Concurrent Session

Best Practices in Representing Debtors: From Preparing Papers to Reaffirmation Agreements

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2009
Educational Materials

Best Practices in Representing Debtors: From Preparing Papers to Reaffirmation Agreements

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Overview and Best Practice Pointers

The concept of "best practices" encompasses all phases of a bankruptcy case, from the initial client interview through the entry of a discharge and all the stages in between.

Internal processes and procedures insure consistency and allow for the fewest errors and oversights. Practitioners, solo or in a firm, are encouraged to develop written policies governing bankruptcy case administration.

Topics:

- Preparing the Pleadings, highlights of the "Working Paper".
- Tips: Client expectations and understanding of the process.
- Tips: Compliance with 11 USC 521 and local bankruptcy rules.
- Tips: 11 USC 341 Meeting of Creditors.
- Tips: Chapter 7 reaffirmation agreements.
- Sources, resources, and other helpful hints and links.

  Please note that Schedule C (exemptions, planning, and strategy) and preparation of the 22A or 22C aka "The Means Test" are far too expansive of topics to be included in this discussion, but practitioners are encouraged to utilize available resources to increase their knowledge and understanding of issues particular to these two topics. See the list of resources included herein for additional information.

Preparing the Pleadings

One of the greatest challenge facing bankruptcy attorneys is accurately and completely preparing the Petition, Schedules, Statement of Financial Affairs, and the 22A or 22C. Preparation of the

documents presents many opportunities for error or omission. Understanding the pleadings, requirements, and how to elicit the information from the client is a necessity.

The Task Force on Attorney Discipline's Best Practices Working Group, Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process published the "Working Paper: Best Practices for Debtors' Attorneys", 64 Bus. Law 79 (2008)[1], a working paper on the preparation and completion of a debtor's pleadings.

Our panel identified two issues of ongoing concern that are not addressed in the ABA Best Practices Report, but which seem to cause significant confusion, misunderstanding and potentially unnecessary angst for debtors, their counsel and trustees. Those issues are the proper disclosure and scheduling of:

1) Assets in which the debtor has an interest, but are not estate property within the scope of § 541;

2) Assets titled in the name of the debtor, but in which the debtor has no interest and / or are owned by a 3rd party.

Official forms 6A and 6B provide that the schedules include the "current value of debtor's interest, in property, without deducting any secured claim or exemption" and the Advisory Committee notes state:

> Schedule B - Personal Property. This schedule is to be used for reporting all of the debtor's interests in personal property except leases and executory contracts, which are to be listed on the Schedule of Executory Contracts and Unexpired Leases.

The dilemma for most debtor's and their counsel is how to properly disclose / schedule these interests while, at the same time, not allowing fulfillment of the disclosure duty to give rise to an inference or concession that the items are estate property that may be subject to administration by a trustee.

ASSETS IN WHICH THE DEBTOR MAY HAVE AN INTEREST, BUT ARE NOT ESTATE PROPERTY WITHIN THE SCOPE OF § 541

This category began to arise with increasing frequency shortly after the Patterson v. Shumate decision, in the context of the debtor's interests in ERISA qualified plans. Examples of these types of property interests include: interests in defined benefit and defined contribution ERISA plans; interests in trusts; right to receive student loan proceeds; professional licenses ?

In reviewing, analyzing and determining how to properly disclose / schedule these items, counsel should:

1) Confirm clearly what items of property the debtor owns or has interests in;

[1] The Best Practices article was a follow up to an earlier Report by the Task force, entitled "Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005", 61 Bus. Law. 697 (2006).

2) Determine if the item or interest is or is not property of the estate;

   a. Consult the scope of § 541(a); and

   b. Review the exclusions in § 541(b) & (c);[2]

   c. Review the applicability of the legal title / equitable interest rules in § 541(d).[3]

3) Determine how to schedule the items.

One method of scheduling these assets is to fully describe the asset in the "Description and location of property" box including disclosure of the value of the debtor's interest in the property and adding a statement similar to the one below to explain why the property is not estate property:

> AMERICAN FUNDS SEPP, ACCOUNT # 9876
>
> FMV AS OF 12/31/08 WAS APPROXIMATELY $91,050
>
> SCHEDULED FOR DISCLOSURE PURPOSES ONLY. DEBTORS INTEREST IN PLAN IS EXCLUDED FROM THE ESTATE UNDER SECTION 541(C) (2) AND PATTERSON v. SHUMATE, 112 S. CT. 2242 (1992). DISCLOSURE HEREIN DOES NOT CONSTITUTE AN ADMISSION THAT THIS ITEM IS PROPERTY OF THE ESTATE.

ASSETS TITLED IN THE NAME OF THE DEBTOR, BUT IN WHICH THE DEBTOR HAS NO INTEREST AND / OR ARE OWNED BY A 3RD PARTY

This category includes things such as:

1) Joint bank accounts where the elderly parent added the debtor child "for convenience";

2) The car owned by the minor child but titled in the name of the debtor parent;

3) The real estate transferred by the elderly parent to the adult child who becomes a debtor.

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[2] This is not the same as determining the property is exempt. Exemptions need only be claimed if property comes into the estate; if the property never makes it into the estate, no need to exempt it. "No property can be exempted unless it first falls within the bankruptcy estate." Owen v. Owen, 500 U.S. 305, 308, 111 S. Ct. 1833, 1835 (1991).

[3] Section 541 (d) provides: **"**Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."

The common issue in these fact patterns is legal title is in the name of the financially distressed debtor but the debtor has no equitable interest. At first blush, this issues seems to be dealt with in § 541(d), which provides that property of the estate includes:

> (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section **only to the extent of the debtor's legal title** to such property, **but not to the extent of any equitable interest** in such property that the debtor does not hold.

The legislative statement found in Senate Judiciary Committee report No. 95-989 explains section 541(d) as follows:

> Section 541(d) of the House amendment is derived from section 541(e) of the Senate amendment and reiterates the general principal that *where the debtor holds bare legal title without any equitable interest, that the estate acquires bare legal title without any equitable interest in the property*. [emphasis added].

The United States Supreme Court in United States v Whiting Pools, Inc., 462 US 198, 204; 103 S Ct 2309, 2313; 76 L Ed 2d 515, 520, n.8 (1983) explained that:

> [t]he legislative history indicates that Congress intended to exclude from the estate property of others in which the debtor had some minor interest such as a lien or bare legal title. See 124 Cong. Rec. 32399, 32417 (1978) (remarks of Rep. Edwards); . . . 124 Cong. Rec. 33999 (1978) (remarks of Sen. DeConcini) (§541(d) "reiterates the general principle that where the debtor holds bare legal title without any equitable interest, . . . the estate acquires bare legal title without any equitable interest in the property. Similar statements to the effect that §541(a)(1) does not expand the rights of the debtor in the hands of the estate were made in the context of describing the principle that the estate succeeds to no more or greater causes of action against third parties than those held by the debtor. See H.R. Rep. No. 95-595, pp. 367-368 (1977). [Whiting Pools, Inc. 462 US 198, 204; 103 S Ct 2309, 2313; 76 L Ed 2d 515, 520, n. 8].

"The application of this provision is usually in the context of the imposition of a constructive trust, . . .but it applies as well to equitable interests generally." Software Customizer, Inc. v Bullet Jet Charter (In re Bullet Jet Charter, Inc.), 177 BR 593, 604 (Bankr ND Ill 1995).

However, the precise (or imprecise) line between bare legal title and equitable interest(s) is defined by state property law. Thus, counsel will need to consult relevant state law relating to the applicable theory of joint ownership (gift, trust, joint tenancy or contract), presumptions of shares in jointly owned assets and related matters to determine what interests come into the estate.

A good starting point for Michigan practitioners is "Joint Bank Accounts: One Size Does Not Fit All" in the March 1999 Michigan Bar Journal, pp.292-297 which also sheds some light on the issue in the bank account context.

See also cases from other jurisdictions:

Iowa: Ackley State Bank v. Thielke, 920 F.2d 521 (CA 8 1990), good discussion of the different theories applied to joint ownership, the existence of the "rebuttable presumption rule", the introduction of parol evidence and the sufficiency of the evidence needed to overcome the rebuttable presumption.

Massachusetts: Blanchette v. Blanchette, 362 Mass. 518, 523 & n. 1, 287 N.E.2d 459 (1972)

"If the creation of a joint account is intended as a gift, the gift is completed upon the creation of the account since the usual requirement of delivery when consummating a gift is replaced by the contract with the bank." Desrosiers v. Germain, 12 Mass.App.Ct. 852, 855, 429 N.E.2d 385 (1981),

Bonanno v. Sarmanian, 67 Mass.App.Ct. 1106, 853 N.E.2d 609 (Table) Mass.App.Ct., 2006.

A Recent Practical Example:

While preparing these materials, in October 2009 Mr. Cossitt had a case in which the debtor, a self employed contractor, received an advance of $37,000 from a customer and deposited the sum in his business checking account (no LLC or Inc., just a Schedule C d/b/a) just prior to filing. The total balance in the account at the time of filing was $37,257. His analysis and advice was:

> OPTION 1: File now and disclose:
>
> a. The entire amount in the text of Schedule B-2 along with an explanation as to why the $37,000 was not an interest of the debtor in property other than a possessory interest (earmarked, held in trust, etc.);
>
> b. Enter $257 as the value of the debtor's interest in the account;
>
> c. Disclose $37,000 in SOFA # 14 and cross reference that entry with the text in Schedule B-2
>
> Based on his research, he thinks a filing now will be fine and the customer's funds will not be subject to administration by the Trustee.
>
> OPTION 2: Spend the money on goods, product, materials and subs for the customer's project and file the case later.

See also "Additional Cases and Considerations" section at the end of these materials.

Tip: "Ask it seven ways from Sunday". Remember, the client does not know or fully understand what information you are trying to obtain. Asking the same questions multiple times with different words will usually result in additional information being provided by the client as he or she didn't really understand what you were asking the first time.

Tip: Cross reference the pleadings in your questionnaire. Bankruptcy case management software typically includes a generic questionnaire to be completed by the client during the initial client interview. Developing your own questionnaire, based on the needs and experiences

of your particular practice and client profile, will allow you to essentially cross reference the client's information, resulting in fuller or more complete disclosure on the part of the client.

Tip: It is a good practice to have the client review all the pleadings in final form and for the practitioner to then answer any outstanding questions, make necessary corrections, and enter any additional clarifying information. At that point, the practitioner may wish to utilize a comprehensive final questionnaire, similar to one a Chapter 7 Trustee may use at the 341, to confirm that all assets and all liabilities have been fully disclosed. This is just one more way to "ask it seven ways from Sunday."

Tip: In Chapter 13 cases, at the time the Chapter 13 Plan is written, and signed by the client, practitioners should consider providing an outline of responsibilities to the client, to be acknowledged by the client independent of the Chapter 13 Plan. This outline should include, at the minimum:

- The plan payment amount,
- The payment method (certified funds),
- The payment address, and
- The payment start date.

Other client responsibilities practitioners may wish to highlight could include: requirement to file tax returns, requirements to remit refunds to the Chapter 13 Trustee, how to determine if debts are "direct by debtor" or paid by the Trustee, continuing to pay current utility bills and property taxes, etc.

Setting the Course: Client Expectations and Understanding of the Process

Typically clients are not knowledgeable, or possess misconceptions, of the bankruptcy process when they first meet with an attorney. The knowledge they may have, correct or incorrect, has been obtained from family, friends, the internet, or other outside sources and is often times a hurdle the practitioner must overcome by educating the client about bankruptcy and how it applies to the client's specific situation.

In addition to the method by which a practitioner addresses these issues, there are several resources available to debtors to assist the attorney in educating the debtor and providing the debtor with a general, but accurate, framework of the bankruptcy process.

The Administrative Office of the U.S. Courts offers an on-line informational video service on basic bankruptcy matters, which can be accessed at: http://www.uscourts.gov/video/bankruptcybasics/bankruptcyBasics.cfm. Debtors may also access written materials on the site at http://www.uscourts.gov/bankruptcycourts/bankruptcybasics.html. These resources may also be accessed through links on the court websites for the Eastern and Western Districts of Michigan.

In the Eastern and Western Districts of Michigan, practitioners may also refer Chapter 13 debtors to the following resources:

Debtor handbooks:

- Krispen S. Carroll, Standing Chapter 13 Trustee, ED MI (Detroit): http://www.det13ksc.com/pdfs/chpt13_handbook.pdf.
- Brett N. Rodgers, Standing Chapter 13 Trustee, WD MI: http://www.rodgersch13.com/PDF%20Subfile/revised%20YELLOW%20BOOK%203-9-07.pdf.
- Tammy L. Terry, Standing Chapter 13 Trustee, ED MI (Detroit): http://www.det13.net/PDF/DebtorHandbook.pdf.

Note: This list is a sample only and is not exhaustive. Please check with each Chapter 13 Trustee's office for handbooks and other resources they may provide directly to debtors.

Debtor Orientation Program: Detroit, Monday mornings, starting at 9:30 am and repeating every hour thereafter until early afternoon, in Room D of the 3rd floor meeting rooms at 211 West Fort, Detroit. The orientation is offered by the Office of the Standing Chapter 13 Trustee David Wm. Ruskin, ED MI (Detroit). "The purpose of the Orientation is to help debtors better understand the Chapter 13 process (not to provide legal advice) [and] will consist of a 30-45 minute PowerPoint presentation followed by Q & A" (www.det13.com). A handout of the slide presentation is also available at the orientation.

Articles for Debtors: Carl Bekofske, Standing Chapter 13 Trustee, ED MI (Flint): http://www.flint13.com/index.php?option=com_content&view=category&id=20:debtor-abcs&Itemid=77&layout=default.

Tip: Remember, when the final goal is obtaining a discharge, an educated client, armed with accurate information and understanding, has the highest opportunity to succeed.

Compliance: 11 USC 521 and LBRs

Pursuant to 11 USC 521(a)(1)(iv), as modified by local bankruptcy rules[4], at the minimum debtors must provide both Chapter 7 and Chapter 13 trustees with their last sixty (60) days of paystubs or other income. The debtors must also provide the Chapter 7 trustee with the last tax return filed[5] and, in the case of Chapter 13, debtors must provide their last two (2) years of tax returns[6]. Failure to do so may result in dismissal of their case. There are also deadlines, longer than those which are set forth in the Code, and additional document requirements depending on the chapter and the trustee.

Understanding the objective of the "paystubs" requirement will assist the practitioner in determining how to best comply with that requirement. In its most basic form, the requirement demonstrates the recent historical income of the debtors and sets the basis for the figures asserted

[4] To protect against public disclosure of personally identifying information such as social security numbers.

[5] 11 USC 521(e)(2).

[6] Joint memo dated October 3, 2003 issued by the Chapter 13 Trustees (Detroit). See http://www.det13.com/PDF/341docs.pdf

on Schedule I. Keeping this objective in mind, for every source of income set forth on Schedule I, proof must be provided.

Tips on "priority of proof": In its best form, proof is established by 3rd party direct documents, such as paystubs or other stubs (i.e. pension/unemployment/disability/etc.) produced by the payor. The next best form is proof established by 3rd party indirect documents, such as bank statements, supplemented by an award letter, or profit and loss statements prepared by an accountant or other financial professional. These preferred forms of proof are followed by affidavits of 3rd parties and then affidavits of the debtor. Practitioners should use affidavits[7] to establish proof of income that cannot be established by any other method, such as household contributions, resident and non-resident family support, rent from a boarder or tenant, payments of debtor's financial obligations by another party, etc.

As a practical matter, practitioners should also use affidavits to establish the non-existence of income or household contribution. In the event debtor or spouse have not had income or paystubs in the sixty days prior, an affidavit should be filed to that effect. Similarly, if another adult party lives in the household but does not contribute, it may be best to file an affidavit to that effect.

Practitioners are well advised to develop internal processes and procedures to insure consistency and compliance with the document requirements. For the specific document deadlines of Chapter 13 trustees, please refer to each trustee's website. Links to each trustee can be found on the courts' websites.

Tip: The practitioner should make every effort to anticipate the questions the Trustee may have regarding the income listed on Schedule I (and perhaps on the 22A or 22C) and submit appropriate documentation in support.

Tip: As practitioners should be in possession of the required paystubs and tax returns at the time the pleadings are drafted, sending the required documents to the Trustee immediately upon case assignment will insure compliance with the deadlines established by each trustee's office.

Tip: Document requirements in the Eastern District of Michigan are established pursuant to local bankruptcy rule and it is recommended that practitioners utilize a checklist, including all the items set forth in the rule, to insure all documents are obtained from the client prior to filing the case. For a complete list of documents required, see LBR 2003-2 (EDMI).

Tip: It is Ms. Lassner's policy to provide the Chapter 7 Trustee with all documents set forth in LBR 2003-2 (EDMI) at the time she completes her compliance. This allows the trustee the opportunity to review the documents prior to the hearing and determine what, if any, issues exist and what additional information the trustee may require to conclude the hearing. This policy

[7] This reference is not all inclusive. Affidavits may also be used to establish the amount, frequency, and duration of unique expenses set forth on Schedule J, such as private in-home child care, debtor's rental of a private party's vehicle or other item, etc.

also shortens her client's hearings and decreases the likelihood that she and her clients will have to return "for control purposes" or attend a 2004 exam[8].

341 Meeting of Creditors

Prior to the Meeting:

- Know your Trustee and his or her preferences, practices, and target issues,
- Arrive prior to the Meeting,
- Meet with your client,
- Complete any questionnaires or supplemental statements required by the Trustee with the client,
- Review additional documentation provided by client,
- Outline the hearing process for the client,
- Explain to your client what the Trustee's job/role/objective is.

During the Meeting:

- Hand the completed questionnaire or supplemental statement, if any, to the Trustee,
- Advise the Trustee of any changes to the pleadings that have not already been amended,
- Advise the Trustee of any amendments made in the days just prior to the hearing,
- Advise the Trustee of any additional documents provided by the client,
- Hand over additional documents at the hearing, to the extent that you have had a chance to fully review and analyze, otherwise, advise the Trustee that you will forward copies to his or her office following the hearing,
- Preemptively address issues the Trustee has advised you of prior to the hearing by taking testimony of your client,
- Note issues the Trustee questions your client about, to determine if further investigation/inquiry/proof of the information provided in the pleadings may be necessary.

Following the Meeting:

- Explain "what to expect" to the client, will a discharge be issued, will there be objections to confirmation, will the client have to come in for an appointment to amend a pleading, etc.,
- Give the client the next step: confirmation, hearings, complete debtor education, etc.,
- Follow up with the client in writing.

Tip: Counsel's objective is to have the Meeting held and concluded. It is only upon conclusion of the 341 that the case can move to the next stage: discharge or confirmation. Therefore, the foregoing process should be adapted to individual practice with that single objective in mind.

[8] FRBP 2004

Tip: In a Chapter 7, even if the 341 is concluded, if the Trustee holds the case open beyond the discharge date, additional services may be necessary.

Chapter 7: Reaffirmation Agreements

Upon request of the judges of the Eastern District of Michigan, a committee was formed to draft a best practices paper regarding reaffirmation agreements. The paper has been completed and the final draft has been submitted to the Bench as well as the State Bar of Michigan Ethics Committee. The paper, entitled CBA Best Practices for Reaffirmation Agreements, A Debtor's Attorney's Duties to the Client regarding Reaffirmation Agreements, was written by attorneys Noel Aaron Cimmino (Steinberger & Associates, Southfield, MI) and Heather McGivern (Orlans Associates, Troy, MI) on behalf of the Detroit Consumer Bankruptcy Association and provides practitioners the basis on which to evaluate and establish a reaffirmation policy within their own practices. The paper can be accessed at http://www.steinbergerlaw.com/bankruptcy-articles/general/cba-best-practices-for-reaffirmation-agreements.

Other Tips:

A word on status conferences: Several Chapter 13 trustees, by direction of their assigned judges, hold status conferences. These conferences are a chance for the Trustee, counsel, and creditors to resolve any last minute issues that may be preventing confirmation of a Chapter 13 case. The key words here are "last minute". Proper preparation and administration of your case should reduce the number of cases, issues per case, and time you will spend at status conferences. Status conferences are not intended to involve extensive resolution of all outstanding issues. Work with your trustee and creditors in the weeks prior to confirmation to resolve as many issues as possible.

Resources and References:

Books, Papers, and other printed materials:

The Task Force on Attorney Discipline's Best Practices Working Group, Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process, "Working Paper: Best Practices for Debtors' Attorneys", 64 Bus. Law 79 (2008).

ABI: _____

ABA Business Law Section, Consumer Bankruptcy Law Committee:
http://www.abanet.org/buslaw/tbl/tblonline/2008_064_01/home.shtml

ABA Solo & Small Practice Section, Bankruptcy Law Committee:
http://new.abanet.org/committees/GP207000/Pages/default.aspx

West's Bankruptcy Exemption Manual, 2009 ed. Regarding duty to accurately disclose, properly schedule, and the consequences of not properly scheduling assets, specifically:

1) Sections 2.21 to 2.26 address property that is excluded from the estate,

2) Section 7.1 discusses the need for adequacy of descriptions,

3) Sections 8.4 and 8.5 discuss the impact of omission of assets & inaccurate valuations,

4) Section 8.22 is entitled "Ambiguity construed against debtor"

Handling Consumer and Small Business Bankruptcies in Michigan, edited by Richardo I. Kilpatrick, Stuart A. Gold, and John T. Gregg. ICLE, February 2009.

Bankruptcy practitioners' communities:

The ABI Consumer Bankruptcy Committee is included in ABI membership and offers a list serve. Go to http://committees.abiworld.org/consumer to join.

Consumer Bankruptcy Association of the Eastern District of Michigan. An association devoted to excellence in the practice of consumer bankruptcy law. Go to http://www.cbadetroit.com for more information.

"DET13" list serve for soliciting questions, thoughts, opinions, and for dissemination of information relevant to the practice of bankruptcy in the Detroit court. The list serve is managed and administered by the office of Standing Chapter 13 Trustee David Wm. Ruskin. Go to http://det13.com/DET13.shtml to join.

National Association of Consumer Bankruptcy Attorneys (NACBA) "is the only national organization dedicated to serving the needs of consumer bankruptcy attorneys and protecting the rights of consumer debtors in bankruptcy. Formed in 1992, NACBA now has more than 4,000 members located in all 50 states and Puerto Rico." (http://www.nacba.com)

Means Test:

"Statement of the U.S. Trustee Program's Position on Legal Issues Arising Under the Chapter 13 Disposable Income Test"
http://www.usdoj.gov/ust/eo/bapcpa/docs/Disposable_Income_Ch13_UST_Policies.pdf

Rules:

Eastern District of Michigan, Local Bankruptcy Rules and other important information:
http://www.mieb.uscourts.gov/rulesAndForms/rules.html

Western District of Michigan, Local Bankruptcy Rules and Administrative Orders:
http://www.miwb.uscourts.gov/content/services/rules.asp.

Additional cases and considerations:

Swanson v Stoffregen (In re Stoffregen), 206 BR 939 (Bankr ED Wisc. 1997) (parents convey to children, one child reconveys to parents for no consideration and then files chapter 7, trustee cannot recover).

In re Rosenberg, 69 BR 3 (Bankr. EDNY 1986)(Debtor's fiancée paid $42,000 for the purchase for a house, debtor on title briefly and reconveys to fiancée, trustee cannot recover)

In re Jensen, 120 BR 219 (Bankr MD Fla 1990)(mother & son bought lots as joint tenants using mom's money, convenience title case, son files bankruptcy, trustee loses)

In re Hulk, 8 BR 444 (Bankr D Conn 1981) (trustee loses)

In re Reynolds, 151 BR 974 (SD Fla 1993) (debtors have bare legal title because the son could not obtain financing. Debtors convey title to son and the trustee attacked the transfer as being fraudulent under section 548. The court held that:

[a] fraudulent transfer under §548 of the Bankruptcy Code presupposes the existence of a transfer of an interest of the debtor in the property. Since the Debtors did not in fact have such an interest but only bare record title for the convenience of the real owner, their son Barry, there could not be a fraudulent transfer. Without such an interest in property there would also be lacking, as required by §548, an intent to hinder, delay or defraud creditors.

B. Michigan Law Looks to Substance over Form When Determining Property Interests

While federal bankruptcy law determines the effect of legal or equitable interests in property, the court must look to state law to determine the nature and extent of the interest. Butner v United States, 440 US 48; S Ct 914, 59 L Ed 2d 136 (1979). As the court will see from the decisions discussed below, Michigan courts look beyond the mere form of the transaction to determine property interests in a variety of ways.

