

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN
DISTRICT OF IOWA

IN RE:)

) Chapter 13

KEITH JEANES)

JO ELLEN JEANES,) Bankruptcy No. 01-00760

)

Debtors.)

ORDER RE APPLICATION FOR COMPENSATION BY DEBTORS' ATTORNEY

Attorney John W. Hofmeyer III filed an Application for the award of additional attorney's fees in the amount of \$988.33 for work performed on behalf of Debtors in this confirmed Chapter 13 case. The Chapter 13 Trustee objected to the Application. The matter was set for hearing. Hearing was held on May 26, 2004 and the matter was taken under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b) (2) (A).

BACKGROUND

Keith and Jo Ellen Jeanes filed a Chapter 7 petition in March, 2001 for which they paid Attorney Hofmeyer a \$1000 retainer fee. The case was converted to Chapter 13 in April 2001, and a plan was confirmed in December 2001. In November 2001, Mr. Hofmeyer submitted an application for approval of payment of additional fees, attaching an invoice totaling \$4700.97 (the "2001 Invoice"). From this total, Mr. Hofmeyer subtracted \$1074.06, which represented the amount already paid from the original retainer. Of the remaining amount of \$3626.91, Mr. Hofmeyer requested that the court allow payment of \$2500. By order dated December 20, 2001, this Court allowed \$2000 of the remaining fees and disallowed the remaining \$1626.91. The grounds for disallowance included full-fee charge for travel, vague pre-petition fees, charging for preparation of the fee application, and assessing finance charges. This Court concluded that \$3000 total (including the retainer) was allowable compensation given the nature of the case. Trustee Carol Dunbar paid the additional \$2000 on January 3, 2003.

In August 2003, Mr. Hofmeyer again petitioned the court for approval of fees, requesting an additional \$1092.54 for fees incurred in transactions related to Debtors' purchase of vehicles. With this application, Mr. Hofmeyer attached an invoice for dates December 31, 2001-July 23, 2003 (the "2003 Invoice"). The balance forward listed at the beginning of the invoice is \$0. Debtors, Mr. Hofmeyer, and Trustee came to an agreement to approve additional fees in the amount of \$797.54. The balance of \$295

was denied by this court in an order dated September 26, 2003. Trustee paid the approved fee amount on September 30, 2003. This award was in satisfaction of all fees up to the final billing date of July 23, 2003.

In March 2004, Debtors sent Trustee a letter requesting permission to use Debtors' income tax refund to pay Mr. Hofmeyer. They enclosed an invoice sent directly to Debtors by Mr. Hofmeyer requesting an additional \$1326.93 for the period ending January 31, 2004 (the "2004 Invoice"). Mr. Hofmeyer subsequently filed a formal application for fees on April 19, 2004 at the behest of Trustee. The 2004 Invoice contains all of the fees assessed for the Jeanes' case to date, excluding the charges listed on the 2003 Invoice. Unfortunately, it is not reconcilable with Mr. Hofmeyer's two previous applications. Specifically, there are new charges for 2002 listed on the 2004 Invoice that did not appear in the 2003 Invoice for the same period. Additionally, finance charges were not present in the 2003 Invoice, but they appear in the 2004 Invoice. There is no credit for the amount of fees denied in the December 2001 and September 2003 orders.

After Trustee objected to the fee application, Mr. Hofmeyer submitted a revised invoice (the "Revised Invoice") which removes interest charges, reduces the amount charged for travel time and purports to combine the 2001 and 2003 Invoices. These changes were applied to the entire invoice, including the portions which were paid in full by the Trustee pursuant to the December 2001 and September 2003 orders. The Revised Invoice total is \$988.33. The only post-July 23, 2003 charges total \$347.54. The Revised Invoice is an accounting nightmare. It contains vague descriptions and fee amounts which differ from the previous three invoices. Even more confusing, new charges for 2001 and 2003 appear on the Revised Invoice that were neither on the 2004 Invoice nor the 2003 Invoice.

