2019 Hon. Eugene R. Wedoff Seventh Circuit Consumer Bankruptcy Conference

# The Good, the Bad and the Ugly: Coverage Counsel at § 341 Meetings

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2019

**HON. EUGENE R. WEDOFF SEVENTH CIRCUIT CONSUMER BANKRUPTCY CONFERENCE**

**OCTOBER 14, 2019**

**The Good, the Bad and the Ugly: Coverage Counsel at § 341 Meetings**

**Introduction:**

An emerging topic in consumer bankruptcy is the propriety of using of coverage counsel (also referred to as "stand-in counsel" and "appearance counsel") at §341 meetings and court hearings. When correctly employed, coverage counsel can be a beneficial contribution to the smooth functioning of a bankruptcy case. However, all too frequently issues arise on account of underprepared coverage counsel. One Chapter 7 Trustee bemoaned that "[s]uch lack of preparedness is a disgraceful violation of their oaths as attorneys, making them truly a blight on the profession, and detracts and diminishes from the proper place and power and prestige of the bankruptcy courts and the bankruptcy system."[1] Although a bit dramatic, such concern may be well founded.

Additionally, even when coverage counsel is well versed in the particulars of a case, there may be other disclosure issues which have been inadvertently overlooked. Courts have held that coverage counsel needs to disclose its compensation with the court. Also, courts have disgorged attorney fees holding that debtors' attorneys paying coverage counsel to appear in court or at a §341 meeting is engaging in unauthorized fee splitting. This panel will cover the dos and don'ts of coverage counsel.

[1] *See* Dkt. 38, *In re D'Arata,* 18-10524, (Bankr. S.D.N.Y. 2018)

**Relevant Bankruptcy Code Sections:**

11 USC §329. Debtor's transactions with attorneys

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—

(1) the estate, if the property transferred—

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 USC §504. Sharing of Compensation

(a) Except as provided in subsection (b) of this section, a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title may not share or agree to share—

(1) any such compensation or reimbursement with another person; or

(2) any compensation or reimbursement received by another person under such sections.

(b)

(1) A member, partner, or regular associate in a professional association, corporation, or partnership may share compensation or reimbursement received under section 503(b)(2) or

503(b)(4) of this title with another member, partner, or regular associate in such association, corporation, or partnership, and may share in any compensation or reimbursement received under such sections by another member, partner, or regular associate in such association, corporation, or partnership.

(2) An attorney for a creditor that files a petition under section 303 of this title may share compensation and reimbursement received under section 503(b)(4) of this title with any other attorney contributing to the services rendered or expenses incurred by such creditor's attorney.

(c) This section shall not apply with respect to sharing, or agreeing to share, compensation with a bona fide public service attorney referral program that operates in accordance with non-Federal law regulating attorney referral services and with rules of professional responsibility applicable to attorney acceptance of referrals.

**Relevant Rules of Bankruptcy Procedure:**

FRBP 2016 (b)

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by §329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

FRBP 9001(10)

"Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual or firm.

**ABA Model Rules of Professional Conduct**[2]

**RULE 1.1: COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**Statement From The ABI Commission on Consumer Bankruptcy**

The ABI Commission on Consumer Bankruptcy addressed the growing trend of cases coming out against the use of coverage counsel, noting the prevalent issues, but ultimately advocated, albeit cautiously, that the practice should be permitted to continue.

ABI Commission Recommendation: "The Commission recommends the adoption of rules to govern stand-in counsel. These rules should have best practices specific to bankruptcy that ensure clients receive competent and ethical representation. Because appropriate use of stand-in counsel promotes the efficient practice of law, which redounds to the benefit of clients, the Commission's recommendation rejects an outright ban on the use of stand-in counsel."

**Relevant Caselaw**[3]

*In re Geraci*, 138 F.3d 314 (7th Cir. 1998)*

This opinion does not address coverage counsel, nevertheless it provides the legal underpinning for a bankruptcy court's inherent power to act whenever it determines that the compensation the

[2] Model Rule 1.1 is adopted by Illinois, Indiana and Wisconsin.

[3] * indicates the opinion is not included in these written materials

debtor has paid or agreed to pay his counsel exceeds the reasonable value of the services provided. No further finding is required.

*In re Ortiz,* 496 B.R. 144 (Bankr. S.D.N.Y. 2013)

- Coverage counsel not always inappropriate, but coverage counsel must file its own fee disclosure with the court
- Bankruptcy court has an independent duty, and broad discretion, to examine fees of debtors' counsel

*In re Olson*, No. 15-01580-TLM, 2016 Bankr. LEXIS 2308, WL 3453341 (Bankr. D. Idaho June 16, 2016)

Counsel ordered to disgorge entire fee, the bankruptcy court held

- Attending a §341 meeting is not a service which can be unbundled as it is part of a "normal, ordinary and fundamental core obligation of counsel"
- Coverage counsel is required to disclose any fee received
- Division of fee with coverage counsel was inappropriate
- Debtor must provide affirmative consent before accepting representation by another attorney

*In re D'Arata,* 587 B.R. 819 (Bankr. S.D.N.Y. 2018)

Counsel ordered to disgorge fee due to use of coverage counsel which violated New York rules of Professional Responsibility due to: (1) not obtaining debtor's informed consent to use coverage counsel; (2) failing to adequately prepare the coverage counsel.

*In re Schatz,* Nos. 16-31208 (AMN), 142, 143, 2019 Bankr. LEXIS 1407 (Bankr. D. Conn. May 6, 2019)

Debtor's attorneys required to disgorge fee where (1) debtor's counsel shared fee without authorization, (2) appearance counsel did not file an appearance, and (3) neither counsel adequately represented the debtor's interests

*Gross v. Rojas (In re Gross)*, No. CC-18-1218-SKuTa, 2019 Bankr. LEXIS 2452 (B.A.P. 9th Cir. Aug. 7, 2019) (unpublished)*

This opinion involves dismissal of a Chapter 13, but in dicta the Ninth Circuit BAP noted that, "[w]hile appearance counsel often appear at 'routine' hearings in bankruptcy cases without adverse results, they typically are ill-prepared to address any issues that arise at the hearing requiring an understanding of the history of their clients or their bankruptcy case."

*In re Bennett,* Nos. 17-31697 (AMN), 16-30663 (AMN), 15-30473 (AMN), 59, 2019 Bankr. LEXIS 2523 (Bankr. D. Conn. Aug. 13, 2019)*

Similar the *Schatz* opinion, Judge Ann M. Nevins again finds use of coverage counsel inappropriate, ordering one attorney to disgorge a fee, and an uncompensated attorney to attend continuing legal education.

**FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| In re: | Chapter 7 |
| Alfred and Maritza Ortiz, | Case No. 13-36177 (cgm) |
| Debtor. | |

**A P P E A R A N C E S :**

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Law Offices of David S. Waltzer, PC
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Attorneys for Debtors

**MEMORANDUM DECISION ON ATTORNEYS' RULE 2016(b) STATEMENT**

**CECELIA G. MORRIS**
**CHIEF UNITED STATES BANKRUPTCY JUDGE**

## Introduction

The Court set a hearing in this case to request information regarding the scope of the attorney's representation, pursuant to his inconsistent Rule 2016(b) Statement as defined below. The Court now finds that debtors' attorney impermissibly excluded routine matters that are required of every attorney representing a consumer debtor in bankruptcy.

## Background

Alfred and Maritza Ortiz ("Debtors") filed a chapter 7 petition on May 22, 2013, through their counsel, the Law Offices of David S. Waltzer, PC ("Law Firm"). In the Disclosure of Compensation of Attorney for Debtor(s) form ("Rule 2016(b) Statement") filed with the petition,

the Law Firm set forth that it had received a flat fee of $1,494.00 in pre-petition compensation. In return for this fee, the Law Firm:

> [A]greed to render legal services for all aspects of the bankruptcy case, including:
>
> a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;
> b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;
> c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;
> d. [Other provisions as needed]

*See Disclosure of Compensation of Attorney for Debtor(s),* ECF No. 1, pg. 34, ¶ 5.

The Rule 2016(b) Statement also indicated that, by agreement with the Debtor, the following services were excluded from the fee:

> Over one hour of post 341a work. More than one 341a appearance (except if caused by attorney). Amendments due to client error or omission. Reaffirmations. Redemptions. Adversary Proceedings. Litigation and/or negotiation with trustee or 3rd Party. Credit Repair.

*Id*. at ¶ 6. Notably, the Rule 2016(b) Statement specified that the Law Firm had agreed to share the fee with a person or persons who are not members or associates of the Law Firm, and that a copy of such agreement, together with a list of the people sharing in the compensation was attached. No such agreement was attached to the Rule 2016(b) Statement, but instead the following details were provided: "Attorney may hire appearance counsel to attend the first 341(a) meeting. Attorney will pay between $75 and $150 for the appearance. These fees will not be passed onto the Debtor." *Id*. at ¶ 4.

## Discussion

When a bankruptcy petition is filed, every debtor's attorney is required to comply with § 329(a) of the Bankruptcy Code, which requires:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

11 U.S.C § 329(a). As noted in § 329(a), a statement of compensation must be filed with the court, the details of which are found in Federal Rule of Bankruptcy Procedure 2016(b):

> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Fed. R. Bankr. P. 2016(b).

Disclosure of compensation pursuant to § 329 and Rule 2016(b) is mandatory, not permissive. S*ee e.g., In re Basham*, 208 B.R. 926 (B.A.P. 9th Cir. 1997); *In re Kowalski*, 402 B.R. 843, 848 (Bankr. N.D. Ill. 2009) (citing *In re Whaley*, 282 B.R. 38, 41 (Bankr. M.D. Fla. 2002)); *In re Bennett*, 133 B.R. 374, 378 (Bankr. N.D. Tex 1991). The Bankruptcy Code requires fee disclosure so that courts can "prevent overreaching by debtors' attorneys and give interested parties the ability to evaluate the reasonableness of the fees paid." *In re Hackney*, 347 B.R. 432, 442 (Bankr. M.D. Fla. 2006); *In re Waldo*, 417 B.R. 854, 893 (Bankr. E.D. Tenn 2009) (citing *Jensen v. United States Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 848 (B.A.P. 10th Cir. 1993)). "[P]ayments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny." *Hackney*, 347

B.R. at 442 (quoting H.R. Rep. No. 95–595, at 329 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 6285).

The Court has an "independent duty to review any fee application, even in the absence of an objection from an interested party." *In re Smith*, 331 B.R. 622, 627-28 (Bankr. M.D. Pa. 2005) (citing *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 822, 841 (3d Cir. 1994)). "Broad discretion is vested in the court to conduct such review." *Smith*, 331 B.R. at 628 (internal citations omitted).

**I. Limitations on Representation**

Once a petition is filed, an attorney representing the debtor must shepherd the client through the bankruptcy process, to its conclusion. *In re Bancroft*, 204 B.R. 548, 552 (Bankr. C.D. Ill. 1997). Representation of a debtor in a consumer bankruptcy case includes assisting the debtor "through the normal, ordinary, and fundamental aspects of the [bankruptcy] process." *See In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001). The court in *Castorena* indicated that such representation:

> [I]include[s] the proper filing of all required schedules, statements and disclosures; preparation and filing of necessary amendments to the same; attendance at the § 341 meeting; turnover of assets to the trustee, and cooperation with the trustee; compliance with the tax turnover and other orders of the Court; performance of the duties imposed by § 521(1), (3) and (4); counseling in regard to § 521(2) and the reaffirmation, redemption, surrender or retention of consumer goods securing obligations to creditors, and assisting the debtor in accomplishing those aims; and responding to issues that arise in the basic milieu of the bankruptcy case, such as violations of stay and stay relief requests, objections to exemptions and avoidance of liens impairing exemptions, and the like.

*Id*. at 530.

While an attorney may limit the scope of representation, "a practice colloquially referred to as 'unbundling' . . . [such limitation must be] consistent with the rules of ethics and professional responsibility binding on all attorneys." *In re Seare*, 493 B.R. 158, 176 (Bankr. D.

Nev. 2013); *see also id.* at 180 ("Attorneys are professionals. Individuals place their financial lives, and more, in their attorney's hands. Attorneys have ethical obligations to their clients regardless of the economic pressures which might exist.") (citing *Castorena*, 270 B.R. at 530-31). Although "there is no local rule [in this District] regarding what services must be included in the [attorney's] flat fee . . . [s]ervices that are not considered 'typical' may be properly excluded . . . so long as the client receives proper notice of what is and is not included." *In re Cahill*, 478 B.R. 173, 177 (Bankr. S.D.N.Y. 2012).

**A. Section 341(a) Meeting of Creditors**

The flat fee of $1,494 disclosed on the Law Firm's Rule 2016(b) Statement excluded "[m]ore than one 341(a) appearance (except if caused by the attorney)." This exclusion is valid if it comports with the applicable New York Rules of Professional Conduct. *See Kittay v. Kornstein*, 230 F.3d 532, n.2 (2d Cir. 2000) (stating that federal bankruptcy courts sitting in New York apply New York state law to ethical disputes).

New York Rule of Professional Conduct 1.2(c) provides that "[a] lawyer may limit the scope of the representation *if the limitation is reasonable* under the circumstances, the client gives informed consent, and where necessary notice is provided to the tribunal and/or opposing counsel." N.Y. R. Prof. Con. R. 1.2(c) (emphasis added). The Court finds it *unreasonable* to exclude more than one § 341(a) meeting of creditors from an attorney's flat fee in a chapter 7 case. The filing of a bankruptcy petition sets "in motion a series of events, including the first meeting of creditors, which exposes a layperson [debtor] to a plethora of legal hurdles . . . [including] questioning by a professional trustee and attorneys representing creditors." *Bancroft*, 204 B.R. at 551. The § 341(a) meeting is a "fundamental and core obligation" of any attorney representing a debtor. *Castorena*, 270 B.R. at 530; *see also In re Harwell*, 439 B.R. 455, 458

(Bankr. W.D. Mich. 2010) ("For many debtors, [the § 341 meeting] is an intimidating experience. Having an attorney at the first meeting, preferably one with direct knowledge of a debtor's schedules and pre-bankruptcy circumstances, provides considerable comfort and crucial assistance."). Multiple courts agree that an attorney, engaged in representation of the debtor, must appear on behalf of a client at the § 341(a) meeting of creditors. *See In re Johnson*, 291 B.R. 462, 468 (Bankr. D. Minn. 2003) (noting that the § 341(a) meeting is a core event in a bankruptcy case, and that "it is difficult to fathom a basic, original retainer not including counsel's attendance and representation at the 341 meeting"); *In re Josey*, 195 B.R. 511, 514 (Bankr. N.D. Ga. 1996) ("Attorneys for debtors cannot adequately represent their clients if they fail to appear at the § 341 meeting."); *Castorena*, 270 B.R. at 530.

The court in *In re Seare* noted that "representation at the Section 341 meeting is mandatory to fulfill the duty of competence; it is part of the bundle of services that are reasonably necessary to achieve the client's reasonably anticipated result—a discharge." 491 B.R. at 193; s*ee also id.* at 192-94. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." N.Y. R. Prof'l. Con. 1.2(c). Thus, an attorney must apply his or her professional skills and knowledge at the first meeting of creditors to fulfill the duty of competence. *See also Bancroft*, 204 B.R at 551-52 (questioning whether an attorney can uphold his duty of competency under the Illinois Rules of Professional Conduct without first attending the meeting of creditors). Considering how important the meeting of creditors is to a debtor's case, excluding more than one appearance violates New York Rule of Professional Responsibility 1.2(c).

