In the United States Bankruptcy Court

for the Northern District of Iowa

LOWELL E. INDVIK and MELVA INDVIK	Bankruptcy No. X88-01247M
Debtors.	Chapter 7
ELDON INDVIK	Bankruptcy No. X88-01246M
Debtors.	Chapter 7

Under consideration is the reasonableness of debtors' pre- bankruptcy compensation of the law firm of Arens & Alexander (FIRM). On September 27, 1990, the court ruled that debtors' retainer fee payment to the firm would be examined pursuant to 11 U.S.C. § 329(b). Hearing was held January 30, 1991 in Sioux City, Iowa. Briefs were subsequently filed. The court now issues its ruling including findings of fact and conclusions of law. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

FINDINGS OF FACT

Trial on the examination of fees was bifurcated at the request of the parties. The initial hearing led to the court's determination that the firm's fees could be examined by the court pursuant to 11 U.S.C. § 329 (slip op. Sept. 27, 1990). In that decision the court issued findings of fact which are relevant and applicable to the present ruling. These will not be repeated except as necessary to the present explanation of the court's decision. Unrepeated findings are nonetheless applicable to this ruling. From the additional evidence introduced at trial, the court makes these additional findings.

Lowell, Melva and Eldon Indvik (INDVIKS) retained the firm on November 13, 1987. At the time, the Indviks were debtors in bankruptcy cases pending in this court. John Arens, a partner in firm, convinced the Indviks not to resist a pending motion to dismiss the bankruptcy cases. These cases were dismissed on January 19, 198<u>8</u> (the court's prior ruling incorrectly showed the dismissal date as January 19, 198<u>7</u>). Some work was done by firm prior to the dismissals. This work was done without benefit of the firm's seeking or obtaining court approval as attorney for the debtors.

Although the firm had taken the Indviks as clients based on a fixed fee, firm, for purposes of the court's examination of the fees, has introduced the attorneys' normal billing rates for the period in question. Normal hourly rates for firm attorneys and personnel working on Indvik matters are:

Terry A. Zelinski, attorney	$100.00 per hour
Richard P. Alexander, attorney	150.00 per hour
David G. Nixon, attorney	100.00 per hour
J. D. Moon, attorney	150.00 per hour
Joe Summerford, attorney	100.00 per hour
H. Clay Fulcher, attorney	100.00 per hour
Michael Bonnett, economist	75.00 per hour
Raymond Nance, economist	75.00 per hour
Law Clerk	25.00 per hour

The only information on the qualifications on these persons is that provided in the "Summary" attached to firm's application for fees (filed February 23, 1989). Upon the agreement of the parties, the court indicated it would consider

this information as evidence.

Zelinski graduated from Arkansas University Law School with honors in May, 1985. Since graduation, she has practiced primarily bankruptcy law. Nixon obtained his law degree from the Oklahoma City University School of law in May, 1983. He is also a certified public accountant. He has practiced bankruptcy law since 1986. Bonnett has B.S. and M.S. degrees in agricultural economics from Oklahoma State University. He received his M.S. in 1976 and has worked as an agricultural economist since that time. Nance received his M.S. in agricultural economics from the University of Arkansas in 1984. He has been employed in that field since. The law clerk, Craig Henry, while employed by firm, was a student in the University of Arkansas School of Law.

Firm, by its agreement, expected to fully represent Indviks in five matters. Such representation would include investigatory work, settlement negotiations, litigation, administrative proceedings and appeals. The retainer was to cover all legal expenses with the exception of the payment of local counsel. Indviks were also to pay their personal expenses associated with the cases. Firm expected that costs for expert witnesses and deposition transcripts would range between $10,000.00 and $15,000.00 and that these costs would be paid out of the retainer fee. Additional costs to be paid out of the retainer would be travel, lodging, telephone, copying and postage. The portion of the retainer not used to pay costs would fully satisfy Indviks' fee obligation to the firm.

