Ethics: Representation Issues: Don't Gamble With Your Reputation or Getting Paid

Hon. Maureen A. Tighe, Moderator
U.S. Bankruptcy Court (C.D. Cal.); Woodland Hills

August B. Landis
Office of the U.S. Trustee, Region 17; Las Vegas

Prof. Nancy B. Rapoport
University of Nevada, Las Vegas Boyd School of Law; Las Vegas

Lenard E. Schwartzer
Schwartzer & McPherson Law Firm; Las Vegas

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Office of the U.S. Trustee, Region 17; Las Vegas, NV

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Lenard E. Schwartzer
Schwartzer & McPherson Law Firm, Las Vegas, NV

1. **Unbundling/Limited Scope**

In re Basham, 208 B.R. 926 (B.A.P. 9th Cir. 1997) (affirmed by 9th Cir. in unpublished opinion found at 152 F.3d 924)

This was a consolidation of two motions by the U.S. Trustee to disgorge attorney's fees against the same attorney in two separate cases (a chapter 7 and a chapter 13 case). Generally, the attorney charged debtors a flat fee of $390 for chapter 13 cases and $190 for chapter 7 cases. The fees only covered pre-petition services (consultation, preparation of the petition, schedules and statement of affairs). If the debtor wanted representation at the §341(a) meeting or any other hearing, the attorney charged an additional fee of $150 per appearance and $100 per hour for additional work not related to the pre-petition services. The debtors in these two cases paid the flat fee, and opted to forego representation at the§341(a) meeting.

Noting that there were numerous problems with these two cases, including incomplete and inaccurate schedules, improperly claimed exemptions, an improperly noticed chapter 13 plan confirmation hearing, the Court granted the U.S. Trustee's motion to disgorge attorney's fees. The Court found that the debtor's attorney failed to timely file the required 2016(b) disclosure statement. In addition, the Court held that the attorney failed to meet his burden in establishing that his fees were reasonable.

On review, the BAP held that the Bankruptcy Court was within its authority to order disgorgement of attorney's fees because the attorney failed to timely file a disclosure statement,

in violation of § 329 and Rule 2016. The BAP also found that the Bankruptcy Court properly found that the fees charged were not reasonable in light of the numerous problems with the petition. Moreover, the BAP repeated the Bankruptcy Court's opinion that the attorney "had an obligation to either handle the case from beginning to end and [to] perform the services for whatever amounts the clients could afford, or refer the cases to another attorney." 208 B.R. 926, 932-933. By limiting the scope of his representation and failing to file a disclosure statement, the BAP found that the attorney created a situation where he would have no responsibility for the outcome of the debtor's cases, but could still receive compensation for his services without the Bankruptcy Court's knowledge. The BAP noted that Rule 2016(b) was specifically designed to address this type of abuse by requiring a disclosure statement.

In re Hutchinson, No. 03-12764-A-7 (Bankr. E.D. Cal. Aug. 20, 2003)

Debtor's attorney limited the scope of representation to exclude attendance at the §341(a) meeting and the U.S. Trustee moved to disgorge attorney's fees. Unlike the attorney in In re Basham, the debtor's attorney in In re Hutchinson filed a statement pursuant to FRBP 2016(a) using the Eastern District's required Form 2016(a). However, the attorney either crossed out or omitted the portions of the form that stated that he would represent the debtor at the §341(a) meeting, in contested matters, and other services. The attorney also submitted Form 2090-1 (Declaration Re: Limited Scope of Appearance pursuant to Local Bankruptcy Rule 2090-1) from the Central District of California. No equivalent form or local rule existed in the Fresno Division of the Eastern District of California. Using the Central District's Form 2090-1, the attorney declared that he was excluding his attendance at the §341(a) meeting unless the debtor

agreed to additional fees.

Pursuant to 11 U.S.C. §329(b), the U.S. Trustee moved for review of the $750 in fees received by the attorney, arguing that the fees received by the attorney were excessive for the services he rendered the debtor, and that, at minimum, the attorney must include representation of the debtor at the §341(a) meeting to claim a professional fee. The U.S. Trustee also argued that failure to attend the §341(a) meeting violates the attorney's ethical duty of zealous representation.

