I. Introduction

Sections 327 through 330 of the Bankruptcy Code and related Bankruptcy Rules of Procedure govern the standards and requirements for the employment and compensation of professionals such as attorneys, financial advisors, investment bankers, and accountants who are hired to administer the bankruptcy estate. This section reviews and discusses noteworthy cases from 2014 that relate to those sections.

The first area of discussion in this Article begins with the standard that courts use to determine whether a professional can be retained under section 327 of the Bankruptcy Code. This discussion is within the context of whether a creditor representation creates a per se conflict and which findings are necessary to demonstrate disinterestedness so that the professional cannot represent the debtor. Most courts analyzing section 327, however, do not subscribe to a per se rule, but rather undergo a fact-intensive inquiry to determine whether a professional is disinterested.

There is also a discussion of section 328 of the Code, which provides for the circumstances where professionals are retained by the estate through an engagement letter or

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agreement. If properly submitted, the terms of the agreement approved by the court should apply. Courts may allow different compensation from the terms in the engagement letter or agreement, if the terms and conditions prove to have been “improvident” in light of developments incapable of being anticipated at the time the terms and conditions were approved. The cases discussed herein analyze the circumstances in which courts will approve or reject agreements with the debtor under section 328 of the Code.

There is also a review of section 329 in this Article, which discusses the required disclosures that professionals must make to the court; namely in which situations a debtor’s attorney must disclose payments made by a debtor in matters that are seemingly unrelated to the bankruptcy. Moreover, this Article analyzes whether law firms must disclose receiving a retainer from a third party on behalf of the debtor. Finally, this Article analyzes “no-look” or presumptive fees and a 2014 case abandoning a standing order allowing for such fees.

Finally, the discussion in this Article on section 330 highlights instances where courts have analyzed whether the work performed by bankruptcy professionals was actual, necessary, and reasonable under the Bankruptcy Code. In contrast to section 328 of the Bankruptcy Code, under section 330 the court approves compensation only after services have been rendered, applying the standard of reasonable compensation for actual, necessary services. In determining the reasonableness of the fees and expenses, the court takes into account the lodestar approach, as well as all relevant factors, including the six factors set forth in the statute, and a number of factors set forth in Johnson v. Georgia Highway Exp., Inc., a circuit court decision from the United States Court of Appeals for the Fifth Circuit. This Article discusses section 330 of the Code in the context of fee enhancements to professionals, and whether professionals can be reimbursed for defending fee applications.

II. Section 327: Professionals’ Lack of Disinterestedness and Disgorgement of Fees

Section 327 of the Bankruptcy Code governs the employ-

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1A fee enhancement is usually an incentive given to a professional to meet certain goals.
Sections 327 through 330: Recent Developments in the Law of Employment and Compensation of Bankruptcy Professionals

ment of bankruptcy professionals, such as attorneys, accountants, appraisers, and auctioneers, to represent or perform services for the bankruptcy estate. This provision prevents a professional from holding an adverse interest to the estate and requires that the professional be disinterested.

A. Adverse Interest, Disinterestedness and Section 327 of the Code

The Bankruptcy Code does not define “adverse interest” but most courts have held that “a person holds an adverse interest if he or she (1) holds or asserts an economic interest that would reduce the value of the estate or give rise to an actual dispute with the estate, or (2) possess a bias against the estate.” By the plain terms of section 327(a), professionals who currently represent or have represented creditors of an estate are potentially barred from representing a trustee.

Unlike the term “adverse interest,” the term “disinterestedness” is defined in the Bankruptcy Code: attorneys are disinterested if they “do[ ] 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 for any other reason.” Therefore, as indicated by the Third Circuit, a professional cannot have any conflict with the bankruptcy estate, while a conflict with a creditor or equity holder must be material.

Where an actual conflict exists, professionals will gener-

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ally not be allowed to represent the estate. An actual conflict exists where there is “active competition between two interests, in which one interest can only be served at the expense of another.” Two instances where actual conflict exists are when “(1) the interests of the trustee and the creditor are in direct conflict or (2) the creditor is receiving a preference denied to the other creditors.” In *In re Hanckel*, the debtors objected to an attorney’s representation of their estate’s trustee where the attorney previously represented one of their creditors. The debtors further argued that the attorney still represented the creditor, and that simultaneous representation of both a creditor and a trustee is not allowed. The court overruled the debtors’ objection, concluding that there was no actual conflict or adverse interest.