**B. Use of Appearance Counsel**

The Rule 2016(b) Statement filed in this case indicates that appearance counsel may be hired to attend the § 341(a) meeting of creditors. The Court does not find that it is per se inappropriate for a debtor's attorney to have another attorney, unrelated with the firm, represent the debtor at the § 341(a) meeting. Rather, any attorney who appears on behalf of a debtor at a § 341(a) meeting, and receives compensation for such appearance, must file his or her own Rule 2016(b) statement disclosing such compensation. *See In re Bernhardt*, 2012 WL 646150, at *5 (Bankr. D. Colo. Feb. 28, 2012); *In re Johnson*, 411 B.R. 296, 302 (Bankr. E.D. La. 2008). This is true even if the fee for appearing is not directly passed on to the debtor. Section 329(a) of the Bankruptcy Code makes clear that "[a]ny attorney representing the debtor in a case . . . or in connection with such case . . . whether or not such attorney applies for compensation . . . shall file with the court a statement of compensation paid or agreed to be paid . . . for services rendered . . . in connection with the case by such attorney." 11 U.S.C. § 329(a). Although appearance counsel may not "represent" the debtor in the bankruptcy case, they certainly appear on behalf of the debtor "in connection with such case." Thus, a separate Rule 2016(b) statement must be filed by "[e]very attorney for a debtor" that falls within the scope of § 329(a) of the Bankruptcy Code. *See* Fed. R. Bankr. P. 2016(b); *see also In re Bell*, 212 B.R. 654, 657 (Bankr. E.D. Cal. 1997) ("Whether or not a debtor's counsel appears 'of record' in a bankruptcy case, he or she must comply with Rule 2016(b) and Section 329(a)."); *In re Cowan*, 620 F. Supp. 2d 867, 870-71 (E.D. Tenn. 2009); *In re Downs*, 103 F.3d 472, 477 (6th Cir. 1996).

**C. Additional Limitations**

The Rule 2016(b) Statement additionally excluded"[o]ver one hour of post 341a work," "[a]mendments due to client error or omission," "[r]eaffirmations," and "[r]edemptions" from the flat fee. These services may only be unbundled if the limitations are reasonable and the

client gives their informed consent. *See* N.Y. R. Prof'l. Con. 1.2(c); *Seare*, 493 B.R. at 197-203. Informed consent requires adequate disclosure and valid consent. "Disclosure involves the attorney explaining to a debtor the nature of the bankruptcy process, what problems could or will be encountered, how those problems should be addressed, and the risks or hazards, if any, associated with those problems. Consent involves a clear understanding on the part of the debtor as to these factors and the possible results of a debtor proceeding without an attorney being present." *Bancroft*, 204 B.R. at 552. Notwithstanding a client's informed consent to his or her attorney's limited representation, certain exclusions may not be reasonable.

A lawyer who agrees to represent a debtor in a consumer bankruptcy case must act as his or her attorney for all "normal, ordinary, and fundamental aspects" of the case, including amendments to the schedules and other routine representation necessary to ensure that the debtor receives a discharge. *See Castorena*, 270 B.R. at 530; *In re Egwim*, 291 B.R. 559, 574 (Bankr. N.D. Ga. 2003) ("Unless and until a lawyer is permitted to withdraw from representation of the chapter 7 debtor, the lawyer is obligated, by rules of this Court as well as by standards of professional responsibility, to represent the client in any matter filed in the Court or related to the bankruptcy representation"). Although this District does not provide an exhaustive list of those services required by a debtor's attorney in a chapter 7 case, other jurisdictions provide guidance that this Court finds persuasive. *See e.g.,* E.D.N.Y. LBR 2090-2(a) (stating that an attorney of record for a debtor, or an attorney acting of counsel to such attorney shall appear on behalf of the debtor in every aspect of the case, including the § 341 meeting, adversary proceedings, contested matters, motions, or applications filed against the debtor, while providing that only adversary proceedings may be excluded form representation); W.D.N.Y. LBR 2016-1 (listing certain basic services to be performed by any attorney for a chapter 7 debtor, including: (i) representation at

the § 341 meeting; (ii) amending lists, statements, and schedules to comport with developments of the case; (iii) negotiate, prepare, and file reaffirmation agreements; and (iv) motions to redeem exempt personal property from liens); N.D.N.Y. LBR 2016-3 (listing certain required duties of an attorney representing a chapter 7 debtor, including: (i) appear personally and represent the debtor at any scheduled § 341 meeting; (ii) prepare and file all lists, schedules, and statements, as well as any amendments that may be necessary; (iii) advise the debtor, and negotiate, prepare, and file reaffirmation agreements; (iii) prepare and file a motion to redeem exempt or abandoned personal property).

**Conclusion**

The Law Firm is directed to represent the Debtors in this case consistent with this decision.

Dated: Poughkeepsie, New York
August 20, 2013

/s/ Cecelia G. Morris
CECELIA G. MORRIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF IDAHO**

| | | |
|---|---|---|
| **IN RE** | ) | |
| | ) | **Case No. 15-01580-TLM** |
| **DANIELLE ELAINE OLSON,** | ) | |
| | ) | **Chapter 7** |
| **Debtor.** | ) | |
| | ) | |

**MEMORANDUM OF DECISION**

**INTRODUCTION**

In 2003, the Honorable Jim D. Pappas of this Court wrote an article outlining the issues that arise under the Bankruptcy Code, the Bankruptcy Rules and the Idaho Rules of Professional Conduct ("IRPC") when a lawyer agrees to "appear for" another lawyer at a § 341(a) meeting. *See* Hon. Jim D. Pappas, *Simple Solution = Big Problem*, 46 THE ADVOCATE 31 (Oct. 2003) (official publication of the Idaho State Bar) (discussing § 329(a), § 504, Rule 2016(b), and the IRPC).[1] Judge Pappas warned attorneys that requesting or agreeing to so appear could raise matters with serious consequences absent strict compliance with the Code, Rules and professional responsibilities.

A year later the Court, in *In re Peterson*, 2004 WL 1895201 (Bankr. D.

[1] Unless otherwise indicated, all statutory references are to the Bankruptcy Code, Title 11 U.S. Code §§ 101–1532, and Rule references are to the Federal Rules of Bankruptcy Procedure. The IRPC are made applicable to attorneys before this Court through Local Bankruptcy Rule 9010.1(g).

Idaho Aug. 25, 2004), addressed a situation where a solo bankruptcy practitioner did not attend § 341(a) meetings in several of his chapter 13 cases, instead sending a different attorney from outside his firm in his stead and paying that second attorney. The Court held that the bankruptcy attorney violated his obligations under § 504, § 329(a) and Rule 2016(b), by sharing his fee with a lawyer outside the firm and then not disclosing the fee sharing relationship. It also held that the second attorney "once he agreed to represent these bankruptcy debtors in connection with their cases, was affirmatively obligated to file his own Rule 2016(b) statement in each case. [His] failure to file a proper Rule 2016(b) disclosure within fifteen[2] days of payment or agreement presents a problem independent of his and [the bankruptcy attorney's] violation of § 504." *Id.* at *3–*7.

*Peterson* was not the first time practitioners in this Court had been advised of the problems that could arise in connection with § 341(a) meetings. As noted in *Peterson*, the Court addressed such issues in *In re Castorena*, 270 B.R. 504, 529–31 (Bankr. D. Idaho 2001), and *In re Lish*, 04.4 I.B.C.R. 34, 35 (Bankr. D. Idaho 2004). *See also In re Dewaal*, 2002 WL 33939745 (Bankr. D. Idaho 2002). This Court is not alone. *See*, *e.g.*, *In re Ortiz*, 496 B.R. 144 (Bankr. S.D.N.Y. 2013); *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013); *In re Egwu*, 2012 WL 5193958 (Bankr. D. Md. Oct. 19, 2012); *In re Bernhardt*, 2012 WL 646150

[2] In 2009, Rule 2016(b) was amended to require such submissions within fourteen days.

(Bankr. D. Colo. Feb. 28, 2012); *In re Johnson*, 411 B.R. 296 (Bankr. E.D. La. 2008); *In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill. 1997).

But the issues have not gone away.

**BACKGROUND**

In the present case, Eric Wayne Olsen ("Counsel"), is an Idaho licensed lawyer who lives in Salem, Oregon, and practices in the OlsenDaines firm. Counsel represented an Idaho resident, Danielle Olson, in her chapter 7 case. Ms. Olson's case was filed in November 2015.

At that time, however, Counsel's firm had no Idaho branch office, having closed it in March 2015.[3] Instead of traveling to Boise, Idaho to represent Ms. Olson, Counsel planned to and did retain an "appearance attorney" to attend the § 341(a) meeting. Counsel's Rule 2016(b) disclosure indicated that he received $1,100.00 to represent Ms. Olson, and he agreed to share his compensation with a person outside Counsel's firm, paying that individual, attorney Sarah Bratton, a "Flat Fee of $50.00 *for appearing* at debtor's 341(a) hearing *on my behalf*." Doc. No. 5 (emphasis added).

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[3] The current website for the firm says the it does bankruptcy work in "Oregon, Washington and Idaho." It identifies offices in Albany, Bend, Coos Bay, Eugene, Grants Pass, Klamath Falls, Medford, Portland, Roseburg, Salem and Tigard, Oregon (which "all feature experienced bankruptcy lawyers who offer free consultation"), and offices in Spokane, Tacoma, Tri-Cities, Vancouver and Walla Walla, Washington. It identifies no Idaho office. Olsen Daines, under an "attorneys" heading, lists six partners and three associates. *See* http://www.olsendaines.com (last visited June 16, 2016). Of those listed lawyers, a review of the Idaho State bar website identifies only Counsel as being licensed to practice in Idaho. *See* http://isb.idaho.gov/licensing/attorney_roster.cfm (last visited June 16, 2016).

As will be discussed, Bratton was unable to attend the § 341(a) meeting. Counsel replaced her with attorney Kristoffer Sperry, an Idaho attorney who had been the sole member of OlsenDaines in Idaho until the Idaho branch closed.[4] Sperry, however, missed the meeting, leaving Ms. Olson unrepresented. At a later, continued § 341(a) meeting, Sperry appeared.

On March 30, 2016, the United States Trustee ("UST") and Counsel filed a stipulation under which Counsel agreed to refund $100.00 to Ms. Olson for his failure to appear at the initial § 341(a) meeting. Doc. No. 23. The UST proffered an order for the Court to enter approving the stipulation.

The Court declined to do so, and on April 14 set the matter for a hearing on May 9, and ordered Counsel to personally appear at that hearing. Doc. No. 24 ("Notice of Hearing and Order"). It also ordered Counsel to file on or before May 2 an itemization of services rendered by Counsel's firm to Ms. Olson, including descriptions of services, the individual who rendered them, such individual's qualifications, and the time expended. It also required an accounting of all billings to and payments received from Ms. Olson. *Id.*

Though he was served on April 14 with the Notice of Hearing and Order, Counsel neither timely nor completely complied.

On May 3, the day after the deadline, Counsel filed an amended Rule

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[4] According to the Idaho State Bar website, *see supra* note 3, Sperry works with Howell & Vail, LLP in Meridian, Idaho.

2016(b) disclosure. Doc. No. 26. It was identical to his prior disclosure except that it identified Sperry, not Bratton, as the attorney agreeing to "appear" in return for a $50 payment from Counsel.

On May 4, Counsel filed an "affidavit" of fees. Doc. No. 29 ("Counsel's Affidavit"). It showed services rendered from October 14, 2014 through March 30, 2016. But it identified the individuals performing the services only by initial—not by name—and provided none of the information as to their qualifications, etc., required by the Notice of Hearing and Order.

After business hours on Thursday, May 5, Counsel filed a request to appear at the May 9 hearing by telephone and an appended affidavit asserting that "a personal appearance in Boise in this matter would be extraordinarily expensive." Doc. No. 31. This request, coming twenty-one days after the Notice of Hearing and Order was entered and served, and presented to the Court on the Friday before the Monday hearing, was denied. Doc. No. 32.

Ms. Olson appeared at the hearing on May 9, as did the chapter 7 trustee and counsel for the UST. Counsel did not appear. Shortly before hearing, the Court's clerk was informed by phone that Counsel's "staff" had mis-booked his flight for Tuesday, May 10. When Ms. Olson was advised, and even though she had taken time off from work without pay to attend the hearing, she agreed to return the following day when Counsel would be present. The trustee and UST also agreed, and the hearing was continued.

On May 10, Counsel tardily filed an affidavit of billings to and payments by Ms. Olson. This statement, Doc. No. 37, is not clear but indicates Ms. Olson paid a total of $1,100 in fees.[5] It also appears to reflect a payment back to Ms. Olson of $100.00 on February 18, 2016, and the comments at hearing indicated that Counsel had issued the $100.00 refund to her per his stipulation with the UST.

The hearing was held on May 10. Counsel and his local associated attorney, Sperry, addressed the Court. The trustee, counsel for the UST, and Ms. Olson also made comments. Following questioning and discussion, the matters were taken under advisement.

**ADDITIONAL DETAIL**

As noted, OlsenDaines once had a Boise, Idaho office, and attorney Sperry was an associate there. He left the firm in the spring of 2015. In Counsel's May 5 affidavit in support of his request for a telephone appearance, he states: "When Mr. Sperry left the OlsenDaines law firm, OlsenDaines made a decision to withdraw from practicing bankruptcy law in Idaho. OlsenDaines has filed its last chapter 7 bankruptcy case in Idaho.[6] We are in the process of turning over all current Chapter 13 cases and referring new calls to local Idaho counsel." Doc. No. 31 at 3.

Sperry, while still with OlsenDaines, was the attorney who first met with

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[5] This is consistent with the total fee amount disclosed in Counsel's 2016(b) statement, Doc. No. 5.

[6] In 2016, seven chapter 7 cases were filed, with the last, Case No. 16-00568-JDP, being filed on April 29, 2016, just days before the May 5 affidavit and the May 10 hearing.

Ms. Olson in regard to her bankruptcy filing. Counsel's Affidavit reflects Sperry had a .20 hour telephone call and a .50 hour meeting with Ms. Olson on October 22, 2014, and a .50 hour "telephone appointment" with her on November 11, 2014.

Ms. Olson's case was filed a year later on November 30, 2015. Counsel's Affidavit shows activity in November 2015 during which the petition, schedules and statements were prepared and signed.[7]

Ms. Olson told the Court at hearing that after her initial meetings with Sperry, she was handed off to a series and variety of staff and paralegals. She felt neglected, unserved, and unimportant. She was unimpressed with most of the staff she dealt with. When Ms. Olson called Counsel's office with concerns about her case, she talked with a number of staff people though only one did a "good job" in Ms. Olson's view.[8]

Counsel's Affidavit does not establish what information was gathered from Ms. Olson or how, or how it was updated from whatever might have been

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[7] Counsel's Affidavit fails to provide the detail required by the Notice of Hearing and Order. As the Court labored through the same at hearing to elicit pertinent details, it was informed by Sperry and Counsel that the date and time information was not necessarily accurate or complete, because the firm does bankruptcy work at a "flat rate" rather than on an hourly basis. According to Sperry, that any time entries appear in firm records is due to attorneys and staff making "contact notes" when dealing with a file, much as a collection agency might document its contacts with debtors for their internal records. Sperry noted that staff was more disciplined in making those contact notes than were the attorneys.

[8] Ms. Olson identified this employee as "Sherie" and Counsel's Affidavit itemizes services by a "SDC" which, at hearing, was identified as this individual. Counsel indicated Sherie was a paralegal. He also at hearing represented that all the firm's paralegals are trained by the firm or gained their experience through other similar work, and none are certified paralegals by reason of education or credentials.

conveyed to Sperry a year earlier. Counsel's Affidavit indicates the drafting of the petition, schedules and statements took only .50 hours and was performed solely by a paralegal.

There was no lawyer involvement until Ms. Olson was, in her terms, "forwarded to" Counsel's partner Rex Daines. She dealt with him by telephone, though that was "mostly by voice mail." Counsel's Affidavit reflects Daines had a telephonic "pre-signing appointment . . . to go over Petition/Schedules" with Ms. Olson lasting .50 hour on November 13, 2015, and another "meet[ing] with client to sign Petition/Schedules" of .50 hour on November 20. This latter "meeting," Counsel explained, would not have been in person but instead by internet video.[9]

Her only pre-filing contacts with attorneys were the initial meetings with Sperry in 2014, and the November 2015 telephone/video conversation with Daines.[10] Ms. Olson never met personally with Counsel.[11]

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[9] The petition bears electronic signatures (*i.e.*, a "/s/" symbol) of Counsel and Ms. Olson dated November 20, 2015. The scanned .pdf images of the signature pages filed pursuant to this District's ECF procedures show both signatures and the November 20 date for each on a single page, though how both could physically sign and date the same page on the same day, since Ms. Olson was in Idaho and Counsel in Oregon, is not explained. The petition was not filed until November 30.

