THE ETHICAL RAMIFICATIONS OF SECTION 330(a)(1) OF THE BANKRUPTCY CODE

INTRODUCTION

The 1994 Reform Act of the Bankruptcy Code[1] made the most extensive changes in bankruptcy law since the enactment of the Bankruptcy Code itself in 1978.[2] Among its goals,[3] the aim of the amended section 330[4] was to encourage "greater uniformity in the application for and processing and approval of fees."[5] The section was also intended to ensure reasonable compensation for bankruptcy attorneys so highly qualified specialists would not be forced to abandon the practice of bankruptcy law in favor of a more remunerative kind of legal work.[6] Section 330 provides the guidelines for compensation of services and reimbursement of expenses to officers of the estate.

Prior to the 1994 Reform Act, section 330(a) provided in relevant part:

> (a) After notice to any parties in interest, and to the United States trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney . . .

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[1] Bankruptcy Reform Act of 1994, Pub. L. No. 103–394, 108 Stat. 4106 (1994).

[2] *See* 140 CONG. REC. S14, 464 (Oct. 6, 1994) (statement of Sen. Hatch); *see also* Eric W. Lam, *The Limit and Inconsistency of Application of the Plain Meaning Rule to Selected Provisions of the Bankruptcy Reform Act of 1994*, 20 HAMLINE L. REV. 111, 111 (1996) (stating 1994 Act makes most sweeping changes in bankruptcy law in at least ten years); Ned W. Waxman, *The Bankruptcy Reform Act of 1994*, 11 BANKR. DEV. J. 311, 311–12 (1994–1995) (explaining Reform Act of 1994 considered one of most noteworthy pieces of economic legislation enacted by 103d Congress).

[3] *See* 140 CONG. REC. H10, 764 (Oct. 4, 1994) (statement of Rep. Brooks) (stating amended § 330 was intended to expedite bankruptcy process, discourage abuses and resolve certain bankruptcy law problems); *see also* Hon. Leif M. Clark & Douglas E. Deutsch, *New Development: The Delaware Gap: Exposing New Flaws in the Scheme of Bankruptcy Referrals*, 5 AM. BANKR. INST. L. REV. 257, 266 (1997) (acknowledging one of its purposes is to "ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes"); David M. Green & Walter Benzija, *Spanning the Globe: The Intended Extraterritorial Reach of the Bankruptcy Code*, 10 AM. BANKR. INST. L. REV. 85, 109 (2002) (noting vital goal of Code is orderly distribution of assets and providing honest debtors with "fresh start").

[4] 11 U.S.C. § 330 (2000).

[5] *See* Bankruptcy Code, Rules and Forms, at 77 (West Group 2000). *See generally* 140 CONG. REC. H10, 752, H10, 769 (Oct. 4, 1994) (indicating changes were designed to promote greater uniformity in fee process); S. REP. NO. 95–989, at 40 (1978) (exploring importance of compensation under § 330 because of inherent public interest).

[6] *See* 124 CONG. REC. H32, 394 (1978) (statement of Rep. Edwards) (stating "Congress made clear its intent to ensure competent representation of debtors by requiring compensation of 'attorneys and other professionals serving in a case under title 11 at same rate as attorney or other professional would be compensated for performing comparable services' in non-bankruptcy cases."); *see also In re* Nucorp Energy, Inc., 764 F.2d 655, 658 (9th Cir. 1985) (pointing out objective of legislatures when enacting § 330); Waxman, *supra* note 2, at 317 n.42 (explaining assessment of reasonable compensation by typical rates charged by equivalently skilled nonbankruptcy practitioners should be beneficial to bankruptcy specialists).

> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or attorney . . . .[7]

Thus, when the Code was enacted in 1978, it identified a "debtor's attorney" as one of the professional persons who is eligible to receive compensation for services performed for the benefit of the debtor's estate. However, in 1994, Congress deleted the words "debtor's attorney,"[8] thereby excluding compensation from the estate for debtor's counsel in chapter 11 and chapter 7 proceedings.[9] Chapter 12 and chapter 13 debtors' attorneys were not affected by this amendment because section 330(a)(4)(B) expressly provides that a court may allow them reasonable compensation for services that benefit and are necessary to the estate.[10]

Part I of this Note asserts that the correct application of section 330(a)(1) should be interpreted to include "debtor's attorney" as one of the persons who may be compensated from the estate. Otherwise, the amended section 330(a)(1) would have serious ramifications in a variety of chapter 7 and chapter 11 contexts. As support for this conclusion, Part II of this Note will examine relevant judicial interpretations of section 330, the statutory language of section 330, and its legislative history. Part III will examine the lack of available alternatives for the debtors' attorney to utilize in order to be compensated in chapter 7 and chapter 11 proceedings. Part IV will explore the ethical dilemmas that will inevitably arise due to the lack of alternative, viable payment options. Finally, this Note concludes that the potential for non-compensation will have a disastrous effect on the bankruptcy community and the attorney/client relationship in chapter 7 and chapter 11 cases. Congress must take steps to correct its error; absent that, courts should overlook the omission of "debtor's attorney[s]" when interpreting section 330(a)(1).

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[7] *See* 11 U.S.C. § 330(a) (1978).

[8] *See* 4-5 COLLIER COMPENSATION, EMPLOYMENT & APPOINTMENT OF TRUSTEES & PROFESSIONALS IN BANKRUPTCY CASES ¶ 4.02 [2] (Matthew Bender & Co., Inc., ed. 2001) (explaining deletion of debtor's attorney is clearly unintended result). *See generally* U.S. Tr. v. Garvey, Schubert & Barer (*In re* Century Cleaning Servs., Inc.), 195 F.3d 1053, 1059–60 (9th Cir. 1999) (suggesting deletion of debtor's attorney "resulted from an unintended slip of the pen"); *In re* Ames Dep't Stores, Inc., 76 F.3d 66, 71–72 (2d Cir. 1996) (holding omission of "debtor's attorney" was inadvertent).

[9] *See* U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 290 F.3d 739, 745–47 (4th Cir. 2002) (disallowing reasonable compensation for debtor's attorney for chapter 7 proceeding); Andrews & Kurth L.L.P. v. Family Snacks, Inc. (*In re* Pro-Snax Distribs., Inc.), 157 F.3d 414, 425–26 (5th Cir. 1998) (excluding reasonable compensation to chapter 11 debtor's attorney); *see also* Mark D. Sherrill, *Compensability of Debtor's Counsel Under Section 330(a) of the Bankruptcy Code*, 10 NORTON BANKR. L. ADVISOR, Oct. 2001, at 7, 8 (suggesting debtor's counsel may have difficulty receiving compensation from estate for chapter 11 cases converted to chapter 7 or when court appoints chapter 11 trustee).

[10] *See* 11 U.S.C. § 330(a)(4)(B) (2000); *see also* Smith v. Edwards & Hale L.T.D. (*In re* Smith), 305 F.3d 1078, 1084 (9th Cir. 2002) (stating new provision in § 330 expressly authorizes reasonable compensation only to debtor's attorneys for chapter 12 and 13); *In re* Friedland, 182 B.R. 576, 579 (Bankr. D. Colo. 1995) (holding statutory language only allowed reasonable compensation from estate, or assets of estate, to counsel for debtors in chapter 12 and 13 proceedings).

I. UNDERSTANDING SECTION 330(a)(1) AFTER THE 1994 AMENDMENT

Prior to the 1994 Reform Act, the answer to whether debtors' attorneys were entitled to compensation from the estate was obvious. Debtors' attorneys were among four classes of officers to whom the bankruptcy court was explicitly allowed to give compensation.[11] The deletion of the words "debtor's attorney" from section 330(a)(1) has cast doubt on this arrangement.

A bankruptcy estate is created under section 541 of the Code.[12] It is comprised of all of the debtor's interests, legal and equitable, in property wherever located and by whomever held.[13] The property of the estate, with certain exceptions, is property in which the debtor had an interest on the date the petition was filed.[14] In many chapter 7 liquidation proceedings and chapter 11 reorganization proceedings, section 330 is irrelevant because debtors' attorneys usually require that they are paid before the filing of the petition.[15]

In a chapter 11 proceeding, the debtor in possession[16] steps into the shoes of the trustee. Section 1107(a) of the Code gives the debtor in possession "all of the rights . . . and powers" of a trustee, and requires the debtor in possession to "perform all the functions and duties" of a trustee.[17] This includes the right to "employ one or more attorneys, accountants . . . or other professional persons" authorized by section

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[11] *See In re* Top Grade Sausage, Inc., 227 F.3d 123, 127 (3d Cir. 2000) (describing § 330(a) before 1994 amendments); *see also* Rajala v. Hodes (*In re* Hodes), No. 98-20039-7-I-JAR, 2003 U.S. Dist. LEXIS 2436 at *19–25 (D. Kan. Feb. 13, 2003) (discussing whether debtor's attorney can be considered compensable officer under § 330); *In re Century Cleaning Servs.*, 195 F.3d at 1055 (stating debtor's attorneys are excluded from list of professionals eligible for compensation under statute).

[12] *See* 11 U.S.C. § 541 (2000) (explaining what is included in property of estate and what is not).

[13] *See* Bailey v. Big Sky Motors, Ltd. (*In re* Ogden), 314 F.3d 1190, 1197 (10th Cir. 2003) (explaining § 541 provides "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case."); *see also* Hon. William Houston Brown et al., *Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 AM. BANKR. L.J. 197, 202–05 (2001) (discussing bankruptcy disclosure requirements under § 541). *See generally* 1-1 COLLIER BANKRUPTCY MANUAL ¶ 1.03 [2][c][i] (Mathew Bender & Co., Inc., 3d ed. Rev. 2002) (defining that property forms estate, with exceptions for property obtained post-petition, is property in which debtor had interest at date of filing).

