

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

|                           |   |                       |
|---------------------------|---|-----------------------|
| In Re Thomas W. OLICK and | : | CIVIL ACTION          |
| Kathryn OLICK             | : |                       |
|                           | : | NOS. 01-1606, 01-1607 |
|                           | : |                       |

**MEMORANDUM and ORDER**

YOHN, J.

MARCH \_\_\_\_, 2002

Debtors, Kathryn and Thomas Olick (“Olick”), appeal from the bankruptcy court’s March 1, 2001 order approving the creditor claim of their former attorney, William H. House (“House”). (*In re Olick, appeal docketed*, No. 01-1606). In this appeal, Olick challenges the bankruptcy court’s findings that House was entitled to compensation for legal services rendered from April 29, 1997 through March 24, 1998 and that House’s fee application was reasonable to the extent that it covered this period.

House cross-appealed from the same order of the bankruptcy court, contending that the court erred in finding that Olick terminated House’s employment in March 1998. (*In re Olick, appeal docketed*, No. 01-1607). House argues that he did not receive written notice of his termination until December 7, 1998, and therefore that he is properly entitled to compensation through that date. In addition, House appeals from the bankruptcy court’s June 7, 2001 order denying his motion to reconsider the March 1, 2001 order, or in the alternative, for relief under Fed. R. Bankr. P. 9024 from the bankruptcy court’s January 20, 2000 order. (*In re Olick, appeal docketed*, No. 01-3567). House’s cross-appeal and appeal have been consolidated under No. 01-

1607 by order of August 20, 2001. After reviewing these appeals, I conclude that the bankruptcy court's order of March 1, 2001 should be affirmed in part.

### **FACTUAL AND PROCEDURAL BACKGROUND**

At the root of these appeals is a dispute between the debtors, Kathryn and Thomas Olick, and their former bankruptcy counsel, William House, concerning the date of House's termination and the amount of compensation to which he is entitled. House was appointed by order of the bankruptcy court on April 29, 1997 to serve as bankruptcy counsel to the debtors in their chapter 13 proceeding in the United States Bankruptcy Court for the Eastern District of Pennsylvania. (Bankruptcy No. 96-22123T). House and Olick subsequently entered into a written agreement to memorialize the terms of House's engagement. Pursuant to the terms of this retainer agreement, Olick had the right to terminate House's services at any time by written notice. (01-1606, Doc. 12, Ex. A).

On March 20, 1998, House received a letter via facsimile that notified him of Olick's decision to file a motion to discharge counsel with the bankruptcy court. (01-1607, Doc. 12, Ex. C). At a hearing on March 24, 1998, the bankruptcy court acknowledged Olick's motion, which had been filed on the previous day. (3/24/98 Tr. at 4). At this hearing, House testified that it was his intention to continue as Olick's bankruptcy counsel. Based upon House's testimony, the court decided not to rule on the motion to discharge. (3/24/98 Tr. at 17-18). Neither Olick nor the bankruptcy court thereafter took any action on the motion.

Following the March 24, 1998 hearing, House continued to represent Olick in his bankruptcy matters. It was not until December 7, 1998 that House received a letter from Olick

notifying him that “at the end of this date, my wife and I are discharging you as our bankruptcy counsel.” (01-3567 Record at 22). Olick sent a contemporaneous letter to the bankruptcy court advising it that House had been discharged as his counsel and that he would now be proceeding pro se. (01-3567 Record at 21).

On January 21, 1999, House filed his fee application with the bankruptcy court. Olick objected to the fee application, contending that House was discharged in March 1998, and that as a result all charges incurred after this date should not be allowed. (01-1606 Record at 7). By an order dated January 20, 2000, the bankruptcy court awarded House compensation for legal services rendered from a period beginning April 29, 1997 and ending March 20, 1998. (01-3567 Record at 6). The court concluded without specific findings of fact that House acted as a volunteer after March 20, 1998 and was not entitled to compensation after that date. *Id.*

Olick subsequently filed a motion for reconsideration of the bankruptcy court’s January 20, 2000 order. In connection with this motion, Olick sought discovery from House of documents that related to House’s fee application. (01-3567 Doc. 9, Ex. 3). On April 11, 2000, Olick filed a motion to compel discovery of these documents. (01-3567 Doc. 9, Ex. 4). By an order dated May 4, 2000, the bankruptcy court denied the motion to compel based on its finding that the right to discovery does not exist in conjunction with a motion for reconsideration. (01-1607 Record at 10).

