

**CHAMBERS PROCEDURES: JUDGE ELIZABETH E. BROWN
UNITED STATES BANKRUPTCY COURT, DISTRICT OF COLORADO**

**ATTORNEYS AND OTHER PROFESSIONALS:
SEEKING EMPLOYMENT BY THE ESTATE**

I. ATTORNEYS.

A. Approval of Employment

In order to be employed by and paid from the estate, attorneys must obtain prior approval of their employment under 11 U.S.C. § 327(a) by complying fully with the requirements of Fed. R. Bankr. P. 2014(a) and L.B.R. 2014-1. Judge Brown requires notice of the application to be given in all of the circumstances listed in L.B.R. 2014-1(b), and may order notice to be given in other appropriate circumstances.

B. Retainers.

In cases where a retainer is paid to a professional by an entity other than by the debtor, this Court requires that a verified statement under Fed. R. Bankr. P. 2014(a), addressing the factors set forth in *In re Lotus Prop. LP*, 200 B.R. 388 (Bankr. C.D. Cal. 1996). The verified statement must disclose all transfers by the debtor to the entity providing the retainer and any other circumstances that may create a conflict of interest between the debtor and the payor. The payor must retain independent counsel and must provide a written acknowledgement that the debtor's counsel's duty of loyalty is owed solely to the debtor, and not to the payor.

C. Withdrawal as Counsel.

The procedure for withdrawal as counsel is set forth in L.B.R. 9010-4. Requests to withdraw that are not strictly in compliance with this Rule may be denied. Note that withdrawal requires a motion and a separately filed L.B.R. 9013-1 notice. Please ensure that the motion and notice contain ALL of the required information set forth in L.B.R. 9010-4(a) and (b). The motion and notice must be served on the withdrawing attorney's client and all counsel of record in the case or proceeding.

A motion to withdraw may not be considered timely and may be denied, if made too near a hearing or deadline such that prejudice to the client may result.

Motions to withdraw may not be used in an attempt to circumvent the prohibition against limited representation contained in L.B.R. 9010-1(c).

II. NON-ATTORNEY PROFESSIONALS.

The employment of accountants, appraisers, auctioneers, and "other professional persons," to represent or assist a trustee or Chapter 11 debtor-in-possession in carrying out the duties of a trustee or debtor-in-possession, is also subject to court approval pursuant to 11 U.S.C. § 327, Fed. R. Bankr. P. 2014, and L.B.R. 2014-1. Questions may arise as to whether a particular person who is not an

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accountant, appraiser, or auctioneer nevertheless falls within the category of “other professional persons” whose employment is subject to § 327. Courts that have dealt with this question have focused on whether the employee takes a central role in the administration of the debtor’s bankruptcy estate, the degree of discretion or autonomy exercised by the professional in the administration of the bankruptcy estate, whether the employee’s services involve some degree of special knowledge or skill, and many other factors. *See, e.g., In re Seatrain Lines, Inc.*, 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981); *In re Neidig Corp.*, 117 B.R. (Bankr. D. Colo. 1990); and *In re First Merchants Acceptance Corp.*, 1997 WL 873551 at *3 (Bankr. D. Del. 1997). If a particular employee is later found to be a professional person within the meaning of § 327, and approval of the employee’s employment was not obtained, the employee may not be compensated with estate funds. *See* 11 U.S.C. § 330(a). When in doubt, file an employment application to be safe.

The Court considers it to be part of DIP counsel’s responsibility to advise the Debtor that all professionals must be employed with court approval and that the Debtor must inform DIP counsel of any professionals that will provide services post-petition so that counsel may determine whether employment is necessary. Ordinarily, it will be counsel’s responsibility to ensure that applications are filed before the professional commences work.

III. NUNC PRO TUNC OR POST FACTO REQUESTS.

In the absence of extraordinary circumstances, this Court will not authorize the employment as of a date that precedes the date of the filing of the application. “Back dating” the employment date is commonly referred to as approving employment “*nunc pro tunc*.” This division follows the cases of *In re Land*, 943 F.2d 1265 (10th Cir. 1991) and *In re Schupbach Investments, LLC*, 808 F.3d 1215 (10th Cir. 2015), which prohibit *nunc pro tunc* employment orders, absent “extraordinary circumstances.”

IV. OUT-OF-STATE ATTORNEYS & USE OF LOCAL COUNSEL.

Local Bankruptcy Rule 9010-1(b) provides that out-of-state attorneys may practice before this Court if they are admitted and in good standing to practice in the United States District Court for the District of Colorado. More information on how to apply for admission to the United States District Court is available here:

www.cod.uscourts.gov/AttorneyInformation/GeneralAttorneyInformation.aspx. If an out-of-state attorney does not have an office in Colorado, this Court may impose additional requirements for practice before the Bankruptcy Court, including that out-of-state counsel retain local counsel qualified to practice before this Court. *See* L.B.R. 9010-1(b)(2)(B), available at <http://www.cob.uscourts.gov/local-rules>.

Pro hac vice admission to the United States District Court for the District of Colorado or to appear before the Bankruptcy Court is no longer available.