[10] Though this Decision deals with several issues, it does not address the adequacy of the time spent by attorneys in working with Ms. Olson. But given the limited time invested by licensed lawyers, the admonitions of the Bankruptcy Appellate Panel in *In re Nguyen*, 447 B.R. 268 (9th Cir. BAP 2011), are apropos. The Panel there considered a case where client interviews and gathering of financial and other information was solely conducted by non-attorney staff, and the attorney spent perhaps fifteen minutes conversing with a debtor and reviewing the draft. The bankruptcy court found the attorney to be insufficiently active in working with his clients and to have exhibited a cavalier attitude toward the accuracy of bankruptcy schedules. *Id.* at 273–74, 279–80. The bankruptcy court imposed a requirement that the attorney meet for at least an hour

(continued...)

**THE § 341(a) MEETINGS**

Ms. Olson's initial § 341(a) meeting was scheduled on January 7, 2016. As noted, Counsel's Rule 2016(b) disclosure indicated attorney Bratton would be paid a $50.00 "flat fee" from Counsel "for appearing at debtor's 341(a) hearing on my behalf."[12] Ms. Olson duly appeared, but no attorney was there. The trustee announced a continuation of the meeting to January 21.

Counsel explained that his firm was contacted at the last minute and advised Bratton could not appear, and it therefore made arrangements for Sperry to take her place.[13] Sperry said that, while he agreed to do so, he miscalendared the time of Ms. Olson's meeting. He arrived well after it had concluded and, in attempting

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[10] (...continued)
with each of his prospective debtor clients. In rejecting the attorney's complaint that this was onerous, the Panel stated: "[T]he sanction was tailored to coerce [counsel] into spending time with clients to ascertain a full picture of their financial history, assure the client's awareness of the importance of correctly completing bankruptcy documents, and to assure that [counsel] has an adequate understanding of his clients' needs. . . . As for [counsel's] assertion that it is unduly burdensome to be required to spend a minimum of one hour with his clients, *we agree with the bankruptcy court that one hour is below the amount of time competent counsel generally spend with their clients. [Counsel] has chosen to be an attorney and must accept the duties and responsibilities associated with the position*." *Id.* at 282–83 (emphasis added).

[11] Ms. Olson said her first contact with Counsel was when he tried to call her the night before the May 10 hearing—a late contact which Ms. Olson, under the circumstances, found offensive. The only prebankruptcy entry on the Affidavit for Counsel's own time was .40 hours on November 20, 2015 to "Review complete filing and authorize eFiling of petition. Sign." And, post-bankruptcy, Counsel had only a .25 hour phone call with Sperry on January 6, 2016, regarding the § 341(a) meeting.

[12] Bratton never filed any Rule 2016(b) disclosure regarding her agreement to represent Ms. Olson at the § 341(a) meeting or her agreed compensation.

[13] As noted, Counsel's Affidavit indicates he spent fifteen minutes on the phone with Sperry on January 6, 2016, the day before the meeting "to review case in preparation of 341(a) meeting."

to determine what happened by calling the firm's office in Oregon, he ended up missing a second § 341(a) meeting for Counsel that he had also agreed to "cover."[14]

The absence of an attorney had another impact beyond requiring Ms. Olson to return at her expense for a second § 341(a) meeting. After her case was called and continued, Ms. Olson was confronted by a creditor who berated her about a vehicle obligation. She had to cope with this individual on her own. She felt intimidated by the creditor, and abandoned and disregarded by Counsel. She was angry and distraught over what had occurred and, understandably, remains so.

Sperry appeared with Ms. Olson at the continued § 341(a) meeting on January 21, 2016. While Counsel on May 3 belatedly filed an amended Rule 2016(b) disclosure indicating his agreement to pay Sperry a flat fee of $50.00 for this appearance, on May 17 Counsel filed another amended Rule 2016(b) disclosure, indicating he actually paid Sperry $75.00. Sperry eventually filed his own required Rule 2016(b) disclosure in this case, confirming the $75.00 payment from OlsenDaines, Doc. No. 42, but that filing occurred two weeks after the May hearing.

Ms. Olson has received her discharge. Her case remains open because her trustee has issued a notice of assets and request for claims.

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[14] That case was *In re Al-Sammak*, Case No. 15-01608-JDP. The UST and Counsel entered into a similar stipulation for refund of $100.00 in that case. That matter is before Bankruptcy Judge Pappas.

**DISCUSSION**

The term "appearance counsel" was used in connection with Bratton and Sperry's role. Counsel's Rule 2016(b) disclosures indicate these other attorneys, for a "flat fee," agreed to "*appear*[ ] at debtor's 341(a) hearing *on my behalf*."

Despite Counsel's characterization, Bratton and Sperry were not simply agreeing to appear on Counsel's behalf. They were appearing, as counsel, *for Ms. Olson*. And they were not just "appearing"—they were *representing* her at a § 341(a) hearing *as her attorney*. Thus, a more apt phraseology than "appearance" counsel might be "substitute" or "associated" counsel. Even though this arrangement may be for a limited purpose or duration, the second attorney is, for that time and purpose, *the* attorney who is representing the client.

**A. Code, Rule and ethical violations**

**1. Section 329 and Rule 2016(b)**

Under § 329(a), any attorney representing a debtor in or in connection with a case shall file a statement of the compensation paid or agreed to be paid for the services rendered or to be rendered by that attorney and the source of the compensation. This provision is implemented by Rule 2016(b), which provides:

> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code, including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any

> agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Sperry was contacted, certainly by January 6 when Counsel telephoned him, if not earlier. He agreed to appear at Ms. Olson's January 7 meeting. He was obligated to file a Rule 2016(b) disclosure within 14 days of that agreement. He did not. Indeed, despite the colloquy about Rule 2016(b) disclosures at the May 10 hearing, it took him almost two more weeks to file the required disclosure.

In addition, Counsel reached an "appearance" and fee sharing agreement with Sperry by January 6, and Counsel was thus required by the Rule to disclose it within 14 days thereafter.[15] Counsel did not file a Rule 2016(b) disclosure of this agreement until May 3, after the Court had issued its Notice of Hearing and Order.[16]

Thus Counsel and Sperry have each violated § 329(a) and Rule 2016(b).[17]

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[15] Counsel did disclose an agreement with Bratton in Doc. No. 5.

[16] And, though that May 3 disclosure is certified by Counsel as correctly reflecting the agreement, it was evidently in error given the May 17 disclosure of a $75.00 fee for Sperry.

[17] It also appears Bratton violated the Rule and Code in this case. Counsel's initial Rule 2016(b) disclosure reflected the agreement reached with Bratton to attend the § 341(a) meeting in return for payment by Counsel of $50.00. Bratton was obligated to file a Rule 2016(b) disclosure within 14 days of her agreement. She did not, and never has. Even though Bratton ultimately could not appear on January 7 and represent the debtor, the agreement alone required the filing of the Rule 2016(b) disclosure.

**2. Informed consent of the client**

A lawyer-client relationship is not merely contractual. The IRPC establish the parameters of the ethical and professional aspects of that relationship. As noted in the commentary to IRPC 1.0:

> Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person . . . before accepting or continuing representation or pursuing a course of conduct. . . . The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives.

*Id.* at cmt. 6.

Nothing establishes Ms. Olson's informed consent to the use of "appearance" counsel (whether paid $50 or $75 or something else) to represent her at a § 341(a) meeting. Counsel argued at hearing that part of a standard "form agreement" with his firm's clients includes a disclosure that another attorney may appear at such meetings. There are, here, problems with that assertion. First, Counsel acknowledged that a search of his firm's records failed to find any such written form agreement with and executed by Ms. Olson. Second, he failed to establish just what such a form "discloses" or that it explains non-OlsenDaines lawyers may be so used. Third, he did not show that Ms. Olson provided informed

consent to the use of the specific lawyers (initially Bratton, who apparently had no connection or history with Ms. Olson, and later Sperry, who was no longer with the OlsenDaines firm) as her lawyer, counselor and advisor at the meeting.[18] And nothing shows that Bratton or Sperry sought or obtained Ms. Olson's informed consent to their acting as her attorney, or that these lawyers confirmed Counsel had previously so obtained that specific consent.[19]

As noted in the IRPC commentary, "Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence." *Id.* at cmt 7.

Counsel's anticipated use of a lawyer outside the firm to "cover" the § 341(a) meeting was also a limitation on (or at least a qualification of) the scope of Counsel's representation of Ms. Olson. *Castorena*, 270 B.R. at 530 (representation at § 341(a) meeting is part of the normal, ordinary and fundamental "core obligations" of counsel for debtors). Under IRPC 1.2(c), "A lawyer may limit the scope of the representation if the limitation is reasonable under the

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[18] *See*, *e.g.*, *Egwu*, 2012 WL 5193958 at *4, n.16 ("Just how another attorney from a separate firm can be legitimately imposed upon a client without his express consent presents a real head scratcher[.]")

[19] Additionally, nothing presented at the hearing suggests that Bratton or Sperry were given, at the time they were asked to appear, specific information about Ms. Olson or her creditors, so that these attorneys could determine whether they could ethically represent her. It is unclear, for example, that the attorneys could do even basic conflict checks to see if their agreed representation of the debtor was proper.

circumstances and the client gives informed consent." The burden is on Counsel to show that a debtor, like Ms. Olson, "properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes. Proving competent, intelligent, informed and knowing consent of the debtor" is required. *Castorena*, 270 B.R. at 530.

Moreover, the use of an attorney outside the firm implicates IRPC 1.5(e). That Rule provides that a division of a fee between lawyers who are not in the same firm may be made only if (1) the division is in proportion to the services each lawyer performs; (2) the client agrees to the arrangement *and* such agreement "is confirmed in writing;" and (3) the total fee is reasonable. Even assuming the first and third elements could be met, the second clearly is not.

Counsel and Sperry thus violated IRPC 1.2(c) and 1.5(e).

**3. Additional issues**

Counsel and Sperry addressed the Court on May 10. Those lawyers evinced an attitude that § 341(a) meetings are brief, uneventful, and of little consequence, thus justifying the use of "appearance counsel" who are paid *de minimis* fees. Even setting aside the inadequate disclosure and other issues addressed above, the view expressed is troublesome. It has been rejected in *Castorena* and *Peterson*, as well as in Judge Pappas' article, and by other courts around the country. And it certainly was not a view shared by Ms. Olson.

As already noted, the term "appearance" counsel is not apt; its use is an

error of comprehension as well as syntax. The adjective "appearance"—as used by Counsel and Sperry—effectively demeans the noun "counsel." Sperry did not just "appear" so that the presence of a lawyer at the § 341(a) meeting could be noted. He necessarily agreed to *represent Ms. Olson as her attorney*. That agreement invokes all his professional responsibilities, and the provisions, and weight, of the IRPC. *See, e.g.*, *"Covering" a Bankruptcy Proceeding for Another Attorney*, 99 Formal Ethics Opinion 12, 2000 WL 33300696 (N.C. St. Bar 2000) (concluding that when a lawyer appears with a debtor at a § 341(a) meeting, the lawyer is representing the debtor, with all of the ethical obligations such legal representation mandates, including the requirement that the attorney determine prior to accepting representation that there are no conflicts of interest; obtain the express consent of the client; and provide competent representation following adequate preparation even if a "limited" appearance).

IRPC 1.1 provides that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." While it may be accurate to say that many § 341(a) meetings are uneventful, that is not always the case. Trustees regularly use those meetings to flesh out facts and issues that have significant impact on a debtor's case, estate property, the validity of exemptions, and even matters that will affect a debtor's right to a discharge.[20]

[20] There have also been cases where testimony at § 341(a) meetings has been material to (continued...)

Creditors are adept at using the meetings to their advantage as well. That many, even most, meetings present or generate few problems is not a reason to denigrate the importance of competent representation by counsel for debtors, both in their preparation for and their appearance at such meetings.

Sperry had some awareness of Ms. Olson's situation a year before she actually filed bankruptcy. However, he was no longer a member of Counsel's firm. His preparation, according to the pre-hearing record, amounted to a fifteen minute phone call on January 6. He did not explain at hearing just how much time he spent in reviewing Ms. Olson's filings before heading to, but missing, her January 7 meeting. And, of course, he did not actually meet and confer with Ms. Olson that day.[21]

Sperry's statements at hearing, and his acceptance of a $75 "flat fee" for this work, reflects an attitude that § 341(a) meetings are unimportant and not deserving of the attention, care and application of thought, time and effort that other legal representation requires. Sperry's statements were in some ways expressly, and other ways tacitly, endorsed by Counsel

While the IRPC recognizes that not all engagements require the same level

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[20] (...continued)
referral and criminal prosecution under 18 U.S.C. § 152.

[21] Sperry's belated Rule 2016(b) disclosure asserts he spent 2 hours preparing to represent Ms. Olson and met with Ms. Olson prior to her continued § 341(a) meeting. While of record, this disclosure was filed only after the Court emphasized at hearing the importance of such review and preparation. In many ways, the late filed disclosure is self-serving and, given its untimely filing, could not be addressed by parties at the hearing. It is weighed accordingly.

of attention and preparation, all representation nonetheless must be adequate and competently performed. *See* IRPC 1.1 at cmt. 5; *see also* IRPC 1.2 at cmt. 7 (noting that an agreement for "limited" representation does not exempt a lawyer from the duty to provide competent representation, but is a factor to be considered when determining the knowledge, skill, thoroughness and preparation reasonably necessary for the representation).

**B. Consequences for Code, Rule and ethical violations**

As set forth above, the violations by Counsel and Sperry of § 329(a), Rule 2016, and the requirements of the IRPC are several.[22] However, the Notice of Hearing and Order was issued due to the request that the Court enter an order approving the stipulation between Counsel and the UST to refund $100.00 to Ms. Olson. Nothing in the Notice of Hearing and Order warned Counsel or Sperry of other or further sanction. But the facts clearly warrant more than the $100 penalty.[23]

First, it appears clear that Counsel and Sperry failed in their duties to obtain knowing and informed consent from Ms. Olson, and to adequately and properly represent her as required by the IRPC. The Court will therefore transmit this Decision to Bar Counsel at the Idaho State Bar.

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[22] While the Court here specifically addresses Sperry and Counsel, Bratton should also be aware of the potential violations of the Code and Rules and her professional responsibilities if she plans to continue to agree to "appear" at § 341(a) meetings or court hearings for another attorney.

[23] The stipulation's suggested $100 amount has already been repaid to Ms. Olson. The Court sees no reason not to enter that requested order.

Second, in this Circuit, a violation of § 329(a) and/or Rule 2016(b) requirements supports the total disallowance of all compensation. *In re Lewis*, 113 F.3d 1040, 1045–46 (9th Cir. 1997); *In re Park-Helena Corp.*, 63 F.3d 877, 881–82 (9th Cir. 1995); *Hale v. United States Trustee (In re Basham)*, 208 B.R. 926, 930–31 (9th Cir. BAP 1997). As noted by the Ninth Circuit Bankruptcy Appellate Panel, "The disclosure requirements imposed by § 329 are mandatory, not permissive, and an attorney who fails to comply with the disclosure requirements forfeits any right to receive compensation." *Id.* (citing *In re Crayton*, 192 B.R. 970, 981 (9th Cir. BAP 1996)).

Given Counsel's approach to his representation of Ms. Olson and the consequences such decisions have had on her as a debtor, the Court concludes total disgorgement is appropriate. Thus, the Court intends to order Counsel to disgorge his entire compensation and return, in addition to the $100.00 already refunded, the remaining $1,000 to Ms. Olson.[24] This order will be based on Counsel's violations of § 329(a) and Rule 2016(b), and upon the above case law, and on this Court's authority under § 329(b), Rule 2017 and its inherent powers.

However, despite the fact that the Ninth Circuit case law regarding § 329(a) and Rule 2016(b) is clear, and attorneys are on notice of the same, this Court did not provide specific notice to Counsel of possible sanctions when it issued the

[24] Clearly Sperry also violated § 329(a) and Rule 2016(b), however, § 329(b) dictates that fees found excessive are to be returned to the entity that made the payment. Here, the Court sees little utility to ordering Sperry to return $75.00 to OlsenDaines.

Notice of Hearing and Order. Thus, through this Decision and a subsequent notice, the Court will provide Counsel seven days to request a hearing on the subject if he desires to provide any additional information or argument. If no hearing is requested, the Court will enter the order requiring the disgorgement of the identified fees.