Firm adopted this fee structure because its experience in the agricultural law field led it to believe that the attorney/client relationship was more often than not "poisoned" when inevitably during the course of litigation, the farmer/client lost the financial ability to pay ongoing fee obligations. The method, according to the firm, allowed it to fully and zealously represent the client without the detraction of the client's later financial problems.

Once the cases were dismissed, firm set about to deal with the Indviks' problems with the five creditors described in the firm retention letter--Farmers Home Administration (FmHA), Production Credit Association (PCA), Forest City Bank and Trust (FCBT), Forest City Elevator (ELEVATOR), and John Hancock Life Insurance Co. (also referred to as HANSECO). All were creditors of the Indviks' faltering farming business. All but Elevator claimed security interests in assets of the Indviks. Because of the differing natures of the creditors, it was expected by firm that each would be treated somewhat differently in the litigation process.

ELEVATOR

Elevator had sued Indviks to collect an unpaid bill in the approximate amount of $8,000.00 or $9,000.00. Firm entered its appearance in the state court proceeding and successfully resisted a motion for summary judgment. Firm, with Indviks' approval, settled the suit for $6,500.00 to be paid to elevator over a short period of time. Attorneys Zelinski and Alexander devoted 28.8 hours to this matter. On an hourly rate basis, total fees would have been $3,067.50; expenses were $18.01.

PRODUCTION CREDIT ASSOCIATION

PCA had threatened Indviks with foreclosure of the creditor's security interests in Indviks' property. Firm expected substantial time to be spent on restructuring efforts under the Agricultural Credit Act of 1987. If restructuring failed, firm expected state court litigation. Firm's informal negotiations with PCA resulted in a reduction of Indviks' debt from $30,000.00 to $6,000.00; the reduced amount was to be paid over time. Prior to Indviks filing their bankruptcy cases in 1988, they had defaulted on the settlement agreement. Firm thus considered that the debtor/creditor relationship had returned to "square one." Attorneys Zelinski, Alexander, Nixon, Fulcher and Moon devoted a total 19.75 hours to the matter. This would normally have amounted to $2,412.50 in attorneys' fees. Economists spent three hours on the case; expenses were $11.22.

FmHA

Indviks were in default on their loan obligations to FmHA.

Firm expected to pursue the loan restructuring process as far as possible. Litigation subsequent to this process was also a possibility. Richard Alexander testified as to the plodding nature of the administrative process. He doubted that Indviks

and FmHA ever reached a conclusion to their dispute. During the administrative process, firm succeeded in obtaining the release of operating and living expenses. Three attorneys worked on this matter, expending 18.15 hours--a normal fee of $1,902.50. Expenses amounted to $16.13. The law clerk generated $37.50 worth of time on the case.

HANSECO

Hanseco was a long-term lender with a mortgage on Indviks' land, including the homestead. A foreclosure action was pending when firm was retained. Because Hanseco was determined by firm to be a "passive lender", it was believed that there would be few if any lender liability claims or defenses which could be asserted by Indviks in the action. It was firm's strategy to "hold Hanseco to its proof" and make sure that procedural requirements were followed. From its research on Iowa law, firm determined that Indviks' hopes of retaining the homestead rested on their statutory redemption rights.

Money would be needed for redemption. Indviks expected to receive some money from the estate of a deceased relative. However, disagreement among the heirs or beneficiaries was slowing the pace of the probate proceeding. Firm became involved in negotiating an end to the dispute. Ultimately, Indviks received approximately $40,000.00 to $50,000.00 from the estate. Before it could be used to redeem the homestead, Indviks spent it other ways. When loans to save the homestead could not be obtained, it was the consensus at the firm that bankruptcy was the only answer. The present cases were filed on August 17, 1988, thereby staving off the foreclosure sale on Indviks' land.

