AMERICAN BANKRUPTCY INSTITUTE

Rocky Mountain Bankruptcy Conference

Getting Paid and Doing It Ethically

Hon. Kevin R. Anderson
U.S. Bankruptcy Court (D. Utah) | Salt Lake City

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2025

Retainers and Fee Applications

By David Warner, Esq.

I. Different Types of Retainers and the Ethics of Each

A. A "classic retainer" is known as an "earned-on-receipt" retainer. The client agrees to pay a fixed sum to have the attorney available to perform legal work that may arise during a specified period of time. It is earned upon receipt and the client retains no interest in the payment after it is made.

1. "The majority view holds that classic retainers "usurp" the bankruptcy court's authority under Sections 327, 328(a), 329, 330, and 331 of the Code and corresponding Bankruptcy Rules." *In re Prod. Associates, Ltd.*, 264 B.R. 180, 188 (Bankr. N.D. Ill. 2001).

B. With a "security retainer," the attorney holds the funds advanced by the client or another to cover future legal work. The funds remain property of the client until the funds are applied to services already rendered.

1. Retainers in bankruptcy are usually prepetition "security retainers" where funds are held in trust until the court awards a fee and authorizes the fee to be paid from the retainer.

2. Most bankruptcy courts have concluded that a prepetition retainer paid by a debtor to counsel for services in connection with a case is security for, or held in trust for, payment of fees and costs to be incurred. *In re Printing Dimensions, Inc.*, 153 B.R. 715, 719 (Bankr. D. Md. 1993) (opining that counsel will not be required to share a prepetition retainer pro rata with other administrative claimants where the retainer is treated as security or held in trust).

C. Under an "advance-fee agreement," the attorney receives payment in advance for legal work to be completed in the future.

1. Some states bar advance-fee retainers and require that funds received from a client for services not yet performed be placed in trust until earned by performance. Utah prohibits a fee contract which states that the entire fee is earned upon receipt under Utah RPC 1.5. *In re Discipline of Brussow*, 2012 UT 53, 286 P.3d 1246 (Utah 2012). In Colorado, non-refundable retainers are barred. *In re Sather*, 3 P.3d 403 (Colo. 2000), modified on denial of reh'g, (June 12, 2000); Colo. RPC 1.5(g) ("Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.")

2. An "advance-fee agreement" is not the same as a "fixed or flat fee" for all-inclusive representation. A flat or fixed fee is calculated based on the lawyer's historical assessment of the time and labor required to complete the task.

D. Postpetition retainers are subject to more stringent standards. An attorney is not free to receive a postpetition retainer from property of the estate without proper notice and prior permission from the court.

E. An "evergreen retainer […] contemplates that the client will pay regularly and that the lawyer will not tap the retainer for payment until the final bill is due, or, in the case of a bankruptcy representation, until the court approves the final fee application." Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113, 117 (2009)

1. A evergreen retainer agreement contemplates that a debtor's professional's interim compensation shall be paid from the debtor's operating capital, holding the original retainer for application towards a final fee application.

2. There are two main concerns with evergreen retainers - First, the requirement for post-petition deposits decreases the debtor's operating capital, potentially making the reorganization more difficult. Second, in the case of an administratively insolvent estate, an evergreen retainer arrangement necessarily prefers one administrative claimant over others.

3. An evergreen retainer allows a professional to increase its chances of payment if the Debtor's financial performance deteriorates or the estate becomes administratively insolvent.

4. When first examined in depth by bankruptcy courts, evergreen retainers were a recent phenomenon. However, the national bankruptcy landscape has evolved to the point where evergreen retainers are common practice in chapter 11 cases. *In re Raocore Tech., LLC*, 24-00065-ELG, 2025 WL 828880, at *5 (Bankr. D.D.C. Feb. 20, 2025)

5. Evergreen retainers are permissible under limited circumstances, according to *In re Raocore Tech., LLC*, 24-00065-ELG, 2025 WL 828880, at *4 (Bankr. D.D.C. Feb. 20, 2025).

a) Pursuant to § 328(a), a debtor, with court approval, "may employ" a professional under § 327(a) "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis." 11 U.S.C. § 328(a).

b) Professionals seeking employment under s. 327(a) must "state specific facts showing … any proposed arrangement for compensation." Fed.R.Bankr.P. 2014(a)(2)(E).

c) As part of the consideration of an application to employ a professional, a bankruptcy court must examine the reasonableness of proposed fee arrangements. See Official Comm. of Unsecured Creditors v. Harris (In re Sw. Food Distribs., LLC), 561 F.3d 1106, 1112–13 (10th Cir. 2009).

d) Reasonable evergreen retainers are permissible in certain chapter 11 cases with: (i) appropriate notice; (ii) specific disclosure of the existence of an evergreen retainer in any employment application filed with the Court; (iii) the inclusion of any retention agreement with any employment application; (iv) terms in the applicable retention agreement making clear that any amounts paid shall be held in trust until a final fee application is approved (or other time period as agreed by the parties and approved by the Court); and (v) ultimate approval of any employment application by the Court prior to any payments made by any entity thereunder.

e) Although no one factor is determinative, factors to be considered in determining whether the terms of a proposed retention are reasonable include (i) the relationship between the Debtor and the applicant, including whether the parties have equal bargaining power engaging in an arms-length negotiation; (ii) whether the proposed terms of retention are in the best interests of the estate; (iii) whether there is creditor opposition to the retention or retainer provisions; and (iv) whether given the size and circumstances of the case, the amount and terms of the retainer are reasonable, including whether the terms provide an appropriate level of risk minimization taking into consideration any other risk minimization factors such as an administrative order or carve-outs.

II. Format of Successful Professional Fee Application (Most of these requirements can be found in Colorado L.B.R. 2016-1).

A. Cover sheet that includes

1. Name of applicant

2. Date of order authorizing employment (no retroactive fees)

3. Periods for which compensation is sought

4. Amount of fees sought

5. Amount of expense reimbursement sought

6. Whether it is an interim or final application

7. Information about prior fee application

   a) date filed

   b) period covered

   c) total requested fees and expenses

   d) total allowed

B. Body with introduction that includes

1. Brief history of the case

2. Pending matters

3. And future matters anticipated before closure of the case

C. Remaining body of the application that includes

1. Petition date

2. Date of order authorizing employment

3. Date of order approving retainer

4. Scope of employment

5. Facts to establish disinterestedness and lack of conflicts

6. History of previous fee applications and major details regarding each

7. Identification of exhibits

   a) Exhibit with biographical summaries of people identified in time records

   b) Exhibit with summary of costs

   c) Exhibit with narrative by category of major/significant services (should match separate billing categories). Within each category, the narrative must describe

      (1) The nature of the services

(2) The results obtained, if any

(3) The benefits to the estate

(4) A general description of any additional work that remains to be done

(5) A statement of the number of hours spend on the particular matter and by whom

(6) The portion of the total fee applicable to the particular category

d) Exhibit with detailed time records which include

(1) The date of the work performed

(2) The individual performing the services

(3) An allocation of time spent on each task (tenth of an hour increments)

(4) The total fee for each task

(5) Detailed description of the work performed

(6) Each task must contain separate time allocations for each task, no lumping

(7) Time records must establish separate billing categories

D. Example

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
EUGENIA TOLL,	)	Case No. 25-12345 ABC
	)	Chapter 7
Debtor.	)	

TITLE BRIDGES AND POULTER, P.C.'S FIRST AND FINAL APPLICATION FOR ALLOWANCE OF ATTORNEYS' FEES AND EXPENSES

TITLE BRIDGES AND POULTER, P.C. ("TBP") hereby applies for approval of its fees and costs incurred as counsel for Anne Nishimoto, the chapter 7 trustee in this case. TBP seeks final approval and allowance of attorneys' fees in the amount of $12,500.00 and reimbursement of expenses in the amount of $325.00. In support of its First and Final Application (the "Application"), TBP states as follows:

Introduction

1. TBP was retained by the Trustee to represent the estate in connection with the liquidation of real property jointly owned by the estate and the non-filing co-owner Amber Williams. With TBP's assistance, the Trustee sold the property and the estate recovered $57,588. There are no pending matters and the Trustee has not requested TBP provide any further services.

Application

2. Eugenia Toll (the "Debtor") filed for relief under chapter 7 of the Bankruptcy Code on or about March 1, 2025 (the "Petition Date").

3. Anne Nishimoto is the duly appointed chapter 7 trustee (the "Trustee") of the Debtor's bankruptcy estate.

4. The Trustee retained TBP to generally assist the Trustee in the administration of this case and to represent the Trustee in connection with litigation matters arising in this case.

5. On April 2, 2025, the Trustee filed an application to employ TBP as counsel to the Trustee.

6. The Court entered an Order Authorizing Employment of TBP as Attorneys for the Trustee on May 1, 2025 effective as of April 2, 2025.

7. TBP has no agreement or understanding of any kind or nature with any other person to share any compensation received for services rendered in or in connection with this proceeding.

8. TBP does not hold and has not held during the pendency of this proceeding any interest adverse to the estate.

9. TBP utilized one attorney to perform services related to the representation of the Trustee in this proceeding: Sara J. Weaver. Ms. Weaver is the managing partner of TBP. She graduated from the University of Colorado School of Law in 2001 and has been a licensed attorney since that year. She has substantial experience in bankruptcy litigation and has been a member of the panel of chapter 7 trustees in the United States Bankruptcy Court for the District of Colorado since 2005. For the period covered by this Application, Ms. Weaver's hourly rate ranged from $450.00-$525.00.