[14] *See* Kenneth DeCourcy Ferguson, *Discourse and Discharge: Linguistic Analysis and Abuse of the "Exemption by Delcaration" Process in Bankruptcy*, 70 AM. BANKR. L.J. 55, 56–58 (1996) (discussing § 541 and what qualifies as property of estate); Myron M. Sheinfeld et al., *Civil Forfeiture and Bankruptcy: The Conflicting Interests of the Debtor, Its Creditors and the Government*, 69 AM. BANKR. L.J. 87, 103 (1995) (explaining property captured pre-petition is property of estate). *See generally* 1-1 COLLIER BANKRUPTCY MANUAL ¶ 1.03[2][c][i] (describing what is included within property of estate under § 541).

[15] *See* U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 290 F.3d 739, 742 (4th Cir. 2002) (describing how retainer is used to pay attorney in advance for fees incurred during case); *In re Century Cleaning Servs.*, 195 F.3d at 1054 (explaining how debtor's attorney used retainer to be compensated for all pre-petition and post-petition services); *see also* Sherrill, *supra* note 9, at 7–8 (explaining compensability of debtor's counsel under § 330(a)).

[16] *See* BLACK'S LAW DICTIONARY 168 (7th ed. 1996) (defining debtor in possession as "a Chapters 11 or 12 debtor continues to operate its business as a fiduciary to the bankruptcy estate; with certain exceptions, the debtor in possession has all the rights, powers, and duties of a Chapter 11 trustee.").

[17] 11 U.S.C. § 1107(a) (governing rights, powers, and duties of debtor in possession).

327 of the Code.[18] This enables debtors' counsel to be compensated from the estate as a "professional person employed under section 327" by the debtor in possession, which is within the bounds of section 330.[19] However, section 330 is relevant and especially problematic for counsel representing a debtor in a chapter 7 proceeding, a chapter 11 proceeding that converts to chapter 7, or when a court appoints a chapter 11 trustee.[20]

A. Effects of Section 330(a)(1) on Conversion from a Chapter 11 Proceeding to a Chapter 7 Proceeding

A chapter 11 proceeding is a negotiation process which provides a method for the reorganization of a troubled business which desires to return to being a profitable member of the economic community.[21] Chapter 7 is a liquidation proceeding which provides a mechanism for taking control of the debtor's property, selling it, and distributing the proceeds in conformity with the distribution plan of the Code.[22] The court may grant a motion for conversion from a chapter 11 case to a chapter 7 case when it is in the best interests of the creditors and the estate.[23] Any party as a matter of right can propose conversion from a chapter 11 proceeding to a chapter 7 proceeding.[24] When debtors' counsel files an application for compensation for services performed for the estate after the date of conversion,[25] which is post-

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[18] *Id*. § 327(a) (explaining trustee, with court approval, may employ one or more attorneys).

[19] *See id*. § 330(a)(1) ("the court may award to a . . . professional person employed under section 327"); *see also id*. § 327 (governing employment of professional persons).

[20] *See In re Equip. Servs.*, 290 F.3d at 745–47 (concluding debtor's attorney was only allowed to recover fees for services performed during chapter 11 proceeding but was not authorized to be paid funds from bankruptcy estate for services rendered after case was converted to chapter 7 proceeding); *see also* Courington & Nash v. Moore (*In re* American Steel Product, Inc.), 197 F.3d 1354, 1356 (11th Cir. 1999) (holding chapter 7 debtor's attorney is not entitled to compensation from estate); Andrews & Kurth L.L.P. v. Family Snacks, Inc. (*In re* Pro-Snax Distribs., Inc.), 157 F.3d 414, 425 (5th Cir. 1998) (holding Congress has clearly indicated debtor's attorney may not be compensated from estate after appointment of chapter 11 trustee).

[21] *See* 1-1 COLLIER, *supra* note 13, ¶ 1.03 at [4] (explaining chapter 11 reorganization); *see also* Cynthia A. Baker, *Other People's Money: The Problem of Professional Fees in Bankruptcy*, 38 ARIZ. L. REV. 35, 38 (1996) (noting chapter 11 proceedings focus on two important issues: size of debtor's estate and how it can be increased, and division of estate); Linda J. Rusch, *Unintended Consequences of Unthinking Tinkering: The 1994 Amendments and the Chapter 11 Process*, 69 AM. BANKR. L.J. 349, 349 (1995) (stating basis of reorganization law is debtor is more valuable economically alive than dead).

[22] *See* 1-21 COLLIER, *supra* note 13, ¶ 301.12, at n.6 (explaining purpose of chapter 7 provisions).

[23] *See* 1-301 COLLIER, *supra* note 13, ¶ 301.12 at n.6 (suggesting court may be authorized to convert chapter 11 to chapter 7 if it serves best interests of creditors and estate). *See generally* Cent. Trust Co. v. Official Creditors' Comm. of Geiger Enters., Inc., 454 U.S. 354, 356 (1982) (finding upon filing motions for conversion, courts should consider what is in estates' best interests).

[24] *See* 3-1112 COLLIER, *supra* note 13, ¶ 1112.02 (explaining debtor's right to convert chapter 11 case to chapter 7 case is subject to certain restrictions). *See generally* United States v. Aetna Life Ins. Co., No. 01-14291, 2003 U.S. App. LEXIS 1346 at *14 (11th Cir. January 28, 2003) (illustrating motion to convert case from chapter 11 to chapter 7); Stoltz v. Brattleboro Housing Auth. (*In re* Stoltz), 315 F.3d 80, 85 (2d Cir. 2002) (illustrating motion to convert case from chapter 13 to chapter 7).

[25] *See* FED. R. BANKR. P. 2016(a) (providing procedural mechanism by which attorneys can seek compensation under § 330(a)). *See generally* Robert J. Landry, III & James R. Higdon, *Ethical*

petition, the attorney is at risk of the application being denied on the ground that the 1994 version of section 330 deleted "debtor's attorney," thereby precluding compensation from the estate.

B. The Effects of Section 330(a)(1) After a Chapter 11 Trustee Is Appointed

It may also be problematic for debtors' attorney to receive compensation when a court appoints a chapter 11 trustee. Generally, a court finds that there is cause to appoint a trustee when there is mismanagement of the debtor's estate because of fraud, dishonesty, or incompetence.[26] The court may also order appointment of a trustee if it is in the best interest of the estate.[27] Once the trustee has been appointed, the trustee displaces the debtor in possession for purposes of administering the estate and operating its business.[28] At this point, the debtor in possession, who had the same rights and duties as a trustee, is displaced. Therefore, debtors' counsel can no longer be considered a "professional person" employed by the debtor in possession under section 327(a).[29] Since section 330(a)(1) no longer provides compensation to "debtor's attorney," counsel for the debtor in a chapter 11 proceeding no longer fits within one of the categories of compensable persons once a trustee has been appointed.[30]

Considerations in Appointment and Compensation of an Attorney for a Chapter 11 Debtor in Possession, 66 MISS. L.J. 355, 368–70 (1996) (analyzing procedure of awarding compensation under § 330).

[26] *See* 11 U.S.C. § 1104(a) (2000) (governing when court will order appointment of trustee); *see also In re* Marvel Entm't Group, 140 F.3d 463, 471 (3d Cir. 1998) (explaining when court is empowered to appoint trustee); Fukutomi v. U.S. Tr. (*In re* Bibo, Inc.), 76 F.3d 256, 257 (9th Cir. 1996) (illustrating court directing U.S. Trustee to appoint trustee upon finding of fraud).

[27] *See* Ad Hoc Comm. of Bondholders v. Citicorp Venture Capital LTD., No. 99 Civ. 3177, 2000 U.S. Dist. LEXIS 2606, at *8 (S.D.N.Y. March 8, 2000) (stating bankruptcy court may appoint trustee for best interest of estate or creditors); *see also* 1-1 COLLIER, *supra* note 13, ¶ 1.03, at [4][a] (noting process by which chapter 11 trustee is appointed). *See generally* Barry L. Zaretsky, *Trustees and Examiners in Chapter 11*, 44 S.C. L. REV. 907 (1993) (discussing role of trustee, debtors in possession and creditor in chapter 11).

[28] *See In re* NRG, Inc., 64 B.R. 643, 647 (Bankr. W.D. La. 1986) (pointing out there is no need for debtor to have assistance performing duties which have been assumed by trustee); *see also* Andrews & Kurth L.L.P. v. Family Snacks, Inc. (*In re* Pro-Snax Distribs., Inc.), 157 F.3d 414, 423 (5th Cir. 1998) (stating Code is clear trustee replaces debtor in possession for reason of managing estate).

[29] *See In re Pro-Snax Distribs., Inc.*, 157 F.3d at 424–26 (providing extensive discussion of why it would not allow counsel for debtor to receive compensation for work performed after chapter 11 trustee has been appointed); *see also In re* Brierwood Manor, Inc., 239 B.R. 709, 717 n.11 (Bankr. D.N.J. 1999) (stating just as trustee replaces debtor in possession, trustee's attorney replaces debtor's attorney); Bruce H. White & William L. Medford, *Compensation for Debtor's Counsel After a Chapter 11 Trustee is Appointed: When Should Debtor's Counsel Stop Working*, 1999 ABI JNL. LEXIS 79, at *4–6 (June 1999) (examining Pro-Snax opinion).

[30] *See In re Pro-Snax Distribs. Inc.*, 157 F.3d at 425 (holding debtor's attorneys are excluded from those who may be compensated after appointment of chapter 11 trustee); *see also In re* Keller Fin. Servs. of Fla., Inc., 243 B.R. 806, 817 (Bankr. M.D. Fla. 1999) (endorsing holding of *Pro-Snax*); *In re* Skinner, 240 B.R. 225, 227 (Bankr. W.D. Va. 1999) (holding debtor's attorney is not among one of officers eligible for compensation under § 330).

II. DIVERGENCE AMONG THE COURTS

The issue whether section 330(a)(1) authorizes compensation of debtors' counsel after the 1994 amendments has sparked divergence among the courts.[31] Some courts have ruled that section 330(a)(1) is clear and unambiguous. Other courts have ruled that the text of the statute is ambiguous, and that legislative history and public policy support the contention that the omission was inadvertent.

