UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 03-32764
	)	
Bobbie McEwen,	)	Chapter 7
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM AND ORDER REGARDING MOTION OF THE UNITED STATES TRUSTEE TO REVIEW COMPENSATION PAID TO COUNSEL FOR DEBTOR AND TO ORDER THE RETURN OF EXCESSIVE OR UNREASONABLE FEES

This matter is before the court for decision after an evidentiary hearing on a motion filed by the United States Trustee to review compensation paid to counsel for Debtor Bobbie McEwen and to order the return of excessive fees [Doc. # 10]. The United States Trustee's motion generally challenges the practice of counsel's "undbundling" of legal services to Chapter 7 consumer debtors.[1]

This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this contested matter by Fed. R. Bankr. P. 9014 and 7052. Regardless of whether specifically referred to in this Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the court will grant the instant motion to the extent it seeks review of fees paid to Debtor's counsel but will grant the motion in part and deny the motion in part to the extent it seeks disgorgement of those fees.

FINDINGS OF FACT

Debtor's petition for relief under Chapter 7 of the Bankruptcy Code was filed on April 14, 2003. Debtor lives in Sandusky, Erie County, Ohio, which is at least a one hour drive from both this court and the location at which the first meetings of creditors are held for debtors from that

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The same issue has been raised as to the same lawyer in *In re Bryant*, Case No. 03-33470 in this court. The two hearings were conducted together, but separate decisions will be entered because the facts are not the same in the two cases.

county. Debtor had retained as counsel George Evans, whose office is also located in Sandusky.

The petition was signed by both Debtor and Evans ("Counsel"), who was entered as the attorney of record in the case at the time of filing. The bankruptcy schedules filed show a consumer Chapter 7 case with no complex issues. Debtor owns $5,388.00 in personal property but owns no real property, has no secured claims and no priority unsecured claims. She has general unsecured claims totaling $44,282.12.

In accordance with 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b), Counsel filed a form entitled Disclosure of Compensation of Attorney for Debtor ("Fee Disclosure Statement"). Counsel indicates in the Fee Disclosure Statement that he had received $750.00 as compensation for "legal service for all aspects of the bankruptcy case," including:

a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;

b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;

c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof.

[Doc. #1]. Notwithstanding this disclosure, the United States Trustee and Counsel stipulate that the actual fee received from Debtor was $450.00 and further stipulate that Counsel and Debtor agreed that Counsel would not appear at the first meeting of creditors scheduled in accordance with 11 U.S.C. § 341(a). Although Counsel offered Debtor the option of being represented at the first meeting of creditors for an additional fee of $150.00, Debtor chose not to pay the additional fee. [Doc. # 18, Tr. of § 341 meeting, p. 9]. Counsel did not, however, move to withdraw as counsel in the case, nor is there any evidence that he informed the Chapter 7 Trustee, Debtor's creditors or the court of this agreement.

The United States Trustee offered the testimony of two attorneys who represent Chapter 7 debtors in this court regarding their fees for such representation. The testimony indicates a fee range between $200.00 and $2,000.00 depending on the complexity of the case, with the average fee being between $500.00 and $700.00.

The first meeting of creditors in this case was initially scheduled for June 6, 2003. Although Debtor appeared for the meeting, Counsel did not appear and the meeting was rescheduled for June 13, 2003. The Chapter 7 Trustee testified that the meeting was rescheduled due to ethical concerns she had regarding questioning Debtor outside the presence of Counsel. On June 13, 2003, neither Debtor nor Counsel appeared, and the meeting was again rescheduled for July 11, 2003. On that date, Debtor appeared

without Counsel. The Chapter 7 Trustee informed Debtor of the adversarial nature

of her relationship as Trustee in the case and of Debtor's right to request a continuance. But Debtor elected to proceed without counsel and the examination was completed. No creditors were present at any of the meetings.

On July 18, 2003, the Chapter 7 Trustee reported that there was no property available for distribution from the estate over and above that exempted by law and that the estate had been fully administered. [Doc. # 9]. The order of discharge was entered on September 17, 2003.

LAW AND ANALYSIS

Section 329(b) of the Bankruptcy Code, implemented by Fed. R. Bankr. P. 2017(b), authorizes the bankruptcy court to determine whether attorney fees charged in connection with a bankruptcy case are reasonable and to order disgorgement of any fees that are excessive. The bankruptcy court has wide discretion in determining reasonable compensation. *Henderson v. Kisseberth (In re Kisseberth),* 273 F.3d 714, 721 (6th Cir. 2001)*; In re Allied Computer Repair, Inc.*, 202 B.R. 877, 881 (Bankr. W.D. Ky. 1996).