The attorney argued that his representation of the debtor was above the bare minimum level of services, was satisfactory to the debtor, and skillful. The attorney also argued that his attendance at the §341(a) meeting was not required to zealously represent the debtor, especially when his attendance would waste the debtor's resources and did not result in injury to the debtor.

The Bankruptcy Judge held that excluding the attorney's appearance at the §341(a) meeting from the scope of representation violated the attorney's ethical obligation of competent representation. Although the California Rules of Professional Conduct allow limiting the scope of representation with the informed consent of the debtor client, the court found that truly informed consent from the debtor was difficult, if not impossible, to obtain. Truly informed consent requires the attorney to adequately explain to the debtor every conceivable variable that might occur during a §341(a) meeting. The attorney also has the burden of proving to the court that truly informed consent was obtained from the debtor.The court also found that once the attorney signs the petition or appears as the attorney of record, court approval is required to withdraw from the case. The attorney in this case did not seek nor get the court's approval to withdraw and thereby,

violated court rules by leaving the debtor to appear in pro per.

In Re Carrillo, Case No. 02-09852-H7 (Bankr. S.D. Cal. Mar. 24, 2004)

U.S. Trustee filed a motion to examine fees pursuant to 11 U.S.C. §329 and requested disgorgement of attorneys fees. While conceding that the California Rules of Professional Conduct permit limiting the scope of representation, the U.S. Trustee argued that it would violate the duty of competent representation to exclude representation at the §341(a) meeting in chapter 7 cases. The U.S. Trustee argued that it is critical to have counsel attend the §341(a) meeting with their clients because of the adverse consequences that may stem from the debtor's responses to questions by the trustee and creditors and that excluding counsel's attendance at the §341(a) meeting from the scope of representation amounts to a breach of the attorney's obligation to provide competent representation.

Before the Court ruled on the motion, the debtor's attorney submitted to the U.S. Trustee's demand that, in the future, he will either appear or have an attorney appear to represent the debtor at §341(a) meeting. In addition, the debtor's attorney had previously voluntarily refunded his entire fee in this case.

Although the motion to examine and disgorge attorney's fees by the U.S. Trustee was resolved, the Court noted for the record that it was "critical for an attorney to be at the §341(a) hearing." Transcript of March 24, 2004 Proceedings at 5:2-3. The Court also quoted Judge Jaroslovsky of the Northern District of California in stating that "'[t]he responsibility of debtor's counsel does

not end with the schedules. Any debtor's counsel who does not understand the vital importance of attending a meeting of creditors with the debtor is in desperate need of further education. Not only is the meeting the best opportunity to discover and take care of problems which invariably arise' - - in other words, a forgotten creditor still sending bills, et cetera – 'but discharges are either won or lost at the meeting of creditors.' I couldn't agree more with that." Transcript of March 24, 2004 Proceedings at 6:10-20.

Northern District CA - (unreported rulings)

In a 2004 letter addressed to the bankruptcy bar appearing before his court, Judge Jaroslovsky expressed disbelief that attorneys could competently represent chapter 7 debtors without attending the §341(a) meeting. He admonished that "[a]ny debtor's counsel who does not understand the vital importance of attending the meeting of creditors with the debtor is in desperate need of further education." He directed that "[i]n addition to the schedules and meeting of creditors, there are several other responsibilities which I expect debtor's counsel to take care of *regardless of the fee charged*. These include amendment of schedules, addressing stay relief motions, avoiding simple household good liens, reaffirmation and redemptions."

Judge Newsome ruled in In re Bogdan Isvoranu, Case. No. 03-40578-NT, that the attorney should disgorge $400 of the $1,000 fee because "the debtor received little more than the services of a petition preparer" where the attorney did not attend the 341(a) meeting. Judge Newsome stated in his ruling that the form for use in the Northern District for compliance with BR 2016(b) requires that an attorney's services include representation of the debtor at the Meeting of Creditors.

