

**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

**TELEPHONE (605) 224-0560**  
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January 10, 2001

Daniel J. Nichols, Esq.  
Counsel for Debtor  
#101, 427 North Minnesota Avenue  
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 Joanne R. Nolte,*  
Chapter 7; Bankr. No. 00-40804

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 Nichols' fees as Debtor's 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 Nichols 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. Joanne R. Nolte ("Debtor") filed a Chapter 7 petition on September 21, 2000. Debtor scheduled personalty valued at \$2,360. She declared all of it exempt. Debtor listed real property valued at \$91,900 and stated it had a secured claim against it of \$63,800. Debtor stated in her schedules that she earns \$3,018 per month. Her expenses total \$3,087.29. She is single and has one dependent. Debtor disclosed in her statement of financial affairs that she has lost approximately \$30,000 to video lottery gambling in the past two years. Debtor's only secured creditor is the mortgagee on her home. She has no creditors holding priority unsecured claims. She scheduled eight unsecured claim holders who held claims totaling \$66,229.46.

23

Re: Joanne R. Nolte  
January 10, 2001  
Page 2

Debtor's bankruptcy counsel was Daniel J. Nichols. Attorney Nichols disclosed that he received \$1,500 from Debtor pre-petition for his services. The agreed services he would render included analyzing her financial status and advising her on the bankruptcy option, preparing and filing the necessary documents, and representing her at the meeting of creditors. Services specifically excluded from the \$1,500 fee arrangement were any contested matters involving excess exemptions or adversary proceedings.

On October 10, 2000, the United States Trustee filed a motion under 11 U.S.C. § 329(b) seeking a review of Attorney Nichols' fees for reasonableness. She argued the case was not sufficiently complex to warrant fees of \$1,500.

Attorney Nichols filed a response on October 23, 2000. He stated his disclosure of compensation was in error. He said the \$1,500 flat fee included adversary proceedings and excess exemptions and also the filing fee and applicable sales tax.

A hearing was held December 5, 2000. Attorney Gering identified discrepancies or problems and concerns with the case that may reflect on Debtor's counsel's expertise in the area:

- (1) Debtor claimed her interest in her employer's sponsored retirement fund exempt at only \$0.00, leaving the balance available to the trustee as estate property;
- (2) Debtor listed an unexpired auto lease on her schedule of assets but not on the schedule of executory contracts;
- (3) On her statement of financial affairs, Debtor did not list any income from current employment or operation of a business; in answer to the question of income other than from employment or operation of a business in the two years previous to the petition, Debtor listed three dollar amounts but did not state the particulars of what these sums represented;
- (4) On her statement of financial affairs, Debtor stated she did not make any transfers to attorneys for debt counseling or bankruptcy related services within the year before the case was filed although Attorney Nichols disclosed he had received \$1,500 for bankruptcy work; and
- (5) On her statement of intentions, Debtor did not list any secured property to be retained or surrendered, thus leading to possible confusion on whether she intends to

Re: Joanne R. Nolte  
January 10, 2001  
Page 3

reaffirm the debt with her home mortgagee or surrender the home.

Assistant U.S. Trustee Gering also noted that Attorney Nichols had responded that a portion of the \$1,500 was for expected post-petition work. He noted this is contrary to *Snyder v. Dewoskin (In re Mahendra)*, 131 F.3d 750, 755-56 (8th Cir. 1997).

Attorney Nichols said the \$1,500 he has received included the filing fee. He explained that the \$1,500 flat fee in this case was higher than he normally charged due to expected litigation with Debtor's former husband regarding dischargeability of a divorce-related debt and with the case trustee or others regarding excess claimed exemptions and valuation of property. Attorney Nichols also said Debtor's schedules, though simple in appearance, required more-than-normal background work to prepare. He said he was not prepared to address the expertise questions raised by Assistant U.S. Trustee Gering since those concerns were not set forth in the Motion. Attorney Nichols concluded that the \$1,500 was reasonable for this case and, in the end, would not cover all the time he has or will invest in this case.

The Court reviewed *Mahendra* with counsel and then took the matter under advisement.

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

Re: Joanne R. Nolte  
January 10, 2001  
Page 4

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.<sup>1</sup>

DISCUSSION. Based on the case file and the arguments of counsel, the Court concludes that Attorney Nichols' services, through attendance of the meeting of creditors, do not warrant fees that are significantly higher than the average. Analyzing Debtor's financial situation, advising her, and preparing the necessary petition, schedules, and statement of financial affairs were essentially routine. Chapter 7 debtors who have gambling problems or divorce-related financial problems are not atypical. Moreover, even if post-petition litigation was expected from the get-go, Attorney Nichols 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 on the petition date. *Mahendra*, 131 F.3d at 755-56. 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 and Attorney Nichols, that this puts Chapter 7 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 from post-petition, non bankruptcy estate

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

Re: Joanne R. Nolte  
January 10, 2001  
Page 5

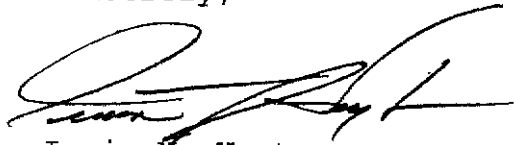
assets.<sup>2</sup> See generally *Gordon v. Hines (In re Hines)*, 147 F.3d 1185 (9th Cir. 1998).

Since Attorney Nichols' response to the United States Trustee's motion did not include an itemization of the work performed 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 Nichol'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 Nichols from Debtor shall be turned over to the case trustee pending finalization of Debtor's allowed exempt property. If it is found that Debtor has value left under S.D.C.L. § 43-45-4 to use, the funds may be returned to her. If not, the funds will remain property of the estate to be administered by the trustee.

It is clear that Attorney Nichols has and will continue to render bankruptcy-related services for Debtor after the meeting of creditors. He is still entitled to reasonable compensation for those services from Debtor. 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

INH:sh

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

**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**

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<sup>2</sup> This assumes that payment for the attorney's fees is being made 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.

Case: 00-40804 Form id: 122 Ntc Date: 01/11/2001 Off: 4 Page : 1  
Total notices mailed: 4

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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