1. Equitable Mortgages, or Deeds in Lieu of Mortgages

Perhaps the most obvious example of Michigan courts going beyond the form of the transaction to determine the substance of the transaction is the doctrine of deed lieu of mortgage, or equitable mortgage. In Barber v Milner, 43 Mich 248 (1880) the plaintiff found himself indebted to Citizens Bank of Flint, Michigan ("Citizens") and in various financial predicaments "because of a habit he had acquired of using intoxicating liquors to excess." Id. at 248. To secure payment of the debt to Citizens, the plaintiff executed a deed to the property in question to a cashier at the bank. The oral agreement the plaintiff and his wife, who, of course, had to join in the conveyance, had with Citizens was that upon the plaintiff paying his debt to Citizens in whole, Citizens would convey the property to the plaintiff's wife, Mrs. Barber, or to any other person that the plaintiff directed. (Presumably another creditor). Sometime later, Mrs. Barber directed Citizens to convey the property to her son-in-law, Milner, who paid the bank the sum of $1,500, which was in excess of the outstanding indebtedness owing on the loan. Upon receiving the overpayment, the cashier conveyed the property to Milner who then conveyed the property to Mrs. Barber. Mr. Barber, possibly to fuel his addiction to intoxicating liquors, drew out the amount of the surplus payment made by his son-in-law, Milner. In discussing the transaction, the court held that "Gibson [the cashier for Citizens] could not under any circumstances, be considered the absolute owner of the property, and having obtained the title as security upon an agreement to convey to a third party, the law would not permit him to claim or dispose of the property contrary to such agreement." Id. at 250. The court also clearly held "that parol evidence is admissible to show that a deed absolute on its face was intended as a mortgage." Id. at 249. The court also ruled that an express trust had been created and was provable by the fact that the terms of the trust had been executed, stating "[h]ere he has conveyed as agreed, the trust

has been executed, and whether valid, because in writing, or not, is no longer an open question." Id. at 250.

The court also determined that a deed had been intended as a mortgage in McKeighan v Citizens Commercial & Savings Bank of Flint, 302 Mich 666 (1942). Quoting Wells v Park, 233 Mich 277 (1925), the court stated:

'It is well settled that a deed, though absolute in form, may be shown to be a mortgage by oral proof.' In the case at bar, the deed from McKeighan to the bank was in effect a mortgage. All interested parties treated it as a mortgage. The McKeighans made payments on the loan from the bank, platted the property, sold some pieces on contract, paid some taxes assessed against the property, exercised control over it and in all ways considered themselves the owners subject to the indebtedness owing to the bank. [McKeighan at 670].

The Michigan Supreme Court also has held that deed holders who hold the deeds for security are not the true owners of the property subject to the mechanics' liens and that the "sellers" are mortgagors and, as such, are the true owners. See Huebner v Lashley, 239 Mich 50 (1927).

2. Equitable Liens

As the court will recall, the Stoffregen court also held that the defendants held an equitable lien on the property, which related back to the time when the one-quarter property interest had been deeded to Jonathan Stoffregen. Stoffregen, 206 BR 939, at 944. The court relied on Wisconsin law to determine whether Jonathan Stoffregen had any real property interest beyond "bare legal title" and to impose an equitable lien on the property in favor of the defendant, Gertrude Stoffregen. Michigan courts had long recognized the doctrine of equitable liens. See, e.g., Cheff v Haan, 269 Mich 593 (1939); Kelly v Kelly, 54 Mich 30 (1884).

In Cheff, the Michigan Supreme Court explained that equitable liens upon real estate could be imposed when:

There [is a] contract in writing out of which the equity springs, indicating an intention to make particular property identified in the written contract security for the debt or obligation, or whereby it is promised to assign, transfer, or convey the property as security. In the absence of such written contract, equity from the relations of the parties may declare an equitable lien out of considerations of right and justice based upon the fundamental principles of equity jurisprudence, such as cases where one joint owner improves property for the benefit of both; where a party innocently makes permanent improvements and repairs which presently enhance the value of the property; but in all cases, the person seeking to establish the lien must show that in equity, in good conscience, he is entitled to the lien claimed. [Id. at 598-99 (emphasis added) (citing Kelly v Kelly, 54 Mich 30 (1884))].

Like the court in Stoffregen, this court will be presented with ample evidence of the contributions made by defendant Debra Jernigan to the property at issue, including supplying funds to purchase the property, funds to renovate the property, and, to this day, funds expended to pay the mortgage on the property. Ms. Jernigan made all of the expenditures innocently, as the Cheff court requires, with the honest belief that she alone owned the property and that she alone would benefit from the increase in value which resulted from the fruits of her efforts.

3. Trusts (Constructive or Otherwise)

Michigan law is replete with examples of court imposing trusts, constructive or otherwise, to prevent fraud, mistake, or other inequities. In Chapman v Chapman, 31 Mich App 576 (1971), the Michigan Court of Appeals imposed a constructive trust on property which had been conveyed to relatives of the plaintiff during a financial crisis for the purpose of securing funds advanced by the family member. The Court of Appeals upheld the trial court's decision to impose a constructive trust on the property. The court stated that "[i]n order for the trial court to have imposed a constructive trust on the proceeds from the two sales, plaintiffs must have established at the trial that the agreement between the parties was to vest only legal title in defendants while plaintiff's retained the beneficial interest." Id. at 579. The court, therefore, looked to substance, not simply to the form of the parties' dealings.

Likewise, in Robair v Dahl, the Michigan Court of Appeals imposed a constructive trust where a deceased grantor conveyed a deed to her sons, Bernard Dahl and Edward Dahl. As she conveyed the property to the two, the mother stated loudly "I am putting this in the name of the two boys for all of you." Id. at 462. Predictably, the brothers invoked the parol evidence rule. The court quoted Professor Wigmore at length. Wigmore makes the distinction between the act of transfer and the user of the property transferred or, put another way, between the character of the estate conveyed (fee simple, life estate, etc.) and the quality of the estate conveyed (security, trust, etc.). [Wigmore] then states his belief as to the proper inquiry to be made by the court: Whether the parties under all of the circumstances, appear to have intended the document to cover merely the kind of estate transferred, including that of the quality of the estate. [Id. at 463 (citing 9 Wigmore, Evidence (3d Ed.), §2437, pp 119-122) (further citations omitted)].

More significantly, the court quoted Cornell v Hall, 22 Mich 377 (1871), which stated a rule Wigmore "urged." The Michigan Supreme Court stated that "[e]ach case must be decided in view of the peculiar circumstances which belong to it and mark its character, and . . . the only safe criterion is the intention of the parties, to be ascertained by considering their situations and the surrounding facts, as well as the written memorials of the transaction." Cornell at 382 (emphasis added). Cornell's approach has been repeatedly adopted by the Michigan Supreme Court to support the court's conclusion that a trust exists. See, e.g., Prentis v Prentis, 189 Mich 1, 6 (1915) ("we think that this testimony was proper to explain the voluntary conveyance had with reference to this property, and to show why Mary Prentis received her deed, and why she conveyed it to Browse, and in 1912 quitclaimed to John F."); Lasley v Delano, 139 Mich 602, 606 ("The parol contract between complainant and Mr. Delano has been performed, and the parol trust imposed upon him fully executed."); Patten v Chamberlain, 44 Mich 5, 6-7 (1880) (Justice Cooley) ("Jane E. Chamberlain defends this suit in the interest of her daughter, and avows the trust in her answer. That is a sufficient declaration of trust in writing to answer the requirements of the statute of frauds."). Applied to the instant case, Donald Schuitema's declaration that he held the property as a "guardian" on this bankruptcy schedules, under oath, and under penalty of perjury, can serve as the writing to prove the existence of the trust

In Digby v Thorson, 319 Mich 524 (1948), the Michigan Supreme Court held that a constructive trust would be imposed "if circumstances are such as to render it inequitable for the holder of the legal title to retain the same, the court may charge it with a trust in favor of the equitable owner." Id. at 538. Again, as the court noted in Software Customizer, Inc. v Bullet Jet Charter (In re Bullet Jet Charter, Inc.), 177 BR 593, 604 (Bankr ND Ill 1995) cited supra, while the application

of section 541(d) "is usually in the context of the imposition of a constructive trust, . . . but it applies as well to equitable interests generally" and "[w]hether or not an equitable interest is labeled a constructive trust is of no moment." Id. The point being that Michigan courts, via constructive trusts, equitable liens, equitable mortgages, or simply by using equitable principles generally, look beyond the face of the transactions to determine the true nature of the parties' affairs and ownership interests.

Working Paper: Best Practices for Debtors' Attorneys*

By Task Force on Attorney Discipline Best Practices Working Group,
Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes,
ABA Section of Business Law

The Best Practices Working Group operates under the auspices of the Task Force on Attorney Discipline of the American Bar Association Section of Business Law's Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes. The Working Group was formed to examine both the legal standards and the practical considerations for attorneys representing clients who may become debtors under the Bankruptcy Code and to present recommendations as to what constitutes "best practices" in the preparation of a non-emergency bankruptcy case.

The Working Group's recommendations center on matters into which attorneys should inquire to ensure legally sufficient disclosure of information on the debtor's petition, schedules, statement of financial affairs, and Form 22A. The Working Paper includes suggestions regarding the types of documents attorneys can review to obtain information about which the client is uncertain or to verify, where needed, the information the client has provided. These recommendations and suggestions are not confined to representation of clients in consumer bankruptcy cases; their applicability extends to most business and individual debtor cases. The Working Group does not intend, however, that its recommendations and suggestions be construed as creating minimum standards that would serve as a basis for attorney liability. Such an interpretation would deprive attorneys of the flexibility needed to deal with unique circumstances and create a one-size-fits-all approach to debtor representation, which serves neither attorneys nor their clients well.

* The views expressed herein have not been adopted by the House of Delegates or the Board of Governors of the American Bar Association and consequently should not be considered the policy of the American Bar Association. The research herein is current through February 26, 2008.

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Section 1

Introduction

On September 20, 2005, the Task Force on Attorney Discipline, which operates under the authority of the American Bar Association Section of Business Law's Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes, issued its Report on Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Report").[1] The Report provided general recommendations for the interpretation of key words and phrases in new subsections 707(b)(4)(C)[2] and (D),[3] which became law via the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"),[4] including:

- "reasonable investigation"
- "inquiry"
- "knowledge"
- "incorrect."

This Working Paper on Best Practices for Debtors' Attorneys ("Working Paper") is a continuation of that initial effort. The Best Practices Working Group (the "Working Group") was formed to examine both the legal standards and practical considerations for attorneys representing clients who may become debtors under the Bankruptcy Code (the "Code")[5] and to present recommendations as to what constitutes "best practices" in the preparation of a bankruptcy case.

1.1. Scope and Purpose of the Best Practices Working Paper

1.1.1. Working Paper vs. Report

The Working Group considered at length whether this effort should culminate in a working paper or report. The distinction is an important one. In general

1. Task Force on Attorney Discipline, Ad Hoc Comm. on Bankr. Court Structure & Insolvency Processes, Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 61 Bus. Law. 697 (2006) [hereinafter "Report"].

2. Section 707(b)(4)(C) provides:

> The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—
>
> (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
>
> (ii) determined that the petition, pleading, or written motion—
>
> (I) is well grounded in fact; and
>
> (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

11 U.S.C. § 707(b)(4)(C) (2006).

3. Section 707(b)(4)(D) provides: "The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." 11 U.S.C. § 707(b)(4)(D) (2006).

4. Pub. L. No. 109-8, 119 Stat. 23 (codified at 11 U.S.C. §§ 101–1532 (2006)).

5. Unless otherwise noted, all sections cited herein refer to the Bankruptcy Code, 11 U.S.C. §§ 101–1532 (2006).

terms, a report is intended to be authoritative, while a working paper is intended to create a basis for further discussion and debate.

The Working Group decided that a working paper was the better approach for two key reasons. The first reason concerns consequences that could result in producing a report. As an authoritative text, a report could create a one-size-fits-all approach to debtor representation, which serves neither attorneys nor their clients well. Attorneys must have the flexibility needed to deal with the unique circumstances that their clients present.

The Working Group was also cognizant that a report could inadvertently create minimum standards that would serve as a basis for attorney liability. As discussed below,[6] Rule 9011 is a critical governing authority and the Working Group sought to avoid designating specific inquiries or document review as required in order to meet the Rule 9011 standards.[7]

The second reason for choosing to craft a working paper rather than a report is to serve the very purpose intended: to create a basis for discussion among debtors' attorneys. Even within the small community of the Working Group, issues arose that generated robust disagreement; as a consequence, some of the recommendations included in the Working Paper are the result of compromise. The Working Group prefers to expand the discussion and is confident that the debtors' bar will agree with this paper's goals of maintaining high standards among seasoned practitioners and assisting attorneys new to bankruptcy practice in preparing a high-quality work product. These goals serve not just clients, but also the standards of professionalism expected of attorneys.[8]

Because the case law related to the topics discussed in this Working Paper is evolving, especially with regard to the means test and the changes encompassed in BAPCPA, the citations provided herein should always be updated and shepardized before they are used to support a legal position. Additionally, this Working Paper does not cite every case on any particular legal issue, but rather provides some of the significant cases decided on the legal topics discussed.

1.1.2. Content and Recommendations

The scope of the Working Paper is narrow. The Working Paper examines only the various forms that are required to be filed by bankruptcy debtors, specifically:

- The Petition[9]
- Schedules A, B, and D through J[10]

6. *See infra* Section 1.3.

7. Rule 9011 of the Federal Rules of Bankruptcy Procedure is the counterpart to Rule 11 of the Federal Rules of Civil Procedure and provides, among other things, that an attorney's signature on a paper presented to the court represents that the attorney conducted a reasonable inquiry into the facts and law supporting the paper.

8. It should go without saying that nothing in this Working Paper is intended to supplant authorities governing attorney conduct, such as state ethics rules.

9. For the purposes of the Working Paper, the Working Group used the petition and schedules revised in April 2007.

10. The Working Group chose not to include a discussion of Schedule C in the Working Paper. Although there are exceptions, a good deal of Schedule C preparation turns on state law, and there are

- The Statement of Financial Affairs ("SoFA")
- Form 22A.[11]

The Working Group's goal is to make recommendations regarding matters into which attorneys should inquire to ensure legally sufficient disclosure of information in the filing of a non-emergency bankruptcy case.[12] The Working Group also makes suggestions regarding the types of documents attorneys can review to obtain information for disclosures about which the client is uncertain or to verify, where needed, the information the client has provided.

Excluded from the Working Paper is advice on attorneys' representation of their debtor clients. The information clients provide can raise any number of issues that require an attorney's skill and expertise to resolve. Such issues and their resolution are well beyond the scope of this Working Paper, although some "practice pointers" are provided along the way.

1.1.3. Audience

This Working Paper is broader in reach than was the Report which had as its focus specific statutory provisions affecting attorneys representing clients with primarily consumer debts in chapter 7 cases. The Report, therefore, did not apply to a host of other debtors' attorneys, including those representing business entities, chapter 13 debtors, or individuals whose debts are not primarily consumer debts.

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significant differences among the states in the types and amounts of property that may be exempted. The Working Group does note that proper inquiry as described in this Working Paper with respect to Schedules A and B is a precursor to declaring exemptions. The legal standard for disclosure discussed in Section 1.4.2, however, may not apply to exemptions, as some courts require greater specificity when exempting property than when disclosing it. *See In re* Park, 246 B.R. 837, 842 (Bankr. E.D. Tex. 2000) (discussing the requirement of full disclosure in bankruptcy schedules and noting that "[t]he required degree of specificity increases when itemizing property that is claimed as exempt under section 522"); *In re* Mohring, 142 B.R. 389, 394–95 (Bankr. E.D. Cal. 1992) (same), *aff'd*, 153 B.R. 601 (9th Cir. B.A.P. 1993) (unpublished table decision), *aff'd*, 24 F.3d 247 (9th Cir. 2004) (unpublished table decision).

11. The Working Group chose not to include discussion of Forms 22B and 22C in the Working Paper for a variety of reasons. The 22B form is the simplest of the means-testing forms and is used for debtors filing for chapter 11, requiring only the calculation of the debtor's current monthly income ("CMI"), as defined in section 101(10A), and the debtor's signature of the verification. Consequently, a detailed analysis of the form would be of limited usefulness. The 22C form is very similar to the 22A form in that it also requires determination of the debtor's CMI, but the form is used to determine the debtor's commitment period and projected disposable income in a chapter 13 bankruptcy.

12. Although the Working Paper does not address emergency filings, the Working Group concurs with the following as a recommendation of what, at a minimum, attorneys should do in such cases:

> 1) conduct as much of the normal client interview as possible; 2) make reasonable attempts to contact the attorney for the party that is taking action against the debtor; 3) check the electronic case dockets for prior bankruptcy filings by the debtor; 4) if possible, obtain a credit report on the client; and 5) obtain a prompt prebankruptcy credit counseling briefing for the client or otherwise comply with section 109(h).

See HENRY J. SOMMERS, BEST PRACTICES FOR CONSUMER BANKRUPTCY CASES (INCLUDING COMMENTARY) 2 (FEB. 8, 2006), *available at* http://www.amercol.org/images/BPC%20Update%20and%20Consumer%20Practices%20Subcommittee%20Report%20with%20Commentary%20and%20Questionnaire%20.PDF.

The Working Group attempts to reach this larger universe of debtors' attorneys, with two caveats. First, in some areas, most notably the discussion of Form 22A,[13] the discussion does tend to have an emphasis on consumer cases. This is merely a reflection of the fact that consumer filings are the most common among bankruptcy cases. Second, the Working Group recognizes the unique character of chapter 11 bankruptcies of large corporations where, for example, schedules are typically filed well after the petition date, if at all. As such, this Working Paper is likely of limited utility to attorneys who represent large business entities.

1.2. Organization; Key Terms

For each item of information discussed in this Working Paper, there are two tiers, an "Initial Inquiry and/or Document Review" and a "Further Inquiry." The relevance of the "further inquiry" is dependent upon the client's responses to the initial inquiry or other considerations, such as where a particular disclosure expressly states that specificity is required.

- **Initial Inquiry and/or Document Review.** In this phase, the attorney must be reasonably confident that the client understands the scope and nature of the question asked and has provided a thoughtful, accurate answer. In many cases this level of investigation is achieved through discussion with the client. In other cases, the client's written responses to a checklist may suffice. For example, no discussion would likely be necessary if the client is an urban wage earner and simply answers "no" when asked about crops or farming equipment. On the other hand, the attorney may determine that, for a particular client or for specific matters in the preparation of a client's case, document review should be a part of the initial inquiry.
- **Further Inquiry.** A further inquiry is triggered when, in the attorney's professional judgment, the information provided by the client is insufficient, incomplete, or in need of verification. Further inquiry is usually accomplished by reference to source documents, public records, or experts, such as appraisers. A further inquiry may also be triggered where a particular disclosure or jurisdiction requires more than the usual detail.

The Working Group has also provided "comments" and "practice pointers" on various subjects. These are intended to give fuller explanation to points made in this Working Paper and to give debtors' attorneys some practical considerations to keep in mind when preparing documents for clients.

13. Form 22A must be prepared only by individuals in chapter 7 whose debts are "primarily consumer debts." The phrase "primarily consumer debts" is discussed in Section 1.4.3.

1.3. Legal Standard: Reasonable Inquiry

The legal standard that underlies the Working Paper is Rule 9011 of the Federal Rules of Bankruptcy Procedure (the "Rule" or "Rule 9011") and the case law interpreting and applying it. Rule 9011 provides, in relevant part:

> (b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.[14]

The Working Group anticipates that the Working Paper will be read in light of the recommendations set forth in the Report regarding application of Rule 9011. This means that consumer debtors' attorneys, to whom section 707(b)(4)'s "reasonable investigation" and "inquiry" requirements apply, should be able to look to, and be governed by, the Rule and its judicial application.[15]

More specifically, as in the Report, the Working Group accepts the following general articulation of an attorney's reasonable pre-filing inquiry:

> The duty of reasonable inquiry imposed upon an attorney by Rule 11 and by virtue of the attorney's status as an officer of the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.[16]

14. Fed. R. Bankr. P. 9011.

15. The Report specifically recommended that "reasonable investigation" and "inquiry" be governed by Rule 9011 case law. *See* Report, *supra* note 1, at 703, 710.

16. Report, *supra* note 1, at 704 (citing *In re* Robinson, 198 B.R. 1017, 1024 (Bankr. N.D. Ga. 1996); *In re* Armwood, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994); *In re* Matthews, 154 B.R. 673, 680 (Bankr. W.D. Tex. 1993)). *See also In re* Thomas, 337 B.R. 879, 892 (Bankr. S.D. Tex. 2006), *aff'd*, 223 F. App'x 310 (5th Cir. 2007); *In re* Huerta, 137 B.R. 356, 379 n.8 (Bankr. C.D. Cal. 1992).

In addition, the Working Paper incorporates the other recommendations of the Task Force Report. These recommendations include the following:

> Attorneys should be able to rely on case law that allows time constraints to be taken into account.
>
> The reasonableness of the attorney's inquiry should not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney's inquiry at the time that the inquiry was made.
>
> Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney's professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy.
>
> Attorneys should be able to rely upon documents prepared by third parties in the scope of their employment, including tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor's pre-petition credit counseling agency.[17]

Although the Report was addressed to attorneys representing consumer debtors in chapter 7 cases, its recommendations were premised on Rule 9011 jurisprudence. Accordingly, the Working Group expects that the recommendations will apply to all debtors' attorneys, irrespective of the chapter under which the bankruptcy case proceeds or the character of the client's debt.

1.4. Other Applicable Legal Standards

1.4.1. Generally

Discrete discussions within this Working Paper rely to varying degrees on case law on point or, in some cases, jurisdictional splits. Citations to authority are provided within those discussions.

1.4.2. Judicial Standards on Disclosure

There are any number of cases describing generally a debtor's duty of disclosure in the bankruptcy schedules, SoFA, and other required bankruptcy forms.[18] Courts have stated generally that debtors must make full disclosure and complete their forms fully, accurately, and honestly.[19] This duty of disclosure is the tradeoff for the discharge of indebtedness the debtor receives.[20]

The courts are less clear about the degree of specificity required of the debtor in completing the petition, SoFA, and other filing documents.[21] Obviously, it is

17. Report, *supra* note 1, at 710.
18. *See, e.g., In re* Colvin, 288 B.R. 477, 479–81 (Bankr. E.D. Mich. 2003) (citing cases).
19. *See, e.g., id.* at 480.
20. *See, e.g., id.* at 481.
21. *See, e.g.*, Kuehn v. Cadle Co., Inc., No. 5:04-cv-432-Oc-10GRJ, 2007 WL 809656, at *4, 2007 U.S. Dist. LEXIS 18387 (M.D. Fla. Mar. 15, 2007) (noting it was "unable to find any legal authority which explains the level of detail a debtor must include when listing assets on bankruptcy schedules").

inappropriate for a debtor to conceal assets or information, to play "fast and loose," or to be generally indifferent to the importance of full disclosure.[22] At the same time, courts tend not to punish debtors for imperfection or for failing to investigate exhaustively and document fully the details relating to every asset, liability, and financial transaction.[23]

The Working Group believes that notice should be the guiding principle underlying the debtor's duty of complete and accurate disclosure. In other words, disclosure should be sufficient to put the trustee and creditors on notice of the possible existence of assets available for distribution and actions that may be taken against the debtor.

There are a variety of reasons underlying our belief that notice is the appropriate standard. Foremost among them is the trustee's affirmative duty to investigate the financial affairs of the debtor.[24] Requiring the debtor and the debtor's attorney to undertake a comprehensive and detailed pre-filing investigation would render this duty superfluous, especially in light of the debtor's post-petition obligation to cooperate with the trustee.[25]

The Advisory Committee Notes to the schedules likewise assume a notice standard to aid the trustee in fulfilling its duty of investigation. As one court explained:

> The 1991 Advisory Committee Notes to the Form 6 Schedules (Schedules A–J) explain that "the schedules require a complete listing of assets and liabilities *but leave many of the details to investigation by the trustee*." Indeed, the schedules were intended to be summaries that could serve as a quick and easy list of relevant information. The Notes state that Schedule C, for example, was simplified in 1991 by "elimina[ting the] duplication of information provided" on other schedules. Similarly, a former requirement in Schedule C that the debtor state the present use of property was "eliminated as best left to inquiry by the trustee." The requirements for listing personal property in Schedule B also reflect the basic purpose of the schedules. The Notes state that this schedule requires that debtors declare whether they have "any property in each category on the schedule." They add that the trustee "can request copies of any documents concerning the debtor's property necessary to the administration of the estate." The Advisory Committee Notes elaborate that "Section 521(3)[26] of the Code requires the debtor to cooperate with the trustee, who can *administer the estate more effectively by requesting* any documents from the debtor *rather than relying on descriptions in the schedules* which *may prove to be inaccurate*."[27]

22. Hamo v. Wilson (*In re* Hamo), 233 B.R. 718, 725 (6th Cir. B.A.P. 1999) (noting that purpose of the Code is to ensure that "those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs").

23. *See, e.g.*, *In re* Price, 211 B.R. 170, 172 (Bankr. M.D. Pa. 1997) (noting "literal compliance with the Official Schedules is the exception rather than the rule").

24. *See* 11 U.S.C. § 704(a)(4) (2006).

25. *See id.* § 521(a)(3).