On June 28, 2000, Olick’s motion for reconsideration was heard by the bankruptcy court. House argued that he was entitled to compensation through December 7, as it was not until this date that he received written notice of his termination. By an order dated March 1, 2001, the bankruptcy court affirmed its January 20, 2000 order, except that it extended the time for which

House was entitled to compensation through March 24, 1998. (01-1606 Record at 4). The bankruptcy court also approved House's final fee application and found that the "hourly rate charged, the amount of time spent and the expenses incurred during this time period were reasonable." Id.

On March 10, 2001, House filed a motion for reconsideration of the March 1, 2001 order, or in the alternative, for relief under Fed. R. Bankr. P. 9024 from the bankruptcy court's January 20, 2000 order. (01-3567 Record at 10). This motion was denied on June 7, 2001 and on July 17, 2001, House filed an appeal of denial. (01-3567 Record at 6).

On April 3, 2001, Olick filed an appeal from the March 1, 2001 order of the bankruptcy court, alleging that the bankruptcy court erred in extending the period for which House was entitled to compensation, in approving House's fee application, and in finding the fee application to be reasonable. House cross-appealed, alleging that the bankruptcy court erred in finding that his services had been terminated in March 1998 rather than on December 7, 1998.

### **STANDARD OF REVIEW**

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court's factual findings and a de novo standard to review its conclusions of law. *In re Siciliano*, 13 F.3d 748, 750 (3d Cir. 1994). A finding of fact is clearly erroneous if a reviewing court has a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The factual determination of the bankruptcy court will be accepted unless that determination is either "completely devoid of minimum evidentiary support" or "bears no rational relationship to the supportive evidentiary

data.” *Hoots v. Pennsylvania*, 703 F.2d 722, 725 (3d. Cir. 1983). Mixed questions of fact and law require a mixed standard of review, under which the court reviews findings of historical or narrative fact for clear error but exercises plenary review over the bankruptcy court’s “choice and interpretation of legal precepts and its application of those precepts to the historical facts.” *Mellon Bank N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991).

## DISCUSSION

There are primarily three issues involved in these appeals.<sup>1</sup> First, Olick and House both dispute the bankruptcy court’s decision to allow House compensation for his fees and reimbursement for his expenses for a time period ending March 24, 1998. Olick argues that

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<sup>1</sup> There is no basis for the other arguments Olick presents to this court in his appeal. First, Olick’s contention that the bankruptcy court improperly ordered a discharge of his bankruptcy is erroneous. Although in a footnote to the March 1, 2001 order, the bankruptcy court stated its intention to discharge the bankruptcy after the chapter 13 Trustee filed his final report, the court did not actually enter an order of discharge on March 1, nor has such an order been entered as of this date according to the record before me.

Second, Olick improperly raises the issue of whether the bankruptcy court erred in approving House’s creditor claim without entering an order for its payment through a bankruptcy plan. This issue was not brought before the bankruptcy court, and as such it cannot be brought on appeal. Moreover, even if this issue were properly on appeal, the evidence does not support a finding that the bankruptcy court erred in not modifying the bankruptcy plan to provide for payment of House’s creditor claim. At the time Olick filed his third amended bankruptcy plan on December 22, 1998 House’s entitlement to some compensation for his legal services was evident. However, the third amended plan did not specifically provide for payment of House’s attorney fees, causing House to object to this plan. On January 25, 1998, the bankruptcy court approved Olick’s third amended plan over House’s objection. Olick cannot blame the bankruptcy court for its failure to provide for payment of House’s creditor claim through a bankruptcy plan when Olick himself did not amend his plan to include specific provisions for the payment of House’s claim.

