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Attorney Compensation in Chapter 13 Cases and Related Matters

Presented by

David S. Kennedy
Chief United States Bankruptcy Judge
Western District of Tennessee

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Atlanta, Georgia

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David S. Kennedy[*]

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[*]David S. Kennedy is the Chief Judge of the United States Bankruptcy Court for the Western District of Tennessee. Judge Kennedy extends a special thanks and acknowledgment to Brent Alan Heilig, Bankruptcy Extern from the University of Memphis School of Law, and Vanessa Alexandra Lantin, Esquire, his current Law Clerk, for their major contributions to this Article.

I. Introduction and Broad Overview of Attorney Compensation in Chapter 13 Cases and Related Matters

It has been said that no aspect of practice and procedure under the Bankruptcy Code ("Code") is more susceptible to local variation than that under chapter 13. The various differences among the judicial districts involving case management and administration of estates under chapter 13 of the Code can be attributed to a composite of traditional reasons including: statutory and procedural differences in state collection practices and exemption laws; the structure of home ownership and mortgage recording procedures; eviction and foreclosure rates; and the local attitudes of the bench, bar, and public in favor of fostering repayment of debts over seeking relief under the liquidating provisions of chapter 7 of the Code.

Treatment concerning the allowance, disallowance, collection, payment, and actual receipt of attorney fees in chapter 13 cases are understandably matters of vital interest to the members of the bench and bar, and are likewise susceptible to significant local variation. Bankruptcy judges have the statutory power and ultimate responsibility under the Code to allow or disallow attorney fees in chapter 13 cases. Of course, the allowance or disallowance of fees is subject to the subsequent filing of a motion by a party (1) to alter or amend the order allowing or denying requested attorney's fees or for a new trial pursuant to FED. R. BANKR. P. 9023 or (2) of a notice of appeal triggering the traditional appellate review process under 28 U.S.C. § 158.

The recent emergence of multiple issues involving the various treatment of attorney compensation in chapter 13 cases by local bankruptcy courts continues to engender much attention, discussion, and debate. Notable is the creative response of the bankruptcy courts to the growing number of attorney fee applications and the efforts made to streamline judicial supervision and review of these applications. For several years now, bankruptcy courts throughout the nation have experimented with the adoption and implementation of an attorney fee award approach aimed at

standardizing and expediting compensation for debtor's attorneys in routine chapter 13 cases. One common method many judicial districts utilize, especially in high volume chapter 13 districts, is to set up a uniform fee review system that creates so-called "off-the-rack" or "no look" guidelines for debtor's attorneys' fees (*i.e.*, a preset or standard presumptive fee) based on local and practical considerations. Attorney fees based upon these uniform fee guidelines are presumptively reasonable without further fee related action on the part of the debtors' attorneys or the courts (although the bankruptcy courts always reserve and retain the right and statutory responsibility, predicated primarily on reasonableness standards and equitable considerations, to reduce or increase local, preset, standard or "no look" presumptive fees when appropriate to do so).

Generally, this standardized attorney fee review process establishing presumptively valid or "no look" attorney compensation in chapter 13 cases is controlled by local rules or guidelines promulgated in most judicial districts. While certain inherent safeguards should accompany any standardized procedure which allows for an automatic fee awards in order to prevent situations of abuse, it can be argued that use of presumptive fee guidelines makes, among other things, pragmatic sense. First, creation of standardized or uniform fee guidelines helps to relieve the chapter 13 trustees and the bankruptcy courts of the administrative burden of reviewing each and every attorney fee application. Due to the large numbers of chapter 13 cases, the burden to the bankruptcy courts in reviewing, and thereafter ruling on fee applications of debtors' attorneys in every chapter 13 case is great. An overly technical fee review process in all cases can strain the offices of the chapter 13 trustees and the courts, especially in the high volume chapter 13 districts. However, this burden is significantly lifted in the so-called "no look" districts. Second, creation of standardized or uniform fee guidelines for chapter 13 cases fosters an apparent acceptable degree of uniformity at the bankruptcy court level in the judicial

districts that utilize this unique and creative fee review process. Third, a standardized or uniform fee application process encourages predictability and efficiency for all "players" in a chapter 13 case.

Although the award of attorney fees is ultimately the bankruptcy judge's responsibility, effective review of fee requests not surprisingly requires parties in interest (*e.g.*, the chapter 13 trustee or a creditor) to inform the court via formal objections concerning whether a particular requested fee suggests or indicates that the compensation sought is unreasonable and inappropriate. If an objection is made to the fee request, after notice to the parties in interest, a court hearing will be conducted to determine the reasonableness of the fee. Standardized or uniform fee guidelines ameliorate any need for intensive and unduly time consuming scrutiny of attorney fee requests by a party in interest and the court in most chapter 13 cases. Incentive also is created for the debtors' attorneys to work as efficiently and effectively as possible in order to capitalize on the presumptive fee and avoid wasting time attending additional hearings to determine the reasonableness of the attorney's fee. As a result, the court dockets are cleared of numerous fee application hearings that otherwise would have to be considered and ruled upon by the courts on a case-by-case basis.

Additional compelling reasons exist for the use of presumptively valid or qualified "no look" local fee guidelines in the vast majority of chapter 13 cases and will be discussed in more detail below. Also discussed below is the ostensible argument that a debtor's attorney should be permitted when appropriate to apply for and receive additional compensation when the presumptive "no look" fee does not fairly and equitably compensate the attorney. Instances where additional compensation necessarily arise in chapter 13 cases are where, for example, unexpected litigation occurs or unanticipated post-petition services are required. It is scenarios such as these (*i.e.*, unexpected litigation) that may result in the presumptive "no look" fee being exceeded by the debtor's attorney. Still the rate of compensation for additional services remain subject to review by parties in interest and the court; and

the court may reduce the amount claimed by virtue of Section 329(b) if it finds the requested fee to be excessive. Of course parties in interest (*e.g.*, creditors and/or chapter 13 trustees) or the court, on its own initiative, may request and trigger judicial hearings to determine the reasonableness of the requested additional fee, or for that matter, review the reasonableness of the initial local preset or "no look" fee itself. Such scrutiny could possibly result in the "no look" fee being reduced, in part in a particular case. This is to say that judicial fee review exits as a safeguard mechanism to prevent windfalls or unfairness regarding fair and equitable fee awards and disbursements. Interestingly, where such standardized fee processes exist, market competition itself oftentimes drives attorneys' fees down below the local chapter 13 "no look" fee.

