

11 USC § 329(a)
FRBP 2016(b)
Attorney's fees

In Re Jessica and Christopher Addison
4/25/08 Radcliffe

Case # 07-62855-aer13
Published

A Chapter 13 debtors' attorney's fee disclosure statement/fee application (LBF 1305) did not attach his employment agreement with the debtors even though the form stated it was attached. LBF 1305 also inaccurately noted a \$4,000 flat fee for the entire case and did not mention the debtor's legal insurance, which capped the attorney's fees at \$1,100 through confirmation and provided for discounted fees post-confirmation. The plan, as opposed to LBF 1305, did mention the legal insurance and the \$1,100 fee, but failed to mention the post-confirmation discount.

The attorney then filed an amended LBF 1305 which again did not have attached thereto a copy of the employment agreement. Further, amended LBF 1305 failed to mention the legal insurance.

Approximately one month after a final hearing on fees in which he failed to appear and more than two months after representing at another fee hearing that he would do so, the attorney filed a second amended LBF 1305 which correctly noted the compensation terms under the legal insurance, but again failed to attach a copy of the employment agreement.

The court reviewed the requirements for disclosure of compensation by a debtor's attorney, noting that in Chapter 13 all pertinent information should be in LBF 1305 rather than in the plan or some other document. It further opined that the filing of the second amended LBF 1305 was at that juncture an empty gesture. Based on the disclosure failures noted above, and based on similar failures in two prior cases, the court denied all fees for the entire case. It further reserved the right should the attorney later seek to withdraw, to condition such withdrawal on the attorney indemnifying the debtors for any reasonable fees they may incur in securing substitute counsel.

E08-5(11)

1
2
3
4
5
6
7
8
9 UNITED STATES BANKRUPTCY COURT
10 FOR THE DISTRICT OF OREGON

11 In Re:) Bankruptcy Case
12) No. 07-62855-aer13
13 JESSICA DIANE ADDISON and)
CHRISTOPHER MARK ADDISON,) MEMORANDUM OPINION
14)
Debtors.)

15 Keith Hayes represents Jessica and Christopher Addison, the
16 Chapter 13 debtors herein (Debtors). This matter comes before the court
17 upon Mr. Hayes' application for fees. Resolution of the matter
18 emphasizes the need for an attorney's compliance with the disclosure
19 requirements of the Bankruptcy Code and Rules. In at least two other
20 cases before this court, Mr. Hayes has disregarded these requirements.
21 Since this pattern is relevant to the present disposition, the two cases
22 (In re Abrego and In re Reich) are discussed below.

23 Abrego:

24 On January 5, 2007, Ludibina Abrego filed a Chapter 13 petition
25 through Mr. Hayes (Case # 07-60034-aer13). Mr. Hayes' disclosure of
26 compensation on Local Bankruptcy Form (LBF) 1305 was filed the same day.

1 In it he requested a flat fee of \$4,000 for the entire case (except for
2 appeals or adversary proceedings).¹ The form indicated he had received
3 \$0 before the petition's filing. Although the form requires it, Mr.
4 Hayes did not indicate whether he had entered into a written employment
5 agreement with Ms Abrego. As discussed below, although Ms Abrego had
6 legal insurance through her employer which covered part or all of Mr.
7 Hayes' services, LBF 1305 did not indicate such insurance.

8 On February 1, 2007, Ms Abrego filed her Chapter 13 plan.
9 Contrary to LBF 1305, the plan indicated \$750 of fees had been paid. At
10 the initial confirmation hearing, Ms Abrego requested time to file a
11 modified plan. On April 5, 2007, she filed a modified plan dated March
12 12, 2007, which again indicated \$750 in fees had been paid.² The
13 modified plan was confirmed on June 28, 2007. The confirmation order
14 awarded \$4,000 in fees. It indicated \$750 had previously been paid,
15 leaving \$3,250 to be paid through the plan.

