

Concurrent Session

How to Avoid Problems with the Trustee: Consumer Best Practices

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HOW TO AVOID PROBLEMS WITH THE TRUSTEE- CONSUMER BEST PRACTICES

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While the topic of how to avoid problems with the Trustee is a rather broad, Best Practices is a topic near and dear to my heart. Basic analysis and proper intake are the stepping stones to success for any Bankruptcy practitioner, however, Best Practices are essential to anyone's long term success in this business. The key to such success starts with the basics and causes you to build fundamentally sound skills which lead to an advanced practice.

Best Practices require that we start at the very beginning. Best Practices should begin even before you begin to meet with a client or have an associate meet with a client. Best Practices should begin with the Bankruptcy Code itself.

- **THE BANKRUPTCY CODE.** Read the Bankruptcy Code- Cover to Cover. Read the code with the intention of familiarizing yourself with the code, how it works, how it is inconsistent , how it often make you jump from section to section to answer the simplest of questions. If you get frustrated, done give up, you are not alone. Remember, a bankruptcy practitioner must know how to practice law, not just fill in blanks on a petition and hope that the computer program gets it right. Many practitioners assume that the computer programs are always correct. The computer programs are put together with the assistance of lawyers, but they **CAN NOT SUBSTITUTE** for knowledge of the law.
- **MENTOR YOUR ASSOCIATES.** Associates do not learn how to practice law by osmosis. The practice of law is very complicated. Do not assume that the bright young associate you just hired out of law school even knows where the court house is. They may be book smart, but bankruptcy law is very intricate and very complex. Teach your associates how to do client interviews, how to fill out schedules, how to draft plans. Don't assume that it is the Trustee's job to point out errors. Don't assume that they will just "pick it up". Without solid mentoring, the associates that enter the practice of bankruptcy will just pick up bad habits, which will eventually perpetuate the belief that consumer bankruptcy is just the bad step child of the practice of Federal Law.

Thus, having mastered the Bankruptcy code and the mentoring process, Best Practices then begins the very minute you meet with a client and continues until the case is concluded. The first question that you must ask is "is the person/are the people sitting in front of me candidates for any type of bankruptcy?" This question must be asked and answered every time someone steps into your office. In order to make a determination that someone can be helped by a bankruptcy, you must first begin with the initial case management requirements of BAPCPA.

- **DISCLOSURES.** Pursuant to the requirements of the Code that make an attorney a "debt relief agency", you must provide the potential "assisted person" a copy of the notices mandated by 11 U.S.C. §527(a)(2), 11 U.S.C. §527(b) and 11 U.S.C. §527(a)(1), which mandates that a debt relief agency shall provide the written notice required under §342(b)(1)

Further, be aware that there are inaccurate statements in the disclosures of 11 U.S.C. §527, including the statement that if a debtor chooses to file a bankruptcy, they will have to pay a filing fee. This is obviously not always a true statement.

- **INITIAL CONSULTATION AGREEMENT.** Upon providing the disclosures to a potential client, 11 U.S.C. §528 requires the “debt relief agency” to have the assisted person execute a written contract that explains clearly and conspicuously (a) the services such agency will provide to such assisted person, (b) the fees or charges for such services and the terms of payment, and (c) to provide the assisted person with a copy of the fully executed and completed contract.
 - **BEST PRACTICES SUGGEST THAT YOU** have your client/potential client sign a Consultation Agreement spelling out what will be done and the cost. Even if you are not retaining the potential client, if you meet with the potential client, have the client sign a Consultation Agreement. Your consultation with the client may be at a cost or may be free, but disclose it in the consultation agreement. Disclose what the initial appointment entails and includes. Further, be sure to incorporate a written acknowledgment from the client that they have received the disclosures previously mentioned.
- **NECESSARY DOCUMENTATION FOR TRUSTEES.** Properly providing all needed documentation to a Trustee, before being requested to do so is a significant step in avoiding problems and achieving a practice that uses “ Best Practices”
- **PAYMENT ADVICES AND 11 U.S.C. §521.** It is quite possible that the single most important and the singularly most annoying section of BAPCPA that must be adhered to is 11 U.S.C. 521.. This section requires the Debtor to, unless the Court orders otherwise, file copies with the Court of all payment advices or other evidence of payment received within sixty (60) days before the date of the filing of the Petition by the Debtor from any employer of the Debtor. In the Eastern District of Michigan, Southern Division, we are not required to file the pay stubs with the Court. Instead, we are required to provide them to the applicable Chapter 7 or Chapter 13 Trustee. The failure to properly provide all needed payment advices is one of the most common areas that generates problems and issues with the Trustee’s.
 - Failure to provide the required information is not an option. Specifically, 11U.S.C §521(i)(1) states “the punishment for failing to provide the required documents is automatic dismissal of the case on the 46th day after the date of filing of the petition”. Most employers can provide the information through their Payroll Department or Human Resource Department that is required, in the form of a written report, providing a breakdown on the weekly, bi-weekly, or semi-