House is only entitled to compensation for services rendered through March 10, 1998,<sup>2</sup> or alternatively March 20, 1998, while House contends he is entitled to compensation for services rendered through December 7, 1998. Second, Olick maintains that House's creditor claim misrepresented the time House spent working on Olick's bankruptcy matter. Olick further contends that the failure of House to provide supportive documentation for his creditor claim renders his claim "factually defective." Thus, Olick argues that the bankruptcy court erred in finding House's "factually defective" fee application to reasonably represent the amount of time spent and the expenses incurred on Olick's bankruptcy matter. Third, Olick claims that the bankruptcy court did not afford him a fair hearing on his motion for reconsideration. In particular, Olick argues that the bankruptcy court abused its discretion by failing to allow for discovery.

### **I. Time Period for Compensation**

By order of January 20, 2000, the bankruptcy court awarded House fees and costs incurred for legal services rendered from April 29, 1997 until March 20, 1998, stating that House "acted as a volunteer after March 20, 1998." (01-1607, Doc. 7). House disputes this statement, arguing that the services he provided after March 20, 1998 were not volunteered but rendered pursuant to his retainer agreement, and that he is entitled to compensation for all services provided to Olick until December 7, 1998, the date his retainer was effectively terminated by written notice from Olick.

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<sup>2</sup> March 10, 1998 is the date Olick contends he first requested permission from the bankruptcy court to discharge House.

It is well-settled that basic factual findings and inferred factual conclusions are reviewed for clear error. Thus, if the bankruptcy court's statement that House was a volunteer after March 20, 1998 is considered a factual finding, this court will not disturb such a finding unless it is clearly erroneous. Whether House acted as a volunteer after March 20, 1998 is certainly not a basic fact, as there is no historical or narrative basis set forth for this statement. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981) ("Basic facts are the historical and narrative events elicited from evidence presented at trial."). However, it is unclear to this court whether the statement of House's volunteer status is an inferred factual conclusion or a mixed question of law and fact. Inferred factual conclusions are those "drawn from basic facts," where "logic and human experience indicate a probability that certain consequences can and do follow from the basic facts." *Id.* The failure of the bankruptcy court to provide support for its statement that House was a volunteer renders it impossible for this court to discern whether this finding is an inferred factual conclusion, to which a clearly erroneous standard of review should be applied or whether it is a mixed question of law and fact to which this court must exercise plenary review over the legal components of the finding. Because of this uncertainty, I will remand this action to the bankruptcy court to give it the opportunity to clarify the factual predicate upon which its statement that House acted as a volunteer after March 20, 1998 is based.<sup>3</sup>

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<sup>3</sup> On remand the bankruptcy court may wish to consider the following record evidence, which may undermine a finding that House volunteered his services after March 20, 1998. First, under the retainer agreement, the debtors incontestably had the right to terminate the engagement between them and House "by written notice at any time." Olick contends that the letter he sent to House on March 20, 1998 provided House with such written notice. (01-3567, Doc. 9 at 10-16). This letter, however, appears only to notify House that Olick had filed a motion with the court requesting the bankruptcy court to terminate House's representation. The letter does not appear

## II. Reasonableness of Fee Application

On March 1, 2001, the bankruptcy court approved House's fee application to the extent that it sought compensation of fees and reimbursement of expenses for the period extending from April 29, 1997 through March 24, 1998. The bankruptcy court found that the "hourly rate charged, the amount of time spent and the expenses incurred during this time period were reasonable." (01-1606 Record at 4). Olick contests this finding of the bankruptcy court. Olick contends that supportive documentation is required for House's fee application and that since House has not provided the court with any such documentation, the court erred in approving House's "factually defective" fee application. (01-1606, Doc 15 at 11). Olick also claims that the court erred in finding many of the specific charges contained in House's fee application to be reasonable. *Id.* at 20, 24, 27, 31.<sup>4</sup>

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to contain specific language terminating House in connection with his retainer agreement.

