

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**  
Bankruptcy Judge Sid Brooks

In re:	)	
	)	
JIMMY DEWAYNE PATTERSON	)	Bankruptcy Case No.
SS#xxx-xx-0007 and	)	99-25093-SBB
TERESA PATTERSON	)	Chapter 13
SS#xxx-xx-4050,	)	
	)	
Debtors.	)	

**ORDER REGARDING CHAPTER 13 FEE APPLICATION  
AND ATTORNEY FEE DISCLOSURE STATEMENT**

THIS MATTER comes before the Court pursuant to this Court's Order issued January 9, 2001 regarding attorney's fees and the issues raised *sua sponte* by the Court. The Court had questions regarding (a) fees applied for by counsel for Debtors, (b) disclosure of said fees pursuant to 11 U.S.C. § 329 and Fed.R.Bankr.P. 2016, and (c) the method of payment of attorney's fees through the Debtors' Chapter 13 Plan. The Court, having reviewed the file, having held a hearing, and otherwise being duly advised in the premises, enters the following findings of fact, conclusions of law and order.

The subject of attorney's fees in Chapter 13 cases is one which fosters continuing examination by the Court and consumer bankruptcy bar. It is part and parcel of their mutual efforts to insure the award of fair and reasonable fees to counsel, provide adequate disclosure of fees to the Court and all interested parties, and integrate payment of those fees into feasible, successful Chapter 13 plans. This case presented those issues in a new light and pursuant to circumstances becoming increasingly prevalent fee practice among some attorneys.

Debtors' counsel provided the Court an extensive, detailed and useful discussion of various matters pertaining to estimating, setting, disclosing and being paid fees for legal services in a Chapter 13 case. The Chapter 13 Trustee presented similar commentary and noted certain objections to the process/disclosure used by counsel in this case.

The Court finds as follows:

1. This Court has received and considered (a) Debtors' counsel's June 12, 2000 Chapter 13 Fee Application; (b) Debtors' counsel's December 6, 1999 Attorney Fee Disclosure Statement; (c) this Court's June 29, 2000 Order for Report on Fees; (d) Chapter 13 Trustee's July 14, 2000 Response to Court's Order for Report on Fees; (e) this Court's July 21, 2000 Order Allowing/Approving Fees; (f) this Court's January 9, 2001 *sua sponte* Order regarding Debtors' counsel's fee procedure and application; (g) Debtors' counsel's January 29, 2001 Response to Court's Questions Raised at Hearing of January 9, 2001, with exhibits (Fee Agreement, Debtors'

Plan); (h) Chapter 13 Trustee's March 23, 2001 Statement Re: Fee Agreement and "Reserve"; and (i) Transcripts of June 8, 2001 Fee Hearing in *In re Apodaca*, Case No. 00-15955-ABC, held by the Honorable A. Bruce Campbell.

2. The particular issues in this case, and within the context of the seemingly interminable problems associated with the procedures pertaining to, applications for, and award of attorneys' fees in Chapter 13 cases include:

- (a) Whether the disclosures regarding legal fees in this case made by counsel are adequate and legally sufficient?
- (b) Whether it is an appropriate and acceptable practice to provide for a "fee reserve" or "bubble" in a debtor's Chapter 13 plan which is intended to ensure full payment of counsel's fees, but which can also serve to augment a debtor's payout to unsecured creditors.

3. The issues identified here are part of and integrally related to the overall process of Chapter 13 fee administration and the disclosures, practices and problems attendant to that process. In the District of Colorado, as in other districts, the overall process is subject to continuing scrutiny, evaluation and modification.

4. The Bankruptcy Court in this District, in its most recent iteration of rules and procedures, has been attempting to simplify and streamline the fee application and approval process, while insuring full disclosure and fair treatment to all interested parties, and it has adopted General Order 2001-1 and, now, more recently, adopted *Amended* General Order 2001-1.

5. The Bankruptcy Court for the District of Colorado has concluded that "it is appropriate to institute a revised system for awarding attorneys' fees and costs in Chapter 13 cases . . .," and it is intending to "establish . . . a new system of . . . fee awards . . ." To accomplish this goal, the Court is, now, continuing the process of gathering data, "monitoring the current system, and reviewing the efficacy of this system" which task is to be concluded after June 30, 2002 (General Order and Amended General Order 2001-1).

