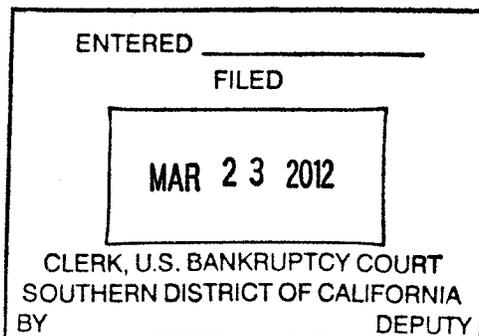


1 **MEMORANDUM DECISION – NOT FOR PUBLICATION**



9 UNITED STATES BANKRUPTCY COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re:

12 PATRICIA SOKOL,

13 Debtor.

14 } Bankruptcy No. 09-07880-PB13

15 } MEMORANDUM DECISION

16

17 On July 12, 2011, D.J. Rausa, attorney for debtor Patricia Sokol ("Debtor"), filed his Motion

18 for an Order Authorizing the Payment of Additional Attorneys Fees ("Motion"), seeking this Court's

19 approval of his request for \$1,462.50 in attorneys fees as compensation for his work in preparing

20 and representing the Debtor in filing a motion seeking approval of a modified Chapter 13 Plan (the

21 "Plan Modification Motion"). Mr. Rausa acknowledges that the "no look" fee contained in this

22 Court's Guidelines Regarding Chapter 13 Attorney Fees (the "Guidelines") is \$600, but argues that

23 the Guideline fee does not "reasonably address the work and time" put into preparing the Plan

24 Modification Motion. Further, Mr. Rausa argues that it is time for this Court to revisit the

25 Guideline fee structure because, while the fees adopted in the Guidelines may have been reasonable

26 when they were adopted in 2007, they are now outdated and must be amended.

27 The Chapter 13 Trustee, David L. Skelton, objects to Mr. Rausa's Motion, arguing that

28 counsel has not "demonstrated that any novel or complex work was performed in achieving the

1 post-confirmation modification of the Debtor's plan," and thus Mr. Rausa's fees should be limited to
2 what the Guidelines approve.

3 11 U.S.C. § 330 governs compensation of attorneys who prepare and file Chapter 13
4 bankruptcy cases.¹ Section 330 subsection 3 provides in relevant part:

5 (3) In determining the amount of reasonable compensation to be
6 awarded to an examiner, trustee under chapter 11, or professional
7 person, the court shall consider the nature, the extent, and the value of
such services, taking into account all relevant factors, including –

8 (A) the time spent on such services;

9 (B) the rates charges for such services;

10 (C) whether the services were necessary to the administration
11 of, or beneficial at the time at which the service was rendered
toward the completion of, a case under this title;

12 (D) whether the services were performed within a reasonable
13 amount of time commensurate with the complexity,
14 importance, and nature of the problem, issue, or task
addressed;

15 (E) with respect to a professional person, whether the person is
16 board certified or otherwise has demonstrated skill and
experience in the bankruptcy field; and

17 (F) whether the compensation is reasonable based on the
18 customary compensation charged by comparably skilled
19 practitioners in cases other than cases under this title.

20
21 The Ninth Circuit Court of Appeals has upheld this Court's reliance upon the Guideline fees
22 for routine services in chapter 13 cases as consistent with §330. *Eliapo v. Devin Durham-Burk*;
23 *U.S. Trustee (In re Eliapo)*, 468 F.3d 592, 598-600 (9th Cir. 2006). Accordingly, in order to obtain
24 approval of Chapter 13 attorneys fees *in excess* of those contemplated by the Guidelines, an
25 attorney in this district must demonstrate that the problems faced by him/her in preparing the
26

27
28 ¹ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code,
11 U.S.C. §§101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 subject motion were "more difficult than those faced by Chapter 13 practitioners on a regular basis."
2 See *Eliapo v. Devin Durham-Burk; U.S. Trustee (In re Eliapo)*, 468 F.3d 592 (9th Cir. 2006) citing
3 *In re Eliapo*, 2002 WL 31185824, at *1 (Bankr. N.D.Cal. Aug. 2, 2002). However, if the problems
4 that arose in preparing a subject motion are "typical" of those encountered in a Chapter 13 case, the
5 attorney is authorized no more than the presumptive fee. *Eliapo*, 468 F.3d at 601.
6

7 In support of his Motion, Mr. Rausa has provided this Court with time sheets that detail the
8 time spent on the Plan Modification Motion by Mr. Rausa and his paralegal. These time sheets
9 demonstrate that both Mr. Rausa and/or his paralegal "Krystle" spent time, among other things (i)
10 corresponding with the Debtor, (ii) preparing the Plan Modification Motion, (iii) corresponding
11 with the Court to obtain a hearing date, (iv) filing and serving the modified plan, (v) amending the
12 Debtor's Schedules I and J, (vi) attending the hearing on the Plan Modification Motion and (vii)
13 preparing a fee application in connection therewith. While the Court understands that a significant
14 amount of work may be involved in compiling and ultimately obtaining approval of a motion to
15 modify a confirmed chapter 13 plan, to date, Mr. Rausa has failed to demonstrate that the issues he
16 confronted in preparing his clients' Plan Modification Motion were atypical or more difficult than
17 those faced on a regular basis, and thus justify approval of fees in excess of those contemplated by
18 the Guidelines. As this Court has stated previously, and states again here, in order to secure
19 approval of an award of fees in excess of those provided in the Guidelines, counsel must produce
20 concrete evidence that the services provided went beyond what is usual, regular or customary in
21 preparing a given motion. Thus, Mr. Rausa has failed to meet his burden under the Ninth Circuit's
22 *Eliapo* standard.