monthly payments that the Debtor receives, including the taxes withheld, etc. Many employers now have access for the employee, via the Internet, to obtain a payment history from their Payroll Department or Human Resource Department, and this can be received usually within forty-eight (48) hours of request. Most Social Security payments are in the form of direct deposits and a Social Security benefit statement can be obtained from the Social Security Administration at www.ssa.gov

- **TAX RETURNS.** Tax return issues differ for Chapter 7 and Chapter 13 Trustees. In order for a Chapter 13 Trustee to allow a case to be confirmed and in order for the Court to confirm a case, pursuant to 11 U.S.C. §1308, if the Debtor was required to file an income tax return under applicable non-bankruptcy law, a Debtor must have filed with the appropriate taxing authorities, all tax returns for all taxable periods ending during the four (4) year period ending on the date of the filing of the Petition. In order to verify that the Debtor has filed all tax returns, counsel for the Debtor should complete the IRS Form, 2848, and the equivalent Power of Attorney for the state in which the Debtor resides/resided for the previous four (4) years. In order to contact the Internal Revenue Service, you may reach them at 1-866-860-4259. Once you are on the telephone with them, you can fax the Internal Revenue Service the completed Form 2848 and then order, by telephone or by mail, copies of the tax returns. When you order them by telephone, they can be received as fast as twenty-four (24) to forty-eight (48) hours.

In order to file a Chapter 7 bankruptcy, you must be able to provide the Chapter 7 Trustee, pursuant to 11 U.S.C. §521(e)(2)(A) with a copy of the federal income tax return required under applicable law, or the election of the Debtor, a transcript of such tax return, for the most recent tax year ending immediately before the commencement of the case and for which a federal income tax return was filed. Should you fail to provide this information as required by 11 U.S.C. §521, the Trustee may move to dismiss the case for failure to comply with the Code.

Additional Concern: Be sure to look at the return to see if there is a refund for the previous year, Chapter 7 Trustee's are often claiming that the next years tax refund is property of the estate and that the debtor will have to pay over a pro-rated share of the refund to the Trustee unless the debtor has exempted same. Often tax planning is necessary for clients to help them avoid large refunds and to avoid having to turn a refund over to the Chapter 7 Trustee.

In Chapter 13 cases, tax planning is even more important, often a Chapter 13 debtor is required to remit his or her tax refund to the Trustee for the duration of the Chapter 13 plan. Proper advance planning and adjustment to withholdings can allow the debtor to use those funds to fund the Chapter 13 plan by returning

them to the regular pay check. Thus a case which may appear to be underfunded may truly have viability with proper tax planning.

Best Practices suggests that you either affiliate yourself with a CPA who can provide tax planning advice or at the very least familiarize yourself with the U.S. Master Tax Guide and the formulas for tax computation. By knowing how the tax code works, you can often find funding for Chapter 13 plan when your client would otherwise lose their home.

