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UNPUBLISHED

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re	)	Bankruptcy Case No. 95C-22607
	)	
JEFFREY LANE COLLINS,	)	Chapter 13
	)	
Debtor.	)	MEMORANDUM OPINION AND ORDER
	)	DENYING MOTION TO RECONSIDER

This matter came before the court on the motion of debtor's attorney, Sherri Flans Palmer ("Palmer"), to reconsider this court's order denying Palmer's application for attorney's fees.

Palmer appeared in behalf of herself as applicant. No appearance was made by the United States Trustee or the Chapter 13 Trustee despite notice being sent to both and despite the fact that the order disallowing attorney's fees was drafted by the standing Chapter 13 Trustee.

JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a "core" proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (B).

BACKGROUND

This bankruptcy proceeding originated as a Chapter 13 case filed on May 15, 1995. The first confirmation hearing was scheduled for December 12, 1995. That confirmation hearing was continued. The second confirmation hearing was scheduled for January 30, 1996. That confirmation hearing was continued. The third confirmation hearing was scheduled for April 16, 1996. That confirmation hearing was continued. The fourth confirmation hearing was scheduled for June 4, 1996. That confirmation hearing was continued. The fifth confirmation hearing was scheduled to be heard before this court on July 23, 1996; however, the case was converted to a case under Chapter 7 on July 16, 1996.

Palmer's fee application was originally scheduled to be heard before this court on March 5, 1996. That fee application hearing was stricken for nonappearance of counsel. Palmer's second fee application came before the court on May 14, 1996. The fee application at paragraph 3 indicates that the sum of $2,430.00 was sought, of which $140.00 was paid prior to the filing of the petition. The fee application contradicts the Rule 2016(b) statement signed and filed by Palmer on May 15, 1995, which indicates that no attorney's fees had been paid by the debtor prior to the filing of the petition. Both the fee application and the Rule 2016(b) statement contradict

the debtor's Chapter 13 plan Exhibit "A" which states that the total attorney's fees to be paid through confirmation are $1,340.00 and that $1,340.00 has been paid counsel as a prepetition retainer. Consistent with debtor's plan of reorganization, the court awarded zero fees to be paid debtor's counsel through the plan reasoning that Palmer committed to take the case through confirmation for the sum of $1,340.00 and that according to the plan she has already been paid $1,340.00 as a prepetition retainer.

On May 29, 1996, Palmer filed a motion to reconsider[1] and an amended fee application.[2] The amended application seeks the sum of $3,140.00 in fees of which $140.00 is claimed to have been paid prior to the filing of the petition. The amended application seeks fees for the time period beginning 03-02-95 through 05-29-96.

At the hearing on Palmer's motion to reconsider, Palmer represented to the court that she had reread *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557 (Bankr. D. Ut. 1985) and that "I learned my lesson. I have worked to correct it and we believe that now everything should be done properly and so we ask that the attorney's fees be granted." (Transcript of hearing dated June 20,

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[1]Attached to the motion to reconsider are four exhibits: Exhibit A, an amended Rule 2016(b) statement; Exhibit B, the debtor's first amended Chapter 13 plan; Exhibit C, Palmer's amended fee application and Exhibit D, the affidavit of Jeffrey Lane Collins. The exhibits uniformly state that $160.00 was paid to Palmer as a retainer and that total fees for the case are "to be determined."

[2]As a separate document in the case file Palmer filed her amended fee application which refers to "a detailed statement of services rendered, time expended, and expenses incurred, and the amount requested." However, Palmer failed to attach the detailed time entries to her amended application. As a result, the court was forced to look to Exhibit C of Palmer's motion to reconsider which did have the detailed time entries.

1996, at p. 5.) It is obvious to the court that Palmer either did not reread *Jensen-Farley*, that she did not read her own amended fee application, or both.

THE APPLICATION

A comparison of Palmer's original application with her amended application reveals several troubling inconsistencies which puts the veracity of Palmer's statements to this court into serious question.

