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Collier Consumer Bankruptcy Practice Guide

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CHAPTER 5 Considerations for Attorneys -- Duties and Compensation

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P 5.04 Disclosure and Review of Bankruptcy Attorney's Fees

One aspect of attorney's fees in bankruptcy that is somewhat unusual is the close court supervision of fees charged. In addition, monitoring and, where appropriate, commenting upon attorney's fees applications is one of the primary duties of the United States trustee's office. This supervision of attorney's fees in bankruptcy arises mainly from an unfortunate history of abuse and overreaching by the bankruptcy bar.

The purpose of the monitoring is twofold. First, it was designed to prevent bankruptcies in which there are significant assets from becoming impracticable and wasteful of time and money for the lawyers involved. Second, the scrutiny of fees paid by the debtor is based upon a recognition that bankruptcy clients are particularly vulnerable to attorney overreaching. Court oversight now prevents much of that overreaching. To assist the courts in their supervisory role, every attorney for a debtor is required to furnish a disclosure statement providing the details of any compensation and fee-sharing agreement. Furthermore, procedures are in place that allow certain parties to request a court review of any compensation agreement with the debtor's attorney for a determination of its reasonableness.

[1] Disclosure Statement Required

Both the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure have strict requirements for disclosure of all fees. Together, section 329(a) and *Rule 2016(b)* require the disclosure of the amount and source of any compensation and the details of any fee-sharing arrangement.

[a] Compensation

Section 329(a) requires any attorney representing a debtor in a bankruptcy case, or in connection with a bankruptcy case, to file a statement:

- of the amount of all compensation paid or agreed to be paid in connection with services rendered within one year prior to filing, or to be rendered, which are related to the bankruptcy; and
- the source of all such compensation.ⁿ¹

The statute requires disclosure of sums already paid, as well as money to be paid prospectively. It is improper to list only money which is paid by or expected from the estate or the debtor. Fees for services not rendered directly in the bankruptcy case but related to the case must also be disclosed.ⁿ² The disclosure of fees must be filed even if the

attorney has charged only for advice or preparation of papers and has not appeared in the bankruptcy case.ⁿ³ The statement must be filed whether or not the debtor's counsel files or intends to file an application for compensation or reimbursement of expenses under section 330 or 331.

[b] Fee-Sharing

Bankruptcy Rule 2016(b) requires that the disclosure statement must also state whether the attorney has shared or agreed to share such compensation with any other person, and the particulars of any such sharing arrangement, except where the sharing is with another attorney in the same firm.ⁿ⁴ The only proper statement on this matter that can be included in the disclosure of compensation statement is a denial of any agreement to share compensation except with other members or regular associates of the attorney's law firm, at least if the compensation is from property of the estate. The Rules make clear that any sharing, in the form of referral or forwarding fees, with attorneys who have not performed real service to earn their portion of the fee shall not be allowed, and can be the basis for the denial of fees for all attorneys involved in the transaction.ⁿ⁵ Similar sorts of fees to nonattorneys are also improper, and must be disclosed to the court, with respect to prebankruptcy fees at least, in response to question 9 in the Statement of Financial Affairs.

MORE INFORMATION

The Statement of Financial Affairs is examined in more detail in chapter 6 *infra* .

In most states, the sharing of compensation arising from the referral of cases is permitted under, but is subject to, the provisions of the canons of ethics adopted by the legislature or, by delegation, by the state Supreme Court.ⁿ⁶ To the contrary and as a matter of superseding federal law, Congress has prohibited the payment of any referral fees by a debtor's counsel. The only exception is for fees paid to a bona fide public service attorney referral program, of the type operated by bar associations.^{n6a} *Rule 2016(b)* acts as a policing mechanism to enforce the prohibition against fee splitting. If the debtor's counsel has agreed to pay a referral fee and fails to disclose that agreement, and that agreement is later discovered and brought to the attention of the court, the debtor's counsel may be disqualified from any further representation of the debtor in the bankruptcy case, ordered to disgorge the entire retainer, and denied all further compensation.ⁿ⁷

