeable under § 523(a)(6)), *In re Lehnert*, 2009 WL 1163401 (E.D.Mich. Jan. 14, 2009) (debtor’s plan proposed in bad faith where largest creditors had non-dischargeability claims and debtors understated income by \$1,000/month), *Ingram v. Burchard*, 482 B.R. 313 (N.D.Cal. 2012) (Congress’ preference for Chapter 13 is tempered by restrictions and 0% plan with lien strip was unfair manipulation of the Bankruptcy Code), and *In re Barnes*, 12-06613-8-RDD (Bankr.E.D.N.C. Jan. 15, 2013) (above-median debtors’ plan with early termination language as debtors had no secured or unsecured priority claims other than the trustee and attorney would be in bad faith, but 60 month plan with no early termination language would not be in bad faith).

<sup>7</sup> *In re Paley*, 390 B.R. 53, 59 (Bankr.N.D.N.Y 2008). See also *In re Arlen*, 461 B.R. 550, 553-4 (Bankr.W.D.Mo. 2011) (holding that the court need not perform an exhaustive analysis of the factors for good faith and “the key inquiry is whether a plan violates the spirit and purpose of Chapter 13”).

<sup>8</sup> *Paley*, 390 B.R. at 59-60.

<sup>9</sup> *In re Montry*, 393 B.R. 695, 696-7 (Bankr.W.D.Mo. 2008).

<sup>10</sup> *Id.*

client, the Court and the bankruptcy systems as a whole...” and allowing attorneys to utilize Chapter 13 in this way runs afoul of the purpose of Chapter 13.<sup>11</sup>

The First Circuit in *In re Puffer* recently held that fee only plans are not per se bad faith because “there may be special circumstances, albeit relatively rare, in which this type of odd arrangement is justified.”<sup>12</sup> The debtor would carry the heavy burden to justify the plan based on special circumstances.<sup>13</sup> The court made clear in *Puffer* that they were not approving fee only plans generally and expressed concern that fee only plans seem to only advantage the attorney and have the appearance of abuse.<sup>14</sup>

Exigency and inability to receive a Chapter 7 discharge may be special circumstances that warrant approval of a fee only plan.<sup>15</sup> Chapter 13 may also put a debtor in a better position if they have ongoing medical debt that may necessitate a future bankruptcy within the eight year waiting period between Chapter 7’s.<sup>16</sup> The totality of circumstances analysis and individual circumstances of the debtor are crucial to determining the good faith of a debtor in proposing a fee only plan.<sup>17</sup> Depending on the debtors’ circumstances, it could even border on malpractice to file a Chapter 7 if their interests would be better served in Chapter 13.<sup>18</sup>

Certainly bankruptcy practitioners in some districts could consider a bifurcated fee arrangement in filing a Chapter 7 in order to address the issue debtors’ inability to pay Chapter 7

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<sup>11</sup> *In re Buck*, 432 B.R. 13, 21-2 (Bankr.Mass 2010) (citing *In re Diano*, No. 01-85932-CRM, slip op., at 3-4 (Bankr.N.D.Ga Dec. 17, 2011)).

<sup>12</sup> *Puffer*, 674 F.3d at 83.

<sup>13</sup> *Id.*

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

<sup>15</sup> *In re Molina*, 420 B.R. 825 (Bankr.N.M. 2009) (court refused to read requirement of minimum dividend into the Bankruptcy Code and found that debtor was complying with the letter and spirit of the Bankruptcy Code as written). *But see Paley* at 60 (fee only plans for debtors ineligible for Chapter 7 invalidates § 727(a)(8)).

<sup>16</sup> *In re Crager*, 691 F.3d 671, 675 (5th Cir. 2012) (holding that it was not erroneous for the bankruptcy court to find debtor’s plan “was not an attempt to abuse Chapter 13, but rather a responsible decision given her particular circumstances” as the 5<sup>th</sup> Circuit does not have a per se rule that 0% plans are bad faith).

