UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 99-50103
	)	
JOSEPH WILLIAM DREPS	)	Chapter 7
Soc. Sec. No. 352-50-0925	)	
and	)	MEMORANDUM OF DECISION RE:
CYNTHIA ANN DREPS	)	U.S. TRUSTEE'S MOTION
aka Cindy Dreps	)	FOR EXAMINATION OF
Soc. Sec. No. 323-54-1819	)	DEBTORS' TRANSACTIONS
	)	WITH DEBTORS' ATTORNEY
Debtors.	)	

The matter before the Court is the United States Trustee's Motion for Examination of Debtors' Transactions with Debtors' Attorney under 11 U.S.C. § 329(b) and Attorney Lawrence R. Bihlmeyer's response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the compensation Attorney Bihlmeyer received from Debtors exceeded the reasonable value of the services rendered by $535 and that Attorney Bihlmeyer shall return the $535 to the case trustee as property of the bankruptcy estate.

I.

Cynthia Dreps made and kept an appointment with Attorney Lawrence W. Bihlmeyer's office to discuss the possibility of filing bankruptcy with her husband Joseph. At the first office

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conference, Cynthia Dreps met with Kelley Belken, who presented Cynthia Dreps with a business card and identified herself as Attorney Bihlmeyer's legal assistant. Cynthia Dreps brought with her certain information and documents that Belken had requested when the appointment was made. Belken advised Cynthia Dreps of the fee that the Drepses would pay the office, analyzed the Drepses' financial situation, and determined that they should file under Chapter 7. Belken asked Cynthia Dreps if she and her husband had received a federal income tax refund. Cynthia Dreps advised Belken that they had received a refund but had spent it, including repaying a debt of $1,200 to their future son-in-law. Belken advised Cynthia Dreps that they could claim the $1,200 exempt.

The Drepses later went to the Bihlmeyer law office together to review and sign the petition, schedules, and statement of financial affairs. As Belken had requested, the Drepses brought their 1998 federal income tax return. Belken reviewed the completed petition, schedules, and statement of financial affairs with the Drepses to be sure the entries were correct. The Drepses signed them. Belken asked the Drepses to bring in a copy of their 1997 federal income return.

Cynthia Dreps came to the office to pick up the Drepses' copy of the petition and schedules. She found an error and told Belken about it.

The Drepses filed a Chapter 7 petition on March 5, 1999. On

their schedule of personal property under "Other liquidated debts owing debtor including tax refunds. Give particular[,]" the Drepses listed a "payment to soon to be son-in-law" of $1,200. The $1,200 payment was also declared exempt under S.D.C.L. "43-31 + 43-45," and it was disclosed in the Drepses' statement of financial affairs as a debt repayment to an insider.

Belken attended the meeting of creditors with the Drepses on April 15, 1999. The Drepses brought a copy of their 1997 federal income tax return with them. At the meeting of creditors, Trustee Dennis C. Whetzal asked Cynthia Dreps about the Drepses' 1998 federal income tax refund and advised her that the $1,200 they had paid to the their future son-in-law needed to be repaid to the bankruptcy estate as a preferential payment. He also requested receipts showing how the remainder of the refund was spent. Immediately after the meeting of creditors, Belken advised Cynthia Dreps that had she, Belken, known the Drepses' 1998 income tax refund was so large, she would have advised them to put it all into exempt life insurance. Belken and Cynthia Dreps discussed the need for the Drepses to produce receipts on how the remainder of the federal income tax refund was spent. Cynthia Dreps understood that Belken was advising her to produce false receipts, if necessary.

Later that day, Cynthia Dreps called Attorney Bihlmeyer's office to express her concern about what had happened at the meeting of creditors. Neither Belken nor Attorney Bihlmeyer was

available. Belken returned the telephone call the next business day and told Cynthia Dreps not to worry about anything. Later that day, Cynthia Dreps stopped by Attorney Bihlmeyer's office with some receipts.