26. Section 521(3) is now, pursuant to a BAPCPA amendment, section 521(a)(3).

27. White v. Mitchell (*In re* Hardee), No. 96-1968, 1998 WL 766699, at *4, 1998 U.S. App. LEXIS 26859 (4th Cir. Oct. 20, 1998) (citations omitted) (alteration in original).

Relevant case law is in agreement.[28] In *Cusano v. Klein*,[29] for example, Cusano was involved in litigation a few years after he exited his chapter 11 bankruptcy. One of the issues in that lawsuit was Cusano's claim for unpaid royalties for songs written for the rock band KISS. In his bankruptcy, Cusano scheduled "songrights in . . . Songs written while in the band known as 'KISS'" and listed their value as "unknown."[30] The district court dismissed the claim on the basis that Cusano lacked standing because of his alleged failure to schedule in his bankruptcy his copyrights and entitlement to royalties for the songs he composed pre-petition.[31]

On appeal, the court determined that the "question of ownership turns on the validity and effect of Cusano's listing of his 'songrights' as an asset in his bankruptcy schedules."[32] The court found that Cusano did, in fact, own the assets because the disclosure Cusano made "was not so defective that it would forestall a proper investigation of the asset."[33] The court stated:

> The "songrights" asset as described by Cusano can reasonably be interpreted to mean copyrights and rights to royalty payments for songs written for the band KISS pre-petition. . . . Although it would have been more helpful for Cusano to break down the description further so that it named songs, albums, and dates of and parties to royalty and copyright agreements, the additional detail would not have revealed anything that was otherwise concealed by the description as it was, which provided inquiry notice to affected parties to seek further detail if they required it.[34]

Cusano did not prevail, however, regarding his claim for pre-petition royalties and other damages that had accrued ahead of his bankruptcy filing.[35] These, the

28. Although informative, decisions in section 727 actions to deny the debtor's discharge are, in some respects, of limited utility. On the one hand, that section is generally construed strictly against the objecting party because of the harshness of the remedy and bankruptcy's "fresh start" policy. *See, e.g.*, Yash Raj Films (USA), Inc. v. Akhtar (*In re* Akhtar), 368 B.R. 120, 127 (Bankr. E.D.N.Y. 2007) (indicating that "[t]his rule of construction gives effect to the bankruptcy goal of providing honest debtors with a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt'" (quoting Cazenovia Coll. v. Renshaw (*In re* Renshaw), 222 F.3d 82, 86 (2d Cir. 2000))). On the other hand, when successful, section 727 actions often involve egregious disclosure failures and other misconduct on the part of debtors. Thus, the section 727 cases do not fully address situations where a debtor (and the debtor's attorney) may face sanctions for inadequate disclosure that would be insufficient to deny the debtor's discharge. *Compare* Jensen v. Groff (*In re* Groff), 216 B.R. 883, 887 (Bankr. M.D. Fla. 1998) (denying discharge where, among other things, debtor failed to disclose $50,000 tax refund received), *with In re* Colvin, 288 B.R. 477, 483–84 (Bankr. E.D. Mich. 2003) (holding where debtors failed to disclose $10,000 income tax refund, their only asset, appropriate remedy was to deny debtors' claim of exemption in that refund).

29. 264 F.3d 936, 942 (9th Cir. 2001).

30. *Id*. (omission in original).

31. *Id*. at 943.

32. *Id*. at 945.

33. *Id*. at 946.

34. *Id*. at 946–47. *See also* Cristol v. Blum (*In re* Blum), 41 B.R. 816, 819 (Bankr. S.D. Fla. 1984) (holding that debtor's failure to properly value two automobiles was not ground for denial of discharge because the assets were properly disclosed to the trustee who could perform an appraisal of the vehicles); *In re* Price, 211 B.R. 170, 172 (Bankr. M.D. Pa. 1997) (noting that although the debtor is required to file accurate schedules, substantial compliance is enough).

35. *Cusano*, 264 F.3d at 947–49.

court determined, "were subject to a separate scheduling requirement as accrued causes of action," which are separate assets that must be scheduled as such.[36] "Simply listing the underlying asset out of which the cause of action arises is not sufficient."[37]

In *Tilley v. Anixter Inc.*,[38] the court analogized the lack of specificity with which the debtor listed pre-existing claims to *Cusano* and, consequently, reached the same result. In *Tilley*, the debtor disclosed claims arising from ongoing domestic relations disputes with her former spouse, but the question arose as to whether she properly disclosed the specific claim of intentional infliction of emotional distress.[39] Holding that the debtor did not make adequate disclosure, the court reasoned that the language she used to describe her claim "show[s] that she scheduled a state court claim for unpaid child support, not for intentional infliction of emotional distress."[40] That the latter claim may have arisen from her former husband's actions relating to his child support obligations "did not absolve her of a duty to schedule it separately" because "a claim 'for back child support' does not . . . inform a trustee of the need to investigate" whether the debtor has a claim for emotional distress.[41]

As *Cusano* and *Tilley* illustrate, the notice standard should not be confused with a lax standard. The Working Group does not suggest or wish to be interpreted as concluding that it is appropriate for debtors to make minimal disclosure in the expectation that the trustee will follow up in filling in the details. Overly vague and incomplete disclosure not only fails to put the trustee on notice of specific inquiries that should be made, but can also give rise to actions against the debtor, up to and including denial of discharge.

The reasoning behind the notice standard of disclosure applies with equal force to the value stated for a client's assets.[42] Although valuing assets can be difficult, the Working Group believes that an attorney should always be as specific

36. *Id.* at 947.
37. *Id.* (citing Vreugdenhill v. Navistar Int'l Transp. Corp., 950 F.2d 524, 525 (8th Cir. 1991)).
38. 332 B.R. 501, 510–11 (D. Conn. 2005).
39. *Id.* at 507.
40. *Id.* at 510.
41. *Id.* at 510–11. *See also In re* Doyle, 209 B.R. 897, 901 (Bankr. N.D. Ill. 1997) (stating that "'Household Furnishings-4 rooms' in the sum of $1,200 inadequately described the contents of those four rooms," and thus the exemption was not listed with the required specificity). The court also stated that the debtors did not list their bank account, life insurance policy, or retirement assets with the required specificity. *Id.* For other examples of insufficient specificity in claimed exemptions, see *In re Dickson*, 114 B.R. 740, 742 (Bankr. N.D. Okla. 1990) (denying the debtors' claim of exemption because the debtor did not indicate the statutory basis for the exemption); and *In re Wenande*, 107 B.R. 770, 772 (Bankr. D. Wyo. 1989) (finding debtors' listing of "stocks," "mineral interest," "accounts," "intangibles," and "personal property" was not sufficient to provide notice to the trustee of the property claimed as exempt).
42. An important distinction, however, is that for purposes of exempting property, courts often expect more precision than for other filing documents such as Schedule B. *See, e.g., In re* Bell, 179 B.R. 129, 131 (Bankr. E.D. Wis. 1995) ("A debtor is in a far better position than the trustee to know the value of the property being claimed as exempt. To permit the debtor to exempt such property by use of the term 'entirely exempt' would require a trustee in almost every case to obtain an appraisal.").

as reasonably possible under the circumstances. This does not mean that an attorney must hire a professional to value every asset, such as the debtor's home.[43] The Working Group merely believes that its endorsement of specificity with regard to valuing assets means avoiding the use of "unknown," except when a reasonable inquiry indicates that "unknown" is the most accurate description of an asset's value. The Working Group's belief is consistent with some courts' statements that (1) an approximate value may be the best information; (2) if an approximate value cannot be obtained, then an estimate is appropriate; and (3) finally, if no educated estimate can be made, then the use of "unknown" may be proper.[44]

The Working Group does not seek to specify or define what is entailed by the Working Group's recommendation as to asset valuation. Such a determination must be made by individual attorneys on a case-by-case basis and should be consistent with the foregoing discussion of the appropriate standard for disclosure. A useful example is a pre-petition cause of action, which is quite difficult to value prior to settlement or final judgment.[45] If a lawsuit has been actually commenced, counsel could include a statement in the property's description indicating the amount of damages prayed for in the complaint.

In some circumstances, it might not be possible to provide a reasonable estimate of an asset's value, in which case the use of "unknown" is likely an appropriate description of value. Attorneys should not have to make a guess simply to provide a numeric value of an asset's value because a guess could be more inaccurate—and misleading—than candidly stating that the value, after reasonable inquiry, is not known. When "unknown" is used, however, the Working Group believes that more detailed information should be provided regarding the property itself. For example, if the client is a member of a class in a class action against a defendant that has sought chapter 11 relief, the attorney should provide a description of the lawsuit, the name of the defendant, contact information for class counsel, and the case number and jurisdiction of the defendant's bankruptcy.

43. *See* Cole v. Seruntine (*In re* Seruntine), 46 B.R. 286, 288 (Bankr. C.D. Cal. 1984) ("A debtor who lives in an area in which his home is comparable to those of his neighbors will usually have a good idea of its value from simply living in the area and talking to neighbors about recent sales.").

44. *See, e.g.*, Cusano v. Klein, 264 F.3d 936, 946 (9th Cir. 2001) (noting, in a chapter 11 case, that: "Although there are no bright-line rules for how much itemization and specificity is required, [a debtor is] required to be as particular as is reasonable under the circumstances. If possible, [the debtor should] list the approximate dollar amount of each asset. If faced with a range of values, [a debtor should] choose a value in the middle of the range. There are assets, however, the value of which is unknown; when that is the case, a simple statement to that effect will suffice." (citations and internal quotation marks omitted)); *In re* Wenande, 107 B.R. 770, 772 (Bankr. D. Wyo. 1989) ("This court's position is that 'value,' as set forth on the official form, generally means an approximate dollar amount .... [V]alue is the type of information that is not always available on the date a petition is filed. Where it is not, an estimation, so designated, may serve the purpose of the B-4 Schedule, e.g., 'approximately $1,500.' If the value is unknown, a simple statement to that effect serves the purpose of the B-4 Schedule.").

45. *See* Wissman v. Pittsburgh Nat'l Bank, 942 F.2d 867, 871 (4th Cir. 1991) ("A cause of action ... is an asset that is not easily valued because there is no market where it is bought and sold.").

1.4.3. "Primarily Consumer Debts"

The phrase "primarily consumer debts" appears several places in the forms discussed in this Working Paper. There is not, however, a definition of that phrase in the Code; nor are the courts in full agreement as to when an individual's debts are "primarily consumer debts."[46]

"Consumer debt" is a defined term and it means a "debt incurred by an individual primarily for a personal, family, or household purpose."[47] Taxes[48] and debts incurred with a profit motive[49] are generally not consumer debts. However, the character of many other debts is not facially apparent. As the definition indicates, the determination here rests on the purpose of the debt. Many individuals, for example, have debt relating to automobiles purchased for everyday life, which

46. *See generally* Deborah Sprenger, Annotation, What Are "Primarily Consumer Debts," Under 11 U.S.C.A. § 707(b), Authorizing Dismissal of Chapter 7 Bankruptcy Case if Granting Relief Would Be Substantial Abuse of Chapter's Provision?, 101 A.L.R. FED. 771 (1991).

47. 11 U.S.C. § 101(8) (2006).

48. *See* IRS v. Westberry (*In re* Westberry), 215 F.3d 589, 591 (6th Cir. 2000) (noting that courts that have addressed the issue have "[a]lmost without exception" held tax debts are not consumer debts).

49. *See. e.g.*, Citizens Nat'l Bank v. Burns (*In re* Burns), 894 F.2d 361, 363 (10th Cir. 1990) (holding loan not a "consumer debt" when taken out for purpose of playing the stock market); Toyota Motor Credit Corp. v. Johnson, Civ. A. No. 06-2175, 2007 WL 2702193, at *4, 2007 U.S. Dist. LEXIS 67820 (W.D. La. Sept. 11, 2007) (interpreting the definition of "personal use" in the hanging paragraph contained in 11 U.S.C. section 1325(a)(5) and stating: "[T]he relevant inquiry for purposes of defining the term 'personal use' as opposed to 'business use' within the context of the 'cramdown' provision and the 'hanging paragraph' is twofold, that is (1) whether the individual is using the vehicle to travel to and from work, or (2) whether the vehicle is actually utilized in the performance of the individual's job duties." The court found this distinction in conformity with the definition of "consumer debts" included in 11 U.S.C. section 101(8) as being those debts incurred for "personal" use.); Davis v. Melcher (*In re* Melcher), 322 B.R. 1, 6 (Bankr. D.D.C. 2005) (stating, in ruling on the plaintiff's allegation that the defendant-debtors utilized fake building permits and an unlicensed contractor to renovate their home, thereby causing damage to a neighbor's home, that: "The debt must be viewed from the perspective of the plaintiff's theory of a fraud debt which entailed a profit motive because the defendants engaged in fraud to perform construction on the cheap." The damage was caused as a result of the contractor's negligence. Therefore, the debt owed by the defendant-debtors was not incurred for a consumer purpose because "negligence by definition is unintended and thus cannot be a debt incurred for a household purpose."); *In re* Pedigo, 296 B.R. 485, 491–92 (Bankr. S.D. Ind. 2003) (holding, despite that the debtor incurred mortgage expenses to acquire a building adjacent to his home, that the expense did not constitute "consumer debt" because the debtor's purpose in acquiring the adjacent land was to rent it out), *rev'd on other grounds sub nom*. U.S. v. Pedigo, 329 B.R. 27 (S.D. Ind. 2005). *But see* Frazier v. Bank of Va. (*In re* Lindamood), 21 B.R. 473 (Bankr. W.D. Va. 1982). In *Frazier*, the debtor asked the plaintiff, a friend, to cosign a loan from the defendant-bank. The plaintiff did so as a personal favor to the debtor. Unbeknownst to the plaintiff, the debtor used the proceeds of the bank loan in the debtor's automobile business. In determining the applicability of the stay sought by the co-debtor, the court held that, from the standpoint of the debtor and the co-debtor, the loan was a "consumer debt" despite the fact the debtor used the loan proceeds in the debtor's business. *Id*. at 474–75. *See also* Boitnott v. United Va. Bank (*In re* Boitnott), 4 B.R. 122 (Bankr. W.D. Va. 1980). In *Boitnott*, title to two vehicles was taken in the debtors' names. Later, title to the vehicles was transferred to a corporation owned by the debtors. Subsequently, the bank holding liens on the vehicles consented to the re-titling of the vehicles in one of the debtor's names. For the convenience of the bank, the debtor consolidated the notes on the vehicles with various other notes of the corporation. The court held that the consolidation of the vehicle debts with debts of the debtors' business did not change the fact that the debts on the vehicles were consumer debts. *Id*. at 123–24.

clearly fits the "consumer debt" definition. Others, however, may have a vehicle that is dedicated to business, in which case the underlying debt is not for personal, family, or household purposes.[50]

"Primarily" is defined differently among the courts. Most agree that "primarily" means the total amount of consumer debt should exceed 50 percent of overall indebtedness. In some jurisdictions, the inquiry stops there because of holdings that "primarily" should be defined solely in terms of the relative dollar amount of the debtor's consumer debt.[51] In others, such as the Fifth Circuit, the court may look also at the number of consumer debts the debtor has relative to the number of non-consumer debts.[52]

Section 2

Official Form 1: Voluntary Petition

Current Name of Debtor and Joint Debtor

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Because the trustee or U.S. Trustee may request verification of the debtor's identity, a copy of the debtor's driver's license, passport, or other identifying document should be copied (scanned) and saved in the file (folder).

Practice Pointer: Joint petitions are limited to individuals who are married to each other. Neither relationships between individuals, such as parent and child, nor non-individual relationships, such as between corporate parent and subsidiary, qualify.

Although rare, issues of whether a couple is legally married can arise. Resort to state law is usually appropriate, such as with a common law marriage, but that may not be the case with same sex marriages or civil unions because of the federal Defense of Marriage Act.[53] Under that statute, "spouse" as used in section 302,[54] which permits joints cases, can mean only "a person of the opposite sex who is a husband or a wife."[55]

50. *See, e.g.*, Shaffer v. BC Nat'l Banks (*In re* Shaffer), 315 B.R. 90, 94 (Bankr. W.D. Mo. 2004) (holding, where money borrowed by debtor from father to purchase a truck, debt was a non-consumer debt because truck was used primarily in farming business). *But see In re* Lowder, No. 05-44802, 2006 WL 1794737, at *4, 2006 Bankr. LEXIS 1769 (Bankr. D. Kan. Aug. 14, 2006) (holding that "when a vehicle is not used within the scope of employment and the vehicle is acquired for the joint purpose of traveling to and from work and for conducting a debtor's private affairs, it is properly classified as 'personal use' for purposes of the Bankruptcy Code").

51. *See, e.g.*, Stewart v. U.S. Tr. (*In re* Stewart), 175 F.3d 796, 808 (10th Cir. 1999) (finding that consumer debt must be more than fifty percent); Zolg v. Kelly (*In re* Kelly), 841 F.2d 908, 913 (9th Cir. 1988) (same).

52. *See In re* Booth, 858 F.2d 1051, 1055 (5th Cir. 1988). *See also* First USA v. Lamanna (*In re* Lamanna), 153 F.3d 1, 2 n.2 (1st Cir. 1998) (dicta) (citing *Booth* in defining "primarily"); *In re* Vianese, 192 B.R. 61, 68 (Bankr. N.D.N.Y. 1996) (adopting *Booth* approach).

53. Defense of Marriage Act of 1996 § 3(a), 1 U.S.C. § 7 (2006).

54. 11 U.S.C. § 302 (2006).

55. *See, e.g., In re* Kandu, 315 B.R. 123, 131 (Bankr. W.D. Wash. 2004).

Prior Name(s) of Debtor and Joint Debtor

Initial Inquiry and/or Document Review: Ask client about past names, including DBAs and FDBAs, over the prior eight years.

Further Inquiry: Confirm that information about DBA or FDBA is consistent with information in Item 18 of the SoFA.

Practice Pointer: Compare with information on tax returns—Internal Revenue Service ("IRS") Schedule C—to determine if the client has been self-employed or an owner of a business within the last eight years. The tax returns may disclose FDBA information that the client has overlooked.

Social Security, EIN, or Other Tax Identification Number

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Confirm via tax returns, W-2s, 1099s, etc.

Practice Pointer: Note that only the last four digits of an individual's Social Security number should be listed, but other tax identification numbers should be listed in full.

Address/Mailing Information

Initial Inquiry and/or Document Review: Ask client about current physical address and mailing address. If mailing address and physical address are different, disclose that information in the proper section. For business clients, inquire about location of principal assets and disclose.

Further Inquiry: For married clients contemplating separation or divorce, confirm accuracy of physical and mailing address for each spouse just prior to filing.

Practice Pointer: This inquiry can be far more complicated than it seems with consumer debtors who are separated and/or divorcing and moving around while filing bankruptcy at the same time.

Type of Debtor (Form of Organization)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: If the client is an artificial entity, conduct a search in the jurisdiction of organization to confirm the type or form of the organization and verify the exact name of the entity.

Practice Pointer: Confirm the governing body of the organization has authorized the filing of the petition and obtain a copy of the authorization or resolution from the client's governing body.

Nature of Business (Including Whether a Tax-Exempt Entity)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: In most cases none should be required.

Practice Pointer: For the most part, this item allows easy identification of cases for which the Code provides some form of unique treatment, such as healthcare debtors, which must comply with the various Code amendments in Title IX of BAPCPA. If "other" is selected, a general description (e.g., "auto repair" or "retail") should suffice.

Chapter Under Which Case Will Proceed
Initial Inquiry and/or Document Review: None.
Further Inquiry: None.
Practice Pointer: Chapter selection requires the attorney's professional determination formed after:

- Analyzing the client's goals and financial circumstances;
- Explaining to the client the purpose and requirements of the various chapters;[56] and
- Applying controlling statutory and judicial eligibility rules.

Counsel should retain work product relating to the attorney's explanation and recommendation and the client's informed consent to chapter choice.

Nature of Debts[57]
Initial Inquiry and/or Document Review: Ask client, as appropriate. Much of counsel's inquiry into the nature of the client's debts will stem from the analysis required to complete Schedules D, E, and F.
Further Inquiry: In close cases, inquire about the underlying nature of the client's debts, particularly credit card debts that may have been incurred for business purposes. In individual cases, if counsel concludes that the debts are not primarily consumer debts, a memo to the file and/or retention of the internal work product used to make that determination is advisable. Cross reference the information provided by the client with information provided in any credit reports to confirm whether debts have primarily a consumer or non-consumer purpose.
Practice Pointer: The "Nature of Debts" box in the petition provides for only two choices: (a) primarily consumer debts and (b) primarily business debts. These two choices fail to account for cases in which the debts are not primarily either business or consumer debt, such as a case in which the debt is primarily tax debt or tort debt. In cases such as these, counsel will need to determine if either box should be checked or an explanatory statement should be added to the official form.

Filing Fee
No comment.

Chapter 11 Debtors/Small Business and Pre-Packaged Chapter 11 Cases
Initial Inquiry and/or Document Review: Whether the client will file a plan with the petition and has solicited acceptances pre-petition should not require separate inquiry by the attorney. Except under unusual circumstances, the attorney will have been involved in the pre-petition plan development and vote solicitation and, accordingly, whether these boxes need to be checked will be self-evident.

56. If counsel is a "debt relief agency," the client must be given the written notice required under section 342(b)(1), which explains the chapter choices. *See* 11 U.S.C. § 527(a)(1) (2006).
57. See Section 1.4.3 for a discussion of "primarily consumer debts."

The attorney should be able to determine whether the client is a "small business debtor," as defined in section 101(51D),[58] from the information required to complete Schedules D, E, and F.

Further Inquiry: Verification may be required regarding whether any of the client's debts are non-contingent, liquidated, or owed to insiders or affiliates.

Practice Pointer: A "small business debtor" is defined not just by reference to the client's indebtedness, but also based on whether a creditors' committee has been appointed and is active in the case. The latter is obviously not applicable to pre-petition document preparation because a case must be actually commenced before a committee can be appointed. Accordingly, attorneys should be guided by the debt ceiling part of the definition of "small business debtor," even though indicating that the debtor is a "small business debtor" and that its aggregate debts fall below the statutory ceiling appear to be repetitive.[59]

Prior Bankruptcy Cases

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Some courts require a PACER search for prior cases, at least in certain circumstances.[60] If a prior individual case terminated because of the client's failure to obtain pre-petition credit counseling, determine whether the prior case should be treated as having been dismissed or, conversely, never filed.[61]

58. Post-BAPCPA, the term "small business debtor"—

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under [Title 11] and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount not more than $[2,190,000] (excluding debts owed to 1 or more affiliates or insiders) for a case in which the United States Trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than $[2,190,000] (excluding debt owed to 1 or more affiliates or insiders).

11 U.S.C. § 101 (51D) (2006). Note that section 101(51D) itself imposes a $2,000,000 debt ceiling, but that amount is subject to triennial adjustment pursuant to section 104.

59. The Best Practices Group is unsure why a "small business debtor" would have to check two boxes, one indicating that the debtor is a "small business debtor" and the other that the relevant debts are below the statutory ceiling. The Advisory Committee Notes provide no clarification, stating only that "chapter 11 debtors whose aggregate noncontingent debts owed to non-insiders or affiliates are less than $2 million are directed to identify themselves in this section." 11 U.S.C. app. Official Form 1 Committee Notes on Rules—2005 Amendment (2006). Indeed, the Notes appear to be inconsistent with the petition and Code definition because, although debt owed to affiliates is excluded from the definition, the Advisory Committee Notes suggest it should be included for purposes of the "aggregate debt" box on the petition.

60. *See, e.g., In re* Oliver, 323 B.R. 769, 773 (Bankr. M.D. Ala. 2005); *In re* Bailey, 321 B.R. 169, 179 (Bankr. E.D. Pa. 2005).

61. *See In re* Elmendorf, 345 B.R. 486, 499 (Bankr. S.D.N.Y. 2006) (holding court has authority to determine whether petition should be stricken or dismissed based on the circumstances).

Practice Pointer: If there are two or more prior cases, the attorney should ensure that no court has entered an injunction prohibiting the filing the client is currently contemplating.[62]

Pending Bankruptcy Cases of Debtor's Spouse, Partner, or Affiliate
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: The attorney should run a PACER search to confirm any information that the client provides about related cases.

Exhibit A: Disclosures of publicly traded companies.
Initial Inquiry and/or Document Review: The information disclosed in Exhibit A is for publicly traded companies only. Ask client if it is required to file periodic reports with the U.S. Securities and Exchange Commission. If so, counsel should obtain those reports and complete Exhibit A as required.
Further Inquiry: None.
Practice Pointer: Note that the information sought in Item 4 of Exhibit A is the same information requested in Item 21(b) of the SoFA.

Exhibit B: Attorney declaration regarding chapter selection.
Initial Inquiry and/or Document Review: None.
Further Inquiry: None.
Practice Pointer: This exhibit is used only in individual cases with primarily consumer debts and confirms that counsel has provided the notice required by section 342(b).[63] As noted above, chapter selection requires the attorney's professional determination formed after:

- Analyzing the client's goals and financial circumstances;
- Explaining to the client the purpose and requirements of the various chapters; and
- Applying controlling statutory and judicial eligibility rules.