[c] Statement of Services Rendered and Expenses Incurred

Where compensation is sought from the estate, including payment through the chapter 13 plan, *Rule 2016(a) of the Federal Rules of Bankruptcy Procedure* requires an attorney to provide a detailed statement of the services rendered and expenses incurred to justify the amount requested. Although *Rule 2016(b)* does not require that such a listing be included in the disclosure statement, it is a good idea to furnish a similar listing in the statement, even in those cases in which the attorney is paid directly by the debtor. Not only will the description of services support the amount of fees requested, it will also make clear to the court what services have not been included, so that there can be no later question as to whether the attorney's fee included particular activities. Indeed, it is usually advisable to include in the statement a specific disclosure of the hourly rate or other arrangements which have been made for such additional services as might become necessary.

FORMS

For a sample of a disclosure of compensation by the attorney for the debtor *see* Collier Consumer Bankruptcy Forms, Form CS5.02-2 (Matthew Bender).

Where fees are to be paid from property of the estate, payment must be requested by application. However, the application process varies from one jurisdiction to another. Some jurisdictions will allow a disclosure statement that sufficiently details the services rendered combined with a provision in a chapter 13 plan to substitute for the usual fee

application process.

[d] Procedure for Filing

Federal Rule of Bankruptcy Procedure 2016(b) implements section 329(a). *Rule 2016(b)* requires the statement of compensation and feesharing to be filed within 15 days after a voluntary petition is filed or at such other time as the court may direct. In addition it must be transmitted to the United States trustee. The failure to file this form may jeopardize an attorney's right to receive any fees at all.

[e] Supplemental Disclosure Statement

Rule 2016(b) requires a supplemental disclosure statement to be filed with the court and transmitted to the United States Trustee within 15 days after any payment or agreement regarding payment not previously disclosed. The supplemental statement should generally conform to the same standards as the original disclosures.

FORMS

For a sample of a disclosure of an agreement for supplemental services *see* Collier Consumer Bankruptcy Forms, Form CS5.03-1 (Matthew Bender).

[2] Bankruptcy Court Review of Fee Disclosures

The whole point of *section 329(a) of the Bankruptcy Code* and *Rule 2016(b) of the Federal Rules of Bankruptcy Procedure*, requiring disclosure of any fee agreement, is apparent from section 329(b) and *Rule 2017*. The object of section 329(b) is to guard against and to impose sanctions on a debtor's attorney who takes advantage of a desperate debtor by charging excessive fees. Section 329(b) authorizes the court to cancel any agreement or to order the return of any payment when the compensation paid or agreed to be paid to the debtor's counsel exceeds the "reasonable value" of legal services when, under section 329(a), *inter alia* such payment or applicable agreement was made in the year before filing of the petition. *Rule 2017* provides for a determination by the court whether any fees paid or property transferred by the debtor to an attorney for services rendered or to be rendered is "excessive." That matter may be heard on motion by the United States trustee, or on the court's own motion, or if the fees were paid or property transferred before the petition date, then on motion by any party in interest.

[a] Transactions with Debtor's Attorney Subject to Review by Bankruptcy Court; Rule 2017

All fees paid by the debtor related to the bankruptcy case are subject to review. Any payments exceeding the reasonable value of services rendered may be ordered returned to either the debtor or the estate, whichever is appropriate. The provisions of *Bankruptcy Rule 2017* are divided into two parts based on when the transaction between the debtor and debtor's attorney occurred.

[i] Payments Before Order for Relief

Rule 2017(a) provides for the examination of transfers or payments by a debtor to the attorney prior to the entry of the order for relief. The rule covers any transfer or payment, whether direct or indirect. The transfer or payment must be in contemplation of the commencement of a bankruptcy case to be subject to review under the Rule. What is meant by "in contemplation of" the filing of a petition is something more than mere consciousness of insolvency. It means that the debtor, in making the transfer, is influenced by the imminence of bankruptcy. Even services devoted to the prevention of bankruptcy, such as to effect a settlement, may be rendered in contemplation of bankruptcy and are, therefore, subject to re-examination. The best test is whether the ensuing bankruptcy was reasonably predictable at the time the payment or transfer to the attorney was made.

