

13-05

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	:	CASE NO. 00-74112-PWB
	:	
ALNETA L. STAFFORD,	:	CHAPTER 13
	:	
Debtor.	:	JUDGE BONAPFEL
	:	

**ORDER**

On November 2, 2000, attorney John C. Whatley, VI, filed a petition initiating this Chapter 13 case on behalf of his former client, Almeta L. Stafford (the "Debtor"). [Docket No. 1]. Attorney Robert D. Schwartz has replaced Mr. Whatley as counsel for the Debtor in this case, as shown by a certificate of consent dated September 13, 2004 [Docket No. 24], and this Court's order entered on September 15, 2004. [Docket No. 23].

During the time that Mr. Whatley was representing the Debtor, the Court entered an Order lifting the stay to permit Charter One Mortgage Corp. ("Charter One") to proceed to foreclose on the Debtor's residence. [Docket No. 20]. Mr. Schwartz filed an emergency motion to reimpose the stay, which came on for a hearing on September 28, 2004. [Docket No. 22].

At the September 28 hearing, Mr. Schwartz represented that the Debtor had delivered \$1,600 to Mr. Whatley's law office (\$1,300 on September 9, 2003, and \$300 on September 15, 2003), for Mr. Whatley's transmittal to Charter One. Charter One asserted that it had not received these funds. Mr. Schwartz stated that Mr. Whatley had not provided an accounting as to the disposition of the funds. The issues between the Debtor and Charter One with regard to reimposition of the stay are being resolved by separate order.

By orders entered on September 30 and October 27, 2004 [Docket Nos. 27, 29], the Court

ordered Mr. Whatley to appear at a hearing and show cause as to why he should not be required to immediately turn over to the Debtor the sum of \$1,600 and pay the attorney's fees of Mr. Schwartz incurred in connection with his attempts to obtain an accounting of the funds. The Orders also directed Mr. Whatley to show cause why this Court should not impose appropriate discipline and why the Court should not report this matter to the State Bar of Georgia for such action as the State Bar sees fit.

Mr. Whatley filed a written response on November 29, 2004 [Docket No. 33], and appeared at the hearing held on December 1, 2004. Mr. Whatley admitted in his written response and at the hearing that his law office received \$1,600 from the Debtor. (Tr. 6-7). His written response and statements at the hearing do not deny that he did not transmit the funds to Charter One, and they show affirmatively that Mr. Whatley cannot account for the proper disbursement of the Debtor's funds.

Rather than assuming responsibility to the Debtor for the funds she entrusted to him, Mr. Whatley asserts that the Debtor should pursue Mr. Karl Schneider who, in the words of Mr. Whatley, was an agent of his law firm (in which Mr. Whatley is the only equity owner) and was handling the day-to-day matters of the law firm, including receipt of client funds. (Tr. 4). Mr. Whatley asserts that Mr. Schneider received the funds, violated law firm procedures by not depositing them into the law firm's trust account, exceeded his authority to act on behalf of the law firm, and failed to notify him of what was transpiring in the Debtor's case. Asserting legal principles generally applicable to an agent's duties to his principal, Mr. Whatley concludes that it is Mr. Schneider, and not he, who is responsible for the Debtor's loss. Thus, his written response states (Unnumbered Page 6):

It is obvious that the person who received the monies, who claims to have purchased

cashier's checks or money orders with the funds, who cannot produce the records of purchase of these cashier's checks or money orders, is none other than Karl Schneider, and it is to him rather than to the undersigned the Debtor should look for an accounting and refund of monies.

Mr. Whatley's position demonstrates a fundamental misunderstanding of his professional responsibilities that is appalling to this Court and dangerous to his clients. There is no doubt that an attorney is responsible for client funds and must account for their proper handling and disposition. Rule 1.15(I), Georgia Rules of Professional Conduct (the "Georgia Rules"). The Court cannot conceive of any possible circumstance under which an attorney can avoid responsibility for the handling of client funds based on defalcation of an employee. Mr. Whatley has a clear, unequivocal duty to return the entrusted funds to his client, and the Court will order him to do so.

The Court will also require Mr. Whatley to pay attorney's fees incurred by the Debtor in connection with this matter. At the hearing, Mr. Schwartz estimated that he had spent approximately 1.5 hours dealing with these issues and that his hourly fee for this matter was \$150. The Court finds that the resulting fee of \$225 does not represent reasonable compensation for Mr. Schwartz in the sense that it is too low; the Court suspects that Mr. Schwartz has spent more than 1.5 hours in dealing with problems caused by Mr. Whatley's breach of duty and that Mr. Schwartz should be entitled to an hourly rate of more than \$150 for services with regard to this issue. The fee is, therefore, more than reasonable from Mr. Whatley's standpoint, and the Court will require him to pay it.

