ATTORNEY FEES IN CONSUMER CASES

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State Bar of Texas
22ND ANNUAL ADVANCED CONSUMER BANKRUPTCY COURSE
September 21 - 22, 2006
Houston

CHAPTER 13
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After that: 6 years in Saudi Arabia with Arabian American Oil Company; 5 years general counsel to Belvieu Enterprises Company in Houston, Texas.  
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ATTORNEY FEES IN CONSUMER CASES

Introduction - Compensation for our work and reimbursement of our expenses are the life blood of any attorney’s practice. Before the 1978 Bankruptcy Law became effective in October of 1979, fees awarded in Bankruptcy cases were to be awarded based on a “spirit of economy”, focusing on the conservation of the estate and a better return to creditors. The 1978 Code brought with it a shift toward awarding compensation in line with what other attorneys were being paid for comparable services, thereby keeping and attracting good attorneys to perform bankruptcy work. Most fees to Debtor’s counsel in Chapter 7 and 13 cases are allowed under the provisions of §§ 105, 329 and 330, although the amount, means and timing of payment are determined by Local Rules and the Plan confirmed in the Chapter 13 case.

This paper will discuss the allowance and payment of attorney fees in Chapter 7 and 13 consumer cases, through an analysis of recent court decisions, and with suggestions for appropriate forms and arguments to use in establishing terms of employment and getting fees approved and paid.

I. CHAPTER 7

A. Flat Fees - Flat fees in consumer Chapter 7’s typically range between $1,500 to $3,000, with the more complicated cases tending toward the higher end of the fee range. They may go slightly higher if §523 or §727 actions are anticipated. You can probably get as much as $5,000.00 to $7,500.00, depending on how real the possibility of §522 or §727 actions are.

B. Chapter 7 fees cannot be paid from the Debtor’s bankruptcy estate. §330 does not authorize compensation to debtor’s attorneys from the estate unless they are employed in a chapter 7 by a trustee under §327 with court approval. Lamie v. U.S. Trustee, 124 S.Ct. 1023 (2004). If taken as a retainer vs. flat fee, Debtor’s counsel runs the risk of the Court requiring disgorgement except for reasonable fees for services actually rendered. In Stewart v. Olson, 93 B.R. 91 (N.D. TX. 1988) aff’d 878 F.2d 414 (5th Cir. 1989), Debtor’s counsel took a $25,000 retainer (in anticipation of §523/§727 adversary proceeding), which the Trustee challenged. The District Court found that the prepetition retainer was an asset of the estate and only reasonable fees were allowed ($3,000). The balance had to be disgorged. The District Court noted that §541 broadly includes in the debtor’s estate every conceivable interest of the debtor as of the filing date, but that §329(b)(1)(A)(recovery of property above the reasonable value of services) and 541(a)(3)(recovery, including under 329(b)) would be superfluous if debtor’s attorney were not allowed to keep fees for reasonable value of services. See also In re Pro-Snax Dist. Inc., 157 F.3d 414 (5th Cir. 1998) (Counsel to Chapter 7 Debtor was not entitled to be paid from bankruptcy estate unless employed under §§ 327 or 1103.) See also In re Dixon, 143 B.R.671 (Bky. N.D.Tex. 1992) ($300,000 in cash and art ordered disgorged by criminal counsel hired and paid by the Debtor, within one (1) year of the filing of the Debtor’s Chapter 11, because it was paid in “contemplation” of the filing of the bankruptcy case, and because the Bankruptcy Court had authority to examine fee arrangements with non bankruptcy counsel.)

PRACTICE NOTE: Make it a flat fee and make it reasonable. If you anticipate post-filing work beyond attending the §341, then get enough to cover reasonably anticipated Chapter 7 work or have arrangements for someone beside the Debtor to loan the Debtor money post-petition. Fee agreements should retain the right to additional compensation on an hourly rate basis for postpetition adversary and dischargeability actions on the basis that we are not receiving property of the estate, but compensation from debtor’s postpetition earnings which are exempt under Texas law. This should not be confused with a prepetition retainer or allowance for such activities. Any such compensation must still be disclosed.

II. CHAPTER 13

A. Flat Fee vs. Retainer Fees vs. Pre Determined Loadstar - Fees in Chapter 13 cases, as in all other bankruptcy cases, are determined under Sec 330, with different predetermined (“no look”) fees set by Local Rules in each District. If a great deal of work beyond the “no look” fee is anticipated, most start with a retainer and seek additional fees from the estate, on appropriate application and Court approval. The amount of fees allowed under the pre-determined loadstar and when they are paid vary from district to district.

The 1994 amendments to the Code, sets forth five factors, derived from, Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974)(Identifying twelve factors), to be considered by the Court in determining the “reasonableness” of fees by examining the nature, extent and value of the legal services provided to the Debtor, enumerating the factors as
Attorney Fees in Consumer Cases

Chapter 13

- the time spent on the services provided;
- the rates charged for the services;
- whether the services were necessary to the administration of the bankruptcy case or were beneficial to the bankruptcy case at the time the services were rendered;
- whether the services were performed within a reasonable amount of time in light of the complexity, importance, and nature of the problem, issue, or task addressed; and
- whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in nonbankruptcy cases.

B. Normal Range of Fees – The normal range of fees, depending on several variables, seems to be between $2000 and $3500. If a simple Chapter 13, flat fee may work fine. If you anticipate contested motions for relief from stay, cure of delinquent mortgage or car, complex tax issues with IRS, or other similar obligations, then fees higher than those allowed under the local rules may be necessary, and allowed by the Court.

C. Local Rules - Local rules on the amount and how the fees are paid vary among the four districts in Texas. Each Bankruptcy Judge reviews the fee applications filed by the Debtor’s attorney, and usually invites comments from the Standing Chapter 13 Trustee. While creditors may file objections or comments few do, so generally your audience is the Court and the Chapter 13 Trustee.

1. Northern District of Texas –
   These can be found at http://www.txnb.uscourts.gov/orders/
   General “no look” fee is $3000, and $3500 for a business case.
   The Chapter 13 Trustees generally see the “no look” fees as sufficient fees in most cases and see fee applications as “rare” and reserved for exceptional cases. To justify fees above the “no look”, you will need to document and justify the additional fees.

2. Eastern District of Texas –
   Local Bankruptcy Rule (LBR) 2016(h) governs 13 fees. LBR 2016(e) governs retainers.
   Local rules are at http://www.txeb.uscourts.gov/BAPCPA/new_rules.asp
   General “no look” fee is $2500, without stay litigation, and $3,000 with stay litigation. Fee applications are filed with twenty-day negative notice language found in Local Rule 9007(a). If no one objects, the Court may rule on the application without a hearing, or the Court may set a hearing.
   Chapter 13 Trustee reviews and comments if fees are unreasonable.

3. Southern District of Texas –
   The link to the Southern District of Texas General Order is http://www.txwb.uscourts.gov/pdf/chapter_13_debt_atty_fees.pdf
   The Southern District provides a no-look fee of $2,050.00 for representation through confirmation plus 120 days. Alternatively, the fee is increased to $2,460.00 if the debtor attorney accepts payment on a deferred basis – one-half of plan payments until fees are paid. The General Order allows an election to be compensated post-confirmation (plus 120 days) for modifications at $400.00 per modification and to be paid $250.00 for lift stays and Trustee’s Motions to Dismiss. Otherwise, the attorney is required to maintain contemporaneous time records and submit fee applications under the Johnson factors.

4. Western District of Texas –
   General Order 5-01 and Standing Order 6-01 determine fees.
   General Order 5-01 limits payment to the Debtor’s attorney to $100.00 per month from date of filing: http://www.txwb.uscourts.gov/pdf/chapter_13_debt_atty_fees.pdf

PRACTICE NOTE: Determine what your Judge and what your Chapter 13 Trustee wants to see in the application and how they want it presented. Be familiar with and watch your Local Rules, they change from time to time. Watch the decisions that interpret your Local Rules, because they often put a spin on the Rules that you did not anticipate. If the Local Rules need to be changed, get involved in the process.

D. Bky. Code §330(a)(4)(B) - (Is it helpful?)

§330(a)(4)(B) specifically provides

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 to
the debtor and the other factors set forth in
this section.

Notwithstanding a plain reading of §330(a)(4)(B), and
the acknowledgment of §330(a)(4)(B) by many courts,
few courts actually seem to have given it any special
meaning in Chapter 13 cases. See the following:

In re DeSardi, 340 B.R. 790 (Bky. S.D. Tex. 2006)(Recognizing § 330(a)(4)(B) and
discussing priority of payments of car creditor adequate protection payments and
attorney fees, as implemented by §§ 363(e), 502, 507 and 1326, holding that attorney fees
came after adequate protection payments.);

In re Balderas, 328 B.R. 707 (Bky. W.D. Tex. 2005) (Post petition attorney fees
allowed for preparation and presentation of
modification of confirmed Chapter 13 Plan.);

In re Powell, 314 B.R. 567 (Bky. N.D. Tex. 2004) (Reads §330(a)(4)(B) broadly [and
holistically] and allows the divorce attorney
representing Debtor attorney’s fees, incurred
in connection with the divorce proceeding, to
be paid from the Debtor’s estate.);

“lodestar”, allows fees for services provided
beyond the traditional and customary fees.)

In re Zamora, 274 B.R. 268 (Bky. W.D. Tex. 2002)(Discussing § 330(a)(4)(B) and
allowing Chapter 13 Debtor in a case
converting to Chapter 7, to assign to her
Chapter 13 attorney the refund that would
have come from the Chapter 13 Trustee to
cover the post conversion fees in the Chapter
7.);

In re Colida, 270 B.R. 209 (Bky. S. D. Tex. 2001)(Discussing § 330(a)(4)(B), § 329 and
Bky. R. 2016, but denying request for
expedited hearing seeking additional attorney
fees.);

fees where case was dismissed before a plan
could be confirmed, duplicate services, not
prepared for confirmation hearing and no
benefit to the Debtor.)

E. In re Cahill, 428 F.3d 536 (5th Cir. 2005)

Issue before the Court: In addition to their appeal
of factual findings, Appellants (attorneys for the
debtor) argued that the court erred in using a “typical
case” lodestar as provided in (Southern District of
Texas) General Order 2004-5 rather that a traditional
lodestar calculation for analyzing its fee request under

Holding: The bankruptcy court did not abuse its
discretion by using the precalculated lodestar amount
the bankruptcy court properly applied 11 USCS § 330
and Johnson factors to the specific facts of the case;
bankruptcy court did not give precalculated lodestar
disproportionate amount of weight; its findings that
firm spent unreasonable amount of time on case,
duplicated efforts, performed unnecessary work, were
unprepared for confirmation hearing, and were
handling case that presented no novel or complex
issues supported conclusion that case did not warrant
upward adjustment of lodestar amount of § 330.

Comment: The appellate court, as it (almost)
always does, deferred to the fact findings of the Court.
The good part of this decision for those of us who
lack the discipline to keep a log of everything-we-do-
every-day-in-tenth-of-a-minute-increments is that the
appellate court found nothing improper in the
bankruptcy court’s use of the pre calculated lodestar
amount contained in General Order 2004-5.

PRACTICE NOTE: If you need to file a fee
application, keep contemporaneous time records and
describe activities with reasonable specificity. If you
cannot convince the bankruptcy court (and the Chapter
13 Trustee, to whom most Bankruptcy Judges will
often defer) that your time spent was reasonable and
necessary and benefitted the Debtor or the Estate, you
lose.

F. Barron v. Countryman, 432 F.3d 590 (5th Cir.
2005)

Issue before the Court: The attorney appealed the
judgment of the bankruptcy and district courts ordering
him to disgorge fees taken both pre- and post petition
from clients in 167 cases. The court considered
whether the attorney was required to escrow pre
petition deposits and whether the attorney was required
to disgorge post petition fees for which no court
approval was sought.

Holding: The court first addressed the standing of
the Chapter 13 trustee to challenge the attorney’s fee
arrangement, finding that Congress has given the
Chapter 13 trustee a broad array of powers and duties,
including the power to review compensation of
attorneys and other officers under §§ 329 and 330.

With regard to pre petition retainers the Court
noted that the Code requires court approval of all
attorneys fees sought to be paid from the estate of the debtor. 11 U.S.C. §330(a)(4)(B), §331.

The court identified three types of retainer:

1. A classic retainer involving fees paid as consideration for employment of counsel, as opposed to compensation for services rendered, is outside the estate and purview of §330 though it remains subject to disclosure and reasonableness review under §329.

2. A security retainer, involving fees paid to counsel for prospective services, until services are actually rendered. Because the debtor retains an interest in these funds, they become property of the estate at filing under §§ 329 and 330.

3. An advance payment or flat fee retainer involving compensation for services to be rendered under which the payment passes entirely to counsel upon remittance and the debtor relinquishes all interest. Advance payment retainers do not become property of the estate and are subject to §§ 329 only.

In considering the attorney’s retainer agreement the court concluded that the facts established that his prepetition retainer was an advanced payment retainer and was not property of the estate at filing. Factors considered that enhanced the attorney’s position: the client will forfeit initial deposits if he does not make scheduled payments or opts not to file and the attorney’s testimony that the bulk of his Chapter 13 scheduled payments or opts not to file and the client will forfeit initial deposits if he does not make payments. Because the debtor retains an interest in these funds, they become property of the estate at filing under §§ 329 and 330.

The court then considered postpetition payments received by the attorney, generally for contested proceedings, that were not disclosed to the court. The court found that accepting postpetition fees directly violated the L.R. 2016. Even without the local rule, the court held that acceptance of the postpetition payments was improper, citing In re Mayeaux, 269 B.R. 614 (Bky. E.D. Tex. 2001) at 626 “that money paid to Debtor’s counsel in the post-petition period constitutes estate property. It is elementary bankruptcy law that all post-petition earnings of a Chapter 13 debtor ... constitute property of the bankruptcy estate.” A “chapter 13 debtor ... has no authority to transfer estate property to an attorney without proper notice [to the court].” Id. The court upheld disgorgement of all such postpetition fees.