Second, although after March 20, 1998 Olick may have been disgruntled about being represented by House, it was not until December 7, 1998 that Olick sent House a letter via facsimile which stipulated that "at the end of this date, my wife and I are discharging you as our bankruptcy counsel." (letter from Olick to House dated December 7, 1998). Olick maintains that this letter was a reiteration of House's March termination and that its purpose was to inform House that his services, which allegedly had been volunteered since March, were no longer welcome. (6/28/00 Tr. at 84). However, there is no reason given as to why the December letter indicates that House was being fired as of "this date" and not March 20, 1998.

Third, Olick's continued recognition of House as his attorney on some bankruptcy matters after March 1998 needs to be explained if House's services had been completely terminated as of March 1998.. (01-1607 Record at 15, Ex. F, letter from Olick to Dunagan dated October 30, 1998). The letter that Olick sent House on May 15, 1998 suggests that Olick expected to pay House for the legal services he rendered after March 20, 1998. In this letter, Olick refers to a pending adversary proceeding and states that he would only accept settlement if the amount was sufficient to cover House's legal fees on this matter. (01-1607 Doc. 12, Ex. H). In addition, I note that Olick's calculations of the amount owed to House on this matter included charges for the time House spent after March 20, 1998. (01-1607 Doc. 12 Ex. Q).

<sup>4</sup> In raising this challenge, Olick disputes the bankruptcy court's finding that the debtors did not object to the compensation sought by House for services rendered and costs incurred



## **A. Supportive Documentation Requirement**

House's claim against Olick's bankruptcy estate is a claim for compensation for his legal services. Under section 330(a) of the bankruptcy code, the bankruptcy court is authorized to award reasonable compensation to the debtor's attorney for representing the interests of the debtor in bankruptcy. 11 U.S.C. § 330(a)(4)(B). Attorney compensation is categorized as an administrative expense of the bankruptcy estate. 11 U.S.C. § 503(b)(2).

A request for payment is the appropriate mechanism in which a claim for an administrative expense may be made after commencement of a bankruptcy case. *In re First Century Corp.*, 166 B.R. 47, 48 (M.D. Pa. 1994). House made his request for payment by filing a fee application with the bankruptcy court on January 20, 1999. (01-1606, Doc. 15, Ex. A). House's fee application is in full compliance with the Bankruptcy Rules, as it lists the services rendered, time expended and amounts requested by House on Olick's bankruptcy matter.<sup>5</sup> The fee application also complies with the guidelines set out in the advisory committee note to Rule 2016 of the Bankruptcy Rules.<sup>6</sup> Nowhere in the Bankruptcy Rules or guidelines is there a

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before March 20, 1998. The bankruptcy court's finding, however, is supported by Olick's record testimony that he agreed to the payment of House's charges through March 20, 1998. (4/15/99 Tr. at 5-6). Olick has not offered any reason why the bankruptcy court erred in accepting Olick's testimony at face value.

<sup>5</sup> Bankruptcy Rule 2016(a) provides that the fee application must set forth "a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested." 11 U.S.C. Rule 2016.

<sup>6</sup> The guidelines require that time for which compensation is requested be presented chronologically, entries for telephone calls identify the person addressed and the subject matter of the conversation, and entries for court appearances identify the nature of the proceeding and the parties in attendance. Advisory Committee Note Guidelines to Bankr. Rule 2016, III.B.,

requirement that a fee application be accompanied by additional supportive documentation. House's request for payment of his attorney fees does not require documented support, and therefore Olick's argument that House's fee application is "factually defective" is without legal merit.

Olick's contention that House's creditor claim is defective because it lacks the required supportive documentation is based upon a misapplication of the bankruptcy code. The cases Olick cites provide that claims filed under section 501 of the bankruptcy code and subject to the provisions of section 502 must be supported by documentation. *See, e.g., In re Circle J. Dairy*, 112 B.R. 297, 300 (W.D. Ark. 1989). The procedure for resolving claims filed under section 501 is separate and distinct from the procedure established for the payment of administrative expenses under section 503. *See In re First Century Corp.*, 166 B.R. at 48 ("Proofs of Claim are not the mechanism by which administrative claims should be advanced."). Thus, the cases cited by Olick are inapposite to House's claim for attorney fees, which is classified as a section 503 administrative expense.

