

APR 28 2005

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	AZ-04-1442-MoSZ
)		
TRIPLE STAR WELDING, INC.,)	Bk. No.	02-00346-YUM-JMM
)		
Debtor.)		
<hr/>			
LOUIS A. MOVITZ, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	<u>O P I N I O N</u>	
)		
BARTON L. BAKER,)		
)		
Appellee.)		
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Argued on February 24, 2005
at Phoenix, Arizona

Submitted on March 18, 2005

Filed - April 28, 2005

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable James M. Marlar, Bankruptcy Judge, Presiding.

Before: MONTALI, SMITH and ZIVE,¹ Bankruptcy Judges.

¹ Hon. Gregg W. Zive, Chief Bankruptcy Judge for the
District of Nevada, sitting by designation.

1 MONTALI, Bankruptcy Judge:

2

3 This appeal involves a fee award to debtor's counsel despite
4 his nondisclosure of numerous facts that potentially render him
5 ineligible for employment or compensation. The bankruptcy court
6 has broad discretion to approve employment and award fees after
7 the true facts are known, but not when the attorney does not make
8 a full, candid, and complete disclosure.

9 The bankruptcy court also applied an incorrect legal standard
10 to the nondisclosure issues by requiring an adversary proceeding.
11 The attorney did not disclose his receipt of a prima facie
12 preference, and that or other nondisclosures or conflicts of
13 interest may be a sufficient basis to reduce or deny his
14 compensation whether or not the preference turns out to be
15 avoidable. In addition, because the preference claim is facially
16 plausible the bankruptcy court should not have awarded any
17 compensation before resolving the preference issues.

18 For each of these independent reasons, we REVERSE and
19 REMAND.²

20

I. INTRODUCTION

21 Chapter 7 trustee Louis A. Movitz ("Trustee") appeals from
22 the bankruptcy court's order awarding fees to Barton L. Baker,
23 Esq. ("Baker"), for his services as Chapter 11 counsel to debtor
24 Triple Star Welding, Inc. ("Debtor"), prior to conversion to
25

26

27 ² We publish this disposition to stress to the bar the
28 importance of full and timely disclosure of pertinent facts, and
compliance with all procedural rules, as part of the employment
and compensation of professionals in bankruptcy cases.

1 Chapter 7.³ Trustee objected that Baker was not disinterested
2 because he was a key player in what Trustee viewed as a pre-
3 petition fraudulent transfer of Debtor's assets to a newly formed
4 affiliate and because Baker received what Trustee believes are
5 avoidable preferential payments of his legal bills. Trustee also
6 objected that Baker did not disclose these possible preferences
7 and that some of his legal bills remained unpaid on the date when
8 Debtor filed its voluntary Chapter 11 petition, leaving him a
9 creditor of Debtor.

10 The bankruptcy court ruled that the pre-petition transfer of
11 Debtor's assets was in essence a proposed sale to be accomplished
12 through a plan of reorganization and that this was unorthodox but
13 not sinister or illegal. It declined to rule that Debtor's pre-
14 petition payments to Baker were preferential without an adversary
15 proceeding, did not otherwise discuss the nondisclosure issues,
16 and awarded Baker his requested fees and costs. Trustee timely
17 appealed.

18 **II. FACTS**

19 Debtor was an air conditioning and metal fabricating
20 contractor. Its primary business was rebuilding vegetable cooling
21 facilities in Arizona and California. Debtor ran into trouble
22 when it purchased 80 acres of real property adjacent to its
23 existing shop, located on ten acres of property where its founder
24 Jorge Cabrera ("Cabrera") also lives. Debtor defaulted on several
25 installment payments and lost the property at a trustee's sale in
26

27 ³ Unless otherwise indicated, all chapter, section and
28 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 December, 2001. Debtor also fell behind on payroll taxes and
2 material supplier accounts. Approximately ten judgments were
3 entered in various courts, followed by attachments and
4 garnishments.

5 Baker tried to negotiate consensual resolutions with Debtor's
6 creditors. After Debtor failed to pay Baker's invoices he told
7 Debtor that he would stop work unless he was paid. On December 18
8 and 28, 2001, Baker received payments of \$1,676.50 and \$1,000.00
9 (the "Pre-Petition Payments"), leaving a balance of \$2,677.90 (the
10 "Balance Due").

11 Negotiations with creditors did not produce the results for
12 which Debtor had hoped. On or about March 1, 2002, Debtor entered
13 into a sales agreement (not in the excerpts of record), shut down
14 its business, and transferred its operating assets to a new
15 corporation, American Mechanical Integrated Systems, Inc.
16 ("AMIS"), formed by two of Debtor's three principals and its
17 comptroller. Baker orchestrated this transaction, and the
18 transfer occurred before Debtor filed a voluntary Chapter 11
19 petition on March 27, 2002 (the "Petition Date").

20 1. Partial disclosures regarding Baker's employment

21 Just over two weeks after the Petition Date Baker filed an
22 Application for Appointment of Counsel (the "Employment
23 Application") requesting that he be appointed as Debtor's
24 counsel.⁴ The Employment Application was signed by Baker himself,
25

26 ⁴ Section 327(a) provides that a debtor in possession,
27 "with the court's approval, may employ one or more attorneys . . .
28 that do not hold or represent an interest adverse to the estate,
and that are disinterested persons," to represent or assist the
(continued...)

1 not by Debtor, and it contains none of the representations
2 regarding disinterestedness required by Rule 2014(a),⁵ nor does it
3 mention Baker's involvement in the sale to AMIS, the Pre-Petition
4

5 _____
6 ⁴(...continued)

7 debtor in carrying out its duties under the Bankruptcy Code. 11
8 U.S.C. § 327(a). Section 1107(b) states, "Notwithstanding section
9 327(a) of this title, a person is not disqualified for employment
10 under section 327 of this title by a debtor in possession solely
11 because of such person's employment by or representation of the
12 debtor before the commencement of the case." 11 U.S.C. § 1107(b).
13 Section 101(14) states, "'disinterested person' means [a] person
14 that -- (A) is not a creditor, an equity security holder, or an
15 insider; . . . and (E) does not have an interest materially
16 adverse to the interest of the estate or of any class of creditors
17 or equity security holders, by reason of any direct or indirect
18 relationship to, connection with, or interest in, the debtor . . .
19 or for any other reason[.]" 11 U.S.C. § 101(14).

20 ⁵ Rule 2014(a) provides, in full:

21 Rule 2014. **Employment of Professional Persons**

22 (a) Application for an order of employment

23 An order approving the employment of attorneys,
24 accountants, appraisers, auctioneers, agents, or other
25 professionals pursuant to § 327, § 1103, or § 1114 of the
26 Code shall be made only on application of the trustee [or
27 debtor in possession acting as trustee, per 11 U.S.C.
28 § 1107(a)] or committee. The application shall be filed and,
unless the case is a chapter 9 municipality case, a copy of
the application shall be transmitted by the applicant to the
United States trustee. The application shall state the
specific facts showing the necessity for the employment, the
name of the person to be employed, the reasons for the
selection, the professional services to be rendered, any
proposed arrangement for compensation, and, to the best of
the applicant's knowledge, all of the person's connections
with the debtor, creditors, any other party in interest,
their respective attorneys and accountants, the United States
trustee, or any person employed in the office of the United
States trustee. The application shall be accompanied by a
verified statement of the person to be employed setting forth
the person's connections with the debtor, creditors, any
other party in interest, their respective attorneys and
accountants, the United States trustee, or any person
employed in the office of the United States trustee.

