

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
BETTY JEAN GURLEY,
Debtor.

Case No. 97-35255-L
Chapter 11

OPINION

BEFORE THE COURT is the Application for Allowance and Payment of Compensation and Reimbursement of Expenses by Counsel for George E. Mills, Trustee, filed September 13, 1999. On June 30, 1999, the Court awarded the Trustee \$14,501.50 to be reimbursed as an administrative expense pursuant to 11 U.S.C. § 503(b)(4) for attorney fees incurred by the Trustee in making a substantial contribution in Mrs. Gurley's Chapter 11 case. Pursuant to its Order Granting Trustee's Motion for Rehearing/Reconsideration dated August 9, 1999, the Court now considers the Trustee's request for allowance of compensation of \$23,459.50 and reimbursement of expenses in the amount of \$4,751.51 incurred in pursuit of the Trustee's administrative expense claims. For the reasons set forth below, the Court will reduce the fees and expenses requested by the Trustee to 3% of the previous award.

I.

As set forth in this Court's prior memorandum concerning the award of an administrative expense priority to the Trustee,¹ George E. Mills, Jr. is the Chapter 7 trustee for the estate of William M. Gurley, the Debtor's husband, whose Chapter 7 bankruptcy case is pending in the United States

¹ *In re Gurley*, 235 B.R. 626 (Bankr. W.D. Tenn. 1999).

Bankruptcy Court for the Middle District of Florida. The Trustee was the largest creditor in Mrs. Gurley's Chapter 11 case, holding a secured claim in the amount of \$10,983,667.00, and an unsecured claim in the amount of \$11,070,289.00. A Plan of Reorganization was confirmed on September 22, 1998, providing for payment in full of the Trustee's claims. In his initial Request for Payment of Administrative Expense Claim, filed November 19, 1998, the Trustee sought reimbursement of \$41,992.71 in expert witness fees; \$90,015.75 in attorneys fees; and \$22,586.56 in costs; for a total request of \$154,595.02. The request was made pursuant to 11 U.S.C. § 330. The United States Trustee objected to the request, pointing out that the Trustee had never been appointed as a professional in this Chapter 11 case, but rather was a creditor. In response, the Trustee filed his Amended Request for Payment of Administrative Claim on January 4, 1999, pursuant to 11 U.S.C. § 503 for the same amounts set forth in the original request. On February 18, 1999, the Trustee filed his Second Amended Request for Payment of Administrative Claim. In this request the Trustee again asked for reimbursement of his expert witness fees in the amount of \$41,992.71, and attorney fees and expenses in the reduced amount of \$71,855.65. In addition, the Trustee requested for the first time compensation for himself in the amount of \$75,000 plus \$15,114.33 in travel expenses, for a total request of \$203,962.69. Of this amount, the Court actually awarded \$14,501.50, or approximately 7% of the requested amount. Now the Trustee seeks an additional award of \$28,211.01 for fees and expenses incurred in making the original fee application. The amount requested for bringing the application is almost double the award actually made by the Court as the result of the application.

Both the Debtor and the United States Trustee filed objections to the Trustee's present request. The Debtor argues that the additional fees requested by the Trustee are unconscionable in view of the fact that the Court disallowed approximately 93% of the award requested by the Trustee. The Debtor asks that the Court award no additional fees or, if any, no more than 5% of the \$14,501.50 actually awarded to the Trustee. The United States Trustee also asserts that the Trustee should be awarded no additional fees reasoning that the amount sought in the application bears no reasonable relation to the result obtained and that the filing of the fee application conferred no benefit upon the estate.

II.

The Court has carefully read each of the opinions relied upon by the Trustee in support of his application. None of those cases supports an award of attorney fees for the preparation of an application pursuant to § 503(b)(3).² Indeed the Court's own research has uncovered no case in

² The Court cannot help but wonder who, if anyone, read the cases relied upon in the Trustee's brief. For example, the Trustee cites *In re Mandalay Shores Co-op. Housing Ass'n, Inc.*, 21 F.2d 303, 383 (11th Cir. 1994) for the proposition that, "Bankruptcy judges have broad discretion in determining the amount of fees to award Trustee's counsel for services performed in a bankruptcy case." Mr. Mills is not the trustee in bankruptcy for Mrs. Gurley; he is a creditor of this estate. Further, *Mandalay Shores* is concerned with fees sought not by a trustee in bankruptcy, but by a bank in connection with an interpleader action. The bank's application was opposed by a Chapter 11 trustee in bankruptcy.