A. Section 330(a)(1)'s Lack of Clarity

After examining the language of the statute, it is difficult to come to the conclusion that section 330(a)(1) is clear and consistent in its meaning.[32] This is supported by inconsistencies that arise within the text of section 330, and the conflicts it creates pertaining to other sections of the Code.

A significant ambiguity stems from an internal discrepancy between two parts of the same sentence. While omitting "debtor's attorney" from its enumeration of persons that bankruptcy courts can compensate from the estate in section 330(a)(1), the same sentence goes on to include a reference to "attorney[s]" in subpart (A).[33]

> (a)(1) After notice to the parties in interest . . . the court may award to a trustee, an examiner, a professional person, employed under section 327 or 1103—
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> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or *attorney* and by any paraprofessional person employed by any such person;[34]

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[31] *See In re* Top Grade Sausage, Inc., 227 F.3d 123, 130 (3d Cir. 2000) (concluding debtor's attorney may still receive compensation from estate); U.S. Tr. v. Garvey, Schubert & Barer (*In re* Century Cleaning Servs., Inc.), 195 F.3d 1053, 1057 (9th Cir. 1999) (stating statutory language of § 330(a)(1) is ambiguous); *In re* Ames Dep't Stores, Inc., 76 F.3d 66, 71–72 (2d Cir. 1996) (asserting deletion of debtor's attorneys was inadvertent). *But see* U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 290 F.3d 739, 745–46 (4th Cir. 2002) (concluding language of § 330(a)(1) is unambiguous and reasonable); Inglesby, Falligant, Horne, Courington & Nash v. Moore (*In re* American Steel Prod., Inc.), 197 F.3d 1354, 1356 (11th Cir. 1999) (holding plain reading of § 330 precludes compensation of attorney's fees to debtor's counsel in chapter 7 and chapter 11 proceedings); *In re Pro-Snax Distribs.*, 157 F.3d at 425 (concluding although brief evaluation suggests Congress inadvertently omitted debtor's attorneys, canons of construction do not permit consideration of exogenous sources because statute is clear and unambiguous).

[32] *See* Lawrence P. King, *Understanding the 1994 Amendments to the Bankruptcy Code*, 710 P.L.I./COMM. 247, 273–76 (1995) (contemplating inconsistencies of § 330); Lam, *supra* note 2, at 118–20 (discussing why it is illogical to apply plain meaning rule to § 330(a) of Code). *But see In re Equip. Servs. Inc.*, 290 F.3d at 745 (holding language of § 330 is not ambiguous).

[33] 11 U.S.C. § 330(a)(1)(A) (2000) (allowing "reasonable compensation for actual, necessary services rendered by trustee, examiner, professional person or attorney").

[34] *Id*. (emphasis added).

The second half of this sentence seems to allow what the first half prohibits.[35] In the absence of any attempt to amend the parallel list, it is difficult to conceive that Congress deliberately intended to preclude compensation to debtors' attorneys.

Another point that reinforces the conclusion that section 330 is unclear, is a drafting error within the first list of persons eligible for compensation.[36] Since the 1994 amendments omitted the reference to "debtor's attorney," it made a "professional person employed under section 327 or 1103" the last category in the provision.[37] To render the amended list grammatically correct, Congress should have inserted the conjunction "or" instead of leaving just a comma immediately before the last category, "a professional person"[38]: "(a)(1) After notice to the parties in interest . . . the court may award to a trustee, an examiner, *a professional person employed* under section 327 or 1103—"[39]

The absence of the conjunction lends to the argument that the reference to "debtor's attorney" was a "slip of the pen" and inadvertently omitted when proposed text was deleted.[40] At the very least it tends to prove that Congress made careless errors when drafting the provision.[41]

Not only are there internal conflicts within section 330, but the provision also conflicts with other sections of the Code.[42] Section 329 appears to permit debtors' counsel to be paid from a pre-petition retainer for services already performed or that will be performed.[43]

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[35] *See In re* Top Grade Sausage, 227 F.3d at 129 (describing ambiguous language of sec. 330); *In re* Century Cleaning Servs., 195 F.3d at 1057 (discussing substantial ambiguity between two parts of same sentence); U.S. Tr. v. Eggleston Works Loudspeaker Co. (*In re* Eggleston Works Loudspeaker Co.), 253 B.R. 519, 520–21 (B.A.P. 6th Cir. 2000) (explaining inclusion of "attorney" in 330(a)(1)(A) is necessarily part of 330(a)(1) and this inconsistency renders statute inherently inconsistent).

[36] *See In re Century Cleaning Servs.*, 195 F.3d at 1058; *see also In re* Ramsey, 266 B.R. 857, 861 (Bankr. S.D. Iowa 2001) (noting drafting errors made including lack of conjunction, but still holding debtor's attorney is precluded from compensation); *In re* Miller, 211 B.R. 399, 401 (Bankr. D. Kan. 1997) (noting lack of conjunction one would expect to find if phrase were intended to be last one on list).

[37] *See In re Century Cleaning Servs.*, 195 F.3d at 1058; *see also In re Eggleston*, 253 B.R. at 522 (recognizing drafting error because of missing conjunction); *In re* Brierwood Manor, Inc., 239 B.R. 709, 715 (Bankr. D. N.J. 1999) (holding drafting error in initial list of compensable persons supports inference omission of debtor's attorneys was unintentional).

[38] *See also In re Century Cleaning Servs.*, 195 F.3d at 1058; U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 290 F.3d 739, 744 (4th Cir. 2002) (contemplating argument that missing conjunction renders statute ambiguous); *In re Top Grade Sausage, Inc.*, 227 F.3d at 127 (pointing out penultimate and ultimate class of officers are separated only by comma and not disjunctive 'or.').

[39] 11 U.S.C. § 330(a)(1) (emphasis added).

[40] *See In re Century Cleaning Servs.*, 195 F.3d at 1059–60 (recognizing to render list grammatically correct Congress would have had to insert conjunction); *see also* Rajala v. Hodes (*In re* Hodes), No. 98-20039-7-I-JAR, 2003 U.S. Dist. LEXIS 2436 at *24 (D. Kan. February 13, 2003) (agreeing drafting error lends to argument deletion was scrivener's error); *In re Top Grade Sausage*, 227 F.3d at 128–29 (analyzing drafting error and concluding deletion of words "debtor's attorney" was inadvertent).

[41] *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1059–60.

[42] *See In re Top Grade Sausage*, 227 F.3d at 130 (contemplating conflict between § 330 and § 329 of Code); *In re Eggleston*, 253 B.R. at 523 (considering inconsistency between § 330 and § 329); *In re* Miller, 211 B.R. 399, 402 (Bankr. D. Kan. 1997) (examining discrepancy between § 330 and § 329).

[43] 11 U.S.C. § 329(a).

> (a) Any attorney representing a debtor in a case 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 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.[44]

Since courts generally consider the retainer a part of the estate, then it cannot be applied to post-petition fees if section 330 is interpreted as precluding such application.[45] If Congress had intended on precluding compensation from the estate for post-petition fees, then section 329 should have been amended as well to preclude a debtor's attorney from being compensated through a pre-petition retainer.[46]

Additionally, section 331 permits payment from the bankruptcy estate of interim compensation[47] for "a trustee, an examiner, a *debtor's attorney*, or any professional person employed under sections 327 or 1103 of this title."[48] The sole purpose of this section is to "remove any doubt that officers of the estate may apply for, and the court may approve, compensation and reimbursement during the case, instead of being required to wait until the end of the case, which in some instances, may be years."[49] It follows that if debtors' counsel may be permitted to apply for interim compensation from the estate, then debtor's counsel must also be eligible for final compensation.[50]

Rather than focusing on these inconsistencies, courts that have interpreted section 330(a)(1) as precluding an award of compensation to chapter 7 and chapter 11 debtors' attorneys have concluded that since Congress inserted a specific reference to chapters 12 and 13 debtors' attorneys later on in the statute, this is evidence of Congress' intention to exclude chapters 7 and 11 debtors' attorneys.[51]

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[44] *Id*.

[45] *See In re Top Grade Sausage, Inc.*, 227 F.3d at 130 (considering whether § 330 would prevent pre-petition retainers from being applied to post-petition attorney services performed for debtor if § 329 allows pre-petition fees to debtor's attorney); *In re Miller*, 211 B.R. at 402 (discussing inconsistency between amended § 330 and § 329).

[46] *See In re Eggleston Works Loudspeaker Co*., 253 B.R. at 523 (reasoning inconsistency between §§ 329 and 330 demonstrates Congress did not intend to deny compensation to debtors).

[47] 11 U.S.C. § 331 (2002) (permitting officers of estate to apply for compensation and reimbursement during case rather than waiting until end).

[48] *Id*. (emphasis added).

[49] *See* H.R. REP. NO. 95–595, (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963 (accompanying H.R. 8200, 95th Cong. (1st Sess. 1977)).

[50] *See* Towarnicky v. Peyton (*In re* Taylor), 250 B.R. 869, 871 (E.D. Va. 2000) (examining conflict between § 330 and § 331 of Code).