The original fee application at 06-01-95 claims three-tenths of an hour performed by a paralegal at Palmer's office for compensation of $15.00. (Palmer bills her paralegal's time at the rate of $50.00 per hour.) The amended application shows the identical entry performed by a secretary rather than a paralegal. The amended application claims three-tenths of an hour performed by the secretary but continues to seek compensation of $15.00 for the services. (The amended application indicates that Palmer bills her secretary's time at the rate of $15.00 per hour.) There is no explanation why the amended application claims that the services were performed by the firm's secretary as opposed to the firm's paralegal. Also, there is no explanation why Palmer seeks compensation for her secretary at the rate of $50.00 per hour ($15.00 for three-tenths of an hour) instead of the $15.00 per hour indicated by Palmer as the billable hourly rate for her secretary.

The original application at 06-02-95 claims one-tenth of an hour performed by the firm's paralegal. The amended application claims that two-tenths of an hour were expended by the

firm's paralegal performing the same task. No explanation is given as to how, a year after the fact, counsel made the determination that the telephone conversation performed by the firm's paralegal took two-tenths of an hour rather than the one-tenth of an hour claimed in the original application.

The original application at 06-06-95 seeks reimbursement for a telephone conversation conducted by the firm's paralegal for one-tenth of an hour[3]. The amended application claims that the same telephone conversation was conducted not by the paralegal but by Palmer herself and that the conversation took four-tenths of an hour as opposed to one-tenth of an hour. No explanation is offered by counsel as to how, over a year after the fact, a function claimed by the firm to have taken one-tenth of an hour by a paralegal is now suddenly amended to claim that it took four-tenths of an hour by Palmer herself.

The original application at 06-12-95 seeks compensation of $15.00 for three-tenths of an hour expended by the firm's paralegal. The amended application seeks compensation of $15.00 for three-tenths of an hour expended by the firm's secretary. There is no explanation about the change from paralegal to secretary or why the secretary billing at the rate of $15.00 per hour should be compensated $15.00 for three-tenths of an hour.

The original application at 07-13-95 seeks compensation of $15.00 for three-tenths of an hour by the firm's paralegal. The amended application seeks $15.00 for three-tenths of an hour for services performed by the firm's secretary. There is no explanation about the change from

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[3]The original application seeks compensation of $50.00 for the one-tenth of an hour telephone call which computes to a billable rate of $500.00 per hour for Palmer's paralegal.

paralegal to secretary or why the secretary billing at the rate of $15.00 per hour should by compensated $15.00 for three-tenths of an hour.

The original application at 10-05-95 seeks $15.00 for three-tenths of an hour performed by the firm's paralegal. The amended application seeks $15.00 for three-tenths of an hour for the same services performed by the firm's secretary. Once again no explanation is offered about the change from paralegal to secretary or why the secretary billing at the rate of $15.00 per hour should by compensated $15.00 for three-tenths of an hour.

The original application at 12-04-95 seeks $37.50 in compensation for three-tenths of an hour performed by Palmer as attorney. The amended application seeks the sum of $62.50 for five-tenths of an hour for Palmer to perform the same itemized task as described in the original application. No explanation is offered how, more than six months after the fact, Palmer determined that the task described as "Receive Trustee's Report" took five-tenths of an hour to perform as opposed to the three-tenths of an hour as represented in the original application.

The amended application at 01-29-96 seeks $15.00 compensation for three-tenths of an hour by Palmer's secretary who purportedly bills at the rate of $15.00 for an entire hour.

The amended application at 05-23-96 seeks compensation of $15.00 for three-tenths of an hour once again performed by the firm's secretary who purportedly bills herself at $15.00 per hour.

DISCUSSION

This court has a substantial Chapter 13 case load. As a result, the court must consider a seemingly endless flow of Chapter 13 attorney fee applications from counsel. Much of the legal work itemized in those fee applications is understandably and necessarily work that involves short spurts of time for which the attorney must account. As a practical matter, it is frequently impossible for the court to do anything other than take the attorney's word for the fact that the time spent and work done was actually spent and done. Although no objection was raised by the United States Trustee, the Standing Chapter 13 Trustee, or by any party in interest, this court has an affirmative duty and responsibility to address the issues raised in this application. "Thus, §§ 327(a), 328 and 329 are alike as they give the bankruptcy judge the responsibility and power to oversee professionals involved in a bankruptcy case without any requirement that the issues be raised by a party in interest." *In re Interwest Business Equipment, Inc.*, 23 F.3rd 311, 317 (10th Cir. 1994).