The Trustee cites *In re American Fabricators, Inc.*, 197 B.R. 987 (Bankr. M.D. Fla. 1996), for a list of factors the Court should consider "to determine the amount of attorneys fees to be awarded." *American Fabricators* is concerned with, among other things, the amount of attorney fees to be awarded a subcontractor in connection with a mechanic's lien claim pursuant to Florida statute. While the list of factors cited would be applicable to other types of attorney fee requests, they are not at all helpful in determining when and whether a bankruptcy court should award additional attorney fees for the preparation of a fee request.

The third case relied upon by the Trustee, *In re Spanjer Brothers, Inc.*, 191 B.R. 738 (Bankr. N.D. Ill. 1996) is concerned with fees requested by the attorneys for a debtor-in-possession pursuant to 11 U.S.C. § 330, and the fourth case, *In re Chary*, 201 B.R. 783 (Bankr. W.D. Tenn. 1996) is concerned with a request for enhanced compensation by a Chapter 7 trustee's attorney. Neither case is concerned with the award of fees in connection with the preparation and

which a court awarded attorney fees to a creditor for the preparation of an application under § 503(b).

The Court is aware of cases, however, in which fees have been awarded for the preparation of a fee request under 11 U.S.C. § 330.³

presentation of a fee application.

While it is not strictly improper for the Trustee to rely upon cases decided under other sections of the Bankruptcy Code and under fact situations not presented by the present dispute, it is clearly improper to cite a case for a proposition not supported at all by the reported decision, and it is improper to fail to draw to the Court's attention the fact that an argument is being made by analogy.

Only the first and last paragraphs of the Trustee's memorandum address themselves to the issue before this court, *i.e.*, whether the Trustee's attorneys are entitled to be compensated for time spent in preparing and arguing the merits of his request for payment of administrative claim. Neither of these paragraphs sites any supporting authority.

3 11 U.S.C. § 330(a)(1) provides in pertinent part:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103--

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

* * * *

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

In contrast, 11 U.S.C. § 503(b)(3)(D) and (4) provides:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including--

(3) the actual, necessary expenses, other than compensation and reimbursement specified in paragraph (4) of this subsection, incurred by --

(D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title.

* * * *

(4) reasonable compensation for professional services rendered by an attorney or accountant of an entity whose expense is allowable under paragraph (3) of this subsection, based on the time, the nature, the extent, and the value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

Both sections 330(a)(1) and 503(b) provide for “reasonable” compensation to professionals for “actual, necessary” services rendered to an estate or to a creditor in making a substantial contribution in a case and for reimbursement of “actual, necessary expenses” of such professionals. Section 330 was amended in 1994 to specifically provide that “any compensation awarded for the preparation of a fee application shall be based on the level and skill reasonably required to prepare the application.” 11 U.S.C. § 330(a)(6). Section 503(b) contains no similar language concerning the award of fees and expenses incurred in the preparation of an application for reimbursement of administrative expenses. Nevertheless, if fees and expenses are to be awarded for preparation of applications pursuant to § 503(b), there appears no reason not to base such compensation upon the level and skill reasonably required to prepare the application.

There is wide disparity in the reported decisions concerning whether a professional should be compensated for the preparation and presentation of a fee application pursuant to § 330. Some courts hold that the time expended for preparation of fee applications is not compensable. *See, e.g., In re Schachter*, 228 B.R. 359, 367 (Bankr. E.D. Pa. 1999) (Time spent on preparation of fee applications should not be compensated); *In re Junco, Inc.*, 185 B.R. 215, 222 (Bankr. E.D. Va. 1995) (Time spent preparing and presenting a professional’s fee application is a cost of doing business rather than a compensable service rendered for the debtor); *In re Courson*, 138 B.R. 928, 935 (Bankr. N.D. Iowa 1992) (Cost of preparing applications for trustee’s counsel was not compensable from Chapter 7 bankruptcy estate). Conversely, there are a number of decisions that have allowed compensation for the preparation of fee requests. *See, e.g., In re Nucorp Energy*, 764

F.2d 655, 658-59 (9th Cir. 1985) (Bankruptcy counsel are entitled to compensation for the time and effort spent in preparing fee applications); *In re Bennett Funding Group, Inc.*, 213 B.R. 234, 249 (Bankr. N.D.N.Y. 1997) (Reasonable compensation is appropriate for time spent preparing fee application); *In re MEI Diversified, Inc.*, 186 B.R. 455, 459 (Bankr. D. Minn. 1995) (Preparation of fee application constitutes compensable “actual and necessary services” in bankruptcy); *In re CF&I Fabricators, Inc.*, 131 B.R. 474, 483 (Bankr. D. Utah 1991) (Because the fee application is required by the bankruptcy court, the professional is entitled to reasonable market time in fulfilling that requirement); *In re Pettibone Corp.*, 74 B.R. 293, 304 (Bankr. N.D. Ill. 1987) (Professionals will be permitted reasonable compensation for time spent in preparing fee applications).