<sup>17</sup> *Id.* at 675-6.

<sup>18</sup> *Id.* at 675 (citing to the bankruptcy court’s ruling).

fees in advance.<sup>19</sup> Debtors' attorneys unable to pursue a bifurcated fee agreement in their district could always reduce their Chapter 13 fees below the no look or flat fee amount to allow some dividend to unsecured creditors.<sup>20</sup> Otherwise, debtors' attorneys should expect an uphill battle in convincing a court that the fee only plan should be confirmed.

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<sup>19</sup> See *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1128 (7th Cir. 2003), Bankruptcy Court Northern District of Illinois Standing Order dated February 17, 2004, and *In re Slabbinck*, 482 B.R. 576, 597 (Bankr.E.D.Mich. 2012).

<sup>20</sup> See *Molina*, 420 B.R. at 826.

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

ABC CORPORATION,

Debtor.

Case No. 12-33996

Chapter 11

Judge Thomas Smith

**MOTION OF THE DEBTOR-IN-  
POSSESSION FOR AUTHORITY TO  
EMPLOY COUNSEL, INCLUDING  
DECLARATION**

\*\*\*\*\*

Now comes ABC Corporation, the Debtor-in-Possession (“Debtor”), pursuant to 11 USC §§ 327(a), 329 and Bankruptcy Rules 2014 and 2016-1, and respectfully moves this Court for an order appointing and approving David Jones to represent the Debtor in these proceedings and further represents as follows:

1. That on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, this case was commenced pursuant to 11 USC § 1103 and § 1108 and the Debtor remains a debtor-in-possession.
2. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The Debtor wishes to employ David Jones and the lawyers regularly associated with him, duly admitted to practice in this Court, to represent the Debtor in this case.
4. The Debtor has selected David Jones for the reason that he has had considerable experience in matters of this nature and the Debtor believes David Jones is knowledgeable and well qualified to represent the Debtor in this proceeding.
5. The professional services to be rendered are as follows:

- a. To give the Debtor legal advice with respect to its powers and duties under its bankruptcy proceeding;
  - b. To consult with and aid in the preparation and implementation of a plan of reorganization and the collection of the assets of the Debtor;
  - c. To represent the Debtor in all litigation instituted by or against the Debtor;
  - d. To represent the Debtor in all matters related to this proceeding.
6. The Debtor states that David Jones and the attorneys regularly associated with Jones & Baker Co. LPA, and the employees of Jones & Baker Co. LPA have no connection with the Debtor, its creditors, or any other party in interest, their respective attorneys and accountants, the United States Trustee or persons employed in the United States Trustee's office.
7. The Debtor states that the attorneys regularly associated with David Jones are not relatives of any Bankruptcy Judge or of the United States Trustee, nor do they have any connection or relationship to any Bankruptcy Judge of the Northern District of Ohio or the United States Trustee. The Debtor further states that it has inquired and to the best of its knowledge, no one associated with David Jones in the practice of law is related to any Bankruptcy Judge or the United States Trustee, or connected with any Bankruptcy Judge of the Northern District of Ohio or the United States Trustee.
8. David Jones acknowledges that he is fully informed as to the limitation on compensation set forth in § 328(b), and the prohibition against sharing of compensation set forth in § 504, as well as the other applicable rules governing retention, compensation and conduct of professionals before this Court.

9. The Debtor states that David Jones, as attorney for the Debtor, may, from time to time, utilize the services of other attorneys, or paralegals with whom he is regularly associated, and that the charges to be made to the Debtor will be based upon the rates in effect at the time services are rendered. The current rates, which may be subject to future increases, are:

Joseph Baker	\$300.00/hr.
David Jones	\$225.00/hr.
Associates	\$150.00/hr. - 200.00/hr.
Paralegals	\$ 90.00/hr. - 125.00/hr.

