

NOT FOR PUBLICATION

JUL 26 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-06-1232-PaDMo
)		
JOHN D. CASTELLUCCI,)	Bk. No.	SV 01-20176-KT
)		
Debtor.)		
_____)		
LINDA CASTELLUCCI,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JAMES ANDREW HINDS, JR.,)		
d/b/a/ THE LAW OFFICES OF)		
JAMES ANDREW HINDS, JR.,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 22, 2007
at Pasadena, California

Filed - July 26, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Kathleen T. Thompson, Bankruptcy Judge, Presiding.

Before: PAPPAS, DUNN and MONTALI, Bankruptcy Judges

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 **INTRODUCTION**

2 The bankruptcy court approved some, but not all, of the
3 attorney fees and costs sought by Appellee James Andrew Hinds, Jr.
4 ("Hinds") arising from his representation of debtor John D.
5 Castelluci during his chapter 11² case. Because the court found
6 that Hinds had violated his obligations under the Bankruptcy Code
7 and Rules to disclose the details of his legal relationships with
8 others, and because Hinds received substantial payments during
9 pendency of the chapter 11 case without prior notice to parties or
10 approval by the bankruptcy court, the court declined to award
11 Hinds the full amount of fees he requested, and also ordered him
12 to disgorge to the chapter 7 trustee a portion of the unauthorized
13 payments he received.

14 While Hinds did not appeal the bankruptcy court's ruling,
15 Appellant Linda Castelluci, the debtor's spouse, did. She argues
16 that the bankruptcy court erred when it struck her objection to
17 Hinds' fee application because she lacked standing. She also
18 contends the bankruptcy court should have denied Hinds any fees or
19 expenses, and should have ordered him to disgorge all the payments
20 he received.

21 We agree that Appellant had standing to object to Hinds' fee
22 application. We REVERSE the bankruptcy court's order and REMAND
23 this matter to the bankruptcy court with instructions that it
24 consider Appellant's objection in further proceedings.

25
26 ² Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
enacted and promulgated prior to the effective date (October 17,
2005) of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, April 20,
2005, 119 Stat. 23.

1 **FACTS**

2 Separate involuntary chapter 7 petitions were filed in the
3 bankruptcy court against John D. Castellucci ("Debtor") and his
4 wife, Linda Castellucci ("Appellant"), on October 29, 2001. They
5 both engaged attorney Hinds to represent them in the bankruptcy
6 cases pursuant to a fee agreement dated October 31, 2001 ("Fee
7 Agreement"). The Fee Agreement, which both Debtor and Appellant
8 signed, provided they would be jointly and severally responsible
9 for all amounts due to Hinds for any services provided in either
10 case. At the same time, Debtor, Appellant and Hinds signed a
11 conflicts waiver, which provided, "At the present time none of us
12 see any existing conflicts in the existing and potential
13 representation of each of you, in these matters"

14 The involuntary petition filed against Appellant was
15 dismissed by the bankruptcy court on February 4, 2002. But an
16 order for relief was entered in Debtor's case on November 30,
17 2001. The case was converted to a chapter 11 case on Debtor's
18 motion on the same day.

19 On January 2, 2002, an application seeking bankruptcy court
20 approval for Hinds' law firm to be employed as counsel for Debtor
21 as debtor-in-possession (the "Employment Application") was filed.
22 The Employment Application was supported by the declaration of
23 Paul R. Shankman, Of Counsel to Hinds' firm. The Employment
24 Application disclosed that Hinds represented Appellant in her
25 involuntary case. It also contains the following statement:

26 At the present time there does not appear to be
27 any conflict of interest in the proposed
28 representation of the Debtor's wife in her
involuntary bankruptcy case. Counsel
acknowledges that should an actual conflict
arise counsel will make a supplemental report to

1 this Court and withdraw as counsel for Linda
2 Castellucci in her case. Should a conflict be
3 identified, counsel will [sic] a supplement and
4 amendment to this Application will be filed and
5 served seeking further instructions from this
6 Court.

7 In addition, as later quoted by the bankruptcy court in its
8 decision, the Employment Application recites:

9 Paragraph 4 of the Employment Application
10 states: "The Firm received no pre-petition
11 retainer as part of this proposed engagement.
12 During the so-called 'gap period,' the Debtor
13 paid the Firm \$7,500, all of which has been paid
14 for services rendered prior to the adjudication
15 of this case, including payment of the fee
16 required upon conversion of this case to one
17 under Chapter 11, Title 11 of the Code, and as
18 part of the proposed engagement in the
19 involuntary case filed against the Debtor's wife
20 in her involuntary case (In re Linda
21 Castellucci, Case No. SV-01-20177 AG). As of
22 the date of this Application the Firm has filed
23 a Rule 12(b)(1) Motion for Reconsideration of
24 this ruling. Should the Linda Castellucci case
25 proceed before this Court and should Mrs.
26 Castellucci elect to retain the Firm as her
27 counsel in her case, a supplement and amendment
28 to this Application will be filed and served."

Paragraph 5 of the Employment Application
states: "It is contemplated that the Debtor may
not be able to compensate his counsel for work
performed during the course of this case without
the assistance of certain third parties such as
his employer(s). Should payment from any third-
party source be required the Debtor and proposed
general counsel will notify the Office of the
United States Trustee and this Court of the
source and amount of said proposed payment."

Memorandum on Application for Fees and Expenses by Law Offices of
James Andrew Hinds, Jr. (the "Fee Memorandum") at 5.

The Employment Application discloses that after the filing of
the involuntary petition against Debtor, and before conversion of
his case to a chapter 11 case, Hinds received a \$7,500 payment
toward his fees. The declaration accompanying the Employment

1 Application states that no fees were owed to Hinds on the date of
2 conversion.

3 In addition, attached to the Employment Application is a copy
4 of the Disclosure of Compensation of Attorney for Debtor which had
5 been filed in Debtor's bankruptcy case by Hinds on December 27,
6 2001, presumably to comply with Rule 2016(b).³ This disclosure
7 represents that Hinds "will seek payment of compensation [for his
8 post-petition services] upon duly noticed interim fee
9 applications."

10 There is no reference to the terms of the Fee Agreement in
11 the Employment Application or the accompanying declaration. Hinds
12 later acknowledged that the Employment Application and declaration
13 were deficient in that:

14 The Employment Application disclosed that Hinds
15 represented Appellant in her involuntary case,
16 but Hinds failed therein to disclose: (1) that
17 Appellant was a guarantor of the Debtor's fees
18 and costs; (2) that Appellant asserted a secured
19 claim against the residence in Malibu scheduled
20 on the Debtor's Schedule D in the sum of \$1.3
21 million [footnote omitted]; and (3) he did not
22 attach a copy of the Engagement Letter to the
23 Employment Application [footnote omitted].

