Ever More Advice and Thoughts from Judge Starzynski

prepared for

BANKRUPTCY 2004: The 20th Annual Year in Review
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The Honorable James S. Starzynski
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District of New Mexico

The following continues my "More than You Probably Wanted to Know" monologues with practitioners at the Annual Year in Review programs, which deal largely with practice and procedures in my courtroom and chambers.

These practice and procedure tips are in addition to those already listed on my chambers website. If you are interested in or need to know about these practice tips, then you need to also review the other practice tips at my chambers website. To get to my chambers website, go to www.nmcourt.fed.us, then click on U.S. Bankruptcy Court, then on Judges, then on Judge Starzynski's "homepage", and then start clicking on the various topics you want or need to read about. (Note that at that site there is a list of Judge Starzynski's decisions (pdf) filed chronologically and that there is a "last updated" line at the bottom of that page, which will help you remain current on what is filed on that page.) There is a wealth of other information on the chambers website as well, such as a "matters pending" list and the court calendar for the upcoming six months, which is usually updated once a week and is searchable. Spending some time at that site might be useful, especially if you are new to bankruptcy practice in this district.

Note: items marked with a "*" indicate repeats from last year.

1. For some time now the issue of what rates attorneys should be allowed to charge has presented itself to both bankruptcy judges in this district. Specifically the issue has been that certain counsel have, for several years now, requested permission to charge hourly rates in excess of $200/hour. I currently have a number of thoughts about that subject, which necessarily do not take into account all the contingencies and details that might arise in different cases. And of course, the decision in any given case will be based on the evidence and the legal argument presented. Nevertheless, some of my thoughts on this subject are as follows:

a. Judge McFeeley has allowed recently rates of $225/hour and $250/hour respectively to specific counsel in certain cases. E.g., In re Robert and Mitzi Miller, No. 12-98-13174, Memorandum Opinion on Second Interim Fee Application, docketed June 14, 2004 (doc 337). I have been more reluctant to allow such higher rates (the Furrs case being the notable, and sui generis, exception, and unlikely to repeat itself, given the ultimate disposition of certain fee applications in that case), although I did recently allow one attorney to charge $225/hour in a certain case. Nevertheless, the rise of rates generally in the market for legal services, coupled with

the dictate of Section 330(a)(3)(E) ("...whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title."), foretells that rates in excess of $200/hour will be the norm for at least some counsel sometime before August 2012.

b. The process of determining rates generally occurs in connection with chapter 11 cases, in connection with employment applications for counsel for the debtor in possession or for the unsecured creditors committee. My practice has been to approve a rate at the beginning of the employment (and to have that rate clearly set out in the employment order so that anyone can easily find out what the rate is and so that there is no question about what the rate is), so that everyone in the case can (sort of) calculate or estimate what the fees will be, and so that the attorney can estimate during the case what the income will be for the purpose of running his or her business. Should the attorney want to increase the rate of compensation during the case, then the attorney can file an application to do so, with notice to the creditors. (But part of the language of Section 328(a) may come into play here: "[T]he court may allow compensation different from [that permitted in the employment order if the compensation terms and conditions] 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.") And my practice has also been by and large to approve a rate of up to $200/hour, with the proviso in the order that if the attorney wants a higher rate, the attorney can request a specific hearing on that issue to present evidence and legal (or other) argument for the increased rate.

c. In making the decision about a compensation rate, Section 330(a)(3)(E) refers to rates of comparably skilled practitioners in cases other than cases under this title. Case law also says to look at the rates being charged by attorneys in bankruptcy cases in that jurisdiction. E.g., Miller v. United States Trustee (In re Miller), 288 B.R. 879, 883 (10th Cir. B.A.P. 2003) (court should consider hourly rates of bankruptcy attorneys in its jurisdiction and adjust for applicant's experience). What those standards are aiming at, it seems to me, is a prediction about the value to be brought to the estate by the professional in the form of the quality of the professional's work. That prediction is expressed in the form of the rate allowed, as determined by the market. The determination about the applicant's experience, in order to permit the adjustment called for in the Miller decision, will often be governed at least in part by the past performance of the applicant. The mere number of years in practice is not necessarily an accurate predictor of what value the professional will bring to the estate; after all, twenty years' of experience for one professional might be characterized by continual improvement, whereas another attorney might repeat the first-year learning experience twenty times.

d. Keep in mind also that if you are trying to establish a rate for legal work and you solicit affidavits from various attorneys who represent secured creditors, there are other counsel for secured creditors who work on a flat-fee or reduced-fee basis. Those rates are also part of the market.

