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15 Attorneys' Fees in Chapter 11 Cases

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I. [15.1] INTRODUCTION

As its title indicates, this chapter examines the process by which attorneys are compensated in Chapter 11 cases. The chapter covers only those attorneys who are entitled to compensation from the assets of the bankruptcy estate, *i.e.,* the debtor's counsel and any statutory committee's counsel (attorneys representing individual creditors or other interested parties are left to seek compensation from their clients in their usual manner). The chapter is divided into two parts. Sections 15.2 – 15.12 set out the retention process, as the entitlement to attorneys' fees is premised on the attorney's court-authorized retention. Sections 15.13 – 15.36 examine the standards for fee applications and the review of fee applications.

II. [15.2] RETENTION

Debtors-in-possession and statutory committees have the "inherent right . . . to employ the counsel of their choice subject to the restrictions of [the Bankruptcy Code]." *In re Diamond Mortgage Corporation of Illinois,* 135 B.R. 78, 92 (Bankr. N.D.Ill. 1990). As a general rule, in order for legal counsel to be compensated out of the assets of a bankruptcy estate, it must first receive court approval for its retention. *In re Singson,* 41 F.3d 316, 319 (7th Cir. 1994). The Bankruptcy Code, 11 U.S.C. §101, *et seq.,* provides that professionals employed by either the debtor-in-possession or a statutory committee (*i.e.,* the unsecured creditors committee) may be compensated out of the assets of the bankruptcy estate.

The retention by a debtor-in-possession (or trustee) of professionals, including legal counsel, is governed by 11 U.S.C. §327 and Federal Rule of Bankruptcy Procedure 2014. Section 327 authorizes, with court approval, the retention of the debtor's bankruptcy counsel as well as any counsel necessary for non-bankruptcy-related matters. As discussed more fully below in §§15.3 – 15.7, the standards for these two types of legal counsel differ.

The retention for counsel to a statutory committee is governed by 11 U.S.C. §1103 and Fed.R.Bankr.P. 2014.

A. [15.3] Retention of Debtor's Bankruptcy Counsel

Bankruptcy Code §327 authorizes the debtor-in-possession to retain legal counsel to assist it in any bankruptcy-related matter. It reads as follows:

> **[**T**]he trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.** 11 U.S.C. §327(a).

Courts applying §327 require that (1) the retention is reasonably necessary, (2) the attorney seeking to be retained is disinterested, and (3) the attorney does not hold an adverse interest. Furthermore, the requirements for retention create ongoing duties to remain disinterested and

devoid of any adverse interest throughout the course of employment. *In re Rusty Jones, Inc.,* 134 B.R. 321, 341 (Bankr. N.D.Ill. 1991); *In re Diamond Mortgage Corporation of Illinois,* 135 B.R. 78, 93 (Bankr. N.D.Ill. 1990).

1. [15.4] Reasonably Necessary

A party seeking to retain a professional must first establish that the employment of the professional is reasonably necessary. *In re Vettori,* 217 B.R. 242, 245 (Bankr. N.D.Ill. 1998) ("the appointment [of a professional] must be in the best interest of the estate"). See also Federal Rule of Bankruptcy Procedure 2014 ("The application [for employment] shall state the specific facts showing the necessity for the employment."). Accordingly, applications for employment will be denied when such retention would be duplicative or otherwise unnecessary. *In re Kingsway Purchasing, Inc.,* 69 B.R. 713, 716 (Bankr. E.D.Mich. 1987) (denying retention of secretary for unsecured creditors committee as unnecessary); *In re Bible Speaks,* 67 B.R. 426, 427 – 428 (Bankr. D.Mass. 1986) (denying retention of multiple cocounsel to unsecured creditors committee as duplicative and unnecessary).

2. [15.5] Disinterested

The Bankruptcy Code requires that a professional must be disinterested in order to be retained and must thereafter remain disinterested. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub.L. No. 109-8, 119 Stat. 23, changed the definition of "disinterested person" to eliminate the rules regarding persons that had acted as investment bankers for the debtor or the debtor's securities. For cases filed after October 17, 2005, the Bankruptcy Code defines a "disinterested person" as a person that

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor; and

(C) does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason. 11 U.S.C. §101(14).

The Bankruptcy Code further defines many of these qualities of disinterestedness. The definition of a "creditor" is defined to include any entity that has a claim against the debtor. 11 U.S.C. §101(10). An "insider" is defined broadly to include not only management of a debtor but also relatives of the debtor. 11 U.S.C. §101(31). Finally, while the Bankruptcy Code does not further define a person having an interest materially adverse to the estate or its creditors, the Seventh Circuit has defined it to be "sufficiently broad to include any professional with an 'interest or relationship that would even faintly color the independence and impartial attitude required by the Code.' " *In re Crivello,* 134 F.3d 831, 835 (7th Cir. 1998).

