How Do I Get Paid for This Work?

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Top Ten Things To Consider When Preparing A Fee Application

1. When in Rome, do as the Romans do - Local Rule 2016-2 (Western District) and Local Rule 2016-1 (Eastern District) outline the guidelines to follow for fee applications. Avoid having your application denied for procedural reasons by following these rules. The Western and Eastern Districts of Michigan have different procedures on fees. For example, the Western District requires fee applications in excess of the no-look fee to document all services from the beginning of the case - the Eastern District does not. If you follow the local rules, you will be on solid ground.

2. Make your application easy to read - Bankruptcy Judges and court staff look at many applications daily. Consider the format of your application and make sure all of the most important information is easily accessible.

3. If you are taking a haircut on fees, don't wear a hat - Sometimes counsel sees the need to reduce fees. As unhappy as that is, don't hide that fact. Instead, state the reduction and the amount of the reduction up front. Also, consider disclosing those entries when you do not charge. This shows you are in contact with a client, but not billing for every call or service. That way the judge knows you are already working for less, that you are exercising billing judgment, and will probably stop a judge from cutting your fees.

4. If your fees are high, give a reason why - Most high fee requests can be supported because of the facts of the case, but make the reviewer's job easier by explaining what caused the fees to escalate. Mortgage modification requests, modification of plans, defense of dismissed motions, and motions to borrow are the usual suspects for why the fee is high.

5. Tell the court anything that is not on the docket - Most judges can look at the Court's docket and quickly determine what happened. In some cases, such as where taxes are being negotiated, the services of counsel are not evident. Explain the efforts taken by counsel to fill in the gaps.

6. State the impact the award of fees has on the Chapter 13 plan - Generally, the award of post confirmation fees means less money for creditors, but we already know that. But if the fee award will crater a plan or cause the debtor to have to pay additional money to the Trustee, you should state that in the application. It also helps to indicate if the extra fees have already been budgeted in the liquidation analysis. By doing so, you send a message to the court that you know a problem exists and have some idea of what to do to fix it.

7. If possible, put a dollar sign on the value of the service to the debtor - This is something where Chapter 7 Trustees and their counsel excel. They can say, with varying degrees of accuracy, that their effort gained "X" dollars for the estate. While not always possible in Chapter 13 cases, consider if you can put a dollar amount on the value. For example, if you incurred $3,000 in fees to defend an adversary proceeding seeking a $100,000 exception to discharge, it puts the service in perspective.

8. Consider how often you file a fee application - There is no correct answer here, but some firms file fee applications early and often and others only near the end of the case.

9. Keep your client informed - In addition to this being part of your duty to your client, it also helps when the debtor is not blind sided by what he or she thinks is a large bill. This avoids the debtor filing an objection to the fee application and the subsequent uncomfortable appearance in court as adversaries over your fees.

10. In certain cases, consider compromising your fees - Although you feel you worked hard for your fees and, in fact you did, the debtor may think otherwise. While no one wants to be an easy mark, some compromise eliminates the court appearances, and, in some cases, the resulting grievance and expense of that process.

***Harris v. Viegelahn*, 135 S. Ct. 1829 (May 18, 2015)**

The opinion of the Supreme Court addresses the disposition of wages earned by a debtor after he converts from a Chapter 13 case to a Chapter 7 case.

Issue: What does the United States Bankruptcy Code require a Chapter 13 Trustee to do with undistributed funds on hand at the time of conversion?

Held: A debtor who converts from Chapter 13 case to Chapter 7 case is entitled to the refund of any post-petition wages not yet distributed by the Chapter 13 Trustee.

The Debtor in *Harris* converted his Chapter 13 case to a Chapter 7 case. At the time of the post confirmation conversion, the Chapter 13 Trustee had $5,519.00 of post-petition wages on hand. Ten days after conversion of the case, the Chapter 13 Trustee disbursed the funds she was holding to administrative claimants and to creditors in accordance with the terms of the confirmed Chapter 13 plan. The Debtor disagreed with the position of the Trustee to disburse the funds on hand to creditors post conversion. The Debtor filed a motion with the Court asserting that once the case was converted to a Chapter 7 case, the Chapter 13 Trustee lacked the authority to disburse funds to creditors. The Debtor's motion requested a refund of the wages that the Chapter 13 Trustee disbursed to the Debtor's creditors post conversion.