6. This Judge is mindful of the larger issues at hand and the questions to be addressed later this year by the Court, through appropriate changes in Local Bankruptcy Rules and Bankruptcy Forms, and general Court procedures. As a consequence, this Judge is not going to use this case as a tool to prescribe or materially change important or customary fee application practices, procedures, standards or requirements that would affect the ongoing process noted above, and any new local rules and procedures which may be promulgated thereafter. Procedural matters and Court policy regarding fees and case administration are, in many respects, better left to the local rules and general procedural orders.

7. With respect to the issue before the Court as to adequacy of disclosure, I conclude that the Attorney Fee Disclosure Statement of counsel in this case is *not* legally insufficient. Counsel's Disclosure Statement comports with and follows Official Local Bankruptcy Form 102.1. However, in the context of counsel's Fee Agreement with Debtor, it is *incomplete, vague and confusing*. Counsel's Disclosure Statement is not as complete, informative or accurate as specified in 11 U.S.C. § 329(a) and Fed.R.Bankr.P. 2016(b). Perhaps more important, counsel's Disclosure Statement is not consonant with, and does not accurately reflect, the terms and provisions of counsel's Fee Agreement.<sup>1</sup>

8. In this case, the Attorney Fee Disclosure Statement provided for \$2,500 total fees,<sup>2</sup> of which \$600.00 had been paid pre-petition, leaving a balance of \$1,900 to be paid through the Plan. The Plan provided for the \$1,900 to be paid through the Plan. However, the actual Fee Application later submitted by counsel requested only \$1,500 in total fees, not \$2,500. Only \$900 in legal fees was thus to be paid through the plan, not the \$1,900 originally contemplated. This plan arrangement thus built in fees ostensibly to be held in reserve by the Chapter 13 Trustee to pay Debtors' attorney's fees *if* they rose to the level of \$2,500. Because the fees did *not* reach the level of \$2,500, the excess remaining in the Chapter 13 Plan, about \$1,000, would thus be disbursed to the general unsecured creditors.

9. Counsel's Fee Agreement has important fee provisions which are (a) ambiguous, or (b) not fully disclosed on his Attorney Fee Disclosure Statement, and/or (c) inconsistent with the Disclosure Statement or the Plan provisions, including but not limited to:

- (a) The fee recited in the Fee Agreement is only an estimate, with a broad range of possibilities (between \$1,000 - \$2,500). There is little precision and no certainty in the fee statement.
- (b) The fee charged and disclosed does *not* include various important legal services such as: (i) "consultation . . . after plan confirmation"; (ii) any contested matters, or (iii) any amendments that may need to be filed.

The legal services excluded from the disclosed fee include many of the important, indeed sometimes critical, services inherent in a bankruptcy

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<sup>1</sup> Procedural Bankruptcy Form No. B-203, 11 U.S.C.A., is a more complete and informative form than that form adopted by and used in this Court. Unfortunately, this Court's local form, Form 102.1, Statement, has superseded the more useful Official Procedural Form in practice.

<sup>2</sup> The \$2,500 was an estimate of fees to be charged in the case, but both the Disclosure Statement and the Plan specify legal fees totaling \$2,500, of which \$1,900 was to be paid through the Plan.

case. The fees do not cover various “basic services” often essential in a Chapter 13 case.<sup>3</sup>

10. Problems regarding the disclosure in this case were well illustrated when the Debtor sought post-petition legal consultation concerning a Motion for Relief from Stay and counsel demanded an additional \$300 paid by Debtor directly to counsel *before* any such legal services would be provided.<sup>4</sup> The Debtors could not afford the \$300 extra cost so they appeared *pro se* to contest the Motion. This situation resulted in (a) the fee reserve built into the Plan being of no use or value to the Debtor, (b) an increased, unexpected and undisclosed financial burden on the Debtor, post-confirmation, (c) a premium to be paid to the unsecured creditors from the so-called “fee reserve,” and (d) jeopardy to Debtors’ Plan because their budget had not ever accounted for additional, post-confirmation attorney’s fees “outside the plan.”