Counsel should retain work product related to the attorney's explanation and recommendation and the client's informed consent to chapter choice.

Exhibit C: Debtor ownership or possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Follow up on information by obtaining and reviewing documents from the client related to matters disclosed. Complete Exhibit C as required.
Practice Pointer: If a chapter 7 case is being filed, prepare an information package to enable the trustee to make a prompt decision regarding abandonment.

62. Although a full discussion is beyond the scope of this Working Paper, the Best Practices Working Group notes that a prior filing can legally impact the case the client is contemplating in a variety of ways, including limiting applicability of the automatic stay.
63. The statutory authority for the Exhibit B declaration is section 521(a)(1)(B)(iii)(I), not section 342(b). The latter requires the clerk to provide the debtor with the required notice.

Exhibit D: Individual debtor's statement regarding consumer credit counseling requirement.

Initial Inquiry and/or Document Review: Explain requirement to the client and ask the client to obtain and provide certificate.

Further Inquiry: Confirm certificate has not expired at the time of filing.

Practice Pointer: Advise clients to obtain these late in the case preparation process.

Venue

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Check client's responses to Item 15 in the SoFA regarding whether the client has moved in the prior three years.

Practice Pointer: The test for venue is still the location of the client's domicile, residence, principal place of business, or principal assets for the 180 days prior to filing (or where the client had any of those for the greatest part of the 180 days), although, per section 522(b)(3)(A), a debtor can claim exemptions only of the state in which its domicile was located for the 730 days prior to the bankruptcy filing (or, if the debtor's domicile changed within those 730 days, where the domicile was located for the 180 days prior to the 730-day period or the greatest part thereof).

Statement of Debtor Who Resides as Tenant of Residential Property

Initial Inquiry and/or Document Review: Inquire whether (a) the client is a tenant of real property used as a residence and (b) the landlord has a judgment against the client for possession of the residence. If so, obtain and review a copy of the judgment.

Further Inquiry: Determine whether the client can cure the entire monetary default and whether a deposit or rent for thirty days post-petition should be included with the filing of the case. See subsections 362(b)(2) and (*l*) for guidance on the information needed for this item.

Section 3

Schedule A: Real Property

Official Form 6

Initial Inquiry and/or Document Review: Determine that the client has an understanding of the types of real property interests that need to be listed.

Further Inquiry: Check public records, such as those maintained by county recorders, online asset search or valuation services (where feasible), tax notices, appraisals, deeds, mortgages or deeds of trust, title reports, leases and land contracts, environmental notices, and divorce judgments.

Comment: In his 1999 study of the accuracy of bankruptcy schedules and statements of financial affairs, Judge Rhodes found that a common error was the failure of married debtors to designate whether property "was owned by the husband, the wife, jointly, or as community property."[64] Accuracy in designating

64. Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 Am. Bankr. L.J. 653, 663–665, 678 (1999).

ownership interest is especially important with respect to real estate, as is accurately disclosing how the property is held (e.g., joint tenancy, tenancy by the entirety). Because of the significance of real property to the debtor's overall financial status, disclosure problems on Schedule A can lead to serious consequences, from the loss of the homestead exemption or the home itself to the denial of discharge.

Practice Pointers: Counsel should determine whether property is community or common law property and how the property is held.

With respect to the value of real property, counsel should consider including a brief description of the valuation method or source, such as a real estate broker's drive-by or the value ascribed by the local taxing authority. Attorneys are reminded that where the debtor owns real property with a non-filing individual, only the value of the debtor's interest should be scheduled. Check local rules for section 341 documentation requirements.

Section 4
Schedule B: Personal Property
Official Form 6

Certain aspects of the attorney's inquiry are common to all types of personal property on Schedule B while others warrant unique consideration. The Working Group's discussion here reflects these commonalities and distinctions, with general considerations discussed first and then issues unique to each subpart of Schedule B.

General Comments: Longstanding case law construing section 541 has expansively defined "property rights" by reference to state law.[65] In *Segal v. Rochelle*,[66] the court stated that "the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed."[67] Subsequently, the broad reach of what is estate property was confirmed in *United States v. Whiting Pools, Inc.*[68]

Thus, the Working Group suggests that (1) attorneys analyze the existence of property interests using this broad reach; (2) if the property interest exists under state law, such interest be scheduled or disclosed on the appropriate schedule; and (3) any ambiguity over the existence of property be resolved in favor of disclosure.[69] Additionally, attorneys should avoid using "unknown" as the value of an

65. *See, e.g.*, Butner v. United States, 440 U.S. 48, 54 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").
66. 382 U.S. 375 (1966).
67. *Id*. at 379.
68. 462 U.S. 198, 207–10 (1983).
69. *See, e.g., In re* Cheatham, 309 B.R. 631 (Bankr. M.D. Ala. 2004). In *Cheatham*, the debtors scheduled, and claimed as exempt, prepaid tuition purchased for the debtors' children through plans offered by the state. *Id*. at 632. A threshold issue was whether the plans were property of the debtors or the debtors' children. The court determined that the plans were not property of the estate, but noted that the schedules do not allow easy disclosure for that kind of property and advised:

asset unless, after reasonable inquiry, "unknown" is the most accurate description that can be provided.[70]

Practice Pointer: Attorneys should determine whether property is community or common law property and how ownership of the property is held.

Item B.1: Cash on hand.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Examine bank records for large withdrawals and missing deposits such as payroll.

Item B.2: Checking, savings or other financial accounts, certificates of deposit, or share in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.

Initial Inquiry and/or Document Review: Discuss various types of accounts and the difference between bank balance and checkbook balance. Determine that the value of each account is recent.

Further Inquiry: Obtain and review bank records. Check local rules for section 341 documentation requirements.

Practice Pointers: The amounts payable on checks written but not yet cleared as of the petition date are likely property of the debtor and, therefore, the estate.[71] Outstanding checks should be noted separately because, when presented and paid, the checks are post-petition transfers of property of the estate and subject to avoidance by the trustee. Note also that the trustee might seek to recover the funds from the debtor.

Item B.3: Security deposits with public utilities, telephone companies, landlords, and others.

Initial Inquiry and/or Document Review: Inquire into the various types.

Further Inquiry: Examine leases, other agreements, cancelled checks, etc.

Item B.4: Household goods and furnishings, including audio, video, and computer equipment.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom. In many jurisdictions the judge, U.S. Trustee, or panel trustees will have a minimum value per item threshold below which there is no need to disclose each item. Inquire about items purchased recently, antiques, and electronics. Review insurance riders.

The best course of action is to schedule the property and then claim it exempt, thereby making full disclosure and giving notice that the debtor believes that the property is not subject to distribution to creditors. Another option may be to make the disclosure in Paragraph 14 of the Statement of Financial Affairs, which calls for a listing of "property held for another."

Id. at 637–38 (relying on *In re Stevens*, 177 B.R. 619, 620 n.2 (Bankr. E.D. Ark. 1995); and *In re Avis*, No. 95-12007-AM, 1996 WL 910911, at *8, 1996 Bankr. LEXIS 1948 (Bankr. E.D. Va. Mar. 12, 1996)). The court further rejected that, by making disclosure, the debtor waived the argument that the property was excluded from the estate. *See id*. at 638.

70. See Section 1.4.2 for a more detailed discussion of the use of "unknown."

71. *See* Brown v. Pyatt (*In re* Pyatt), 486 F.3d 423, 427–28 (8th Cir. 2007).

Further Inquiry: For individual items, obtain and review receipt or credit card statement setting out purchase price, appraisal value, or eBay-type valuation. Consider conducting a walk-through.

Comment: The degree of specificity presents an especially tricky question with respect to this item. Overgeneralizations, such as "miscellaneous household goods," are likely insufficient to put the trustee on notice of whether the client has property that is not exempt and of value to estate creditors. On the other hand, a detailed itemization might require significant effort that, on balance, is not merited because the value of the various goods will lead to no return for creditors, especially after exemptions are taken into account.

Practice Pointer: Attorneys should be satisfied with the client's responses to questions regarding items to be disclosed here. Further, the consequences of attempting to hide property should be made clear to the client.

Item B.5: Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom. Inquire about items purchased recently, antiques, and electronics; review insurance riders.

Further Inquiry: For individual items, obtain and review receipt or credit card statement setting out purchase price, appraisal value, or eBay-type valuation. Consider conducting a walk-through.

Practice Pointers: It can be helpful simply to ask the client, "Do you collect anything?" or "Do you have a lot of [books, movies, CDs, etc.]?" In addition, clients need to understand the distinction between ordinary items and those that may have value.

Item B.6: Wearing apparel.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom. Inquire about items purchased recently and review insurance riders.

Further Inquiry: For individual items, obtain and review receipt or credit card statement setting out purchase price, appraisal value, or eBay-type valuation.

Practice Pointers: Clients need to understand the distinction between ordinary wearing apparel and items that may have value. Most used wearing apparel is normally worth about ten percent of its retail value.

Item B.7: Furs and jewelry.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom. Inquire about items purchased recently and review insurance riders.

Further Inquiry: For individual items, obtain and review receipt or credit card statement setting out purchase price, appraisal value, or eBay-type valuation.

Practice Pointer: Most everyone has something that can and should be disclosed in the "furs and jewelry" category and, in some jurisdictions, listing "none" will raise a red flag for the trustee. Clients may be less than candid regarding items

to which the client feels a sentimental attachment or those items that are family heirlooms.

Item B.8: Firearms and sports, photographic, and other hobby equipment.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom. Inquire about items purchased recently and review insurance riders.

Further Inquiry: Obtain and review receipt or credit card statement setting out purchase price, appraisal value, or eBay-type valuation.

Practice Pointer: Clients may be less than candid regarding items to which the client feels a sentimental attachment or those items that are family heirlooms or that the client uses extensively for recreation.

Item B.9: Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.

Initial Inquiry and/or Document Review: This item requires a detailed response. Exemptions may depend on the response.

Further Inquiry: Review the declaration sheet and statement of current cash surrender value. Check local rules for section 341 meeting of creditors documentation requirements and obtain and review all documents that will be required.

Practice Pointer: Counsel should exercise discretion regarding insurance policies that have no value unless a stated contingency occurs, such as term life insurance policies. However, any insurance policy, including home and automobile policies, against which the client or some other person may have a claim should be disclosed, and the claim should be scheduled or listed in the SoFA as appropriate. Life insurance policies in which the client has a beneficial interest should be scheduled in Item 20.

Item B.10: Annuities. Itemize and name each issuer.

Initial Inquiry and/or Document Review: This item requires a detailed response. Exemptions may depend on the response.

Further Inquiry: Review declaration sheet and statement of current cash surrender value.

Comment: It is unclear how the value of annuities should be scheduled. Keeping in mind that the use of "unknown" is discouraged and the disclosure standard is to put the trustee and creditors on notice of the asset,[72] attorneys should exercise professional judgment in determining how to list value.

Item B.11: Interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1). Give particulars. (File separately the record(s) of any such interest(s). 11 U.S.C. § 521(c); Rule 1007(b)).

Initial Inquiry and/or Document Review: This item requires a detailed response. In addition, if the debtor's exemption rights cannot be determined with

72. *See supra* Section 1.4.2.

reasonable certainty, recent statements or consultation with a plan administrator may be necessary.

Further Inquiry: Review declaration sheet and statement of current cash surrender value.

Comment: This item was necessitated by the enactment of subsections 541(b)(5) and (6) as part of BAPCPA. A number of questions arise, such as who is the owner of funds and whether the funds are excluded or may be exempted from the estate, but these questions have not yet been addressed by the courts.[73]

Practice Pointer: If the education IRA is for a child of the client, it should still be scheduled. Do not include names of minor children.

Item B.12: Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Give particulars.

Initial Inquiry and/or Document Review: This item requires a detailed response. In addition, if the client's exemption rights cannot be determined with reasonable certainty, recent statements or consultation with a plan administrator may be necessary.

Further Inquiry: Review recent statements, plan documents, declaration sheet, and statement of current cash surrender value.

Comment: It is unclear how the value of these assets should be scheduled. Keeping in mind that the use of "unknown" is discouraged and the disclosure standard is to put the trustee and creditors on notice of the asset,[74] attorneys should exercise professional judgment in determining how to list value. Counsel should inquire about loans from these assets and discuss the effect of discharge. Apparently, if the personal liability to repay a loan from one of these plans is discharged and the loan is not repaid, a plan administrator can treat the unpaid loan as an early distribution, thus triggering tax consequences.[75]

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73. New subsections 541(b)(5) and (6) appear to alter the amount in these education funds that is property of the estate by excluding from the estate only contributions made within a year of filing the petition (along with adding other restrictions and conditions). However, this section does not answer the question of who owns the funds. In *In re Cheatham*, for example, the court held that, under Alabama law, prepaid tuition credits were property of the debtors' children and, therefore, excluded from the estate. 309 B.R. 631, 634 (Bankr. M.D. Ala. 2004). If a non-debtor has the beneficial interest in an education fund, then it is difficult to see how the fund could be administered for the benefit of the debtor's creditors. Bankruptcy law should not, and likely cannot, be construed as requiring a forfeiture of property owned by a non-debtor. *See, e.g.*, Cmty. Nat'l Bank & Trust Co. of N.Y. v. Persky (*In re* Persky), 134 B.R. 81, 97 (Bankr. E.D.N.Y. 1991) ("When Congress, however, determines that property of a third party, not a creditor or insider of the debtor, and having nothing to do with the bankruptcy process, can be taken, affected or appropriated, wholly or partially, for the benefit of the debtor's estate or its creditors, it has gone beyond that which is permissible under the Bankruptcy Clause.").

74. *See supra* Section 1.4.2.

75. *See In re* Herndon, 289 B.R. 629, 633 (Bankr. E.D. Mich. 2003). In *Herndon*, the debtor took loans from her ERISA-qualified retirement account and later filed for bankruptcy. The debtor defaulted on the repayment of those loans and, based on Sixth Circuit precedent, could not repay them under a chapter 13 plan that paid unsecured creditors less than 100 percent. The court held that the representative of the retirement fund was not prohibited by the automatic stay from reporting the early distribution to the IRS. *Id.* at 630–33.

Item B.13: Stock and interests in incorporated and unincorporated businesses. Itemize.

Initial Inquiry and/or Document Review: This item requires a detailed response. Closely held interests must be discussed in detail to determine the nature and value of the debtor's interest.

Further Inquiry: Review tax returns and account statements for publicly traded stocks. Closely held interests may call for a review of financial statements or accounts, buy-sell agreements, bankruptcy clauses in governing documents, etc., or consultation with the client's or company's accountant.

Item B.14: Interests in partnerships or joint ventures. Itemize.

Initial Inquiry and/or Document Review: This item requires a detailed response. Closely held interests must be discussed in detail to determine the nature and value of the debtor's interest.

Further Inquiry: Review tax returns and account statements for publicly traded stocks. Closely held interests may call for a review of financial statements or accounts, buy-sell agreements, bankruptcy clauses in governing documents, etc., or consultation with the client's or company's accountant.

Item B.15: Government and corporate bonds and other negotiable and nonnegotiable instruments.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review account statements.

Item B.16: Accounts receivable.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review books, promissory notes, and other records.

Item B.17: Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.

Initial Inquiry and/or Document Review: Review judgments and applicable orders. If a divorce or custody hearing is pending, make a detailed inquiry or confer with the client's family law counsel. Inquire regarding whether the obligor is in arrears.

Further Inquiry: None.

Practice Pointer: With respect to arrearages, the face amount should be disclosed in the explanatory text and the factors used to discount that face value due to doubtful collectability should be briefly identified. For the numerical value in the "current value of the debtor's interest in property" column, counsel may make a good-faith collectability assessment and discount the face value accordingly.

If there is a matter pending in a state domestic relations court, ensure required information is listed in Item 4.a. of the SoFA.

Item B18: Other liquidated debts owed to debtor including tax refunds. Give particulars.

Initial Inquiry and/or Document Review: Explain liquidated debts, including tax refunds, to client and inquire.

Further Inquiry: Review documents, if any, that support underlying obligations. Review the amount of last year's tax refund, if any, and disclose an estimated amount for the current year.

Practice Pointer: Under Internal Revenue Code ("I.R.C.") section 1398, a debtor can elect to split the tax year into two parts, with the first period ending on the date prior to the filing of the petition and the second period starting on the filing date and going through the end of the year. This election presents various planning opportunities that counsel should consider and is very useful if there are assets in the estate and the debtor has engaged in year-to-date activities that have resulted in pre-petition tax liability.

Professional (usually attorney) retainers and other prepaid items are a common source of confusion and could be listed in several locations on Schedule B. The Working Group has selected Item 18, "Other liquidated debts," as the place of disclosure for purposes of this discussion. A flat fee earned upon receipt is not property of the estate. But funds in the client trust account of an attorney retained by a debtor become property of the estate upon the debtor filing the bankruptcy petition because the retainer belongs to the client until the funds are earned by the attorney.[76] Therefore, the debtor should list any unearned retainers on its Schedule B as other liquidated debts.

Additionally, it remains at issue whether an attorney with a pre-petition retainer possesses a secured lien for unpaid fees against such retainer and whether the debtor is required to list the attorney on Schedule D as a secured creditor.[77]

Item B.19: Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A—Real Property.

Initial Inquiry and/or Document Review: Ask client if (a) any relatives have died and left a surviving spouse and (b) whether there are any family trusts.

Further Inquiry: Review any court order, settlement, or document as well as the circumstances underlying the interest.

Practice Pointer: Be sure your client understands what is being asked. Most of the terms used in the description of this item are legal and may be confusing to the client.

76. *See In re* Hill, 355 B.R. 260, 262–63 (Bankr. D. Or. 2006), *aff'd sub nom*. Hill v. Camacho, No. CV-07-710-MO, 2007 WL 2120891 (D. Or. July 24, 2007).

77. *See* Weinman, Cohen & Niebrugge, P.C. v. Peters (*In re* Printcrafters, Inc.), 233 B.R. 113, 118 (D. Colo. 1999) ("Most bankruptcy courts have concluded that a prepetition retainer paid by a debtor to counsel for services in connection with a case is security for, or held in trust for, payment of fees and costs to be incurred."); *In re* Golf Augusta Pro Shops, Inc., Nos. 01-11989, 01-11990, 2003 WL 22176082, at *2 (Bankr. S.D. Ga. Aug. 28, 2003) (holding same and noting that, regarding whether a conflict of interest exists, "there is an exception to § 327 where the attorney holds a pre-petition and post-petition claim for money owed for future bankruptcy services and/or where the legal fees that accrued pre-petition have been incurred solely for services rendered in contemplation of and in connections with the bankruptcy case"); *In re* Office Prods. of Am., Inc., 136 B.R. 964, 972–73 (Bankr. W.D. Tex. 1992) (holding same under Texas law).

Item B.20: Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.

Initial Inquiry and/or Document Review: Ask client if (a) any relatives have died and left a surviving spouse and (b) whether there are any family trusts.

Further Inquiry: Review of any court order, settlement, or document as well as the circumstances underlying the interest.

Practice Pointer: The term "life insurance policy," as used here, means a policy under which the client is a beneficiary. If the client is the insured rather than the beneficiary, the policy should be scheduled in Item 9.

Item B.21: Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.

Initial Inquiry and/or Document Review: Ask if the client is (a) a party to a lawsuit; (b) has any counterclaims pending; (c) has any rights to sue anyone for anything; or (d) has consulted with an attorney for any matter other than bankruptcy in the past two years.

Further Inquiry: Review facts and circumstances surrounding such claims. Contact counsel handling any such claims.

Practice Pointer: Keep in mind claims that may have arisen from pre-petition debt collection activity, such as violations of the Fair Debt Collection Practices Act[78] and state laws governing debt collection.

Item B.22: Patents, copyrights, and other intellectual property. Give particulars.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Obtain and review all patents, copyrights, and trademarks. Consult with intellectual property counsel as necessary.

Item B.23: Licenses, franchises, and other general intangibles. Give particulars.

Initial Inquiry and/or Document Review: Ask client and ensure client understands the nature of the interest subject to disclosure here.

Further Inquiry: Review related documents.

Practice Pointer: Counsel may consider whether to include occupational licenses here and, if so, make appropriate inquiry.

Item B.24: Customer lists or other compilations containing personally identifiable information (as defined in 11 U.S.C. § 101(41A)) provided to the debtor by individuals in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes.

Initial Inquiry and/or Document Review: Explain to client and inquire.

Further Inquiry: None.

78. Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified as amended at 15 U.S.C.A. §§ 1692–1692p (West 1998 & Supp. 2007)).

Comments: In some cases, the presence of a customer list or similar database should be obvious, such as with a business client that sells goods via the Internet. Be aware, however, that such lists can be involved in consumer cases. For example, a client might run an open-forum-style web log and have information about registered users.

Item B.25: Automobiles, trucks, trailers, and other vehicles and accessories.

Initial Inquiry and/or Document Review: Review title, if available, or other evidence of liens. Perform online search if documents are electronically available. Inquire about untitled vehicles.

Further Inquiry: Confirm values with Kelly Blue Book or other Internet source. Have vehicle appraised if the client intends to redeem the property.

Comments: Check local rules for documents that the client might be required to produce at the first meeting of creditors held pursuant to section 341.

Item B.26: Boats, motors, and accessories.

Initial Inquiry and/or Document Review: Review title, if available, or other evidence of liens. Determine whether property is titled under state or federal law. Perform online search if documents are electronically available. Inquire about untitled property. Inquire whether client lives aboard.

Further Inquiry: Confirm values on Internet, eBay, www.usedboats.com, or another Internet resource. Have boat, motor, and accessories appraised if the client intends to redeem the property.

Item B.27: Aircraft and accessories.

Initial Inquiry and/or Document Review: Request bills of sale and lien information available to the client regarding aircraft and accessories. Request appraisals completed regarding the aircraft or accessories. If no appraisal is available, perform a valuation of the aircraft via online sources.

Further Inquiry: If feasible, obtain and review "title" for any aircraft or accessories.

Practice Pointer: Obtaining "title" to an aircraft is not a simple process. The Federal Aviation Administration ("FAA") records are not available online, and it is a tedious process to obtain them. Moreover, the FAA may not have copies of all liens and bills of sale because the parties do not always provide them promptly. A company specializing in aircraft title searches may be the most efficient way to determine what liens are on the aircraft or accessories and the true owner of these items.

Item B.28: Office equipment, furnishings, and supplies.

Initial Inquiry and/or Document Review: For individual clients, ask about items purchased for more than a threshold value in accordance with local practice and custom. For business clients, request a listing of relevant items.

Further Inquiry: For individual items, obtain and review receipt or credit card statement setting out purchase price, appraisal value, or eBay-type valuation.

Item B.29: Machinery, fixtures, equipment, and supplies used in business.
Initial Inquiry and/or Document Review: For individual clients, ask about items purchased for more than a threshold value in accordance with local practice and custom. For business clients, request a listing of relevant items.
Further Inquiry: For individual items, obtain and review receipt or credit card statement setting out purchase price, appraisal value, or eBay-type valuation.

Item B.30: Inventory.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Confirm consistency with response to Item 20 in the SoFA. Compare to Item 20 and understand any discrepancies.

Item B.31: Animals.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: None.
Comments: Be sure clients understand that family pets, even those without any apparent monetary value, should be included here. Livestock may require a detailed inventory as of petition date for section 552 purposes. Breeding stock may give rise to income.
Practice Pointer: Be sure your client provides expense information relating to pets for inclusion on Schedule J.

Item B.32: Crops—growing or harvested. Give particulars.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: None.
Comments: The attorney may want detailed documentation for section 552 purposes. Consider photographs or independent appraisal of crops on the date of petition. Include quantity and quality descriptions. Consider the effect of section 552 as to crops planted after filing.

Item B.33: Farming equipment and implements.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Detailed inventory of year, make, model, and hours of use for each unit. Use Internet sources for valuation. Consider taking photographs of equipment at time of case filing. Consider obtaining a pre-petition appraisal.

Item B.34: Farm supplies, chemicals, and feed.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Consider photographs or independent appraisal of supplies, chemicals, and feed on date of petition. Need quantity and quality descriptions.

Item B.35: Other personal property of any kind not already listed. Itemize.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Inquire about such items as golf, tennis, health, and other club memberships, frequent flier miles, season tickets, and lottery tickets.

Section 5
Schedule D: Creditors Holding Secured Claims
Schedule E: Creditors Holding Unsecured Priority Claims
Schedule F: Creditors Holding Unsecured Nonpriority Claims
Official Form 6

5.1. General Comments and Inquiry Recommendations

Certain aspects of the attorney's inquiry are common to Schedules D, E, and F, while others warrant unique consideration. The Working Group's discussion reflects these commonalities and distinctions, with general considerations discussed first, and issues unique to each of Schedules D, E, and F discussed in the "commentaries."

Initial Inquiry and/or Document Review: Ask client and request all documentation the client has regarding debts. For debts that are contingent, unliquidated, or in dispute, ask the client in simple terms whether the client believes he or she should not have to pay any of them. Review documents to determine when the debts were incurred.

