

**PROFESSIONAL FEE AND EXPENSE GUIDELINES
IN BANKRUPTCY CASES PENDING BEFORE
JUDGE MITCHELL L. HERREN**

I. INTRODUCTION.

These guidelines were initially established in 2002 for the benefit of professionals practicing in this court who are Kansas lawyers or are admitted in other jurisdictions. They are also applicable to other employed professionals approved by this court such as accountants, auctioneers, real estate brokers, financial advisors, and investment bankers. They are based on 11 U.S.C. §§ 327-331,¹ Fed. R. Bankr. P. 2014 and 2016, and controlling Tenth Circuit authority.

- A. *Approach.* The Guidelines attempt to balance professionals' need to be compensated commensurately with professionals in non-bankruptcy cases with the fact that most estates lack sufficient assets to satisfy all creditor demands. Because these are only guidelines, I will depart from them to prevent substantial injustice in appropriate circumstances.
- B. *Applicability:* These guidelines apply to *all* professional fees sought to be allowed under §§ 327, 328, 503(b)(3) and (4), 506(b) and (c), and 1103(a). *See also* Fed. R. Bankr. P. 2014 and 2016; D. Kan. L.B.R. 2014.1 and 2016.1.

II. RETAINING PROFESSIONALS.

- A. *Need for Appointment.* To be compensated, professionals must be employed under 11 U.S.C. § 327 or § 1103(a).² Those whose employment has not been approved risk **not being granted compensation.**³ In

¹ All statutory references hereafter are to the Bankruptcy Code, 11 U.S.C. §101, *et seq.*, unless otherwise noted.

² D. Kan. L.B.R. 2014.1(a) expressly requires that a debtor-in-possession seeking to employ an attorney to conduct a chapter 11 case, file an application to employ the attorney "with the petition."

³ Unapproved professionals are considered volunteers if payment from the bankruptcy estate is sought. *In re Schupbach Investments, L.L.C.*, 808 F.3d 1215, 1219 (10th Cir. 2015), citing *In re Interwest Business Equipment, Inc.*, 23 F. 3d 311, 318 (10th Cir. 1994); *See also In re Albrecht*, 233 F.3d 1258 (10th Cir. 2000) (law firm whose employment as chapter 11 trustee's counsel was disapproved was not entitled to payment as an administrative expense under § 503(b)(1)(A)).

rare but appropriate circumstances, *nunc pro tunc* relief may be granted to professionals who previously failed to obtain Court approval before undertaking estate work.⁴ Trustees or debtors in possession employing attorneys and other professionals not accustomed to practicing in this bankruptcy court should take special care to acquaint them with the statutes, rules and guidelines governing their employment and compensation. The court independently reviews and approves employment of professionals under § 327(a), whether or not there is an objection to the application.⁵

- B. *Retention Not Compensation.* Note that a retained professional's fees and expenses remain subject to court approval, even if no party objects. Contractual fee arrangements approved under § 328 may 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).⁶ 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). Note also that debtor attorneys should exercise caution to ensure their Rule 2016(b) fee disclosure statement is complete and accurate.⁷

III. RATES. In the absence of other circumstances, professionals may expect to be compensated at their customary, usual hourly or other rate, regardless of where they office, provided the rate is reasonable. I understand that some professionals such as auctioneers or appraisers may charge fees on a different basis.

IV. 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

⁴ See *Land v. First Nat'l Bank of Alamosa (In re Land)*, 943 F. 2d 1265, 1267-68 (10th Cir. 1991) (simple neglect does not justify *nunc pro tunc* approval; disapproved *nunc pro tunc* employment resulted in return of compensation received by the attorney, even if the fees were reasonable). See also *In re Schupbach Investments, L.L.C.*, 808 F.3d 1215, 1220 (10th Cir. 2015) (adhering to *Land*; applying extraordinary circumstances test for *nunc pro tunc* approval); *In re Boot Hill Biofuels, LLC*, Case No. 08-13128, 2009 WL 982192 at *12 (Bankr. D. Kan. Mar. 27, 2009) (Nugent, J.).

⁵ *In re Interwest Business Equipment, Inc.*, 23 F.3d 311, 317 (10th Cir. 1994).

⁶ *In re Market Center East Retail Property, Inc.*, 730 F.3d 1239 (10th Cir. 2013) (bankruptcy court is not bound by the parties' compensation agreement in calculating reasonable compensation under § 330).

⁷ See § 329; *In re Smitty's Truck Stop, Inc.*, 210 B.R. 844 (10th Cir. BAP 1997) (failure to disclose prepetition retainer resulted in denial of compensation and disgorgement of retainer).

