

SIGNED.



Dated: May 21, 2010

James M. Marlar
JAMES M. MARLAR
Chief Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:) Chapter 13
SUSAN C BROWN,)
Debtor.) **MEMORANDUM DECISION**

The Debtor has objected to a portion of her former counsel's attorney fee (DN 15, 76). The matter was heard on April 21, 2010, after which the parties were directed to file additional pleadings supporting or defending their positions. Since then, on May 5, 2010, counsel has asked for an additional \$2,075.75 above the initial \$3,500 contracted for (DN 88). Considering that this court approves the \$3,500 fee, this new application is moot, and will therefore be DENIED. Additional costs of \$56.05 will also be DENIED.

DISCUSSION

A. The Dispute

The Debtor's former counsel, Anthony W. Clark, has requested a fee of \$3,500. The Debtor feels that a fee of over \$1,500 is unreasonable, and seeks disallowance of \$2,000.

The court must, upon objection, determine the reasonableness of a debtor's attorney's fee. Here, the Debtor proceeds from the point of view of things that she perceives her prior counsel

1 did not do. The court, on the other hand, proceeds from the other direction, looking to what counsel
2 did do, in order to determine the appropriate fee.

3 In a Chapter 13 case, a presumptive reasonable fee is between \$3,500 and \$4,500,
4 provided that counsel has done all that he is required to do. Here, Debtor's former counsel seeks
5 \$3,500 for work performed up to the time that he was discharged as counsel, and new counsel was
6 substituted into the case.

7 8 **B. The Law** 9

10 Looking first to the law, Section 330 of the Bankruptcy Code governs a court's
11 inherent authority to grant less than the presumptive fee in a chapter 13 case, when a meritorious
12 objection has been raised. *See In re Eliapo*, 468 F.3d 592 (9th Cir. 2006). The bankruptcy court
13 has sua sponte authority to “award compensation that is less than the amount of compensation that
14 is requested.” § 330(a)(2).

15 A bankruptcy court in a Chapter 13 case “may allow reasonable compensation to the
16 debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case
17 based on a consideration of the benefit and necessity of such services to the debtor and the other
18 factors set forth in this section.” 11 U.S.C. § 330(a)(4)(B).

19 Section 330(a)(3) provides:

20 (3) In determining the amount of reasonable compensation to be awarded
21 to a . . . professional person, the court shall consider the nature, the
22 extent, and the value of such services, taking into account all relevant
23 factors, including--

24 (A) the time spent on such services;

25 (B) the rates charged for such services;

26 (C) whether the services were necessary to the administration of, or
27 beneficial at the time at which the service was rendered toward
28 the completion of, a case under this title;

1 (D) whether the services were performed within a reasonable
2 amount of time commensurate with the complexity, importance,
3 and nature of the problem, issue, or task addressed;

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

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

10 With those legal standards in mind, the court now looks to what has been accomplished in this case.

11
12 **C. The Debtor's Contentions**

13
14 In this case, Debtor and Debtor's prior counsel agreed to a flat fee of \$3,500 for a basic
15 Chapter 13 case. The file reflects that Debtor's counsel performed as required, at least insofar as the
16 required and routine written and filed pleadings and other paperwork are concerned.

17 The Debtor's main arguments, against awarding Mr. Clark the \$3,500 agreed fee,
18 contend that:

- 19 1. Two years ago she gave information to Mr. Clark concerning her
20 complaint regarding predatory lending practices against her mortgage
21 lender. Mr. Clark did not follow up or challenge the creditor.
- 22 2. In the summer of 2008, Mr. Clark failed to take steps to remove a
23 "wage garnishment" until Debtor informed him that she had to get a
24 payday loan.
- 25 3. In the summer of 2009, Mr. Clark obstructed Debtor's negotiations for
26 a loan modification "by sending notices 1-2 weeks later [sic] and never
27 returning my calls." "Left to Mr. Clark, I would be homeless by now."

1 4. When Mr. Clark does call Debtor, it is "adversarial or with some nasty
2 negative response."

3 5. "Mr. Clark discharged himself at our last appearance on the front steps
4 of this courthouse, because he was refusing to do as the court requested,
5 which was to work with Mr. Quinn of Routh Castle Cooper Olsen to
6 resolve this matter. Mr. Clark stated "Report me to the Bar
7 Association, I'll e-mail you the address."
8

9 **D. Analyzing the Contentions**

10
11 Addressing each matter, the court notes:

12 1: Advising Mr. Clark of alleged "predatory lending practices," and
13 expecting him to then embark on investigation and possible litigation,
14 is beyond the scope of what he agreed to do. (*See* Disclosure of
15 Compensation DN 13.) Moreover, such cases are typically not fruitful
16 to a debtor, especially since it appears that Debtor's promissory note to
17 the primary secured lender was executed on August 31, 2005 (DN 59).
18 Applicable statutes of limitations had likely run on an such causes of
19 action, as most bear a one-year limitation period. A Chapter 13's
20 counsel's primary job is to propose a repayment plan to creditors, over
21 a 3 to 5-year period, and shepherd the case through to a confirmation
22 order. Litigation is not a significant part of a Chapter 13 case. Usually,
23 objections to claims are about as adversarial as these cases get.
24 Counsel's employment is usually not to embark on a general litigation
25 crusade against a particular creditor. Moreover, in this case, litigation
26 was not included in the agreement as to what Chapter 13 counsel
27 agreed to do.
28

1 That Mr. Clark, in his professional judgment, did not see merit
2 in the pursuit of generalized "predatory" practices, is not an adequate
3 legal reason to deny him a fee for what he otherwise did accomplish.