10. The work performed by TBP is more fully described in TBP's Narrative, which is attached hereto as Exhibit A and incorporated herein by this reference. As TBP's Narrative illustrates, the services rendered by TBP assisted the Trustee in complying with her obligations under the Bankruptcy Code and benefited the estate.

11. TBP kept daily time records for the services performed. The work performed was billed on an hourly basis. Attached hereto as Exhibit B is the firm's detailed time report for the period of this Application.

12. TBP also incurred the sum of $325.00 in copy and postage costs, court filing fees, and fees for retrieving documents from the Mesa County Clerk and Recorder during the period covered by this Application on behalf of the Trustee. Attached hereto as Exhibit C is the firm's summary of expenses.

13. The services rendered by counsel assisted the Trustee in complying with her obligations under the Bankruptcy Code, administering the Debtor's estate and recovering monies for distribution to creditors.

14. TBP believes that the fees requested are reasonable and necessary in this case, considering the risks involved and the complexity of the legal issues.

15. Payment of the amount requested by TBP will not prejudice the rights of any creditor in the chapter 7 case (including the Trustee) holding a claim of equal or higher priority as there will be sufficient monies in the bankruptcy estate to pay all chapter 7 administrative claims entitled to priority under 11 U.S.C. § 507(a)(2).

16. Prior to the filing of this First and Final Application, the Trustee approved the attorney fees requested herein.

WHEREFORE, Title Bridges and Poulter, P.C. respectfully requests that this Court enter an order approving as final its fees in the amount of $12,500.00 and expenses in the amount of $325.00 pursuant to 11 U.S.C. § 330, and grant such other relief as deemed appropriate.

DATED this 20th day of June, 2025.

Respectfully submitted,

TITLE BRIDGES AND POULTER, P.C.

/s/ Sara J. Weaver

_____

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sweaver@TBP.com
Attorneys for the Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
EUGENIA TOLL,	)	Case No. 25-12345 ABC
	)	Chapter 7
	)	
Debtor.	)	

ORDER GRANTING TITLE BRIDGES AND POULTER, P.C.'S FIRST AND FINAL APPLICATION FOR ALLOWANCE OF ATTORNEY FEES AND EXPENSES

THE COURT having reviewed Title Bridges and Poulter, P.C.'s First and Final Application for Allowance of Attorney Fees and Expenses (the "Application") as counsel for Anne Nishimoto, the chapter 7 trustee (the "Trustee"), and finding that notice was duly served and no responses or objections having been filed, hereby

ORDERS that the Application is **GRANTED**. The fees and expenses incurred by Title Bridges and Poulter, P.C. ("TBP") as counsel to the Trustee are approved and allowed on a final basis. The Trustee is authorized to pay TBP the amount of $12,500.00 in fees and $325.00 in expenses.

DATED this _____ day of _____, 2025.

BY THE COURT:

_____
Hon. Alberta B. Carter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
EUGENIA TOLL,	)	Case No. 25-12345 ABC
	)	Chapter 7
	)	
Debtor.	)	

NOTICE OF TITLE BRIDGES AND POULTER, P.C.'S FIRST AND FINAL APPLICATION FOR ALLOWANCE OF ATTORNEY FEES AND EXPENSES

OBJECTION DEADLINE: 21 DAYS (if fees exceed $1,000) Fed.R.Bankr.P. 2002.

YOU ARE HEREBY NOTIFIED that Title Bridges and Poulter, P.C., counsel for the chapter 7 trustee Anne Nishimoto, has filed its First and Final Application for Allowance of Fees and requests the following relief: final approval of the firms' fees in the amount of $12,500.00 and expenses in the amount of $325.00 incurred as counsel to the chapter 7 trustee. A copy of the Application is on file with the Clerk of the United States Bankruptcy Court, 721 19th Street, Denver, Colorado 80202.

If you oppose the motion or object to the requested relief your objection and request for hearing must be filed on or before the objection deadline stated above, served on the movant at the address indicated below, and must state clearly all objections and any legal basis for the objections. The court will not consider general objections.

In the absence of a timely, substantiated objection and request for hearing by an interested party, the court may approve or grant the requested relief without any further notice to creditors or other interested parties.

DATED this 20th day of June, 2025.

Respectfully submitted,

TITLE BRIDGES AND POULTER, P.C.

/s/ Sara J. Weaver

_____

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sweaver@TBP.com
Attorneys for the Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
EUGENIA TOLL,	)	Case No. 25-12345 ABC
	)	Chapter 7
	)	
Debtor.	)	

COVER SHEET FOR TITLE BRIDGES AND POULTER, P.C.'S FIRST AND FINAL APPLICATION FOR ALLOWANCE OF ATTORNEY FEES AND EXPENSES

Name of Applicant: Title Bridges and Poulter, P.C.

Authorized to provide professional services to: Anne Nishimoto, chapter 7 trustee

Date of Order Authorizing Employment: May 1, 2025 effective April 2, 2025

Period for which compensation is sought: April 2, 2025 through June 19, 2025

Amount of fees sought: $12,500.00

Amount of expense reimbursement sought: $325.00

This is an: Interim Application [ ]; Final Application [X]

This is the first and final application filed by Applicant in this case.

DATED this 20th day of June, 2025.

Respectfully submitted,

TITLE BRIDGES AND POULTER, P.C.

/s/ Sara J. Weaver

_____

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sweaver@TBP.com
Attorneys for the Chapter 7 Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re:	)	
	)	
EUGENIA TOLL,	)	Case No. 25-12345 ABC
	)	Chapter 7
	)	
Debtor.	)	

CERTIFICATE OF SERVICE

9013-1 Certificate of Service of Motion, Notice and Proposed Order:

The undersigned certifies that on June 20, 2025 a copy of Title Bridges and Poulter, P.C.'s First and Final Application for Allowance of Attorney Fees and Expenses, Notice, Cover Sheet and proposed order was served on all parties against whom relief is sought and those otherwise entitled to service pursuant to the Fed. R. Bankr. P. and the L.B.R. via either CM/ECF or first class mail at the following addresses:

9013-1.1 Certificate of Service of Notice:

The undersigned further certifies that on June 20, 2025, I served by prepaid first class mail a copy of the foregoing Notice and Cover Sheet in accordance with Fed. R. Bankr. P. 2002 on parties in interest contained on the attached list, which is a copy of the Court's Creditor Address Mailing Matrix for this case, obtained from PACER on June 20, 2025.

/s/ Peter Capitola
For Title Bridges and Poulter, P.C.

EXHIBIT A

Narrative Describing Work Performed

Chapter 7 trustee Anne Nishimoto (the "Trustee") engaged Title Bridges and Poulter, P.C. ("TBP") to act as counsel to assist with the liquidation of non-exempt equity in real property scheduled by the debtor Eugenia Toll (the "Debtor").

The work performed by TBP during the period from April 2, 2025 through June 19, 2025, is more fully described in the billing records included as Exhibit B to the First and Final Application of Title Bridges and Poulter, P.C. for Allowance of Fees and Expenses (the "Application"). Accordingly, while this Narrative should be read in connection with Exhibit B, it contains only a summary of those records. Parties should refer to Exhibit B for a complete understanding of the time spent and fees for which approval is sought through the Final Application. Any inconsistency between Exhibit B and the summary provided herein shall be resolved by reference to Exhibit B.

The work performed by TBP during the period from April 2, 2025 through June 19, 2025 is summarized as follows:

Property of the bankruptcy estate (the "Estate") included property with an address of 1234 Oak Tree Lane, West Chesterville, Colorado 12345 (the "Property"). The Debtor jointly owned the Property on the Petition Date with her granddaughter Amber Williams. The Debtor's interest in the Property was property of the Estate pursuant to 11 U.S.C. § 541(a).

The Trustee determined that there was approximately $30,000 in non-exempt equity in the Property. Based upon this determination, in March 2022, the Trustee offered to resolve any and all issues with respect to the Property in exchange for payment of $30,000 from the Debtor.

The Trustee determined that selling the Property was the only means of recovering the non-exempt equity for the benefit of creditors. Because Ms. Williams was on title, the Trustee first required authorization under 11 U.S.C. § 363(h) to sell Ms. Williams's interest. TBP drafted a complaint and, on December 2, 2022, an adversary proceeding was commenced against Ms. Williams seeking such authorization. Ms. Williams answered the complaint, generally denying the Trustee's allegations. TBP conferred with Ms. Williams, prepared initial Rule 26(a)(1) disclosures, and then prepared a Rule 7026(f) report.

Settlement negotiations followed shortly thereafter. TBP represented the Trustee in the negotiations and drafted a settlement agreement. Both the Debtor and Ms. Williams signed the agreement, which required payment of $30,000 on or before May 1, 2025, failing which the Trustee would be authorized to record a judgment and list and sell the property. TBP prepared a stipulated judgment for entry in the event of default and a motion seeking approval of the agreement. The agreement was approved by the Court..

As a result of TBP's efforts, the Trustee recovered $30,000.00.

Attorneys	Time	Amount
Sara J. Weaver	22.90 hours	$12,500.00
Paralegals		
Ronette Wilson	2.30 hours	$ 0.00
TOTAL	25.20 hours	$12,500.00

EXHIBIT B

Detailed Billing Statements

EXHIBIT C

Summary of Costs Advanced

TIMING OF EMPLOYMENT AND PROFESSIONALS REPRESENTING TRUSTEES

By Michael F. Thomson, Esq.

Timing of Employment

How does the timing of court-approved employment affect a professional's compensation?

