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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. ID-11-1315-HJuMk
)
LESLIE FRED DANNER and) Bk. No. 11-00651-TLM
TERRIANN RENE DANNER,)
)
Debtors.)

LESLIE FRED DANNER;)
TERRIANN RENE DANNER,)
)
Appellants,)
)
v.)
)
UNITED STATES TRUSTEE,)
)
Appellee.)

In re:) BAP No. ID-11-1525-HJuMk
)
KEVIN CLYDE WERRY and D'RESE) Bk. No. 11-01710-JDP
GRETCHEN WERRY,)
)
Debtors.)

KEVIN CLYDE WERRY;)
D'RESE GRETCHEN WERRY,)
)
Appellants,)
)
v.)
)
UNITED STATES TRUSTEE,)
)
Appellee.)

MEMORANDUM¹

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Argued and Submitted on June 14, 2012
2 at Boise, Idaho

3 Filed - July 31, 2012

4 Appeal from the United States Bankruptcy Court
for the District of Idaho

5 Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding²
6 Honorable Jim D. Pappas, Bankruptcy Judge, Presiding³

7 Appearances: Randal Jay French, Esq. of Bauer & French argued
8 for the Appellants; David W. Newman, Esq. of the
Office of United States Trustee argued for the
Appellee.

9
10 Before: HOLLOWELL, JURY, and MARKELL, Bankruptcy Judges.

11 Randal J. French of the law firm, Bauer & French,
12 (collectively referred to as French) appeals orders denying his
13 applications for employment. In each bankruptcy case, French
14 disclosed that he had received an "advance payment retainer" from
15 the debtors. However, the bankruptcy courts found that the
16 advance payment retainer was actually a security retainer, and
17 therefore, was property of the estate, which required that French
18 seek approval and authorization pursuant to § 330⁴ before he
19 could draw against it to pay his fees. Because the employment
20 applications did not contemplate that the retainers would be
21 reviewed under § 330, the bankruptcy courts denied them. We
22 AFFIRM.

23
24 ² BAP No. ID-11-1315.

25 ³ BAP No. ID-11-1525.

26 ⁴ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

1 I. FACTS

2 A. Danner Bankruptcy Case

3 On March 16, 2011, Leslie and TerriAnn Danner (the Danners)
4 filed a chapter 11 petition for relief and remained as debtors-
5 in-possession. The same day, French filed an employment
6 application for approval pursuant to § 327 (Danner Employment
7 Application). In the Danner Employment Application, and in the
8 accompanying disclosures and affidavits, French disclosed that he
9 had received funds from the Danners prior to the bankruptcy
10 filing. The Danners paid French \$8,539, which included a \$7,500
11 "advance payment retainer" (Retainer) and \$1,039 for the filing
12 fee. According to the fee agreement between French and the
13 Danners, the Retainer was considered to be advance payment for
14 French's services to be provided in the chapter 11 case. French
15 disclosed that he would charge an hourly fee for services and
16 then credit the services performed both before and after the
17 Danners' filing against the Retainer. French also stated that he
18 would "account for all services rendered and refund any unearned
19 retainer or seek additional compensation if the fees for services
20 rendered exceeds the amount of the advance payment retainer."

21 On March 31, 2011, the bankruptcy court issued a notice of
22 hearing on the Employment Application. Prior to the hearing, the
23 United States Trustee (UST) filed an objection to the Employment
24 Application contending that French was using the Retainer to
25 ensure payment for postpetition services without seeking
26 bankruptcy court approval, which improperly circumvented § 330.⁵

27
28 ⁵ Section 330 provides:
(a)(1) After notice to the parties in interest and the
United States Trustee and a hearing, and subject to sections
(continued...)

1 French filed a response to the UST's objection. French
2 asserted that the Retainer, as an "advance payment retainer,"
3 belonged to French as of the date of payment and was not part of
4 the bankruptcy estate. French stated he had deposited the
5 Retainer in the firm's general business account; it was not
6 segregated in a client trust account. French also asserted that
7 because the Retainer was not the Danners' property or property of
8 the Danners' estate, review under § 330 was not required.

