

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Barney and Rebecca Revier  
David Newberry**

**BK 04-50317  
BK 04-50318**

**Debtors.**

**Chapter 7**

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**UNITED STATES TRUSTEE'S MOTION FOR ORDER  
TO RETURN PAYMENT UNDER 11 U.S.C. § 329(b)**

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COMES NOW the United States Trustee through his undersigned attorney, Sarah J. Wencil, and files this motion for order to return payment under 11 U.S.C. § 329(b).

1. The Court will hold a hearing on this motion on September 8, 2004, at 2:00 p.m. before the United States Bankruptcy Court, Courtroom 2, Fourth Floor, 416 U.S. Courthouse, 515 West First Street, Duluth, MN 55802.

2. Any response to this motion must be filed and delivered not later than September 2, 2004, which is three business days before the time set for the hearing, or filed and served by mail not later than September 26, 2004, which is seven business days before the time set for the hearing.

**UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

3. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a

core proceeding.

4. This motion arises under 11 U. S. C. Section 329(b) and FED.R.BANKR.P. 2017.

This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5.

5. The following Chapter 7 cases were filed in the District of Minnesota, Duluth Division:

<u>Debtors</u>	<u>Case No.</u>	<u>Filing Date</u>	<u>Trustee</u>	<u>Section 341 Date</u>
Revier	04-50317	3/22/04	Larison	May 5, 2004
Newberry	04-50318	3/22/04	Larison	May 5, 2004

6. Arthur M. Albertson is the attorney of record in both cases. Mr. Albertson filed the Rule 2016(b) statement in each of the above named cases to represent the debtors. The summary of the compensation agreed to is as follows:

<u>Debtors</u>	<u>Total Fee</u>	<u>Balance on Filing Date</u>	<u>Exhibit No. (Docket Report)</u>
Revier	\$ 600	\$ 350	1
Newberry	\$ 500	0	2

7. Each Rule 2016(b) statement defines the scope of the representation engaged by the debtors as the following:

5. In return for the above-disclosed fee, I have agreed to render legal service 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;

....

Rule 2016(b) Statement, ¶ 5 (Exhibits 1-2) (emphasis added).

8. On May 6, 2004, the United States Trustee received a complaint from the Chapter 7 Trustee appointed in each of the cases. Ex. 3. The Chapter 7 Trustee notified the Office of the U.S. Trustee that Mr. Albertson failed to appear at both of the above named cases' meeting of creditors on May 5, 2004, but that the clients of Mr. Albertson did appear. Mr. and Mrs. Revier informed the Chapter 7 Trustee that they expected Mr. Albertson to appear at the meeting. Mr. Newberry informed the Chapter 7 Trustee that Mr. Albertson told him that he would not appear at the meeting of creditors.

9. On June 17, 2004, the United States Trustee wrote to Mr. Albertson to request that Mr. Albertson return a fee of \$ 125.00 to the debtors (based on findings in *In re Johnson*, 291 B.R. 462 (Bankr. D. Minn. 2003) (O'Brien, J.)); or provide no later than June 30, 2004, an explanation as to why information provided to the U.S. Trustee or as to why the application of *In re Johnson* to the cases at hand was incorrect. Ex. 4 (without attachments).

10. The United States Trustee received no response from Mr. Albertson.

11. The United States Trustee received no information that missing the meetings was inadvertent, due to reasonably unforeseen circumstances.

12. The failure to appear and represent the above named debtors at the Section 341 meetings violates the terms of Mr. Albertson's compensation in the Rule 2016(b) Statements. Mr. Albertson represented to the Court in the statements that he contracted with the debtors to represent

them at the Section 341 meeting, and he failed to appear.

13. Local Rule 9010-3(e) requires that a debtor's attorney in a Chapter 7 case must represent a client in "all matters or proceedings in the bankruptcy case other than adversary proceedings..." L.R. 9010-3(e)(4). An attorney who wishes to withdraw must make a motion for leave to withdraw. L. R. 9010-3(e)(2).