[51] *See* 11 U.S.C. § 330(a)(4)(B) (2000); *see also In re* Friedland, 182 B.R. 576, 580 (Bankr. D. Colo. 1995) (concluding Congress "intentionally" removed language from § 330(a)(1) regarding compensation of debtor's attorney fees from debtor's estate). Absent § 330(a)(4)(B), arguably fees would be precluded for chapter 12 and 13 debtor's attorneys by § 330(a)(1) as well. *But see In re* Top Grade Sausage, Inc., 227 F.3d

> (a)(4)(B) In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services . . .[52]

Section 330(a)(4)(A) assures that only services that are unique, necessary or reasonably likely to benefit the debtor's estate are compensated.[53] However, section 330(a)(4)(B) provides a more liberal standard for attorneys representing debtors in a chapter 12 and chapter 13 bankruptcy proceeding.[54] A possible explanation for this liberal standard is that the legislators are more sympathetic for the chapter 12 and 13 consumer debtor than the chapter 7 and 11 commercial debtor.[55] Just because the statute uses a different standard to determine the level of compensation for chapters 12 and 13 debtors' attorneys does not imply that other debtors' attorneys are not entitled to compensation.[56] It appears likely that what Congress actually intended to do was to recognize that this class of debtors' attorneys need to be excepted from the more stringent standards for compensation.[57]

Considering the grammatical peculiarities of section 330 and its inherent inconsistency with other sections in the Code, it seems impossible that a court can find the statute to be clear and unambiguous.[58] If Congress had intended to exclude certain professionals from receiving compensation, it would have made the

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123, 129–30 (3d. Cir. 2000) (explaining § 330(a)(4)(B) does not preclude other debtor's attorneys from reimbursement).

[52] *See* 11 U.S.C. § 330(a)(4)(B).

[53] *See id*. § 330(a)(4)(A); *see also* Smith v. Edwards & Hale Ltd. (*In re* Smith), 305 F.3d 1078, 1085–86 (9th Cir. 2002) (stating under this section bankruptcy court cannot award fees for services unnecessarily duplicative); Andrews & Kurth L.L.P. v. Family Snacks (*In re* Pro-Snax Distribs., Inc.), 157 F.3d 414, 418–19 (5th Cir. 1998) (noting § 330(a)(4)(a) requires fee be reduced by services duplicative of trustee's efforts).

[54] *See In re Top Grade Sausage, Inc.*, 227 F.3d at 130 (stating because there is another standard for chapter 12 and 13 debtor's attorneys does not mean other debtor's attorneys are not entitled to compensation).

[55] *See id*. at 130 (explaining Congress' recognition "this discrete class of debtors' attorneys need to be excepted from regular, more stringent standards for compensation.").

[56] *See* U.S. Tr. v. Garvey, Schubert & Barer (*In re* Century Cleaning Servs., Inc.), 195 F.3d 1053, 1057 (9th Cir. 1999) (explaining different standard does not preclude compensation to all debtor's attorneys); *see also In re Top Grade Sausage, Inc.*, 227 F. 3d at 130 (quoting *In re* Century Cleaning Servs.).

[57] *See In re Top Grade Sausage, Inc.*, 227 F.3d at 130 (suggesting Congress recognizing that chapter 12 and 13 debtors' attorneys need more lenient standard for compensation purposes, indicates Congress' belief debtors' attorneys in general remain eligible for compensation under usual standard).

[58] *See* Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 469 (2002) (noting "the Supreme Court has indicated plainness of a statute is to be determined 'by reference to the language itself, the specific context in which language is used and the broader context of the statute as a whole'" (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997))). *But see In re* Johnson, 234 B.R. 671, 675 (Bankr. S.D. Tex. 1999) (holding court is bound by terms of statute); *In re* Fassinger, 191 B.R. 864, 865 (Bankr. D. Or. 1996) (holding § 330 does not award fees from estate funds to debtor's attorney in chapter 7); *In re* Kinnemore, 181 B.R. 520, 521 (Bankr. D. Idaho 1995) (holding no statutory basis for award from estate to chapter 7 attorney).

prohibition clear.[59] Our canons of statutory construction provide that when a "statutory scheme is coherent and consistent; there is generally no need for a court to inquire beyond the plain meaning of the statute."[60] Since the current version of section 330 is ambiguous, there is a need to inquire beyond the plain meaning of the statute and examine the legislative history.

B. The Legislative History of Section 330, Or Lack Thereof . . .

The United States Supreme Court is "reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."[61] Where the language in a statute is unambiguous, silence in the legislative history cannot be controlling.[62] Given the ambiguities in the text of section 330, the lack of legislative history becomes relevant and controlling. Although some courts are reluctant to interpret beyond a statute's plain language,[63] many support embracing heavier use of legislative history in statutory interpretation.[64]

The history of the Reform Act points to the conclusion that the deletion of "debtor's attorney[s]" was a scrivener's error.[65] When the Bankruptcy Reform Act of

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[59] *See In re* Brierwood Manor, Inc., 239 B.R. 709, 715 (Bankr. D.N.J. 1999) ("The absence of a direct prohibition of such compensation appears to us to militate against finding there was an implicit repeal, by the 1994 amendments, of prior law allowing compensation to a chapter 7 debtor's counsel from the estate."); *see also In re Century Cleaning Servs.*, 195 F.3d at 1061 (concluding deletion of debtor's attorney was inadvertent because of ambiguous nature of section).

[60] *See* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240–41 (1989) (stating court should not look beyond plain language of statute if unambiguous); *see also* United States v. Turkette, 452 U.S. 576, 580 (1981) (asserting obligation of courts is to apply statute as Congress wrote it).

[61] Dewsnup v. Timm, 502 U.S. 410, 419; *see* United Savings Assn. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 380 (1988) (noting unlikelihood of Congress to make major change to Code without providing specific language supporting such change); *see also* Pennsylvania Dep't. of Pub. Welfare v. Davenport, 495 U.S. 552, 563 (1990); *Ron Pair Enters.*, 489 U.S. at 244–45 (1989).

[62] *See* Reeves v. Ernst & Young, 507 U.S. 170, 177 (1993) (determining in absence of "clearly expressed legislative intent to the contrary," if statute's language is clear, then it must be regarded as conclusive (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980))); *But see In re* Miller, 211 B.R. 399, 402 (Bankr. D. Kan. 1997) (determining lack of legislative history of § 330 indicates Congress did not intend to change prior practice of allowing fees to debtor's attorneys).

[63] *See In re* American Steel Product, Inc., 197 F.3d 1354, 1356–57 (11th Cir. 1999) (stating they do not believe it is in court's province to make assumptions about Congress' intent); *In re* Skinner, 240 B.R. 225, 228 (Bankr. W.D. Vir. 1999) (declaring court must presume legislature says in statute what it intends on saying); *In re* Redding, 242 B.R. 468, 474 (Bankr. W.D. Mo. 1999) (expressing reluctance in writing back into statute words Congress has removed).

[64] *See* West v. Gibson, 527 U.S. 212, 219–21 (1999) (showing court reliance on legislative history and extratextual sources when examining whether EEOC has authority to enforce § 717 through award of compensatory damages); United States v. Estate of Romani, 523 U.S. 517, 534 (1998) (examining extensively history of Tax Lien Act). *See generally* Hon. Stephen Breyer, *Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

[65] *See* Rajala v. Hodes (*In re* Hodes), No. 98-20039-7-I-JAR, 2003 U.S. Dist. LEXIS 2436 at *23 (D. Kan. Feb. 13, 2003) (considering whether deletion of debtor's attorney from § 330 was merely scrivener's error); *see also* U.S. Tr. v. Garvey, Schubert & Barer (*In re* Century Cleaning Servs., Inc.), 195 F.3d 1053, 1058–60

1994 was presented in the Senate, the bill maintained the previous language of section 330(a) which allowed payment to "debtor's attorney[s]."[66] The initial version of the bill stated in relevant part:

> (1) After notice to the parties . . . the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103, or the debtor's attorney, after considering comments and objections submitted by the United States Trustee in conformance with guidelines adopted by the Executive Office for United States Trustees pursuant to section 586(a)(3)(A) of title 28 . . .[67]

It is reasonably likely that the current language resulted when a drafter of the statute inadvertently deleted the text immediately before the reference to "debtor's attorney[s]" instead of at "after considering comments."[68] Soon after the initial version of the bill was introduced, Senator Metzenbaum presented an amendment intending to clarify the factors that a court should consider in determining compensation for professionals.[69] It was this amendment to the bill that first omitted the phrase "or the debtor's attorney" from section 330(a).[70] The Metzenbaum amendment contained new procedures that negated the need for the language regarding comments and objections submitted by the U.S. Trustee.[71] Therefore the amendment struck out a large amount of the language contained in the initial

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(9th Cir. 1999) (suggesting fact attorneys were deleted from first list by revision removed from § 330(a)(1) considerably larger, adjacent and independent provision indicates deletion was not deliberate). *But see* U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 290 F.3d 739, 745 (4th Cir. 2002) (stating current version of § 330(a) has been in force for eight years and Congress has not elected to acknowledge it had made scrivener's error).

[66] *See* S. 540, 104th Cong. § 309 (1994) (proposing new criteria for courts to determine compensation under § 330(a), but still permitting payment to "debtor's attorney").

[67] *See id*.

[67] *Id*.; *see also In re Century Cleaning Servs.*, 195 F.3d at 1059.

[68] *See* Sherrill, *supra* note 9, at 9 (examining Metzenbaum amendment); *see also In re Century Cleaning Servs.*, 195 F.3d at 1059–60 (discussing possibility phrase "debtor's attorney" was inadvertently deleted); U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 260 B.R. 273, 277 (Bankr. W.D. Va. 2001) (pointing out Metzenbaum amendment deleted "or the debtor's attorney").

[69] *See* 140 CONG. REC. S4741-01 (daily ed. Apr. 21, 1994).

[71] *See In re Equip. Servs.*, 260 B.R. at 277 (stating amendment was adopted as amended and approved by Senate without reference to debtor's attorney); *see also In re Century Cleaning Servs.*, 195 F.3d at 1059 (discussing history of Reform Act of 1994); Joseph Gleason Minias, *Discerning the Basis For Debtor's Attorney's Fees Under Chapter 7 and 11 of the Bankruptcy Code*, 18 BANK. DEV. J. 201, 215–18 (2001) (explaining some of deleted language was moved to new subsection while four unrelated words, "or the debtor's attorney," were removed); Sherrill, *supra* note 9, at 8–12 (exploring history and enactment of § 330); *see also In re Century Cleaning Servs.*, 195 F.3d at 1059 (noting Senator Metzenbaum's amendment consolidated procedures to eliminate redundancy).