Courts are split over how rigorously to apply the requirement of disinterestedness. A majority of courts hold that the Bankruptcy Code establishes a per se rule disallowing the retention of any person that is not strictly disinterested. *See, e.g., In re Pillowtex, Inc.*, 304 F.3d 246, 254 (3d Cir. 2002); *In re Harold & Williams Development Co.*, 977 F.2d 906, 909 (4th Cir. 1992); *In re Pierce*, 809 F.2d 1356, 1362 (8th Cir. 1987). Other courts apply a more flexible standard, allowing for the retention of a professional who may not qualify as disinterested under the Bankruptcy Code but whose retention may be vital to the administration of the case or the rehabilitation of the debtor. *See, e.g., In re Martin*, 817 F.2d 175, 180 (1st Cir. 1987). The Seventh Circuit has yet to weigh in on the matter, and Illinois bankruptcy courts are similarly split. *Compare In re Envirodyne Industries, Inc.*, 150 B.R. 1008, 1016 (Bankr. N.D.Ill. 1993) (per se), *and In re American Printers & Lithographers, Inc.*, 148 B.R. 862, 865 (Bankr. N.D.Ill. 1992) (per se), *with Meeker v. Germeraad (In re Quincy Air Cargo, Inc.)*, 155 B.R. 193, 195 – 196 (Bankr. C.D.Ill. 1993), *and In re Diamond Mortgage Corporation of Illinois*, 135 B.R. 78, 90 – 94 (Bankr. N.D.Ill. 1990).

Additionally, Federal Rule of Bankruptcy Procedure 5002 prohibits a bankruptcy judge from authorizing the employment of any attorney that is related to the bankruptcy judge.

3. [15.6] Holding No Adverse Interest

The Bankruptcy Code does not define what constitutes an "adverse interest" or how the requirement of not holding an adverse interest is distinguishable from the requirement that the debtor's counsel be disinterested. The Seventh Circuit has defined it as "(1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate." *In re Crivello*, 134 F.3d 831, 835 (7th Cir. 1998). Using this standard, Judge Schmetterer of the Northern District of Illinois held that a law firm seeking to represent a debtor held an interest adverse to the estate when the debtor's senior prepetition lender was a significant client of the firm in unrelated matters. *In re American Printers & Lithographers, Inc.*, 148 B.R. 862, 864 – 865 (Bankr. N.D.Ill. 1992).

Other courts have found an adverse interest when an attorney represented the debtor corporation's officers (*In re Tauber on Broadway, Inc.*, 271 F.2d 766, 770 (7th Cir. 1959) (under Bankruptcy Act)), served as an officer and director of the debtor corporation (*In re Wells Benrus Corp.*, 48 B.R. 196, 199 (Bankr. D.Conn. 1985)), or co-owned land with the debtor (*In re Patterson*, 53 B.R. 366, 372 – 373 (Bankr. D.Neb. 1985)). *But see In re Capen Wholesale, Inc.*, 184 B.R. 547 (N.D.Ill. 1995) (district court reversed order denying retention of law firm, holding that firm may be retained if partner who had served as corporate officer was screened from representation). However, courts have held that there might not be an adverse interest when an attorney was the mortgagee of the debtor (*In re Martin*, 817 F.2d 175, 183 (1st Cir. 1987) (no per se rule against mortgagee)) or worked for the debtor's competitor (*In re Aircraft Instrument & Development, Inc.*, 151 B.R. 939, 942 (Bankr. D.Kan. 1993)).

The requirement of holding no adverse interest and its difference from the requirement of disinterestedness is particularly important in the retention of a debtor's special purpose counsel under 11 U.S.C. §327(e) or the committee's counsel under 11 U.S.C. §1103(b), as the Bankruptcy Code does not require these counsel to be disinterested but does require that the counsel have no adverse interest.

4. [15.7] Concurrent Representation of Both the Debtor and a Creditor

Section 327(c) of the Bankruptcy Code provides a limited exception to the requirements of remaining disinterested and devoid of any adverse interest:

> **[**A**] person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.** 11 U.S.C. §327(c).

If a creditor (or the United States Trustee) objects to the retention of an attorney based on the attorney's representation of another creditor and the court finds an actual conflict of interest, the court must deny the attorney's application for retention. An actual conflict exists if the attorney's representation of a creditor has or likely will involve matters relating to the debtor's bankruptcy. *See In re Diamond Mortgage Corporation of Illinois,* 135 B.R. 78, 90 (Bankr. N.D.Ill. 1990) ("An actual conflict of interest has been defined as 'an active competition between two interests, in which one interest can only be served at the expense of the other.' "). In the face of a creditor's objection, such actual conflicts cannot be remedied by informed consent or waivers by the debtor or the creditor. *Id.* Thus, the safe harbor of §327(c) is generally limited to a case in which the party seeking to be retained does or has represented a creditor in a completely unrelated matter.

B. [15.8] Debtor's Special Purpose Counsel

The Bankruptcy Code requires less rigorous qualification for counsel that will represent a debtor-in-possession on matters unrelated to the bankruptcy. Section 327(e) of the Bankruptcy Code provides that a debtor-in-possession

> **with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.** 11 U.S.C. §327(e).

This provision allows for the retention of attorneys by the debtor for non-bankruptcy-related matters even though the attorney is not disinterested. *DeVlieg-Bullard, Inc. v. Natale (In re DeVlieg, Inc.),* 174 B.R. 497, 502 (N.D.Ill. 1994). Most courts apply this provision literally and limit the special purpose counsel to matters on which the attorney represented the debtor prior to the bankruptcy. *E.g., In re French,* 139 B.R. 485, 489 (Bankr. D.S.D. 1992). The retention

application for special purpose debtors should identify with specificity the special purpose for which the retention is being sought. Courts will scrutinize the fee applications of special purpose counsel and disallow compensation for work unrelated to the special purpose for which the attorneys were retained.

C. [15.9] Committee's Counsel

Committees appointed under Bankruptcy Code §1102 are authorized, with court approval, to employ legal counsel to help in performing the committees' functions. 11 U.S.C. §1103(a). Bankruptcy Code §1103 reads:

> **(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys . . . to represent or perform services for such committee.**
>
> **(b) An attorney . . . employed to represent a committee . . . may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case.** 11 U.S.C. §1103.