Four attorneys spent 69.70 hours on the Hanseco matter. The law clerk worked 23.25 hours. Expenses totaled $1,154.19. Legal fees based on normal hourly rates would have been $8,363.75. Time spent by firm lawyers and personnel was kept, as in the other matters, in quarter hour increments.

FOREST CITY BANK AND TRUST

Litigation with FCBT began with a pro se action initiated by Indviks in state court. Firm planned to investigate the basis of Indviks' claims against the bank and to amend the pleadings as necessary to assert additional and/or different lender liability theories against the bank. A significant amount of research was done by firm regarding potential amendments and regarding applicable statutes of limitation as to Indviks' claims. Before amendments to the pleadings could be filed, FCBT was taken over by the Federal Deposit Insurance Corporation. Firm did additional research on Indviks' likely success in asserting their claims against the FDIC. Firm ultimately viewed this as an unlikely prospect given the state of the law in the field. Firm also researched the possible assertion of claims against bank directors. The FCBT litigation was interrupted by the filings of bankruptcy. The pro se complaint was never amended.

Prior to the bankruptcy filings, 79.55 hours of attorney time and 72.50 hours in law clerk time were put in. There were $51.21 in expenses. Normal hourly billing would have resulted in $10,017.50 in fees. Of this, $787.50 was generated prior to the Indviks' dismissal of their 1987 bankruptcies.

ADMINISTRATIVE

Some work done by firm lawyers and personnel did not neatly sort into the five creditor matters. Itemizations presented to the court listed this work under an "Administrative" category. Included in this category was the "Osmonson matter" which involved a lease of some of the land being foreclosed upon by Hanseco. There was discussion and research on the effect of the foreclosure upon the lease and rent. Also included in this category was work on the probate problem, some document drafting and research. The "Administrative" category involved 49.25 hours in attorney time, 28 hours in economist time, 15.75 hours in law clerk time, and expenses of $3.29. Total billing at normal hourly rates would have been $7,506.25 plus the expenses of $3.29. Of the hours expended, $917.50 worth of time was spent before the initial bankruptcies were dismissed.

1988 BANKRUPTCIES

The final category on firm's billing summary (A & A Exhibit 13) covered the present bankruptcy proceedings. The exhibit shows 171.20 hours in attorney time, 101 hours of economist time and 113 hours of law clerk time spent on bankruptcy matters. Expenses totaled $3,946.02. Of the time spent, one hour of time was spent by Alexander prior to the

dismissals of the 1987 bankruptcies; four hours of law clerk time was so spent. Some $1,240.00 in time was expended prior to the filing of the present bankruptcies but after the dismissals of the prior cases.

While the Indviks were debtors-in-possession in the present bankruptcies, three lawyers, two economists, and the law clerk worked on the cases. Prior to the firm's discharge by Indviks and the filing of the motion to substitute counsel, the breakdown of work by the firm was as follows:

Zelinski	60.30 hours
Alexander	.25
Nixon	16.75
Law clerk	27.75
Economists	24.00

Expenses just prior to the filing of the petition through the filing of the motion to substitute amounted to $2,609.61. The time spent on the bankruptcy after December 20, 1988 involved firm's defense of its retainer fees.

Firm had intended to continue the litigation covered by the retention letter even after bankruptcy had ensued. However, debtors discharged firm in early December, 1988. The resulting motion to withdraw was filed on or about December 20.

DISCUSSION

Firm obtained a fixed fee, non-refundable retainer from Indviks to handle all matters involving five of Indviks' creditors. At the close of trial on January 30, the court inquired of counsel whether non-refundable retainers were permissible in Iowa, and if not, the effect of such impermissibility upon the court's examination of the fee retainer. The court now considers that the type of retainer taken by the firm is not relevant to the court's examination of the fees under 11 U.S.C. § 329(b) and Fed.R.Bankr.P. 2017(a).