Palmer's history before this court is marked with an unpublished memorandum opinion[4] by the Honorable Judith A. Boulden, United States Bankruptcy Judge cited as *In re Gerald V. Eborn*, no. 94B-25640 (Bankr. D. Ut. August 10, 1995). The opinion addresses Palmer's fee application practices and contains findings which include the following:

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[4]The *Eborn* opinion contains numerous findings of fact and conclusions of law only a portion of which are discussed in this opinion. The opinion contains seven separate orders, five of which are prospective in nature and are obviously an attempt by Judge Boulden to impress upon Palmer that this court expects full compliance with established fee application requirements in the future.

1. Palmer's billing system consists of the following:

a. An appointment book in which clients' future appointments are recorded. The time scheduled for appointments reflects the anticipated time the appointment will take with the client. Palmer does not record the actual time spent with the client.

b. Notations on the outside of a client's case file regarding certain services performed for the client. The notations do not represent the actual time spent in service to the client, but instead the customary time such a service would ordinarily take based upon Palmer's experience.

c. Some type of computer listing for telephone calls. The computer listing functions only part of the time.

d. Handwritten notations made on papers located within the file that indicate services rendered on behalf of the client. From the handwritten notations on the various papers in the file, the amount of time believed to have been spent to perform a task is extrapolated. The actual time spent performing the service is not recorded.

2. The itemization on the application that reflects the debtor's various office visits with Palmer or her staff represents the amount of time scheduled for any particular appointment, not the amount of time actually spent by Palmer or her staff with the client. Other time entries that appear on the application reflect the amount of time Palmer

estimated it would take to accomplish a particular service for the debtor, not the actual time spent.

3. The following time entries that are designated as being performed by "A" or attorney, allegedly represent time spent by Trease[5] on the debtor's case:

12-16-94	Preparation	Case for Upcoming Hearing	0.9	$112.50
12-16-94	Preparation	Discuss Case Requirements with Client after 341 Hearing	.03	$ 37.50

4. Trease did not perform the indicated services for the debtor, nor did he expend the time indicated in these time entries contained in the application.

5. The time entries and services attributed to Trease for 12-16-94 were recreated from handwritten notes made by Trease during or while waiting for the debtor's Section 341 meeting on a paper listing the debtor's matrix of creditors. The handwritten notes do not indicate any services performed or time spent on behalf of the debtor. They indicate, instead, tasks to be accomplished on behalf of the debtor in the future or matters that may become issues in the case.

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[5]During December of 1994, Jory Trease was employed by Sherri Palmer & Associates to serve as attorney for many of the Chapter 13 cases handled by Palmer's office.

The *Eborn* opinion contains conclusions of law including the following:

1. The evidence indicates the time entries on the application do not represent the actual time spent or services rendered to the debtor by Palmer. In some instances the time entries represent an estimation or approximation of the amount of time taken in other cases to perform similar services. In other instances the time entries represent estimations of time incurred for services to the debtor that were determined prior to any service ever being performed. In still other instances, the time and service entries are pure fiction.

2. Palmer's time keeping methodology is irregular at best. It does not reflect the maintenance of meticulous contemporaneous time and expense records that accurately represent the date the service was performed, the person performing the service, a concise description of the service, the time increment in tenths of an hour and the lodestar extension. Since the application does not contain an accurate representation of time actually expended, it is impossible for the court to determine if the time spent was reasonable, necessary or beneficial to the estate.

3. The evidence indicates Palmer's time keeping methods are not isolated to this application. Palmer has represented and currently represents numerous debtors before this court. Since, at present, Palmer continues to practice in this court, a methodology must be developed to ensure that future applications truthfully comply with the requirements of the statute. This is essential because Palmer's signature on this application does not honestly represent that the contents are well grounded in fact.

The findings of fact and conclusions of law in *Eborn* illustrate that this is not an isolated incident for Palmer. As a bankruptcy practitioner, Palmer is expected to be knowledgeable of the disclosure requirements and the fee application procedures of the Bankruptcy Code and Rules. *In re CF & I Fabricators of Utah, Inc.*, 131 B.R. 474, 485 (Bankr. D. Ut. 1991) (It is an attorney's professional responsibility to engage in the necessary study to provide adequate client representation, including how to be paid). The burden of proof is on the applicant to show entitlement to the fees and costs requested. *In re TS Industries, Inc.*, 125 B.R. 638, 641 (Bankr. D. Ut. 1991). A detailed discussion of the fee application requirements in the District of Utah is set forth in *Jensen-Farley*, 47 B.R. 557. *Jensen-Farley* does not permit compensation for secretarial services, it requires contemporaneous time records, it prohibits estimation of fees and costs, and it demands that the detailed time records be accurate.