However, the Bankruptcy Code explains that "[r]epresentation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest." 11 U.S.C. §1103(b).

In addition to the requirements that a committee's counsel be properly appointed at a meeting of a majority of committee members and that he or she not represent any other entity having an adverse interest, courts also require that the retention of such counsel be necessary. *E.g.*, *In re Bible Speaks*, 67 B.R. 426, 427 – 428 (Bankr. D.Mass. 1986) (denying retention of multiple cocounsel to unsecured creditors committee as duplicative and unnecessary). See also Federal Rule of Bankruptcy Procedure 2014. While Bankruptcy Code §1103 does not on its face require counsel to a committee to be disinterested, Bankruptcy Code §328(c) gives the bankruptcy court discretion to deny compensation "if at anytime during [the employment of a statutory committee's counsel] such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." 11 U.S.C. §328(c)

D. Application Process

1. [15.10] Retention Application Contents

The contents of an application for the employment of a professional are set forth in Federal Rule of Bankruptcy Procedure 2014. It specifies that an application must include

a. the specific facts showing the necessity for the employment;

b. the name of the person to be employed;

c. the reasons for the selection;

d. the professional services to be rendered;

e. any proposed arrangement for compensation; and

f. to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee.

Furthermore, the application must be "accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed.R.Bankr.P. 2014(a).

It is the purview of the bankruptcy court to determine the significance of the disclosures required under Rule 2014, as such applicants should make all required disclosures regardless of how innocuous they may seem. *In re Tinley Plaza Associates, L.P.,* 142 B.R. 272, 278 (Bankr. N.D.Ill. 1992).

Counsel retained under the Bankruptcy Code is under an ongoing obligation to update its disclosures under Rule 2014. *Id.*

2. [15.11] Nunc Pro Tunc Orders

The Seventh Circuit permits nunc pro tunc retention orders in cases of excusable neglect. The Seventh Circuit has interpreted the Bankruptcy Code to require court approval of retention prior to the rendition of services. However, like the Bankruptcy Code's other time requirements, courts have discretion to approve retroactive orders in cases of "excusable neglect" pursuant to Federal Rule of Bankruptcy Procedure 9006(b)(1). *In re Singson*, 41 F.3d 316, 319 – 320 (7th Cir. 1994). In order to prevail under this standard, the court must determine first "whether the applicant would have been approved upon a timely request," and then the court must determine "the sufficiency of the excuse for delay." *In re Anicom, Inc.,* 273 B.R. 756, 762 (Bankr. N.D.Ill. 2002).

Under the excusable neglect standard, "neglect" has been defined to include cases in which a party's compliance is prevented

> **by forces beyond control, such as by an act of God or unforeseeable human intervention . . . cases where a party [**chooses**] to miss a deadline although for a very good reason, such as to render first aid to an accident victim discovered on the way to the courthouse, as well as cases where a party misses a deadline through inadvertence, miscalculation, or negligence.** *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 123 L.Ed.2d 74, 113 S.Ct. 1489, 1494 (1993).

The determination of whether such neglect is excusable

> **is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.** 113 S.Ct. at 1498.

Furthermore, appellate courts will only review a bankruptcy court's determination of excusable neglect under an abuse of discretion standard. *Singson, supra,* 41 F.3d at 320.

E. [15.12] Sanctions

Except in the rare case in which a court authorizes nunc pro tunc retention, courts will deny compensation for work performed by attorneys post-petition and prior to retention. Furthermore, as the Seventh Circuit has explained, "counsel who fail to disclose timely and completely their connections proceed at their own risk because failure to disclose is sufficient grounds to revoke an employment order and deny compensation." *In re Crivello,* 134 F.3d 831, 836 (7th Cir. 1998).

III. [15.13] COMPENSATION AND FEE APPLICATIONS

While the Bankruptcy Code does allow attorneys and their clients a degree of freedom to structure compensation agreements, professionals are entitled only to compensation from the bankruptcy estate to the extent such compensation agreements comport with the Bankruptcy Code. *In re Chas. A. Stevens & Co.,* 109 B.R. 853, 854 (Bankr. N.D.Ill. 1990). Furthermore, "[e]ven if no objections are raised to a fee application, the Court is not bound to award the fees sought, and in fact has a duty to independently examine the reasonableness of the fees." *In re Alberto,* 121 B.R. 531, 534 (Bankr. N.D.Ill. 1990). Section 330 of the Bankruptcy Code governs compensation of professionals. It reads as follows:

> **(a) (1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103 —**
>
> > **(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and**
> >
> > **(B) reimbursement for actual, necessary expenses.**
>
> **(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.** 11 U.S.C. §330(a).

Section 331 of the Bankruptcy Code, governing interim compensation, reads as follows:

> **A trustee, an examiner, a debtor's attorney, or any professional person employed under section 327 or 1103 of this title may apply to the court not more than once every 120 days after an order for relief in a case under this title, or more often if the court permits, for such compensation for services rendered before the date of such an application or reimbursement for expenses incurred before such date as is provided under section 330 of this title. After notice and a hearing, the court may allow and disburse to such applicant such compensation or reimbursement.** 11 U.S.C. §331.

Generally, courts consider three questions when evaluating a fee application: (a) whether the services that are the subject of the application were preformed pursuant to an order authorizing employment; if so, (b) whether the services were necessary and adequately documented; and if so, (c) how they should be valued. *See, e.g.*, *In re Fry*, 271 B.R. 596, 602 (Bankr. C.D.Ill. 2001); *In re Crivilare*, 213 B.R. 721, 724 (Bankr. S.D.Ill. 1997); *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 485 (Bankr. N.D.Ill. 1992); *In re Wildman*, 72 B.R. 700, 704 – 705 (Bankr. N.D.Ill. 1987).