9 A hearing on the Danner Employment Application took place on
10 April 18, 2011. The bankruptcy court took the matter under
11 advisement. On May 26, 2011, the bankruptcy court issued a
12 memorandum decision and order denying the Danner Employment
13 Application. The bankruptcy court found that despite French's
14 characterization, the Retainer was not an advance payment
15 retainer because it was not a flat fee for services to be
16 performed. Instead, the bankruptcy court found that French
17 intended to use the Retainer, in part, as compensation for future

18
19 ⁵(...continued)
20 326, 328, and 329, the court may award to a trustee, . . .
21 or a professional person employed under section 327 . . .
22 (A) reasonable compensation for actual, necessary
23 services rendered by the . . . professional person, or
24 attorney and by any paraprofessional person employed by any
25 such person; and
26 (B) reimbursement for actual, necessary expenses.

27 The court must consider and take into account all relevant
28 factors, including time spent on services, rates charged, whether
the services were necessary to the administration of the estate,
performed in a reasonable time and manner, or duplicative.
11 U.S.C. § 330(a)(3), (4). Therefore, the court may award
compensation that is less than the amount of compensation
requested. 11 U.S.C. § 330(a)(2).

1 yet-to-be performed services. Thus, the bankruptcy court found
2 that the Danners retained an ownership interest in the Retainer.
3 As a result, the bankruptcy court found that the Retainer was a
4 security retainer used to secure payment for future fees, which
5 remained property of the estate, and which could only be drawn
6 upon to the extent compensation is awarded and authorized
7 pursuant to § 330. The bankruptcy court denied the Danner
8 Employment Application because under the terms of French's
9 proposed employment, French would draw against the Retainer in
10 contravention of § 330. The Danners timely appealed.

11 **B. Werry Bankruptcy Case**

12 Kevin Clyde and D'Rese Gretchen Werry (the Werrys) filed a
13 chapter 11 bankruptcy petition on June 6, 2011, and continued as
14 debtors-in-possession. Two days later, French filed an
15 employment application pursuant to § 327 (Werry Employment
16 Application). In the Werry Employment Application and
17 accompanying disclosures and affidavits, French disclosed that he
18 had received, prepetition, \$7,500 as an "advance payment
19 retainer" (Retainer). The Retainer and fee agreement in the
20 Werrys' case were the same as those in the Danners' case. The
21 Retainer was considered advance payment for pre- and postpetition
22 services provided in the chapter 11 case. French disclosed that
23 he would charge an hourly fee for services and then credit the
24 services performed both before and after the Werrys' filing
25 against the Retainer. Additionally, French stated that he would
26 either refund any unearned portion of the Retainer or seek
27 additional compensation if the fees for services performed
28 exceeded the amount of the Retainer.

1 Also, in the Werry Employment Application and affidavit
2 submitted with it, French disclosed that the Retainer was
3 provided by Carol Duppong (Duppong). While the Werrys
4 acknowledged that their friend, Duppong, had paid the Retainer,
5 they agreed to pay for any fees over the Retainer amount.⁶
6 French disclosed that \$4,294.50 of the Retainer had already been
7 used to pay for prepetition services. Finally, French disclosed
8 that it had represented no interest adverse to the Werrys or the
9 estate.

10 The UST objected to the Werry Employment Application. The
11 UST objected because:

12 Counsel appears to have paid himself for post-petition
13 services that had not been performed as of the date of
14 payment. He states that he will account to the Court
15 for all services post-petition, but by implication that
16 is merely an accounting and not an application for the
17 Court to approve the fees paid pre-petition but earned
18 post-petition.