A week after the meeting of creditors, Cynthia Dreps advised Bihlmeyer's office that she no longer wished to employ them. She followed the telephone call with a dismissal letter, as Attorney Bihlmeyer's office had requested. Upon receipt of the letter, Attorney Bihlmeyer filed a motion seeking permission to withdraw as the Drepses' counsel. That motion was granted April 21, 1999.

During her discourse with Attorney Bihlmeyer's office, Cynthia Dreps contacted the United States Trustee's office. At their request, she put her concerns into a letter to them. The Drepses later repaid the $1,200 to Trustee Whetzal, as he had requested.

On May 10, 1999, the United States Trustee filed under 11 U.S.C. § 329(b) a Motion for Examination of Debtors' Transaction with Debtors' Attorney. Therein, the United States Trustee alleged that the $710 in compensation that Attorney Bihlmeyer received for his services was not reasonable because he never met with the Drepses at any time in the bankruptcy process, the advice given to the Drepses resulted in Trustee Whetzal's recovery of a preferential payment, and Bihlmeyer's legal assistant may have encouraged the Drepses to produce fraudulent receipts for Trustee Whetzal. A copy of the Drepses' letter of concerns to the United

States Trustee was attached.

Attorney Bihlmeyer filed a response to the United States Trustee's § 329(b) motion on May 18, 1999. He stated that only $505 of the $710 was for legal services; $175 of the remainder was for the filing fee and the other $30 was for state sales tax. Attorney Bihlmeyer acknowledged that for $710 he had agreed to analyze the Drepses' financial situation and advise them whether to file bankruptcy; to prepare the Drepses' petition, schedules, and financial affairs; and to attend the meeting of creditors. He said he performed all three services through Belken, his employee. Attorney Bihlmeyer noted he was unable to personally attend the Drepses' meeting of creditors because he had another hearing to attend and that Belken appeared with the Drepses at the meeting of creditors with Trustee Whetzal's consent, as she had done in previous cases. Attorney Bihlmeyer conceded that he never met with the Drepses, but because his office is close to Belken's and he had his door open, he stated he was able to hear the "intake" and "schedule signing" conferences Belken conducted with the Drepses. Attorney Bihlmeyer also opined that Belken had correctly advised the Drepses that they should declare exempt the $1,200 payment to their future son-in-law.

A hearing was held June 15, 1999. Assistant U.S. Trustee Bruce J. Gering appeared for the United States Trustee. Attorney Bihlmeyer appeared *pro se*. Trustee Whetzal also appeared.

Debtor Cynthia Dreps testified about her conferences and telephone conversations with Belken before and after the meeting of creditors. Cynthia Dreps' testimony about her conversations with Belken, which tax returns were produced when, and whether Belken advised her to produce false receipts was credible. She had a heightened awareness of and concern about perpetrating any fraud upon the Court because a co-worker had been prosecuted for bankruptcy fraud. Her recognition of the severe consequences of bankruptcy fraud manifested itself in acute conscientiousness regarding her and her husband's bankruptcy case.

Belken acknowledged that she had made notes on a sample petition and schedules during one of her meetings with Cynthia Dreps or both the Drepses and that she then used the information to produce computer-generated forms. Belken said she did not advise Cynthia Dreps to produce false receipts. Belken also said that the Drepses brought their 1997 federal income tax return to the "signing conference," but she said she did not receive the Drepses' 1998 federal income tax return until after the petition was filed. Belken said she learned about the large amount of Joseph Dreps' tax refund at the meeting of creditors. She admitted that she never specifically asked them the amount of their tax refunds before filing the petition.

Belken stated she is not a certified legal assistant but that she qualifies as one under the state law permitting an attorney to

assess whether the employee is qualified. There was no testimony about her education or law-related training.

Belken said she consults with Attorney Bihlmeyer if she "come[s] across any situation that [she is] unsure of or curious about[.]" She said she consults with him about almost all bankruptcy cases. There was no evidence that she ever consulted him about this case before the petition and schedules were filed or that Attorney Bihlmeyer played any role before the case was commenced except to sign the petition.

