In the United States Bankruptcy Court

for the Northern District of Iowa

DUANE F. STEIN and
RITA M. STEIN
Debtor(s).

Bankruptcy No. 92-31609XF

Chapter 11

ORDER RE: APPLICATION FOR PROFESSIONAL COMPENSATION

The law firm of Childers & Fiegen, P.C. (FIRM) has applied to the court for allowance and payment of professional fees following its withdrawal as debtors' counsel. Debtors objected to firm's final application. The United States Trustee filed no comment. Hearing on the application was held by telephone on February 16, 1996. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

I.

Childers & Fiegen, P.C. is the second law firm to withdraw as debtors' counsel. This case was filed under chapter 12 on September 1, 1992 by attorney James H. Cossitt. The case was converted to chapter 11 on June 3, 1993. Cossitt moved to withdraw on October 27, 1993. Cossitt alleged that his clients, Duane and Rita Stein, believed he had mishandled aspects of the case and that Steins' concerns with his performance interfered with his ability to represent them. A particular problem between the Steins and Cossitt was that Cossitt was refusing to release funds which belonged to the Steins. There was disagreement over his right to hold the money as protection for his fees. The court found that the relationship between the debtors and their counsel had deteriorated and that effective representation was impossible. The court granted the motion to withdraw on November 24, 1993. At the time of the withdrawal, the accomplishments of the case, as shown by the file, included the filing of two sets of schedules, a claims report, a plan and a disclosure statement and the filing of an adversary proceeding to determine tax debt. The court had denied approval of the disclosure statement.

Steins had filed bankruptcy in the hope of determining and providing for payment of disputed tax claims of the Internal Revenue Service and the Iowa Department of Revenue (IDOR). Thus far, they have been the only creditors participating in the case. Steins' other debts include county real estate taxes, small secured loans to two relatives, and claims of unsecured creditors. Prior to the Steins' filing, the IRS had levied on their Iowa real estate. Cossitt filed an adversary proceeding against the IRS and the IDOR. It was still pending at the time of his withdrawal. Prior to Cossitt's withdrawal, the court had allowed him interim fees of $9,665.00 and reimbursed expenses of $1,194.20. His interim application was not objected to by Steins. Cossitt filed a final application after his withdrawal. He requested fees of $4,840.00 and reimbursement of expenses in the amount of $770.87. The court, on its own motion, set hearing on Cossitt's authority to hold debtors' funds. Hearing was set as well on Cossitt's administrative claim.

Steins first contacted Childers & Fiegen, P.C. in early March 1994. Firm agreed to represent debtors. The court denied a pro se motion by the debtors to change the venue of the case to Cedar Rapids to accommodate the firm. The court ruled that venue for matters arising in the case would be determined on a case-by-case basis so as to be fair to those then involved in any particular proceeding. Firm applied to represent debtors, and the application was granted.

The application provided for a retainer of $10,000.00. Steins would pay $2,000.00 on approval of the application to employ and $3,000.00 by May 15, 1994. The remaining balance of the retainer would be paid by Steins at the rate of $300.00 per month beginning June 15. Debtors agreed "that counsel be allowed to draw 80 per cent of all billing periodically from the retainer in payment, subject to Court approval." Application to Employ docket no. 99, ¶ 8. Fees in

excess of the retainer would be paid when approved. Id.

Firm filed an objection to Cossitt's final fee request. The fee dispute was settled with Cossitt agreeing to accept a final allowance of $1,394.72 in fees and expenses. Although the settlement did not specify the breakdown of the final allowance, I will presume for purposes of the pending matter that the final allowance was for all expenses of $770.87 with the balance of $623.85 applied as fees. Cossitt agreed to return to the debtors money in excess of the allowance.

During the case, Steins employed attorney Charles A. Walker to work on tax matters. He is still employed. He has thus far been awarded $1,920.00 in fees and $241.12 in expenses.

Firm moved the adversary proceeding with the IRS and IDOR toward trial. The time for discovery was extended. Counsel for Steins, IRS and IDOR filed a Joint Pretrial Statement on March 21, 1995. The proceeding was set for trial for April 4, 1995. The attorneys met just prior to trial and reached a settlement of the case.