Types of fee retainers were well explained and discussed in the decision of In re McDonald Bros. Construction, Inc., 114 B.R. 989 (Bankr. N.D. Ill. 1990). In light of McDonald Bros. Construction, the court considers that firm's retainer was an "advance payment retainer", ownership of which was intended by firm and Indviks to pass to firm upon transfer to compensate firm in advance and in full for the provision of legal services. Id. at 1000.

The retention letter provided that the advance fee payment was non-refundable. The court doubts, but need not decide, that the non-refundable provision is enforceable in Iowa because it violates DR 9-102 of the Code of Professional Responsibility for Lawyers adopted in Iowa in 1974. This Code section states that:

> All funds of clients paid to a lawyer or law firm, advances for costs and expenses, except retainer fees paid on a regular and continuing basis, shall be deposited in one or more identifiable interest-bearing trust accounts. . . . (Emphasis added.)

DR 9-102(A). The retainer paid by Indviks to firm was not one paid on a regular and continuing basis.

A lawyer must withdraw when discharged by a client, DR 2-110(B)(4), and upon withdrawal, the attorney must refund "any part of a fee paid in advance that has not been earned." DR 2-110(A)(3). See Louisiana State Bar Association v. Tucker, 560 So.2d 435, 437 (La. 1989), reh'g *denied;* cf. Estate of Forrester v. Dawalt, 562 N.E.2d 1315 (Ind. Ct. App. 1990), *reh'g denied* (1991).

But the issue of refund ability and of whether under Iowa law, the firm, on discharge, is entitled to recovery based on quantum meruit or on contract would be more appropriately decided in a client's, trustee's or firm's action on contract. The court's examination of the reasonableness of the retainer is based on 11 U.S.C. § 329(b).

Firm makes three arguments. First, that the retainer should be examined for reasonableness from the perspective of the parties at the time the fee agreement was made, and that through such an analysis, the $50,000.00 should be found to be

reasonable. Second, that if the court should order some fees returned to the estate as excessive, the court should consider and allow firm's fee application as an administrative expense. Third, that to the extent the entire fee is not allowed under the first two arguments, firm should be permitted to file a proof of claim as an unsecured creditor.

I.

Under 11 U.S.C. § 329, the court may examine transfers by debtors to their attorneys made within the year prior to bankruptcy if the transfers are for services rendered or to be rendered in contemplation of or in connection with a case under the Code. If the compensation exceeds the reasonable value of the services, the court may "cancel any such agreement [to transfer], or order the return of any such payment, to the extent excessive. . . ." 11 U.S.C. § 329(b). The purpose of this section "is to counteract the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him from financial reverses." In re C & P Auto Transport, Inc., 94 B.R. 682, 688 (Bankr. E.D. Cal. 1988) (citing in re Wood and Henderson, 210 U.S. 246, 28 S.Ct. 621 (1908)); see also, In re GIC Government Securities, Inc., 92 B.R. 525, 529 (Bankr. M.D. Fla. 1988).

The legislative history accompanying § 329 states:

> Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny.
>
> Subsection (b) permits the court to deny compensation to the attorney, to cancel an agreement to pay compensation, or to order the return of the compensation paid, if the compensation exceeds the reasonable value of the services provided.

HR Rep No. 595, 95th Cong. lst Sess. 329 (1977); S Rep No. 989, 95th Cong. 2d Sess. 39-40 (1978).

Firm would have the court analyze the retainer in light of the parties' expectations as to what work would be necessary to represent the Indviks in the five matters. In setting the flat fee, that would certainly be the primary consideration of the firm. But this court must view the reasonableness of the retainer in light of the work which was actually done. In re C & P Auto Transport, Inc., 94 B.R. 682, 688 (Bankr. E.D. Cal. 1988). Firm's citation of G.W.C. Financial and Insurance Services, Inc., 8 B.R. 122 (Bankr. C.D. Cal. 1981) is not on point. In that case, the court gauged an award of bankruptcy fees not on the work actually done but on the work which it found "reasonably necessary under circumstances of . . . [the) case." Id. at 125.

