United States Bankruptcy Court
Southern District of California
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San Diego, California 92101-6989

Chambers Of
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Re: Recent Changes to Chapter 13 Presumptive Fees

Dear Bar Leaders:

Recently the Court circulated proposed changes to the chapter 13 presumptive fees and Chapter 13 Rights and Responsibilities Agreement ("RARA"). This letter explains the Court's current thoughts on presumptive fees and outlines the analysis that went into their creation. The most recent increases were a consensus agreement, not necessarily a unanimous opinion. In addition, for conflict reasons, Judge Mann was not involved in the decision as to presumptive fee amounts. At the end of the day, however, we agreed on a philosophy, and it is this viewpoint that this memo, in part, attempts to outline. This memo also responds to some of the specific comments from the Bar.

1. The Court Believes that Presumptive Fees Can Benefit the Administration of Chapter 13 Cases in this District.

Presumptive fees are allowed, among other things, because of their role in streamlining chapter 13 cases, reducing expense, and improving the administration of justice. See *Law Offices of David A. Boone v. Derham-Burk* (*In re Eliapo*), 468 F.3d 592 (9th Cir. 2006). In *Eliapo*, the Ninth Circuit endorsed presumptive fees but did not mandate them. A District, thus, is not required to establish or allow presumptive fees. In this District, however, the Court sees an appropriate place for presumptive fees in the administration of chapter 13 cases.

2. No One Is Required to Charge the Presumptive Fee.

At an early point, perhaps when the Court initially adopted its first Chapter 13 Rights and Responsibility Agreement, language in the document arguably suggested that presumptive fees were required. The Court, as currently composed, has not enforced the chapter 13 RARA in such a manner. The new iteration of the Rights and Responsibility Statement deletes any language suggesting that presumptive fees are required.

Perhaps because of the previous RARA's language, some practitioners apparently feel pressure to use the presumptive fees. The Court wants to make clear that we do not require their use. We understand that the presumptive fee may provide economy, obviate the need to keep time records, and may provide for prompt payment without the need to file and attend a hearing on a fee application. But we are prepared to consider fee applications, if counsel desire to file them.

We encourage practitioners considering the fee application process to consult with the practitioners who are regularly bringing fee applications before the Court. I also am willing to participate in a fee application training if the chapter 13 Bar believes this will be helpful.

3. Our Experience with Fee Applications Indicates that in a Straightforward Chapter 13 Case the Adjusted Presumptive Rates Are Reasonable.

Only a few practitioners regularly file fee applications in chapter 13 cases. But these applications provided valuable information. First, they allowed the Court to determine what billing rates would be appropriate if a lodestar analysis is used. Practitioners who do not regularly appear before the Court on fee applications may assign hourly rates to themselves that are not those that the Court would consider appropriate. The process also allowed the Court to arrive at these rates and then to do the lodestar analysis.

The Court observed that once an appropriate hourly rate is assigned, the parties seeking an initial fee application after confirmation do not always charge fees equal to the old presumptive rate for a typical case. And this is true even though a reasonable fee application cost is included in the initial fee application. Further, this is true even where the practitioners, attorneys the Court considers to be fine ones, provided services that are not required by a strict interpretation of the current RARA. The Court has allowed these fees as well as the opportunity for additional fee applications in the future. The concern, obviously, is that a fee application cost is included where the fee application might be unnecessary if the entire presumptive fee is not earned. The practitioners filing fee applications have assured us that over the course of the case the entire fee will be earned. The Court suspects that this is true if the case continues to case completion. If, however, the case is dismissed either voluntarily or involuntarily, it remains probable that the presumptive rate will not be entirely earned. This experience suggests that the previous presumptive rate for a basic case was not far off the mark. While this analysis might argue for no change, we continue to believe that a

presumptive rate increase is appropriate based on inflationary factors and have provided it.

4. The Current Presumptive Rate Is Not Intended to Reward the Best Practitioners for the Best Work in All Cases.

When presumptive rates entered the chapter 13 world, the assumption was that they were rewarding the most efficient attorneys for the best possible work. The Court's experience over the years, however, is that the converse is often now true. For example, the ability of practitioners from out of District to easily practice here given internet solicitation, electronic filing, and special appearance counsel does not build confidence. All too often, we see practitioners whose work we cannot readily judge; they appear only through appearance counsel, fail to comply with the Local Rules, and provide subpar written documents. These practitioners, we must assume, are providing a bare bones RARA representation, but the quality of their work is not that of our best practitioners. The presumptive rate, however, does not differentiate.

The question then becomes should we create a market where we pay a high presumptive fee to the attorney providing minimal effort, or should we create a system where we fairly compensate the average practitioner providing RARA compliant work and alternatively allow for a fee application so that we can better compensate those lawyers who are providing a more extensive, but still reasonable, level of representation. We have decided we want to fairly compensate our best lawyers.

Again, not all cases will justify something other than the presumptive fee. But where the case supports a higher fee based on the client's ability to pay it and other relevant factors, the lawyer may consider a fee application.

5. The Court Has Made Two Determinations Regarding Business Cases.

We see numerous cases where the business rate is charged because there is something that is only generously described as a business. In short, we see abuse. We, thus, provided only a very modest increase in the presumptive fee for a business case. We might more aptly characterize this fee as relating to a routine case with actual, but minimal, additional business related issues.

However, we have also determined that we do not have the data sufficient for us to create a presumptive rate in a true "business case."