Steins and IRS agreed that the IRS claim, which IRS calculated to be $79,000.00 as of the trial date, would be compromised for $24,400.00 plus interest after that date. Steins and IDOR agreed that the Iowa tax claim, which IDOR calculated at $2,200.00, would be compromised for $1,000.00. The settlements were contingent on Steins' obtaining financing as the taxing authorities had bargained for immediate payment. Steins did not have ready cash but immediately sought authority to mortgage 39 acres of farm ground to raise the money. A motion to compromise and a motion to incur secured debt were filed by their attorneys. The latter motion would give debtors authority to borrow up to $42,000.00 with the land as security and to pay closing costs and accrued real estate taxes. The motions were granted in late May 1995.

Steins found it difficult to obtain financing. The court granted additional time to consummate the settlement. Finally, the court entered an order in September 1995 giving Steins to December 1 to obtain a loan commitment. If one were not obtained, the court would set the adversary proceeding for trial. On November 15, 1995, firm filed its motion to withdraw. Firm alleged an irreparable breakdown of the attorney-client relationship. Steins objected to the withdrawal. At a hearing in Cedar Rapids on December 20, the court learned that Duane Stein was critical of the firm for pressuring him to accept a settlement of the tax disputes on the day that had been set for trial the previous April. Mr. Stein told the court that although the settlement might have been satisfactory if he had been able to raise the money, he was not able to pay the settlement funds, and would have been better off going to trial. He was critical of the efforts of Dan Childers and Charles Walker to pressure him into a settlement. Since he could not raise the funds, he felt he had lost time, was worse off than before he settled, and he blamed his attorneys.

I reluctantly permitted the withdrawal knowing that Steins would have difficulty in obtaining new counsel and realizing that without counsel the Steins would have an uphill battle in trying the adversary proceeding and in reorganizing. Steins and counsel agree that if Steins are not substantially successful in the tax litigation, reorganization may not be possible. At the hearing, I alerted attorney Childers that a *quid pro quo* for permitting withdrawal may be the required release of some or all of firm's retainer to permit Steins to obtain new counsel.

Firm filed its final application for fees on December 27, 1995 (docket no. 160). Firm requests the allowance and payments of $11,317.50 in fees and $1,331.49 in expenses for a total application of $12,648.99. Steins filed a *pro se* objection saying:

> 1. In nearly two years while representing the Steins, the Law Firm has accomplished little if anything other than a questionable settlement with Mr. James Cossitt to retrieve funds from a trust account being held by Mr. Cossitt.
>
> 2. The Steins urgently need the retainer paid to the Law Firm so they can employ a new attorney.

(Objection, docket no. 163.)

Firm responded to the Objection by recalling the court- approved provision for its $10,000.00 retainer and pointing out that it had received only $8,308.15 of that amount. Firm argues that the amount it has been paid does not fully satisfy its fee request and that unless the court awards less than the amount thus far paid, nothing should be returned to Steins.

Firm says Steins have failed to show a lack of other resources to pay a retainer to a new attorney. It draws the court's attention to monthly reports which show that there is 1995 crop remaining which could be sold to generate funds for a retainer. Duane Stein contends that he needs some of the remaining crop to put in a crop for 1996 and that although he can raise some money for a retainer, he cannot, without it, raise the $10,000.00 that is being demanded by counsel he has contacted. I find this to be so.

II.

The fee application shows that these professionals worked the following hours on the case at the rates shown.

Attorney/Paralegal	Position	Hourly Rate	Hours	Total
Dan Childers	Attorney	$135	12.6	$ 1,701.00
		150	23.75	3,562.50
Kate Corcoran	Attorney	85	6.75	573.75
Thomas Fiegen	Attorney	100	12.80	1,280.00
		120	2.10	252.00
Melanie Fisher	Paralegal	35	.10	3.50
	Attorney	85	.40	34.00
Sue Daves	Paralegal	50	1.30	65.00
Nancy Roth	Paralegal	40	31.85	1,274.00
		45	57.15	2,571.75
		Total	148.80	$11,317.50

The above reflects a change in hourly rates on January 1, 1995, a credit given by Dan Childers for $615.00 for 4.10 hours of work, and Melanie Fisher's change in rate when she became a lawyer. The fee application shows 14.75 hours for which no charge was made, which hours are included in the above totals. Mr. Childers says substantial time was spent that is not shown in the application.