11. Central to the problem here is the fee reserve built into the Plan and funded by the Debtors, but counsel’s refusal to provide services when needed. While the Debtors were paying for legal services through the Plan, counsel was otherwise requiring *additional*, immediate payment of fees outside the Plan, as provided for in his Fee Agreement. While this practice may have been consonant with the Fee Agreement—but, not disclosed to the Court or others—it created serious problems and risk to the Debtors’ Plan and fresh start.

12. As to the existence of a fee payment arrangement and Chapter 13 plan which provides for a “fee reserve” or “bubble,” the Court is persuaded that it is not a practice that is *per se* improper, problematical or unfair to a debtor. It is an acceptable—and not necessarily unfair—approach to assuring adequate fees for counsel, yet still being fair to the debtor and

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<sup>3</sup> Basic services, as defined in this Court’s General Order, 2001-1, Exhibit A, such as:

13. Prepare and file any necessary amendments to schedules, statements and proposed plans.
14. Prepare and file motions for avoidance of liens.
15. Represent the debtor(s) at any Rule 2004 examination.
16. File proofs of claim, as necessary, to protect the debtor(s)’ interest.
17. If appropriate, prepare and file responses to and appear at any hearings on motions for relief from automatic stay.
18. Advise the debtor(s) with regard to motions to dismiss/convert, and, if appropriate, file a response thereto and appear at any hearings on such motions.

<sup>4</sup> To Debtors’ counsel’s credit, Mr. Mathiowetz did appear to observe the hearing and his clients’ *pro se* appearance, at which time the Court requested counsel to step forward and speak to the issues of the Motion and the question of attorney’s fees/representation.

creditors. Having said that, the practice is one ripe for either abuse, surprise, or imposition of an undue and unfair burden on the debtor, resulting in failure of the Plan.

13. By way of illustration, abuse and/or an undue or unfair burden on a debtor can result from counsel designing a debtor's plan with too large a fee reserve which (a) invites inflated fee requests, (b) denies a debtor an ability to meet current financial obligations, or payments "outside the plan" because the plan is "over-funded," or (c) wrongly deprives a debtor of necessary post-confirmation services from counsel if counsel demands fees be paid directly from debtor for such post-confirmation services (while ignoring the debtor's plan reserve as a source of compensation).

14. A source of this problem lies largely in the failure to adequately disclose the material terms and conditions of legal services to be rendered and of fees to be paid to counsel both through the Plan and "outside" the Plan. Without meaningful disclosure of the services and fees in a Chapter 13 case, the Debtors may not have a genuine understanding of basic services available under the Fee Agreement, the Chapter 13 Trustee cannot monitor, evaluate or contest fee applications in an effective manner, and the Court and other interested parties are deprived of important information about the Debtors' Plan, Plan feasibility, counsel's services, and reasonableness of legal fees.

15. In short, while counsel's disclosure may be legally sufficient because he is using the prescribed local forms, it is not adequate under these circumstances or with this type of Fee Agreement. Using the provisions of this Court's General Order 2001-1 and the prescribed "Basic Services Anticipated in Chapter 13 Cases" as a baseline, any material limitation, modification, deletion or variation from that scheme should be disclosed on or with the Attorney Fee Disclosure Statement, Local Bankruptcy Form 102.1.

IT IS THEREFORE ORDERED as follows:

1. The practice undertaken by counsel in this case, and the procedures adopted by him in establishing and applying for fees, are, essentially, legally sufficient and acceptable to the Court.
2. Henceforth, in the event that counsel's Fee Agreement(s) with debtors contains terms or provisions which embody any material limitation, modification, deletion, or variation from the scheme of legal services set forth on General Order 2001-1, Exhibit B, then counsel shall disclose all such material limitations, modifications, deletions or variations, either by reciting them directly on counsel's Attorney Fee Disclosure Statement or by attaching a copy of counsel's Fee Agreement to the Disclosure Statement. This disclosure shall be required on all fee applications submitted to the undersigned Judge commencing February 1, 2002.

Dated: January 10, 2002

BY THE COURT:

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Sidney B. Brooks,  
United States Bankruptcy Judge