

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In Re:
Michael Shane Scharf

Case No. 17-01442-als7

Debtor.

ORDER

(date entered on docket: March 8, 2018)

Before the Court is a Motion filed by the United States Trustee (“UST”) requesting the Court to examine and order a refund of attorney fees paid by Michael Sharf (“Sharf”) for representation in his bankruptcy filing. At the conclusion of the hearing, the Court asked Attorney Stephen Newport¹ (“Newport”) to submit his agreement with UpRight Law, LLC (“UpRight”) and proof of the amount of fees he received for representing Scharf. The UST was asked to submit a bank account exhibit to complete the record. The Court has jurisdiction in this core proceeding under 28 U.S.C. §§ 1334 and 157(b)(1). For the reasons stated the Motion is granted.

FACTUAL BACKGROUND

The following facts are undisputed. Scharf received an UpRight advertisement on his mobile phone that offered information about filing bankruptcy. He responded and the person he spoke with gave him information about payment of attorney fees and setting up the pre-requisite credit counseling required under 11 U.S.C. §109(h)(1). After paying the fees required by UpRight, Newport was assigned to Scharf’s file. On July 21, 2017 a chapter 7 petition was filed on Scharf’s behalf which identifies Newport, an attorney of UpRight, as his counsel of record. Schedule A/B filed with the Court identified two bank accounts that each contained a balance of \$200. On July 31, 2017 the docket reflects that the filing had been selected for audit². Two weeks later the chapter 7 trustee filed a report identifying the filing as a no asset case.

¹ Newport did not file a formal objection to the Motion but appeared at the hearing.

² “Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), the USTP is authorized to contract with independent firms to perform audits of individual chapter 7 and chapter 13 cases. The purpose of the audit is to determine the accuracy, veracity, and completeness of petitions, schedules, and other information required to be provided by the debtor under sections 521 and 1322 of title 11.”
<https://www.justice.gov/ust/debtor-audit-information>

DISCUSSION

The UST's alleges that the audit reflected bank account balances that were higher than disclosed on Schedule A/B. This information was provided to the chapter 7 trustee and Newport. According to the auditor's findings, filed at docket number 16, there were "no material misstatements" and no reference to any bank account balances. Newport stated that the bank balances originally stated in the schedules were the result of a typographical error. The record only contains the bank statement submitted at the request of the Court that reflects that during the month of July 2017 Scharf's balance generally ranged between \$2,000 to \$4,000, which is higher than the originally scheduled amounts. The trustee withdrew his previously filed report of no distribution and requested turnover of \$3,379.98 to the estate. At this point amendments to Schedules A/B and C were filed on behalf of Scharf.

The UST requests an examination of the reasonableness of Newport's fees because he did not properly prepare the schedules or advise Scharf related to his bankruptcy filing. Specifically, the schedules were not accurate and he failed to explain or consider Iowa exemptions in timing the filing of the petition which both caused the turnover of non-exempt funds to the bankruptcy estate.

A framework for the disclosure and evaluation of the reasonableness of attorney fees is found in the Bankruptcy Code at 11 U.S.C. § 329. *Schroeder v. Rouse*, 247 B.R. 474, 478 (B.A.P. 8th Cir. 2000). This statute allows the court to regulate attorneys who appear to have charged debtors excessive fees, and is aimed at preventing overreaching by a debtor's attorney. *Brown v. Luker*, 258 B.R. 719, 724 (B.A.P. 8th Cir. 2001). "The decision to reduce fees under §329 is within the sound discretion of the bankruptcy court." *Davis v. Hibbits*, 226 B.R. 624, 627 (8th Cir. 1998). What constitutes reasonableness is a question of fact to be determined by the particular circumstances of each case. *In re Chez*, 441 B.R. 724, 730 (Bankr. D. Conn. 2010); 3 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 329.04 [1] (16th ed. 2016). Upon examination, if the court determines that the fees paid by the debtor for representation in a bankruptcy case exceed the "reasonable value of the services rendered, the court may order the return of any payment made, to the extent excessive." *In re Miller Auto. Grp., Inc.*, 521 B.R. 323, 326 (Bankr. W.D. Mo. 2014). Competence of the performance and the nature of the services rendered are important factors as well. *In re Gorski*, 519 B.R. 67, 75 (Bankr. S.D.N.Y. 2014) citing *In re Chez*, 441 B.R. at 730.