2. If you are charging the estate $225/hour, or even $200/hour, you need to work efficiently and bill reasonably. For example, if it takes you a total of one minute to

place a call to chambers and get a call back from chambers taking a hearing off the docket, you should not charge the estate .2 hour. Frankly, you probably should not be doing that even if you are only charging $150/hour. But it is particularly egregious if you are charging $200/hour or more; at that rate, you should be focusing your efforts on the bigger strategic aspects of the case and conducting the tough negotiations that will solve problems and avoid litigation, and leave your paralegal – better yet, your clerical help – to make phone calls like that. (After all, we deal with your secretaries every day and sometimes they are as well known to us as you are.)

3. As you might have gathered, I tend to look at fee applications somewhat more closely when the rate being charged is relatively high (say, $200/hour or more, vs. $150/hour). I tend to look more closely also when the amount being charged is relatively high. For example, I don't devote a lot of time to examining chapter 13 fee applications for $2m to $2.5m, whereas one for $4-5m (or more) leads me to examine the docket and application and seek an explanation about why the cost was higher than average. For those of you submitting fee applications for higher amounts in chapter 13 cases, you can shorten the approval process by providing up front, especially in the application and repeated in the transmittal e—mail, the information that tells me, and the trustee and creditors, what led the application to be as high as it is. Understand that I don't have a problem with paying for the work done; in fact, attorneys need to get paid for doing the work, all the work, that is needed for their client's case. And depending on the client and the problems, that could be a little work or a huge amount of work. And it should all be paid for, as long as it was necessary and it was efficiently done. Which is what takes us back to the fee applications and the need for a full explanation of why the amount of the fee application is what it is.

* More on Chapter 13 fee applications specifically: If your fee application asks for more than about $2,000 or so, you should provide a brief explanation in your fee application in order to permit me to facilitate my review of the application and approval of your fee order. If you do not do that, I am likely to send the order back and ask for the supplement. The supplement can be as little as an extra sentence; e.g., "Counsel had to spend several additional hours negotiating the claim of the IRS." These are things that are not immediately apparent from the time sheets. Of course, if your fee application is for substantially higher amounts, then a slightly longer explanation may be in order.

4. Federal Bankruptcy Rule 7004(h) requires, in connection with adversary proceedings and contested proceedings under Rule 9014 and with certain exceptions, service by certified mail on certain institutions that are insured by the Federal Deposit Insurance Corporation. The following is some detail about complying with that requirement (compiled by Jim Burke):

Rule 7004(h) discusses service "on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act)". Section 3 of the Federal Deposit Insurance Act (FDI Act) is 12 U.S.C. Section 1813. Section 1813(c)(2) defines "insured depository institution" as "any bank or savings association the deposits of which are insured by the Corporation pursuant to this chapter."

"Bank" is defined in Section 1813(a)(1) as "any national bank and State bank, and any Federal branch and insured branch" and includes former savings associations that have converted from a savings association charter and is a Savings Association Insurance Fund member. State banks includes banks, banking associations, trust companies, savings banks, industrial banks, or similar depository institutions that operate like an industrial bank, and other banking institutions that are engaged in the business of receiving deposits. (Section 1813(a)(2).) "Savings association" is defined in Section 1813(b)(1) as any Federal savings association, any State savings association, and any corporation that is determined to be operating in substantially the same manner as a savings association. State savings associations include building and loan associations, savings and loan associations, homestead associations, and cooperative banks. (Section 1813(b)(3).)

