

**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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March 8, 1989

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Re: Earl and Ruby Hanson, 386-00136, Chapter 12  
Harold and Jim Assman, 87-30147, Chapter 12  
Lower Brule Construction, 87-30079, Chapter 11  
Ward and Norman Lemmon, 88-10078, Chapter 12  
Gary and Kathleen Schindler, 88-30036, Chapter 12  
Donald and Bonnie Schindler, 88-30037, Chapter 12

Dear Counsel and Mr. Hamilton:

These cases are before the Court on applications for Court approval of professional compensation from estate funds. A real estate appraiser's application is in question in Lemmon. Final and interim debtor's attorney's applications make up the remainder of the cases. The cases are presented on the United States Trustee's office objections, and the Court's duty to scrutinize fee applications independent of objections.

The objections are addressed primarily to travel time. The United States Trustee requests the Court to set standards as to the rate professionals may bill for their travel time, and as to the mileage expense allowed a professional who drives on estate business. Additionally, some of the applications are objected to as inadequately itemized.

Travel Time

These professionals traveled by automobile, and chartered and commercial airline flights. Virtually all the travel time is billed at the professionals' full hourly rate. The United States Trustee's  
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office has taken the position that travel time should be billed at a reduced rate, unless the applicant demonstrates that legal work was performed during the travel time.

Section 330(c) (1) of the Code allows a court appointed professional an award from the estate constituting "reasonable compensation for actual, necessary services . based on the nature, the extent, and the value of such services, time spent on such services, and the cost of comparable services other than in a case under this title. . . ." Section 331 allows interim applications for compensation under the standards provided in Section 330.

The Eighth Circuit has instructed that Section 330

is meant to encourage high standards of professional legal practice in the bankruptcy courts. Bankruptcy courts are no longer bound by pre-Code notions of frugality and economy in fixing fees. Bankruptcy courts must consider whether the fee awards are commensurate with fees for professional services in non-bankruptcy cases, thus providing sufficient economic incentive to practice in the bankruptcy courts.

Mann v. McCombs (In re McCombs), 751 F.2d 286, 288 (1984), quoting In re Atlas Automation, Inc., 27 B.R. 820, 822 (E.D. Mich. 1983). The award of fees is within the discretion of the bankruptcy court. McCombs, 751 F.2d at 287.

Further guidance is provided by In re Doyle-Lunstra Sales Corp., 19 B.R. 1003, 1005 (D. S.D. 1982), wherein District Judge Nichol adopted the twelve factors originally set out in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) "to determine reasonable attorney's fee awards in bankruptcy cases." Also, while preserving the bankruptcy estate is no longer the primary concern in awarding professional fees, Judge Ecker has rightfully retained economy as a relevant factor. He has determined that a balance must be struck between preserving the estate for creditors and "the need to be generous enough to encourage lawyers and others to render the necessary and exacting services that bankruptcy cases often require." In re Henning, 55 B.R. 682, 684 (1985) (Henning II), citing In re Yale Express System, Inc., 366 F. Supp. 1376, 1381 (S.D. N.Y. 1973).

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As the attorney for the United States Trustee's exemplary brief points out, the published cases vary widely in the compensation allowed for reasonable and necessary travel time. Some courts allow a reduced rate, such as fifty percent of the professional's usual hourly rate<sup>1</sup>, some courts have set a flat rate for travel, such as \$40.00 per hour<sup>2</sup>, or have allowed the full hourly rate. In re Frontier Airlines, Inc., 74 B.R. 973, 978-79 (Bkrtcy. D. Cob. 1987).

In the District of South Dakota, the geographic locations of the court points does not always coincide with the attorney's residence, and the concession must be made that substantial travel time is often necessary. Also, because a limited number of attorneys in our District practice bankruptcy law, the debtor's ability to hire qualified counsel would be unduly chilled if travel was not fully compensable. Accordingly, I hold that professionals should be compensated at their full reasonable hourly rate for necessary travel hours, unless the travel fees become too large a percentage of the total fees applied for, exclusive of expenses and sales tax.

