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PRACTICE GUIDELINES MEMORANDUM

TO: Attorneys Practicing Before Me and
Other Interested Persons

FROM: C. Timothy Corcoran, III
United States Bankruptcy Judge

DATE: February 21, 1995 (Revised July 1, 1998)

RE: Guidelines for Affidavits Filed in
Support of Applications to Employ
Professionals in Chapter 11 Cases

Applications for approval of the employment of attorneys and other professionals in Chapter 11 cases must be supported by affidavits and declarations. F.R.B.P. 2014(a); F.R.B.P. 2016(b). The purpose of these requirements is to provide the court a factual basis to determine that the professional meets the statutory qualifications for employment so that the court may grant the application and approve the employment. It is important, therefore, that the affidavit be prepared correctly as to form and completely as to content so it can fulfill its essential purpose. This memorandum is intended to highlight the most significant issues that frequently come up in connection with affidavits of this type so counsel can prepare their affidavits quickly, correctly, and completely. Although I have prepared this memorandum using the employment of counsel as the model, the principles described here are equally applicable with regard to the employment of other professionals.

First, counsel should keep in mind the basic requirements for affidavits used in court to establish evidentiary facts as a matter of record. Although F.R.B.P. 2014, F.R.B.P. 9017, and F.R.Civ.P. 43(e) permit the court to hear applications of this kind on affidavits, an affidavit submitted in support of the application must set forth facts as would otherwise be admissible in evidence under the Federal Rules of Evidence through the witness making the affidavit. Accordingly, the affidavit must affirmatively show, on its face, that:

(a) The witness is competent to testify. F.R.Evid. 601; §§ 90.601 - 90.603, Fla. Stat.

(b) The witness has personal knowledge of the facts stated. F.R.Evid. 602. If the witness offers hearsay testimony, the affidavit must show that the testimony is within a hearsay exception. See, e.g., F.R.Evid. 803(6) (when the witness relies on business records). Thus, if counsel makes the statements in the affidavit in reliance on his or her law firm's client conflict check index system, counsel should include the necessary statements showing that this information is admissible under the business records exception to the hearsay rule.

(c) The witness has taken an oath or affirmation as to the truth of the facts stated in the affidavit. F.R.Evid. 603. If a notary public administers the oath, the notary's jurat or certificate of administration of the oath must be in correct form. See, e.g., § 117.05(16)(a), Fla. Stat. A notary public's certificate of acknowledgment of execution in lieu of an oath is insufficient. § 117.03, Fla. Stat. (A certificate of acknowledgment of execution is a requirement for recording an instrument in the public records; it has nothing to do with a witness swearing to the truth of the facts stated. §§ 695.03 and 695.25, Fla. Stat. See, also, § 117.05(16)(b)-(c).) As an alternative to the use of a notary public, the witness may make an unsworn declaration under penalty of perjury in appropriate form. 28 U.S.C. § 1746; § 92.525, Fla. Stat.

Second, the affidavit must set forth facts that are admissible in evidence showing that the attorney is qualified to be employed. To be qualified for employment, an attorney must "not hold or represent an interest adverse to the estate" and must be "disinterested." 11 U.S.C. § 327(a). Regarding the requirement of lack of adverse interest, traditional conflict of interest principles applicable to the legal profession as set forth in The Florida Bar's Rules of Professional Conduct apply. See, e.g., Rules 4-1.7 through 4-1.12. The most common problem areas are therefore counsel's present or former representation of a creditor of the estate and counsel's status as a creditor of the estate because of unpaid prepetition fees owed to counsel. In the case of a closely held corporate debtor, there can also be a problem with counsel's previous or current representation of the debtor's principal, especially when there are claims as between the principal and the corporation. There can also be a problem when the same attorney represents related debtors, especially when the assets, liabilities, and management are intertwined.

Regarding the requirement of disinterestedness, "disinterested person" is a defined term in the Bankruptcy Code. 11 U.S.C. § 101(14). The relationships that cause a person not to be disinterested are therefore plainly set forth in the statute. (Special requirements exist when counsel is to be employed for a special purpose only. 11 U.S.C. § 327(e). The

disinterestedness requirement is inapplicable, and, in certain circumstances, special counsel can therefore be owed unpaid fees for prepetition services performed for the debtor.)