PRACTICE NOTE: This is a relatively brief opinion that is a guideline to keeping your fees. Read it. Look at your fee agreements. Make sure your fee agreements conform in language and substance to the teachings of this section.

The fees ordered disgorged were probably reasonable and necessary. They were apparently ordered disgorged because they were not DISCLOSED!!! While this may seem to be an inherently unfair result (at least from a debtor’s counsel point of view), it is a long-practiced sanction that you can avoid in your practice by filing a statement of compensation received under Rule 2016 and/or a fee application.


G. Fee Applications

1. Lodestar - In the Fifth Circuit the lodestar method of calculating fees is generally used. See In re Fender, 12 F.3d 480 (5th Cir. 1994); Shipes v. Trinity Indus., 987 F.2d 311 (5th Cir. 1993).

2. Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974) provides twelve (12) factors to be considered:

   (1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation and ability of the attorneys;
(10) the “undesirability” of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

Johnson has been followed by a number of Fifth Circuit opinions, including In re First Colonial Corporation of America, 544 F.2d 1291 (5th Cir.) cert. denied, 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977), as well as in most of the other circuit courts. First Colonial is the case most often cited for the Johnson factors.

PRACTICE NOTE: Tell the Court and the Chapter 13 Trustee what you did, how long it took, how it benefited the estate, how you expect the fees to be paid and if the fees will affect feasibility or the projected plan payments. If there is not enough money in the plan to pay the fees, then will the plan need to be amended to add to the stream of payments.

III. OTHER SOURCES OF FEES

A. Special Counsel to Trustee - §327 requires approval of the court after notice and hearing. If you forgot to get employed, and only realize it when you ask to be paid, you may seek approval nunc pro tunc. See In re Triangle Chemicals, Inc. 607 F.2d 1280, 1291 (5th Cir. 1980)(Sets forth requirements for consideration of nunc pro tunc, essentially an equity argument.) Conflict issues often arise where Trustee wants to employ attorneys who have represented creditors. See discussion in In re Contractor Technology, CTP., 2006 U.S. Dist. LEXIS 34466, May 30, (S.D. Tex. May 30, 2006)(Recognizing that “[a] trustee is given great latitude in the employment of counsel” the court approved the employment of a firm, as special counsel for the Chapter 7 Trustee, that represented 8 out of 400 creditors, discussing both §327 (employment) and §328 (contingent fee arrangement).) If employment is to be on a contingent fee basis, which is permitted (and in many cases the only way that makes any sense) two recent opinions from the Fifth Circuit, In re National Gypsum Co., 123 F.3d 861(5th Cir. 1997) and Daniels v. Barron (In re Barron), 225 F.3d 583 (5th Cir. 2000)(Clarifying National Gypsum.), are mandatory reading.

B. §523(d) - Successful defense of a §523(a)(2) dischargeability action. Credit card issuer brought adversary proceeding, seeking determination that Chapter 7 debtor’s credit card debt was nondischargeable under the fraud discharge exception. After orally ruling in favor of debtor, who then requested attorney fees, the Bankruptcy Court held that: (1) debtor made a factually true express representation to credit card issuer before using its unsolicited check; (2) credit card issuer did not rely on debtor’s representation; (3) debtor did not intend to defraud credit card issuer; and (4) credit card issuer failed to show that it was substantially justified in filing this complaint or that special circumstances existed that made an award of fees to debtor unjust. Fee request allowed. In re Akins, 235 B.R. 866 (Bky. W.D. Tex. 1999). Of interest in the opinion is the burden placed on the creditor. The creditor must prove its case under the fraud discharge exception by a preponderance of the evidence. Id. 872. § 523(b) provides in relevant part that if the creditor loses a § 523(a)(2) action, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney’s fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust. Id. 872. See also AT&T Universal Card Services, Corp. v. Arroyo, 205 BR 984 (Bky. SD Fla. 1997)

PRACTICE NOTE: While the language of § 523(d) does not appear to require a counterclaim, a counterclaim should be considered when appropriate. It may open the eyes of the creditor and lead to earlier resolution. The alternative argument is that it may awaken a creditor attorney to the exposure faced if they do not prove their case at trial.

C. §362(k)(formerly §362(h)) - Adversary proceeding for damages for violation of the stay or for refusing to return property subject to a stay. There are three elements to a claim under 362(h): (1) the defendant must have known of the existence of the stay; (2) the defendant’s acts must have been intentional; and (3) these acts must have violated the stay. Brown, et al. v. Chestnut, 422 F.3d 298, 302, (5th Cir. 2005). In Chestnut,
there was a question whether a certain asset was property of the estate. The court indicated that the property was not clearly part of the debtor’s estate, but neither was it clearly not property of the estate. The judgment of the bankruptcy court included a fine and an award of attorney’s fees to the debtor’s counsel.

D. R 9011 – Requires twenty-one days advance notice that you will file a motion for sanctions. If no correction to the offending pleadings or withdrawal, you file your motion and proceed.

E. Sec 705(b)(5)(A) – Narrowly allows fees to Debtor’s Counsel based on Rule 9011 type misconduct.

F. 28 U.S.C. § 2412 - The Equal Access to Justice Act allows fees against the federal government where the federal government takes a position, before or during litigation, that is not substantially justified. In a recent case in Northern District of Texas, the U.S. Trustee filed a § 707(b) Motion, which the Court denied. Debtor’s counsel then sought and was awarded $3800 in fees at the statutory limit of $155 per hour.

G. Fair Debt Collection Practices and Mortgage Lending Violations - Consumer debtors are the prime target for collection agencies and sub prime lenders, many of whom take advantage of the lack of sophistication of debtors to abuse the collection methods allowed under Federal and State law, and the strict requirements of the handling of mortgage loans of all types. This is an area that most consumer Debtor attorneys overlook. You do not have to necessarily handle these yourself, but at least be able to identify offensive conduct and refer the client to an attorney with expertise in these areas.

**PRACTICE NOTE:** These fees are in addition to the “no look” fees allowed in most districts will add to your income, and will expand the good services provided to deserving clients. The Courts and the Chapter 13 Trustees know which attorneys are providing good service to their clients and it is this good service that makes it easier to get your fee applications approved.

**IV. ATTACHMENTS:**

1. Chapter 7 Representation Contract with Special Circumstance Addendum to Fee Contract
2. Chapter 13 Representation Contract (with E.D.N.C. Local Rules)
3. Interim Fee Application
4. *In re Cahill*
5. *Barron v. Countryman*
Contract For Chapter 7 Bankruptcy Services

This Agreement is executed this ________ day of _____________, 2006, by and between The Brewer Law Firm (hereinafter “Attorney” and _________________________________ (hereinafter “Debtor”, whether one or more). The parties agree as follows:

1. Type of Bankruptcy

Client retains attorney to file a Chapter 7 bankruptcy. If the Debtor determines at a later date that the Debtor desires to file a Chapter 13 bankruptcy, the parties shall execute a new fee contract setting forth the terms of such representation.

2. Services Provided by Attorney

Contingent upon being paid for the services as specified below, the Attorney shall provide the legal services set out in paragraphs 5 -7.

3. Fees and Costs

(a) Attorney Fees

(i) The base fee for the filing of the bankruptcy is $______________.

(ii) The fee is based on the following assumptions:

(A) Debtor has provided attorney with complete and accurate information.
Debtor’s circumstances, especially Debtor’s current monthly income, do not substantially change prior to the filing of the case.1

(B) If Debtor has not already turned in the completed bankruptcy forms, the Debtor will turn in those forms within 30 days of the date of this fee contract.

(C) Debtor will pay the fee in a reasonable amount of time, but no later than 90 days from this date.

(iii) If any of the assumptions set out above are inaccurate, and as a result, the amount of legal service to be provided by Attorney and/or his staff is increased, the fee shall be increased accordingly to compensate Attorney for the additional time and expense in providing the legal

1 A significant factor in setting chapter 7 fees is the amount of time and effort you expect to spend on the means test. You don’t want to set a fee based on the debtor being below median income, and then have to represent an above-median debtor. See footnote 6.
services.

(iv) If Debtor has not paid the fees within 180 days of the date of this Agreement, it shall be presumed that Debtor has elected not to file bankruptcy. 2

(b) Costs

Debtor shall pay all the costs related to filing of the bankruptcy. The costs are as follows:

(i) The filing fee charged by the bankruptcy court is $299.00.

(ii) The cost of credit counseling, which is a prerequisite to filing bankruptcy, is $34.00 unless otherwise indicated below.

(iii) The cost of the instructional course concerning personal financial management, which is a prerequisite to obtaining the chapter 7 discharge, is $8.00 per person filing.

(iv) All fees and costs shall be paid to Attorney, who shall disburse the funds.

(v) Other costs are as follows:

____________________________________________________________
____________________________________________________________
____________________________________________________________

4. Terms Of Payment; Refunds

(a) Debtor has paid ___________ as a retainer fee. This amount has been earned upon receipt by Attorney and is not refundable.

(b) As of the execution of this Agreement Debtor has paid an additional sum of $____________.

(c) As Debtor pays fees in excess of the retainer fee, the funds shall first be applied to attorney’s fee, then to the cost of credit counseling,

2 This is the “fish-or-cut-bait” provision of the contract. A lesson I learned last autumn prior to the effective date of BAPCPA is that if the debtor perceives that there is a deadline to meet in paying the fee, he will meet the deadline.
then to other costs, and finally to the bankruptcy filing fee. 3

(d) The Attorney shall not file the bankruptcy until all fees and costs have been paid in full.

(e) In the event the Debtor elects not to file bankruptcy and requests a refund of fees in excess of the $400 retainer fee, the Attorney shall refund to the Debtor only that portion of the fees that have not been earned. The determination of the fees earned shall include all relevant factors, including: (i) whether the bankruptcy petition, schedules, and statements have been prepared; (ii) the amount of time spent by the Attorney and his staff communicating with the Debtor, representatives of the Debtor, and the Debtor’s creditors; (iii) and the amount of time the file has been open. The parties agree that, at the least, the Attorney has earned $400 upon the opening of the file and earns an additional $_________ per month for each month that the file is open. 4

5. **Services Provided Under the Base Fee.**

The following legal services are provided under the base fee.

(a) All services reasonably necessary to fully inform the Debtor of the Debtor’s rights and responsibilities under the bankruptcy laws, and to enable the Debtor to make an informed decision whether to file bankruptcy and whether to file Chapter 7 or Chapter 13 bankruptcy.

(b) All services reasonably necessary to prepare complete, accurate bankruptcy schedules, statements and other required bankruptcy filings.

(c) If applicable, filing motions to continue the automatic stay pursuant to §362(c)(3)(B) or to impose an automatic stay pursuant to §362(c)(4)(B).

(d) Advise Debtor of his exemptions and assist the Debtor in claiming exemptions that best serve the Debtor’s needs and desires.

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3 This provision makes it clear that the last funds paid are for the filing fees. Should a client request a refund, this provision can help avoid disputes.

4 This provision provides the framework in which fees are refunded when the client decides not to file. I put “$75.00” in the blank in paragraph 4(f). It represents the costs of maintaining an office that is available to answer the client’s questions, to confirm to creditors that my firm represents the client, and to prepare the documents required to file a bankruptcy.
(e) Assistance to Debtor in meeting all the requirements imposed by the bankruptcy laws.

(f) Attendance at the 341 Creditors Meeting with the Debtor, or the procurement of other counsel to attend the 341 Creditors Meeting with the Debtor. Normally, Attorney will represent Debtor at the 341 Creditors Meeting, but on occasion, due to scheduling conflicts or unforeseen circumstances, Attorney may not be able to attend. On such circumstances, if the 341 Creditors Meeting is not continued, Attorney may make arrangements with another attorney to represent Debtor at the meeting with Debtor’s prior knowledge and consent.

(f) If applicable, filing motions to avoid non-purchase money liens on exempt household goods and judgment liens that impair exempt property.

Assisting Debtor in carrying out the Debtor’s Statement of Intention, provided that there is an additional fee for redemptions as set out in paragraph (7)(f).

(h) Assisting the Debtor in complying with all proper requests for information or documents by the trustee, the bankruptcy administrator, the court, or other parties in interests.

(g) Communicating as necessary with the creditors and other parties in interest to facilitate the administration of the case and the application of the automatic stay.

6. Means Test Services

With respect to the “means test” provisions imposed by §707(b) of the Bankruptcy Code, the base fee charged in this case is based on one or more of the four assumptions set out below. The applicable assumption is denoted by the parties’ initials placed after the assumption.

(a) Debtor’s debts are not primarily consumer debts, and therefore the §707(b) means test does not apply. The parties assume that no issues

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5 At this time I include dealing with reaffirmation agreements as included within the bundle of services included in the base fee. Of course, I include reaffirmation agreements into the list of factors I consider in setting the fee.

6 As stated at footnote 1, a key factor in setting fees is coping with the means test. This provision explicitly sets out the parties’ assumptions with respect to the means test.
concerning the means test will arise in this case __________

(b) Debtor’s current monthly income is below the median income. The parties assume that no issue concerning the means test will arise in this case. ____________

(c) Debtor’s current monthly income is above the median income, but the Debtor’s expenses, as calculated under §707(b)(2)(A) are sufficient to prevent the presumption of abuse from arising in this case. The parties assume that no issues concerning the means test will arise in this case. _____________

A presumption of abuse does arise in this case, but Debtor and Attorney will attempt to rebut the presumption by demonstrating extraordinary circumstances pursuant to §707(b)(2)(B). Attached to this Agreement is an addendum setting forth an explanation of the Debtor’s obligation in demonstrating extraordinary circumstances and the details of the parties’ agreement concerning fees for any proceeding related to the establishment of extraordinary circumstances. ____________7

7. Services Not Provided Under the Base Fee.8

Except as set out in an addendum attached to this contract, the services set out below are not provided under the base fee. Compensation for these services shall be as provided in paragraph 8. These services are as follows:

(a) Representing the Debtor in any dischargeability proceedings, including student loan discharge proceeding.