14. By failing to represent the debtors at the Section 341 meeting, Mr. Albertson violated Local Rule 9010-3(c). Local Rule 9010-3(c) requires that an attorney representing a debtor in a bankruptcy case represent the client through the entire case and not unbundle services.

15. The United States Trustee requests that if a reasonable basis cannot be found for why Mr. Albertson failed to appear at the meeting, the Bankruptcy Court order Mr. Albertson to return the excess fee to the debtors on the basis that the fee is unreasonable under Section 329(b) because Mr. Albertson did not complete the services that he represented that he would provide in exchange for the fees paid by the debtors in the cases.

16. The United States Trustee requests that the fees paid in each case be reduced by \$125.00 and that Mr. Albertson be required to return the difference to the bankruptcy estates.

17. The United States Trustee requests that if the relief requested in the motion is granted, that the Bankruptcy Court order Counsel to submit an affidavit within ten (10) days of any Order issued by the Bankruptcy Court to confirm compliance with the Order and include copies of the checks for returning the payments.

WHEREFORE, the United States Trustee requests that the Bankruptcy Court find that the compensation disclosed in the Rule 2016 Statement in this case is excessive, order Counsel to return

the excessive fees to the estates, and order that Counsel submit proof of the return of those funds.

Dated: July 9, 2004

HABBO G. FOKKENA  
United States Trustee  
Region 12

/s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
Office of U.S. Trustee  
Iowa Atty. No. 14014  
U.S. Courthouse, Suite 1015  
300 South Fourth Street  
Minneapolis, MN 55415  
TELE: (612) 664-5500  
FAX: (612) 664-5516

**United States Bankruptcy Court  
District of Minnesota**

In re BARNEY P REVIER,  
REBECCA L REVIER

Debtors

Case No. \_\_\_\_\_

Chapter 7

**DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR**

1. Pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b), I certify that I am the attorney for the above-named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

For legal services, I have agreed to accept . . . . .	\$ <u>600.00</u>
Prior to the filing of this statement I have received . . . . .	\$ <u>250.00</u>
Balance Due . . . . .	\$ <u>350.00</u>

2. The source of compensation paid to me was:  
 Debtor                       Other (*specify*)

3. The source of compensation to be paid to me is:  
 Debtor                       Other (*specify*)

4.  I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm.  
 I have agreed to share the above-disclosed compensation with a person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation is attached.

5. In return for the above-disclosed fee, I have agreed to render legal service 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]  
    Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

6. By agreement with the debtor(s), the above-disclosed fee does not include the following services:  
Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

**CERTIFICATION**

I certify that the foregoing is a complete statement of any agreement for payment to me for representation of the debtor(s) in this bankruptcy proceeding.

Dated: March 22, 2004

\_\_\_\_\_  
/s/ Arthur M. Albertson  
Arthur M. Albertson  
Albertson Law Office  
101 West Second Street  
Suite 107  
Duluth, MN 55802  
(218) 733-0660

**United States Bankruptcy Court  
District of Minnesota**

In re DAVID R NEWBERRY  
Debtor

Case No. \_\_\_\_\_

Chapter 7

**DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR**

1. Pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b), I certify that I am the attorney for the above-named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

For legal services, I have agreed to accept . . . . .	\$ <u>500.00</u>
Prior to the filing of this statement I have received . . . . .	\$ <u>500.00</u>
Balance Due . . . . .	\$ <u>0.00</u>

2. The source of compensation paid to me was:

Debtor                       Other (*specify*)

3. The source of compensation to be paid to me is:

Debtor                       Other (*specify*)

4.  I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm.

I have agreed to share the above-disclosed compensation with a person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation is attached.

5. In return for the above-disclosed fee, I have agreed to render legal service 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]  
Negotiations with secured creditors to reduce to market value; exemption planning; preparation and filing of reaffirmation agreements and applications as needed; preparation and filing of motions pursuant to 11 USC 522(f)(2)(A) for avoidance of liens on household goods.

6. By agreement with the debtor(s), the above-disclosed fee does not include the following services:  
Representation of the debtors in any dischargeability actions, judicial lien avoidances, relief from stay actions or any other adversary proceeding.