"We have assumed that a bankruptcy court may approve an attorney's employment *post facto*, thereby entitling him to seek fees for work performed prior to approval." *Lazzo v. Rose Hill Bank (In re Schupbach Invs., L.L.C.)*, 808 F.3d 1215, 1220 (10th Cir. 2015) (citing *In re Albrecht*, 233 F.3d 1258, 1260 (10th Cir. 2000)).

However, "retroactive approval of an attorney's employment 'is only appropriate in the most extraordinary circumstances' and . . . '[s]imple neglect will not justify **nunc pro tunc** approval.'" *In re Schupbach*, 808 F.3d at 1220 (quoting *Land v. First Nat'l Bank of Alamosa (In re Land)*, 943 F.2d 1265, 1267 (10th Cir. 1991) (emphasis in original).

"The prevailing approach is that a bankruptcy court should grant retroactive retention orders [only] in extraordinary or exceptional circumstances to deter attorneys and other professionals from general nonobservance of section 327." *Collier on Bankruptcy* ¶ 327.03[3], at p. 327-25 (Alan N. Resnick & Henry J. Sommer, eds., Jun. 2015).

"[U]ntil the bankruptcy court approves the employment application, the Tenth Circuit considers bankruptcy professionals to be mere volunteers who cannot be compensated." *In re Golesis*, 659 B.R 767, 774 (Bankr. D. Utah 2024).[1]

Golesis Test[2] for Applying "Extraordinary Circumstances" Standard:

Part I: Would the court have approved counsel's employment application had it been filed on the petition date?

- If the answer is no, the retroactive employment must be denied.

[1]The *Golesis* court also recognized that the 10th Circuit "has declared that orders authorizing retroactive employment are, as a matter of taxonomy, not **nunc pro tunc**, and that the more appropriate term is 'post facto.'" *In re Golesis*, 659 B.R. at 777 (quoting *In re Albrecht*, 233 F.3d 1258, 1260 n.4 (10th Cir. 2000) (emphasis in original) (internal citations omitted).

[2] *See In re Golesis*, 659 B.R 767, 780-786 (Bankr. D. Utah 2024). This test derives from, but modifies, the test in the case of *In re Arkansas Co.*, 798 F.2d 645 (3d Cir. 1986), based on the *Golesis* court's reading of *In re Schupbach*. The primary modification was to replace the *Arkansas* test's fourth factor ("the extent to which compensation to the applicant will prejudice third parties") with a catch-all ("other circumstances bearing on whether to grant retroactive employment").

Other bankruptcy courts within the 10th Circuit have applied the regular *Arkansas* test. *See In re Kearney*, 581 B.R. 644, (Bankr. D.N.M. 2018); *In re Bear Communs., LLC*, 2021 Bankr. LEXIS 2553 *; WL 4256161 (Bankr. D. Kan.); *In re Novinda Corp.*, 2017 Bankr. LEXIS 1006, 2017 WL 1284715, at *2 (Bankr. D. Co.).

- If the answer is yes, go to Part II of the test.

Part II: Has counsel shown extraordinary circumstances?

Consider four factors:

(1) Whether counsel or another person bore responsibility for filing the application to employ;

(2) Whether counsel was under time pressure to begin providing services before the application to employ could be filed;

(3) Whether counsel was diligent in attempting to timely file the application to employ; and

(4) Other circumstances bearing on whether to grant retroactive employment, including to deter other professionals from general nonobservance of section 327.

Examples:

1. Debtor's counsel's thirty-day delay in filing an employment application did not satisfy the "extraordinary circumstances" standard where applicant neglected to file it because he had to prepare and file a "whole bunch of first day motions . . . regarding rents involving eight different creditors" and the application "got lost in that work." *(In re Schupbach)*.

2. Committee counsel's four-day delay in filing employment application did satisfy the "extraordinary circumstances" standard in large chapter 11 case where counsel needed time to investigate conflicts and the existing disputes in the case placed "extraordinary pressure" for committee counsel to "hit the ground running." *(In re Bear Communs., LLC).*

Colorado Local Rules Incorporating the "Extraordinary Circumstances" Test:

Colorado LBR 2014-1(c):

(c) **No Retroactive Approval of Applications**. Unless otherwise stated, an Order granting an application to employ a professional will be effective as of the date of filing of the application. Requests for nunc pro tunc or retroactive approval to a date prior to the filing date of the application will not be granted absent a showing of extraordinary circumstances.

Colorado LBR 2016-1(a)(3):

(3) **No Retroactive Fees**. The application must not seek to obtain compensation for services rendered prior to the effective date of the Order approving the employment of the applicant.

Professionals Performing Trustee's Duties

When are legal services provided by a trustee's attorney not compensable?

"Although many tasks fall within a chapter 7 trustee's duties that theoretically could be performed by a lawyer, an attorney is not entitled to professional compensation for performing a trustee's statutory duties." *Shay v. Hoffman (In re Metschan)*, 2025 Bankr. LEXIS 1128, *20 (9th Cir. BAP May 9, 2025). *See also In re Lally*, 612 B.R. 246, 255 (Bankr. D.N.H. 2020) ("An attorney for a chapter 7 trustee is not entitled to professional compensation for performing non-delegable duties of the trustee.").

"While it is often difficult to differentiate between the roles of a trustee and an attorney, the role of counsel should be to perform only those tasks that require special expertise beyond that expected of an ordinary trustee." *In re Metschan*, 2025 Bankr. LEXIS 1128 at *20.

"Only tasks that require professional skill and expertise beyond the ordinary knowledge and skill of the trustee may be delegated." *In re Lally*, 612 B.R. at 256.

"Trustees may employ counsel to advise on complex legal matters, or to represent the trustee in contested matters or adversary proceedings. However, routine, uncontested tasks such as the turnover of tax refunds or avoidable transfers without a complaint, review of consumer claims, sale of personal property, and boiler-plate legal pleadings do not always require legal assistance. This is particularly true in this District where all trustees are seasoned attorneys." *In re Reynolds*, 2018 Bankr. LEXIS 1406, *11 (Bankr. D. Utah 2018).

"The burden is always upon the applicant to demonstrate an entitlement to the fees requested." *In re Metschan*, 2025 Bankr. LEXIS 1128 at *23.

Examples on Non-Compensable Legal Services:

1. Drafting an exemption waiver for a homestead exemption to which the debtor was not legally entitled (*In re Metschan)*.

2. Drafting a motion to sell property where motion did not include basic relevant evidence such as the value of the property. (*In re Metschan).*

3. Routine application/declaration/order to employ professional, including attorneys, auctioneers, and real estate agents. *In re Craig*, 651 B.R. 612, 619 (Bankr. S.D. Ala. 2023); *Gordon v. McConnell (In re McConnell)*, 641 B.R. 261, 276 (Bankr. N.D. Ga. 2022); *In re Reynolds*, 2018 Bankr. LEXIS 1406 (Bankr. D. Utah 2018).

4. Reviewing contracts and matters related to an uncontested sale motion. (*In re Craig).*

5. Drafting a routine demand letter for turnover of property. (*In re Reynolds).*

6. Prosecuting an uncontested motion to approve a settlement agreement. (*In re Reynolds)*.

7. Prosecuting an uncontested motion to sell property. (*In re Reynolds)*.

8. Discussions and negotiations concerning the terms of a listing agreement. (*In re McConnell)*.

9. Sending settlement/demand letter to debtor's attorney. (*In re McConnell)*.

THIRD PARTY RETAINERS AND DISCLOSURES

By Keri L. Riley, Esq.

Revisiting In re Lotus Properties LP

The primary case that generally sets forth the factors that must be established in order to allow for a third party to pay retainers and fees in a bankruptcy case is *In re Lotus Properties LP,* 200 B.R. 388 (Bankr. S.D. Ca. 1996). In *Lotus Properties*, the debtor, a motel with 104 rooms was placed in a receivership by its secured lender and the appointment of a receiver left the debtor with minimal funds to employ insolvency counsel. The debtor was also unable to meet all of its post-petition operating expenses, and it was anticipated that the secured lender would object to the use of its cash collateral for payment of counsel's fees. Following a chapter 11 filing, the debtor filed an application to employ its counsel, disclosing that the sole general partner had paid a pre-petition retainer of $7,500, and that the general partner would be paying counsel's fees going forward. The fee agreement attached to the application to employ was signed by the general partner and provided that counsel owed its "sole legal duty to [the debtor] and will act solely in the interests of [the debtor]" regardless of the best interests of the general partner.

The United States Trustee objected to the retention of counsel, asserting that the third-party payment of fees created a conflict of interest. The bankruptcy court, in analyzing whether the third-party payment of the retainer and fees created such a conflict, adopted the analytical approach, holding that following factors must be met when a non-debtor party was responsible for payment of fees:

> 1) the arrangement must be fully disclosed to the debtor/client and the third party payor/insider;
> 2) the debtor must expressly consent to the arrangement;
> 3) the third party payor/insider must retain independent legal counsel and must understand that the attorney's duty of undivided loyalty is owed exclusively to the debtor/client;
> 4) the factual and legal relationship between the third party payor/insider, the debtor, the respective attorneys, and their contractual arrangement concerning the fees, must be fully disclosed to the Court at the outset of the debtor's bankruptcy representation;
> 5) the debtor's attorney/applicant must demonstrate and represent to the Court's satisfaction the absence of facts which would otherwise create non-disinterestedness, actual conflict, or impermissible potential for a conflict of interest.

There was no question that the first four factors were met. The one that required additional clarification at a hearing was the fifth element, where the inclusion of the phrase "personal responsibility" created a question of whether the general partner would be taking on individual liability for the fees that were incurred by the debtor. Upon clarification that it was not intended to be a guaranty of the fees, just an acknowledgement that he would be the party paying the fees, the bankruptcy court held that there was no conflict or lack of disinterestedness and therefore approved the application to employ counsel.