(b) Representing the Debtor in any contested motions to avoid liens.

(c) Representing the Debtor in any contested matters or adversary proceedings related to the enforcement of the automatic stay or discharge injunctions, except as provided in paragraph (5)(c).

7 The Special Circumstances Addendum is included in these materials in a separate document following this Chapter 7 Fee Contract.

8 This provision should not be misunderstood as limiting the attorney’s representation of the client. As set out at paragraph 9, attorneys in EDNC are obligated to represent debtors in all matters unless they are allowed to withdraw. This paragraph sets out the services not included in the base fee, and the next paragraph sets out the parties agreement as to how the attorney will be compensated for such services. If the debtor does not pay or refuses to pay, the attorney’s remedy is to seek to withdraw. See paragraph 9. In those cases in which the parties know or anticipate that some of these “non-routine” services will be necessary, they can include them within the base “flat” fee pursuant to an addendum.
(d) Representing the Debtor in any motions related to the enforcement of §707(a) or (b) of the Bankruptcy Code, except as provided in the Special Circumstances Addendum.

(e) Representing the Debtor in contested motions for relief from stay.

(f) Representing Debtor in any motions to redeem exempt personal property.

(g) Representing Debtor with respect to defending the Debtor’s claim of exemptions.

(h) Filing amendments to the Schedules, unless the amendment arises out of a mistake by Attorney.

(i) Filing motions to continue the 341 Creditors Meeting, unless the reason for the continuance is due to Attorney and not Debtor.

(j) Filing motions to abandon property.

(k) Other matters not provided in the base fee.

8. **Compensation For Services Not Covered Under Base Fee.**

(a) Debtor shall compensate Attorney for these services as follows:

   (i) With respect to amendments to the schedules, the attorney’s fee shall be $50.00 per amendment. There is also a filing fee charged by the court.

   (ii) With respect to motions to continue the 341 Creditor’s Meeting the fee shall be $50.00.

   (iii) With respect to defending motions for relief from stay, the fee shall be $250.00 - $350.00.

   (iv) With respect to redemptions, the fee shall be between $300.00 and $600.00, depending upon the degree of opposition to the motion.

   (v) With respect to all other matters, the fee shall be based on the time spent, with attorney billing at $250.00 per hour and the

---

9 I have found this $50 charge to be very useful over the years – not because I often charge it to a client, but because the client who “needed” to have the 341 CM continued, upon being reminded of the $50 fee, found the need evaporate.
paralegals at $75.00 per hour.

(b) Fees for these services shall be paid as follows:

(i) Fees for all services, which are not billed hourly, shall be paid in advance unless Attorney waives this requirement. Fees for services billed on time spent shall be paid within 30 days of Debtor’s receipt of the bill for such services. Attorney may require the payment of a retainer fee for non-base services that are expected to require more than 2 hours of Attorney’s time.

(ii) Debtor understands that if Debtor does not pay the fees as set out above, Attorney has no obligation to provide the services, and has the right to file a motion to withdraw as the attorney for the Debtor in this case or in an adversary proceeding.

9. **Debtor’s Obligations.**

Debtor’s Obligations are as follows:

a) To pay the fees as set out above.

b) To provide accurately, completely and honestly information necessary to prepare and file the chapter 7 bankruptcy, and other motions or proceedings arising in the case.

c) To keep Attorney advised at all times of the Debtor’s address and telephone numbers.

d) To attend the 341 Creditors Meeting and any other hearings set in the case.

e) To provide any information requested of Debtor by the Chapter 7 trustee, the Bankruptcy Administrator, 10 or any other party in the case, unless the Court rules that Debtor is not required to provide the information.

f) To respond immediately to any requests of Debtor by Attorney or his staff.

---

10 In Texas, change to “United States Trustee”.
10. **Attorney of Record; Withdrawal from the Case or Adversary Proceeding by the Attorney**

Pursuant to Local Rule 9011-1 of the Local Rules of the Bankruptcy Court the Attorney shall remain the responsible attorney of record for the Debtor in all matters in the case until the case is closed of until the Attorney is relieved from representation by order of the court. The parties agree that just reasons for the Attorney to withdraw from representation of the Debtor include, but are not limited to the following:

(a) The failure of Debtor to pay for services not included in the base fee.

(b) The failure of Debtor to comply with Debtor’s obligation set out in paragraph (9)(b) – (9)(f).

(c) The failure or refusal of Debtor to comply with Debtor’s obligations to provide any supplemental information to the court or to the trustee, or to correct any incorrect or incomplete information provided to the court or to the trustee.

(d) Any irreconcilable conflict between Attorney and Debtor with respect to the case.

The Brewer Law Firm

Date: _______________   By: ____________________

William E. Brewer, Jr.

Date: _______________         ________________________
Debtor

Date ___________________          ________________________
Debtor

---

EDNC Local Rule 9011-1 requires a debtor’s attorney to represent the debtor in all matters that arise in the case unless the attorney is allowed to withdraw. I assume that all the Texas bankruptcy courts have similar provisions. Should you find it necessary to seek to withdraw from a case, a provision like this in the fee contract will be useful.
Debtor has chosen, after consultation with Attorney, to file a chapter 7 bankruptcy. Attorney has advised Debtor that by application of the “means test” the filing of the bankruptcy will be presumed to be an abuse. Unless the Debtor demonstrates the existence the special circumstances to the court, the case must either be dismissed or converted to Chapter 13. Special circumstances are those circumstances which justify additional expenses not included in the approved expenses set out on the Bankruptcy Code or which justify adjustments to the calculation of current monthly income. There must be no reasonable alternative to the additions or adjustments. Examples of special circumstances are a serious medical condition or a call to active duty in the Armed Forces. In order to establish special circumstances Debtor must itemize each additional expense or adjustment to income and provide both documentation for such expense or adjustment and a detailed explanation of the special circumstances that make such expense or adjustment to income necessary and reasonable. Debtor must attest under oath to the accuracy of any information provided to demonstrate special circumstances.

The attorney’s fees related to the establishment of special circumstances are as follows:

[Choose One of the three following fee arrangements]

The fees are included in the base fee paid by Debtor.

Debtor shall pay the attorney’s fees as a non-base fee in accordance with paragraph (7)(d) and (8)(b). Debtor has paid the Attorney a retainer fee of $________ for such services.

Debtor shall pay a flat fee of $________ for the special circumstances litigation to be paid as follows:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
This Agreement is executed this ________ day of ______________, 2006, by and between The Brewer Law Firm (hereinafter “Attorney” and ______________ __________________________________ (hereinafter “Debtor”, whether one or more). The parties agree as follows:

1. **Type of Bankruptcy**

Debtor retains attorney to file a Chapter 13 bankruptcy. If Debtor determines at a later date that Debtor desires to file a Chapter 7 bankruptcy, the parties shall execute a new fee contract setting forth the terms of such representation.

2. **Services Provided by Attorney**

Contingent upon being paid for the services as specified below, Attorney shall provide the legal services set out in paragraphs 5 -6.

3. **Fees and Costs**

   (a) **Attorney Fees**

   (i) The base fee for the filing of the bankruptcy is $______________.

   The base fee shall be paid as follows: $___________ (the “upfront fee”) shall be paid prior to the filing of the bankruptcy, and the remainder of the fee shall be paid through the chapter 13 plan payments.2

   (ii) **The base fee and the upfront fee are based on the following assumptions:**3

   (A) **Debtor has provided Attorney with complete and accurate information.**

---

1 This is the fee contract used by me for my practice in the Bankruptcy Court for the Eastern District of North Carolina. The local rules related to chapter 13 fees require the attorney to disclose to the debtor the procedures related to the awarding of attorneys fees. Therefore, I attach a copy of the applicable rules to the fee contract. All references in the fee contract are to the Local Rules of EDNC. The footnotes are for the purpose of explaining the rationale for certain provisions.

2 In the EDNC, the standard “no-look” fee is now $3,000. Attorneys are entitled to collect all of the base fee prior to filing, but the debtor’s financial circumstances and competition from other attorneys limit the instances in which this occurs. I usually charge $600 in upfront fees. I do so for two reasons: 1) The debtor who has money invested in the process is more likely to follow through with his obligations; and 2) The debtor’s ability to come up with the money provides a litmus test of his ability to produce the funds required to comply with the terms of the plan.

3 This provision gives the attorney the right to adjust the fee upon discovering that the case has complications that were not known when the fee was set.
(B) Debtor’s circumstances, especially Debtor’s current monthly income, do not substantially change prior to the filing of the case.

(C) Debtors will pay the fee in a reasonable amount of time, but no later than 90 days from this date.

(iii) If either of the assumptions set out above are inaccurate, and as a result, the amount of legal service to be provided by Attorney and/or his staff is increased, the fee shall be increased accordingly to compensate Attorney for the additional time and expense in providing the legal services.

(iv) If Debtor has not paid the fees within 180 days of the date of this Agreement, it shall be presumed that Debtor has elected not to file bankruptcy. 4

(b) Costs

Debtor shall pay all the costs related to filing of the bankruptcy. The costs are as follows:

(i) The filing fee charged by the bankruptcy court is $274.00.

(ii) The cost of credit counseling, which is a prerequisite to filing bankruptcy, is $34.00 unless otherwise indicated below.

(iii) All fees and costs shall be paid to the Attorney, who shall disburse the funds.

(iv) Other costs are as follows:

________________________________________________________________________

________________________________________________________________________

1. Terms Of Payment; Refunds

(a) Debtor has paid __________ as a retainer fee. This amount has been earned upon receipt by the Attorney and is not refundable.

(b) As of the execution of this Agreement, Debtor has paid an additional sum of $__________.

(c) As Debtor pays fees in excess of the retainer fee, the funds shall first be applied to the upfront attorney’s fee, then to the cost of credit

4 This is the “fish-or-cut-bait” provision of the contract. It is not as important in chapter 13 cases as in chapter 7 cases. A lesson I learned last autumn prior to the effective date of BAPCPA is that if the debtor perceives that there is a deadline to met in paying the fee, he will meet the deadline.
counseling, then to other costs, and finally to the bankruptcy filing fee.5

(d) The Attorney shall not file the bankruptcy until all upfront fees and costs have been paid in full.

(e) The balance of the base fee shall be paid through Debtor’s Chapter 13 plan in accordance with the applicable provisions of the Bankruptcy Code and the applicable provisions of the Local Rules of the Bankruptcy Court. Attached to the Agreement are copies of the Local Rules related to the payment of fees in Chapter 13 cases.6

(f) If Debtor elects not to file bankruptcy and requests a refund of fees in excess of the $400 retainer fee, the Attorney shall refund to the Debtor only that portion of the fees that have not been earned. The determination of the fees earned shall include all relevant factors, including: (i) whether the bankruptcy petition, schedules, and statements have been prepared; (ii) the amount of time spent by the Attorney and his staff in communicating with Debtor, representatives of Debtor, and Debtor’s creditors; (iii) the amount of time the file has been open. The parties agree that, at the least, the Attorney has earned $400 upon the opening of the file and earns an additional $________ per month for each month that the file is open.7

5. Services Provided Under the Base Fee.

The following legal services are provided under the base fee:

The basic services reasonably necessary to properly file the bankruptcy and to represent Debtor before the bankruptcy court during the first twelve months after filing the case; provided that, the Attorney may apply for additional fees within the 12-month period upon providing a certain level of services as set out in the local rules attached to this Agreement.8

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5 This provision makes it clear that the last funds paid are for the filing fees. Should a client request a refund, this provision can help avoid disputes.

6 If your district has rules or a standing order related to the payment of fees incorporate it into your contract. Otherwise, specify how you will be paid through the chapter 13 plan to the extent possible.

7 This provision comes into play more often in chapter 7 cases. It provides the framework in which fees are refunded when the client decides not to file. I put “$75.00” in the blank in paragraph 4(f). It represents the costs of maintaining an office that is available to answer the client’s questions, to confirm to creditors that my firm represents the client, and to prepare the documents required to file a bankruptcy.

8 This first 12-month provision arises from the EDNC local rule. Draft this provision to comport with the practices and procedures of your district.
The services set out in subparagraph (a) include the following:

(i) All services reasonably necessary to fully inform Debtor of Debtor’s rights and responsibilities under the bankruptcy laws, and to enable Debtor to make an informed decision whether to file bankruptcy and whether to file Chapter 7 or Chapter 13 bankruptcy.

(ii) All services reasonably necessary to prepare complete, accurate bankruptcy schedules, statements, chapter 13 plan, and other required bankruptcy filings.

(iii) If applicable, filing motions to continue the automatic stay pursuant to §362(c)(3)(B) or to impose an automatic stay pursuant to §362(c)(4)(B).

(iv) Advise Debtor of his exemptions and assist Debtor in claiming exemptions that best serve the Debtor’s needs and desires.

(v) Assistance to Debtor in meeting all the requirements imposed by the bankruptcy laws.

(vi) Attendance at the 341 Creditors Meeting with the Debtor, or the procurement of other counsel to attend the 341 Creditors Meeting with the Debtor. Normally, Attorney will represent Debtor at the 341 Creditors Meeting, but on occasion, due to scheduling conflicts or unforeseen circumstances, Attorney may not be able to attend. On such circumstances, if the 341 Creditors Meeting is not continued, Attorney may make arrangements with another attorney to represent Debtor at the meeting with Debtor’s prior knowledge and consent.

(vii) If applicable, filing motions to avoid non-purchase money liens on exempt household goods and judgment liens that impair exempt property.

(viii) Services related to obtaining confirmation of the chapter 13 plan; provided that, substantial additional services related to confirmation may merit an application for additional fees.

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9 These provisions should be carefully drafted to meet the needs of your practice and to comply with the requirements or expectations of your district.