2002(a)(6). Monthly fee applications 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. 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.⁸ I routinely review all fee applications whether objections are filed or not.⁹ The lack of an objection to the application does not assure its approval.

A. *Information Necessary on All Applications:*¹⁰ 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

⁸ Fed. R. Bankr. P. 2002(a)(6).

⁹ *In re Market Center East Retail Property, Inc.*, 730 F.3d 1239, 1246 (10th Cir. 2013) (Section 330 gives the bankruptcy court the ability to independently determine reasonable fees); *In re Commercial Financial Services, Inc.*, 427 F.3d 804, 810 (10th Cir. 2005) (same); *In re Albrecht*, 245 B.R. 666, 672 (10th Cir. BAP 2000) (bankruptcy court has an independent duty to review professional fee applications); *In re Tahah*, 330 B.R. 777, 780-81 (10th Cir. BAP 2005).

¹⁰ See Fed. R. Bankr. P. 2016(a).

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;
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, where 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.¹¹
 - 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.¹²

¹¹ Entries that describe several tasks or services performed on the same date by the same individual without allocating the time spent on each task are “batched” entries and will be disallowed. *See In re Recycling Industries, Inc.*, 243 B.R. 396, 406 (Bankr. D. Colo. 2000) (practice of batching is “universally disapproved” by bankruptcy courts.).

¹² By signing fee and expense applications, attorneys certify that the statements contained in them are true. *See Fed. R. Bankr. P. 9011.*

V. WHAT IS COMPENSABLE.

A. Fees.

1. Adjusted Lodestar Approach: In determining whether the professional fees requested are reasonable, I consider the factors enumerated in § 330(a)(3)(A)–(F), together with the following *Johnson* factors:¹³
 - 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.¹⁴
2. Whether the services were reasonable and necessary and were calculated to benefit the estate is considered as of the time they were rendered.¹⁵
3. Enhancement of fees awarded under § 330 is permitted. The lodestar amount may be enhanced or adjusted downward based

¹³ See § 330(a)(3)(A)–(F); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) (12 additional factors); *In re Commercial Fin. Servs.*, 427 F.3d 804, 811 (10th Cir. 2005) (this circuit uses adjusted lodestar analysis to determine reasonableness of a requested professional fee; it takes into account the § 330(a)(3) factors, plus the *Johnson* factors, in determining reasonableness of financial advisor's fees); See also *In re Permian Anchor Services, Inc.*, 649 F.2d 763, 768 (10th Cir. 1981), decided prior to § 330 and adopted the lodestar analysis and factors set forth in *Johnson*, to determine reasonable attorney's fees.

¹⁴ See *In re Market Center East Retail Property, Inc.*, 730 F. 3d 1239, 1249 (10th Cir. 2013) (the adjusted lodestar approach considers the *Johnson* factors in addition to the § 330(a)(3) factors).

¹⁵ See *In re Lederman Enter., Inc.*, 997 F.2d 1321 (10th Cir. 1993); § 330(a)(3)(C).

on the same § 330 and *Johnson* factors.¹⁶

B. *Compensable Components of Professional Fees*

1. Fee Applications: reasonable time spent in preparation of the fee application is compensable.¹⁷ But fees incurred in defending bankruptcy fee applications are not.¹⁸
2. Prepetition: only time spent in preparation for or contemplation of filing bankruptcy is compensable.
3. Travel Time: nonlocal travel 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. Section 330(a)(4)(A)(i)-(ii) specifies that services that are unnecessarily duplicative, unlikely to benefit the debtor's estate, or unnecessary to administration of the case, are not compensable.
5. 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. With the advent of the internet, e-mail, and the court's CM/ECF system for electronic filing of pleadings, several of the expense types listed

¹⁶ *In re Market Center East Retail Property, Inc.*, *supra* (rejecting Supreme Court's limitations on fee enhancements under *Perdue v. Kenny A. ex rel Winn*, 559 U.S. 542 (2010), a civil rights case, to § 330 fees in the bankruptcy context).

¹⁷ § 330(a)(6); *In re Seneca Oil Co.*, 65 B.R. 902, 910 (Bankr. W.D. Okla. 1986) (but time spent to prepare the detailed billing statements is not compensable); *Case v. Unified School District No. 233*, 157 F.3d 1243, 1254 (10th Cir. 1998).

¹⁸ *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164-66, 2169 (2015) (§ 330 does not displace the American Rule that litigants pay their own attorney fees).

below that pertain to communicating with the court, clients and parties, and transmitting documents and pleadings, are unlikely to arise with any frequency in the current technology environment. The court encourages counsel and other professionals to transmit documents and communicate regarding a case via e-mail when possible.

