

11 U.S.C. §327(a)
11 U.S.C. §330(a)(1)
Disinterestedness

In re Alranco, Inc., #395-32652-dds7

4/10/96

DDS

Unpublished

Attorney for former state court receiver lacks
disinterest and is not eligible to be counsel for trustee. Where
fees are incurred and employment is rejected by the court,
authority exists to pay those fees.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 395-32652-dds7
ALRANCO, INC., a Nevada)
corporation,) FINDINGS OVERRULING OBJECTIONS
) OF DEBTOR TO ATTORNEYS' FEES
Debtor.) OF GREENE & MARKLEY

The debtor objected to any allowance of compensation to the law firm of Greene & Markley, P.C., for service to the trustee, on the grounds that the firm lacked disinterest under 11 U.S.C. § 101(14), was not appointed by the court under 11 U.S.C. § 327(a), and claimed excessive amounts. The firm claimed attorneys' fees totalling \$4,773.78 for services rendered prior to its withdrawal from representation during the early stage of the trustee's appointment. The law firm withdrew after the court expressed the view that the trustee could not employ the firm because of disqualification based on its representation of the state court receiver. The parties submitted the other issues to the court based upon oral offers of proof. There was argument but no testimony.

The fees should be allowed based upon the offers of

proof and waiver of the right to present testimony. The
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itemization of services is adequate. The services were
necessary. The hours claimed and the rate of charges are
reasonable and are justified by the cost of comparable
services in the community. Greene & Markley has satisfied
11 U.S.C. § 330(a)(1).

I cannot find that Greene & Markley was disinterested
under the cited statutes. The state court receiver has a
statutory duty to turn over assets and to account to the
bankruptcy trustee under 11 U.S.C. § 543(b). Clearly, as the
former attorney for the receiver and as the attorney for the
trustee, Greene & Markley would potentially be required to
oppose disclosure and defend matters for one client which the
firm would be required to seek and question for the other
client. While ethicists may disagree as to the application
of the rules governing active and potential conflicts of
interest and waiver of conflicts, I am satisfied that the
problem cannot be explained away by saying that there were no
active conflicts. The attorney for a former receiver who
also represents a trustee has a "materially adverse" interest
within 11 U.S.C. § 101(14)(E) even though an active conflict
has not been triggered. The duty to account and the duty to
receive the accounting cannot exist in the same person at the
same time. An attorney in such a position cannot be

disinterested. Employment of Greene & Markley as a matter of law could not be approved under 11 U.S.C. § 327(a).

In spite of Greene & Markley's lack of eligibility
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for employment, discretion exists under In re CIC Investment Corp., 192 B.R. 549 (9th Cir. BAP 1996) to allow fees where the attorney acted in good faith and where the unknown disqualification did not affect performance. In addition, the use of the term "may" in 11 U.S.C. § 328(c) suggests that denial of compensation is discretionary rather than automatic where lack of disinterest is found after services are rendered in good faith.

Greene & Markley fully disclosed its connections with the prior receiver and in good faith relied upon its judgment regarding eligibility for appointment even though that judgment proved to be erroneous. The firm provided services based upon such reliance and the admitted need of the trustee for counsel. Greene & Markley's lack of disinterest did not impair representation of the trustee during the brief time involved.

The debtor has ten days to submit any further material on the remaining objection. Greene & Markley may respond within seven days thereafter. The matter is set for hearing on May 10, 1996 at 9:30 a.m.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Bradley O. Baker
David A. Foraker
Albert N. Kennedy
Edward C. Hostmann
U. S. Trustee

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