So, it appears that pretty much any Federal or State bank or bank-like institution COULD be covered. The best news, however, is that there is an internet site that lists all FDIC insured institutions. **http://www3.fdic.gov/idasp/.** So, it should be easy enough for any lawyer to check this site to see if certified mail is required.

However, nowhere is there a reference to credit unions in the FDI Act. The Federal Credit Union Act, 12 U.S.C. 1751 et seq. Section 1781 states that the National Credit Union Administration Board "shall" insure all federal credit unions and "may" insure state credit unions. Section 1783 then establishes the "National Credit Union Share Insurance Fund" as a separate US Treasury fund to pay insurance related to credit unions. So, credit unions have their own insurance fund, and Rule 7004(h), which refers to "insured depository institutions" as defined in the FDI act, would not apply to credit unions.

Note: On January 24, 2005, the Court sent out a Notice to Practitioners ("NTP") about this subject (No. 2005-1).

5. Federal Bankruptcy Rule 7004(b)(3) requires, if you serve by mail (i.e., post), that the service of an adversary proceeding complaint or a paper initiating a contested matter (Rule 9014) upon a corporation, partnership or other unincorporated association (presumably including a limited liability company) be by mailing a copy of the summons and complaint "to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent if one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Actions included in this category of "contested proceedings" include motions to avoid liens, motions to value collateral, motions to assume or reject contracts or leases, objections to proofs of claim, and similar such requests for relief, but would presumably not include such things as service of a chapter 13 plan which proposes "merely" to pay less than the full amount of the unsecured claim of a creditor. The new form chapter 13 plan, like the current form chapter 13 plan, has specific service provisions that comply with commonly used portions of Rule 7004(b). And note that our current case management system has space for four lines for each address on the mailing matrix, such that you can insert "Attn Branch Mgr." or whatever other language is appropriate, which will allow you to use the mailing matrix for many notices to corporations et al. without having to separately address envelopes.

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6. And don't forget the extra service requirements if you want to sue or engage in a contested proceeding with the government; see Federal Bankruptcy Rule 7004(b)(4), requiring at a minimum service on the civil process clerk of the applicable office of the United States Attorney together with mailing a copy of the complaint and summons to the office of the Attorney General in Washington, D.C.

7. Waiver of the 10-day stay of a modification of the stay provided by Rule 4001(a)(3): If the creditor does not ask for this relief in its motion, then I won't grant it in a default order (assuming I know when the order comes in that it has not been asked for). On the other hand, if it is asked for explicitly in the motion, I will grant it in a default order. And I will grant it if the respondent agrees to it, as in a stipulated order. But I will not grant it at the end of a contested hearing (particularly an evidentiary hearing) in which I have granted stay relief, at least without a showing by the movant of a good reason for depriving the respondent of that protection.

8. White v. General Motors Corporation, Inc., 908 F.2d 675, 682 ((10th Cir. 1990) (White v. GMC II)("Part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case. An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is in applicable in a given situation.... The attorney's argument must be nonfrivolous, however; she runs the risk of sanctions if her only response to an affirmative defense is unreasonable...(if failure to make prefiling investigation is sanctionable so too is failure to disclose adverse results of investigation)."). (Citations omitted.) This would seem to be particularly applicable, for example, to a trustee pursuing preferential transfers between a business and creditors who comes across evidence of payments constituting subsequent new value. (Note: This admonition is not directed at the trustees and their counsel in this district, who as far as I can see certainly appear to be heeding this admonition.)

9. As a reminder, attached are the current chapter 13 procedures for confirmation, dismissal and similar hearings and the form scheduling order in effect in my courtroom (i.e., proceedings before me). These procedures are the second attempt to work out with chapter 13 practitioners and the chapter 13 trustee's office a set of procedures that minimize the amount of time that counsel and parties have to spend in court and preparing for court. The first attempt (also worked out with chapter 13 practitioners and the chapter 13 trustee's office) was met with some unhappiness on the part of just about everyone but us, but so far, these new procedures seem to be working well, or at least better. The chapter 13 committee, co-chaired by Jerry Velarde and Kelley Skehen, is also working on a revised version of the "combo" chapter 13 plan, and on other issues, including any other procedures in my courtroom that could be improved. So if you have any thoughts or concerns about the procedures in my courtroom, or about anything else having to do with chapter 13 cases, feel free to let us

or the co-chairs know.