- 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 call, except those made from a cell phone;
 - 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;
 - 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 among them;¹⁹
 - h. Express mail or delivery, if expediency is necessary: actual, reasonable and necessary costs;
 - i. Fax charges: actual, reasonable and necessary long-distance telephone charges for outgoing faxes;
 - j. Internet legal research: actual and reasonable cost over subscription fee, and traceable to the specific case or client and subject matter; may not include basic or background legal research;
 - k. PACER search: per page cost that is actual and necessary;
 - l. Transcript and deposition costs; and
 - m. Witness subpoena/mileage costs.
2. Items that would ordinarily be part of a professional's office overhead are not compensable. Some examples include:
- a. Ordinary photocopying: routine correspondence and documents;

¹⁹ *In re Constable*, No. 99-41918, 2001 WL 34652938 at *4 (Bankr. D. Kan. Nov. 21, 2001) (attorney time in driving to Topeka to file a pleading disallowed absent a showing of considerable exigency, but mileage expense allowed).

- b. Ordinary postage/ mailing expense: routine correspondence and transmission of documents;
- c. Telephone service;
- d. Internet service and e-mail;
- e. Firm or office-issued cell phones and service, including text messages;
- f. Word processing;
- g. *Pro hac vice* admission fee and other court-mandated attorney registration fees;
- h. Other office overhead, including, but not limited to: rent; utilities; insurance; taxes; clerical or secretarial wages, salary, benefits and overtime; local telephone charges;
- i. In-town travel;
- j. Messenger service or in-town delivery; and
- k. Library costs and expenses, including electronic research database subscriptions such as Westlaw, Lexis-Nexis, *etc.* or other online resources frequently used by professionals in their respective field.

D. *Billing Judgment.*

In preparing and prior to filing a fee application, counsel should take care to exercise “billing judgment” in advance of the court’s review. This consists of “winnowing the hours actually expended down to the hours reasonably expended.”²⁰ Was the time claimed necessary? Was the time claimed duplicative of others? Were there interoffice conferences among multiple attorneys? Did multiple attorneys appear at court proceedings and were all the appearances necessary? In general, duplication of services will result in reduction of fees.²¹ Were the rates reasonable? Was non-working travel time billed at the full rate? After exercising billing judgment it is helpful to the court to summarize any reduction in hours and fees from the application submitted to the court. This signals to the court that you have exercised “billing judgment.”

VI. INTERIM AND FINAL APPLICATION PRACTICE: All interim applications

²⁰ See *Case v. Unified School Dist. No. 233*, 157 F.3d 1243, 1250 (10th Cir. 1998) (time that an attorney would not properly bill the client should be excluded from the application); *In re Cascade Oil Co., Inc.*, 126 B.R. 99, 106 (Bankr. D. Kan. 1991); *In re Grosswiler Dairy, Inc.*, 257 B.R. 523, 528 (Bankr. D. Mont. 2000) (if cost benefit analysis indicates that the only party likely to benefit from the service is the professional, the service is unwarranted).

²¹ *In re Seneca Oil Co.*, 65 B.R. 902, 909 (Bankr. W.D. Okla. 1986) (where more than one attorney attends a meeting, hearing, deposition, *etc.*, unless both actively participate or duplication is plainly justified, a reduced fee or no fee will be permitted for the second or subsequent attorneys).

should contain a recapitulation of all fees and expenses applied for and awarded to the date of the application's filing so that the parties and I can assess the running total of fees and expenses incurred at each stage of the case.

A. *Interim 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. *Applications for Monthly Payments: See D. Kan. L.B.R. 2016.1.*

a. Applications for monthly draws 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 applications 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).

b. Per D. Kan. L.B.R. 2016.1(c), notice of the Motion for Monthly Payments must be given to:

- (1) The debtor and debtor's attorney;
- (2) The United States Trustee;
- (3) All secured creditors;
- (4) All parties requesting notice; and
- (5) Creditors' committee, if any, or the 20 largest unsecured creditors who are not insiders.

c. Counsel may apply for payment of 100 percent of the fees and 100 percent of the expenses incurred in a given month. Such applications may be approved, provided, however, that where 100 percent of the fees and expenses are paid, counsel shall hold at least 10 percent of the fees in trust pending approval by this Court of an interim or final application, unless otherwise ordered. D. Kan. L.B.R. 2016.1(b).

d. Monthly applications and orders should contain a clear statement of what payments have been received by the applicant to the date of the present application, the source of those payments, the date of the payments and what payments and reimbursements of fees and expenses have previously been approved by the Court. From the order's terms, the Court should be able to ascertain the cost to conduct the case in fees and expenses at any given application date.

- 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).

/s/ Mitchell L. Herren
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

September 10, 2020