Counsel for debtor should be proactive when dealing with tax issue. Prepare and file with the IRS the form 2848 immediately upon retaining a client. The transcripts will offer you significant information that you may never have known until it was too late, information such as the existence of tax liens, the filing dates of the returns in order to determine dischargeability, or even the debtor's failure to file a return. This knowledge is especially important in a Chapter 7 case where you might need to wait out a statute of limitations or a time period to allow a tax debt to be dischargeable when it otherwise would not.

Best Practices suggest that you should determine if dischargeability issues exist in both Chapter 13 and Chapter 7 as to outstanding tax liabilities. Familiarize yourself with the discharge requirements as to income taxes outlined in 11 U.S.C. 523 and 507. If you are not aware of when a tax obligation becomes dischargeable, you may have to pay a malpractice claim.

- o **DUE DILIGENCE REQUIREMENT.** Best practices and cooperation with the Trustee starts with day one. As a practitioner you should do all of the Due Diligence investigation of the client's situation before you file the case.

In a Chapter 7 case, in order to avoid the most basic issues and problems Pursuant to 11 U.S.C. §707, you, as counsel for the Debtor, have a duty to investigate the assets of the Debtor. Specifically, you must

- (1) perform a reasonable investigation in the circumstances giving rise to the Petition, pleading, or other motion,
- (2) determine that it is well-grounded in fact, and
- (3) determine that it is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law and does not constitute a "abuse" under 11 U.S.C. 707(b)(1).

Failure to comply with the above requirements subjects the attorney for the Debtor to sanctions pursuant to Rule 9011. Amusingly, the same provision does not apply in Chapter 13.

With regard to a due diligence review, I suggest that the following is the minimum amount of review required in any case:

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1. Obtain recorded Deeds and Mortgages for all real property owned/ previously owned for the last six (6) years by the Debtor.
2. Obtain a copy of the title to all vehicles.
3. Obtain three (3) to six (6) months bank statements for all bank accounts.
4. Perform a Westlaw/Lexis asset search.
5. Obtain tax transcripts for the prior four (4) years.
6. Obtain an Appraisal of the real property owned by the Debtor. This is extremely useful in a Chapter 13 case if you are intending to strip a lien. Providing this documentation to a Trustee may help you avoid an objection to confirmation.
7. Obtain the state equalized value and taxable value for all real property owned by the Debtor.
8. In homes where the Debtor(s) have high income/above medium income, it may be wise to obtain an Appraisal of all household assets.
9. If the Debtor pays child support, contact the applicable Friend of the Court and determine if any arrearage in child support exists.
10. Obtain Proof of Insurance for automobiles and for the home.
11. Obtain purchase dates of the vehicles/PMSI's to determine if the obligation can be crammed down in a Chapter 13. Remember one day can make the difference.
12. Obtain statements for credit cards to determine if non-dischargeability issues may exist.
13. Obtain a Credit Report, a Tri-Merge Report, if possible. This is a blended credit report from all three major credit reporting agencies. Otherwise, each individual can obtain their Credit Report at www.annualcreditreport.com. This Credit Report is available for free, annually.
14. Obtain proof of income for the six (6) months ending the last day of the month before the month that the case will be filed in.
15. Obtain a copy of all payment advices received by the Debtor within the last sixty (60) days and of the Debtor's spouse, significant other and obtain affidavits of support/rent from others providing income to the household.
16. Do a U.S. National Pacer search for any prior cases.
17. Obtain a copy of a Judgment of Divorce, if applicable.

While this is the minimum documentation necessary, each individual case may support the requirement to obtain additional documentation. As such, be aware that the more documentation you obtain, the more you will be able to support your case. I also suggest using a checklist system to aid in making sure all prerequisites are met and none have been accidentally omitted.

○ **BEST PRACTICES AND REAFFIRMATIONS.**

One of the most confusing and contentious areas of the law under Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) arises from the handling of Reaffirmation Agreements.

