

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 M. Wilka, Esq.
Counsel for Debtors
311 East 14th Street
Sioux Falls, South Dakota 57104

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

Subject: *In re Richard J. and Arla R. Pearsall,*
Chapter 7; Bankr. No. 00-30080

Dear Counsel:

The matter before the Court is the United States Trustee's request for a review under 11 U.S.C. § 329(b) of Attorney Wilka's fees as Debtors' counsel. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order 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 Wilka may retain only \$800 (plus the filing fee and applicable sales tax) of his initial flat fee for services rendered through the meeting of creditors and related costs.

SUMMARY OF MATERIAL FACTS. Richard J. and Arla R. Pearsall ("Debtors") filed a Chapter 7 petition on September 8, 2000. Their bankruptcy attorney, John M. Wilka, disclosed that he had agreed to represent Debtors for \$1,500 plus costs and tax. He further stated that Debtors had paid him \$1,500 before the petition was filed.

Debtors' only real property was their home. Their personalty was scheduled as having minimal value. Their only secured creditor was the mortgage holder on their home. They listed numerous and substantial credit card debts. They also disclosed that they owed First Fidelity Bank \$140,000. Neither is presently working. Debtor Richard Pearsall receives a small disability income.

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On October 10, 2000, the United States Trustee filed a motion requesting a review of Attorney Wilka's fees under 11 U.S.C. § 329(b). She argued that the case did not appear to be sufficiently complicated to warrant fees of \$1,500. Attorney Wilka filed a response on October 14, 2000. He stated Debtor Arla Pearsall had been convicted of embezzling the \$140,000 from First Fidelity Bank and was scheduled for sentencing in November 2000. He said the debt would be "converted to restitution" and that she would be required to make payments when she is released from prison. Attorney Wilka stated his primary efforts in the case had been to protect assets for Debtor Richard Pearsall. He also stated that he expected one or more creditors to object to discharge.

A hearing was held December 5, 2000. Appearances included Attorney Wilka and Assistant United States Trustee Bruce J. Gering. At the hearing, Attorney Wilka reviewed his office's Chapter 7 fee policy. He said the usual charge is \$1,000. From that sum his office will pay the filing fee and applicable sales tax on his compensation.

An itemization of services rendered was not attached to Attorney Wilka's response. At the hearing, the Court advised him that he would be permitted to file one as a supplement to his response. None was received.

APPLICABLE LAW. Section 329 governs a determination of whether 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

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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. Based on the case file and the arguments of counsel, the Court concludes that Attorney Wilka's services, through attendance of the meeting of creditors, do not warrant fees that are significantly higher than the average. Advising Debtors and preparing the necessary petition, schedules, and statement of financial affairs were essentially routine. The only non routine matter was Debtor Arla Pearsall's embezzlement conviction. That fact, however, would most likely result in additional post-petition work for Attorney Wilka. Moreover, even if Debtors' involvement in an adversary proceeding was a sure thing when the case was filed or if other post-petition legal work was expected, Attorney Wilka could not collect fees pre-petition for these expected post-petition services. By doing so, that portion of the retainer related to yet unearned fees became property of the bankruptcy estate. *Snyder v. Dewoskin (In re Mahendra)*, 131 F.3d 750, 755-56 (8th Cir. 1997). 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.

Under the *Mahendra* case, it is virtually impossible for a Chapter 7 debtor's attorney to be "pre-paid" for post-petition services, such as responding to an objection to exemptions or a discharge or dischargeability complaint. Similarly, an attorney may not be able to take a pre-petition security interest for these yet-to-be-performed services. *Id.* The Court recognizes, as did Assistant U.S. Trustee Gering, that this puts debtors and their counsel "between a rock and a hard place." The Code and the *Mahendra* case, however, do not allow the Court to present any better alternatives than for a Chapter 7 debtor's attorney's pre-petition retainer/flat fee to cover only services through the meeting of creditors and for any post-petition services to be paid

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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from post-petition, non bankruptcy estate assets.² See generally *Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th Cir. 1998).

Since Attorney Wilka's response to the United States Trustee's Motion did not include an itemization of services and the time expended in this case, the Court must rely on the customary charges in this District and the specifics of this case. *Mahendra*, 131 F.3d at 758. Based on those, the Court concludes that a reasonable fee for Attorney Wilka's services through the meeting of creditors was \$800, plus the filing fee of \$200, and applicable sales tax. The remainder of the funds already received by Attorney Wilka from Debtors shall be returned to Debtors since they have unused exemptions under S.D.C.L. § 43-45-4.

If Attorney Wilka has rendered bankruptcy-related services for Debtors after the meeting of creditors, he is still entitled to reasonable compensation for those services from Debtors. Whatever arrangement (amount and payment terms) he makes for these services must also be disclosed under § 329(a) and Rule 2016(b).

An appropriate order will be entered.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

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

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 LNH:sh 

CC: case file (docket original; copies to parties in interest)

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: 6

Debtor Pearsall, Richard Jay 246 West 1st St., Winner, SD 57850

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Aty Wilka, John M. 311 East 14th Street, Sioux Falls, SD 57104

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

Creditor U.S. Department of Ag Rural Development,

Delonda Davis, Centralized Servicing Center, PO Box 66879, St. Louis, MO 63166