The Bankruptcy Court and the District Court granted Harris' motion. The Fifth Circuit reversed holding that a former Chapter 13 Trustee must distribute a debtor's accumulated post-petition wages to his creditors. The U.S. Supreme Court ultimately reversed the Fifth Circuit and held that a debtor who converts to Chapter 7 is entitled to return of any post-petition wages not yet distributed by the Chapter 13 Trustee.

In reaching its decision, the Supreme Court looked to 11 U.S.C. §348(f)(1)(A) which provides that, "property of the estate in the converted case shall consist of property of the estate, as of the date of the filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." Id. 1837. Therefore, property incurred by the debtor post-petition (during the Chapter 13 case) is generally excluded from a Chapter 7 estate. A debtor's postpetition wages are property of the estate in the Chapter 13 case pursuant to 11 U.S.C. §1306(a), but are not property of the estate in a Chapter 7 case as of the date of the original petition. Therefore, post-petition wages in the hands of the Chapter 13 Trustee at the time of conversion cannot be considered property of the estate in a converted Chapter 7 case. However, Congress added an exception for debtors who convert in bad faith, §348(f)(2) provides "If the debtor converts a case [initially filed] under Chapter 13 . . . in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of the conversion." Id.

The Supreme Court summarized that a debtor's postpetition wages, including the undisbursed funds on hand with the Chapter 13 Trustee at the time of a post confirmation conversion, generally do not become part of the Chapter 7 estate upon conversion. "Absent a bad faith conversion, §348(f) limits a converted Chapter 7 estate to property belonging to the debtor 'as of the date' the original Chapter 13 petition was filed. Postpetition wages by definition, do not fit that bill." Id. The exception broadens the scope of the Chapter 7 estate, in that a bath faith conversion brings into the Chapter 7 estate property that would have otherwise been excluded.

Although the bankruptcy code does not expressly state that upon conversion postpetition wages are to be returned to the debtor, the Court explained that such a conclusion would be the most sensible reading of what Congress did provide. The Court reasoned that "by excluding

postpetition wages from property of the converted Chapter 7 estate §348(f)(1)(A) removes those earnings from the pool of assets that may be liquidated and distributed to creditors." Id.

Further the Supreme Court recognized that a core service provided by a Chapter 13 Trustee is the disbursement of payments to creditors. The Court explained that the bankruptcy code allows the debtor to convert a Chapter 13 case to a Chapter 7 case at anytime. The moment a case is converted from Chapter 13 to Chapter 7, the Chapter 13 Trustee is stripped of authority to provide that core disbursement service. Id. at 1838.

The Court reasoned that allowing the former Chapter 13 trustee to disburse the very same earnings to the very same creditors would circumvent §348(f)(1)(A) and would be incompatible with the statute. After Congress explicitly exempted from Chapter 7s liquidation-and-distribution process a debtor's post petition wages, the Court declined to place those wages in the creditors hands another way, i.e. via the Chapter 13 trustee. Id. at 1837.

***In re Bateson*, Case No. 13-55057-PJS (Bankr. E.D.Mich. June 23, 2016)**

The opinion addresses the disposition of wages earned by a debtor after she dismisses her Chapter 13 case.

Issue: What does the United States Bankruptcy Code require a Chapter 13 Trustee to do with undistributed funds on hand at the time of dismissal?

Held: Absent a demonstration of cause under §349(b)(3), a Chapter 13 Trustee must return any funds on hand to the debtor upon dismissal.

In *Bateson*, the Debtor's Chapter 13 plan was confirmed with the requirement to remit plan payments in the amount of $8,885.00 per month yielding a 100% distribution to unsecured creditors. Post confirmation the Debtor filed a motion to voluntarily dismiss her case. The Court subsequently entered an order of dismissing the case. At the time of dismissal, the Chapter 13 Trustee had $16,614.95 on hand.