In order to improve the organization of § 330(a) and eliminate any potential redundancy between the two different provisions discussing objections, Senator Metzenbaum's amendment deleted the discussion of objections from both § 330(a)(1) and § 330(a)(2)(A)(i), and added in their place new § 330(a)(2) which contained general provision relating to objections, including those by the U.S. Trustee. *In re Century Cleaning Servs.*, 195 F.3d at 1059.

version of the bill, making it conceivable that the reference to "debtor's attorney" was accidentally deleted.[72]

Additionally, there is little legislative history regarding the enactment of the Amendment.[73] The complete body of legislative history accompanying section 330(a) consists of three sentences stated by Congressman Jack Brooks:[74]

> [Section 330] requires the United States Trustee to invoke procedural guidelines regarding fees in bankruptcy cases and file comments with fee applications. The section also clarifies the standards for court award of professional fees in bankruptcy cases. These changes should help foster greater uniformity in the application for and processing and approval of fee application.[75]

Nowhere in these three sentences is there any suggestion that allowing compensation to counsel for chapter 7 and chapter 11 debtors' attorneys would lead to problematic precedent.[76] The more rational reading of section 330(a)(1) is that Congress' deletion of the words "debtor's attorney[s]" was inadvertent and unintentional.[77] Even the leading bankruptcy treatise concedes that it is more likely that the deletion of the words "debtor's attorney" was an inadvertent, scrivener's error.[78]

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[72] *See In re Century Cleaning Servs.*, 195 F.3d at 1060 (explaining it is conceivable scrivener could have crossed out too many words when deleting proposed language); Sherrill, *supra* note 9, at 8–12 (describing potential impact of removing large portion of language from statute).

[73] *See In re* Miller, 211 B.R. 399, 402 (Bankr. D. Kan. 1997) (noting no legislative history exists to support contention Congress intentionally excluded "debtor's attorneys"); *In re* Friedland, 182 B.R. 576, 578–79 (Bankr. D. Colo. 1995) (stating no legislative history exists to guide interpretation of amendments made to § 330); *see also* Minias, *supra* note 71, at 215–18 (analyzing legislative history of § 330 and Metzenbaum amendment).

[74] *See* Lam, *supra* note 2, at 111 (noting little amount of legislative history accompanying § 330); *see also* 4-4 COLLIER, *supra* note 8, ¶ 4.02 at [2] (stating committee report is supposed to explain reason for amendment to § 330(a) is singularly unhelpful); Sherrill, *supra* note 9 (stating Congressman Brooks gave brief summary of each section before it was passed by House).

[75] *See* 140 CONG. REC. H10769 (Oct. 4, 1994) (statements of Rep. Brooks).

[76] *See* Lam, *supra* note 2, at 119 (stating legislative history does not indicate differences among chapter 7, chapter 12, and chapter 13 should lead to different treatment of payment of debtor's counsel fees); *see also* Sherrill, *supra* note 9 (pointing out Congressman Brooks did not reveal intent to remove "debtor's attorney" from list of compensable officers).

[77] *See In re* Ames Dep't Stores, Inc., 76 F.3d 66, 71–72 (2d Cir. 1996) (expressing incredulity that Congress would make such drastic change without even mentioning existence of change during legislative process); Towarnicky v. Peyton (*In re* Taylor), 250 B.R. 869, 872 (E.D. Va. 2000) (stating absence of any comment suggests Congress' omission was inadvertent); *In re* Bottone, 226 B.R. 290, 297 (Bankr. D. Mass. 1998) (holding due to absence of legislative history or comment in support of such an extensive change in section, deletion of "debtor's attorney" was inadvertent).

[78] *See* 3 COLLIER, *supra* note 22 ¶ 327.03 at 327–48 (Lawrence P. King ed., 15th ed. 1996).

III. LACK OF VIABLE PAYMENT OPTIONS AVAILABLE TO THE DEBTOR'S ATTORNEY

A debtor's attorney who practices bankruptcy law in a jurisdiction which interprets section 330 as precluding compensation to debtor's counsel in chapter 7 and chapter 11 proceedings must seek out alternatives to increase their chances of payment.[79] Attorneys have attempted to gain compensation through the use of pre-petition retainers, attorney liens and reaffirmation agreements.[80] However, these alternatives have all proven to be fruitless.[81]

A. Pre-petition Retainers

In most chapter 7 and chapter 11 proceedings, the debtors' attorneys will usually seek to be paid a pre-petition retainer[82] from their client before the filing of the bankruptcy case.[83] A pre-petition retainer payment is generally an amount that will cover the entire cost of all expected services and reimbursable expenses.[84] The retainer enables counsel to continue to render post-petition services to his or her client and be compensated by the pre-petition retainer.[85] A significant difficulty that

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[79] *See In re* Kahler, 84 B.R. 721, 724 (Bankr. D. Colo. 1988) (stating "practicing attorneys representing chapter 7 debtors . . . must devise ways to obtain payment prior to the filing of the petition…or make suitable alternative arrangements for financing post-petition services."); Minias, *supra* note 71, at 220 (discussing ways debtor's attorney can maximize likelihood of payment).

[80] *See* Minias, *supra* note 71, at 220 (suggesting use of retainers to maximize attorney's chances of being paid); *see also In re* Johnson, 234 B.R. 671, 676 (Bankr. S.D. Tex. 1999) (holding valid attorneys lien attached. to retainer attaches only to fees permitted by court and debtor's attorney is not entitled to post-petition fees from pre-petition retainer); *In re* Pasco, 220 B.R. 119, 124 (Bankr. D. Colo. 1998) (disapproving reaffirmation agreement for failure of counsel to advise debtor in plain written terms debtor didn't have to enter into fee agreement); *In re* Friedland, 182 B.R. 576, 577 (Bankr. D. Colo. 1995) (concluding chapter 7 debtor's attorney cannot be paid from pre-petition retainer for post-petition services rendered).

[81] Minias, *supra* note 71, at 222–23 (stating available alternatives offer little comfort to debtor's attorney and is likely not to recover reasonable compensation).

[82] 11 U.S.C. § 328(a) (2000) (permitting trustee or debtor "to employ or authorize the employment of a professional person…on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis.").

[83] *See* White & Medford, *supra* note 29, at *1 (noting when bankruptcy practitioners are asked how they get paid, they respond confidently they get paid first); *see also* 2-12 COLLIER, *supra* note 8, ¶ 2.03 at [2][a] (explaining reorganization counsel will request retainer for costs from inception of pre-petition planning through at least date of final hearing on any § 364 financing order).

[84] *See* 2-6 COLLIER, *supra* note 8, ¶ 2.03 at [1][a] (discussing effect of 1994 amendment of § 330 on pre-petition retainers); *see also* Regina Stango Kelbun et al., *Conflicts, The Appointment of "Professionals," and Fiduciary Duties of Major Parties in Chapter 11*, 8 BANK. DEV. J. 349, 392 (1991) (explaining pre-petition retainer taken by debtor's attorney for services to be rendered and costs to be incurred is held in trust); Minias, *supra* note 71, at 220–22 (analyzing potential alternative of pre-petition retainer).

[85] *See In re* Friedland, 182 B.R. 576, 577 (Bankr. D. Colo. 1995) (arguing pre-petition retainer limited to payment for pre-petition services); *see also* U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs.), 290 F.3d 739, 742 (4th Cir. 2002) (explaining debtor's counsel received retainer to assure payment in advance for fees to be earned during case); U.S. Tr. v. Garvey, Schubert & Barer (*In re* Century Cleaning Servs., Inc.), 195 F.3d 1053, 1054 (9th Cir. 1999) (stating debtor's attorney received retainer of $27,860.34 for post-petition legal services and expenses).

the debtor's attorney will encounter stems from the fact that the pre-petition retainer may be considered by the court to be property of the estate.[86]

Recently in *In re Equipment Services, Inc.*,[87] the court held that the debtor's attorney was not entitled to fees from the estate with respect to services rendered when the case was converted from a chapter 11 proceeding to a chapter 7 proceeding.[88] Counsel for the debtor argued that all fees with respect to the bankruptcy proceeding were paid in advance by Equipment Services in the form of a retainer.[89] Therefore, he argued that he was entitled to bill all of his fees, including those incurred after the chapter 7 proceeding, against the retainer.[90] On the other hand, the trustee argued that any unearned portion of the retainer became property of the estate when the initial chapter 11 petition was filed.[91]

The court agreed with the trustee, thereby allowing compensation to debtor's counsel against the retainer only for the costs incurred while the case was still in chapter 11.[92] This is because the debtor's counsel was employed by the debtor in possession as a "professional person" under section 327 of the Code, thereby allowing compensation under section 330(a)(1) while the case was still in chapter 11.[93] The court interpreted section 330 as not authorizing debtors' counsel compensation from the estate while the proceeding was under chapter 7.[94] Therefore, even though the counsel for the debtor incurred an extra $1,000 in fees on behalf of Equipment Services after the chapter 7 conversion, he could not be reimbursed from the retainer because it was property of the estate.[95]

Unfortunately, debtors' attorneys who try to secure payment through the use of a pre-petition retainer will probably be denied compensation again on the grounds that the retainer is part of the estate and such compensation is not authorized by section 330.[96]

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[86] *See* 2-6 COLLIER, *supra* note 8, ¶ 2.03 at [1][a] (explaining some bankruptcy courts have ruled no deductions from retainer can be permitted for services performed for debtor during post-petition period); *see also In re* Johnson, 234 B.R. 671, 675–76 (Bankr. S.D. Tex. 1999) (concluding any unearned portion of retainer is property of estate); *In re Friedland*, 182 B.R. at 577–80 (finding post-petition fees cannot be paid from pre-petition retainer because it is property of estate).

[87] 290 F.3d 739 (4th Cir. 2002).

[88] *See id*. at 746.

[89] *Id*.

[90] *Id*.

[91] *Id*.

[92] *See In re Equip. Servs.*, 290 F.3d at 747.

[93] *See id*.

[94] *See id*.

[95] *See id*.