The attorney was employed by the trustee as special counsel to pursue an asset that the attorney had superior knowledge of due to his representation of the creditor. The attorney’s representation of the trustee purportedly furthered the goal of recovering assets for the estate as a whole. There was no evidence that the attorney held an adverse interest because the attorney’s representation of the creditor would not lead to the creditor receiving preferential treatment or that the attorney’s actions would be adverse to the trustee’s interest in augmenting the estate. In sum, the trustee’s and the creditor’s interests were aligned and, therefore, there was no “actual conflict” under 327(c) of the Code.

Bankruptcy Courts must engage in a fact-intensive inquiry in determining whether section 327(a) has been

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violated. In In re Radnor Holdings Corp., the District Court of Delaware affirmed the Bankruptcy Court’s order, granting the final fee application of Skadden Arps Slate Meagher & Flom LLP (“Skadden”) despite a creditor’s objection that Skadden had a long-standing, attorney-client relationship with the debtor’s potential purchaser, Tennenbaum Capital Partners LLC (“Tennenbaum”).14 The District Court reinforced the well-settled rule that employment of attorneys is allowed only if they “do not hold or represent an interest adverse to the estate” and if they are “disinterested persons.”15 In analyzing section 327(a) of the Bankruptcy Code, the Bankruptcy Court considered a number of factors, and concluded that the following findings did not warrant denying Skadden’s final fee application: (i) the percentage of Skadden’s revenues attributed to Tennenbaum and its affiliates was not a material percentage of the firm’s revenues; (ii) Skadden’s revenue in dollar-amounts derived from Tennenbaum was not significant; (iii) there was no concern that Skadden may be influenced in any fashion not to engage in the best representation of the debtor; and (iv) the Skadden-Tennenbaum relationships presented no improprieties.16

The Bankruptcy Court for the Northern District of Illinois also conducted a fact-intensive inquiry in the In re Rental Systems, L.L.C. case. The court denied the law firm’s retention application because of the law firm’s connections to affiliates that owed the debtor money, affiliates that were owed money by the debtor, or affiliates that were jointly liable with the debtor for debts.17 The court was concerned with the law firm’s connections. First, the law firm represented Raymond Plote and Janice Plote in connection with prepetition litigation with PNC Bank, N.A., where PNC sued the Plotes and the debtor on a $9.8 million note. The Plotes


were guarantors and the debtor’s records showed that the Plotes owed the debtor almost $3 million as of the petition date. The law firm, while failing to disclose the representation of the Plotes, filed an adversary proceeding, seeking to enjoin PNC from enforcing the debt against the Plotes. Second, the law firm admitted to representing two entities that owed the debtor a total of approximately $3.3 million. Third, the law firm admitted to representing an entity within one year prior to the bankruptcy petition in connection with a debt of over $1.3 million to a bank for which the debtor was jointly liable.

The court rejected the law firm’s argument that these were not true debts or assets of the debtor. Indeed, the court concluded that the law firm’s position suggested that it was truly unwilling to recommend that the debtor seek to collect the various debts described above. Given that the law firm represented some of these affiliates, the court rendered the firm’s argument suspect.

The court also found that the law firm was derelict in its duty to timely file its disclosure relating to the source of its compensation as well as a copy of the engagement letter. The court indicated that the law firm’s principal partner had over 39 years of bankruptcy experience and, therefore, should have been fully aware of these requirements. Yet the law firm did not file the necessary disclosures for over a month after the meeting of the creditors was held, and only

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after the U.S. Trustee filed a motion to dismiss or convert the debtor's case.24

Once the law firm filed the necessary disclosure, it indicated that the bulk of its retainer was paid by Plote Construction, Inc., an entity that the debtor listed as having a claim against the debtor for over $45 million. The only explanation that the law firm provided was that it was a small firm that was “very busy” and that the disclosures “fell through the cracks.”25 This was not acceptable to the Bankruptcy Court, nor was it deemed excusable neglect. As such, denial of the application was necessary.26