16 On November 1, 2007, the court received a letter from Ms Abrego
17 advising that when she initially consulted Mr. Hayes, she had employer-
18 sponsored legal insurance with "ARAG," and that Mr. Hayes was a
19 participating attorney under the policy. She stated that the insurance
20

21 ¹ In this District all Chapter 13 debtor's attorneys must file LBF 1305
22 which is entitled "Debtor's Attorney's Disclosure of Compensation and Any
23 Employment Agreement, and Application for Compensation under 11 USC § 329 and
24 FRBP 2016(b)." The form allows debtor's counsel to pick Schedule 1 indicating
25 a flat fee for the entire case, or Schedule 2 indicating either a flat fee or
an estimated hourly fee, through plan confirmation and the initial claims
audit. Under Schedule 2, the attorney must request post-confirmation fees
(beyond the initial claims audit) through a supplemental fee application.

26 ² The original and modified plans at ¶ 2(b)(4) stated "Original attorney
fees are \$4,000; of which \$3,250.00 remains unpaid."

1 should have paid Mr. Hayes' fees in full, but that Mr. Hayes had not yet
2 submitted a claim to ARAG despite her request to do so. She objected to
3 the \$4,000 in fees noted in the modified plan. She attached a letter she
4 had written to Mr. Hayes dated September 20, 2007, stating Mr. Hayes
5 never discussed his fee for representing her in the Chapter 13, and that
6 she did not ask because she presumed it would be covered by her legal
7 insurance.

8 On December 4, 2007, a hearing was held regarding Ms Abrego's
9 letter. Mr. Hayes appeared by phone and did not put on any evidence. He
10 represented to the court that legal insurance would only pay \$750 of his
11 fee and that a claim to ARAG was not to be filed until the case was
12 completed. He further represented that insurance would not pay anything
13 past confirmation. He did not produce a copy of his fee agreement with
14 Ms Abrego or his agreement with ARAG. Ms Abrego appeared and represented
15 that she believed her insurance fully covered Mr. Hayes' fees. Based on
16 Mr. Hayes' failure to disclose his arrangement with ARAG and his
17 misleading "flat fee" of \$4,000,³ the court entered an order on
18 December 20, 2007, requiring Mr. Hayes to disgorge \$2,037.76 to the
19 Chapter 13 trustee (trustee) by January 4, 2008. This sum represented
20 all the fees the trustee had paid Mr. Hayes. The court further ordered
21 that should the case be dismissed, the fees were to be refunded to Ms
22 Abrego.⁴

24 ³ By his own representations, Mr. Hayes' fees at best were capped at \$750
25 through confirmation.

26 ⁴ The December 20th order also allowed Mr. Hayes to withdraw from
representing Ms Abrego.

1 Reich:

2 On October 13, 2007, Steven and Rebecca Reich filed a Chapter 13
3 petition through Mr. Hayes (Case # 07-62872-aer13). Mr. Hayes filed LBF
4 1305 on November 10, 2007. It indicated he had entered into a written
5 employment agreement with the Reichs, which was attached thereto. In
6 fact, the agreement was not attached. Like Abrego, LBF 1305 indicated
7 \$4,000 in total compensation requested, representing all compensation for
8 the life of the case. It indicated Mr. Hayes had received \$1,100 at or
9 before the petition's filing, leaving a balance of \$2,900 to be paid
10 through the plan as funds were available. Mr. Hayes left blank the date
11 on the form indicating service on the Reichs, trustee and United States
12 Trustee (UST). Like Ms Abrego, the Reichs were covered by ARAG
13 insurance, yet LBF 1305 did not disclose it. The Reichs' amended plan
14 dated November 5, 2007, was filed on November 13, 2007. It provided in
15 ¶ 2(b)(4) for original attorney fees of \$ 4,000, of which \$2,900 remained
16 unpaid. The fees were to be paid prior to all creditors.

17 At the initial confirmation hearing on December 18, 2007, the
18 Reichs requested time to file a modified plan. At the hearing, Mr. Hayes
19 represented that the case involved legal insurance. The court adjourned
20 the confirmation hearing to January 16, 2008, along with a specially-set
21 evidentiary hearing on Mr. Hayes' fees.