[96] *See In re* Lilliston, 127 B.R. 119, 120–21 (Bankr. D. Md. 1991) (holding any unearned portion of retainer is property of estate because debtor retains an equitable interest in it); *In re* Saturley, 131 B.R. 509, 515 (Bankr. D. Me. 1991) (explaining portion of pre-petition retainer not earned prior to petition is property of estate); Minias, *supra* note 71, at 222 (explaining pre-petition retainers are unlikely to help debtor's attorney receive compensation).

B. Attorney Lien

Another approach that debtor's attorneys have employed to secure payment of reasonable compensation is a lien.[97] Courts that have determined that debtor's attorney may not be compensated by pre-petition retainers have come to the same conclusion concerning attorney's liens.[98]

In *In re Johnson*,[99] debtor's counsel was seeking approval of his pre-petition retainer, consisting of fees and expenses that accrued before and after the appointment of the trustee in the chapter 11 proceeding.[100] He argued that he had an attorney's lien which attached to his retainer, thereby becoming the attorney's property, not the estate's, and circumventing the section 330 problem.[101] Debtor's counsel urged the court to adopt the holding of *In re IPS Systems*.[102] According to the court in *In re IPS Systems*, an attorney's lien attaches upon the agreement to represent the debtor throughout the course of the case and thus is not considered property of the estate.[103]

The court disagreed with debtor's counsel, positing that "an attorney's lien simply secures the amount of the underlying debt as determined by the bankruptcy court."[104] Although debtor's counsel may have had a valid lien in the retainer, the lien only attaches to fees permitted by the court.[105] Feeling constrained by the fifth Circuit's holding in *Pro-Snax*,[106] the court held that the debtor's counsel's fee is limited to pre-appointment services only.[107]

Liens, like pre-petition retainers, offer little assurance for a debtor's attorney in a jurisdiction where the court interprets section 330 as not authorizing compensation for post-petition services in a chapter 7 or chapter 11 case. When these courts decide that a lien is property of the estate, a debtor's attorney has

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[97] *See* BLACK'S LAW DICTIONARY 379 (7th ed. 1996) (defining attorney's lien as "[t]he right of an attorney to hold or retain a client's money or property . . . until the attorney's fees have been properly determined and paid.").

[98] *See In re* Johnson, 234 B.R. 671, 675–76 (Bankr. S.D. Tex. 1999) (holding possessing an attorney's lien does not entitle debtor's attorney to entire amount of retainer); *In re* Friedland, 182 B.R. 576, 580 (Bankr. D. Colo. 1995) (concluding after payment of fees and expenses for pre-petition services, remainder of retainer is property of estate).

[99] 234 B.R. 671.

[100] *See id*. at 675.

[101] *Id*.

[102] 205 B.R. 88 (Bankr. S.D. Tex. 1997).

[103] *See id*. at 89 (noting agreements to represent debtors in bankruptcy cases denote value for purposes of attachment of security interests). *See generally In re* Printcrafters, Inc., 233 B.R. 113, 119–20 (Bankr. D. Colo. 1999) (proposing § 330 may permit debtors' attorneys to draw post-petition fees from pre-petition retainer).

[104] *See In re Johnson*, 234 B.R. at 675–76 (relying on *In re* Monument Auto Detail, Inc., 226 B.R. 219, 225 (B.A.P. 9th Cir. 1998)). *See generally In re* Friedland, 182 B.R. 576, 580 (Bankr. D. Colo. 1995) (stating retainer balance is property of estate and not subject to valid liens in favor of debtor's counsel).

[105] *See In re Johnson*, 234 B.R. at 676 (holding attorney's lien secures only amounts as decided by bankruptcy court).

[106] 157 F.3d 414, 425 (5th Cir. 1998) (holding Congress clearly indicated debtors' attorneys may not be compensated from estate after appointment of chapter 11 trustee).

[107] *In re Johnson*, 234 B.R. at 676.

virtually no chance of receiving reasonable compensation for post-petition services.[108]

C. Reaffirmation Agreements

Negotiating post-petition reaffirmation agreements is another option that a debtor's attorney may employ.[109] Reaffirmation means that the debtor agrees, in writing, to remain liable for a debt that would otherwise be subject to discharge.[110] This approach of obtaining compensation sounds good, but it actually creates a multitude of problems because it raises serious ethical problems in light of the statutory process for judicial approval of reaffirmation agreements.[111]

Counsel for the debtor is supposed to review all reaffirmation agreements that are proposed to the debtor and advise his or her client whether entering into it is in the client's best interest.[112] Counsel must consider whether the agreement is a worthwhile settlement of litigation involving the non-dischargeability of that debt or whether reaffirmation is necessary to retain a piece of property subject to a security interest.[113] Rarely is reaffirming an unsecured liability in the debtor's best interest.[114]

Thus, when a debtor's counsel tenders his or her client with a reaffirmation agreement in order to receive compensation for post-petition services, the ethical conflict becomes all too apparent.[115] Effectively, counsel's status becomes creditor as well as debtor's counsel. It may be difficult, if not impossible, for debtor's counsel to separate his interest in being compensated from his responsibility to act

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[108] *See* Minias, *supra* note 71, at 222–23 (describing ineffectiveness of attorney's liens).

[109] *See* Whitehouse v. Laroche, 277 F.3d 568, 574 (1st Cir. 2002) (discussing mandated criteria for reaffirmation agreements); Gordon v. Hines (*In re* Hines), 147 F.3d 1185, 1190 (9th Cir. 1998) (explaining postfiling reaffirmation by debtor represents approach by which lawyer may obtain payment); *In re* Nidiver, 217 B.R. 581, 585 (Bankr. D. Neb. 1998) (approving reaffirmation agreement for unpaid pre-petition chapter 7 legal services).

[110] *See* 11 U.S.C. § 524(c) (2000) (stating criteria for valid reaffirmation agreement); *In re* Duke, 79 F.3d 43, 44 (7th Cir. 1996) (explaining "a reaffirmation agreement is one in which the debtor agrees to repay all or part of a dischargeable debt after a bankruptcy petition has been filed."); 1-1 COLLIER, *supra* note 13, ¶ 1.03 at [1][d][vi] (discussing reaffirmation agreements).

[111] *See* Hessinger & Assocs. v. Voglio (*In re* Voglio), 191 B.R. 420, 425 (D. Ariz. 1995) (explaining "the attorney is required to disclose to the debtor there is no legal obligation to reaffirm a debt while simultaneously attorney must rely on reaffirmation if he is to be compensated for his services."); 3-1 COLLIER, *supra* note 8, ¶ 3.02 at [1] (pointing out problems debtor's counsel will encounter using reaffirmation agreement).

[112] *See Gordon*, 147 F.3d at 1190 (contemplating how debtor's attorney can advise debtor effectively where lawyer is one bargaining); 3-1 COLLIER, *supra* note 8, ¶ 3.02 at [1] (discussing duty of counsel when reviewing reaffirmation agreement).

[113] *See* 1-1 COLLIER, *supra* note 13, ¶ 1.03 at [1][d][vi] (Mathew Bender & Co., Inc., 3d ed. Rev. 2002).

[114] 3-1 COLLIER, *supra* note 8, ¶ 3.02 at [1].

[115] *See In re* Bethea, 275 B.R. 284, 290 (Bankr. N.D. Ill. 2002) (stating debtor's attorney may not represent debtor when negotiating reaffirmation agreement); *In re Voglio*, 191 B.R. at 425 (explaining attorney cannot represent debtor in negotiating reaffirmation agreement because of conflict of interest); *see also In re* Pasco, 220 B.R. 119, 124 (Bankr. D. Colo. 1998) (disapproving reaffirmation agreement for failure of counsel to advise debtor in plain, conspicuous written terms she was not required to enter into fee agreement).

with commitment and dedication to the best interests of the client.[116] Rule 1.7 of Model Rules of Professional Conduct, which governs conflicts of interest, makes it clear that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[117] Comment 10 of Rule 1.7 elaborates further by explaining that the lawyer's own interests should not be allowed to affect representation of the client adversely.[118]

Accordingly, it is unethical and contrary to the Model Rules of Professional Conduct for a debtor's attorney to seek client's consent to a reaffirmation agreement since reaffirming an unsecured liability will generally not be in the debtor's best interest. Like pre-petition retainers and attorney's liens, reaffirmation agreements are not an effective means of gaining compensation. Given these failings, when a court interprets the deletion of the words "debtor's attorney[s]" from section 330(a)(1) as precluding compensation from the estate for post-petition services in chapter 7 and chapter 11 proceedings, it becomes impractical for a debtor's attorney to secure compensation.

IV. THE ETHICAL RAMIFICATIONS OF THE LACK OF VIABLE PAYMENT OPTIONS

Interpreting the ambiguous provision of section 330(a)(1) to eliminate the possibility of post-petition compensation for debtors' attorneys creates many ethical problems. Since there are not any viable alternatives for compensation, the potential of working for free increases dramatically. Such a potential for free work creates not only an ethical dilemma, but also an economical dilemma that could lead to debtor's counsel withdrawal or unwillingness to perform any post-petition services.[119]

A. Potential Of Withdrawal Of Counsel

Picture this . . . Calvin, counsel for debtor, has been hired by Danielle, the debtor, to prepare a petition for relief under chapter 11 of the Bankruptcy Code and to represent her in the bankruptcy proceedings. Calvin receives a pre-petition retainer from Danielle for $80,000 in order to cover the entire cost of all expected services and reimbursable expenses. $20,000 of the retainer is used to pay pre-petition services such as the fees and costs of the filing of the chapter 11 petition. Soon thereafter, the United States Trustee moves to convert the case to a chapter 7

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[116] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2002) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[117] *See id*. at R. 1.7(a) (2002).

[118] *Id*. at R. 1.7 cmt. 10.