In summary, most judicial districts, either by local rule, standing administrative order, local unpublished opinion, or local guidelines set presumptively valid debtors' attorneys' fees in the vast majority of chapter 13 cases which result in no required fee hearing and the elimination of traditional time records to support such "no look" fees in the vast majority of chapter 13 cases. Requested attorneys' fees in the "no look" fee districts that do not exceed the local presumptive or customary amount need not be accompanied by a traditional fee application (and supporting time records) under section 331 or 330 and FED. R. BANKR. P. 2016, and do not require traditional notice to all creditors and parties in interest or a court hearing as ordinarily mandated by FED. R. BANKR. P. 2002(a)(6).[1]

The obvious by-product effect of the presumptive "no look" fee approach is that initially no formal court hearings are required, and the debtors' attorneys are not expected to maintain traditional time records to be filed with the bankruptcy court to support the presumptive "no look" fee. In the event a larger fee is later requested, the chapter 13 debtor's attorney must file with the court a

[1]FED. R. BANKR. P. 2002(a)(6) does not require a hearing on any entity's request for compensation or reimbursement of expenses if the request is less than $1,000. The chapter 13 plan itself, if properly reflected, may include a fee request as a permissive plan provision under 11 U.S.C. § 1322(a)(10). A party in interest or the court, acting sua sponte, may object to confirmation of the plan that includes an objectionable fee provision. 11 U.S.C. §§ 1324 and 105(a).

traditional fee application and submit proper supporting time records to justify the requested enhanced fee to be considered at a court hearing, after notice to all parties in interest and opportunity for a hearing. At this hearing, the chapter 13 trustee, other parties in interest, and the court may review the requested additional fee based upon a proper determination of its reasonableness, utilizing factors such as market rates or the "lodestar" approach.

As stated earlier, the various issues surrounding attorney compensation in chapter 13 cases have engendered much attention and debate among attorneys, judges, and legal scholars. Some commentators contend that chapter 13's presumptively valid attorney fee guidelines are merely nothing more than a presumption that such requested compensation is reasonable if paid in the amounts and in the manner prescribed by local guidelines. It is further argued that these fee guidelines can be harmonized with other courts' determinations based on the current local market rates and the traditional "lodestar" approach. In contrast, other commentators assert that the presumptive "no look" fees artificially inflate attorneys' fees in chapter 13 cases and impermissibly violate traditional determinations of reasonableness based on the "lodestar" approach.

The following related questions, among others, also have been raised regarding attorney compensation in chapter 13 cases: Do larger debtors' attorneys' fees in chapter 13 cases influence that chapter's choice over chapter 7? It has been suggested that it does.[2] Are larger debtors' attorneys' fees in chapter 13 cases a carrot or incentive for some attorneys to inappropriately encourage clients to file cases under chapter 13 instead of chapter 7 cases? It has been suggested that they are.[3] Are chapter 13 debtors' attorneys' fees more generous in the high volume chapter 13 districts? A recent survey undertaken by the National Association of Consumer Bankruptcy Attorneys ("NACBA"), authored by

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[2]See Jean Braucher, *Increasing Uniformity in Consumer Bankruptcy: Means Testing as a Distraction and the National Bankruptcy Review Commission's Proposal as a Starting Point*, 6 AM. BANKR. INST. L.R. 1, 21 (1998).

[3]See Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts*, 17 HARV. J.L. & PUB. POL'Y 801, 844 (1994).

Norma Hammes, Esquire, provides no evidence to support the claim that high debtors' attorneys' fees inappropriately increase the percentage of chapter 13 filings within a given district.[4] See "Appendix A." .

Consumer bankruptcy practitioners, trustees, and judges, alike, generally recognize that there are many factors which either encourage or discourage the filing of chapter 13 cases. State exemptions and local economic conditions may affect the advisability of filing a chapter 7 and consequently may affect the chapter 13 case filing rate. The degree of local enforcement of section 110 regarding "bankruptcy petition preparers" also may affect the chapter 13 case filing rates. In addition, local attitudes and interpretations by chapter 13 trustees, U.S. trustees, bankruptcy administrators, and judges regarding substantive issues such as, for example, "good faith" in chapter 13 case and plan filings, section 707(b) ("substantial abuse") issues, the treatment of home mortgage arrearages, and the debtor's ability to modify chapter 13 plans after confirmation - strongly affect chapter 13 case filing rates. The NACBA surveyed a geographic sample of its members, requesting data about attorneys' fees normally allowed in their area, the method of paying those fees, and the duties of the attorneys in chapter 13 cases. The NACBA survey reflects that fee limits are either imposed by local chapter 13 guidelines or by local practice adopting the presumptive "no look" fee approach because no time records are required to be kept.[5]

This Article also addresses and attempts to provide insight into numerous related issues that typically surround attorney compensation in chapter 13 cases. The issues discussed below include the following:

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[4]This valuable and thoughtful survey of the National Association of Consumer Bankruptcy Attorneys is being used and cited here with the permission of its author, Norma Hammes, Esquire.

[5]*Id.*

- insuring the collection of attorneys' fees as permissive plan provisions under confirmed chapter 13 plans: reasonable fee amounts, market rates, "lodestar" rates, or "no look" fees;

- grounds for and likelihood of successfully attaining court approved awards for additional compensation;

- the chapter 13 trustees' and bankruptcy courts' general views on awarding additional compensation to debtors' attorneys in chapter 13 cases;

- the scope of counsel's duty to represent the debtor beyond services initially agreed upon, limited representation ("unbundling"), "ghostwriting," and counsel's ongoing duties beyond confirmation of the chapter 13 plan; and

- withdrawal of the chapter 13 debtor's counsel from legal representation and grounds for such withdrawal.

II. Insuring Collection of Attorneys' Fees Under Chapter 13 Confirmed Plans: Reasonable Amount, Market Rates, "Lodestar" Rates, or "No Look" Fees

Although attorney fees in bankruptcy cases are of vital interest to the bar, the subject matter itself is not unduly complicated. A general review of sections 327, 328, 329, 330, 331, 503(b), and 507(a)(1) of the Code and FED. R. BANKR. P. 2016 and 2002(a)(6) are most helpful to attorneys seeking guidance and knowledge of attorney fee matters. The following discussion is primarily devoted to attorney compensation in consumer chapter 13 cases (although the basic structure of the Code's fee disclosure and fee application procedures in consumer cases also generally applies to attorney fees considerations in chapter 11 cases with limited exceptions). Unlike the former Bankruptcy Act, section 330(a) of the Code mandates that attorneys be awarded reasonable fees at comparable value with similar services performed in other areas of the law. This is a welcomed new fee philosophy.