The application explains that Childers initially met with the Steins and settled the fee dispute with Cossitt. Corcoran then took over to finalize the Cossitt settlement, and to file a complex application to employ firm as counsel. Childers again became involved, analyzing the status of the case and the options available to the Steins. Childers then assigned Fiegen to work on the tax dispute and to review the existing plan and disclosure statement. When Steins and Fiegen could not get along, Childers again became involved beginning in mid-March 1995. He worked out the settlements with IRS and IDOR. Paralegal Nancy Roth did substantial work on the case throughout the firm's representation of the Steins. Other paralegals were involved only sporadically.

III.

I do not agree with Steins' argument that firm "accomplished little, if anything" in the case. Firm aided in the administration of the case, including the filing of monthly reports and participation in status conferences required by the court. The firm obtained a substantial reduction in Cossitt's final fee request, a reduction of more than $4,000. Firm prepared for trial of the tax adversary. I am not persuaded by Duane Stein that the settlement of that adversary was a bad one. IRS had filed tax liens against Steins, tying up various property. The IRS claims nearly $80,000.00 in taxes, and IDOR claims approximately $2,200. Counsel reached a settlement with them for $25,400. Stein admits that he may owe some taxes. As to the IRS, he disputes its claim of interest. He says there may be only $10,000 to $12,000 in taxes owed to the IRS. The effect of the settlement was to buy the certainty of paying $12,400 of the disputed amount against a risk of paying $67,000 more than that if he lost the case. I cannot, on this record, find that this was an unreasonable settlement. Indeed it was previously approved by me and without Steins' objection. Even Duane Stein does not seem to think it unreasonable when it is viewed abstractly. However, since he could not satisfy his agreement, he believes he is worse off than if he had not settled and that it is the attorneys' fault. He has not shown that counsel is to blame--either that it was the attorneys' responsibility that Steins could not fund the agreement or that the attorneys should have known

that he could not do so. Therefore, I find that the legal work done by firm with regard to the tax dispute is compensable at the hourly rates requested except as where time may hereafter be disallowed for other reasons.

There are areas, however, where compensation should not be allowed or it should be reduced. Firm has charged Steins for its work in filing the motion to withdraw. That is not, in my view, a charge that should be borne by the debtors. Firm sought to have its contract of representation terminated. Under the Iowa Code of Professional Responsibility (DR 2-110(A)(1)) and the Local Rules of this court (Local Rule 3(B)(4)), firm was required to seek permission to withdraw. But when it does so, it represents itself, not the client. During the period November 14-17, 1995, I find that 4.05 hours of time charged at $339.75[(1)] was spent on the application to withdraw. Expenses associated with this application total $88.26. These amounts will be disallowed.

On May 23, 1994, attorney Charles Walker applied for professional fees of $600. On June 21, 1994, firm became involved with Walker's fee application. On that date, Dan Childers reviewed correspondence drafted by Nancy Roth to obtain the clients' position on the application. He did not charge for this. The clients never objected to the fee application. Nonetheless, firm, in eight entries, charged Steins $44 for 1.1 hours of paralegal work on Walker's fees.[(2)] All of this time was not necessary. One letter or phone call asking the clients their position was necessary. As there was no objection, counsel could then have directed the clients on how to respond to the order approving the fee. I will allow .30 hours at $40.00 equaling $12.00 and disallow $32.00.

In late June 1995, Walker again sought fees. It appears he asked firm's help in filing his application. Firm charged Steins for seeking approval of Walker's fees. From June 20, 1995 to October 12, 1995, firm spent 2.80 hours for which it charged $115.00.[(3)] The court does not compensate attorneys for preparation of their fee applications. I will not compensate firm for preparation of the application of another attorney who regularly practices in this court.

Other charges that should be disallowed fall into various categories, such as charging legal fees for clerical work that might be done by a secretary or where a paralegal spends time viewing or reviewing documents about which she is not competent to make legal judgments. Also, some of the entries show that work was duplicated between paralegals and attorneys. The following are charges which the court will disallow for the reasons described. They total $393.25 for 6.15 hours.