The review of a client's credit report is an emerging trend among attorneys and may become the standard practice. The Working Group believes this is a positive development both because of the breadth of information available on credit reports and because most consumer clients can obtain a report without charge.[79] The Working Group suggests that attorneys incorporate this practice as part of their customary reasonable inquiry, and attorneys should be able to rely on the information obtained from credit reports without further inquiry.[80] Counsel should, however, get the client's written consent to retrieve and use credit reports.

Further Inquiry: If the client has filed another bankruptcy case within the prior year, or such other time frame that the attorney determines is appropriate under the circumstances, the attorney should retrieve the schedules from that case and compare the lists of creditors to ensure full disclosure.

If the client indicates that any debt is contingent, unliquidated, or in dispute, inquire whether the debt is the subject of a judicial or other proceeding and

79. Credit reports are available at AnnualCreditReport.com, http://www.annualcreditreport.com (last visited Sept. 5, 2008), or from the Federal Trade Commission's web site, Federal Trade Commission, Free Annual Credit Reports, http://www.ftc.gov/bcp/conline/edcams/freereports/index.html (last visited Sept. 5, 2008).

80. *See* Report, *supra* note 1, at 710. *See also In re* Debtor's Attorney Fees in Chapter 13 Cases, 374 B.R. 903, 907 (Bankr. M.D. Fla. 2007) (suggesting the importance of credit reports by allowing attorneys practicing before the Middle District of Florida to charge debtors for the expense of obtaining the debtor's most recent credit report), *amended by* No. 07-MP002 MGW, 2007 WL 2986127 (Bankr. M.D. Fla. Sept. 19, 2007); *In re* Habiballa, 337 B.R. 911, 916 (Bankr. E.D. Wis. 2006) (granting, where debtor relied exclusively on his credit report in scheduling his credit card indebtedness, the debtor's objection to a proof of claim to the extent it claimed a higher amount than the amount listed in the debtor's schedules).

determine, to the extent possible, whether the client has a claim against the other party.

Practice Pointers: The phrasing of questions related to this item can make a great deal of difference in how the client understands what information the attorney is seeking. Many clients will not understand the technicalities of whether a debt is contingent, liquidated, or in dispute, but clients usually are well aware of debts they think they should not have to pay.

General Comments: The timing of obtaining a credit report should be left to the attorney's judgment on a case-by-case basis. Some clients may present a complicated financial situation that will take time to sort out and, if the report is pulled early in the representation, the report may be dated by the time the case is actually commenced. Other clients may have no documentation regarding their debts or may strike the attorney as being less than candid, making the report a valuable tool in completing the schedules.

The Working Group has no comment on the various notice provisions in section 342, which were enacted as part of BAPCPA, other than to remind attorneys that there were changes and to make appropriate inquiry regarding addresses for notice to creditors.

5.2. Comments on Schedule D: Creditors Holding Secured Claims

The degree of document review will depend on the type of collateral and the circumstances of the case. For real property, attorneys should obtain proof of recordation and the payoff amount at or near the time the petition is filed. The Working Group believes that a title report is generally not necessary unless the facts of a specific case suggest otherwise. Similarly, for titled and UCC-1 personal property, the attorney should obtain proof of the lien, if available, and the payoff amount at or near the time the petition is filed.

In individual cases, clients might have credit cards that enable the issuing retailer to take a security interest in items purchased at the store with the credit card. Sears is a common example of this type of issuer. The Working Group believes that pre-petition review of these arrangements is not necessary. Most consumers do not have the underlying agreement and the value of the property is often low.

If a secured creditor has retaken collateral and the client's equitable right of redemption has expired, the debt should not be listed on Schedule D.[81] Deficiencies belong on Schedule F or, in certain circumstances, Schedule E.

If the client has given a piece of collateral to another person as a gift or if the client is a co-signor without any interest in the collateral, the debt should not be listed on Schedule D. It is an unsecured debt as to the client and should be listed on Schedule F.

81. The property, likewise, should not be listed on Schedule A or B but should be included in Item 5 (repossessions, foreclosures, and returns) of the SoFA.

5.3. Comments on Schedule E: Creditors Holding Unsecured Priority Claims

The extent of inquiry regarding priority claims will depend on the circumstances. For clients whose incomes are below the state median and whose cases will result in a "no asset" report, the expense of a detailed inquiry may not be justified. This is especially true with respect to tax claims, where separating the amounts entitled to priority from those that are not can be complicated and time consuming, and may be more easily accomplished after the bankruptcy case has been commenced.

A more searching analysis is required, however, for clients where (1) income is above the state median, (2) debts are primarily consumer debts, and (3) the case will proceed under chapter 7. Priority debt is imputed into the means testing formula and, if done improperly, could lead to a motion to dismiss the client's case as abusive.

For all clients, the attorney should make reasonable efforts to determine whether debts that appear to be priority debts are actually secured by a lien on property. To the extent there is security, the debt should be listed on Schedule D. Where the debt has secured and priority aspects, attorneys should be careful when listing the amount of each to avoid improperly overstating the total amount owed.

Further inquiry in other cases should be left to the discretion of the attorney. In some cases, for example, the client may be better served by allowing the priority determination to proceed through a contested proceeding after the case is filed. In others, a more searching pre-filing inquiry may be necessary based on the client's needs, goals, and financial circumstances.

The Working Group also notes that some attorneys might confuse priority debts with those that are not dischargeable but not entitled to priority. Only three types of debts fit both categories: certain tax debts, domestic support obligations, and certain personal injury claims resulting from the client's operation of a motor vehicle while under the influence.[82] Unlike these types of debts, student loans owed to the government, for example, are not priority debts, although they are non-dischargeable. Similarly, property settlements in divorce proceedings should not be confused with domestic support obligations; both types of debt are non-dischargeable, but only the latter is priority debt.

As a general rule, the IRS and the state taxing authority should always be scheduled, especially in chapter 13 cases. This will ensure notice to the taxing authorities and put the onus on them to file claims and start the process of resolving what amounts are owed and whether those amounts are secured, priority, or general unsecured debts. Scheduling these tax authorities also protects the client who does not realize that he or she has outstanding tax liability.

82. Although these three types of debt are entitled to section 507(a) priority and are non-dischargeable under section 523(a), their scope under the two sections may differ. For example, if a debtor caused personal injury while operating an aircraft under the influence, the debt is non-dischargeable but not entitled to priority.

5.4. Comments on Schedule F: Creditors Holding Unsecured Nonpriority Claims

The Working Group recognizes that credit cards, which are used over a period of time, pose a problem in identifying the "date incurred" for which Schedule F calls. The Working Group believes the use of "various dates" is appropriate.

Section 6

Schedule G: Executory Contracts[83] and Unexpired Leases

Official Form 6

Initial Inquiry and/or Document Review: Ask client in plain language and exercise judgment regarding information the client provides for other purposes, such as income from rental property.

If the client is a business, ask about equipment that is commonly leased and types of contracts that are common, such as business premises or copy machine leases or contracts for regular delivery of water for the office cooler.

Further Investigation: If the client responds affirmatively or, in the attorney's judgment, there is an executory contract or unexpired lease, request relevant documentation from the client. If there are no documents, ask the client for the lease's terms.

Practice Pointer: Clients often think of bankruptcy in terms of debts, which does not capture all of what Schedule G requires. They will better understand the type of information required for Schedule G if examples are given. Some items to suggest as examples and for which to be on the lookout include:

- Household goods acquired from rent-to-own retailers
- Property acquired through a lease rather than a sale[84]
- Land contracts
- Real property the client leases as the client's residence (including mobile home lots)
- Real property the client leases to others for residential or commercial purposes
- Farm land the client operates but which is owned by another person
- Unperformed contracts for services the client provides for extra income, such as home improvement or car repair

83. "Congress intended the term [executory contract] to mean a contract 'on which performance is due to some extent on both sides.'" NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 n.6 (1984) (quoting H.R. Rep. No. 95-595, at 347 (1977)). "More precisely, a contract is executory if 'the obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other.'" Unsecured Creditors' Comm. of Robert L. Helms Constr. & Dev. Co. v. Southmark Corp. (*In re* Robert L. Helms Constr. & Dev. Co., Inc.), 139 F.3d 702, 705 (9th Cir. 1998) (quoting Griffel v. Murphy (*In re* Wegner), 839 F.2d 533, 536 (9th Cir. 1988)).

84. Because of variances among jurisdictions and in the facts presented from one case to the next, the Working Group makes no comment on transactions that have the appearance of being leases but which may in fact be secured transactions. Counsel should inquire in accordance with controlling precedent and local practice and custom.

- Personal property, such as a car, equipment from a failed business, or sporting equipment, that the debtor permits another to use on an ongoing basis in exchange for consideration
- Property on consignment.

Schedule G disclosures will often trigger, or be triggered by, disclosures required on other schedules or in the SoFA.[85]

SECTION 7

SCHEDULE H: CODEBTORS

OFFICIAL FORM 6

Initial Inquiry and/or Document Review: Ask client if any other person is obligated under any debt listed on Schedule D, E, or F or if the client has co-signed or guaranteed someone else's debt.

Further Inquiry: If the client's case will proceed under chapter 13, determine whether the subject debt is a consumer debt for purposes of the co-debtor stay.

Practice Pointer: Individual clients may not be candid about co-debtors, especially if the obligation involves a family member. The client might be ashamed and assume that the bankruptcy can be kept secret if the co-debtor is not disclosed. Some clients might try to protect the other person by "keeping him or her out" of the bankruptcy. Divorced clients may likewise wish to hide the fact of the bankruptcy from their former spouse or may not realize that the domestic relations court cannot alter either spouse's legal liability on a debt.

SECTION 8

SCHEDULE I: CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

SCHEDULE J: CURRENT EXPENDITURES OF INDIVIDUAL DEBTOR(S)

OFFICIAL FORM 6

8.1. GENERAL COMMENTS

Generally speaking, much of the information needed to complete Schedules I and J is also necessary for disclosures on other forms discussed in this Working Paper and, therefore, the inquiry is substantially similar to that made for other forms.[86] For example, child support that the client receives must be listed here, on Form 22, and in Item 2 of the SoFA. Attorneys should check for consistency across

85. For example, in his 1999 study, Judge Rhodes found that 122 debtors in his sample listed rent as an expense on Schedule J (107 for a residence and 15 for a mobile home lot). Of those, 85 percent (88 percent for residential renters, 67 percent for those leasing mobile home lots) failed to disclose the lease on Schedule G. In addition, 81 percent of these debtors listed no security deposit on Schedule B. Rhodes, *supra* note 64, at 666, 668.

86. A key difference among the various forms, however, is that Schedule I is based on an estimated average or projected monthly income, measured at the time the case is filed. By contrast, Form 22 income follows the "current monthly income" formula set out in the means test.

forms insofar as the information ought to be consistent; inconsistency could give rise to investigation by the trustee or U.S. Trustee.[87]

Note that Schedules I and J require information about spouses irrespective of whether the case will be filed by both spouses jointly or by just one of the spouses, unless the couple is separated. Attorneys should be prepared to deal with the resistance some non-filing spouses exhibit in providing information.

Regarding income, attorneys should be clear about whether the client is utilizing historical averages or projected income in supplying information for Schedule I. That information will likely be relevant to the trustee. By the same token, itemization of expenses that are out of the ordinary is useful.

Clients need to be clear on what is and is not income. Gifts should not be included, but regular contributions to the client's household should be included.[88] Remember also that clients may not be candid about all sources of income. They might also be less than forthcoming with expenses. Attorneys can look for clues to ferret out information, such as where a client is months behind on bills despite a showing of available cash when income less expenses is determined.

Another note on the relationship between Form 22 and Schedules I and J is warranted. The six-month look-back period for "current monthly income" creates several distinct issues when determining whether a presumption of abuse arises and whether a debtor has projected disposable income. This determination depends on the definition of "current monthly income" (which has been colloquially described as being "not current, not monthly, and not income"). This definition can create the appearance of monthly income that is not in fact available to the client. On the other hand, the definition of "current monthly income" can create an opportunity for pre-petition income manipulation by a debtor, for example, taking an unpaid leave of absence from work, refusing formerly welcomed overtime, or quitting a job.[89]

Thus, courts might look to Schedule I (and correlatively, regarding the means test's expense formula, to Schedule J) to ascertain the circumstances of an individual debtor's income and expenses.[90] However, there are decisions, mainly in chapter 13 cases, in which courts have held that they lack the authority to review Schedules I and J, a conclusion seemingly compelled by the Code's plain language.[91]

87. The facts may dictate inconsistency. Again using the child support example, if the obligor stopped paying four months prior to filing, Form 22 would include the two months that were paid, with the amount averaged over six months. Schedule I, on the other hand, would reflect the current circumstance, i.e., that no child support was currently being received. Expenses present an even starker example because Form 22 relies on figures from the IRS while Schedule J utilizes actual expenses.

88. A declaration from the donor of gratuitous contributions may be appropriate for other purposes in the representation, such as plan feasibility or approval of reaffirmation agreements.

89. *See* Baxter v. Johnson (*In re* Johnson), 346 B.R. 256, 264 (Bankr. S.D. Ga. 2006) (quoting Marianna Culhane & Michaela White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 Am Bankr. L. Rev. 665, 689 (2005)).

90. *See, e.g., In re* Edmunds, 350 B.R. 636, 648 (Bankr. D.S.C. 2006) (rejecting mechanical application of Form 22C); *In re* Kibbe, 342 B.R. 411, 415 (Bankr. D.N.H. 2006) (same), *aff'd*, 361 B.R. 201 (1st Cir. B.A.P. 2007).

91. *See In re* Farrar-Johnson, 353 B.R. 224, 229 (Bankr. N.D. Ill. 2006); *In re* Rezentes, 368 B.R. 55, 58–59 (Bankr. D. Haw. 2007); *In re* Dalton, No. 07-50402 ERG, 2007 WL 4554024, at *2, 2007 Bankr. LEXIS 4387 (Bankr. S.D. Miss. Dec. 19, 2007).

8.2. Schedule I: Current Income of Individual Debtor(s)

Marital Status; Dependents of Debtor and Spouse

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Inquire whether someone other than the client's spouse or children qualifies as a dependent of the client or review tax returns. Note the age and birth date of minor children. Review divorce judgments to determine how dependency status is allocated.

Comments: Information provided should be consistent with the information provided on Form 22. Generally, attorneys should be able to rely on what clients tell them regarding spouses and children. Do not disclose names of minor children.[92]

Employment

Initial Inquiry and/or Document Review: Ask client or review payment advices.

Further Inquiry: Review payment advices.

Practice Pointer: If the client receives regular income from the operation of a business, profession, or farm, that income should be listed on Line 7 and appropriate disclosure should be made in Item 1 of the SoFA.

Line 1: Monthly gross wages, salary, and commissions.

Initial Inquiry and/or Document Review: Review income tax returns or transcripts, payment advices, employment contracts, and W-2 and 1099 forms.

Further Inquiry: Inquire whether the client's income is expected to change over the next year.

Line 2: Estimate monthly overtime.

Initial Inquiry and/or Document Review: Review past pay information.

Further Inquiry: Inquire whether the client anticipates any changes on a going-forward basis.

Line 4: Payroll deductions.

Initial Inquiry and/or Document Review: Review payment advices.

Further Inquiry: Review income tax returns or transcripts for current and prior years and client's W-4 form. Review employment manuals or obtain a statement from the client regarding mandatory deductions.

Practice Pointer: Accurate information about current payroll deductions should be given regardless of the nature of the deductions. Whether a deduction should be included as part of the client's current monthly income or disposable income (either because of its type or amount) should be dealt with elsewhere (in Line 17, for example).

Line 7: Regular income from operation of business or profession or farm.

Initial Inquiry and/or Document Review: Review income tax returns including Schedules C and K-1 and Form 1120, business bank statements, and profit and loss statements.

92. *See* 11 U.S.C. § 112 (2006).

Further Inquiry: The form requires that a detailed statement be attached.

Practice Pointers: Attorneys should exercise professional discretion in obtaining relevant information and may want to consider listing the efforts undertaken, including whether the client or counsel used the prior year's tax returns or IRS Schedule C.

Line 8: Income from real property.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review lease/rental agreements, income tax returns, and bank statements.

Comment: The client's interest in the property should be included on Schedule A and any lease/rental agreements should be included on Schedule G.

Line 9: Interest and dividends.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review income tax returns, broker statements, and bank statements.

Comment: Be sure to make related disclosures on Schedule B and in the SoFA.

Line 10: Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.

Initial Inquiry and/or Document Review: Review divorce judgments and related documents, including modifications. Note birth dates of minor children.[93]

Further Inquiry: Determine whether the obligor is currently making payments and whether there is any arrearage.

Practice Pointer: Where payments are current, one is likely due to the client at the time of filing. Attorneys should schedule and exempt that expected payment.

Line 11: Social security or government assistance.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review bank statements, payment advices, and benefit award determination letters.

Comment: Note that the form requires the client to specify the source or type of payment. For purposes of Form 22, certain payments under the Social Security Act are not included in "current monthly income."[94]

Line 12: Pension or retirement income.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review bank statements, income tax returns, payment advices, and benefit determination award letters.

Comment: Include relevant information in Item 12 of Schedule B.

93. Pursuant to 11 U.S.C. section 112, the debtor may not be required to disclose names of minor children in public records.

94. *See* 11 U.S.C. § 101(10A)(B) (2006).

Line 13: Other monthly income.

Initial Inquiry and/or Document Review: Inquire regarding family assistance received on a routine basis, inheritances, life insurance benefits, annuities, disability income, and structured settlements.

Further Inquiry: Family assistance should be documented.

Line 17: Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of [Schedule I].

Initial Inquiry and/or Document Review: Ask client about expected bonuses, health issues (including childbirth), retirement, changes in job status, and contingent benefits, such as workers' compensation or social security, that the client may begin to receive over the next year.

Further Inquiry: None.

8.3. Schedule J: Current Expenditures of Individual Debtor(s)

Line 1: Rent or home mortgage payment (include lot rented for mobile home).

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review current mortgage statement or lease agreement, bank records, and receipts. Inquire whether taxes and insurance are included in the mortgage payment.

Practice Pointer: Because the amounts paid for rent or a mortgage will likely exceed $600, these payments should be disclosed in Item 3 of the SoFA.

Line 2: Utilities.

Initial Inquiry and/or Document Review: Get an average of the amount paid for utilities from the client.

Further Inquiry: If expenses seem out of line with local standards, secure twelve-month data from utility providers' web sites or the client's checking account.

Practice Pointer: Local practice and custom may bear on whether certain expenses are considered to be utilities, such as cell phones.

Line 3: Home maintenance (repairs or upkeep).

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: None.

Practice Pointer: Local practice or custom may determine what can be properly listed. Items that might be included are association dues, garbage collection, security systems, yard work, pest control, wood or oil for heating the home, and repair or replacement of older appliances and furniture. Remember that some clients may have put off needed work because of cost.

Line 4: Food.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Consider age and health of the client and any dependents as well as special dietary needs.

Practice Pointer: Commonly overlooked items include snacks, food eaten out, baby formula, lunch money for children, food for family pets, and alcohol (but not cigarettes). In addition, the reality for many individual debtors is that some non-food items, usually trivial in amount, are purchased at the grocery store and will be captured in this item.

Line 5: Clothing.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Consider age, health, and occupational demands of the client and all dependents.

Line 6: Laundry and dry cleaning.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Consider age, health, and occupational demands of the client and all dependents.
Practice Pointer: Clients commonly overlook these expenses although everyone has them.

Line 7: Medical and dental expenses.
Initial Inquiry and/or Document Review: Ensure client understands the full range of what this item encompasses and ask client.
Further Inquiry: Review receipts and invoices from service providers. Note all health issues relating to the client and dependents.
Practice Pointer: Commonly overlooked items include deductibles and other charges not covered by insurance, eye examinations, glasses, contact lenses and solution, over-the-counter medications, laboratory work, birth control, gym or health club memberships, and items relating to special needs of the client or a dependent.

Line 8: Transportation (not including car payment).
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Review the average miles driven per year on any automobile and compute cost of gas using the vehicle's miles per gallon based on type of vehicle, age, and condition. Inquire whether any major repairs are needed. Inquire whether any personal property taxes are due.
Comments: Clients commonly forget about oil changes, repairs, tires, and other maintenance issues, as well as registration, titling, and inspections. There are also transportation expenses unrelated to cars, such as taxi, bus, train, and subway fares.

Line 9: Recreation, clubs and entertainment, newspapers, magazines, etc.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Review source documents, if any.
Comment: Local practice and custom may determine the reasonableness of expenses.
Practice Pointer: Commonly overlooked expenses include those relating to hobbies, sporting events, books, club dues, vacation travel, movies (whether bought,

rented, or seen at the theater), gambling (including lotteries, casinos, bingo, etc.), and children's activities such as scouting, summer camp, sports participation, extracurricular activities, and gifts for birthday parties.

Line 10: Charitable contributions.

Initial Inquiry and/or Document Review: Ask client, including questions about tithing and contributions to recognized charities and neighborhood or community organizations.

Further Inquiry: Review income tax returns and pay advices.

Comment: Be sure to include the relevant information on Form 22 and in Item 7 of the SoFA and check for consistency.

Line 11: Insurance (not deducted from wages or included in home mortgage payments).

Initial Inquiry and/or Document Review: Ask client about life, health, automobile, renters, burial, and other insurance.

Further Inquiry: For homeowners insurance, review the policy, statement and declaration page, or the client's most recent invoice.

For life insurance, review the policy and the last statement of the issuer. Review payment advices reflecting any deduction for premiums.

For health insurance, review payment advices reflecting deductions for premiums and review current statement from the provider.

For automobile insurance, review a current statement from the insurance provider or the client's most recent invoice.

Practice Pointer: The attorney should note whether life insurance has a cash or surrender value and make the appropriate disclosure in Item 9 of Schedule B. Irrespective of the type of life insurance, if married clients are filing a joint petition, Schedule B should reflect whether each spouse is the beneficiary of the other spouse's policy in Item 20.

Line 12: Taxes (not deducted from wages or included in home mortgage payments).

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review prior year's tax returns or transcripts and statements from taxing authorities. For property taxes not included in the client's mortgage payment, review tax statements or, if available, check the taxing authority's web site. If client is self-employed, review IRS Form 1040ES.

Comment: If the client is not receiving a paycheck and is self-paying, attorneys should be able to rely on the client, at least going forward. When looking back, review Form 1040 ES and copies of checks to determine the amount of taxes paid. Back taxes owed also need to be listed on Schedules D, E, or F, or a combination thereof.

Line 13: Installment payments.

Initial Inquiry and/or Document Review: Review promissory notes, security agreements, installment sales contracts, and payment coupon books for all

secured and non-dischargeable unsecured debts paid in installments. The commentary in Section 5 of this Working Paper relating to Schedule D also outlines the scope of the initial inquiry for this item.

Further Inquiry: In a chapter 7 case, installment payments included here should be consistent with the property to be retained that is listed in the statement of intention.

Practice Pointer: Inclusion of installment payments in this item may vary by district and by chapter. Determine local practice standards for completion of this item.

Line 14: Alimony, maintenance, and support paid to others.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review divorce judgment and any modifications as well as tax returns.

Practice Pointer: Determine whether there is any arrearage and list that on Schedule E or Schedule F, whichever is appropriate.

Line 15: Payments for support of additional dependents not living at your home.

Initial Inquiry and/or Document Review: Determine if the client makes payments of this type and, if so, identity the client's relationship with the recipient and the frequency, regularity, and amount of payments.

Further Inquiry: Determine if the recipient of the payments is actually a "dependent" under applicable legal standards (parent, able-bodied, non-student adult child, disabled relative, etc.).

Practice Pointer: Determine local practice standards for completion of this item.

Line 16: Regular expenses from operation of business, profession, or farm (attach detailed statement).

Initial Inquiry and/or Document Review: Review income tax returns including IRS Schedules C and K-1 and Form 1120, business bank statements, and profit and loss statements.

Further Inquiry: The form requires that a detailed statement be attached.

Practice Pointers: Attorneys should exercise professional discretion in obtaining relevant information and may want to consider listing the efforts undertaken, including whether the attorney used the prior year's federal tax return or Schedule C.

Line 17: Other.

Initial Inquiry and/or Document Review: Identify the expense item, the amount, and the frequency.

Further Inquiry: Confirm responses with checking account register or other document review.

Practice Pointer: This catch-all item is a good place for things like school lunches, automobile registration fees, and related items. Each item should be clearly labeled and pro-rated to the monthly amount. Confirm local practice as some jurisdictions frown on inclusion of items such as gifts and savings for chapter 13 cases.

Section 9
Statement of Financial Affairs
Official Form 7

Item 1: Income from employment or operation of business.

Initial Inquiry and/or Document Review: For employment income, obtain and review income tax returns, W-2s, 1099s, IRS Schedule C, and year-to-date reports, if available. If the client is an individual and is in business, or is the sole or controlling owner of a limited liability company, corporation, or other entity, obtain and review tax returns for the entity, but disclose information for the client only. Disclose information for (a) the current year to date and (b) the two calendar years immediately preceding the current year.[95]

Further Inquiry: As needed, depending on results of minimum investigation. Obtain statements or other documents confirming all income streams from employment, business, and trade.