B. Adverse Interest, Disinterestedness and Bankruptcy Rule 2014

In addition to the requirements under section 327 of the Code regarding disinterestedness and holding no adverse interests, Bankruptcy Rule 2014 sets forth additional requirements for an employment application. A recent decision by the Bankruptcy Court for the Southern District of Texas addresses many of the requirements.27 First, Bankruptcy Rule 2014(a) requires that the movant explain why the employment is necessary.28 The court in In re Edwards explained that this requirement can be met by a simple statement, such as “I need a — (lawyer, accountant, etc.) because _____________ (the reason).”29 Second, the application must identify the persons to be employed.30 Although it is not necessary to list every member of a law firm, the firm should be clearly identified along with the attorneys

27 See generally In re Edwards, 510 B.R. 554 (Bankr. S.D. Tex. 2014)
that will be primarily responsible for the representation.\textsuperscript{31} Although not required, the court in \textit{In re Edwards} explained that the lawyers’ hourly rates would be “extremely helpful to the Court.”\textsuperscript{32} \textit{Third}, a simple and “thoughtful” paragraph as to why the selection made is required.\textsuperscript{33} Objective and subjective reasons may be proposed, and the type and complexity of the case may dictate that the court give varying weight to different considerations.\textsuperscript{34} \textit{Fourth}, the employment application should inform the court of the scope of the proposed services to be provided.\textsuperscript{35} \textit{Fifth}, the contemplated fee arrangement must be provided.\textsuperscript{36} \textit{Finally}, the application must set forth “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.”\textsuperscript{37} The court concluded with the following: “[t]he selection of counsel need not be a morass of confusion. It should be a thoughtful, reasoned process by the trustee that is free of forms and lists.”\textsuperscript{38}

* * *

It appears that courts analyzing section 327 of the Bankruptcy Code have conducted a fact-driven analysis in deciding whether an attorney should be disqualified. The decisions above, when read together, indicate that so long as the professional fully discloses its connections to the debtor, including any prior services rendered and payments received, the court will have the facts necessary to approve the


\textsuperscript{34}\textit{In re Edwards}, 510 B.R. 554, 559 (Bankr. S.D. Tex. 2014).


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application. If a professional fails to fully disclose the services rendered in the first instance but remedies the omission, courts may allow that professional to represent the estate in a bankruptcy proceeding. If the professional does not disclose that it has an adverse interest or that the professional is disinterested, it is likely that the professional will be disqualified or face disgorgement of fees.

III. Section 328: Review of Limitations on Compensation of Professionals

Section 328 allows the Bankruptcy Court to approve employment of professionals on a number of terms, including on retainer, on an hourly basis, or on a contingent fee basis, so long as the terms are reasonable. The court may also allow compensation different from the terms provided under the trustee's agreement if the prior agreement proves to have been “improvident” in light of developments unanticipated at the time of approval of the agreement. Absent any such developments, the reasonable standard of section 330 does not apply inasmuch as the terms of the retention agreement contain preapproved terms. In fact, if employment is approved under section 328, courts may not later switch to section 330 to award fees. Thus, when contingency fee arrangements had been pre-approved under section 328, the


Bankruptcy Court could not reduce the fee award “simply because the size and scope of a settlement had not actually been anticipated, [since] it does not follow that it was incapable of anticipation.” As a result, courts have less discretion in reviewing fees paid to professionals under an agreement pursuant to section 328 of the Code once the agreement has been approved.

The Bankruptcy Court for the District of Massachusetts held, in In re Duplication Mgmt. Inc., that the agreement that the estate and the law firm executed, which was approved by the court under section 328 of the Bankruptcy Code, should be honored. In that case, a law firm was retained on a contingency fee basis to act as special counsel to a chapter 7 trustee for the purposes of pursuing recoveries against certain defendants. The Trustee settled with one party and dismissed claims against other parties. Rather than seeking compensation under the original contingency-based agreement, the law firm sought to be reimbursed based on the lodestar method. In the alternative, the law firm sought 33? percent of what the estate recovered, as well as what was informally abandoned by the Trustee against certain defendants. In interpreting section 328, the court rejected the law firm’s argument. The court highlighted that “Congress enacted [section] 328(a) to eliminate the previous uncertainty associated with professional compensation in bankruptcy proceedings, even at the risk of potentially


46In re Duplication Management Inc., 510 B.R. 446, 449, 59 Bankr. Ct. Dec. (CRR) 132 (Bankr. D. Mass. 2014). The trustee abandoned certain claims against certain defendants on the merits of the allegations. The law firm, however, argued that the abandonment of those claims was not something that it could have anticipated at the time of the engagement that was approved by the court. Id. at 450.
underpaying, or, conversely, providing a windfall to, professionals retained by the estate under [section] 328(a).”

