

1 WRITTEN DECISION - NOT FOR PUBLICATION

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5 APR 28 2008

6 CLERK, U.S. BANKRUPTCY COURT

7 SOUTHERN DISTRICT OF CALIFORNIA

8 BY 104 DEPUTY

9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 07-01824-A13

12)

13 JOHN GLEN KIDWELL and) ORDER ON FEE

14 MONICA KIDWELL,) APPLICATION

15)

16 Debtors.)

17)

18 This is a Chapter 13 case filed on April 13, 2007. At the

19 time of filing, the law firm also filed its "Disclosure of

20 Compensation of Attorney for Debtor". The firm indicated it had

21 agreed to accept \$4,000 and had already received \$1,226 toward

22 that amount. Paragraph 5 of the form stated in relevant part:

23 5. In return for the above-disclosed

24 fee, I have agreed to render legal

25 service for all aspects of the

26 bankruptcy case, including:

...

b. Preparation and filing of any petition, schedules, statements of affairs and plan which may be required;

c. Representation of the debtor at

1 the meeting of creditors and
2 confirmation hearing, and any
adjourned hearings thereof.

3 Paragraph 6 of the same form affords an attorney to disclose what
4 services are not included for the disclosed fee. That part of
5 the form was left blank, indicating nothing was excluded. Rule
6 2016(b), Federal Rules of Bankruptcy Procedure, requires the
7 filing of the "Disclosure of Compensation" within 15 days of
8 filing a voluntary petition.

9 The case proceeded, and ultimately resulted in confirmation
10 of a plan. Thereafter, counsel for the debtors filed their fee
11 application, which is the subject of this proceeding.

12 At the outset it is noted that this district has for years
13 utilized a presumptive or "no-look" fee system in Chapter 13
14 cases because of economies of such a system to debtors,
15 creditors, and even court administration. However, attorneys
16 have always been able to file a fee application instead, subject,
17 of course, to the statutory standards of 11 U.S.C. § 330.
18 Participation in this district's presumptive fee system is
19 triggered by filing a "Rights and Responsibilities" agreement
20 executed by the attorney and the client. In this case, no such
21 document was ever filed, suggesting that the firm always intended
22 to file a fee application in this case.

23 Section 330(a)(4)(B) of Title 11, United States Code
24 provides:

25 In a chapter 12 or chapter 13 case in
26 which the debtor is an individual, the court
may allow reasonable compensation to the

1 debtor's attorney for representing the
2 interests of the debtor in connection with
3 the bankruptcy case based on a consideration
4 of the benefit and necessity of such services
5 to the debtor and the other factors set forth
6 in this section.

7 A hallmark of the "other factors" is that the compensation be
8 "reasonable" and for "actual, necessary services". Section
9 330(a)(3) provides in relevant part:

10 (3) In determining the amount of reasonable
11 compensation to be awarded . . . , the court shall
12 consider the nature, the extent, and the value of
13 such services, taking into account all relevant
14 factors, including -

15 (A) the time spent on such services;

16 (B) the rates charged for such services;

17 (C) whether the services were necessary
18 to the administration of, or beneficial at
19 the time at which the service was rendered
20 toward the completion of, a case under this
21 title;

22 (D) whether the services were performed
23 within a reasonable amount of time
24 commensurate with the complexity, importance,
25 and nature of the problem, issue, or task
26 addressed;

(E) with respect to a professional
person, whether the person is board certified
or otherwise has demonstrated skill and
experience in the bankruptcy field; and

(F) whether the compensation is
reasonable based on the customary
compensation charged by comparably skilled
practitioners in cases other than cases under
this title.

27 The fee application filed by the firm creates a bit of a
28 puzzle. The application states that the "agreed upon fee was
29 \$3,300.00." That amount is inconsistent with the amount on Form
30 B203. The application itself is scarcely a page, and asks for an
31 award of fees of \$6,642.50, with credit for \$1,226 already paid.