A. [15.14] Necessary Services and Expenses

While Bankruptcy Code §330(a)(1)(B) permits compensation only for services and expenses that are "actual [and] necessary," §330(a)(3)(C) of the Bankruptcy Code instructs courts to consider "whether the services were necessary to the administration of, or beneficial *at the time at which the service was rendered* toward the completion of, a case under this title." [Emphasis added.] 11 U.S.C. §§330(a)(1)(B), 330(a)(3)(C).

Section 330(a)(4) of the Bankruptcy Code instructs bankruptcy courts to disallow compensation for services that are duplicative, that are not reasonably likely to benefit the debtor's estate, or that are not necessary to the administration of the case. Furthermore, courts have defined "necessary services" as "those that aid the professional's client in fulfilling its duties under the Code." *In re Ben Franklin Retail Store, Inc.*, 227 B.R. 268, 270 (Bankr. N.D.Ill. 1998). Similarly, "[a]n expense is necessary if it was incurred because it was required to accomplish the proper representation of the client. *In re Palladino*, 267 B.R. 825, 833 – 834 (Bankr. N.D.Ill. 2001).

The party seeking compensation "bears the burden of establishing that she is entitled to certain expenses," and courts "will not assume any expense is necessary." 267 B.R. at 833.

Illinois bankruptcy courts have denied compensation for services found to be unnecessary when compensation was sought for preparing and defending a hopelessly unconfirmable plan (*In re Rusty Jones, Inc.*, 134 B.R. 321, 339 – 340 (Bankr. N.D.Ill. 1991)) and for prosecuting a preference claim after it became apparent that the claim would not yield a net gain to the estate (*In re Taxman Clothing Co.*, 49 F.3d 310, 315 – 316 (7th Cir. 1995)).

B. [15.15] Reasonable Compensation

Section 330 of the Bankruptcy Code specifically details several factors for a court's consideration when determining if fees are reasonable. It reads as follows:

> **(3)(A) In determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including —**
>
> **(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 at 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;**
>
> **(E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and**
>
> **(F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.**
>
> **(4)**
>
> **(A) Except as provided in subparagraph (B), the court shall not allow compensation for —**
>
> **(i) unnecessary duplication of services; or**
>
> **(ii) services that were not —**
>
> **(I) reasonably likely to benefit the debtor's estate; or**
>
> **(II) necessary to the administration of the case. . . .**
>
> *** * ***

> **(6) Any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.** 11 U.S.C. §§330(a)(3) – 330(a)(6).

In applying the factors set forth in Bankruptcy Code §330(a), courts often engage in a lodestar analysis and/or consider the *Johnson* factors. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 – 719 (5th Cir. 1974). See §15.17 below.

1. [15.16] Lodestar Approach

The "lodestar" approach assesses the reasonableness of requested compensation by comparing it to the court's estimates of necessary time and reasonable rates. Under the lodestar method, the court first identifies what compensable services were rendered. The court then determines the reasonable number of hours of work necessary to accomplish the compensable service and multiplies this amount by a court-determined reasonable hourly rate. *In re McMullen*, 273 B.R. 558, 562 (Bankr. C.D.Ill. 2002). In arriving at a reasonable number of hours and a reasonable rate, courts will consider "the evidence presented and by the court's own experience and knowledge of customary fees and costs charged in comparable cases." *Id.* Under this approach, if the requested fee amount is less than the lodestar baseline, it typically will be allowed in full; if greater than the baseline, the fee may be reduced to the baseline amount. *Id.*

While the lodestar method is widely used (*In re Coates*, 292 B.R. 894, 900 (Bankr. C.D.Ill. 2003) ("As in most jurisdictions, Illinois courts rely upon the lodestar method to determine the reasonableness of attorney fees.")), it is not the only method of determining the reasonableness of a fee application and may not be appropriate in all cases. *In re Taxman Clothing Co.*, 49 F.3d 310, 315 – 316 (7th Cir. 1995) ("it is only by analogy that the lodestar approach has been applied in bankruptcy, and that the analogy must not be pressed too hard").

2. [15.17] *Johnson* Factors

Courts also have determined the reasonableness of requested fees by considering the factors first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 – 719 (5th Cir. 1974).

> **The twelve *Johnson* factors are as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal services properly; (4) the preclusion of 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 result 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.** *In re McNichols*, 258 B.R. 892, 904 – 905 (Bankr. N.D.Ill. 2001) (applying *Johnson* factors).

It is not unusual for a court to use the *Johnson* factors in addition to or in combination with the lodestar approach. *In re Coates*, 292 B.R. 894, 901 (Bankr. C.D.Ill. 2003) ("after ascertaining

the lodestar figure, courts should also consider . . . the '*Johnson* factors' "); *In re East Peoria Hotel Corp.,* 145 B.R. 956, 962 – 963 (Bankr. C.D.Ill. 1991) ("[T]hough the factors considered under *Johnson*, the "Lodestar" approach and Section 330 of the Bankruptcy Code are not identically termed, there is a sense of harmony between them and a court need not pick one over the others. The end result would be the same, whatever approach was applied."); *In re Stoecker*, 118 B.R. 596, 602 (Bankr. N.D.Ill. 1990) ("All of the *Johnson* factors must be considered in arriving at reasonable compensation for the Trustee, rather than isolating the process through merely a lodestar analysis with adjustments for other factors.")