This has become the standard by which the Colorado Bankruptcy Courts and other Courts around the country evaluate whether there are sufficient disclosures regarding the third-party payment of retainers and fees. It has become an increasing area of focus, and while it should generally be a matter of course, continues to be an ongoing issue. Particularly with emergency filings, retainers are frequently paid by third parties and require additional disclosures in order to ensure that the *Lotus* factors are fully complied with.

Additional circumstances that likely warrant additional disclosures based on the *Lotus* factors:

- Retention of special counsel with fees paid by an insurance carrier;
- Circumstances where fees will be paid by a holding company or management company;
- Fee sharing agreements between jointly administered debtors;
- Capital contributions with the purpose of paying fees.

Judge Jones and The Recovery of Fees from Firms

The Southern District of Texas was a favored location for large scale Chapter 11s for years, favoring the expedited procedures and two judge panel that oversaw all large Chapter 11 cases. Then in 2023, the landscape changed when it was discovered that one of the judges, Judge David Jones, who oversaw large Chapter 11 cases including the JC Pennies bankruptcy case, had been in relationship with an attorney appearing regularly in front of him, and had been cohabitating with the attorney since 2017.

This has led to its only series of ethical issues, but more than that, it has also led the United States Trustee seeking disgorgement of significant fees from Jackson Walker, the firm that employed the attorney that was in a relationship with Judge Jones, as well as Kirkland & Ellis, who had employed Jackson Walker as local counsel. It has also led to the firm having to disgorge fees directly to its clients.

The non-disclosure led to a myriad of issues. The failure to disclose resulted an inability for parties to request recusal based on the prior connection. Numerous conflicts of interest issues existed that could not be determined until later, including in evaluating and overseeing fee approvals for Jackson Walker and Kirkland Ellis. Overall it led to over 30 actions for disgorgement of fees in order to recover the fees previously approved by Judge Jones on cases in which his romantic partner had appeared in front of him.

The scope of the fees is well into the tens of millions of dollars, with just the UST's actions to disgorge or deny fees for Jackson Walker exceeding $20 million. The firm has already paid back over $1.5 million to former clients, and Kirkland & Ellis is similarly facing actions by the UST to disgorge or deny significant amounts of fees in cases over which Judge Jones resided.

While this presents an extreme example, the underlying message is clear: failing to disclose relationships between parties can result putting a firm's fees at risk and it simply isn't something that should be trifled with when it is already hard enough to get paid in Chapter 11 bankruptcy cases. Disclosure should be made early and often. Even if a connection or prior client relationship is discovered well after the employment of a firm is approved, providing additional disclosures can prevent additional issues when it comes to approval of fees. If discovered later, the non-disclosure issues could result in fees being denied or disgorged when the prior connection or relationship is eventually discovered.

KeyCite Yellow Flag
Distinguished by In re 38-36 Greenville Ave L.L.C., Bankr.D.N.J., April 6, 2020

200 B.R. 388
United States Bankruptcy Court, C.D. California, San Bernardino Division.

In re LOTUS PROPERTIES LP, Debtor.

Bankruptcy No. SB96–14907MG.
|
Sept. 16, 1996.

Synopsis
Chapter 11 debtor sought to employ law firm as general insolvency counsel. United States Trustee objected. The Bankruptcy Court, Mitchel R. Goldberg, J., held that: (1) debtor-in-possession could employ law firm even though counsel's fees and costs would be directly contributed by debtor's sole general partner, and (2) counsel would be allowed to withdraw funds from retainer under fee guide procedures promulgated by United States Trustee for Central District of California, but only during first four months of case and only up to maximum amount of $25,000.

So ordered.

West Headnotes (8)

[1] **Attorneys and Legal Services** Bankruptcy and debt collection
Bankruptcy Attorneys

Chapter 11 debtor-in-possession could employ law firm as general insolvency counsel even though counsel's fees and costs would be directly contributed by debtor's sole general partner; terms of fee arrangement were fully disclosed, debtor consented to fee arrangement, partner was represented by independent counsel with respect to issues relating to debtor's sole asset and debtor's primary secured lender, and all parties understood that counsel's duty of loyalty was owed exclusively to debtor. Bankr.Code, 11 U.S.C.A. §§ 327(a), 1107(a).

1 Case that cites this headnote

[2] **Bankruptcy** Disclosure requirements

Disclosure of all facts pertinent to court's determination of whether attorney is disinterested or holds adverse interest to bankruptcy estate must be made in application for order approving employment, and burden is on person to be employed to come forward and make full, candid, and complete disclosure in applications for employment. Bankr.Code, 11 U.S.C.A. §§ 327(a), 1107(a).

1 Case that cites this headnote

[3] **Bankruptcy** Attorneys

"Restrictive approach" to issue of payments by third party/insider to fund proposed counsel for debtor-in-possession announces per se rule prohibiting proposed counsel from representing Chapter 11 debtor-in-possession when counsel's fees and costs are contributed by principal or insider of debtor.

3 Cases that cite this headnote

[4] **Attorneys and Legal Services** Bankruptcy and debt collection
Bankruptcy Attorneys

Where fees of counsel for Chapter 11 debtor-in-possession would be directly contributed by debtor's sole general partner, in order to alleviate any appearance of non-disinterestedness, actual conflict, or impermissible potential conflict of interest, order on approval for employment would have to provide that general partner had no individual legal liability for providing payment based upon attorney fee arrangement, that partner's contributions would not be deemed guaranty of fees and expenses, and that payments would create no direct obligation by partner to counsel. Bankr.Code, 11 U.S.C.A. §§ 327(a), 1107(a).

3 Cases that cite this headnote

[5] **Attorneys and Legal Services** Bankruptcy and debt collection

Bankruptcy Attorneys

Capital contribution, rather than direct payment, of fees and costs by general partner of Chapter 11 debtor to counsel that debtor sought to employ was not required to avoid potential conflict of interest issue arising when counsel's fees and costs are contributed by principal or insider of debtor. Bankr.Code, 11 U.S.C.A. §§ 327(a), 1107(a).

1 Case that cites this headnote

[6] **Bankruptcy** Attorneys

Payments by third party/insider to fund proposed counsel for debtor-in-possession does not per se prohibit proposed counsel from representing Chapter 11 debtor-in-possession; rather, individual facts must be considered and equities and practicalities of each unique situation must be balanced.

2 Cases that cite this headnote

[7] **Bankruptcy** Interim compensation

Counsel for Chapter 11 debtor would be allowed to withdraw funds from retainer under fee guide procedures promulgated by United States Trustee for Central District of California, which allow for dissipation of prepetition retainers without prior order of the court and without distinction as to size of case, but only during first four months of case and only up to maximum amount of $25,000. Bankr.Code, 11 U.S.C.A. §§ 330, 331.

1 Case that cites this headnote

[8] **Bankruptcy** Application; documentation and itemization

Bankruptcy Application; Documentation and Itemization

To receive compensation in bankruptcy matters, professionals must file fee applications on interim and final basis. Fed.Rules Bankr.Proc.Rules 2002(a)(7), (c)(2), (k), 2016(a), 11 U.S.C.A.

Attorneys and Law Firms

***389** Todd C. Ringstad, Law Offices of Todd C. Ringstad, Irvine, CA, for Debtor Lotus Properties.

Timothy J. Farris, Office of U.S. Trustee, San Bernardino, CA, for U.S. Trustee.

MEMORANDUM–OPINION, FINDINGS, & ORDER

MITCHEL R. GOLDBERG, Bankruptcy Judge.

I.

INTRODUCTION

Before the Court is an Application of Lotus Properties LP (a debtor with very limited cash reserves) for Authorization to Employ the Law Offices of Todd C. Ringstad as general insolvency counsel and the United States Trustee's Objection thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b)(1). For the reasons set forth below, the U.S. Trustee's objection is denied in part and granted in part, subject to the clarifications set forth in this memorandum.

II.

FACTS

Lotus Properties LP ("Lotus" or "Debtor") filed a voluntary petition under Chapter 11 of Title 11 on March 28, 1996, seven months after a state-court receiver took possession and control of the single asset of the Debtor, a 104–unit motel located in Victorville, California. David Tsai is the Debtor's sole general partner. The Tsai Family Trust is the sole limited partner. Appointment of the Receiver was obtained by Lotus' primary secured lender, Cathay Bank.[1] The duration of the receivership's control left Lotus with scarce funds for pre-

petition use and/or for the purpose of employing competent general insolvency counsel. Post-petition, Lotus has been unable to meet all of it's ongoing operating expenses and, as such, advances have been made by the general partner, David Tsai. It was foreseeable under all circumstances that the Bank would object to the use of its cash collateral for counsel fees.

Lotus timely served and filed it's Application for Authorization to Employ the Law Offices of Todd C. Ringstad ("counsel") as general insolvency counsel ("Application") on May 13, 1996. The Application disclosed that David Tsai personally paid counsel a pre-petition retainer of $7,500, which was promptly placed in a segregated client trust account. The Attorney–Client Fee Agreement disclosed that Mr. Tsai agreed to contribute the retainer plus payment of fees and costs incurred on an ongoing basis which, "will not be paid from the assets of Lotus" ***390** (*See* Exhibit 2 attached to Application). More precisely, the Fee Agreement contained the following pertinent language with respect to the provision signed by Mr. Tsai, individually:

> [Tsai] hereby agrees to be **personally responsible** for payment of all fees and costs incurred on behalf of Lotus. [Tsai] understands and agrees that the Firm will owe its **sole legal duty to Lotus** and will act solely in the interests of Lotus regardless of whether such action is in the best interest of [Tsai] (emphasis added).

