

EMPLOYMENT AND COMPENSATION OF PROFESSIONALS

The following are guidelines only and do not amend or replace applicable sections of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, District of Kansas Local Bankruptcy Rules, and case law. Counsel should familiarize themselves with 11 U.S.C. §§ 327-331, 503(b)(3) and (4), 506(b) and (c), and 1103(a), Fed. R. Bankr. P. 2014 and 2016, and D. Kan. L.B.R. 2014.1 and 2016.1.

I. EMPLOYMENT OF DEBTOR'S COUNSEL

- A. Court approval under § 327 is not required for the retention of professionals by a debtor in a Chapter 7 or Chapter 13 case. The Court will entertain motions for such orders in those chapters, but the issuance of the order does not relieve the professional from other, required disclosures and fee applications and approvals.
- B. Judge Herren does not have a “no look” or standard fee for debtor’s counsel in either Chapter 7 or Chapter 13 cases.

II. RETAINING PROFESSIONALS.

- A. *Need for Appointment.* When retention of a professional is appropriate, those whose employment has not been approved by the Court risk **not being granted compensation or having to disgorge compensation previously received.**
- B. *Orders Granting Employment Applications.* Pursuant to Rule 6003(a), the Court will not issue an order granting an application to employ a professional within 21 days after the filing of the petition for relief unless it is necessary to avoid immediate and irreparable harm. The court independently reviews and approves employment of professionals, regardless of whether there is an objection to the application.
- C. *Retention is Not Final Approval of Compensation.* **Counsel should include in any proposed order approving retention of a professional that the Court’s approval does not constitute final approval of the fees of any such professional. Appropriate fee disclosures and fee applications are still necessary.** A retained professional’s fees and expenses remain subject to court approval, even if no party objects. Court-approved contractual fee arrangements, even under § 328, also may ultimately be altered if the terms prove to have been “improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.” § 328(a). In any fee arrangement, what is allowed must be reasonable

compensation for the actual and necessary services or expenses performed or incurred in service to the estate. § 330(a)(1) and (3). All professionals, including debtor counsel, should ensure their Rule 2016(b) fee disclosure statement is updated and accurate.

III. FEE APPLICATION PROCESS. Interim and final fee applications should be submitted on a notice and hearing basis as § 330(a) requires. Applicants should give 21-days' notice to the "debtor, the trustee, all creditors" and the U. S. Trustee. Rule 2002(a)(6). Monthly compensation of professionals permitted by D. Kan. L.B.R. 2016.1 should be noticed to the debtor, debtor's attorney, the U.S. Trustee, all secured creditors, all parties requesting notice under Rule 2002(g), the creditors' committee, and the 20 largest unsecured creditors, if no creditors' committee exists. Fee applications may be set to the court's monthly miscellaneous docket on negative notice. No hearing is required if the application seeks \$1,000 or less. The lack of an objection to the application does not assure its approval.

- A. *Information Necessary on All Applications:* Any application must contain the following information and additional information may be requested if circumstances warrant.
1. Identity of applicant and client;
 2. Date of petition;
 3. Dates and docket numbers of application for employment and order of employment of applicant;
 4. Whether the application is interim or final and, if interim, which interim application (first, second, *etc.* interim application for services rendered from [date] to [date]); this should be identified in the title of the pleading as well as the body of the fee application.
 5. A recapitulation of –
 - a. Previous payments made or promised to applicant for services to be rendered;
 - b. The source of payments made or promised;
 - c. The dates of said payments; and
 - d. The amounts of compensation and reimbursement previously approved by the Court (dates and docket numbers of prior applications and orders approving);

- e. Whether any compensation received has been shared and if so, describe sharing arrangement.
6. The amount of fees and expenses requested in the current application with itemized billing detail attached as an exhibit to the application or filed as a supplement or supporting document to the application, or made available upon request;
 7. Relative to EXPENSES, the following –
 - a. Date incurred;
 - b. Nature of expense (*e.g.*, number of copies and rate per copy);
 - c. Purpose (*e.g.*, copies of plan for solicitation of ballots);
 - d. Any profit margin, markup or other overhead factor realized on any expense item.
 8. Relative to FEES, the following –
 - a. Name(s) of the individual(s) who have worked on the case during the period, their titles and positions, and their hourly rates;
 - b. *Individual and separate entries* describing each service or task performed including –
 - (1) Who did the work;
 - (2) Date it was performed;
 - (3) A specific, detailed description of work done and, if not self-evident, the purpose of the work;
 - (4) The amount of time spent on each task (in increments of tenths of an hour); and
 - (5) The dollar value of the work performed.
 - c. Receipts: Members of Official Creditors Committees and non-lawyer professionals shall submit receipts in support of reimbursable expense claims; attorney applicants shall, absent further Court order, be excused from submitting receipts.