1 Attached to the application is a "Supplemental Declaration
2 Regarding Award of Compensation of Attorney's Fees", signed by
3 attorney Diamond. It is, quite simply, all over the map. It
4 starts off saying it seeks fees from July 2, 2007, while the
5 "Application" says the firm was hired February 2, 2007. The
6 Supplemental says the case was filed April 16, when in fact it
7 was filed April 13. It says the initial agreed fee was \$3,300,
8 in contrast with the Form B203. It says the agreement
9 contemplates "one hearing in Chapter 7 and 13 cases and one court
10 hearing in chapter 13 cases." That is in contrast to the Rule
11 2016 statement. It also says that the fee "does not include
12 amendments required post-filing that are a result of your (the
13 debtors) failure to provide us with information." That, too, is
14 in contrast with the form B203 filed in this case.

15 Pages 2-4 of the "Supplemental" appear to be from a
16 different case altogether. It refers to an objection to
17 confirmation by GMAC, and continued confirmation hearings two
18 months after this case was confirmed. The bulk of p.2 refers to
19 Mr. And Mrs. Rodriguez and their tax returns, not these debtors,
20 the Kidwells. The bottom of p.3 and top of p.4 ask for fees
21 totalling \$7,490.10, not the amount sought in the "Application".

22 The thrust of the firm's pitch for fees is contained on p.3
23 of the "Supplemental", although the Court is left to guess at its
24 applicability to these debtors since it appears to continue to be
25 aimed at the Rodriguezes. The firm states:

26

1 In sum, the debtors numerous failures to
2 provide accurate information to both their
3 attorney and the IRS caused an inordinate amount
4 of time and resources to be devoted to an
5 otherwise unremarkable matter.

6 Debtors' counsel are required to perform
7 issue specific analysis in order to calculate a
8 feasible plan proposed in good faith which devotes
9 all of a debtor's disposable income to re-payment
10 of their obligations. These debtors' actions
11 specifically frustrated the required actions of
12 their attorney.

13 The debtor's case should specifically serve
14 as instructive to the entire bankruptcy system
15 from the bench, to the UST to the Chapter 13
16 Trustees in this district and to other bankruptcy
17 practitioners. The lesson to be learned being
18 that counsel for the debtors are at the mercy of
19 the debtor. Debtors' counsel is at the debtor's
20 mercy since counsel must rely on the information
21 given him by the debtor in conceptualizing the
22 case. If the information is inaccurate or just
23 plain false counsel is left there to pick up the
24 pieces and that time is often uncompensated.

25 Nearly all of the information provided by
26 these debtors proved to be unreliable. This
27 unreliability which is the common denominator in
28 nearly all bankruptcy cases causes an inordinate
29 amount of work to complete cases and debtor's
30 counsel should not have to bear the risk of this
31 unreliability in the form of depressed chapter 13
32 fees. Had these debtors been honest with their
33 attorney from the outset of their case, numerous
34 calls to Rebecca Pennington and Regina Greene
35 would have been avoided, file review and amended
36 plan analysis avoided, and numerous confirmation
37 hearings would have been avoided as well.

38 The Chapter 13 trustee filed opposition to the firm's fee
39 application. Unfortunately, the trustee was led down the wrong
40 path by pages 2-4 of the "Supplemental" and spent time addressing
41 the tax matters which, so far as the Court can determine, were
42 not an issue in the Kidwell case. Nonetheless, the trustee makes

1 several valuable points. At the core is the notion that there is
2 much counsel can do to improve the reliability of information
3 provided by debtors if, in fact, the problem is endemic, as
4 counsel argues. Moreover, the idea that the attorney is at the
5 mercy of the client is not completely accurate because, as the
6 trustee points out, there are steps the attorney can take to
7 reduce that dependency on the completeness and accuracy of the
8 client's information, including requiring the client to produce
9 documentation. Aside from periodic billing statements and other
10 similar documents, the trustee correctly noted that a debtor is
11 required by statute to produce the applicable tax return to the
12 trustee not less than 7 days prior to the first date set for the
13 meeting of creditors. 11 U.S.C. § 521(e)(2)(A)(i). It is
14 difficult to imagine why production of tax returns is not an
15 early requirement of counsel for debtors given not only that
16 statutory requirement, but also the need for hard information in
17 designing a confirmable plan. Among many other things, counsel
18 will need to know whether the client underwithholds or
19 overwithholds, and whether there are annual refunds that a
20 trustee will want to factor in.