Based on the foregoing, Mr. Whatley owes his former client \$1,825. At the hearing, Mr. Whatley said that it would take at least a year for him to repay his client. (Tr. 7). Given this

representation, the Court will not currently impose a specific time frame for Mr. Whatley to return his former client's money. The Court will, instead, order Mr. Whatley to refund the funds to the Debtor as soon as possible and will enter judgment against him. Furthermore, the Debtor may file a motion for an order to compel Mr. Whatley to pay within a certain time if Mr. Whatley does not pay the amounts due. This relief does not resolve any other claims that the Debtor may have against Mr. Whatley on account of his representation of her in connection with this case.

The failure of Mr. Whatley to properly account for funds his client entrusted to him constitutes a violation of Georgia Rule 1.15(I). Mr. Whatley's response – that his client should pursue his legal assistant – is shocking because it shows a total lack of understanding of this basic duty. Furthermore, Mr. Whatley's effort to shift responsibility to his legal assistant raises questions of whether (1) he failed to establish measures to provide reasonable assurance that his legal assistant's conduct was compatible with Mr. Whatley's professional obligations as a lawyer in violation of Georgia Rule 5.3, and (2) he permitted his legal assistant to engage in the unauthorized practice of law in violation of Georgia Rule 5.5(a).

At the hearing, Mr. Whatley stated that Mr. Schneider's duties included bringing in clients, talking to them about filing bankruptcy cases, and handling client money. (Tr. 4, 8-10). Page 1 of his written response states that, with regard to the funds in question, the Debtor "dealt only with Karl Schneider, the undersigned having no knowledge of her payment of the funds, no knowledge until later of any problem with her bankruptcy, and no knowledge of the handling of cash monies which would leave no paper trail." Thus, Mr. Schneider was able to receive funds from Mr. Whatley's client and divert them from Mr. Whatley's trust account without Mr. Whatley's knowledge. Mr. Whatley had no contact with his client about this or any problems in her bankruptcy case. (Tr. 17). Although

Mr. Whatley claims no contemporaneous knowledge of the Debtor's problems, the record reflects that Charter One's attorney mailed notice of default to Mr. Whatley and the Debtor on May 27, 2004, and served them with a motion for entry of an order lifting the stay due to default on June 28, 2004 [Docket No. 19], and that on July 2, 2004, the Clerk mailed Mr. Whatley a copy of the order lifting the stay that had been entered on June 30. [Docket Nos. 20, 21]. At the hearing, Mr. Whatley stated that Mr. Schneider kept him from getting his mail at these times. (Tr. 18).

These circumstances tend to indicate that, at best, Mr. Whatley failed to supervise his legal assistant properly. Beyond that, the facts could very well be consistent with a conclusion that Mr. Whatley permitted Mr. Schneider to practice law. These potential violations of Georgia Rules 5.3 and 5.5(a) require further proceedings by appropriate authorities.<sup>1</sup>

Concerned about Mr. Whatley's cavalier lack of regard for his professional responsibilities, the Court at the hearing asked Mr. Whatley if he was still practicing law. (Tr. 18). He responded that he was not and that he had taken no new cases since May. (Tr. 18). In fact, Mr. Whatley at that time represented at least three debtors in this Court, and the Court's records reflect that Mr. Whatley has filed another case since the December 1 hearing.

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<sup>1</sup>Colloquy at the hearing indicated that Mr. Schneider is now working for another lawyer in the same location who is soliciting bankruptcy business with a letter with the names of both the lawyer and Mr. Schneider on it. [Tr. 11]. The lawyer with whom Mr. Schneider is now working is permitting Mr. Schneider to do the same things he was doing with Mr. Whatley. This raises questions about the other lawyer's professional conduct. The other lawyer's conduct is not before the Court, and it is unfair to draw any conclusions about the other lawyer without notice and an opportunity to be heard. Indeed, it is not even appropriate for the Court to inquire further. For these reasons, the Court is reluctant even to mention the other lawyer. At the same time, however, the Court believes that a lawyer whose practice may have been questioned should be aware of that questioning; the lawyer should know what the Court has heard. The proper course for the Court in these circumstances is to call the other lawyer's attention to the issue without making it an issue and without identifying the lawyer. To accomplish this, the Court will direct chambers staff to mail a copy of this Order to the other attorney.

On October 13, 2004, Mr. Whatley filed a Chapter 7 case on behalf of Janet Massa Kiawu-Chesson, Case No. 04-97409. (Interestingly, although Mr. Whatley filed the case on October 13, the petition is dated June 3, 2004, over four months earlier. Under an Order entered by Judge Drake on August 10, 2004, Mr. Whatley had been suspended from filing new cases in this Court through October 12. *In re Michael Leon Gaffney and Rozella Kathleen Gaffney*, Case No. 04-90170 (August 10, 2004).) The deadline for the filing of objections to discharge or for the filing of complaints for the determination of the dischargeability of certain debts in the Kiawu-Chesson case is January 14, 2005. Because an attorney is responsible for representing a Chapter 7 debtor in all aspects of the case unless and until permitted to withdraw, *In re Egwim*, 291 B.R. 559 ( Bankr. N.D. Ga. 2003), Mr. Whatley was representing his client in that case at the time of the hearing.