With the Trustee's next disbursement cycle, the Trustee disbursed the funds that were on hand at the time that the case was dismissed to unsecured creditors. The Debtor filed a motion to compel the Trustee to recoup the funds disbursed to creditors and instead issue a refund to the Debtor.

The Court explained the competing views of the Debtor and the Chapter 13 Trustee. The Debtor's motion asserted that a Chapter 13 Trustee must distribute funds on hand at the time of dismissal to the Debtor. The Debtor relied on 11 U.S.C. §349(b)(3) which provides that dismissal of a case "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." Id. at 3. In otherwords, to put the Debtor in the position she was in at the time the case was filed.

In response, the Chapter 13 Trustee argued that "since post-petition wages by definition did not exist at the time that the case was commenced, it is nonsensical to talk about revesting

them 'in the entity' which they were 'vested immediately before the commencement of the case.'" The Trustee argued that §349(b)(3) is irrelevant to the question of who was entitled to the funds on at the time of dismissal." Id. The Trustee relied on 11 U.S.C. §1326 titled "Payments." The pertinent part of §1326(a)(1) requires that a debtor start making Chapter 13 plan payments no later than 30 days after the date of filing of the petition. Section 1326(a)(2) provides:

> A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. If a plan is confirmed, the trustee shall distribute any such payments in accordance with the plan as soon as is practicable. If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

The Trustee argued that §1326 was clear, and that in the event of a pre-confirmation dismissal, the Trustee is to disburse funds to the Debtor, less any administrative claims under §503(b), and if the plan is confirmed then §1326 instructs the Trustee to disburse the funds on hand to creditors pursuant to the terms of the debtor's confirmed plan. Id. at 4.

The Debtor disagreed and argued that §1326(a)(2) only applies to payments made by a debtor pre-confirmation and because the instant case is a post confirmation dismissal §1326(a)(2) is inapplicable. Id.

The Court held that the Trustee's duties under §1326(a)(2) cease to exist once the case is no longer in Chapter 13. Absent a demonstration of cause under §349(b)(3), a Chapter 13 trustee must return any funds on hand to the debtor upon dismissal.

In reaching its conclusion, the Court looked to *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015) for guidance. In *Harris*, the Supreme Court addressed the issue of what must a Chapter 13 Trustee do with funds on hand at the time of a post confirmation conversion. The Supreme Court held that funds on hand at the time of a post confirmation conversion should be returned to the debtor. In reaching its conclusion, the Supreme Court explained that "by excluding postpetition wages from

property of the converted Chapter 7 estate, §348(f)(1)(A) removes those earnings from the pool of assets that may be liquidated and distributed to creditors." *Bateson* at 5 (quoting *Harris* at 1837-38) Post-petition wages on hand with the Chapter 13 Trustee at the time of conversion cannot be considered property of the estate in a converted Chapter 7case. Id.

Section §348(e) provides "Conversion [from Chapter 13 to Chapter 7] terminates the service of the [Chapter 13] trustee." Id. at 6. "A core service provided by a Chapter 13 Trustee is the disbursement of payments to creditors. §1326(c) The moment a case is converted from Chapter 13 to Chapter 7, the Chapter 13 Trustee is stripped of authority to provide that core disbursement service." Id.

The Chapter 13 Trustee in *Bateson* argued that the ruling in *Harris* is inapplicable to *Bateson* because *Harris* was a post-confirmation conversion as opposed to a post-confirmation dismissal. The Trustee argued that this is so because the Supreme Court in Harris relied upon 348(e) which terminates the service of the Chapter 13 Trustee upon conversion, replacing the Chapter 13 trustee with a Chapter 7 trustee. The Trustee maintains that "unlike §348, which applies to conversion, §349, which applies to dismissal contains no similar provision 'terminating the service of the Chapter 13 trustee' upon dismissal." Id. In other words, under §349 the Chapter 13 Trustee is still the Trustee in a dismissed case because there is no replacement Trustee to administer the case. Therefore, according to the Chapter 13 Trustee, the ruling in Harris should be limited to post-confirmation conversions.