Disallowed Charges

Date	Paralegal or Attorney	Time	Description
3/9/94	SD	.10	Calendaring hearing dates is clerical work, not legal work.
3/15/94	SD	.20	In reviewing Cossitt's fee application, the paralegal could have made no legal judgments on whether to object. That required an attorney's consideration. The time spent indicates this was reading mail on which someone else must act. Also, calendaring the bar date was clerical, not legal, work.
3/18/94	NR	.10	The paralegal drafted a memo to the attorney on the court's two-sentence proceeding memo. This is "makework."
4/5/94	NR	.10	Charge by one paralegal talking to another paralegal about whether the client needed to be present at a hearing. That is an attorney's decision.
4/6/94	NR	.10	Charge for a phone call to client to advise that a hearing was canceled. This is clerical work which could have been handled at no charge by a secretary.
4/19/94	NR	.10	Two entries: reviewing letter and calendaring date from letter; calendaring and docketing a fee hearing. These are clerical services. They also appear to be duplicative.
4/27/94	SD	.10	Phone conference with client on matter of fee hearing. Only entry for this paralegal in this month. Work done after matter had been handled almost exclusively by another paralegal. From the entry, I cannot understand why SD became involved for such a short period unless it was merely to contact the client.

5/5/94	KC	.30	Attorney drafted letter to client regarding the attorney's retainer. This will not be compensated as work for the client.
5/25/94	KC	2.35	Her reviewing file duplicated work of Dan Childers.
6/2/94	NR	1.50	Paralegal reviewed documents received from attorney James Cossitt and reviewed Duane Stein's deposition. This is work that an attorney would have had to do in any event.
6/3/94	NR	.20	Paralegal reviewed a letter drafted by an attorney in the firm. This should not be necessary. Then paralegal drafted memo on the contact.
6/14/94	KC	.10	This entry involves a note from client relating to the retainer. This is not legal work for client.
6/14/94	NR	.10	The work regards firm's retainer, not legal work for clients.
11/22/94	NR	.10	Part of this entry involves "making arrangements with Barb for scheduling conference call." The clerk of court does not arrange this judge's conference calls.
4/13/95	MF	.40	Reviewed motion to incur debt and to compromise. This work involved reviewing motions drafted by lead attorney. Review is duplicative.
4/13/95	NR	.30	Discussion by paralegal with attorney Fisher on motions drafted by attorney Childers. There is too much duplication in these entries.

The last issue relating to the reasonableness of fees regards Duane Stein's contention that the work accomplished little, if anything. Firm did a substantial amount of work regarding the disclosure statement and plan and the information needed for them. Firm produced no disclosure statement or plan for Steins. Whatever work they did would have no value unless they completed the job. Nothing the firm did regarding the plan and disclosure statement would appear to have value to any subsequent attorney. It appears that firm charged Steins $1,106 for this work.[(4)] How should this work be compensated?

It has been said in nearby jurisdictions that a client has a right to discharge his attorney at will, but that the attorney is entitled to recover the reasonable value of his or her services. Scudder v. Haug, 201 Neb. 107, 266 N.W.2d 232 (1978); Anderson v. High, 211 Minn. 227, 300 N.W. 597 (1941). I can find no similar holding in Iowa, but I conclude such would also be the law of Iowa. Here, however, the firm was not discharged but sought to withdraw on the ground that the attorneys could not get along with the clients. I attribute no fault to the breakup in the relationship. The attorneys did the work; but because the relationship is terminated, it has little value now. Neither the attorneys nor the clients should bear the full consequences of the lost value. I conclude that the Steins should pay one-half of the charges for this work. Firm will be allowed $553.00 for the time expended.

IV.

Based on the foregoing considerations, I will disallow $1,433 of the fee request, allowing $9,884.50. I will disallow $88.26 in expenses and allow $1,243.23. The total allowance for professional fees and reimbursed expenses is $11,127.73.

V.