Mr. Whatley was also representing at least two Chapter 13 debtors in this Court. The docket in the case of Vincent L. Watts, Case No. 02-91827, reflects the filing of a pleading on behalf of the debtor in that case on November 29, 2004, two days prior to the hearing. And on December 6, 2004, five days after the hearing, Mr. Whatley filed pleadings in the case of Harold K. Barnes, Case No. 04-92664, on behalf of the debtor. Following the dismissal of Case No. 04-92664 on December 7, 2004, Mr. Whatley filed a new case for Mr. Barnes, Case No. 04-99066, on December 29, 2004.

Mr. Whatley's statements to the Court that he was not practicing law and had not filed a case since May when, in fact, he was representing at least three debtors in this Court and had filed a case in October indicates a lack of candor with the Court in violation of Georgia Rule 3.3(a). This, too, requires further investigation by appropriate authorities.

There are also problems with Mr. Whatley's receipt of compensation in this case and his proper disclosure of it. When this case was filed on November 2, 2000, this Court's General Order

No. 4 (January 14, 2000) established rules for compensation of attorneys for Chapter 13 debtors. This General Order required specific application and Court order for a Chapter 13 debtor's attorney to receive a fee in excess of \$1,500 or a prepetition retainer in excess of \$600 plus the filing fee of \$185. Thus, the maximum amount that Mr. Whatley could have received prior to filing the petition was \$785; the total he could properly receive without separate application was \$1,685. His disclosure of compensation filed pursuant to FED. R. BANKR. P. 2016 reflects prepetition receipt of \$785 (\$600 plus the \$185 filing fee). [Docket No. 3]. There has been no application for anything beyond what the General Order permitted.

At the December 1 hearing, Mr. Schwartz reported that the Debtor had receipts for the payment of \$870 to Mr. Whatley prior to the filing of this case, and the Chapter 13 Trustee reported that Mr. Whatley had received an additional \$900 in fees under the plan. (Tr. 10-11). If these reports are accurate, Mr. Whatley received a total of \$1,670; this is \$85 more than he should have received. And it would appear he did so by falsely stating the amount of the prepetition retainer on his Rule 2016 disclosure statement.

Mr. Whatley had no explanation for this at the hearing. (Tr. 12). (In fairness, Mr. Whatley had no prior notice that this specific issue would be considered at the hearing.) The misstatement of compensation received is a serious problem; it is even more serious if such a misstatement is made intentionally for the purpose of circumventing this Court's orders governing procedures for compensation in Chapter 13 cases.

These facts, if true, would show another instance of lack of candor with the Court in violation of Georgia Rule 3.3(a). Moreover, an intentional misrepresentation of facts by a lawyer in connection with receipt of compensation in a bankruptcy case may constitute a federal bankruptcy

crime. *See United States v. Gellene*, 182 F.3d 578 (7<sup>th</sup> Cir. 1999).

The circumstances described above raise questions as to whether the Debtor is entitled to a refund of some or all of the fees she has paid. It could well be that all or part of the fees should be disallowed because of Mr. Whatley's improper disclosure or because he has failed to represent his client competently in this case; to his credit, Mr. Whatley candidly acknowledged at the hearing that the Debtor was not given the service she should have been given. (Tr. 17). Absent some explanation from Mr. Whatley, the Debtor is entitled to a refund of the extra \$85 she paid. These issues were not before the Court at the hearing, and the Court makes no findings or conclusions with regard thereto. The Debtor may file a motion for this Court to review Mr. Whatley's fees pursuant to 11 U.S.C. § 329 and other applicable law and to require disgorgement of fees paid, if she decides such action is warranted.

The Court concludes that Mr. Whatley has violated Georgia Rule 1.15(I) by failing to account to his client for \$1,600 she entrusted to him. The Court, further, concludes that there are reasonable grounds to believe that Mr. Whatley has also violated the following Georgia Rules: Georgia Rule 5.5(a), which prohibits a lawyer from assisting in the unauthorized practice of law; Georgia Rule 5.3, which requires proper supervision of legal assistants; Georgia Rule 3.3(a), which imposes a duty to be candid with the Court; and Georgia Rule 1.1, which requires a lawyer to provide competent representation to his client.

The Court concludes that the circumstances discussed above raise serious questions regarding the fitness of Mr. Whatley to practice law in the State of Georgia and in this Court. The Court, therefore, will refer this matter to the State Bar of Georgia for further investigation and proceedings. The Court directs that copies of this Court's Orders entered on September 30 and October 27, 2004,



Mr. Whatley's response filed on November 29, 2004, and the transcript of the hearing be forwarded to the State Bar of Georgia, together with a copy of this Order.

IT IS SO ORDERED this 12 day of January, 2005.

  
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PAUL W. BONAPFEL  
UNITED STATES BANKRUPTCY JUDGE

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