The United States Trustee contends that Counsel's fees are excessive in this case because it is a simple, routine Chapter 7 case and Counsel's representation was inadequate in that he failed to represent Debtor at the first meeting of creditors, which the United States Trustee describes as a core event in a Chapter 7 bankruptcy proceeding. Counsel counters that debtors living in areas remote from the bankruptcy court should be given the option, when appropriate, of representing themselves at the first meeting of creditors and paying a reduced fee for legal counsel's services. Otherwise, Counsel argues, debtors may not have affordable access to legal counsel for bankruptcy matters in some parts of the district.[2]

Counsel's compensation of $450.00 is not an unreasonable fee for representing a consumer debtor in a routine Chapter 7 case. Nevertheless, a determination that a fee is unreasonable "is not

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The Western Division of the Northern District of Ohio includes 21 counties and covers substantial geographic territory ranging roughly from the Ohio/Michigan border and Lake Erie in the north, to Marion, Ohio in the south, to the Ohio/Indiana border in the west, to the Sandusky area in the east. While other courts have explicitly rejected this argument, *In re Johnson*, 291 B.R. 462, 470 (Bankr. D. Minn. 2003), it has some resonance with this judge. The only geographic area of the Western Division in which there has been active bankruptcy petition preparer practice is the Sandusky area in the easternmost part of the court's geographic territory.

solely a question of overcharging; it can also be a question of underperforming." *In re Castorena*, 270 B.R. 504, 522 (Bankr. D. Idaho 2001). Several courts have addressed the importance of representation by counsel at the first meeting of creditors. *Id.* at 526-28; *In re Bancroft*, 204 B.R. 548, 551-52 (Bankr. C.D. Ill. 1997); *In re Johnson*, 291 B.R. at 468-69; *In re Merriam*, 250 B.R. 724, 738 (Bankr. D. Colo. 2000). A debtor's testimony at the first meeting of creditors is provided under oath. False or even problematic answers could lead to an adversary proceeding objecting to a debtor's discharge under 11 U.S.C. § 727 or even to prosecution for a bankruptcy crime under 18 U.S.C. § 152. As one court explained, "[t]he layperson will be exposed to questioning by a professional trustee and attorneys representing creditors. The layperson may be asked to take certain actions. In response, the layperson, acting out of ignorance or feeling that there was no need for an attorney to represent him, may say or do something to his or her detriment." *In re Bancroft*, 204 B.R. at 551-52. This court agrees that the first meeting of creditors is one of the core events in every Chapter 7 case, and one both infused with legal significance and fraught with potential legal difficulty for the debtor.

There is, however, some support for Counsel's approach in this case of offering to limit his representation to exclude attendance at the first meeting of creditors. *See In re Merriam*, 250 B.R. at 739 (recognizing that attendance by debtor's counsel at the § 341 meeting may be important in a particular case and that, in such case, reduction of fees may be warranted for counsel's failure to attend, but concluding that this does not justify imposition of a rule mandating attendance by every attorney representing a debtor at every § 341 meeting); *In re Bancroft*, 204 B.R. at 552 (concluding that an attorney can limit the scope of representation, but only if the client consents after disclosure regarding the problems that could or will be encountered, how those problems should be addressed, and the risks or hazards associated with those problems). Whether or not in a proper case a debtor and his counsel may agree to limit counsel's representation, the court finds that certain ethical concerns make Counsel's approach in this case unacceptable.

Counsel is the attorney of record in this case. The Ohio Code of Professional Responsibility prohibits a Chapter 7 trustee who is also an attorney, as the Trustee in this case is, from communicating with a debtor regarding the Chapter 7 case without the consent of the debtor's attorney. Ohio Code of Prof'l Responsibility DR 7-104. Counsel neither sought to withdraw from the case nor gave any notice of his agreement with Debtor or his consent to discuss relevant bankruptcy matters with Debtor. As a result, the Trustee was compelled to adjourn the § 341

meeting. Had counsel for creditors appeared in this case, they too would have been precluded from discussing any relevant matters with Debtor. Furthermore, Counsel's approach resulted in Debtor having to travel to Toledo on two separate occasions for the first meeting of creditors.

While the United States Trustee and Counsel stipulated that Counsel and Debtor agreed that Counsel would not appear at the first meeting of creditors, there was no evidence indicating that Debtor's agreement was based upon adequate disclosure of the potential problems that could be encountered at the meeting and the risks associated with those problems. *See In re Bancroft*, 204 B.R. at 552; *see also* Restatement (Third) of The Law Governing Lawyers § 19 ("a client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances."). Assuming that Counsel could contract away his duty to attend the first meeting of creditors, which the court does not decide here, Debtor was entitled, at a minimum, to the disclosures discussed above. And such disclosures should be in writing, with best practice and this court's preference to have the entire fee agreement in writing.[3]

Although the court concludes that Counsel's failure to appear at the first meeting of creditors was not an acceptable approach to his representation of Debtor in this case, Counsel has proceeded in the good faith belief that limiting his representation in such a manner was appropriate. There is no binding Sixth Circuit case law and no Sixth Circuit Bankruptcy Appellate Panel case law addressing unbundling of bankruptcy services and related issues of professional responsibility. There does not appear to be any circuit court of appeals case law from any other jurisdiction addressing these issues. Nor are there published cases from other bankruptcy courts in this district addressing unbundling. And, as described above, there is some case law from other bankruptcy courts supporting the proposition that counsel may limit services to bankruptcy debtors for a reduced fee under certain circumstances. Moreover, the concept of unbundling is a growing and debated issue in both bankruptcy and other consumer law areas. *See* Thomas J. Yerbich, *Testing the Limits on Unbundled, Limited Representation*, ABI Journal, Feb. 1, 2004.