10 The EDNC local rule provides that these motions are not included in the base fee and allows an additional charge of $350 for them. Since, I usually will know whether such a motion is necessary when I enter into the fee contract, I include in the base services and increase the base fee from $3,000 to $3,350. This method provides the client a more complete disclosure of the fees.
(ix) Assisting the Debtor in complying with all proper requests for information or documents by the trustee, the bankruptcy administrator, the court, or other parties in interests.

6. Services Not Provided Under the Base Fee.

Non-base services are set out in Local Rule 2016-1(a) and the Administrative Guide promulgated by the court in connection with that rule. Local Rule 2016-1(a) and the pertinent part of the Administrative Guide are appended to the Agreement.11

7. Compensation For Services Not Covered Under Base Fee.

Debtor shall compensate Attorney for these services in accordance with the Local Rule 2016-1(a).

8. Debtor’s Obligations.

Debtor’s obligations are as follows:

(a) To pay the fees as set out above.

(b) To make all the payments provided in the Chapter 13 plan.

(c) To provide accurately and honestly all the information necessary to prepare and file the Chapter 13 schedules and statements, and other documents, motions or responses arising in connection with the case.

(d) To keep Attorney advised at all times of Debtor’s address and telephone numbers.

(e) To attend the 341 Creditors Meeting and any other hearings set in the case.

(f) To provide any information requested of Debtor by the Chapter 13 trustee, the Bankruptcy Administrator,12 or any other party in the case, unless the Court rules that Debtor is not required to provide the information.

(g) To respond immediately to any requests of Debtor by Attorney or Attorney’s staff.

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11 You may have to list these services and the compensation for such services rather than making reference to the local rules as I am able to do in EDNC.

12 In Texas, change to “United States Trustee”.
(g) To comply with the obligations placed upon the Debtor by EDNC Local Rule 4002-1(f), a copy of which is attached hereto.13

9. Attorney of Record; Withdrawal from the Case or Adversary Proceeding by the Attorney14

Pursuant EDNC Local Rule 9011-1, the Attorney shall remain the responsible attorney of record for the Debtor in all matters in the case until the case is closed or until the Attorney is relieved from representation by order of the court. The parties agree that just reasons for the Attorney to withdraw from representation of Debtor include, but are not limited to the following:

(a) The failure of the Debtor to pay for services not included in the base fee.

(b) The failure of the Debtor to comply with the Debtor’s obligation set out in paragraph (8)(b)-(h).

(c) The failure or refusal of the Debtor to comply with the Debtor’s obligations to provide any supplemental information to the court or to the trustee, or to correct any incorrect or incomplete information provided to the court or to the trustee.

(d) Any irreconcilable conflict between the Attorney and the Debtor with respect to the case.

Date: ______________ The Brewer Law Firm

By: __________________________
    William E. Brewer, Jr.

Date: ______________

Debtor

Date: ______________

Debtor

13 If your local rules contain a provision related to the debtor’s duties, I recommend that you attach a copy to the fee contract. Then, there can be question that you have advised the debtor of these duties.

14 EDNC Local Rule 9011-1 requires a debtor’s attorney to represent the debtor in all matters that arise in the case unless the attorney is allowed to withdraw. I assume that all the Texas bankruptcy courts have similar provisions. Should you find it necessary to seek to withdraw from a case, a provision like this in the fee contract will be useful.
a. **COMPENSATION OF ATTORNEY FOR DEBTOR IN CHAPTER 13 CASES:**

1. **AMOUNT OF STANDARD BASE FEE:** The standard base fee in a chapter 13 case is as provided in the statement of approved compensation published annually by the clerk and included in the Administrative Guide to Practice and Procedure. Though the standard base fee will typically be approved by the court without hearing, the trustee may recommend, in appropriate cases, that a lower fee be allowed. In recommending a standard base fee in converted cases, the trustee shall take into consideration the compensation already received.

2. **SERVICES INCLUDED IN THE BASE FEE:** The standard base fee includes the basic services reasonably necessary to properly represent the debtor before the bankruptcy court during the first 12 months after filing the case.

3. **APPLYING FOR A HIGHER BASE FEE:** Applications for approval of a base fee higher than the standard base fee must be filed by the debtor’s attorney within 60 days after the conclusion of the creditor’s meeting under § 341 of the Bankruptcy Code.

4. **NON-BASE FEE SERVICES DEFINED:** The following services are not covered by the standard base fee, and additional compensation for these services may be awarded by the court:
   A. motion for authority to sell real property;
   B. application to incur debt;
   C. motion to extend or impose the automatic stay for repeat filers;
   D. prosecution or defense of adversary proceedings;
   E. filing of formal motions or responses pertaining to three or more matters arising during the first year of the case, including but not limited to the services listed below in subsection (6); and
   F. any other service that, in the discretion of the court, reasonably warrants additional compensation.

5. **APPROVAL OF NON-BASE FEES:** Except as specified in subsection (6), applications for fees for any non-base fee services provided to a chapter 13 debtor must be approved by the court. Notice of each
application for fees and expenses in any amount under $1,000 must be sent to each debtor, the trustee, and the bankruptcy administrator. Notice of each application for fees and expenses of $1,000 and above must be given to all parties in interest.

6. **PRESumptive NON-BASE FEES/APPROVAL/NONE:** The list of presumptively reasonable non-base fee services are contained in the statement of approved compensation published by the clerk and included in the Administrative Guide to Practice and Procedure. Applications for the presumptive non-base fee must be filed with a notice verifying completion of the service and a certificate of service evidencing service of the notice on each debtor, the trustee and the bankruptcy administrator. The applications for presumptive non-base fees will automatically be approved by the court. Alternatively, the debtor’s attorney may apply to the court for approval of non-base fees on a "time and expense" basis pursuant to Rule 2016 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 330.

7. **DISCLOSURE OF FEE PROCEDURES:** Every attorney for a chapter 13 debtor must disclose to the debtor the procedures applicable in this district to awards of attorneys’ fees in chapter 13 cases.

8. **INTERIM APPROVAL OF PARTIAL BASE FEE:** An attorney fee as specified in the Administrative Guide to Practice and Procedure for services provided to the debtor up to and including the petition date is authorized and shall be considered part of the base fee. Any amount in excess of the base fee collected by the attorney prior to filing the chapter 13 petition must be held in the attorney’s client trust account pending further order of the court or approval of the fees in accordance with this rule.

9. **PAYMENT OF ATTORNEY FEES/MODIFICATION OF PLAN:** The following will be treated and paid as administrative expenses of the chapter 13 case:
   - A. the standard base fee, less any partial base fee paid prior to filing the chapter 13 petition; and
   - B. any additional amounts awarded in excess of the standard base fee or for non-base fee services.

   These fees shall be paid by the trustee at the rate set in the Administrative Guide to Practice and Procedure unless the court directs otherwise. The trustee may, without application to the court, modify the chapter 13 plan to extend the duration of the plan and/or increase the monthly amount of the plan payment in order to provide the funds necessary to pay attorney fees. The trustee must notify the debtor and the debtor’s attorney of the plan modification.
### Rule 2016-1: Compensation of Professionals

<table>
<thead>
<tr>
<th>(a)(1)</th>
<th>Amount of Standard Base Fee:</th>
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<tbody>
<tr>
<td></td>
<td>Effective in cases filed on and after April 1, 2006, the standard base fee in a chapter 13 case is $3,000.00.</td>
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<thead>
<tr>
<th>(a)(6)</th>
<th>Presumptive Non-base Fees:</th>
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<tbody>
<tr>
<td></td>
<td>Motion to extend or impose the automatic stay for repeat filers $350.00</td>
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<tr>
<td></td>
<td>Motion to use interrogatories, and interrogatories $150.00</td>
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<tr>
<td></td>
<td>Motion for turnover $250.00</td>
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<td></td>
<td>Adversary proceeding for turnover $500.00</td>
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<td></td>
<td>Uncontested lien avoidance $500.00</td>
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<td></td>
<td>Motion to avoid judicial lien $200.00</td>
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<td></td>
<td>Motion to modify plan post-confirmation $250.00</td>
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<tr>
<td></td>
<td>Motion to substitute collateral $350.00</td>
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<tr>
<td></td>
<td>Motion for authority to sell property $250.00</td>
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<td></td>
<td>Application to incur debt $200.00</td>
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<td></td>
<td>Defense of motion for relief from stay and/or co-debtor stay $350.00</td>
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<td></td>
<td>Handling of an insurance inquiry received more than twelve (12) months after the Chapter 13 case is filed $50.00</td>
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<td>Defense of motion to dismiss $200.00</td>
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<td>Motion for hardship discharge $350.00</td>
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<td></td>
<td>Objection to claims $200.00</td>
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<td>Notice to abandon property $100.00</td>
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<table>
<thead>
<tr>
<th>(a)(9)(B)</th>
<th>Payment of Attorney Fees/modification of Plan</th>
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<tbody>
<tr>
<td></td>
<td>These fees shall be paid by the Trustee at the rate of $200.00 per month during the first year of the plan unless the Court directs otherwise. In a case where this rate will not pay the entire amount of the Standard Base Fee authorized to be paid in the Chapter 13 plan during the first 12 months of the plan, the trustee may adjust the monthly rate upward to pay the entire fee during this period.</td>
</tr>
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</table>
DUTIES OF CHAPTER 13 DEBTOR IMPOSED BY EDNC LOCAL RULE 4002 –1(f)

A debtor in a case under chapter 13 shall:

1. **PAYMENTS UNDER PLAN:** The debtor shall begin making the payments called for in the proposed plan on the first day of the first month following the month in which the chapter 13 case is filed. The payments shall be made directly to the standing chapter 13 trustee.

2. **DIRECT PAYMENTS TO CREDITORS:** If secured claims are to be paid outside the plan, the debtor must continue to make the regular scheduled payments to the secured creditor prior to confirmation.

3. **DISPOSITION OF PROPERTY:** The debtor shall not dispose of any non-exempt property having a fair market value of more than $5,000 by sale or otherwise without prior approval of the trustee and an order of the court.

4. **OBTAINING CREDIT:** The debtor shall not purchase additional property or incur additional debt of $5,000 or more without prior approval from the court. The debtor must give notice of the application to purchase additional property or to incur additional debt to the chapter 13 trustee, who must respond within five days of receipt of the notice. If no objection is filed, the court may approve the application without a hearing.

5. **ADEQUATE PROTECTION:** When a case is dismissed prior to confirmation, the court may require the debtor to provide adequate protection to one or more secured creditors by directing that the chapter 13 trustee make adequate protection payments from funds received under paragraph (d)(1) of this rule.

6. **COLLISION INSURANCE:** If the collision insurance coverage lapses on a vehicle subject to a secured claim, the debtor shall immediately refrain from driving the vehicle.
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN PROCEEDINGS UNDER
CHAPTER 13
CASE NO.

FIRST INTERIM APPLICATION OF ST. CLAIR NEWBERN, III,
COUNSEL TO THE DEBTOR, FOR ALLOWANCE OF
COMPENSATION AND REIMBURSEMENT OF EXPENSES

Name of Applicant: St. Clair Newbern, III

Authorized to Provide Professional Services to: Chapter 13 Debtor

Date of Retention: April 10, 2006

Plan Confirmed: Pending

Dividend (Estimated) to Unsecured Creditors: 100%
St. Clair Newbern (“Applicant”), counsel to Chapter 13 Debtor (the “Debtor”), in the above-captioned Chapter 13 case, applies to the Court for allowance of compensation and reimbursement of expenses for the designated time period as follows:

1. Applicant makes this Application pursuant to 11 U.S.C. §§ 105, 329, 330, 331 and Bankruptcy Rule 2016, for allowance of compensation for professional services rendered and for reimbursement of expenses actually, reasonably, and necessarily incurred by Applicant in representing the Debtor. Attached hereto as Exhibit “A” is the Affidavit of St. Clair Newbern, III, submitted with respect to the compensation and reimbursement requested and in support of this Application.

2. Attached hereto as Exhibit “B” is a detailed, chronological itemization covering all the services performed by Applicant with respect to this matter for the designated time period. All time is billed in increments of one-tenth of an hour, the time entries are presented chronologically and all meetings or hearings are individually identified.

3. Debtor paid a pre-petition payment of $2,000.00 to Applicant and paid an additional $2,500 into Applicant’s Trust Account.

4. Applicant has based the request for compensation upon 23.60 hours of services at a rate of $350.00 per hour for St. Clair Newbern, III (SCN), 8.60 hours of services at the rate of
$200.00 per hour for Carl T. Clarke (CTC), 12.40 paralegal hours at the rate of $125.00 per hour for Susan E. Angle (SEA), 1.00 and 1.90 paralegal hours at the rate of $75.00 per hour for Rachel Hardy (RH) and Sheri Hopkins (SH) respectively, all being at the average of the fee range normally being charged in the Dallas/Fort Worth area for attorneys experienced in and familiar with bankruptcy proceedings. In this regard, Applicant would show that he has spent a substantial amount of his professional time as a lawyer during the past thirty (30) years engaged in various Bankruptcy proceedings, in so doing serving as attorney for Debtors in Chapters 7, 11, 12 and 13 proceedings, as attorney for receivers and trustees in both Chapter 7 and 11 proceedings and as trustee and receiver in Chapter 7 and Chapter 13 proceedings. At the time of Applicant's employment as the attorney for the Debtor, and since that time, Applicant has spent approximately ninety-five (95%) percent of his professional time involved in various bankruptcy proceedings in both the Northern and Western Districts of Texas. It is respectfully requested that the Court take judicial knowledge of the fact that a substantial number of bankruptcy proceedings are now pending in the Northern District of Texas requiring the competence and experience of knowledgeable bankruptcy attorneys. It is further respectfully requested that the value of the services rendered by Applicant should be judged by the criteria set forth in the case of In Re First Colonial Corporation of America, 544 F.2d 1291 (5th Cir.), cert. denied, 431 U.S. 904 (1977)\(^1\).