22 At the January 16th hearing, Mr. Hayes requested time to file a
23 modified plan to deal with fee issues and the IRS' objection to
24 confirmation. Again, Mr. Hayes produced neither his employment agreement
25 with the Reichs nor his agreement with ARAG. The UST appeared and agreed
26 to the continuance.

1 In anticipation of the adjourned hearing, the UST filed a
2 memorandum, attaching a stipulation between it and Mr. Hayes. The
3 stipulation provided that: 1) the Reichs had legal insurance with ARAG
4 that covered them up through confirmation for a \$1,100 flat fee which
5 ARAG would pay; 2) as of the date of the stipulation,⁵ Mr. Hayes had not
6 sought or been paid the \$1,100 or any compensation from the Reichs; and
7 3) the insurance contract obligated Mr. Hayes to provide the Reichs a 25%
8 discount for post-confirmation services.⁶

9 The adjourned hearing was held on February 28, 2008. Mr. Hayes
10 did not appear, instead leaving a message on the court's chambers' phone
11 shortly beforehand that he was ill and would not be attending.⁷ The
12 trustee appeared and noted the plan before the court was not feasible,
13 and that no modified plan had been filed. Based on his failure to appear
14 and his disclosure deficiencies, in particular his failure to properly
15 disclose his arrangement with ARAG, to provide the court and interested
16 parties a copy of his fee agreement with the Reichs and the applicable
17 terms of his agreement with ARAG, an order was entered on March 3, 2008
18 denying Mr. Hayes any fees in the case. On that same date a separate
19 order was entered dismissing the case.

20 The Case at Bar:

21 _____
22 ⁵ The stipulation is undated. It was entered into sometime between
23 January 16, 2008 (the prior hearing date) and February 25, 2008 (the date the
UST's memorandum was filed).

24 ⁶ In light of the stipulation, LBF 1305's \$4,000 flat fee is troubling.
25 Further, as the UST points out (and as Abrego and the case at bar confirm),
\$4,000 is Mr. Hayes' usual flat fee; it does not reflect the 25% discount he
26 was obligated to give the Reichs for post confirmation services.

⁷ Mr. Hayes however did not request a continuance, even orally.

1 On October 11, 2007, Debtors filed their Chapter 13 petition as a
2 skeletal filing through Mr. Hayes. Follow-up schedules as well as LBF
3 1305 were filed on November 10, 2007. LBF 1305 was identical to the one
4 filed in Reich, that is, it disclosed Mr. Hayes entered into a written
5 employment agreement with Debtors which was attached, when in fact it was
6 not attached. It further disclosed a flat fee of \$4,000 for the entire
7 case with \$1,100 paid, leaving \$2,900 to be paid through the plan. Mr.
8 Hayes did not fill in the service date. Debtors' plan dated October 23,
9 2007, was also filed on November 10, 2007. Contrary to LBF 1305, plan ¶
10 2(b)(4) indicated original attorney's fees of \$1,100, which had been
11 paid. It then noted "ARAG legal insurance will pay fees."

12 On December 16, 2007, Mr. Hayes filed an amended LBF 1305, again
13 indicating an employment agreement reached and attached, yet none was
14 attached.⁸ On this version, Mr. Hayes chose Schedule 2, indicating a
15 flat fee of \$1,100 through confirmation and the initial claims audit. He
16 left blank the space in Schedule 2 disclosing fees paid to date and the
17 remainder that needed to be paid through the plan.

18 The confirmation hearing was held on December 18, 2007. Although
19 there were no objections to confirmation, the trustee questioned Mr.
20 Hayes' fees because of the legal insurance, at which point confirmation
21 was set over to January 16, 2008, along with a specially-set evidentiary
22 hearing on Mr. Hayes' fees. The fee issues were to be tracked with those
23 in Reich.

24
25
26 ⁸ The court surmises Mr. Hayes filed amended LBF 1305 based on the
concerns expressed by the court in Abrego.