Courts also have the authority to reject an agreement between a law firm and a debtor; the Bankruptcy Court for the District of Kansas decision in In re Hall reminds us of this power. In this case, the law firm agreed to represent the debtor in the chapter 11 case on a contingency fee basis, agreeing to cover all work performed by the law firm so long as it received a 10 percent fee of any assets sold (either through a plan or under section 363 of the Code). In presenting this arrangement to the court, the law firm argued factors similar to personal injury cases, i.e., the debtor had no source of funds to pay fees and expenses, costs would be substantial, representation would require many hours of work over several years, and even then a successful outcome (in this case, an administratively solvent estate) would be uncertain. The court, however, explained that this is not a tort case and that the interests of creditors must be considered. In addition to selling the debtor’s assets, estate counsel has other significant responsibilities. Given the fact that no authority existed for a contingency fee basis agreement between counsel and a chapter 11 debtor, and that the facts here were not “so compelling” that the court should “plow new ground,” the court rejected the section 328 agreement.

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52 In re Hall, 520 B.R. 116, 123, 60 Bankr. Ct. Dec. (CRR) 85, 72 Collier Bankr. Cas. 2d (MB) 1418 (Bankr. D. Kan. 2014). The court also refused to employ the law firm under section 328 at an hourly rate because
IV. Section 329: Disclosure of All Compensation and Expenses to the Court is Necessary

Section 329 governs a debtor’s transactions with attorneys, which requires an attorney to submit a statement of compensation paid or agreed to be paid for services rendered or to be rendered in contemplation or in connection with the case. The attorney need only disclose payments or agreements made within one year before the filing of the petition. The purpose of the disclosure is to ensure reasonableness of fees incurred in connection with the case. If the compensation paid or agreement for compensation to be paid is not reasonable, then the court has the authority to cancel the agreement or order the return of the debtor’s funds to the extent the fee is excessive.

A. “In Connection with the Case” Provisions Interpreted Broadly

Bankruptcy Code section 329(a) and Bankruptcy Rule 2016 focus specifically on the duty to disclose. The Bankruptcy Court for the Southern District of New York has explained that section 329 requires attorneys who represent debtors to file a statement disclosing fees, while Bankruptcy Rule 2016 provides for the content of that disclosure. The court stated:

Disclosure of compensation pursuant to § 329 and Rule 2016(b) is mandatory, not permissive. The Bankruptcy Code requires fee disclosure so that courts can prevent overreaching by debtors’ attorneys and give interested parties the ability to evaluate the reasonableness of the fees paid. Payments to a debtor’s attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious there were too many unknowns that it was impossible for the court to determine what issues may arise. Id.

55 11 U.S.C. § 329(b). Courts have also held that filing an inaccurate, incomplete, or false Rule 2016 disclosure violates not only Bankruptcy Rule 2016, but also section 329(a), and is grounds for sanctions.
potential for overreaching by the debtor’s attorney, and should be subject to careful scrutiny.\textsuperscript{57}

The court explained that the term “in connection with the case” is interpreted broadly.\textsuperscript{58} Thus, once an attorney is actually representing a debtor in a case, then the attorney must disclose compensation for services on any matter having a connection with the case.\textsuperscript{59} The question lawyers face, however, is how an unrelated matter will be interpreted as “in connection with” a bankruptcy case.

In \textit{In re Gorski}, the debtor sought the services of a law firm after he filed for relief under chapter 13 of the Bankruptcy Code.\textsuperscript{60} The law firm, allegedly knowing that the client was a debtor in a pending bankruptcy case, received a $7,150 retainer to conduct a divorce.\textsuperscript{61} When the debtor filed a motion seeking to disgorge the amounts paid to the divorce lawyer for failure to seek approval from the court, the law firm argued that he typically does not practice before the court, was unfamiliar with the procedure, and that it was the responsibility of the debtor to seek retention.\textsuperscript{62}

The court analyzed prior cases discussing the connection between a divorce case and a bankruptcy case and concluded that,\textsuperscript{63} given the broad application of the phrase “in connection with” amongst the courts, the disclosure requirement of

