

A SIMPLE DESULTORY (NON)PHILIPPIC¹

Prepared for presentation by Bankruptcy Judge James Starzynski at "Bankruptcy 1998: The 14th Annual Year in Review"

1. Lawyer's Creed -- D.N.M.L.Civ.R. 83.9.
2. Candor with Court (e.g., *Patriot* decision)
3. Compliance with Local Rule 9013.1(b) -- noncompliance may lead to dismissal except in cases where notice to the matrix is being employed.
4. Preliminary hearings/PTC (vs scheduling conference):we review files and Jim prepares crib notes; want to resolve issues early if possible (e.g., bonuses committed to Chapter 13 plan, income tax refunds not committed to plan), or spot difficult issues that will need to be briefed (e.g., 11th amendment matters); want to set realistic times to dispose of the matters; want parties to have researched their cases before the hearing (exception [sort of]: Chapter 13 prelims). See *attached form of PTC/summons* -- this is the current version which you all should be using.
5. Hearings, both preliminary and final -- it is *not enough* to say that an order settling the matter is circulating. Hearings will not be put off without order submitted at or before the hearing signed off by all counsel, or counsel (or one of them -- but the others who don't show will be bound by what the one counsel says) can appear and read agreement into the record (and usually will set a deadline for submitting the written order) or ask for a continuance (no guarantee it will be granted). (exception: 13 confirmations -- like a trading day on the floor of the Chicago Mercantile Exchange -- with consent of parties, will put off a final hearing on confirmation till next Chapter 13 day once).
6. Scheduling or requesting hearings:
 - Bring your calendars, because we give settings on the spot and expect to deal with conflicts at that time.
 - Policy about priority of hearings
 - other courts
 - family matters (family vacations)
 - Prefer calling rather than sending in a written request
 - If get a hearing ahead of time pursuant to current version of CPPG 5.1.1.3, then will have to deal with the hearing even if no objections to requested relief.

¹ With apologies to Paul Simon. Synonyms for "desultory" are "wandering" or "random". The term "philippic" derives from Demosthenes series of orations vigorously condemning Philip of Macedon (and later Cicero's like criticism of Mark Anthony), and has come to mean "tirade".

7. Evidence at hearings (exhibits, witnesses live or by depo, stips, judicial notice of adjudicative facts), not just affidavits or presentations of counsel.
8. Length of hearings (child care)
9. Feedback.
10. Role of the BR Law Section (vs other committees, etc.)
11. No gifts
12. Post decisions on web site, but not publishing necessarily in West or others. Free to cite web site cases. Other cases won't get on web when they are particularly fact-intensive or are issued quickly without adequate time to "polish" for publication (or even if they are). In fact, most decisions rendered orally pursuant to Rule 7052.
13. Court fax number (248-6585) -- for the most part, DON'T USE IT! With respect to judicial matters, it is to be used by parties and counsel only to confirm telephonic appearances. For all other judicial matters, use Litigation Graphics (842-9841) for faxes (*recall that this will take some time -- examples of hearing held anyway and tossed fax*), or deliver to chambers otherwise. For administrative matters (e.g., CLE, Rules Committees, etc.), it is OK to use the fax number.
14. Procedures for orders (multiple review, Kelley sign off on most 13 orders, recitals about notice, time, rates being charged to estate, etc. -- why we do this; agreed upon stay order language that says creditor can collect if debtor dismisses case or no discharge is granted will be crossed out, etc.) If you are going to submit an order so you don't have to appear, remember it takes a bit of time, but at least send a letter or note with the order telling us about the hearing this will obviate. And don't fax *and* mail the same order to us for signature.
15. Put most things on record, including chambers conferences with counsel during a trial, telephone conferences dealing with merits of an issue even if in chambers, etc. (assuming Ct Rptr is available).
16. Don't want to do anything ex-parte (define -- does not mean letters) -- for example, request for TRO has always resulted so far in call to opposing counsel and hearing on preliminary injunction on short notice. Keep in mind *Pioneer Ford* case (Me. 1980)
17. Chapter 13 practice, including fee applications, what debtors are paying for, what happens when case ready to convert right after all admin costs paid, etc. Address more at the next brown-bag.