19 French made three main arguments in its response to the
20 UST's objection. First, French argued that the Retainer was not
21 a basis for denial of the Werry Employment Application, but that
22 the bankruptcy court could only deny employment if the attorney
23 is not disinterested or holds an interest adverse to the estate.
24 Second, French argued that because the Retainer was an advance
25 payment retainer, the bankruptcy court could review its

26 //

27 //

28 ⁶ The Werrys' schedules list Duppong as an unsecured,
nonpriority creditor holding a \$8,539 claim stemming from a loan.
Therefore, it appears that the Werrys borrowed the money from
Duppong to pay French.

1 reasonably under § 329.⁷ Third, French contended that
2 advance payment retainers were not unethical or impermissible
3 under the Bankruptcy Code or Idaho law.

4 A hearing on the Werry Employment Application was held on
5 July 19, 2011. The bankruptcy court took the matter under
6 advisement and subsequently issued a memorandum decision finding
7 that (1) French failed to adequately disclose his relationship to
8 Duppong, a creditor of the bankruptcy estate, and was potentially
9 not disinterested; and (2) the Retainer was not an advance
10 payment retainer and therefore was property of the estate, which
11 required authorization and approval for payment under § 330. For
12 these reasons, the bankruptcy court denied the Werry Employment
13 Application. It entered its order denying the Werry Employment
14 Application on August 26, 2011. The Werrys timely appealed.

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16 ⁷ 11 U.S.C. § 329.

17 (a) Any attorney representing a debtor in a case under this
18 title, or in connection with such a case, whether or not
19 such attorney applies for compensation under this title,
20 shall file with the court a statement of the compensation
21 paid or agreed to be paid, if such payment or agreement was
22 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.

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

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

1 **II. JURISDICTION**

2 The bankruptcy courts had jurisdiction pursuant to 28 U.S.C.
3 § 157(b)(2)(A) and § 1334(b). The Bankruptcy Appellate Panel
4 granted the Danners' and Werrys' motions for leave to appeal the
5 interlocutory orders; therefore, we have jurisdiction under
6 28 U.S.C. § 158.

7 **III. ISSUE**

8 Did the bankruptcy courts err in finding that the Retainers
9 were property of the debtors' estates, and therefore, that they
10 could only be drawn upon to the extent compensation is awarded
11 and authorized under § 330?

12 **IV. STANDARDS OF REVIEW**

13 Employment orders are reviewed for abuse of discretion.
14 COM-1 Info, Inc. v. Wolkowitz (In re Maximus Computers, Inc.),
15 278 B.R. 189, 194 (9th Cir. BAP 2002). A bankruptcy court abuses
16 its discretion if it bases a decision on an incorrect legal rule,
17 or if its application of the law was illogical, implausible, or
18 without support in inferences that may be drawn from the facts in
19 the record. United States v. Hinkson, 585 F.3d 1247, 1261-62 &
20 n.21 (9th Cir. 2009) (en banc); Ellsworth v. Lifescape Med.
21 Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP
22 2011). The bankruptcy court abuses its discretion if it makes a
23 clearly erroneous finding of fact. Hinkson, 585 F.3d at 1262. A
24 factual finding is clearly erroneous if it is "illogical,
25 implausible, or without support in the record." Retz v. Samson
26 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010) (citing
27 Hinkson, 585 F.3d at 1261-62 & n.21).

1 V. DISCUSSION

2 A. The Employment Application

3 Because the Danners and the Werrys are debtors-in-possession
4 acting in the capacity of a trustee, they are required to obtain
5 approval under § 327 for any professional they seek to employ.
6 See 11 U.S.C. § 1107. Valid employment under § 327 is a
7 prerequisite to compensation. Movitz v. Baker (In re Triple Star
8 Welding, Inc.), 324 B.R. 778, 790 (9th Cir. BAP 2005). Section
9 327 provides that:

10 with the court's approval, [a trustee] may employ one
11 or more attorneys, . . . or other professional persons,
12 that do not hold or represent an interest adverse to
the estate, and that are disinterested persons