\textsuperscript{58} \textit{In re Gorski}, 519 B.R. 67, 71 (Bankr. S.D. N.Y. 2014).
\textsuperscript{60} \textit{In re Gorski}, 519 B.R. 67, 70 (Bankr. S.D. N.Y. 2014).
\textsuperscript{61} Seventy-five percent of the retainer was paid for by a third party.
section 329(a) applied to the law firm.\textsuperscript{64} Having found a violation, the court analyzed the extent to which the law firm should be sanctioned. Many courts, “perhaps the majority,” punish law firms by requiring the disgorgement of the entire compensation.\textsuperscript{65} But courts have discretion in fashioning a sanction. In this case, the court ordered the disgorgement of $500 of the fees paid. Even if the law firm did not learn of the bankruptcy until much later, no disclosure was ever made in this case even though disclosure is a crucial duty.\textsuperscript{66}

**B. Retainers Provided by Third Parties**

The disclosure provisions are equally violated where a law firm does not disclose that a debtor’s retainer was by a third party connected to the debtor.\textsuperscript{67} In *In re Miller Auto. Grp., Inc.*, the court granted the debtor’s motion to dismiss the case and the United States Trustee sought to reopen the case, seeking a determination of the reasonableness of the attorney’s fees.\textsuperscript{68} The court focused, in part, on section 329 of the Code and held that the disclosure provisions were violated. *First*, the court explained that the Statement of Financial Affairs (which was filed two weeks late) was not considered part of the law firm’s disclosure and the firm should have disclosed receipt of the retainer from the debtor’s equity holder in the Disclosure of Compensation. The court, effectively, considered the law firm’s employment without complete and accurate information.\textsuperscript{69} *Second*, stating in the Statement of Financial Affairs that the retainer was paid from a “3rd Party Not a Creditor” was an insufficient disclosure. The law firm had previously been admonished by the court for using this specific wording in a different bank-

\textsuperscript{64} In *re Gorski*, 519 B.R. 67, 73 (Bankr. S.D. N.Y. 2014).
\textsuperscript{65} In *re Gorski*, 519 B.R. 67, 73 (Bankr. S.D. N.Y. 2014); (quoting *In re Gage*, 394 B.R. 184, 191 (Bankr. N.D. Ill. 2008) (collecting cases)).
Third, the court took issue with the fact that an interested party provided the retainer. It was conceivable that she could have filed a claim against the debtor and, thus, become an interested party.\textsuperscript{71}

Although the retainer was paid by a third party and, arguably, not estate funds, the court explained that it is well-settled law that “a Bankruptcy Court may order the disgorgement to the estate of attorney’s fees paid by a third party when it is established that the payments constituted distributions that would have otherwise accrued to the debtor’s estate.”\textsuperscript{72} Part of the court’s decision was also likely influenced by the attorney’s lack of knowledge of the bankruptcy process.\textsuperscript{73} The above reasons were sufficient for the court, under section 329 of the Code, to deny the law firm’s requested fees and order the disgorgement of the entire retainer.\textsuperscript{74}

C. No-Look Fees Admonished

A practice is followed in some jurisdictions known as no-look or presumptive fees, for which an attorney may not be required to keep time records. Whenever an attorney requires no-look fees above the flat fee, the attorney would


\textsuperscript{73} The law firm sought approval of a broker who had worked with the debtor pre-petition to sell the debtor’s assets but the firm failed to disclose connections between the broker and the firm. The law firm withdrew the application. Then the firm filed a plan, but the court was unable to consider it because it lacked a disclosure statement. The debtor then filed a motion to use cash collateral, but the grounds that the financial information on which the motion was based was unreliable. The firm then immediately filed a motion to withdraw the reference, which was denied. In re Miller Automotive Group, Inc., 521 B.R. 323, 325–26, 60 Bankr. Ct. Dec. (CRR) 63 (Bankr. W.D. Mo. 2014).

\textsuperscript{74} Courts have also ordered the disgorgement of a retainer fee in situations where the debtor paid the retainer, but failed to disclose the fact with the court. Kohout v. U.S. Trustee, 513 B.R. 675, 681 (N.D. W. Va. 2014).
need to file a fee application, supported by time and expense itemization. This practice is most common in chapter 13 cases. This allows attorneys to control their cases without being subject to the discretion of the judges. At the same time, judges are able to free up their dockets because they can approve fee arrangements without analyzing details relating to time spent. Although there is no uniformity on the law of no-look fees, the Western District of Louisiana recently admonished the practice in *In re Savell*.