The attorney fee review process under the Code, the Federal Rules of Bankruptcy Procedure, and local guidelines should lead to both the reality and the perception that the fees awarded by the bankruptcy courts are reasonable and necessary under the particular circumstances. An attorney ordinarily is entitled to be compensated for services performed pursuant to contract of the parties and

may collect a reasonable fee prior to filing a case under the Code. However, such fees are always subject to scrutiny and review by parties in interest and the bankruptcy court. Unlike chapter 11 cases, the chapter 13 debtor's attorney does not have to obtain prior court approval via an order of employment under section 327(a) for legal representation of the debtor.

One of the threshold issues a chapter 13 debtor's attorney and a new client should discuss is the basic fee and what professional services it actually covers. The best way to avoid future problems concerning these fee matters is through a written fee agreement that states the exact services covered by the basic fee, usually the initial consultation, the preparation and filing of all required bankruptcy "papers," attendance at the section 341(a) meeting of creditors, the chapter 13 confirmation hearing if one is held, etc. Ideally and in a perfect situation, the financially distressed chapter 13 debtor will have sufficient monetary funds to pay his/her attorney in full by way of a lump sum amount for all reasonable and necessary services rendered prior and subsequent to filing the chapter 13 case. It comes as no surprise to the bench and bar that this is not likely to frequently occur in the unique and real world of bankruptcy cases. Due to the financial vulnerability of most individual debtors and the disparity among local attorney fee guidelines found throughout the 90 bankruptcy judicial districts, situations arise more often than not where the debtor's attorney must be satisfied to seek to collect all or part of his/her fees as a permissive plan provision under the confirmed chapter 13 plan in deferred installment payments to be made by the debtor and distributed by the chapter 13 trustee as disbursing agent. It should be emphasized here that the attorney should be certain to provide the court with full disclosure regarding the fee arrangement.

To the extent that the debtor's attorney's fee is not collected by the attorney prior to filing of the chapter 13 case, the outstanding balance, as noted, may be paid with court approval under the chapter 13 debtor's confirmed plan via deferred installment payments (*i.e.*, under the "plan payment

option"). While the court shall confirm the chapter 13 plan if it meets the statutory requirements for confirmation,[6] the court does not have to automatically approve the amount of attorney's fees requested and set forth in the debtor's fee disclosure statement and proposed plan.[7] Rather, the court may either approve the compensation paid or to be paid to the chapter 13 debtor's attorney, deny compensation in full or part, cancel the agreement to pay compensation, or order the full or partial return or disgorgement of compensation paid, if, for example, such compensation exceeds the reasonable value of the professional services actually rendered.[8] The traditional requirement that all attorney's fees be subject to court approval is found in section 329 of the Code (plus the inherent authority of the court) and ordinarily requires the attorney to file a formal fee application with the court detailing the amount paid or agreed to be paid to the attorney for services rendered or to be rendered in contemplation of or in connection with the chapter 13 case.[9]

Section 330 of the Code provides the statutory authority for awarding final attorney fees and reimbursement of expenses out of the bankruptcy estate created under sections 541(a) and 1306(a), and prescribes the standards according to what amount of reasonable compensation is to be considered and eventually awarded by the court. Section 330 ordinarily authorizes the bankruptcy court to hear and determine the amount of reasonable compensation allowable based on considerations of, for example,

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[6]11 U.S.C. § 1325(a)(1) through (6) enumerates the six basic statutory requirements that must be met before a court can confirm a plan.

[7]11 U.S.C. § 330(a) provides that after notice and hearing, the court may award "reasonable compensation for actual, necessary services rendered ... and reimbursement for actual, necessary expenses." See also 11 U.S.C. §§ 1322(a)(10), 507(a)(1), and 1322(a)(2).

[8]11 U.S.C. § 329(b); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 329 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 39-40 (1978)(indicating that payments to debtor's attorney could be detrimental to debtor's fresh financial start, and should therefore be subject to careful scrutiny). However, the requirement for prior court approval of employment does not apply to an attorney representing a debtor in a chapter 13 case. *See* 11 U.S.C. § 327.

[9]11 U.S.C. § 329. *See also* FED. R. BANKR. P. 2016 and 2017 (implementing § 329 by requiring the attorney to disclose the fee arrangement for services in any way related to debtor's case and authorizing examination of the fee arrangement by the court).

whether the attorney's services are likely to benefit the debtor (or the debtor's estate), and are reasonable and necessary to the administration of the bankruptcy case and estate.[10] While section 330(a)(4)(A) of the Code governs the calculation of reasonable and necessary fees to the extent an attorney's services benefit the estate, section 330(a)(4)(B) carves out an exception for a chapter 13 debtor's attorney. Section 330(a)(4)(B) provides:

> In a chapter 12 or chapter 13 case in which the debtor is an individual, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

If a court awards compensation and/or reimbursement of expenses under section 330(a) to any entity described in that section, the amount of such compensation or reimbursement of expenses is entitled to priority status as an administrative expense to be dealt with under sections 503(b)(2), 507(a)(1), and 1322(a)(12).[11] As a result, attorney fees are categorized and allowed as administrative expenses and receive first distribution priority over most other claims against the debtor and the bankruptcy estate.[12] Such administrative expenses, as long as they are reasonable and necessary, must

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[10] 1011 U.S.C. § 330(a)(4)(A)(ii) – (B). Although the statutory language of § 330(a)(4)(B) clearly provides authority for the court to award compensation to debtors' attorneys in chapter 13 cases, the reference to "the debtor's attorney" as one of the persons who could be paid professional fees was omitted from section 330(a) when amended in 1994. This glaring omission sparked significant controversy and debate among the varying circuits that was finally resolved by the Supreme Court's decision in Lamie v. U.S. Trustee, 124 S.Ct. 1023 (2004). In Lamie, the Supreme Court agreed with the holdings of the Fourth, Fifth, and Eleventh Circuits that this omission repealed the authority for court to award compensation to the debtor's attorney in either chapter 7 or chapter 11 cases. In re Equipment Servs., Inc., 290 F.3d 739 (4th Cir. 2002); In re Am. Steel Product Inc., 197 F.3d 1354 (11th Cir. 1999); In re Pro-Snax Dist. Inc., 157 F.3d 414 (5th Cir. 1998). It therefore rejected the decisions of the Second, Third, Sixth and Ninth Circuits that the omission of the "debtor's attorney" from section 330(a) was an inadvertent drafting error, and that the court may still award compensation from the estate for services rendered and expenses incurred. In re Top Grade Sausage, 227 F.3d 123 (3d Cir. 2000); In re Eggleston Works Loudspeaker Co., 253 B.R. 519 (B.A.P. 6th Cir. 2000); In re Century Cleaning Servs. Inc., 195 F.3d 1053 (9th Cir. 1999); In re Ames Dep't. Stores Inc., 76 F.3d 66 (2d Cir. 1996).