FILED

UNITED STATES BANKRUPTCY COURT^{at}
FOR THE DISTRICT OF NEW MEXICO

_____ o'clock _____ M

FEB 25 1999

In re:

United States Bankruptcy Court
Albuquerque, New Mexico

LEO SIMS,

Debtor.

No. 7-96-14099 RR

ORDER ARISING OUT OF PRELIMINARY HEARING
ON FIRST AND FINAL APPLICATION FOR
PAYMENT OF FEES AND REIMBURSEMENT OF
OUT-OF-POCKET EXPENSES FOR
LAIN, FAULKNER & CO., P.C.

Lain, Faulkner & Co., P.C. ("Applicant") filed its First and Final Application for Payment of Fees and Reimbursement of Out-of-Pocket Expenses for Lain, Faulkner & Co., P.C. ("Application") on December 22, 1998, and noticed out the Application on the same date. Aline Sims and Thomas and Winnie Kennann, Leo V. Sims, II and George Lynn Sims objected timely. Neither the Trustee nor the Assistant United States Trustee filed objections. The Application and objections came on for a preliminary hearing on February 24, 1999.

Applicant was represented by Wiggins, Campbell & Wells (Bevin Owens); Aline Sims by Puccini & Little, P.A. (Louis Puccini) and by Heidel, Samberson, Newell & Cox (Lewis Cox and Mike Newell); Thomas and Winnie Kennann, Leo V. Sims, II and George Lynn Sims ("Kennann Parties") by Daniel Behles; and Gary Ottinger the Chapter 7 Trustee by Gary Ottinger as counsel.

The Application seeks approval or allowance of \$33,392.44, consisting of \$31,248.00 for fees, \$2,144.44 for costs, and nothing for New Mexico gross receipts taxes. Applicant has been paid (or reimbursed) \$19,242.65 so far, and the balance due is \$14,149.79. The Application covers the period May 6, 1997 through October 31, 1998, although virtually all the services were rendered during the first twelve months of the period in question.

During the course of the hearing, the Court and parties narrowed the factual and legal disputes considerably, and the Court issued several preliminary rulings, concerning this Application. The purpose of this preliminary order is to set out those rulings, which the Court considers generally applicable (subject, of course, to the right of any party to raise and argue these issues) to all professional fee applications in bankruptcy cases that come before this Court, and to specify as well the remaining issues for decision in this Application.

1. Terms of employment, including terms of compensation.¹

¹ The Applicant was employed on a fixed fee or "flat fee" basis for certain monthly basic and payroll accounting services, and on an hourly rate for other accounting services such as financial analysis and litigation services. This interim opinion and order is directed more to professionals' hourly arrangements than to fixed fee arrangements (such as for a real estate broker selling a home at a fixed price) or expressly contingent fee arrangements (such as for an auctioneer).

Aline Sims and the Kennann Parties object that the rate to be charged by the senior accountants of \$175.00 per hour is too high, and that the Chapter 11 trustee² could have hired less expensive accountants from within the State of New Mexico. These objections will not be considered in this context because they were raised (as they should have been) and resolved at the hearing on the application to employ Applicant. Ordinarily the order employing a professional should recite all the terms on which the professional is being employed, including the terms of compensation.³ (It is the Court's practice not to approve a form of order that does not explicitly recite in it what the terms of compensation are. A mere reference to the employment application is insufficient.)

Once this order is entered, it should be binding for the rest of the case, except in unusual circumstances, as is contemplated by the Code. 11 U.S.C. § 328(a)*; see also 11

² The Chapter 11 trustee hired the Applicant.

³ The Court has, in at least one other case, received a suggestion that it enter one order permitting the employment of a professional and enter a subsequent order, perhaps at the time of the first fee application, ruling what the compensation terms will be. None of the parties in this case has taken that approach, and the Court has refused to accept the suggestion in the other case pending before it.

