

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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January 10, 2001

John W. Keller, Esq.
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Ron J. Volesky, Esq.
Counsel for Debtor Beilke
356 Dakota Avenue South
Huron, South Dakota 57350

Bruce J. Gering,
Assistant United States Trustee
#502, 230 South Phillips Avenue
Sioux Falls, South Dakota 57104

Subjects: *In re Daniel M. Keefe,*
Chapter 7; Bankr. No. 00-40806

In re Jessie B. Aldrich,
Chapter 7; Bankr. No. 00-40969

In re Toni-Dee L. Beilke,
Chapter 7; Bankr. No. 00-40818

Dear Counsel:

The matters before the Court are the United States Trustee's requests for a review under 11 U.S.C. § 329(b) of Attorney Keller's and Attorney Volesky's fees as debtors' counsel in the above-named cases. These are core proceedings under 28 U.S.C. § 157(b)(2). The matters are being considered jointly because an important, common issue is raised in each: how should a Chapter 7 debtor's attorney be compensated for time spent traveling to and from the meeting of creditors. This letter decision and accompanying orders shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that Attorney Keller's and Attorney Volesky's fees for services rendered in these cases are reasonable and no adjustments will be made under § 329(b).

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SUMMARY OF MATERIAL FACTS-KEEFE. Daniel M. Keefe ("Keefe") filed a Chapter 7 petition on September 22, 2000. On his schedules, he stated his mobile home, valued at \$15,000, had been surrendered to the lien holder earlier in the year and that a deficiency claim was expected. He stated he owned personalty valued at less than \$3,000; he declared it all exempt. His listed secured creditors were the lien holder on the mobile home and the lien holder on three vehicles. Keefe scheduled several unsecured claim holders, whose claims totaled \$12,550. Keefe's current income is \$2,143.38. His monthly expenses are 2,346.17. He makes his home with three young daughters.

John W. Keller has served as Keefe's bankruptcy attorney. Attorney Keller disclosed that Keefe has paid him \$1,200 for the filing fee and for legal services and costs through the meeting of creditors.

On October 3, 2000, the United States Trustee requested a review of Attorney Keller's fees under 11 U.S.C. § 329(b) on the grounds that Keefe's case was not sufficiently complex to warrant a \$1,000 fee. Attorney Keller responded on October 23, 2000. He stated he personally works with his bankruptcy debtors and prepares the petitions and schedules using the best available computers and software programs.

Attorney Keller stated that his fees must be increased to account for travel from his office in Huron to meetings of creditors in the divisional towns of Pierre, Aberdeen, or Sioux Falls. He said he also insures that he has time to meet with his clients before the meeting to prepare them and answer any questions. He said occasionally he will hire his lawyer son to attend a meeting of creditors in his stead; he pays his son \$150 from the fee he has already received from the debtor. Attorney Keller said his total travel time (to either Pierre, Aberdeen, or Sioux Falls) is generally five hours.

Attorney Keller further responded he considers his legal fees to be about \$600 of the total flat fee received. He pays the sales tax on that amount from the flat fee.

Attorney Keller stated this case was fairly typical. There were a few glitches that arose from Keefe's recent divorce and custody of his three children and a new domestic partnership arrangement with another.

Attorney Keller stated in his brief that he does not usually provide legal services at an hourly rate. When he does, he generally charges \$150 per hour plus actual expenses.

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A hearing was held December 5, 2000. Assistant United States Trustee Bruce J. Gering asked the Court to address the issue of compensation for attorneys' travel to the meeting of creditors, but took no position on the issue. Attorney Keller reviewed his office practice for bankruptcy cases and explained the merits of debtors being able to use local counsel. He noted that debtors would expend more time and money to travel to a divisional town for legal assistance if they could not use a local attorney.

Keefe received his discharge on December 27, 2000. No contested matters or adversary proceedings have arisen. The trustee has not found any non exempt assets to liquidate. The case will close after this fee matter is resolved.

SUMMARY OF MATERIAL FACTS-ALDRICH. Jessie Bell Aldrich ("Aldrich") filed a Chapter 7 petition on November 14, 2000. Aldrich is 77 years of age, retired, and disabled. She currently lives with her sister as a boarder. In her schedules, Aldrich listed personal property with a total value of \$4,032. She declared it all exempt. Aldrich does not have any secured or priority creditors. She has six unsecured creditors whose claims total \$44,800. Aldrich's monthly income is \$1,217.75. Her monthly expenses are \$1,084. She does not have any dependents.

