

1 Prepetition, the debtor paid the Milberg firm a \$25,000
2 retainer, about 25% of which was consumed by prepetition work,
3 leaving a balance of approximately \$18,719. To further ensure
4 payment of its fees and costs, the firm has also asked for a lien
5 on any recovery the debtor might obtain, whether the firm had
6 already withdrawn or been relieved. Under the terms of the lien
7 agreement itself, it appears the lien would attach to the real
8 property and any proceeds from a sale of it. The lien agreement
9 recites in relevant part:

10 The lien will attach to: all funds and
11 property in the possession or control of M&D;
12 all claims and causes of action that are the
13 subject of M&D's representation under this
14 Agreement . . .; all interests in real
15 property, personal property, or both, which
 are the subject of our legal representation;
 and any recovery you may obtain, whether by
 arbitration award, judgment, settlement or
 otherwise, in any matter which is the subject
 of our legal representation.

16 The Court is troubled by the firm's request for a lien on
17 the debtor's assets without any explanation of why one is
18 necessary, much less why unsecured administrative claim priority
19 is not a sufficient priority for payment of fees the firm has
20 earned.

21 The Court is also concerned with the possible conflict of
22 interest such a lien creates for the firm because in these
23 troubled times it is at least theoretically possible the debtor
24 might be obliged to sell the property for less than the total of
25 secured debt on it. If the firm is a junior secured lienholder

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1 and potentially out of the distribution, the firm has a conflict
2 in its representation of the debtor.

3 The court is always troubled when a law firm seeks to take a
4 security interest in a client's property to secure fees. See
5 Hawk v. State Bar of California, 45 Cal. 3d 589 (1988).
6 California Rule of Professional Conduct 3-300 recognizes doing so
7 may be permissible, but imposes requirements which include
8 "(B) The client is advised in writing that the client may seek
9 the advice of an independent lawyer of the client's choice and is
10 given a reasonable opportunity to seek that advice; and (C) The
11 client thereafter consents in writing" Here, the lien
12 agreement, which is page 6 of the overall fee agreement, does
13 advise the debtor that it "may seek the advice of an independent
14 lawyer" The next sentence reads: "By signing this Lien
15 Agreement and signing the Fee Agreement You acknowledge that You
16 have been so advised and given a reasonable opportunity to seek
17 that advice." Whether that is an accurate statement, or only lip
18 service to Rule 3-300 is for another day, if there is a case or
19 controversy over it.

20 Of concern here is that independent of Rule 3-300, 11 U.S.C.
21 § 327(a) requires that an attorney or firm seeking to be employed
22 "not hold or represent an interest adverse to the estate, and
23 that are disinterested persons"

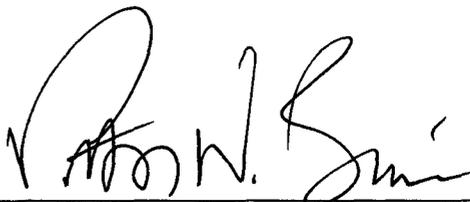
24 In the present instance Mr. DePhillips' declaration states
25 that John DeWald and Scott Kelly are jointly and severally liable
26 for the firm's fees and costs, although the Court was unable to

1 find any such recitation in the Fee Agreement itself. That
2 apparent omission raises other issues about just what the terms
3 of any agreement are with respect to Mr. DeWald and Mr. Kelly.

4 Under all the circumstances set out above, the Court is
5 unwilling to approve employment of Milberg & DePhillips as
6 general counsel for the debtor. The Court has no reservations
7 about the firm, its integrity, or the caliber of its practice.
8 The Court's concern is with the purported lien and with what
9 appears to be some sort of side agreement between the firm and
10 Mr. DeWald and Mr. Kelly. That raises additional issues about
11 the firm's duty to the debtor as distinct from other interest
12 holders.

13 Were the firm to revise the fee agreement to delete the lien
14 provision and co-liability of Mr. DeWald and Mr. Kelly, the Court
15 would quickly approve such employment.

16 IT IS SO ORDERED.
17 DATED: FEB 10 2009

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20 PETER W. BOWIE, Chief Judge
21 United States Bankruptcy Court
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