Further, Debtor ultimately attained the primary objectives of filing her Chapter 7 case – discharge of her debts and retention of all exempt assets. Thus, she has suffered no adverse

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[3] Due to the parties' stipulation, it is not clear whether the fee agreement between Debtor and Counsel is in writing. No written agreement was introduced as evidence in the motion proceedings.

consequences from the limitation of Counsel's services and such limitation did not alone significantly decrease the value of his services to Debtor.

The manner in which Counsel implemented the fee agreement did, however, cause problems for both the Debtor and the Chapter 7 Trustee. These problems can be traced directly to Counsel's lack of disclosure of the fee agreement. At a minimum, the fee agreement was required to be completely and accurately disclosed on Counsel's Rule 2016(b) disclosure statement. *In re Kisseberth*, 273 F.3d at 720-21. It was not. The Chapter 7 trustee was properly reluctant to conduct the first meeting of creditors in the absence of Debtor's attorney of record and his express consent to so proceed, particularly given the filed fee disclosure form that expressly included attendance at the first meeting of creditors within the scope of Counsel's representation. These problems resulted in the rescheduling of the first meeting of creditors and the necessity of Debtor traveling twice from Sandusky to Toledo. Accordingly, the court finds that the manner in which counsel proceeded did impact the value of services to Debtor. Moreover, the failure to file a complete and accurate Rule 2016(b) statement is sanctionable in the absence of a finding that the fees exceeded the value of the service. *Id.* at 721.

In the companion case raising similar issues heard at the same time, Counsel did file a complete and accurate disclosure statement of the same fee arrangement. The court therefore finds that Counsel's failure to disclose the fee arrangement in this case was inadvertent. Inadvertence does not, however, preclude sanctions. *Id.*

The court concludes that a sanction is necessary due to Counsel's lack of disclosure of the fee arrangement and its resulting impact on the value of his services to Debtor. The appropriate amount of the sanction is $50.00. This amount approximates the mileage at the IRS reimbursement rate for Debtor's second round trip to Toledo for the first meeting of creditors and for parking costs. Beyond the $50.00 sanction, the court finds that complete disgorgement of Counsel's $450.00 fee is not an appropriate sanction in this particular case. A bankruptcy court's power to levy sanctions must be exercised "with restraint and discretion." *Id.* at 720 (quoting *In re Downs*, 103 F.3d 472, 478 (6th Cir. 1996). Disgorgement of the entire fee is an excessive sanction for the nondisclosure, because it was inadvertent. *But cf. In re Downs*, 103 F.3d at 479 (denying all compensation to an attorney who disregarded his obligation to disclose his fee arrangement under § 329 and Rule 2016(b)). The court declines to further sanction Counsel on account of the underlying fee agreement because of its findings that he acted in good

faith in attempting to structure the

contract and that Debtor was not adversely affected in the ultimate result of her case. *See In re Egwim*, 291 B.R. 559 (Bankr. N.D. Ga. 2003)(court comprehensively discusses issues relating to counsel's limitation of services to debtors for reduced fee, concluding that exclusion of representation in adversary and stay relief proceedings was unreasonable, but declining to order disgorgement as a sanction due to counsel's good faith and the fact that debtors did not suffer any adverse consequences). And although the court does not now decide the issue of the propriety of unbundling of services to consumer Chapter 7 debtors under different factual circumstances, the court fully expects that if Counsel seeks to do so in the future, the particular problems identified in this decision will not recur.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Motion of the United States Trustee to Review Compensation Paid to Counsel for the Debtor and to Order the Return of Excessive or Unreasonable Fees is GRANTED to the extent review of Counsel's compensation is sought and GRANTED, in part, and DENIED in part, to the extent that disgorgement of Counsel's fees is sought; and

IT IS FURTHER ORDERED that George Evans shall reimburse Debtor Bobbie McEwen the total sum of $50.00, with that sum to be paid within 30 days of the date of this order; and

IT IS FURTHER ORDERED that George Evans shall file evidence of compliance with this order within 7 days of such compliance; and

IT IS FINALLY ORDERED that George Evans is granted leave to file such evidence manually and not by electronic means.

/s/ Mary Ann Whipple

Mary Ann Whipple
United States Bankruptcy Judge