3. [15.18] Fee Enhancements

Compensation in excess of a reasonable lodestar amount for superior representation is disfavored by bankruptcy courts. *In re UNR Industries, Inc.*, 986 F.2d 207, 211 (7th Cir. 1993) (It is presumed that fee "enhancements are not proper when the compensation awarded is reasonable."). However, courts may consider the experience and special skill of counsel, the quality of representation, and the results obtained in determining the reasonable lodestar amount. *Id.*

C. [15.19] Treatment of Specific Activities

Generally, courts will deny compensation for activities it finds to be excessive, duplicative, or properly accounted for as overhead. Sections 15.20 – 15.25 below detail the treatment of several commonly disputed items.

1. [15.20] Overhead Costs

Attorneys typically recover overhead costs through their hourly billing rate, and thus including such items as expenses on a fee application would result in a windfall to the attorney. *See In re Rusty Jones, Inc.*, 134 B.R. 321, 339 (Bankr. N.D.Ill. 1991). Accordingly, "[o]rdinary firm overhead is not reimbursable." *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 489 (Bankr. N.D.Ill. 1992). Courts have defined overhead as "all continuous administrative or general costs or expenses incident to the operation of the firm which cannot be attributed to a particular client or cost" (*Rusty Jones, supra*, 134 B.R. at 339) and have included as non-compensable overhead charges for postage (*In re Adventist Living Centers, Inc.*, 137 B.R. 701, 719 (Bankr. N.D.Ill. 1991)), messenger service (*id.*), secretarial work (*id.*), secretarial overtime (*In re Convent Guardian Corp.*, 103 B.R. 937, 940 (Bankr. N.D.Ill. 1989)), local meals (*id.*), parking charges (*id.*), photocopying (*id.*), art supplies (103 B.R. at 948), data input (*In re Fry*, 271 B.R. 596, 603 (Bankr. C.D.Ill. 2001)), clerical work (*id.*), and word processing (*In re Churchfield Management & Investment Corp.*, 98 B.R. 838, 864 (Bankr. N.D.Ill. 1989)).

A court also may deny overhead expenses if the fee application does not list the expenses with sufficient detail for the court to assess their necessity. *See, e.g., In re Palladino,* 267 B.R. 825, 834 (Bankr. N.D.Ill. 2001) (denying postage expense in Chapter 13 case for failure "to adequately describe what was mailed to whom and for what purpose").

As it becomes more common outside bankruptcies for law firms to identify and to pass these costs on to their clients, many of the items courts once found to be non-compensable overhead will likely be allowed as expenses. *Compare In re Covent Guardian Corp., supra,* 103 B.R at 940 ("absent extraordinary circumstances, . . . postage charges, messenger service charges, and express mail charges, are overhead and thus noncompensable"), *with In re On Tour, LLC,* 276 B.R. 407, 420 (Bankr. D.Md. 2002) ("This court takes the view that the concept of a reasonable [attorney's] fee encompasses reasonable out-of-pocket expenses incurred by the attorney that are normally charged to the attorney's client. The policy of this court is to allow reasonable expenses incurred for photocopies, telecopies, postage, travel, research, and telephone charges.").

2. [15.21] Travel Time

When travel is necessary, courts will reimburse professionals for their travel expenses. Courts may, however, reduce compensation for nonproductive travel time. *See, e.g., In re Spanjer Brothers, Inc.,* 191 B.R. 738, 755 (Bankr. N.D.Ill. 1996).

3. [15.22] Meals

Generally, bankruptcy courts will not authorize reimbursement for meals unless out-of-town travel is involved. *In re Rusty Jones, Inc.,* 134 B.R. 321, 339 (Bankr. N.D.Ill. 1991); *In re Stoecker,* 114 B.R. 965, 978 (Bankr. N.D.Ill. 1990); *In re Convent Guardian Corp.,* 103 B.R. 937, 942 (Bankr. N.D.Ill. 1989).

4. [15.23] Office Conferences

Courts will authorize compensation for intra-office conferences only when the necessity of each participating professional is adequately explained. *In re Adventist Living Centers, Inc.,* 137 B.R. 701, 716 (Bankr. N.D.Ill. 1991); *In re Wire Cloth Products, Inc.,* 130 B.R. 798, 809, 815 (Bankr. N.D.Ill. 1991); *In re Wiedau's, Inc.,* 78 B.R. 904, 908 (Bankr. S.D.Ill. 1987). Furthermore, in *Adventist Living Centers, supra,* Judge Sonderby of the Bankruptcy Court for the Northern District of Illinois classified various types of office conferences and explained the availability of compensation for each. Judge Sonderby's designations are as follows:

> **1. Direction Conference. In a direction conference one attorney directs another attorney to perform a task. Thus, one attorney is active and the other is passive. The Court will only allow the active attorney to bill for his time.**
>
> **2. Document Review Conference. In a document review conference one attorney reviews another's work product. Again, one attorney is active and the other passive. Thus, the Court will only allow the active attorney to bill for his time.**
>
> **3. Litigation Conference. In a litigation conference one or more of the attorneys from the firm participate in a conference with opposing counsel. The key here is participate. All attorneys are active in the conference. Thus, the Court will allow all attorneys to bill for their time.**

4. Status Conference. In a status conference one attorney advises another as to matters pending in a case and often assigns future work to be performed. Because status conferences incorporate input from everyone involved, the Court will allow all attorneys to charge their time.

5. Strategy Conference. In a strategy conference one or more attorneys determine the course of a case. Because strategy conferences involve input from all parties, the Court will allow all attorneys present to bill for their time.