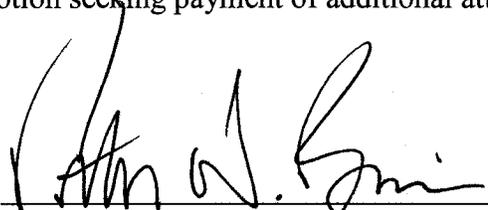
23 In connection with the Motion, Mr. Rausa has argued that it is time for this court to "revisit"
24 the Guideline Fee Structure set for Chapter 13 practitioners in the Southern District of California.
25 In support of this request, Mr. Rausa argues that the Guidelines are "unreasonably low" and do not
26 "adequately compensate counsel." Specifically, Mr. Rausa argues that (a) improvements in
27 technology have resulted in attorneys spending more time responding to e-mails from clients than
28

1 they did five years ago, and (b) the cost of office supplies and "doing business" has increased
2 significantly since the enactment of the Guidelines.

3 At the request of this Court and other courts around the country, the Federal Judicial Center
4 ("FJC") has been collecting information regarding presumptive fees for chapter 13 debtors'
5 attorneys nationwide. As a result, the FJC has produced the "Narrative on United States
6 Bankruptcy Court Presumptive ("No-Look") Fees for Chapter 13 Debtors' Attorneys" attached to
7 this memorandum decision (the "FJC Narrative"). The FJC Narrative examines the types of
8 presumptive fees used throughout the country, how they are calculated and explores a number of
9 perceived benefits and expressed criticisms to the presumptive fee approach. This Court finds the
10 FJC Narrative helpful in understanding the state of presumptive fees across the country. However,
11 without more evidence to assist this Court in determining whether the fees outlined in the
12 Guidelines are indeed outdated and/or unreasonably low, this Court is unable to make an informed
13 decision about the need to review and revise the Guidelines. If Mr. Rausa desires to gather and
14 submit specific, detailed, broad-based, comprehensive evidence to this Court in support of his
15 contentions regarding necessary revisions to the Guidelines, the Court will consider any evidence at
16 that time.

17 For the reasons stated herein, Mr. Rausa's Motion seeking payment of additional attorneys
18 fees is hereby denied, without prejudice.

19
20 DATED: March 23, 2012


21 PETER W. BOWIE, CHIEF JUDGE
22 United States Bankruptcy Court
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**NARRATIVE ON UNITED STATES BANKRUPTCY COURT
PRESUMPTIVE (“NO-LOOK”) FEES
FOR CHAPTER 13 DEBTORS’ ATTORNEYS¹
(as of June 2011)**

¹ Extensive initial work on this narrative—most of the research and the entire first draft—was done by Kathy Steuer, law clerk to the Honorable David S. Kennedy, Chief Bankruptcy Judge for the Western District of Tennessee. Ms. Steuer conducted this research as part of her work on revising the bankruptcy case management guide. This edited version will be pared down for the final guide, but should be helpful even in its present form to those interested in this evolving area of bankruptcy law.

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**NARRATIVE ON UNITED STATES BANKRUPTCY COURT
PRESUMPTIVE (“NO-LOOK”) FEES
FOR CHAPTER 13 DEBTORS’ ATTORNEYS
(as of June 2011)**

I. Introduction

Also known as “benchmark,” “base,” “summary,” or “presumptive” fees, no-look fees are flat, court-determined and approved attorney’s fees for representing debtors in bankruptcy cases. Bankruptcy courts have widely approved the no-look fee in chapter 13 cases.¹ However, a small minority of courts still opposes adoption of the fixed fee in such cases.² Frequently, the need for the fees is brought to a court’s attention on motion of a party or professional, or upon the request of a bar liaison group. Once adopted, no-look fees are presumed to be reasonable under 11 U.S.C. § 330(a)(3) and can be established through local rules, general, administrative, or standing orders, and guidelines. In fewer cases, courts create the fees *sua sponte* in judicial opinions or, less formally, in official letters. And in rare cases the fees exist simply by local “unofficial” custom. While no-look fees are available in chapter 7 cases³ and in some creditor actions,⁴ they are most commonly seen in chapter 13 cases. This section therefore focuses on chapter 13 no-look fees.

The procedural intricacies of the no-look fee vary from district to district. In some districts attorneys must elect the fee at the outset of the debtor’s case. In other districts, the debtor’s attorney must file a fee application for services rendered only at the objection of the trustee or the debtor; otherwise the presumptive fee is automatically approved.⁵ Still others require a short

¹ *E.g.*, *Law Offices of David A. Boon v. Derham-Burk* (“*In re Eliapo*”), 468 F.3d 592, 598-600 (9th Cir. 2006) (“We see nothing in § 330 that prevents a bankruptcy court from issuing and then relying on guidelines establishing presumptive fees for routine services in Chapter 13 cases.”); *In re Kindhart*, 167 F.3d 1158, 1159-60 (7th Cir. 1999); *In re Szymczak*, 246 B.R. 774, 781 (Bankr. D.N.J. 2000); *see also In re Cahill*, 428 F.3d 536, 540-41 (5th Cir. 2005) (per curiam).