10. Counsel has received the sum of \$\_\_\_\_\_ as a retainer to cover fees and expenses incurred by counsel for the Debtor. The retainer was paid into the Debtor as a capital contribution by one of the members, Andrew B. Cook.

11. The Debtor and David Jones have agreed, as part of the arrangement due to the ongoing services that will be required in this case, that an order allowing David Jones and the attorneys and paralegals regularly associated with him to be paid on a monthly basis, all fees and expenses incurred during the preceding month, with prior notification to the Debtor, US Trustee's Office, the Court and the Unsecured Creditor's Committee, if any, each month of the amounts billed, the substance of the services rendered, with subsequent filing of fee applications for review and approval by the Court pursuant to 11 USC § 331. It is recognized that all such fees and expenses paid would be subject to final approval by the Court and possible disgorgement upon order of the Court and that nothing herein should be construed to in any way limit the ability of the Court to review and evaluate the reasonableness or propriety of any fees or expenses paid.

**WHEREFORE**, the Debtor requests the Court approve the employment of David Jones and the attorneys and paralegals regularly associated with him to represent the Debtor herein at

the rates of compensation indicated above, subject to review of the Court, and for such other relief as is just and equitable.

/s/ Andrew B. Cook  
Andrew B. Cook, Member

**CERTIFICATE OF SERVICE**  
**AND NOTICE PURSUANT TO LOCAL RULE 9013-1**

Please take note that you have fourteen (14) days from the date of service, as set forth on the Certificate of Service herein, to file an objection to this Motion, and that if an objection is not timely filed with the Court and served on the Movant c/o David Jones, Jones & Baker Co., L.P.A, 1000 Main Street, Toledo, OH 43604, the Court may grant the relief requested without further notice.

I certify that a copy of the foregoing Motion was served via ECF or U.S. Mail, as indicated, to the parties listed below this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

[insert attorney name  
firm name  
email address]

Twenty Largest Unsecured Creditors as follows:

XYZ Inc.  
51 Sawyer Road #200  
Columbus, OH 43215

[insert remaining 19 creditors here]

/s/ David Jones  
David Jones

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

ABC CORPORATION,

Debtor.

Case No. 12-33996

Chapter 11

Judge Thomas Smith

**DECLARATION OF COUNSEL**

David Jones (0012345)  
Jones & Baker Co., L.P.A.  
1000 Main Street  
Toledo, OH 43604  
Telephone: 419-242-1212  
Facsimile: 419-242-1313  
Email: djones@jonesbaker.com

\*\*\*\*\*

David Jones being first duly sworn, deposes and states as follows:

1. That this Verified Statement is made pursuant to the provisions of 11 U.S.C. § 327(a) and (c) of the Bankruptcy Code regarding employment of professional persons, and in light of the restrictions imposed thereon by Bankruptcy Rules 2014(a), 2016(b) and 5002;
2. That this Verified Statement supplements the disclosures contained in and accompanying the Motion for Authority to Employ Counsel filed herewith;
3. That I am an attorney duly authorized to practice in both Federal and State Courts in the State of Ohio;
4. That I practice law under the firm name of Jones & Baker Co. LPA. The firm maintains offices for the practice of law at 1000 Main Street, Toledo, OH 43604;
5. That I have experience in bankruptcy, corporate reorganization and debtor/creditor law and feel that I am qualified to represent the Debtor herein and am willing to accept representation in these proceedings on the basis set forth in the Motion.