The remaining dispute is over the retainer. The allowance of $11,127.73 is more than the retainer. Steins paid firm $8,308.15. Steins ask that the retainer be returned so they can use it to hire new counsel. Firm wants to keep the payments and be paid the balance. There is equity on each side. Firm has done the work, and it should not be solely responsible for financing the retention of new counsel. Debtors should have to look to some extent to other resources. On the other hand, firm wanted to terminate the relationship. If it were not permitted to withdraw, it would be ethically required to continue the representation in the absence of a willful failure to pay allowed fees. Also, permitting the withdrawal leaves the debtors in the lurch. They are not solely responsible for this predicament. New counsel would not want to be employed without a retainer. Firm had taken the same position when it agreed to represent debtors. The problem was easy to foresee, and I alerted Mr. Childers that the price of getting out might be the return of some or all of the retainer.

There is no solution to this problem that would be fair and yet would please both sides. I do not attribute bad faith to Steins or their former attorneys. To rule in favor of one side would be to force the other to bear all the consequences of the termination of the attorney-client relationship. I conclude the fairest outcome is to permit the use of so much of the retainer as is necessary to pay all of firm's expenses and divide the remainder in half, requiring that one-half be applied to firm's fees and the other half be held by firm for payment to counsel approved by this court hereafter to represent Steins. I will not require an immediate turnover to Steins because if no new counsel is hired, it would be unfair to divert the money from its original purpose.

From the retainer of $8,308.15, the firm may apply $1,243.23 for payment of expenses. The balance of $7,064.92 shall be applied as follows: $3,532.46 in part payment of firm's allowance for fees and $3,532.46 shall be held by firm pending the appearance of new counsel. Upon the court's approval of an application to employ counsel for the debtors, firm shall remit $3,532.46 to new counsel. Accordingly,

IT IS ORDERED that Childers & Fiegen, P.C. is allowed $9,884.50 as professional compensation under 11 U.S.C. §330(a)(1)(A) and $1,243.23 as reimbursement for expenses under 11 U.S.C. §330(a)(1)(B).

IT IS FURTHER ORDERED that Childers & Fiegen, P.C. may apply so much of their retainer of $8,308.15 as shall satisfy the award for expenses.

IT IS FURTHER ORDERED that from the remainder of the retainer, Childers & Fiegen, P.C. may apply $3,532.46 to the allowance of compensation.

IT IS FURTHER ORDERED that Childers & Fiegen, P.C. shall hold the $3,532.46 balance of the retainer and shall remit it to counsel approved hereafter by this court to represent the debtors. If no new counsel is appointed, the money shall be disbursed only as the court hereafter orders.

SO ORDERED THIS 28th DAY OF FEBRUARY 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order and a judgment by U.S. mail to: Dan Childers, Debtors, James Cossitt, Charles Walker, U.S. Attorney, Joan Ulmer and U. S. Trustee.

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1. 11/14/95, DC .40 hours; 11/15/95, DC ½ of .60, NR 1.00, .85, .10; 11/16/95 DC .55 and .25; 11/22/95 NR .10; 11/29/95 NR .50. Expenses, 11/15-17/95.

2. 6/21/94, NR .10 and .5 hours; 6/28/94, NR .10; 7/28/94, NR .10 and .10; 7/29/94, NR .10; 8/2/94, NR .25; 9/15/94, NR .10.

3. 6/23/95 NR .90 hours; 6/27/95 NR .05; 6/29/95 NR .75 and .20; 7/19/95 NR .45; 8/2/95 NR .15 and .10; 10/12/95 NR .20.

4. 6/10/94 NR 1.50 hours; 6/28/94 DC 1.30; 8/9/94 NR .60 and ½ of .40; 8/25/94 NR .25; 9/22/94 TLF .40; 9/23/94 TLF .30 and .20; 10/6/94 NR 1/80; 10/7/94 TLF .10 and .10; 10/10/94 TLF .20; 10/14/94 TLF .20; 10/11/94 NR .40; 10/14/94 NR 1.25 and .10; 10/17/94 NR .80 and 1.30, TLF .80, .20, .50 and .30; 11/7/94 TLF .20 and .50; 11/18/94 TLF ½ of .90; 10/12/95 DC .30, NR 2.00; and 10/13/95 NR .50.