The *Bateson* Court disagreed with the Chapter 13 Trustee and explained that "[w]hen a debtor exercises his statutory right to convert, the case is placed under Chapter 7's governance, and no Chapter 13 provision holds sway." *Bateson* at 6 (citing *Harris* at 1838).

The *Bateson* Court found the *Harris* reasoning equally applicable to the dismissed cases explaining that "[o]nce the Debtor dismissed her case, 'no Chapter 13 provision holds sway.' That means that the effect of a Chapter 13 confirmation order is no greater in a dismissed Chapter 13 case than it would be in a converted Chapter 13 case. In either instance, the Chapter 13 case is over." Id. 6-7.

The *Bateson* Court explained that the Supreme Court's analysis in *Harris* could be construed as even more compelling to a dismissed case as opposed to a converted case "because in a dismissed case, none of the provisions of the Bankruptcy Code remain in effect, other than those provided for in §349. The response to the Trustee's assertion that there is no counterpart in §349 to §348's termination of the Chapter 13 trustee is that there is no need for a counterpart in §349 because dismissal ended the entire case and does not result in the appointment of a new trustee." Id. at 7.

The *Bateson* Court further explained that although the Trustee was correct in that §1326(a)(1) requires the debtor to make plan payments and that §1326(a)(2) advises the Trustee what to do with the plan payments "[t]hose duties arise only when a Chapter 13 case is filed, and they continue in effect only while the Chapter 13 case is pending." Id. "Regardless of whether §1326(a)(2) governs only pre-confirmation payments – as Debtor argues – or governs both pre-confirmation and post-confirmation payments – as the Trustee argues – the Trustee's duties under §1326(a)(2) cease to exist once the case is no longer in Chapter 13." Id.

The Court also explained that the application of *Harris* is also consistent with Congress' intent behind §349(b)(3) which is [a]fter a bankruptcy case is dismissed, the debtor returns to the status he or she was in before the petition was filed." Id. at 9, (citing Bli v. Greenstone Farm Credit Services, FCLA *(In re Bli Farms*), 312 B.R. 606, 622 (E.D. Mich. 2004).

Lastly, the Chapter 13 Trustee argued that even if the Court holding mandated that the Chapter 13 Trustee must return funds on hand as of the date of dismissal to the debtor, §349(b)(3) nonetheless expressly authorizes a bankruptcy court to "order otherwise" upon a showing of "cause." Id. at 9. The Trustee asserted that cause exists for the reasons that the Debtor made only half of her plan payments, unsecured creditors who were scheduled to received a 100% distribution only received 27% and the Debtor "unilaterally" determined the timing of the dismissal to prevent the Trustee's distribution of funds on hand to creditors.

The Court explained that even if all the facts as alleged by the Trustee were true, those facts do not demonstrate cause for the Court to order under §349(b)(3) that the funds should be disbursed to anyone other than the Debtor. Id. at 10. The Court held that "absent a demonstration of cause under §349(b)(3), a Chapter 13 trustee must return any funds on hand to the debtor upon dismissal." Id. at 11.

HOW DOES A DEBTOR'S ATTORNEY GET PAID FOR WORK PERFORMED DURING THE HOME STRETCH UNDER A CHAPTER 13 PLAN WHEN THERE ARE NO ADDITIONAL FUNDSTO BE PUT INTO THE PLANTO PAY FOR THOSE SERVICES?

***In re Sorter*, Case No. 08-57829-PJS (Bankr. E.D.Mich. 2015)**

Kathleen Sorter filed her Chapter 13 case on July 24, 2008 and her Chapter 13 plan was confirmed on August 11, 2009. Ms. Sorter's plan treated the first mortgage on her property as a direct payment from Ms. Sorter to the lender.