**CONCLUSION**

The bankruptcy system relies on the work of dedicated professionals. Such professionals include lawyers who are solo practitioners or who work in small firms. The simple fact of life is that, at some point, a lawyer will find that personal events and circumstances, or professional conflicts, will make it impossible to attend a scheduled hearing or a § 341(a) meeting. Seeking a continuance or rescheduling is not always possible or desirable. The Court is not insensitive to this reality.

However, if an attorney chooses to arrange for another attorney to represent the client, whether it's a § 341(a) meeting or a court hearing, several steps must be taken in order to satisfy both attorneys' ethical and professional obligations. The circumstances that occasionally arise necessitating substitute counsel can be accommodated without compromising those professional standards.

The Court believes the vast majority of attorneys take seriously their professional and ethical obligations. The rights of, and risks to, clients demand no less. Here, that did not occur, and insufficient attention to those obligations was

given by the attorneys involved.

Based on the foregoing, the stipulation between Counsel and the UST to refund $100.00 to Ms. Olson will be approved. A copy of this Decision will be forward to the Idaho State Bar. And, if Counsel does not request a hearing within seven days, the Court will enter an order requiring Counsel to disgorge the remaining $1,000.00 to Ms. Olson.

DATED: June 16, 2016

TERRY L. MYERS
CHIEF U. S. BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT**
**SOUTHERN DISTRICT OF NEW YORK**

**FOR PUBLICATION**

---------------------------------------------------------------x
In re: Chapter 7

VINCENT D'ARATA, Case No. 18-10524-shl

Debtor.
---------------------------------------------------------------x

**MEMORANDUM DECISION REGARDING**
**THE DISGORGEMENT OF ATTORNEY'S FEES**

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**SEAN H. LANE**
**UNITED STATES BANKRUPTCY JUDGE**

Before the Court is the Order to Show Cause, dated April 19, 2018 [ECF No. 21], issued to Raymond Ragues, Esq. as counsel for Vincent D'Arata, the debtor in the above-captioned Chapter 7 case (the "Debtor" or "Mr. D'Arata"). The Court issued the Order to Show Cause based on two letters from the Debtor that complained about the conduct of his counsel. *See* Letter of Vincent D'Arata, dated April 2, 2018 [ECF No. 13]; Letter of Vincent D'Arata, dated

April 4, 2018 [ECF No. 19]; Statement of United States Trustee in Support of Order to Show Cause re: Attorney Raymond Ragues ¶¶ 10, 18, 20 ("UST Statement") [ECF No. 25]; Chapter 7 Trustee's Statement in Connection with the Court's April 19, 2018 Order to Show Cause ¶ 9 ("Chapter 7 Trustee Statement") [ECF. No. 26]. In his letters, Mr. D'Arata complained that, among other things, his counsel had filed incorrect documents on his behalf, notwithstanding Mr. D'Arata's repeated attempts to correct the errors. *See* ECF Nos. 13, 19. Based on the allegations in the letters, the Court issued the Order to Show Cause whether Mr. Ragues should be required to return the fee that he charged the Debtor for the filing of the bankruptcy case. As it turns out, the incorrect filings were only part of a much more pervasive problem that included the use of so-called appearance counsel that effectively left the Debtor without representation at his meeting of creditors under Section 341 of the Bankruptcy Code. Given all the problems caused by Debtor's counsel here—as further set forth below—counsel must return the fee that he charged the Debtor. The Court writes this opinion to remind attorneys practicing in this jurisdiction of their ethical obligations to their debtor clients and to avoid the use of appearance counsel as a way of passing the buck on those obligations.[1]

## BACKGROUND

There is nothing about this Chapter 7 case that suggests it would be unusually difficult. In late February 2018, the Debtor filed a voluntary petition (the "Petition") for relief under Chapter 7 of the Bankruptcy Code, along with, among other things, his initial set of Schedules of Assets and Liabilities (the "Schedules"), Statement of Financial Affairs and Creditor Matrix [ECF No. 1]. The purpose of the Schedules in a bankruptcy case is to list the types of assets that

[1] The Court previously issued a bench ruling requiring the turnover of the fee charged to the Debtor. *See* Hr'g Tr. 32:7-9, May 1, 2018 [ECF No. 31]. But the Court made clear at the hearing that, given the importance of the issue, the Court would also issue a written decision. *See id.* at 33:12-15; *see also* Order Requiring Return of Fee Payments to Debtor Pursuant to Bankruptcy Code § 329(b), dated June 27, 2018 [ECF No. 32].

a debtor has in its possession or would like to claim as exempt. Consistent with the practice in Chapter 7 cases, a Chapter 7 trustee was appointed to administer the Debtor's case; the trustee appointed here was Albert Togut, Esq. (the "Chapter 7 Trustee").

Raymond Ragues, Esq. of Raymond Ragues PLLC is the attorney who filed the case for the Debtor. *See* Petition at 7. Prior to the filing, Mr. D'Arata paid Mr. Ragues a fee of $900 for his legal services in the case. *See* Disclosure of Compensation of Attorney for Debtor [ECF No. 1]. The Debtor never met Mr. Ragues in his office, but instead communicated with him online and over the telephone. *See* UST Statement ¶ 5.

Mr. D'Arata lives on a monthly income of $1,435.00, with his monthly expenses exceeding his income by $20. *See* Schedules I and J [ECF No. 1]. Mr. D'Arata spends 65% of his monthly income ($953) on rent, food, and basic supplies alone. *See id.*[2] Given his financial circumstances, it took Mr. D'Arata a year to save the money to pay Mr. Ragues' fee. *See* UST Statement ¶ 16. Mr. D'Arata paid the $900 legal fee in installments over eight months, with the last installment paid in November 2017, some three months before the bankruptcy case was filed. *See* Letter of Vincent D'Arata, dated April 2, 2018.

As is customary in Chapter 7 cases, the Debtor was scheduled to appear at a meeting of creditors and be questioned under oath by the Chapter 7 Trustee about his case, including with regard to the Debtor's assets and liabilities and the consequences of seeking a discharge. *See* 11 U.S.C. § 341 (providing for an oral examination of the debtor at a meeting of creditors). These so-called 341 meetings are not presided over—or even attended—by the Court, but rather are run by the Chapter 7 trustee appointed in the case. *See* 11 U.S.C. § 341(c) (noting that a court may

[2] Due to his financial circumstances, Mr. D'Arata also applied for a waiver of the fee for filing this Chapter 7 case, which was subsequently granted by the Court. *See* Order on the Application to Have the Chapter 7 Filing Fee Waived [ECF No. 9].

not preside at or attend a 341 meeting).[3] As a Chapter 7 case is often administered without the need for the Debtor to appear before the Court, a 341 meeting may be the most significant event in such a case for an individual debtor, particularly in a no-asset case such as this one. *See* Chapter 7 Trustee's Report of No Distribution, docket entry dated June 7, 2018.[4] No-asset cases are usually more streamlined because the liquidation of a debtor's estate produces no assets from which creditors can recover value, or there is such low value recovered that only administrative costs—generally attorneys' and trustees' fees—can be paid. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Rep. No. 137, pt.1, at 3-4 (July 1973), *reprinted in* B Collier on Bankruptcy App. Pt. 4(c).

But notwithstanding the straightforward nature of Mr. D'Arata's case, difficulties arose almost immediately. The 341 meeting in this case was first convened on March 28, 2018 (the "First Meeting"), but Mr. Ragues did not appear to represent the Debtor. *See* UST Statement ¶ 14. Instead, an appearance was made on behalf of the Debtor by an attorney named Kenneth Zweig, Esq. *See id.* But Mr. Zweig was not hired by Mr. D'Arata. Rather, he came to the First Meeting as so-called "appearance counsel"—meaning that he appeared as counsel on behalf of Mr. Ragues and his firm even though Mr. Zweig was not employed at Mr. Ragues' firm.[5] *See*

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[3] Several decades ago, a Commission Report on Bankruptcy Law survey determined that it was highly inefficient for judges to handle certain of the paperwork and procedural aspects of consumer bankruptcy cases. *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Rep. No. 137, pt.1, at 6 (July 1973), *reprinted in* B Collier on Bankruptcy App. Pt. 4(c). The work was not judicial in nature and was administratively-focused, and the involvement of judges would result in the wasting of judicial resources. *See id.* Furthermore, the Commission found that it was important that judges do not participate in 341 meetings to avoid any appearance of bias. *See id.*

[4] On June 7, 2018, the Chapter 7 Trustee electronically uploaded the report of no distribution of assets in the Debtor's case. In the Southern District of New York, Chapter 7 trustees electronically upload such reports to the Case Management/Electronic Case Filing system, but the reports are not assigned a docket number.

[5] Mr. Zweig did not disclose whether he was compensated to appear at the First Meeting, and he has not filed a statement pursuant to Section 329(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016(b), which would reveal the compensation he received. Similarly, Mr. Ragues has failed to disclose any fee sharing arrangements as required by Section 329(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016(b). *See* Disclosure of Compensation of Attorney for Debtor [ECF No. 1] (indicating that Mr. Ragues had not

Tr. of March 28, 2018 Meeting of Creditors at 1, attached as Exhibit A to the Chapter 7 Trustee Statement [ECF No. 26].[6] While the Debtor knew that an attorney would represent him at the First Meeting, he did not know that it would be Mr. Zweig. *See id.* at 3.

During this First Meeting, the Debtor testified that the information in the original set of Schedules filed by Mr. Ragues with the Petition was incorrect in several significant ways: (1) the original Schedules included a bank account that the Debtor closed prior to the filing of the Petition; (2) the original Schedules reported that the Debtor had previously sought bankruptcy relief when he had not; and (3) the original Schedules improperly listed student loan obligations. *See id.* at 2. The Debtor testified that he had identified those errors and reported them to Mr. Ragues in November 2017—before the Petition and the original Schedules were filed—but that these errors had not been corrected. *See id.* at 2-3. During the First Meeting, the Debtor also explained that the Petition contained a version of his signature that did not match the signature he affixed to the Petition and original Schedules. *See id.* at 5. At no point during the First Meeting did appearance counsel Mr. Zweig assist the Debtor or the Chapter 7 Trustee in addressing any of these concerns. In fact, Mr. Zweig was not at all familiar with the Debtor's case. *See id.* at 2, 4-5.

At the conclusion of the First Meeting, the Chapter 7 Trustee explained that he could not examine the Debtor without the correct schedules so he adjourned the examination to April 18,

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agreed to share his compensation with any other person unless they were members or associates of his firm). The failure to disclose any such compensation is improper. *See In re Ortiz*, 496 B.R. 144, 150 (Bankr. S.D.N.Y. 2013) ("[A]ny attorney who appears on behalf of a debtor at a § 341(a) meeting, and receives compensation for such appearance, must file his or her own Rule 2016(b) statement disclosing such compensation.") (internal citations omitted).

[6] The audio of the First Meeting—and a subsequent 341 meeting—were both recorded by a device provided by the Office of the United States Trustee. No court reporter or stenographer was present, but the audio of the two 341 meetings was transcribed by an employee of the Chapter 7 Trustee and provided to the Court as an exhibit to the Chapter 7 Trustee's Statement. *See* Tr. of March 28, 2018 Meeting of Creditors at 1. No party has objected to the Court considering the transcript of the two 341 meetings.

2018, so that the Mr. Ragues could file corrected schedules. *See id.* at 3, 5. The Chapter 7 Trustee also told Mr. Zweig to have Mr. Ragues meet with the Debtor to correct the schedules. *See id.* at 5. Of course, all this meant a second trip downtown for Mr. D'Arata, a particular hardship for this disabled Debtor. *See* Letter of Vincent D'Arata, dated April 2, 2018 (Debtor noting that he is disabled).

Things continued to go downhill after the First Meeting. On April 2, 2018 and April 4, 2018, the Debtor sent letters to the Court, which explained that he had been unable to contact Mr. Ragues, that Mr. Ragues failed to correctly amend his Schedules, and that incorrect information had been provided to the Chapter 7 Trustee. *See* ECF Nos. 13, 19. Mr. Ragues did not respond to those letters, or at least no response was ever filed by Mr. Ragues with the Court. *See* Chapter 7 Trustee Statement ¶ 9. It was not until April 17, 2018—only one day prior to when the 341 meeting was scheduled to resume—that Mr. Ragues finally filed an amended voluntary petition, amended Schedules, and amended Summary of Assets and Liabilities and creditor matrix [ECF Nos. 15-18].

On the morning of April 18, 2018, the Debtor once again appeared and testified under oath at the adjourned 341 Meeting (the "Second Meeting"). *See* UST Statement ¶ 22. Mr. Ragues again chose not to appear. *See id.* Instead, Mr. Ragues sent another appearance counsel to represent the Debtor. *See id.* at ¶ 23. This appearance counsel was not even the same lawyer that appeared at the First Meeting. *See id.* To make matters worse, this second lawyer—Sanam Nowrouzzadeh, Esq.[7]—advised the Chapter 7 Trustee that she had never met the Debtor before

[7] While Ms. Nowrouzzadeh was paid an appearance fee, *see* UST Statement ¶ 23, once again no statement was filed as required under Section 329(a) of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 2016(b) to reflect the payment. *See In re Ortiz*, 496 B.R. at 150.

the morning of April 18, 2018, and that she was not informed prior to April 18th about the issues relating to the Debtor's filings. *See id.* at ¶¶ 23, 27; *see also* Tr. of April 18, 2018 Meeting of Creditors at 5, attached as Exhibit B to the Chapter 7 Trustee's Statement [ECF No. 26] (Ms. Nowrouzzadeh noting that she had learned of the problems at the last examination only on the morning of the Second Meeting, and not in time to have a meaningful consultation with the Debtor). Thus, like Mr. Zweig, Ms. Nowrouzzadeh was unable to adequately represent the Debtor.

At the Second Meeting, the Debtor explained that the amended Schedules were still not correct. *See* Tr. of April 18, 2018 Meeting of Creditors at 4. The Debtor also testified during the Second Meeting about other problems in his case, including that:

- Mr. Ragues failed to advise Mr. D'Arata that he would not appear at the Second Meeting and would send another appearance counsel whom the Debtor had never met;

- Mr. Ragues failed to obtain the Debtor's consent to file the amended Schedules; and

- Without the Debtor's review or approval, Mr. Ragues affixed a copy of Mr. D'Arata's signature from a different document to the amended Schedules and filed them.

*See id.* at 1, 3-4.

In response to the Debtor's letters, the Court issued the Order to Show Cause upon Mr. Ragues. *See* ECF No. 21. Both the United States Trustee and the Chapter 7 Trustee filed statements in support of requiring Mr. Ragues to disgorge the fee that he received from the Debtor. *See* ECF Nos. 25, 26. The Chapter 7 Trustee's Statement vigorously requested that the use of appearance counsel for 341 meetings be banned by the Court. *See* Chapter 7 Trustee Statement ¶ 26. Additional filings in response to the Order to Show Cause were submitted by other members of the bar who serve as Chapter 7 trustees, who have experienced problems with the use of appearance counsel. *See* Letter of Alan Nisselson, Esq., dated May 7, 2018 [ECF No.

30]; Letter of Robert L. Geltzer, Esq., dated May 10, 2018 [ECF No. 38]; Letter of Kenneth P. Silverman, dated May 17, 2018 [ECF No. 37]. Despite not having filed any written response to the Order to Show Cause, Mr. Ragues attended the hearing held on the Order to Show Cause on May 1, 2018. *See* Hr'g Tr. at 3:2-9, May 1, 2018 [ECF No. 31].

**DISCUSSION**

Section 329(b) of the Bankruptcy Code authorizes the denial of compensation to debtor's counsel, the cancellation of his or her employment agreement with the debtor, or the return of compensation paid, if the Court finds that the compensation paid exceeds the reasonable value of the legal services provided. *See* 11 U.S.C. § 329(b). Section 329(b) provides, in relevant part:

> [if] such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to . . . (2) the entity that made such payment.

*Id.* On the motion of a party in interest, Federal Rule of Bankruptcy Procedure 2017(a) directs the Court to determine whether any payment or transfer of property to an attorney "in contemplation of the filing" of the bankruptcy petition "is excessive." Fed. R. Bankr. P. 2017(a).

