IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re:	Bankruptcy Number 02-40943
AMY WILLIAMSON	Chapter 7
Debtor.	

MEMORANDUM DECISION AND ORDER OVERRULING U.S. TRUSTEE'S OBJECTION TO DISMISSAL AND GRANTING MOTION TO DISGORGE FEES
Docket Number 6

The Debtor's attorney's failure to comply with Fed. R. Bankr P. 1007(a)(1), Local Rule 5005-1(c), and the Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. No. 98-353, § 322, as amended, would not ordinarily warrant resolution by a memorandum decision. However, if the failure appears to be a chosen course of attorney office procedure, and if the defense raised by the attorney is that the Debtor, clerk's office, Judicial Conference of the United States, and the United States trustee are all responsible for the failure, it is appropriate to resolve these issues through a written decision.

The facts relating to the United State's trustee's Objection to Dismissal and Motion to Disgorge Fees (Motion) are essentially undisputed. The evidence shows that Debtor's counsel

engaged in a series of transactions that violated several Bankruptcy Rules, and further indicates that this pattern of misconduct is a matter of routine in his office. For the reason set forth below, the Court overrules the Objection to Dismissal, but grants the Motion requiring Debtor's counsel disgorge all attorney fees collected in this case.

FACTS

Amy Williamson (the Debtor), first contacted the office of attorney Lyle J. Barnes (Barnes) on either December 6 or December 9, 2002, for assistance in filing a Chapter 7 petition.[1] Barnes's secretary told the Debtor to come in that same day without making a specific appointment. The Debtor did as instructed and informed Barnes's secretary that she wished to file a Chapter 7 petition. On this date, the Debtor did not meet with Barnes, any other attorney, or any paralegal in his office. She received no legal advice regarding the differences between filing a Chapter 7 and any other Chapter, what Chapter was most appropriate for her financial circumstances, what debt she should reaffirm or collateral that she should surrender, or which of her debts may be non-dischargeable. The Debtor brought along a list of her creditors and their addresses and was prepared to give the list to her bankruptcy counsel. Inexplicably, she was told this was not necessary at this point in time. Instead, the Debtor was given a packet of information to take home and fill out regarding her financial condition. The Debtor was instructed to make an appointment to return with the completed packet within 10 days. The Debtor also made an initial $300 payment.

[1] The Debtor testified that she first contacted Barnes's office on December 9, but the petition is signed and dated December 6, 2002.

Official Form 1, Voluntary Petition, was filled in and the Debtor signed it on December 6, indicating that she was aware that she could proceed under Chapter 7, 11, 12, or 13, that she understood the relief available under each chapter, and that she elected to proceed under Chapter 7. The petition was also imprinted with Barnes's signature stamp. Barnes had not seen the petition or the Debtor at this point, and his signature apparently was stamped by a secretary who is no longer employed at the firm. Testimony from Barnes's paralegal indicated that this was an accepted method for handling an "emergency" or "bare bones" case filing. According to Barnes's paralegal, the definition of a "bare bones" filing is one in which a debtor is facing an imminent garnishment, foreclosure or repossession. No evidence indicates any of these circumstances applied to the Debtor.

A document entitled "Attorney-Client 'Barebones' Agreement" (Agreement) was also signed by the Debtor dated December 6, 2002. The Agreement described a "barebones" filing and other matters in the following manner:

> It is not a COMPLETE bankruptcy! It involves only a mailing matrix of the creditors' addresses, the Petition and the Statement of Attorney for Debtor. The Bankruptcy Rules require that the rest of the bankruptcy be completed and filed with the Court Clerk within fifteen (15) days following the filing of the "barebones" or your case will be dismissed and the protection lost.
>
> . . .
>
> I declare that I have reviewed all other options available to me including but not limited to Chapter 7, Chapter 9, Chapter 11, Chapter 12, and Chapter 13 Bankruptcy, and state that I am fully informed and satisfied as to the consequences of my decision to file for Bankruptcy under the Chapter __7___.[2]

The Agreement also stressed the importance of completing the required papers within fifteen days.

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[2] Exhibit B.

The petition was filed with the Court on Monday, December 9, along with the Debtor's statement of intention required under 11 U.S.C. § 521(2)(A)[3] to be filed within thirty days after the date of the filing of the petition, and a Fed. R. Bankr. P. 2016(b) disclosure statement required to be filed within fifteen days of the filing of the petition. The Fed. R. Bankr. P. 2016(b) statement indicated a total agreed fee of $410 with $75 already paid. The fee disclosure statement was also imprinted with Barnes's signature stamp. No list of creditors and their addresses (matrix) was filed, nor were any other papers. Unless the petition is accompanied by a schedule of liabilities, a matrix must be filed with the petition under § 521(1), Fed. R. Bankr. P. 1007(a)(1) and Local Rules 2002-1(d) and 5005-1(c). Thus, the only documents filed with the petition were documents that were not required at that time, while the required documents were not filed.