[ii] Payment or Transfer After Order for Relief

Under *Rule 2017(b)* the court may review a payment or transfer or an agreement to pay or transfer to an attorney by the debtor after the entry of an order for relief in a bankruptcy case. Since a transfer or payment must occur after the entry of the order for relief in order to fall within *Rule 2017(b)*, there is no need to limit the payments or transfers to be reviewed to those made (or promised) in contemplation of bankruptcy. However, as the last clause of *Rule 2017(b)* indicates, the services of the attorney must be related to the bankruptcy case in some way.ⁿ¹⁴

[iii] Payment or Transfer Made by Third Party

While *Rule 2017* permits on its face examination of a transfer or payment (or an agreement for payment or transfer) by the debtor, *section 329 of the Bankruptcy Code* is not so limited. Therefore, courts have held that a payment or transfer by a third party is subject to examination pursuant to *Rule 2017*, notwithstanding the wording of the Rule.ⁿ¹⁵

[b] Nature of Review

One aspect of reviewing fees simply involves the question of whether the fees charged are reasonable in relation to the services involved. The second aspect of fees with which courts concern themselves is that of preventing the abuse of the bankruptcy process by attorneys at the expense of debtors or creditors.

[i] Review For Reasonableness

The Bankruptcy Court must review all fees or arrangements between the debtor and the debtor's attorney to determine whether the fees charged in each case are reasonable for the services actually provided. What is reasonable is, of course, a question of fact to be determined by the particular circumstances in each case.ⁿ¹⁶ Bankruptcy courts have broad discretion in determining appropriate levels of compensation.ⁿ¹⁷

The general test to be applied by the court in determining the reasonableness of the fee arrangements under *Rule 2017* is the same as the test applied in review of an application for compensation pursuant to *Rule 2016* and *section 330 of the Bankruptcy Code*.ⁿ¹⁸

In practice, courts have established rates to serve as guidelines to expedite the review process. Most judges have a range of rates which they consider fair for the basic services involved in a consumer bankruptcy case and will not perform a detailed review if the attorney's fee falls within that range.ⁿ¹⁹ Information as to what this range is should be easy to obtain through a review of fees approved in other cases filed at the clerk's office. Many judges also have let it be known what they feel is equitable for an uncontested adversary proceeding or other routine tasks. In some jurisdictions a local rule may fix the standards for reasonableness of compensation in certain types of cases (*e.g.*, consumer liquidations).

Different courts also have a variety of rules regarding such issues as whether fees are allowed for travel time, which costs are compensable, and the rates that will be permitted for costs such as photocopying.

Counsel for debtors should not be afraid, however, to charge more than the basic fee when the work reasonably required in a case warrants a larger fee which the client agrees to pay.ⁿ²⁰ The "basic fee" (sometimes called the "no-look fee") utilized by many courts is only a guideline set for the convenience of the court and counsel. Bankruptcy litigation can be lengthy and complex, and the legislative history of the Bankruptcy Code makes clear that Congress intended bankruptcy attorneys to be compensated at the same level as other attorneys in the community handling nonbankruptcy matters of similar difficulty.ⁿ²¹

Previous case lawⁿ²² holding that bankruptcy cases are governed by a special "spirit of economy" which dictated lower fees was expressly disapproved when the Bankruptcy Code was enacted.ⁿ²³ The policy of the Code is to encourage

quality representation in bankruptcy by allowing fees which will attract competent practitioners.

[ii] Review to Prevent Abuses of the Bankruptcy Process

The second aspect of fees with which courts concern themselves is that of preventing the abuse of the bankruptcy process by attorneys at the expense of debtors or creditors. In pursuit of this goal, bankruptcy judges have granted relief under *section 329 of the Bankruptcy Code* and *Rule 2017* citing any number of factors including:

- the incompetence of the attorney in the performance of services;
- whether any benefit was derived from the services;
- whether the services rendered were compensable;
- whether the attorney engaged in unethical conduct;
- whether the attorney deceptively advertised fees; and
- whether the attorney failed to accurately disclose the fees charged.