[11] 11 U.S.C. § 507(a)(1) provides that administrative expenses under section 503(b) receive priority status over unsecured claims against the bankruptcy estate. Section 503(b) in turn provides that compensation and reimbursement of expenses awarded under section 330(a) are allowed administrative expenses when approved by the court. Section 330 provides the statutory authority for compensating the services and reimbursing the expenses of officers of the estate including attorneys in chapter 13 cases.

[12] *See supra*, note 7.

be paid in full under the debtor's chapter 13 plan according to their priority status.[13] While section 1322(a)(2) permits unsecured priority claims to be paid in full under the plan, section 1326(b)(1) controls the timing of such payments by allowing them to be made either before or contemporaneously with the plan payments to other priority creditors.[14]

The precise manner and timing in which attorneys' fees are to be paid in chapter 13 cases (*i.e.*, the "plan payment option") vary greatly throughout the nation's bankruptcy courts. Some courts refuse to allow attorneys' fees to be paid in full under the plan before other claims (*e.g.*, secured claims), and instead spread the payment of attorney's fees via deferred installment payments over the term or life of the plan - provided that the attorney's fees are paid no later than the first payment under the plan to other creditors.[15] Other courts have approved the payment of attorneys' fees first, stating that section 1322(a)(2) expressly permits payment of all administrative expenses before any other claims are paid under the plan.[16] In any event, it is not uncommon for all or part of the chapter 13 debtor's attorney's fees to be paid contemporaneously with the claims of pre-petition creditors under confirmed plans.

In order to determine "the nature, the extent and the value" of the services, a bankruptcy court may consider and invoke, among other things, the market rate, contractual rate agreed to by the parties,

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[13] 11 U.S.C. § 1322(a) ("[t]he plan shall provide for full payment of all claims entitled to priority under section 507 ... unless the holder of a particular claim agrees to a different treatment of such claim").

[14] 11 U.S.C. § 1326(b)(1).

[15] *See, e.g., In re Palombo*, 144 B.R. 516 (Bankr. D. Colo. 1992); *In re Barbee*, 82 B.R. 470 (Bankr. N. D. Ill. 1988); *In re Lanigan*, 101 B.R. 530 (Bankr. N.D. Ill. 1986); *In re Parker*, 21 B.R. 692 (E.D. Tenn. 1982).

[16] *See, e.g., In re Pedersen*, 229 B.R. 445 (Bankr. E.D. Ca. 1999); *In re Hallmark*, 225 B.R. 192 (Bankr. C.D. Cal. 1998); *In re Shorb*, 101 B.R. 185 (B.A.P. 9th Cir. 1989); *In re Tenney*, 63 B.R. 110 (Bankr. W.D. Okla. 1986). *But see In re Busetta-Silvia*, 300 B.R. 543 (D.N.M. 2003) (the court held that guided by the overriding pre-petition/post-petition considerations in the Code and absent any statutory language to the contrary, the court could not rule that the chapter 13 attorney's fees that he earned in connection with pre-petition services could not be entitled to priority as an administrative expense but rather would be treated as any other unsecured debt and paid the same pro-rata percentage as other unsecured debts).

or "loadstar" rate in awarding compensation. Under the "lodestar" method of attorney fee calculation (*i.e.*, hours - times - dollar rate), one typically multiplies the attorney's reasonable hourly rate by the number of hours reasonably expended.[17] The traditional "lodestar" method of calculating fee awards has recently been questioned regarding whether it is in reality the best method to use, in determining reasonable compensation, especially in the chapter 13 context. It has been argued that the "lodestar" approach rewards inefficiency because law firms have no incentive to limit the number of attorneys assigned to the case or the number of hours that are worked.

As previously mentioned, most bankruptcy courts by promulgation of local rules or standing administrative orders set forth predictable and uniform "no look" local fee guidelines in chapter 13 cases that an attorney may predictably and routinely use to determine the amount of his/her fee to be awarded and paid.[18] Such local fee guidelines tend to encourage and promote predictability and uniformity, but vary by locality and are dependent upon, among other things, the nature, difficulty, and complexity of the chapter 13 case, local custom and tradition, debtor and estate benefits, and the necessity of professional services. By following the local fee guidelines, chapter 13 attorney's fees may be uniformly and fairly applied and established as presumptively reasonable without too much monitoring by parties in interest and the court in the vast majority of cases, sufficient safeguards exist to prevent unreasonable compensation.

Note: By way of illustration, the Bankruptcy Court for the Northern District of Georgia, effective September 8, 2003, entered General Order No. 9 (superceding prior General Order No. 4) and approved new chapter 13 attorney fee guidelines whereby attorneys representing chapter 13 debtors

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[17]*See, e.g., In re Boddy*, 950 F.2d 334 (6th Cir. 1992).

[18]*In re Agnew*, 144 F.3d 1013 (7th Cir.1998) (holding for court authorization to establish a presumptive reasonable value of legal fees in consumer bankruptcies and to limit fees to this level unless the attorney establishes that the services in a particular case justify a higher fee).

received a $1,000.00 increase in that District's "no look" fee from $1,500.00 to $2,500.00. See "Appendix B." (The last change in this District's presumptive valid fee was made on January 14, 2000.) Under the new fee guidelines, chapter 13 debtors' attorneys in the Northern District of Georgia may receive a first distribution of up to $1,500.00 upon confirmation of the debtor's chapter 13 plan (less any amount that the attorney received from the debtor prior to confirmation). The new guidelines in Georgia Northern also allow chapter 13 debtors' attorneys to collect the balance of their fees at the rate of $125.00 per month beginning in the first month of the initial distribution under the confirmed plan. (The former guidelines allowed attorneys to receive no more than $75.00 per month.) If the chapter 13 plan is not confirmed and the case is later dismissed or converted to a case under chapter 7, the chapter 13 trustee may disburse up to $900.00 to the debtor's chapter 13 attorney less any money that the attorney already collected from the debtor or the chapter 13 trustee. (The prior guidelines allowed compensation of up to $750.00.) Additionally, under General Order No. 9 the chapter 13 debtors' attorneys are required to provide their debtor-clients with a copy of this District's "Rights and Responsibilities Statement Between Chapter 13 Debtors and Their Attorneys" ("Statement") prior to filing chapter 13 cases. See "Appendix B." An attorney's failure to provide the services detailed in the Statement may result in a reduction or complete disgorgement of attorney's fees regardless of whether the fees were awarded under the "no look" process or by a formal fee application.[19]

It is emphasized here that each bankruptcy judge is entitled to decide whether chapter 13 attorney fee requests will be closely scrutinized in every case without the benefit of local guidelines or whether fee requests will be presumptively and automatically approved in accordance with the "no look" approach under local guidelines and accompanying safeguards in most cases. Local rules, standing orders, fee guidelines, or practice also may provide authority for a chapter 13 debtor's

[19]*See Consumer Bankruptcy News*, Vol. 13, Issue 5, p. 4 (Oct. 16, 2003).

attorney to receive additional compensation for post-petition services rendered on behalf of the debtor (or the estate) in the event the presumptive fee amount is later exceeded by the attorney. The extent to which the attorney's post-petition services may confer a benefit to the chapter 13 debtor (or the estate), and whether the legal fees sought are in reasonable proportion to the complexity of the chapter 13 case and proceedings therein are fact specific issues to be addressed and reviewed by the courts under the totality of the circumstances analysis.