Specific facts permitting the court to find that these statutory qualifications have been satisfied must be set forth in the affidavit. Putting them in the application signed by the debtor does not satisfy these requirements. For example, if counsel does not now and has not in the past represented a creditor of the estate, counsel should say so in the affidavit. If counsel has represented a creditor in the past but that representation did not substantially relate to the current representation of the debtor, counsel should say so giving full particulars. If counsel performed legal services for the debtor prepetition, but was fully paid for those services before the filing of the case, counsel should say so. If counsel does not now and has not in the past maintained any of the relationships described in the statutory definition of disinterestedness, counsel should say so. The attorney's conclusory statements that he or she holds no adverse interest and is disinterested are insufficient.

Third, Section 329(a) of the Bankruptcy Code and F.R.B.P. 2016(b) require that counsel make specific disclosure as to counsel's financial arrangements with respect to the proposed employment. This information may be contained in a separately filed disclosure statement. In a Chapter 11 case, however, it is preferable that this disclosure be combined with and contained in the F.R.B.P. 2014 affidavit because of the relationship that counsel's paid and unpaid fees and counsel's prepetition retainer have to the issue of counsel's status as a creditor. Full details as to compensation paid and agreed to be paid should be given, including amounts, dates, the persons or entities that paid the compensation, and their relationships to the debtor. The financial disclosure form included in most bankruptcy forms and software packages, although adequate in consumer cases, is inadequate in Chapter 11 cases because it requires incomplete information and discloses the payment of a retainer with reference to the time the disclosure statement is filed rather than the time the petition is filed.

Remember: err on the side of disclosure. If the facts you have put in the affidavit raise questions, you probably have not described the situation as fully as you should have.

A sample form of affidavit addressing and satisfying all these requirements appears in Bankruptcy Court Decisions Weekly News and Comment (Vol. 26, Issue 10, Jan. 17, 1995) at A7, A9. In addition, I have used that form to prepare a sample affidavit that illustrates how counsel might address each of the issues described in this memorandum. That sample affidavit and

a sample order approving the employment of counsel follow this memorandum. In reviewing the sample, counsel should keep in mind the following points:

1. The sample is not intended by me to be a required form. It merely illustrates compliance with the principles described in this memorandum. Other forms of affidavit, including shorter forms, can similarly comply with these principles and, when they do, are equally satisfactory to me.

2. This sample is not intended to cover all situations that may arise in cases. Tailoring to the circumstances is always required. Please do not use this sample as a form in circumstances in which it does not apply. For example, a solo practitioner's affidavit can probably be very simple; a large, multi-state law firm's affidavit might be more detailed.

I am hopeful that this memorandum with its sample forms will be of assistance to counsel. If you still have questions about drafting after reviewing the memorandum and the sample form, please feel free to raise them with my law clerk, Cheryl Thompson, who can be reached at (813) 301-5200.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re)
)
) Case No.
)
 Debtor.)
)
 _____)

AFFIDAVIT AND FINANCIAL DISCLOSURE IN
SUPPORT OF DEBTOR'S APPLICATION TO APPROVE
THE EMPLOYMENT OF ATTORNEY LAURA LAWYER

STATE OF FLORIDA)
)
 COUNTY OF HILLSBOROUGH) §§

BEFORE ME, the undersigned authority, personally appeared Laura Lawyer, who, being duly sworn, deposes and says:

1. I am Laura Lawyer. I am an attorney employed by the law firm of Good, Better & Best, P.A. I am a member of the bar of the United States District Court for the Middle District of Florida. My law firm and I represent the debtor in this Chapter 11 bankruptcy case. I make this affidavit in compliance with the provisions of Sections 327(a) and 329(a) of the Bankruptcy Code and F.R.B.P. 2014(a) and F.R.B.P. 2016(b).

2. Unless otherwise stated, this affidavit is based upon facts of which I have personal knowledge.

3. In preparing this affidavit, I reviewed the debtor's bankruptcy schedules and lists that have been filed in this court. I also compared the information contained in those schedules and lists with the information contained in my law

firm's client and adverse party conflict check index system. The facts stated in this affidavit as to the relationship between other lawyers in my law firm and the debtor, the debtor's creditors, other parties in interest, their respective attorneys and accountants, the United States trustee, other persons employed by in the office of the United States trustee, and those persons and entities who are defined as not disinterested persons in Section 101(14) of the Bankruptcy Code are based upon the results of my review of my firm's conflict check index system.