² *See In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991) (“The establishment of a fixed fee for certain ‘normal and customary’ services is directly contrary to the plain actual, necessary services rendered language of 11 U.S.C.S. § 330.”); *see also* Subsection vi, Criticisms of the Presumptive Fee Approach, *infra* at p. 12.

³ *Matter of Geraci*, 138 F.3d 314, 321 (7th Cir. 1998).

⁴ Bankr. D.N.J. L.B.R. 2016-1(j)(3); Bankr. E.D. Wis. Local Rules Appx., “Presumed Reasonable Fees as of 1 Dec. 2010.”

⁵ *E.g.*, *In re Debtor’s Attorney Fees in Chapter 13 Cases*, 374 B.R. 903, 908 (Bankr. M.D. Fla. 2007), *as amended*

application for the fee at the start of a case.⁶ Adding to the complexity, some courts will specify the priority in which presumptive fees are paid through the plan.⁷ And, in line with the incentive method mentioned elsewhere,⁸ courts might give professional fees high priority to encourage attorneys to take lower-income clients who cannot afford a sizeable prepetition retainer.⁹ Several courts specify the manner of payment of chapter 13 counsel's "summary compensation"; for instance, having the trustee pay an initial percentage, with the remainder disbursed at a rate of ten percent of the monthly payout to creditors.¹⁰

In even more complex cases (if and when they come to pass—we hope not *too* frequently), the fee may be mixed – that is, partially fixed and partially based on an hourly or other rate – and a formal fee application may also be required.¹¹ Some jurisdictions have mandated court-approved retainers or other documents specifying the rights and responsibilities of the debtor and debtor's counsel.¹²

Most courts that have embraced the no-look option in chapter 13 cases offer it on a voluntary basis; in only a few districts is the presumptive fee mandatory. Even if an attorney chooses the no-look option, many courts will later permit the filing of individual fee applications for specific services that fall outside those covered by the base fee.¹³ However, some courts will assume acquiescence in the presumptive fee absent counsel's express rejection of it within a specified

by 2007 WL 2986127 (Bankr. M.D. Fla. Sept. 19, 2007); Bankr. D. Mont. L.B.R. 2016-1(b); Bankr. D. Mass. L.B.R. Appx. 1, Chapter 13 Rule 13-7(b); Bankr. E.D. Wis. Appx. to Local Rules, "Presumed Reasonable Fees as of 1 Dec. 2010."

⁶ Bankr. M.D.N.C. "Application for Base Fee – Chapter 13," Chapter 13 Standing Trustee's Office Form C13-21(e) (Oct. 2005), available at <http://www.ncmb.uscourts.gov/procedure.php>; Bankr. E.D. Mo. L.B.R. 2016-3 and Local Form "Chapter 13 Attorney Fee Application" (1st ¶); Bankr. S.D. Tex. General Order 2004-5, Notice (Mar. 10, 2005); "Bankruptcy Rule 2016(b) Disclosure and Application for Approval of Fixed Fee Agreement," available at <http://www.txs.uscourts.gov/bankruptcy/rulesformsproc/#forms>.

⁷ *In re Debtor's Attorney Fees in Chapter 13 Cases*, 374 B.R. 903, 908 (Bankr. M.D. Fla. 2007); Bankr. D. Md. L.B.R. Appx. F. "Chapter 13 Debtor's Counsel Responsibilities and Fees," ¶ 4.D.

⁸ See Subsection iv, Calculating the Presumptive Fee, *supra* at p. 9 (discussing incentive / disincentive method).

⁹ *Id.* ¶ 11.

¹⁰ Bankr. D. Ark. (E.D. and W.D.), "Guidelines for compensation for Services Rendered and Reimbursement of Expenses in Chapter 13 Cases," ¶ 4; Bankr. W.D.N.C. L.B.R. 2016-1.i.4.

¹¹ *In re Young*, 285 B.R. 158, 174 (Bankr. D. Md. 2002).

¹² Bankr. D. Mont. LBF 3-A, Attorney Retention Agreement (Chapter 13); Bankr. S.D. Fla. L.B.R. 2016-1(B)(2)(a); Bankr. S.D. Ind. L.B.R. B-2016-1(b)(1)(A) and (b)(3); see also *In re Eliapo*, 468 F.3d at 598. Others require form disclosure. Bankr. W.D.N.C. L.F. 3, "Disclosure to Debtor(s) of Attorneys Fee Procedure for Chapter 13 Cases," in Appx. C to Local Rules.

¹³ See *In re Eliapo* at 600; *In re Debtor's Attorney Fees in Chapter 13 Cases*, 374 B.R. at 904; Bankr. W.D.N.C. L.B.R. 2016-1.g.2; Bankr. M.D.N.C., "Chapter 13 Debtor's Attorney Election to Opt Out of Presumptive Base Fee," Chapter 13 Standing Trustee's Office Form (Mar. 2005).

timeframe after filing.¹⁴

II. Benefits of the Presumptive Fee Approach

Courts have identified several benefits in the presumptive fee system.¹⁵ For example, it saves attorneys time that would otherwise be spent preparing detailed fee applications pursuant to the lodestar method¹⁶ (and thus potentially lowering attorneys fees); saves clients money “by preventing inefficient practitioners from passing on the cost of their inefficiency”; permits speedier payouts; and saves the court time it otherwise would spend reviewing detailed fee applications.¹⁷ Other courts also have emphasized efficiency in extolling the benefits of the presumptive fee system. Said one court: “[w]ith the pending chapter 13 caseload in this District, no bankruptcy judge can thoroughly review each fee application.”¹⁸ Some presumptive-fee courts find the lodestar method,¹⁹ by contrast, to be unfair and unreasonable for rewarding inefficient attorneys and punishing those who may have more experience and technical expertise.²⁰ The presumptive fee approach is not foolproof, however; in order to realize the full benefits of no-look fees, courts must set them high enough to fairly compensate (and thereby incentivize) the attorney for services rendered, but not so high as to unduly burden the estate.²¹

III. Types of Presumptive Fees

Local rules, standing orders, and court guidelines address the basic services compensated by the district or division’s presumptive fee. Typical services covered by the fixed fee include:²²

¹⁴ Bankr. W.D.N.C. L.B.R. 2016-1.g.2.