The U.S. Trustee argues that counsel is prohibited from representing the Debtor because Mr. Tsai's direct payment of attorney's fees constitutes a *per se* impermissible conflict of interest.

With respect to the procedure for payment, the Fee Agreement provided that counsel would render an invoice every two weeks to Mr. Tsai and Mr. Tsai agreed to contribute sufficient funds to cover the amount.[2] Counsel agreed to file Professional Fee Statements for future disbursements and withdraw funds in accordance with the U.S. Trustee Guide to Applications for Employment of Professionals and Treatment of Retainers ("Employment Guide") for the Central District of California. Counsel did not propose to file any interim fee applications during the pendency of the case. Counsel also disclosed that he would only file a *final* Fee Application at the conclusion of the case, seeking allowance of all fees and costs "if the Court deemed such filing necessary and appropriate," and agreed to repay any amount paid through interim payments that exceeded the amount ultimately allowed. The Trustee also objects to counsel's proposed method of withdrawing funds as they are received by Mr. Tsai asserting that counsel, if he is employed, is required to file formal Fee Applications and receive court approval in order to obtain payment for fees and costs.

III.

ISSUES PRESENTED

A. May counsel for debtor in possession be employed when it is disclosed that the payment of the pre-petition retainer as well as all ongoing legal fees and costs will be paid by the principal/insider of the debtor, or do these payments *per se* constitute an impermissible conflict of interest mandating denial of the Application for Employment?

B. If employment is approved, may counsel be authorized to withdraw funds from the pre- and post-petition retainer without a fee application, provided he complies with the Fee Guide procedures for pre-petition retainers promulgated by the U.S. Trustee?

IV.

DISCUSSION

A. *Payment of the pre-petition retainer and ongoing counsel fees by the general partner of the Debtor does not constitute a per se impermissible conflict of interest.*

[1] This Court is given authority to review and approve the Employment Application by virtue of 11 U.S.C. §§ 327, 328, 329(b), 330 and 331 of the Bankruptcy Code. Section 328(a) provides that any agreement or arrangement concerning the employment or compensation of a professional by a debtor-in-possession is subject to court review and approval and that such arrangement or agreement must be reasonable. This requirement is further supported by Bankruptcy Rule 2014 which mandates that professionals seeking approval of their employment by the bankruptcy estate must disclose "... any proposed arrangement for compensation ..." and "... all of the person's connections ***391** with the debtor, creditors, any other party in interest, their respective attorneys and accountants, [and] the United States trustee...." Title 11 U.S.C. §§ 327(a) and 1107(a) present certain limitations on authorizing a debtor-in-possession to employ an attorney or other professional. That professional must be considered a "disinterested person" and must not hold an interest adverse to the interest of the estate with respect to the matter on which

such professional person is employed. "Disinterested person" is defined in 11 U.S.C. 101(14), in pertinent part as follows:

> "disinterested person" means person that—
>
> (A) is not a creditor, an equity security holder, or an insider; ...
>
> (E) does not have an interest materially adverse to the interest of the estate or of 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 an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

[2] All facts pertinent to a court's determination of whether an attorney is disinterested or holds an adverse interest to the estate must be disclosed. The disclosure must be made in the Application for Order Approving Employment, and the burden is on the person to be employed to come forward and make full, candid and complete disclosure in applications for employment. *In re Park Helena Corp.,* 63 F.3d 877, 880–882 (9th Cir.1995); *In re Gire,* 107 B.R. 739, 746 (Bankr.E.D.Cal.1989) (citing *In re Roberts,* 75 B.R. 402, 411–12 (Bankr.D.Utah 1987) (en banc), aff'g, 46 B.R. 815, 839 (Bankr.D.Utah 1985)); Fed.R.Bankr.P. 2014.

It is undisputed that the facts pertinent to this Court's determination of the approval of the Application for Employment in Lotus were fully disclosed. The issue presented is whether the facts that were disclosed require this Court to deny approval of the Application based on a perceived potential conflict of interest. The challenged action is Mr. Tsai's payment of the pre-petition retainer as well as his funding of the ongoing payments covering administrative fees and costs, considering that he is the general partner of the Debtor and is also a guarantor of it's major creditor, Cathay Bank.

1. *The "Restrictive" Approach*

[3] Courts have taken distinctly different approaches in addressing the issue of payments by a third party/insider to fund proposed counsel for the debtor-in-possession. This Court characterizes the opposing views as the "restrictive approach" and the "analytical approach." The "restrictive approach" announces a *per se* rule prohibiting proposed counsel from representing a Chapter 11 debtor-in-possession where counsel's fees and costs are contributed by a principal or insider of the debtor. That position is most clearly expressed in *In re Hathaway Ranch Partnership,* 116 B.R. 208 (Bankr.C.D.Cal.1990).

In *Hathaway,* the bankruptcy court held that proposed counsel's acceptance of payment of the pre-petition retainer from a third party necessarily presented a conflict of interest "... in that counsel is serving two masters—the one who paid counsel and the one counsel is paid to represent." *Id.* at 219. The Court reasoned that

> Third parties do not transfer property or funds to an attorney to represent a debtor in possession unless that representation is in the best interest of the third party. It is often the case that the interests of the third party are not identical to the interests of the debtor in possession in its role as fiduciary of the bankruptcy estate. *Id.* at 219.

The Court ruled that such an arrangement represents an "... actual conflict of interest that disqualifies a professional from being employed pursuant to 11 U.S.C. § 327 absent a showing that the interests of the third party and the bankruptcy estate are identical upon notice to all creditors, equity security holders and other parties in interest." *Id.* at 219. Ultimately, the Court held that proposed counsel for the debtor-in-possession failed to show that the interest of the third party and the bankruptcy estate were identical and, as a result, proposed counsel had an actual conflict of interest between the debtor and the third party insiders. *Id.*

***392** Thus, *Hathaway* stands for the proposition that the absence of identical interests creates an impermissible conflict so that, with one exception, the principals of the debtor-in-possession may never fund attorney's fees for the bankruptcy estate. The reasoning for the decision appears to be based upon the belief that any future potential appearance of impropriety demonstrates an existing conflict because the insider may encourage counsel to take some action that is adverse or different from the *pure* interests of the debtor-in-possession.

This Court believes that, although Mr. Tsai's and Lotus' interests are united, they are not absolutely identical. Lotus' interests are united and best served by Mr. Tsai's funding of the legal fees and costs, including the retainer, so that it's scarce cash reserves were not completely depleted before the start of the case or during the proceedings. As a result, Lotus would be able to focus upon improving it's own financial condition. That improvement would then benefit Mr. and Mrs. Tsai and the Tsai Family Trust as they reap whatever profit is earned from the operation of the motel, and reduce the

debt owed to Cathay Bank. In reality, whether Mr. Tsai or the Debtor reduces the debt owed, if the case is ultimately dismissed or converted to a case under Title 11, Chapter 7, the Bank will be free to seek a deficiency judgment against Mr. and Mrs. Tsai through judicial foreclosure on the motel asset. With this knowledge, Mr. Tsai has the necessary motivation to ensure the smooth running of the bankruptcy case, including payment of attorney's fees.

Several prior bankruptcy court decisions from this Circuit are in accord with *Hathaway.* As in *Hathaway,* these decisions are generally based on other facts, such as serious allegations of misconduct by the third party, inadequate disclosure by counsel of the source of the retainer, dual representation by proposed counsel of the bankruptcy debtor and a principal/insider, the failure of counsel to provide full disclosure of all pertinent connections, and the presence of a reimbursement or guarantee arrangement. *In re McKinney Ranch Associates,* 62 B.R. 249 (Bankr.C.D.Cal.1986) (counsel's representation of general partners of the debtor while simultaneously representing the debtor in possession on related matters to the bankruptcy was a potential conflict of interest disqualifying counsel unless and until that adverse representation was terminated); *In re WPMK, Inc.,* 42 B.R. 157 (Bankr.D.Haw.1984) (counsel's failure to disclose that payments received on behalf of debtor were funded by creditors, who were to be reimbursed for their contributions upon court's approval of fee application, constituted an actual conflict of interest); *In re Bergdog Productions of Hawaii, Inc.,* 7 B.R. 890 (Bankr.D.Haw.1980) (counsel's receipt of payment from principals of the debtor, with principal's guarantee of further payments in exchange for reimbursement from any court-approved compensation, constituted a conflict of interest justifying denial of employment application); *In re Marine Power & Equipment Co., Inc.,* 67 B.R. 643 (Bankr.W.D.Wash.1986) (attorney appointed as special counsel denied fees for failure to disclose dual representation of debtor corporation and it's officers as co-defendants in connection with criminal proceeding, constituting actual conflict of interest); *In re Senior G & A Operating Company, Inc.,* 97 B.R. 307 (W.D.La.1989) (provision of application for employment of debtor's counsel providing for guaranty of fees by debtor's insiders, whether or not court approved, denied as evasion of court's power to determine compensation); and *In re Glenn Electric Sales Corp.,* 89 B.R. 410 (Bankr.D.N.J.1988); aff'd by *In re Glenn Electric Sales Corp.,* 99 B.R. 596 (Bankr.D.N.J.1988) (counsel's receipt of retainer from debtor's 100% shareholder, who borrowed money from creditor to retain the firm, gives rise to a potential conflict of interest, but does not represent an interest adverse to the estate as a matter of law).