The court explained that it has been common practice in the Shreveport division for attorneys to seek and obtain court approval for the payment of post-petition and post-confirmation attorney’s fees directly from the debtors and these no-look fees were sanctioned by the Amended Standing Order Regarding “No Look” Fees in Chapter 13 Cases.

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75 *In re Crager*, 691 F.3d 671, 677, Bankr. L. Rep. (CCH) P 82280 (5th Cir. 2012) (concluding that the Bankruptcy Court did not err in awarding presumptive $2,800 “no-look” fee to Chapter 13 debtor’s counsel because the trustee’s objection was based on false premise that this debtor’s case was “more simplistic” than the average Chapter 13 bankruptcy, and it was trustee’s own challenge to the plan on “bad faith” grounds that transformed the case from a routine Chapter 13 matter into a complicated proceeding); *In re Rogers*, 401 B.R. 490, 493 (B.A.P. 10th Cir. 2009) (holding that attorney whose fees were reduced based on objection to fee application could not claim “no-look” fee); *In re Becker*, 469 B.R. 121, 124 (Bankr. M.D. Fla. 2012) (holding that in addition to a “no-look” fee, Chapter 13 debtor’s counsel could charge a monitoring fee of $20 to $50 per month for routine work necessary after the plan was confirmed); *In re Brent*, 458 B.R. 444, 450 (Bankr. N.D. Ill. 2011) (concluding that the “flat fee” or “no look fee” represents a kind of agreement not only with the chapter 13 debtor, but with the court: in exchange for the attorney’s commitment to perform specified legal services for the debtor, the court awards a flat fee and dispenses with the usual application); *In re Snyder*, 445 B.R. 431, 437 (Bankr. E.D. Pa. 2010) (explaining that chapter 13 attorney failed to establish cause to exceed no-look fee stated in original Rule 2016 statement); *In re Vernon-Williams*, 377 B.R. 156, 191 (Bankr. E.D. Va. 2007) (explaining that in order for Bankruptcy Court to approve award of supplemental compensation in chapter 13 case in excess of “no look” fee, court must be persuaded, not only of attorney’s entitlement to the additional compensation sought, but also that the original fees awarded without benefit of formal fee application were fully earned); *In re Smith*, 331 B.R. 622, 629–30 (Bankr. M.D. Pa. 2005) (holding that because a fee application is not required if a flat fee at or under the presumptive amount is charged, these arrangements are often referred to as “no-look fees”).

entered September 19, 2013. The court revisited the practice and concluded that it cannot condone the current practice in the Shreveport division regarding direct payments from the debtors to counsel for post-petition and post-confirmation attorneys’ fees without any disclosure or prior court approval. The no-look practice in Shreveport was, according to the court, in direct conflict with Bankruptcy Rule 2016 and section 329 of the Code. Thus, although a similar order may exist in another jurisdiction, practitioners should be aware that this practice could be overturned by the Bankruptcy Court in their jurisdiction.

V. Section 330: A More Flexible Standard than Section 328, But the Services Must be Reasonable, Actual, and Necessary

Section 330 governs the compensation of various professionals in a bankruptcy case, including a trustee, a consumer privacy ombudsman, a patient care ombudsman, an examiner, or any other professional employed under section 327 or 1103 of the Bankruptcy Code such as attorneys, investment bankers, and financial advisors. Section 330(a) is far more flexible than section 328 of the Code because it affords Bankruptcy Courts broad discretion when determining the amount that professionals should be paid after they have completed their engagements. The provision states that courts are authorized to award “reasonable compensation for actual, necessary services rendered by the . . . professional.” This discretion enables courts to consider a number of factors when determining reasonable compensation—including (1) the lodestar method, (2) those factors

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80 See infra Section III.
found in section 330(a)(3), and (2) other factors listed by courts. The downside, however, is that professionals may be subjecting their fees to “inherent uncertainty” when the court is determining the amount of professional fees that should be approved.

A. *In re ASARCO Revisited: the Fifth Circuit*

The Fifth Circuit in *In re ASARCO, L.L.C.* approved a Bankruptcy Court’s analysis in applying the loadstar method where a fee enhancement of 20 percent and 10 percent was given to law firms for pursuing litigation. In *In re ASARCO*, the debtor, a mining company, filed a chapter 11 petition in

Section 330(a)(3) lists the following factors:

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.