Attorney Keller has served as Aldrich's bankruptcy attorney. He disclosed that Aldrich paid him \$1,200 pre-petition for the filing fee and his legal services and costs through the meeting of creditors.

On November 20, 2000, the United States Trustee filed a motion seeking a review of Attorney Keller's fees under § 329(b) on the grounds that the case was not sufficiently complex to warrant an above-average fee. At the conclusion of the December 5, 2000 hearing in the Keefe case and in a pleading filed December 8, 2000, Attorney Keller requested that the Court consider his response in Keefe as his response in the Aldrich case and that another hearing not be required.

The case trustee reported that he has not found any assets from which to pay claims. No contested matters or adversary proceedings have arisen. Entry of the discharge order and closing of the case are expected in February 2001.

SUMMARY OF MATERIAL FACTS-BEILKE. Toni-Dee L. Beilke ("Beilke") filed a Chapter 7 petition on September 29, 2000. In her schedules, Beilke listed minimal personal property valued at \$2,500 and she declared it all exempt. Beilke did not schedule any real

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property. However, she scheduled as a secured creditor a mortgage company with a fully secured claim of \$36,000. She said she is a co-debtor on this claim and that she intends to surrender the collateral. The Internal Revenue Service, which is owed \$1,500, is Beilke's only priority claim holder. She has several unsecured creditors whose claims total \$10,240. Beilke's current monthly income is \$772.66. Her monthly expenses total \$760. She has one dependent, a teenage son.

Ron J. Volesky has served as Beilke's bankruptcy attorney. He disclosed that Beilke paid him \$1,200 to do the usual Chapter 7 services and represent her in any adversary proceedings or contested matters.

On October 6, 2000, the United States Trustee requested a review of Attorney Volesky's fees under 11 U.S.C. § 329(b) on the grounds that Beilke's case was not sufficiently complex to warrant the fees he received. Attorney Volesky responded on October 20, 2000. He stated his \$1,200 may be divided as follows: \$200 for the filing fee; \$46 for costs, such as copying and postage; \$54 for sales tax on his compensation; and the remaining \$900 for his compensation. Attorney Volesky explained that his \$900 in compensation includes about five hours in travel from his office in Huron to the site of the meeting of creditors (he does not charge mileage) and an hour for conferring with his clients and attending the meeting itself. The balance, about \$150, is for conferences with the debtors and creditors and preparing the necessary documents. He said his usual hourly rate is \$125 per hour.

A telephonic hearing was held December 12, 2000. Assistant U.S. Trustee Gering noted that the case was uncomplicated. The factor increasing the legal fees was Attorney Volesky's travel to Sioux Falls for the meeting of creditors. He noted that use of Sioux Falls counsel to handle only the meeting of creditors would reduce costs.

Attorney Volesky reviewed his response. He said he is willing to consider use of Sioux Falls counsel more often to reduce costs. He said some of his debtor-clients, however, simply prefer not to work with an unfamiliar attorney at the meeting.

The case trustee has reported that he has not found any assets to liquidate to pay creditors. Beilke received her discharge on January 8, 2001. The case will close after this fee matter is resolved.

APPLICABLE LAW. Section 329 governs a determination of whether

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fees for a debtor's attorney, from whatever source paid, exceed the reasonable value of the services rendered. The fees that are reviewable under § 329(b) and Fed.R.Bankr.P. 2017 include those paid to the debtor's attorney within one year before the petition for legal services in "contemplation of or in connection with the [bankruptcy] case," which may include post-petition compensation. 11 U.S.C. § 329(a); *Schroeder v. Rouse (In re Redding)*, 247 B.R. 474, 477-78 (B.A.P. 8th Cir. 2000). The sole purpose behind § 329(b) is to prevent overreaching by a debtor's attorney. *Id.* at 478.

A Chapter 7 debtor's attorney generally is entitled to compensation from the debtor's pre-petition assets for analyzing a debtor's financial condition, rendering advice and assistance to the debtor in determining whether to file a petition in bankruptcy; preparing the petition, the schedules of assets and liabilities, and the statement of financial affairs; and representing the debtor at the § 341 meeting of creditors. *In re Dawson*, 180 B.R. 478, 479 (Bankr. E.D. Tex. 1994); *In re Walgamuth*, Bankr. No. 91-50270, slip op. at 5 (Bankr. D.S.D. July 1, 1992). These are the services that aid the Chapter 7 debtor in performing his legal duties under the Bankruptcy Code and are necessary to the administration of the case. *Dawson*, 180 B.R. at 479.

Following a survey in this District of Chapter 7 cases filed in 2000 through October, the average fee charged was found to be between \$600 and \$800. A more precise average was difficult to calculate because not all of the attorneys' disclosures under § 329(a) clarified whether the filing fee was included in the sum they had received.¹

DISCUSSION. Without the additional compensation required to pay Attorneys Keller and Volesky to travel to the meeting of creditors, it is clear that these attorneys' fees would be within the District's norm for a typical Chapter 7 case. The issue presented is whether their higher-than-average fees are still reasonable when they include significant compensation to cover this travel. The Court finds that the additional compensation is reasonable in these cases.

It is a reality that not all of our bankruptcy attorneys practice in the four divisional towns of Aberdeen, Sioux Falls,

¹ The Local Bankruptcy Rules Committee is currently studying a possible "reasonable" fee standard for an average Chapter 7 case in this District.

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Pierre, and Rapid City where meetings of creditors are conducted. To not allow these attorneys to charge for their time during travel to the meetings would make it difficult for them to take bankruptcy cases. Just as important, it would mean that debtors have to travel out of town to confer, once, twice, perhaps three times with a bankruptcy attorney who works in a divisional town, and then travel again for the meeting of creditors. While that arrangement may save the debtor legal fees, it may mean more personal travel costs and more time away from their jobs. It is not an advantageous alternative. Accordingly, this Court finds that it is reasonable for a Chapter 7 debtor's attorney to be compensated for his time traveling to and from a meeting of creditors.

As the Court noted in *In re Grimes*, 115 B.R. 639, 643 (Bankr. D.S.D. 1990) (citing *In re Hanson*, Bankr. No. 86-30136, slip op. 1989 WL 78596 (Bankr. D.S.D. March 8, 1989)), travel time should be prorated among multiple cases when possible. Though it may be difficult for an attorney to know whether such a proration will be possible at the time he makes a fee arrangement with a Chapter 7 debtor, the proration may be made after the fact. The attorney can return any excess fee to the debtor, who would then claim it exempt, if unused exemptions remain, or the attorney can turn the excess fee over to the case trustee as estate property. Also, in routine cases, attorneys will want to consider, when appropriate, using a local attorney to appear in their stead at the meeting of creditors, as Attorney Keller and others sometimes do. To reduce costs for out-of-town debtors and their attorneys, Chapter 7 trustees may also want to explore greater use of the State's rural satellite television network. All these efforts will insure that a Chapter 7 debtor may employ local counsel without incurring fees that are unreasonable.

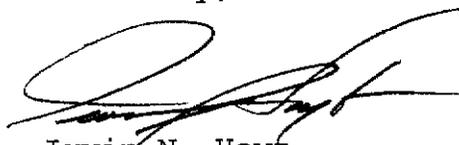
Finally, the Court notes that Attorney Volesky's fee arrangement in *Beilke* may run afoul of *Snyder v. Dewoskin* (*In re Mahendra*), 131 F.3d 750, 755-56 (8th Cir. 1997). Under *Mahendra*, counsel for a Chapter 7 debtor may not collect fees pre-petition for services to be performed post-petition. By doing so, that portion of the retainer related to yet unearned fees becomes property of the bankruptcy estate. *Id.* Post-petition services in a Chapter 7 case that benefit only the debtor must be paid from post-petition assets that are not property of the estate. Consequently, Attorney Volesky may want to reconsider including "representation of the debtor in adversary proceedings and other contested bankruptcy matters" as part of the services included in his pre-petition flat fee/retainer. The Court recognizes that trying to collect fees post-petition for post-petition services is

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not the ideal. The Code and the *Mahendra* case, however, do not allow the Court to present any better alternative.² See generally *Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th Cir. 1998). Since no post-petition services have been rendered for Debtor Beilke, no adjustment is necessary under § 329(b).

Appropriate orders will be entered.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case files (docket original in Keefe and docket certified copies in Aldrich and Beilke; serve copies on parties in interest in each case)

I hereby certify that a copy of this document
was mailed, hand delivered, or faxed this date
to the parties on the attached service list.

JAN 11 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By CR

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

JAN 11 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

² This assumes that payment for the attorney's fees is coming from the Chapter 7 debtor. If someone else is paying the debtor's legal bills, the attorney must still disclose the fees and they must still be reasonable, as required by §§ 329(a) and (b) and Fed.R.Bankr.P. 2016(b), and the fees must still be reasonable, as required by § 329(b) and Rule 2017, but the property of the estate and conflict of interest issues raised in *Mahendra* may not be present.

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Total notices mailed: 4

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Aty Keller, John W. PO Box 97, Huron, SD 57350-0097

Trustee Lovald, John S. PO Box 66, Pierre, SD 57501

Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321