Practice Pointers: Confirm that information reported in this item matches source documents. Retain copies of source documents showing internal calculations and other work product from which information is derived or that substantiates how it is disclosed. Compare information disclosed in this item with information provided on Schedule I and Form 22[96] for consistency to the extent the information ought to be consistent.[97]

Item 2: Income other than from employment or operation of business.

Initial Inquiry and/or Document Review: For income other than from employment, ask the client about Social Security, Supplemental Security Income, pensions, Aid to Families with Dependent Children income, food stamps, child support, investments, rental income, and any other income streams. Review income tax

95. In *United States v. Naegele*, 341 B.R. 349, 357 (D.D.C. 2006), the court held that the instructions to this item were so "fundamentally ambiguous" that the debtor-lawyer's responses were insufficient to support a criminal charge under 18 U.S.C. section 153(3) (2006). The debtor had disclosed the gross income that he, as an individual, had received *from* his business (gross from business operations less expenses) rather than the gross income *of* the business. The court observed that "the language of the question suggests that the debtor is, as defendant maintains, supposed to report his 'take-home' income from the operation of his business." *Id.* at 356–57. Although the law practice was a sole proprietorship and the gross of the business operations was reported on Schedule C, the court concluded that the gross income the individual received *from* the business, as shown on Line 12 of Form 1040, was the proper amount to be disclosed in Item 1 of the SoFA.

96. For convenience, the Working Group uses "Form 22" to refer to Form 22A (chapter 7), Form 22B (chapter 11), and Form 22C (chapter 13).

97. "Income" is not necessarily a uniform term across the SoFA, Schedule I, and Form 22. For example, Form 22 has a six-month look-back period, irrespective of when a case is commenced, and the income is averaged across the six months. The SoFA, on the other hand, averages income by calendar year. Thus, a client who earned $2,000 per month, but who became unemployed on February 1 and filed a bankruptcy case in March, would not list income the same way on Form 22 and the SoFA. The SoFA would list $4,000 for the current year and $24,000 for the prior calendar year (assuming the client had been earning $2,000 per month at least since January 1, 2007). By contrast, the client's "current monthly income" on Line 3 of Form 22 would be $1,333.33 ($2,000 x 4 months/6), which, on a year-to-date basis, differs from the SoFA. Income on Schedule I would be different still; in this simple hypothetical, income would be zero.

returns for refunds from prior years,[98] rental income, capital gains, pension distributions, and any other types of income. Disclose information for (a) the current year to date and (b) the two calendar years immediately preceding the current year.

Further Inquiry: As needed, depending on results of minimum investigation. Obtain statements or other documents confirming all income streams.

Practice Pointers: Confirm that information in this item matches source documents. Retain work copies of source documents showing internal calculations and other work product from which information is derived or that substantiates how it is disclosed. Compare information disclosed in this item with information provided on Schedules I and J and Form 22 for consistency to the extent the information ought to be consistent.[99]

Item 3: Payments to creditors.

Initial Inquiry and/or Document Review: Counsel should obtain and review checking account register(s) and bank statements for the last twelve months. For Item:

- 3(a) (primarily consumer debts):[100] Look for aggregate payments in excess of $600 within the last ninety days;
- 3(b) (not primarily consumer debts): Look for aggregate payments in excess of $5,475[101] within the last ninety days; and
- 3(c): Look for and ask client if any relatives or other specifically defined categories of per se "insiders," per section 101(31), are creditors.

Counsel should ask client if he or she has (a) granted any lien or security interest to any creditor within the past ninety days, including in real estate refinance transactions, or (b) used new credit to pay old debt.

Further Inquiry: Counsel should request copies of all cancelled checks, receipts, and money orders that document payments where the client's finances are complex or where the information provided by the client suggests that the attorney should probe deeper. The latter is especially true where transferees are or may be "insiders."

Comment: Preliminary determination of insider status can be particularly troublesome and fact intensive. *Collier on Bankruptcy* suggests that the scope of counsel's inquiry regarding insiders should be:

> [T]he attorney should probe the debtor or its principals to determine who might fall within this definition. Indeed, the attorney has a general obligation to probe the debtor regarding transactions and transfers in general, but must be particularly diligent in probing with regard to transactions with insiders. This is necessary not only because debtors or their principals often attempt to conceal such transactions, but

98. *See, e.g.*, Jensen v. Groff (*In re* Groff), 216 B.R. 883, 886–87 (Bankr. M.D. Fla. 1998) (denying discharge where, among other things, debtor failed to disclose $50,000 tax refund received).

99. *See supra* note 87.

100. See Section 1.4.3 for a discussion of "primarily consumer debts."

101. The preference floor for transfers on debts that are not "primarily consumer debts" is subject to triennial adjustment pursuant to section 104(b). The last such adjustment occurred in 2007.

also because of debtors' obligations to their creditors. Similarly, the attorney should also probe for facts relating to affiliates, board members, and creditors.[102]

Adding to the complexity of this inquiry is that although "insider" is a defined term,[103] it does not lend itself to a precise definition that can be easily applied to the facts of a case. The definition extends only to specific categories of per se "insiders," and the courts have expanded the meaning of "insider" beyond the persons and entities expressly mentioned in the statute.[104] Accordingly, the courts will look at the nature of the relationship between the debtor and other person, including whether the relationship puts the other person in a position to exercise some degree of control or influence over the debtor.[105] Therefore, a person who is not a "per se insider"—that is, a person whose relationship with the client is not expressly included in the section 101(31) definition—may in the end be found to be an "insider." Moreover, because the question of whether someone is an insider is highly fact dependent, it has produced answers that seem counterintuitive at first blush. There are decisions, for example, applying the "insider" label to former spouses,[106] live-in partners,[107] and attorneys,[108]

102. 2 Collier on Bankruptcy § 101.31, at 101-143 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008).

103. Section 101(31) of the Code expressly includes relatives, officers, partners, and other specific entities within the term "insider," but that section's use of "'insider' includes" means that the list presented is not exhaustive. *See* 11 U.S.C. § 102(3) (2006) ("includes" is not a limiting term). The legislative history of the 1978 Bankruptcy Code defines an insider as a person or entity with "a sufficiently close relationship with the Debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the Debtor." H.R. Rep. 95-595, at 312 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6269 (1977).

104. *See* Rupp v. United Sec. Bank (*In re* Kunz), 489 F.3d 1072, 1078–79 (10th Cir. 2007).

105. The inquiry into whether a person is an "insider" focuses on the nature of the relationship between the purported insider and the debtor. *See* Wake Forest Inc. v. Transamerica Title Ins. Co. (*In re* Greer W. Inv. Ltd. P'ship), No. 94-15670, 1996 WL 134293, at *3, 1996 U.S. App. LEXIS 8495 (9th Cir. Mar. 25, 1996). Accordingly, the courts will look at the nature of the relationship, including "whether the relationship in question is fraught with the same potential for improper influence as the relationships specifically enumerated in the statute." *Id*. For example, one court has noted that although relatives do not necessarily exercise any "formal" control over the debtor's affairs, Congress nonetheless included relatives as "insiders" "because of the high probability that transactions between relatives will be motivated by affinity rather than independent business judgment." Three Flint Hill Ltd. P'ship v. Prudential Ins. Co. (*In re* Three Flint Hill Ltd. P'ship), 213 B.R. 292, 299–300 (D. Md. 1997). The court continued: "Clearly, then, Congress did not intend the insider determination to rest on a finding of actual control, but a finding that, given the relationship and conduct of the parties, the relevant transaction or arrangement was entered into based on that relationship rather than an independent purpose or motivation." *Id*. at 300. *See also* Freund v. Heath (*In re* McIver), 177 B.R. 366, 370 (Bankr. N.D. Fla. 1995) ("A business, professional, or personal relationship, that compels the conclusion that the transferee could be able to gain an advantage such as that attributable simply to affinity, would result in the transferee being classified as an insider.").

106. *See, e.g.*, Browning Interests v. Allison (*In re* Holloway), 955 F.2d 1008, 1015 (5th Cir. 1992) (holding ex-wife was an insider).

107. *In re* McIver, 177 B.R. 366, 370 (Bankr. N.D. Fla. 1995) (holding live-in girlfriend had relationship "'close enough to gain an advantage attributable simply to affinity'" (quoting Friedman v. Sheila Plotsky Brokers, Inc. (*In re* Friedman), 126 B.R. 63, 70 (9th Cir. B.A.P. 1991))). *Contra* Hunter v. Dupuis (*In re* Dupuis), 265 B.R. 878, 885–86 (Bankr. N.D. Ohio 2001) (holding, where debtor and former spouse continued to share marital home, relationship, standing alone, did not make former spouse an insider).

108. *See, e.g.*, Winick v. Daddy's Money of Clearwater, Inc. (*In re* Daddy's Money of Clearwater, Inc.), 187 B.R. 750, 756 (M.D. Fla. 1995) (holding debtor's attorney was an insider with respect to

while in other cases first-degree relatives,[109] directors,[110] and current spouses[111] may not have been insiders.

Practice Pointers: Ordinary course payments, such as an individual's house payment, can be disclosed in summary fashion, such as "ordinary monthly mortgage payment of $1,500."

Instead of spending significant time and resources on making anything more than a preliminary determination as to insider status, an attorney should simply err on the side of disclosure and include language such as "potential insider" or "insider status uncertain" to avoid making an admission of the recipient's status as an "insider" or "non-insider."

Attorneys need to balance the requirements of accuracy against the practicalities of preparing bankruptcy documents when it may be several weeks or even months between the initial draft of the schedules and other documents and commencement of the case. The purpose of Item 3 is to enable the trustee to discern preferences and fraudulent conveyances. Consequently, in the case of repetitive regular payments to creditors scheduled, it is acceptable to note generally that the debtor has made regular payments in the ordinary course. In choosing this method of disclosure, the attorney should be satisfied that these are regular payments and that the payments were made in the ordinary course. In most consumer cases, such payments will include the mortgage payment, the car payment, utilities payments, and, to the extent that they are regular, monthly credit card payments.

The responses to the Item 3 questions present powerful opportunities for pre-bankruptcy planning in terms of the timing of the filing of the case. Once any payment or transfer is identified in response to this item, the filing date of the petition can be accelerated or delayed, depending on the identity of the transferee and the client's goals.

Item 4: Suits and administrative proceedings, executions, garnishments, and attachments.

Item 4(a): Suits and administrative proceedings.

Initial Inquiry and/or Document Review: Ask client about lawsuits; obtain and review lawsuit documents from the client to attempt to determine status of

funds the attorney disbursed to himself from money held in trust for debtor), *reh'g denied*, No. 95-119-CIV-T-17, 1996 WL 134225 (M.D. Fla. Mar. 13, 2006). As one court recently noted, however, where attorneys are held to be insiders, "that status has been imposed because of a relationship with the debtor that transcended the normal attorney-client boundaries." Glassman v. Heimbach, Spitko & Heckman (*In re* Spitko), No. 05-0258, 2007 WL 1720242, at *10, 2007 Bankr. LEXIS 2050 (Bankr. E.D. Pa. June 11, 2007).

109. *See, e.g.*, Sticka v. Anderson (*In re* Anderson), 165 B.R. 482, 488 (Bankr. D. Or. 1994) (holding debtor's brother, who, as a representative of their mother's estate, obtained a state court judgment lien against debtor, was not an insider because of actual hostility between him and the debtor).

110. *See, e.g.*, Rapp v. United Sec. Bank (*In re* Kunz), 335 B.R. 170, 175–76 (10th Cir. B.A.P. 2005) (holding director "emeritus," who did not have any decision-making authority, was not a per se insider).

111. *See, e.g.*, Barnhill v. Vaudreuil (*In re* Busconi), 177 B.R. 153, 159 (Bankr. D. Mass. 1995) (holding debtor's wife was not an insider where bitter divorce was pending at the time of the transfer).

each action. Include all lawsuits in which the client is a named party, regardless of status.

Further Inquiry: If the client has been involved in numerous suits, conduct a search of local court records to ensure completeness and accuracy of basic information provided by the client. Consider searching the court records of states in which the client has lived, owned real property, or conducted business. Contact and confer with counsel who defended suits for the client. Hire counsel in other jurisdiction(s) to conduct a lawsuit records search to confirm accuracy of information for both this item and listings on creditor schedules.

If the lawsuit or administrative proceedings relate to environmental laws, disclose such matters in Item 17 of the SoFA as well and make a short notation here cross-referencing the disclosure.

Practice Pointers: If judgment has been entered in a pre-petition lawsuit in a judgment lien state and the client owns real estate, obtain a title search to confirm whether the judgment is a lien for lien avoidance purposes or advise client of this option. Do not overlook other types of lawsuits, such as administrative proceedings, divorce, child support enforcement, criminal cases, and others.

If the client is a plaintiff, list such claims on Schedule B as well. If the client is a defendant, list the plaintiff as a creditor on Schedule D, E, or F, as appropriate.

Item 4(b): Executions, garnishments, and attachments.

Initial Inquiry and/or Document Review: Ask about attachments, levies, garnishments, and any other pre-petition judgment collection activity. Obtain and review documents from the client to determine status of lawsuits and judicial collection activity. Review paycheck advices, bank account statements, and related documents to confirm status of garnishments and levies.

Further Inquiry: Update the status of pre-petition collection activity during case preparation as forms go through revisions.

Practice Pointers: For many clients with primarily consumer debts, the garnishments and bank account levies are small amounts and the clients' records are poor. Counsel needs to balance the cost of obtaining more information with the benefit of that information to the administration of the case. In addition, collection activity will likely continue between the first meeting with the client and case commencement. The cost of updating the bankruptcy forms to reflect reality on the date of filing needs to be weighed against counsel's general duty of a reasonable disclosure; local practice and custom should be considered. If a minimal disclosure is made because of the cost (as compared to the benefit) of obtaining accurate information on the date of filing, that should be stated.

Item 5: Repossessions, foreclosures, and returns.

Initial Inquiry and/or Document Review: Ask client about all repossessions, foreclosures, and voluntary returns within the last year.

Further Inquiry: Obtain a copy of any deficiency notice or notice of disposition.

Practice Pointers: Make sure the creditor is listed correctly on Schedule D, E, or F, as the case may be. Consider if any of the information disclosed here gives

rise to any claims under section 544(b) and, if so, the applicable reach-back period under the law of the attorney's jurisdiction in overall case planning.

Item 6: Assignments for the benefit of creditors.

Initial Inquiry and/or Document Review: Counsel should ask the client about:

- Item 6(a): Any assignment for the benefit of creditors made within 120 days immediately preceding case commencement; and
- Item 6(b): Property in the hands of a custodian, receiver, or court-appointed official within one year immediately preceding case commencement.

Further Inquiry: If any such proceedings are identified, obtain and review all documents in the client's possession. In Item 6(a), disclose the fact of the assignment along with the fiduciary's contact information and a general description of the property that is the subject of the assignment. In Item 6(b), the same basic information should be provided, with the property listing being derived from the order of appointment. Disclose whether the subject of the assignment or other proceeding is a business or an individual.

Practice Pointers: Confer with counsel for the assignee or other fiduciary and obtain available records of the proceeding, if court supervised. Summarize the status of the proceeding in response to this item.

Item 7: Gifts.

Initial Inquiry and/or Document Review: Ask if, during the past year, the client made gifts over $200 in value to a single person or charitable contributions over $100. Obtain and review checking account registers or other records.

Further Inquiry: Obtain and review records of cash gifts, including tax returns.

Practice Pointers: Check for consistency with monthly cash gifts on Schedule J. Depending on information disclosed by the client, consider implications of section 544(b) or 548 in terms of overall case planning.

Item 8: Losses.[112]

Initial Inquiry and/or Document Review: Ask client if any losses due to theft, casualty, gambling, or other circumstance have been sustained in the past year. If so, follow up by requesting and reviewing records relating to theft losses (police reports), casualty losses (insurance claims), or gambling losses.

Further Inquiry: Obtain and review records regarding losses directly from third parties.

Practice Pointers: Many clients are embarrassed about gambling losses and will be reluctant to admit them.

112. Item 8 requests information "since the commencement of the case" in addition to pre-petition information. Because this Working Paper primarily addresses pre-petition investigation and document preparation, the Working Group makes no comment on the post-filing disclosure requirement.

Insurable losses or other losses giving rise to a right to sue should be disclosed on Schedule B.

Item 9: Payments related to debt counseling or bankruptcy.

Initial Inquiry and/or Document Review: Ask client. Disclose dates and amounts of payments to the attorney's law firm, other law firms, credit counselors, the credit counseling certificate provider, petition preparers, and credit repair agencies. Examine client's checking account register to confirm dates and amounts.

Further Inquiry: Obtain and review records regarding these payments directly from third parties.

Practice Pointers: If a client has paid amounts to another bankruptcy lawyer in the past twelve months, that could be indicative of attorney shopping. One fact pattern is where a client:

- retains Attorney A and makes a truthful disclosure of financial or property matters;
- receives advice and counsel regarding bankruptcy;
- does not like the advice, counsel, or consequences of the future bankruptcy filing;
- still desires bankruptcy relief;
- hires Attorney B and fails to disclose the matter(s) on which Attorney A provided the undesired advice; and
- files a case with Attorney B.

If Attorney A is a bankruptcy attorney, Attorney B should consider obtaining a waiver of the attorney-client privilege, speak to Attorney A, and confirm that the client provided consistent information to both attorneys, or that there is a reasonable explanation for any discrepancy.

Item 10: Transfers.

Initial Inquiry and/or Document Review: Counsel should explain in plain language the meaning and scope of a "transfer" under section 101(54). After explaining the scope in detail, counsel should inquire about items transferred outright, gifted, traded, sold, junked, disposed of in any other fashion, or pledged as collateral. (Any type of a mortgage transaction would fall within the section 101(54) definition of "transfer.") Counsel is seeking information about the following:

- Item 10(a): All property transferred, other than in the ordinary course, within two years immediately preceding case commencement; and
- Item 10(b): Property transferred within ten years immediately preceding case commencement to a self-settled trust or similar device of which the client is a beneficiary.

Ask the client to provide all documents evidencing such transfers, such as bills of sale, closing statements, deeds, security instruments, and divorce decrees.

Further Inquiry: Obtain and review records regarding these transactions directly from third parties. If a client has filed a prior bankruptcy case within the

past ten years and documents are readily available, retrieve and review the prior schedules to see whether items listed as assets in the prior bankruptcy are no longer in the client's possession.

Practice Pointers: In addition to the transactions themselves, also inquire about the disposition of the proceeds from the transactions. The disposition of the proceeds may lead to discovery of other matters that should be disclosed in other parts of the SoFA. Many state fraudulent transfer statutes have a reach-back period longer than the two years in section 548. If your state has such a statute, expand the scope of your inquiry to match the reach-back period of your state's fraudulent transfer law in light of section 544(b). If there are troublesome transfers, consider delaying the filing of the case until the reach-back period expires.

The ten-year look back is necessitated by the new provisions of (a) section 548, which allows the avoidance of certain transfers; and (b) section 522(o), which limits the homestead exemption in certain circumstances to the extent the value of homestead property "is attributable to any portion of any property that the debtor disposed of in the 10-year period ending on the date of the filing of the petition." Another change from BAPCPA to section 548 is an additional ground to avoid a transfer as fraudulent where the debtor made a transfer, or incurred an obligation, to or for the benefit of an insider "under an employment contract and not in the ordinary course of business." Such transfers should be noted here and, if applicable, in Item 23.

Item 11: Closed bank accounts.

Initial Inquiry and/or Document Review: Ask client and request final statements for accounts in question. Review all relevant information, documents, and account statements.

Further Inquiry: Obtain and review account statements and related information.

Practice Pointers: Counsel should ask if the records (registers, statements, and digital records, e.g., Quicken) from closed bank accounts are available. For a client who has been in business, records are particularly important to help identify potentially avoidable transactions (both insider and non-insider) to address with the client prior to filing.

Item 12: Safe deposit boxes.

Initial Inquiry and/or Document Review: Ask client about any safe deposit boxes in the client's name or in which the client had property in the past year. Request that the client provide all relevant information, including a written inventory of contents.

Further Inquiry: Review client's written inventory and consider a personal review of contents, including documents. Inquire about and determine the identity and value of contents.

Practice Pointers: Although this item includes a requirement to provide a description of the safety deposit box's contents, appropriate disclosure should also be made on the schedules. For example, if the box contains a life insurance policy

under which the client is the beneficiary, the client's interest in the policy should be disclosed in Item 20 of Schedule B. If the client holds property belonging to a third party in a safe deposit box, make appropriate disclosure in Item 14 of the SoFA.

Item 13: Setoffs.

Initial Inquiry and/or Document Review: Ask client about any setoffs against accounts. Request all documents related to any setoff.

Further Inquiry: Although it is the fact of the setoff, rather than its propriety, that needs to be disclosed, counsel may need to obtain and review documents relating to the setoff.

Practice Pointers: If the client owes child support or any debt to a governmental entity, be on guard for a setoff against money the government owes the client. Tax refunds are a common, but by far not the only, example.[113]

Setoffs can also give rise to preference issues. Analyze any setoff transactions for preference implications and disclose in Item 3 if appropriate.

Item 14: Property held for another.

Initial Inquiry and/or Document Review: Ask client about property that the client holds, controls, or physically possesses but is owned by someone else. Pay particular attention to (a) bank or financial accounts in the client's name that contain the funds of children or elderly relatives; and (b) vehicles that may be titled in the client's name but to which the client refers as belonging to someone else, usually a child, who may also be making the payments.

Further Inquiry: If ownership of the item is evidenced by a title certificate, review the title certificate to verify the client does not have an ownership interest.

Practice Pointers: Pay attention to non-titled personal property (usually household goods) that belongs to (a) a non-filing spouse, live-in partner, or significant other; (b) other relatives; (c) teenage or adult children; or d) any other person. As a prophylactic measure, consider making a minimal disclosure of all non-titled personal property in possession of the client or located at the client's residence that the client does not own.

If vehicles are titled in the client's name but are actually owned by others, consider the effect of state title statutes on the determination of ownership and the implications of such ownership for the case and the client's goals.

Item 15: Prior address of debtor.

Initial Inquiry and/or Document Review: Ask client about prior residences. Require a detailed list of all prior addresses (including cities and states) where

113. See, *e.g.*, United States v. Maxwell, 157 F.3d 1099, 1103 (7th Cir. 1998) (holding Small Business Administration entitled to offset funds owed debtor based on contract awarded by U.S. Navy); Small v. County of Hennepin (*In re* Small), 18 B.R. 318, 319 (Bankr. D. Minn. 1982) (allowing setoff of income and property tax refund for delinquent child support payments); Barfknecht v. County of Hennepin (*In re* Barfknecht), 15 B.R. 463, 464 (Bankr. D. Minn. 1981) (same).

the client resided during the past 180 days and the dates during which the client resided at those addresses.

Further Inquiry: Cross-check addresses from old creditor statements and loan documents.

Practice Pointers: Cross-check with addresses on credit report(s).

Item 16: Spouses and former spouses.

Initial Inquiry and/or Document Review: If the client resides or resided in a community property state or territory,[114] ask client if he or she was divorced in the preceding eight years. If so, request a copy of the decree to determine the nature of the property settlement.

Further Inquiry: Contact divorce counsel to obtain decree or confirm necessary information.

Practice Pointers: None.

Item 17: Environmental information.

Initial Inquiry and/or Document Review: Ask client about the existence of:

- Sites for which the client received a governmental notice of violation of environmental law;
- Sites for which the client provided notice to a governmental unit of a "release of hazardous material"; and
- Any judicial or administrative proceedings under any environmental law to which the client is or was a party.

For any site identified, request that the client provide all notices and related documents including any lien notices and filings.

Further Inquiry: Contact the governmental entities in question to confirm accuracy of information provided by the client. Contact client's counsel of record in all environmental proceedings to determine status for proper disclosure.

Practice Pointers: Confirm that the governmental units or plaintiffs are provided notice of the bankruptcy case by listing them on Schedule D or F. For any judicial or administrative proceeding, request the relevant documents and disclose here and in Item 4(a).

If the client has been in any sort of business that is susceptible to environmental issues (gas station, lumber mill, manufacturing, etc.), and the client or counsel even remotely suspects the existence of environmental violations, give notice to appropriate authorities.

Item 18: Nature, location, and name of business.

Initial Inquiry and/or Document Review: Ask client and note that the information required in this item is particularized on the SoFA, which will guide the

114. The requirement to list any spouse or former spouse who lived with the debtor in a community property state derives expressly from the SoFA, which lists, as community property states, the following: Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin.

questioning of the client. Obtain and review documents relating to the interests disclosed and the client's tax returns and related forms and schedules.

Further Inquiry: Conduct an Internet search for each state in which the client has conducted business in the past six years. Check the web site of the Secretary of State or other business records custodian for each state. Print the information that is located. Contact any attorney that set up any business for the client to confirm information provided by the client.