⁴ "The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103

U.S.C. § 330(a)(3)(A). By the same token, of course, the Applicant will also ordinarily be bound by the "flat fee" arrangements it has entered into.⁵ This permits the parties, including the debtor in possession or the trustee, to estimate more accurately the cost to the estate of the services already rendered or to be rendered by multiplying the hours times the rate. It also permits the professional to anticipate what its income will be in any given month as well as overall, an important consideration for the operation of any business.⁶ Payment in bankruptcy cases is more contingent than is desirable; eliminating the uncertainty that would accompany easily changing rates at least conforms bankruptcy practice to more of what the parties expect in similar circumstances outside of bankruptcy,

of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such 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."

⁵ In this instance, the Application reflects that the Applicant charged the estate \$18,650.50 for "Monthly Accounting" and "Tax Preparation" under the flat fee provision, thereby writing off \$21,727.00 of fees for those categories.

⁶ It is for this reason that the Court will ordinarily sign professional employment orders, even in cases that are intended to be of fairly short duration, that provide for interim monthly payments of 75% of fees and 100% of costs.

which would be consistent with Congress' goal of encouraging qualified professionals to render the required services to bankruptcy estates. See Notes of the Committee on the Judiciary, House Report No. 595, reprinted at Appendix C, Collier on Bankruptcy, App. Pt. 4-1459.

Fixing the rates of compensation at the outset of the employment does not preclude or hinder the Court from awarding compensation appropriate to the circumstances either on an interim basis, by means of interim fee applications as provided for by 11 U.S.C. § 331, or in connection with a final fee application, pursuant to 11 U.S.C. § 330. What it does do is force the parties and the Court to address directly questions of the value of the services to the estate, amount of time spent (and charged to the estate), etc., rather than addressing those issues indirectly by changing the rates of compensation.

Of course, fixing the rate of compensation at the beginning of the employment is no guaranty that the professional will receive the full amount of the compensation on the terms ordered. The unfortunate reality is that bankruptcy practice is still to some extent "contingent hourly" work: there is almost never any upside (such as payment of a bonus for work done better than average) and frequently a downside (insufficient funds to pay all the bills of the professionals, pressure from secured creditors

and those employing professionals to accept less than has been earned, etc.) to practicing bankruptcy.⁷ In summary, assuming adequate disclosure by the professional and adequate notice to the parties to the case, the terms of compensation set out in the employment order are going to be binding on the professional and upon the estate unless explicitly changed by court order.

2. Costs, New Mexico gross receipts tax, and expense of preparing fee application..

Ordinarily the Court will allow reimbursement of reasonable expenses incurred by the professional, even if the fees are substantially reduced. This is because there ordinarily is not - or should not be -- a "profit" built into the expenses.⁸ That

⁷ Of course, not every bill gets paid promptly and in full outside the bankruptcy arena either

⁸ Having said this, the Court also recalls an article from a legal economics magazine from the late 1980's which included advice about setting up a law firm's photocopier as a "profit center". While seeking reimbursement calculated to take into account the full cost of a photocopier (or facsimile machine, for example), including supplies, lease or purchase costs, maintenance costs, etc. is certainly permissible, it is probably unethical, inside or outside the bankruptcy arena, for an entity hired to provide professional services such as lawyering and accounting to make any significant profit from copying, sending and receiving facsimiles, etc., at least without an explicit agreement to the effect with the client (and, in bankruptcy, approval by the Court). See ABA Comm. On Ethics and Professional Responsibility, Formal Op. 379 (1993). ("[I]n the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves... The lawyer's stock in trade is the sale of legal

is, there should be no motivation for the professional to incur any expenses other than those necessary to render the needed services. Expenses also constitute out-of-pocket expenditures by the professional for the estate -- essentially a small short-term loan to the estate -- that are appropriately repaid quickly and in full by the estate.