13 11 U.S.C. § 327(a). Thus, in order to obtain court approval, two
14 conditions have to be satisfied: the professional (1) may not
15 hold or represent an interest adverse to the estate, and (2) must
16 be a disinterested person. Tevis v. Wilke, Fleury, Hoffelt,
17 Gould & Birney, LLP (In re Tevis), 347 B.R. 679, 687 (9th Cir.
18 BAP 2006). A "disinterested person" means a person that is not a
19 creditor, equity security holder or insider and does not have an
20 interest materially adverse to the interest of the estate or any
21 class of creditors or equity security holders. See 11 U.S.C.
22 § 101(14). A "creditor" is an "entity that has a claim against
23 the debtor that arose at the time of or before the order for
24 relief." 11 U.S.C. § 101(10).

25 Applications for employment must provide "full, candid and
26 complete" disclosure of the facts pertinent to a court's
27 determination of whether an attorney is qualified under § 327.
28 Mehdipour v. Marcus & Millichap (In re Mehdi-pour), 202 B.R. 474,

1 480 (9th Cir. BAP 1996); Neben & Starrett, Inc. v. Chartwell Fin.
2 Corp. (In re Park-Helena Corp.), 63 F.3d 877, 880 (9th Cir. 1995)
3 (attorneys must comply with strict disclosure requirements).
4 Rule 2014(a) mandates that an application for employment include
5 a verified statement of the proposed professional that sets forth
6 the professional's connections with the debtor, creditors, or any
7 other party in interest.

8 The UST did not object to the employment of French based on
9 any disqualification as a result of an adverse interest or
10 because French was not disinterested.⁸ Instead, the UST objected
11 to the proposed terms and conditions of French's employment.
12 Specifically, the UST contended that it was improper for French
13 to accept any prepetition fees for postpetition services without
14 receiving authorization by the bankruptcy court under the
15 requirements of § 330.⁹

17 ⁸ The bankruptcy court in the Werry case found that French
18 did not properly disclose that Duppong was a creditor of the
19 estate. Furthermore, it found that (although unclear) if the
20 Retainer was paid to French directly by Duppong, French likely
21 was not a disinterested person under § 327(a). Because we affirm
22 the bankruptcy court's decision to deny the Werry Employment
23 Application based on the analysis of the Retainer, we need not
24 address whether the bankruptcy court erred in finding that the
25 disclosure was inadequate or that French was potentially not
26 disinterested.

24 ⁹ Prepetition payment for prepetition services are not
25 considered property of the estate and such payment is solely
26 reviewed for reasonableness under § 329. See In re C&P Auto
27 Transp., Inc., 94 B.R. 682, 687 (Bankr. E.D. Cal. 1988).
28 However, review under § 329 is not undertaken as a matter of
course, but by motion made by any party in interest or on the
court's own initiative. Rule 2017(a). Thus, the use of § 329

(continued...)

1 The bankruptcy court must ensure that attorneys who
2 represent the debtor do so in the best interests of the estate.
3 Id. at 880. Professionals seeking employment must disclose,
4 along with the employment application, the terms and conditions
5 of any compensation agreement. Rule 2014(a), Local Bankruptcy
6 Rule (LBR) 2014.1(a)(1). As a result, courts examine proposed
7 fee arrangements when deciding whether to approve employment
8 applications. Additionally, § 328 contemplates that employment
9 of professionals under § 327 will be based on reasonable terms
10 and conditions. 11 U.S.C. § 328(a). Thus, a bankruptcy court
11 may properly review an employment application for the
12 reasonableness of the compensation agreement at the outset of a
13 case. In re Heritage Mall Assocs., 184 B.R. 128, 131 (Bankr. D.
14 Or. 1995).