24 ³ Rule 2016(b) provides:

25 **Disclosure of Compensation Paid or Promised to**
26 **Attorney for Debtor.** Every attorney for a debtor, whether
27 or not the attorney applies for compensation, shall file
28 and transmit to the United States trustee within 15 days
after the order for relief, or at another time as the
court may direct, the statement required by § 329 of the
Code including whether the attorney has shared or agreed
to share the compensation with any other entity. The
statement shall include the particulars of any such
sharing or agreement to share by the attorney, but the
details of any such sharing or agreement for the sharing
of compensation with a member or regular associate of the
attorney's law firm shall not be required. A supplemental
statement shall be filed and transmitted to the United
States trustee within 15 days after any payment or
agreement not previously disclosed.

1 Hinds' Response Br. at 4.

2 The bankruptcy court entered an order approving the
3 Employment Application on January 8, 2002. That order specifies
4 that "[c]ompensation shall be awarded [to Hinds] in accordance
5 with §§ 328, 330 and 331 of the Bankruptcy Code."

6 During the course of Debtor's chapter 11 case, roughly on a
7 monthly basis, Hinds filed declarations, again presumably as
8 required by Rule 2016(b), disclosing his receipt of certain cash
9 payments for his services in Debtor's bankruptcy case (the
10 "2016(b) declarations"). Except for the amounts and dates of the
11 payments, the twenty-five 2016(b) declarations submitted to the
12 bankruptcy court are identical, and recite that:

13 I, James Andrew Hinds, Jr., declare and
14 state as follows:

15 * * *

16 2. On or about [date], the Debtor paid to
17 the Law Offices of James Andrew Hinds, Jr. the
18 total sum of [amount] for professional fees and
19 costs incurred on a post-petition basis in this
20 case. This payment is consistent with the Order
21 approving employment of general reorganization
22 counsel in this matter, the provisions of
23 Chapter 11, Title 11, and is subject to final
24 review and allowance by this Court in accordance
25 with law.

26 I declare under penalty of perjury,
27 pursuant to the laws of the United States of
28 America, that the foregoing is true and correct.

Executed this [date] at Los Angeles,
California.

/signature/
James Andrew Hinds, Jr.

The 2016(b) disclosures reveal that, all told, Hinds received

1 at least \$289,099.71 in fee payments during the chapter 11 case.⁴

2 On May 19, 2003, Schaefer Oil Co., Inc. ("Schaefer Oil")
3 filed a petition for relief under chapter 11. Case no. SV 03-
4 14298 AG. Debtor was the president, as well as the sole member of
5 the board of directors, of Schaefer Oil, and signed all documents
6 on behalf of that company. On June 17, 2003, Schaefer Oil applied
7 to the bankruptcy court to employ Hinds as its attorney. The
8 Schaefer Oil employment application and accompanying declaration
9 disclosed that Hinds was currently representing Debtor in his
10 chapter 11 case. The bankruptcy court approved the employment
11 application on September 4, 2003. Schaefer Oil's bankruptcy case
12 was eventually dismissed on January 8, 2004.

13 In the meantime, at the request of Debtor's creditors, his
14 chapter 11 case was converted to a chapter 7 case on February 5,
15 2004, and a chapter 7 trustee was appointed.

16 Hinds continued to represent Debtor until November 2004.
17 At about that time, Hinds filed a complaint against Appellant in
18 California Superior Court (the "Complaint"). In the Complaint,
19 based upon the Fee Agreement, Hinds sought recovery from Appellant
20 for fees for services in the approximate amount of \$320,000. A
21 significant portion of the fees which Hinds sought from Appellant
22 arose from services he provided to Debtor as counsel in his
23 bankruptcy case.⁵

24

25

26 ⁴ None of the 2016(b) disclosures include copies of any
payment instruments revealing the source of the payments.

27

28 ⁵ Appellant caused this action to be removed to the
bankruptcy court on January 5, 2005. On November 14, 2006, the
bankruptcy court stayed proceedings in that action pending the
outcome of this appeal.

1 On November 8, 2005, the bankruptcy court approved a
2 Settlement Agreement and Release executed by Debtor, Appellant,
3 the chapter 7 trustee in Debtor's bankruptcy case, and Schaefer
4 Oil. As part of the settlement, Appellant assigned to the chapter
5 7 estate her right to any disgorgement from Hinds that she might
6 be entitled to receive, in exchange for a 25 percent interest in
7 any net recovery obtained and actually collected from Hinds on
8 account of disgorgement or other claims against Hinds.

9 Hinds had filed no applications for approval of any of his
10 fees and expenses in Debtor's bankruptcy case. On December 16,
11 2005, the chapter 7 trustee filed a motion to fix a bar date for
12 filing requests for payment of chapter 11 administrative claims.
13 Apparently in response, on January 3, 2006, Hinds filed an
14 "Application for Payment of: Final Fees and/or Expenses (11 U.S.C.
15 § 330)" (the "Fee Application"). The Fee Application sought
16 approval by the bankruptcy court of fees for Hinds' services in
17 Debtor's bankruptcy case of \$366,740.00, and reimbursement of
18 expenses of \$30,556.20, for a total of \$397,296.20.

19 The Fee Application also sought court approval of several
20 payments that had been made during the pendency of Debtor's
21 chapter 11 case to Hinds totaling \$296,599.71, presumably
22 including those reflected in the 2016(b) disclosures as having
23 been made "by Debtor." But, for the first time, Hinds disclosed
24 in the Fee Application that the source of these payments was not
25 just Debtor's post-petition income, but some payments had been
26 made to Hinds by Schaefer Oil, and by Debtor's creditor Lou

27

28

1 Lubensky.⁶ Hinds alleged in the Fee Application that, except for
2 the \$7,500 retainer and three previously undisclosed payments of
3 \$10,000, \$2,000, and \$3,000, all prior payments he received had
4 been contemporaneously disclosed in the various 2016(b)
5 disclosures. As a result of the payments, the Fee Application
6 requested payment of net fees and costs from the bankruptcy estate
7 to Hinds totaling \$100,696.49 (i.e., \$397,296.20 less
8 \$296,559.71).

9 Oppositions to the Fee Application were filed by the chapter
10 7 trustee, in which the U.S. Trustee joined, by a creditor,
11 Williams, and by Appellant. A hearing was conducted by the
12 bankruptcy court on the Fee Application on January 31, 2006.
13 Hinds appeared in person, and Appellant, the chapter 7 trustee,
14 the U.S. Trustee, and creditors Williams and Capstone Capital were
15 represented by counsel. The bankruptcy court heard comments and
16 argument from the parties and took the issues under submission.