29 Fed. R. Bankr. P. 2014(a) (emphasis added).

1 Payments, or the Balance Due to Baker, although it does state that
2 Baker will charge \$200.00 per hour and "has not received a
3 prepetition retainer."

4 The bankruptcy court's docket does not reflect any separate
5 verified statement required by the final sentence of Rule 2014(a)
6 ("Rule 2014 Statement") and the excerpts of record contained none.
7 Nevertheless, at oral argument before us both Baker and Trustee's
8 counsel said that they believed Baker did file a Rule 2014
9 Statement. After re-examining the docket and excerpts and finding
10 nothing we issued an order giving Baker ten days in which to
11 produce a file stamped copy of the document that he contends is
12 his Rule 2014 Statement. Baker served an "Appellee's Notice of
13 Filing [of] Rule 2014 Statement" attached to which was another
14 copy of his Employment Application, but no Rule 2014 Statement.
15 We thus analyze this case under the presumption that Baker failed
16 to comply with Rule 2014 and the bankruptcy court did not
17 independently enforce it.

18 Baker did file other documents with the bankruptcy court that
19 contained partial disclosures of his connections with Debtor and
20 fee arrangements. On April 26, 2002, he filed a Disclosure of
21 Compensation of Attorney for Debtor (the "Rule 2016 Disclosure")⁶

22 _____
23 ⁶ Rule 2016(b) provides, in relevant part:

24 **Rule 2016. Compensation for Services Rendered and**
25 **Reimbursement of Expenses**

26 * * *

27 (b) Disclosure of compensation paid or promised to
28 attorney for debtor

(continued...)

1 which states:

2 Pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule
3 2016(b), I certify that I am the attorney for
4 [Debtor] and that compensation paid to me within one
5 year before the filing of the petition in bankruptcy,
6 or agreed to be paid to me, for services rendered or
7 to be rendered on behalf of [Debtor] in contemplation
8 of or in connection with the bankruptcy case is as
9 follows:

10 For legal services, I have agreed to accept
11 \$200.00 per hour

12

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14 ⁶(...continued)
15 Every attorney for a debtor, whether or not the attorney
16 applies for compensation, shall file and transmit to the
17 United States trustee within 15 days after the order for
18 relief, or at another time as the court may direct, the
19 statement required by § 329 of the Code including whether the
20 attorney has shared or agreed to share the compensation with
21 any other entity. . . .

22 Fed. R. Bankr. P. 2016(b) (emphasis added).

23 Section 329 provides, in full:

24 **§ 329. Debtor's transactions with attorneys**

25 (a) Any attorney representing a debtor in a case under
26 this title, or in connection with such a case, whether or not
27 such attorney applies for compensation under this title,
28 shall file with the court a statement of the compensation
paid or agreed to be paid, if such payment or agreement was
made after one year before the date of the filing of the
petition, for services rendered or to be rendered in
contemplation of or in connection with the case by such
attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of
any such services, the court may cancel any such agreement,
or order the return of any such payment, to the extent
excessive, to --

- (1) the estate, if the property transferred --
 - (A) would have been property of the estate; or
 - (B) was to be paid by or on behalf of the debtor
under a plan under chapter 11, 12, or 13 of this
title; or
- (2) the entity that made such payment.

11 U.S.C. § 329.

1 Prior to the filing of this statement I have
2 received \$5000.00

3 Balance Due \$ _____

4 The Rule 2016 Disclosure does not state whether the \$5,000.00
5 was a retainer for future services or instead consisted of one or
6 more payments for past services. In particular, the document does
7 not disclose that one of the Pre-Petition Payments, for \$1,000.00,
8 was inside the 90 day preference period of Section 547(b)(4)(A)
9 and was in payment of an antecedent debt.

10 Debtor's Statement of Financial Affairs ("SFA") refers to the
11 \$5,000.00 payment to Baker and, under date of payment, states
12 "various." It gives no further details.

13 On the same day as the SFA and the Rule 2016 Disclosure were
14 filed the bankruptcy court filed an order granting the Employment
15 Application.

16 On July 11, 2002, Debtor filed a plan of reorganization (the
17 "Plan") and disclosure statement (the "Disclosure Statement").
18 The Disclosure Statement's discussion of administrative claims
19 states that "no retain[er] has been paid" to Baker. The
20 Disclosure Statement and the portions of the Plan in the excerpts
21 of record (collectively, the "Plan Documents") do not otherwise
22 discuss the Pre-Petition Payments and Balance Due to Baker. Their
23 discussion of possible preference recoveries does not include any
24 analysis of why the Pre-Petition Payments would not be avoidable
25 preferences.

26 2. Partial disclosures regarding AMIS transaction

27 In the Employment Application Baker states that the case will
28 be a small business Chapter 11 liquidation case. He refers to the

1 sale of Debtor's assets as if that had not already occurred,
2 stating that Debtor "proposes to sell the assets of the business
3 . . . to gain fair market value for the business assets as opposed
4 to liquidation value."

5 On April 25, 2002, Baker signed and filed a Case Management
6 Report (the "Baker Report"). The Baker Report states that Debtor
7 "plans" to liquidate its business by selling its operating assets
8 (but not its receivables) to AMIS for "fair market value" in
9 exchange for AMIS' commitment to fund the Plan. The Baker Report
10 reveals that AMIS is a new corporation formed by two of Debtor's
11 three principals. Debtor's SFA, filed the next day, lists the
12 sale to AMIS but under "date" there is no information and under
13 "relationship to debtor" it states "NONE." (Emphasis in
14 original.)

15 Several months after the Baker Report, Debtor filed the Plan
16 Documents which disclose that the sale to AMIS has already
17 occurred (though no date is mentioned) and state that "Debtor
18 requests the Court to approve the AMIS sale as part of the
19 confirmation hearing." The Disclosure Statement mentions that
20 AMIS has promised to pay \$150,000.00 for Debtor's operating assets
21 but does not state the terms of payment. An executed unsecured
22 promissory note, not included in the Plan Documents, provides for
23 AMIS to make quarterly payments to Debtor of "\$20,000.00 plus
24 interest" at 6.5%, starting March 31, 2002.⁷ Under the Plan these

26 ⁷ According to Trustee, Debtor's founder Cabrera testified
27 for Debtor at the Section 341 meeting of creditors on May 24,
28 2002, that the initial payment was not due from AMIS until July,
2002. It is unclear whether this testimony was false or
(continued...)