In re Merriam, 250 B.R. 724 (Bankr. D. Colo.) -

The U.S. Trustee argued that the attorney's fees were excessive due to (1) the attorney's failure to attend the §341(a) meeting with the debtor, and (2) the attorney's failure to sign the debtor's petition. The court found that the undisputed facts were as follows:

The attorney interviewed the debtor and determined that the debtor's case was a simple consumer case. Based on this, the attorney offered the debtor two flat fee options: (1) a flat fee of $399 plus fees for three additional hours to perform pre-petition services (advice, preparation and filing the petition, schedules and statement of affairs and other required documentation) *and* to attend the §341(a) meeting with the debtor, or (2) a flat fee of $399 for the pre-petition services but not attendance of the §341(a) meeting. Regardless of the debtor's choice of services, the attorney agreed to consult with the debtor prior to the §341(a) meeting, respond to the debtor's pre- and post-petition questions, and to review proposed reaffirmation agreements. The attorney also offered to represent the debtor in specific post-petition matters for additional fees.

After an explanation of what the §341(a) meeting is, how it is conducted and the risks of attending the meeting without an attorney, the debtor chose the option excluding the attorney's attendance at the §341(a) meeting from the scope of representation.

On the issue of the attorney's failure to sign the debtor's petition, the U.S. Trustee argued that this violated FRBP 9011, Administrative Order 1999-6 (issued by the District Court for the District of Colorado) and constituted impermissible "ghostwriting" by the attorney. In reply, the attorney justified his failure to sign the debtor's petition by saying that "the scope of his

representation had been limited in accordance with COLO. R. PROF'L CONDUCT 1.2©) and that to sign the petition would have resulted in his entry of a general appearance in the case." In re Merriam, 250 B.R. at 732.

The Court found that the attorney's actions violated FRBP 9011. Analogizing FRBP 9011 to FRCP 11, the Court held that the signature requirement in FRBP 9011, like the signature requirement in FRCP 11, serves to certify to the court the accuracy of the petition. The Court reasoned that when attorneys fail to sign petitions they have prepared, there is a potential for misleading the Court, the trustee and creditors, as well as distorting the bankruptcy process. After all, the Court noted, petition preparers are required to sign the petitions they prepare, so there is no justification for excusing attorneys from signing the petitions that they prepared. The Court further emphasized that it might be more important for petition preparers and attorneys in limited representation to sign the petition because of the errors and omission in petitions and schedules that commonly arise. Petitions signed by the petition preparer (both BPPs and attorneys) allow the U.S. Trustee to obtain clarifying or correcting disclosures to problematic petitions.

The Bankruptcy Court rejected the attorney's assertions that he did not sign the petition because he did want to enter a general appearance in the case (which is customarily done by signing and filing a pleading). The Court held that FRBP 9011 (as well as FRCP 11) does not govern the entries of appearance. Rather, the sole purpose of FRBP 9011 (and FRCP 11) is to ensure the accuracy of the pleading/petition.

Although Colorado Rules of Professional Conduct allow the unbundling of legal services, they also require that attorneys comply with the Colorado state law counterpart to FRCP 11 and FRBP 9011. While the court notes that there are varying interpretations of the term “attorney of record,” the court found that a narrow interpretation of the phrase ignores the purpose of FRBP 9011, and the link between unbundling of legal services and compliance with Colorado’s ethical rules requiring the signature of an “attorney who represents a party.” As the court stated, “Rule 9011 requires either an ‘attorney of record’ or ‘[a] party who is not represented by an attorney’ to sign the petition. Here, the Debtor was represented by Mr. Zurinskas [the attorney] in drafting her petition, schedules and statement of affairs. . . . She was not by any definition a ‘party who is not represented by an attorney.’ As between the Debtor and Mr. Zurinskas, Mr. Zurinskas should have signed the petition because he drafted it and is therefore responsible for certifying its compliance with Rule 9011.” As a final note, the Court found that as officers of the court, attorneys owed a duty to the Court and the legal system to sign petitions they have prepared.

The court denied the U.S. Trustee’s motion to disgorge which argued that the attorney’s failure to attend the §341(a) meeting with the debtor makes his fee excessive. The court found that the U.S. Trustee failed to establish by evidence that the $399 fee received by the attorney was excessive, in light of his pre-petition services for the debtor. Although attorneys are not required to attend the §341(a) meeting with the debtor, the Court found that attendance at the §341(a) meeting by the debtor’s attorney is often beneficial to the debtor, creditor and trustees. The Bankruptcy Court also rejected arguments by the U.S. Trustee that attendance at the §341(a) should be mandatory for all debtor’s attorneys. While attendance of the debtor’s attorney at a §341(a) meeting may be critical in some cases, the court noted that some pro se debtors

successfully complete the bankruptcy process even though they are without legal representation at the §341(a) meeting. Absent a showing that the attorney's "failure to attend the §341(a) meeting violated his duty to the debtor, dropped below the minimum professional standards in the community or resulted in injury to the debtor or the estate," the Court held that a reduction or recoupment pursuant to 11 U.S.C. §329(b) was not warranted.