[119] *See* Towarnicky v. Peyton (*In re* Taylor), 250 B.R. 869, 872 (E.D. Vir. 2000) (suggesting debtor's attorneys will become unwilling to accept bankruptcy cases for fear of working for free); White & Medford, *supra* note 29, at *4–6 (asserting holding of Family Snacks increases potential of working for free). *But see In re* Friedland, 182 B.R. 576, 579 (Bankr. D. Colo. 1995) (stating theoretically post-petition attorneys fees can be paid out of debtor's post-petition earnings in chapter 7).

proceeding, which the court grants. At the time of the conversion, Calvin has performed services totaling $22,280 during the chapter 11 proceeding. He realizes that the bankruptcy court in this jurisdiction has interpreted section 330(a)(1) as not providing post-petition compensation for a debtor's attorney in a chapter 7 or chapter 11 case, and thus he considers withdrawal before he performs any more services that will not be compensated.[120] Calvin will be compensated $22,280 from the pre-petition retainer for services performed during the chapter 11 proceeding because he was employed by the debtor in possession before the trustee was appointed, and can therefore be considered a "professional person" under section 327. Section 330(a)(1) allows compensation from the estate to a "professional person" employed in a chapter 11 proceeding. However, he will not be compensated for services performed once the case is converted to a chapter 7 proceeding. What should Calvin do?

Construing section 330(a)(1) to exclude chapter 7 and 11 debtors' attorneys from receiving post-petition compensation would significantly alter the ability of chapter 7 and 11 debtors to secure counsel in order to perform necessary services after conversion of a case, or after a chapter 11 trustee is appointed.[121] The U.S. Trustee in *In re Friedland*[122] argued that denying debtors' attorneys section 330 post-petition fees in chapter 7 proceedings would not prevent the debtor from retaining counsel because the attorney's fees could be paid out of the debtor's post-petition earnings which do not belong and are not assets of the estate.[123] This argument, however, ignores the likelihood that if a debtor in a chapter 7 proceeding were defunct, it will have no earnings from which to pay attorney's fees.[124] Even the dissent in *In re Century Cleaning Services*[125] recognized that this categorical exclusion of fees can "only result in denial of access to justice, with debtors unrepresented or underrepresented."[126]

Calvin, Danielle's counsel, may be able to withdraw from his representation under Rule 1.16 of the Model Rules of Professional Conduct, which governs when a lawyer may decline or terminate representation.[127] This rule permits a lawyer to withdraw from representation of his client if "the representation will result in an unreasonable financial burden on the lawyer."[128] Although withdrawal is a viable

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[120] Based on the facts of U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 290 F.3d 739, 742–43 (4th Cir. 2002).

[121] *See* U.S. Tr. v. Garvey, Schubert & Barer (*In re* Century Cleaning Servs., Inc.), 195 F.3d 1053, 1061 (9th Cir. 1999) (explaining debtor's inability to secure counsel would represent fundamental change in bankruptcy law); White & Medford, *supra* note 29, at *9 (suggesting possible reluctance of debtor's counsel to perform services after appointment of chapter 11 trustee).

[122] 182 B.R. 576 (Bankr. D. Colo. 1995).

[123] *See id*. at 579.

[124] *See In re Century Cleaning Servs.*, 195 F.3d at 1061 (responding to argument denying debtor's attorneys' post-petition fees in chapter 7 proceedings would not prevent debtor from securing counsel because attorney could be paid from debtor's post-petition earnings).

[125] 195 F.3d 1053 (9th Cir. 1999).

[126] *See id*. at 1064 (Thomas, J., dissenting) (admitting majority adopts better public policy decision).

[127] *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 (2002).

[128] *See id*. at 1.16(6).

option for Calvin, it defies our notions of equity given that it is a simple drafting error by Congress, not any culpability on Danielle's part, that precludes her attorney from being compensated.

Some courts support the 1994 change by pointing out that chapter 7 debtors' attorneys, such as Calvin, cannot do the "type of good work that can enlarge the estate because a chapter 7 proceeding is a zero sum game."[129] In a chapter 7 proceeding, unlike chapter 11, 12 and 13, the debtors and creditors do not act as a team.[130] And in a chapter 7 proceeding, the trustee is authorized to hire attorneys at estate expense as needed to help liquidate the estate; in the view of some courts, this negates the need for the debtor's attorney.[131] Additionally, in a chapter 11 proceeding, a court may appoint a chapter 11 trustee, again negating the need for the debtor's attorney. The trustee replaces the debtor in possession for the purpose of controlling the estate and managing its business; therefore any debtors' attorney can serve no beneficial purpose for the estate unless they are characterized as attorneys for the trustee.[132]

These arguments, however, short-sightedly belittle the importance of debtors' attorneys such as Calvin.[133] There are many post-petition services commonly performed by the debtor's attorney in chapter 7 and chapter 11 proceedings that are necessary to the administration of the estate.[134] Chapter 11 and chapter 7 debtors may need representation at the section 341 meeting, which is a meeting of the creditors and equity security holders.[135] At this meeting the trustee conducts an examination of the debtor for the purpose of inquiring into financial matters, matters affecting the estate and the discharge.[136] The debtor's attorney may also

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[129] *See* U.S. Tr. v. Equip. Servs., Inc. (*In re* Equip. Servs., Inc.), 290 F.3d 739, 745 (4th Cir. 2002) (considering trustee's argument chapter 7 debtors' attorneys are dispensable).

[130] *Id*. at 744.

[131] *Id*.; *see also In re* Top Grade Sausage, Inc., 227 F.3d 123, 129 (3d Cir. 2000) (pointing out debtor's attorneys are not only attorneys whose services could benefit estate and other officers of estate routinely hire attorneys to help administer estate). *But see* Andrews & Kurth L.L.P. v. Family Snacks, Inc. (*In re* Pro-Snax Distribs., Inc.), 157 F.3d 414, 423–24 (5th Cir. 1998) (considering argument representation for chapter 11 debtors is even more necessary after appointment of trustee).

[132] *See Andrews & Kurth*, 157 F.3d at 423 (quoting *In re* NRG Res., Inc., 64 B.R. 643, 647 (Bankr. W.D. La. 1986)).

[133] *See* Sherrill, *supra* note 9, at 12 (stating debtor's counsel may offer valuable services by localizing assets, maximizing values, and negotiating with creditors).

[134] *See id*.; *see also* U.S. Tr. v. Garvey, Schubert & Barer (*In re* Century Cleaning Servs., Inc.), 195 F.3d 1053, 1061 (9th Cir. 1999).

[135] *See* 11 U.S.C. § 341(d) (2000)

> (d) . . . the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—
>
> the potential consequences of seeking a discharge in bankruptcy, including the effect on credit history;
>
> the debtor's ability to file a petition under a different chapter of this title;
>
> the effect of receiving a discharge of debts under this title; and
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> the effect of reaffirming a debt, including the debtor's knowledge of the provisions of section 524(d) of this title.

[136] *See In re Century Cleaning Servs., Inc.*, 195 F.3d at 1064 (Thomas, J., dissenting) (explaining after filing of petition there is little activity other than attendance at § 341 meeting); *Andrews & Kurth*, 157 F.3d

have to represent the debtor in a Rule 2004 examination,[137] which is the basic discovery device in bankruptcy cases and permits an extensive examination aimed at discovering assets, unearthing fraud, and determining the debtor's right to discharge.[138] Further, the debtor in a chapter 11 proceeding may need representation and assistance in effecting a plan of reorganization under section 1121, which section governs who may file a plan.[139] When a proceeding is converted from a chapter 11 to a chapter 7 proceeding the debtor will need assistance with preparing schedules, amended reports, statement of affairs, and a Rule 2015 report.[140] The debtor may also need help cooperating with a trustee in performance of the trustee's duties.[141]

All of these necessary services which are beneficial to the estate will go uncompensated and thus, in all likelihood, unperformed. Calvin, would likely withdraw from the case in order to avoid the unreasonable financial burden that would be imposed upon him. Danielle would be left without counsel and would have an extremely difficult time retaining an attorney who would perform post-petition services for free. This will only lead to an increase in *pro se* cases, and cases which become *pro se* after the petition is filed.[142] Debtors, such as Danielle, will be abandoned by their attorneys after they file the petition in order to avoid the risk of expending their time and effort without any prospect for compensation. Debtors representing themselves do not aid the administration of the bankruptcy system.[143]

B. Potential For Debtor's Counsel To Perform Post-petition Services Inadequately

Calvin, counsel for debtor, is now representing Daphne, the debtor, in a chapter 11 reorganization proceeding. Daphne retained Calvin to file the chapter 11 petition, advise her of certain duties that she may have as a debtor, protect the best interests of the estate, prepare any necessary applications or other legal papers, and to perform any and all other relevant legal services. Calvin excitedly accepts the case because he is aware that under section 327 of the Code he can be considered a "professional person," and therefore entitled to compensation under section

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at 424 (considering argument chapter 11 debtors may need representation at § 341 meeting); 1-1 COLLIER, *supra* note 13, ¶ 1.03 at [d][i].

[137] *See* FED. R. BANKR. P. 2004; *In re Century Cleaning Servs., Inc.*, 195 F.3d at 1060–61 (pointing out necessary post-petition services debtor's counsel performed including participating in Rule 2004 examinations).

[138] *See* FED. R. BANKR. P. 2004.

[139] *See* 11 U.S.C. § 1121 (2000); *Andrews & Kurth*, 157 F.3d at 424 (contemplating argument chapter 11 debtors may need help in prosecuting plan of reorganization under § 1121(c)).

[140] *See In re Century Cleaning Servs., Inc.*, 195 F.3d. at 1061 (describing some post-petition services debtor's attorney may need to provide including Rule 2015 report).

[141] *See In re Pro-Snax Distribs., Inc.*, 157 F.3d at 423–24 (discussing possible scenarios where debtor may need representation).

[142] *See In re Century Cleaning Servs., Inc.*, 195 F.3d. at 1064 (Thomas, J., dissenting) (discussing possible consequence of denying compensation for post-petition services to chapter 7 and 11 debtor's attorneys).

[143] *Id*.