APPLICATION FOR COMPENSATION

Pursuant to 11 U.S.C. § 330(a)(1)(A), this Court may award an attorney reasonable compensation for actual, necessary services rendered and expenses incurred. Federal Rule of Bankruptcy Procedure 2016 requires that an attorney seeking compensation for fees from the estate file with the court an application detailing his services rendered, time spent, expenses incurred, and amount requested. On its own motion, this Court may award less than the amount requested. 11 U.S.C. § 330(a)(2); In re Peterson, 251 B.R. 359, 363 (B.A.P. 8th Cir. 2000). Subsection (4)(B) of § 330(a) provides that in a Chapter 13 case in which the debtor is an individual, the court may award reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the

bankruptcy case, based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in § 330(a).

This Court applies the lodestar analysis to determine the reasonableness of the attorney's requested compensation. In re Apex Oil Co., 960 F.2d 728, 732 (8th Cir. 1992). Mr. Hofmeyer's hourly rate has already been analyzed in a previous order and \$90 per hour is reasonable. In re Jeanes, No. 01- 00760-W, slip op. at 3 (Bankr. N.D. Iowa Dec. 20, 2001). Mr. Hofmeyer has since raised his rate to \$100 per hour. That rate remains within the range of reasonable rates. See, e.g., In re Blessing Indus., Inc., No. 00-00140, slip op. at 2 (Bankr. N.D. Iowa May 31, 2000).

Only those amounts approved by the court may be collected from Debtor. In re Gantz, 209 B.R. 999, 1002 (B.A.P. 10th Cir. 1997). Fees are disallowed, allowed as an administrative expense to be paid from the estate, or allowed but must be paid by the debtor directly, not from the estate. Gantz, 209 B.R. at 1003. Because § 330(a) requires court approval to create the obligation to pay the attorney's fees, absent court approval neither the debtor nor the estate is ever liable. Id; In re Digman, No. 98-00322-C, slip op. at 1-2 (Bankr. N.D. Iowa 1998). Court approval under § 330(a) is what creates the liability, not the performance of the services.

DISCLOSURE OF COMPENSATION

In addition to obtaining court approval of fees, a debtor's attorney is required to disclose the amount and source of all fees to be received on behalf of the debtor. The requirements of court approval and disclosure are separate and distinct requirements. Application for compensation under § 330 does not constitute disclosure. In re Brandenburger, 145 B.R. 624, 627 (Bankr. D.S.D. 1992). Disclosure is mandated by § 329 of the Bankruptcy Code, which provides:

Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation. [Emphasis added].

Section 329 requires a debtor's attorney to disclose compensation he expects to receive regardless of whether such compensation is coming

from the debtor or some other source. In re McDonald Bros. Const., Inc., 114 B.R. 989, 995 (Bankr. N.D. Ill. 1990). The procedure for filing the disclosure is governed by Fed. R. Bankr. P. 2016(b), which provides:

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed. [Emphasis added].

Whenever an attorney's fee arrangement with a debtor changes, Rule 2016(b) requires that the attorney file a supplemental disclosure statement. Brandenburger, 145 B.R. at 627. The legislative history provides insight into the rationale for such a rule:

Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for over-reaching by the debtor's attorney, and should be subject to careful scrutiny.

H.R.Rep. No. 95-595, at 329 (1977); S. Rep. No. 95-989, at 39 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5825, 6285. (cited in McDonald Bros. Const., Inc., 114 B.R. at 995 and Brandenburger, 145 B.R. at 627). Even if a debtor's attorney does not intend to receive compensation from the bankruptcy estate, the attorney is still required to disclose all compensation amounts and sources. McDonald Bros., 114 B.R. at 995. Compensation from third parties is subject to § 329(b), which provides:

If such compensation exceeds the reasonable value of any such services the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to-

(1) the estate, if the property transferred-

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

While compensation paid by third parties is not subject to the requirements of § 330, it must still be disclosed. The court has the discretion to determine whether such compensation is excessive, and to order disgorgement of such excessive compensation if found. See In re Land, 138 B.R. 66, 69-70 (D. Neb. 1992).