## **B. Individual Claims**

Olick challenges many of the charges contained in House's fee application as wasteful, exploitative and unreasonable. (01-1606, Doc. 15 at 36-37). Thus, Olick contends that the bankruptcy court erred in finding House's fee application reasonable. Upon review of the record, this court finds that the bankruptcy court's finding of reasonableness was not erroneous. For each charge that Olick contests, House has provided a reasonable explanation supported by his

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III.C.1., III.C.2.

sworn affidavit.<sup>7</sup> Moreover, Olick has not supported his allegation of unreasonableness with any evidence, and as a result he has not provided this court with a basis for disturbing the bankruptcy court's finding. This court cannot avoid the conclusion that Olick's objection to House's fee application is more an attempt to avoid payment of legal fees, than a meritorious challenge to any of the specific charges contained in House's fee application.<sup>8</sup>

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<sup>7</sup> This court will not reiterate all of Olick's objections to House's charges nor all of House's explanations for these charges. However, two examples are set forth below.

(1) Olick claims that the charge for House's telephone conversation with Warren Young should not be allowed. (01-1606, Doc. 15 at 15). Olick maintains that Young had no information related to the bankruptcy, and therefore the telephone conversation charge was "an unreasonable wasteful activity." *Id.* House responds that the telephone conversation with Young was in reference to Young's knowledge of Olick's pending bankruptcy claim against numerous lawyers who Olick alleged owed him compensation for services that he had provided in the initiation and litigation of a class action lawsuit. Young's affidavit supports House's contention as it provides that on one occasion House contacted him in regard to a bankruptcy claim related to the class action. (01-1606, Doc. 11, Ex. A ¶ 8). Thus, there is evidence that the charge for time spent on the telephone call to Young was related to the bankruptcy, and therefore reasonable.

(2) Olick maintains that he was not informed that he would be charged for the cab fares for travel from House's offices to his home and that the retainer agreement does not provide for reimbursement of these commuting expenses. (01-1606, Doc. 15 at 20). House counters that Olick was informed that it was House's practice to bill a client for the cost of commuting home when he worked on the client's matter after 11:00 p.m. (01-1606, Doc. 11 at 23). Moreover, House claims that regardless of what Olick was or was not told, the retainer agreement does in fact provide for payment of his commuting costs, as commuting charges fall within the miscellaneous category of expenses "reasonably incurred in the performance of the engagement." *Id.* at 25. In addition, the guidelines set out by the advisory committee on bankruptcy rules allow for reimbursement of expenses of the kind customarily charged to non-bankruptcy clients. Advisory Committee Note Guidelines to Bankr. Rule 2016, IV.B. House has testified that it is his general practice to bill clients for commuting charges incurred after 11:00 p.m. (01-1607 Record at 8, ¶ 4).

<sup>8</sup> The fact that House's first invoice differed from his fee application is not sufficient to overturn the bankruptcy court's finding that the fees were reasonable. According to Olick, the fee application contains 33 more hours than the first invoice. House, however, has provided a reasonable explanation for the discrepancies between these two documents. First, House maintains that what Olick calls the first invoice was really an unaudited printout of time entries that House provided to Olick at his request. (01-1607 Record at 8, ¶¶ 3-4). Second, House attributes most of the additional hours of the fee application to time House spent working on

### III. Fair Hearing

#### A. Bankruptcy Court's Denial of Discovery

Olick alleges that he was not afforded a fair hearing on his objections to the fee application because he was not permitted discovery. Doc. 15 at 12. This allegation, however, does not withstand scrutiny.