1 funds plus Debtor's receivables (to be collected by AMIS and
2 turned over to Debtor) would go to pay secured creditors. AMIS
3 would also pay a 5% dividend (estimated at approximately
4 \$26,000.00) to general unsecured creditors. AMIS' two principals
5 would pay approximately \$260,000.00 in priority taxes over five
6 years through AMIS "[d]ue to potential successor liability and
7 personal liability."

8 3. Appointment of Chapter 11 trustee, and later conversion to
9 Chapter 7

10 On June 4, 2002, the United States Trustee ("UST") filed a
11 motion to convert the case to Chapter 7 or, alternatively, to
12 appoint a trustee or examiner. UST questioned the timing and the
13 consideration for the "insider sale" to AMIS, suggested that a
14 Chapter 7 case would be more efficient, and argued that in a
15 Chapter 11 case "the [D]ebtor would essentially be responsible for
16 collecting the note from itself." Debtor responded that it
17 "openly admits and discloses that the sale of [its] hard assets to
18 [AMIS] is an insider transaction" but that the sale price was
19 structured "well over" fair market value "to overcome objections
20 such as those raised by [UST]."

21 On July 22, 2002, the bankruptcy court ordered the
22 appointment of a Chapter 11 trustee. Trustee was appointed and on
23 August 29, 2002, he filed a combined report and motion to convert
24

25 ⁷(...continued)
26 inaccurate or if instead the terms of sale to AMIS had been
27 amended (although no amended documents appear in the excerpts of
28 record). It is also unclear whether the promissory note was
before the bankruptcy court -- it is included in Trustee's
excerpts of record without being attached to any pleading -- but
Baker has not objected to its inclusion in the excerpts of record.

1 the case to Chapter 7 (the "Conversion Report"). The Conversion
2 Report reiterated UST's concerns, pointed out that AMIS had not
3 made any payments or provided any financial information to Debtor,
4 and added:

5 Further, despite the assertion that the
6 transaction with [AMIS] was fair, that is clearly
7 false. [D]ebtor gave up all of its assets in
8 exchange for an unsecured promise to pay. Those
9 assets included not only assets already pledged to [a
10 bank], but at least two vehicles [and perhaps as many
11 as 13] on which the bank did not have a lien.
12 [Footnote omitted.] [D]ebtor's records reflect that
13 those [two] vehicles alone are worth approximately
14 \$20,000.00. Giving up \$20,000.00 of unencumbered
15 assets, in exchange for an unsecured promise to pay,
16 is anything but fair. It is fraudulent.

17 . . . Moreover, the disclosure statement filed by
18 [D]ebtor indicates that [D]ebtor's counsel expects to
19 incur another \$30,000.00 in fees to obtain
20 confirmation and consummation of the plan. Thus,
21 there is no meaningful likelihood that unsecured
22 creditors will ever receive anything if this case
23 remains in Chapter 11.

24 Debtor filed a response arguing that Debtor had disclosed the
25 sale to AMIS in the Baker Report, that "[n]o bill of sale has been
26 executed and no action taken to put anything beyond the reach of
27 creditors or the Trustee," and that Debtor was seeking judicial
28 approval of the sale because it "has always had the ability to set
the sale to [AMIS] aside."⁸ After a reply by Trustee and a
hearing the bankruptcy court issued an order, on October 29, 2002,
for conversion to Chapter 7. Meanwhile, two things happened: on
September 26, 2002, AMIS filed its voluntary Chapter 11 petition
(Arizona, Case No. 02-01273-YUM-JMM), and on August 16, 2002,

⁸ Baker has not explained how he could make such a
concession on behalf of AMIS nor how Trustee could actually set
aside the sale to AMIS, particularly when AMIS had already
dissipated some of the transferred assets.

1 Baker filed his application for fees (the "Fee Application").

2 4. Baker's Fee Application

3 The Fee Application recites that Baker spent 33.75 hours on
4 administrative matters including preparation of Debtor's
5 bankruptcy schedules and SFA, 12.5 hours on negotiations with
6 secured creditors, 8.5 hours on two preference actions and
7 receiving funds returned by creditors, and 19.5 hours on
8 preparation of the Plan Documents. Baker seeks a total of
9 \$12,993.75 in fees and \$950.00 in costs.

10 The Fee Application does not address the conflicts of
11 interest involving AMIS alleged in UST's motion to convert and
12 Trustee's Conversion Report, nor does it discuss the Pre-Petition
13 Payments or the Balance Due except to state:

14 Applicant did not receive a retainer fee prior to
15 filing this case. There were pre-petition monthly
16 statements sent to Debtor and in the year prior to
17 filing Debtor paid approximately \$8,000.00 [sic] to
18 applicant.⁹

19 Trustee filed an objection arguing that Baker was a key
20 player in a fraudulent conveyance and Baker had taken no steps to
21 enforce AMIS' promise to pay Debtor \$20,000.00 per month. After
22 discovering the timing and nature of the Pre-Petition Payments,
23 Trustee filed a supplement to his objection (the "Objection
24 Supplement") arguing that those payments appeared to be
25 preferences and that Baker's failure to reveal the relevant facts
26 to the Court requires the disallowance of his fee application.

27 Baker filed a supplemental reply acknowledging that the Pre-

28 ⁹ The Fee Application offers no explanation for the
disparity between this \$8,000.00 figure and the \$5,000.00 stated
both in Baker's Rule 2016(b) Disclosure and in Debtor's SFA.

1 Petition Payments (now said to be either \$4,908.00 or \$2,676.50¹⁰)
2 were paid not as a retainer but for past services and "to induce
3 further work from the attorney." Baker nevertheless argued that
4 he would have defenses to any preference avoidance action.

5 As for the Balance Due, Baker's declaration in support of his
6 supplemental reply states that he "simply wrote off the balance
7 due at [the] time" of his last invoice to Debtor, on January 10,
8 2002. That invoice, however, shows a "Balance due" of \$2,677.90
9 without any indication that the balance was written off.¹¹

10 Baker's Fee Application came on for hearing on March 12,
11 2004. Trustee's counsel noted that the AMIS bankruptcy case was
12 probably administratively insolvent, having been converted to
13 Chapter 7 for non-payment of post-petition taxes on January 26,
14 2004, and notwithstanding Baker's claims that the sale to AMIS
15 could be set aside at any time Trustee had been unable to
16 establish this and was likely to recover nothing from the AMIS
17 estate.

18
19 ¹⁰ Baker confirmed at oral argument before us that the
20 correct figure for payments he received within one year prior to
21 the Petition Date is \$2,676.50, as opposed to \$4,908.00 of
22 payments in the calendar year 2001. He mistakenly used an
23 approximation of the latter amount in his Rule 2016 Disclosure
24 (\$5,000.00) and in Debtor's SFA (\$5,000.00). The \$8,000.00
referred to in his Fee Application appears to be a further
mistake. See generally 11 U.S.C. § 329(a) (requiring disclosures
of payments "made after one year before the date of the filing of
the petition").