17 The bankruptcy court entered its decision on the issues on
18 June 15, 2006 (the "Fee Memorandum"). The bankruptcy court
19 approved fees for Hinds in the amount of \$366,740, and costs in
20 the amount of \$30,566, essentially as Hinds had requested.
21 However, because the bankruptcy court found that Hinds had engaged
22

23 ⁶ The record is not clear regarding the nature of the
24 relationship between Lubensky and Debtor. However, a fair reading
25 would indicate that it was not a simple, arms-length debtor-
26 creditor relationship. See Fee Memorandum at 8 n. 6 ("Lubensky
27 did not proceed with his relief from stay motion, filed on January
28 11, 2002, or move forward with foreclosure while allowing the
Debtors to stay in the home without payment on their obligations
to Lubensky. . . . In addition, it appears that Lubensky
guaranteed Hinds' fees in the Schaefer Oil case and personally
funded a buy-out of a major creditor's interest in the Schaefer
Oil case. Hinds describes Lubensky as the Debtor's 'business
partner.'")

1 in what it described as "multiple, material breaches of a chapter
2 11 debtor's counsel's obligations under the Bankruptcy Code and
3 Rules," the court reduced Hinds' fee award by 15 percent
4 (\$55,011), together with another \$50,471.17 representing the
5 attorney's fees incurred by the chapter 7 trustee in objecting to
6 Hinds' Fee Application.⁷ An additional \$30,000 of Hinds' fees was
7 ordered subordinated to the payment of all other claims in the
8 case. Therefore, under the bankruptcy court's decision, the net
9 amount of compensation Hinds could receive as a chapter 11
10 administrative claimant was \$231,247.83.

11 In addition to reducing his fees, the bankruptcy court ruled
12 that Hinds must disgorge \$121,793.70 of the fee payments he had
13 received to the trustee. The court indicated that it may consider
14 further disgorgement if it became necessary to pay the claims of
15 creditors with a higher priority than Hinds, or to equalize
16 payment of claims of equal priority.⁸

17 The bankruptcy court explained the basis for its fee
18 reduction and disgorgement order in these words:

19 Hinds failed to make adequate disclosures in the
20 Employment Application in violation of Rule
21 2014(a). Specifically, he failed to disclose
22 that a specific third party, namely Linda
Castellucci, was considered a co-obligor for

23 ⁷ This amount was fixed later, after the trustee filed a
24 statement documenting the extent of his attorney fees. Hinds does
not challenge this amount on appeal.

25 ⁸ We cannot determine, based on the record, the actual
26 financial impact of the bankruptcy court's decision on Hinds.
27 If there are sufficient funds available for distribution to pay
28 all chapter 7 and 11 administrative claims, Hinds could receive
the full amount of fees and costs awarded to him by the bankruptcy
court. If the funds in the bankruptcy estate are inadequate to
pay chapter 11 administrative claims in full, Hinds would share
pro-rata with other creditors holding claims of similar priority.
See § 726(a), (b).

1 payment of fees incurred in representation of
2 the Debtor. Hinds failed to disclose that third
3 party obligors and third party payors were
4 creditors or alleged creditors of the estate.
5 Thereafter, Hinds failed to accurately disclose
6 the identity of persons tendering payments on
7 his fees, totaling \$121,793.70. Hinds violated
8 Rule 2016(b) by failing to file required
9 disclosures as to four payments totaling
10 \$17,000. Hinds failed to make timely
11 application for approval of his fees. He
12 received at least \$128,543.70 in 2002, \$142,000
13 in 2003, and \$17,000 in 2004. No fee
14 application was filed until January 2006. This
15 substantial delay prejudiced the ability of
16 creditors and the court to evaluate the services
17 rendered and the reasonableness of fees. The
18 court finds that the delay was unreasonable and
19 that Hinds knew or should have known that the
20 delay would impair or, if the case were
21 dismissed, preclude review of Hinds' fees.
22 Nothing in the record suggests that Hinds held
23 the fees in his trust account until approved by
24 the court.

25 Memorandum Decision at 16.

26 While sustaining the various objections to the Fee
27 Application filed by the chapter 7 trustee, U.S. Trustee, and
28 Williams, in its Fee Memorandum, the bankruptcy court struck the
objection filed by Appellant because, in the court's opinion, she
lacked standing to contest Hinds' fee request.

The bankruptcy court entered its Fee Memorandum as an order
on June 16, 2006. Appellant filed a timely appeal.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
§§ 1334 and 157(b) (2) (A) and (B). We have jurisdiction pursuant
to 28 U.S.C. § 158.

1 **ISSUE**

2 The sole issue we address is whether Appellant had standing
3 to object to the Fee Application.

4
5 **STANDARD OF REVIEW**

6 Standing to object in the trial court is a jurisdictional
7 question that we review de novo. Nat'l Org. for Women v.
8 Scheidler, 510 U.S. 249, 253 (1994); Paine v. Dickey (In re
9 Paine), 250 B.R. 99, 104 (9th Cir. BAP 2000). See also McClellan
10 Fed. Credit Union v. Parker (In re Parker), 193 B.R. 525, 527 (9th
11 Cir. BAP 1996) (holding that a similar standard applies in
12 determining standing on appeal).

13
14 **DISCUSSION**

15 In an interesting variation on the usual scenario, Hinds, the
16 professional whose fee request was reduced by the bankruptcy
17 court, has not appealed,⁹ and instead asks us to affirm the
18 bankruptcy court's decision as a proper exercise of its
19 discretion. He acknowledges that he violated the Bankruptcy Code
20 and Rules in connection with his employment and service as counsel
21 for the debtor-in-possession, and he concedes that the fee
22 reduction and other measures employed by the bankruptcy court were
23 calculated and appropriate responses to his conduct under the
24 circumstances.

25 Appellant, on the other hand, insists that the bankruptcy
26 court erred in deciding she lacked standing to object to Hinds'
27 fee application. She also urges us to reverse the bankruptcy

28 ⁹ Hinds also filed no cross-appeal in response to Appellant's appeal.

1 court's order because it did not disallow Hinds' request for
2 compensation and expenses in any amount, and because it did not
3 require him to fully disgorge all the payments he received.