330(a)(1) of the Code. Since Calvin's representation of Danielle, Calvin has not represented any debtors for post-petition services in chapter 7 cases. Being a sole practitioner, Calvin cannot afford to perform services for which he will not be compensated.

Unfortunately for Calvin, the creditors filed a motion to appoint a chapter 11 trustee, which the bankruptcy court granted. Calvin realizes that after the appointment of a chapter 11 trustee, he will no longer be considered a "professional person" under section 327, therefore no longer fitting within one of the categories of professional persons that may receive compensation for post-petition services in chapter 7 and chapter 11 cases under section 330(a)(1). Since the bankruptcy court in the jurisdiction in which he practices interprets section 330(a)(1) as excluding debtors' attorneys from compensation for post-petition services in chapter 7 and chapter 11 cases, he has decided that he will not expend much of his time and effort on behalf of his client Daphne. Calvin does not want to withdraw from the case because he is concerned that if he does so, it will deter other clients from employing him as counsel. Is it ethical for Calvin to remain as Daphne's counsel, but to minimize his expenditures of time and effort on Daphne's behalf?

As the hypothetical illustrates, by upholding a *per se* ban on awarding fees after the appointment of a trustee, attorneys will be disinclined to represent a debtor's interests.[144] The unwillingness to represent the best interests of the estate runs contrary to the Model Rules of Professional Conduct which state that an attorney must act with loyalty to his client. Under Rule 1.3, a lawyer is required to act with "reasonable diligence."[145] Further, a lawyer must act with "zeal in advocacy upon the client's behalf."[146]

Consequently, it would be unethical for Calvin to maintain representation of his client Daphne. A vicious cycle occurs because Calvin is now only left with the alternative of withdrawal. Once again, the debtor is left without representation.

C. Potential for Counsel to Postpone Conversion of Chapter 11 Proceeding to a Chapter 7 Proceeding

Calvin is now representing Damon, the debtor, and is again faced with the conversion of a chapter 11 proceeding to a chapter 7, which means that his post-conversion work will not be compensated. Instead of withdrawing from representation or performing the post-petition services inadequately, Calvin decides

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[144] *See In re Pro-Snax Distribs., Inc.*, 157 F.3d at 424 (stating argument *per se* ban on awarding fees will result in "widespread 'under-exercising' of debtors' rights and the underperformance of debtors' Code-mandated duties."); *see also* Towarnicky v. Peyton (*In re* Taylor), 250 B.R. 869, 872 (E.D. Va. 2000) (noting concern with possible 'chilling effect' on willingness of attorneys to accept bankruptcy cases for worry they will not recover fees); Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (*In re* Mednet), 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000) (suggesting debtor's attorneys may "shy away" from services which may benefit estate).

[145] *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002) (governing conflict of interest with current client).

[146] *See id*. at R. 1.3 cmt. 1 (2002).

on a third option. Is it ethical for Calvin to attempt to postpone conversion, even though conversion is in the best interest of the estate?

This hypothetical recognizes the problem that may arise if the debtor's attorney is attempting to postpone a chapter 11 conversion to a chapter 7 proceeding in order to avoid performing post-petition services which will not be compensated. This preventative action of the debtor's counsel is unethical in bankruptcy proceedings because counsel is looking out for his own best interests rather than the estate's. The obligations of counsel include a duty to "carefully monitor each case and encourage conversion or dismissal without delay when it becomes apparent that reorganization is no longer feasible."[147]

Additionally, section 327 of the Bankruptcy Code requires that professional persons employed under the Code not hold an interest adverse to the estate.[148] The concept of holding or representing an interest adverse to the estate is broad enough to include anyone who might have an interest that would bias the independent and impartial attitude required by the Code.[149] Therefore, an interest adverse to the estate includes any economic interest which would tend to lessen the value of the bankruptcy estate or just create a general bias against the estate.[150] It is apparent that Calvin holds an interest adverse to the estate by attempting to postpone conversion when conversion is necessary and beneficial to the estate.

Calvin's behavior would be disastrous to the attorney/client relationship if he were behaving in a way that would impede his client's rights and best interests. Calvin's only available option again is to withdraw from the case before incurring any unreasonable financial burdens.

D. Potential for Unwillingness to Represent Chapter 7 and Chapter 11 Debtors in Bankruptcy Proceedings

Calvin has been approached by Darla, the debtor, to represent and counsel her with respect to filing for chapter 7 bankruptcy. Calvin, who has had a string of bad luck, has decided to limit his services exclusively to chapter 12 and chapter 13 debtors. Since section 330(a)(4)(B) expressly provides that a chapter 12 and chapter 13 debtor's attorney may be compensated from the estate,[151] Calvin believes

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[147] Christopher W. Frost, *The Theory and Pragmatism of Corporate Governance in Bankruptcy Reorganizations*, 72 AM. BANKR. L.J. 103, 139 (1998); *see also In re* Pacific Forest Indus., Inc., 95 B.R. 740, 744 (Bankr. C.D. Cal. 1989) (suggesting way to ensure whether debtor in possession can be trusted).

[148] 11 U.S.C. § 327(a) (2000).

[149] *See* 3 COLLIER, *supra* note 22, ¶ 327.04 at [2][a][iii][E]; *see also* Hill & Sandford v. Mirzai (*In re* Mirzai), No. 98-55223, 1999 U.S. App. LEXIS 31570 at *4 (9th Cir. November 29, 1999) (stating court has broad discretion when determining whether attorney holds interest adverse to interest of estate).

[150] *See In re* Am. Printers & Lithographs, Inc., 148 B.R. 862, 864 (Bankr. N.D. Ill. 1992); *see also In re* Tinley Plaza Assocs., L.P., 142 B.R. 272, 277 (Bankr. N.D. Ill. 1992) (interpreting "holding an interest adverse to the estate" according to case law since it is not defined in Bankruptcy Code); *In re* Rusty Jones, Inc., 134 B.R. 321, 342 (Bankr. N.D. Ill. 1991) (discussing definition of holding "an interest adverse to the estate").

[151] 11 U.S.C. § 330(a)(4)(B) (2000).

it is in his best inerest to play it safe and limit his clientele. Calvin turns Darla away, refusing to accept her offer of engagement. Although it is within the discretion of an attorney to choose the clients they represent, does this place an unfair burden on chapter 7 and chapter 11 debtors?

It certainly does not seem fair to debtors such as Darla to have such a difficult time retaining counsel, especially if many bankruptcy attorneys begin to follow Calvin's lead. This hypothetical points out that the deletion of the reference to "debtor's attorney[s]," not only has an adverse effect on counsel for chapter 7 and chapter 11 debtors, but also the debtors themselves. As pointed out previously, debtors need the assistance of counsel for numerous post-petition services. Without this necessary representation, it appears that Darla's best interest may become overlooked. Darla may be forced to represent herself at her own proceedings which may decrease the efficiency of the bankruptcy system since errors are more likely to occur.[152] Interpreting section 330(a)(1) to eliminate the possibility of post-petition compensation for chapter 7 and chapter 11 debtors' attorneys will significantly alter the capacity of debtors to secure counsel.[153]

CONCLUSION

Maintaining a system where all debtors' attorneys are afforded reasonable compensation from the estate for post-petition services can effectively present the ethical ramifications of not doing so. As the Second Circuit acknowledged, "where the benefits of services to the estate are the same, it makes no sense to treat performance of such benefits by debtors' attorneys differently than performance by other retained professionals."[154] Additionally, if any services are duplicative of the trustee's role and would result in a hardship for the estate, section 330(a)(4)(A)(i) prevents the compensation of the debtor's attorney.[155]

In short, section 330 is ambiguous and the legislative history that purportedly explains the reason for the amendment is lacking. The evidence suggests that the deletion of the reference to "debtor's attorney" was inadvertent, and that the deletion conflicts with the statute's goals that attorneys be reasonably compensated and that future attorneys not be deterred from taking bankruptcy cases due to the failure to

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[152] *See In re Century Cleaning Servs.*, 195 F.3d. at 1064 (Thomas, J., dissenting) (contemplating potential of chapter 7 and 11 debtors representing themselves if their attorneys are not awarded compensation for post-petition services from estate); Minias, *supra* note 71, at 225–26 (noting that prose debtors will decrease efficiency of bankruptcy system).

[153] *See In re* Miller, 211 B.R. 399, 402 (Bankr. D. Kan. 1997); *see also* Towarnicky v. Peyton (*In re* Taylor), 250 B.R. 869, 872 (E.D. Vir. 2000) (suggesting debtors' attorneys may become unwilling to accept bankruptcy cases); Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswig Drug Co. (*In re* Mednet), 251 B.R. 103, 108 (B.A.P. 9th Cir. 2000) (stating debtor's attorneys may refrain from performing services which may benefit estate).

[154] *See In re* Ames Dep't Stores, Inc., 76 F.3d 66, 72 (2d Cir. 1996); *see also In re* UNR Indus., Inc., 986 F.2d 207, 210 (7th Cir. 1993); *In re Miller*, 211 B.R. at 403.

[155] 11 U.S.C. § 330(a)(4)(A)(i) (disallowing compensation for unnecessary duplicative services).

award reasonable compensation.[156] The ramifications for the bankruptcy community demand that if courts are unwilling to overlook Congress' omission, Congress must take steps to correct the error itself.

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[156] *See* Rajala v. Hodes (*In re* Hodes), 98-20039-7-I-JAR, 2003 U.S. Dist. LEXIS 2436 at * 25 (D. Kan. February 13, 2003) (stating exclusion of debtor's attorneys would only serve to discourage them from accepting bankruptcy cases for fear of not regaining their post-petition fees); *see also* White & Medford, *supra* note 29, at *9 (explaining negative consequences for bankruptcy community); Hon. Roger M. Whelan et al., *Professional Compensation Reform: New Ideas or Old Failings*, 1 AM. BANKR. INST. L. REV. 407, 408 (1993) (stating restricting compensation of bankruptcy bar will serve to drive qualified people away from practice).