UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 98-50064
	)	Chapter 7
DEAN ROBERT WALTERS, JR.	)	
Soc. Sec. No. [redacted]-[redacted]-7627	)	MEMORANDUM OF DECISION
	)	RE: § 329(b) REVIEW OF
Debtor.	)	DEBTOR'S ATTORNEY'S FEES

The matter before the Court *sua sponte* is the reasonableness under 11 U.S.C. § 329(b) of Debtor's attorney's fees for services rendered in Adversary No. 98-5005. 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 sought by Debtor's attorney for services rendered in the adversary exceeds the reasonable value of said services. The Court will direct that Debtor's budgeted monthly payments of $150.00 to his attorney shall first be directed to the non dischargeable claims determined in the adversary proceeding before they are directed to Debtor's attorney for payment of the adversary related services.

I.

Debtor's former wife commenced an adversary proceeding against Debtor under 11 U.S.C. § 523(a)(15) seeking a determination that three divorce-related debts totaling about $3,000.00, plus any applicable interest, were non dischargeable. During the adversary trial, testimony from Debtor and an exhibit established that Debtor was paying his attorney, Lawrence W. Bihlmeyer, just over $4,000.00

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for the adversary-related services. Debtor stated he "didn't know [the adversary litigation] was going to be that expensive." He acknowledged receiving a statement of fees from Attorney Bihlmeyer before the trial began.

The Court initiated a review of Attorney Bihlmeyer's adversary-related fees under 11 U.S.C. § 329(b) and directed Attorney Bihlmeyer to file a supplemental disclosure of compensation under F.R.Bankr.P. 2016(b).[1] According to the supplemental disclosure filed September 22, 1998, Debtor agreed to pay Attorney Bihlmeyer $95.00 per hour, plus costs, to represent him in post-petition matters.[2] Debtor's brother paid Attorney Bihlmeyer a $400.00 retainer for these services.

The Court then requested an itemized fee statement, which Attorney Bihlmeyer filed on October 8, 1998. According to the statement, Attorney Bihlmeyer rendered 42.75 hours of services for total fees of $4,061.25, plus $243.67 in sales tax, for total compensation of $4,304.92. No costs were included. According to Debtor's budget offered as evidence in the adversary proceeding, Debtor intended to pay his attorneys' fees over time at $150.00 per month.

By letter dated October 29, 1998, the Court notified Attorney

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[1] The supplemental disclosure of compensation should have been filed by Debtor's attorney regardless of the Court's § 329(b) inquiry. *See* F.R.Bankr.P. 2016(b) and *In re Brandenburger*, 145 B.R. 624, 627-28 (Bankr. D.S.D. 1992).

[2] Debtor paid Attorney Bihlmeyer a flat $710.00 to represent Debtor through the meeting of creditors. Debtor also owes Attorney Bihlmeyer an undisclosed sum for representing him in a divorce.

Bihlmeyer that it was taking his adversary-related fees under advisement pursuant to § 329(b). It advised him that he could file a response and request a hearing. No response or request for a hearing was received.

By separate Memorandum of Decision and Judgment, the Court ruled in favor of Debtor's former spouse in the non dischargeability adversary proceeding.

II.

Section 329(b) of the Bankruptcy Code and F.R.Bankr.P. 2017(b) provide that a court may review a debtor's attorney's compensation agreement for post-petition services to determine whether they are excessive; that is, whether the compensation sought exceeds the reasonable value of the services rendered. *Synder v. Dewoskin (In re Mahendra)*, 131 F.3d 750, 757 (8th Cir. 1997). The attorney bears the burden of showing the fees are reasonable. *Id.* If the compensation is not reasonable, the court, after notice and an opportunity for hearing, may order that the excessive fees be returned to their source, whether that is the bankruptcy estate or another entity that paid them. 11 U.S.C. §§ 102(a) and 329(b) and F.R.Bankr.P. 2017(b).

Independent of § 329(b) and Rule 2017(b), a court may also sanction an attorney before it for unethical or unprofessional conduct. *Hurley v. Kujawa (In re Kujawa)*, 224 B.R. 104, 108 (Bankr. E.D. Mo. 1998). Some courts utilize their power to prevent an abuse of process, as provided in 11 U.S.C. § 105(a), to address

such problems or harms. *See In re Volpert*, 110 F.3d 494 (7th Cir. 1997); *In re Zepecki*, 224 B.R. 907, 911 (Bankr. E.D. Ark. 1998).

III.

The Court can only conclude that attorneys' fees of nearly $4,100.00 to contest the non dischargeability of debts totaling about $3,000.00 are not reasonable. Even if Debtor had prevailed in the adversary proceeding, he would expend more time and money than if he had just paid the subject claims. If his former spouse prevailed, as did happen, Debtor's attorneys' fees essentially doubled the original subject debts. At the point of diminishing returns, which may have been very early in this adversary proceeding, Attorney Bihlmeyer should have assessed the burden of proof necessary for Debtor to prevail and reconsidered with Debtor the merit of continuing the litigation. *See In re Alderson*, 114 B.R. 672, 679-80 (Bankr. D.S.D. 1990).

To remedy the unreasonable fees under § 329(b), the Court will direct Debtor to pay the claims rendered non dischargeable in the adversary before he pays his attorney. Thus, the $150.00 per month Debtor has earmarked for attorneys' fees should first be used to pay these divorce-related claims. This remedy implements § 329(b) to the extent possible under the circumstances. Attorney Bihlmeyer's fees are only delayed, not denied, since Debtor consented to Attorney Bihlmeyer's representation and also apparently consented to his fees.

Some discovery requests and Attorney Bihlmeyer's examination

of witnesses at the trial indicated Debtor and his counsel wanted to retry the earlier divorce action. However, the Court does not have sufficient evidence before it to show that Debtor continued the non dischargeability litigation for such a vexatious purpose or that Attorney Bihlmeyer aided him in that intent. Further, the adversary plaintiff did not bring a Rule 9011 motion and the Court did not advise Attorney Bihlmeyer that his representation would be scrutinized under Rule 9011 or 28 U.S.C. § 1927, in addition to § 329(b). Therefore, the Court will not consider sanctions under Rule 9011 or § 1927.

An appropriate order will be entered.

Dated this 8 day of December, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By _____
Deputy Clerk

(SEAL)

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

DEC 08 1998

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.

DEC 08 1998

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

Case: 98-05005 Form id: 122 Ntc Date: 12/08/1998 Off: 3 Page : 1
Total notices mailed: 4

Aty Bihlmeyer, Lawrence R. PO Box 8274, Rapid City, SD 57709-8274
Aty Smoot, Alan L. 2902 W Main St, #3, Rapid City, SD 57702-1552
Intereste Walters, Dean Robert, Jr. 6401A George Dr, Ellsworth AFB, SD 57706
Intereste Whetzal, Dennis PO Box 8285, Rapid City, SD 57709

Case: 98-50064 Form id: 122 Ntc Date: 12/08/1998 Off: 3 Page : 1
Total notices mailed: 5

Debtor	Walters, Dean Robert, Jr. 6401A George Dr, Ellsworth AFB, SD 57706
Aty	Bihlmeyer, Lawrence R. PO Box 8274, Rapid City, SD 57709-8274
Trustee	Whetzal, Dennis C. PO Box 8285, Rapid City, SD 57709
Aty	Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty	Ridgway, Michael E. PO Box 5073, Sioux Falls, SD 57117-5073