¹⁵ See, e.g., *In re Eliapo*, 468 F.3d. at 599.

¹⁶ The lodestar method is used to calculate reasonable attorney’s fees on a case-by-case basis and involves multiplying the number of hours worked by the reasonable hourly rate for the services provided. The reasonable hourly rate is determined by taking into account different factors that vary among jurisdictions.

¹⁷ *Id.*

¹⁸ Bankr. S.D. Tex., General Order 2004-5, *In re: Chapter 13 Fee Applications – Notice and order Regarding Debtor’s Counsel’s Fees*, at p. 4 (citation omitted), amended by Memorandum Opinion and Order Amending Local Procedures for Chapter 13 Fee Applications, *In re: Chapter 13 Fee Applications* (Misc. Case No. 06-00305); see also *In re Wilson*, 2003 WL 21501789 at *4-5 (Bankr. S.D. Tex. April 10, 2003).

¹⁹ See fn. 16, *supra* (defining lodestar method).

²⁰ *In re Szymczak*, 246 B.R. at 780-81 (Bankr. D.N.J. 2000).

²¹ See Subsection vi, Criticisms of the Presumptive Fee Approach, *infra* at p. 12 (discussing objections to fixed fee).

²² Bankr. S.D. Tex. (Houston Div.), L.F. ¶ 1, “Bankruptcy Rule 2016(b) Disclosure and Application for Approval of Fixed Fee Agreement,” <http://www.txs.uscourts.gov/bankruptcy/rulesformsproc/default.htm>; Bankr. W.D.N.C. L.B.R. 2016-1.f.1. and 2; Bankr. N.D. Cal. (San Francisco Div.), Guidelines for Payment of Attorney’s Fees in chapter 13 Cases, introductory paragraph and ¶ A. 4, and Rights and Responsibilities of Chapter 13 Debtors and their Attorneys, available at <http://www.canb.uscourts.gov/rules/guidelines>; Bankr. E.D. Mo. L.B.F. “Chapter 13 Attorney Fee Application (Short Form); Bankr. S.D. Fla. “Guidelines for Compensation for Professional Services or Reimbursement of Expenses by Attorneys for Chapter 13 Debtors Pursuant to Local Rule 2016-1(B)(2)(a),” ¶ (A); see also Bankr. D. Mont. L.B.F. 3-A, Attorney Retention Agreement (Chapter 13); *In re Szymczak*, 246 B.R. at 782.

- Advising debtor on an as-needed basis (such as whether it is advisable to file for bankruptcy and, if so, under what chapter; explaining the required documentation; when and where to make plan payments; which payments are made by the trustee and how they are made; the need to maintain car insurance; and securing loans or leases)
- Obtaining a credit report and checking PACER to ascertain whether debtor has filed bankruptcy cases in the past
- Advising debtor on obtaining credit counseling certificate and completing debtor education course
- Preparing and filing the following:
 - all documents required by section 521²³

²³ 11 U.S.C. § 521, "Debtor's Duties," requires debtors to file, *inter alia*: debtor's statement of intentions; a certificate and the repayment plan from the approved credit counseling agency; a record of debtor's interests in an education individual retirement account or under a qualified state tuition program; a statement of the attorney or document preparer affirming that debtor has been given notice, or if there was no preparer, a statement that the debtor has obtained and read the notice; evidence of payment from employers, if any, received within sixty days before the filing of the petition; a statement of monthly net income, itemized to show how the amount is calculated; a statement of reasonably anticipated increases in income or expenditures over one year after filing; debtor's tax return or transcript for the latest taxable period prior to filing; copies of all tax returns which are required to be filed from the commencement of the case to the termination of the case; an annual statement of income and expenses giving specific information regarding income sources, parties responsible for support of dependants, and contributions to

- (and any amendments)
- a proposed chapter 13 plan (and any amendments)
- motions to protect debtor's interests (including motions to sell or refinance property and motions to avoid liens)
- responses to motions filed against debtors (including motions for relief from stay and motions to dismiss or convert)
- Attending section 341 meetings
- Responding to creditor inquiries, objecting to claims, and defending against trustee or creditor objections to confirmation of the plan
- Attending confirmation hearing in certain circumstances
- Reviewing the trustee's annual reports; and
- Assisting with compliance with discharge requirements.

household income; and, at the trustee's request, a photo identification.

Districts vary widely on which services are included in the “basic” case, and which ones qualify for additional compensation beyond the no-look fee. For example, although assisting the debtor to obtain a discharge is, in the Northern District of California, part of the basic services compensated by the fixed fee, such assistance in the Southern District of Texas would garner debtor’s counsel \$100.00 more than the presumptive fee of \$2,700.²⁴

Some courts also identify services excluded from the fixed fee, such as representing the debtor with respect to:²⁵

- Any adversary proceeding that involves “extraordinary” circumstances
- A matter in which the court orders fee shifting, which requires someone other than the debtor to pay the fees
- Certain matters for which the first hearing is set more than 120 days after confirmation;
- Activities undertaken post-discharge
- Wage garnishment orders
- Conversion of a case to chapter 7; and
- Motions for stays or moratoria.