Much of this conduct would also make a retainer agreement void and unenforceable under section 526 and potentially subject the attorney to monetary liability.ⁿ²⁴

[3] Policing Conduct of Nonattorneys

Finally, section 329 has been used to police the fees and conduct of nonattorneys who provide debtors with "advice" or "services" in connection with bankruptcy cases, which are then often filed *pro se*. Either upon motion by the United States trustee, or upon request of disgruntled "clients," *section 329 of the Bankruptcy Code* can be an effective weapons against the unauthorized practice of law and abusive practices of these "clinics," "debt counselors," "typing services" and other entities, that prey on the misfortunes of financially troubled debtors.

However, the enactment of *section 110 of the Bankruptcy Code* in 1994 shifted most of the focus on fees paid to nonattorney petition preparers to that section rather than to section 329.ⁿ²⁵

FOOTNOTES:

(n1)Footnote 1. *See 3 Collier on Bankruptcy, P 329.03* (Matthew Bender 15th Ed. Revised); *1 Collier Bankruptcy Manual, P 329.03* (Matthew Bender 3d Ed. Revised).

(n2)Footnote 2. *In re Zepecki, 277 F.3d 1041 (8th Cir. 2002)* (services in connection with prepetition sale of property); *In re Campbell, 259 B.R. 615 (Bankr. N.D. Ohio 2001)* (fees for services in connection with refinancing to complete chapter 13 plan).

(n3)Footnote 3. *In re Kisseberth, 273 F.3d 714 (6th Cir. 2001)* (disgorgement of fees when disclosure requirements not met); *In re Basham, 208 B.R. 926 (B.A.P. 9th Cir. 1997)* (attorney who prepared papers for debtors who filed "pro per" but did not file fee disclosure, and who charged excessive fees for services rendered, required to disgorge all fees).

(n4)Footnote 4. *See 9 Collier on Bankruptcy, P 2016.15* (Matthew Bender 15th Ed. Revised).

(n5)Footnote 5. Advisory Committee Note to *Fed. R. Bankr. P. 2016*; *See In re Wright, 290 B.R. 145 (Bankr. C.D. Cal. 2003)* (discussing rules for disclosure of payments to "appearance attorney" who attends creditors meeting or

hearing); *In re Greer*, 271 B.R. 426 (Bankr. D. Mass. 2002) (improper to pay another attorney \$50 to represent debtors at creditors meeting; listing of attorney on letterhead and paying attorney's malpractice insurance did not make attorney part of firm); *In re Palladino*, 267 B.R. 825 (Bankr. N.D. Ill. 2001) (denying fees for attorneys who were not part of firm hired by debtor and not directly hired by debtor).

(n6)Footnote 6. See Model Code of Professional Responsibility, DR 2-107(A).

(n7)Footnote 6a. 11 U.S.C. § 504(c).

(n8)Footnote 7. See *In re Arlan's Dep't Stores, Inc.*, 615 F.2d 925 (2d Cir. 1979) ; See also *In re Matis*, 73 B.R. 228 (Bankr. N.D.N.Y. 1987) .

(n9)Footnote 8. See, e.g., *In re Coones Ranch, Inc.*, 7 F.3d 740, 29 C.B.C.2d 1625 (8th Cir. 1993) .

(n10)Footnote 9. *In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 30 C.B.C.2d 1264 (3d Cir. 1994) .

(n11)Footnote 10. *In re Walters*, 868 F.2d 665, 22 C.B.C.2d 263 (4th Cir. 1989) (court had power to review fees paid by debtors from exempt property in state court suits against creditor). Cf. *Matter of Hargis*, 895 F.2d 1025 (5th Cir. 1990) (court had no authority to order disgorgement of fees paid for services not related to bankruptcy case).

(n12)Footnote 11. 11 U.S.C. § 329(b). *In re Lee*, 884 F.2d 897 (5th Cir. 1989) (court ordered return of fees attorney collected under contingent fee agreement to the extent they exceeded reasonable hourly rate). See 3 *Collier on Bankruptcy*, P 329.04 (Matthew Bender 15th Ed. Revised); 1 *Collier Bankruptcy Manual*, P 329.04 (Matthew Bender 3d Ed. Revised).