Attorneys should determine which of the business entities identified in the initial inquiry are single asset real estate entities as defined by section 101(51B) and disclose as required in Item 18(b).

Practice Pointer: For individual clients, include business interests in companies such as Mary Kay®, Tupperware®, and AmWay®.

General Comment: Items 19 through 35 are to be completed only where the debtor is a corporation or partnership or, if the debtor is an individual, where the debtor is or has been, within six years immediately preceding the commencement of the bankruptcy case, any of the following: "an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed [in a trade, profession, or other activity, either full-time or part-time]."

Item 19: Books, records, and financial statements.

Initial Inquiry and/or Document Review: Ask client about:

- Bookkeepers and accountants that kept or supervised the keeping of the client's books within the two years immediately preceding case commencement;
- Firms or individuals that audited the client's books or prepared a financial statement for the client within the two years immediately preceding case commencement;
- Firms or individuals in possession of the client's books at the time of case commencement; and
- Entities to which the client issued a financial statement within two years immediately preceding case commencement.

Ask client to provide copies of audit reports and financial statements. Ask client to describe specifically which records are in possession of which bookkeeper or accountant.

Further Inquiry: Confer with bookkeepers and accountants to confirm accuracy of information provided by the client, obtain copies of financial statements, and confirm who has possession of records.

Practice Pointers: Obtain and review financial statements. Contrast financial statement information with information in bankruptcy papers for consistency. Ask client to clarify or explain any discrepancies, depletion of assets, or other irregularities. Ask specifically about Schedule D creditors whose debts were

incurred during the past two years. Most secured creditors require a financial statement.

If records are unavailable, damaged, inaccessible, or otherwise not readily available, document and explain the circumstances and compare those circumstances to the standard in section 727(a)(3).

Item 20: Inventories.

Initial Inquiry and/or Document Review: Ask client about prior two inventories taken of the client's property. Inquire regarding the name and address of the person in possession of the records for each inventory and obtain and review those records.

Further Inquiry: Compare inventory records with information on Schedule B and understand any disparities.

Practice Pointers: Losses, such as from theft or fire, and claims based on losses, should be listed in Item 21 of Schedule B.

Item 21: Current partners, officers, directors, and shareholders.

Initial Inquiry and/or Document Review: Ask client and management regarding:

- If the client is a partnership, the persons who currently have an ownership interest in the partnership and the nature and percentage of each such interest;[115] and
- If the client is a corporation, the persons currently serving as officers and directors and any stockholder who owns or controls five percent or more of the client's voting or equity securities.

Request, obtain, and review current governing documents (e.g., articles, bylaws, operating agreement, etc.) and recent minutes relevant to type of entity.

Further Inquiry: Contact corporate counsel or counsel who created the entity to confirm accuracy of information provided by the client.

Practice Pointers: The SoFA seems dated insofar as it omits limited liability companies and other forms of business of increased use in recent years. Counsel should consider making similar inquiry and disclosure for these business entities despite the SoFA's express reference to only partnerships and corporations.

Item 22: Former partners, officers, directors, and shareholders.

Initial Inquiry and/or Document Review: Ask client and management about:

- If the client is a partnership, each partner who withdrew from the partnership within the prior year and the date of each withdrawal;[116] if the client is a limited liability company, each member who terminated its membership within the prior year and the date of each termination; and

115. The SoFA refers to "members" of the partnership; that term, however, is more accurately used to describe those with interests in limited liability companies.

116. *See supra* note 115.

- If the client is a corporation, officers and directors whose relationship with the client terminated within the prior year[117] and the date of each termination.

Request, obtain, and review current and past governing documents (articles, bylaws, operating agreement, etc.) and past minutes relevant to type of entity and documents specifically relating to the withdrawal or termination of any partner or member.

Further Inquiry: Contact corporate counsel to confirm accuracy of information provided by the client.

Practice Pointer: The SoFA seems dated insofar as it omits limited liability companies and other forms of business of increased use in recent years. Counsel should consider making similar inquiry and disclosure for these business forms despite the SoFA's express reference to only partnerships and corporations.

Item 23: Withdrawals from a partnership or distributions by a corporation.

Initial Inquiry and/or Document Review: Ask client and management about all withdrawals and distributions given or credited to insiders within the prior year. Request, obtain, and review current and past financial records of such withdrawals and distributions.

Further Inquiry: Confirm veracity of information provided by the client with the client's accountant or bookkeeper.

Practice Pointers: The SoFA seems dated insofar as it omits limited liability companies and other forms of business of increased use in recent years. Counsel should consider making similar inquiry and disclosure for these business forms despite the SoFA's express reference to only partnerships and corporations.

In a closely held entity, pay careful attention to withdrawals by any owner, majority or controlling shareholder, director, or officer. (Any person may be one or more of these.) Withdrawals could include W-2 wages, 1099 income, shareholder or other distributions, or loan repayments.

The information gleaned from this inquiry may provide the basis for claims against the recipients (transferees) who are insiders. These will typically be the same persons who are making the decision to file the case on behalf of the entity; there is potential for a conflict between the insiders' duties to the entity and their self-interest. Do not overlook new section 548(a)(1)(B)(IV), added by BAPCPA, which adds as a ground for fraudulent transfer avoidance a transfer made, or obligation incurred, to or for the benefit of an insider "under an employment contract and not in the ordinary course of business." Such transfers or obligations should be noted here and also under Item 10.

117. It is unclear why there is a comma in the phrase "list all officers, or directors whose relationship with the corporation terminated" in Item 22 because its presence suggests that the termination language does not apply to officers. That reading, however, is inconsistent with the apparent purpose of Item 22.

Item 24: Tax consolidation group.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Confirm with accountant.

Item 25: Pension funds.
Initial Inquiry and/or Document Review: Ask client.
Further Inquiry: Confirm with documents.

Section 10

Form 22A: Chapter 7 Statement of Current Monthly Income and Means-Test Calculation

10.1. Introduction

Official Form 22A (formerly known as B22A) is one of three forms created after the enactment of BAPCPA that are intended to implement new Code provisions dealing with consumer debtors' income and the application of the means test. As explained in the 2005 Advisory Committee Notes:

> Among the changes introduced by [BAPCPA] are interlocking provisions defining "current monthly income" and establishing a means test to determine whether relief under Chapter 7 should be presumed abusive. Current monthly income ("CMI") is defined in § 101(10A) of the Code, and the means test is set out in § 707(b)(2). These provisions have a variety of applications. In Chapter 7, if the debtor's CMI exceeds a defined level the debtor is subject to the means test, and § 707(b)(2)(C) specifically requires debtors to file a statement of CMI and calculations to determine the applicability of the means test presumption. In Chapters 11 and 13, CMI provides the starting point for determining the disposable income that must be contributed to payment of unsecured creditors. Moreover, Chapter 13 debtors with CMI above defined levels are required by § 1325(b)(3) to complete the means test in order to determine the amount of their monthly disposable income, and pursuant to § 1325(b)(4), the level of CMI determines the "applicable commitment period" over which projected disposable income must be repaid to unsecured creditors.[118]

This section discusses Form 22A, which was created for use in chapter 7 cases (with Forms 22B and 22C designed for chapters 11 and 13, respectively). Notably, of all the items discussed in this Working Paper, none has as many ambiguities, uncertainties, and unanswered questions as does Form 22A. Not only is Form 22A new, but it is also grounded on statutory language that most admit is not well crafted. As decisions have emerged that interpret the various words and

118. 11 U.S.C. app. Form B 22A Committee Notes on Rules—2005 Amendment (2006).

phrases relevant to Form 22A, the result has been judicial conflict.[119] Clear guidance remains elusive.

10.2. WHO MUST COMPLETE FORM 22A?

Form 22A must be completed, in whole or in part and in addition to Schedules I and J,[120] by every individual chapter 7 debtor whose debts are primarily consumer debts. In joint cases, only one Form 22A is required.

10.2.1. "Primarily Consumer Debts"

As noted above, Form 22A states that the form must be completed by individuals whose debts are "primarily consumer debts." This limitation derives from section 707(b)(1), which limits the entire "abuse" framework, including the means test, to this particular class of debtors.[121]

For a discussion of case law interpreting and applying the phrase "primarily consumer debts," see Section 1.4.3 of this Working Paper.

10.2.2. Conversion from Chapter 13

The results are mixed in the few cases addressing the question of whether the means test applies to debtors whose cases were filed under chapter 13 but were converted to cases under chapter 7. The court in *In re Fox*[122] held that the plain language of section 707(b)(1), which refers to cases "filed by" chapter 7 debtors, removes converted cases from section 707(b)'s means-test provisions. On the other hand, in *In re Perfetto*,[123] the court found the "filed by" argument to comprise too narrow a construction of section 707(b)(1).[124]

119. For a discussion of various means-test issues, including where courts are divided, see generally David W. Allard & Katherine R. Catanese, *The Means Test: Seeing Clearly the CMI*, AM. BANKR. INST. J., Feb. 2007, at 12; David W. Allard & Katherine R. Catanese, *The Means Test, Part II: Deductions*, AM. BANKR. INST. J., Sept. 2007, at 14; David W. Allard & Katherine R. Catanese, *The Means Test, Part III: Keeping Up with Dismissals Under BAPCPA*, AM. BANKR. INST. J., Apr. 2007, at 16.

120. See *supra* Section 8 for a discussion of Schedules I and J.

121. Section 707(b)(1) states that "[a]fter notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter."

122. 370 B.R. 639, 648 (Bankr. D.N.J. 2007).

123. 361 B.R. 27, 31 (Bankr. D.R.I. 2007).

124. For a court following *Perfetto*, see *In re Kerr*, Nos. 06-12302, 06-12881, 2007 WL 2119291, at *3, 2007 Bankr. LEXIS 2474 (Bankr. W.D. Wash. July 18, 2007).

10.2.3. Exclusion for Certain Disabled Veterans

Part I of Form 22A implements section 707(b)(2)(D), which provides an exclusion from means testing for some disabled veterans. Specifically, section 707(b)(2)(D) applies if:

- The client is a "disabled veteran," as defined in 38 U.S.C. section 3741(1),[125] which means the client is a veteran[126] and either:
  - o The disability is rated at 30 percent or more, or
  - o The client's discharge or release from active duty was for a disability that was either incurred or aggravated in the line of duty; and
  - o The client's indebtedness occurred primarily during a period in which the client was either:
    - On active duty, as defined in 10 U.S.C. section 101(d)(1),[127] or
    - Performing a homeland defense activity, as defined in 32 U.S.C. section 901(1).[128]

Inquiry suggestions for this exclusion are discussed under "Part I. Exclusion for Disabled Veterans" below.

10.3. Note on January 2008 Amendment to Form 22A

In January 2008, a substantial revision to the means-test form went into effect (the "January 2008 Amendment").[129] This revision was premised on the IRS changes to its "2007 Allowable Living Expense Standards."[130] The most significant changes include adding a deduction for out-of-pocket health care, a deduction for cell phone usage, and changes to the allowable transportation expenses.

125. The text of 38 U.S.C. section 3741(1) is:

> The term "disabled veteran" means (A) a veteran who is entitled to compensation under laws administered by the Secretary for a disability rated at 30 percent or more, or (B) a veteran whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.

38 U.S.C. § 3741(1) (2000).

126. "Veteran" is defined in 38 U.S.C. section 101(2) (2000) as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable."

127. "The term 'active duty' means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty." 10 U.S.C. § 101(d)(1) (2006).

128. "The term 'homeland defense activity' means an activity undertaken for the military protection of the territory or domestic population of the United States, or of infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to national security, from a threat or aggression against the United States." 32 U.S.C. § 901(1) (Supp. V 2005).

129. *See* U.S. Courts, Bankruptcy Forms, Bankruptcy Forms Manual, B 22A Statement of Current Monthly Income and Means-Test Calculation (Chapter 7) (01/08), http://www.uscourts.gov/rules/BK_Forms_08_Official/B_022A_0108v2.pdf (last visited Sept. 5, 2008) [hereinafter "January 2008 Amendment"].

130. IRS News Release IR-2007-163 (Oct. 1, 2007).

In the discussion below, lines that are affected by the January 2008 Amendment are listed with an asterisk, i.e., *Line X, and a description of each change is provided as a footnote to the affected line.

10.4. FORM 22A: CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

Part I. Exclusion for Disabled Veterans

Line 1: Veterans Declaration.[131]

Initial Inquiry and/or Document Review: Ask client about award letter and rating decision from Veterans Benefits Administration for disability rating. Review client's DD Form 214[132] for dates of service and compare to when client's debts were primarily incurred.[133]

Further Inquiry: None.

Part II. Calculation of Monthly Income for § 707(b)(7) Exclusion

Line 2: Marital Filing Status.

Initial Inquiry and/or Document Review: If box 2(b) is marked on the means-test form, review:

- Address of non-filing spouse;
- Legal separation papers, if any; and
- If client is divorced, a copy of the judgment of divorce.

Further Inquiry: None.

Line 3: Gross Wages, Salary, Tips, Bonuses, Overtime, Commissions.

Initial Inquiry and/or Document Review: Inquire about and review federal income tax return or transcript for the most recent tax year ending immediately before the commencement of the case. Ask client for payment advices for the six-month period ending on the last day of the calendar month immediately preceding the commencement of the case.[134]

Further Inquiry: Review W-2s and 1099s, especially if the debtor received tips, bonuses, or commissions. If the client is calculating this amount, request detailed calculations of the number provided on this line.

131. The January 2008 Amendment adds Line 1B, which requires the debtor to check the box if the debtor declares that his or her debts are primarily non-consumer debts.

132. DD Form 214, Certificate of Release or Discharge from Active Duty, is a report of separation issued when a service member performs active duty or at least ninety days of active duty training. *See* National Archives, DD Form 214, Discharge Papers and Separation Documents, http://www.archives.gov/veterans/military-service-records/dd-214.html (last visited Sept. 7, 2008). DD Form 214 contains information normally needed to verify military service for benefits, retirement, employment, and membership in veterans' organizations and includes the dates of entry into and separation from active duty. *See id.*

133. See *supra* Section 10.2.3 for further explanation of the veteran exclusion.

134. It is recommended that most records reviewed for Part II, except tax returns, be reviewed for this six-month period.

Practice Pointers: Section 521(e)(2)(i) requires that the debtor provide to the trustee a copy of the federal income tax return or transcript for the most recent tax year ending immediately before the commencement of the case. Consequently, that federal tax return or transcript should be reviewed to look for support for the client's verbal statements and for inconsistencies in all Part II categories.

Attorneys should note that tax transcripts provide much less information than returns do. Attorneys should consider the detail of information that they wish to provide when making a determination whether to submit a return or transcript.

Attorneys may also want to request payment advices after the petition date because some trustees will want to verify that income has not substantially changed after the filing. If the client's income has substantially increased, the trustee could file a motion to dismiss the case under section 707(b)(3).

Line 4: Income from the operation of a business, profession or farm.[135]

Initial Inquiry and/or Document Review: Review federal income tax return or transcript for the most recent tax year ending prior to the commencement of the case for a business, profession, or farm, if applicable. Review any financial statements and bank statements for the year ending prior to the commencement of the case.

Further Inquiry: None

Practice Pointer: For reimbursement of expenses, claim the income as business income and an offsetting business expense. It is clear that the reimbursed expense is not traditional income. However, it might be considered part of the debtor's gross income. In a chapter 13 case, this distinction will make a difference because of the applicable commitment period.

Line 5: Rent and other real property income.

Initial Inquiry and/or Document Review: Inquire about any lease agreements, together with written notices of any rent increases. Ask the client for cancelled checks or other business records regarding rent received, if available, and bank statements.

Further Inquiry: None.

Practice Pointer: Past due amounts owing to the client should be listed on Schedule B.

Line 6: Interest, dividends, and royalties.

Initial Inquiry and/or Document Review: Review bank and brokerage statements and the client's federal tax return or transcript for the year ending prior to commencement of the case.

Further Inquiry: None.

135. The January 2008 Amendment adds the following language: "If you operate more than one business, profession, or farm, enter aggregate numbers and provide details on an attachment."

Line 7: Pension and retirement income.

Initial Inquiry and/or Document Review: Ask client about payment advices or statements showing the distributions.

Further Inquiry: Request bank statements from the client.

****Line 8: Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.***[136]

Initial Inquiry and/or Document Review: Review bank statements and statements of child support enforcement agencies, if any, regarding payments. Also ask client for birth dates of minor children.

Further Inquiry: Review cancelled checks or a detailed description of contributions from other persons for household expenses. Review any judgments of divorce and any other written support agreements and any modifications to those agreements.

Practice Pointers: Among the problems that can emerge here is the dilemma of the non-filing spouse. To the extent a non-filing spouse's income is not included, the U.S. Trustee takes the position that a detailed statement, together with supporting documentation, should be provided explaining why such income is not included. A non-filing spouse, however, might refuse to turn over tax returns or other information that may not be in the debtor's possession. Issues regarding jurisdiction and privacy have not been addressed by the courts to date; but there are some cases in which courts discuss the extent to which a non-filing spouse or other household member's income can be included in CMI.[137]

The attorney may want to advise that each spouse retain separate counsel when spouses maintain separate finances.

The courts have not yet provided contours to this item regarding which financial contributions should be included. Attorneys should consider looking first at the "regular basis" component required by section 101(10A). Although the courts have not defined this phrase as it is used in the means test, there is an analogous body of case law addressing "regular income," as used in section 101(30), upon which chapter 13 eligibility turns.[138]

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136. The January 2008 Amendment omits the words "spousal support" and adds the following language: "Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed."

137. *See In re* Jewell, 365 B.R. 796, 802 (Bankr. S.D. Ohio 2007) (holding income of a household member that is not used on a regular basis for household expenses is not included in the debtors' CMI). *See also In re* Lightsey, 374 B.R. 377, 381–82 (Bankr. S.D. Ga. 2007) (holding non-filing spouse's income is included in CMI to the extent that it is expended on a regular basis for household expenses); *In re* Quarterman, 342 B.R. 647, 651 (Bankr. M.D. Fla. 2006) (same); *In re* Travis, 353 B.R. 520, 526 (Bankr. E.D. Mich. 2006) (same); Stapleton v. Baldino (*In re* Baldino), 369 B.R. 858, 861 (Bankr. M.D. Pa. 2007) (same); *In re* Shahan, 367 B.R. 732, 737 (Bankr. D. Kan. 2007) ("[I]f a debtor's non-filing spouse has income, that portion of the spouse's income not dedicated to paying household expenses is deducted from CMI."); *id*. at 738 (holding non-filing spouse's income is included in CMI to the extent that it is expended on a regular basis for household expenses).

138. The term "regular basis" is not defined in the Code but 11 U.S.C. section 101(30) defines "individual with regular income" as an "individual whose income is sufficiently stable and regular to

Line 9: Unemployment compensation.

Initial Inquiry and/or Document Review: Review unemployment compensation payment advices.

Further Inquiry: Request and review bank statements and federal income tax return or transcript for the most recent tax year ending prior to commencement of the case.

Practice Pointer: Some courts have concluded that unemployment compensation should not be included in the means test.[139]

Line 10: Income from all other sources.[140]

Initial Inquiry and/or Document Review: Inquire into inheritances, buyouts not included elsewhere, gifts, state benefits information for which the debtor has not already accounted, court-ordered payments received by the debtor, distributions from retirement accounts, sales of stocks, and any dividends not reinvested.

Further Inquiry: None.

Practice Pointers: Benefits received under the Social Security Act are not included. One-time events, such as a stock sale within the six months before filing, may constitute a "special circumstance" under section 707(b)(2)(B)(i). If there has been an early distribution from a retirement account, check to see whether taxes are owing on the amount withdrawn.

Part III. Application of § 707(b)(7) Exclusion

Line 14: Applicable median family income.

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the U.S. Trustee's web site.[141] Verify "household size."

Further Inquiry: None.

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enable such individual to make payments under a plan under chapter 13." "The benchmark for determining whether an individual has 'regular income' for purposes of section 101(30) of the Bankruptcy Code is not the type or source of income, but '*its stability and regularity*.'" *In re* Antoine, 208 B.R. 17, 20 (Bankr. E.D.N.Y. 1997) (quoting *In re* Cole, 3 B.R. 346, 349 (Bankr. S.D. W. Va. 1980) (noting that Congress made clear its intent to include even certain non-employed persons, provided that their income was sufficiently stable and regular)). *See also In re* Sigfrid, 161 B.R. 220, 222 (Bankr. D. Minn. 1993) (determining that where debtor is unemployed, debtor must establish that the source of the payment, such as a non-debtor spouse's income, is sufficiently stable and regular and such a determination is made on a case-by-case basis); Rowe v. Conners (*In re* Rowe), 110 B.R. 712, 718 (Bankr. E.D. Pa. 1990) (finding debtor's receipt of $200 a month from the debtor's son constituted stable and regular income).

139. *See, e.g., In re* Sorrell, 359 B.R. 167, 183 (Bankr. S.D. Ohio 2007); *In re* Munger, 370 B.R. 21, 25–26 (Bankr. D. Mass. 2007).

140. The January 2008 Amendment revises Form 22A as follows:

> *Income from all other sources*. Specify source and amount. If necessary, list additional sources on a separate page. Do not include alimony or separate maintenance payments paid by your spouse if Column B is completed, but include all other payments of alimony or separate maintenance. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism.

141. U.S. Trustee Program, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited Sept. 7, 2008).

Comments: Attorneys need to be sure that they are reviewing the *most recent* median family income tables for the debtor's state. "Family size" is not defined in the Code and case law, thus far, is limited.[142] Form 22A indicates that the median family income for the applicable state and *household* size should be reported, and the form refers the reader to the U.S. Trustee's web site.[143] The web site reports the applicable *family* size. It is unclear why this discrepancy exists.[144]

Part IV. Calculation of Current Monthly Income for § 707(b)(2)

Line 17: Marital Adjustment.[145]

Initial Inquiry and/or Document Review: Review bank statements and credit card statements.

Further Inquiry: Review payment advices for the non-filing spouse, the tax return or transcript for the non-filing spouse (if separate from the debtor's) for the tax year ending prior to the commencement of the case, bank statements for any accounts of the non-filing spouse, and a detailed statement from the non-filing spouse together with supporting documentation regarding income that is not contributed to the household.

Practice Pointers: A non-filing spouse might refuse to turn over tax returns or other information that might not be in the debtor's possession. Issues regarding jurisdiction and privacy have not been addressed by the courts to date.[146]

Part V. Calculation of Deductions Allowed Under § 707(b)(2)

Subpart A: Deductions Under Standards of the Internal Revenue Service (IRS)

Line 19: National Standards: food, clothing, household supplies, personal care, and miscellaneous.[147]

142. The Working Group identified only a handful of cases on point. Two decisions address whether a pregnant debtor can include an unborn child as a member of the household, with both answering in the negative. *See In re* Pampas, 369 B.R. 290, 294 (Bankr. M.D. La. 2007); *In re* Fleishman, 372 B.R. 64, 70 (Bankr. D. Or. 2007). In *In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007), the court rejected both a broad "heads on beds" approach as well as a narrow definition found in an IRS manual. Striking a middle ground, the court looked at the dependence of the debtors' adult daughter and her children on the debtors' contributions to the household. The court determined that the daughter and her children should be included within the household for purposes of the means test. The debtors' adult son, by contrast, was merely a "head on a bed" and was properly not counted as a member of the household. *Id*. at 800–02. *Contra In re* Ellringer, 370 B.R. 905, 911 (Bankr. D. Minn. 2007) (adopting the "heads on beds" approach).

143. *See* U.S. Trustee Program, http://www.usdoj.gov/ust (last visited Sept. 7, 2008).

144. *See In re* Plumb, 373 B.R. 429, 436–38 (Bankr. W.D.N.C. 2007) (addressing this discrepancy).

145. The January 2008 Amendment adds the following language: "Specify in the Lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page." Additionally, this Amendment includes a space for the debtor to specify the basis and amounts of the marital adjustment.

146. For a discussion of application of the marital deduction, see *In re Travis*, 353 B.R. 520, 527–28 (Bankr. E.D. Mich. 2006). *But see* Stapleton v. Baldino (*In re* Baldino), 369 B.R. 858, 861–62 (Bankr. M.D. Pa. 2007) (questioning whether the existence of a non-filing spouse's significant earnings necessarily raises the debtor's standard of living).

147. The January 2008 Amendment revises the April 2007 form as follows:

19A. *National Standards: food, clothing, household supplies, personal care, and miscellaneous and other items*. Enter in Line 19A the "Total" amount from IRS National Standards for Food, Clothing

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the U.S. Trustee's web site.[148]

Further Inquiry: None.

Practice Pointer: It is unclear whether "gross monthly income," which is used for this standard, is the same as "current monthly income."

Line 20A: Local Standards: housing and utilities; non-mortgage expenses.[149]

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the U.S. Trustee's web site.[150]

Further Inquiry: None.