25 ¹¹ It is possible that Baker wrote off the fees later, and
26 at oral argument before us Baker pointed to Debtor's schedules as
27 evidence that he was not owed any money by Debtor as of the
28 Petition Date. Although this might be true, and perhaps Baker's
Declaration was just poorly phrased, we have found nothing in the
excerpts of record to suggest that he presented such an
explanation to the bankruptcy court and the only explanation he
did give, in his declaration, is internally inconsistent.

1 5. The bankruptcy court's rulings

2 The bankruptcy court took the matter under advisement and, on
3 August 6, 2004, filed a Memorandum Decision allowing all fees and
4 costs in the Fee Application. That decision states:

5 . . . [T]rustee chooses policy as his
6 battleground, asserting that [D]ebtor's pre-petition
7 transfers [to AMIS], orchestrated by [D]ebtor's
8 counsel, left little, if anything, for this [D]ebtor
9 to reorganize.

10 However, [the Plan] did clearly identify those
11 transfers, and sought to merely convert the
12 transferred assets into a stream of income which
13 would then be paid to [D]ebtor's creditors. In
14 essence, the plan was a sale plan, although
15 accomplished in reverse order from what would be
16 typical.

17 However unorthodox, novel, unusual or creative
18 this course of events may be, or the subject of
19 legitimate debate as to its efficacy, the court
20 perceives nothing sinister or illegal in the method
21 chosen. After all, neither [D]ebtor nor its counsel,
22 upon filing, could expect that these events would not
23 be noticed or scrutinized. Indeed, the court
24 recalls, early in the case, inquiring of [D]ebtor's
25 counsel about the very things that [T]rustee has
26 raised, and that [D]ebtor's counsel candidly and
27 openly explained what occurred and the reasons
28 therefor.

19 On August 12, 2004, Trustee filed a Motion to Alter or Amend
20 Ruling and for Additional Findings, requesting that the bankruptcy
21 court specifically address the preference and disinterestedness
22 issues. An order allowing Baker's fees and costs in full was
23 filed on August 23, 2004. The same day, Trustee filed a Motion to
24 Alter or Amend Order reiterating Trustee's request that the
25 bankruptcy court address the issues raised in the Objection
26 Supplement. The bankruptcy court issued an order (the
27 "Reconsideration Order") stating:

28 This court cannot determine preference issues in

1 the context of a fee application. Such matters are
2 in the nature of adversary proceedings to recover
3 money or property. See Bankr. R. 7001(1). . . . If
4 [D]ebtor's counsel has received preferential
5 payments, such monies may be recovered after all
6 claims and defenses have been fully aired. The court
7 declines to rule on such important issues without an
8 adversary proceeding. The grant of fees in this
9 contested matter did not preclude [T]rustee from
10 bringing such an action should he desire to do so.

11 To the extent so clarified, the motion to alter or
12 amend is GRANTED. The entry of this order thus ends
13 the appeal tolling period

14 III. ISSUES

15 1. May the bankruptcy court award fees absent a Rule 2014
16 Statement and full disclosure by Baker?¹²

17 2. Did the bankruptcy court apply the correct legal standard
18 to determine disinterestedness and lack of an adverse interest
19 when it ruled that it could not determine the preference issues
20 absent an adversary proceeding?

21 3. Do the preference issues have to be resolved before Baker
22 may be paid any compensation?¹³

23 ¹² Trustee challenged Baker's award of compensation rather
24 than seeking to set aside the order that authorized his
25 employment. While we confine our decision to the issue presented
26 we note that the reasons why the award of compensation was
27 erroneous apply with equal force to the threshold question of
28 whether Baker should have been employed in the first place.

¹³ Trustee argues on this appeal that even if Baker was
disinterested his services provided no benefit to Debtor's estate
and were not reasonably likely to render any benefit, citing
Leichty v. Neary (In re Strand), 375 F.3d 854 (9th Cir. 2004). We
do not address this issue because it was not raised before the
bankruptcy court and Trustee has offered no reason why it should
be considered on this appeal. See generally Briggs v. Kent (In re
Prof'l Inv. Props. of Am.), 955 F.2d 623, 625 (9th Cir. 1992)
(describing rare circumstances in which arguments not raised
before trial court can be raised on appeal).

Baker argues that he has an affirmative defense to any

(continued...)

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IV. STANDARDS OF REVIEW

We review the bankruptcy court's decision to allow compensation for abuse of discretion. Film Ventures Int'l, Inc. v. Asher (In re Film Ventures Int'l, Inc.), 75 B.R. 250, 253 (9th Cir. BAP 1987). A bankruptcy court necessarily abuses its discretion if it bases its ruling upon an erroneous view of the law or a clearly erroneous assessment of the evidence. The panel also finds an abuse of discretion if it has a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. Beatty v. Traub (In re Beatty), 162 B.R. 853, 855 (9th Cir. BAP 1994) (citations omitted). We review the bankruptcy court's conclusions of law and questions of statutory interpretation de novo, and factual findings for clear error. Village Nurseries v. Gould (In re Baldwin Builders), 232 B.R. 406, 410 (9th Cir. BAP 1999).

¹³(...continued)
preference action because the Pre-Petition Payment of \$1,000.00 was "a contemporaneous exchange -- willingness to perform services for a \$1,000.00 payment on account and in the ordinary course of business." Baker then cites not the contemporaneous exchange provisions of Section 547(c)(1) but the ordinary course provisions of Section 547(c)(2). 11 U.S.C. § 547(c)(1) and (2). He also cites a case that he characterizes as holding that pre-petition services directed at financial issues are not avoidable preferences (In re Hargis, 148 B.R. 19 (Bankr. N.D. Tex. 1991)) and another dealing with whether pre-petition compensation is excessive under Section 329 (In re Emco Enterprises, Inc., 94 B.R. 184 (Bankr. E.D. Cal. 1988)). Trustee responds that Baker's preference defense would fail, because his bills do not reflect any new value after the Pre-Petition Payments were made, citing Miniscribe Corp. v. Keymarc, Inc. (In re Miniscribe Corp.), 123 B.R. 86, 92 - 95 (Bankr. D. Colo. 1991) (creditor's promise to continue doing business with debtor if it paid overdue bills was neither new value nor "ordinary course of business"). For the reasons described in the text we do not reach any of these issues.

1 **V. DISCUSSION**

2 Full disclosure is an essential prerequisite for both
3 employment and compensation. The Ninth Circuit has stated:

4 The bankruptcy court must ensure that attorneys
5 who represent the debtor do so in the best interests
6 of the bankruptcy estate. The court must ensure, for
7 example, that the attorneys do not have interests
8 adverse to those of the estate, that the attorneys
9 only charge for services that benefit the estate, and
10 that they charge only reasonable fees. To facilitate
11 the court's policing responsibilities, the Bankruptcy
12 Code and Federal Rules of Bankruptcy Procedure impose
13 several disclosure requirements on attorneys who seek
14 to represent a debtor and who seek to recover fees.
15 The disclosure rules impose upon attorneys an
16 independent responsibility. Thus, failure to comply
17 with the disclosure rules is a sanctionable
18 violation, even if proper disclosure would have shown
19 that the attorney had not actually violated any
20 Bankruptcy Code provision or any Bankruptcy Rule.