First, Olick's initial discovery request was made in connection with his motion for reconsideration of the bankruptcy court's January 20, 2000 order. The bankruptcy court denied Olick's motion to compel, finding that no right to discovery existed in the context of a motion for reconsideration. This court agrees with the bankruptcy court that generally the recognition or creation of a right of discovery in connection with a motion for reconsideration does not square with the federal court's hesitancy in granting such motions. *Continental Cas. Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937, 943 (E.D. Pa. 1995) ("Because federal courts have a strong interest in the finality of judgments, motions for reconsideration should be granted sparingly."). However, there may be a right to discovery in connection with a motion for reconsideration if the basis for such a motion is the availability of new evidence that was not available before entry of the order for which reconsideration is sought. *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 673 (3d Cir. 1999). Thus, if the basis of Olick's motion for reconsideration was the existence of new evidence, it would have been proper to allow him the opportunity to discover this evidence. Olick, however, has not alleged that there is new evidence which supports his motion for reconsideration. It appears that Olick's late discovery request was not to uncover new evidence,

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matters that had not been reflected in the first invoice. The other additional time is accounted for by adjustments made during the audit of the records. *Id.* Olick neither addresses these explanations nor offers any evidence to contradict them.

but rather to obtain evidence that was readily available at the time that the bankruptcy court entered its January 20, 2000 order. In this context, the bankruptcy court was correct in denying Olick's right to discovery in connection with his motion for reconsideration.

Second, there is no record evidence to support Olick's allegation that he was prejudiced by House's failure to cooperate in the discovery process. (01-1606, Doc. 15 at 12).<sup>9</sup> Olick contends that House selectively produced those documents which were favorable to his creditor claim while he intentionally hid those documents which were adverse. *Id.* at 37. However, neither the selected documents that House was allegedly allowed to produce nor the documents that House was allegedly allowed to hide have been identified. Moreover, even if Olick had been allowed full discovery, he has not demonstrated how the fruits of this discovery would bear on the bankruptcy court's decision to allow reconsideration. Without evidentiary support, Olick's allegation of prejudice is hollow. Thus, the bankruptcy court acted within its discretion in not allowing discovery in connection with Olick's motion for reconsideration.

## **B. Bankruptcy Court's Treatment of Kathryn Olick**

Olick contends that the bankruptcy court "brow beat Debtor Kathryn Olick to retract her affidavit," and that this conduct "unreasonably prejudiced the case against the Debtors." (01-1606, Doc. 15 at 12-13). The incident to which Olick is referring occurred when House was questioning Kathryn Olick about portions of her affidavit in which she testified that she had

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<sup>9</sup> Whether under the terms of the retainer agreement House was required to provide Olick with documents to support his charges is not a matter for this court to decide on appeal. The only issue that this court must decide is whether the bankruptcy court's failure to allow Olick discovery prevented him from obtaining a fair hearing on his objection to House's fee application.

spoken on the telephone with House about matters of his personal life. When asked about why she picked the particular dates on which she alleged these telephone conversations with House to have occurred, Kathryn Olick became flustered and admitted to not knowing the exact dates but to have relied upon her husband's suspicions of the correct dates. (6/28/00 Tr. at 38-39). At this point, the court went off the record. Given that statements in her sworn affidavit were made without basis, the court correctly informed Kathryn Olick that she was risking perjury should she continue to testify. Kathryn Olick subsequently withdrew her testimony. As there is no transcript of what exactly the bankruptcy court said to Kathryn Olick, there is no evidence to support the claim that the bankruptcy court improperly intimidated Kathryn Olick into withdrawing her testimony. Therefore, I cannot find that the bankruptcy court engaged in conduct that unreasonably prejudiced the case against Olick.

### **CONCLUSION**

The bankruptcy court's March 1, 2001 order will be affirmed in part.

The bankruptcy court's conclusion that House's fee application for legal services rendered from April 29, 1997 through March 24, 1998 was reasonable will be affirmed. Olick has not demonstrated that the bankruptcy court erred in approving House's fee application for this period. However, because it is unclear whether there is a factual predicate for the bankruptcy court's statement that House volunteered his services after March 1998, the matter will be remanded to the bankruptcy court for a clarification of its findings. Should the bankruptcy court find that House's services were not volunteered after March 1998 and that House is entitled to compensation through December 7, 1998, the bankruptcy court must make a determination as to

the reasonableness of House's fee application for the time period extending from March 24, 1998 through December 7, 1998.

The appropriate orders follow.