On October 28, 2014 the Trustee filed a Notice of Completion of Plan Payments and Notice of Final Cure. The mortgage lender filed a Disagreement with Final Cure on November 18, 2014. Ms. Sorter contented that she had made all required payments on the obligation and Counsel for Ms. Sorter attempted to contact the lender to resolve the matter. Unable to do so, Debtor's Counsel attended the hearing on the Disagreement with Final Cure on December 16, 2014. The lender did not appear at the status conference so Debtor's Counsel was forced to appear on the contested call. The lender did not appear at the time of the contested call and the Court overruled the Disagreement with Final Cure. The Order overruling the Disagreement with Final Cure was entered on December 16, 2014 at 12:52 p.m. The Order Discharging the Debtor was entered on December 16, 2014 at 12:55 p.m.

Debtor's Counsel had filed a Fifth Post-Confirmation Application for Attorney Fees on July 25, 2014. Debtor's Counsel filed a Sixth Post-Confirmation Application for Attorney Fees on December 28, 2014. The fee application sought attorney fees of $1332.50 and expenses of $61.04. The time frame for the work completed for this fee application was August 5, 2014 through December 19, 2014. Sixty percent of the attorney fees billed were from the time the Notice of Completion was filed by the Trustee through Discharge of the case. The Trustee objected to the Sixth Post-Confirmation Application arguing in part that there is no authorization under the

Bankruptcy Code to award Counsel fees and expenses for work done prior to the Discharge of the case and that Debtor's obligation to pay pre-discharge administrative expenses had been discharged with the other debts.

A hearing was held on January 27, 2015. Debtor's Counsel argued in part that because the Discharge was entered 3 minutes after the entry of the Order Overruling the Disagreement with Final Cure was entered, it was impossible for Debtor's Counsel to file a fee application prior to Discharge. The Court adjourned the hearing on the fee application for the Trustee and Debtor Counsel to submit support for their position. The Court noted that none of the cases cited were controlling as there had been no decision made by the 6th Circuit, the District Court or a Bankruptcy Court in the Eastern District of Michigan.

On February 10, 2015 the Court ruled that if Counsel wishes to be compensated for any fees and expenses for work done in connection with a Chapter 13 case a fee application must be filed and approved by the Court. 11 USC 329 allows the Court the opportunity to review the reasonableness of the fees sought to be compensated to Debtor Counsel. Debtor Counsel may not send a bill to a client for the work performed after the case is completed.

The Court previously ruled ***In re Carey,*** Case No. 08-62428 (Bankr. E.D.Mich. 2014), that fees and expenses incurred prior to the Notice of Completion are an administrative expense provided for by the Chapter 13 Plan. The Court applied the same ruling in this case and ruled that if Counsel wishes to be compensated for fees and expenses incurred prior to the Notice of the Completion being filed then Counsel must file a fee application within the notice period allowed by the Notice of Completion. The Notice of Completion provides 21 days.

However, the Court ruled that fees and expenses incurred after the Notice of Completion that were not anticipated until the mortgage lender filed a Disagreement with Final Cure are not administrative expenses of the Chapter 13 case.

The question then becomes –

CAN THE ATTORNEY FEES SURVIVE DISCHARGE?

The Court made a distinction between fees and expenses incurred before and after the Notice of Completion of the case. If a fee application is not filed by Counsel within the notice period allowed by the Notice of Completion the Court ruled that these fees and expenses are discharged pursuant to 11 USC 1328(a) which provides:

> **(a)** Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
>
> **(1)** provided for under section 1322(b)(5);
>
> **(2)** of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) of section 523(a);
>
> **(3)** for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or

> **(4)** for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual.

However, fees and expenses incurred after the filing of the Notice of Completion are not discharged as they are not provided for by the plan. Fees and expenses incurred after the Notice of Completion that are approved by the Court are not discharged and the Debtor is responsible to pay for these fees and expenses. The Court reasoned that Debtor had notice of the work that was done in order to obtain the Discharge and because a fee application was filed with the Court, the Debtor had an opportunity to object to the reasonableness of the fee application. The Court wishes to encouraged Debtor Counsel to timely file fee applications but also be encourage Debtor Counsel to do the work necessary for the Debtor to receive a Discharge.