13 * * *

14 The disclosure rules are applied literally, even
15 if the results are sometimes harsh. Negligent or
16 inadvertent omissions do not vitiate the failure to
17 disclose. Similarly, a disclosure violation may
18 result in sanctions regardless of actual harm to the
19 estate.

17 * * *

18 The disclosure requirements of Rule 2014 are
19 applied as strictly as the requirements of Rule 2016
20 and section 329

21 Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena
22 Corp.), 63 F.3d 877, 880-81 (9th Cir. 1995) (citations and
23 quotation marks omitted).

24 In Park-Helena the Ninth Circuit affirmed the bankruptcy
25 court's denial of the attorneys' "entire fee request" based on
26 their nondisclosure of the "true source of the retainer" -- the
27 president of the debtor, rather than the debtor itself -- and the
28 firm's "connections" to the debtor's president arising from the

1 same transaction. Id. at 880. The firm argued that because the
2 president had borrowed funds from the corporate debtor his payment
3 of the retainer was "in effect" a payment from the debtor, so the
4 firm did not need to disclose the details of the source of funds.
5 The Ninth Circuit rejected this argument:

6 A fee applicant must disclose the precise nature
7 of the fee arrangement, and not simply identify the
8 ultimate owner of the funds.

9 Id. at 881 (citations and quotation marks omitted, emphasis
10 added).

11 More generally we have stated:

12 Pursuant to § 327, a professional has a duty to
13 make full, candid and complete disclosure of all
14 facts concerning his transactions with the debtor.
15 Professionals must disclose all connections with the
16 debtor, creditors and parties in interest, no matter
17 how irrelevant or trivial those connections may seem.
18 The disclosure rules are not discretionary.

19 Mehdipour v. Marcus & Millichap (In re Mehdi-pour), 202 B.R. 474,
20 480 (9th Cir. BAP 1996) (citations omitted, emphasis added).

21 Once the true facts are known the bankruptcy court has
22 considerable discretion in determining whether to disallow all,
23 part, or none of the fees and expenses of a properly employed
24 professional. Film Ventures, 75 B.R. at 253; Law Offices of
25 Nicholas A. Franke v. Tiffany (In re Lewis), 113 F.3d 1040, 1045-
26 46 (9th Cir. 1997).

27 Until proper disclosure has been made, however, it is
28 premature to award fees for two reasons. First, the bankruptcy
29 court cannot exercise its discretion to excuse nondisclosure
30 unless it knows what it is excusing. Second, employment is a
31 prerequisite to compensation and until there is proper disclosure
32 it cannot be known whether the professional was validly employed.

1 See First Interstate Bank of Nevada v. CIC Inv. Corp. (In re CIC
2 Inv. Corp.), 175 B.R. 52, 55-56 (9th Cir. BAP 1994) ("CIC I")
3 (§ 327(a) "clearly states that the court cannot approve the
4 employment of a person who is not disinterested" and "[b]ankruptcy
5 courts cannot use equitable principles to disregard unambiguous
6 statutory language").¹⁴

7
8 ¹⁴ If it turns out that the professional was not validly
9 employed that is not necessarily the end of the inquiry. On the
10 one hand, employment is a prerequisite for compensation under the
11 Bankruptcy Code and Rules and the bankruptcy court cannot simply
12 disregard those rules and instead award compensation under quantum
13 meruit or other state law theories. Law Offices of Ivan W.
14 Halperin v. Occidental Fin. Group, Inc. (In re Occidental Fin.
15 Group, Inc.), 40 F.3d 1059, 1062-63 (9th Cir. 1994); DeRonde v.
16 Shirley (In re Shirley), 134 B.R. 940, 944-45 (9th Cir. BAP 1992).

17 On the other hand, employment sometimes can be retroactively
18 authorized or authorized for part but not all of the time that a
19 professional has worked for the estate. See Atkins v. Wain,
20 Samuel & Co. (In re Atkins), 69 F.3d 970, 973-76 (9th Cir. 1995)
21 (affirming retroactive employment in exceptional circumstances);
22 Mehdipour, 202 B.R. at 478 (when professional has disqualifying
23 conflict of interest for only some services, "the bankruptcy court
24 has discretion to award or deny compensation for services
25 performed outside of a conflict").

26 In addition, we held in one case that the bankruptcy court
27 had discretion to award compensation for services performed in
28 reliance on the order authorizing employment, before that order
was reversed on appeal. See First Interstate Bank of Nevada v.
CIC Inv. Corp. (In re CIC Inv. Corp.), 192 B.R. 549, 553-54 (9th
Cir. BAP 1996) ("CIC II"). We note, though, that in CIC II the
professional had "fully disclosed" its relevant connections and
"all potential conflicts" at the outset (id.), and its lack of
disinterestedness was not immediately clear (the courts were split
on the issue). CIC I, 175 B.R. at 54-56. In this case, as we
discuss below, Baker has not made proper disclosures and his
employment was improperly authorized in the absence of a Rule 2014
Statement. These facts might require him to apply for retroactive
employment, or perhaps bar his employment altogether. Compare
Mehdipour, 202 B.R. at 478 (stating in dicta that employment "in
violation of § 327" is "void ab initio") (citing In re EWC, Inc.,
138 B.R. 276, 281 (Bankr. W.D. Okla. 1992)) with COM-1 Info, Inc.
v. Wolkowitz (In re Maximus Computers, Inc.), 278 B.R. 189, 194
(9th Cir. BAP 2002) (lack of Rule 2014 Statement "necessitates
vacating the employment order") (emphasis added) and id. at 199
(Montali, J., concurring). But cf. Kravit, Gass & Weber, S.C. v.
Michel (In re Crivello), 134 F.3d 831, 838 (7th Cir. 1998)

(continued...)

1 1. The bankruptcy court cannot award Baker any of his
2 requested fees absent full, candid, and complete
3 disclosure

4 Trustee argues that Baker is motivated to act for the benefit
5 of Debtors' principals at the expense of creditors and is not in
6 fact disinterested. Trustee chiefly points to the terms of sale
7 to AMIS and the allegedly preferential Pre-Petition Payments to
8 Baker. We will not reach the merits of Trustee's arguments.
9 Neither we nor the bankruptcy court can properly assess these
10 matters and approve any of the requested fees in the absence of
11 proper disclosure by Baker, starting with a verified disclosure of
12 his "connections with the debtor, creditors, any other party in
13 interest, their respective attorneys and accountants" etc. Fed.
14 R. Bankr. P. 2014(a). The Bankruptcy Rules do not give the
15 bankruptcy court any discretion to waive the requirement of a Rule
16 2014 Statement. See id.

17 Our inquiry could end here. Little purpose would be served,
18 however, if we were to reverse the award of fees and remand so
19 that Baker could file a Rule 2014 Statement disclosing perhaps no
20 more than he has already disclosed, which he argues is sufficient
21 and Trustee argues is not. For the sake of judicial economy, we
22 will discuss the issues that the parties have briefed and argued,
23 if only to point out that without proper disclosure those issues
24 cannot be resolved.