5. This is the first Interim Application filed by Applicant.

6. Applying the standard criteria set forth in the First Colonial Case, Applicant would show the Court as follows:

\(^1\)Because this is a Chapter 13 proceeding, the provisions of 11 USC § 330 (a)(4)(B) are applicable.
a. Debtor filed this case Pro Se to stop a foreclosure. The case was in danger of dismissal for failure to file schedules, etc. Applicant filed Motion to Extend time to file Schedules and Statement of Affairs.

b. Completed Schedules and Statement of Affairs, attended creditors meeting, and held continued creditors’ meeting, multiple meetings and discussions with Debtor regarding sale of various properties, tax returns, etc.

c. Because of the complexity of Debtors problems it has been necessary to spend a great deal of time on dealing with various hostile creditors, defending Motion for Relief from Stay, attempting to salvage Debtor’s businesses, etc. This has involved attending court hearings and engaging in depositions and other discovery.

d. The issues which Debtor discussed with counsel at the inception of this case were merely the tip of the iceberg and each new matter has required intense scrutiny in order to assist the Debtor in his rehabilitation efforts.

e. The most significant issue dealt with to date was Subway’s Motion to Lift Stay (See Docket No. 13) which the Court denied after a evidentiary hearing and post hearing briefing.

f. The denial of Subway’s Motion to Lift Stay will allow the Debtor to sell the franchised store and assign both the franchise and lease, permission for which the Debtor sought on November 14, 2005. (See Docket No. 42.)

WHEREFORE, PREMISES CONSIDERED, St. Clair Newbern, III respectfully requests that this Court enter an Order:
(i) Granting this Interim Application and authorizing allowance of compensation in the amount of $11,747.50 for professional services rendered and $625.02 for reimbursement for actual and necessary costs, less a payment by the Debtor of $2,000.00 for a total due of $10,372.52.

(ii) Applicant prays that the Court allow the draw down of $2,000 held in Applicant’s Trust Account and that the amount of $10,372.52 be ordered paid out of the first available funds held by the Trustee.

(ii) Granting any additional relief that this Court deems appropriate.

Applicant prays for general relief.

Respectfully submitted:

LAW OFFICES OF
ST. CLAIR NEWBERN, III
A Professional Corporation

By: ________________________________

ST. CLAIR NEWBERN, III
State Bar No. 14941000
1701 River Run Road, Suite 1000
Fort Worth, Texas 76107
Telephone: (817) 870-2647
Facsimile: (817) 335-8658

ATTORNEYS FOR DEBTOR
CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of the foregoing via first class mail, proper postage affixed or via ECF upon the following:

Mr. Tim Truman  
Standing Chapter 13 Trustee  
6851 N.E. Loop 820, Suite 300  
Fort Worth, TX 76180-6608

And upon those filing a notice of appearance:


__________________________________________

ST. CLAIR NEWBERN, III
C

Briefs and Other Related Documents

United States Court of Appeals, Fifth Circuit.
In the Matter of Bobby CAHILL, Janice Cahill,
Debtors.
Walker & Patterson, P.C., Appellant.
No. 05-20145
Summary Calendar.


Background: Order was entered by the United States Bankruptcy Court for the Southern District of Texas awarding compensation to debtors' attorneys for their work in Chapter 13 case, but in amount which was less than that requested by attorneys, and attorneys appealed. The District Court, Kenneth M. Hoyt, J., affirmed, and attorneys again appealed.

5Holding: The Court of Appeals held that bankruptcy court's use of precalculated lodestar amount for typical Chapter 13 cases that was contained in its General Order, in calculating what was reasonable fee award for Chapter 13 debtors' attorneys, was not abuse of bankruptcy court's discretion.

Affirmed.

West Headnotes

[1] Bankruptcy 51 C==3779

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 k. Scope of Review in General.

Most Cited Cases
Court of Appeals reviews district court's decision in its bankruptcy appellate capacity by applying same standard of review to bankruptcy court's conclusions of law and findings of fact that the district court applied.

[2] Bankruptcy 51 C==3784

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3784 k. Discretion. Most Cited Cases
Court of Appeals reviews bankruptcy court's award of attorney fees for abuse of discretion.

[3] Bankruptcy 51 C==3784

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3784 k. Discretion. Most Cited Cases
"Abuse of discretion" occurs in bankruptcy court's fee award when bankruptcy court (1) applies improper legal standard or follows improper procedures in calculating award; or (2) rests its decision on findings of fact that are clearly erroneous.

[4] Bankruptcy 51 C==3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases

Bankruptcy 51 C==3786

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3786 k. Findings of Fact
51k3786 k. Clear Error. Most Cited Cases
Court of Appeals reviews bankruptcy court's legal conclusions de novo and its findings of fact for

[5] Bankruptcy 51 C=3182

51 Bankruptcy
51IX(E) Compensation of Officers and Others
51IX(E) Attorneys
51k3180 Items and Services
Compensable
51k3182 k. Necessity of Service.
Most Cited Cases

Bankruptcy 51 C=3188

51 Bankruptcy
51IX(E) Compensation of Officers and Others
51IX(E) Attorneys
51k3180 Items and Services
Compensable
51k3188 k. Duplicative Services.
Most Cited Cases

Bankruptcy 51 C=3194

51 Bankruptcy
51IX(E) Compensation of Officers and Others
51IX(E) Attorneys
51k3191 Amount
51k3194 k. Lodestar Amount and Deviations Therefrom. Most Cited Cases

Bankruptcy 51 C=3195

51 Bankruptcy
51IX(E) Compensation of Officers and Others
51IX(E) Attorneys
51k3191 Amount
51k3195 k. Time Expended. Most Cited Cases

Bankruptcy 51 C=3198

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E) Attorneys
51k3191 Amount
51k3198 k. Skill or Experience; Novelty. Most Cited Cases

Bankruptcy court's use of precalculated lodestar amount for typical Chapter 13 cases that was contained in its General Order, in calculating what was reasonable fee award for Chapter 13 debtors' attorneys, was not abuse of bankruptcy court's discretion, where court did not mechanically award the precalculated lodestar amount without conducting any analysis to determine that debtors' Chapter 13 case was, in fact, a typical case, and where court considered whether upward adjustment was warranted, but decided against it based on specific findings that attorneys spent unreasonable amount of time on case, duplicated each other's efforts, performed unnecessary work, were unprepared for confirmation hearing, and were handling case that presented no novel or complex issues. 11 U.S.C.A. § 330.

[6] Bankruptcy 51 C=3194

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E) Attorneys
51k3191 Amount
51k3194 k. Lodestar Amount and Deviations Therefrom. Most Cited Cases

Under lodestar approach to award of attorney fees under bankruptcy fee provision, court computes lodestar by multiplying number of hours that attorney would reasonably spend for same type of work by prevailing hourly rate in community, and then considers whether to adjust lodestar up or down based on factors contained in bankruptcy fee provision and on its consideration of so-called Johnson factors. 11 U.S.C.A. § 330.

[7] Bankruptcy 51 C=3194

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E) Attorneys
51k3191 Amount

51k3194 k. Lodestar Amount and Deviations Therefrom. Most Cited Cases
While bankruptcy court has considerable discretion in applying factors to determine whether adjustment in attorney's lodestar compensation is warranted, court must explain the weight given to each factor that it considers and how each factor affects its award. 11 U.S.C.A. § 330.

[8] Bankruptcy 51 <=3786

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3786 k. Clear Error. Most Cited Cases
Court of Appeals defers to bankruptcy court's factual findings unless, after reviewing all of the evidence, it is left with firm and definite conviction that bankruptcy court made a mistake. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

[9] Bankruptcy 51 <=3205

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3202 Procedure
51k3205 k. Evidence. Most Cited Cases
Finding that attorneys in law firm that represented Chapter 13 debtors had duplicated each other's efforts, as factor weighing against any upward adjustment in precalculated lodestar amount for firm's work on typical case such as debtors' case, was not clearly erroneous, given evidence, based on billing records produced, that attorneys worked on overlapping pieces of case and spent excess time bringing each other up to speed on tasks begun by the other. 11 U.S.C.A. § 330.

[10] Bankruptcy 51 <=3194

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys

Southern District of Texas. Walker & Patterson initially filed with the petition a Chapter 13 plan proposing sixty monthly payments of $226.34 to the trustee to pay three secured claims, two Internal Revenue Service priority claims, and $2500 of attorneys' fees.\footnote{1} The plan also allotted $382.53 to unsecured creditors (roughly a one-percent payment of the unsecured claims) and proposed that the Cahills continue to make monthly payments on their mobile home and on a fishing boat used purely for recreational purposes. After responding to motions from various creditors and moving to postpone*\textsuperscript{538} the confirmation hearing, Walker & Patterson filed an amended plan that, among other things, increased the balance of attorneys' fees to be paid under the plan to $3000.

\begin{footnotesize}

\footnote{1}{Because Walker & Patterson had already accepted $500 in compensation from the Cahills, $2500 represented the "balance due" on a fee totaling $3000.}

\footnote{538}{After the bankruptcy court confirmed the Cahills' amended Chapter 13 plan, Walker & Patterson filed a fee application together with contemporaneous time records. According to the time records, Walker & Patterson spent 13.20 attorney hours on the case, 2.05 paralegal hours, and $12.33 in out-of-pocket expenses. Based on its hourly rates, Walker & Patterson claimed a total amount of $3758.08.}

\footnote{539}{Although no objection was filed to the fee request, the bankruptcy court sua sponte entered an order for a hearing on the request. After the hearing, the bankruptcy court found that Walker & Patterson's initial fee request was unreasonably high given that "[t]here was nothing terribly unusual about the case," and, "[i]f anything, the case appeared to involve less activity than most." \textit{In re Cahill, Order Allowing Fees for Debtors' Counsel, No. 03-43024-HI-13, at 2 (Bankr.S.D.Tex. Sept. 19, 2004)}. Applying the criteria for "reasonable compensation" enumerated in 11 U.S.C. § 330(a)(3) (2000) and the factors set forth in \textit{Johnson v. Georgia Highway Express, Inc.}, 488 F.2d 714, 717-19 (5th Cir.1974), the bankruptcy court awarded Walker & Patterson $1737\footnote{1} in attorneys' fees plus $12.33 in expenses based on the following findings: (1) the time spent by Walker & Patterson greatly exceeded that spent by other counsel in a typical Chapter 13 case, and in some cases Walker & Patterson's attorneys duplicated each other's efforts; (2) the rates that Walker & Patterson charged exceeded the reasonable and customary hourly rate for Chapter 13 practitioners in the area; (3) Walker & Patterson performed unnecessary work pertaining to the payment of a secured claim to keep a boat used solely for recreational purposes; (4) Walker & Patterson did not adequately prepare the case for the first confirmation hearing and did not perform its services in a particularly timely manner; (5) the proposed fee amount substantially exceeded the customary compensation for comparably skilled non-bankruptcy practitioners, and no adequate basis for a premium was shown; (6) the case was less novel, less complicated, and less undesirable than most; (7) the fee was not contingent; (8) neither the case nor the client imposed exceptional time constraints; (9) the attorney-client relationship was not a factor in this case; and (10) the typical attorneys' fee award in similar cases totaled $1737. The bankruptcy court determined that, given the totality of these findings, $1737 was a reasonable fee for a "typical" Chapter 13 proceeding such as this one. The bankruptcy court made this determination relying on the lodestar calculation in General Order 2004-5, "Order Regarding Chapter 13 Debtors' Counsel's Fees," U.S. Bankr.Ct. Rules S.D. Tex., 427-36 (as entered Apr. 14, 2004) (West 2005), a per curiam order setting forth standards to guide bankruptcy courts in awarding Chapter 13 attorneys' fees in "typical" cases.\footnote{3}} in attorneys' fees plus $12.33 in expenses based on the following findings: (1) the time spent by Walker & Patterson greatly exceeded that spent by other counsel in a typical Chapter 13 case, and in some cases Walker & Patterson's attorneys duplicated each other's efforts; (2) the rates that Walker & Patterson charged exceeded the reasonable and customary hourly rate for Chapter 13 practitioners in the area; (3) Walker & Patterson performed unnecessary work pertaining to the payment of a secured claim to keep a boat used solely for recreational purposes; (4) Walker & Patterson did not adequately prepare the case for the first confirmation hearing and did not perform its services in a particularly timely manner; (5) the proposed fee amount substantially exceeded the customary compensation for comparably skilled non-bankruptcy practitioners, and no adequate basis for a premium was shown; (6) the case was less novel, less complicated, and less undesirable than most; (7) the fee was not contingent; (8) neither the case nor the client imposed exceptional time constraints; (9) the attorney-client relationship was not a factor in this case; and (10) the typical attorneys' fee award in similar cases totaled $1737. The bankruptcy court determined that, given the totality of these findings, $1737 was a reasonable fee for a "typical" Chapter 13 proceeding such as this one. The bankruptcy court made this determination relying on the lodestar calculation in General Order 2004-5, "Order Regarding Chapter 13 Debtors' Counsel's Fees," U.S. Bankr.Ct. Rules S.D. Tex., 427-36 (as entered Apr. 14, 2004) (West 2005), a per curiam order setting forth standards to guide bankruptcy courts in awarding Chapter 13 attorneys' fees in "typical" cases.\footnote{3}}

\end{footnotesize}

*539 Walker & Patterson appealed the bankruptcy court's award of fees to the district court, contending that the bankruptcy court erred by relying on the General Order 2004-5 "typical case" lodestar calculation to determine the total fee awarded instead of using the traditional lodestar approach, and that Walker & Patterson should have received the full amount requested in its fee application. The district court affirmed the bankruptcy court's fee award. This appeal followed.