The chapter 13 debtor's attorney must show, *inter alia*, that the representation reasonably and necessarily benefitted the debtor (or the estate). Section 330 of the Code ordinarily has two ultimate goals: (1) to reasonably compensate attorneys for professional services rendered and (2) to not discourage debtors' attorneys from taking on representation in future bankruptcy cases due to the court's failure to allow for adequate and reasonable compensation. Several courts have noted concerns regarding a possible "chilling effect" on the willingness of attorneys to accept future chapter 13 cases for fear they will never recover their reasonable attorneys' fees.

III. Grounds for and Likelihood of Successfully Attaining Court Approved Awards for Additional Compensation

Absent clear local rules, standing orders, guidelines, or practice, the flexibility allowed by a chapter 13 plan may logically lead to some degree of uncertainty and confusion among attorneys, chapter 13 trustees, creditors, and the courts when assessing and determining reasonable and necessary compensation under the circumstances of a particular case. In some instances, the debtor's attorney may have failed to consider unexpected litigation or difficulty of the chapter 13 case, and thereby also failed to privately contract for appropriate compensation for future services to be rendered. Accordingly, the question then arises: Can a chapter 13 debtor's attorney subsequently file for and successfully obtain, in addition to the "no look" fee, compensation for professional services beyond those originally anticipated and determined? As discussed earlier, the answer to this question is

generally yes, but depends on the particular facts and circumstances of a given case and the attitude and views of the presiding judge and judicial precedent within a district or circuit.

Chapter 13 debtors' attorneys who agree to accept a presumptive "no look" fee ordinarily should be able to subsequently request the bankruptcy court to approve additional compensation for unanticipated, complex, or difficult professional work. The burden of proof is on the chapter 13 debtor's attorney to demonstrate by a preponderance of the evidence that the total requested fee (*i.e.*, the "no look" fee plus the additional requested fee) is reasonable and necessary in light of a totality of the particular facts and circumstances of a given case.[20] If such grounds exist for additional compensation and a traditional fee application is filed by the chapter 13 debtor's attorney, FED. R. BANKR. P. 2016(a) and 2002(a)(6) should be followed regarding procedure and notice requirements, and also supporting time records should be maintained by the attorney and filed with the court (along with the fee application itself). If the debtor does not have the lump sum funds to pay in full his/her attorney the additional compensation that may be awarded by the court, the local rule, standing order, guidelines, or practice should be fair and flexible, and if appropriate to do so, modified in particular cases in order to foster fair and equitable results. Moreover, it seems that the Code itself flexibly authorizes the allowance of additional compensation, when it is appropriately warranted. 11 U.S.C. §§ 330, 331, and 105(a).

Chapter 13 trustees and bankruptcy courts generally support fair and reasonable fees for all professionals including attorney compensation in chapter 13 cases. Chapter 13 trustees and bankruptcy courts do not, for example, expect debtors' attorneys to voluntarily fund and prosecute chapter 13 cases and proceedings by rendering free or under-compensated legal services. (See discussion below.)

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[20] But see *In re Lederman Enterprises*, 997 F2d 1321 (10th Cir 1993) (Attorneys' fees for reorganization work also may be denied if the debtors inability to complete the plan should have been evident at the outset and therefore subsequent work was not necessary and should not be compensated); *See also In re Office Products of America, Inc.*, 136 B.R. 983 (Bankr. W.D. Tex 1992).

IV. The Chapter 13 Trustees' and Bankruptcy Courts' General Views on Awarding Additional Compensation to Debtor's Counsel in Chapter 13 Cases

Some assert that chapter 13 debtors' attorneys who agree to take a presumptive "no look" fee should not be allowed to subsequently request the bankruptcy court to approve an additional or enhanced fee request based on services rendered on routine matters. It also has been said that while chapter 13 debtors' attorneys may seek compensation and reimbursement of expenses for extraordinary services that are not part of the presumptively reasonable standard fee, such attorneys cannot use the fee application to revisit their compensation for time spent on normal, customary, and routine aspects of their representation.

Although the setting of a "no look" fee amount as the maximum reasonable fee payable to chapter 13 debtors' attorneys for "normal and customary" services in consumer cases is common in most bankruptcy courts, subsequent fee requests that seek additional compensation and the accompanying time records should be closely scrutinized by the chapter 13 trustees, creditors, and the court, after notice to creditors and other parties in interest pursuant to FED R. BANKR. P. 2002(a)(6). The better view is that after close scrutiny and in appropriate cases, additional compensation may be awarded after notice and an opportunity for a hearing.[21] This view is generally supported by most chapter 13 trustees and bankruptcy judges.

V. The Scope of Counsel's Duty to Represent the Debtor Beyond Services Initially Agreed Upon, Limited Representation ("Unbundling"), "Ghostwriting," and Counsel's Duties Beyond Confirmation of the Chapter 13 Plan

Pre- and post-petition counseling and legal representation of a chapter 13 debtor are closely intertwined with the attorney's fees awarded in each case. Prior to the filing of a chapter 13 petition

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[21] In certain instances the local rules will provide guidance and even specific directions as to the amounts that may be compensated in excess of the "no-look" fee. *See* Local Bankruptcy Rule for the Western District of North Carolina 2016-1(e), (f), and (g) and Local Form 3 for the Western District of North Carolina (delineating the services covered by the "base fee" (in essence a "no look" fee) and the services that will be compensated in excess of the "base fee" should they be required in a given case).

under the Code, the debtor's attorney should, inter alia, properly interview and adequately counsel the debtor-client as to the available relief under each of the operative chapters of the Code. It is intended that such explanation and advice provided by the attorney will assist the debtor-client to make the proper and informed decision regarding what chapter under the Code the debtor should file to seek relief, if any. Since chapter 13 plans typically have a duration of three to five years under section 1322(d), changed circumstances frequently will occur after confirmation of a plan; during that time period post confirmation modification under section 1329 may be required. It is, therefore, necessary that the initial legal representation by the chapter 13 debtor's attorney also carry over into the post-confirmation period of a chapter 13 case as well. Thus, the bankruptcy court has the authority and also statutory obligation to determine the extent and scope of counsel's duty to represent the debtor and also determine the reasonableness and necessity of professional services rendered under sections 329, 331, and 330 and FED. R. BANKR. P. 2016 and 2017; and parties in interest, of course, have a right to object, and appear and be heard regarding fee requests.