The Debtor completed her worksheets and was prepared to return with them on December 19, 2002, the date of her appointment. Due to circumstances which were unclear from the testimony, however, the Debtor called and informed Barnes's office that she would not be able to keep her appointment on that date. The meeting was re-scheduled for December 23. This new appointment was one day short of the fifteen days deadline required by Fed. R. Bankr. P. 1007(c) within which the Debtor was required to file her schedules and statements. The Debtor was not informed of the potential problems that might result due to delaying the appointment from the 19th until the 23rd, or that filing her papers with the Court on December 24 would be difficult for Barnes's office. On December 23, 14 days after the petition was filed, the Debtor and Barnes met for the first time. The meeting lasted roughly one hour, with Barnes filling in the statement

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[3] All future statutory references are to title 11 of the United States Code unless otherwise indicated.

of financial affairs and schedules from the information on the worksheets completed by the Debtor. The Debtor attached several papers to the worksheets listing the information about her creditors, as instructed, because she ran out of room on the preprinted forms, but all the information was available to Barnes. Once again, the Debtor received no advice regarding the chapter of the Bankruptcy Code under which she should file. She was not informed of any impending deadlines regarding filing the matrix, the statement of financial affairs or the schedules. Nor was the Debtor asked to transport her papers to the clerk's office or informed that any difficulty in filing the papers would occur because it was close to Christmas. At some point during this meeting, Barnes had the Debtor sign a second chapter 7 petition. She did not understand, and was not advised, that this might result in a new and separate bankruptcy case. The Debtor testified that she paid an additional $100 on this visit, and the balance on a later date. Barnes's office issued a receipt for $235 on January 7, 2003, bringing the total paid to $635.

Barnes did not file the list of creditors, the statement of financial affairs, or the schedules, nor did he file a motion to extend the filing deadline. On his own, and without informing the Debtor what he was doing, Barnes elected to file a second chapter 7 petition. On December 26, 2002, Barnes filed the second petition along with the matrix, statements and schedules that had been filled out on December 23 (the second case). Case number 02-41849 was assigned by the Clerk's office. Barnes paid the filing fee himself, and did not collect any additional attorney fees for filing the second case.

The § 341 meeting of creditors (meeting of creditors) in the first case was set for February 5, 2003. Official Form 9, Notice of Commencement of Case, was mailed on January 15, and the Clerk of Court also entered a notation in the docket that the Notice of Commencement of Case

was mailed without a matrix. Therefore none of the Debtor's creditors received notice of her first Chapter 7 filing, the meeting of creditors or the critical deadlines in her case. A case in which no creditors have received notice of the filing so that they may participate in the case causes unreasonable delay that is prejudicial to creditors, and the case should be dismissed.

The meeting of creditors in the second case was set for February 19, and the notice was sent to the matrix. As fate would have it, both cases were assigned to the same chapter 7 panel trustee (Trustee). The Debtor and Barnes appeared at the meeting of creditors in the first case on February 5. The trustee questioned the Debtor, apparently based upon the documents filed in the second case. The Debtor answered all questions and the meeting was concluded without the Debtor's creditors ever being informed of the filing of the case, the meeting of creditors, or case deadlines.

Upon returning home, the Debtor discovered the notice of the meeting of creditors in the second case. She contacted Barnes's office to find out why she had two different dates for the meeting of creditors. Someone at the office indicated that they would contact the Court about the second notice and follow up. The Debtor was not expressly told by Barnes or anyone in his office to go to the February 19 meeting. The Debtor made additional efforts to find out whether there she should plan to attend the second meeting of creditors. Barnes's office, apparently expecting the Court to unravel the duplicate filings, was either non-responsive or unhelpful.

Ultimately, Barnes appeared at the second meeting of creditors but the Debtor did not. The trustee filed Section 341 Meeting Detailed Reports recommending dismissal in each case on February 24. The first case was subject to dismissal pursuant to Local Rule 5005-1(b)(1) for

failure to file statements and schedules. Dismissal of the second case was recommended pursuant to Local Rule 2003-1(a) for failure of the Debtor to attend the meeting of creditors.

The United States trustee filed objections to dismissal in each case and moved for an order requiring Barnes to disgorge fees under § 329, based upon unusual circumstances that resulted in two separate Chapter 7 cases for this Debtor to be open simultaneously. After a hearing on April 17, the Court overruled the objection to dismissal because no creditors had been notified of the existence of this base, but ordered that the case remain open pending issuance of this opinion.