In evaluating the value of legal services under Section 329(b), "the question is whether the [sum] he was paid was excessive for what he accomplished for debtor in this case." *In re Nakhuda*, 544 B.R. 886, 903 (9th Cir. 2016) (upholding disgorgement of fees paid where debtor's attorney filed documents in violation of local electronic filing orders). The Court has wide discretion in making this determination so long as the fees at issue are evaluated in light of the services actually performed. *See Karsch v. LaBarge (In re Clark)*, 223 F.3d 859, 863-64 (8th Cir. 2000). "The Court may reduce the compensation if it finds that the amount requested is excessive or of poor quality." *In re Carmine Alessandro*, 2010 WL 3522255, at *2 (Bankr. S.D.N.Y. Sept. 7, 2010). The value of legal services is lessened where an attorney has violated

an ethical standard. *See In re Damon*, 40 B.R. 367, 376 (Bankr. S.D.N.Y. 1984) (holding that forfeiture of attorney's fee is mandated where an ethical standard is violated).

Applying the standards under Section 329, the Court easily concludes that Mr. Ragues should return the fee to the Debtor. In short, Mr. Ragues did not adequately represent his client Mr. D'Arata, either in the documents that were filed or at the 341 meetings. Courts have ordered attorneys to disgorge fees in such circumstances. *See generally In re Olson*, 2016 WL 3453341 (Bankr. D. Idaho June 16, 2016) (requiring counsel to show cause why disgorgement should not be ordered when, among other things, neither the debtor's attorney nor either of the replacement attorneys appeared at the debtor's initial 341 meeting, the debtor's attorney and the appearance counsel failed to file disclosures of the fee sharing arrangement within the required time frame, failed to obtain the debtor's informed consent with respect to the representation, and failed to adequately represent the debtor); *In re Al-Sammak*, 2016 WL 3912375 (Bankr. D. Idaho July 12, 2016) (companion case to *Olson* directing disgorgement); *In re Harwell*, 439 B.R. 455 (Bankr. W.D. Mich. 2010) (ordering the debtor's attorney to disgorge his fees when debtor's chosen law firm failed to attend the 341 meeting and instead sent appearance counsel, and failed to properly disclose the fee sharing arrangement it had with appearance counsel); *In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001) (ordering attorney to disgorge fees paid by Chapter 7 debtors when, among other things, the attorney failed to adequately describe the services he provided and prepared amended schedules because the original schedules all contained errors); *see also In re Ortiz*, 496 B.R. at 148 (ordering firm to properly represent debtor where debtor's counsel failed to fulfill his duty to "shepherd the client through the bankruptcy process, to its conclusion.").[8]

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[8] While the issue in *Ortiz* was framed as a failure to disclose the sharing of fees, the Court noted that "[a] lawyer who agrees to represent a debtor in a consumer bankruptcy case must act as his or her attorney for all 'normal, ordinary, and fundamental aspects' of the case, including amendments to the schedules and other routine representation necessary to ensure that the debtor receives a discharge." *In re Ortiz*, 496 B.R. at 150-51.

Indeed, this case starkly highlights the perils of the use of appearance counsel. Such counsel are attorneys who appear at proceedings at the request of, and on behalf of, the debtors' chosen attorney. *See In re Bradley*, 495 B.R. 747, 757 n.1 (Bankr. S.D. Tex 2013). As other courts have observed, these lawyers are generally not disclosed to the Court or to the Chapter 7 trustee before their appearance, and debtors are usually unaware that an appearance attorney will be representing them until right before the meeting or hearing. *See id.* Compounding these problems is that appearance counsel often know little or nothing about the case. For these reasons, various courts have frowned on the use of appearance counsel in circumstances like those present here. *See In re Cochener*, 360 B.R. 542, 580 (Bankr. S.D. Tex. 2007) (recognizing that counsel for a debtor "owes a professional duty to the [judicial] system to appear at the [341 meeting]"); *see generally In re Bradley,* 495 B.R. 747 (criticizing and banning the use of appearance counsel); *In re Olson,* 2016 WL 3453341; *In re Al-Sammak,* 2016 WL 3912375; *In re Bernhardt*, 2012 WL 646150 (Bankr. D. Colo. Feb. 28, 2012); *In re Harwell*, 439 B.R. 455; *In re Jacobson,* 402 B.R. 359 (Bankr. W.D. Wash. 2009); *see also In re Castorena,* 270 B.R. 504, 529-32 (Bankr. D. Idaho 2001) (criticizing and requiring the attorney to disgorge his $250 flat fee, which the court found was unreasonable given the services he provided); *In re Ortiz,* 496 B.R. at 150 (holding that "appearance counsel may not 'represent' the debtor in the bankruptcy case"); *In re Seare,* 493 B.R. 158 (Bankr. D. Nev. 2013) (sanctioning debtor's attorney that failed to fulfill his professional duty of competence, unreasonably "unbundled" legal services, and failed to perform reasonable investigation into circumstances that gave rise to the bankruptcy filing); *In re Egwu,* 2012 WL 5193958 (Bankr. D. Md. Oct. 19, 2012); *In re Johnson,* 411 B.R. 296 (Bankr. E.D. La. 2008); *In re Bancroft,* 204 B.R. 548 (Bankr. C.D. Ill. 1997).

As courts have observed, improper use of appearance counsel can "frustrate the negotiation and communication process among the debtor, the creditors, and the trustee." *In re Bradley*, 495 B.R. at 804; *see also In re Jacobson,* 402 B.R. at 365 ("[t]he practice of undisclosed 'appearance attorneys' creates problems—other parties (and the court) are sandbagged, and the [d]ebtor, trustee, other creditors, and counsel cannot readily communicate regarding scheduling or substance."). Moreover, appearance counsel can promote a lack of accountability:

> Appearance attorneys are rarely listed as an attorney of record or co-counsel in a case and this can raise questions as to the legitimacy of their representation of debtors and their authority to speak for, or make admissions on behalf of, the debtor. While many appearance attorneys are competent lawyers, others are '[m]ere drones who give inadequate representation.' If a court cannot determine who has the authority to speak on behalf of a debtor, a sizeable and unnecessary roadblock is thrown up in front of the bankruptcy process. The court overseeing a bankruptcy case must know who speaks for a debtor and whom it can hold accountable for any improprieties in the process.

*In re Bradley*, 495 B.R. at 804 (internal citations omitted). Under such circumstances,

> debtors are left in an awkward position of having to trust the work of an attorney with whom they have never met and did not hire. They must have faith that their own attorney has exercised good judgment and has chosen a quality lawyer to appear on his behalf. Such practices can leave clients vulnerable to substandard representation and attorneys vulnerable to sanctions and other disciplinary measures.

*Id.* (internal citations omitted).

Not surprisingly then, the use of appearance counsel here violated a number of New York's Rules of Professional Responsibility. For example, it violated two requirements by failing to obtain the Debtor's informed consent when using appearance counsel at the two 341 meetings. *See* N.Y. R. Prof. Conduct 1.2(c) (allowing a lawyer to limit the scope of representation if such limitation is reasonable and the client gives informed consent); N.Y. R. Prof. Conduct 1.4 (requiring a lawyer to promptly inform client of, among other things, any

decision or circumstance with respect to which the client's informed consent is required by the Professional Rules); *In re Bradley,* 495 B.R. at 805 (observing that "the client did not hire the appearance attorney, and, almost always, the client has little or no say as to whether the attorney they *did* hire will represent them at any given proceeding.") (emphasis in original); *In re Bernhardt*, 2012 WL 646150, at *5 (holding that failure to disclose the use of substitute attorneys in advance of those attorneys' appearances, deprived debtors of an opportunity to consent to the appearances). Mr. Ragues also violated Rule 5.1(b)(2) of the New York Rules of Professional Conduct when he failed to ensure that appearance counsel was adequately prepared to address the issues at the 341 meetings, thus leaving the Debtor with counsel in name only. *See* N.Y. R. Prof. Conduct 5.1(b)(2) (requiring that a lawyer with direct supervisory authority over another lawyer make reasonable efforts to ensure that the supervised lawyer conforms with the Professional Rules).

In his submission, the Chapter 7 Trustee sums up the real world consequences of the improper use of appearance counsel at a 341 meeting in a case like this one, noting that individual debtors such as Mr. D'Arata

> most often have never hired a lawyer. They are overwhelmed by debt. They are in need of help. They nearly all are honest debtors. They are not proud to be filing for bankruptcy. The day they appear for examination by the trustee is the lowest day of their lives. If ever there was a day when they need the help of their lawyer, it is the day of their § 341 examination.

Chapter 7 Trustee Statement at 2.[9] And as another attorney who serves as a Chapter 7 trustee observed:

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[9] *See also* Chapter 7 Trustee Statement at 2 (noting that in cases like this one, debtors "are effectively abandoned and left unprotected because their lawyer sends a 'per diem' appearance counsel to the first meeting of creditors who had nothing to do with consulting with the Debtor or preparing his petition, who had never even met the debtor until immediately before the trustee's examination, who has only the most superficial knowledge of the facts of the case, and who is unprepared to answer the trustee's questions or provide meaningful assistance at the first meeting of creditors.").

> Generally, the use of Appearance Counsel is problematic. By the nature of such assignment, Appearance Counsel is unfamiliar with the case and the pleadings filed in support of the case. Thus, any problems that may arise as a result of the trustee's review of debtor's schedules and SOFA or debtor's testimony cannot be resolved at the initial 341 Meeting. As appears to be the case regarding the above-referenced Debtor, the trustee's directions to Appearance Counsel often go unresolved either because they are not communicated to the retained counsel or a lack of communication between Appearance Counsel and debtor's retained counsel.

Letter of Alan Nisselson, Esq., dated May 7, 2018. As further noted by another Chapter 7 trustee in this jurisdiction:

> Per diem attorneys appear—purportedly on behalf of a debtor/client—not even knowing who the person is. They appear not knowing, not having, and having never even seen the file. They appear with no authority to act on behalf of the debtor in even the simplest situations as, for example, agreeing to an extension of time to object to discharge in situations where, for example, the trustee has not been sent the petition and schedules, tax returns, pay stubs, and/or Consumer Credit Counseling Certificate, or received documents requested by the trustee upon his or her thorough review of the schedules prior to the 341 meeting. *Such inappropriate activity disserves debtors who might, consequently, be compelled to return to an adjourned 341 meeting which they would not otherwise have to do.*

Letter of Robert L. Geltzer, Esq., dated May 10, 2018 (emphasis added).

All these significant concerns are only heightened by the apparently widespread (and increasing) use of appearance counsel in Chapter 7 cases. While the Court is not in a position to assess such trends directly—because the Court does not participate in 341 meetings—members of the bar who serve as trustees in Chapter 7 cases have helpfully provided information about current trends. They paint a disturbing picture. Indeed, one Chapter 7 trustee in this jurisdiction stated that use of appearance counsel at 341 meetings "has substantially increased in frequency in recent years and has become, unfortunately, a common practice in the Southern District." Letter of Kenneth Silverman, Esq., dated May 17, 2018; *see also* Letter of Alan Nisselson, dated May 7, 2018 ("[I]t is often the case that over 50% of represented debtors on any 341 meeting calendar day are covered by Appearance Counsel.").

The Chapter 7 Trustee here urges that the Court bar the use of appearance counsel in its entirety for 341 meetings. *See* Chapter 7 Trustee Statement ¶ 26 ("The Trustee respectfully submits that the Court should ban the use of appearance counsel altogether at 341 meetings in the Southern District of New York."). The Chapter 7 Trustee cites to a number of jurisdictions that have promulgated such local rules as to appearance counsel. *See, e.g.,* E.D.N.Y. LBR 2090-2(a) (an attorney of record for a debtor who is knowledgeable in all aspects of a debtor's case shall appear on behalf of such a debtor in *every* aspect of the case, including but not limited to appearances at a 341 meeting, any adjournments of such meetings, and defending contested matters, motions, or adversary proceedings); N.D.N.Y. LBR 2016-3(b) (lists required duties of an attorney representing a Chapter 7 debtor, including appearing personally and representing the debtor at any scheduled 341 meeting). But rather than ban appearance counsel in cases before only one judge in this jurisdiction, the Court believes that the entire Court should first consider the wisdom of enacting a local rule to address these issues. In the meantime, the Court will be exceedingly vigilant on this issue and encourages the reporting of any instance where a counsel is failing to meet his or her obligations to a debtor, including, but not limited to, failing to personally appear with the debtor at a 341 meeting.

Of course, the Court's ruling today is not an indictment of attorneys who satisfy the requirements for serving as appearance counsel. The Court has seen many such instances of appearance counsel in Chapter 13 cases, often involving solo practitioners or small firms who ably and honorably serve as a support system for one another and who appear in Court well prepared to represent a debtor. But sadly, it appears that the requirements for appearance

counsel are often "[m]ore honour'd in the breach than the observance." William Shakespeare, Hamlet, act 1, sc. 4.[10]

## CONCLUSION

For the reasons set forth above, the Court concludes that the compensation provided by the Debtor to Mr. Ragues exceeds the value of the services provided by Mr. Ragues due to Mr. Ragues' failure to provide adequate representation at the Debtor's 341 meetings.[11]

Dated: New York, New York
August 3, 2018

***/s/ Sean H. Lane***
UNITED STATES BANKRUPTCY JUDGE

[10] In reaching its conclusion today, the Court does not rule upon the allegation that Mr. Ragues filed documents without the signature or approval of his client, Mr. D'Arata. The lack of a ruling on that issue does not in any way suggest that this allegation is not an exceedingly serious one. Filing documents with the debtor's electronic signature, without first obtaining his actual signatures or consent to such filings, would run afoul of New York's Rules of Professional Conduct. N.Y. Rule of Professional Conduct 8.4(c) provides that "[a] lawyer or law firm shall not . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." N.Y. R. Prof. Conduct 8.4(c). The electronic filing of a document that purports to have the debtor's signature but, that is not, in fact, signed by the debtor, "is no different than physically forging the debtor's signature on a paper document." *In re Stomberg*, 487 B.R. 775, 808 (Bankr. S.D. Tex. 2013) ("[M]ultiple bankruptcy courts have found that 'electronically filing a document bearing an electronic signature that was not actually or validly signed' constitutes a forgery amounting to a Rule 9011 violation."); *In re Obasi*, 2011 WL 6336153, at *3 (Bankr. S.D.N.Y. Dec. 19, 2011) ("While the parties have debated whether the conduct at issue violates the rules regarding the electronic filing of documents, the Court believes the real issue concerns an attorney's obligations when submitting documents to the Court. Those obligations are governed by Bankruptcy Rule 9011."); *see also United States Bankruptcy Court Southern District of New York Procedures for the Filing, Signing, and Verification of Documents by Electronic Means* (June 17, 2013), http://www.nysb.uscourts.gov/sites/default/files/5005-2-procedures.pdf (providing, among other things, that petitions, lists, schedules, statements, amendments, pleadings, affidavits, stipulations and other documents must contain original signatures). But there appears to be a factual dispute as to whether such an unauthorized filing took place, and such a dispute could not be resolved without an evidentiary hearing. As the Court has ample basis to require that the fees here be returned without reaching that issue, the Court concludes that it would be unjust and inappropriate to subject Mr. D'Arata to further proceedings in Court if that can be avoided.

[11] It is the Court's understanding that the filing fee has already been returned by Mr. Ragues to the Debtor, in accordance with an order issued by the Court on June 27, 2018 [ECF No. 32].

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
NEW HAVEN DIVISION

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| In re: | : | |
| | : | Case No. 16-31208 (AMN) |
| BRIAN A. SCHATZ, | : | |
| Debtor | : | Chapter 13 |
| | : | |
| | : | RE: ECF Nos. 142, 143 |

**MEMORANDUM OF DECISION AND ORDER GRANTING IN PART AND DENYING IN PART APPLICATIONS FOR COMPENSATION AND REQUIRING DISGORGEMENT OF ATTORNEYS' FEES**

This Memorandum of Decision and Order addresses the financial transaction disclosure requirements mandated by 11 U.S.C. § 329(a) and Fed.R.Bankr.P. 2016(b), and the practice of using "appearance counsel" to represent bankruptcy debtors on a temporary or "drop in" basis in meetings of creditors pursuant to 11 U.S.C. § 341, in hearings before the court, and otherwise throughout the pendency of a bankruptcy case. Because the attorneys here – both the appearing attorney and the non-appearing "appearance counsel" – failed to comply with Fed.R.Bankr.P. 2016(b), they are required to disgorge some or all of the attorneys fees they were paid in this case.