6. That this Verified Statement affirms to this Court that neither myself, nor any person with whom I am associated in the practice of law, or employed by my firm in the practice of law, is a relative by blood or marriage of any Bankruptcy Judge of the Northern District of Ohio; and that neither myself, nor any member of my firm, or employed by my firm, is not now, nor has ever been, so connected with any such Judge that would render my firm's appointment, or the Court's approval of my firm's employment in the within cause improper or prohibited by Bankruptcy Rule 5002;
7. That this Verified Statement is to fully disclose to the Court that to the best of my knowledge, I know of no matters that might be considered by any party to create an issue or claim of conflict or lack of being a disinterested party; and neither myself, nor any member of my firm, nor any employee of my firm, has any connections to the Judge, the Debtor, any creditors, or any party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the Office of the United States Trustee;
8. That this Verified Statement affirms the undersigned's acknowledgement that he is fully informed as to the limitation on compensation set forth in § 328(b) and the prohibition against sharing of compensation set forth in § 504;
9. That this Verified Statement affirms the undersigned's knowledge of the United States Trustees Guidelines for Compensation and Expense Reimbursement of Expenses Filed Under 11 U.S.C. § 330 and the U.S. Bankruptcy Court, Northern District of Ohio Guidelines for Compensation and Expense Reimbursement of Professionals.

/s/ David Jones  
David Jones

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

In re: Case No. 12-33996  
ABC CORPORATION, Chapter 11  
Debtor. Judge Thomas Smith

**FINAL FEE APPLICATION OF JONES &  
BAKER CO. LPA**

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TO THE HONORABLE THOMAS SMITH, BANKRUPTCY JUDGE:

This Final Fee Application of Jones & Baker Co. LPA (the "Firm"), attorneys for ABC Corporation, the Debtor-in-Possession, for compensation and reimbursement of expenses, respectfully represents and shows as follows:

1. This Final Fee Application for an award of compensation for legal services actually and necessarily rendered to the Debtor herein, and for reimbursement of actual and necessary expenses, is made pursuant to Sections 330 and 326 of the United States Bankruptcy Code and Bankruptcy Rule 2016. This Application seeks first, an award for services rendered and reimbursement of expenses recorded during the period \_\_\_\_\_ through \_\_\_\_\_. In addition, this Application seeks final approval of all the prior interim orders; approval for payment of the funds held back from the early fee applications; and payment of estimated fees and expenses as necessary for work performed from \_\_\_\_\_ through close of this liquidation proceeding.

2. By way of background, a voluntary Chapter 11 bankruptcy petition was filed on \_\_\_\_\_ by ABC Corporation.

3. The Debtor filed its application to retain the Firm on \_\_\_\_\_ and the Court approved the Debtor's retention of the Firm by Order entered on \_\_\_\_\_.

4. All of the professional services for which compensation is sought and all of the expenses incurred for which reimbursement is requested were performed and incurred solely for the Debtor in this case and pursuant to the professional responsibility of the Firm and not on behalf of any other person or party in interest.

**SERVICES RENDERED BY THE FIRM**

5. The Firm maintains records of the time expended by attorneys and paraprofessionals in rendering the services performed for the Debtor in this case. Such time records are made

contemporaneously with the rendition of such professional services and in the ordinary course of the Firm's practice, and are prepared by the attorney or paraprofessional person who had rendered the service. A schedule of the professional services rendered showing the date performed, the services rendered, the name of the attorney or paraprofessional who performed the services, and the amount of time expended in each instance is annexed as Exhibit A (consisting of \_\_\_\_\_ invoice(s)). The schedule shows those services recorded through \_\_\_\_\_, for which compensation is requested in this Application.

6. The Firm is requesting compensation for time which was devoted exclusively to travel at one-half of the hourly rates normally charged by its attorneys and paraprofessionals. Where time spent traveling was also utilized to perform other services, such as conferences or dictation, that fact is noted in the attached schedule. The Firm requests compensation for such time at its full hourly rate.

7. The Firm also maintains records of all actual and necessary expenditures incurred in connection with the performance of professional services in this case. A schedule of such expenditures for which disbursement was made and recorded as of \_\_\_\_\_ and for which reimbursement is requested is found at the end of each of the invoices attached as Exhibit A annexed hereto (consisting of \_\_\_\_\_ invoice(s)). Mileage expense has been calculated at the rate of \$.565 per mile as of January 1, 2013, in accordance with Internal Revenue Service regulations. Photocopies made on the Firm's equipment are charged at the rate of 20¢ per page. When time allows and the size of the job justifies, the Firm engages an outside copying service at a lower rate per page. Postage is charged only in mass mailing situations, such as service of pleadings, and not for ordinary correspondence.