ANALYSIS

On December 20, 2001, this Court awarded Hofmeyer \$3,074.06. In September 2003, after a supplemental fee request and hearing, this Court awarded an additional \$797.54 in full satisfaction of fees incurred through July 2003. It is unclear why these fees, which have already been approved and paid, should now reappear on either the 2004 Invoice or the Revised Invoice. What is more disturbing is that there is no credit on the Revised Invoice for the amount of fees which were denied in the previous two fee application orders. It appears as though Mr. Hofmeyer is indirectly and surreptitiously re-petitioning the Court for payment of fees which this Court has previously denied.

Since there is a discrepancy in the 2001 charges listed, and finance charges from the first two invoices are credited on the 2004 Invoice and the Revised Invoice, the exact numbers cannot be reconciled. The amount of fees denied to date is \$1921.91. On the Revised Invoice, there is a \$1000 credit for "Relationship to client," but there is no credit for the fees which were denied. Additionally, it contains several hundred dollars in previously unlisted fees, and a \$385.43 deduction cryptically labeled "Write off balance due," which does not correspond to any other set of numbers.

The 2001 fees which appear for the first time on the Revised Invoice should have been included on the 2003 Invoice. The September 2003 Order stated that the \$797.54 award was in full satisfaction of the fees which had accrued to date, and Mr. Hofmeyer had ample opportunity to request compensation for those fees in the 2003 fee application. He has offered no explanation why those fees were not included on the 2003 Invoice.

The only new fees appearing on the Revised Invoice which would not be included in the previous two orders are those listed at the bottom of the Revised Invoice. They total \$347.54. Of these charges, \$317.54 arise from preparation of the fee application. This Court does not permit attorneys to charge debtors

for the costs they incur in petitioning the court for their fees. See In re Courson, 138 B.R. 928, 933 (Bankr. N.D.Iowa 1992). Therefore, \$317.54 of the new fees are not allowable. The only new billable work is in the amount of \$30.00.

Mr. Hofmeyer can offer no explanation why the fees on the Revised Invoice total \$988.33 when the only fees incurred after July 23, 2003 are \$347.54. When asked about this discrepancy, his response was "All I know is we combined the bills." Mr. Hofmeyer's inability to explain the origin of the other \$640.79 in fees leaves no alternative but to conclude that the only possible source of those fees is from the earlier invoices, and that those fees were previously disallowed.

Since it appears as though most of the fees were previously disallowed, and the balance of the fees with the exception of \$30 for services rendered in January 2004 are for preparation of Mr. Hofmeyer's fee applications, all but \$30 of the Revised Invoice represents disallowed fees. Mr. Hofmeyer is therefore precluded from ever collecting these disallowed fees from Debtors or the estate.

The Court is troubled by Mr. Hofmeyer's reference in his letter to the Trustee and his comments at the hearing that he had entered into an arrangement whereby payment of the balance of the Revised Invoice was to be guaranteed by "a good client, third party." While Mr. Hofmeyer is not required to petition the Court for approval of compensation paid by third parties on the debtor's behalf, he is required to disclose the arrangement pursuant to § 329(a) and Rule 2016(b). Mr.

Hofmeyer did not disclose the fact that he was attempting to collect the fees directly from Debtors or that he had made an informal payment arrangement with a third party, both of which violate § 329.

Even assuming Mr. Hofmeyer had complied with the disclosure requirements enumerated above, the fees for which he is seeking payment outside the bankruptcy estate still represent fees which were disallowed by this court in previous applications. These circumstances give the appearance that Mr. Hofmeyer is attempting to circumvent this Court's denial of his fees by collecting them without disclosure from a third party, or directly from Debtors without approval, or by obtaining Court approval by means of a misleading fee application. Although Mr. Hofmeyer denies that he urged Debtors to pay the 2004 Invoice out of their 2003 income tax refund, he solicited payment of disallowed fees from Debtors who had no other source of income from which to pay him. Any payment to Mr. Hofmeyer by Debtors comes from Debtors' disposable income to the detriment of unsecured creditors. It is for this precise reason that disclosure and court approval are required.