6. Update Conferences. In an update conference one attorney merely updates another on a case. No further action is required as in a status conference. Accordingly, the Court will allow only the active attorney to bill for his time.

The Court notes that this list of conferences is not exhaustive or all-encompassing. It merely serves as a guideline. The Court cautions counsel, however, against the excessive use of any of the conferences mentioned above. 137 B.R. at 717.

5. [15.24] Fee Application Preparation

Prior to the Bankruptcy Reform Act of 1994, courts were split over whether time spent preparing fee applications was compensable. The Bankruptcy Reform Act of 1994 added Bankruptcy Code §330(a)(6) which makes it clear that time spent preparing fee applications is compensable if it is reasonable. Courts often determine the reasonableness of the time spent preparing the application in relation to the amount of compensation requested in the application. Generally, compensation for the preparation of a fee application will be permitted if it is below three percent of the compensation requested in the application. *In re Churchfield Management & Investment Corp.,* 98 B.R. 838, 887 (Bankr. N.D.Ill. 1989) ("[I]n the absence of unusual circumstances the hours for preparing and litigating the attorney fee applications should not exceed three percent of the total hours."). However, local courts will consider the particular facts of each case and have approved compensation at least as high as ten percent. *See, e.g.,* 98 B.R. at 867. *See also In re Spanjer Brothers, Inc.,* 203 B.R. 85, 93 (Bankr. N.D.Ill. 1996) (reducing to five percent); *In re Alberto,* 121 B.R. 531, 535 – 536 (Bankr. N.D.Ill. 1990) (1.5 hours requested was appropriate); *In re Grabill Corp.,* 110 B.R. 356, 362 (Bankr. N.D.Ill. 1990) (reducing compensable hours from 35.8 to 19).

6. [15.25] Copying Expenses

Generally copying expenses should not exceed ten cents per page. See Judge Black, United States Bankruptcy Court for the Northern District of Illinois, Standing Order No. 4, available at www.ilnb.uscourts.gov/JudgeBlack/StandingOrders/StandingOrder4.pdf (case sensitive); Judge Doyle, United States Bankruptcy Court for the Northern District of Illinois, Standing Order No. 10, available at www.ilnb.uscourts.gov/JudgeDoyle/StandingOrders/10-stand.pdf (case sensitive); Judge Schmetterer, United States Bankruptcy Court for the Northern District of Illinois, Standing Order No. 8, available at www.ilnb.uscourts.gov/JudgeSchmetterer/StandingOrders/so8.pdf (case sensitive).

D. [15.26] Form of Interim and Final Applications

Generally, interim fee applications and final fee applications should follow the same format and contain the same level of detail. *In re McNichols*, 258 B.R. 892, 906 (Bankr. N.D.Ill. 2001) (addressing "misguided impression that because this is an interim application, the Debtor's Counsel is not required to provide the degree of specificity required if it were a final fee application"). Pursuant to Federal Rule of Bankruptcy Procedure 2016(a):

> **An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, [**and**] the source of the compensation so paid or promised.**

Additional disclosures are required when compensation has or will be shared with an entity other than "as a member of a regular associate of a firm of lawyers." *Id.*

The fee application should be filed on the case docket, noticed for a hearing, and served on the United States Trustee. *In re Production Associates, Ltd.*, 264 B.R. 180, 186 (Bankr. N.D.Ill. 2001); Fed.R.Bankr.P. 2014.

Many jurisdictions, including the Northern and Southern Districts of Illinois, have further defined the content of fee applications.

1. [15.27] Local Practice in the Northern District of Illinois

The bankruptcy courts of the Northern District of Illinois have further defined the form and content of a fee application in Bankruptcy Rule 5082-1. Under N.D.Ill.Bankr.R. 5082-1, all fee applications "shall begin with a completed and signed *cover sheet* in a form approved by the court and published by the clerk," and "also include both a *narrative summary* and a *detailed statement* of the applicant's services for which compensation is sought." [Emphasis added.].

a. [15.28] Cover Sheet

The clerk has not published a form specifically identified as the cover sheet referred to in 5082-1. The cover sheet that is generally used, however, sets forth the name of the applicant, the date on which the court entered the order authorizing the applicant's retention, the time period covered by the applicant's fee application, the amount of fees and expenses sought, a summary of all earlier applications that have been filed and the amounts allowed by the court, and a statement of the amount paid to the applicant to date.

b. [15.29] Narrative Summary

Under Northern District of Illinois Bankruptcy Rule 5082-1, the narrative summary should include

> **(a) a summary list of all principal activities of the applicant, giving the total compensation requested in connection with each such activity;**
>
> **(b) a separate description of each of the applicant's principal activities, including details as to individual tasks performed within such activity, and a description sufficient to demonstrate to the court that each task and activity is compensable in the amount sought;**
>
> **(c) a statement of all time and total compensation sought in the application for preparation of the current or any prior application by that applicant for compensation;**
>
> **(d) the name and position (partner, associate, paralegal, etc.) of each person who performed work on each task and activity, the approximate hours worked, and the total compensation sought for each person's work on each such separate task and activity;**
>
> **(e) the hourly rate for each professional and paraprofessional for whom compensation is requested, with the total number of hours expended by each person and the total compensation sought for each;**
>
> **(f) a statement of the compensation previously sought and allowed;**
>
> **(g) the total amount of expenses for which reimbursement is sought, supported by a statement of those expenses, including any additional charges added to the actual cost to the applicant.**