- I. While I can not speak to what every practitioner must do, I suggest the following in dealing with Reaffirmation Agreements as to what Best Practices requires. Section 524(c) and (d) together lay out a series of requirements that must be followed for a reaffirmation agreement to be enforceable. The requirements include:
- a. 524(c)(1) the agreement must be made before the granting of the discharge
 - b. 524(c)(2) the debtor must have received the disclosures described in 524(k) at or before the time at which the debtor signed the agreement
 - c. 524(c)(3) that the agreement must be filed with the court and if necessary be accompanied by a some kind of representation of the attorney representing the Debtor that
 - i. 524(c)(3)(A) the Debtor was fully informed and the agreement is voluntary
 - ii. 524(c)(3)(B) the agreement does not impose an undue hardship
 - iii. 524(c)(3)(C) the attorney has fully advised the debtor of the consequences of signing the agreement
 - iv. 524(c)(4) and that the Debtor hasn’t rescinded the agreement in the sixty days after signing it.

Best practices suggests that you:

- 1. Do not exclude representation of the Debtor regarding reaffirmations from your engagement/retainer agreement.
- 2. Do not send a client to a hearing on a reaffirmation agreement alone.
- 3. Do not accept the offered reaffirmation from the creditor at face value. Negotiation is acceptable and recommended.
- 4. When Debtor’s counsel receives a reaffirmation agreement counsel should clearly review the document, determine if the expense is affordable pursuant to Schedule J or the clients updated expenses and whether the reaffirmation offer relates to the proper collateral and whether a security interest really exists even if one is claimed.
- 5. Counsel for the debtor should also review the benefits and burdens placed on the debtor if he/she reaffirms a debt.

Best practices **DOES NOT REQUIRE YOU TO SIGN THE REAFFIRMATION AGREEMENT**, but attendance should be mandatory at the reaffirmation hearing.

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Pursuant to 11 USC 524(c)(3), an attorney who has represented a debtor in the negotiation of a reaffirmation agreement must certify that the debtor has entered into the agreement after being fully informed of the terms and has done so voluntarily. The attorney must further certify that the agreement does not impose an undue hardship on the debtor and that the attorney has advised the debtor of the “legal effect and consequences” of the agreement and any default there under.

Whether or not you should sign the agreement is often as much a business practice decision as it is a legal decision that you must make in light of your interpretation of the liability you assume in conjunction with 11 USC 524(c)(3). Particular consideration should be taken as to what level of inquiry you must make to determine that “such agreement does not impose an undue hardship on the debtor or a dependent of the debtor.” 11 USC 524(c)(3)(B). The more detailed the analysis, the better.

Absent clear evidence that the debtor has the ability to maintain the payments on the secured debt, it is usually best to have the debtor sign the portion of the reaffirmation agreement requesting that the matter be set for hearing on a motion. This allows the court to make a determination on the issue of undue hardship.

In my opinion, attendance at a reaffirmation hearing should be mandatory once the matter is set for hearing, but as stated, that proviso does not mean that you have to sign the document if the client wants to reaffirm and you think it would be an undue hardship. In fact, it may be a violation of the canons of professional responsibility to sign a reaffirmation agreement when a debtor can not afford same, regardless of the debtor’s desires. You should be able to relate to the court, why you can not sign the document, and of course allow the debtor to have his or her day in court also.

If you choose not to sign an reaffirmation agreement, REMEMBER, it is only after the court has made a finding that all the required findings under Section 524(c)(6) have been made, that a reaffirmation be determined to be enforceable. Needless to say these hearings, particularly when dealing with a debtor who is not represented by counsel can take considerable time and can create a significant logjam in court. In Detroit, the bench has indicated its significant displeasure with debtors failing to be represented at reaffirmation hearings and the amount of time such a practice takes up. Counsels attendance and representation of his/her client at the hearing will only speed things up.

An excellent case which lays out the concerns and pitfalls of the reaffirmation process is In re Minardi, ----- (N.D. Okla 2009).

○ **BEST PRACTICES AND ASSUMPTION OF A LEASE.**

Lease assumption is essentially the equivalent of a reaffirmation agreement for a lease agreement, but without the same protections of a reaffirmation agreement. Unexpired leases are governed by 11 USC 365, which allows the trustee, subject to approval of the court, to assume or reject an unexpired lease of the debtor. In Chapter 7 proceedings, the debtor elects to assume or reject, subject to the same approval of the court. 11 USC 365(d)(1) requires generally that the debtor must assume or reject the lease within 60 days of the order for relief or the lease is deemed rejected.