4 We agree with Appellant that she had standing to object to
5 Hinds' application in the bankruptcy court. As a result, a
6 reversal of the bankruptcy court's decision and a remand is
7 required.¹⁰

8 Standing to object to a fee application in the bankruptcy
9 court has both a constitutional and prudential dimension.

10 Constitutional standing requires that a party:

11 must demonstrate that "(1) it has suffered an
12 'injury in fact' that is (a) concrete and
13 particularized and (b) actual or imminent, not
14 conjectural or hypothetical; (2) the injury in
15 fairly traceable to the challenged conduct of
the [other party]; and (3) that it be likely, as
opposed to merely speculative, that the injury
will be redressed by a favorable decision.

16 City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004)
17 (quoting Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),
18 Inc., 528 U.S. 167, 180-181 (2000)).

19 Appellant meets the constitutional threshold for standing to
20 object to the Fee Application in the bankruptcy court. She holds
21 a particularized, concrete, judicially cognizable interest in the
22 outcome of the dispute over the Fee Application, in that she may

23
24 ¹⁰ Under these circumstances, we decline Appellant's
25 invitation to review the substance of the bankruptcy court's fee
26 award and disgorgement order for an abuse of discretion. It is
27 true that the chapter 7 trustee, joined by the United States
28 Trustee, objected to the Fee Application, as did creditor
Williams, and those objections are substantially similar to the
objections asserted by Appellant. Nevertheless, Appellant's
objection goes further than the others by asking that Hinds'
employment be deemed void ab initio, and of course, she has a
direct stake in the outcome. Thus we decline to act as a trial
court and deal with the merits of her objections before they have
been considered by the bankruptcy court.

1 be liable under the Fee Agreement for any amounts awarded to Hinds
2 that are not paid to him by the bankruptcy estate. There is also
3 causal connection between the bankruptcy court's approval of the
4 Fee Application and Appellant's potential liability to Hinds. And
5 it was certainly within the power of the bankruptcy court to
6 redress Appellant's alleged injury by denying Hinds' request.
7 Assuming Appellant's objection was sustained, the bankruptcy court
8 could have denied Hinds' right to recover any fees or expenses
9 incurred in Debtor's case. §§ 327(c); 330(a).

10 Appellant also has a potential property interest in any funds
11 ordered disgorged by Hinds. Pursuant to the Settlement Agreement
12 and Release she executed with the chapter 7 trustee in Debtor's
13 bankruptcy case, which was approved by the bankruptcy court,
14 Appellant is entitled to receive 25 percent of any net recovery
15 obtained and actually collected from Hinds on account of
16 disgorgement or other affirmative claims against Hinds.

17 Based upon these interests, clearly, then, Appellant
18 satisfies the constitutional standard for standing to object to
19 the Fee Application.

20 Appellant also enjoys prudential standing under the
21 Bankruptcy Code to object to Hinds' fees. In doing so, Appellant
22 must be asserting her own rights, not those of other parties, and
23 her interest must fall within the zone of interests protected by
24 the Bankruptcy Code. Dunmore v. United States, 358 F.3d 1107,
25 1112 (9th Cir. 2004). While the Code does not specify which
26 parties may object to an estate professional's application for
27 approval of compensation and expenses, under § 330(a) and Rule
28 2002(a)(6), among others, "parties in interest" are entitled to

1 receive notice of the filing of, and the hearing concerning, such
2 application. Presumably, the same parties in interest entitled to
3 notice of the filing and hearing on a fee application would, in
4 response to the notice, have some right to be heard.¹¹ We have
5 held that a party holding a "pecuniary interest" in property of
6 the estate is a party in interest. Hasso v. Mozsgai (In re La
7 Sierra Fin. Servs.), 290 B.R. 718, 728 (9th Cir. BAP 2002).
8 Therefore, under these facts, we conclude that Appellant had
9 standing to challenge Hinds' application for fees.

10
11 **CONCLUSION**

12 We REVERSE the bankruptcy court's decision striking and
13 refusing to consider Appellant's objection to the Fee Application
14 because she lacked standing. Because Appellant has argued that
15 Hinds should receive no fees from the bankruptcy estate, and
16 should be ordered to disgorge all payments he received, we REMAND
17 this matter to the bankruptcy court for further proceedings to
18 consider the merits of Appellant's objection.

19
20
21 PAPPAS, Bankruptcy Judge, concurring:

22 The Panel resolves this appeal by holding that Appellant had
23 standing to object to Hinds' fee application. I concur with the
24

25 ¹¹ The Code grants parties in interest a broad right to be
26 heard in chapter 11 cases. See § 1109(b) (providing that, in a
27 chapter 11 case, a party in interest "may raise and may appear and
28 be heard on any issue in a case") While Hinds' fees and
costs were considered only after Debtor's bankruptcy case was
converted to a chapter 7 case, the services in question, and
Hinds' conduct under examination, all occurred while the case was
in chapter 11. In this context, we see little reason to question
Appellant's statutory right to be heard in the chapter 7 case.

1 Panel's decision concerning this narrow issue, and that a remand
2 to the bankruptcy court is therefore required.

3 As noted above, the Panel does not address the merits of
4 Appellant's multiple arguments urging that, based upon his conduct
5 in this case, Hinds should receive no fees and expenses from the
6 bankruptcy estate, and that he should be ordered to disgorge all
7 payments he did receive. While I am confident that, upon remand,
8 the bankruptcy court will give serious consideration to her
9 arguments, I write separately to acknowledge the legal
10 significance of Appellant's contentions, and to highlight the many
11 facts in the record which support Appellant's concerns.¹²

12
13 I.

14 To put what follows in context, and before turning to the
15 facts, a brief review of the applicable provisions of the Code,
16 Rules and case law is in order.

17 The bankruptcy court may, but need not, award compensation to
18 bankruptcy estate professionals under § 330(a). The relevant
19 provisions specify that:

20 (a) (1) After notice to the parties in interest
21 and the United States Trustee and a hearing, and
22 subject to sections 326, 328, and 329, the court
23 may award to a trustee, an examiner, a
24 professional person employed under section 327
25 or 1103 -

26 (A) reasonable compensation for actual,
27 necessary services rendered by the trustee, an
28 examiner, professional person or attorney and by
any paraprofessional person employed by any such
person; and

27 ¹² I thank my colleagues for their willingness to include an
28 expanded recitation of the facts in the Panel's decision to
facilitate some of the observations offered in this concurrence.

1 (B) reimbursement for actual, necessary
2 expenses.

3 (2) The court may, on its own motion or on
4 motion of the United States Trustee, the United
5 States Trustee for the District or Region, the
6 trustee for the estate, or any other party in
7 interest, award compensation that is less than
8 the amount of compensation that is requested.