15 Section 328(a) provides that the debtor-in-possession, with
16 the court's approval, "may" employ a professional under § 327 "on
17 any reasonable terms and conditions of employment, including on a
18 retainer [basis] . . ." 11 U.S.C. § 328(a). The operative words
19 are "may" and "reasonable." A bankruptcy court has wide
20 discretion to decide whether a proposed arrangement is or is not
21 reasonable or appropriate under the circumstances of a particular
22 case. See Official Comm. Of Unsecured Creditors v. Harris (In re
23 Sw. Food Distribs., LLC), 561 F.3d 1106, 1112 (10th Cir. 2009)
24 (considering attorney fees with the employment application is
25

26 ⁹(...continued)
27 shifts the burden from the debtor and his attorney to demonstrate
28 the fees spent in a case are reasonable to the creditors and the
court to identify an issue as to excessive or unreasonable fees.

1 judicially efficient). If a bankruptcy court does decide to
2 approve a professional's employment and its proposed compensation
3 arrangement under § 328(a), then a bankruptcy court's later
4 inquiry into the reasonableness of the fees is limited to whether
5 the agreement proved to be "improvident in light of developments
6 not capable of being anticipated at the time of the fixing of
7 such terms and conditions." 11 U.S.C. § 328(a).

8 The Ninth Circuit has held that if an attorney wants
9 approval of its compensation arrangement or retention agreement
10 at the outset of a case, he must unambiguously specify that he
11 seeks approval under § 328 in his employment application,
12 otherwise the attorney must justify his fees as reasonable for
13 actual and necessary services and be approved by the bankruptcy
14 court under the application procedure of § 330. Circle K. Corp.
15 v. Houlihan, Lokey, Howard & Zukin, Inc. (In re Circle K Corp.),
16 279 F.3d 669, 673-74 (9th Cir. 2002).

17 Here, French did not seek approval of his compensation
18 arrangements with the Danners or Werrys under § 328.
19 Nevertheless, French argues that because the Retainer was an
20 advance payment retainer, it was not subject to review under
21 § 330. He argues that because the Retainer was not property of
22 the estate and was paid prepetition, that the only review that
23 applied was a review for reasonableness under § 329. Thus, in
24 order to assess French's argument, we must turn to an analysis of
25 the nature of the Retainers.

26 **B. The Retainers**

27 There are several types of retainers used by attorneys in
28

1 fee arrangements.¹⁰ For example, there is a "classic" retainer
2 that is a retaining fee given to insure and secure an attorney's
3 future services and induce him to act for the client. Rus,
4 Miliband & Smith, APC v. Yoo (In re Dick Cepek, Inc.), 339 B.R.
5 730, 736 n.5 (9th Cir. BAP 2006). An "advance payment retainer"
6 is defined "as one in which the debtor pays for all or a portion
7 of the services to be rendered by the attorney in advance, or in
8 other words, a 'flat fee' arrangement." In re Dearborn Constr.,
9 Inc., 2002 WL 31941458, *5 (Bankr. D. Idaho, Dec. 20, 2002); In
10 re GOCO Realty Fund I, 151 B.R. 241, 251 (Bankr. N.D. Cal. 1993);
11 see also, In re Dick Cepek, Inc., 339 B.R. at 736 (advance
12 payment retainer occurs when client pre-pays for expected
13 services). Classic and advance payment retainers are considered
14 to be earned-on-receipt entitling an attorney to the retainer at
15 the time of payment. In re Dick Cepek, Inc., 339 B.R. at 736.
16 Thus, once the client pays the retainer, the client no longer has
17 an interest in the money, and the retainer becomes property of
18 the attorney.

19 A more common type of retainer is the security retainer. "A
20 security retainer is generally held as security for payment of
21 fees for future services to be rendered by the attorney." Id. A
22 security retainer differs from an earned-on-receipt retainer
23 because the money remains property of the client until the
24 attorney applies it to charges for services actually rendered;

25

26 ¹⁰ "The term 'retainer' has become inherently ambiguous
27 [and] . . . has come to be used loosely in various connotations
28 to include the compensation paid to an attorney for services."
In re C&P Auto Transp., Inc., 94 B.R. at 686.

