

# AMERICAN BANKRUPTCY INSTITUTE JOURNAL

Issues and Information for Today's Busy Insolvency Professional

## Crossing the Line: Continuing to Represent Clients after a Chapter 11 Filing (Part II)

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As noted in part one of this series, once you have determined that you or your firm can be hired as a professional for a debtor, you will need to be formally retained in order to get paid. *See Lamie v. U.S. Trustee*, 540 U.S. 526 (2004) (noting that employment of professional must be approved by court in order for professional<sup>2</sup> to be paid from bankruptcy estate funds). However, actually getting employed in today's current compensative environment is not an easy or a mere administrative task.<sup>3</sup>

### Looking Out for Number One: Getting Hired

For a number of years, debtors' counsel took the responsibility of preparing all necessary documents for the retention of all the debtors' professionals. While debtors have a significant interest in having their professionals retained, given the stakes involved, the first thing financial advisors should do is retain their own counsel to represent them in the retention process for any significant engagement. However, this expense may not be deemed an expense that should be reimbursed by the estate, but having someone whose duty is to represent your own interests is generally necessary given the complexity of the fee and retention process in chapter 11.

<sup>1</sup> The author acknowledges C.R. "Chip" Bowles for his invaluable help in writing this article.

<sup>2</sup> For a discussion of whether a party is a professional whose employment requires court approval, *see* Bowles, "Getting Paid: Retention and Compensation in Bankruptcy Cases—A Guide for Non-attorney Professionals" (2005), at p. 5. As a general rule, financial advisors will be considered professionals.

<sup>3</sup> It is "unlikely" that any bankruptcy court would approve the AIG bonuses.

### About the Author

Carl Young is president and a managing director of Bridge Associates LLC in Tulsa, Okla.

### 11 U.S.C. §§327 or 328?: The Importance of "One"

Unless another method of billing is provided for in a financial advisor's engagement agreement, courts will apply the Lodestar (reasonable hours times reasonable hourly rates) in evaluating how fees should be awarded to professionals. *See, generally, Blum v. Stensen*, 465 U.S. 886 (1984). As many financial advisors have fee structures that are different from Lodestar, allowing for this default method of fee awards will cause serious problems. Regardless of what fee structure a financial advisor may

provision means that if financial advisors obtain court approval of a fee structure under 11 U.S.C. §328 as part of the court order approving their employment, their fees can only be reconsidered if the court finds that the terms and conditions of the fee structure "prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." 11 U.S.C. §328(a).

If a financial advisor's fee structure is not approved by the court under 11 U.S.C. §328, then that party's final fee application may be reviewed under 11 U.S.C. §330(a)(3) to see if the compensation requested is reasonable. The court may require time records based on Lodestar to support these fees. *See, generally, In re Circle K Corp.*, 294 B.R. 111, 120-123 (Bankr. D. Ariz. 2003) (discussing how to determine fees for reasonableness under 11 U.S.C. §330

## Turnaround Topics

use in an engagement with a bankruptcy estate or committee, the financial advisor should seek in its retention application to have its fee structure approved by the court under the provisions of 11 U.S.C. §328.



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The most important provisions of 11 U.S.C. §328(a) provide that a bankruptcy court may approve, as a part of the retention of professionals, "any reasonable terms and conditions of their employment, including on a retainer, on an hourly basis, or on a contingent fee basis." This

where professional's flat fees were not approved under 11 U.S.C. §328 and professionals did not keep time records). Therefore, having your own counsel work to structure the terms of your employment will be invaluable in getting your fees paid.

### Thinking Outside of the Box: Retention under 11 U.S.C. §§363 and 365

As discussed above, if you have a prebankruptcy contract with a company that files for bankruptcy and are owed sums that you are unwilling to waive, you may have to consider seeking retention as a professional by having your contract assumed by the debtor under 11 U.S.C. §365. In both *In re Beare Company*, 177

B.R. 879 (Bankr. W.D. Tenn. 1994), and *In re Monarch Capital Corp.*, 163 B.R. 899 (Bankr. D. Mass. 1994), courts allowed the retention of prebankruptcy professionals under 11 U.S.C. §365. While this is not a typical procedure, it is an option.

A far more commonly-used alternative, especially when the financial advisor has acted as an officer and/or director of a debtor, is retention under the provisions of 11 U.S.C. §363. This procedure is sometimes referred to as the “Jay Alix Protocol.” This protocol arose from an agreement between the U.S. Trustee for Region 3, including the District of Delaware, and Jay Alix & Associates in the *Safety-Kleen Corp.* bankruptcy case and addresses the role of financial advisors acting as both consultants and officers of the debtor in the same case. It recognizes that there is an inherent conflict between an advisor’s duty to a debtor and its own business interests, where the advisory firm serves as both a financial advisor retained under §§327 and 328 and members of the financial advisor serve also as officers of the debtor corporation. Although the protocol is not binding law in every jurisdiction, it is widely accepted in appropriate circumstances. Whether it is applicable must be cleared by your own counsel in each case.

### **Rule 2014: Still Beating the Dead Horse**

Another important issue facing financial advisors being retained under 11 U.S.C. §§327(a) and 328 is making appropriate disclosure under Bankruptcy Rule 2014, which provides:

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents or other professionals, pursuant to §327, §1103 or §1114 of the Code, shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States Trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for

compensation and, to the best of the applicant’s knowledge, all of the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person’s connection with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee.

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While courts are somewhat divided in the language that they use to describe the term “connections,” they have consistently held that any connection which may be in any way pertinent to a court’s determination as to retention of a professional must be fully disclosed.

Financial advisors, given the relationship-driven nature of the profession, must take special care in making their disclosures of connections. In light of numerous recent decisions that reduced a professional’s fees for a lack of disclosure, particular care must be given to disclosing any form of business relationships with the parties covered by the dictates of Rule 2014.

In light of the increasing complexity of the extent and nature of these disclosures, as well as related issues concerning the retention of financial advisors, you should involve your counsel in making these disclosures.

However, please note that in a typical catch-22 fashion, financial advisors should exercise care in selecting this counsel, as their retention of counsel will itself be a connection that will have to be disclosed and reviewed in other bankruptcy proceedings.

### **Closing the Deal**

In summary, financial advisors will be facing, in the current economy, far more fluid situations than have occurred in the recent past. Lack of credit, liquidity and time will require that all professionals make the effort to secure the details of their retention at the very beginning of the engagement. Otherwise, events may move so quickly that you may be faced with the harsh prospect of closing a deal, not knowing whether you will get paid for it. ■

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