9 As noted in § 330(a)(1), the right to compensation and
10 reimbursement of expenses is limited to those "employed under
11 section 327 or 1103[¹³]" Section 327(a), in turn, requires
12 that, to be employed by the bankruptcy estate, professionals "not
13 hold or represent an interest adverse to the estate" and are
14 "disinterested persons."¹⁴ Finally, § 327(c) requires that estate
15 professionals remain free of adverse interests throughout the term
16 of that employment.¹⁵

17 ¹³ Section 1103 governs employment of professionals by
18 committees in chapter 11 cases, and is therefore not implicated in
19 this appeal. Hinds' employment was approved by the bankruptcy
20 court under authority of § 327.

21 ¹⁴ The text of § 327(a) provides that:

22 Except as otherwise provided in this section, the
23 trustee, with the court's approval, may employ one or
24 more attorneys, accountants, or other professional
25 persons, that do not hold or represent an interest
26 adverse to the estate, and that are disinterested
27 persons, to represent or assist the trustee in carrying
28 out the trustee's duties under this title. . . .

¹⁵ Section 327(c) provides, in pertinent part that:

[T]he court may deny allowance of compensation
for services or reimbursement of expenses of a
professional person employed under section 327
. . . if, at any time, during such
professional person's employment . . . such
professional person is not a disinterested
person, or represents or holds an interest
adverse to the interest of the estate with
respect to the matter on which such
professional person is employed.

1 Assuming a professional is eligible under § 327(a), the
2 debtor-in-possession's employment of that professional must be
3 approved by the bankruptcy court. Rule 2014(a) dictates that
4 bankruptcy court approval be obtained via an application,
5 supported by a verified statement of the person to be employed.
6 The Rule also specifies the requisite information for inclusion in
7 that application and verified statement:

8 The application shall state the specific facts
9 showing the necessity for the employment, the
10 name of the person to be employed, the reasons
11 for the selection, the professional services to
12 be rendered, any proposed arrangement for
13 compensation, and, to the best of the
14 applicant's knowledge, all of the person's
15 connections with the debtor, creditors, any
16 other party in interest, their respective
17 attorneys and accountants, the United States
18 trustee or any person employed in the office of
19 the United States Trustee. The application
20 shall be accompanied by a verified statement of
21 the person to be employed, setting forth the
22 person's connections with the debtor, creditors,
23 any other party in interest, their respective
24 attorneys and accountants, the United States
25 trustee or any person employed in the office of
26 the United States Trustee.

18 Rule 2014(a) (emphasis added).

19 The Ninth Circuit has instructed that full disclosure is an
20 essential prerequisite for both employment and compensation of
21 estate professionals:

22 The bankruptcy court must ensure that attorneys
23 who represent the debtor do so in the best
24 interests of the bankruptcy estate. The court
25 must ensure, for example, that the attorneys do
26 not have interests adverse to those of the
27 estate, that the attorneys only charge for
28 services that benefit the estate, and that they
charge only reasonable fees. To facilitate the
court's policing responsibilities, the
Bankruptcy Code and Federal Rules of Bankruptcy
Procedure impose several disclosure requirements
on attorneys who seek to represent a debtor and
who seek to recover fees. The disclosure rules

1 impose upon attorneys an independent
2 responsibility. Thus, failure to comply with
3 the disclosure rules is a sanctionable
4 violation.

4 Neben & Starrett, Inc. v. Chartwell Fin. Corp. (In re Park-Helena
5 Corp.), 63 F.3d 877, 880 (9th Cir. 1995).

6 We echoed the Circuit's concern in Mehdipour v. Marcus &
7 Millichap (In re Mehdipour), 202 B.R. 474 (9th Cir. BAP 1996):
8 "Professionals must disclose all connections with the debtor,
9 creditors and parties in interest, no matter how irrelevant or
10 trivial those connections may seem. The disclosure rules are not
11 discretionary." Id. at 881.

12 Some circuits take such a demanding view of the disclosure
13 requirements that, absent strict compliance with the Code and
14 Rules, compensation will be denied to professionals who fail to
15 adequately disclose relevant facts. See In re Big Rivers Elec.
16 Corp., 355 F.3d 415 (6th Cir. 2004) (failure to disclose third-
17 party fee agreement resulted in loss of all fees); Matter of
18 Prudhomme, 43 F.3d 1000, 1003 (5th Cir. 1995) (all fees denied to
19 an attorney who exhibits a willful disregard of his fiduciary
20 obligations to fully disclose the nature and circumstances of his
21 fee arrangement); Electro-wire Products v. Sirote & Permit, P.C.
22 (In re Prince), 40 F.3d 356 (11th Cir. 1994) (denial of fees for
23 failure to disclose multiple conflicts); Turner v. Davis,
24 Gillenwater & Lynch (In re Inv. Bankers), 4 F.3d 1556, 1565 (10th
25 Cir. 1993) (compensation issues must be fully disclosed or
26 attorney risks losing all fees).

1 II.

2 Set against this landscape of legal requirements, in my
3 opinion, Appellant persuasively argues that Hinds' was guilty of
4 serious violations of the disclosure requirements of the Code and
5 Rules in connection with his application to the bankruptcy court
6 for approval of his employment as attorney for Debtor in the
7 chapter 11 case. Indeed, Appellant contends that the bankruptcy
8 court's approval of Hinds' employment as counsel for Debtor as
9 debtor-in-possession should be declared void ab initio because
10 Hinds failed to disclose that he held or represented an interest
11 adverse to the bankruptcy estate at the time he filed the
12 Employment Application. This argument deserves consideration by
13 the bankruptcy court upon remand.

14 The adverse interest referenced by Appellant derives from two
15 circumstances. First, under the Fee Agreement, Appellant was
16 allegedly obligated to pay all of Hinds' fees and costs, including
17 those incurred in representing Debtor. Second, Appellant, whom
18 Hinds was simultaneously representing in another bankruptcy case,
19 was at that same time a creditor in Debtor's bankruptcy case,
20 holding a deed of trust on Debtor's home.¹⁶ According to
21 Appellant, because Hinds was burdened with these disqualifying
22 conflicts of interests, neither of which were adequately disclosed
23 to the bankruptcy court in Hinds' Employment Application, Hinds

24
25 ¹⁶ It is true the bankruptcy court eventually concluded that
26 the debt allegedly owed by Debtor to Appellant arose from a sham
27 transaction. However, the court did not reach this conclusion
28 until much later in Debtor's bankruptcy case, long after approving
Hinds' employment. The salient consideration here is that
Appellant's status as an alleged creditor was not timely disclosed
by Hinds. Further, the record before us does not indicate whether
Hinds represented Appellant in her capacity as a secured creditor
in Debtor's case.