Note, unlike 11 USC 524(c)(4), which allows the debtor to rescind a reaffirmation agreement within 60 days of the filing of such an agreement or at any time before discharge, there is no such provision in the Code to reject a previously assumed lease.

Further, unlike a reaffirmation **there is no requirement that a debtor's attorney sign an assumption of lease form** or that a hearing will be scheduled. Many creditors create forms that have approval or signature line for an attorney, but the Code does not require such approval. Best practices suggest that a lease assumption agreement should be thoroughly reviewed by the debtor with counsel prior to entering into same. Just because you don't have a requirement to sign the document, this does not mean that you have no duty to your client. Specifically, you still have a duty to advise your client of the consequences, benefits and detriments of assuming a lease, especially the inability to change their mind after the lease has been assumed.

○ **BEST PRACTICES AND CREDIT COUNSELING.**

11 U.S.C. §109(h) requires credit counseling before anyone is eligible to be a Debtor in a bankruptcy. While not necessarily required by the code, best practices suggests that you should not file a case on the same day you do your client does his or her pre-filing Credit Counseling. Many courts have held that a case filed the same day as the credit counseling is done is a nullity. Other courts have found it to be not timely and have dismissed the case. Other Courts have said that it can be done just before the filing and that there is no timing issue to worry about other than the need to complete it before the filing. There is a split of authority as to all of these issues, which leads us to the conclusion that BEST PRACTICES suggests that Credit Counseling should be done the date prior to the filing of the case.

○ **BEST PRACTICES AND THE CHAPTER 13 PLAN – UNDERSTANDING THE MATH OF THE PLAN.**

I. Best Practices regarding Chapter 13 plan drafting requires the following:

- A. Practitioners must handle Chapter 13 cases in light of the Code as well as local practices, customs, and expectations.
- B. Be prepared. Failure of a practitioner to review and know his or her case prior to the 341 hearing and the Confirmation hearing results in time wasted for the attorney, other attorneys, the Trustee, and the Court.
- C. Local Rules and Administrative Orders. Practitioners should read and know the local rules and administrative orders as they are numerous and quite prominent in the daily practice of bankruptcy in this District. A copy of the Local Rules for the Eastern District of Michigan can be found at: www.mieb.uscourts.gov
- D. Familiarity with the preferences of each Judge and each Trustee's office will serve the practitioner well. Information on each of the Judges may be accessed through the Court's website. Information on each of the Chapter 13 Standing Trustees may be accessed through each Trustee's website. Websites for the Court in the Eastern District of Michigan and the Chapter 13 Trustees for the Eastern District of Michigan are found at:

The Court: www.mieb.uscourts.gov

Trustee David Ruskin: www.det13.com

Trustee Krispen Carroll: www.det13ksc.com

Trustee Tammy Terry: www.det13.net

Trustee Carl Bekofske: www.fling13.com

Trustee Tom McDonald can be reached by phone at (989) 792-6766

II. **CONTENTS OF THE PLAN.**

- A. Pursuant to §1322, the plan must contain the following provisions:
 - a. Submission of all future income necessary to fund the plan,
 - b. Full payment of all claims entitled to priority under §507 unless the Creditor agrees to less favorable treatment (§1322(a)(2)) or the plan provides for all of the debtor's disposable income to be paid to the plan for a period of five (5) years (§1322(a)(4)), and
 - c. Treatment in kind of all claims of the same class.
- 2. The plan may:
 - a. Designate a class of unsecured claims, providing for treatment in kind of all such claims. Unsecured claims, for which a non-filing co-debtor is liable, may be treated differently.
 - b. Modify certain secured or unsecured claims.
 - c. Cure or waive a default.
 - d. Provide for payments to unsecured creditors to be made concurrently with secured creditors.