25
26 ¹⁴(...continued)
27 (professional need only be "employed," not "validly" employed, to
be eligible for compensation).

28 We express no further opinion on these issues. They can be
addressed, if necessary, once the relevant facts are known.

1 Three areas of concern involve Baker's relationship with AMIS
2 and its principals, the Pre-Petition Payments, and the Balance Due
3 to Baker. The excerpts of record have little information on these
4 matters, and when Baker has made disclosures they have been
5 characterized by a lack of timeliness, completeness, and candor:

6 * Debtor's SFA falsely states that AMIS' relationship to
7 Debtor is "NONE" even though two of Debtor's three
8 principals are also AMIS' principals. Baker's Employment
9 Application says nothing about the conflict of interest
10 implications. See In re Perry, 194 B.R. 875, 880 (E.D.
11 Cal. 1996) (waiver of conflict by non-debtor parties was
12 insufficient and "[i]nformed consent could not be
13 obtained" because "the real parties in interest in this
14 case are the creditors, and that is not a waivable
15 conflict").¹⁵

16 * There is no disclosure whether AMIS had its own counsel or
17 whether, when Baker orchestrated the sale to AMIS, he was
18 the only attorney involved.

19 * Proper disclosure could shed light on why Baker
20 orchestrated the sale to AMIS (including the unencumbered
21 trucks) as an unsecured obligation and then apparently
22 took no action to enforce that obligation or obtain and
23
24
25

26
27 ¹⁵ We note that the Disclosure Statement's liquidation
28 analysis says nothing about the fact that, according to the Baker
Report, the debt to Debtor's principal secured creditor is cross
collateralized by a lien on the home of Debtor's founder Cabrera.

1 disclose financial information from AMIS.¹⁶

2 * Up until the Plan Documents the sale to AMIS was described
3 as if it had not already occurred. Later, despite Baker's
4 claim that the sale "could be set aside at any time,"
5 Trustee claims that he could not set aside the sale and
6 recover anything from AMIS' Chapter 7 estate. When we
7 asked Baker at oral argument whether there was any
8 evidence that AMIS had agreed to reverse the transfer if
9 the bankruptcy court did not approve it, Baker admitted
10 that there was no such evidence apart from his own
11 representations.

12 * Baker offered an inconsistent and incomplete explanation
13 to the bankruptcy court about writing off the Balance Due.
14 See footnote 11 above and accompanying text.¹⁷

16 ¹⁶ It appears that AMIS never made any payments on its
17 promissory note. See footnote 7 above. We also note that the
18 Baker Report states, "some pre-petition receivables have been used
to pay March expenses" after the sale to AMIS, but it appears that
Baker took no action in response.

19 ¹⁷ Baker argues that even if he does hold a pre-petition
20 claim against Debtor he is not necessarily disqualified from
acting as Debtor's general bankruptcy counsel. He is wrong.
21 Baker cites two cases that actually hold to the contrary and
one case that does not address the issue. See In re Eastern
22 Charter Tours, Inc., 167 B.R. 995 (Bankr. M.D. Ga. 1994)
(rejecting such a rule and holding that Bankruptcy Code
23 unambiguously disqualifies creditors from employment under
§ 327(a), but acknowledging contrary minority position); In re
24 Watervliet Paper Co., Inc., 111 B.R. 131 (W.D. Mich. 1989) (no de
minimis exception permitting creditor to be employed under
25 § 327(a), despite "persuasive" minority view); In re Areaco Inv.
26 Co., 152 B.R. 597 (Bankr. E.D. Mo. 1993) (attorneys' prior
27 representation of closely held corporate debtor's shareholders was
a connection to parties in interest that should have been
disclosed, and nondisclosure plus duplication of work warranted
33% reduction in fees).

28 We have previously acknowledged that "[t]he courts do not
(continued...)

1 * As we explain in the next section of this discussion, the
2 known facts establish that Baker apparently received a
3 preference, even if he thinks he has an affirmative
4 defense to avoidance of that preference. Baker said
5 nothing about these issues in his Employment Application,
6 the SFA, the Disclosure Statement, the Rule 2016
7 Disclosure, or any other document until Trustee discovered
8 the timing and nature of the Pre-Petition Transfers and
9 raised the preference issue in connection with Baker's Fee
10 Application.

11 These examples illustrate that the bankruptcy court cannot
12 fully evaluate whether Baker is disinterested or has an interest
13 adverse to the estate without all the relevant facts. Baker's own
14 nondisclosure is not the only problem. The employment application
15 was signed by Baker not by Debtor as required by Rule 2014(a).
16 The practical consequence is that Debtor has not disclosed its own
17 knowledge about Baker's connections to Debtor, creditors, other
18 parties in interest, etc. See Fed. R. Bankr. P. 2014(a)
19 (requiring applicant to state, "to the best of the applicant's

20 _____
21 ¹⁷(...continued)

22 agree on whether counsel with a prepetition claim against the
23 debtor is absolutely barred from representing the trustee or
24 debtor in possession as general counsel," but we have come down
25 firmly on the side of the courts barring such representation.
26 CIC I, 175 B.R. at 55-56. See also In re Siliconix, 135 B.R. 378
(N.D. Cal. 1991) (adopting per se rule that creditors are barred
27 from employment by estate, rejecting minority view). Compare In
28 re Martin, 817 F.2d 175 (1st Cir. 1987) (no absolute rule against
debtor's counsel requiring retainer to be secured, rejecting
strict reading of term "creditor").

If Baker was a creditor of the estate on the Petition Date
then he was ineligible for employment. The facts are unclear on
this issue, so we make no determination whether Baker is barred
from employment (and compensation) on this basis.

1 knowledge," all such connections).

2 Until the true facts are known, it is premature to excuse
3 Baker from any nondisclosure of those facts and award him
4 compensation. See generally Park-Helena, 63 F.3d at 880-81;
5 Mehdipour, 202 B.R. at 478-80. Therefore, we must reverse the
6 order granting the Fee Application.

7 2. The bankruptcy court applied an incorrect legal standard
8 by requiring an adversary proceeding without addressing
9 the disinterestedness or adverse interest issues

10 The bankruptcy court did not explicitly address the
11 disinterestedness issues. Rather, it ruled in its Reconsideration
12 Order that it could not determine preference issues in the context
13 of a fee application, that such issues required an adversary
14 proceeding, and that "[i]f [D]ebtor's counsel has received
15 preferential payments, such monies may be recovered after all
16 claims and defenses have been fully aired." See Fed. R. Bankr. P.
17 7001(1).