The following are other factors used by courts:

- (1) The time and labor required;
- (2) The novelty and difficulty of the questions;
- (3) The skill requisite to perform the legal service properly;
- (4) The preclusion of other employment by the attorney due to acceptance of the case;
- (5) The customary fee;
- (6) Whether the fee is fixed or contingent;
- (7) Time limitations imposed by the client or other circumstances;
- (8) The amount involved and the results obtained;
- (9) The experience, reputation, and ability of the attorneys;
- (10) The “undesirability” of the case;
- (11) The nature and length of the professional relationship with the client; and
- (12) Awards in similar cases.


After 52 months in bankruptcy, the debtor emerged pursuant to a plan of reorganization with little debt, $1.4 billion in cash, and the successful resolution of its environmental, asbestos and toxic tort claims. At the end of the case, Baker Botts and Jordan Hyden, Womble, Culbreth & Holzer, P.C. (“Jordan Hyden”) sought lodestar fees, expenses and a 20% fee enhancement, and fees and expenses for preparing their final fee applications. The debtor objected, asking for every document during the 52-month bankruptcy.

The Bankruptcy Court rejected the debtor’s arguments and awarded more than $113 million to Baker Botts and $7 million to Jordan Hyden for fees and expenses. The court also approved fee enhancements only for the work the law firms performed on certain litigation in the amount of $4.1 million to Baker Botts and $125,000 to Jordan Hyden. On appeal, the District Court affirmed the fee enhancements but remanded to the Bankruptcy Court to determine whether any of the firm’s $5 million defense-fee award related to the enhancement. The Bankruptcy Court concluded that the entire defense-fee award compensated to Baker Botts for...
defending the core fees incurred in connection with the case was reimbursable and the District Court affirmed. ASARCO appealed to the Fifth Circuit.

The Fifth Circuit explained that the Bankruptcy Court applied the lodestar method and nothing in section 330 prohibits a court from authorizing fee enhancements.\textsuperscript{91} Although fee enhancements should be granted in limited circumstances, the District Court here found that there was an abundance of evidence supporting the fee enhancement, including a seven billion dollar judgment, which was recoverable, and saved the company, funding a 100 percent recovery for all concerned.\textsuperscript{92} The District Court described this as a “once in a lifetime result,” explaining that the litigation was ASARCO’s “crown jewel.”\textsuperscript{93}

The second issue, however, was decided in ASARCO’s favor. Namely, the Fifth Circuit concluded that section 330 does not authorize compensation for the costs counsel or professionals incur to defend their fee applications.\textsuperscript{94} The court reasoned that compensation is not allowed where the services are not likely to benefit the estate or necessary to the case administration.\textsuperscript{95} The court indicated that the primary beneficiary of a professional fee application is the professional and not the estate. Thus, in adopting the

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Eleventh Circuit’s conclusion, the Fifth Circuit in *In re ASARCO* concluded that the costs incurred by the law firms to defend the fee applications are not reimbursable by the estate. The Fifth Circuit’s decision on this issue was heard by the Supreme Court of the United States on February 25, 2015 but no decision was handed down by the high court at the time of publication.

**B. Success Fees Are Allowed**

Under sections 330 and 363, courts are allowed to award reasonable success fees to parties providing a benefit to the debtor's estate. Section 363(b) allows for the use, sale or lease of property of the estate and if a debtor's proposed use of its assets represents a reasonable business judgment, that use may be approved. Success fees must still meet the section 330 test for reasonableness, by using the factors set forth in section 330(a)(3)(A)–(F) of the Code. In *In re Residential Capital*, the court analyzed the following factors: (1) whether the services of the Chief Restructuring Officer ("CRO") were necessary and beneficial to the estates at the time that they were rendered; and (2) whether the success fee was reasonable based upon a market comparison.