- e. Provide for ongoing payments and/or for curing any default on any continuous claim.
 - f. Provide for payment of post-petition claims.
 - g. Assume, reject, or assign an executory contract or unexpired lease.
 - h. Provide for payments from property of the estate or of the debtor.
 - i. Vest the property of the estate in the debtor or another entity.
 - j. Allow interest to accrue on any non-dischargeable unsecured claim.
1. The plan may be 36 to 60 months long. In no event shall the plan propose a term of more than 60 months.

III. CONFIRMATION OF THE PLAN.

A. Pursuant to §1325

1. The court shall confirm a plan if it fulfills all the requirements set forth in §1325(a). These requirements include the debtors ability to make the payments set forth in the plan, the appropriate treatment of all claims, the value of the property to be distributed is at least equal to the amount a creditor would receive in a Chapter 7 proceeding, and that the plan is proposed in good faith. These requirements are not all inclusive and practitioners should review §1325 in its entirety.
2. The Trustee or a creditor objects to confirmation of the plan, the court may confirm the plan “over the” Trustee or creditor’s objections upon certain findings. §1325(b).
3. Best Practices requires that any attorney always be prepared to proceed before the Judge.

Truly effective practitioners will prepare cases in advance of 341 and Confirmation hearings and will proactively address outstanding issues and objections. These basic steps will always reduce problems with the Trustee’s office

Jurisdictional rules, practices, and procedures of each Judge you practice before can often be found on the respective Court’s websites. Practitioners are responsible for familiarizing themselves with these details, as well as any local rules and administrative orders from your district.

4. If a plan is well drafted, provides appropriately for all creditors, and complies with the Code and local rules; no objections are filed; and the Trustee approves the Order Confirming Plan (OCP), the case can often be confirmed without hearing pursuant to various local rules and practices for the districts.

IV. CALCULATION OF THE CHAPTER 13 PLAN MATH.

- I. While many attorneys decide to purchase case management software, it is imperative that each attorney practicing in the area of bankruptcy know how to calculate a plan by hand (“hand calc”) and not simply assume a computer is correct after plugging numbers into it. Once a practitioner is comfortable with the steps involved, the practitioner will be better equipped to fully represent clients both pre- and post-confirmation.
- II. Steps to “hand calc” a plan.
 1. Make an initial list of claim (i.e. debt) information and idiosyncrasies of each type of debt. i.e. how to treat the vehicle debt based on when the Debtor financed the vehicle, etc.
 2. Begin the calculation by classifying each claim appropriately (§507, §1322, §365, §1325), identifying missing information (interest rates, FMV, amount to be repaid on unsecured debt, etc.), and determining which debts can be calculated on a straight division basis (claim amount to be paid, divided by number of months of the plan).
 3. Complete the calculation by using an amortization calculator¹ to complete the computation of debts paid interest through the life of the plan (i.e. IRS, vehicles, etc.). Both the straight division and the amortization calculations should be completed for a 36, 48, and 60 month plan. While mortgage arrearages will typically be paid within the first 36 months after confirmation, practitioners should still calculate this debt over a 48 and 60 month repayment period as well.
 4. Add up the total payments for a 36, 48, and 60 month plan. Add in the Trustee fee, assume 6% in order to account for increases in the Trustee fee during the life of the plan. Be aware that a Trustee fee can be as high as 10%.
 5. Anticipate the attorney fees in your calculations for the entire case, not just the fees needed to confirm the case. Anticipating all fees will give the case a greater chance of completing and being discharged.
 6. Determine the amount of funding needed to fund the plan so you don’t draft the plan that is underfunded. Be sure to understand the Order of payment of claims and how a claim is paid. Note that in drafting a plan, understanding the classification of claims and the Order of payment of claims is essential to avoiding problems with the Trustee.

CONCLUSION

Best Practices is not a new concept. It is just a label assigned to the common sense concept best set forth in the cub scouts, BE PREPARED. As a society we have come to accept that laziness and work that would get a grade of “C” is acceptable. As a member of the bar, I have concluded that nothing short of “A” work is acceptable. I hope these suggestions and tips assist you in achieving a practice that strives for excellence.