In accordance with Rule 1.2 of the Rules of Professional Conduct, infra, the scope of legal representation of a client ordinarily may not be limited unless proper cause exists. Rule 1.4 of the Rules of Professional Conduct, infra, provides that "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." As such, the attorney's representation of a chapter 13 debtor regarding post-confirmation matters will typically not be limited. When a debtor's attorney files a motion or complaint with the court, absent court approved withdrawal from legal representation, the attorney must continue on with the representation of the debtor.[22]

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[22] *In re Egwim*, 291 B.R. 559, 574 (Bankr. N.D. Ga. 2003).

Frequently, chapter 13 trustees and creditors file post-confirmation motions to dismiss the chapter 13 case or convert the chapter 13 case to a case under chapter 7 because, for example, the debtor may not be fulfilling his/her obligations under the proposed or confirmed plan. Just as the debtor's professional pre-confirmation legal representation before the court is important, so is the continuous post-petition counseling and legal representation of the debtor to ensure that the debtor is properly represented, and the plan is prepared in good faith, fulfilled, and completed, if possible. These professional services ordinarily may not be limited simply because they may exceed the prearranged or "no look" fee. Such services may be extraordinary or outside the scope of employment typically anticipated.[23]

Model Rule of Professional Conduct 1.2, entitled "Scope of Representation," provides:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of the representation, subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.
> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
> (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Rule 1.4 of the Rules of Professional Conduct, entitled "Communication," provides:

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[23] *Id* at 573 (citing the Code and Rules of Professional Conduct as limiting the ability to predetermine limitations on representation and the availability of fee applications to account for unanticipated events requiring further fees).

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Limited representation, frequently called "unbundling," seemingly is an emerging national issue, especially in the area of family law. In "unbundling" legal services, an attorney may offer representation limited to only certain aspects of the client's case. Proponents contend that the practice of "unbundling" of services is a justifiable means by which individuals in lower income brackets who cannot afford "full service" may obtain legal assistance with a variety of piecemeal legal services without having to pay a large retainer fee for other services (as well as provide the legal professional with a means to expand his/her client base). Several states have officially sanctioned limited representation in certain areas of litigation (*e.g.,* Alaska, California, Colorado, New Mexico, Washington, and Wyoming).[24] The overriding concern in the states that permit "unbundling" is that the attorney still maintains an ethical duty, for example, to continue to forward or respond to the client regarding any correspondence received by the attorney on the debtor's behalf. Limitation of services must pass the two prong analysis of Model Rule 1.2(c): (1) reasonable limitation under the circumstances and (2) informed consent by the client. Additional information on limited representation of "unbundling" may be found on the internet at www.unbundledlaw.org. In October 2003, the ABA released a 155-page "Handbook on Limited Scope Legal Assistance," found at www.abanet.org/litigation/taskforces/modest/home.html.[25]

Some bankruptcy courts have considered situations in chapter 13 cases in which the debtor's attorney has attempted to limit his/her representation of the debtor (*i.e.*, the attorney attempts to

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[24]See Yerbich, *Limited Representation: Inevitable?* ABI JOURNAL, *Consumer Corner* (Feb. 2004).

[25]*Id.*

"unbundle" or limit the scope of employment to special and limited purpose representation on an ad hoc type basis), charging a much lower fee than the judicial district's customary "no-look" fee for "full service' representation. Can attorneys provide chapter 13 debtor-clients with an "a la carte" menu of services to select? Can an attorney exclude an appearance at the section 341(a) meeting of creditors or of a hearing on a Rule 9014 contested matter or a Rule 7001adversary proceeding? The bankruptcy courts considering the issue of limited representation or "unbundling" have noted that such legal representation *may* be limited. Citing the Model Rules of Professional Conduct, these courts have indicated that in order to limit the scope of legal representation, an attorney must consult with the client and provide a full disclosure of the bankruptcy landscape or the "lay of the land," and the client must provide an informed written consent to the limitation of representation in order for the limitation to be valid.

Some courts have questioned whether, given the intricacies of the Bankruptcy Code, a consultation would be sufficient to properly express to the unsophisticated individual debtor the pitfalls of limiting the representation.[26] Some attorneys may seek to limit representation, for example, to an initial consultation-meeting setting forth the relief available under each operative chapter of the Code and limited assistance in the preparation of the petition under the Code and accompanying "papers" without signing the petition for actual filing. Some courts have allowed this limitation[27] while others

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[26]*In re Castorena*, 270 B.R. 504, 523-24 (Bankr. D. Idaho 2001), *citing In re Basham*, 208 B.R. 926, 932-33 (Bankr. D. Idaho 1997). ("Unless debtors truly understand what they are bargain [sic] away, the bargain is a sham.")

[27]*In re Merriam*, 250 B.R. 724, 728-730, 736-739 (Bankr. D. Colo. 2000) (the court considered the Rules of Professional Conduct of Colorado that permitted the "unbundling" of services in not reducing the attorney's fees, as well as recognizing that not every case is identical and that in certain instances the limitation of representation would not be as egregious as in others.).

have stated that the attorney "having initiated the process ... must shepherd the client through it, to its conclusion." [28]

In conjunction with the recent increased "no-look" fee in the Northern District of Georgia, *supra*, the Bankruptcy Court, as discussed earlier, recently issued General Order 9 describing both the change in the amount of the fee and prescribing the procedures attorneys need to follow. The Georgia Northern Bankruptcy Court's General Order 9 prescribes that an attorney needs to provide to the chapter 13 debtor a description of the rights and responsibilities of both the debtor and the attorney prior to filing the case and after the chapter 13 petition is filed with the court.[29] This document ("Appendix B") describes the duties and responsibilities of the attorney both prior to the filing of the petition and post-confirmation. In order for a debtor's attorney to not risk disgorgement or disallowance of any portion of the "no-look" fee, the attorney must comply with the various duties described therein. These duties include the typical preparation of, for example, amendments to schedules and responses to objections to confirmation, if any, as well as the requirement to "promptly respond to the Debtor's questions through the term of the plan" and providing "any other legal services necessary for the administration of the case." [30]

A closely related issue to "unbundling" or limited representation is the practice known as "ghostwriting." "Ghostwriting" occurs when the attorney prepares pleadings for a pro se litigant without the attorney's signature on the documents. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. What is the permissible role, if any, of an attorney in the practice known as "ghostwriting?" Can the attorney

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[28] *In re Bancroft*, 204 B.R. 551-52; see also *In re Pair*, 77 B.R. 976, 979 (Bankr. N.D. Ga. 1987) (stating "[W]hile they should not be unreasonably burdened, counsel cannot be permitted to initiate cases and then simply abandon debtors. Absent exceptional circumstances, counsel will be required to represent the debtor client until the conclusion of the case.").