1 was ineligible to represent Debtor as debtor-in-possession.

2 There is support in our cases for the proposition that if a
3 professional holds or represents an adverse interest, or is not
4 disinterested, the bankruptcy court's order authorizing employment
5 of that professional is ineffective:

6 Section 327(a) prohibits the employment of
7 professionals who hold or represent an interest
8 adverse to the estate and who are not
9 disinterested. The bankruptcy court does not
have authority to allow the employment of a
professional in violation of § 327 and the
employment is void ab initio.

10 Mehdipour, 202 B.R. at 478. Our Court of Appeals has also spoken
11 out strongly against professionals who do not disclose the details
12 of fee agreements containing provisions giving rise to possible
13 adverse interests. In Law Offices of Nicholas A. Franke v.
14 Tiffany (In re Lewis), 113 F.3d 1040, 1045 (9th Cir. 1997), the
15 court of appeals quoted the Sixth Circuit's decision in In re
16 Downs, 103 F.3d 472, 479 (6th Cir. 1996), with approval:

17 The bankruptcy court should deny all
18 compensation to an attorney who exhibits a
19 willful disregard of his fiduciary obligations
20 to fully disclose the nature and circumstances
21 of his fee arrangement under § 329 and Rule
2016. The authority to do so is inherent, and
in the face of such infractions should be
wielded forcefully.

22 For additional support, Appellant cites In re Maximus Computers,
23 Inc., 278 B.R. 189, 194 (9th Cir. BAP 2002), where counsel's
24 simultaneous representation of a creditor and debtor, together
25 with the creditor's payment of debtor's fees, resulted in an order
26 reversing counsel's authorization for employment by an estate.

27 To be precise, Hinds did disclose that he was representing
28 Appellant in her bankruptcy case. And the bankruptcy court found

1 that "[this] dual representation was adequately disclosed and
2 transparent at the time both to the court and to [objecting]
3 creditors Capstone Capital LLC and Williams." Fee Memorandum at
4 9.

5 Even so, the bankruptcy court found that Hinds' disclosure
6 was not adequate. For several reasons, I agree. For example, it
7 is undisputed that, in connection with the Employment Application,
8 Hinds did not disclose the existence and terms of the Fee
9 Agreement signed by Debtor and Appellant, a clear violation of
10 Rule 2014(a)'s mandate that such application "state the specific
11 facts showing . . . any proposed arrangement for compensation" and
12 "all of the [professional's] connections with the debtor,
13 creditors, [or] any other party in interest. . . ."¹⁷ Equally
14 offensive, Hinds also did not disclose Appellant's status as an
15 alleged secured creditor in Debtor's case in the Fee Application.

16 Hinds' simultaneous representation of Debtor and Appellant
17 under a Fee Agreement requiring both clients to pay all of Hinds'
18 fees, when coupled with Appellant's status as an alleged secured
19 creditor of Debtor's bankruptcy estate, may (or may not) have

20
21 ¹⁷ As one bankruptcy law scholar has observed:

22 Third party payments are a special problem [in
23 bankruptcy cases] because they shade into a
24 conventional, noncompensation conflict, the
25 representation of other parties in interest.
26 The reason is that a third-party payor is
27 virtually certain to be a party in
28 interest. . . . Because [third party
guarantees] do raise serious conventional
conflict problems, they should be subject to
special scrutiny and less-dangerous alternatives
[to financing professional fees] should be
explored.

28 J. LAWRENCE WESTBROOK, Fees and Inherent Conflicts of Interest, 1 AM.
BANKR. L. REV. 287, 301 (Winter 1993).

1 rendered Hinds ineligible for employment as counsel for Debtor as
2 debtor-in-possession under § 327(a).¹⁸ But regardless of whether
3 the bankruptcy court might have decided, under these facts, that
4 Hinds could represent Debtor in the chapter 11 case, the
5 attorney's admitted failure to disclose in the Employment
6 Application the details of his Fee Agreement with Appellant and
7 her status as a secured creditor of Debtor was a significant
8 violation of Rule 2014(a).¹⁹ Had these important facts been
9 properly disclosed, and had the bankruptcy court deemed
10 Appellant's or Hinds' interests adverse to the estate, under
11 § 327(a) and Mehdipour, the bankruptcy court was powerless to
12 approve Hinds' employment as counsel for the debtor-in-possession.

14 ¹⁸ I acknowledge that the mere representation of a creditor
15 by a proposed estate professional does not disqualify him or her
16 from employment by the bankruptcy estate. If the dual
17 representation is adequately disclosed and unless a creditor or
18 the U.S. Trustee objects, to disqualify the professional, the
19 bankruptcy court must find that the representation amounts to an
20 actual conflict of interest. See § 327(c). Here, however, when
21 Debtor's bankruptcy case was commenced, Appellant purportedly held
22 a deed of trust on Debtor's home to secure her claim, a lien which
23 was subsequently voided by the bankruptcy court. It is doubtful,
24 then, that Hinds could simultaneously represent Debtor and
25 Appellant, under these circumstances.

21 ¹⁹ It is not enough that the necessary facts about the
22 professional's relationship with the third party appear somewhere
23 in the bankruptcy court's files. One court has so concluded. In
24 re Hathaway Ranch P'ship, 116 B.R. 208, 213 (Bankr. C.D. Cal.
25 1990) ("The disclosure must be made in the application for order
26 approving employment. It is not sufficient that the information
27 might be mined from petitions, schedules, § 341 meeting testimony,
28 or other sources.") See also In re Lotus Props., L.P., 200 B.R.
388, 393 (Bankr. C.D. Cal 1996) (concluding that the Code requires
that the factual/legal relationship between a third-party payor-
insider, the debtor, their attorneys, and their contractual
arrangement concerning fees be fully disclosed at the outset of
the proposed professional's representation, and that the
professional demonstrate the absence of facts that would otherwise
render the professional not disinterested, in actual conflict or
facing an impermissible potential for a conflict.)