During closing arguments, Attorney Bihlmeyer focused on whether Belken was a qualified legal assistant under South Dakota law. Upon being advised by the Court that this was not the key issue, Attorney Bihlmeyer requested and was granted an opportunity to file a brief on the primary issue: whether he was entitled to any compensation since he personally had not rendered any professional services. The United States Trustee was allowed to file a responsive brief.

In his brief, Attorney Bihlmeyer stated Belken qualifies as a legal assistant under S.D.C.L. § 16-18-34.1(6) because she has had three years of law-related experience under the supervision of a licensed attorney and under § 16-18-34.1(7) because she has had two years of in-house training as a legal assistant. He pointed out that S.D.C.L. § 16-18-34.2(f) permits a legal assistant to appear at an administrative hearing. Relying on those and related

provisions regarding an attorney's supervision of a legal assistant (as defined by state law), Attorney Bihlmeyer argued that no "hands-on conduct" by him is required for him to be compensated in this bankruptcy proceeding. He also argued that his $500 flat fee is reasonable in the area for a basic Chapter 7 bankruptcy and that since that was what Belken charged, she did not "negotiate" a fee. For the premise that Belken did not set his fee because it is always $500, he attached to his brief several copies of newspaper ads for his office which state an "uncontested" Chapter 7 costs $500.

Attorney Bihlmeyer urged the Court to recognize this was a successful bankruptcy case for the Drepses because they had been able to discharge $22,000 in unsecured debt. Attorney Bihlmeyer also urged the Court to find that a meeting of creditors is an administrative matter, at which the only function of the debtor's counsel is to hold the debtor's hand, and that in the Drepses' case in particular, no legal expertise was needed. He cited the Court to some cases in which bankruptcy courts have allowed legal assistants to attend the meeting of creditors with debtors.

Finally, Attorney Bihlmeyer urged the Court not to focus on any questions of legal malpractice because that issue is not governed by § 329(b). He argued that the only issue is whether his fees were excessive.

The Assistant United State Trustee filed his office's response

on July 6, 1999. He highlighted the fact that Belken is not a certified legal assistant and cannot be compensated from the bankruptcy estate pursuant to the Court's earlier decision in *In re Overby,* Bankr. No. 89-10129, slip op. (Bankr. D.S.D. Nov. 14, 1990). He argued that Attorney Bihlmeyer is not entitled to any compensation because he did not perform any services in the case other than signing the petition. Finally, the United States Trustee's office argued that Attorney Bihlmeyer's alleged ethical violations (which included allowing Belken to set fees, establish the attorney-client privilege, and give legal advice) should be considered in determining the reasonable value of Attorney Bihlmeyer's fees.

Attorney Bihlmeyer filed a reply brief on July 8, 1999. He identified two factual errors in the United States Trustee's brief, and he attacked Cynthia Dreps' credibility based on perceived inconsistencies between her statements in her letter to Assistant U.S. Trustee Gering and a review of a tape from the meeting of creditors (the official meeting transcript was not offered into evidence). For the first time, in this brief Attorney Bihlmeyer stated it was with his "knowledge and approval that the case was filed with the insider transfer claimed exempt." However, there was no evidence presented at the hearing to establish that fact. Further, Attorney Bihlmeyer's statement in this brief was inconsistent with his statements at the hearing that, contrary to

his usual procedures, he did not review the Drepses' case before the petition and schedules were filed. In the reply brief, Attorney Bihlmeyer again theorized that South Dakota law permitted him to render all the legal services for the Drepses through Belken. He acknowledged he had not found any case law in support of this theory except a recent article in which the authors included attending the meeting of creditors as a suggested task for "qualified" paralegals who need "additional responsibilities within the ethical guidelines set forth in [S.D.C.L. § 16-18-34.3.]" Jacqueline Meile Rasmussen and Paul M. Sedlacek, *Paralegals: Changing the Practice of Law*, 44 S.D.L.REV. 319, 331 (1999). Attorney Bihlmeyer concluded his reply brief by stating that he had discussed the case with Belken after she had met with the Drepses and after she had prepared the petition and schedules and that this constituted his establishment of an attorney-client relationship. Again, there was no evidence presented at the hearing that Attorney Bihlmeyer had any involvement with the Drepses' case, except to sign the petition, until after the meeting of creditors.