21 One of the more troubling aspects of the attorney-at-the-
22 mercy-of-the-client argument is the scope of the attorney's duty,
23 and resulting representations upon signing and filing virtually
24 any document. Rule 9011, Fed.R.Bankr.P., provides in pertinent
25 part:

26

1 (b) Representations to the Court. By
2 presenting to the court (whether by signing,
3 filing, submitting, or later advocating) a
4 petition, pleading, written motion, or other
5 paper, an attorney . . . is certifying that
6 to the best of the person's knowledge,
7 information, and belief, formed after an
8 inquiry reasonable under the circumstances,

9 . . .

10 (3) the allegations and other factual
11 contentions have evidentiary support or, if
12 specifically so identified, are likely to
13 have evidentiary support after a reasonable
14 opportunity for further investigation or
15 discovery

16 Implicit in counsel's argument that the attorney is at the
17 client's mercy is a notion that an attorney has no responsibility
18 to try to find out the truth, or to test any of the client's
19 representations. That notion is directly contrary to Rule 9011.
20 While a body of law concerning what Rule 9011 does require an
21 attorney to do as a "reasonable inquiry" has yet to develop, the
22 idea that an attorney could comply by just uncritically accepting
23 whatever the client says is not only contrary to Rule 9011, but
24 it also leaves the attorney exposed and vulnerable. Rule 9011
25 clearly contemplates something more. See, e.g., Hendrix v.
26 Naphtal, 971 F.2d 398 (9th Cir. 1992).

27 In an interesting sense, counsel has impeached his own fee
28 application by asserting that unreliability of information "is
29 the common denominator in nearly all bankruptcy cases". As
30 counsel is aware, the judges of the court have recently revised
31 the presumptive fees allowable in Chapter 13 cases, with multiple
32 opportunities for input from members of the bar. One might infer

1 that by this application counsel is attempting to attack the
2 reasonableness of those fees. Whether that is so or not, counsel
3 has failed to show how this case, the Kidwell case, is
4 extraordinary or unusual in some way that would support allowing
5 compensation by fee application in an amount substantially in
6 excess of the presumptive or no-look fee. In re Eliapo, 468 F.3d
7 592 (9th Cir. 2006); In re Geraci, 138 F.3d 314 (7th Cir. 1998)¹.
8 That is especially true in this case in the light of the B203
9 form, Disclosure of Compensation, in which counsel indicates the
10 base fee was really \$3,300, not \$4,000, and includes
11 representation "of the debtor at the meeting of creditors and
12 confirmation hearing, and any adjourned hearings thereof."
13 Review of the "Accounting" suggests there were several
14 continuances of the confirmation hearing, which presumably
15 constitutes the extra work counsel complains of.

16 As noted, compensation allowed under § 330 has to be
17 "reasonable" to be an allowed administrative claim payable by the
18 bankruptcy estate. The firm has not shown how this case was
19 extraordinary or unusual in a way that supports departure from
20 the reasonable presumptive fee for a routine chapter 13 case.

21

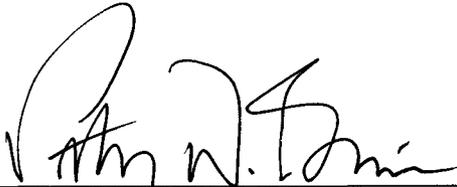
22 ¹For the foregoing reasons, the Court has no need to review individual time entries, including
23 those challenged by the trustee. Were it to do so, however, one item stands out: 5.8 hours of a
24 partner's time at \$250 an hour to prepare the few pages of this fee application, especially since most
of the "Supplemental Declaration" wasn't even applicable to this case. The Court also has in mind
the direction of 11 U.S.C. § 330(a)(6), which states:

25 (6) Any compensation awarded for the preparation of a fee application
26 shall be based on the level and skill reasonably required to prepare
the application.

1 Having failed to make such a showing, the Court finds and
2 concludes that the presumptive fee of \$3,300 is reasonable under
3 the circumstances and is allowed as an administrative claim
4 payable by the Chapter 13 trustee, before credit for the \$1,226
5 already paid by the debtors. The net award payable by the
6 trustee is \$2,074.

7 IT IS SO ORDERED.

8 DATED: APR 28 2008

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10 
11 PETER W. BOWIE, Chief Judge
12 United States Bankruptcy Court
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