Furthermore, the narrative summary should "conclude with a statement as to whether the requested fees and expenses are sought to be merely allowed or both allowed and paid. If the latter, the narrative summary shall state the source of the proposed payment." *Id.*

c. [15.30] Detailed Statement of Services

The detailed statement of services may consist of the applicant's detailed time records. "Such statement shall be divided by task and activity to match those set forth in the narrative description. Each time entry shall state: (1) the date the work was performed, (2) the name of the person performing the work, (3) a brief statement of the nature of the work, and (4) the time expended on the work in increments of tenth of an hour." Northern District of Illinois Bankruptcy Rule 5082-1.

d. [15.31] Sanctions

Failure to comply with Northern District of Illinois Bankruptcy Rule 5082-1 "may result in reduction of fees and expenses allowed. If a revised application is made necessary because of any failure to comply with provisions of this Rule, compensation may be denied or reduced for preparation of the revision. The court may also excuse or modify any of the requirements of this Rule."

2. [15.32] Local Practice in the Southern District of Illinois

The local rules for the bankruptcy courts of the Southern District of Illinois require that fee applications must conform to the requirements set forth in *In re Wiedau's, Inc.,* 78 B.R. 904 (Bankr. S.D.Ill. 1987). Pursuant to *Wiedau's,*

all fee applications will be reviewed and evaluated in accordance with the following requirements:

1. *Itemized Daily Entries.* A proper fee application must list each activity, its date, the attorney who performed the work, a description of the nature and substance of the work performed, and the time spent on the work. Records which give no explanation of the activities performed are not compensable.

2. *Particular Entries.*

***Telephone Calls.* An entry of "telephone call" or even "telephone call with Mrs. X" is insufficient. The purpose of the conversation, and the person called or calling, must be clearly set out.**

***Conferences.* Similarly, an entry of "conference" or "meeting," "conference with X" or "conversation with X" is insufficient. The entry should at the very least note the nature and purpose of the various meetings and conferences as well as the parties involved.**

***Drafting Letters or Documents.* Time entries for drafting documents should specify the document involved and the matter to which it pertains. Time entries for drafting letters should briefly set forth the nature of each letter and to whom it was addressed.**

***Legal Research.* Entries of "research," "legal research" or "bankruptcy research" are insufficient. The nature and purpose of the legal research should be noted. In addition, the entry should indicate the matter or proceeding for which the research was utilized.**

***Other Entries.* Time entries for other activities, such as court appearances, preparation for court appearances, and depositions should also briefly state the nature and purpose of the activity.**

3. *"Lumping."* Applicants may not circumvent the minimum time requirement or any of the requirements of detail by "lumping" a number of activities into a single entry. Each type of service should be listed with the corresponding specific time allotment. Otherwise, the Court is unable to determine whether or not the time spent on a specific task was reasonable. Therefore, services which have been lumped together are not compensable.

4. *Abbreviations.* If abbreviations are used in the itemized daily entries, they must be explained somewhere in the application. Unexplained abbreviations will render the time entry not compensable.

5. *Prior Fee Applications.* In addition to the above requirements, the application should state those fees, if any, that were previously approved by the Court. Such entry shall include the date of the approval of the prior application or applications and the amount of fees and expenses approved.

While the above requirements help to establish that the services performed were "actual," the court must also determine that the services were necessary. This determination will be made in accordance with the following requirements:

1. *Individual Responsibility.* Generally, attorneys should work independently, without the incessant "conferring" that so often forms a major part of many fee petitions. Examples of the kind of work for which only one attorney will be compensated are:

***Conferences.* While some intraoffice conferences may be necessary, no more than one attorney may charge for it unless an explanation of each attorney's participation is given.**

***Court Appearances.* When more than one attorney appears in court on a motion or argument or for a conference, no fee should be sought for non-participating counsel. Attorneys should not circumvent this requirement by merely rotating or taking turns participating at a single court appearance.**

***Depositions. Absent special circumstances.* One attorney is sufficient to handle any deposition or §2004 examination.**

2. *Appropriate Level of Skill.* Senior partner rates will be paid only for work that warrants the attention of a senior partner. A senior partner who spends time reviewing documents or doing research a beginning associate could do will be paid at the rate of a beginning associate. Similarly, non-legal work performed by a lawyer which could have been performed by less costly non-legal employees should command a lesser rate (*e.g.*, copying or delivering documents).

3. *Legal Research.* Counsel who are sufficiently experienced to appear before this Court are presumed to have an adequate background in the applicable law. While it is recognized that particular questions requiring research will arise from time to time, no fees will be allowed for general research on law which is well known to practitioners in the area of law involved.

4. *Document Review.* Fees are not allowable for simply reading the work product of another lawyer as a matter of interest. Only if such review is required to form some kind of response or to perform a particular task in the case will document review be compensable.

5. *Routine Services.* Some courts have held that "routine and ministerial services," that is, telephone calls and correspondence, should be compensated at a lower rate than "truly legal services," such as litigation, research and document drafting. In this Court's view, this is an unwarranted distinction which is contrary to the fundamental notion that counsel should be encouraged to resolve matters informally whenever possible in order to avoid costly litigation.

6. *Fee Petition Preparation.* In [*In re Wildman,*** 72 B.R. 700 (Bankr. N.D.Ill. 1987)**], the court held that attorneys should be compensated for time spent in preparing fee applications. *Id.* at 710. However, other courts have held that fee petition preparation time is not compensable. *See, e.g., In re Wilson Foods Corp.,* 36 B.R. 317, 323 (Bankr. W.D.Okla. 1984). This Court agrees. Time spent preparing a fee petition "is not properly a service rendered on behalf of the debtor-estate, but a necessary expense of doing business." *Id.* at 323. Therefore, absent unusual circumstances, such fee requests shall be denied.** 78 B.R at 907 – 909.