This result is proper because frugality is no longer the main objective, and full compensation is generally available for travel in cases "other than in a case under" title 11<sup>3</sup>. See Section 330(a);

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<sup>1</sup> In re S.T.N. Enterprises, Inc., 70 B.R. 823 (Bkrtcy. D. Vt. 1987), citing In re Taylor, 66 B.R. 390, 397 (Bkrtcy. W.D. Pa.1986) and In re Watson Seafood and Poultry Co., Inc., 40 B.R. 436, 443 (Bkrtcy. E.D. N.C. 1984).

<sup>2</sup> In re Amatex Corp., 70 B.R. 624, 627 (Bkrtcy. E.D. Pa.1985) (the court indicated that greater compensation might be awarded if legal services were performed during travel)

<sup>3</sup> This holding should not be viewed as conflicting with the District Court's Doyle-Lunstra decision. In that case Judge Nichol ruled that "routine and ministerial" services "should be compensated at a lower rate than truly legal services ...." Id., 19 B.R. at 1007. Although travel may not be a "truly legal service," it may be performed only by the professional person traveling, assuming the matter necessitating the travel is of a nature that only the professional could handle it. Paralegals or other assistants, whose time is billed at a lower rate cannot travel for the professional.

McCombs. On the other hand, trimming fees in cases where they become too large a percentage of the total fees applied for helps maintain the balance Judge Ecker spoke of in Henning II, supra.

This holding requires that professionals seeking compensation from the estate prorate travel time and expenses between bankruptcy cases on which they are working. Out of town court appearances must be scheduled for the same date on as many of their files as practical. Also, when traveling, attorneys are encouraged to work on their bankruptcy cases when practical. The legal services need not be rendered on the file on which the attorney is traveling. Work performed on one file when traveling on another file may be pro rated between the cases.

It must be borne in mind that travel is not always "necessary" within the meaning of Section 330. Of course, travel can be unnecessary for many reasons. Judge Ecker exposed one such type of junket when he held that an attorney located far from the "situs of the bankruptcy" cannot expect compensation for travel when "adequate local representation" is available. In re Henning, 52 B.R. 350, 352 (1985), quoting In re Interstate United Electronics Sales Co., 44 B.R. 784 (Bkrtcy. S.D. Fla. 1984). The Hennings hired Chicago counsel.

Attorneys should make every attempt to keep travel expenses at a minimum. Such things as encouraging client meetings in their office rather than traveling to an outside, having documents delivered by paraprofessionals or office staff when personal delivery is necessary, and more use of teleconferencing are just a few examples that come to mind. Also, Attorneys should not expect full compensation for a task that requires little or no legal expertise. See Doyle-Lunstra at f.n. 3 herein.

The point at which attorney's fees become too large a portion of the total fees applied for must be determined on a case by case basis. See In re Hogg, Case No. 386-00062 (Bkrtcy. D. S.D.) (March 18, 1988) (where 50.6 hours of travel time amounted to over one-fifth of the entire amount of fees applied for, fees attributed to travel time were cut by one-half); In re Larry Eugene Hanson, Case No. 485-00388 (Bkrtcy. D. S.D.) (July 28, 1986) (fees reduced where travel time amounted to approximately one-fourth of the entire application).

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### Mileage Expense

In addition to certain fees, Section 330(b) (2) allows a professional reimbursement from the estate for "actual, necessary expenses." In the interest of uniformity a travelling professional driving his or her own auto shall be allowed a mileage expense of 24 cents per mile, regardless of the economy of the auto driven. This is the standard mileage rate the I.R.S. presently allows taxpayers for automobiles used in business, subject to certain restrictions not relevant to this context. Rev. Proc. 88-52, 1988-44 I.R.B. 22. If the professional believes this amount is too low, he may apply for a larger amount if he is willing to justify the increase in court. Of course, a creditor or trustee may object to any mileage rate it finds excessive in a particular case.