1 any unearned funds are returned to the client. Id. citing
2 3 COLLIER ON BANKRUPTCY ¶ 328.02[3][b][I] (15th ed. 2005). Because a
3 security retainer remains the client's property until it is
4 earned and applied to services rendered, it must be held in an
5 attorney's client trust account. Thus, security retainers are
6 routinely held to be property of the estate. In re Blackburn,
7 448 B.R. 28, 35 (Bankr. D. Idaho 2011).

8 French's main argument on appeal is that the bankruptcy
9 courts' refusal to approve the Danner Employment Application and
10 the Werry Employment Application was based on an erroneous view
11 that advance payment retainers are impermissible under the
12 Bankruptcy Code. He asserts that there cannot be a prohibition
13 on the use of advance payment retainers because they are critical
14 to ensure compensation in chapter 7 cases.¹¹

15 The bankruptcy courts, however, did not deny the Danner
16 Employment Application and the Werry Employment Application
17 because of the use of an advance fee retainer. Indeed, the
18 bankruptcy courts agreed that if the Retainers were advance
19 payment retainers then the debtors and their estates would not
20 have an interest in the retainers. However, the bankruptcy
21

22 ¹¹ Chapter 7 debtors' attorneys not employed under § 327 may
23 not draw on a security retainer in compensation for fees because
24 the retainer is property of the estate, and to do so would
25 undermine § 330 and the holding of Lamie v. United States
26 Trustee, 540 U.S. 526, 538-39 (2004). However, because flat fee,
27 or advance payment retainers, belong to the attorney when paid,
28 Lamie allows attorneys to be paid a reasonable advance/flat fee
retainer without approval under § 327 or § 330. See In re
Blackburn, 448 B.R. at 37. "Indeed the Code anticipates these
arrangements." Lamie, 540 U.S. at 538 (citing § 329).

1 courts reviewed the nature of the Retainers and determined that
2 the Danners and the Werrys retained an interest in them. As a
3 result, even though French steadfastly characterizes the
4 Retainers as advance payment retainers, the bankruptcy courts
5 found that they were not actually advance payment retainers but
6 security retainers. In re C&P Auto Transp., Inc., 94 B.R. at 687
7 (the substance, not the name of a retainer determines its nature
8 and legal attributes). French does not articulate in his
9 appellate briefs why the bankruptcy courts clearly erred in
10 finding that the Retainer was a security retainer, and upon
11 reviewing the records, we cannot say the finding was illogical or
12 implausible.

13 The issue of whether a debtor's interest in a retainer is
14 property of the estate is a question of federal law. McCarthy,
15 Johnson & Miller v. N. Bay Plumbing, Inc. (In re Pettit),
16 217 F.3d 1072, 1078 (9th Cir. 2000); In re Blackburn, 448 B.R. 28
17 at 35. However, "bankruptcy courts must look to state law to
18 determine whether and to what extent the debtor has any legal or
19 equitable interests in property as of the commencement of the
20 case." In re Pettit, 217 F.3d at 1078 citing Butner v. United
21 States, 440 U.S. 48, 55 (1979) ("Property interests are created
22 and defined by state law."). Thus, we review whether under Idaho
23 law a client/debtor maintains an interest in an advance payment
24 retainer. See also, In re McDonald Bros. Constr., Inc., 114 B.R.
25 989, 996 (Bankr. N.D. Ill. 1990) (If under state law ownership of
26 a retainer passed to the professional, the client/debtor would
27 have no interest in the retainer and the retainer would not be
28 property of the estate; therefore, earned-on-receipt retainers

1 could be taken by professionals without prior court approval.).