Courts also provide for additional fixed fees for individual services that go beyond the basics, sometimes referred to as “a la carte” services. Qualifying services in this category include preparing or responding to:²⁶

²⁴ Bankr. S.D. Tex. L.F., ¶ 3.C.

²⁵ Bankr. S.D. Tex. (Houston Div.), L.F. ¶ 1, “Bankruptcy Rule 2016(b) Disclosure and Application for Approval of Fixed Fee Agreement,” ¶ 2; Bankr. W.D.N.C. L.B.R. 2016-1.f.3.

²⁶ Bankr. W.D.N.C. L.B.R. 2016-1.f.4.; Bankr. N.D. Cal. “Guidelines for Payment of Attorney’s Fees in Chapter 13 Cases,” ¶ A.2 and A.3; Bankr. D. Tex. L.F., ¶ 4; Bankr. M.D. Fla. (Ft. Meyers Div.), Admin. Order FTM-2010-1, *In re: Debtor’s Attorney Fees in Chapter 13 Cases*, ¶ 2 (March 30, 2020); Bankr. S.D. Cal. General order No. 173, *In re: Updates to the Chapter 13 Attorney Fee Guidelines*; Bankr. S.D. Fla. “Guidelines for Compensation for Professional Services or Reimbursement of Expenses by Attorneys for Chapter 13 Debtors Pursuant to Local Rule 2016-1(B)(2)(a),” ¶ (A); Bankr. D. Ark. (E.D. and W.D), “Guidelines for Compensation for Services Rendered and Reimbursement of Expenses in Chapter 13 Cases,” ¶ 6; *In the Matter of Chapter 13 Cases, Order Regarding Attorneys’ Fees*, Bankr. M.D.N.C. (April 9, 2008), ¶ 4(A)-(H).

- Motions to extend a stay or to avoid a lien
- Motions for relief from stay
- Motions to modify the plan
- notices of mortgage holders of adjusted payment amounts
- Motions to approve settlements
- Motions to deem mortgage current
- Motions to approve sales or refinancing
- Motions to substitute collateral
- Motions for hardship discharges
- Motions to value real property or vehicles
- Objections to claims
- Motions to approve special counsel
- Motions to dismiss; and
- Motions for early termination of the plan.

In addition, to encourage efficient, consensual resolution of disputes, some courts award an even higher fee to attorneys whose “a la carte” services were rendered without resorting to formal hearings.²⁷

Related to the a la carte fixed fees are a number of miscellaneous case-specific fees or “add-on” fees. Like the a la carte service fee, “add-ons” tack on an additional amount to the presumptive fee. Unlike a la carte fees, however, the miscellaneous add-ons exist not only for services rendered, but also for specific types of cases being handled by counsel.²⁸ Courts have awarded add-on fees for cases involving:²⁹

²⁷ Bankr. M.D. Fla. (Ft. Meyers Div.), Admin. Order FTM-2010-1, *In re Debtor’s Attorney Fees in Chapter 13 Cases*, ¶ 2 (March 30, 2002).

²⁸ But the rationale for both fees is in essence the same: attorneys awarded the additional fees have put in more work than that required for the “basic” chapter 13 case, so they deserve to be compensated at a higher rate.

²⁹ Bankr. N.D. Cal. “Guidelines for Payment of Attorney’s Fees in Chapter 13 Cases,” ¶ A.2.

- Real property claims
- Real property encumbrances of \$10,000 or more
- Unfiled tax returns
- Objections to claims of taxing agencies
- Vehicle loans and leases
- Twenty-five or more creditors
- Domestic support claims; and
- Debtors who operate a business.

IV. *Calculating the Presumptive Fee*

The amount of the no look fee in chapter 13 cases varies widely by jurisdiction, ranging from as little as \$1,250 for a basic case, to up to \$6,000 for business-related cases.³⁰ In their effort to maintain a relatively objective basis for these amounts, most courts take into account the local going rate of both chapter 13 cases and those specific services typically provided in such cases.³¹ In general, the local going rate reflects the average price charged for chapter 13 representation in a district or division. Recognizing that the cost of representation must continuously keep up with inflation, however, some courts (guided by the consumer price index) have increased their fees in order to prevent large gaps from forming.³² When calculating their going rates, courts should always try to incorporate the views of the public, practicing bankruptcy counsel, and professional organizations such as the local bar.

In calculating their presumptive fees, courts may also consider the specific services that the fees will compensate. As noted elsewhere,³³ rather than incorporating certain services directly into their base fees, some courts will instead approve additional, service-specific fees that fall outside of their typical chapter 13 cases. Recently, however, many courts have decided to raise their base fees (and not create “additional additional” fees) following the 2005 BAPCPA amendments.³⁴

Some jurisdictions have taken a different approach. In these “timeline” jurisdictions, the base

³⁰ See Subsection iii, Types of Presumptive Fees, *supra* at p. 6-7 (discussing and listing miscellaneous add-on fees, including business case fees).