1 As it turned out, Hinds' employment was approved by the
2 bankruptcy court, and he provided services to Debtor under
3 authority of that order. While Appellant argues that Hinds can
4 receive no compensation as a matter of law under these
5 circumstances, our cases suggest otherwise. If full disclosure is
6 made, even at a later stage in the proceedings, the bankruptcy
7 court has discretion to determine whether to disallow all, part,
8 or none of the fees and expenses of a properly employed
9 professional. Movitz v. Baker (In re Triple Star Welding, Inc.),
10 324 B.R. 778, 789 (9th Cir. BAP 2005) (citing Lewis, 113 F.3d at
11 1045-46). In Triple Star Welding, the Panel considered the two
12 conflicting principles implicated in deciding whether compensation
13 may be awarded when the underlying employment should not have been
14 authorized. On the one hand, proper court approval of counsel's
15 employment is a prerequisite for compensation under the Bankruptcy
16 Code and Rules, and the bankruptcy court cannot simply disregard
17 those rules and instead award compensation under quantum meruit or
18 other state law theories. Id. at 790 n.14, citing Law Offices of
19 Ivan W. Halperin v. Occidental Fin. Group (In re Occidental Fin.
20 Group), 40 F.3d 1059, 1062-63 (9th Cir. 1994); and DeRonde v.
21 Shirley (In re Shirley), 134 B.R. 940, 944-45 (9th Cir. BAP 1992).

22 On the other hand, the Ninth Circuit has occasionally
23 approved retroactive authorization of a professional's employment,
24 or authorized payment for part of the time the professional worked
25 for the estate. Id., citing Atkins v. Wain, Samuel & Co. (In re
26 Atkins), 69 F.3d 970, 973-76 (9th Cir. 1995) (employment and fees
27 may be retroactively authorized in exceptional circumstances).
28 Our own decision in Mehdipour, cited by Appellant to support

1 denying all fees here, does not rule out allowing retroactive
2 employment and fees during the period of employment when there was
3 no conflict:

4 Any professional who the court determines to
5 hold or represent an interest adverse to the
6 estate or who is not disinterested is not an
7 officer of the estate during the time of
8 conflict and must be denied compensation for
9 services performed during the conflict pursuant
10 to § 330.

11 Mehdipour, 202 B.R. at 478 (emphasis added). We have also
12 recognized that the bankruptcy court had discretion to award
13 compensation for services performed in reliance on an order
14 authorizing employment, before that order was reversed on appeal.
15 First Interstate Bank of Nev. v. CIC Inv. Corp. (In re CIC Inv.
16 Corp.), 192 B.R. 549, 553-54 (9th Cir. BAP 1996).²⁰

17 Based upon these cases decided in this Circuit, I think it is
18 likely that a professional who does not fully disclose required
19 information at the time of applying for approval of his
20 employment, such as the existence of a fee agreement requiring
21 another to pay his fees, or his representation of a client with a
22 potential interest adverse to the estate, may not be employed
23 under § 327(a), and any order authorizing that employment is
24 ineffective. Even so, the case law allows the bankruptcy court a
25 certain degree of discretion to approve payment of fees for
26 services provided during the time of the professional's
27 representation when there was no conflict, and after full
28 disclosure has occurred.

29 ²⁰ In CIC Inv. Corp., however, the professional had disclosed
30 its conflicts at the outset and the lack of disinterestedness was
31 not immediately clear. Triple Star Welding, 324 B.R. at 790
32 (citing CIC Inv. Corp., 192 B.R. at 54-56).

1 In this instance, though, it would seem Hinds' deserves
2 little lenience from the bankruptcy court. It is clear that Hinds
3 held or represented adverse interests from the outset of his
4 employment, and did not disclose either the terms of the Fee
5 Agreement requiring Appellant to pay his fees, or that she was a
6 creditor, in connection with seeking court approval of his
7 employment. It is also significant in this case that Hinds never
8 effectively rectified his lack of candor concerning his
9 potentially adverse interests during the chapter 11 case.

10 Under these facts, Appellant's contention that the bankruptcy
11 court should have denied him any fees or expenses raises a
12 legitimate issue.

13 III.

14 Distinct from Hinds' disclosure shortcomings in obtaining
15 approval of his employment, Appellant also focuses our attention
16 on Hinds' many violations of the disclosure and procedural
17 requirements regarding the payments made to him as Debtor's
18 attorney.

19 Hinds admits he violated the Code and Rules in failing to
20 properly disclose the true details of many of the post-petition
21 payments he received during the chapter 11 case, and by accepting
22 payments for fees without proper application, notice to parties,
23 and prior bankruptcy court approval. To demonstrate the extent of
24 the problem, this tabulation of Hinds' various and sundry Code and
25 Rule transgressions is offered:

- 26 • Hinds' Employment Application represented that Hinds would
27 notify the U.S. Trustee and the bankruptcy court if payments
28 from any third parties would be required, and the source and
amounts of those payments. He did no such thing. Instead,
Hinds acknowledges he received almost \$300,000 in payments

1 without prior application, notice to parties, or bankruptcy
2 court approval.

3 • Hinds' 2016(b) disclosures filed with the bankruptcy court
4 purportedly to disclose the details of payments made to him
5 identified some of these payments. But they all indicated
6 that the source of the payments was "the Debtor." In fact,
7 many of the payments came from third parties Schaefer Oil
8 (another chapter 11 debtor) and creditor Lubensky.

9 • Hinds admits that he failed to file any disclosures as to
10 four post-petition payments totaling \$17,000, a clear
11 violation of Rule 2016(b). Some of the payments to Hinds were
12 never disclosed, and only brought to light via Appellant's
13 objections to his Fee Application.

14 • The bankruptcy court found that "Nothing in the record
15 suggests that Hinds held payments in a trust account until
16 approved by the court." In other words, Hinds had access to
17 the funds as he received them.

18 • While he received payments of \$128,543.70 in 2002, \$142,000
19 in 2003 and \$17,000 in 2004, Hinds never sought court
20 approval for, and he was never authorized to receive, any
21 interim fee payments. No fee application was filed until
22 January 2006, and then only after the chapter 7 trustee
23 caused a deadline to be set for asserting administrative
24 claims. Hinds' delays in seeking fee approvals from the
25 bankruptcy court therefore ranged from two to four years.
26 The bankruptcy court found that this delay was unreasonable,
27 and that Hinds knew or should have known that the delay would
28 impair, or if the case were dismissed, preclude review of
fees.

• The bankruptcy court concluded that "Hinds has disregarded
procedures and statutory requirements of the Bankruptcy Code.
Hinds is the creator of all of the problems relating to the
payments, lack of adequate disclosure, and unreasonable
delay."

Estate professionals may not be paid compensation or expenses
absent prior approval by the bankruptcy court obtained after
notice and a hearing. § 330(a); Rule 2016(a); Knudsen Corp., 84
B.R. 668, 671 (9th Cir. BAP 1988).²¹ Section 329(a) and Rule

²¹ In Knudsen, the Panel approved an arrangement for periodic
payments to professionals without prior bankruptcy court approval,
provided that system afforded parties an adequate opportunity to
obtain subsequent review of the reasonableness of the compensation
and payments. However, the Panel made clear that an essential
element to any such payments was prior approval by the bankruptcy

(continued...)

