UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re EULA J. POOLE Debtor	BK 88-10925 K
In re LINDA R. JOHNSON Debtor	BK 89-12492 K
In re ROBERT & SANDRA SPEARMAN Debtors	BK 89-11400 M
In re SCOTT & MARY GREGORY Debtors	BK 89-10002 K
In re GEORGE & JOAN KAETZEL Debtors	BK 89-11026 M
In re VERNA SHERMAN Debtor	BK 89-10674 M
In re MARILYN V. KENT Debtor	BK 89-13160 K
In re PAMELA V. CRAFT Debtor	BK 90-13796 K
In re ROY COVINGTON Debtor	BK 90-11715 K
In re BARBARA A. WILLINGENS Debtor	BK 91-10414 M
In re DONNA M. LOEHR Debtor	BK 91-12278 K
In re GERALD & CHARLENE GRUCZA Debtors	BK 91-10165 K

DECISION AND ORDER

These twelve matters come before the Court pursuant to 11 U.S.C. § 329(b) and Bankruptcy Rule 2016(b), addressing the matter of the reasonableness of fees charged by the attorney for a debtor. In each of these cases the firm of Jeffrey Freedman, Attorneys at Law, represented a debtor in a chapter 13 proceeding. Each of the cases required certain further legal services not included within the scope of the original retainer agreement. These further services and compensation therefor were duly disclosed by the firm in statements filed with the Court. The United States Trustee moved to compel the return of these fees to the debtors in question on the grounds that the firm had not submitted, along with the required disclosure statement, documentary support of the time expended in the performance of those "follow-on" services in each case, and consequently "the Court and other parties in interest are unable to assess the reasonable value of the services provided...."

The undersigned judges have consolidated these twelve motions for hearing and disposition in the interest of economy to the parties and in the interest of avoiding inconsistent decisions.

The "follow-on" fees in question have been paid or are to be paid by the clients "outside the Plan," which is to say from income or assets that have not been committed to payment of creditors under the terms of the Chapter 13 Plan confirmed in each case. The supplemental fees are to be paid, essentially, from "surplus" income or "exempt" property. The services involved are

not included among those to be provided as part of the initial retainer agreement because although these services are not infrequently required, they are not required in every chapter 13 case. The first type ("type 1") arises when a chapter 13 debtor has failed to maintain current mortgage payments after confirmation of his or her chapter 13 plan, and the mortgage lender makes a motion under 11 U.S.C. § 362(d) to lift the automatic stay in order to permit foreclosure. Thus, type 1 services are only involved in cases in which the debtor owns real estate and in which, moreover, the debtor has failed to stay current on the mortgage payments.

The second type of services ("type 2") arise when a chapter 13 debtor has failed to make the payments to the chapter 13 trustee that are required to be made under the terms of a confirmed plan, and the chapter 13 trustee has obtained dismissal of the case for that reason, but the debtor (through counsel) obtains reinstatement of the case.

As to each type, the firm asserts that it expends over three hours of time in representing its client; billed at an hourly rate of $110.00, the "typical" supplemental fee is $350.00. (The typical initial retainer charged by this firm for chapter 13 cases is $750.00.)

On their face, the motions filed by the United States Trustee are premised on a provision of a Standing Order of this Court, dated July 30, 1990, which states (at Paragraph III) that "supplemental statements by attorneys as to compensation sought

from the estate shall be supported by time sheets and detail as to any disbursements charged and shall be accompanied by a motion [notice thereof to be given by the requesting party to parties in interest in accordance with Bankruptcy Rule 2002(a)(7)]."

At hearing on the motions on December 6, 1991, the undersigned concluded and announced that the United States Trustee's motions were premised on an arguably correct reading of the Standing Order. We held that Paragraph III of the Standing Order was not intended to require time sheets and a motion for supplemental fees in a chapter 13 case when the fees are to be paid directly by the client rather than by the chapter 13 trustee from monies dedicated under the Plan to the payment of creditors. (In the latter situation, supplemental allowance to attorneys delays payment to unsecured creditors; hence the distinction.)

On the basis of our decision in this regard, the firm argues that the motions of the United States Trustee must be denied and that further inquiry into the reasonableness of the fees in these cases is not properly before the Court. We disagree.