Does 1328 apply to an attorney fee that was incurred for services rendered post-confirmation?

Section 1328(a)[1] provides that

> [T]he court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt-
> (1) provided for under section 1322(b)(5);
> (2) of the kind specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C), (2), (3), (4), (5), (8), or (9) or section 523(a);
> (3) for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; or
> (4) for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that cause personal injury to an individual or the death of an individual.

11 U.S.C. §1328(a).

I. Are post-confirmation attorney fees a "debt provided for by the plan"?
   a. What does "provided for by the plan" mean?
   b. This district's model Chapter 13 Plan contains provisions for the payment of both pre- and post-confirmation attorney fees.
   c. Aren't all post-petition attorney fees post-petition debt? And isn't post-petition debt not dischargeable?
   d. Attorney fees are an administrative expense. "After notice and a hearing, there shall be allowed administrative expenses..., including…compensation and reimbursement awarded under section 330(a) of this title." 11 U.S.C. §503(b)(2)
   e. Definitions
      1. "'[D]ebt' means liability on a claim." 11 U.S.C. §101(12).
      2. A "claim" is "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured…." 11 U.S.C. §101(5)(A).
   f. Is an allowed administrative expense a claim? What about the distinction between expenses and claims in 11 U.S.C. §507? ("The following expenses and claims have priority in the following order….") If administrative expenses <u>are</u> claims, why did Congress make a distinction? *But see* 11 U.S.C. §1322(a)(2) "…all claims entitled to priority under section 507 of this title…." and 11 U.S.C. §1326(b)(1) "…any unpaid claim of the kind specified in section 507(a)(2) of this title."

II. *In re Hirsch*, 2016 Bankr. LEXIS 2130 (Bankr. W.D. Mich. 2016) and *In re Cripps*, 2016 Bankr. LEXIS 2128 (Bankr. W.D. Mich. 2016) provide detailed discussions of

[1] All references are to 11 U.S.C. 101 et seq. unless otherwise noted.

the relationship among the Bankruptcy Code and Rules and practice relative to chapter 13 attorney fees.

III. Ideas for protecting fees (disclaimer: these are not guaranteed to work)

a. File a notice with the court within 21 days after the trustee files the notice required by E.D. Mich. LBR 2015-3 alerting parties that there may be attorney fees owed.
b. File a fee application every 120 days. *See* 11 U.S.C. §331.
c. Modify the plan to accommodate the fee request by reducing the distribution to unsecured creditors.
d. If you're near the end of the case, and there's enough time, modify the plan to propose that the next or final post-confirmation fee award will be paid directly by the debtor (with the debtor's informed consent).
e. Propose a plan that does not "provide for" post-confirmation fees.
f. Exclude the post-confirmation fees from discharge with the debtor's informed consent.
g. Enter into a post-petition fee agreement with the debtor not to exceed $2,000.00. ($2,000.00 is the maximum amount of debt a debtor may incur during his or her Chapter 13 case without first seeking court approval pursuant to E.D. Mich. Model Plan ¶V.Q.)
h. *Cripps* provides guidance at pages *66-69.

IV. Conclusion

Currently, end-of-the-case attorney fees appear to be awarded on a case-by-case basis. Although there aren't any bright line rules from the 6th Circuit, the judge assigned to your case may have his or her own bright-line rules that you should be aware of.

<u>Getting paid for post-discharge services</u>

I. If post-discharge services are rendered "in connection with [the bankruptcy case]", §329 requires the attorney to "file with the court a statement of the compensation paid or agreed to be paid." 11 U.S.C. §329(a). This requirement applies regardless of whether the fees are paid by the debtor or a third party. *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F. 3d 472, 478 (6th Cir. 1996) ("Retainers paid to counsel for the debtor are to be held in trust for the debtor, and the debtor's equitable interest in the trust is property of the estate."). The statement is also required even if the case has been dismissed. *In re Marin*, 256 B.R. 503, 507 (Bankr. D. Colo. 2000). ("The obligations under section 329 and Rule 2016 are not vitiated by the dismissal of the case. To do so would undermine the role allocated to this Court by Congress under section 329 to protect debtors from the kind of heavy handed overreaching that occurred here.")

a. Note that Fed. R. Bankr. P. 2016(a) requires an application to be filed by an entity seeking "compensation for services…from the estate." This seems to indicate that debtor's counsel is not required to file a fee application for post-discharge services if he or she is not going to be paid from the estate. But Fed. R. Bankr. P. 2016(b) nevertheless requires debtor's counsel to comply with 11 U.S.C. §329 "within 14 days after any payment or agreement not previously disclosed."