(n13)Footnote 12. See 9 *Collier on Bankruptcy*, P 2017.09 (Matthew Bender 15th Ed. Revised).

(n14)Footnote 13. See 3 *Collier on Bankruptcy*, P 329.03[1][d] (Matthew Bender 15th Ed. Revised); 1 *Collier Bankruptcy Manual*, P 329.03[1][c] (Matthew Bender 3d Ed. Revised).

(n15)Footnote 14. See 9 *Collier on Bankruptcy*, P 2017.08 (Matthew Bender 15th Ed. Revised).

(n16)Footnote 15. See 3 *Collier on Bankruptcy*, P 329.04[2][b] (Matthew Bender 15th Ed. Revised); 1 *Collier Bankruptcy Manual*, P 329.04[2][b] (Matthew Bender 3d Ed. Revised).

(n17)Footnote 16. See 3 *Collier on Bankruptcy*, P 330.04 (Matthew Bender 15th Ed. Revised); 1 *Collier Bankruptcy Manual*, P 330.04 (Matthew Bender 3d Ed. Revised).

(n18)Footnote 17. See, e.g., *Matter of Lawler*, 807 F.2d 1207 (5th Cir. 1987) .

(n19)Footnote 18. See, e.g., *Matter of Lee*, 884 F.2d 897, 899 (5th Cir. 1989) .

(n20)Footnote 19. See P 5.01[2][b] *supra*.

(n21)Footnote 20. See generally, See *In re Eliapo*, 468 F.3d 592 (9th Cir. 2006) (attorney who had applied for "no look" fee did not show extraordinary circumstances justifying additional fees for normal case preparation tasks, but was awarded fees for other additional work; attorney should have been granted opportunity for a hearing on disputed fees); *In re Cahill*, 428 F.3d 536 (5th Cir. 2005) (case did not involve sufficient amount of work to deviate from standard fee). *Matter of Lawler*, 807 F.2d 1207 (5th Cir. 1987) ; *In re Powerine Oil Co.*, 71 B.R. 767 (B.A.P. 9th Cir. 1986) .

(n22)Footnote 21. 124 Cong. Rec. H11091-22 (daily ed. Sept. 28, 1978) (Statement of Rep. Don Edwards), reprinted in Vol. D *Collier on Bankruptcy*, App. Pt. 4(f)(i) (Matthew Bender 15th Ed. Revised); H.R. Rep. No. 595, 95th Cong., 1st Sess. 329-30 (1977), reprinted in Vol. C *Collier on Bankruptcy*, App. Pt. 4(d)(i) (Matthew Bender 15th

Ed. Revised). *In re Boddy*, 950 F.2d 334 (6th Cir. 1991) (use of \$650 "normal and customary" fee for bankruptcy case, rather than lodestar method, was abuse of discretion); *Grant v. George Schumann Tire & Battery Co.*, 908 F.2d 874, 23 C.B.C.2d 708 (11th Cir. 1990) (bankruptcy attorney fees should be calculated by lodestar method and should be no less and no more than fees received for comparable nonbankruptcy work).

(n23)Footnote 22. *See, e.g.*, *In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1977) ; *In re Paramount Merrick, Inc.*, 252 F.2d 482, 485 (2d Cir. 1958) .

(n24)Footnote 23. 124 Cong. Rec. H11091-92 (daily ed. Sept. 28, 1978) (Statement of Rep. Don Edwards), *reprinted in* Vol. D Collier on Bankruptcy, App. Pt. 4(f)(i) (Matthew Bender 15th Ed. Revised); H.R. Rep. No. 595, 95th Cong., 1st Sess. 329-30 (1977), *reprinted in* Vol. C Collier on Bankruptcy, App. Pt. 4(d)(i) (Matthew Bender 15th Ed. Revised).

(n25)Footnote 24. *11 U.S.C. 526(c)*, enacted by Pub. L. No. 109-8 (2005), effective with respect to cases filed on or after October 17, 2005.

(n26)Footnote 25. *See* 2 Collier on Bankruptcy, ch. 110 (Matthew Bender 15th Ed. Revised); 1 Collier Bankruptcy Manual, ch. 110 (Matthew Bender 3d Ed. Revised).