2. *The "Analytical" Approach*

The reported case which best embodies the "analytical approach" is *In re Kelton,* 109 B.R. 641 (Bankr.D.Vt.1989). *Kelton* dealt with a disqualification motion brought by creditors of the debtor-in-possession. In that case, counsel received fees for services from the debtor's sole shareholder, officer and officer's spouse which were rendered ***393** prior to the debtor's subsequent conversion from Chapter 11 to Chapter 7. The creditors argued that the *Kelton* Court should adopt a *per se* rule that the arrangement created a presumption of a conflict of interest between the debtor, counsel and it's principals. In support of their position, the creditors cited multiple rulings by the Hawaii Bankruptcy Court. *See In re WPMK, Inc.* and *In re Bergdog Productions of Hawaii, Inc., supra.* The *Kelton* Court responded by stating:

> In an appropriate case there may be merit to Creditors' position. We decline their request in this instance because this arrangement was disclosed to the Court, the corporate debtor consented to it, and, it was understood by DIP's principal that counsel's duty of undivided loyalty was owed only to the DIP. Moreover, the adoption of a *per se* rule would effectively deprive future small corporate bankrupt debtors from obtaining competent counsel of choice. *Id.* at 642.

The issue regarding full disclosure was undisputed, as in Lotus. The *Kelton* creditors contended that counsel's acceptance of payment from the debtor's insider created a potential, if not actual, conflict. They argued that counsel had conflicting loyalty and would be hindered in exercising independent judgment on behalf of the debtor-in-possession rather than on behalf of the interests of Mr. Kelton, the principal and his family. *Id.* at 643. However, after thoughtful analysis of federal and state law, the *Kelton* Court disposed of that argument as follows:

> We reject Creditors' invitation to adopt a *per se* rule against this disclosed arrangement for legal representation by payment from a third party payor-insider where there is no evidence of a fee guarantee or material creditor relationship between the payor-insider and corporate debtor/client. Instead, we believe the inquiry must be case and fact specific. An equitable approach as opposed to a hard and fast rule denying employment is the better custom, and is certainly more consistent with the Code.

> Many small corporations facing the threshold of the Bankruptcy Court depend upon their key, and many times solvent, insiders to fund the debtor's bankruptcy attorney for the latter's undertaking of vital pre- and post-bankruptcy representation. We counterbalance this pragmatic view with an obligatory uncharitable view, such an arrangement may be leaving the proverbial fox in charge of the hen house. We must be assured the Orwellian eye, the scowling mien, and the inquiring mind of debtor's counsel is focused where it should be—on the debtor's interests. *Id.* at 657–58.

Kelton established a five-part test to serve as a guideline where counsel for the debtor is funded by debtor's insiders. The list includes the following elements:

(1) the arrangement must be fully disclosed to the debtor/client and the third party payor/insider;

(2) the debtor must expressly consent to the arrangement;

(3) the third party payor/insider must retain independent legal counsel and must understand that the attorney's duty of undivided loyalty is owed exclusively to the debtor/client;

(4) the factual and legal relationship between the third party payor/insider, the debtor, the respective attorneys, and their contractual arrangement concerning the fees, must be fully disclosed to the Court at the outset of the debtor's bankruptcy representation;

(5) the debtor's attorney/applicant must demonstrate and represent to the Court's satisfaction the absence of facts which would otherwise create non-disinterestedness, actual conflict, or impermissible potential for a conflict of interest. *Id.* at 658.

Applying the *Kelton* factors to the case at hand, this Court finds that proposed counsel has satisfied all five elements:

First, it is undisputed that the terms of the fee arrangement were fully disclosed to Lotus and David Tsai, the third party payor/insider through the Application, the Attorney–Client Fee Agreement, and Mr. Tsai's signed Declaration filed with this Court. The U.S. Trustee's Objection is not based on inadequate disclosure.

***394** Second, Lotus gave its express consent to the fee arrangement by executing a written Fee Agreement which fully disclosed the terms of that arrangement. In addition, the Application and signed Declaration of Mr. Tsai acknowledging that such payments would be made further demonstrated this understanding.

Third, it was disclosed that Mr. Tsai is represented by independent counsel with respect to issues relating to the real property and Cathay Bank, and his liability as a general partner. The Attorney–Client Fee Agreement included an express written acknowledgement that Mr. Tsai understood that counsel's duty of undivided loyalty is owed exclusively to Lotus.

Fourth, it is undisputed that the factual and legal relationships between Lotus, Mr. Tsai and proposed counsel, and all terms of the Fee Agreement were timely and fully disclosed to the Court at the outset of the case, upon the filing of the Application.

[4] Fifth, this Court must decide whether any actual conflict, non-disinterestedness, or an impermissible potential conflict of interest is apparent from the transaction at issue. At hearing, this Court questioned counsel as to the meaning and intent behind the phrase "personal responsibility of Tsai" set forth in the Attorney–Client Fee Agreement. Through oral presentations made by counsel, relating to Mr. Tsai's advancement of the retainer and ongoing fees, this Court finds and clarifies that the phrase "personal responsibility of Tsai," although facially unclear, was intended to signify that Mr. Tsai, not Lotus, will be the individual making the payments. Therefore, this Court rules that the Order on Approval for Employment must provide that Mr. Tsai has no *individual* legal liability for providing payment based upon the Attorney–Fee Agreement, that his contributions shall not be deemed a guarantee of the fees and expenses and, further, that those payments shall create no direct obligation by Mr. Tsai to counsel. With that statement clarified in the Order Approving Employment, the fifth element of *Kelton* is met.[3]

The recent decision of *In re Missouri Mining, Inc.,* 186 B.R. 946 (W.D.Mo.1995) also addressed this issue utilizing an "analytical" approach. Following authorization of his employment, counsel discovered that a principal and creditor of the debtor was the actual source of the $15,000 retainer that debtor had paid counsel pre-petition. Upon discovery, counsel filed a full disclosure. The U.S. Trustee filed a motion for vacation of the order authorizing employment, objecting on the basis that counsel's acceptance of the retainer from a third party holding an interest materially adverse to the debtor, violated the Model Rules of Professional Conduct and § 327 of the Code. *Id.* at 947. However, the Court found no evidence

demonstrating that counsel's sole loyalty was not owed to the debtor and it's creditor body, and found that there were no other understandings between counsel and the principal, either express or implied. *Id.* at 949–950. In determining that the Application should be approved, the Court refused to initiate a *per se* rule, holding that:

> Instead, the Court must look at the facts of each case to determine whether counsel holds or represents an interest adverse to the estate, and is not disinterested. In analyzing those facts, the cases provide guidance as to factors the Courts should consider. *Id.* at 949.

The Court relied upon a four-part test articulated by the Nebraska District Court in *In re Olson,* 36 B.R. 74, 76 (Bankr.D.Neb.1983), which provides similar guidelines to those established in *Kelton.*[4] *See also In re Palumbo* ***395** *Family Ltd. Partnership,* 182 B.R. 447, 466 (Bankr.E.D.Va.1995) (law firm's representation of debtor's general partner in separate Chapter 11 case, and it's acceptance of a retainer from the general partner, did not preclude firm from representing partnership and being compensated for representation; court rejected use of *per se* rules and followed a fact-intensive inquiry into the specific situation).

3. *The Capital Contribution Exception to the Per Se Rule*

[5] The U.S. Trustee asserts that a simple way to avoid the conflict of interest issue is to have Mr. Tsai make a capital contribution to Lotus and have Lotus pay the retainer. The Trustee argues that because the pre-petition payment made by Mr. Tsai never passed through Lotus, but was contributed directly to counsel, such payment can not be deemed a capital contribution and is, *per se,* impermissible. The Trustee also maintains that while the $7,500 retainer payment alone constitutes a conflict of interest, Mr. Tsai's funding of ongoing payments to counsel creates an additional conflict of interest. This Court does not agree that such a methodology is necessary to avoid the potential conflict of interest issue that concerned the *Hathaway* Court.

In practicality, a capital contribution is merely an end-run around making a direct payment of fees to counsel by an insider. If working capital is not available to pay counsel, a capital contribution will, in reality, be discussed by proposed counsel and insiders prior to filing. After all, attorneys demand and should receive a retainer to insure payment of fees and costs for services to be performed. A capital contribution simply recognizes that the principal/insider will not be refunded any payments made, except on the future success of the company. The effect of such a contribution is to remove the otherwise surreptitious taint which attaches to a direct payment. For example, if counsel instructs a principal/insider to make capital contributions during pre-bankruptcy planning meetings, or directs the principal to open a debtor-in-possession account to deposit payment checks for counsel's benefit, these payments by the insider to the company are not required to be disclosed to the court because they are cloaked in the guise of capital contributions. The court might never be aware of any agreements or guarantees which may have been established between the attorney and the principal.

In contrast, where an attorney *fully* discloses the exact nature of the payments, the payment procedure, and the relationship of the insider to counsel, the court is able to determine, with full knowledge, whether a potential or actual conflict exists. Full disclosure ensures that the checks and balances remain carefully in place. Capital contributions do not always release the strings by which counsel may be held. It only releases those which the court does not know about. Further, memorializing the agreement in writing and placing the facts on the record and provides notice to all creditors of record. *See also In re Kelton, supra.*

[6] Consequently, this Court disagrees with the creation of a *per se* rule without allowance for consideration of individual facts and balancing the equities and practicalities of each unique situation. This Court believes that with the full disclosure set forth under the specific facts of this case, the mere fact that payment was made directly by Mr. Tsai to counsel does not constitute a sufficient potential conflict of interest to deny counsel's Application for Employment. To the extent that Bankruptcy Judges in the Ninth Circuit utilize the more restrictive *per se* rule, this Court respectfully declines to adopt said approach. Instead, the Court is satisfied with the reasonableness of the arrangement, finds that it was negotiated in good faith to ensure the retention of competent counsel, and determines that all parties understand that counsel's duty of loyalty is owed exclusively ***396** to the Debtor. These findings provide sufficient grounds to show that no conflict exists.