4. My law firm's client and adverse party conflict check index system is comprised of records regularly maintained in the course of business of the firm, and it is the regular practice of the firm to make and maintain these records. It reflects entries that are noted in the system at the time the information becomes known by persons whose regular duties include recording and maintaining this information. I am one of the persons who keeps this system up-to-date, and I regularly use and rely upon the information contained in the system in the performance of my duties with the law firm and in my practice of law.

5. My firm represented the debtor during the past year in [describe generally]. In connection with that representation, [describe when services were rendered and when payment was received].

6. My firm holds a retainer balance of \$_____ in connection with the prior representation/or is owed \$_____ for

these prepetition services, and holds a guarantee by _____, who is related to the debtor as _____, or holds a security interest in _____ which is owned by _____, obtained on _____.

7. No attorney in my firm holds a direct or indirect equity interest in the debtor [including stock, stock warrants, a partnership interest in a debtor partnership] or has a right to acquire such an interest, except _____.

8. No attorney in the firm is or has served as an officer, director, or employee of the debtor within two years before the petition filing, except _____.

9. No attorney in the firm is in control of the debtor or is a relative of a general partner, director, officer or person in control of the debtor, except _____.

10. No attorney in the firm is a general or limited partner of a partnership in which the debtor is also a general or limited partner, except _____.

11. No attorney in the firm is or has served as an officer, director, or employee of a financial advisor that has been engaged by the debtor in connection with the offer, sale, or issuance of a security of the debtor, within two years before the filing of the petition, except _____.

12. No attorney in the firm has represented a financial advisor of the debtor in connection with the offer, sale, or issuance of a security of the debtor within three years before the filing of the petition, except _____.

13. No attorney in the firm presently represents a creditor, general partner, lessor, lessee, party to an executory contract of the debtor, or person otherwise adverse or potentially adverse to the debtor or estate, on any matter, whether such representation is related or unrelated to the debtor or the estate, except _____ [describe or attach any waivers of conflicts obtained from such clients].

14. No attorney in the firm has previously represented a creditor, general partner, lessor, lessee, party to an executory contract, or person who is otherwise adverse or potentially adverse to the debtor or the estate, on any matter substantially related to the bankruptcy case, except _____ [describe or attach any waivers of conflicts obtained from such former clients].

15. No attorney in the firm represents an insider of the debtor or the debtor's parent, subsidiary, or other affiliate, except _____ [if any such representation, describe that client's relationship with the debtor, including intercompany claims, asset transfers, overlapping creditors, creditor guaranties and subordination agreements, jointly-owned assets, shared officers, directors or owners].

16. No attorney in the firm has been paid fees prepetition or holds a security interest, guarantee or other assurance of compensation for services performed and to be performed in the case, except _____ [explain the sources, amount, and terms of any such arrangement].

17. There is no agreement of any nature, other than the partnership agreement of my firm, as to the sharing of any compensation to be paid to the firm, except _____.

18. No attorney in the firm has any other connection with the debtor, creditors, United States trustee, or any employee of that office, or any other parties in interest, except _____.

19. No attorney in the firm has any other interest, direct or indirect, that may be affected by the proposed representation, except _____.

20. [Where appropriate, the attorney may state the nature and scope of the inquiry, beyond that described in paragraph 3, upon which the affidavit statements are made. Any pertinent information that counsel believes will satisfy any concerns of disqualification also may be included.]

21. This concludes my affidavit.

LAURA LAWYER

SWORN to and SUBSCRIBED before me, this ___ day of _____, 199X, by Laura Lawyer who is personally known to me.

[SEAL]

Notary Public
State of Florida at Large
My Commission Expires:

CERTIFICATE OF SERVICE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re)
)
) Case No.
)
 Debtor.)
_____)

ORDER GRANTING DEBTOR'S APPLICATION
TO APPROVE THE EMPLOYMENT OF
ATTORNEY LAURA LAWYER

This case came on for consideration of the debtor's application to approve the employment of counsel. Finding that the affidavit filed by counsel in support of the application establishes that counsel does not hold or represent an interest adverse to the estate and is disinterested, the court grants the application. Accordingly, the court hereby approves the debtor's employment of Laura Lawyer and the law firm of Good, Better & Best, P.A., as its counsel in this bankruptcy case. The debtor shall make no payment to counsel absent application and order. Counsel shall accept compensation from another source only if disclosed as required by F.R.B.P. 2016(b).

DONE and ORDERED in Tampa, Florida, this ___ day of _____, 199X.

C. TIMOTHY CORCORAN, III
United States Bankruptcy Judge