³¹ *E.g.*, *In re Debtor's Attorney Fees in Chapter 13 Cases*, 374 B.R. 903, 905-06 (Bankr. M.D. Fla. 2007); *In re Szymczak*, 246 B.R. at 781-82 (“[T]he court should be guided by those fees typically charged by attorneys who regularly practice in the bankruptcy court’s jurisdiction.”).

³² Bankr. S.D. Tex. (Houston Div.), *In re: Chapter 13 Fee Applications*, Misc. Case No. 06-00305, Memorandum Opinion and Order Amending Local Procedures for Chapter 13 Fee Applications, at 13-14.

³³ Subsection iii, Types of Presumptive Fees, *supra* at pp. 5-6.

³⁴ *See, e.g.*, *In re Mullings*, 2006 WL 2130648 at *1-*2 (Bankr. E.D. Okla. July 26, 2006); *see generally* Bankr. S.D. Tex. (Houston Div.) *In re: Chapter 13 Fee Applications*, Misc. Case No. 06-00305, Memorandum Opinion and Order Amending Local Procedures for Chapter 13 Fee Applications.

fee is adjusted upwards or downwards depending on the stage of the case through which counsel represents the debtor. Most often confirmation serves as the critical adjustment point in these jurisdictions. For example, one district has established a lesser fee for cases dismissed before confirmation or within 120 days after confirmation, with a resulting base fee ranging from \$2,700 (pre-confirmation) to \$3,085 (post-).³⁵

A few courts have taken an innovative mixed service-specific / timeline approach to calculating base fees. One court reviewed hundreds of fee applications and, using the data collected, created a table that set out the average hourly rate charged by local attorneys, the services typically provided in most of its chapter 13 cases, and the average length of time spent on the services.³⁶ The court then multiplied the average hourly rate by the aggregate number of hours spent on the selected services and adjusted the product upward by fifteen percent. The result became the district's no-look fee in chapter 13 cases.³⁷ The mixed time / service-specific model is both objective (in that it aggregates actual local service charges), and fair (in that it increases the average fee by fifteen percent and thereby prevents "selling short" more highly paid practitioners). Interestingly, the mixed approach derives part of its methodology from the lodestar method³⁸ for determining compensation.

Both the complexity and technical nature of the case have also been considered in calculating base fees.³⁹ A common example is the "business fee," a base fee offered to attorneys representing business-owners.⁴⁰ In business-related cases counsel often must provide a disclosure statement or plan that includes information about the debtor's business assets—information that takes extra time and effort to compile. Business cases may also involve more sophisticated commercial lenders or other business entities with a stake in the proceedings. These additional players may complicate the typical business case (e.g., by raising more objections to the proposed plan) enough to warrant an increase in the base fee.

Courts also use the debtor's income in calculating no-look fees. In these courts, a "median

³⁵ Bankr. S.D. Tex. L.F. re Bankruptcy Rule 2016(b), "Disclosure and Application for Approval of Fixed Fee Agreement," ¶ 3.A.

³⁶ Bankr. S.D. Tex. General Order 2004-5, at 16.

³⁷ Bankr. S.D. Tex. General Order 2004-5, at 15-19.

³⁸ See fn. 16, *supra* at p. 3 (defining lodestar method).

³⁹ See Bankr. N.D. Cal. (San Francisco Div.), "Guidelines for Payment of Attorney's Fees in Chapter 13 Cases," ¶ A.2 (adding an additional \$300 to the presumptive fee for certain kinds of cases, including those with 25 or more creditors).

⁴⁰ Bankr. S.D. Ill. General Order 11-01, *In re: Attorney's Fees in Chapter 13 Proceedings* (establishing \$4,000 base fee and \$4,500 business fee).

income” system may apply: attorneys are paid a lower base fee for cases involving debtors below the median family income, and a higher one for those involving debtors at or above the median income.⁴¹ Cases with higher-income debtors, like cases involving business owners, are likely to entail more work, as wealthier debtors may have invested their assets in multiple locations or private possessions and may have financial ties to more creditors.

Other courts have adopted a sliding scale fee to permit more flexible fee arrangements or to encourage certain desirable behavior on the part of counsel. For example, a court might provide three options: a standard flat fee with a limited right to apply for a higher fee, a significantly higher flat fee with a correspondingly more limited right to apply for additional fees, or a considerably lower initial flat fee with expanded rights to apply for increased fees.⁴² Courts have also used higher presumptive fees to encourage counsel to attend Continuing Legal Education (“CLE”) in districts where they are not required to do so. For example, in the Western District of Michigan attorneys may opt for the standard set fee amount; a higher no-look fee if they certify attendance at bankruptcy education seminars that year; or an even higher fee if they are board-certified attorneys.⁴³

While these and other considerations can assist in obtaining a somewhat objective figure, judges should not assume that a given approach is mutually exclusive of all others. A combinatorial approach may be a better fit for a jurisdiction’s unique caseload and filings. As always, the methodology chosen should complement and ameliorate the court’s issues and idiosyncrasies. The FJC is currently compiling survey results that courts might refer to in setting or revising their fixed fees.⁴⁴

Courts will want to ensure that the presumptive fee selected is consistent with the statutory requirements. One court, to ensure compliance, analyzed the proposed fixed fee rate according to the § 330(a)(3) and *Johnson*⁴⁵ factors, documenting its analysis.⁴⁶ Recognizing that the statute

⁴¹ E.g., Bankr. D. Minn. L.B.R. 2016-1(d)(1); Bankr. E.D. Penn. L.B.R. 2016-2(a)(1)(A) and (B).

