

**Consumer Track:**  
Think Before You File

**John R. Bollinger, Moderator**  
Boleman Law Firm, PC; Richmond, Va.

**August B. Landis**  
Office of the U.S. Trustee ; Las Vegas

**Hon. Michael K. Nakagawa**  
U.S. Bankruptcy Court (D. Nev.); Las Vegas

**Brian D. Shapiro**  
Law Office of Brian D. Shapiro; Las Vegas



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## **Consumer Cases: Think Before You File**

**Hon. Mike K. Nakagawa**  
**Chief Bankruptcy Judge**  
**United States Bankruptcy Court for the District of Nevada**  
**Las Vegas, Nevada**

**August B. Landis**  
**Acting United States Trustee - Region 17**  
**San Francisco, California**

**Brian D. Shapiro**  
**Chapter 7 Panel Trustee**  
**Las Vegas, Nevada**

**John R. Bollinger**  
**Boleman Law Firm, P.C.**  
**Newport News, VA 23606**

## I. Get to Know Your Client’s Financial Situation

### A. Why it Matters

1. **11 U.S.C. § 527 (c)** : The Code requires debt relief agencies to make “*reasonably diligent inquiry of the assisted person or others* so as to obtain such information reasonably accurately for inclusion on the petition, schedules or statement of financial affairs [.]” (emphasis added)
2. **FED. R. BANKR. P. 9011(b)(3)**: The Rules provide that “[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney . . . . is certifying that to the best of the person’s knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances . . . . the allegations and other factual contentions have evidentiary support* or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery[.]” (emphasis added)
3. **ABA Model Rule of Professional Conduct 1.1**: Requires competence in representation of a client: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, *thoroughness and preparation reasonably necessary for the representation.*” (emphasis added) Comment 5 to Rule 1.1 provides in part that “Competent handling of a particular matter includes *inquiry into and analysis of the factual and legal elements of the problem*, and methods and procedures meeting the standards of competent

practitioners. *It also includes adequate preparation. . . .*” (emphasis added)

**4. Your Client is Counting on You.**

**B. How to Learn What You Need to Know: Making a Reasonably Diligent Inquiry**

**1. Take Full Advantage of the Client Intake Meeting.** You can never start too early. Use the initial client meeting to get to know your prospective client. Beware the client who doesn’t have a prompt, clear, and credible answer to the question “Why do you need to file a bankruptcy case?”

**2. Document the Information Requests Directed to Your Client.**

Consider developing a questionnaire that requires the client to provide the critical financial information that will be included in the petition, schedules, and statements of financial affairs, as well as supporting proof (i.e., tax returns, pay advices, deeds of trust, auto titles, bank statements, credit reports, mortgage statements, credit card statements, medical bills, divorce decrees, pleadings from pending lawsuits, bills for recurrent monthly expenses, etc.).

**3. You Can Delegate - - But You Can’t Abdicate.** Making a reasonably diligent inquiry into the financial affairs of your prospective client takes time, and often a fair amount of follow up. Many firms and practitioners delegate that work to paralegals. If you choose to do so:

- a.** Make sure the paralegals have appropriate training; and
- b.** Make sure the paralegals have appropriate oversight.

The duty to make a reasonably diligent inquiry into the client's financial situation remains with the attorney.

4. **Follow Through.** Make sure your client has answered all of your questions and has provided everything you need to evaluate his/her financial situation *before* you file. Once papers have been filed with the court, the requirements of Rule 9011(b)(3) apply - - and it's very hard to unring that bell.

## II. Choose the Right Kind of Bankruptcy Relief

After you've completed your reasonably diligent inquiry into your client's financial situation, carefully consider what type of bankruptcy relief is best suited to your client's needs.

### A. Eligibility

1. **Chapter 7:** Most debtors are eligible. Exceptions include railroads, domestic insurance companies, banks, savings and loan associations, and the other entities identified in the statutory text of 11 U.S.C. § 109 (b).
2. **Chapter 11:** Railroads, persons who qualify as debtors under Chapter 7 (except stockbrokers and commodity brokers), and certain financial institutions identified in the text of 11 U.S.C. § 109(d) qualify
3. **Chapter 12:** Only family farmers and family fishermen with regular annual income are eligible. *See* 11 U.S.C. § 109(f)
4. **Chapter 13:** Only individual debtors with regular annual income and

debts within the limits established by 11 U.S.C. § 109(e)<sup>1</sup> are eligible.

- 5. Don't forget to ask about prior bankruptcy cases.** No individual or family farmer may be a debtor in bankruptcy if he or she has been a debtor in a case pending under the Code at any time in the preceding 180 days if -
- a.** the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
  - b.** the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay under 11 U.S.C. § 362.

*See generally*, 11 U.S.C. § 109(g). Prior bankruptcy cases may also give rise to some fairly complex issues regarding the automatic stay. *See, e.g., In re Reswick*, 446 B.R. 362 (9<sup>th</sup> Cir. BAP 2011); *Jumpp v. Chase Home Finance, LLC* (*In re Jumpp*), 356 B.R. 789 (1<sup>st</sup> Cir. BAP 2006).