Pending are applications seeking allowance of attorneys' fees and reimbursement of expenses pursuant to 11 U.S.C. § 329, filed by Attorneys Andrea Anderson and Howard Brown after the Court questioned their financial transactions with the debtor in this Chapter 13 case. ECF Nos. 142, 143 (ECF No. 142 is the "Anderson Application"; ECF No. 143 is the "Brown Application"; together they are the "Applications"). Attorney Anderson sought allowance of $5,190.00 of attorney's fees and $310.00 in expenses while Attorney Brown sought allowance of $500.00 of attorney's fees. For the reasons

that follow, the Anderson Application is GRANTED IN PART and DENIED IN PART, and the Brown Application is DENIED, with certain of the fees paid to Attorney Anderson and all of the fees paid to Attorney Brown to be disgorged as described below.

## FACTS

This Chapter 13 case commenced on July 31, 2016 (the "Petition Date"), when Attorney Anderson filed the debtor's voluntary Chapter 13 petition. The debtor's case was fairly complex due to two bankruptcy dismissals within the preceding twelve months (resulting in only a limited, automatic stay pursuant to 11 U.S.C. § 362(c)(4)) and the debtor's ownership of thirteen real properties.

At all times relevant here, Attorney Anderson and Attorney Brown did not work in the same law firm[1], but they shared a mailing address[2] and perhaps the same office space[3] despite Attorney Anderson's residence in Florida for the duration of the debtor's case. *See* ECF No. 134. Attorney Anderson filed Official Bankruptcy Form 2030[4], a Disclosure of Compensation, stating that she agreed to accept $10,000.00 for the debtor's case having already received $2,500.00 from the debtor. ECF No. 12. Attorney Anderson

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[1] Attorney Anderson's statement of facts states that the "Debtor was also advised that Attorneys Brown and Anderson were not part of the same law firm and maintained separate practices." ECF No. 134.

[2] The mailing address for Attorney Anderson and Attorney Brown is listed in CM-ECF as 516 Ellsworth Avenue, New Haven, CT 06511. However, during hearings Attorney Anderson mentioned her current residency in Florida several times and the Superior Court for the State of Connecticut's records regarding attorneys registered to practice in the State of Connecticut lists the Law Offices of Andrea Anderson, L.L.C. with a mailing address of 1059 Maitland Center, Maitland, Florida 32751. *See* ECF No. 133.

[3] The Court asked Attorney Brown in a hearing whether he and Attorney Anderson were "in the same office." *See* ECF Nos. 60, 61. Attorney Brown responded with a yes. Attorney Brown represented in another hearing that he was with Attorney Anderson's office. *See* ECF No. 72. The Court intended the meaning of that question to be members or associates of the same law office under the Connecticut Rules of Professional Responsibility and the Bankruptcy Code, rather than individuals sharing the same physical space.

[4] Official Bankruptcy Forms are issued by the Director of the Administrative Office of the United States Courts pursuant to Fed.R.Bankr.P. 9009.

represented in Form 2030 that she had "not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm." ECF No. 12. However, Attorney Anderson's statement of facts filed after the dismissal of the case regarding the pending compensation applications stated that she advised[5] the debtor[6] that "Attorney Brown would be covering the 341 meeting and some of the bankruptcy hearings" and that "Attorney Brown would be sharing some of the retainer paid to Attorney Anderson." ECF No. 134. Attorney Anderson's statement of facts further represented that she paid Attorney Brown $120.00 on January 26, 2017, $80.00 on March 2, 2017, and the debtor paid Attorney Brown $300.00 at some time. ECF No. 134.

While Attorney Anderson submitted time records itemizing the time she spent representing the debtor, it became apparent during the course of the Chapter 13 case that Attorney Anderson generally did not appear at court hearings on the debtor's behalf.[7] Attorney Brown represented the debtor at the § 341[8] Meeting of Creditors on October 28, 2016. *See* ECF No. 140. Attorney Anderson filed a Motion to Extend the Automatic Stay (ECF No. 29), which was later denied for a failure to prosecute when neither she or any other attorney appeared for the debtor at the hearing. *See* ECF No. 42.

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[5] Connecticut Rules of Professional Conduct 1.5 requires written communication rather than oral communication regarding the scope of the representation and any fees for which the client will be responsible.

[6] The statement of facts also included an affidavit by the debtor stating that he consented to the fee sharing agreement and that he was satisfied with his legal representation. ECF No. 134, Exhibit A.

[7] Of the seven pre-dismissal hearings held in this case, Attorney Anderson appeared at one, on July 13, 2017. *See* ECF No. 96.

[8] Unless otherwise noted, all statutory references are to Title 11, United States Code (the "Bankruptcy Code").

By contrast, Attorney Brown attended five hearings to consider confirmation of the debtor's Chapter 13 Plan and the Chapter 13 Trustee's motion to dismiss the case in his capacity as Attorney Anderson's coverage counsel.[9] *See* ECF Nos. 60, 61, 72, 73, 80, 109, and 120. Attorney Brown was generally ineffective in representing the debtor. In a hearing on March 2, 2017, Attorney Brown admitted that he had not reviewed the debtor's Chapter 13 Plan (a document of three pages) and deferred to Attorney Anderson who was absent from the hearing. *See* ECF No. 72. Later in that hearing, the Court required Attorney Brown to file a notice of appearance[10] and be familiar with the case for any future hearings. *See* ECF No. 72. Attorney Brown was more familiar with the case at later hearings but generally deferred to the absent Attorney Anderson regarding the salient details of the case and future steps needed to confirm the debtor's Chapter 13 Plan.

The Court denied confirmation of the Debtor's Fifth Amended Chapter 13 Plan and granted leave to amend the plan on or before January 26, 2018. *See* ECF No. 123. A sixth amended plan was not filed and pursuant to the order establishing the deadline, the Court dismissed the debtor's case on January 30, 2018, while retaining jurisdiction to consider the allowance of compensation pursuant to § 330. *See* ECF No. 123. Attorney Anderson failed to appear for a hearing on her application for compensation (ECF No. 87), which requested allowance of $10,000.00 for attorney's fees and $310.00 for expenses, of which $2,500.00 had been paid by the debtor. *See* ECF No. 125. Attorney Anderson later agreed to reduce her fee request and now seeks allowance of $5,190.00 in attorney's fees and costs of $310.00, for a total of $5,500.00. *See* ECF No. 142.

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[9] Attorney Brown stated, "Attorney Anderson is really the one that was working on this. I am just kind of covering for her." ECF No. 72.

[10] Attorney Brown filed a Notice of Appearance in the case as ECF No. 79.

During the continued hearing to consider the allowance of Attorney Anderson's compensation in this case, Attorney Anderson argued that she did not share fees with Attorney Brown, but rather paid him as an "operating expense." *See* ECF No. 131. The Court thereafter issued a scheduling order requiring Attorney Brown to file a statement pursuant to Fed.R.Bankr.P. 2016(b)(essentially, Official Bankruptcy Form 2030) and set a schedule for briefing at the request of Attorneys Anderson and Brown regarding the question of whether payment of an appearance fee by Attorney Anderson to Attorney Brown is considered "fee sharing" under 11 U.S.C. § 504. *See,* ECF Nos. 132, 134, 135, and 141.

Attorney Anderson then filed an amended Form 2030 disclosing the payments totaling $200 to Attorney Brown. *See* ECF No. 138. Attorney Brown filed his own Form 2030 disclosing compensation of $500 from the debtor and from "other: See attached."[11] *See* ECF 135.

## APPLICABLE LAW

### I. The Bankruptcy Court's Supervision of a Debtor's Transactions With Attorneys

Several provisions of the Bankruptcy Code reflect Congress' intent that bankruptcy courts closely monitor and supervise compensation paid by debtors, both before and after they file bankruptcy petitions. For example, § 329(a) of the Bankruptcy Code, "requires an attorney for the debtor to file with the court a statement indicating any compensation paid or agreed to be paid to such attorney for services rendered or to be rendered in contemplation of or in connection with a case under the Code." 3 Collier on Bankruptcy

[11] The attachment was an attorney bill with a signed statement by the debtor. The debtor indicated that he understood that "part of the retainer I paid to Attorney Andrea Anderson was paid to Attorney Howard Brown to compensate Mr. Brown for the above legal services."

¶ 329.03. Section 329, "should be read in conjunction with [Federal Rule of Bankruptcy Procedure] 2016," that "further specifies the disclosure requirements of section 329(a)." 3 Collier on Bankruptcy ¶ 329.03. Under § 329 and Rule 2016(b), the "statement also must disclose the source of such compensation, even if the source is not the debtor but a third party" and "must be filed whether or not the attorney intends to apply for compensation under the Code." 3 Collier on Bankruptcy ¶ 329.03.

Rule 2016(b) also incorporates, "specifically the requirement that the statement filed indicate whether the attorney has shared or has agreed to share in respect of any such compensation with any other person." 3 Collier on Bankruptcy ¶ 329.03. This requirement should be read in conjunction with § 504 of the Bankruptcy Code that expressly prohibits an attorney from sharing any compensation with another attorney that is not another "member, partner, or regular associate" of the applicant's law firm. *See* 11 U.S.C. § 504. The term "regular associate" is defined in Bankruptcy Rule 9001(10) as, "any attorney regularly employed by, associated with, or counsel to an individual or firm." Fed.R.Bankr.P. 9001(10). Under that definition, the majority of courts prohibit debtor's counsel from hiring contract attorneys under § 504. *See, e.g., In re Egwu,* 2012 WL 5193958 (Bankr. D. Md. 2012)(coverage attorney employed by debtor's counsel constituted prohibited fee sharing); *In re Bradley,* 495 B.R. 747, 767 n. 11 (Bankr. S.D. Tex. 2013)(use of an undisclosed "appearance attorney" violated § 504(a)); *In re Tarasiak,* 280 B.R. 791 (Bankr. D. Mass. 2002)(fees disallowed under § 504(a) for payments to an independent contractor professional).

The fee sharing prohibition is also contained in the 2016(b) Statement (Form 2030) and here Attorney Anderson initially certified that she had not agreed to "share the above-

disclosed compensation with any other person unless they are members or associates of my law firm." *See* ECF Nos. 12, 138.[12]

Courts have "either denied compensation or required disgorgement for fee sharing in violation of section 504 for failure to disclose sharing arrangements under Rule 2016." 4 Collier on Bankruptcy ¶ 504.02. A bankruptcy court also has power under § 329(b) to reduce or disallow an attorney's fees if "such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to . . . (2) the entity that made such payment." 11 U.S.C. § 329(b). *See also In re Carmine Alessandro*, 2010 Bankr. LEXIS 3116, 2010 WL 3522255, at *2 (Bankr. S.D.N.Y. Sept. 7, 2010)(holding that a "Court may reduce the compensation if it finds that the amount requested is excessive or of poor quality").

II. <u>Practical Issues and Rules of Professional Conduct Implicated by Utilizing Appearance Counsel</u>

Appearance counsel are "attorneys who appear at proceedings at the request of, and on behalf of, the debtors' chosen attorney." *In re D'Arata*, 587 B.R. 819, 825 (Bankr. S.D.N.Y. 2018) *citing In re Bradley*, 495 B.R. 747, 757 n.1 (Bankr. S.D. Tex. 2013). These attorneys are "generally not disclosed to the Court or to the Chapter 7 trustee before their appearance, and debtors are usually unaware that an appearance attorney will be representing them until right before the meeting or hearing." *In re D'Arata*, 587 B.R. at 825 *citing In re Bradley*, 495 B.R. at 757. "Compounding these problems is that appearance counsel often know little or nothing about the case." *In re D'Arata*, 587 B.R.

[12] This form was later amended by Attorney Anderson after the Court expressed great concern regarding the payments by Attorney Anderson to Attorney Brown. *See* ECF No. 138.

at 825. Various courts around the country discourage the use of appearance counsel to represent the debtor. *See In re D'Arata*, 587 B.R. at 825-826 (collecting cases).

The "improper use of appearance counsel can 'frustrate the negotiation and communication process among the debtor, the creditors, and the trustee.'" *In re D'Arata*, 587 B.R. at 826 *quoting In re Bradley*, 495 B.R. at 804; *see also In re Jacobson*, 402 B.R. at 365 ("[t]he practice of undisclosed 'appearance attorneys' creates problems—other parties (and the court) are sandbagged, and the [d]ebtor, trustee, other creditors, and counsel cannot readily communicate regarding scheduling or substance."). Additionally, appearance counsel can promote a lack of accountability.

> Appearance attorneys are rarely listed as an attorney of record or co-counsel in a case and this can raise questions as to the legitimacy of their representation of debtors and their authority to speak for, or make admissions on behalf of, the debtor. While many appearance attorneys are competent lawyers, others are '[m]ere drones who give inadequate representation.' If a court cannot determine who has the authority to speak on behalf of a debtor, a sizeable and unnecessary roadblock is thrown up in front of the bankruptcy process. The court overseeing a bankruptcy case must know who speaks for a debtor and whom it can hold accountable for any improprieties in the process.
>
> *In re D'Arata*, 587 B.R. at 826 *quoting In re Bradley*, 495 B.R. at 804 (internal citations omitted).

The use of appearance counsel in bankruptcy counsel implicates several of the Connecticut Rules of Professional Conduct. Rule 1.1 states that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Conn. Rules of Prof'l Conduct 1.1. Rule 5.1 interplays with Rule 1.1 by stating that a "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional

Conduct." Conn. Rules of Prof'l Conduct 5.1. Supervisory counsel violate Rule 5.1 when they fail to ensure that appearance counsel are adequately prepared to address questions at hearings, "thus leaving the Debtor with counsel in name only." *See In re D'Arata*, 587 B.R. at 827.

Rule 1.5 requires that the "scope of the representation, the basis or rate of the fee and expenses for which the client will be responsible, shall be communicated to the client, in writing." Conn. Rules of Prof'l Conduct 1.5.

## DISCUSSION

### I. Attorney Anderson's Violations

Attorney Anderson violated Fed.R.Bankr.P. 2016(b) and § 504 in several ways. First, Attorney's Anderson's initial Form 2030 (ECF No. 12) stated that she would represent the debtor at a meeting of creditors pursuant to 11 U.S.C. § 341 (a "341 Meeting"). However, Attorney Anderson instead paid Attorney Brown to represent the debtor at the 341 Meeting. *See* ECF No. 140; *See also* ECF No. 135 (Attorney Brown's Form 2030 indicated he would represent the debtor at court hearings and 341 Meeting; the form was filed after dismissal of the case). A 341 Meeting, although not presided over—or even attended—by a judge, "may be the most significant event in such a case for an individual debtor. . . ." *In re D'Arata*, 587 B.R. at 822. The debtor's case here was complex. The debtor needed a skilled and diligent attorney to have a good chance of confirming a Chapter 13 plan. Thus, it was important for Attorney Anderson to attend the § 341 meeting to get the case on the right path to confirmation.

Second, Attorney Anderson's original Form 2030 stated that she agreed she would not share compensation with any person who was not an associate of her law firm.

Sharing of compensation directly violates 11 U.S.C. § 504, because such sharing is expressly prohibited with another attorney that is not another “member, partner, or regular associate” of the applicant’s law firm. *See* 11 U.S.C. § 504. Attorney Anderson’s Joint Memorandum of Law argued that both she and Attorney Brown, “explained to the Debtor that Attorney Brown would be sharing some of the retainer paid to Attorney Anderson. The Debtor was also advised that Attorneys Brown and Anderson are not part of the same law firm and maintained separate practices.” ECF No. 134. Nonetheless, Attorney Anderson violated § 504 by sharing compensation with an attorney that is not an associate at her law firm. This conclusion is not affected by the alleged disclosure of the sharing arrangement to the client since the statute requires transparency through the Form 2030 filing with the court. If Attorney Anderson needed another attorney to assist her on the debtor’s case, Attorney Anderson should have required the attorney to: (1) execute a written retention and fee agreement with the debtor, (2) file a notice of appearance and Form 2030 at the start of his or her representation of the debtor, (3) seek compensation directly from the debtor, and (4) create a document outlining the tasks and responsibilities to be completed by each attorney.