IV. WHAT IS COMPENSABLE.

A. *Fees.*

1. Adjusted Lodestar Approach: In determining whether the professional fees requested are reasonable, the Court considers the factors enumerated in § 330(a)(3)(A)–(F), together with the following factors:
 - a. The time and labor required;
 - b. The novelty and difficulty of the questions;
 - c. The skill requisite to perform the legal service properly;
 - d. The preclusion of other employment by the attorney due to acceptance of the case;
 - e. The customary fee;
 - f. Whether the fee is fixed or contingent;
 - g. Time limitations imposed by the client or the circumstances;
 - h. The amount involved and the results obtained;
 - i. The experience, reputation, and ability of the attorneys;
 - j. The "undesirability" of the case;
 - k. The nature and length of the professional relationship with the client; and
 - l. Awards in similar cases.
2. Whether the services were reasonable and necessary and were calculated to benefit the estate is considered as of the time they were rendered.
3. Enhancement of fees awarded under § 330 is permitted. The lodestar amount may be enhanced or adjusted downward based on the same factors.

B. *Compensable Components of Professional Fees*

1. Fee Applications: reasonable time spent in preparation of the fee application is compensable. Fees incurred in defending bankruptcy fee applications are not.
2. Prepetition: for bankruptcy counsel, only time spent in preparation for, or contemplation of filing bankruptcy is compensable.
3. Travel Time: travel time compensated at counsel's usual and customary hourly rate; professionals traveling and appearing on

several cases at a single setting should apportion their time among the cases. The full hourly rate for non-working travel time may be reduced.

4. Local Counsel: reasonable fees of local counsel who appear with an attorney admitted *pro hac vice* will be allowed to the extent local counsel participates meaningfully in the preparation and trial of the case or proceedings before the bankruptcy court as required by D. Kan. Rule 83.5.4(c).

C. *Reimbursed Expenses of Professionals.*

1. Without limitation, expenses that may be claimed from an estate include items in excess of ordinary office overhead.
 - a. Extraordinary photocopying: actual, reasonable and necessary (e.g., plan and disclosure statement and corresponding attachments like budget projections, liquidation analysis, historical financials);
 - b. Extraordinary postage expense: actual, reasonable, and necessary;
 - c. Long distance telephone charges not included in the overhead of a telephone plan;
 - d. Fees charged by clerk's office for copies, certification of court document, or exemplification of court document;
 - e. Bankruptcy court filing fees for various pleadings/motions;
 - f. Certified mail if shown to be required by law or otherwise appropriate under the circumstances;
 - g. Out of town travel: including coach class airfare, taxi, car rental, tolls, parking, necessary lodging and meals, nonlocal mileage at Internal Revenue Code rate if driving own vehicle (if appearing for more than one case or client, the travel expense should be apportioned);
 - h. Express mail or delivery, if necessary: actual, reasonable and necessary costs;
 - i. Internet legal research: actual and reasonable cost over subscription fee, and traceable to the specific case or client and subject matter;
 - j. Transcript and deposition costs; and
 - k. Witness subpoena/mileage costs.
 - l. Items that would ordinarily be part of a professional's office overhead are not compensable. Examples include:

- (1) Ordinary photocopying: routine correspondence and documents; Ordinary postage/mailing expense: routine correspondence and transmission of documents;
- (2) Telephone plans;
- (3) Internet service and e-mail;
- (4) Firm or office-issued cell phones and service, including text messages;
- (5) Word processing;
- (6) Other office overhead;
- (7) Local travel expense (20 miles or less, one way);
- (8) Messenger service or in-town delivery; and
- (9) Library costs and expenses, including electronic research database subscriptions.

V. **INTERIM AND FINAL APPLICATION PRACTICE:** All interim applications should contain a recapitulation of all fees and expenses applied for and awarded to the date of the application's filing.

A. *Interim Fee Applications: § 331*

Section 331 authorizes debtor's attorneys and other professionals to apply for compensation and reimbursement of expenses every 120 days after the order for relief, or more frequently as the court permits. Interim compensation may be allowed and disbursed to the applicant after notice and hearing.

B. *Motions for Monthly Payments: See D. Kan. L.B.R. 2016.1.* Applications for monthly payments should be noticed to the docket and **should not be** combined with applications for employment. It must state the filing date of the application to employ and of the order granting employment, if available. D. Kan. L.B.R. 2016.1(a). **An order granting monthly payments must state that the allowance of monthly payments of fees and expenses does not constitute an interim or final approval of the fees and expenses.** D. Kan. L.B.R. 2016.1(d).

C. *Final Applications:* Any order granting compensation and/or reimbursement on a monthly or an interim application shall be deemed **interim** only and remains subject to review of the final application, usually filed at the conclusion of the case (e.g., after confirmation of a plan, completion of an estate's administration, etc.). Until a final fee application is approved, the Court may enhance or reduce fees and expenses previously approved as well as the power to order the

disgorgement of some or all of such fees in appropriate situations. *See* §§ 328 and 329(b).