DISCUSSION

The events and circumstances that brought this matter before the court are not unique to this case. The evidence displays a pattern of conduct that violates the Rules of Bankruptcy Procedure as well as the canons of legal ethics. This conduct cannot be tolerated in this or any district. What is especially disturbing is that Barnes has established a set of operating procedures for handling chapter 7 filings that by its very design achieves these negative results.

The Court is dismayed by what appears to be Barnes's routine practice of filing bankruptcy petitions without providing any advice to his client as required by the Bankruptcy Amendments and Federal Judgeship Act of 1984, that requires that consumer debtors be advised of the available forms of relief under Title 11.[4] Barnes, as a matter of routine, permits his signature to be stamped on the petition stating that he has counseled his clients, when in fact he

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[4] *Matter of Egwin*, 291 B.R. 559, 291 B.R. 559 (Bankr. N.D. Ga. 2003) (describing an attorneys obligations under Fed. R. Bankr. P. 9011(b)3) and exhibit B to Official Form 1); *In re Guth*, 2002 WL 31941460 *5 n. 15 (Bankr. D. Idaho 2002) (explaining the rationale behind the requirement to provide the explanation); (*In re Toms*, 229 B.R. 646, (Bankr. E.D. Penn. 1999)(describing the purpose of the attorney certification in Official Form No. 1); *In re Bryant*, 51 B.R. 729, 731 (Bankr. N.D. Miss. 1985) (stating the ways in which the statute requires this information to be conveyed to the debtor).

has not. The petition filed in this case bears the imprint of Barnes signature stamp upon Official Form 1, received as exhibit 3. Exhibit 3 states:

> I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that (s)he may proceed under Chapter 7, 11, 12, or 13 of title 11, U.S.C., and have explained the relief available under each such chapter.

Barnes did not even meet with the Debtor in this case until 14 days after the petition was filed. This constitutes a false statement made in a document filed with the court.[5] Barnes also filed a statement of intentions on his client's behalf before offering any explanation or advice regarding what property she should keep or surrender and what the legal consequences of each action might be.

The compensation disclosure statement filed pursuant to § 329 and Fed. R. Bankr. P. 2016(b) also bears the imprint of Barnes's signature stamp. The fee disclosure statement indicates that Barnes agreed to accept a total of $410 as a fee for representing the Debtor in her bankruptcy case, with $75 paid pre-petition. Barnes testified that he collected $435 as a legal fee. A debtors transactions with counsel are governed by § 329, which states

> (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.

Rule 2016(b) further provides:

> 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

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[5] *In re Merriam*, 250 B.R. 724, 733 (Bankr. D. Colo. 2000) (the purpose of an attorney's signature on a bankruptcy petition is essentially the same as in civil litigation – to certify the accuracy and legal sufficiency of the allegations made). The circumstances in this case raise issues covered by Fed. R. Bankr. P. 9011(c). However, that rule requires notice and a reasonable opportunity to respond to a motion for sanctions under the rule. No separate motion for sanctions is pending before the Court.

> for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity.... A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

The disclosures required by § 329 are mandatory.[6] Barnes submitted no supplemental disclosure regarding fees over and above $410. Collecting a fee in excess of the amount disclosed is a violation of § 329(a) and Fed. R. Bankr. P. 2016(b). An attorney who fails to comply with the disclosure requirements of § 329 and Fed. R. Bankr. P. 2016(b) forfeits any right to receive compensation for services rendered on behalf of the debtor and may be ordered to return fees already received.[7]

The statements and schedules, other than the statement of intention, must be filed with the petition.[8] If a list of all creditors with addresses is filed along with the petition, the schedules and statements may be filed within 15 days after the petition is filed.[9] Barnes filed the petition without the required mailing matrix and without the schedules and statements. Barnes and his paralegal both acknowledged that the practice of filing a petition without a mailing matrix was standard in a "bare bones" case. This practice is in direct violation of Fed. R. Bankr. P. 1007(a)(1) and (c). Beyond that, there is no evidence of an "emergency" that would justify not filing a matrix in this case. The Debtor brought a list of creditors and their addresses with her on her initial visit, but Barnes's office declined to accept it in spite of the Rules of Bankruptcy Procedure.

It appears to the Court that Barnes's practice of filing defective petitions is not reserved for what he might characterize as emergencies, but that it is in fact a standard operating procedure for the filing of even routine voluntary petitions. He justifies this practice by pointing

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6 *In re Smitty's Truck Stop*, 210 B.R. 844, 848 (10th Cir. BAP 1997).

7 *Id.*

8 Fed. R. Bankr. P. 1007(c).

9 *Id.*

first to the Clerk's office requirement, as authorized by Local Rule 5005-1(c), that the matrix be submitted by e-mail attachment, and next by condemning the bankruptcy court miscellaneous fee schedule, issued in accordance with § 28 U.S.C. § 1930(b), for imposing a $20 fee to add creditors. First, Barnes argues that it is impossible to submit the matrix in electronic form because the case number isn't known until the moment of filing and therefore the matrix cannot be submitted in accordance with the rules. This argument is simply silly. Once the case number is known, by checking the docket or viewing the receipt, the matrix can be electronically transmitted. This slight delay is no justification for wholesale disregard for the applicable rules to the detriment of the Debtor and her creditors. Second, Barnes argues that the amendment fee required for adding creditors justifies failure to file a matrix. This is equally unavailing. In a perfect world, a debtor would know the names and addresses of all creditors at the date of filing. The reality of having to add creditors later for a fee does not, however, excuse compliance with the rules designed to protect the rights of both creditors and the debtor.

The Court further condemns Barnes's apparent practice of filing a matrix with only one or two "problem" creditors at the start of the case with an eye toward later amendment. Creditors are entitled to twenty days notice by mail of the meeting of creditors under Fed. R. Bankr. P. 2002(a)(1). A calculated procedure to deprive creditors of this right and to circumvent a debtor's statutory duties under § 521(1) is not in keeping with an attorney's duties to either his client or this Court. Any attorney who engages in such conduct should not practice in this Court. Such conduct, if continued, will result in reference to the District Court's Disciplinary Panel under D.U.Civ.R. 83-1.5.

In addition to the numerous errors generated as a result of Barnes's poor office management and inattentive handling of this case, there is the matter of Barnes's attitude toward his client's plight and his own obligations as an officer of this Court. In his argument, Barnes sought to shift responsibility for the implosion of this case to

- a secretary who no longer works for him,

- the Debtor, for not returning her worksheets timely,
- the United States trustee, for objecting to dismissal and not allowing this case to be automatically dismissed,
- the Clerk of Court for requiring e-mail matrices, and
- the miscellaneous fee schedule, for imposing fees.

It appears to the Court that Barnes has entirely misapprehended the serious nature of the situation he has created for this Debtor, as well as the fact that he is responsible for creating it. It is Barnes's office procedure that result in petitions filed with the Court without the required matrices. It is with Barnes's authorization that petitions are stamped with his signature when he has not counseled his client at all. Barnes's failure to counsel his client about important deadlines in this case is one of the missteps that brought this matter before the Court. To make matter worse, Barnes not only failed to inform his client about a significant development in the case (that the schedules were not going to be timely filed and that the case would be dismissed), he initiated the filing of a second petition on her behalf and without her knowledge or approval.

Barnes's conduct cannot be countenanced by this Court. He has violated his duties to his client and to this Court, and his performance in this case failed to meet minimum acceptable standards of legal practice. A court may reduce or deny an attorney's fee under appropriate circumstances pursuant to § 329(b), which states

> (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.

Because of the wholly unnecessary difficulties and delays visited upon the Debtor by Barnes's mishandling of this case, the Court determines that his services have no reasonable value. Where an attorney's services are performed so poorly and negligently as to be of no value, disgorgement

of the entire fee collected is appropriate.[10] In addition, Barnes collected a greater fee than that disclosed to the Court. Therefore, the Court will order the entire fee of $435 to be disgorged and returned to the Debtor. This case will be dismissed, though the Debtor may take appropriate action to prosecute the second case.

For the reasons set forth above, it is hereby

ORDERED, that the United States Trustee's Objection to Dismissal of the case is **OVERRULED**, and the case is **DISMISSED**, and it is further

ORDERED, that the United States trustee's Motion to Disgorge Fees is **GRANTED**, and it is further

ORDERED, that Attorney Lyle Barnes disgorge fees in the amount of $435.00.

DATED this 7th day of May, 2003.

JUDITH A. BOULDEN
United States Bankruptcy Judge

[10] *In re Richardson*, 14 B.R. 755, 757 (Bankr. E.D. Pa. 1981).

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CERTIFICATE OF SERVICE

This hereby certifies that the foregoing **MEMORANDUM DECISION AND ORDER OVERRULING U.S. TRUSTEE'S OBJECTION TO DISMISSAL AND GRANTING MOTION TO DISGORGE FEES** was sent as indicated below to the following individuals this _____ day of May, 2003.

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_____
Deputy Clerk

Entered on Docket 5/8/03