In the private sector few if any clients are charged for bill preparation time. *See In re Economy Lodging Sys., Inc.*, 1999 WL 714099 (Bankr. N.D. Ohio 1999). The preparation of an application in bankruptcy generally will require more than is required in merely generating a bill for services. The narrative portions of the applications must be drafted, for example, and a court appearance is often required. The bankruptcy courts in this circuit generally allow some compensation for the preparation of fee applications filed under 11 U.S.C. § 330, but limit these awards as set forth in *Coulter v. State of Tennessee*, 805 F.2d 146 (6th Cir. 1986). *See Economy Lodging Sys.*, 1999 WL 714099 at *6 (Bankr. N.D. Ohio 1999) (Chapter 11 case); *In re Atwell*, 148 B.R. 483, 493-94 (Bankr. W.D. Ky. 1993) (Chapter 13 case); *In re Bass*, 227 B.R. 103, 108 (Bankr. E.D. Mich. 1998) (Chapter 13 case); *In re By-Rite Oil Co.*, 87 B.R. 905, 917 (Bankr. E.D. Mich. 1988) (Chapter 11 case).

In *Coulter*, the Sixth Circuit held that “[i]n the absence of unusual circumstances, the hours allowed for preparing and litigating the attorney fee case [under Title VII] should not exceed 3% of the hours in the main case when the issue is submitted on the papers without a trial and should not exceed 5% of the hours in the main case when a trial is necessary.” *Coulter*, 805 F.2d at 151. In reaching this decision, the court pointed out that “[t]he legislative intent behind attorney fee statutes . . . was to encourage lawyers to bring successful civil rights cases, not successful attorney fee cases” and further that “guidelines and limitations are necessary to insure that the compensation from the attorney fee case will not be out of proportion to the main case and encourage protracted litigation.” *Id.* Bankruptcy Judge Steven W. Rhodes has concluded that *Coulter* is binding authority in this Circuit with respect to the award of compensation for the preparation and prosecution of attorney fee applications in bankruptcy. *See By-Rite Oil Co.*, 87 B.R. at 917. This Court need not decide whether *Coulter*, a Title VII case, represents binding authority with respect to fee applications brought pursuant to the Bankruptcy Code, but believes that the reasoning of *Coulter* is persuasive. The Court agrees with Bankruptcy Judge Snow that “the considerations which led the Sixth Circuit to impose caps on preparing and litigating the attorneys fees in fee shifting cases appear applicable in bankruptcy.” *Economy Lodging*, 1999 WL 714099, at *3. The application of appropriate caps will discourage protracted litigation concerning fee applications.

The author of this opinion has presided over substantially all hearings in this bankruptcy case from its inception in 1997, and thus has had an ability to judge for herself the contribution and demeanor of the Trustee and his counsel throughout these contentious proceedings. Some portion

of the fees and expenses incurred by the Trustee in connection with making this application resulted from his failure to rely upon the appropriate Code section in his initial application, and his failure to timely include his request for compensation for himself in his initial and first amended applications. It is not reasonable to compensate the Trustee for these clumsy efforts. Further, as stated previously, this Court disallowed some 93% of the fees and expenses requested by the Trustee in connection with this bankruptcy case. Although the Court conducted a trial on the Trustee's application, the trial was the result of attempted overreaching by the Trustee, not by the reluctance of the Debtor to compensate the Trustee for reasonable expenses incurred by him in connection with making a substantial contribution in this case. The Trustee has now been paid 100% of his claims against this estate, in excess of \$22 million. In addition, he has been awarded \$14,501.50 in attorney fees and costs as compensation for the contribution he made to this case. Given these circumstances, the Court finds that the Trustee is entitled to no more than a nominal additional amount of compensation for his efforts in this case. Pursuant to the authority of *Coulter*, the Court will limit the award to the Trustee to 3% of \$14,510.50 or \$435.32.

The Court will enter a separate order consistent with the findings and conclusions set forth herein.

BY THE COURT

JENNIE D. LATTA
United States Bankruptcy Judge

Date: _____

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cc: Mr. George E. Mills, Jr., Trustee
Mr. James E. Foster
Ms. Betty J. Gurley
Mr. John R. Dunlap
Mr. Sean M. Haynes