**CERTIFICATION**

I certify that the foregoing is a complete statement of any agreement for payment to me for representation of the debtor(s) in this bankruptcy proceeding.

Dated: March 22, 2004

/s/ Arthur M. Albertson  
Arthur M. Albertson  
Albertson Law Office  
101 West Second Street  
Suite 107  
Duluth, MN 55802  
(218) 733-0660

RECEIVED

**DORRAINE A. LARISON**  
TRUSTEE IN BANKRUPTCY  
1010 West St. Germain, Suite 600  
St. Cloud, MN 56301  
Telephone (320) 252-4414  
Facsimile (320) 252-4482

MAY 11 10 29 AM '04

OFFICE OF THE  
UNITED STATES TRUSTEE

May 6, 2004

SARAH WENCIL  
OFFICE OF THE US TRUSTEE  
1015 US COURTHOUSE  
300 SOUTH FOURTH STREET  
MINNEAPOLIS MN 55415

RE: Barney and Rebecca Revier  
Bky. Case No. 04-50317

David Newberry  
Bky. Case No. 04-50318

Dear Ms. Wencil:

I was assigned a calendar of section 341 meetings in Duluth yesterday. Arthur M. Albertson was the attorney on the above-referenced cases. Mr. Albertson did not appear at the meeting of creditors for either case.

Mr. and Mrs. Revier told me that they had expected Mr. Albertson to appear at the meeting of creditors. For your information, I was running about 30 to 40 minutes behind in the calendar when I called this case. We did conduct the meeting of creditors without Mr. Albertson. I closed this case as a no asset case.

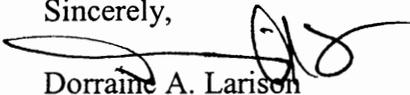
Mr. Newberry testified that Mr. Albertson had informed him that he would not be appearing at the meeting of creditors. I conducted the meeting of creditors without Mr. Albertson. This case remains open as a potential asset case.

It appears that Mr. Albertson simply chose not to appear with the above creditors at the 341 meeting of creditors. The schedules indicate that Mr. Albertson charged Mr. Newberry \$500 and Mr. and Mrs. Revier \$600.

EXHIBIT "3"

Should you have any questions regarding this matter, please feel free to contact me or my paralegal, Nancy Lyke-Hilla.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dorraine A. Larison', with a large, stylized flourish extending to the right.

Dorraine A. Larison  
Trustee in Bankruptcy

GP:1581585 v1



**U.S. Department of Justice**

Office of the United States Trustee

*Districts of Minnesota, North Dakota,  
South Dakota and Iowa*

U.S. Courthouse Suite 1015  
300 South Fourth Street  
Minneapolis, MN 55415

Direct Dial: (612) 664-5504  
Fax: (612) 664-5516  
e-mail: Sarah.J.Wencil@usdoj.gov

June 17, 2004

Arthur M. Albertson  
101 West 2<sup>nd</sup> Street Suite 107  
Duluth, MN 55802

Re: Barney & Rebecca Revier, Bankr. No. 04-50317  
David Newberry, Bankr. No. 04-50318

Dear Mr. Albertson:

The U.S. Trustee is obligated to review attorney employment and fees pursuant to 11 U.S.C. §§ 327-331 of Title 11. Attached is a letter sent to the Office of the U.S. Trustee from the Chapter 7 Trustee in the above named cases, which states that you failed to appear at the Section 341 meeting of creditors.

The Rule 2016(b) Statement (attached) that you filed with the Petitions and Schedules, states that you would provide the debtors with representation at the Section 341 meeting: "5(c) Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;"

It appears to this Office that you contracted to appear with the debtor at the Section 341 meeting as part of the \$ 600 fee and \$ 500.00 fee and that at least the Reviers believed that you would represent them at the Section 341 meeting.

Attached is an opinion from Judge O'Brien issued on April 2, 2003, in *In re Johnson*, which involved similar circumstances. In that case, even though the Rule 2016(b) Statement provided that counsel would appear at the meeting of creditors, counsel produced affidavits from his clients which stated that his clients understood when they entered into the fee arrangement with counsel that the fee did not include an appearance at the Section 341 meeting and that he would not appear (which he did not). Judge O'Brien found the affidavits credible but ordered counsel to return \$ 125.00 of the total fee in each case for failure to appear at the meeting. Judge O'Brien ruled that appearance at the Section 341 meeting is mandatory under Local Rule 9010-3(e) in the District of Minnesota. The fees in that case ranged from \$ 400 to \$ 500 (the Statement on the web cite reflects the fee plus the filing fee, as came out at the hearing).

Given Judge O'Brien's prior opinion, the U.S. Trustee believes from these facts that you should return \$ 125.00 to the debtors. Please provide us with a copy of the cancelled check no later than June 30, 2004, or the U.S. Trustee will file a motion to disgorge this amount with the U.S. Bankruptcy Court and seek such other relief as is necessary. If, in the alternative, you believe that the facts given to this office are incorrect or that this situation does not apply to *In re Johnson*, please submit an explanation by June 30,

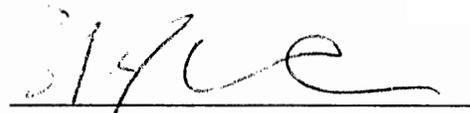
2004, and the U.S. Trustee will consider your position accordingly.

Please call if you have a question or concern about this letter.

Please call if you have a question or concern about this letter.

Sincerely,

HABBO FOKKENA  
UNITED STATES TRUSTEE

A handwritten signature in black ink, appearing to read 'SJC', written over a horizontal line.

Sarah J. Wencil  
Trial Attorney

cc: Dorraine Larison

## VERIFICATION

I, Sarah J. Wencil, trial attorney for the United States Trustee, named in the foregoing pleading declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: July 9, 2004

/s/ Sarah J. Wencil  
Sarah J. Wencil  
Trial Attorney  
IA ATTY NO 14014  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
TELE: (612) 664-5500  
FAX: (612) 664-5516

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Barney and Rebecca Revier  
David Newberry**

**BK 04-50317  
BK 04-50318**

**Debtors.**

**Chapter 7**

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**Memorandum of Law**

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The United States Trustee submits this Memorandum of Law in support of his motion to order the return of payments pursuant to 11 U.S.C. § 329.

**Authority to Reduce Compensation**

Authority to find that this fee is excessive and to order the return of the fees to the Debtor arises under Section 329 of the Bankruptcy Code, which provides:

(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 U.S.C. § 329.

Rule 2017 provides additional requirements:

(a) Payment or Transfer to Attorney Before Order for Relief. On motion by any party in interest or on the court's own initiative, the court after notice and a hearing 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 or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

(b) Payment or Transfer to Attorney After Order for Relief. On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to any attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

FED. R. BANKR. P. 2017.

Besides the authority under Section 329, the Bankruptcy Court has general authority for imposing sanctions. “The United States Supreme Court emphasized in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) that neither Rule 11 nor any statutes displaced the inherent power of the courts to impose sanctions for misconduct or to provide other forms of remedy. *Id.* at 46, 111 S.Ct. at 2133.” *In re Palumbo Family Limited Partnership*, 182 B.R. 447, 477-79 (Bankr. E.D. Vir. 1995). *Chambers* noted that there is an ability to hold a party in contempt for violating an order of the court. *In re Palumbo Family Limited Partnership*, 182 B.R. at 477-79 (citing 111 S.Ct. at 2132) . In *In re Palumbo Family Limited Partnership*, the bankruptcy court noted that civil contempt serves one of two purposes — either to coerce a party into compliance or to

compensate another party for the harm caused. 182 B.R. 447, 477-79 (citing *United States v. United Mine Workers*, 330 U.S. 258, 303, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947); *Eck v. Dodge Chemical Co. (In re Power Recovery Sys., Inc.)*, 950 F.2d 798, 802 (1st Cir.1991); *In re Snider Farms, Inc.*, 125 B.R. 993, 997 (Bankr.N.D.Ind.1991)). “Because civil-contempt sanctions are designed to either compensate or coerce, they ‘may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required.’” *In re Palumbo Family Limited Partnership*, 182 B.R. at 477-79 (quoting *International Union v. Bagwell*, 512 U.S. 821, ----, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994) (footnote omitted)). “As non-Article III tribunals, bankruptcy courts do not have the inherent power to hold a party in civil contempt, but they may do so through the statutory grant of 11 U.S.C. § 105(a).” *In re Palumbo Family Limited Partnership*, 182 B.R. at 477-79 (citing *Burd v. Walters (In re Walters)*, 868 F.2d 665, 669 (4th Cir.1989)).

Section 105 of the Bankruptcy Code grants the Bankruptcy Court broad equitable powers to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a); *In re Palumbo Family Limited Partnership*, 182 B.R. at 477-79. “In other cases where fee applicants have not complied with the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure, the courts have either disallowed or limited compensation.” *In re Palumbo Family Limited Partnership*, 182 B.R. at 477-79 (citing *In re Saturley*, 131 B.R. 509 (Bankr.D.Me.1991); *In re Meyer*, 50 B.R. 3 (Bankr.S.D.Fla.1985)). *In re Palumbo Family Limited Partnership*, the bankruptcy court noted that it should find the least severe sanction to serve the purpose of the rule or statute infringed upon. 182 B.R. at 477-79 (citing *Spallone v. United States*, 493 U.S. 265, 276, 110 S.Ct. 625, 632, 107 L.Ed.2d 644 (1990); *Cabell v.*

*Petty*, 810 F.2d 463, 466 (4th Cir.1987)).

### **Violations by Counsel**

The Rule 2016(b) Statements filed by Counsel in these cases states that the compensation charged includes the charge of representing the debtors at the Section 341 meeting of creditors. Rule 2016(b) requires:

Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code....

FED. R. BANKR. P. 2016(b).

In this case, Counsel failed to provide all of the services that he listed in each of the Rule 2016(b) Statements. Counsel represented in the Statements that he would represent the debtors at the Section 341 meeting and that the fees listed on the Rule 2016(b) Statements included said representation (as is standard practice in the District of Minnesota). Counsel failed to appear at the Section 341 meeting and represent his clients. Therefore, the compensation charged by Counsel in these cases is excessive and unreasonable.

Counsel's conduct also violates Local Rule 9010-3(e). The Local Rule requires the following:

(2) Withdrawal. ... [A]n attorney for a debtor in a chapter 7 or 13 case who wishes to withdraw without substitution of attorney shall make a motion to leave to withdraw.

(4) Effect of Failure to Comply. Until a substitution of attorneys is filled or an order is entered allowing the original attorney to withdraw, the original attorney is the client's attorney of record and the original attorney shall represent the attorney's client in bringing and defending matters or proceedings in the bankruptcy case.... Failure to receive advance payment or guarantee of attorney's fee is not grounds for failure to comply with this subsection.

Local Rule 9010-3(e).

Counsel did not file an application to withdraw as the debtor's counsel, file a substitution of counsel, or otherwise notify the Chapter 7 Trustee or in response to an inquiry the United States Trustee, of a reasonable basis for his absence. Under Local Rule 9010-3(e)(4), Counsel was bound to represent the debtors in "all matters" in the bankruptcy case, which would include the Section 341 meeting. The failure of Counsel to attend the Section 341 meeting with the debtors is a violation of Local Rule 9010-3(e)(4).

In this District, a Bankruptcy Court has held that representation at the Section 341 meeting is mandatory under Local Rule 9010-3(e)(4) and cannot be contracted away. In *In re Johnson*, 291 B.R. 462, 466 (Bankr. D. Minn. 2003) (O'Brien, J.) ("In this District, attendance and representation at the meeting of creditors is mandatory in most circumstances, and may not be avoided by discounting compensation and modifying the Rule 2016(b) statement"). In *Johnson*, the debtor's attorney had a Rule 2016(b) Statement which provided for representation, but counsel obtained affidavits from several of the debtors which provided that the debtors and counsel had agreed that counsel would not appear in exchange for reduced charges. The Court ordered debtor's counsel to return \$ 125.00 to each client, representing the time he would have spent attending the meeting. *Id.* at 472.

As noted in *Johnson*, Minnesota Professional Rules of Conduct permit counsel to limit the objectives of representation, but the Rules are subject to court rules. *Johnson*, 291 B.R. at 471; MINN. PROF. RULE 1.2(b) ("A lawyer may limit the objectives of the representation if the client consents after consultation."). The Professional Rules note that the ability to limit the scope of representation is subject to restriction:

Both lawyer and client have authority and responsibility in the

objectives and means of representation. The client has ultimate authority to determine the purposes to be serviced by legal representation, within the limits imposed by the law and the lawyer's professional obligations.... In questions of means, the layer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the layer's scope of authority in litigation varies among jurisdictions.

MINN. PROF. RULE, Comment on Rule 1.2 (1985). The professional rule contemplates that court rules (such as Local Rule 9010-3) supercede the ability of clients and counsel to enter into agreements limiting services.

Published case law favors requiring attendance at Section 341 meetings, but it is clearly an issue that has split Courts, is dependent on the local rules of the courts, and professional rules, which are unique to each jurisdiction, and therefore, may offer little direction with regard to Local Rule 9010-3(e). See *In re Pocono Truck Wash, Inc.*, 206 B.R. 352 (Bankr. M.D. Pa. 1996) (sanctioning attorney for failing to attend Section 341 meetings, even after compelled to attend by Bankruptcy Court); *Owens v. Doniff (In re Doniff)*, 133 B.R. 351 n. 2 (Bankr. E.D. Va. 1991) (noting in dicta that a local court rule (Local Rule 209), provides for the dismissal for any case where the debtor or counsel fails to appear at a Section 341 meeting); *Hale v. United States Trustee (In re Basham)*, 208 B.R. 926, 932 (Bankr. 9<sup>th</sup> Cir. 1997), aff'd 152 F.3d 924 (9<sup>th</sup> Cir. 1998) (table) (reducing fees of counsel wherein counsel only prepared petition, schedules, and statement and failed to attend Section 341 meeting on basis that debtors failed to pay counsel extra); *In re Hailey*, 21 B.R. 453 (Bankr. N.D. Ga. 1982) (holding that failure of counsel to attend Section 341 meeting merited fee reduction because counsel had contractual duty under professional code, Bankruptcy Rules and orders of the court, even though debtor did not appear at the meeting as well); *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.” and finding that failure to attend meeting, along with several other points of neglect of clients, warranted a hearing to show cause why the attorney should not be enjoined from filing any new cases in the District); *In re Landis*, 2 B.R. 341 (Bankr. S.D. Ohio 1980) (holding that attorney had to return portion of fee for attending Section 341 meeting after he failed to attend but charged client for attendance, but declining to decide issue of whether attendance was mandatory).

*In re Bancroft*, 204 B.R. 548 (Bankr. C.D. Ill. 1997), the Court opined that once a case is filed, counsel should see the case through to the end of the case:

Nor can an attorney apply his professional knowledge and skills without attending the first meeting of creditors. By filing the petition in bankruptcy, the attorney sets in motion a series of events, including the first meeting of creditors, which exposes a layperson to a potential plethora of legal hurdles. The layperson will be exposed to questioning by a professional trustee and attorneys representing creditors. The layperson may be asked to take certain actions. In response, the layperson, acting out of ignorance or feeling that there was no need for an attorney to represent him, may say or do something to his or her detriment. Having initiated the process, an attorney must shepherd the client through it, to its conclusion.

*Bancroft*, 204 B.R. at 551-52 (declining to address whether client can waive the representation because no client agreement was entered into in this case).

In *In re Castorena*, 270 B.R. 504 (Bankr. D. Idaho 2001), the Court held that attorney’s fee has to be reduced from \$ 250.00 to \$ 125.00 because the attorney only provided service of preparing petition, schedules and statement of financial affairs and held that preparation services are subject to a Rule 2016(b) Statement). The Court opined:

The Court shares the concerns voiced in *Bancroft*. There must be a sensitivity to the need of debtors’ attorneys to find time-effective and cost-effective ways to deliver professional services, and a sensitivity to

the changing marketplace. But at the same time, 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. The balance cannot be tipped toward the interest in collecting fees to the detriment of the clients's right to thorough and competent representation. If the proper balance cannot be maintained, the engagement should not be accepted.

*Id.* at 530-31 (*see also* cases discussed on pp. 526-31)

The Bankruptcy Court in the District of Colorado held that appearance at the Section 341 meeting is not mandatory. *In re Merriam*, 250 B.R. 724 (Bankr. D. Colo. 2000). However, in that case, an Administrative Order of the Federal District Court for unbundling of services which had recently been adopted in that District was the authority for counsel to limit services in the bankruptcy court. *Id.* at 730. The Court stated that under the rule: "A debtor's counsel may limit the scope of services to be provided in the main bankruptcy case but must specify the limitation in the Rule 2016 disclosure." *Id.* at 736. The Court stated that attendance was not necessary where there was no showing that the failure to attend violated the attorney's duty to the debtor, that the failure to attend did not drop below the minimum professional standards in the community or result in injury to the debtor. *Id.* at 739; *see also In re Willey*, 6 B.R. 235 (1980) (holding that creditors could not recover a fee for non-attendance at the Section 341 meeting by debtor's counsel and noting that Section 341 meeting was divorced from judicial domain). *But see In re Jones*, 236 B.R. 38, 41 (D. Colo. 1999) (Every debtor must attend a first meeting of creditors under Section 341, and it is to be expected that the debtor will then be represented by her attorney. The time involved in attendance at such a session is not within the control of the attorney. Thus, post-petition services are required in Chapter 7 cases.').

In Minnesota, the standard of practice is for counsel to attend Section 341 meetings, or to

obtain substitute counsel to appear at the Section 341 meetings. Counsel has not provided a reasonable explanation for why he did not attend the meetings of creditors, as represented in the Rule 2016(b) statements.

Appearance at Section 341 meetings is important for debtors and is required under Section 343. The debtors are put under oath, and the testimony is recorded; the meeting, for most debtors, is the only direct contact that the debtors will have with the trustee and with bankruptcy system; the trustees request information at the meeting for the administration of the estate. If counsel limits representation to exclude attendance at those meetings, it is confusing and disruptive for trustees to have to send follow-up letters regarding the meeting. It should not be trustee's burden to advise Counsel of what transpired at the meeting or of what documents or other information that the trustee requested at the meeting.

At most Section 341 meetings, perhaps nothing dramatic will happen. However, the time to determine whether debtors will suffer harm from counsel not attending the meeting or to determine whether any issues arose is not after the meeting has occurred and the injury is done. Counsel should be present at the meeting to guide the debtors through the meeting and through the issues that the trustee may have with the petition, schedules and statements.

An issue not touched on in the Bankruptcy Court decisions, but also of importance, is the burden on the Bankruptcy Court or trustees if debtors are only partially represented in post-petition matters in a bankruptcy case.

For several trustees in Minnesota, they are also attorneys licensed in Minnesota and subject to the Minnesota Professional Rules of Conduct. Minnesota professional rules limit contact between an attorney and a party represented by counsel. Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. A party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the lawyer for the other party, or unless the other party manifests a desire to communicate only through counsel.

MINN. PROF. RULE 4.2. The difficulty in limiting services to exclude representation at the Section 341 meeting, is that those trustees who are also attorneys are prohibited from communicating with the debtors if counsel is not present, particularly if Rule 9010-3(e) provides that counsel is of record.

The waiver this conflict can only be accomplished by debtor's counsel, who must waive the conflict. MINN. PROF. RULE 4.5; *State v. Miller*, 600 N.W.2d 457 (Minn. 1999). There is no indication that the conflict was waived in this case.

Finally, the United States Trustee notes that attendance at the Section 341 meeting should be mandatory because counsel is accountable for the petition, schedule, and statement of financial affairs. Presumably, debtors have little knowledge of exemptions, of the schedule requirements and statement requirements. If counsel prepares those documents, counsel should see the case through and not desert pro se debtors on other participants in the system. Reduced services may be attractive for debtors, but the cost of pro se debtors on the system and on the success of those Debtors' cases once something goes wrong outweighs the benefit of limited representation.

It is unlikely that Counsel or anyone else would argue for limiting services in the context of a hearing before the Bankruptcy Court, such as a Motion for Relief, to defend an Objection to Exemptions, or to defend a Section 707(b) motion. *See In re Johnson*, 291 B.R. at 468 (noting that the Court reprimands or sanctions counsel who fail to appear at relief form stay motions, particularly on

the basis of requiring more money for representation at the hearing).

Assuming that the Bankruptcy Court's would not permit debtor represented by Counsel to appear pro se before the Bankruptcy Court, is there cause under Local Rule 9010-3(e) to state that Section 341 meetings are subject to a different standard? It would appear that meetings are included in the Rule because the Rule clearly designates counsel as "counsel of record" for the case and compels appearances for all "matters" and "proceedings" in the case. Section 341 meetings are established by the Bankruptcy Code and procedures are governed by the Federal Rules of Bankruptcy Procedure. As mandatory and essential to the bankruptcy case, counsel should be required to attend the Section 341 meetings.

### **Conclusion**

The United States Trustee requests that the Bankruptcy Court find that Counsel (1) charged his clients for appearing at the § 341 meeting, but failed to attend those meetings; (2) violated Local Rule 9010-3(e); (3) or in the alternative, made misleading statements in the Rule 2016(b) Statements; and that the Bankruptcy Court order \$ 125.00 to be returned to the debtors in the above named cases and order Counsel to submit an affidavit within ten (10) days of the Court's Order verifying compliance with the Order.

Dated: July 9, 2004

HABBO G. FOKKENA  
United States Trustee  
Region 12

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Sarah J. Wencil  
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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Barney and Rebecca Revier  
David Newberry**

**BK 04-50317  
BK 04-50318**

**Debtors.**

**Chapter 7**

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**CERTIFICATE OF SERVICE**

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The undersigned states under penalty of perjury that she is an employee of the Office of the U.S. Trustee and that on July 9, 2004 she served the United States Trustee Motion for Order to Return Payment under 11 U.S.C. § 329 on the entities listed below by first class mail.

Barney and Rebecca Revier  
PO Box 15202  
Duluth, MN 55815

David Newberry  
3710 West Sixth Street  
Duluth, MN 55807

Dorraine Larison  
1010 West St. Germain Room 600  
St. Cloud, MN 56301

Arthur M. Albertson  
101 West 2<sup>nd</sup> Street Suite 107  
Duluth, MN 55802

  
\_\_\_\_\_  
Office of the U.S. Trustee  
Terri Frazer

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Barney and Rebecca Revier  
David Newberry**

**BK 04-50317  
BK 04-50318**

**Debtors.**

**Chapter 7**

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**ORDER**

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At Duluth, Minnesota, the \_\_\_\_\_ day of \_\_\_\_\_, 2004, the Motion for Order to Return Fees under 11 U.S.C. § 329(b) came before the undersigned. Appearances are noted in the record.

Based on the pleadings, files the arguments of parties, the findings of fact and conclusions of law made on the record, the Court being fully advised of the premises –

**IT IS HEREBY ORDERED:**

1. Arthur M. Albertson, Counsel for the debtors in the above named cases, shall pay to the bankruptcy estates in the above named cases the following amounts:

<u>Debtors</u>	<u>Case No.</u>	<u>Payment</u>
Revier	04-50317	\$125.00
Newberry	04-50318	\$ 125.00

2. Within ten (10) days of this Order, Counsel for the debtors shall file an affidavit verifying his compliance with paragraph 1 of this Order and attaching a copy of the checks or other remittance. The affidavit shall be served upon the Office of the United States Trustee, the Chapter 7 Trustee of the case, and the debtors.

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Chief Judge Gregory F. Kishel

United States Bankruptcy Court