### Paraprofessional Billing

If paralegal work is to be compensable, the qualifications of the assistant should be established to justify the charge. While a legal secretary acquires vast knowledge of the subject matter and is certainly an integral part of any law office, their service is considered one of the many items that make up the cost of office overhead which in turn is reflected in the hourly rate charged by the attorney. Simply classifying a secretary as a paralegal for billing purposes does not justify compensating secretary time.

### Adequate Itemization

The attorney for the United States Trustee also objected in the Lower Brule, Hanson, Assman and the Schindler cases that the applications were inadequately itemized as to travel time. In these applications the purpose of the travel was not adequately set out, and/or the travel time was lumped together with other services, making it impossible to determine the amount of time spent traveling. The Schindler applications have been amended to satisfy the objections. The Lower Brule application is passable. The Hanson and Assman applications must be amended in accordance with the remainder of this decision.

Bankruptcy Rule 2016 provides in pertinent part:

An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an

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application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. (Emphasis added).

Itemizations for hours spent travelling are not adequate unless they (1) specify the necessity of the travel, (2) specifically separate time spent travelling from other services performed the same day, (3) specify the mode of travel, and (4) set out the beginning and ending points of the travel. Likewise, the expense itemization for travel must be equally detailed so that the court may judge whether the expense was actual and necessary. In re Command Services Corp., 85 B.R. 230,234 (Bkrtcy. N.D. N.Y. 1988); S.T.N. Enterprises, 70 B.R. at 834, 835.

In closing, it bears mention that the problem of inadequately itemized applications is not limited to travel related fees and expenses. The Court offers the following words of Bankruptcy Judges Jackwig and Hill of the District of Iowa in hope that they provide guidance for future applications submitted in this District.

At a minimum, every application for attorney fees must include a specific analysis of each task for which compensation is sought. The application should list and describe the activity, the date it was performed, the attorney or other professional who performed the work, the time spent on the work and the individual's hourly rate.... For example, entries for telephone calls or conferences should detail the purpose, length and parties involved. Merely noting 'telephone call' or 'conference with X' is insufficient. Similar specificity should accompany every activity for which compensation is sought and several activities should not be lumped into a single entry. Rather, counsel must list each type of service with the corresponding specific time allotment. (Emphasis added).

In re Pothoven, 84 B.R. 579, 584 (1988), citing In re Pettibone Corp., 74 B.R. 293 (Bkrtcy. M.D. Ill. 1987); In re S.T.N. Enterprises, Inc., 70 B.R. 823 (Bkrtcy. D. Vt. 1987). See also Doyle-Lunstra.

With the opening of the United States Trustee's office in Sioux Falls, the machinery is now in place to scrutinize compensation

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applications. No longer is court approval of fees and expenses requested such a foregone conclusion. When constructing their applications the professionals must bear in mind that it is his or her burden to show that court approval is warranted. In re Tn-County Water Ass'n., Inc., 91 B.R. 547 (Bkrtcy. D. S.D. 1988). Insufficiently documented expense and fee entries will be disallowed. See Henning II, 55 B.R. at 685; Pothoven. In other words, those professionals seeking court approval of fee and expense applications have a strong incentive to establish the propriety of their applications by adequate itemization.

This matter constitutes a core proceeding under 28 U.S.C. §157(b) (2) (A) and (B). The Court shall enter orders rendering specific dispositions of each application taken under advisement.<sup>4</sup>

Very truly yours,

Irvin N. Hoyt  
Chief Bankruptcy Judge

INH/sh

CC: Bankruptcy Clerk

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<sup>4</sup> For those debtor's attorneys who are removing prepetition retainers from their trust fund prior to seeking court approval for those fees, see Tri-County. 91 B.R. at 550-551.