Those cases involving sole proprietorships or more complex business issues should be fee application cases, in our opinion, if the attorney wants fair compensation and the case can sustain a fee greater than the presumptive. Again, any lawyer may agree for economic or business reasons to charge the presumptive business rate. But the myriad of issues and the wide variety of possible complications make it impossible for us to fairly establish a business rate in a case with actual complexity.

Our concern about the business case designation led us to consider a complete elimination of a presumptive rate in this area. Eventually, we may do that; for now,

however, we determined that a modest increase coupled with a suggestion of fee applications in more complex cases was the solution.

Specific Questions:

In addition to these general points, we also respond to more specific comments as follows:

(1) Why don't we match rates in other Districts?

We received many comments from practitioners, comparing our rates with those of other districts within California.

In selecting rates, our analysis begins and ends with what is appropriate in our District. It is informed, among other things, by our consideration of fee application data in chapter 7 and 11 cases as well as our chapter 13 case fee applications. It is also informed by our general knowledge of our legal market. For example, the San Diego County Bar Association recently formed a chapter 7 "flat fee" panel whose members will handle chapter 7 RARA duties for $1,000 to $2,000. A chapter 13 case supports a higher fee, but this information is still relevant.

In adjusting the presumptive rate for a consumer case, our adjustment matches the ECI for the relevant time period rounded upward. In connection with add on presumptive fees, we made adjustments consistent with our experience. Some are slightly less than the ECI, but our adjustment to real property stay relief motions exceeds the ECI.

We also note that comparing rates across Districts is not an apples-to-apples comparison. In the Central District, the presumptive fee for a non-business chapter 13 case is $5,000. Simplistic math suggests that an attorney requesting a presumptive fee in the Central District will invariably recover more than her Southern District counterpart. But a simple analysis misses critical distinctions in local rules and local practice. And while the Eastern District of California has a very slightly higher presumptive fee, this amount includes a stay relief defense; our District allows additional fees for a stay relief defense. Finally, our menu of additional fees reflects our experience in this District; in some cases they exceed those of other Districts.

A bench-bar committee chaired by Judge Latham spent significant time reviewing models from other Districts. The final consensus was to continue with our current model.

(2) Why can't my client use estate assets to pay me directly once a case commences?

The Court has modified the RARA in light of Bar comments to allow deposit of the anticipated (presumptive or other) fee into the attorney's trust

account. The fee may be disbursed from the trust account only after disclosure to and approval by the Court.

(3) Why does the RARA mention the Court's right to reduce fees including presumptive ones?

Guideline fees have been described by the Ninth Circuit as "presumptive fees," meaning that the actual award might differ. *Eliapo*, 468 F.3d at 594 (describing guideline fees as presumptive). A presumptive fee is just that, presumptively valid. But a presumption may be overcome. If an attorney misses the stay relief hearing and fails to file a substantive response, the presumption may be overcome, and fee reduction may be appropriate. If the attorney abandons the client, the same may be true. If the attorney engages in malpractice or misconduct, the same, or worse, could be true. The RARA's language merely states what the law clearly provides. This comports with our obligations under 11 U.S.C. § 330(a)(4)(B) to ensure that "(c)ompensation paid to the attorney for a chapter 13 debtor must be reasonable considering the benefit to the debtor and the necessity of the services." *In re Pedersen*, 229 B.R. 445, 448 (Bankr. E.D. Cal. 1999).

(4) Is typicality a requirement for a fee application?

No, not if the attorney elects to seek fees through fee application at case initiation.

Yes, if the attorney elects to recover a presumptive fee but subsequently seeks non-presumptive fees by fee application.

(5) Does the RARA or presumptive fee schedule govern third party payments under fee shifting statutes such as § 362(k) or CCP § 1717.

This question requests an advisory opinion; we cannot answer it in this letter.

(6) Can my fee application seek recovery for the fee application process itself?

Yes, a reasonable fee for preparation of the fee application may be requested.

(7) Can I file multiple fee applications over the life of the chapter 13 case?

Yes. Indeed, typically you must. Fee applications can be filed at reasonable intervals. A final fee application is required at case conclusion; fee awards during the course of the case are awarded on an interim basis.

(8) Does the Court require notice and opportunity for hearing for fee applications?

Yes, but if a fee application is unopposed, complies with the U.S. Trustee Guidelines, and does not raise concerns when the judge undertakes the review required by § 330, the judge may issue a Tentative Ruling that excuses appearance at the hearing.

9. Does the Court need to approve a change of responsible attorney within a law firm?

No.

10. Will the Court order the disgorgement of some or all of a presumptive fee when an attorney is replaced by another attorney before case completion?

Possibly; a case by case determination is required.

11. Can an attorney receive payment of fees from a non-debtor during the course of the case without Court approval?

Yes, so long as the debtor is not required to repay them during the course of the case.

Thank you for your consideration of these comments. Please know that the Court values the fine practitioners that regularly appear in front of us. We also recognize that we need to more regularly review the presumptive fees; we intend to do so.

Finally we received a suggestion that we allow interest on unpaid attorneys' fees during the payment period. We plan to further review this topic but did not want to delay implementation of the current presumptive fee increases and amended RARA.

Sincerely,

Laura S. Taylor, Chief Judge
United States Bankruptcy Court

cc: Honorable Louise DeCarl Adler
Honorable Margaret M. Mann
Honorable Christopher B. Latham
Barry K. Lander, Clerk