Firm also relies on State ex rel. Gibson v. American Bonding & Casualty Co., 212 Iowa 1052, 237 N.W. 362 (1931) which upheld a contingency fee against a claim by client that the parties had misunderstood at the time the contingency arrangement was negotiated how little work would be necessary to a successful recovery. The $50,000.00 flat fee portion of Indviks' agreement with firm was not based on firm's successful recovery on behalf of Indviks. Firm, through its work, created no fund from which to take a contingency. It was, for the most part, defense work. The contingency related to any potential recovery from FCBT.

The court concludes that the primary gauge of the reasonableness of the fee must be the reasonable value of the services actually rendered in the matters entrusted to firm.

ELEVATOR

Based on its normal hourly rates, firm generated $3,067.50 in fees in defending the elevator's approximate $8,000.00 to $9,000.00 claim against debtors. Firm, with Indviks' consent, settled the claim for $6,500.00. There is no evidence as to whether firm's legal maneuverings were based on a good or colorable defense. Eighteen and one-half hours, more than half if the time spent by firm, was in preparing for and defending a plaintiff's motion for summary judgment. Considering the size of the elevator's claim, the lack of evidence of the basis for the defense, and the result, the court considers an allocation of $3,067.50 in fees to be excessive. There is no evidence that the Indviks were being unreasonable in preventing settlement. The court considers that $2,000.00 plus expenses of $18.01 is a fair and reasonable award.

FmHA

Firm, in its itemization of services on this matter, shows $1,940.00 in fees and $16.13 in expenses. The court finds these amounts to be reasonable.

PCA

For this case, firm shows $2,637.50 in fees and $11.22 in expenses. The court finds these amounts to be reasonable.

FCBT

The itemization (A & A exhibit 11) lists $10,017.50 in fees and $51.21 in expenses. Bank generated $787.50 in fees prior to the dismissal of the former bankruptcy cases. Having not been appointed counsel in those cases, firm is not entitled to compensation in that amount. An entry on the itemization shows four hours of clerk's time worth $100.00 on August 15, 1988 for preparation for hearing and research on redemption. This entry appears to bear no relationship to the FCBT matter, so compensation for it will not be allowed. The balance of the time shown in the amount of $9,130.00 plus expenses in the amount of $51.21 are reasonable.

HANSECO

Firm claims that fees equaling $8,363.75 at normal hourly rates plus expenses in the amount of $1,154.19 are reasonable. The court disagrees. This was a pending foreclosure suit by an admittedly "passive lender." Firm conceded it unlikely that any lender liability defenses were available. Its strategy was to hold the creditor to its burden of proof and make sure that it observed the procedural requirements of foreclosure. Much time was spent in firm's educating itself on Iowa foreclosure and redemption law. Such an education should not be borne solely by the client to the benefit of an attorney with no Iowa experience. EC 6-1, Iowa Code of Professional Responsibility for Lawyers.

There was no indication that Indviks had any defense at all to the foreclosure action. It seems that the defense was perhaps merely an impediment to the plaintiff while firm made an attempt to settle the case. Summary judgment was ultimately entered in Hanseco's favor. No settlement was reached. All that Indviks may have gained by the defense was some time and some advice on redemption of homestead. This was not worth $8,363.75 in fees. A reasonable amount is $5,000.00. Expenses were reasonable in the amount of $1,154.19.

ADMINISTRATIVE

This is a potpourri of work which appeared useful to the clients. However, $917.50 in fees were generated prior to the dismissal of the 1987 cases. Firm may not be compensated for this nor for 1988 post-bankruptcy work in the amount of $125.00. The court finds there were reasonable fees in the amount of $6,463.75 and expenses in the amount of $3.29.