II. DISCUSSION

A. Standards of Review

[1][2][3][4] We review the district court's decision by applying the same standard of review to the bankruptcy court's conclusions of law and findings of fact that the district court applied. In re Jack/Wade Drilling, Inc., 258 F.3d 385, 387 (5th Cir.2001). We therefore review the bankruptcy court's award of attorneys' fees for abuse of discretion. In re Coho Energy, Inc., 395 F.3d 198, 204 (5th Cir.2004); In re Barron, 325 F.3d 690, 692 (5th Cir.2003). An abuse of discretion occurs where the bankruptcy court (1) applies an improper legal standard or follows improper procedures in calculating the fee award, or (2) rests its decision on findings of fact that are clearly erroneous. In re Evangeline Refining Co., 890 F.2d 1312, 1325 (5th Cir.1989). Accordingly, we review the bankruptcy court's legal conclusions de novo and its findings of fact for clear error. Coho Energy, 395 F.3d at 204; Barron, 325 F.3d at 692.

B. Analysis

Walker & Patterson argues that the district court erred by: (1) affirming the bankruptcy court's use of a "typical case" lodestar calculation as provided in General Order 2004-5 rather than a traditional lodestar calculation for analyzing its fee request under 11 U.S.C. § 330; (2) affirming the factual finding that Walker & Patterson's attorneys duplicated each other's efforts in preparing the case, a factor which justified a reduction of the fee request; and (3) affirming the factual finding that Walker & Patterson had not adequately prepared the case for confirmation. We consider each of these arguments in turn.

I. Calculation of Attorneys' Fees

[5] Section 330 of the Bankruptcy Code gives bankruptcy courts discretion to award reasonable compensation to debtors' attorneys in bankruptcy cases. 11 U.S.C. § 330(a)(1)(A). This authority includes the discretion, upon motion or sua sponte, to "award compensation that is less than the amount requested." Id. § 330(a)(2). Section 330(a)(3) further directs courts to "consider the nature, the extent, and the value of the legal services provided when determining the amount of reasonable compensation to award, taking into account "all relevant factors," including, but not limited to: (A) the time spent on such services; (B) the rates charged for such services; (C) whether the services were necessary to the administration of, or beneficial to the time at which the service was rendered toward the completion of, a case under this title; (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

Id. § 330(a)(3).

[6][7] The Fifth Circuit has traditionally used the lodestar method to calculate "reasonable" attorneys' fees under § 330. *540 In re Fender, 12 F.3d 480, 487 (5th Cir.1994). A court computes the lodestar by multiplying the number of hours an attorney would reasonably spend for the same type of work by the prevailing hourly rate in the community. Shipes v. Trinity Indus., 987 F.2d 311, 319 (5th Cir.1993).
Cir.1993). A court then may adjust the lodestar up or down based on the factors contained in § 330 and its consideration of the twelve factors listed in Johnson, 488 F.2d at 717-19. FN4 See Fender, 12 F.3d at 487. While the bankruptcy court has considerable discretion in applying these factors, In re First Colonial Corp. of America, 544 F.2d 1291, 1298 (9th Cir.1977), it must explain the weight given to each factor that it considers and how each factor affects its award. Fender, 12 F.3d at 487; Evangeline Refining Co., 890 F.2d at 1327-28 ("If a court awards fees but fails to explain why compensation was awarded at the level it was given, it is difficult, if not impossible, for an appellate court to engage in meaningful review of a fee award.").

FN4. The Johnson factors are as follows:
(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience, reputation and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.
Johnson, 488 F.2d at 719.

We find nothing improper in the bankruptcy court's use of the precalculated lodestar amount contained in General Order 2004-5 in this case. General Order 2004-5 attempts to clarify and streamline bankruptcy courts' review of Chapter 13 attorneys' fee applications, addressing the need for both efficiency and flexibility in handling the large number of Chapter 13 cases that bankruptcy courts in the Southern District of Texas review each year. FN5 General Order 2004-5 at 427; cf. Henley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (noting that "[a] request for attorneys' fees should not result in a second major litigation."). To this end, General Order 2004-5 provides bankruptcy courts with reasonable attorney time estimates for completing a "typical" Chapter 13 case and customary rates for Chapter 13 services in the Southern District of Texas, which, when multiplied together, yield a typical lodestar amount of $1737. FN6 General Order 2004-5 at 433. *541 This precalculated lodestar aids bankruptcy courts in disposing of run-of-the-mill Chapter 13 fee applications expeditiously and uniformly, obviating the need for bankruptcy courts to make the same findings of fact regarding reasonable attorney time expenditures and rates in typical cases for each fee application that they review.

FN5. General Order 2004-5 indicates that approximately 26,000 Chapter 13 cases are currently pending before bankruptcy courts in the Southern District of Texas, and approximately 12,000 more will be filed in the next year. General Order 2004-5 at 427.

FN6. According to General Order 2004-5, the time typically spent on a Chapter 13 case is 5.7 attorney hours and 5.3 paralegal hours; the reasonable and customary rates are $235 per hour for attorneys and $75 per hour for paralegals. General Order 2004-5 at 433. Walker & Patterson argues that the bankruptcy court's reliance on these factual findings in General Order 2004-5 was improper because "General Order 2004-5 makes significant factual findings without the benefit of an evidentiary hearing, open forum discussion or public comment." Appellant's Br. at 10. This argument is without merit because Walker & Patterson was afforded an evidentiary hearing on its fee request in which the bankruptcy court, while incorporating General Order 2004-5 into its analysis, considered and ruled on the

disputed factual issues specific to Walker & Patterson’s claim. See In re United States Golf Corp., 839 F.2d 1197, 1202 (5th Cir.1981) (requiring the bankruptcy court to hold an evidentiary hearing on an attorneys’ fee request if there are disputed factual issues).

General Order 2004-5 nevertheless anticipates that bankruptcy courts evaluating traditional fee applications will continue to analyze and adjust fee applications on a case-by-case basis using the lodestar analysis and flexible Johnson factors, ensuring that the lodestar amount in an atypical case will be adjusted to reflect the specifics of that case. FN7 Id. at 2. This approach strikes the proper balance between the need for efficient disposal of attorneys’ fee applications and the need for a flexible approach that provides for adjustment of the lodestar when necessary. FN8

FN7. The majority of General Order 2004-5 consists of a discussion of the preapproval of reasonable fixed fee amounts in “typical” cases, using the lodestar calculation of $1737 and applying the § 330 and Johnson factors to determine a range of acceptable fixed fees that courts may preapprove with minimal scrutiny. We decline to address this portion of General Order 2004-5 because the fee arrangement in this case was not fixed.

FN8. Walker & Patterson suggests that the Sixth Circuit has rejected this line of reasoning in In re Boddy, 950 F.2d 334 (6th Cir.1991), in holding that the bankruptcy court in that case abused its discretion by awarding a predetermined maximum attorneys’ fee amount for “normal and customary” legal services instead of adhering to the traditional lodestar method. That case is easily distinguished from the instant case, however, because the bankruptcy court in Boddy mechanically awarded the predetermined maximum fee without conducting any further analysis to determine whether the case was “normal and customary” or whether an adjustment of the fee amount was appropriate. Id. at 337. Consistent with our analysis in this case, the Sixth Circuit explained: [W]e do not hold that the bankruptcy court can never consider the “normal and customary” services rendered in a Chapter 13 bankruptcy. The court can legitimately take into account the typical compensation that is adequate for attorneys’ fees in Chapter 13 cases, as long as it expressly discusses these factors in light of the reasonable hours actually worked and a reasonable hourly rate. Id. at 338.

In this case, the bankruptcy court did not abuse its discretion by using the precalculated lodestar amount to determine Walker & Patterson’s fee award because it properly applied the § 330 and Johnson factors to the specific facts of the case, setting forth a reasoned analysis and providing reasons why the lodestar amount did not need to be adjusted. See In re Evangeline Refining Co., 890 F.2d at 1327-28 (emphasizing that a bankruptcy court must explain its reasons for its award of attorneys’ fees). Moreover, the bankruptcy court did not give the General Order lodestar calculation a disproportionate amount of weight in its analysis as Walker & Patterson suggests: Its findings that Walker & Patterson’s attorneys spent an unreasonable amount of time on the case, duplicated each other’s efforts, performed unnecessary work, were unprepared for the confirmation hearing, and were handling a case that presented no novel or complex issues support its conclusion that this case did not warrant an upward adjustment of the lodestar amount under § 330 or Johnson. Compare In re United States Golf Corp., 639 F.2d 1197, 1199 (5th Cir.1981) (holding that the bankruptcy court abused its discretion by applying a predetermined “maximum limit” to reduce the requested amount of attorneys’ $542 fees “despite the favorable findings [it] had made of the Johnson factors”).

2. Factual Finding of Duplication of Effort

Walker & Patterson next argues that the bankruptcy court erred in finding that Walker & Patterson's attorneys duplicated each other's efforts in their preparation of the Chapter 13 case, a factor that affected the bankruptcy court's lodestar analysis.

[8][9] Because we review the bankruptcy court's findings of fact for clear error, we will defer to a bankruptcy court's factual findings unless, after reviewing all of the evidence, "we are left with a 'firm and definite conviction' that the bankruptcy court made a mistake." In re Bradley, 960 F.2d 502, 507 (5th Cir.1992) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 365, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). After reviewing the billing records in this case, the bankruptcy court found evidence that the attorneys had worked on overlapping pieces of the case and spent excess time bringing each other up to speed on tasks begun by the other. Additionally, the bankruptcy court found some indication that the billing records may not have been contemporaneous and correct. After our review of the record, nothing leaves us with a 'firm and definite conviction' that the bankruptcy court made a mistake" in making these factual findings. Id.; see also In re Young, 995 F.2d 547, 549 (5th Cir.1993) (deferring to the bankruptcy court's findings of fact in the absence of evidence of clear error).

3. Factual Finding of Inadequacy of Preparation

[10] Finally, Walker & Patterson challenges the bankruptcy court's finding that Walker & Patterson failed to prepare the case adequately for the first confirmation hearing. In light of our deferential standard of review, we also decline to disturb this finding of fact. The bankruptcy court is in a better position to make this factual determination than we are, particularly because it presided over the Chapter 13 proceeding and confirmation hearing at issue. See United States Golf Corp., 639 F.2d at 1207-08 (recognizing "the importance of the bankruptcy judge's closeness to the issues raised in an application for attorneys' fees; the bankruptcy judge has not only presided over the evidentiary hearing, but also had the opportunity to observe the performance of the attorney throughout his employment in the bankruptcy court.").

According to the bankruptcy court, Walker & Patterson moved to postpone the first confirmation hearing because it was unprepared, and throughout the case it provided services that were "minimally timely to avoid dismissal of the case for delay prejudicial to creditors." Cahill, Order Allowing Fees for Debtors' Counsel at 5. Given the bankruptcy court's superior position to make this determination and because nothing in the record leads us to believe that this finding was clearly erroneous, we will not reverse it. See In re Acosta, 406 F.3d 367, 373 (5th Cir.2005) ("If the bankruptcy court's account of the evidence is plausible in light of the record viewed as a whole, we will not reverse it.").

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

In re Cahill
428 F.3d 536, Bankr. L. Rep. P 80,372

Briefs and Other Related Documents (Back to top)
• 05-20145 (Docket) (Mar. 01, 2005)

END OF DOCUMENT

C

Briefs and Other Related Documents

United States Court of Appeals, Fifth Circuit.
Robert E. BARRON, Plaintiff-Appellant,
V.
Janna L. COUNTRYMAN, Defendant-Appellee.
No. 04-40462.


Background: Order was entered by the United States Bankruptcy Court for the Eastern District of Texas, requiring attorney that had represented debtors in various Chapter 13 cases to disgorge fees that he collected both pre and post-petition. Attorney appealed. The District Court, Marcia A. Crone, J., affirmed.

Holdings: On further appeal, the Court of Appeals, Edith H. Jones, Circuit Judge, held that:

2(1) Chapter 13 trustee had standing to challenge payment system employed by bankruptcy attorney to collect fees from his debtor-clients;

16(2) retainer that Chapter 13 debtors' attorney collected from debtors prepetition to secure his legal representation and to pay for substantial services that he provided prepetition was in nature of "advance payment retainer," that became attorney's property upon receipt and was not included in "property of the estate";

17(3) sums that attorney collected prepetition as advance payment retainer did not have to be held in trust; but

18(4) attorney could be required to disgorge postpetition fee payments.

Affirmed in part and reversed in part and remanded.

West Headnotes

[1] Bankruptcy 51 C–3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases

Bankruptcy 51 C–3786

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3786 k. Clear Error. Most Cited Cases

[2] Bankruptcy 51 C–2159.1

51 Bankruptcy
51H Courts; Proceedings in General
51H(B) Actions and Proceedings in General
51K2159 Parties
51k2159.1 k. In General. Most Cited Cases
Chapter 13 trustee had standing to challenge payment system employed by bankruptcy attorney to collect fees from his debtor-clients, as allegedly violating provisions of the Bankruptcy Code, Local Bankruptcy Rules, and Texas Rule of Professional Conduct.


51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3180 Items and Services Compensable
51k3182 k. Necessity of Service.

Most Cited Cases

Bankruptcy 51 $=>3192

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3191 Amount
51k3192 k. In General. Most Cited Cases

Bankruptcy Code seeks to protect both debtors and their estates from excessive or unnecessary legal fees. 11 U.S.C.A. §§ 329, 330.

[4] Bankruptcy 51 $=>3172.1

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3172 Necessity of Appointment or Approval
51k3172.1 k. In General. Most Cited Cases

Bankruptcy statute that requires court approval of all attorneys fees sought to be paid from the estate is not applicable to attorney fees derived from source other than bankruptcy estate. 11 U.S.C.A. § 330.

[5] Bankruptcy 51 $=>3203(1)

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3202 Procedure
51k3203 Application; Documentation and Itemization
51k3203(1) k. In General. Most Cited Cases

Bankruptcy court could not require bankruptcy attorney to file fee application prior to applying, as compensation for services rendered, deposits which he received prepetition, unless these prepetition deposits were included in “property of the estate.” 11 U.S.C.A. § 330.