⁴² Bankr. D. Md. L.B.R. Appx. F. “Chapter 13 Debtor’s Counsel Responsibilities and Fees,” ¶ 4.A., B., and C.

⁴³ Bankr. W.D. Mich. Exhs. 5 and 7 to L.B.R., ¶ 16, *and as updated*, Bankr. W.D. Mich., “Memorandum Regarding Allowance of Compensation and Reimbursement of Expenses for Court-Appointed Professionals” (posted Nov. 20, 2009; effective Jan. 1, 2010).

⁴⁴ See Matthew Alex Ward & Elizabeth C. Wiggins, *Examining BAPCPA’s Impact on Presumptive Attorney’s Fees in Bankruptcy Cases* (forthcoming, FJC).

⁴⁵ *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) (enumerating twelve factors used to determine reasonableness of attorneys fee: (1) the time and labor required for the matter; (2) the novelty and difficulty of the questions presented; (3) the skill needed to perform the services appropriately; (4) the preclusion of

requires a reasonableness analysis with respect to professional fees, the court noted that nothing prohibited its conducting the analysis prospectively as to similar chapter 13 cases rather than retrospectively in every case. Analyzing the statutory factors adds rationality to the process and, if documented, informs the public.

Courts may want to review their presumptive fees periodically, such as every two years, to ensure that they keep up with inflation and continue to adequately compensate professionals. In one case, adhering in to a ten-year-old presumptive fee was held to be an abuse of discretion.⁴⁷ Review of the fee every two years was deemed appropriate.⁴⁸ Other courts have also emphasized the need to adjust the fees from time to time.⁴⁹ Public opinion and that of the local bar or other professional organizations may also be solicited through public comment, either formally or informally.

V. Applications for Additional Compensation

In the vast majority of courts, receipt of a presumptive fee does not preclude seeking additional fees “using the lodestar method if the presumptive fees have not provided fair compensation for time spent on the case.”⁵⁰ However, “a practitioner who chooses the latter approach must accept the possibility that the bankruptcy court may take a fresh look at his entire fee application, not just that portion of the application relating to ‘additional’ fees.”⁵¹

Typically, courts apply the lodestar analysis⁵² for fees that exceed the allowed presumptive fee.⁵³ Nonetheless, some courts have set a high hurdle for when they award fees above the presumptive amount, such as only in “atypical” or “out-of-the-ordinary” circumstances.⁵⁴

the professional from taking other cases by working on the matter; (5) the customary fee involved in similar instances; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client; (8) the sums involved and the results obtained; (9) the experience and ability of the employed; (10) whether the case is “desirable” or not; (11) the length of the relationship between the professional and the client; and (12) what awards were granted in similar cases).

⁴⁶ Bankr. S.D. Tex. General Order 2004-5, at 7, 14-19.

⁴⁷ *Matter of Kindhart*, 160 F.3d 1176, 1178-79 (7th Cir. 1998).

⁴⁸ *In re Kindhart*, 167 F.3d 1158, 1160 (7th Cir. 1999).

⁴⁹ E.g., Bankr. S.D. Tex. General Order 2004-5, at 8, amended by Memorandum Opinion and Order Amending Local Procedures for Chapter 13 Fee Applications, *In re Chapter 13 Fee Applications* (Misc. Case No. 06-00305) (Oct. 3, 2006).

⁵⁰ *In re Eliapo*, 468 F.3d at 600; see, e.g., Bankr. W.D.N.C. L.B.R. 2016-1.e.1.B. and 2016-1.g.

⁵¹ *In re Eliapo*, 468 F.3d at 600; see also *In re Rogers*, 401 B.R. 490 (10th Cir. BAP 2009); Bankr. W.D. Mich., Exh. 7 to L.B.R. ¶¶ 15, 16 (effective as amended Jan. 1, 2006).

⁵² See fn. 16, *supra* at p. 3 (defining lodestar method).

⁵³ *In re Argento*, 282 B.R. 108, 117 (Bankr. D. Mass. 2002).

⁵⁴ *In re Eliapo*, 468 F.3d at 601; see also Bankr. D. Md. L.B.R. Appx. F., “Chapter 13 Debtor’s Counsel Responsibilities and Fees,” ¶ 4.A.

Arguably, this resurrects the rule of economy that existed prior to widespread adoption of the no-look fee. Nevertheless, the new approach renders it difficult to obtain increased fees.⁵⁵ Some courts have gone so far as to forbid requests for additional fees. For example, the U.S. Bankruptcy Court for the Middle District of Georgia offers debtors' attorneys with a \$3,000 presumptive fee payable after confirmation. But once counsel elects that payment method, they are expected to represent their client for the duration of the case – without the possibility of an enhanced base fee.⁵⁶

Local rules and guidelines often include limitations to seeking additional fees.⁵⁷ Some courts provide a local form for requesting additional fees.⁵⁸ If a court denies a request for additional fees, it should generally hold a hearing.⁵⁹ This is the case even though, according to the Ninth Circuit, section 330(a)(1)'s hearing requirement does not apply to chapter 13 fee applications made under section 330(a)(4).⁶⁰ In the 330(a)(4) context, a hearing is a chance to be heard, which may not include oral presentation.⁶¹

VI. Criticisms of the Presumptive Fee Approach

Section 330 was amended to ensure that bankruptcy attorneys were paid as well as non-bankruptcy attorneys, thus eliminating the rule of economy. It can be argued, however, that the presumptive fee resurrects the rule of economy by limiting fees across the board; as a result of the new system, counsel may encounter market or judicial resistance to awards exceeding the flat fee.⁶² Clients may be unwilling to pay by the hour, and creditors may object the fixed fees out of hand because they automatically shrink the assets available for distribution. Judges may become so accustomed to the no-look approach that they apply excessively heightened scrutiny to applications for additional compensation.