8. Due to the multiple issues in the case, the Firm, to avoid overlapping of work, has attempted to have certain individuals handle discreet issues. However, to keep others informed as to the status of the proceedings, conferences between attorneys do occur. The Firm minimizes the conferences to only those instances it believes necessary.

9. The services rendered in connection with this case are classified in specific categories. The detailed time records for each category are attached hereto as Exhibit A.

10. During the period covered by this Application, the Firm rendered an aggregate of \_\_\_\_\_ hours of professional services, with an aggregate value of \$\_\_\_\_\_. Therefore, the Firm seeks \$\_\_\_\_\_. The average hourly rate for the attorneys and paraprofessionals who have rendered services during the period covered by this Application is \$\_\_\_\_\_. In the present Application, the Firm seeks payment of \$\_\_\_\_\_, plus \$\_\_\_\_\_ in expenses, for a total sum in this Application of \$\_\_\_\_\_. Annexed hereto as Exhibit A are invoices for the periods specified therein, showing a list of the attorneys and paraprofessionals who have participated in the performance of such services, their respective hourly billing rates, the total number of hours expended by each, and an extension of the value ascribed to the services of each (at the discounted rate), which the Firm deems to be fair and reasonable compensation for their services.

A. General Administrative.

During the period covered by this Application, the Firm assisted the Debtor with the overall general administration. This category includes services relating to assisting the Debtor with all matters relating to the administration of these proceedings, addressing various insurance and tax matters, and related matters.

All of these services were necessary and benefited the Debtor, customers, creditors and the Estate. The following is a billing summary for this category of services:

<u>ATTORNEY</u>	<u>HOURS</u>	<u>RATE</u>	<u>AMOUNT</u>
<b><u>PARTNER</u></b>			
David Jones	_____	\$ _____	\$ _____
Joseph Baker	_____	\$ _____	\$ _____
<b><u>ASSOCIATE</u></b>			
Name of Associate	_____	\$ _____	\$ _____
<b><u>PARALEGAL</u></b>			
Name of Paralegal	_____	\$ _____	\$ _____

B. Factual Investigation.

This category includes services relating to the investigation of the Debtors, their Principals, and the existence of insurance and bonds, review as well as execution of subpoenas and information obtained as a result, collection and review of paper and electronic information, collection and analysis of Debtor records, witness interviews and Rule 2004 depositions, and other investigatory matters.

All of these services were necessary and benefited the Debtor, customers, creditors and the Estate. The following is a billing summary for this category of services:

<u>ATTORNEY</u>	<u>HOURS</u>	<u>RATE</u>	<u>AMOUNT</u>
(No Time Was Entered for this Task for this Time Period)			

C. Creditor Communication.

This category includes services relating to various conferences and conversations with customers and other creditors regarding the status of the liquidation proceedings and claims review.

All of these services were necessary and benefited the Debtor, customers, creditors and the Estate. The following is a billing summary for this category of services:

<u>ATTORNEY</u>	<u>HOURS</u>	<u>RATE</u>	<u>AMOUNT</u>
<b><u>PARTNER</u></b>			
David Jones	_____	\$ _____	\$ _____

D. Claims Management

This category includes all services relating to claims including, evaluation claims coverage issues, working with \_\_\_\_\_ relating to claims, and all matters related to claims litigation.