B. *Counsel may withdraw funds from the retainer pursuant to the Fee Guide procedures promulgated by the U.S. Trustee for the Central District of California, but only for a limited time and a limited amount.*

[7] The second major issue raised in this Application for Employment is the proposed procedure for counsel's distribution of the fees collected. As previously addressed,

Mr. Tsai is authorized to make additional contributions to cover fees and costs in accordance with the terms of the Attorney–Client Fee Agreement, as clarified by this Memorandum. Counsel seeks to withdraw fees as they are charged, pursuant to the U.S. Trustee Guidelines, not only for the first $7,500 retainer but also for each payment made by Mr. Tsai throughout the entirety of the case, and to treat each deposit by Mr. Tsai as part of a retainer, pending the filing of a Final Fee Application "if required." The U.S. Trustee objects to this payment procedure on the grounds that it is inconsistent with the requirements of the U.S. Trustee Guidelines and violates the Bankruptcy Appellate Panel's holding in *In re Knudsen,* 84 B.R. 668 (9th Cir. BAP 1988).

[8] 11 U.S.C. § 328 allows the bankruptcy court to employ a professional "on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis." (Emphasis added.) Section 330 provides the court with authority to award professional reasonable compensation for actual, necessary services and reimbursement for actual, necessary expenses. In order to receive payment, a professional may apply for interim compensation, pursuant to § 331, not more than once every 120 days, or more often if the court permits. The court may allow and disburse the compensation only after notice and hearing. In accord, § 328 requires that compensation is allowed and disbursed only after notice and a hearing. Thus, it is clear that Congress did not contemplate the allowance of compensation for professionals without notice and a hearing. In order to receive compensation in bankruptcy matters, professionals must file fee applications on an interim and final basis (Fed.R.Bankr.P. 2016(a), 2002(a)(7), 2002(c)(2) & 2002(k)).

Pursuant to the Bankruptcy Code and Rules, the intention was to discourage professionals from seeking payment more frequently than every four months, as prescribed under § 331. However, delay in the distribution of a retainer could cause substantial cash flow problems for attorneys, often resulting in submission of fee applications more frequently than every four months. As a result of extensive consultation by the U.S. Trustee with the Bench and Bar, the U.S. Trustee Guidelines, as revised 1994.

The U.S. Trustee Guide to Applications for Employment of Professionals and Treatment of Retainers of the Central District of California ("Employment Guide") instructs professionals who have received a pre-petition or post petition retainer to submit a monthly Professional Fee Statement to the Trustee, including documentation supporting the charges in the form of a regular fee application, and served on appropriate parties.[5] This Statement allows the professional to withdraw funds from the segregated client trust account in the amount requested in the Statement, pending future notice or hearing. If the U.S. Trustee or a party files and serves an objection, the court sets a hearing. If no objection is filed, the professional may draw down the requested compensation without further notice, hearing or order, pending the interim fee application, after one hundred twenty days has expired. The Employment Guide makes clear that although the professional may be performing services covered by a retainer, he or she is still required to file interim fee applications every 120 days. Once the full amount of the retainer is exhausted, ***397** the professional is precluded from filing any further Fee Statements.[6]

The case upon which Trustee relies most heavily is *In re Knudsen, supra.* The proposed payment procedure involved in *Knudsen* is substantially similar to the terms proposed here. In *Knudsen,* the U.S. Trustee appealed an order authorizing a fee payment procedure where professionals and the creditors' committee were to be paid each month without prior court approval of billing statements. Every three months, counsel intended to serve and file an application for approval of the statements. The statements were to be paid promptly by debtor, if found acceptable. Finally, if quarterly statements were not timely filed, debtor would not be required to pay counsel until the statements were approved by the court.[7] While the largest creditor approved the procedure,[8] the U.S. Trustee objected on the basis that the procedure deprived the court from approving the fees requested before counsel was paid. The Bankruptcy Court approved the procedure and Trustee appealed.

The Bankruptcy Appellate Panel ("BAP"), acknowledging that the issue presented was one of first impression, was compelled to "... reconcile section 328's broad language which includes the term 'retainer' with section 331's specific requirements including notice and hearing." *Id.* at 671. The BAP read § 328(a)'s inclusion of the term "retainer" as indicating that "... in certain rare circumstances where adequate safeguards are taken, a bankruptcy court may implement a fee payment procedure such as the one used here." *Id.* at 671. The Trustee asserted, and the BAP agreed, that allowance and disbursement of fees is permitted only in accordance with §§ 330 and 331, but the Court did not find that those sections prohibit the transfer of funds to

professionals prior to compliance with those sections. *Id.* "Section 328(a) specifically states that a bankruptcy court may authorize a retainer as part of a compensation agreement. A retainer contemplates payment of a lump sum at the beginning of a case or periodically thereafter." *Id.* The BAP found that three critical factors must exist, i.e., the fees must not be **finally** allowed until an application is filed; an opportunity for objection has been provided; and the court has reviewed the application. *Id.* (Emphasis added.) In affirming the trial court's decision, the Panel based it's decision on the finding of four specific factual criteria: (1) the case is unusually large; (2) an extended waiting period for payment would place an undue hardship on counsel; (3) counsel can respond to any reassessment; and (4) the fee retainer procedure is subject to a noticed hearing prior to any payment. *Id.* at 672–73.[9]

Thus, the function of the *Knudsen* draw-down procedure is to allow payment for legal fees without forcing counsel to file a noticed motion prior to the expiration of each four-month period until the completion of a large case. Here, the Trustee strongly urges this Court to prohibit counsel from making draw downs during the first four months of this case for any sum in excess of the $7,500 initially paid. In support of his position, the Trustee argues threefold: First, that the specific facts of this case fail to meet each of the four *Knudsen* criteria, primarily because this case is not unusually large and counsel has not shown that he will suffer undue hardship by awaiting compensation until the first interim application is approved. Second, the Trustee asserts the proposed procedure ***398** violates the principle established in *Hathaway,* which requires a professional to obtain an order approving compensation before making draw downs on retainers. *Hathaway,* 116 B.R. at 218. Third, the Trustee maintains that a pre-petition retainer is not intended to cover fees and costs beyond the first four months of the case because after that period, a professional must receive court approval through the filing of interim fee applications. In response, counsel for Debtor asserts that he should not be limited to making draw downs from the $7,500 retainer only and should not be punished for agreeing to provide representation in exchange for taking a very small retainer. Under normal circumstances, counsel argues that he would have required a retainer of no less than $25,000 which would have been reasonable.

The U.S. Trustee Guidelines allow for the dissipation of pre-petition retainers without prior order of the court and without distinction as to the size of the case. In fact, it was in response to the holding in *Knudsen* and based upon dialogue with both the Bench and the Bar, that the U.S. Trustee Guidelines for distribution of retainers were established. As a result, the Guidelines essentially provide a broad interpretation of the *Knudsen* and *Hathaway* holdings, at least as related to pre-petition retainers.

The Court finds that the message behind *Knudsen* and the intent of the U.S. Trustee Guidelines are satisfied by allowing counsel to utilize the Fee Statement procedure (previously discussed herein) during the initial post-petition period. The exercise of this draw-down procedure with a fixed retainer ceiling is, therefore, allowable within the initial four-month post-petition employment period. After discussion with the parties on record, this Court believes that a minimum retainer of $25,000 would have been reasonably requested by counsel to initially represent the Debtor. Because David Tsai was only able to fund the initial sum of $7,500 to counsel, this Court reasons that Mr. Tsai is, therefore, permitted to replenish this retainer account. This amount is to be treated as a pre-petition retainer, although received in post-petition increments.

To the extent that fees and incurred costs actually exceed the $25,000 maximum ceiling established herein prior to the end of the post-petition four-month period, this Court reasons that no additional fees and costs should be distributed from the client trust account except upon order of the court after notice and hearing.

In the event that the initial retainer of $25,000 is not exhausted by counsel by the end of this four-month period, this Court holds that any unused funds must remain in the client trust account until the time of the first Interim Fee Application. On the other hand, if a significant amount of fees and costs are incurred which exceed the $25,000 initial retainer, counsel has a remedy pursuant to 11 U.S.C. § 331 to seek approval of an Interim Fee Application prior to the expiration of the initial retainer period.

The Court anticipates that counsel will accrue fees and expenses beyond the allowed initial retainer and deems it proper for counsel for Debtor to seek approval of all future payments through the filing of regular Interim Fee applications pending a Final Fee Application. This Court believes that the allowance of ongoing draw-downs through the termination of the bankruptcy proceeding is not warranted by the facts in this case. It is the opinion of this Court that this reasoning does not conflict with the objectives of the U.S. Trustee Guidelines, is consistent with the requirements of §§

330 and 331 of the Code, and exemplifies the spirit and intent of *Knudsen.*

V.

FINDINGS OF FACT

1. The facts pertinent to this Court's determination of the approval of the Application for Employment in Lotus were timely and fully disclosed to this Court.