The net result of over-reliance on the presumptive fee may be that bankruptcy attorneys again make less than non-bankruptcy counsel for comparable work. That is, if judges perceive that some attorneys will work for a lower set rate, they may hesitate to increase the rate or award

⁵⁵ See generally *Matter of Kindhart*, 160 F.3d 1176 (1998).

⁵⁶ Many thanks go out to the chambers staff of the Middle District of Georgia for this useful kernel of information.

⁵⁷ E.g., Bankr. N.D. Cal. "Guidelines for the Payment of Attorney's Fees in Chapter 13 Cases," ¶ A.6; Bankr. W.D. Mich. L.B.R. 2016(e)(6)(C); Bankr. D. Mass. L.B.R. Appx. 1, Chapter 13 Rule 13-7(c).

⁵⁸ Bankr. D. Md. L.B.F. E, "Application for Supplemental Allowance of Attorney's Fees."

⁵⁹ FED. R. BANKR. P. 2017(b); *In re Eliapo*, 468 F.3d at 602.

⁶⁰ See *In re Eliapo*, 468 F.3d at 602.

⁶¹ *Id.* at 603.

⁶² See Subsection v, Applications for Additional Compensation, *supra* at p. 10 (discussing "atypical" circumstances warranting enhanced fee).

more fees, feeling that “[b]eing frugal with fees in bankruptcy cases is admirable as what bankruptcy assets there may be are not for the welfare of the bankruptcy bar.”⁶³ For example, in one case,⁶⁴ the court awarded fees under 11 U.S.C. § 330(a) using an hourly rate charged by the firm’s junior associate, all the while disclaiming any reliance on the rule of economy. On appeal, the District Court held that it was proper to discount the rates of the senior attorney because the bankruptcy judge had concluded that the work was routine.⁶⁵ Nonetheless, courts must guard against scrutinizing fee applications to such an extent that the rule of economy is resurrected. The “consequences of continued unreasonably low fees might affect the rendering of prompt and good legal services which could be detrimental to debtors, creditors, and the courts, as well as the bankruptcy bar.”⁶⁶

Other concerns about the presumptive fee exist. A standard benchmark fee below which the application receives little or no scrutiny is usually the district’s “average fee” for chapter 13 cases; however, “[b]y definition, that means that half of the cases should exceed the benchmark.”⁶⁷ This sort of “review threshold” does not, some claim, provide incentive for efficient case administration.⁶⁸ That is, that this method of determining fees “has as its unintended consequences the effect of disguising as efficient and productive, debtor representation which is in fact poor or simply unresponsive to the needs of the client and the creditors.”⁶⁹ As a result, many attorneys will simply limit their client-loads to those debtors whose problems can be resolved for the benchmark or less.⁷⁰ Adhering to the benchmark may cause burnout, a frantic pace, and mistakes, and may force counsel into a tunnel-vision mindset to complete each case within a certain amount of time and at a certain cost—regardless of particular clients’ needs or means.⁷¹

A small minority of courts have ruled a “normal and customary” fee similar to a presumptive

⁶³ *Matter of Kindhart*, 160 F.3d 1176, 1178 (7th Cir. 1998).

⁶⁴ *In re Rheam of Indiana, Inc.*, 133 B.R. 325, 333-34 (E.D. Pa. 1991).

⁶⁵ *Id.* at 335.

⁶⁶ *Matter of Kindhart*, 160 F.3d at 1178.

⁶⁷ Bankr. S.D. Tex., General Order 2004-5, at 5. (This actually would be true if it were the *median*, not the average, but the criticism still holds true in that the average benchmark results in courts that are scrutinizing approximately half of the chapter 13 fee applications, even applications only slightly over the benchmark due to, for example, a single unexpected motion.)

⁶⁸ *Id.* at 6.

⁶⁹ “Order Regarding Chapter 13 Attorney’s Fees,” *In re Robinson*, No 98-41812, slip Op. at 1-2. (Bankr. S.D. Tex. Aug. 29, 2002) (en banc), available at www.txs.uscourts.gov/jid/A580/Robinson9841812.pdf.

⁷⁰ *Id.* at 2.

⁷¹ *Id.*

fee to be inconsistent with the requirements of section 330 and the Supreme Court's lodestar jurisprudence.⁷² This view raises the question whether chapter 13 debtors' counsel must keep time records if they are using the fixed fee. Many courts provide that counsel need not submit a fee application for using the fixed fee, implying or stating outright that time records are not necessary.⁷³ Generally speaking, however, detailed record-keeping should not be required for attorneys who only seek the set fee.⁷⁴ Otherwise, one of the assumed benefits of no-look fees, efficiency, might be lost.

⁷² *In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991).

⁷³ *E.g.*, Bankr. M.D. Fla., Admin. Order FTM-2010-1, Administrative Order Establishing Presumptively Reasonable Debtor's Attorney Fee in Chapter 13 Case," (Mar. 30, 2010), ¶ 11. *But see In re Mullings*, 2006 WL 2130648 at *3 (Bankr. E.D Okla. July 26, 2006).

⁷⁴ *Cf. Barron v. Countryman*, 432 F.3d 590 (5th Cir. 2005).