1 Mr. Hayes as well as the UST appeared at the January 16th
2 hearing. As in Reich, Mr. Hayes adduced neither his agreement with
3 Debtors nor his agreement with ARAG. He did, however, advise that he
4 would be filing a further amended LBF 1305 to correct any prior
5 deficiencies, while attaching thereto his fee agreement with Debtors,
6 along with the relevant terms of the ARAG contract. The UST requested a
7 setover to allow it more time to investigate Mr. Hayes' relationship with
8 ARAG. The court noted several of the disclosure deficiencies discussed
9 below. It queried whether Mr. Hayes explained the ARAG policy's fee
10 limitations to Debtors. Debtors' plan was confirmed, with resolution of
11 the fees deferred to a continued hearing set for February 28, 2008.

12 In anticipation of the February 28th hearing, the UST filed a
13 memorandum which attached a stipulation with Mr. Hayes identical to the
14 one filed in Reich. As noted above, Mr. Hayes did not appear at the
15 February 28th hearing.

16 On March 23, 2008, while his fee application was under
17 advisement, Mr. Hayes filed a second amended LBF 1305 disclosing a flat
18 fee of \$1,100 through confirmation and the initial claims audit, with the
19 notation "ARAG will pay \$1,100.00 on confirmation and approval by Court.
20 25% discount on any post-conf. fees." For the third time in the case,
21 Mr. Hayes failed to attach his fee agreement while stating it was
22 attached.

23 Discussion:

24 The disclosure requirements for debtor's counsel under the
25 Bankruptcy Code and Rules are well established and were summarized
26 recently by this court:

1 Debtors' attorneys are . . . subject to the
2 requirements of § 329, which requires that any attorney
3 representing a debtor file "a statement of the
4 compensation paid or agreed to be paid" for bankruptcy
5 services, if any payment or agreement was made within a
6 year before bankruptcy, and "the source of such
7 compensation." § 329(a). Counsel must file this statement
8 whether or not the attorney applies to the court for
9 compensation. Rule 2016 implements this requirement, and
10 provides that counsel for a debtor must file, within 15
11 days of the order for relief, the statement required by
12 § 329. Fed. R. Bankr.P. 2016(b).

13 In disclosing the fee arrangement, "the applicant must
14 disclose 'the precise nature of the fee arrangement,' and
15 not simply identify the ultimate owner of the funds." *In*
16 *re Park-Helena Corp.*, 63 F.3d 877, 881 (9th Cir.1995). An
17 applicant must lay bare all its dealings . . . regarding
18 compensation [The] fee revelations must be direct
19 and comprehensive. Coy, or incomplete disclosures . . .
20 are not sufficient. *Id.* (quoting *In re Saturley*, 131 B.R.
21 509, 516-517 (Bankr. D. Me.1991)).

22 *In re Farrington*, 2008 WL 4365753, *4 (Bankr. D. Or. 2007).

23 The disclosure requirements allow oversight of fee arrangements
24 between debtors and their counsel. "Section 329(a) seeks to prevent
25 overreaching by debtor's attorneys and serves to counteract the
26 temptation of a failing debtor to deal too liberally with his property in
27 employing counsel to protect him in view of financial reverses and
28 probable failure." *In Re Perrine*, 369 B.R. 571, 579-580 (Bankr. C.D. Cal.
29 2007) (internal quotations omitted).

30 The disclosure rules are literally applied, and
31 "[n]egligent or inadvertent omissions 'do not vitiate the
32 failure to disclose.'" *Park Helena Corp.*, 63 F.3d at 881
33 (quoting *In re Maui 14K, Ltd .*, 133 B.R. 657, 660 (Bankr.
34 D. Haw. 1991)). Failure to comply with the disclosure
35 rules is sanctionable, "even if proper disclosure would
36 have shown that the attorney had not actually violated any
37 Bankruptcy Code provision or any Bankruptcy Rule." *Id.* at
38 880.

1 Farrington, supra at 2008 WL 4365753, *5. It is no excuse that the
2 attorney receives some or all of the fees from a third party, here ARAG.
3 In Re Williams, __ B.R. __, 2007 WL 5006517 (Bankr. N.D. Oh. 2007) (fees
4 received from third parties are equally subject to the disclosure rules).