Additionally, Attorney Anderson was under a continuing duty to file a supplemental Form 2030 within fifteen (15) days after any payments or agreements not previously disclosed. *See* Fed.R.Bankr.P. 2016(b). Attorney Anderson eventually filed an amended Form 2030 after the case was dismissed when the Court had questioned the payments to Attorney Brown. *See* ECF No. 138. At some undisclosed point between the filing of the first Form 2030 (ECF No. 12) and the amended Form 2030 (ECF No. 138), Attorney Anderson was paid an additional $3,000.00, leading to at least the inference that she did

not comply with Rule 2016(b) by updating her disclosure in a timely manner. Based on this record, the Court will require disgorgement of a portion of Attorney's Anderson's requested fees "for fee sharing in violation of section 504 or for failure to disclose sharing arrangements under Rule 2016." 4 Collier on Bankruptcy ¶ 504.02.

Based on the record here, the Court concludes the amount originally disclosed as having been paid as fees in the initial Form 2030, or $2,500.00, should be allowed along with $310.00 as reimbursement of the filing fee cost. The balance paid to Attorney Anderson that was not timely disclosed in an amended Form 2030 in violation of Rule 2016(b) – or $3,000.00 – is ordered to be disgorged.

II. Attorney Brown's Violations

Attorney Brown represented the debtor during several hearings, as well as during the creditors meeting at the Office of the United States Trustee, without filing a notice of appearance in the debtor's case.[13] Attorney Brown only filed a notice of appearance when directed to do so by the Court. *See* ECF Nos. 72, 79. Troublingly, the debtor paid Attorney Brown for appearances at hearings during a time when no written fee agreement existed, leading to a direct violation of Rule 1.5. *See* Conn. Rules of Prof'l Conduct 1.5; ECF No. 134. In any event, Court intervention should not be necessary for an attorney to file his notice of appearance for his client in a case pending in a federal court so that it appears in the record of the case.

Attorney Brown also failed to file Form 2030 until the Court directed him to do so on April 2, 2018. *See* ECF No. 132. Rule 2016(b) requires that this statement be filed

[13] Since the conduct at issue here, the Court has adopted new local bankruptcy rules. Connecticut Local Bankruptcy Rule 9010-1 requires that an "attorney entering an appearance in a case … shall first file an appearance with the Court. . ."

within fourteen (14) days after the petition for relief, or fifteen (15) days after any further payment or agreement is made that was previously undisclosed. *See* Fed.R.Bankr.P.2016. Without filing any appearance in the record of this case, and without any of the mandatory financial disclosures required by Rule 2016(b), Attorney Brown attended the debtor's 341 Meeting on October 26, 2016, and represented the debtor in five hearings during 2017. Attorney's Brown's unreasonable and unexcused delay in filing Form 2030 Statement of Compensation is a violation of § 329 and Rule 2016(b). "This disclosure obligation is mandatory and not permissive, and it is a continuing one." 3 Collier on Bankruptcy ¶ 329.01. This failure compels this Court to require disgorgement of the entirety of Attorney Brown's fees for his failure to timely disclose his fee arrangement by filing a Form 2030 disclosure. *See* 3 Collier on Bankruptcy ¶ 329.01.

Despite the debtor's affidavit stating that he was "fully satisfied with the legal serviced provided to [him] by Attorneys Anderson and Brown," the Court concludes on this record that Attorney Brown and Attorney Anderson did not adequately represent the debtor. ECF No. 134. The debtor's case was more involved than some Chapter 13 cases due to his ownership of thirteen real properties, and the debtor was entitled to only a limited stay because he filed this case on the heels of two prior bankruptcy dismissals within the preceding twelve months. Neither Attorney Anderson or Attorney Brown prosecuted the debtor's motion to extend the automatic stay (ECF No. 24), which was denied for failure to prosecute resulting in the lapse of the automatic stay, the most valuable legal advantage most debtors enjoy during a bankruptcy case. *See* ECF No. 42.

Attorney Brown's lack of preparation for one hearing and inability to adequately represent the debtor's interests during the case, combined with Attorney Anderson's repeated absence from court hearings, from the 341 Meeting, and her failure to ensure adequate preparation of Attorney Brown (though he should not have appeared at all as he had not complied with basic requirements of the Bankruptcy Code and Bankruptcy Rules or the Rules of Professional Conduct) undoubtedly detracted from effective and efficient management of the debtor's case by the court, the Chapter 13 Trustee and the debtor himself.

## CONCLUSION

For the foregoing reasons, it is hereby

**ORDERED:** That, pursuant to 11 U.S.C. § 329(b)(2), the Brown Fee Application is DENIED; and it is further

**ORDERED:** That, on or before June 28, 2019, Attorney Howard Brown shall disgorge $500.00 to the debtor Brian Schatz; and it is further

**ORDERED:** That, pursuant to 11 U.S.C. § 329(b)(2), the Anderson Fee Application is GRANTED IN PART and Attorney Anderson is allowed attorney' fees in the amount of $2,500.00 and reimbursement of expenses in the amount of $310.00; and it is further

**ORDERED:** That, pursuant to 11 U.S.C. § 329(b)(2), the Anderson Fee Application is DENIED IN PART and Attorney Anderson shall disgorge the amount of $3,000.00, representing the amount paid as set forth in ECF No. 138 that is greater than the amount allowed, on or before June 28, 2019, to the debtor Brian Schatz; and it is further

**ORDERED:** That, on or before June 28, 2019, Attorneys Anderson and Brown shall each file a certification that they have disgorged the funds described in this Order.

Dated on May 6, 2019, at New Haven, Connecticut.

# Straight & Narrow

By Hon. Alan S. Trust and Michael A. Pantzer[1]

## Does Sending or Being an Appearance Attorney Have an 80 Percent Chance of Success?

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The well-known and sometimes controversial philosopher Woody Allen has observed that "Eighty percent of success is showing up."[2] However, this ideology may not apply in the world of bankruptcy law to attorneys who pay others to show up on their behalf or to the show-er uppers — a.k.a. appearance counsel. Many attorneys who handle a high volume of consumer bankruptcy work often find that they have more court hearings than they can cover; this creates a variety of professional and ethical challenges, as the laws of physics[3] but not necessarily technology[4] mean that you cannot be in two places at once. When this occurs, how do lawyers ensure that their clients are properly represented and the attorney's ethical obligations are fulfilled?

This article will address one solution lawyers use: Sending appearance or *per-diem* attorneys (lawyer for a day (LFAD)) to show up and discharge the legal obligations of the attorney of record (ARC). (We are not addressing a different "solution" that has been seen utilized too many times: The ARC failing to appear and telling the client to just tell the judge what is going on.) However, "showing up" by sending an LFAD does not guarantee an 80 percent chance of success in bankruptcy court, either for the sender or sendee. So let's talk about the professional and ethical responsibilities of the LFAD and ARC.

An LFAD is neither an associate nor a partner at the ARC law firm, and has not signed any pleadings under Bankruptcy Rule 9011 (the court's appearance log is not a pleading). The LFAD is often a solo or small-firm practitioner who contracts with multiple firms to represent the ARC's clients at the courthouse[5] and covers multiple so-called "routine" or "standard" appearances on the same day.[6] For example, a debtor's ARC may send an LFAD to represent the debtor at the statutorily mandated § 341 meeting of creditors or defend a motion for relief from stay; creditors' ARCs regularly send LFADs to represent the creditor on motions for relief from stay and oppose confirmations of chapter 13 plans; sometimes, both the debtor and creditor will send LFADs to appear on the same motion.[7] Once in a while, an ARC will strategically send an LFAD to ask for a continuance because the ARC could not be there (read: was not ready) for trial (note: this is a bad idea).

Neither the Bankruptcy Code nor the Federal Rules of Bankruptcy Procedure expressly govern the practice of using LFADs. However, on the debtor's side, the Code and Rules apply to all attorneys who appear on a debtor's behalf at any stage of a case, regardless of whether the fee is passed on to the client. Under § 329(a), any attorney representing a debtor in or in connection with a case is required to file a statement of the compensation paid, or agreed to be paid for the services rendered or to be rendered by that attorney, and the source of the compensation. Rule 2016(b) requires that every attorney for a debtor, whether or not the attorney applies for compensation, file and send to the U.S. Trustee the statement required by § 329, including whether the attorney has shared or agreed to share the compensation with any other entity.[8]

Note to an LFAD: Under Rule 2016, disclosure might be required where an attorney who is not part of the ARC firm represents the debtor, even if only at a meeting of creditors or a single court appearance.[9] Remember, the LFAD represents the debtor — not the debtor's lawyer who sent the LFAD.[10] (Do you want to think about the scene from *My Cousin Vinny* where Mona Lisa Vito defines "disclosha?") So LFADs out there might be asking yourself the following question: Have I ever filed a 2016 statement on a one-appearance matter? (P.S.: Do not get too comfortable, estate-paid professionals — you have § 504 to consider.)

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1 Disclaimer: None of the statements contained in this article constitute official policy of any judge, court, agency, government official or quasi-governmental agency.

2 *In re Jacobson*, 402 B.R. 359, 365 (Bankr. W.D. Wash. 2009), as modified (March 10, 2009). Allen is also quoted as having said, "My one regret in life is that I am not someone else," *available at* brainyquote.com/quotes/quotes/w/woodyallen100352.html (unless otherwise indicated, all links in this article were last visited on May 25, 2017).

3 Not the ones that apply to the time it takes to cook grits, famously pointed out by Vinny Gambino at the trial of his cousin in *My Cousin Vinny* (20th Century Fox 1992), *available at* imdb.com/title/tt0104952/quotes ("Well, perhaps the laws of physics cease to exist on your stove.").

4 Many courts allow telephonic appearances and some have implemented video appearances that make it easier for attorneys to cover large geographical areas and be in two different places at almost the same time.

5 *In re Bradley*, 495 B.R. 747, 757 fn.1 (Bankr. S.D. Tex. 2013) (citing Geraldine Mund, "Paralegals: The Good, the Bad and the Ugly," 2 *Am. Bankr. Inst. L. Rev.* 337, 342 (1994)).

6 *In re Wright*, 290 B.R. 145, 148 (Bankr. C.D. Cal. 2003) (in approximately two hours, LFAD made total of 12 appearances for five ARCs before three judges).

7 *In re Pali Holdings Inc.*, 488 B.R. 841, 848 (Bankr. S.D.N.Y. 2013). Been there done that; hearing ended with a chat basically asking, "If y'all come back, next time would you please know more about the file?"

8 *In re Ortiz*, 496 B.R. 144, 150 (Bankr. S.D.N.Y. 2013) (holding appearance counsel who represented debtor at § 341 meeting must file separate Rule 2016(b) statement).

9 *In re Johnson*, 411 B.R. 296, 301 (Bankr. E.D. La. 2008).

10 *Id.*

In addition to the Bankruptcy Code and Rules governing attorneys' fees, many states' Rules of Professional Conduct govern the sharing of fees with attorneys outside of the law firm.[11] For example, in New York, under Rule 1.5(g)(2) of the Rules of Professional Conduct, "A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless ... (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made ... and the client's agreement is confirmed in writing." So, in discharging your duty to provide competent representation and complying with the Code and Rules, does an ARC need to notify the client and have their consent to send an LFAD?[12]

In addition, both the LFAD and ARC need to ensure that the client is being competently represented at the appearance. Courts and commentators have repeatedly expressed frustration with LFADs for various reasons: They are not fully informed on the case, lack accountability and, in unfortunate cases, provide inadequate representation.[13] In addition, LFADs sometimes impede the efficient administration of the case; it is not uncommon for a creditor's LFAD to appear at a lift-stay hearing only to discover that the debtor is actually not in default on her mortgage or as deeply in default as the motion alleges, or has brought money to court to become current and/or is working on a loan modification with the creditor.[14] (It is not uncommon to hear, "I was not advised of that. May I have an adjournment?") This often results in avoidable delays (often longer than the ARC would have wanted) and the consumption of valuable judicial resources, not to mention a debtor having to miss work to come back.

Some courts have taken steps to regulate or limit the use of LFADs.[15] For example, Hon. Jeff Bohm of the U.S. Bankruptcy Court for the Southern District of Texas banned the use of LFADs in any case over which he presides.[16] In *In re Bradley*, Woody Allen was proven terribly wrong; the last drop (or should we say, deluge) that made the vase spill over involved an ARC who, among other things, failed to meet with his clients before filing a notice of conversion from chapter 13 to 7[17] and related Statements of Financial Affairs, directed his assistant to forge the debtors' signatures on documents filed with the court and repeatedly sent an LFAD to § 341 meetings without the debtors' prior knowledge or consent: Three strikes and you are out!

On the day of the § 341 meeting, while one of the debtors met with the unprepared LFAD, she discovered that the documents were forged and contained errors. Not surprisingly, the meeting was continued; the same LFAD showed up at the next § 341 meeting (yup, unprepared again) to "represent" the debtors; court hearings ensued.

The judge ultimately found that the ARC violated Bankruptcy Rules 9011(b)(1)-(3) and 5005(a)(2) (strike one); violated numerous guidelines for professional conduct related to his duties to his clients, his personal dignity and professional integrity (strike two); and violated Local District Rule 11.2, which requires a fully informed attorney with authority to bind the client to appear at all court proceedings, as well as Bankruptcy Rule 2016 for failing to disclose to the court the fees paid to the LFAD and failing to disclose approximately $500 paid by the debtors for conversion to chapter 7 (strike three).[18] (OK, maybe more than three strikes.) The court imposed sanctions against the ARC, his law firm and the firm's managing partners for his violations.[19]

The court determined that the ARC's conduct was not an outlier and that the use of LFADs in this courtroom had to stop. In addition to these outlined problems related to LFADs, the court stated that an attorney's failure to ever meet a client face-to-face is "an affront to the very profession, as well as the judicial system as a whole."[20] In addition, the court stated that attorneys who send LFADs to § 341 meetings and hearings in their place, particularly those who are unprepared, "leave a bad and lasting impression on their clients. This practice reflects poorly on the debtor's attorney, other attorneys, the bankruptcy process, and the judicial system in general."[21] Ultimately, Judge Bohm invoked his powers under § 105(a) and Bankruptcy Rule 9029(b)[22] to implement a rule in all cases in which he presided that "no attorney shall represent a debtor in a case, whether it is at an actual hearing, a meeting of creditors, or any other proceeding, unless that attorney is enrolled as the attorney-in-charge or practices at the attorney-in-charge's firm as an associate or a partner."[23]

As judges, we have varying views on the utility and propriety of ARCs using LFADs; for Judge Trust, while he tolerates the practice for uncontested matters and frowns on it for contested hearings, it is troubling when he raises an issue, even in an uncontested matter, and the LFAD looks at him as if he/she "was told there would be no questions." He also has a colleague who will ask the LFAD if they know anything about the case, and if the answer is "no," will ask, "Then why do I care about anything you are about to say?"

Judge Bohm's ruling in *Bradley* is a cautionary tale to all ARCs who send LFADs on their behalf. The legal profession is a profession because lawyers are not interchangeable like ketchup packets; clients, especially those who have suffered crippling financial misfortune, want and deserve the comfort of the lawyer they met with and to whom they explained their dilemmas to hold their hands and guide them through the scary process of court hearings and the § 341 meeting (especially if being examined while staring at an FBI poster that warns the debtor of the dangers of lying and bankruptcy

11 *See* Colo. St. Rpc. 1.5(d)(2) and (4).

12 N.Y. St. Rpc. Rule 1.1 cmt. 6A (consent to hire outside lawyer ordinarily not required to cover single court call; however, consent is ordinarily required to hire outside lawyer to argue summary-judgment motion or negotiate key points in transaction).

13 *Jacobson*, 402 B.R. at 365 ("[T]he lack of formal association could raise questions about the informally appearing attorney's authority to speak for, and make judicial admissions on behalf of, the client (the contrary suggestion would not be a promising argument).").

14 The issue here might not be that the LFAD is unprepared, but that the creditor has internal communication problems.

15 *Wright*, 290 B.R. at 156 (fee applicant must demonstrate that client agreed to terms of contract attorney if firm contemplated use at the time it was employed); *In re Bernhardt*, No. 06-10626 MER, 2012 WL 646150, at *8 (Bankr. D. Colo. Feb. 28, 2012) (clients must have previously consented to such representation); *Johnson*, 411 B.R. at 302 ("[A]ttorney ... must obtain that client's consent to allow substitute counsel no less than 48 hours before the hearing or creditor's meeting.").