Given the unexplained changes in the detailed time entries and the contradictory claims of time spent by different professionals, the court is forced to conclude that Palmer's time records are not contemporaneous. A court may totally deny a claim for fees when no contemporaneous records are kept. *Anderson v. Secretary of Health and Human Services*, 80 F.3rd 1500, 1506 (10th Cir. 1996); *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). And, because Palmer's fee application lacks any element of accuracy or reliability, it is impossible for this court to determine if the time spent was reasonable, necessary or beneficial to the estate. *In re Lederman Enterprises, Inc.*, 997 F.2d 1321 (10th Cir. 1993).

Failure to Accurately Disclose

Of even greater concern to this court is Palmer's appalling lack of respect for the disclosure requirements of Section 329 and Rule 2016. Even after Palmer's contradictory and misleading statements were brought to her attention by the court during the May 14 hearing, Palmer filed her motion to reconsider without offering any explanation whatsoever about how the contradictory statements came to be filed with the court and what steps have been taken to assure that this type of thing will never happen again. The failure to comply with the Code's disclosure requirements is a breach of fiduciary duty. *In re Roberts*, 46 B.R. 815, 839 (Bankr. D. Ut. 1985) (The attitude of "That's for me to know and for you to find out," is totally incompatible with the law firm's fiduciary status as an officer of the court).

Palmer attempts to trivialize the contradictory statements by simply amending them without comment. The integrity and public confidence in the bankruptcy court system depends upon the strict adherence to the disclosure requirements of the Code and Rules. *In re Century Plaza Associates*, 154 B.R. 349 (Bankr. S.D. Fla. 1992). Compliance with Rule 2016 requirements is necessary to maintain the integrity of the bankruptcy system. *In re EWC, Inc.*, 138 B.R. 276 (Bankr. W.D. Okl. 1992). Even the simple failure to provide details of payments received constitutes a violation of the Section 329 and Rule 2016 disclosure requirements. *In re Park-Helena Corp.*, 63 F.3rd 877 (9th Cir. 1995) (Failure to disclose all payments received from the debtor warrants a denial of all fees and disgorgement of any prepetition retainer). Negligent or inadvertent omissions do not vitiate the failure to disclose. *In re Maui 14K, Ltd.*, 133 B.R. 657

(Bankr. D. Haw. 1991). The disclosure requirements imposed by Section 329 are mandatory, not permissive. Misstating the amount of retainer paid and misstating the terms of a fee agreement constitute a failure to comply with the requirements of Section 329 and Rule 2016. "[A]n attorney who fails to comply with the requirements of § 329 forfeits any right to receive compensation for services rendered on behalf of the debtor and a court may order an attorney sua sponte to disgorge funds already paid to the attorney." *In re Investment Bankers*, Inc., 4 F.3rd 1556 (10th Cir. 1993) (citations omitted). For the above reasons, it is hereby

ORDERED that Palmer's motion to reconsider is denied, and it is further

ORDERED that in an effort to assure that Palmer's future applications comply with the requirements of the Code and Rules, Palmer shall not file any application for fees in any case that is currently pending before this court for which she does not have meticulous contemporaneously maintained and accurate time records attached, and it is further

ORDERED that upon conversion or dismissal of any unconfirmed Chapter 13 case for which Palmer or the law firm of Sherri Palmer & Associates has served as counsel for the debtor, the Chapter 13 Trustee shall return unadministered funds directly to the debtor unless Palmer has first obtained a court order approving her fee application. If Palmer has obtained an approved fee award, the Trustee shall send a check in the amount of the fee award to Palmer and the balance

directly to the debtor. Only in the event that the Chapter 13 Trustee is unable to locate the debtor shall the Chapter 13 Trustee send funds other than court approved fee awards to Palmer. This portion of the court's order shall remain in effect until further notice by the court.

DATED this 25 day of July, 1996.

BY THE COURT:

Glen E Clark

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT