AMERICAN BANKRUPTCY INSTITUTE

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Consumer

Access to Justice, Revisited: Getting Chapter 7 Debtor Counsel Paid

Hosted by the Consumer Bankruptcy and Legislation Committees

John R. Bollinger
Boleman Law Firm, P.C.; Hampton, Va.

Prof. Laura Napoli Coordes
Sandra Day O'Connor College of Law, Arizona State University; Phoenix

Adam Herring
Executive Office for U.S. Trustees; Washington, D.C.

Richard D. Nelson
Cohen, Todd, Kite & Stanford, LLC; Cincinnati

CONCURRENT SESSION

2018

Access to Justice Revisited: Getting Chapter 7 Debtor Counsel Paid
Professor Laura N. Coordes

I. Overview: How Did We Get Here?
   a. The Bankruptcy Code and Debtor Attorney Compensation
      i. Chapter 7 debtors' attorneys are not usually entitled to compensation from the estate. *See* 11 U.S.C. § 330; Lamie v. U.S. Tr., 540 U.S. 526 (2004).
      ii. Unpaid, pre-petition attorneys' fees are discharged in a chapter 7.
      iii. Consequently, a debtor's attorney must look to the debtor personally for payment.
      iv. Prior to filing, attorneys may request a retainer or flat fee to ensure compensation.
         1. Example: a pre-petition, "earned on receipt" engagement allows the attorney to be paid in full prior to commencement of the case.
   b. The Debtor's Struggle to Pay Fees
      i. Chapter 7 debtors are often unable to pay the fees in full upfront.
      ii. Fees are more expensive now than pre-BAPCPA:[1]
         1. Average of $1,224 for chapter 7
         2. Average of $3,442 for chapter 13
      iii. In lieu of seeking counsel, debtors may choose to file *pro se* or delay filing until their situation (financial and otherwise) has substantially worsened.
         1. *Pro se* debtors tend to fare worse in bankruptcy, and they put more burden on the bankruptcy system.[2]
      iv. Other debtors may be encouraged by their attorneys to file "fee-only" chapter 13 cases, even though chapter 7 may have otherwise been a better fit.[3]

II. The Need for Alternative Solutions
   a. A Bankruptcy Code amendment addressing these issues is unlikely.[4] Congress hasn't been responsive, even though courts have been pointing out these problems for years.
   b. Chapter 7 debtors' attorneys have devised several practical alternatives to help them get paid.
   c. Bifurcation
      i. How it works[5]

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[1] Pamela Foohey et al., *Life in the Sweatbox*, 94 NOTRE DAME L. REV. (forthcoming 2018).
[2] Post of Lois R. Lupica & Nancy B. Rapoport, *Limited Scope Representation: An Issue of Access to the Bankruptcy System*, CREDIT SLIPS, June 5, 2013, http://www.creditslips.org/creditslips/2013/06/limited-scope-representation-an-issue-of-access.html.
[3] Daniel E. Garrison, *Liberating Debtors from "Sweatbox" and Getting Attorneys Paid*, 37-JUN. AM. BANKR. INST. J. 16 (2018).
[4] *Id.*
[5] *Id.*

1. Attorneys offer low- or $0-down upfront terms and bifurcate the engagement. They split pre- and post-petition services into separate agreements, allocating post-petition payments to post-petition work only.
2. The same attorney represents the debtor both before and after filing, but uses separate agreements to cover each period. The attorney receives payment for post-petition work from the debtor's post-petition earnings or other non-estate assets.

ii. Concerns[6]

1. Despite its growing popularity, bifurcation is not without its drawbacks.
2. Requires more documentation and more disclosure.
3. Attorney takes a risk by accepting installment payments rather than full payment upfront.
4. Attorney must obtain debtor's informed consent.

d. Alternatives to Bifurcation

i. Limited scope representation: attorney provides a subset of legal services[7]

1. Low-cost alternative to filing *pro se*
2. Still need informed consent
3. May be less attractive to attorneys
4. Difficulty of unbundling services

ii. Petition preparers/other services that do not use attorneys

iii. Other solutions that have arisen in different parts of the country

III. Key Cases

a. Lamie v. U.S. Trustee, 540 U.S. 526 (2004)

i. Attorneys providing post-petition services to chapter 7 debtors must be hired by the trustee and approved by the court pursuant to § 327 to be eligible for compensation.

ii. "It appears to be routine for debtors to pay reasonable fees for legal services before filing for bankruptcy to ensure compliance with statutory requirements."

iii. Court reached its conclusion based on the plain language of § 330, determining that § 330's legislative history was confusing and ultimately unhelpful.

b. Gordon v. Hines (In re Hines), 147 F.3d 1185 (9th Cir. 1998)

i. Court explored various options for addressing payment of attorneys in chapter 7 cases:

1. Full payment, in advance, for all work anticipated to be required
   a. Risk that trustee will reject the contract with the attorney and demand a refund of unearned fees

[6] *Id.*

[7] Lupica & Rapoport, *supra* note 2.

2. Minimal advance payment plus agreement that debtor will pay attorney for work done in bankruptcy from debtor's post-bankruptcy earnings
    a. Risk that court will interpret this as giving attorney a pre-petition claim that is dischargeable
3. Create two separate agreements for pre- and post-petition work
    a. Risk of violating ethics rules that preclude attorney who has filed an appearance from withdrawing from representation without leave of court
4. Post-filing reaffirmation by the debtor
    a. Risk of conflict of interest

ii. Claims for lawyers' compensation stemming from post-petition services actually provided to the debtor do not always fall within the automatic stay or discharge provisions
    1. Thus, stay did not apply to attorney's attempts to collect fees earned from legal services provided post-petition, and attorney had undischarged claim in quantum meruit to reasonable compensation for post-petition legal services.

iii. Not all courts agree with *Hines*.

Lamie v. U.S. Trustee, 540 U.S. 526 (2004)

Summary prepared by Professor Laura N. Coordes

In this case, debtor Equipment Services, Inc. ("ESI") retained petitioner John M. Lamie ("Lamie") to represent it in a chapter 11 bankruptcy. After the case was converted to a chapter 7, Lamie continued to provide legal services to ESI, even though the trustee had not authorized him to perform these services under 11 U.S.C. § 327. When Lamie sought compensation under § 330(a)(1) for the time he worked on the chapter 7, the Government objected, arguing that § 330(a)(1) did not provide for the debtor's estate to compensate an attorney who was not authorized under § 327. The bankruptcy court, district court, and Fourth Circuit Court of Appeals all agreed with the Government's interpretation of the Code, and the Supreme Court granted Lamie's petition for certiorari.

The Court, in an opinion by Justice Kennedy, made clear that it would begin by looking at the text of the statute itself, rather than any predecessor statutes or legislative history, to determine congressional intent. While acknowledging that § 330 was awkwardly worded, the Court held that it was not ambiguous and that its plain meaning did not lead to absurd results. Moreover, the Court recognized that in practice, "[i]t appears to be routine for debtors to pay reasonable fees for legal services before filing for bankruptcy to ensure compliance with statutory requirements." Thus, the Court also sided with the Government, holding that § 330(a)(1) does not authorize compensation from estate funds to a chapter 7 debtor's attorney unless the attorney is employed as authorized by § 327.

Although the Court made its decision based on the statute's text and plain meaning, it noted that "the [legislative] history creates more confusion than clarity about the congressional

intent" and urged Congress to amend the statute if in fact the plain text was different from that intent.

Gordon v. Hines (In re Hines), 147 F.3d 1185 (9th Cir. 1998)

Summary prepared by Professor Laura N. Coordes

In this case, debtor Brenda Hines retained Robert Gordon to convert her previously-filed chapter 13 case to a chapter 7 case. Hines was unable to pay Gordon's fee in advance, so the parties entered into a written fee agreement that provided for Hines to make payments in seven monthly installments. The agreement was supported by a promissory note and seven postdated checks. The first check was to be cashed pre-petition, and the remaining six were to be cashed post-petition.

Gordon properly disclosed his fee arrangement to the bankruptcy court and proceeded to represent Hines after her case was converted to chapter 7. Gordon also cashed two of Hines' postdated checks after conversion of her case. Hines subsequently became dissatisfied with Gordon and decided to go back to her former attorney, Harold Shilberg, who had previously represented her in her chapter 13 bankruptcy. Shilberg advised Hines that any attorneys' fees incurred to Gordon before her chapter 7 case commenced were dischargeable. Shilberg also advised Hines to stop payment on the remaining uncashed, postdated checks. In response, Gordon's law firm sent a "past due" notice to Hines, asked that she make a new payment arrangement, and called Hines to follow up. Hines then filed a motion of contempt against Gordon for willful violation of the automatic stay. The bankruptcy court denied Hines' motion, and the Ninth Circuit Bankruptcy Appellate Panel ("BAP") reversed. Gordon then appealed to the Ninth Circuit, which reversed and remanded.

Hines argued that Gordon's post-petition behavior (cashing the postdated checks and delivering the "past due" notice) was an impermissible attempt to collect a prepetition claim

against Hines. Gordon alleged that the postdated checks represented post-petition claims against Hines that were not subject to the automatic stay; alternatively, he argued that his post-petition conduct fell within an exception to the automatic stay for the presentment of negotiable instruments. The court framed the issue as whether Gordon's post-petition rendition of legal services pursuant to a pre-filing fee agreement entitled him to recover the fees for those services directly from Hines.

The Ninth Circuit began its analysis by observing the difficulty chapter 7 debtors' attorneys face in making advance arrangements for the payment of post-petition services. The court observed that attorneys can employ alternative fee arrangements to work around this problem, but noted that each of these alternative arrangements potentially carries its own risks. The court opined that the "optimum solution" would be for Congress to expressly provide for a compensation procedure under the Bankruptcy Code. Lacking such guidance from Congress, the court nevertheless held that it was not the case that all compensation claims stemming from post-petition services fell within the automatic stay or discharge provisions.

Applying this reasoning to the case at hand, the court held that when Hines fired Gordon, he had an undischarged claim for fees he had earned in excess of the money he had already collected. Because Hines had the right to fire Gordon prior to the completion of his services, Gordon could not claim the entire remaining amount that he had originally contracted for. Instead, the court held that Gordon must look to reasonable compensation under a quantum meruit theory of recovery. For these reasons, the Ninth Circuit reversed the BAP's decision and asked the BAP to remand the matter to the bankruptcy court in order to determine reasonable compensation for the services Gordon had actually performed.

ABI WINTER LEADERSHIP CONFERENCE 2018

ACCESS TO JUSTICE REVISITED;

GETTING CHAPTER 7 DEBTOR COUNSEL PAID

Richard D. Nelson

OBSERVATIONS OF A CHAPTER 7 TRUSTEE

1. Introduction-Getting Chapter 7 Debtor Counsel Paid

    a. The general rule in Chapter 7 cases is that if debtor's counsel has not collected fees before filing the bankruptcy petition, the balance of the fees are discharged in the bankruptcy. This is because attorney's fees are not excepted from discharge under §523, and pre-petition legal fee debts are subject to discharge under §727.

    b. The current filing fee for a Chapter 7 debtor is $335. Nearly one in five Chapter 7 debtors does not pay their filing fees in full at the time they file.[1] Many debtors are unable to raise the funds necessary to retain an attorney in full before filing a Chapter 7 case.

    c. Thus, attorneys must reconcile their interests, both economic and in providing adequate representation to a client, with the client's difficulty in paying the attorney's fees before filing the petition.

    d. This practice of requiring payment up-front can be abusively used by bad attorneys and can cause harm to debtors.

2. Case Law

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

        i. This case illustrates the harm a debtor may face with the use of an "appearance counsel." A Chapter 7 debtor, Vincent D'Arata, paid counsel a pre-petition fee of $900. This fee was paid in installments over eight months. The last installment was paid three months before the petition was filed.

        ii. Debtor's retained counsel did not appear at the 341 meeting, instead sending "appearance counsel" in his place, meaning that this attorney appeared on behalf of debtor's retained counsel. There were numerous inaccuracies in the Petition, and appearance counsel was completely

[1] Flynn, Ed. "Bankruptcy by the Numbers," ABI Journal, September 2018.

unfamiliar with the case. The trustee scheduled a second 341 meeting so that counsel could file amended Schedules. At the second meeting, a different appearance counsel attended. The debtor testified, *inter alia*, that: his counsel did not advise him of the appearance counsel; counsel did not obtain his consent in filing the amended Schedules.

iii. Debtor's counsel was ordered to disgorge the $900 fee in its entirety due to the lack of adequate representation. The court also criticized the use of appearance counsel. The court noted that it would be "exceedingly vigilant" on the issue of adequacy of representation and encouraged "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."

b. *In re Grimmett*, No. 16-01094-JDP, 2017 Bankr. LEXIS 1492 (Bankr. D. Idaho June 5, 2017).

i. This case shows aggressive and unethical tactics that unscrupulous attorneys may attempt to use to collect fees from a Chapter 7 debtor. The debtor retained counsel for her Chapter 7 filing. The fee agreement divided the payments for pre-petition and post-petition services. This included $500 for certain, defined pre-petition services and $1,500 for certain, defined post-petition services. Debtor and counsel attended the 341 meeting, debtor attended a personal financial management course, and "the only obstacle between Debtor and discharge was the second filing fee installment."

ii. The debtor made the initial $500 payment, but did not make any payments thereafter. The fee agreement provided that if any payment was missed, the consequences included: a late fee; the entire balance under the agreement would become due; counsel would charge a 36% interest rate on the unpaid balance until paid in full; the case could be dismissed without a discharge; counsel would seek to withdraw from representation, and; counsel would bring a collection action against her.

iii. After the debtor failed to make additional payments, counsel began collection efforts against the debtor, including six emails demanding payment and threatening withdrawal. After these actions were brought to the attention of the court, the UST filed a motion to cancel and disgorge attorney's fees. The court ordered disgorgement because, *inter alia*: the fee agreement allowed counsel to unbundle services and the fee agreement and the collection attempts created a conflict of interest between the debtor and her counsel.

iv. The Bankruptcy Court had issued an Installment Fee Payment Order stating that "until the filing fee is paid in full, the debtor(s) shall not pay any money or transfer any property to his attorney and his attorney shall not accept any money or property from the Debtor(s) for services in connection with this case." The District Court found that the Fee Agreement violated the Installment Fee Payment Order because it did not specify that the filing fee, which was included in the $2,000 total flat fee, would have to be paid before counsel could collect compensation.

v. Finally, the District Court weighed in on the dangers of unbundling services in a case such as this. The court noted the fear of debtor's attorneys having their fees discharged in bankruptcy. But, the Ninth Circuit recognizes a "doctrine of necessity" holding that "all claims for lawyers' compensation stemming from . . . post-petition services actually provided to the debtor really do not fall within the automatic stay provision of Section 362(a)(60 or the discharge provisions of Section 727." The justification for this doctrine is that the right to payment cannot arise until services are actually performed, so the right to payment for services rendered post-petition is not subject to the automatic stay and discharge provisions of the Code.

vi. The rule in Idaho regarding unbundling of services is that an attorney in a Chapter 7 case "will find it exceedingly difficult to show that he properly contracts away any of the fundamental and core obligations such an engagement necessarily imposes." Moreover, "proving competent, intelligent, informed, and knowing consent of the debtor to waive or limit such services inherent to the engagement will be required." Thus, unbundling is not *per se* impermissible, but attorneys who seek to unbundle their services to a debtor should tread carefully.

c. *Cadwell v. Kaufman*, 886 F.3d 1153 (11th Cir. 2018).

i. This case shows the problems with advising a debtor to incur additional debt by paying the attorney fee with a credit card. In this case, the debtor signed entered into a Fee Agreement for $1,700 total: a $250 retainer, a second $250 installment, and four monthly installments of $300. The debtor's counsel instructed the debtor to make each payment by credit card.

ii. The 11th Circuit held that counsel violated 526(a)(4), which states in part that a "debt relief agency shall not advise" a debtor "to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer a fee or charge for services performed as part of preparing for or representing a debtor in a case

under this title." Even if counsel did not have an improper purpose in instructing the debtor to pay with a credit card, the advice was impermissible.

iii. Moving forward, an attorney may not advise a client to pay for Chapter 7 representation with a credit card, but it is permissible for attorneys to "talk fully and candidly about the incurrence of debt in contemplation of filing a bankruptcy case" so long as there is no "affirmative advice to incur more debt."

3. Unbundling

a. Providing "Limited Scope Representation," or "Unbundling," allows an attorney to limit the scope of services to be performed in exchange for the debtor paying a smaller fee. As is demonstrated in the small sample of cases above, many different problems can arise due to the nature of a Chapter 7 cases and fee agreements.

b. For no-asset Chapter 7 cases, mean attorney fees have increased 48%, as high as $1,500 in some jurisdictions.[2]

c. Partially due to the high cost of retaining Chapter 7 counsel, up to 27.1% of cases are filed *pro se*. [3]

d. Debtors filing *pro se* place a burden on the bankruptcy system , and the chances of a *pro se* debtor's case being dismissed are much higher than that of a represented debtor.

e. Thus, there is a growing trend among the ABA, ABI, and various courts unbundling is acceptable and even desirable in Chapter 7 cases as long as ethical rules are followed.[4]

f. The ABI Bankruptcy Ethics Task Force has recognized the necessity of reconciling the need to protect debtors from receiving inadequate and ineffective representation and the interest of providing debtors with the option of limited legal representation in lieu of self-help resources. The Task Force determined that Chapter 7 cases are amenable to attorneys providing "limited services."

4. ABI Best Practices

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[2] "Unbundling Legal Services in Consumer Cases," Columbus Bar Association Committee Meeting Handouts, January 9, 2014, Page 2.
[3] *Id.*
[4] *In re Seare*, 493 B.R. 158, 182 (Bankr. D. Nev. 2013).

a. Providing "Limited Scope Representation," or "Unbundling," allows an attorney to limit the scope of services to be performed Recognizing that limited scope representation will be of fact-specific nature, the ABI Bankruptcy Ethics Task Force issued Best Practices[5] that should, at a minimum, require the following:

   i. The initial client interview and counseling should make clear the expected scope of representation and the expected limited fee.

   ii. Attorneys counseling unsophisticated consumer debtors must be mindful, when gathering initial information to assess a case, to avoid the formation of the debtor's perception that a full-scale attorney-client relationship is being formed.

   iii. An engagement letter and informed consent should be prepared in plain language and carefully reviewed with the debtor. This letter must clearly and conspicuously set forth the services being provided, the services *not* being provided, and the potential consequences of the limited services arrangement.

   iv. The engagement letter must also clearly describe the fee arrangement, including a statement of how fees for additional services will be charged.

   v. All documents and disclosures filed with the bankruptcy court should be done with full candor consistent with the attorney's duty of confidentiality, disclosing the exact nature of the representation and the calculation of fees for services being provided.

   vi. In the event that withdrawal from the unbundled representation becomes warranted, attorneys must be mindful of protecting their client's interests to the fullest extent practical when exiting the case.

   vii. As is the case with all legal representation, if the attorney becomes aware of a legal remedy, problem, or alternative outside of the scope of his or her representation, the client must be promptly informed. The attorney has the further obligation to provide his or her client with a thorough explanation of the potential benefits and harms implicated, in order for the client to make an informed decision as to how to proceed.

5. Conclusion

[5] "Final Report of the American Bankruptcy Institute National Ethics Task Force," April 23, 2013.

a. Limited scope representation can be beneficial for both debtors and attorneys-debtors receive essential assistance in the Chapter 7 process and counsel receives due compensation.

b. Attorneys should be familiar with the local rules in their jurisdiction. For example, the Ninth Circuit may look unfavorably upon unbundling services due to the presence of the "doctrine of necessity" ensuring that Chapter 7 attorney fees are not discharged in the bankruptcy.

c. Even with the growing trend in favor of unbundling, attorneys operating in jurisdictions where it is permitted should be mindful in the execution of bifurcated fee agreements.

d. If a service excluded in the fee agreement is a routine or fundamental aspect of the bankruptcy case, courts will be less likely to find compliance with relevant ethical rules.

e. If services are going to be bifurcated, the client needs to have a knowledgeable understanding of the terms of the agreement and the potential consequences moving forward.

f. There is no access to justice for the client or attorney if the client does not understand the scope of representation.

g. An attorney commencing the representation of an individual debtor in bankruptcy **MUST** carefully draft a retention agreement that clearly requires the debtor to tell the truth in the preparation of the schedules and, in addition, that the debtor **MUST** advise the attorney of any pending or threatened debt related actions involving the debtor.

h. Counsel should also specify in the retention agreement what the agreement does **not** include such as adversarial proceedings brought in the Bankruptcy Court.

i. A system that delays the ability of an honest but unfortunate debtor to receive the statutory right of relief afforded by the Bankruptcy Code simply because of the timing of the payment for that relief is at least partially broken and needs to be fixed.

Thanks to Jesse Knowlden for his assistance. RDN

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

FOR PUBLICATION

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In re:

VINCENT D'ARATA,

Debtor.

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Chapter 7

Case No. 18-10524-shl

MEMORANDUM DECISION REGARDING
THE DISGORGEMENT OF ATTORNEY'S FEES

RAGUES PLLC
Counsel for the Debtor
33 West 19th Street, Fourth Floor
New York, New York 10011
By: Raymond Ragues, Esq.

TOGUT, SEGAL & SEGAL LLP
Counsel for the Chapter 7 Trustee
One Penn Plaza, Suite 3335
New York, New York 10119
By: Albert Togut, Esq.
Neil Berger, Esq.
Amanda C. Glaubach, Esq.

OFFICE OF THE UNITED STATES TRUSTEE
William K. Harrington, United States Trustee for Region 2
201 Varick Street, Suite 1006
New York, New York 10014
By: Andrew D. Velez-Rivera, Esq.

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]

[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].