II.
COMPENSATION FOR THE SERVICES OF ATTORNEY BIHLMEYER'S ASSISTANT

In *Overby*, this Court held that compensation of paralegals under 11 U.S.C. § 330(a)(1)(1990) "may be only awarded for **legal** services performed by a **certified** legal assistant." *Overby*, slip op. at 4 (emphasis added). This standard is two-pronged. First,

the services rendered must be legal in nature, not secretarial or general office work. Second, a legal assistant for whose services compensation may be sought must be certified. This is an objective standard that insures that the title an attorney gives a staff person does not dictate whether the attorney may separately charge for that staff person's services in a bankruptcy case. *Id.* at 3-4. *See also In re Carter*, 101 B.R. 170, 175 (Bankr. D.S.D. 1989)(Ecker, J.). Instead, the objective standard promotes formal education and testing of legal assistants. It also provides a uniform compensation policy for all law offices in the District. Although § 330 was been amended since 1994, the amendments do not dictate that a different standard should be adopted now regarding compensation for the services by a paralegal.

This case is a prime example of why an attorney's designation that a staff member is a paralegal should not establish whether that staff member's time may be charged against a bankruptcy estate. Though Attorney Bihlmeyer designated Belken as a paralegal under S.D.C.L. §§ 16-18-34.1(6) or (7), her office title obfuscated the fact that Belken had no formal legal training and that her limited knowledge apparently came only from her experiences in the Bihlmeyer Law Office. The standards in S.D.C.L. § 16-18-34.1 for defining who may be a paralegal or legal assistant are quite wide-ranging and somewhat arbitrary. Were the Court to adopt the same standards for the purpose of deciding who may be compensated for

legal services in bankruptcy cases, uniformity throughout the District, and thus fairness to all fee applicants, would be compromised.

Though this contested matter arises under § 329(b) rather than § 330(a), under which *Overby* was decided, the Court finds no reason why a different standard should apply for the compensation of a paralegal's services. Both Code sections require a determination of reasonableness. Moreover, any excess funds in a Chapter 7 case that were paid by a debtor for fees, as in this case, are turned over to the case trustee as estate property. It would be incongruous to have one standard under § 330(a) for determining when funds may be paid from an estate for compensating paraprofessionals and have another standard under § 329(b) for determining when excess compensation should be repaid to the estate.

There is no dispute that Belken rendered substantive work in this case, much of it legal in nature. *See In re Gabrielson,* 217 B.R. 819, 826-27 (Bankr. D. Az. 1998)(discussion of the unauthorized practice of law in bankruptcy setting); *In re Bright*, 171 B.R. 799, 802-03 (Bankr. E.D. Mich. 1994)(list of bankruptcy activities defined as the practice of law); *In re Herren*, 138 B.R. 989, 994-95 (Bankr. D. Wyo. 1992)(discussion of bankruptcy activities that constitute the practice of law). Relying on her experiences in previous cases but without consulting Attorney

Bihlmeyer about the specifics of this case, Belken analyzed the information presented by the Drepses, she decided under which chapter the Drepses should file, she determined what exemptions to declare, and she decided how to resolve a potential preferential transfer problem. Belken, however, is not a certified legal assistant. There was no evidence that she has had any specialized education or training. *In re Grimes*, 115 B.R. 639, 646 (Bankr. D.S.D. 1990)(cites therein). Therefore, her services are not appropriately compensated outside Attorney Bihlmeyer's overhead expenses. *Overby*, slip op. at 4.

III.
COMPENSATION FOR ATTORNEY BIHLMEYER'S SERVICES

From the evidence presented, it is clear that the only service that Attorney Bihlmeyer rendered was to sign the Drepses' petition. He has never consulted with them. He did not substantively review their schedules and statement of financial affairs before they were filed. As noted by the United States Trustee, Attorney Bihlmeyer performed none of the usual legal services for which a Chapter 7 debtor's attorney is generally compensated. Having performed no legal work, he is not entitled to any compensation.

Even Attorney Bihlmeyer's so-called "supervision" of Belken's work cannot qualify as legal services in this case. There is no evidence that he did anything but sign the papers. In fact, Belken

testified and Attorney Bihlmeyer stated[1] that it was their office practice that Belken would decide what, if any, questions or concerns to bring to Attorney Bihlmeyer's attention in a particular case. Accordingly, it was Belken, not Attorney Bihlmeyer, who controlled the case, since she did not consult Attorney Bihlmeyer before the petition and schedules were filed. *See Bright*, 171 B.R. at 804-05 (discussion of attorney supervision of a paralegal under Michigan's Rules of Professional Conduct, which are similar to South Dakota's).

Attorney Bihlmeyer will be ordered to return $535 to the bankruptcy estate. This represents $500 for the general bankruptcy services he had agreed to render but did not, another $5 to remove judgments because that motion was not filed, and $30 for the sales tax. It would be unfair to make the Drepses pay the sales tax on fees when the fees themselves were not earned. The $175 Attorney Bihlmeyer's office received as an advance for the Chapter 7 filing fee is excluded and need not be returned to the estate.

IV.
REPRESENTATION OF DEBTORS AT MEETING OF CREDITORS

A debtor testifies under oath at the meeting of creditors; statements made there can prompt further investigations or result in civil or criminal proceedings. *See Duncan v. Garrett (In re*

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[1] Attorney Bihlmeyer was not called as a witness at the hearing.

Tanksley), 174 B.R. 434, 437 (Bankr. W.D. Va. 1994). The meeting is not simply a routine administrative matter. Debtors too often seek and rely on the advice of counsel at the meeting, as happened in this case.

> [N]omenclature is unimportant, as, for example, whether or not the tribunal is called a 'court,' or the controversy 'litigation.' Where the application of legal knowledge and technique is required, the activity constitutes [the practice of law] even if conducted before a so-called administrative board or commission. It is the character of the act, not the place where it is performed, which is the decisive factor.

Sears, Roebuck and Co. v. Schwab (In re Maloney), 209 B.R. 844, 846 (Bankr. M.D. Pa. 1997)(*quoting therein Shortz v. Farrell*, 193 A. 20, 21 (Pa. 1937)). *See also In re Porter*, Bankr. No. 91-80755, 1991 WL 307259, at 3 (Bankr. S.D. Ind. Dec. 10, 1991). In short, the meeting of creditors is a very important legal proceeding with potentially far-reaching legal ramifications. Therefore, the Court deems it unacceptable for a paralegal to appear at a meeting of creditors with the debtors in the attorney's stead.

In reaching its decision that Attorney Bihlmeyer is not entitled to compensation in this case, the Court did not consider the fact that Attorney Bihlmeyer sent Belken in his stead to the meeting of creditors. Apparently he had done so before, and did this time, with the case trustee's consent. Since learning of this practice, the Court has informed the United States Trustee's office and the case trustees that legal assistants, certified or not, should not be permitted to substitute for counsel at the meeting of

creditors. This decision will spread that word. When the debtor's attorney has an unavoidable scheduling conflict, the attorney should ask the case trustee to reset the meeting date.

V.
MALPRACTICE

Attorney Bihlmeyer is correct that the Court's review of an attorney's compensation under § 329(b) is something other than a determination of whether legal malpractice has occurred. When poor legal advice is given, however, it surely impacts the value of that advice. And some incomplete, if not poor, advice was given here, especially regarding the application of 11 U.S.C. § 522.