[29] See "Appendix B."

[30] Id, Items 9 and 16, p. 4, of "Appendix B."

accept a fee? Does the client who later files a bankruptcy case have to disclose the identity of the attorney and the fee? Although most courts disapprove of "ghostwriting," there seems to be no specific rules on the subject of ghostwriters in the bankruptcy courts, especially in the context of chapter 13 cases. For example, an attorney not signing a chapter 13 petition and accompanying "papers" (*e.g.*, schedules, statement of financial affairs, plan, fee disclosure statement, etc.) prepared for a client may not violate one's professional responsibility to the client; however, it indeed may violate the attorney's duty to be candid and honest with the court.[31] Impermissible ghostwriting may amount to unprofessional conduct, constitute sanctionable conduct under FED. R. BANKR. P. 9011, and also result in contempt of court.[32]

Other areas where counsel can aid the chapter 13 debtor in the post-confirmation period are found in requests for modification of confirmed plans as contemplated under section 1329(a) and FED. R. BANKR. P. 3015(g). Due to material defaults under confirmed plans, chapter 13 trustees and creditors may file motions seeking to dismiss the case or convert the chapter 13 case to a case under chapter 7.[33] Creditors also may file section 362(d) and FED. R. BANKR. P. 4001(a) motions seeking relief from the automatic stay to allow for a foreclosure or repossession of collateral. These unique aspects to bankruptcy law and practice can be daunting to the unsophisticated *pro se* debtor and require the continued or uninterrupted legal assistance of the chapter 13 debtor's attorney.

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[31] *In re Merriam*, 250 B.R. 724 (Bankr. D. Colo. 2000)(chapter 7 debtor's attorney was required to sign the petition that he prepared for the debtor, even if he wished to engage in only limited representation of her; failure to sign the petition violated FED. R. BANKR. P. 9011 regardless of whether the attorney was allowed to provide limited representation to his client; however, reduction or recoupment of fees pursuant to section 329 for a Rule 9011 violation was not appropriate.)

[32] *Ricotta v. State of California*, 4 F.Supp.2d 961 (S.D. Calif. 1998)(an attorney's involvement in drafting 75 to 100% of a pro se plaintiff's legal arguments in his oppositions to motions to dismiss was impermissible ghostwriting amounting to unprofessional conduct; however, neither the attorney nor the plaintiff were held in contempt because the attorney did not think her behavior was offensive and improper, had no intention to mislead the court and parties, and was quick to admit the nature and extent of her involvement).

[33] See § 1307(c) and FED. R. BANKR. P. 1017(e).

VI. Withdrawal of Chapter 13 Debtor's Counsel From Legal Representation and Grounds for Such Withdrawal

Generally, the chapter 13 debtor's attorney who undertakes to represent a client assumes an ethical responsibility to handle all matters arising out of the bankruptcy case and may not withdraw from representation without the court's express approval.[34] This responsibility does "not evaporate because the case becomes more complicated or the work more arduous or the retainer not as profitable as first contemplated or imagined." [35] The chapter 13 debtor's attorney seeking to withdraw from the case ordinarily may only do so by showing exceptional circumstances or demonstrating compelling reasons that would justify cause for withdrawal.[36] Simply put, leave to withdraw from legal representation can only be granted by the bankruptcy court.[37]

The restraint on a chapter 13 debtor's attorney's right to withdraw as counsel is expressly governed by the Rules of Professional Conduct promulgated by the applicable state bar[38] and the local rules of most bankruptcy courts.[39] Absent compelling circumstances requiring mandatory

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[34]*In re Egwim*, 291 B.R. 559, 575-78 (Bankr. N.D. Ga. 2003) (stating that the attorney's obligation to represent a client extends to any matter, and cannot be discharged without permission of the bankruptcy court); *In re Davis*, 258 B.R. 510, 512 (Bankr. M.D. Fla. 2001) ("Once counsel has entered an appearance on behalf of a debtor in this court, counsel may not withdraw from the representation until granted leave to do so by the court."); *In re Pair*, 77 B.R. 976, 979 (Bankr. N.D. Ga. 1987) ("Once employed, counsel's representation continues unless and until he is discharged by the debtor or withdraws upon court approval.").

[35]*Kriegsman v. Kriegsman*, 375 A.2d 1253 (N.J. Super. 1977).

[36]*In re Pair*, 77 B.R. 976, 979.

[37]*Id.*

[38]While the ABA Model Rules of Professional Conduct ("Rules") have no binding effect, they serve as the basis for professional conduct rules that govern lawyers in most of the fifty states with little variation. As a result, the Rules provide a uniform example for illustrating the ethical limitations imposed upon an attorney's representation and right to withdraw from that representation.

[39]To some extent, most local rules or standing orders incorporate each state's Rules of Professional Conduct when addressing the requirements for withdrawal.

withdrawal,[40] the attorney ordinarily is free to withdraw contingently upon a number of legitimate grounds listed and specifically illustrated in Rule 1.16(b) or for other good cause shown by the attorney.[41] It is important to note, however, that even where the attorney can demonstrate good cause and takes proper measures to avoid foreseeable prejudice to his/ her client, this Rule recognizes the attorney's obligation to continue legal representation, if required to do so by the court.[42]

Specifically, Rule 1.16(b), (c), and (d) provides as follows:

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if: (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;(2) the client has used the lawyer's services to perpetrate a crime or fraud;(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or(6) other good cause for withdrawal exists.
>
> (c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
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> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned....

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[40]Rule 1.16(a) provides three instances where an attorney is required to withdraw from representation. Withdrawal is required if (1) representation would violate applicable rules of professional conduct or other law, (2) if the attorney's physical or mental condition impairs their ability to represent the client, or (3) the client has discharged the attorney.

[41]Rule 1.16(b), (c), and (d).

[42]Rule 1.16(c).