In this instance, the Application asks for reimbursement of expenses of \$2,144.44, when in fact the billing statements show expenses incurred of \$3,704.82. The Court sees no reason for virtually all the expenses not to be reimbursed, and by this order deems the Application to have been amended to seek reimbursement of all the expenses except for the otherwise unspecified "office expenses" in the amount of \$19.61. The resulting figure for costs to be allowed is \$3,685.21.

The Application seeks no allowance for payment of New Mexico gross receipts taxes on either the fees or the costs for which payment (or reimbursement) has been made or is sought. Perhaps this stems from the assumption by Applicant that as a Texas entity it is not required to pay those taxes to the state of New Mexico. The Trustee and the Court, and indeed even the objecting

services, not photocopy paper, tuna fish sandwiches, computer time or messenger services") See also L. Harold Levinson, How Ethics Rules Prohibit Hidden Fee Markups, 8 No. 5 Acct. for L. Firms 1, 3 (1995).

parties, questioned that assumption. In addition, the Trustee urged that the gross receipts tax be allowed by the Court and promptly paid to the New Mexico Taxation and Revenue Department, so that there would be no issue of unpaid taxes hindering the closing of the estate. The Court also is concerned that bankruptcy practice carefully comply with all the requirements of the taxing authorities (federal and state), and that the Court not appear to condone tax evasion. The Court will therefore deem the Application upon entry of this preliminary order to have been amended to seek reimbursement as well of applicable gross receipts taxes for prompt payment to the State of New Mexico. Of course, if Applicant for some reason wishes to contest payment of those taxes, it may do so, in which case it must seek the joinder of the Taxation and Revenue Department to obtain a complete resolution of that issue.⁹

It is established law now in this jurisdiction, and contemplated by the Code, 11 U.S.C. § 330(a)(6), that a reasonable fee be allowed for preparation of fee applications.

3. Objections alleging excessive amount of work.

⁹ Applicant is reminded that gross receipts taxes is required to be paid not only on fees received, but also on reimbursement of most costs as well. Certain costs are excepted from this rule, such as court filing fees and, in certain instances, photocopies made by lawyers for their clients. See *Francis & Starzynski, P.A. vs. New Mexico Department of Taxation and Revenue*, No. 24,440 (N.M. 1998).

Both objections assert that much of the services rendered were not necessary and were excessive, and did not benefit the estate. The issue of excessiveness of the work sought to be paid for is encompassed in the larger issue of the overall reasonableness of the fees, and that issue will be deferred for resolution at the final hearing. However, one aspect of the objections needs to be addressed preliminarily.

Both objectors argued that, because the Debtor's previous accountants had detailed accounting records going back over twenty years, the Applicant (and Chapter 11 trustee) could have relied on those records and not "redone" some of that work, thereby saving thousands of dollars of fees for the estate. Obviously the Court does not have sufficient evidence before it now to decide that issue. But the Court is also mindful of the strong caution urged on the Court by the Trustee, who stated that his review of the Debtor's operations left him little confidence in the reliability of the accounting records maintained by the Debtor's long-time accountants. This was not to suggest that the accountants did anything improper, but only that they may not have been provided with all the information that would have permitted a more accurate and complete accounting and had no way of knowing that. In short, the Trustee argues that too severely restricting or scrutinizing the Applicant's "redoing" of some of

the previous accountants' work might chill future efforts by the professionals working for trustees, debtors in possession and committees from adequately investigating the affairs, assets and liabilities of the estate, and could turn out to be "penny wise and pound foolish". While an applicant will need to justify such "reworking" to the Court and the creditors (a burden which basically applies to all aspects of the work done by a professional hired by the estate), there can certainly be no per se rule which disallows payment for such work as excessive or not necessary.

4. Additional objections.

The objectors also claim that Applicants' failure to register with the New Mexico Secretary of State as a foreign corporation doing business in New Mexico, or to be licensed or otherwise approved by the New Mexico Accountancy Board, means that Applicant may not be entitled to any fees, or at least any additional fees. It is the law in New Mexico that a construction contractor not properly licensed by the Construction Industries Division of the State of New Mexico may not use the state courts of New Mexico in any way to obtain or retain payment for work done. Section 60-13-30 NMSA 1978 (1997 Repl.). See e.g., Triple B. Corp. v. Brown Root, Inc., 106 N.M. 99, 101, 739 P.2d 968, 970 (1987).