In re Johnson, 291 B.R. 462 (Bankr.D. Minn. 2003) – The court ordered partial return of attorney's fees where the attorney filed a disclosure statement pursuant to FRBP 2016(b) stating that he would attend the 341(a) meeting, but then failed to attend (allegedly with debtor's consent). The Court found that attendance of the 341(a) meeting is mandatory under the Local Rules.

In re Bancroft, 204 B.R. 548 (Bankr.C.D. Ill. 1997) – The court ordered disgorgement of attorney fees for failure to attend the 341(a) meeting because the debtors did not consent to the attorney's absence.

In re Castorena, 270 B.R. 504 (Bankr. D. Id. 2001) – The attorney charged $250 for preparation of petition and schedules, but included no 341(a) appearance or any other appearance in bankruptcy court. FRBP 2016(b) disclosure statements were filed. The court ruled that the pleadings must be signed by the attorney under Rule 9011, even if the services to be provided were limited, but did not impose sanctions under 9011 because no notice was given of that possibility. The court found that the schedules prepared by this attorney were rife with errors and that he had non-lawyer "interns" doing a large amount of the work, so he had failed to

sustain his burden of proving his services were reasonable and necessary. The ruling is unclear as to whether limited scope representation is completely disallowed in Idaho, but it appears that it would be a rare case where it would be permitted. The court's summarized an excellent discussion of the issue with the statement: "To send a debtor into a bankruptcy *pro se*, on the theory that he has had "enough" advice and counseling in the document preparation stage to safely represent himself is except in the extraordinary case so fundamentally unfair as to amount to misrepresentation."

In re Egwim, 291 B.R. 559 (Bankr. N.D. Ga. 2003) – The attorney here charged $475 per case and included representation at the 341 meeting and any reaffirmations, but nothing further. The court held that attorneys may not limit the scope of their representation in chapter 7 cases, but imposed no sanctions or other discipline because no adverse consequences to the client were shown.

In re Cochener, 360 B.R. 542 (Bankr. S.D. Tex. 2007) -

Counsel should attend the 341 meeting in every case. Court stated that language of General Order 2000-5, which was in effect in 2001 during counsel's representation of the Debtor, clearly imposed a duty on debtors' attorneys to appear even when their client does not. http://www.txs.uscourts.gov/bankruptcy/rulesformsproc/341_meet_attend.pdf. Counsel for the debtor, as an agent of the debtor, shares this duty to cooperate with the trustee. Additionally, court stated that counsel for the debtor owes a professional duty to the system to appear at this meeting.

2. Reffirmation Agreement Representation:

In re Perez, 2010 Bankr. LEXIS 2229 (Bankr. D.N.M. July 12, 2010)
Court held that exclusion of representation for reaffirmation hearing by bankruptcy counsel for a chapter 7 individual debtor in a consumer case would be an impermissible limitation on counsel's representation of the debtor. "…assistance with the decision [to reaffirm] must be counted among the necessary services that make up competent representation of a Chapter 7 debtor."

In re Minardi, 399 B.R. 841, 848 (Bankr. N.D. Okla. 2009)
"As Debtor's attorney of record, [attorney] has undertaken a duty to provide core services and to represent Debtor before this Court until withdrawal is allowed. Included in those core services is the requirement that [attorney] represent and advise the Debtor with respect to reaffirmation agreements.

Accord **In re Harvey**, 452 B.R. 179 (Bankr. W.D. Va. 2010); **In re DeSantis,** 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008)

3. Electronic Filing Declarations

In re Contreras, Order Suspending Attorney's CM/ECF User Password and His Authority and Ability to Electronically File Documents Directly or Through Any Other Person or Entity, Ch. 7 case no. 6:12-bk-25799-SC (C.D. Cal. Aug. 24, 2012), ECF doc. no. 31
U.S. Trustee filed a motion for disgorgement of fees received by an attorney, alleging numerous

instances of documents filed under an attorney's CM/ECF login and password that were altered. After finding that the attorney's testimony about whether any other persons had been utilizing the CM/ECF system under attorney's user name and password unresponsive and evasive at best, the bankruptcy court ordered that the attorney's CM/ECF user password, and authority and ability to electronically file documents, be suspended for a period of time for failure to comply with the CM/ECF Full Attorney Filing Privileges Agreement and the Court Manual for the Central District of California.