[6] Bankruptcy 51 $=>2534

51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General
51V(C)1 In General
51k2534 k. Effect of State Law in General. Most Cited Cases

State law ordinarily supplies definition of property rights in bankruptcy.

[7] Attorney and Client 45 $=>137

45 Attorney and Client
45IV Compensation
45k137 k. Retaining Fee. Most Cited Cases

Attorney retainer agreements fall into three general categories: (1) classic retainers; (2) security retainers; and (3) advance payment retainers.

[8] Attorney and Client 45 $=>137

45 Attorney and Client
45IV Compensation
45k137 k. Retaining Fee. Most Cited Cases

“Classic retainer” involves fees paid as consideration for employment of counsel, as opposed to compensation for services rendered.

[9] Attorney and Client 45 $=>137

45 Attorney and Client
45IV Compensation
45k137 k. Retaining Fee. Most Cited Cases

Classic retainer is earned in its entirety by counsel upon payment, when client relinquishes all interest therein.

[10] Bankruptcy 51 $=>2547

51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General

51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)2 Particular Items and Interests

51k2547 k. Property Held in Trust or Custody for Debtor; Deposits. Most Cited Cases

Classic retainer that debtor pays to attorney prepetition is outside scope of "property of the estate." 11 U.S.C.A. § 541(a).


45 Attorney and Client

43IV Compensation

45k137 k. Retaining Fee. Most Cited Cases

"Security retainer" involves fees paid to counsel for his or her prospective services.

[12] Attorney and Client 45 ⇐137

45 Attorney and Client

43IV Compensation

45k137 k. Retaining Fee. Most Cited Cases

Client retains interest in funds paid to attorney as security retainer, until attorney actually renders service to client; pending rendition of services, attorney merely holds funds for debtor.

[13] Bankruptcy 51 ⇐2547

51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)2 Particular Items and Interests

51k2547 k. Property Held in Trust or Custody for Debtor; Deposits. Most Cited Cases

Security retainer that debtor pays to attorney prepetition is included in "property of the estate." 11 U.S.C.A. § 541(a).

[14] Attorney and Client 45 ⇐137

45 Attorney and Client

43IV Compensation

45k137 k. Retaining Fee. Most Cited Cases

"Advance payment retainer," or "flat fee retainer," involves fees paid as compensation for services to be rendered in which payment passes to counsel entirely upon remittance, at which time debtor relinquishes all interest in retainer.

[15] Bankruptcy 51 ⇐2547

services that he provided prepetition, became attorney’s property upon receipt and did not have to be held in trust pursuant to provisions of Texas Rule of Professional Conduct or provisions of Local Bankruptcy Rule. U.S.Bankr.Ct.Rules E.D.Tex., Rule 2016(b); State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App. A, Art. 10, § 9, Rule 1.14(a).

[18] Bankruptcy 51 C==3172.1
51 Bankruptcy
51X Administration
51X(E) Compensation of Officers and Others
51X(E)3 Attorneys
51k3172 Necessity of Appointment or Approval
51k3172.1 k. In General. Most Cited Cases
Chapter 13 debtors’ attorney could be required to disgorge postpetition fee payments that he received from debtors, without ever requesting permission from court to receive these funds, so as to deny court an opportunity to review fee payments. 11 U.S.C.A. § 330.

[19] Bankruptcy 51 C==2558
51 Bankruptcy
51V The Estate
51V(C) Property of Estate in General
51V(C)2 Particular Items and Interests
51k2558 k. After-Acquired Property; Proceeds; Wages and Earnings. Most Cited Cases
Bankruptcy 51 C==2588
51 Bankruptcy
51V The Estate
51V(D) Liens and Transfers; Avoidability
51k2588 k. Post-Petition Transactions. Most Cited Cases
All postpetition earnings of Chapter 13 debtor constitute estate property, and Chapter 13 debtor has no authority to transfer such property to his or her attorney without proper notice to court.

*592 John J. Durkay (argued), Mehaffy & Weber, Beaumont, TX, for Barron.
Greg Robert Arnowe (argued), Plano, TX, for Countryman.

Appeal from the United States District Court for the Eastern District of Texas.

Before JONES, WIENER, and CLEMENT, Circuit Judges.
EDITH H. JONES, Circuit Judge:
Robert Barron, a bankruptcy attorney, appeals the judgment of the bankruptcy and district courts ordering him to disgorge fees taken both pre-and postpetition from clients who utilized his services in one hundred sixty-seven Chapter 13 bankruptcies. The courts erred in construing Barron’s retainers agreements to require escrow of the prepetition “deposits” earned for prepetition services. Neither Texas professional ethics standards nor applicable Bankruptcy Code provisions and court rules support the courts’ results. We do, however, affirm the order to disgorge postpetition fees for which no court approval was sought. Accordingly, we AFFIRM in part, REVERSE in part, and REMAND to the bankruptcy court to reassess sanctions.

I. BACKGROUND
This is a consolidated appeal arising from a series of motions filed in one hundred sixty-seven bankruptcy cases commenced between 2001 and 2003 in which *592 Barron charged his clients preand postpetition fees. Barron is a bankruptcy attorney with a high-volume practice in the Eastern District of Texas. Under Rule 2016(e)(1) of the Local Rules of the United States Bankruptcy Court for the Eastern District of Texas ("Local Bankruptcy Rules"), an attorney has been permitted to charge a total fee of up to two thousand dollars for a Chapter 13 bankruptcy without filing a detailed fee application. Barron’s standard practice in Chapter 13 was to charge clients a total fee of two thousand dollars or less, but he did this in an unorthodox manner. FN1

FN1. The relevant facts were developed in a trial to the bankruptcy court and are
largely undisputed.

First, Barron would require payment from clients, generally about four hundred dollars, before he filed bankruptcy petitions on their behalf. Barron testified that such payments were necessary to ensure that debtors remained active in their cases, and that the amounts were reasonable, given the substantial prepetition work Barron performed for his clients. These prepetition payments were referred to as "deposits" in the retainer agreement. A form retainer agreement between Barron and the debtor set forth, inter alia, the type of bankruptcy sought, the total fees due, the amount of "initial deposit" owed, and the consequences of not filing. Under the retainer agreement, the client would forfeit the prepetition deposit to Barron if no bankruptcy petition was filed. Barron did not place the prepetition fees into a trust account but, rather, made the funds immediately available to himself and his firm for prepetition work related to and/or in contemplation of bankruptcy. He maintained neither a trust nor an IOLTA account because he considered the prepetition funds his property upon remittance. Barron took prepetition payments in all of the cases involved in this appeal.

Second, in sixty-four of the cases, Barron took additional payments from clients after their bankruptcy petitions had been filed. These payments ranged from thirty to five hundred dollars and reimbursed Barron for his efforts in contested proceedings in the clients' bankruptcy cases. Barron neither requested nor received bankruptcy court approval to accept these postpetition payments. He earned the remainder of his two thousand dollar standard fee subject to court scrutiny as part of the Chapter 13 confirmation process.

Appellee Janna Countrymax, a Chapter 13 trustee, complained that Barron failed both to place prepetition fees in escrow pending court approval and to file a fee application for the extra postpetition fees. After holding a hearing on Countrymax's consolidated motions, the bankruptcy court found that Barron willfully and knowingly violated the Bankruptcy Code, the Texas Disciplinary Rules of Professional Conduct ("Texas Rules"), the Local Bankruptcy Rules, and the Local Rules for the United States District Court for the Eastern District of Texas ("Local Rules"). Barron was ordered to disgorge all pre- and postpetition fees he received prior to plan confirmation in the one hundred sixty-seven cases.

On appeal, the district court affirmed the bankruptcy court's decision. Barron again appeals pursuant to 28 U.S.C. § 158(d).

II. DISCUSSION

Barron principally asserts that the bankruptcy court erred in holding that his failure to place the clients' prepetition payments in escrow pending later court approval violated both Texas Disc. Rule *594 1.14(a) and Local Bankruptcy Rule 2016(b). He also challenges the holding that he violated Local Bankruptcy Rule 2016(e)(5), as well as various provisions of the Bankruptcy Code, in receiving postpetition payments from clients outside the Chapter 13 plans without proper notice and hearing.

FN2. Barron raised a number of other issues on appeal, two of which are waived because they were inadequately preserved: Barron did not seriously mount a Fifth Amendment takings challenge in the bankruptcy court to the disgorgement order, nor did he timely challenge the Local Bankruptcy Rules' nonconformity with national Bankruptcy Rule 9029, Ginther v. Ginther Trusts (In re Ginther Trusts), 238 F.3d 686, 689 (5th Cir.2001) (citing Gilchrist v. Westcott, (In re Gilchrist), 891 F.2d 559, 561 (5th Cir.1990)). The other issues need not be discussed in light of our conclusions above.

[1] When this court reviews the decision of a district court based on a bankruptcy court decision under 28 U.S.C. § 158, findings of fact are reviewed under the clearly erroneous standard and conclusions of law are reviewed de novo. Crowell v. Theodore Bender Accounting, Inc. (In re Crowell...

A. Prepetition Payments

[2] Barron initially contends that Countryman lacked "standing" to challenge his fee arrangements with Chapter 13 debtors. This issue was addressed by the district court and is properly before the court here. Barron focuses his argument on 11 U.S.C. § 1302(b)(4), which prohibits the trustee in chapter 13 from advising the debtor on legal matters. However, he ignores the fact that "Congress has given the chapter 13 trustee a broad array of powers and duties." Matter of Maddox, 15 F.3d 1347, 1355 (5th Cir.1994) (allowing a chapter 13 trustee to avoid a lien under 11 U.S.C. § 522(d)). The trustee in Chapter 13 exists to preserve the bankruptcy estate for creditors. To accomplish this goal, the trustee is given the power to review the compensation of attorneys and other officers, 11 U.S.C. §§ 329, 330, and to avoid certain fraudulent or postpetition transactions, 11 U.S.C. §§ 548, 549. Legal fees that are excessive or are alleged to have been improperly paid postpetition from the bankruptcy estate create an appearance of professional abuse and potentially deprive creditors of funds. The trustee may take action to challenge the propriety of such fees. Although we ultimately reject some of the trustee's arguments, Countryman nevertheless had standing to challenge Barron's payment system.

In order to apply the various rules and statutes Barron has been found liable of violating, we must examine the status of the prepetition "deposits" received from his clients. Three possibilities arise. Were the deposits Barron's exclusive property, as he maintains, or did Barron's clients maintain an interest in the deposits, or does the Bankruptcy Code authorize the courts to require trust accounts for all retainers irrespective of the ownership of the funds? The bankruptcy and district courts rejected Barron's ownership contention and adopted both of the other alternatives.

The key to the bankruptcy court's reasoning is its "plain meaning" conclusion that all attorney retainers are alike for purposes of Local Bankruptcy Rule 2016(b). FN3 While Barron's prepetition "deposits" are properly construed as retainers, this determination standing alone means little. The Local Bankruptcy Rule does not define the retainers to which it refers. Moreover, nothing in the Bankruptcy Code "compels the incorporation into the debtor's estate of all prepetition retainers. FN4 nor do the uniform national Bankruptcy Rules make any pronouncement regarding the placement of retainers in attorney trust accounts.

FN3. The Local Rule, as written at the time this action was commenced, required that "[a] court authorized professional must deposit a retainer, whether received from the debtor or any other person for the benefit of the debtor, in a trust or IOLTA account. The retainer must remain in the account until the Court enters an order allowing removal."

FN4. The debtor's estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (emphasis added). See also 11 U.S.C. § 1306(a)(1) and (2) (defining debtor's estate in Chapter 13 cases).

[3][4][5] Without doubt, the Bankruptcy Code seeks to protect both debtors and their estates from excessive or unnecessary legal fees. The Code requires court approval of all attorneys fees sought to be paid from the estate of the debtor. 11 U.S.C. § 330(a)(4)(B); § 331; In re Mayeaux, 269 B.R. 614, 626 & n. 20 (Bankr.E.D.Tex.2001); In re McDonald Bros. Const., Inc. 114 B.R. 989, 994 (Bankr.N.D.Ill.1990). Section 329 requires disclosure of the debtor's payments or agreements to pay bankruptcy attorneys within the year preceding bankruptcy, and it authorizes the court to review all attorney compensation and agreements for reasonableness, and to cancel excessive service agreements or order return of payments if they are excessive. While these provisions are potent, they are not limitless. Importantly, § 330 is not applicable to attorney fees derived from a source other than the debtor's estate. Mayeaux, 269 B.R. at

debtor retains an interest in these funds, they become property of the estate at filing subject to §§ 329 and 330. Id. at 1000-01. Finally, an advance payment or flat fee retainer involves fees paid as compensation for services to be rendered, but the payment passes entirely to counsel upon remittance, at which time the debtor relinquishes all interest. Id. at 1000, 1002. Funds collected as advance payment retainers do not become property of the bankruptcy estate at filing, and, as such, are subject to § 329 only. See Wootton v. Rankind (In re Dixon), 143 B.R. 671, 677 (Bkrtcy.N.D.Tex.1992) (internal citations omitted).

[16] Barron's Retainer Agreement clearly lays out the prepetition services to be provided by his office and provides that a client will forfeit initial deposits to Barron if he does not make scheduled payments (on the deposit) or opts not to file a petition. Countryman contends that since Barron ultimately filed petitions on behalf of all these clients, the clients never forfeited the deposits and retained their interests in the prepetition payments. Such an argument presumes that the retainer agreements were security retainers for services to be rendered postpetition. However, the record compels the conclusion that the prepetition payments in this case should be characterized as advance payment retainers for prepetition services. Barron testified without contradiction that his clients gave him prepetition deposits to secure his legal representation and to pay him for prepetition work. Barron also explained that his office performs the bulk of its services in ordinary Chapter 13 cases before the case is filed. These services include multiple conferences with the debtor; preparing the schedules; identifying and proposing solutions to typical problems involving mortgage arrearages, auto and insurance debts and taxes; and proposing a payment plan.