The parties have so far cited no similar statute or case law governing the practice of accountancy, or, for that matter, bookkeeping or tax preparation. A ruling denying some or all of the requested fees on either ground (or even a ruling denying the objections on the merits) might seriously impact bankruptcy court practice in this district, to say nothing of the potential impact on all the professionals that appear in this court but are based outside of New Mexico. The objections would also seem to raise significant questions about federal constitutional law, national bankruptcy practice and the application of state policy considerations on bankruptcy practice and procedure. Therefore the Court will not consider this issue even at a final hearing unless a significantly broad range of interests or interested parties are notified and given the opportunity to provide guidance to the Court on this issue, by means of an order or series of orders to be entered (if the objections are pursued) explicitly addressing this issue.

The Aline Sims objection also asserted that during the tenure of the Chapter 11 trustee, while Applicant was employed, the Debtor diverted funds from the estate. The mere allegation of those facts does not of course establish that Applicant did anything it should not have, or failed to do anything it should have. Such allegations need to be fleshed out with discovery and

then presented at trial, if indeed the objection is pursued.

For the foregoing reasons, and with the guidance provided by this preliminary ruling, the Court finds that it should continue the pretrial conference on the objections to the Application for thirty days in order to permit the parties to confer with each other to determine what issues can be settled and what issues need to be heard at a final hearing.

IT IS THEREFORE ORDERED that the pretrial conference on the Application, and on the objections thereto filed by Aline Sims and the Kennann Parties, is hereby continued to March 31, 1999 at 1:30 p.m.



James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following:

Bevin Owens - Attorney for Applicant
Louis Puccini - Attorney for Aline Sims
Lewis Cox and Mike Newell - Attorneys for Aline Sims
Daniel Behles - Attorney for Kennann Parties
Gary Ottinger - Attorney for Chapter 7 Trustee


Mary B. Anderson
Mary B. Anderson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re

Debtor(s).

Case No.

*All documents in this matter must
be identified by both bankruptcy
and adversary case numbers.*

Plaintiff(s),

v.

Adversary No.

Defendant(s).

SUMMONS AND NOTICE OF PRETRIAL CONFERENCE

You must file with the court and serve on the attorney for plaintiff(s), whose name, complete address and telephone number are _____

a response to the complaint which is herewith served upon you

_____ by _____, or
_____ within 30 days of the date of issuance of the summons (see "Date of Issuance" below).

A pretrial conference with respect to this complaint has been set for:

_____ and will be conducted by the Honorable James S. Starzynski in the Bankruptcy Hearing Room, Second Floor, Federal Building and United States Courthouse, 421 Gold Avenue SW, Albuquerque, New Mexico.

Prior to the pretrial conference, the parties shall have conferred with each other and shall provide the following information to the court at the pretrial conference: (1) identification of factual and legal issues, (2) time estimate for a final hearing, if necessary, (3) likelihood of resolution of the matter(s).

Note: Counsel/parties may appear via telephone if a written request is received in the Court's Chambers no later than 5:00 pm (MT) of the business day prior to the day of the hearing. For this purpose only, requests to appear via telephone may be faxed to Chambers at (505) 248-6585.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS SUMMONS, JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED BY THE COMPLAINT.

MICHAEL M. SHEPPARD, Clerk

By: _____

Deputy Clerk

Mailing Address:

PO Box 546

Albuquerque, NM 87103-0546

Telephone: (505) 248-6500

Street Address:

421 Gold SW, 3rd Floor

Albuquerque, NM 87102

Date of Issuance:
NM-10a (Starzynski)



CME, Credit Industry Officials Ring Opening Bell For Trading In the CME Quarterly Bankruptcy Index

November 3, 1998-Leaders from the consumer lending industry joined Chicago Mercantile Exchange (CME) officials today to ring the opening bell on trading in the CME Quarterly Bankruptcy Index (CME QBI). The contract is the first exchange-traded derivative designed specifically to address the growing default risk in the \$1.3 trillion consumer credit market.