Practice Pointer: The U.S. Trustee's web site states:

> The Housing and Utilities Standards are published by the IRS by state (including Guam, the Northern Mariana Islands, Puerto Rico, the Virgin Islands, and the District of Columbia), county, and family size. For purposes of these bankruptcy forms, the Housing and Utilities Standards are provided in two components—non-mortgage expenses and mortgage/rent expenses.[151]

It is unclear what is meant by "non-mortgage" expenses.

Line 20B: Local Standards: housing and utilities; mortgage/rent expense.[152]

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the U.S. Trustee's web site.[153] Verify county of residence for the debtor, "family size" of the debtor, and

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and Other Items for the applicable household size. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

The January 2008 Amendment also includes a section 19B, which states:

> *National standards: health care*. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (The information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the number of members of your household who are under 65 years of age, and enter in Line b2 the number of members of your household who are 65 years of age or older. (The total number of household members must be the same as the number stated in Line 14b.) Multiply Line a1 by Line b1 to obtain a total amount of household members under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for household members 65 and older, and enter the result in Line c2.

Line 19B then provides a chart for the debtor to complete regarding the above amounts.

148. *See* U.S. Trustee Program, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited Sept. 7, 2008).

149. The January 2008 Amendment revises the April 2007 form by changing the words "family size" to "household size."

150. *See* U.S. Trustee Program, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited Sept. 7, 2008).

151. *See id.*

152. The January 2008 Amendment revises the April 2007 form by changing the words "family size" to "household size."

153. *See* U.S. Trustee Program, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited Sept. 7, 2008).

if the debtor has "non-mortgage" or "mortgage" expenses by reviewing mortgage, property tax bills, homeowners insurance payment information, cancelled checks regarding monthly mortgage/rent payment, and utilities payments. Prepare statement indicating the client's intent to surrender or redeem property or to reaffirm the underlying debt, if applicable.

Further Inquiry: None.

Practice Pointer: It is unclear if debtors are entitled to take this deduction when the debtor does not pay rent/mortgage or utilities.[154]

Line 21: Local Standards: housing and utilities; adjustment.

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the U.S. Trustee's web site.[155]

Further Inquiry: None.

Practice Pointer: This line anticipates that the debtor may challenge the process used to compute the housing and utilities adjustment.[156]

****Line 22: Local Standards: transportation; vehicle operation/public transportation expense.***[157]

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the U.S. Trustee's web site.[158]

Further Inquiry: None.

Practice Pointer: The debtor is entitled to this expense regardless of whether the debtor pays the expense of operating a vehicle or uses public transportation.

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154. *See, e.g., In re* Farrar-Johnson, 353 B.R. 224, 231 (Bankr. N.D. Ill. 2006) (holding section 1325(b)(3) allows housing deduction for debtors with above-median income even where they have no actual housing expense).

155. *See* U.S. Trustee Program, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited Sept. 7, 2008).

156. *See In re* Skaggs, 349 B.R. 594, 597 (Bankr. E.D. Mo. 2006) (holding that debtors were limited to the IRS standard housing expense even though their actual rent amount exceeded the IRS standard).

157. The January 2008 Amendment renumbers former Line 22 as Line 22A and adds the following language:

> If you checked 0, enter on Line 22A the "Public Transportation" amount from the IRS Local Standards: Transportation. If you checked 1 or 2 or more, enter on Line 22A the "Operating Costs" amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

Additionally, the January 2008 Amendment adds a Line 22B, which states:

> *Local Standards: transportation; additional public transportation expense*. If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 22B the "Public Transportation" amount from IRS Local Standards: Transportation. (The amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

158. *See* U.S. Trustee Program, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited Sept. 7, 2008).

Line 23: Local Standards: transportation ownership/lease expense; Vehicle 1.[159]

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the U.S. Trustee's web site.[160]

Review title to the debtor's vehicle (unless held by a secured creditor) or lease verifying that the vehicle is in the debtor's name, bills indicating the amount the debtor pays each month, and the debtor's statement of intention regarding surrender, redemption, or reaffirmation, if applicable.

Further Inquiry: None.

Practice Pointers: The case law is mixed on whether a debtor is entitled to this deduction when the debtor owns the vehicle free and clear[161] or has stated an intent to surrender the vehicle post-petition.[162]

The debtor is permitted to subtract "the Average Monthly Payment for any debts secured by vehicle 1, as stated in Line 42" from the IRS transportation standard expense. However, section 707(b)(2)(A)(iii) defines "average monthly payment" as "the total of all amounts contractually due to each secured creditor in the 60 months *following* the filing of the bankruptcy case, divided by 60."[163] Line 23 seems to contemplate a past or present expense, whereas Line 42 seems to contemplate a future expense. Although there appears to be an inconsistency, there have been no cases directly addressing this issue.[164]

It is unclear whether the amortized amount or the amount as indicated in the contract between the debtor and the secured party should be listed as the "average monthly payment."

159. The January 2008 Amendment revises the April 2007 form as follows:

> Enter, in Line a below, the "Ownership Costs" for "One Car" from the IRS Local Standards: Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 23. Do not enter an amount less than 0.

160. *See* U.S. Trustee Program, Means Testing, http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm (last visited Sept. 7, 2008).

161. For cases in which a deduction for a vehicle owned free and clear was permitted, see, for example, *Neary v. Ross-Tousey* (*In re Ross-Tousey*), 368 B.R. 762, 767–68 (E.D. Wis. 2007); *Fokkena v. Hartwick* (*In re Hartwick*), 373 B.R. 645, 653–66 (D. Minn. 2007); *In re Pampas*, 369 B.R. 290, 297 (Bankr. M.D. La. 2007); *In re Barraza*, 346 B.R. 724, 729 (Bankr. N.D. Tex. 2006); *In re Harris*, 353 B.R. 304, 308 (Bankr. E.D. Okla. 2006); *In re Oliver*, 350 B.R. 294, 301–02 (Bankr. W.D. Tex. 2006); and *In re Hardacre*, 338 B.R. 718, 727–28 (Bankr. N.D. Tex. 2006). For cases where a deduction was not permitted, see, for example, *In re Billie*, 367 B.R. 586, 592 (Bankr. N.D. Ohio 2007); *In re Zak*, 361 B.R. 481, 488 (Bankr. N.D. Ohio 2007); *In re Zaporski*, 366 B.R. 758, 768 (Bankr. E.D. Mich. 2007); *In re Fowler*, 349 B.R. 414, 419 (Bankr. D. Del. 2006); *In re Wilson*, 356 B.R. 114, 121 (Bankr. D. Del. 2006); and *In re Prince*, No. 06-10328C-7G, 2006 WL 3501281, at *3, 2006 Bankr. LEXIS 3404 (Bankr. M.D.N.C. Nov. 30, 2006).

162. *See, e.g., In re* Singletary, 354 B.R. 455, 473 (Bankr. S.D. Tex. 2006) (holding debtors were not permitted to take a deduction for a vehicle the debtors had surrendered prior to the motion date). *But cf. In re* Skaggs, 349 B.R. 594, 597 (Bankr. E.D. Mo. 2006) (holding the debtors were not permitted to take a deduction for a vehicle they intended to surrender).

163. 11 U.S.C. § 707(b)(2)(A)(iii) (2006) (emphasis added).

164. *See In* re Vesper, 371 B.R. 426, 432 (Bankr. D. Alaska 2007) (noting distinction by stating that "[i]f the actual car payment exceeds the allowable expense amounts on Lines 23 and 24, the debtor may claim such excess as a deduction on Line 42 of the form, as a 'future payment on secured claims'").

Line 24: Local Standards: transportation ownership/lease expense; Vehicle 2.[165]
Initial Inquiry and/or Document Review: Same as Line 23.
Further Inquiry: None.
Practice Pointers: Same as Line 23.

Line 25: Other Necessary Expenses: taxes.
Initial Inquiry and/or Document Review: Review payment advices and federal, state, and local tax returns or transcripts for the most recent tax year ending prior to the commencement of the case, including business tax returns or transcripts, if applicable.
Further Inquiry: None.
Practice Pointers: The attorney should consider reviewing the debtor's payment advices to ensure that the debtor is not overwitholding taxes. Overwithholding could be a ground for a trustee to move to dismiss a bankruptcy case pursuant to section 707(b)(3).

If the client has no payment advices, the attorney should get a declaration, under oath, to that effect. The declaration can be sent to the trustee in lieu of the payment advices.

Be sure to inquire whether the client cashed in a tax privileged account, such as an IRA, which is not uncommon when people are in financial distress. If so, determine whether taxes remain owing.

Line 26: Other Necessary Expenses: mandatory payroll deductions.
Initial Inquiry and/or Document Review: Review payment advices and 401(k) enrollment information, if applicable.
Further Inquiry: Inquire whether the debtor has employment manuals or a statement from his or her employer regarding mandatory deductions.
Practice Pointer: The client may have significant concerns regarding an employer's knowledge of an upcoming bankruptcy filing. Although the attorney should be clear that the fact of a bankruptcy cannot be kept hidden, the attorney may need to tailor the case to the client's unique concerns, especially in light of judicial interpretations of the Code's anti-discrimination clause[166] that limit that provision's protections to post-petition discriminatory conduct.[167]

Line 27: Other Necessary Expenses: life insurance.
Initial Inquiry and/or Document Review: Review bills for term life insurance and cancelled checks, bank statements, or credit card statements showing payment of life insurance premiums.

165. See *supra* note 159 regarding the January 2008 Amendment to this item, which is the same as the Amendment to Line 23.
166. 11 U.S.C. § 525(b) (2006).
167. *See, e.g.*, Kanouse v. Gunster, Yoakley & Stewart, P.A. (*In re* Kanouse), 168 B.R. 441, 447 (S.D. Fla. 1994) (holding that debtor who was terminated pre-petition was not protected because section 525(b) applies only to debtors and former debtors), *aff'd*, 53 F.3d 1286 (11th Cir.) (unpublished table decision), *cert. denied*, 516 U.S. 930 (1995). *See also* White v. Kentuckiana Livestock Mkt., Inc., 397 F.3d 420, 426 (6th Cir. 2005) (construing strictly "solely because" language of section 525(b)).

Further Inquiry: None.

Practice Pointers: This deduction is permitted only for amounts paid for the debtor's policies; premiums for policies for dependents may not be deducted.

Form 22A distinguishes term life from whole life and other forms of life insurance, allowing a deduction only for term life. This distinction is not in the statute, and the reason for its inclusion on the form is not clear.

Line 28: Other Necessary Expenses: court-ordered payments.

Initial Inquiry and/or Document Review: Review judgments, settlement agreements, releases, other court orders, judgments of divorce, property settlements, any other written support agreements (and any modifications to those agreements), statements of child support enforcement agencies, if any, and garnishments.

Further Inquiry: None.

Practice Pointer: Support arrearages should not be included here. Arrearages are instead deducted as priority debts in Item 44, with the monthly amount averaged out over sixty months.

Line 29: Other Necessary Expenses: education for employment or for a physically or mentally challenged child.

Initial Inquiry and/or Document Review: Review bills or invoices for education as a condition of employment, bills or invoices for education of a physically or mentally challenged dependent child, and doctor's proof of a physically or mentally challenged child.

Further Inquiry: Review employment manual or statement from the debtor's employer indicating mandatory education requirements.

Line 30: Other Necessary Expenses: childcare.

Initial Inquiry and/or Document Review: Review bills or invoices for day care expenses; bills, invoices, or cancelled checks for babysitting expenses or a statement from the debtor indicating the average monthly cost for babysitting; and judgments of divorce and child support orders.

Further Inquiry: None.

Practice Pointer: This deduction is applicable only to childcare; education expenses do not qualify. It is unclear how to differentiate between applicable and inapplicable deductions when a young child, not yet eligible to attend public school, attends a Montessori or similar program that is intended as education rather than childcare.

Line 31: Other Necessary Expenses: health care.

Initial Inquiry and/or Document Review: Review bills and receipts or cancelled checks for health care expenses not reimbursed by insurance or paid from a health savings account.

Further Inquiry: Review health insurance policy.

Practice Pointer: Deduction cannot include payments made for health insurance or health savings accounts included on Line 34.

Line 32: Other Necessary Expenses: telecommunication services.[168]

Initial Inquiry and/or Document Review: Review bills, invoices, and cancelled checks for cell phones, pagers, call waiting, caller ID, special long distance, and Internet service actually paid by the debtor.

Further Inquiry: None.

Practice Pointers: The debtor cannot include an amount previously deducted. The debtor cannot include an amount for basic home telephone service because that expense is included in the IRS local standard for housing and utilities.[169]

The possible telecommunication expenses the debtor can include are not in the statute, but are likely those that the IRS specifies are in effect, e.g., Internal Revenue Manual section 5.15.1.10, on the date of the order for relief.[170]

The telecommunication expense can only be taken for the debtor and the dependents of the debtor.[171]

Case law suggests that the debtor must provide documentation to the trustee to support the debtor's deduction for telecommunication expenses.[172]

Part V. Subpart B: Additional Expense Deductions Under § 707(b)[173]

****Line 34: Health Insurance, Disability Insurance, and Health Savings Account Expenses.***[174]

Initial Inquiry and/or Document Review: Review payment advices showing the monthly expense withdrawn from the debtor's paycheck for health insurance, disability insurance, and health savings accounts, and invoices or cancelled checks for amounts paid by the debtor for health insurance, disability insurance, and health savings accounts.

Further Inquiry: None.

Practice Pointer: The debtor can deduct payments made for the debtor's spouse and dependents.

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168. The January 2008 Amendment revises the April 2007 form so it reads as follows: "Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller I.D., special long distance, or Internet service—to the extent necessary for your health and welfare or that of your dependents. . . ."

169. *See In re* Stimac, 366 B.R. 889, 892 (Bankr. E.D. Wis. 2007); *In re* Lara, 347 B.R. 198, 203–04 (Bankr. N.D. Tex. 2006) (finding debtors were allowed a deduction, in addition to the standard deduction, for cellular telephone at $183.00 per month and for high speed Internet access at $26.00 per month as "other necessary expenses"). *See also In re* Haley, 354 B.R. 340, 345 (Bankr. D.N.H. 2006).

170. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006). *But see In re* Jewell, 365 B.R. 796, 803 (Bankr. S.D. Ohio 2007) (suggesting that the IRS standards are not determinative).

171. *See In re* Plumb, 373 B.R. 429, 440 (Bankr. W.D.N.C. 2007) (holding that the debtors were permitted to take a telecommunication deduction for themselves and their dependents but not for the entire household of ten). *See also In re* Oltjen, No. 07-60534-RCM, 2007 WL 2329695, at *2, 2007 Bankr. LEXIS 2761 (Bankr. W.D. Tex. Aug. 13, 2007) (holding that the debtor was not permitted to take a deduction for her sister's cell phone expense).

172. *See In re* Renicker, 342 B.R. 304, 310 (Bankr. W.D. Mo. 2006); *In re* Johns, 342 B.R. 626, 628 (Bankr. E.D. Okla. 2006).

173. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2006).

174. The January 2008 Amendment revised the April 2007 form as follows: "List the monthly expenses in the categories set out in Lines a–c below that are reasonably necessary for yourself, your spouse, or your dependents." The debtor is then to total the amounts in three categories: Health Insurance, Disability Insurance, and Health Savings Account.

Line 35: Continued contributions to the care of household or family members.

Initial Inquiry and/or Document Review: Review cancelled checks, credit card statements, and bank statements to find the debtor's "reasonable and necessary"[175] payments for the care and support of an elderly, chronically ill, or disabled member of the debtor's household or immediate family who is unable to pay for such expenses.

Further Inquiry: Obtain a doctor's letter indicating that the care of the household member or immediate family member is reasonable and necessary, and a statement signed by the household member or family member indicating that the household member or family member is unable to pay for care.

Line 36: Protection against family violence.

Initial Inquiry and/or Document Review: Ask client. Counsel should make a judgment based on the client's word and, if need be, ask for an in camera hearing so the client can provide relevant details while the court maintains the required confidentiality.[176]

Further Inquiry: None.

Practice Pointer: Although unlikely because of the peculiar circumstances associated with family violence, counsel should review the Family Violence Prevention and Services Act if there are expenses to be listed here. This Act, along with unidentified "other federal law," is the basis for this deduction.

Line 37: Home energy costs.

Initial Inquiry and/or Document Review: Review invoices or bills to determine average monthly amount in excess of the IRS local standard.

Further Inquiry: Obtain a written explanation from the debtor explaining that the expense is reasonable and necessary together with other supporting documentation, if any.

Practice Pointer: The debtor is required to provide documentation to the trustee demonstrating that the additional amount claimed is reasonable and necessary.

Line 38: Education expenses for dependent children less than 18.

Initial Inquiry and/or Document Review: Obtain invoices or bills establishing the average monthly expenses actually incurred by the debtor.

Further Inquiry: None.

Practice Pointers: The debtor is required to provide documentation to the trustee demonstrating that the amount claimed is reasonable and necessary and

175. That the expenses be "reasonable and necessary" is a statutory requirement. 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2006). *See also In re* Hicks, 370 B.R. 919, 922 (Bankr. E.D. Mo. 2007).

176. Section 707(b)(2)(A)(ii)(II) requires the court to maintain the confidentiality of expenses incurred "to maintain the safety of the debtor and the family of the debtor as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable federal law."

not already accounted for by the IRS standards. The deduction is limited to $125 per child, and the child must be less than eighteen.

Line 39. Additional food and clothing expense.

Initial Inquiry and/or Document Review: Review documentation from the client regarding monthly food and clothing expense to see if it exceeds the standard deduction. If it does, obtain all supporting documentation from the client because it is required by statute and inquire into whether the expense is reasonable and necessary.

Further Inquiry: None.

Line 40: Continued charitable contributions.

Initial Inquiry and/or Document Review: Review cancelled checks, bank statements, and credit card statements showing the contributions and any receipts for donations.

Further Inquiry: It may also be necessary to review federal and state income tax returns or transcripts.

Practice Pointer: "Continued" is not defined by the Code.[177] "Charitable contribution" is defined under I.R.C. section 170(c)(1)–(2).

Part V. Subpart C: Deductions for Debt Payment[178]

****Line 42: Future payments on secured claims.***[179]

Initial Inquiry and/or Document Review: See Lines 20B and 23. Review bills or invoices for mortgage and vehicle payments.

Further Inquiry: None.

Practice Pointers: Recent case law is mixed as to whether 401(k) loan repayments may be "payments on account of secured debt" under 11 U.S.C. section 707(b)(2)(A)(iii).[180]

With regard to a debtor taking a deduction for mortgage payments when the debtor did not intend to reaffirm, see *In re Nockerts.*[181]

With regard to a debtor taking a deduction for mortgage payments when the property had been foreclosed, see *In re Brandenburg.*[182]

177. *See In re* Bender, 373 B.R. 25, 29–30 (E.D. Mich. 2007) (holding that the debtors were entitled to take a charitable deduction for a $260 per month charitable contribution that had been paid for the three years prior to filing, but not for the $100 post-petition increase the debtors claimed on Schedule J).

178. *See* 11 U.S.C. § 707(2)(A)(iii) (2006).

179. The January 2008 Amendment revised the April 2007 form by requiring the debtor to check whether the secured payment includes taxes and insurance.

180. For cases in which the court found that 401(k) loans could not be deducted, see *In re Barraza*, 346 B.R. 724, 730 (Bankr. N.D. Tex. 2006); *In re Lenton*, 358 B.R. 651, 660 (Bankr. E.D. Pa. 2006); and *In re Haley*, 354 B.R. 340, 344 (Bankr. D.N.H. 2006). For cases in which the court found the opposite, see, for example, *Eisen v. Thompson*, 370 B.R. 762, 772 (N.D. Ohio 2007); and *McVay v. Otero*, 371 B.R. 190, 203 (W.D. Tex. 2007).

181. 357 B.R. 497, 504–05 (Bankr. E.D. Wis. 2006).

182. No. 07-30344-svk, 2007 WL 1459402, at *3, 2007 Bankr. LEXIS 1781 (Bankr. E.D. Wis. May 15, 2007).

Several courts have allowed a debtor to take a vehicle or mortgage deduction for payments secured by collateral the debtor intends to surrender,[183] while others have disallowed such a deduction.[184]

The debtor is permitted to subtract "the Average Monthly Payment for any debts secured by vehicle 1, as stated in Line 42" from the IRS transportation standard expense. However, section 707(b)(2)(A)(iii) defines "average monthly payment" as "the total of all amounts contractually due to each Secured Creditor in the 60 months *following* the filing of the bankruptcy case, divided by 60."[185] Line 23 seems to contemplate a past or present expense, whereas Line 42 seems to contemplate a future expense. Although there appears to be an inconsistency, there have been no cases directly addressing this issue.[186]

It is unclear whether the amortized amount or the amount as indicated in the contract between the debtor and the secured party should be listed as the "average monthly payment."

Line 43: Other payments on secured claims.

Initial Inquiry and/or Document Review: See Lines 20B and 23. Review any notices of foreclosure or repossession, judgment liens, and any documents showing the debtor made a purchase on a credit card granting a purchase-money security interest to the issuer.

Further Inquiry: None.

Practice Pointers: It is unclear whether the payments to be listed on Line 43 should be averaged over a sixty-month period. It also unclear as to whether future or past payments on secured claims should be included on Line 43.

It has been noted that the means test is "aimed at capturing a 'snapshot' of the debtor's financial state as of the date the petition is filed, rather than at constructing a forward-looking analysis of the debtor's financial situation."[187]

This item might require that the attorney balance the information needed to complete Form 22A and the client's resources. Tracking credit card agreements,

183. *See, e.g., In re* Longo, 364 B.R. 161, 165–66 (Bankr. D. Conn. 2007) (allowing a deduction for collateral that the debtor intended to surrender); *In re* Walker, No. 05-15020-WHD, 2006 WL 1314125, at *8, 2006 Bankr. LEXIS 845 (Bankr. N.D. Ga. May 1, 2006) (holding that the "[d]ebtors are entitled to deduct from CMI the average payments on debts secured by surrendered collateral"); *In re* Singletary, 354 B.R. 455, 473 (Bankr. S.D. Tex. 2006) (holding that merely declaring an intent to surrender collateral in the statement of intention is not enough to preclude debtor from deducting such payments, but adding that debtor would not be permitted to deduct payments if the collateral had already been surrendered).

184. *See, e.g., In re* Skaggs, 349 B.R. 594, 598 (Bankr. E.D. Mo. 2006) (holding debtors were not permitted to take a deduction for a second vehicle that they intended to surrender); *In re* Harris, 353 B.R. 304, 309–20 (Bankr. E.D. Okla. 2006) (holding debtors were not permitted to deduct monthly payments for secured debt when they intended to surrender the collateral); *In re* Love, 350 B.R. 611, 614 (Bankr. M.D. Ala. 2006) (holding "payments on account of secured debts" in chapter 13 plan did not include payments for collateral the debtors intended to surrender).

185. 11 U.S.C. § 707(b)(2)(A)(iii) (2006) (emphasis added).

186. *See In* re Vesper, 371 B.R. 426, 432 (Bankr. D. Alaska 2007) (noting distinction by stating that "[i]f the actual car payment exceeds the allowable expense amounts on Lines 23 and 24, the debtor may claim such excess as a deduction on Line 42 of the form, as a 'future payment on secured claims'").

187. Fokkena v. Hartwick, 373 B.R. 645, 655 (D. Minn. 2007).

payments, and purchases, for example, can be time consuming and expensive. If the client has income below the median, or otherwise does not have apparent problems with the means test, such expenditure could prove needlessly burdensome to the client.

Line 44: Payments on priority claims.[188]

Initial Inquiry and/or Document Review: Review any statements from child support enforcement agencies. Review relevant tax records, such as returns, transcripts, or notices from taxing authorities.

Further Inquiry: If child support is listed as a priority debt, review judgments of divorce, property settlements, any other written support agreements, and any modifications to those agreements.

Practice Pointers: "Priority claims" are defined by section 507(a) and do not include amounts coming due after the petition date.

Priority claims are required to be amortized over sixty months.[189]

Post-petition amounts due that have the same character as priority claims, such as future support obligations, are to be listed in Item 28.

Claims listed here should also be included on Schedule E.

Attorneys should be careful not to confuse priority support with non-priority property settlements. Both are non-dischargeable in a chapter 7 case, but only support debts are entitled to priority.

Part VII. Additional Expense Claims

Line 56: Other Expenses.

Initial Inquiry and/or Document Review: Review bills or invoices and cancelled checks for other expenses.

Further Inquiry: Obtain a statement from the debtor indicating the purpose of the expense and that the expense is necessary for the health and welfare of the debtor or the debtor's family. Also review bank statement or credit card statement showing the expense paid by the debtor.

Practice Pointer: The expense must be for the health and welfare of the debtor or the debtor's family.[190]

188. The January 2008 Amendment revises the April 2007 form to read as follows: "*Payments on prepetition priority claims*. Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. *Do not include current obligations, such as those set out in Line 28.*"

189. 11 U.S.C. § 707(b)(2)(A)(iv) (2006).

190. *See In re* Oliver, 350 B.R. 294, 303 (Bankr. W.D. Tex. 2006); *In re* Lara, 347 B.R. 198, 204 (Bankr. N.D. Tex. 2006).