16 *Bradley*, 495 B.R. 747.

17 The ARC charged debtors $524 for this service, but disclosed the firm collected only $26.

18 *Id.* at 778-90.

19 In support of imposing sanctions, the court reviewed five cases in which the law firm had been subject to sanctions related to its representation of debtors.

20 *Id.* at 805.

21 *Id.*

22 Judges may regulate practice when there is no controlling law, so long as such regulation is consistent with all other law and rules. *See In re Wideman*, 84 B.R. 97 (Bankr. W.D. Tex. 1988).

23 *Bradley*, 495 B.R. at 807.

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## Straight & Narrow: Does an Appearance Attorney Mean Success?

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crimes). Clients do not want to show up in court and ask, "Who's this guy?" See it from the client's side: Would you want to show up for surgery and have someone you never met tell you as they rolled you into the operating room, "Oh Dr. Arch had another procedure to do so she asked me to step in; what seems to be the problem?"

For the most part, ARCs should not have a problem using LFADs, and LFADs should be fine appearing when they are actually familiar with the matter and follow the applicable Code sections and Bankruptcy Rules, Rules of Professional Conduct and Local Rules — but if you are not prepared to do that, stay home and pop open ketchup packets. Woody Allen's famous rule about "showing up" may apply to many facets of life and show business, but ARCs and LFADs should consider shoddily handling legal matters to be in the 20 percent he excluded. abi

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# Consumer Corner

By Elizabeth E. Stephens

## Using Appearance Counsel in Court: Risky Business?

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A bankruptcy judge sitting in New York recently considered one aspect of the continuing discussion regarding the balance among providing professional services to consumer debtors, running a business and charging an affordable fee for the services. In *In re D'Arata*,[1] the court ordered debtor's counsel to disgorge all fees charged to the debtor when debtor's counsel failed to appear personally for the first, as well as the continued, § 341 meeting of creditors. Instead, he employed uninformed "appearance counsels" and failed to amend inaccurate schedules. The court easily concluded that under § 329(b) and Rule 2017(a), debtor's counsel should return the fee to the debtor.[2]

The debtor never met his attorney, as they communicated exclusively online and telephonically. Living on an income of $1,435 per month, it took Vincent D'Arata a year to save $900 to pay counsel's legal fee.[3] The debtor knew that an attorney would represent him at the meeting of creditors, but he did not know who it would be. He was not represented by the counsel he retained; rather, his attorney sent an "appearance counsel."[4]

The *D'Arata* court described "appearance counsel" as "attorneys who appear at proceedings at the request of the debtor's chosen attorney."[5] Other courts have noted that there really is no such thing as "appearance counsel": Once an attorney makes an appearance in a bankruptcy case, he/she has made an appearance for *all* matters and must appear unless excused by the court.[6]

In *In re Bradley*, the court cataloged the inherent problems in employing appearance attorneys. Appearance attorneys are typically not fully informed and might be faced with an unanticipated situation. Further, they lack accountability due to lack of authority to speak on the debtor's behalf, which in turn promotes poor lawyering. Some attorneys never even meet with their clients, and the use of appearance attorneys ultimately results in the improper representation of the client.[7]

Furthermore, as many courts have held, the appearance of debtor's counsel at a § 341 meeting is a core obligation,[8] since it is often the only time that the debtor must appear at the courthouse. It can be intimidating, and having an attorney knowledgeable about bankruptcy and the debtor's case can lead to less anxiety and provides necessary assistance.[9]

### Disgorgement Under § 329(b) and Rule 2017

With the above case law and principles in mind, the judge in *D'Arata* had no problem finding that the debtor's counsel should disgorge his fee to the debtor under § 329 and Rule 2017. Debtor's counsel failed to appear at the § 341 hearings, and the document preparation was also inadequate. Under § 329(b),

> [if] such compensation exceeds the reasonable value of such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to ... (2) the entity that made such payment.[10]

Under Rule 2017(a), after notice and a hearing the court, on motion of a party or its own initiative,

> may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor ... to an attorney for services rendered or to be rendered is excessive.[11]

The court has broad discretion under § 329(b). The *D'Arata* judge found that "the question is whether the [sum] he was paid was excessive for what he accomplished for [the] debtor in this case."[12] Further, the court found that the value of legal services is lessened when an attorney violates ethical standards.[13] The court then found that debtor's counsel violated ethical standards when

1 ____ B.R. ____; 2018 WL 3740680 (Bankr. S.D.N.Y.).
2 *Id.* at *6. *See also* 11 U.S.C. § 329; Fed. R. Bankr. P. 2017(a).
3 *Id.* at *2.
4 *Id.* at *3.
5 *Id.* at *6.
6 *See In re Carvajal*, 365 B.R. 631, 632 (Bankr. E.D. Va. 2007); *see also In re Olson*, 2016 WL 3453341*4 (Bankr. D. Idaho 2016) (counsel appearing at § 341 meeting is representing debtor; more appropriate term is "substitute" counsel).
7 495 B.R. 747, 804-05 (Bankr. S.D. Tex. 2013). *Accord In re Jacobson*, 402 B.R. 359, 365 (Bankr. W.D. Wash. 2009). *In re Johnson*, 411 B.R. 296, 302 (Bankr. E.D. La. 2008). *See generally* Hon. Jim D. Pappas, "Simple Solution = Big Problem," *The Advocate*, October 2013 at 31.
8 *In re Castorena*, 270 B.R. 504, 530 (Bankr. D. Idaho 2001); *accord In re Seare*, 493 B.R. 158, 193 (Bankr. D. Nev. 2013) (representation at § 341 meeting is mandatory to fulfill duty of competence); *In re Johnson*, 411 B.R. 2961, 302 (Bankr. E.D. La. 2008) (unbundling appearance at meeting of creditors is *per se* unreasonable).
9 *In re Harwell*, 439 B.R. 455, 458 (Bankr. W.D. Mich. 2010).
10 11 U.S.C. § 329(b).
11 Fed. R. Bankr. P. 2017(a).
12 *D'Arata*, 2018 WL 37406809 at *5 (citing *In re Nakhuda*, 544 B.R. 886, 903 (9th Cir. 2016)).
13 *Id.* (citing *In re Damon*, 40 B.R. 367, 376 (Bankr. S.D.N.Y. 1984)).

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he failed to obtain debtor's informed consent for the limitation of services.[14] Debtor's counsel also failed to make certain that the appearance counsel was adequately prepared to address the issues raised at the § 341 meetings in violation of ethical rules.[15]

### Disgorgement Under § 329(b) and Rule 2016

The *D'Arata* court mentioned, but did not analyze, the failure to file disclosure statements (1) by debtor's counsel showing fee-sharing and (2) by appearance counsel. However, the failure to file such disclosure statements is perhaps the most dangerous pitfall for both debtor's counsel and appearance counsel. Rule 2016(b) is quite clear and very comprehensive:

> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the [U.S. Trustee] within 14 days after the order for relief ... the statement required by § 329 of the Code, including whether the attorney has shared or agreed to share the compensation with any other entity ... supplemental statement shall be filed and transmitted to the [U.S. Trustee] within 14 days after any payment or agreement not previously disclosed.[16]

Taken together, § 329(a) and Rule 2016(b) require debtor's counsel to exactly disclose the compensation the attorney will receive. Incomplete, inaccurate disclosure is a serious violation and is grounds for sanctions.[17] Full disclosure is an absolute requirement of the bankruptcy process.[18]

Disclosure under Rule 2016(b) is also required of appearance counsel,[19] and that pertains even if counsel will only represent the debtor in the § 341 meeting. If an attorney does not initially know that he/she will employ an appearance counsel, he/she must file an amended disclosure statement within 14 days of an agreement not previously disclosed.[20] Full disclosure is important so that the judge remains an active participant throughout the case.[21]

### Sanctions Pursuant to Rule 9011(b) and § 105(a)

Cases involving appearance counsel often include a discussion of sanctions under Rule 9011(b) and the court's inherent authority to sanction vexatious conduct under § 105(a),[22] because, as in *D'Arata*, they often involve inaccurate, erroneous and/or unsigned schedules. Sanctions could be imposed under Rule 9011(c) for violations of Rule 9011(b). Rule 9011(b) applies to written or oral representations to the court and requires certification that:

> (1) it is not being presented for any improper purpose…;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or ... are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence ... [and] are reasonably based on a lack of information or belief.[23]

Sanctions under Rule 9011(c) might be initiated by a third party by motion,[24] or on the court's own initiative.[25] For motions initiated by a third party, Rule 9011(c)(1)(A) provides a safe harbor requiring a movant to serve the motion or complaint 21 days prior to filing. Further, monetary sanctions might not be awarded on the court's initiative unless the court issues an order to show cause.[26] The safe harbor provision is afforded when a third party initiates sanctions, but there is no equivalence when the court issues an order to show cause. When the court initiates sanctions by an order to show cause, a heightened standard akin to contempt is required.[27] Sanctions imposed under Rule 9011(b) must be limited to what is sufficient for deterrence of further misconduct.[28]

In *In re Bonilla*,[29] debtor's counsel failed to comply with fee-disclosure requirements. At the time of the § 341 meeting, the debtor was represented by appearance counsel. The debtor testified that he paid his attorney in full, contrary to the disclosure statement, which listed zero. He sought to pay the filing fees in installments. The chapter 7 trustee brought a motion for sanctions under Rules 9011(b) and 2016(b), as well as § 329, on a number of grounds, including under Rule 1006(b)(3), because an attorney may not receive payment from the debtor when there is a filing fee balance.

*Bonilla* illustrates the risk in using appearance counsel for the first meeting of creditors. The significance of the case is that it correctly analyzed the various options for imposing sanctions. The court first considered sanctions under Rule 9011(b) and rejected that option because the trustee failed to comply with the safe-harbor provision.[30]

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14 N.Y.R. Prof. Conduct 1.2(c) and 1.4.
15 N.Y.R. Prof. Conduct 5.1(b)(2).
16 Fed. R. Bankr. P. 2016(b).
17 *Bradley*, 495 B.R. at 789; *accord*, *Johnson*, 411 B.R. at 300; *In re Zuniga*, 332 B.R. 760, 783 (Bankr. S.D. Tex. 2005) (inaccurate Rule 2016 disclosure is false statement made to court).
18 *In re Wright*, 290 B.R. 145, 155-56 (Bankr. C.D. Cal. 2003).
19 *In re Futreal*, 75 Collier Bankr. Cas. 2d 1085 (Bankr. W.D. Va. 2016).
20 *Bradley*, 495 B.R. at 789; *In re Greer*, 271 B.R. 426, 433 (Bankr. D. Mass. 2002).
21 *Id.*
22 Fed. R. Bankr. P. 9011. 11 U.S.C. § 105(a).
23 Fed. R. Bankr. P. 9011(b). Violation of Rule 9011(a) is not a basis for sanctions under Rule 9011(c). *See Hale v. U.S. Trustee*, 509 F.3d 1139, 1148 (9th Cir. 2007) (plain text of Rule 9011(c) does not authorize sanctions for violating Rule 9011(a)).
24 Fed. R. Bankr. P. 9011(c)(1)(A).
25 Fed. R. Bankr. P. 9011(c)(1)(B).
26 Fed. R. Bankr. P. 9011(c)(2)(B).
27 *See Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1988); *Nakhuda*, 544 B.R. at 899-900.
28 Fed. R. Bankr. P. 9011(c)(2).
29 573 B.R. 368 (Bankr. D.P.R. 2017).
30 *Id.* at 376-77.

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The court next considered sanctions under § 105(a),[31] which provides in relevant part that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[32] The court noted that § 105(a) gave the court broad authority to exercise its equitable powers, but it does not allow the court to override other Bankruptcy Code sections. Since the case before it was not based on a court order, the *Bonilla* court declined to impose sanctions under § 105(a).

The court eventually ordered the disgorgement of fees under § 329 and Rule 2016.[33] The *Bonilla* court took the same approach to the fee issues as the *D'Arata* court in grounding the disgorgement decision in a specific statute. As the *D'Arata* court demonstrated, the determination of the value of services might be mitigated or aggravated by adherence, or lack thereof, to ethical rules and the performance of professional duties.

### Ethical Pitfalls

Employing appearance counsel is a form of unbundling services. Like unbundling services, it may not be unreasonable *per se*. Nevertheless, as Hon. **Meredith A. Jury** noted in her concurrence in the *Seare* appeal, "an attorney who wishes to limit her or his scope of bankruptcy representation should be mindful of the ethical minefield he or she must navigate."[34]

While numerous state ethical rules might be implicated in the context of appearance counsel, the major ethical pitfall is the failure to obtain the client's informed consent to representation by substitute counsel. Informed consent has two components: (1) providing sufficient information; and (2) obtaining valid consent.[35] At a minimum, the use of substitute counsel must be disclosed in advance of the hearing.[36] Clearly, failure to disclose attendance by appearance counsel deprives the debtor of the ability to consent.[37]

In *Bernhardt*, the court found that under Colorado ethics rules, the client must be informed of the additional lawyer, and the fee arrangement must be fully disclosed and be accompanied by the written consent of both lawyers following the debtor's written consent. The court concluded that an attorney who requires the assistance of a non-employee must obtain (1) the filing of a Rule 2016 disclosure statement and (2) the consent of the client.[38] Further, the court in the *Olson* case noted that appearance counsel "*necessarily agreed to represent [the debtor] as her attorney, not just to appear*."[39] Any appearance by counsel necessarily triggers all the professional responsibilities due from an attorney to a client.[40]

### Conclusion

The *Bradley* court summed it up admirably: "Attorneys are not fungible."[41] Debtors are entitled to representation by the counsel they retain unless they specifically consent to representation by substitute counsel. Consent must be written and informed.

Informed consent requires sufficient disclosure of information and valid consent. Counsel must meet with the client, determine the client's goals, and explain in detail the benefits or disadvantages of appearing with counsel other than the one retained. The client should also be fully informed as to the background and qualifications of the proposed substitute counsel and how he/she will be compensated. Clearly, contact information should be provided. The retainer agreement must be drafted based on the information actually conveyed to the client. Boilerplate provisions are unacceptable, and mere silence on the part of the client may not substitute for consent.

Both lead and substitute counsel are bound by the Bankruptcy Code and Rules to file disclosure statements, which describe in detail the fee agreements. While courts have generally focused on sanctioning debtor's retained counsel for statutory and ethical violations if the use of uninformed appearance counsel is indeed on the rise, courts will undoubtedly begin to focus more on the conduct of appearance counsel.[42]

Wise appearance counsel should review the petition and case notes 48 hours in advance of the hearing to ensure that there is enough time to identify possible issues, and should contact retained counsel and/or the client ahead of the § 341 meeting. Petitions might be freely amended, and a last-minute amendment might obviate a continuance.

Further, appearance counsel should be prepared to offer to amend and cooperate with the trustee if an issue arises during the meeting. Many of the cases imposing sanctions resulted from a trustee's motion for sanctions. Finally, and most obviously, appearance counsel must communicate back to retained counsel regarding the outcome of the § 341 meeting. abi

31 11 U.S.C. § 105(a).
32 573 B.R. at 377.
33 *Id.* at 383-84.
34 *In re Seare*, 575 B.R. 599 (B.A.P. 9th Cir. 2014) ("*Seare II*") (Jury M., concurring).
35 *Seare*, 493 B.R. at 196-97.
36 *In re Bernhardt*, 2012 WL 646150 at *5 (Bankr. D. Colo. 2012).
37 *Id.*
38 *Id. Accord*, *In re Olson*, 2016 WL 3453341 at *6 (Bankr. D. Idaho 2016) (court found that both debtor's counsel and appearance counsel violated § 329(a) and Rule 2016(b)).
39 2016 WL 3453341 at *8 (emphasis in original).
40 *Id.*
41 495 B.R. at 808.
42 *See, e.g., In re Futreal*, 75 Collier Bankr. Cas. 2d 1085 (Bankr. W.D. Va 2016); Roy M. Terry, Jr. and Elizabeth L. Gunn, "*UpRight*: A Cautionary Tale of a National Consumer Law Firm," XXXVII *ABI Journal* 7, 32-33, 63-64, July 2018, *available at* abi.org/abi-journal.

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