1 2016(b) require a debtor's attorney to file a statement with the
2 bankruptcy court concerning any payments of compensation to the
3 attorney. That Rule also requires that a supplemental statement
4 be filed within 15 days after any payment not previously
5 disclosed. Violation of any of these provisions can justify the
6 denial of all compensation and expenses to the professional.
7 Lewis, 113 F.3d at 1045; Hale v. U.S. Trustee (In re Basham), 208
8 B.R. 926, 931 (9th Cir. BAP 1997), aff'd 152 F.3d 924 (9th Cir.
9 1997).

10 Hinds makes no real attempt to excuse his disregard of the
11 Code and Rules in accepting these payments. To me, Appellant's
12 argument rings true that an ample basis exists to deny Hinds any
13 compensation.

14 IV.

15 In obtaining court approval of his employment, Hinds failed
16 to adequately disclose his fee arrangement with Appellant and that
17 she was a creditor, both potentially constituting adverse
18 interests to Debtor's bankruptcy estate. In addition to these
19 Code and Rule compliance defects, Hinds also received, without
20 prior court approval, over \$280,000 in payments of fees during
21 Debtor's chapter 11 case, in many instances from third parties,
22 without adequately disclosing the existence or source of such
23 payments.²²

24
25 ²¹(...continued)
26 court of the arrangement itself. 84 B.R. at 673. There was no
such prior approval for payments to Hinds in this case.

27 ²² Hinds also significantly delayed in applying for approval
28 of his fees and expenses. In this regard, the bankruptcy court
aptly characterized Hinds' mode of operation:

(continued...)

1 While Hinds' reprehensible ambivalence for his duties under
2 the Code and Rules as an estate professional is clear from this
3 record, the bankruptcy court approved his fee and expense request
4 totaling nearly \$400,000, and decided that a reduction of 15 per
5 cent to account for what it described as his "multiple, material
6 breaches of counsel's obligations," and by the amount incurred by
7 the trustee in objecting to his fee application, was sufficient to
8 redress Hinds' conduct. The bankruptcy court also ordered Hinds
9 to disgorge to the trustee approximately \$120,000 of the post-
10 bankruptcy payments he had received.²³

11
12 ²² (...continued)

13 The procedure used by Hinds to realize payment
14 of his attorneys' fees for his services as the
15 Debtor's general bankruptcy counsel appears to
16 boil down to the following: (1) get hired by the
17 Debtor; (2) secure sources of payment [of fees]
18 from third parties; (3) get employed by the
19 Bankruptcy Court; (4) obtain payment of fees
20 from the Debtor or a third party; (5) file [in
21 many instances, an erroneous and misleading]
22 Rule 2016(b) statement when payments are
23 received; (6) file a fee application only when
24 (and presumably, if) the Trustee sends notice
25 setting a deadline for filing administrative
26 claims.

20 Fee Memorandum at 13. The court also observed that "Hinds is the
21 creator of all of the problems relating to [this payment scheme],
22 lack of disclosure, and unreasonable delay." Id. at 16.

22 ²³ There is no doubt that a bankruptcy court may, under
23 § 329(a), scrutinize payments made to a chapter 11 debtor's
24 counsel by third parties, and order return of any amounts found to
25 be excessive. Hinds has not argued to the contrary. See In re
26 BOH! Restaurante, Inc., 99 B.R. 971, 973 (9th Cir. BAP 1989):

25 Payments to a debtor's attorney provide serious potential
26 for evasion of creditor protection provisions of the
27 bankruptcy laws, and serious potential for overreaching by
28 the debtor's attorney, and should be subject to careful
scrutiny.

28 Id. quoting S. Rep. No. 95-989, 95th Cong. 2d Sess. 39 (1978). In
(continued...)

1 No analysis or extended discussion was provided by the
2 bankruptcy court as to why, under these egregious circumstances,
3 Hinds should be allowed any fees or expenses. This seems odd
4 since, as noted above, Hinds' disclosure deficiencies were such
5 that, at least arguably, his employment as attorney for debtor-in-
6 possession was tainted from the outset, a condition never, ever
7 remedied by Hinds. And this is not a case where a bankruptcy
8 professional inadvertently forgot to properly disclose an isolated
9 or insignificant post-petition payment of fees. Hinds received,
10 and had access to, multiple unauthorized post-petition payments
11 totaling over \$280,000.

12 I am sensitive to the discretion accorded the presiding judge
13 in assessing the proper amount of professional fees to be awarded
14 in a bankruptcy case.²⁴ Still, bankruptcy courts must be mindful
15 of the Ninth Circuit's instruction that "[t]he bankruptcy court
16 should deny all compensation to an attorney who exhibits a willful
17 disregard of his fiduciary obligations" and that "in the face of
18 such infractions [this power] should be wielded forcefully."
19

20 ²³(...continued)
21 BOH! Restaurante, Inc., the Panel concluded, based on this
22 legislative history, that fees paid to the debtor's counsel may be
23 reviewed by the bankruptcy court "regardless of their source."
24 Id.; accord Henderson v. Kisseberth (In re Kisseberth), 273 F.3d
25 714, 718 (6th Cir. 2001) ("Any payment made to an attorney for
representing a debtor in connection with a bankruptcy proceeding
is reviewable by the bankruptcy court notwithstanding the source
of payment.") (quoting In re Walters, 868 F.2d 665, 668 (4th Cir.
1989)).

26 ²⁴ For example, the Panel should be especially deferential to
27 the judgment of a presiding bankruptcy judge who is familiar with,
28 and has developed special insights involving, a bankruptcy case
over time. In this case, though, the bankruptcy judge who decided
the Hinds fee issue did not assume responsibility for this
bankruptcy case until 2005, when the former presiding judge
retired.

1 Lewis, 113 F.3d at 1045.

2 Hinds's conduct is as model for how not to discharge the
3 disclosure, procedural and other obligations of a bankruptcy
4 estate professional. Instead of being candid and comprehensive,
5 his disclosures omitted multiple material facts which deprived the
6 parties and bankruptcy court of its opportunity to consider his
7 fitness to represent a chapter 11 debtor-in-possession. And
8 Hinds' disregard for the requirements of the Bankruptcy Code and
9 Rules governing prior approval for payments of compensation can
10 only be viewed as willful, especially when he had assured parties
11 and the bankruptcy court that he would observe proper procedures
12 in connection with obtaining approval of his compensation.

13 On remand, the bankruptcy court will have an opportunity to
14 further consider Appellant's arguments.

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