Although based upon the Standing Order, the United States Trustee's motions simply assert that the reasonableness of the fees in question cannot be ascertained without time sheets. The Standing Order is significant only insofar as it might demand that time sheets be filed. It does not, we conclude, so demand in these cases. But regardless of how the matter came before us, it is well established that the reasonableness of fees under 11 U.S.C. § 329

is proper for sua sponte consideration by the Court. Thus we announced that we would sua sponte consider the reasonableness of the fees in question, and we invited the firm to submit time sheets if it so desired, announcing as well that if it did not wish to submit time sheets we would consider the fees on the basis of the papers already submitted. We have received no further materials from the firm documenting the reasonableness of the fees and will consider the matter on the basis of the papers submitted.

Those papers include the firm's breakdown of the time spent in representing its client in a "typical" type 1 and a "typical" type 2 case. We have examined the dockets in each of these 12 cases in light of those breakdowns in an effort to determine whether any might have been "atypical." This has not been a particularly productive effort since Court dockets only reflect documents filed and appearances made; they would not reflect the attorney's other labors on behalf of his or her client. We can only say that these cases do not appear from the dockets to be significantly "atypical," and that consequently the fees charged do not appear to be facially "unreasonable."

This exercise causes us to announce today, with reluctance, that henceforth we will generally undertake sua sponte examination of the reasonableness of such fees for follow-on services in Chapter 13 cases (in which fees are to be paid "outside the plan") only if the fees are facially unreasonable. Consequently, time sheets will be required only if an aggrieved

party or the U.S. Trustee lodges objection to fees on a specific basis, a basis other than the fact that the absence of time sheets undermines efforts to assess reasonableness.

There are three factors compelling our decision. Firstly, we are ill-equipped to assess the reasonableness of the fees in the absence of time sheets. Secondly, requiring the maintaining of contemporaneous time sheets in such instances in which only the rights of debtors (and not of creditors) are implicated may of itself increase the cost, to debtors, of obtaining competent representation in routine cases. Lastly, "reasonableness" of fees is to some extent a function of market forces which drive hourly rates and "standard" rates, and to this extent "reasonableness" is not a function merely of time devoted to the case by the attorney. Thus, until an aggrieved party asserts a basis for objection to the fee, or until the attention of the court is focused (sua sponte or otherwise) on a fee that is facially unreasonable, an attorney should be able to charge his or her standard rates based upon experience as to time spent in a "typical" case.

In this last regard, it is regrettable that the value of "professional" services are decided even in part on the basis of "market forces." However, it is inevitable. It would be a reversion to 19th-century policy to decide otherwise.

Having stated our holding, it is critical in this instance to make clear what we are not holding. We are not holding

that the fees charged in these cases were reasonable; anyone with standing may raise inquiry into that issue by objection which sets forth a basis for inquiry by the Court (other than a lack of time sheets). We reaffirm that time sheets are required in support of any application for fees payable "from the estate," which is to say fees, the payment of which affects creditors in any manner. We reaffirm that fees that appear facially unreasonable will be reviewed by the Court either sua sponte or otherwise, and that in such instances the attorney will be required to provide contemporaneous time sheets, at peril of reduction or disallowance of fees in accordance with decisions of the Second Circuit which emphasize the importance of contemporaneous time sheets in matters of fees reviewable or allowable by a Bankruptcy Court.

The twelve motions are hereby denied without prejudice to the right of any party or of the United States Trustee to seek further review of the reasonableness of the fees charged, by bringing a motion which sets forth a specific basis for challenging their reasonableness, including (but not limited to) evidence that the matter was of exceptional simplicity, evidence that it involved exceptionally little attorney time, evidence that the work performed was not successful, evidence that the hourly rate assessed exceeded that charged by the attorney for similar matters outside the bankruptcy context, or evidence that the fee charged

was not in compliance with the landmark factors typically applied by Bankruptcy Courts in allowing or reviewing fees.

Dated: Buffalo, New York
January 7, 1992

Beryl E. McGuire, U.S.B.J.

Michael J. Kaplan, U.S.B.J.