The court approved the success fee for the following reasons. First, the CRO played a vital and indispensable role in the reorganization. The case was nearly in free-fall before the CRO’s appointment and two events that moved the process along in the right direction were Judge Peck’s appoint-

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ment as a mediator and the appointment of the CRO.\textsuperscript{101} The court further concluded that although the CRO was not solely responsible for the success of the case, he played an important role. Just because the CRO worked in tandem with other parties, including Judge Peck, does not mean that the success fee is unreasonable under section 330.\textsuperscript{102}

\textit{Second}, the court found that the $2 million success fee was well within market standards, considering the debtor’s assets, liabilities, and measure of value creation and savings to the estates.\textsuperscript{103} “Courts in the Second Circuit have adopted a ‘market-driven’ approach in which the cost of comparable services is a significant factor in determining reasonableness of fees.”\textsuperscript{104} The debtors looked to other large-sized cases and found that the $2 million success fee was comparable to the market. The debtors also argued that the CRO wore multiple hats as one of many factors in informing their decision regarding the amount of the award.

Thus, based on a careful review of the services the CRO provided, the results achieved, and the uncontroverted evidence of market rates, the court found that the CRO’s proposed $2.0 million success fee was reasonable.\textsuperscript{105} Finally, the court explained that success fees are designed to compensate a bankruptcy professional, including a CRO, for results that they achieve. While the number of hours is certainly a relevant factor in determining what a “reasonable” success fee is, it is by no means the most important factor.\textsuperscript{106} The court also highlighted the fact that the engagement letter, CRO retention application, and the amended engagement letter provided the court with specific factors by


which to determine the reasonableness of the success fee. The success fee was meant to act as an incentive for the professional to obtain a certain result and should thus not be calculated based on the amount of time that the CRO spend to reach achieving that result.\textsuperscript{107}

VI. Conclusion

One of the themes that resonates throughout the decisions discussed in this Article is that courts are generally less willing to punish professionals that are forthright and honest about their connections to parties-in-interest in a bankruptcy case. On the other hand, professionals that do not fully disclose all connections to the court may face partial or full disgorgement of their fees, depending on whether the disclosure was inadvertent or willful. They could also face disqualification. Disclosure is critical.

Under the Bankruptcy Rules, connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee must be disclosed. It is up to the court to decide whether any connections create an adverse interest to the estate; not the professional. Inadvertent failure to disclose may result in disgorgement, in whole or in part, even if the professional was disinterested. If the failure to disclose, however, was willful, the court may require disgorgement of all fees and perhaps even disqualification of that professional. Nonetheless, it should not be left to the professional to determine whether it is disinterested or holds an adverse inference. Courts tend to engage in fact-intensive inquiries on these issues, such as in \textit{In re Radnor Holdings Corp.} and \textit{In re Residential Capital, LLC}, 504 B.R. 358, 372, 59 Bankr. Ct. Dec. (CRR) 15 (Bankr. S.D. N.Y. 2014); see also \textit{In re Commercial Financial Services, Inc.}, 427 F.3d 804, 815, 45 Bankr. Ct. Dec. (CRR) 148, 54 Collier Bankr. Cas. 2d (MB) 1635, Bankr. L. Rep. (CCH) P 80381 (10th Cir. 2005) (approving the Bankruptcy Court’s reasonableness evaluation with regard to a financial advisor’s compensation based upon the lodestar method, calculating number of hours worked and rates charged in comparison to other financial advisors working in the same proceeding); \textit{In re Citation Corp.}, 493 F.3d 1313, 1320–21, 48 Bankr. Ct. Dec. (CRR) 158, Bankr. L. Rep. (CCH) P 80982 (11th Cir. 2007) (approving use of adjusted lodestar analysis as one method to determine the reasonableness of fees charged for financial advisory and investment banking services).

Rental Systems, L.L.C. Thus, professionals should not decide for themselves what is worth disclosing or not.

Professionals should also be mindful under which provisions they are to be compensated. Professionals employed by the estate may be compensated under either section 328(a) or section 330(a) of the Bankruptcy Code. As explained in this Article, reimbursement under section 330 is a far more flexible standard for payment of fees than seeking compensation for additional services rendered under section 328(a) of the Code. Courts have more discretion in determining the amount the professionals should be paid if their fees are reviewed under section 330 of the Bankruptcy Code.

The downside, however, is that there is a level of uncertainty in not entering into terms of compensation at the time of engagement because there is generally no predictability of the way in which the court will exercise its discretion. Likewise, bankruptcy professionals who enter into an agreement under section 328(a) prior to rendering services will generally enjoy the benefit of the bargain. However, it is important to be mindful of courts' opinions on whether the retention order, retention application, or both dictate whether a section 328(a) agreement exists. Thus, attention should be paid to engagement letters, and purposeful decisions should be made when professionals enter into retention agreements with the estate.