The trustee complains that Barron's retainer is suspect as compensation for prepetition work because he keeps no official time records. On the contrary, the trustee's argument is meritless. First, Barron testified without contradiction to the substantial prepetition services his office performs for clients in order to smooth their transition into Chapter 13 and develop realistic payment plans.

Second, the trustee did not challenge the reasonableness of the overall fee, implying acquiescence in Barron's testimony. Third, the trustee is hoist by her own petard, viz., by her reliance on the Local Bankruptcy Rule's specific approval of Chapter 13 attorney fees of $1,000 or less without a formal fee application. Detailed record keeping is either required or, in the Local Rule's commonsense approach to the practicalities of Chapter 13 representation, it is not.

Barron's characterization of the prepetition fees as "earned" immediately upon receipt is not controlling. See In re Chapel Gate Apartments, Ltd., 64 B.R. 569, 574 (Bankr.N.D.Tex.1986). The language of the Retainer Agreement and the undisputed operation of Barron's practice demonstrate, however, that the prepetition fees became Barron's property upon receipt in exchange for his prepetition work.\textsuperscript{fn5}

\textsuperscript{fn5} It is worth noting that the practice of taking advance payment retainers is common in Chapter 11 bankruptcies. Countryman's broad interpretation of Local Bankruptcy Rule 2016(b) and of the trust requirement could have implications beyond this case. Attorneys for Chapter 11 filers are routinely paid "current" for prepetition work before the case is actually filed. Requiring firms to escrow debtors' advance payment retainers for work done in advance of the filing would create an enormous disincentive to competent Chapter 11 representation. Yet the protections of Section 529 remain an effective policing device for such payments.

\textsuperscript{*597} [17] Having determined that Barron's initial deposit bears the characteristics of an advance payment retainer, we must consider whether Barron's assuming control of the funds violated the Local Bankruptcy Rules. Pursuant to L.R. 2016(b), attorneys are required to place "a retainer ... in a trust or IOLTA account," and "[t]he retainer must remain in the account until the court enters an order allowing removal." L.R. 2016(b). Texas case law on trust and IOLTA accounts is consistent with the plain statement of this local rule. As the bankruptcy court in \textit{Dixon} stated:

It has been the practice in Texas and elsewhere to require pre-petition retainers taken for services to be rendered during the pendency of a bankruptcy case, to be held in trust .... Such retainer taken prior to the filing of bankruptcy becomes the property of the bankruptcy estate upon commencement of the bankruptcy case.

\textit{Dixon}, 143 B.R. at 677 (emphases omitted). However, contrary to the bankruptcy court's conclusion that "the evidence is unequivocal that Barron ignored Texas [trust rules and case law]," R. at 90, the trust duty as pertains to earned prepetition fees is not settled in Texas. As the \textit{Dixon} court also noted: Though Texas ethical opinions have not prohibited flat fees [a.k.a. advance payment retainers] as unethical per se, they have recommended that all client funds whose nature of ownership is subject to question be placed into a trust account and segregated from funds belonging entirely to the attorney.

\textit{Id.} at 678 n. 6 (emphasis added); \textit{see also} Tex. Ethics Opinion 391 (discussing treatment of an advance payment retainer).

While it might have been prudent for Barron to place in escrow the prepetition payments he received, the Texas Rules do not require an advance payment retainer, earned by the attorney prepetition, to be placed in trust. Further, because the retainers at issue in this case were advance payments in nature, they became Barron's property upon remittance. As Barron's property, they were not subject to Local Bankruptcy Rule 2016. \textit{See In re Dixon}, 143 B.R. at 677-78. There is no issue as to their unreasonableness or nondisclosure under 11 U.S.C. § 329, and the retainers are outside the reach of § 330, since they were not property of the bankruptcy estate. The bankruptcy and district courts erred in ordering Barron to disgorge his prepetition retainers.

\textbf{B. Postpetition Fees}

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The bankruptcy court found that in accepting postpetition fees directly from clients, Barron violated Local Bankruptcy Rule 2016(e)(5). This rule states that any fees sought beyond an attorney's initial fee must be paid as an 11 U.S.C. § 503(b)(2) administrative expense. Barron plainly violated this rule in taking additional funds from debtors without disclosing such payments. Moreover, even in the absence of Local Rule 2016(e)(5), these postpetition payments would have been improper. As the court in *Mayeaux* correctly noted, "money paid to Debtor's counsel in the post-petition period constitutes estate property. It is elementary bankruptcy law that all post-petition earnings of a Chapter 13 debtor ... constitute [ ] property of the bankruptcy estate." *Mayeaux*, 269 B.R. at 626. A "chapter 13 debtor ... has no authority to transfer estate property to an attorney without proper notice [to the court]." *Id.* Pursuant to 11 U.S.C. § 549(e), the trustee may avoid a transfer of the estate's property unless the transfer is authorized by the bankruptcy court. Since Barron never requested permission *§98* from the court to receive these funds, he denied the court an opportunity to review the transfers. Accordingly, the bankruptcy court had a sound basis to order Barron to disgorge his undisclosed postpetition fees.

**CONCLUSION**

The bankruptcy court properly ordered Barron to disgorge his undisclosed postpetition fees but erred in ordering disgorgement of his prepetition retainers. We therefore AFFIRM the portion of the judgment concerning postpetition fees, REVERSE as to prepetition fees, and REMAND for further proceedings.

Barron v. Countryman
432 F.3d 590, Bankr. L. Rep. P 80,408

Briefs and Other Related Documents (Back to top)

* 04-40462 (Docket) (Apr. 21, 2004)

END OF DOCUMENT

Ten Principles to Guide the Courts in Establishing Rules for the Payment of Fees in Chapter 13 Cases

1. In the aggregate, the total compensation actually paid to each attorney who represents chapter 13 debtors should adequately compensate the attorney. Adherence to this principle depends upon the recognition and acceptance by the Court of the contingent nature of the payment of fees.

   *There will be some cases in which attorneys are not paid in full. In order to receive compensation, on the whole, that is adequate, the base fee will be higher than it “should be” for some debtors.*

2. The rules should provide a financial incentive to attorneys to zealously and effectively represent their clients.

   *Attorneys’ ethical obligations of zealous representation are to their clients, and the fees should not be designed to reward them for benefiting other parties to the proceeding. The rules should provide a financial incentive for attorneys to provide the proper services during the entire case.*

3. To the extent practicable, the amount each attorney charges to represent a debtor in a chapter 13 case should be determined by the market place, subject to the provisions of applicable rules of professional conduct.

   *The courts and the state bars have the authority to disallow excessive fees. Furthermore, a completely unregulated system is not likely to result in such fees. The marketplace will regulate the fees. If Attorney A charges $4,000 for a chapter 13, and Attorney B charges $3,000, Attorney B will likely to lure some of Attorney A’s clients to her office.*

   *This principle works in concert with the principles 4, 8 and 9. One of the main concerns about the amount of the attorneys’ fees has been that every dollar paid to the attorney in a 36 month “pot plan” is a dollar taken away from the unsecured creditors. Post-BAPCPA, in many cases this will no longer be true. In the EDNC, 0% plans are now possible and may become the norm. See *In re Alexander*, 3xx B.R. xxx (Bankr. E.D.N.C. 2006). Every dollar paid to the attorney is a dollar paid by the debtor, not a dollar taken away form an unsecured creditor.*

4. The parties who are primarily affected by the amount of attorneys’ fees and the timing of the payment of attorneys’ fees are the debtors, their attorneys, and the secured creditors. The amount of attorneys’ fees has a relatively minor impact on unsecured creditors.
The difference between $3,500 and $2,500 is so small, as a percentage of unsecured claims filed in a particular case, that it almost irrelevant, especially when you consider the following facts: 1) There will be more 0% plans 2) Unsecured creditors are paid at the end of the plan 3) So many cases are dismissed prior to the payment of any distribution to unsecured creditors 4) In a “liquidation test” case, the plan must pay the liquidation amount in addition to the attorney’s fee.

5. To the extent possible and with deference to other principles, the timing of the payment of the fees should correspond with the time in which the attorney provides the services.

Most of the work is done prepetition and within the first 6-months of the case. The current system of paying the fees within the first year works fairly well and should be retained. The current system of paying for additional services when provided also works well and should be retained. However, there are services provided to every client throughout the case in addition to the in-court, additional fee matters. Compensation for these services should be provided. See A Modest Proposal for Bonus Fees.

6. The timing of the payment of the fees should balance interests of the attorneys in being paid with the interests of creditors, especially secured creditors, in receiving distributions on their claims that adequately protect their interests.

Adherence to this principle will be controlled by the substantive adequate payment provisions and equal monthly payment provisions of BAPCPA.

7. The fee structure should financially reward successful cases, but not to the extent that attorneys become unwilling to represent debtors in the marginal cases.

This principle relates back to the first principle. Chapter 13 exists to give people a second chance. A chapter 13 case in which the debtors ultimately lose their home to foreclosure and convert to chapter 7 is not necessarily an “unsuccessful case”. If in the end, those debtors can say, ”My attorney and the USBC gave me a fair chance to save my house, but I just couldn’t do it,” then the case was successful.

8. The fee structure should be sufficiently flexible to allow for the higher than normal fees when the circumstances merit it. There are cases that involve unusually difficult fact situations, difficult debtors, and difficult legal issues.

The current no-look fees go too far in treating all cases as if they are the same. The same fee is paid in a case in which the debtor is honest, easy-going and helpful, as in a case in which the debtor is quarrelsome, long-winded, and deceitful. It is difficult to put these reasons in a fee application for enhanced fees. Closer adherence to principle 3 would help take care of the problem.
9. The fee paid to an individual attorney should take into consideration the attorney’s specialization certification, if any, skill, and years of experience, and should encourage and financially reward attorneys to attend continuing legal education seminar.

Not all attorneys have the same skills. Not all attorneys provide the same level of services to their clients. See Sec. 330(a)(3)(E). Build incentives into the fee structure for attorneys to obtain certification and attend seminars. Adherence to principle 3 also accommodates these issues. If an attorney builds such a reputation in the community for effectiveness that clients are willing to pay a premium for her services, she should be allowed to do so.

10. The rules should be as self-effectuating, as possible, and minimize the administrative burden placed upon the courts and the trustees.

Needs no explanation. But it is only one principle out of 10.
A MODEST PROPOSAL FOR BONUS FEES

I propose that the courts have the chapter 13 trustees set aside a fund of $25.00 per month in each case, beginning with the 25th month of the plan, as a “bonus fee fund”. The bonus fee fund will be presumably for the benefit of the debtor’s attorney and will be paid upon the termination of case. The major factor in the awarding of the fee will be granting of the discharge and is designed to reward the attorney for his/her legal service in assisting debtors in achieving a discharge. A secondary purpose is to compensate attorneys for the costs of representing clients while a case is pending. If the bonus fee is not paid to the attorney, it may be disbursed as provided by the court.

The following examples illustrates the proposal:

Example One:

A debtor whose income is below the medium income proposes a 48-month plan of $400.00 per month. The 12-month no-look fee is set at $3,000.00. The debtor pays 600.00 in up-front fees. Therefore, the trustee distributes $2,400.00 ($200.00) to the debtor’s attorney for the first twelve months. Thereafter, the Trustee sets aside $25.00 per month for 24 months in the bonus fee fund. At the end of the 48-month plan the trustee will have accumulated $600.00 in the bonus fee fund. Upon discharge, the debtor’s attorney files an application to receive the fund. The debtor, the chapter 13 trustee, or the court itself, may object to the application. If the attorney has performed her obligations to the debtor, the attorney receives the fees. Upon a determination that the attorney has not earned the entire bonus fee fund, the court may order that a portion of the fund be returned to the debtor.

Upon the dismissal or conversion of the case, in addition to the attorney, the stakeholders in the fund will be unpaid priority and secured creditors, and if the debtor has “disposable income” pursuant to §1325(b), the unsecured creditors. The court would determine the disbursement of the funds.

Example Two:

The debtor’s income exceeds the median income, and his commitment period is 60 months pursuant to §1325(b) (4)(ii). However, upon application of §1325(b)(2) the debtor has no disposable income and appropriately proposes a “zero percent” plan to unsecured creditors. The debtors propose a 36-month plan of $800, which pays his priority and secured debts in full. In this case, $300 will be accumulated in the bonus fee fund. If the debtors elect to propose a 60-month plan at $480.00 per month, they will pay $900 into the bonus fee fund. If the case is completed, the stakeholders in the fund will be the debtors and the attorney. If the case is not completed, then the stakeholders will include the priority and secured creditors.
This proposal accomplishes the following objective:

1. It encourages attorneys, financially, to assist their clients in obtaining a discharge. Under the current system in EDNC, since the entire base fee is paid within the first year, there is less financial incentive to the attorney to oppose motions to dismiss, modify plans, convert cases to chapter 7, or take other actions on behalf of their clients that serve the clients’ best interest.

2. It encourages attorneys to represent their clients in such a manner that neither the chapter 13 trustees nor the judges are induced to oppose the award of the bonus fee fund to them.

3. It encourages attorneys to communicate with their clients and to maintain a relationship with their client that forestalls the client’s opposition to the payment of the additional fees.

4. Attorneys receive a greater compensation for 60-month plans than for 36-month plans. An attorney’s right to the award of additional fees for filing motions, responses, and the like in a case is helpful in obtaining adequate compensation, but it is not a complete solution. In many cases there is substantial, time-consuming communications between debtors and their attorneys that are not in connection with a matter that comes before the court. These communications increase the costs of providing proper representation to clients. A $25 per month “carrying charge” is modest compensation.

5. Under BAPCPA, more debtors will be able to propose plans for terms greater than necessary based on their real disposable income. The additional fee of $25.00 per month provides some incentive to the debtor to propose a shorter plan. By doing so, the creditors are paid more quickly and the amount of the time that the clerk’s office and the chapter 13 trustee must administer the case is decreased.