**B. Know Your Client's Goals and Manage Related Expectations**

Clients may expect to get a bankruptcy discharge, even though they have disposable income at a level that is sufficient to repay a significant portion of their overall debt. Others have a steadfast desire to repay as much of their debt as they can, even though they earn less than the bills they pay each month. Some want to

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<sup>1</sup>The debt limits are measured as of the date of filing, and generally limit chapter 13 eligibility to those debtors having “noncontingent, liquidated, unsecured debts of less than \$360,475 and noncontingent, liquidated, secured debts of less than \$1,081,400[.]” *See* 11 U.S.C. § 109(e).

reaffirm the debt on their home or car, despite the fact that they are unemployed and have no income or liquid assets to service the related debt. If it becomes evident that your client's expectations regarding the outcome of their bankruptcy case are inconsistent with their financial situation, the time to address that inconsistency with them in earnest is before - - not after - - you file the case.

**C. Know Your Limitations as a Practitioner**

Consumer bankruptcy cases are often straightforward matters. However, there are a number of new issues that can be traps for practitioners who are less than candid with themselves about their skills in the bankruptcy arena. A non-exhaustive list in the individual Chapter 11 area alone includes:

**1. The Need for Court Approval to Serve as Debtor's Counsel.** The consequences of failing to obtain that approval can be severe.

**2. Knowing Who You Represent.** Bankruptcy Estate vs. The Individual

**3. Unexpected Conflicts:** Defending Objections to Claimed Exemptions

Other current and developing issues in the consumer arena outside of Chapter 11 include lien stripping; "Chapter 20" developments; exemption approaches after the Supreme Court's decision in Schwab v. Reilly, \_\_\_ U.S. \_\_\_, 130 S. Ct. 2652 (2010); how to properly handle student loan debts in light of the Supreme Court's decision in United Student Aid Funds, Inc. v. Espinosa, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1367 (2010); and how to deal with "no look" fees after the 9<sup>th</sup> Circuit's ruling in Law Offices of David A. Boone v. United States Trustee (In re Eliapo), 468 F.3d 592 (9<sup>th</sup> Cir. 2006).

**III. Make Sure That Your Case (and Your Client) is Ready to File****A. Make Sure Your Client Has Satisfied the Credit Counseling Requirement****1. Approved Providers Can Be Found Here:**

[http://www.justice.gov/ust/eo/bapcpa/ccde/cc\\_approved.htm](http://www.justice.gov/ust/eo/bapcpa/ccde/cc_approved.htm)

**2. It's Required to be Eligible for Bankruptcy Relief:** 11 U.S.C. § 109(h)**3. Your Client Has To Take Credit Counseling - - Not Your Staff.** *See In re Pagaduan*, 429 B.R. 752 (Bankr. D. Nev. 2010), *aff'd in part and vacated in part*, 447 B.R. 614 (D. Nev. 2011).**4. Seeking a Waiver:** *See* 11 U.S.C. § 109(h)(3) and (4). Be prepared to prove your case.**B. Complete the Correct Means Test Form Correctly.** There are different means test forms for cases filed under chapters 7, 11 and 13 of the Bankruptcy Code. Make sure you use the correct, current form for the chapter you choose for your client, and fill it out completely.**C. Conduct a Complete Review of All Papers With Your Clients As They Sign.**

Retain the original signature pages in your files, even if you use electronic signatures on the documents that are filed with the court.

**IV. Anticipate and Meet Case Administration Requirements****A. Anticipate Case Trustee Needs and Requirements.** Check your local rules, as well as the websites maintained by your Clerk of Court and bankruptcy trustees. If the trustees use a questionnaire in their case review process, complete it early in the case and return it to the trustee as far in advance of the 341 meeting as possible.**B. Make Your Client Aware of the 341 Meeting Date and Time.**

- C. Make Sure Your Client Complies with the Statement of Intent Filed With the Court.** Failure to complete this simple task may have significant ramifications, both for the debtor and for case administration general. *See In re Blixseth*, \_\_\_ B.R. \_\_\_, 2011 WL 2420999 (9<sup>th</sup> Cir. BAP May 28, 2011)
- D. Make Sure Your Client Promptly Completes a Debtor Education Class.** Remember, the debtor education class is a post-filing requirement separate and distinct from the prepetition credit counseling required as a condition of eligibility to be a debtor. *Compare* 11 U.S.C. §§ 109(h) and 111. Failure to complete a post-filing debtor education class will delay the entry of a discharge. *See* 11 U.S.C. § 727(a)(11) *and* FED. R. BANKR. P. 4004(c)(1)(H). Approved providers can be found at the following link:  
[http://www.justice.gov/ust/eo/bapcpa/ccde/de\\_approved.htm](http://www.justice.gov/ust/eo/bapcpa/ccde/de_approved.htm)
- E. Avoid Automatic Dismissal:** Make sure that you've complied with the requirements of 11 U.S.C. § 521.
- F. Anticipate the Possibility of United States Trustee Audit Under 28 U.S.C. § 586(f).**
- G. Have Reaffirmation / Redemption Agreements Properly Prepared and Timely Filed.** Reaffirmation agreements in particular must meet a number of statutory requirements as a predicate to approval. *See generally* 11 U.S.C. § 524; *see also* 11 U.S.C. § 722 *and* FED. R. BANKR. P. 6008.
- V. Preparation Before Filing Yields the Best Results for Your Clients**
- A.** "For the want of a nail, the shoe was lost; for the want of a shoe the horse was lost; and for the want of a horse the rider was lost, being overtaken and slain by the

enemy, all for the want of care about a horseshoe nail." ~ Benjamin Franklin

- B.** "One of life's most painful moments comes when we must admit that we didn't do our homework, that we are not prepared." ~ Merlin Olsen
- C.** "If you are prepared, you will be confident, and will do the job." ~ Tom Landry