All of these services were necessary and benefited the Debtor, customers, creditors and the Estate. The following is a billing summary for this category of services:

<u>ATTORNEY</u>	<u>HOURS</u>	<u>RATE</u>	<u>AMOUNT</u>
<b><u>PARTNER</u></b>			
David Jones	_____	\$ _____	\$ _____
Joseph Baker	_____	\$ _____	\$ _____

**ASSOCIATE**

Name of Associate \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

**PARALEGAL**

Name of Paralegal \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

E. Miscellaneous Litigation

This category includes services relating to various matters and hearings thereon, including the remaining litigation matters with \_\_\_\_\_, and \_\_\_\_\_.

All of these services were necessary and benefited the Debtor, customers, creditors and the Estate. The following is a billing summary for this category of services:

<u>ATTORNEY</u>	<u>HOURS</u>	<u>RATE</u>	<u>AMOUNT</u>
<b><u>PARTNER</u></b>			
David Jones	_____	\$ _____	\$ _____





**ATTORNEY**

**HOURS**

**RATE**

**AMOUNT**

(No Time Was Entered for this Task for this Time Period)

L. Financing.

**ATTORNEY**

**HOURS**

**RATE**

**AMOUNT**

**ASSOCIATE**

Name of Associate \_\_\_\_\_ \$ \_\_\_\_\_ \$ \_\_\_\_\_

11. Neither the Firm nor any of its partners or associates has received any compensation for the services or expenses covered by this Application.

12. No part of the compensation requested in this Application will be shared with any other person or firm and no agreement exists nor will be made between the Firm and any other person or firm for sharing any compensation received.

13. The Firm is unaware of any unpaid administrative expenses except those fees due the Debtor.

WHEREFORE, for the period of \_\_\_\_\_ through \_\_\_\_\_, the Firm respectfully requests that it be allowed compensation in the sum of \$\_\_\_\_\_. Further, the Firm requests that it be allowed reimbursement of expenses in the amount of \$\_\_\_\_\_;

That an Order be entered authorizing and directing the payment of such compensation and reimbursement of expenses advanced herein as an administrative expense pursuant to Section 503(b)(2) of the Bankruptcy Code and 15 U.S.C. §78eee(b)(5) and entitled to priority pursuant to Section 507(a)(1) of the Bankruptcy Code; and

That an Order be entered providing final approval of all the prior interim orders with respect to fees awarded to Jones & Baker.

Respectfully submitted,

Dated: \_\_\_\_\_

/s/ David Jones

David Jones (0012345)  
Jones & Baker Co., L.P.A.  
1000 Main Street  
Toledo, OH 43604  
Telephone: 419-242-1212  
Facsimile: 419-242-1313  
Email: djones@jonesbaker.com  
*Attorney for ABC Corporation, Debtor*

STATE OF OHIO     )  
                                  )SS  
LUCAS COUNTY     )

David Jones, individually deposes and says that he is one of the attorneys for the Debtor herein; that he has read the foregoing Application, that the compensation and expense reimbursement conforms with the Guidelines for the United States Bankruptcy Court for the Northern District of Ohio, that the compensation and expense reimbursement requested are billed at rates, and in accordance with practices, no less favorable, to the Debtor than those customarily employed by applicant and in fact, fees are billed at the Firm's usual and customary rates, and that the same is true to the best of his knowledge, information and belief; that there is no agreement or understanding existing either directly or indirectly for a division of fees between the Firm or the creditors, or any of them or their attorneys, or any other person rendering services in this case, or any other person except that said compensation may be shared with members or regular associates of the Firm as permitted by federal bankruptcy law.

\_\_\_\_\_  
David Jones

SWORN TO BEFORE ME and subscribed in my presence by David Jones, this \_\_\_\_\_  
day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

**CERTIFICATE OF SERVICE**

I certify that on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, a true and correct copy of the foregoing fee application was served:

Via the courts' Electronic Case Filing System on these entities and individuals who are listed on the court's Electronic Mail Notice List:

[insert attorney name  
firm name  
email address]

And by regular U.S. mail, postage prepaid, on:

Name  
Company  
Address  
City, State zip

*/s/ David Jones* \_\_\_\_\_

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