18 As we will discuss in more detail in the next section, if an
19 adversary proceeding is truly required then the bankruptcy court
20 either should defer its consideration of the Fee Application until
21 such an adversary proceeding can be resolved or else it should
22 combine the two proceedings. Osherow v. Ernst & Young LLP (In re
23 Intellogic Trace, Inc.), 200 F.3d 382, 389-90 (5th Cir. 2000); In
24 re Pillowtex, Inc., 304 F.3d 246 (3d Cir. 2002). Even without an
25 adversary proceeding, however, the bankruptcy court should have
26 considered Baker's non-disclosure of what appears to be a
27 preference, as well as any other nondisclosure or conflict of
28 interest issues. For purposes of this part of our discussion, the

1 issue is not whether Baker ultimately would have prevailed in any
2 preference avoidance action. The issue is whether his
3 nondisclosures and his possible conflicts of interest are enough
4 by themselves to render him ineligible for employment or warrant
5 disallowance or reduction of his fees.

6 There was a sufficiently realistic possibility that Baker had
7 received a preference that he should have disclosed and addressed
8 that issue. In fact, Baker essentially admits all the elements of
9 a preference, although he alleges that he has an affirmative
10 defense. Baker concedes that out of the Pre-Petition Payments
11 \$1,000.00 was received within the applicable preference period.
12 He appears to admit (even insist) that this \$1,000.00 was in
13 payment of an antecedent debt rather than a retainer, and he does
14 not contest the other elements of a prima facie preference. See
15 11 U.S.C. § 547(b) (1)-(5).¹⁸ Yet Baker never disclosed this prima
16 facie preference, and only in response to Trustee's Objection
17 Supplement did he explain why he believes he would have had an
18 affirmative defense to avoidance of that preference.

19 Baker should have disclosed the facts immediately after the
20 Petition Date but the Employment Application, the Baker Report,
21 the SFA, the Rule 2016 Disclosure, the Plan Documents, and the Fee
22 Application are all silent on the issue. Whatever the merits of

23
24 ¹⁸ Section 547(b) provides for avoidance of any transfer of
25 an interest of the debtor in property (1) to or for the benefit of
26 a creditor, (2) for or on account of an antecedent debt owed by
27 the debtor before such transfer was made, (3) made while the
28 debtor was insolvent (presumed on and during the 90 days preceding
the Petition Date), (4) made on or within 90 days of the Petition
Date (or one year for insider creditors), and (5) that enables
such creditor to receive more than it would receive if the
transfer had not been made and such creditor received payment of
such debt as provided in Chapter 7. 11 U.S.C. § 547(b) and (f).

1 Baker's alleged affirmative defenses (about which we express no
2 view) his lack of disclosure should have been taken into account
3 by the bankruptcy court without requiring Trustee to initiate an
4 adversary proceeding.

5 In a comparable case nondisclosure of potential preferential
6 or fraudulent transfers to a law firm was held to be a sufficient
7 basis to deny all of the firm's requested fees, even though the
8 trustees' suspicions of preferences or fraudulent transfers had
9 not been proven and even though the firm allegedly believed that
10 the transfers ultimately benefitted the estates. In re Republic
11 Fin. Corp., 128 B.R. 793 (Bankr. N.D. Okla. 1991).

12 We do not mean to imply that Baker's nondisclosures and
13 potential conflicts of interest are necessarily fatal to his
14 employment or compensation. The bankruptcy court might determine,
15 for example, that his nondisclosure of the preference issue was an
16 oversight and should be excused, or that it warrants only a
17 reduction and not elimination of any compensation. Our point is
18 simply that in the circumstances of this case the burden is not
19 initially on Trustee to prove an avoidable preference or commence
20 an adversary proceeding to show that Baker is not disinterested or
21 holds or represents and adverse interest. The initial burden is
22 on Baker to establish that he was eligible for employment and
23 should receive compensation notwithstanding his possible conflicts
24 of interest and his nondisclosures, including that he received
25 what appears on its face to have been a preference. If Baker
26 meets that initial burden then, for reasons we discuss below, the
27 bankruptcy court will still have to give Trustee the opportunity
28 to resolve the preference issues before Baker may be paid any

1 compensation.

2 3. The preference issues must be resolved before Baker may be
3 paid any compensation

4 Trustee does not just object to Baker's nondisclosure.
5 Trustee also argues that Baker actually received an avoidable
6 preference. This has two implications.

7 First, if Baker actually did receive an avoidable preference
8 then he would be ineligible to be paid anything from the estate
9 unless and until he returns that preference. See 11 U.S.C.
10 § 502(d); MicroAge, Inc. v. Viewsonic Corp. (In re MicroAge,
11 Inc.), 291 B.R. 503 (9th Cir. BAP 2002) (§ 502(d) applies to
12 administrative claims). Trustee acknowledges that any preference
13 action may be time barred but as Trustee points out even a time
14 barred action can be asserted under Section 502(d). We have
15 adopted this interpretation of Section 502(d) in keeping with the
16 general rule that offsetting counterclaims and other matters of
17 defense may be raised even when time barred and because we can
18 discern "no purpose for section 502(d) if it applied only when the
19 transfer therein contemplated could form the basis of an
20 independent avoidance action seeking affirmative relief from the
21 transferee." Comm. of Unsecured Cred. v. Commodity Credit Corp.
22 (In re KF Dairies, Inc.), 143 B.R. 734, 736-37 (9th Cir. BAP
23 1992).

24 Second, if Baker actually did receive an avoidable preference
25 then he would probably be ineligible for employment, no matter how
26 completely he disclosed the relevant facts, at least until he
27 returns the preference. (See footnote 14 above.) As one court
28 has put it, he would be unlikely to sue himself. Pillowtex, 304

1 F.3d at 254. This is critical because, as we have discussed
2 above, until the bankruptcy court can determine whether Baker was
3 properly employed it is premature to award him fees. See Park-
4 Helena, 63 F.3d at 880-81; Mehdipour, 202 B.R. at 478-80; CIC I,
5 175 B.R. at 55-56; and footnote 12, supra.

6 Baker suggests on this appeal that Trustee waived the
7 preference issues by proceeding to a hearing on the Fee
8 Application without filing an adversary proceeding. Baker cites
9 no authority for such a waiver, he did not make this argument
10 before the bankruptcy court, Trustee filed his Opposition
11 Supplement as soon as he discovered the relevant facts, and
12 Trustee could not have acted sooner because of Baker's
13 nondisclosure. We see no basis for any waiver.

14 To the contrary, one reason why it is proper to address this
15 issue now, before any approval of Baker's Fee Application, is that
16 otherwise Trustee might be held to have waived such an objection.
17 See Osherow, 200 F.3d at 386-91 (debtor's failure to object to
18 accountants' fees in § 330 hearing barred subsequent malpractice
19 adversary proceeding); MicroAge, 291 B.R. at 512 ("section 502(d)
20 should have been raised as an affirmative defense before the
21 bankruptcy court entered an order allowing [the administrative
22 claimant's] claim").