The fees which Mr. Hofmeyer is attempting to collect from the third party are subject to the Court's examination under § 329(b). The Court may cancel any compensation agreement between Mr. Hofmeyer and the third party if it deems such compensation to be in excess of the reasonable value of services rendered. The Court has carefully analyzed the requested compensation on two separate occasions and found it to be in excess of the reasonable value of such services. Mr. Hofmeyer was compensated for the amount which the court found to be reasonable, and the remainder was disallowed.

Thus, it is obvious, for the reasons set out in this opinion, that Mr. Hofmeyer is not entitled to any additional compensation from any source. The only remaining issue is whether Attorney Hofmeyer should be required to disgorge any or all fees he has received because of the above described violations of the Code and Rules.

In summary, Mr. Hofmeyer failed to inform the Court, at any time during these proceedings, that an alternative source of compensation existed from third parties. Mr. Hofmeyer sought payment directly from Debtors, in violation of the automatic stay, without Court approval. Finally, it appears that Mr. Hofmeyer attempted to mislead the Court, by mistake or otherwise, by adding billable time to previously completed fee applications and resubmitting fees which had previously been denied. These matters are individually and collectively serious violations of the letter and spirit of the Bankruptcy Code. This Circuit has consistently granted to the Bankruptcy Court broad power and discretion to order disgorgement of fees already paid when cause exists. In re Zepecki, 277 F.3d 1044, 1045 (8th Cir. 2002). Disgorgement of all fees is considered an appropriate remedy where an attorney fails to fully disclose his fee arrangements. In re Downs, 203 F.3d 472, 477-78 (6th Cir. 1996).

The Eighth Circuit B.A.P. likewise views the failure to fully disclose compensation agreements as a significant violation. "It is well settled that disgorgement of fees is an appropriate sanction for failure to comply with the disclosure requirements of § 329 and Rule 2016." In re Redding, 263 B.R. 874, 880 (B.A.P. 8th Cir. 2001).

Through various Court orders during the administration of this case, this Court has allowed and approved payment of \$3,797.54 to Mr. Hofmeyer. This entire amount has already been paid. It is the conclusion of this Court that Mr. Hofmeyer's failure to disclose third party compensation agreements and seeking to obtain direct payment from Debtors constitute serious violations of important policies underlying the Bankruptcy Code. Failure to comply with these provisions warrants forfeiture of some or all of Mr. Hofmeyer's compensation. It the conclusion of this Court that Mr.

Hofmeyer should be directed to disgorge the sum of \$3,000 of fees already approved and paid.

WHEREFORE, for all the reasons set forth herein, the Court enters the following orders:

1. The Application for Compensation filed by Attorney Hofmeyer is DENIED as Mr. Hofmeyer has already received all compensation to which he is entitled.

2. Any agreement between Mr. Hofmeyer and any third party regarding payment of fees of Keith and Jo Ellen Jeanes is invalidated.

3. Attorney Hofmeyer is ordered to refrain from any attempts to collect attorney's fees which involve Debtors from any third party.

4. Attorney Hofmeyer is ordered to refrain from attempting to collect any attorney's fees directly from Mr. and Mrs. Jeanes as a result of this bankruptcy proceeding.

5. For the reasons set forth in this opinion, Attorney Hofmeyer is ordered to disgorge the sum of \$3,000 in previously approved attorney's fees based upon the violations set forth in this opinion.

6. Mr. Hofmeyer is ordered to pay the disgorged fees to the Chapter 13 Trustee on or before June 28, 2004. This sum shall be considered disposable income and distributed by the Trustee pursuant to the confirmed Chapter 13 Plan.

7. The Clerk's Office is directed to mail a copy of this order to Debtors at their address of: Box 155, 125 S. Jamison St. Westgate, IA 50681.

SO ORDERED this 17th day of June, 2004.

J. KILBURG
Chief Bankruptcy Judge

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