Joining CME Chairman Scott Gordon at the bell ringing was David M. Willey, Treasurer of Capital One Financial Corp., one of the top ten credit card issuers worldwide with approximately 15 million customers. Also on hand was Blake Hogan, President and Chief Executive Officer of Hogan Information Services, the nation's leading provider of bankruptcy data.

The CME QBI will give credit card issuers, banks and other consumer lenders the opportunity to reduce costs associated with repayment defaults stemming from personal bankruptcy filings which remain at record high levels in the United States.

"The CME QBI will allow creditors like Capital One to better manage the financial exposure created by rising bankruptcy rates," said Gordon. "In turn, this should provide them with the opportunity to lower consumer borrowing costs."

Noting the unique nature of the contract, Gordon said he expected usage of the contract to build gradually over time.

The CME QBI is based on the number, in thousands, of new bankruptcy filings each quarter in U.S. bankruptcy courts. Futures contracts are sized at \$1,000 times the CME QBI. The tick size is .025, equivalent to 25 bankruptcy filings and valued at \$25. The contracts expire in the March quarterly cycle.

"Despite the sharp increase in the number of bankruptcy cases in recent years, there have been few options for lenders to offset their associated financial risk," said Fred Arditti, Senior Executive Vice President for Planning and Development. "The CME QBI now gives them a powerful new tool."

"Keeping with the innovative culture at Capital One, our treasury team is constantly seeking new tools to manage risk," said Willey. "The CME Quarterly Bankruptcy Index will allow risk managers the ability to diversify their exposure."

Hogan Information Services, a business unit of First Data Corporation, is the leading provider of public record information. Hogan's proprietary software enables field collectors to gather accurate information from the courts and electronically submit it in the same day. Hogan also specializes in retrieving court information via the Federal Court PACER system (Public Access to Court Electronic Retrieval).

"The growing importance of personal bankruptcy makes it critical to compile accurate and timely information," Blake Hogan said. "Hogan brings to the CME QBI the highest quality of bankruptcy information available which is essential to the effectiveness of this product."

Through the first half of 1998, the number of bankruptcy filings in U.S. courts again increased though at a slower growth rate than in recent years.

Noting that the CME QBI is the first exchange-traded credit derivative product in the world, Gordon said the CME was continuing to research additional products to allow lenders to offset and better manage their financial risk.



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QUARTERLY BANKRUPTCY INDEX

QBI Futures and Options Data

91 Day Spot Rate for 10/31/98 thru 2/10/99 is: 307,138
Current Contract Count is: 116,284
Last Updated on: 2/10/99

State by State Quarterly Filings Updated Daily (Text Files)

	March (H)	June (M)	September (U)	December (Z)
1998			qbi1998u.txt	qbi1998z.txt
1999	qbi1999h.txt			

These files are a running count of national bankruptcy filings in the current quarter, updated daily, reflecting the previous days' filings. The sum of the daily filings for a calendar quarter will serve as that quarter's final index value and contract settlement price. The CME-QBI includes both personal and non-personal bankruptcies.

3-Month Rolling Total Updated Daily (Pipe Delimited Text File)

A 3-month "rolling total" of national bankruptcy filings. This number represents the total filings for the 91 days prior to the current day. It can be interpreted as a surrogate "spot" price for the expiring contract.

Historical 3-Month State By State Updated Monthly (Text File / Zipped Excel File)

A historic State by State Breakdown of Bankruptcy filings since 1996. The file is updated monthly.

Historical Quarterly Filings 1980-present Nationally and By District (Text File / Zipped Excel File)

These numbers, going back to 1980, are updated on a quarterly basis, and include both national filings, and filings by district.

Filings By State By Quarter, 1996-present (Text File / Zipped Excel File)

These numbers, going back to 1980 include both national filings, and filings by district.

Note: To open zipped files you will need a zip utility such as [PKZip](#) or [WinZip](#).



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