UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| In Re: | ) | Case No. 03-33470 |
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| Patricia Bryant, | ) | 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 Patricia Bryant and to order the return of excessive fees. [Doc. # 8]. 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 deny the motion 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 May 5, 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 county. Debtor had retained as counsel George Evans, whose office is also located in Sandusky. The petition was signed by

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1 The same issue has been raised as to the same lawyer in *In re McEwen*, Case No. 03-32764 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.

both Debtor and Evans ("Counsel"), who was entered as the attorney of record in the case at the time of filing.

In accordance with 11 U.S.C. § 329(a) and Fed. R. Bankr. P. 2016(b), Counsel filed a form called Disclosure of Compensation of Attorney for Debtor ("Fee Disclosure Statement"). Counsel indicates in the Fee Disclosure Statement that he had received $450.00 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.

[Doc. # 1]. By crossing out described services on the form Fee Disclosure Statement, Counsel excluded the following specific services from the ambit of his representation:

c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;
d. Representation of the debtor in adversary proceedings and other contested bankruptcy matters.

[*Id.*]. The United States Trustee and Counsel stipulate that the fee received from Debtor was, in fact, $450.00 and further stipulate that Counsel and Debtor agreed that Counsel would not appear at the first meeting of creditors scheduled under 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 $300.00, 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 provided the Chapter 7 Trustee or Debtor's creditors with his prior consent to discuss with Debtor matters relevant to her bankruptcy case.

The United States Trustee offered the testimony of two attorneys who represent Chapter 7 consumer 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.

Debtor also testified at the hearing on the instant motion. She indicated that she had some familiarity with what occurs at a first meeting of creditors since she had previously filed for bankruptcy and attended the meeting in that case. She further testified that Counsel explained what was going to occur and that it was her understanding that her creditors had been notified of the filing of her bankruptcy petition and that

they would appear at the meeting "if they had any complaints."

The first meeting of creditors in this case was initially held on June 6, 2003. Although Debtor appeared for the meeting, per his agreement with Debtor, Counsel did not. Debtor nevertheless elected to go forward. The Chapter 7 Trustee could not, however, conclude the meeting because Debtor reported that her petition incorrectly identified her social security number. In addition, Debtor had not scheduled a 1995 Ford Escort as personal property owned by her on Schedule B. The Trustee adjourned the meeting to allow Debtor to amend her petition and supply correct information. Debtor testified that she returned to Counsel who prepared and filed the amendments without additional charge. Debtor admitted that the petition and schedules were prepared with information provided by her, and that she reviewed them before she signed them.

The bankruptcy schedules filed in this case suggest a relatively routine consumer Chapter 7 case with no complex issues. Debtor owns no real estate and no nonexempt assets. Apart from the debt for her car, she lists only general unsecured claims totaling $25,550.51. Debtor testified that Counsel also represented her in a criminal matter in Sandusky Municipal Court for no additional charge since it was related to her bankruptcy case.[2]

On July 23, 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. # 6]. The order of discharge was entered on September 23, 2003. [Doc. # 11].

## 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 a debtor 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 there

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2 Debtor testified that a "check cashing" entity had filed criminal charges against her after she had filed her bankruptcy petition in an attempt to collect a debt from her. Counsel appeared on her behalf and the criminal case was dismissed.

were errors in the schedules originally filed by Counsel and that his representation was inadequate in that he failed to represent Debtor at the first meeting of creditors, which the Trustee describes as a core event in a Chapter 7 bankruptcy proceeding. Counsel counters that he prepared the schedules from information supplied by Debtor and amended the schedules without additional charge when he learned of the inaccuracies. Further, he argues, 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, debtors may not have affordable access to legal counsel for bankruptcy matters in some parts of this district.[3]

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 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). The court notes that the necessity of counsel filing amended schedules is not an unusual occurrence in a Chapter 7 case and does not, in this case, so diminish the value of Counsel's representation as to require disgorgement of his fee.

With respect to the Trustee's argument regarding attendance at the first meeting of creditors, several courts have addressed the importance of representation by counsel at that meeting. *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.

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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.

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 consumer 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 unacceptable in this case.

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 well as counsel for creditors, 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 directly gave the Chapter 7 Trustee or counsel for Debtor's creditors his consent to discuss relevant bankruptcy matters with Debtor; any such consent would have to have been inferred from Debtor's representations and the Fee Disclosure Statement. Although Debtor elected to proceed without representation, Counsel's procedure created an unacceptably thorny and unclear ethical situation for the Trustee. In addition, had counsel for creditors appeared in this case, they would have faced the same predicament as to whether it was ethically permissible to question Debtor directly about her case in the absence of the lawyer who was counsel of record.

Furthermore, 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 insufficient evidence to find 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, Debtor was entitled, at a minimum, to the disclosures discussed above. Simply being told that creditors may attend the meeting and voice any complaints does not rise to the level of disclosure required to make an informed decision to forgo representation at the §341 meeting. Such disclosures should be in writing, with better practice and this court's strong preference to have the entire fee agreement in writing.

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 areas of consumer law. *See* Thomas J. Yerbich, *Testing the Limits on Unbundled, Limited Representation*, ABI Journal, Feb. 1, 2004.

Further, Debtor has attained the primary objectives of filing her Chapter 7 case – discharge of her debt and retention of all exempt assets. The evidence shows that her second appearance at the meeting of creditors resulted from the problems in the petition and schedules. When called upon to correct the errors and prepare the necessary amendments, which was clearly within the agreed scope of his representation and the $450.00 fee charged, Counsel did so without additional charge. Thus, she has suffered no adverse consequences from the limitation of Counsel's services and such limitation did not decrease the value of his services to Debtor. He also successfully handled for Debtor the related criminal matter without additional charge, which was beyond the scope of the initial fee agreement as shown by the Fee Disclosure Statement. Consequently, the court declines to sanction Counsel on account of the underlying fee agreement because he acted in good faith in trying to structure the contract and 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 ultimate 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 issues and problems identified in this decision will be addressed.

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 DENIED to the extent that disgorgement of Counsel's fees is sought.

/s/ Mary Ann Whipple
Mary Ann Whipple
United States Bankruptcy Judge