2. The interests of David Tsai and Lotus, although united, are not absolutely identical.

3. The terms and conditions of the fee arrangement were fully disclosed to Lotus and David Tsai through the Application, the Attorney–Client Fee Agreement and the ***399** Declaration of David Tsai filed with this Court.

4. Lotus consented to the fee arrangement when it executed a written Fee Agreement which fully disclosed the terms of that fee arrangement.

5. David Tsai, through execution of the Attorney–Client Fee Agreement clearly understood that counsel's duty of undivided loyalty was owed exclusively to Lotus.

6. Mere payment by the general partners to the Debtor for counsel fees does not constitute sufficient potential conflict of interest to deny counsel's Application for Employment.

7. The intent of *Knudsen* and the intent of the U.S. Trustee Guidelines are satisfied by allowing counsel to utilize the Fee Statement procedure during the first four months of the case only, and up to a maximum amount of $25,000.

8. The proposed payment procedure for the first four months of the case does not conflict with the objectives of the U.S. Trustee Guidelines and is consistent with the requirements of §§ 330 and 331 of the Code and exemplifies the spirit and intent of *Knudsen.*

VI.

ORDER

Based upon the foregoing Memorandum Opinion and Findings, it is

ORDERED, that the U.S. Trustee's Objection to the Employment Application is denied and the Application is conditionally approved; and it is further

ORDERED, that the Order Authorizing Employment of General Insolvency Counsel entered July 26, 1996 is hereby modified to provide that David Tsai has no individual liability for providing payment based upon the Attorney–Fee Agreement and that his contributions shall not be deemed a guarantee of fees and costs; and it is further

ORDERED, that counsel may draw down a maximum of Twenty–Five Thousand ($25,000.00) Dollars for the first four-month post-petition employment period against fees and costs incurred pursuant to the U.S. Trustee Guide to Applications for Employment of Professionals and Treatment of Retainers for the Central District of California; and it is further

ORDERED, that David Tsai is permitted to replenish the initial Seven Thousand, Five Hundred ($7,500.00) Dollar retainer account, as provided by the Attorney–Client Agreement, without further order of this Court; and it is further

ORDERED, that to the extent fees and costs incurred exceed the $25,000.00 ceiling prior to the end of the initial four-month employment period, no future draw-downs are permitted beyond said $25,000, except upon order of this Court, after proper notice and hearing. In the event, post-petition retainer account funds remain on hand after the fourth month has expired, those monies are to remain on deposit in counsel's client trust account pending determination by this Court of an Interim and/or Final Fee Application hearing; and it is further

ORDERED, that pursuant to the Court ruling made on the record the statutory time within which the parties have the right to serve and file a Notice of Appeal herein will run upon the entry of this Memorandum–Opinion, Findings and Order upon the Court's Docket.

All Citations

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Footnotes

1 David and Millie Tsai have personally guaranteed the Promissory Note with the Bank.

2 The Agreement specifically stated that no portion of the retainer was to be treated as "earned on receipt." Counsel also made the required averments that he is a "disinterested person" within the meaning of 11 U.S.C. 101(14), has no adverse interest to Lotus or to the estate, and is not owed any funds aside from the additional retainer funds. The remainder of the retainer as well as the ongoing additional payments covering fees and costs would be deposited in the client trust account in accordance with the U.S. Trustee Guide to Applications for Employment of Professionals and Treatment of Retainers for the Central District of California. Finally, counsel disclosed that Mr. Tsai retains independent counsel dealing with matters related to Cathay Bank.

3 With this Court's characterization of the nature of the Mr. Tsai's payment of counsel fees and costs as strictly voluntary, the Court notes that if Mr. Tsai decides to withdraw funding of this administrative expense, counsel's only appropriate remedy is to serve and file a formal application to withdraw. Counsel does not have the automatic right of withdrawal. Instead, non-payment of ongoing fees will serve only as one criteria for this Court's consideration, as in any other motion to withdraw.

4 The U.S. Trustee in *Missouri Mining* stated it preferred that the insider make a capital contribution to the debtor entity, and then have debtor transfer payment to counsel. However, since that Court found no evidence of any loan agreement and no claim had been filed by the principal as to his payment of the retainer, it found that such payment "... should be treated as a capital contribution to the debtor, even though such funds were paid on behalf of, not to, the debtor." *Missouri Mining,* 186 B.R. at 950. The Court held that the payment of the retainer by the insider, "... without more, does not create an actual conflict of interest sufficient to disqualify debtor's counsel ..." and that counsel "... does not hold or represent any interest adverse to the debtor and is disinterested." *Id.* at 950.

5 The Fee Statement must be served upon the official creditors' committee or, if no committee is appointed, on the 20 largest unsecured creditors, on those parties who have requested special notice, and upon the U.S. Trustee.

6 The Guide notes that "some judges do not permit attorneys to draw down on retainers pursuant to the above procedures" and advises professionals to determine what procedures are required by each individual judge.

7 This type of payment procedure has been dubbed an "evergreen" payment, and the Employment Guide requires that notice of the employment application should include any terms, including "evergreen" provisions, that allow for payments or transfers of funds to the professional without any further notice or hearing.

8 The case was a Chapter 11 liquidation and debtors' principal secured creditor, Citicorp Industrial Credit, Inc. was funding debtor's administrative obligations.

9 The *Knudsen* Court acknowledged that in especially large cases, "... when counsel must wait an extended period for payment, counsel is essentially compelled to finance the reorganization. This result is improper and may discourage qualified practitioners from participating in bankruptcy cases; a result that is clearly contrary to Congressional intent." *Id.* at 672.

End of Document

Faculty

Hon. Kevin R. Anderson is a U.S. Bankruptcy Judge for the District of Utah in Salt Lake City, appointed on Sept. 4, 2015. Previously, he served for 17 years as the standing chapter 13 trustee for the District of Utah, administering more than 70,000 chapter 13 cases. Judge Anderson served as president of the National Association of Chapter 13 Trustees (NACTT), and he served on several national committees regarding chapter 13 legislation, rules, forms and policy. He has frequently written and presented on chapter 13 issues, including for the *Norton Bankruptcy Law Advisor*, the *ABI Journal*, the *NACTT Quarterly* and the *NACTT Academy for Consumer Bankruptcy Education*. He also is a Fellow in the American College of Bankruptcy. Prior to his appointment as chapter 13 trustee, Judge Anderson practiced for 13 years as a commercial litigator with an emphasis on civil fraud, real property, and representing chapter 11 and 7 trustees. He also clerked for Hon. David N. Naugle, U.S. Bankruptcy Judge for the Central District of California. Prior to law school, Judge Anderson worked for two years as a data systems specialist testing military and commercial jet engines for General Electric. He received his J.D. *cum laude* from the J. Ruben Clark Law School at Brigham Young University.

Keri L. Riley is a partner with Kutner Brinen Dickey Riley, P.C. in Denver, where she focuses primarily in the areas of bankruptcy and insolvency law. She has represented debtors and creditors in all aspects of bankruptcy cases, including complex chapter 11 reorganizations and liquidations, chapter 7 cases, adversary proceedings, and appeals to the Tenth Circuit Bankruptcy Appellate Panel and Tenth Circuit Court of Appeals. Prior to joining the firm, Ms. Riley clerked for the Colorado Attorney General's Office, where she worked with the Consumer Protection Services Department, advocating for the rights of consumers who were subjected to illegal business practices. Her commitment to her clients has continued to earn her recognition in the legal community following graduation, and she has been selected as a "Rising Star" by *Super Lawyers* every year since 2018. In addition, she has been active in helping the survivors of human trafficking rebuild their financial lives through her continued *pro bono* work with the Alliance to Lead Impact in Global Human Trafficking. Ms. Riley received her J.D. with honors from the University of Denver, Sturm College of Law and was a member of the DU National Trial Team and ABA Appellate Advocacy Team, where she won multiple awards for her advocacy skills.

Michael F. Thomson is a shareholder with Greenberg Traurig, LLP, in Salt Lake City, where his practice focuses on navigating complex bankruptcy and receivership proceedings, out-of-court restructurings and related litigation. He also is a chapter 7 and subchapter V trustee in the District of Utah, currently serves as a chapter 11 trustee, and represents creditors, distressed companies, chapter 7 and 11 trustees, and court-appointed receivers in virtually all aspects of the workout, restructuring and liquidation process, including litigation and appeals. Mr. Thomson is a Fellow with the American College of Bankruptcy nd has been recognized in *The Best Lawyers in America* (Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law, and Litigation – Bankruptcy), *Super Lawyers* magazine, *Mountain States Super Lawyers* (Bankruptcy & Creditor/Debtor Rights) and *Utah Business* magazine's "Legal Elite" (Bankruptcy/Workout). He also is rated AV-Preeminent by Martindale-Hubbell. Mr. Thomson received his J.D. from the University of Utah College of Law, where he was an articles editor of the *Utah Law Review* and a William H. Leary Scholar.

David J. Warner is a partner with Wadsworth Garber Warner Conrardy, P.C. in Littleton, Colo., and has focused on bankruptcy law and commercial litigation in Colorado since 2007. He has served as a chapter 7 panel trustee in Wyoming since 2021. Mr. Warner represents individual and corporate clients in chapter 7 and chapter 11 proceedings, nondischargeability litigation, and related civil matters in state and federal courts. He has guided clients through business reorganizations, defended against class actions, and represented trustees and liquidating agents in significant recovery efforts. In 2017, Mr. Warner secured one of Colorado's largest jury verdicts in a case involving an airline union. He is admitted to practice in Colorado, Wyoming and Texas (inactive), and before the U.S. District Court for the District of Colorado. Mr. Warner received his J.D. from Baylor Law School in 2006.