2 Idaho law allows for advance payment retainers, provided the
3 fee is reasonable. See State ex. rel. Moore v. Scroggie,
4 704 P.2d 364, 370 (Idaho Ct. App. 1985); see also, Idaho Rules of
5 Professional Conduct (IRPC), commentary, 1.5 ("Fees") at [4].¹²
6 However, any advance payment made to an attorney is not
7 considered the attorney's property until it is actually earned.
8 Id.; IRPC 1.16(d). Additionally, IRPC 1.15(c) directs attorneys
9 to deposit into a client trust account legal fees and expenses
10 that have been paid in advance, to be drawn on by the attorney
11 only as fees are earned or expenses incurred.

12 As the bankruptcy courts noted, in order for French to
13 properly obtain an interest in the Retainers, he had to have
14 earned the fees on receipt. In the disclosures of compensation
15 filed with the Danner Employment Application and with the Werry
16 Employment Application, French indicated that in consideration
17 for the Retainers, French would: (1) provide an analysis of the
18 Danners' and Werrys' financial situations and advise them on
19 whether to file bankruptcy; (2) prepare and file bankruptcy
20 petitions, schedules and plans; (3) represent them at the § 341
21 meeting of creditors and plan confirmation hearing; and, (4) with
22 respect to the Werrys, represent them in adversary proceedings
23 and other contested bankruptcy matters. However, there was no
24 indication that the Retainer amount of \$7,500 would completely

25
26 ¹² Idaho law regarding advance payment retainers is scant,
27 limited essentially to Scroggie. Additionally, there does not
28 appear to be an Ethics Opinion interpreting the IRPC or
discussing advance fee retainers.

1 compensate French for those tasks. Although French disclosed
2 that \$4,294.50 of the Werrys' Retainer had been drawn on for non-
3 specified prepetition services, French did not otherwise indicate
4 what portion of the Retainers had been billed or used to complete
5 any of the specific enumerated tasks.¹³

6 French stated that he would draw on the Retainers only as
7 the time and services were expended on the cases and that any
8 unearned portion of the Retainers would be refunded. French also
9 stated that he would seek additional compensation if the fees for
10 services provided exceeded the amount of the Retainers.
11 Moreover, French indicated that his fees would be based on hourly
12 billing rates and that he would provide regular detailed
13 statements showing the work done, time spent, and the charges
14 incurred and deducted from the Retainers. These facts support
15 the bankruptcy courts' findings that the Retainers were not true
16 earned-on-receipt or advance payment retainers, but instead were
17 security retainers where fees are determined and earned as the
18 hours are worked in the respective cases and the retainers are
19 used to provide a secure source of payment for the past and
20 future services.

21 Based on the information contained in the Danner Employment
22 Application, Werry Employment Application, and the accompanying
23 fee agreements and disclosures, French concedes that the
24 Retainers were not entirely earned prepetition and that they were
25 not anticipated to fully compensate French for enumerated past
26

27 ¹³ French did not indicate that any of the Danners' Retainer
28 had been used for prepetition services.

1 and future services that he expected to perform in the bankruptcy
2 cases. Thus, we conclude that the bankruptcy courts' findings
3 that the Retainers were not advance payment retainers, but were
4 instead security retainers, were not clearly erroneous.

5 The consequence of the bankruptcy courts' findings that the
6 Retainers were security retainers is that the Retainers were
7 property of the Danners' and Werrys' bankruptcy estates. French
8 acknowledges that approval of compensation from funds of the
9 estate requires the authorization and approval under §§ 330 and
10 331. See, e.g., Appellants' Opening Brief, BAP No. ID-11-1525 at
11 25; Appellants' Opening Brief, BAP No. ID-11-1315 at 10-11.
12 Accordingly, we conclude that the bankruptcy courts did not err
13 in denying the Danner Employment Application and the Werry
14 Employment Application because they failed to contemplate
15 approval of the Retainers under § 330.

16 VI. CONCLUSION

17 For the reasons stated above, we AFFIRM the order of the
18 bankruptcy court that denied the Danner Employment Application in
19 BAP No. ID-11-1315 and the order of the bankruptcy court that
20 denied the Werry Employment Application in BAP No. ID-11-1525.

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