Both Attorney Bihlmeyer's and Belken's conclusion that the Drepses could declare the $1,200 payment to their future son-in-law exempt was off the mark. The $1,200 was not property of the bankruptcy estate on the petition date, 11 U.S.C. § 541(a), and only property of the estate may be declared exempt. 11 U.S.C. § 522(b). Further, it does not appear that the Drepses could recover the $1,200 as a voidable transfer under § 522(h). Section 522(h) has essentially two requirements before a debtor may avoid a preferential transfer: the transfer must have been one that the trustee could, but did not, recover under §§ 547 and 550, *and* the property the debtor wants to recover must be property that the debtor could exempt under § 522(g)(1). Section 522(g)(1) provides that property that a debtor voluntarily transferred may not be

exempted by the debtor after the trustee recovers it. Though there was no evidence offered on this point, it appears that the Drepses voluntarily transferred the $1,200 to their future son-in-law and, therefore, they could not have exempted it under § 522(g)(1) and thus could not recover it under § 522(h).[2]

It also appears that Belken was unaware that joint debtors may claim exempt personalty valued up to $10,000 under S.D.C.L. § 43-45-4 as amended in 1998. *See In re Jerald J. and Penny A. Burns,* Bankr. No. 98-50451, bench op. (Bankr. S.D. Nov. 23, 1998). The Drepses' limited assets, however, did not permit a full utilization of the $10,000, even if Belken had known.

If the United States Trustee had filed its § 329(b) motion solely on the premise of Attorney Bihlmeyer's or Belken's incomplete or poor legal advice regarding the $1,200 or the amount of the allowed exemptions under § 43-45-4, the Court would probably have deducted little, especially since the initial fee charged to the Drepses was not large. As discussed above, the compensation paid Attorney Bihlmeyer was excessive under § 329(b) by $535

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[2] The Court also notes that the Drepses' *future* son-in-law may not have been an insider at the time they repaid him the $1,200. *See* 11 U.S.C. §§ 547(b)(4)(B), 101(31)(A), and 101(45); *Pfeiffer v. Thomas (In re Reinbold)*, 182 B.R. 244, 246-47 (D.S.D. 1995). Depending on the other circumstances surrounding the loan and repayment, Attorney Bihlmeyer and Belken may have been hasty in filing the petition if a less than 90-day wait from the repayment date may have avoided a problem under § 547(b). *Id. See also Matson v. Strickland (In re Strickland)*, 230 B.R. 276, 284-87 (Bankr. E. D. Va. 1999); *Freund v. Heath (In re McIver)*, 177 B.R. 366 (Bankr. N.D. Fla. 1995).

because he personally did not render any legal services. Any deduction for the incomplete or poor legal advice given the Drepses by Belken, therefore, has been subsumed by the $535 deduction.

VI.
POSSIBLE ETHICAL OR STATE CODE VIOLATIONS

This Court does not have jurisdiction to determine what consequences, if any, other than those remedies offered in § 329(b)(1),[3] should ensue from Attorney Bihlmeyer's possible violations of S.D.C.L. §§ 16-18-34.2 or -34.3 or South Dakota Rule of Professional Conduct 5.5(b). While the Court will give Attorney Bihlmeyer the benefit of the doubt that this case has better educated him on the appropriate utilization of a legal assistant as set forth in S.D.C.L. § 16-18-34.2, two more serious issues warrant a referral to the State Bar and the United States Attorney's office for further investigation.[4] The evidence presented indicated Belken may have practiced law without a license and that she may have encouraged the Drepses to produce false receipts for the case trustee. The Court must refer matters of such weight to the

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[3] The United States Trustee's office raised F.R.Bankr.P. 9011 in their post-hearing brief. The Rule has not been applied here since it was not raised in the United States Trustee's Motion or at the hearing.

[4] Rule 8.3(a) of the South Dakota Rules of Professional Conduct does not require that all ethical violations be reported, only those "that [raise] a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]"

appropriate authorities.

An order will be entered directing Attorney Bihlmeyer to reimburse the bankruptcy estate $535 in excessive compensation.

So ordered this 5th day of August, 1999.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

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

AUG 05 1999

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

ATTEST:
Charles L. Nail, Jr., Clerk
By _____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT SEAL

(SEAL)

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.

AUG 05 1999

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

Case: 99-50103 Form id: 122 Ntc Date: 08/05/1999 Off: 3 Page : 1
Total notices mailed: 5

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