SUMMARY

A summary of the foregoing shows reasonable fees and expenses as follows:

CASE	FEES	EXPENSES	TOTAL
Elevator	$ 2,000.00	$ 18.01	$ 2,018.01
FmHA	1,940.00	16.13	1,956.13
PCA	2,637.50	11.22	2,648.72
FCBT	9,130.00	51.21	9,181.21
Hanseco	5,000.00	1,154.19	6,154.19
Administrative	6,463.75	3.29	6,467.04
	$27,171.25	$1,254.05	$28,425.30

The court finds that reasonable fees and expenses for firm were $28,425.30. The balance of the retainer is excessive in the amount of $21,574.70.

BANKRUPTCY

As stated, $21,574.70 of the retainer was excessive. The court may order that amount returned to the estate. Firm asks that it be permitted to apply any excessive amount to its unpaid bankruptcy fees which it claims are $32,743.52. Firm never applied for appointment as counsel for the debtors in the cases. Nor has firm sought an order granting retroactive appointment. There is sufficient evidence before the court on the reason for the failure to obtain appointment and on the value of the bankruptcy legal work for the court to rule on firm's request.

When the decision was made to file the chapter 12 cases in late summer 1988, firm drafted all necessary appointment documents, executed them, and forwarded them to local counsel for filing. They were never filed. "Extraordinary circumstances" must be shown to permit retroactive appointment of counsel. Matter of Independent Sales Corp., 73 B.R. 772 (Bankr. S.D. Iowa 1987).

The court believes that the circumstances of this case are sufficient to warrant consideration of firm's fee application retroactive to the date of filing. There would be little point in appointing firm at this juncture. However, firm's bankruptcy fee request will not be disallowed for failure to obtain appointment at the outset of the cases.

RATES

In examining the retainer, the court accepted the normal hourly rates of the attorneys and other personnel involved. The court concludes that in examining fees under 11 U.S.C. § 329, a somewhat different standard must be used than when approving bankruptcy fees under § 330. The pre-bankruptcy fees were the firm's normal hourly rates for their state court work and for handling settlements and administrative proceedings. Those hourly rates did not shock the conscience. For the performance of legal work in the bankruptcy court, however, rates must be charged which are approved by the court upon justification by the professional.

Not all of the hourly rates charged by firm are justified in this case. Generally, attorneys practicing in this court have requested rates ranging from $60.00 to $125.00 per hour. Few request approval of hourly rates greater than $100.00. The $100.00 hourly rate is common for the most competent and experienced attorneys. This court would approve rates greater than $100.00 but only with testimony showing that rates for comparable work in the community in other fields of law also exceed $100.00 for similarly qualified counsel. This court has no particular desire to restrict attorneys to $100.00 per hour. In the general practice of law, competition, and the supply of work affect, and most times restrict, rates. It is often not so in bankruptcy. Attorneys for debtors, creditors committees or trustees often seek to charge more than they charge other clients for other types of work. This fact and the court's knowledge of fees charged in this region leads it to believe that those attorneys charging $100.00 per hour are being fairly compensated in comparison to equally qualified attorneys in other fields.

Having written this, the court must say that although Mr. Alexander appears to be quite capable and competent, he has not justified to this court an hourly rate of $150.00. He will be allowed $100.00 per hour as will Mr. Nixon. Ms. Zelinski will be allowed a $90.00 hourly rate. She began working on the Indviks' matters after being out of law school less than three years.

There is contradiction in the evidence as to the normal hourly rates for the economists. The "Summary of Professional Credentials" attached to the fee application showed the hourly rate for Bonnet and Nance at $50.00. Yet the "Summary of Time & Billing . . ." (A & A exhibit 13) shows the rate at $75.00 per hour. They will be allowed $50.00. Law clerk work will be compensated at the rate of $25.00 per hour.