In most instances, withdrawal of counsel from legal representation also is governed by local rules or standing orders promulgated by bankruptcy (or district) courts in most judicial districts. Many local rules or standing orders define the scope of the attorney's legal representation and additionally describe and regulate the terms and conditions of such withdrawal practice. Local rules or standing orders also may recognize and define the chapter 13 debtor's attorney's responsibility to the debtor-client. This responsibility is one of paramount importance because of the unique and underlying purposes of bankruptcy cases. In the vast majority of judicial districts, the bankruptcy courts allow a debtor's attorney to withdraw from legal representation only upon leave of the court.[43] While the local rules of each district may vary in degree - some are much more restrictive than others. Nonetheless, the underlying purpose of each local rule is substantially the same.[44]

Withdrawal of representation without court approval ordinarily is not allowed and will be dealt with accordingly. The rationale underlying the bankruptcy court's seemingly paternalistic approach in regulating the bankruptcy bar in these situations is rather simple and straightforward. The bankruptcy court has an interest in overseeing meaningful representation of the debtor and equitable administration of bankruptcy cases and estates and also making sure that instances of actual or perceived unfairness do not arise. Efficient, inexpensive, and orderly case and estate administrations are the ultimate judicial goals under FED. R. BANKR. P. 1001.

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[43]*See, e.g.*, Local Bankruptcy Rule 2090-1(f) of the Western District of Tennessee ("Debtor(s)' counsel may be permitted to withdraw only upon leave of Court with reasonable notice to the debtor and to other parties in interest as the Court may direct."); Local Bankruptcy Rule 2090-2(2)(e) of the Northern District of Alabama (stating "attorneys shall be held at all times to represent the parties for whom they appear of record in the first instance until, after formal motion and notice to such parties and to opposing counsel, they are permitted by order of court to withdraw from such representation.").

[44]*See, e.g.*, Local Bankruptcy Rule 9010-2 of the Northern District of Georgia (Counsel will not ordinarily be allowed to withdraw after pretrial or at a time when withdrawal will cause a delay in the progress of an adversary proceeding or a contested matter.); Local Bankruptcy Rule 2091-1 of the Western District of North Carolina (stating that attorney's representation extends to all matters that arise in the case and conversion to another Chapter, and the attorney is only relieved of duty by case dismissal, or upon order of the court); Local Bankruptcy Rule 2091-1 of the Southern District of Florida (No appearance by an attorney may be withdrawn in any case or proceeding except by leave of court after notice served on the client and parties in interest entitled to notice).

The circumstances under which withdrawal of counsel from legal representation is permitted indeed appear very limited. Although the Rules of Professional Conduct provide permissive withdrawal of representation for lack of payment, most bankruptcy courts do not regard the debtor's inability to pay attorney's fees to be sufficient grounds for automatic withdrawal.[45] While the practical consequences of an attorney's entitlement to a reasonable fee for services rendered is appreciated, bankruptcy courts have repeatedly spoken – attorneys must not abandon their clients under the Code for lack of payment once representation is undertaken.[46] Consequently, a bankruptcy court ordinarily will not grant such withdrawal motions unless the debtor's attorney proves or demonstrates to the court that the client-debtor's rights are properly protected. Withdrawal is not purely a matter of business economics. Withdrawal from legal representation by counsel is justified by the existence of compelling circumstances including an unreasonable burden imposed on the attorney-client relationship other than lack of payment.[47]

VII. Conclusions

As noted earlier, no aspect of practice and procedure under the Bankruptcy Code is more susceptible to local variation than under chapter 13. The attorney fee review process in chapter 13 involving debtors' attorneys also is susceptible to great local variation; however, these disparities are

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[45] *In re Albert*, 277 B.R. 38 (Bankr. S.D.N.Y. 2002); *In re Meyers* 120 B.R. 751 (Bankr. S.D.N.Y. 1990); *In re Edsall*, 89 Bankr. 772 (Bankr. N.D. Ind. 1988); *In re Pair*, 77 Bankr. 976 (Bankr. N.D. Ga. 1987); *Kriegsman v. Kriegsman*, 375 A.2d 1253 (App. Div. 1977).

[46] Rule 1.16(b)(4) (permissive withdrawal allowed if "client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services"); Rule 1.16(b)(5)(permissive withdrawal allowed if "the representation will result in an unreasonable financial burden on the lawyer."). Compare *In re Douglass*, 258 B.R. 510, 514 (Bankr. M.D. Fla. 2001) ("Where the attorney seeks to withdraw merely for reason of his economy and his convenience, as is the case here, the court is required to deny the attorney's motion to withdraw."); *In re Meyers*. 120 B.R. 751, 753 (Bankr. S.D.N.Y. 1990) (finding that client's failure to pay was not sufficient grounds permitting withdrawal.).

[47] Cause for withdrawal has been found where, in addition to nonpayment of fees, circumstances of hostility and animosity exist between attorney and client. *See Holmes v. Y.J.A. Realty Corp.*, 128 A.D.2d 482 (1st Dep't 1987), where the attorney-client relationship had become unproductive; *Kolomick v. Kolomick*, 133 A.D.2d 69 (2d Dep't 1987), where there had been a breach of trust on the part of the client or a challenge to the attorney's loyalty. *See also Hunkins v. Lake Placid Vacation Corp.*, 120 A.D.2d 199 (3d Dep't 1986).

being creatively reduced on a national level due primarily to the adoption and promulgation in many judicial districts of so-called presumptively valid "no look" fees, especially in the high volume chapter 13 districts.[48] Most consumer bankruptcy attorneys have a standard fee for their services, and only when unexpected litigation or the like occurs will the attorney seek a fee increase. Sufficient safeguards exist in these "no look" districts to trigger formal judicial review, after notice and a hearing, in cases where the presumptively valid attorney fee should be reduced or enlarged under the totality of particular facts and circumstances of a given case. Such practice and procedure, inter alia, fosters predictability and uniformity and concomitantly assists in achieving the judicial goal set forth and articulated in FED. R. BANKR. P. 1001: "to secure the just, speedy, and inexpensive determination of every case and proceeding."

An attorney's limited legal representation of a chapter 13 debtor-client (*i.e.*, "unbundling") should be the exception rather than the rule, notwithstanding the apparent national momentum existing at this time in favor of this concept. Unidentified "ghostwriting" should not be permitted.[49] Likewise, attorney withdrawal from legal representation of chapter 13 debtor-clients should be the exception rather than the rule. Until such time as clear national rules are promulgated, the totality of the particular facts and circumstances of a given chapter 13 case, the Rules of Professional Conduct, and district-by-district considerations will dictate whether an attorney may (1) limit his/her legal representation, (2) ghostwrite, or (3) be authorized to withdraw from legal representation. These fact specific issues are currently addressed on their own merits and determined on a case-by-case basis by the presiding bankruptcy judge.

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[48]Sharron B. Lane, *Attorney Fees in Chapter 13: Do They Influence Chapter Choice?* Issue No. 9 Norton Bankr. L. Advisor 5 (Sept. 2003).

[49]It has been said that an attorney who is paid to assist the chapter 13 debtor, for example, in preparing the petition and accompanying "papers" should not be held to a lesser standard than section 110 statutorily imposes on bankruptcy petition preparers.