5 Here, Mr. Hayes has woefully failed in his duty to disclose. His
6 original LBF 1305 was inaccurate in that it did not attach the fee
7 agreement with Debtors, did not mention ARAG insurance, and provided for
8 a \$4,000 flat fee, when the actual fee was \$1,100 through confirmation.
9 It also did not disclose the 25% post-confirmation discount Mr. Hayes was
10 obligated to extend to Debtors. While the plan, as opposed to LBF 1305,
11 did disclose attorney's fees of \$1,100, which "ARAG legal insurance will
12 pay," this does not vitiate Mr. Hayes' lapses. Interested parties and
13 the court should not have to look to a separate document to determine the
14 nature of an attorney's fee arrangement. All pertinent information
15 should be set forth on LBF 1305. C.f., Hale v. United States Trustee (In
16 Re Basham), 208 B.R. 926, 931 (9th Cir. BAP 1997), aff'd, 152 F.3d 924
17 (9th Cir. 1998) (unpublished) (fee disclosures in statement of affairs
18 did not excuse late filing of separate attorney compensation statement
19 required under § 329(a) and FRBP 2016(b)). Further, the plan also fails
20 to mention the 25% post-confirmation discount.

21 Mr. Hayes' failures continued with the amended LBF 1305, which
22 again does not have attached a copy of the employment agreement, although
23 the form says it does, and again fails to mention the ARAG insurance,
24 including the 25% post-confirmation discount. The second amended LBF
25 1305 filed three months later, completes a trilogy of failure to attach
26

1 the employment agreement.⁹ Although it finally discloses the material
2 terms of the arrangement with ARAG, by that time it was an empty gesture
3 rather than a good faith attempt to comply with disclosure
4 requirements.¹⁰

5 The UST has recommended disallowance of the \$1,100 pre-
6 confirmation fee to be paid by ARAG. In addition, it recommends that
7 any applications for supplemental compensation be supported by time
8 records and documentation that show Mr. Hayes is billing his time at 75%
9 of his customary rate for similar matters.

10 Were Mr. Hayes' failure to disclose an isolated instance, the
11 court might be disposed to follow the UST's recommendation, however, as
12 recounted above, Mr. Hayes has exhibited a pattern of disdain for
13 disclosure requirements in this case and in Abrego and Reich, all
14 involving legal insurance. Of note, in none of these cases did he
15 produce a copy of the employment agreement with his clients or a copy of
16 the agreement with ARAG. Despite the court's stated concern, in none of
17 the cases did he adduce any evidence that his clients understood the
18 terms of his agreement with ARAG. In none of the cases did he bring the
19 various disclosure deficiencies to the court's attention. Rather, it
20 took a complaining client (Abrego) or inquiry from the court and an
21 investigation by the UST (Reich and Addison) to bring them to light.

22
23 ⁹ This failure is itself sufficient to deny fees. In re Hanson, 223 B.R.
775, 781 (Bankr. D. Or. 1998).

24 ¹⁰ Mr. Hayes filed the second amended LBF 1305 more than five months after
25 the Chapter 13 petition, more than two months after advising the court he would
26 be filing it, and almost one month after the February 28th evidentiary hearing
where he failed to appear, and after which the matter was taken under
advisement.

1 Once brought to light, Mr. Hayes' efforts at remedying the deficiencies
2 were dilatory and incomplete. Under Farrington, supra (and the authority
3 cited therein), sanctions can be imposed even for negligent and
4 inadvertent non-disclosures. Here, Mr. Hayes' conduct, if not willful,
5 is at least grossly negligent. As such, sanctions are warranted. Mr.
6 Hayes will be denied all fees for this entire case. Further, if he seeks
7 to withdraw from representing Debtors, the court reserves the right to
8 condition withdrawal on the indemnification of Debtors for any reasonable
9 fees they may incur in securing substitute counsel.

10 This opinion constitutes the court's findings of fact and
11 conclusions of law under FRBP 7052. They shall not be separately stated.
12 An order consistent herewith shall be entered.

13
14
15
16 ALBERT E. RADCLIFFE
17 Bankruptcy Judge
18
19
20
21
22
23
24
25
26