In re Smith, 462 B.R. 783, 792-795 (Bankr. D. Nev. 2011)

Bankruptcy court found an attorney in contempt of court when the attorney, who had been barred from filing bankruptcy petitions, nonetheless used his own ECF credentials and another attorney's electronic signature to file a bankruptcy petition during the period in which he was barred. The bankruptcy court also found that the attorney violated Fed. R. Bankr. P. 9011(b) when he filed the petition for an improper purpose: to circumvent a court order that barred him from filing new cases. The bankruptcy court listed many different options that the attorney had to assist the client that would not have violated the court's order.

In re Sponhouse, 477 B.R. 147, 151-156 (Bankr. D. Nev. 2012)

The bankruptcy court issued an OSC re Sanctions, directing the debtors' attorney to appear and show cause why he should not be sanctioned for allegedly filing the debtors' petition and other documents without authorization. At the debtors' initial § 341(a) meeting, at which the debtor's attorney did not appear, the debtors indicated to the chapter 7 trustee that they did not sign the second bankruptcy petition or other documents filed by their attorney on their behalf. After a

hearing on the OSC, the bankruptcy court found that the attorney violated Fed. R. Bankr. P. 9011(b)(3) when he used his CM/ECF login and password to file the petition, which constitutes a signature for the purposes of Rule 9011, and falsely certified that he possessed the petition and other documents bearing the debtors' original signatures. The court also sanctioned the attorney for failing to disclose that he shared part of his compensation with a non-professional paralegal who filed the debtors' first petition while the attorney was on vacation.

In re Rich, Memorandum of Decision Regarding U.S. Trustee's Motion for Review and Disgorgement of Attorney's Fees, Imposition of Monetary Sanctions, and Injunction Against e-Filing, Ch. 7 case no. 10-64847-B-7 (E.D. Cal. Aug. 29, 2012), ECF doc. no. 75

U.S. Trustee filed a motion requesting the bankruptcy court to review the attorney's conduct and for disgorgement of fees received by an attorney, alleging that attorney filed a petition on behalf of the debtor without the debtor having reviewed, approved or signed the petition. The attorney could not produce the file with the original signed documents, and acknowledged that the petition and other documents had been filed without having been reviewed and signed by the debtor. The court ordered the attorney to disgorge his fee to the debtor. The U.S. Trustee then requested the attorney to produce original signed documents for a random sample of 25 other cases filed by the attorney; the attorney produced only 17.

After receiving the results of the U.S. Trustee audit, the court found that the attorney's failure to obtain wet signatures on the documents constituted a false representation to the court was a violation of Fed. R. Bankr. P. 9011(b), and Bankr. E.D. Cal. R. 9004-1(c)(1)(d). The court sanctioned the attorney $2,000, and required the attorney to file an original copy of the "wet

signature document" for any document that the attorney filed electronically that required a debtor's signature for a one-year period. The attorney was also required to reimburse the U.S. Trustee for its costs attributable to its investigation.

4. ABI Journal Articles

Peter C. Fessenden, *A Modest Proposal for the Care and Fee'ding of Debtor's Counsel*, XXXI ABI Journal 8, 18-19, 89 (September 2012) (arguing that chapter 13 plans should be designed with a contingent administrative reserve which recognizes the likelihood that the debtor will require additional services above and beyond the no-look fee amount).

Hon. Stacey G.C. Jernigan, *Motions to Withdraw as Attorney: Why Breaking Up Is Sometimes Hard to Do*, XXXI ABI Journal 8, 50-51, 100 (September 2012) (discussing the importance of thorough client screening, as withdrawing from bankruptcy representation is not, nor should it be, simple).

Hon. Mary P. Gorman and Khadijia V. Thomas, *Of Handguns, Tequila and Electronic Case Filing*, XXX ABI Journal 7, 16, 74-75 (September 2011) (discussing the common problems that can arise from the ease of using electronic case filing, and strategies to address those problems).