10. Debtors cannot use section 522(f) to avoid liens on vehicles. See Martinez v. Government Employees Credit Union of El Paso (In re Martinez), 22 B.R. 7 (Bankr. D. N.M. 1982). Section 522(f)(B) is limited to nonpossessory, nonpurchase-money security interests in 1) household furnishings and household goods, 2) implements and tools of the trade, and 3) health aids. Also, under 522(g), the general rule is that a debtor cannot exempt property recoverable by a trustee if the debtor's transfer of that property was voluntary.

11. * Sharing Fees: It appears that the practice of paying another attorney to do part of the work in a bankruptcy case, particularly covering the § 341 meeting in another town, apparently is fairly routine. I have not decided whether such a practice constitutes fee sharing, and thus requires disclosure pursuant to Rule 2016(b), and the issue to date has not officially come to my attention, but you may want to consider that issue next time you file a Rule 2016(b) statement. I certainly have no problem with the practice itself; in this state, such an arrangement may almost be a prerequisite to conducting an economically viable debtor-representation case. The concern, rather, is disclosure. So think about that in connection with any of your pending or future cases. (Perhaps this might be applicable as well if you pay someone to cover your cases in your absence.)

12. * (and supplemented) Filing what you send us: One consequence of the "paperless" or, more accurately, "less paper" filing system now in effect is that there will not be filing on the "left side" of the file, since that refers to the paper files that the Clerk's office used to maintain, where it used to keep things like correspondence that were not treated as part of the pleadings. Now, if you send something to the Clerk's office or my chambers such as, for example, a letter brief, a letter in response to an order to show cause, or a letter asking for some sort of relief (although the last item is what we receive from pro se parties rather than attorneys, usually), that document will be filed as a pleading and will appear on the ACE docket. And this applies to e-mail transmissions which we send back to you for some reason but which we also deem of sufficient importance in the case such that, if there were a "left side" of the file, we would have filed a paper copy of the e-mail transmission there.

13. * A reminder of the obvious: If the Clerk's office, including particularly a case manager, contacts you about getting something done so the case can be closed, or for some other reason, please have the good sense to do what you need to do, and do it promptly.

14. * (supplement to last year's entry) Hang up and drive: As an addition to my continuing focus on discouraging people from participating in hearings by telephone while operating a motor vehicle: A recent article in both The New York Times and the Albuquerque Journal (ensuring truly national publication) reported about a study done in Salt Lake City in which 20-year old drivers using cell phones drove as if they had the

reflexes and reactions of 70-year olds. This is in addition to the article in The New York Times, Tuesday, July 1, 2003, page D8: In an experiment done in Spain, tests done on the road showed that talking with someone is more distracting than just listening, and trying to follow instructions (as in answering questions from the judge) is even worse. The ability to pay attention to what was happening on the road dropped by 1/3, and that result was the same when using a hands-free cell phone as well. In other words, when you are talking on a cell phone while driving, the problem is not so much that your hands are otherwise engaged as it is that your brain is otherwise engaged. So if you are driving when you are called for hearing, let me know and I will call you back shortly when you have had a chance to pull over safely and can talk.

15. Remember that if you have any complaints or concerns about how I or any of my staff are performing our duties, you may contact me or any chambers staff directly, or contact the Clerk of the Court, anonymously or otherwise, or contact Fred Hart, anonymously or otherwise. Professor Hart is the Judicial Performance Liaison who has agreed to serve in that role. See NTP 2004-1 (March 3, 2004). Of course, you can also complain directly to the Tenth Circuit pursuant to 28 U.S.C. Section 372(c) (see N.M.L.B.R. 9028-1 (August 13, 1996 edition) Disability or Misconduct of a Judge).