II. In general, once the debtor receives his or her Chapter 13 discharge, the trustee will not have any funds on hand and will not expect the estate to receive any funds (and in many instances, the trustee will be discharged from his or her duties as well). Debtor's counsel should consider preparing a separate fee agreement and filing a statement in compliance with §329(a).

III. Practically speaking, post-discharge services rendered in connection with the bankruptcy case aren't likely to amount to much more than providing a copy of the Order of Discharge or the schedules and debtor's counsel may want to consider providing these documents gratis.

The impact of *Baker Botts* on debtors' attorneys and objections to fees

I. *Baker Botts L.L.P. v ASARCO LLC*, 135 S.Ct. 2158 (2015)

When ASARCO filed its Chapter 11 case, the court approved the employment of 2 law firms, Baker Botts L.L.P. and Jordan, Hyden, Womble, Culbreth & Holzer, P.C. (collectively, the "Law Firms"). The Law Firms successfully prosecuted several fraudulent transfer claims, obtaining a judgment worth between $7 and $10 billion, which contributed to payment in full of all of ASARCO's creditors.

The Law Firms sought compensation pursuant to 11 U.S.C. §330(a)(1). ASARCO's parent company objected. After a 6-day trial, the Law Firms were awarded $120,000,000 for their services in the bankruptcy case plus a $4,100,000 bonus for exceptional performance. In addition, the Bankruptcy Court awarded $5,000,000 to the Law Firms for time spent litigating the fee applications.

The Supreme Court granted certiorari to determine whether 11 U.S.C. §330(a)(1) permits a bankruptcy court to award fees to an attorney for successfully defending a fee application.

Justice Thomas began with the American Rule that each litigant pays its own fees, regardless of the outcome, unless a statute or contract provides otherwise. Reviewing §330(a)(1), Justice Thomas reasoned that the defense of attorney fees does not qualify as "actual, necessary services rendered" based on the definition of services. The Court further relied on its prior opinion in *Woods v. City Nat. Bank & Trust Co. of Chicago*, 312 U.S. 262 (1941) which held that "'reasonable compensation for services rendered'

necessarily implies loyal and disinterested service in the interest of a client". *ASARCO* at 2165. Concluding that "[t]ime spent litigating a fee application against the administrator of a bankruptcy estate cannot be fairly described as 'labor performed for'—let alone 'disinterested service to'—that administrator" *id*., the Court held that fees for the defense of a fee application, even if successful, are not compensable from the estate.

Following *ASARCO*, the natural instinct would be to include fees for defending a fee application in the fee agreement itself as a contract provision exception to the American Rule. *Boomerang Tube*[2] was the first case to test that theory.

In *Boomerang Tube*, Judge Walrath denied the request of counsel for the unsecured creditors committee to include a provision in its contract allowing fees for defending a fee application. Reasoning that a retention agreement is not like an ordinary contract between 2 parties requiring one to pay the other's fees if it loses a dispute between them, the court held that retention agreements are not contractual exceptions to the American Rule. *Id*. at 75. It is clear that, at least in bankruptcy courts in Delaware, counsel seeking to contract for the payment of fees for the defense of a fee application will not have their employment approved.[3]

[2] *In re Boomerang Tube*, 548 B.R. 69 (Bankr. D. Del. 2016)
[3] Robert J. Keach and Brady C. Williamson, *The Boomerang Effect: Is There a Contract Exception to ASARCO (and if Not, What Then)?*, Am. Bankr. Inst. L. J., Apr. 2016, at 14, 94-96.