4 2: The Debtor alleges that Mr. Clark failed to remove an ongoing "wage
5 garnishment." Form the file, it appears that the Debtor is referring to
6 a wage assignment, not a garnishment. The assignment order was
7 signed by this court on October 3, 2007 (DN 22), and specified that the
8 Debtor's ongoing plan payments were to be directed to the Trustee
9 through Debtor's employer (DN 10, 20). This assisted, not hindered,
10 the Debtor's reorganization. That the Debtor later changed her mind,
11 and wished to pay the Trustee directly, did not cause a legal detriment
12 to her. Counsel did not misuse his authority. Moreover, the record
13 reflects that Mr. Clark filed a motion to quash the assignment on
14 August 15, 2008 (DN 50), and an order doing just that was signed by
15 the court on August 18, 2008 (DN 52).

16 3: In the summer of 2009, the Debtor asserts that Mr. Clark did not assist
17 in her attempts to "modify" or otherwise resolve a pending motion for
18 stay relief with the principal creditor on her home.

19 The file reflects that the creditor's stay relief motion was filed on
20 July 10, 2009 (DN 58), and to date, has not been pressed. In fact, new
21 counsel appears to have amicably resolved the creditor's claims. But
22 Mr. Clark responded appropriately to the motion on July 28, 2009 (DN
23 64), and the court held the following hearings:

24 August 19, 2009	Preliminary hearing (DN 68)
25 September 23, 2009	Hearing (DN 71)
26 November 24, 2009	Hearing (DN 72)
27 December 18,2009	Hearing (DN 75)

28

1 At the last hearing, present counsel had come into the case, and it
2 appeared that the creditor's concerns had been satisfied.

3 But it also appears that Debtor's former counsel, by whatever
4 means, was able to fend off the requested stay relief for about five
5 months, and that the Debtor's new counsel was thereby given the time
6 necessary to resolve the matter.

7 Although, perhaps, Mr. Clark's demeanor might have been more
8 patient and civil, even accepting Debtor's comments as true, the court
9 has no issue with the result obtained for the Debtor, if only to stall
10 matters long enough for someone else to eventually settle them.

11 4: This concern falls under the label "civility." Put another way, basic
12 professional obligations require civil communications with clients.
13 Rule of Professional Conduct 1.4 requires an attorney to promptly and
14 reasonably consult with clients, and to keep them informed on all
15 matters. "Reasonably" encompasses civil communication.

16 Occasionally, as we have all experienced, clients and their
17 attorneys may not see eye-to-eye. This does not excuse the need for
18 civility, but in legal affairs, sometime edges are raw. Clients may feel
19 distress if they perceive a lack of interest on the part of their attorney;
20 an attorney may not have time, due to other crises for other clients, to
21 adequately communicate with another client, even though that client's
22 case may not be in any imminent danger.

23 Understanding the stresses of the practice of law does not excuse
24 uncivil discussions, but neither does it give cause, by itself, to lower a
25 fee for work otherwise properly done.

1 **E. Was the Agreement for Legal Services Performed?**

2
3 Happily, the court has a written document to look to. On September 2, 2007, the
4 Disclosure of Compensation of Attorney for Debtor was filed with the court (DN 13). In it, Mr.
5 Clark agreed to perform certain Chapter 13 legal services for the Debtor, for a flat fee of \$3,500.
6 The file also reflects the state of the record as to whether those services were performed. The court
7 can therefore determine the adequacy and timeliness of the service.

8

9 <u>Agreed Service</u>	<u>Performed?</u>	<u>Legally Adequate?</u>	<u>Timely?</u>
10 Initial consultation with	Yes	Yes	Yes
11 Debtor (preliminary consultation)			
12 Review and prepare	Yes	Yes	Yes
13 schedules, statement and plan			
14 Appear at § 341 meeting	Yes	Yes	Yes
15 Review and solicit	Yes	Yes	Yes
16 claims and amended claims			
17 Negotiate with objecting creditors	Yes	Yes	Yes
18 Prepare amendment	Yes	Yes	Yes
19 to Schedules I and J			
20 Prepare confirmation order	Yes	Yes	Yes

21 In addition, prior counsel prepared a request for wage assignment (and rescission thereof) (DN 10,
22 20), and orders relating thereto (DN 12, 22); the routine Employer Payments Declaration, Certificate
23 of Debtor regarding tax payments (DN 31); time extension motions; objection and appearances at
24 stay relief hearings (DN 64, 67, 68, 71, 72). Counsel performed these tasks, at no extra charge, even
25 though the Disclosure of Compensation did not mention them or specifically excluded them.
(DN 13.)

26 The schedules and statement of affairs, and the initial Chapter 13 plan, showed care
27 and accuracy. Eventually, given more time, counsel would have been able to resolve the secured
28 creditor's concerns and would have obtained confirmation of the plan.

1 Based on the foregoing, the court concludes that the \$3,500 fee was earned by Mr.
2 Clark. The \$3,500 fee will therefore be allowed.

3
4 **RULING**

5
6 The Debtor's objection to \$2,000 of the \$3,500 attorney fee of Mr. Clark will be
7 OVERRULED. Counsel's request for a fee enhancement and additional costs will be DENIED. A
8 separate order will issue.

9
10 DATED AND SIGNED ABOVE.

11
12 COPIES to be sent by the Bankruptcy Notification
13 Center ("BNC") to the following:

14 Susan C Brown, Debtor

15 David Allegrucci, Attorney for Debtor

16 Anthony W. Clark, Former Attorney for Debtor

17 Ronald Hoffbauer, Attorney for Trustee

18 Office of the U.S. Trustee
19
20
21
22
23
24
25
26
27
28