



## Membership

[Why Join](#)
[Join](#)
[Renew](#)
[Update Profile](#)
[Committees](#)
[Member Directory](#)

### Committees: Ethics and Professional Compensation

## Debtor's Bad Conduct Is Grounds for Denial of a Fee Waiver



**Sean Markham**  
[Markham Law Firm, LLC; Charleston, S.C.](#)



Date Created: Wed, 12/09/2015 - 14:34

A recent decision from the U.S. Bankruptcy Court for the Eastern District of California confirms what many bankruptcy attorneys have long suspected: A debtor's bad conduct in bankruptcy may serve to defeat a fee waiver for a debtor who otherwise qualifies under the income guidelines. [1] In *In re Gjerde*, the debtor, Sean Patrick Gjerde, was a disbarred bankruptcy attorney who filed several *pro se* chapter 7 cases. In his first four *pro se* filings, Gjerde failed to pay all of the required installment fees and failed to appear at any of the first meetings of creditors. [2] In this particular case, his fifth attempt at a *pro se* chapter 7 bankruptcy, Gjerde filed his case from federal prison while serving a 30-month sentence for mail fraud, conspiracy and false statements in mortgage applications. In the case in question, Gjerde again pled poverty, and sought to have his fees waived because he had been disbarred from his law practice and asserted that he would never again be able to earn a living. [3] The chapter 7 trustee objected to the wai

[Help Center](#)

Chief Judge Christopher M. Klein examined the statutory authority for fee waivers under 28 U.S.C. § 1930(f)(1), determined that the statute has two elements: (1) the objective element that uses the income guidelines (debtor must earn less than 150 percent of the official poverty line), and (2) the subjective element that examines the debtor's inability to pay, as well as other non-monetary factors that might be grounds for a denial. [5] A debtor may qualify for a waiver under the objective test, but could still be denied a fee waiver under the subjective test. The court found that Gjerde met the objective criteria and focused its opinion on analyzing the subjective criteria to determine if the Debtor was eligible for a waiver. [6]

When applying the subjective test, the court must look at the totality of the circumstances to determine if the debtor is unable to pay and might look to see if there are other non-monetary grounds for denial. [7] The court may consider assets or income that might not be property of the estate, the resources of other persons (like a non-filing spouse, partner or other persons assisting with the costs of bankruptcy), and the debtor's future financial prospects. [8] In evaluating Gjerde's future prospects and sources of income, the court noted that the debtor was a college graduate with a law degree and, although he may have "self-inflicted obstacles to future success," those obstacles did render him unemployable. [9] The court noted that when a fee waiver is granted, the court is conscripting the chapter 7 trustee to work the case without compensation, and must balance the chapter 7 trustee's need to earn a living with a debtor's ability to access the bankruptcy process. [10]

Next, the court examined the debtor's conduct in his previous bankruptcy filings as part of the subjective non-monetary factors to determine if the debtor's conduct made him ineligible for a fee waiver. The court noted that subjective criteria relating to a debtor's bad conduct was much more difficult to find, [11] but was present in this case. The court ruled that Gjerde's failure to attend the first meeting of creditors in his previous four cases, his failure to properly disclose those four cases in his current petition, and his failure to disclose unpaid fees of \$931 that were owed to the U.S. Trustee, were each independent causes for denial of the fee waiver request. [12]

The court noted that its options to enforce the payment of the filing fee were (1) waiving the filing fee, (2) closing the case without entry of

discharge, or (3) dismissing the case under 11 U.S.C. § 707(a). Courts typically dismiss the case under § 707(a) for failure to make a payment, as the failure to pay the fee is alone grounds for dismissal. This court was careful to note that a denial of a fee waiver was not automatically fatal to a debtor's case. [13] A dismissal is not required because the failure to pay the fee would prevent the debtor from getting a discharge order, which is the ultimate goal of a debtor in chapter 7. [14]

The court ultimately declined to waive the debtor's fees due to bad conduct on the part of the debtor, as well as his failure to meet his burden in proving his inability to pay. Rather than dismissing the case, the court required that Gjerde pay all unpaid fees (including fees from the previous four filings), indicating that Gjerde was properly motivated to see a successful resolution of his case because he was simultaneously prosecuting an adversary procedure for hardship discharge of student loans. The court believed that during the pendency of the adversary proceeding, the debtor would be able to accumulate the necessary funds to pay all of his court fees. [15]

The *Gjerde* case involves particularly aggravating factors, including the fact that the debtor had been a practicing bankruptcy attorney with knowledge of what is required of a debtor in bankruptcy, yet failed to comply with the Bankruptcy Code and Rules. It remains to be seen if this opinion will be more broadly applied to other cases, but as Judge Klein noted in his opinion, "[j]ust as baseball umpires may have different strike zones, differences in outcomes in fee waiver cases may reflect differences in the threshold of doubt of individual judges." [16]

[1] *In re Gjerde*, 535 B.R. 329 (Bankr. E.D. Cal. 2015).

[2] *Id.*

[3] *Id.* at 336.

[4] *Id.* at 331.

[5] *Id.* at 332.

[6] *Id.* at 335.

[7] *Id.* at 330.

[8] *Id.* at 332-33.

[9] *Id.* at 336.

[10] *Id.* at 332.

[11] *Id.* at 333.

[12] *Id.* at 335.

[13] *Id.* at 333-34.

[14] Fed. R. Bankr. P. 4004(c)(1)(G).

[15] *Id.* at 335-36.

[16] *Id.* at 333.

---

American Bankruptcy Institute | 66 Canal Center Plaza, Suite 600 | Alexandria, VA 22314

Tel. (703)-739-0800 | Fax. (703) 739-1060

© 2015 American Bankruptcy Institute, All Rights Reserved