

## Tip # 9: You can afford an attorney, even if the business is struggling.

By Kim Fineman

The topic of attorneys' fees and costs can be particularly uncomfortable for a struggling business. The thought of adding another expense when you already can't make ends meet can be daunting. It may help to know that every other struggling business is in the exact same situation and the bankruptcy process is set up to address that concern.

First, let's talk about how Bankruptcy and Restructuring attorneys bill. In consumer cases, attorneys commonly charge a flat fee for their services. That fee covers the basics, and any additional projects are billed separately. This set up works well in consumer cases for individuals because they are generally straight forward and not subject to additional negotiation or litigation inside bankruptcy. In a typical business bankruptcy, the circumstances are quite different. Just as every business is unique, the legal plan in bankruptcy is specific to the needs of a business. (The same is true for individuals with more complex finances.) For that reason, most Bankruptcy and Restructuring attorneys bill for their time on an hourly basis.

So how do these open-ended invoices work in a bankruptcy case? The Bankruptcy Code and Rules specifically provide for them. Once you are in bankruptcy, the expenses of your Bankruptcy and Restructuring attorney are subject to court scrutiny and approval. The attorney cannot be paid without an order from the court approving the specific fees and costs sought. Strict rules regulate how those time and expense entries must be kept and reported. Because of this, the bill statements from your Bankruptcy and Restructuring attorney will likely be far more detailed than you may have seen in the past from other attorneys.

The reason for this heightened scrutiny is that the attorneys' fees and costs for the business debtor's counsel will be treated as administrative expenses during the bankruptcy case. This means, those approved expenses will be paid ahead of most other claims as a necessary cost of the administration of the bankruptcy case. Since those expenses may directly reduce the distributions to the business' creditors, any of those creditors can object to the fees and expenses sought. Fees and costs can be challenged as excessive, unnecessary, or even insufficiently detailed. What is more, any professional who will be paid from the funds of the bankruptcy estate must have their employment approved by the Bankruptcy Court after all parties have been noticed and given the opportunity to object.

The mechanisms for regulating and paying attorneys' fees and expenses during the bankruptcy are very transparent. There is, therefore, no reason for the business debtor to worry that they cannot "afford" a Bankruptcy and Restructuring attorney. The only slight caveat that a business considering a restructuring should know is that these rules and regulations only apply once the bankruptcy has been filed. Before the filing, the debts the business incurs to the attorney are treated just the same as any other debt. Further, if there is a large unpaid debt to the attorney at the time the bankruptcy case is filed, the attorney will be disqualified from working in the bankruptcy case. This is because a large claim against the debtor would create a conflict of interest by the attorney. For this reason, your Bankruptcy and Restructuring attorney will insist that their invoices be paid promptly and in full prior to filing. This isn't because they are jerks or don't trust or believe in the business debtor. It's because if they don't, they can't represent you after the potential filing. This too is a well-established part of the restructuring process. The policy behind all these rules is the recognition that the fear of additional costs should not prevent a struggling business from getting the restructuring help it needs.