According to Official Form B2030 filed in the case Scharf paid attorney fees in the amount of \$1,450 and the filing fee of \$335. Newport states that he was only paid \$400 to handle Scharf's bankruptcy filing. This is contrary to the information filed with the Court. No account records were provided to the Court to substantiate Newport's claim that his portion of the fee payment was less than

the stated amount. He merely provided one page of a document that is titled: “Attorney-Client Legal Services Agreement for Chapter 7 Bankruptcy” that purports to be executed between “Upright Law LLC (“Firm”) and the undersigned (“Client”)”. A review of the text of this submission details the fees charged by Upright, not any fee sharing between affiliated attorneys. To the extent there is an issue between Upright and Newport related to the division of fees that is not for this Court to decide.

Upright stated it would provide Scharf the following services:

6. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:
 - a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;
 - b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;
 - c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;
 - d. [Other provisions as needed]

All services not specifically excluded by 7 below to reasonably achieve the debtor's objectives.

7. By agreement with the debtor(s), the above-disclosed fee does not include the following service:
Representation in any objection to discharge, adversary proceeding, or any contested matter.

To determine whether fees are reasonable under 11 U.S.C. §329(b) a totality of the circumstances test that evaluates the following factors has been utilized: (1) the amount of time expended on the case, (2) the manner in which the attorney rendered services, (3) the nature of the services and the competence of the performance, (4) the ultimate conclusion in the case, and (5) the lack of complaint from debtors or case trustee. *In re Frye*, 570 B.R. 21, 26-27 (Bankr. D. Vt. 2017). These factors guide the review of the fees charged by Upright in this case.

Scharf explained that he did not really understand the bankruptcy process, he had difficulty communicating via email and that the first time he met Newport was at the 341 Meeting where he signed his schedules. His testimony demonstrates that he was clearly frustrated with the bankruptcy process, his legal representation, and that he regretted contacting Upright.

Newport’s examination of his client at the hearing is unpersuasive in establishing the reasonableness of attorney fees. The entire focus was upon when he first met with Scharf to sign his petition and schedules. Newport unsuccessfully attempted to elicit testimony that he met with Scharf

several times at his office, both before and after the bankruptcy filing. The Motion before the Court does not assert that the signatures on the bankruptcy petition and schedules are inadequate, were not properly obtained or violated the penalty of perjury clause. Rather, the primary issue raised relates to whether Newport discussed bank account balances and exemption rights with Scharf before the filing. No responsive evidence is provided related to this issue.

No time records were provided to establish the types of service or time expended in representing Scharf in his chapter 7 case. The record is void of any facts that describe the procedures that took place including: what attorney had primary responsibility for obtaining the necessary information to properly prepare the schedules; who prepared or directed the preparation of the schedules and reviewed them for accuracy; whether Scharf met with any attorney prior to his filing and whether he was actually provided the required, let alone adequate, information about his rights and duties that arise in filing bankruptcy. To protect confidential communications, the advice given need not be disclosed but at a minimum counsel's procedures to provide the expected services are relevant to whether the fees charged are reasonable.

Ultimately it is counsel's burden of proof to establish that the fees charged are reasonable. *Chamberlain v. Kula*, 213 B.R. 729, 736 (B.A.P. 8th Cir. 1997). The facts demonstrate that Upright provided only minimal representation to Scharf in his bankruptcy case and do not support a conclusion that the fees charged were reasonable. This information is clearly lacking from the record. Consequently, Upright has failed to meet its burden in this case.

For the reasons stated, the attorney fees charged by Upright in this case are determined to be unreasonable for the services actually provided. Reasonable attorney fees are established in the amount of \$300. The balance of fees paid to UpRight in the amount of \$1150 shall be refunded by check payable to Michael Scharf and sent to the Office of the United States Trustee³ within 30 days of the date of this order.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Chapter Case

³ Federal Bldg Room 793, 210 Walnut Street Des Moines, IA 50309