E. [15.33] Disgorgement of Interim Compensation and Holdbacks

"[A]ll interim awards of attorney's fees in bankruptcy cases are tentative." *In re Taxman Clothing Co.,* 49 F.3d 310, 312 (7th Cir. 1995). Accordingly, courts may reconsider the necessity or reasonableness of services previously compensated under an interim application and order the disgorgement of awarded compensation. *See, e.g.,* 49 F.3d at 316. Additionally, "[w]here insufficient assets dictate pro rata distribution among a class of creditors, the court must revisit the propriety of any interim awards in light of the final schedule of priorities and the principle that claimants of one class are entitled to be reimbursed on an equal basis." *In re Kids Creek Partners, L.P.,* 219 B.R. 1020, 1022 (Bankr. N.D.Ill. 1998).

To prevent against the difficulties inherent with disgorgement, many courts find it preferable to grant only a portion of the requested interim compensation creating a held-back amount (often referred to as the "holdback"), thus permitting the court to reduce final compensation without requiring disgorgement. *See, e.g., In re Alberto,* 121 B.R. 531, 538 – 539 (Bankr. N.D.Ill. 1990). *See also In re Pettibone Corp.,* 74 B.R. 293, 302 (Bankr. N.D.Ill. 1987) ("Section 331 does not require . . . that the Court shall grant the full amount of the interim fee, even if the services were actual and necessary."). If upon consideration of the final application, the court finds no ground to reduce compensation, the court will authorize the payment of the holdback. The amount of the holdbacks will vary depending on the nature of the services and the facts of the case.

F. [15.34] Fee Applications in Mega Cases

It is not unusual for courts to vary fee application procedures in very large cases. Often, courts will enter orders allowing for the monthly payment of compensation less a holdback, followed by interim and final applications. Furthermore, in such large cases, the United States Trustee may request that applications be accompanied by computerized time and expense records, allowing for easier review. Additionally, the court may approve a fee review committee comprised of interested parties and a representative of the United States Trustee's Office to review and informally and formally resolve disputed matters.

G. [15.35] Timekeeping

"A proper fee application must list each activity, its date, the attorney who performed the work, a description of the nature and substance of the work performed and the time spent on the work." *In re Adventist Living Centers, Inc.*, 137 B.R. 701, 705 (Bankr. N.D.Ill. 1991). Such specificity is required to enable the court to determine if services were reasonable and necessary. Accordingly, courts require time entries for telephone calls, conferences, and letters to state the purpose or nature of the service and the persons involved.

Similarly, applicants should not "lump" several services into one entry. Each service should be listed in a separate entry. Courts routinely deny compensation for those entries that contain "lumping." *Id. See also In re Fry,* 271 B.R. 596, 602 (Bankr. C.D.Ill. 2001); *In re Crivilare,* 213 B.R. 721, 724 (Bankr. S.D.Ill. 1997); *In re Stoecker,* 114 B.R. 965, 972 (Bankr. N.D.Ill. 1990); *In re Pettibone Corp.*, 74 B.R. 293, 302 (Bankr. N.D.Ill. 1987).

Furthermore, bankruptcy courts generally require applicants to record their time in one tenth of an hour increments. Northern District of Illinois Bankruptcy Rule 5082-1; *In re Spanjer Brothers, Inc.*, 203 B.R. 85, 95 (Bankr. N.D.Ill. 1996); *In re Wire Cloth Products, Inc.*, 130 B.R. 798, 809, 808 n.2 (Bankr. N.D.Ill. 1991); *Adventist Living Centers, supra*. Courts will reduce compensation for services recorded in larger time increments. *See, e.g., Spanjer Brothers, supra; Adventist Living Centers, supra*.

H. [15.36] Prepetition Retainers

Much has been written regarding the propriety of prepetition retainers serving as compensation for post-petition work. Courts have identified three types of retainers under Illinois law:

1. classic retainer — characterized in that "it is earned by the lawyer upon receipt, without the lawyer being required to provide any legal services." *In re Production Associates, Ltd.*, 264 B.R. 180, 184 – 185 (Bankr. N.D.Ill. 2001).

2. security retainer — under which an "attorney holds the funds advanced by the client to cover future legal work." 264 B.R. at 185.

3. advance payment retainer — under which an "attorney receives payment in advance for legal work to be performed in the future" and distinguished from the security retainer in that the "advance retainer is intended as a present payment to the lawyer for his agreement to represent the client. However, the payment is refundable if the representation ends before services equal to the payment amount are performed." *Id.*

Contrary to most bankruptcy courts and based on Illinois law, Illinois bankruptcy courts hold that a classic retainer does not become property of the estate (except if successfully challenged as a preference) and can be drawn on freely by the retained counsel without court approval. Security retainers do become property of the estate and cannot be drawn on without court approved retention and compensation. 264 B.R. at 186 – 190. However, Illinois courts are split on the treatment of advance payment retainers with most holding that such retainers are property of the estate to the extent the estate retains a right to refund. *Id.* However, all retainers must be disclosed in any retention application. 264 B.R. at 186, 190. *See also In re Sheridan,* 215 B.R. 144 (Bankr. N.D.Ill. 1996); *Meeker v. Germeraad (In re Quincy Air Cargo, Inc.),* 155 B.R. 193 (Bankr. C.D.Ill. 1993); *In re McDonald Bros. Construction, Inc.,* 114 B.R. 989 (Bankr. N.D.Ill. 1990).