23 The bankruptcy court was concerned that an adversary
24 proceeding would be required to resolve preference issues --
25 presumably an action for declaratory relief because a preference
26 action itself is apparently time barred. See Fed. R. Bankr. P.
27 7001(1) and (9). If so, then the bankruptcy court should stay the
28 proceedings on Baker's Fee Application pending resolution of the

1 preference issues or else it should combine the two proceedings.
2 See Osherow, 200 F.3d at 389-90 (noting that fee hearing could
3 have been stayed pending resolution of malpractice claims, or
4 issues could have been litigated together). See also Fed. R.
5 Bankr. P. 3007 ("If an objection to claim is joined with a demand
6 for relief of the kind specified in Rule 7001, it becomes an
7 adversary proceeding."); Fed. R. Bankr. P. 9014(c) (bankruptcy
8 court can direct that one or more rules applicable to adversary
9 proceedings apply to contested matters).

10 In any event, until the preference issues are resolved Baker
11 cannot be paid any compensation. We agree with the court in
12 Pillowtex, 304 F.3d at 255, that where there is a "facially
13 plausible" preference claim then the preference issues must be
14 resolved before proposed counsel can be employed (or compensated).
15 Otherwise creditors bear the risk that they will be prejudiced by
16 counsel who turns out not to have been disinterested or to have
17 held or represented an averse interest.

18 The facts in Pillowtex are illustrative. The law firm in
19 that case, Jones, Day, Reavis and Pogue ("Jones Day"), received
20 payments from debtors during the ninety days before they filed
21 bankruptcy petitions, including both a retainer for future
22 bankruptcy services and payments on account of past services.
23 Jones Day explained that it sought payment of outstanding bills
24 "in order that it would not be a creditor at the time of the
25 bankruptcy, as that would have disqualified it from retention as
26 counsel," id. at 253, and it argued that the payments

27 "were substantially within the historical pattern of
28 payments between Jones Day and the Debtors, which
included wide swings in the timing of payments." []

1 Jones Day opposed the [UST's] requested hearing [to
2 determine preference issues], arguing that it was
3 "not necessary or appropriate for the Debtors'
4 estates to incur the time and expense of litigating
5 the preference issue."

6 Pillowtex, 304 F.3d at 249.

7 The order on appeal in Pillowtex authorized employment of the
8 firm without determining the preference issues. Id. at 249. The
9 Third Circuit reversed and remanded, rejecting Jones Day's
10 arguments that any conflict was not material and that the firm had
11 a preference defense because "the \$997,569.36 it received within
12 the 90-day period was in the ordinary course of business." Id. at
13 254. The Third Circuit stated:

14 Although a bankruptcy court enjoys considerable
15 discretion in evaluating whether professionals suffer
16 from conflicts, that discretion is not limitless. A
17 bankruptcy court does not enjoy the discretion to
18 bypass the requirements of the Bankruptcy Code.

19 * * *

20 Because there has never been a judicial
21 determination whether Jones Day received a
22 preference, it is unclear at this time whether the
23 preference, if there were one, presents a conflict
24 which would require Jones Day's disqualification. We
25 hold that when there has been a facially plausible
26 claim of a substantial preference, the district court
27 and/or the bankruptcy court cannot avoid the clear
28 mandate of the statute by the mere expedient of
approving retention conditional on a later
determination of the preference issue.

Pillowtex, 304 F.3d at 254-55 (emphasis added).¹⁹

Trustee in this case made a "facially plausible" claim of a
preference. The \$1,000.00 transfer primarily at issue is not a

¹⁹ The only disagreement we have with Pillowtex on this
point is that it also required the alleged preference amount to be
"substantial." We think that a professional can be ineligible for
employment even if the alleged preference was not in a substantial
dollar amount. See 11 U.S.C. §§ 101(14) and 327(a) and footnote
17, above.

1 large dollar amount, but there is no minimum amount in Section
2 502(d) and under Sections 327(a) and 101(14) the \$1,000.00 amount
3 appears to be relevant to whether Baker was and is eligible for
4 employment. Therefore, the bankruptcy court should have resolved
5 the preference issues before awarding Baker's fees.

6 As in Pillowtex, other events have transpired and the work
7 has already been done. See id. at 249 (noting that the
8 "bankruptcy proceeding continued while this appeal proceeded" and
9 plan of reorganization was confirmed). Nevertheless, the
10 bankruptcy court has no discretion to disregard the Bankruptcy
11 Code's requirements that Baker be eligible for employment (11
12 U.S.C. § 327(a) and 101(14)) and that Baker turn over any
13 avoidable preference before he can be paid any administrative
14 claim for fees. 11 U.S.C. § 502(d).

15 We recognize that the estate might gain only a Pyrrhic
16 victory because in correspondence attached to Trustee's Objection
17 Supplement Baker previously offered to return the \$1,000.00, and
18 perhaps the bankruptcy court will find that doing so cures any
19 problem with Baker's employment and makes him eligible for fees.
20 Trustee has undoubtedly spent more than the \$1,000.00 on this
21 appeal. Baker also might be able to moot the Section 502(d)
22 issues by agreeing to a holdback of \$1,000.00 from his Fee
23 Application until the preference issues are resolved.

24 Still, these are only possible scenarios and it is also
25 possible that Baker will turn out to be ineligible for employment
26 or that his Fee Application will be denied in whole or in part,
27 permitting the estate to retain up to \$12,993.75 in fees that it
28

1 otherwise would have had to pay.²⁰ Moreover, even if the estate in
2 this case ultimately gains no financial benefit, it is critical
3 that we enforce the ethical requirements of the Bankruptcy Code
4 and Rules. See Republic Fin. Corp., 128 B.R. at 802-06; Henderson
5 v. Kisseberth (In re Kisseberth), 273 F.3d 714, 721 (6th Cir.
6 2001) (citing "the need to compel future compliance" by sanctioned
7 counsel "and on the part of all counsel appearing in bankruptcy
8 court").

9 For these reasons the bankruptcy court must resolve the
10 preference issues, even if that requires an adversary proceeding,
11 before Baker can be paid any compensation.

12 VI. CONCLUSION

13 The absence of a Rule 2014 Statement and Baker's other
14 nondisclosures prevented the bankruptcy court from determining the
15 true facts.

16 The bankruptcy court applied an incorrect legal standard when
17 it apparently declined to address the disinterestedness or
18 conflict issues unless Trustee could prevail in a preference
19 avoidance action. The burden is on Baker to establish that
20 despite his nondisclosure of the prima facie preference and other
21 matters, and despite his possible conflicts of interest, he should
22 be awarded some or all of his requested fees and expenses.

23 Trustee has also made a facially plausible claim that Baker
24 did in fact receive a preference. Under Section 502(d), Baker's
25 administrative claim for fees cannot be paid until he returns any

26
27 ²⁰ We express no opinion whether different rules might
28 apply to reimbursement of Baker's expenses than for payment of
Baker's fees. But see Republic Fin. Corp., 128 B.R. at 806
(awarding expenses even though all fees were denied).

1 avoidable preference; and under Sections 101(14) and 327(a) any
2 preference may make Baker ineligible for employment, and hence for
3 compensation. Therefore, the bankruptcy court erred by not
4 addressing the preference issues before awarding Baker any
5 compensation.

6 For the foregoing reasons, the bankruptcy court's order
7 granting Baker's Fee Application is REVERSED and the case is
8 REMANDED for further proceedings consistent with this opinion.

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