PRE-FILING BANKRUPTCY WORK

The "Review Statement" (part of exhibit 11) shows work done from August 15 through 17, 1988 in preparation for filing. Nixon worked 3.5 hours. This will be allowed. Attorney Fulcher worked .50 hours. There was insufficient

explanation of Fulcher's task or its value to the bankruptcy. It will not be allowed. The law clerk is shown to have worked 42 hours. Not all of this time will be allowed. Four hours on August 15 will be disallowed. It is described as "Preparation for hearing/research redemption." It does not appear related to the filing. Substantial time had been spent on state law redemption issues long before the 15th of August. This entry is not satisfactorily explained. Also, one entry shows 18 hours of work on August 15. This is in addition to the previously described four hours. The court doubts the accuracy of a statement that the clerk put in a 22-hour day. For the 15th of August, the clerk will be allowed compensable time of eight hours. Thus, for pre-filing work, Nixon will be allowed 3.5 hours, and the firm will be compensated for the clerk's work in the amount of 17 hours at $25.00 per hour and 11 hours at $12.50 per hour. This pre-filing compensation totals $912.50.

POST-FILING BANKRUPTCY WORK

Firm will be compensated for work done from the filing of the petition on August 17, 1988 to the filing of the motion to withdraw as counsel on August 20, 1988. The time subsequent to the motion was spent defending the retainer fee. There was substantial time and energy spent on this, but it will not be compensated by the estate.

The court finds that during the period August 17 to December 20, firm personnel worked the following number of hours on the cases.

Zelinski	60.30 hours
Alexander	25.00
Nixon	16.75
Clerk	27.75
Bonnet	7.50
Nance	16.50

Nance and Bonnet are economists. It appears from the pertinent part of exhibit 11 ("Review statement re consolidated bankruptcy") that they both worked on the same tasks, preparing budgets and cashflows. The court believes that duplication was inevitable. Therefore, six hours of economist time will be disallowed; 18 hours will be allowed. Attorneys' and clerk's times will be allowed as shown above at the rates previously approved, yielding approved compensation in the following amounts:

Zelinski	$5,427.00
Alexander	25.00
Nixon	1,675.00
Clerk	693.75
Economists	900.00
Total	$8,720.75

Bankruptcy expenses will be allowed in the requested amount of $3,946.02.

The total bankruptcy allowance, for pre- and post-filing work, is $13,579.27. The court, pursuant to § 329(b) appears to have the discretion to have the excess retainer returned to the estate. It could then allow the bankruptcy fees as a chapter 11 administrative expense. There would be no certainty that it would be paid in full. There is a better alternative. Normally, a firm holding a retainer albeit for bankruptcy work would apply that retainer to allowed chapter 11 fees until the retainer was exhausted. Only fees not covered by the retainer would risk not being paid upon a conversion to chapter 7. It is true that the retainer in this case was not paid for the purpose of the bankruptcy filing. Yet the court views it as fair to permit the allowed bankruptcy fees to be paid from the portion of the retainer determined to be excessive. The balance must be returned to the estate.

CONCLUSIONS

Of the $50,000.00 retainer fee paid to Arens & Alexander by Indviks, $21,574.70 was and is an excessive fee pursuant to 11 U.S.C. § 329(b).

Firm may obtain compensation for its work on Indviks' bankruptcy cases despite the failure of the firm to obtain advance appointment. Firm is allowed $13,579.27 in fees pursuant to 11 U.S.C. § 330.

Firm may subtract the allowed bankruptcy fees from the excessive work. The balance must be turned over to the trustees of the Indvik estates in equal shares pursuant to 11 U.S.C. § 329(b).

ORDER

The court determines that of the $50,000.00 retainer fee paid to the law firm of Arens & Alexander by Lowell, Melva and Eldon Indvik, $21,574.70 is excessive.

Arens & Alexander is allowed $13,579.27 as compensation for professional fees and expenses in these bankruptcy cases, and firm may deduct this amount from the excessive amount of fees.

Arens & Alexander shall turn over to the trustees of the Indvik estates, in equal shares, the total sum of $7,995.43.

Judgment shall enter accordingly.

SO ORDERED ON THIS 24th DAY OF JUNE, 1991.

William L. Edmonds
Chief Bankruptcy Judge