# Consumer: 25 Key Issues in Advising Debtors Pre-Petition

CONCURRENT SESSION

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# 25 KEY ISSUES IN ADVISING DEBTORS PRE-PETITION

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## 1. THE HIPPOCRATIC OATH – FIRST, DO NO HARM

When a new client comes in to see you they have many questions about bankruptcy and their personal financial situation. Frequently, they have expectations that you are going to give them advice which will help them retain assets, conceal assets, make transfers, and the like. The key aspect to your job is not to create more problems for the client. By giving any advice which helps them secret assets, transfer assets and not be truthful, you create claims under § 727 and possible criminal liability. It also presents possible areas for a Trustee or creditors to bring fraudulent transfer actions.

Particularly, you do not want to give creditors, or a Trustee, a third party to sue. So often I see attorneys advise their clients to transfer monies to their children, or other family members or friends, which just creates another defendant to be sued. I always tell my clients not to involve their children or other family members in their problems, but rather keep them out of it. Explain to them the concept of the honest debtor who brings his assets and his liabilities to the bankruptcy court and ask for the concept of "relief". Explain to them what that means, the value of "relief," and what happens to them if their discharge is denied. Do you understand what it means if the debtor's discharge is denied and the consequences for them in the future?

## 2. NEVER TRUST ANY INFORMATION GIVEN ORALLY BY THE CLIENT

You certainly have to interview your client to get their story and get their information. It helps to take a good set of notes. Train yourself at the interview to maintain and keep a good set of notes on the client. Because my clients tend to have more complicated financial backgrounds, I usually spend at least an hour with them on the first interview. I start off the interview by generally talking

about the situation and what was the cause of their financial difficulties. Then I go into specifics regarding businesses they own and lawsuits pending against them. Finally, I make a list of their assets, going into detail on each one, discussing each one with them. Then I do the same with respect to their liabilities. Then, I try to write a few notes about the goals for the client and what needs to be done next. At the end of the interview, those notes and my information sheet are imaged into my computer so I can quickly retrieve them if the client calls me in the future. I can usually glance at my initial set of notes and recall everything in the case. It is a great technique to learn the case.

Beyond that, you need to double check everything they have told you. Do not rely upon them to tell you that there is a piece of property in only the husband's name, or there is a piece of property in the husband and wife's name or the car titles are such and such. Make sure they give you the original source documents so that you can verify for yourself who owns the house, the vacation home, the vehicle, etc. You will frequently find that the debtors are incorrect regarding their ownership interest and that could drastically affect the advice you give them from the beginning and throughout the case.

Reviewing the tax returns and financial statements clients have given to the Internal Revenue Service, or to various lenders, tend to be the best source of finding information. Usually, although not always, people will not lie to the IRS or to banks when they are borrowing money and as a result you will find out the true story from those documents. If what you have been told by the client does not mesh with the history in those documents, then you have something to discuss to find out what is really going on.

3. **Look For 523 Issues Up Front**

Section 523 of the Code sets forth the types of debts, which are not subject to the bankruptcy discharge. If it has been awhile since you read Section 523, take a second and read it. Keep in the back of your mind as you talk to the client and give them advice, the kind of claims that could be covered by Section 523. This Section covers certain tax debts, claims for fraud and false representations regarding assets and finances, obtaining debt through fraudulent representations, frauds committed while acting in a fiduciary capacity, embezzlement or larceny, claims for domestic support obligations, claims for willful and malicious injury by the debtor to another entity, fines for governmental units, for death or personal injury from a drunk driving charge, certain student loans, certain final judgment or orders relating to FDIC claims, certain obligation and charges relating to bank fraud, certain claims for restitution, claims for violations for Securities Laws. The extent of Section 523 has greatly expanded in the past ten years and you need to be familiar with all parts of it. Some of the aspects of 523 will not come about very often, but they need to be in the back of your mind so that you can recognize those issues and discuss them with your client early on.

4. **Understand The Dischargeability Of Tax Claims**

Certain income tax claims can be discharged if they meet the criteria of Section 523. There are some very good books on the issue of dischargeability of tax claims. It is a very complicated area. If you do not feel comfortable giving advice in that area, pick a more seasoned bankruptcy attorney in your area to advise you. I particularly like Morgan King's Book on Discharging Taxes in Bankruptcy. It will be a very helpful source.

Section 523(a)(1)(A) - (C) contain most of the exceptions to discharge pertaining to taxes and requires the attorney to be familiar with and cross-reference Section 507 of the Bankruptcy Code.

The first category of taxes excepted from discharge under 11 U.S.C. §523(a)(1)(A) are taxes incurred in the ordinary course of the debtor's affairs during the period from the commencement of an involuntary to the earlier of the appointment of a trustee or entry of an order for relief. These taxes are third priority claims under Section 507(a)(3).

Second, are "tax[es] or customs dut[ies]" as set forth in section 507(a)(8). These taxes are non-dischargeable regardless of whether a claim was filed, or allowed. There are eight categories of taxes under this provision and include:

(i) Income and gross receipts for taxes due within the three years prior to filing;

(ii) Income and gross receipts for taxes assessed within 240 days before petition date, but still permitted to be assessed under applicable tax laws,

a. This period is tolled during the pendency of an offer to compromise, plus an additional 30-days thereafter and during the pendency of a stay of collections under bankruptcy or non-bankruptcy law plus 90-days;

(iii)Income and gross receipts not assessed prior to the petition date

(iv) Any property tax assessed before commencement of the case and last payable without penalty within one year prior to the petition date or thereafter;

(v) Taxes for which the Debtor is required by law to withhold or collect from others and for which he is liable in any capacity, regardless or the age of the tax claim;

(vi) The employer's share of employment taxes on wages paid before the petition date and on third-priority wages paid post-petition by the estate;

(vii) Excise taxes on transactions for which a return, if required, is last due, under otherwise applicable law or under any extension, within three years of before the petition date or thereafter;

(viii) Certain unpaid customs duties, such as duties on imports entered for consumption within 1 year prior to filing.

Section 523(a)(1)(B) excepts from discharge taxes for which a tax return, report, or notice, if required, was filed after the date it was last due, under applicable law or any extension, and the tax return was filed within two years prior to the petition date.

Section 523(a)(1)(C) excepts from discharge any and all taxes "with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax." 11 U.S.C. §523(a)(1)(C).

Where a tax obligation is not discharged under Section 523 of the Bankruptcy Code, the debtor will remain liable on all pre-petition interest that had accrued; the debtor may also be liable for post-petition interest that accrues as a result of Bruning v. United States, 376 U.S. 358, 84 S. Ct. 906, 11 L. Ed. 2d 772 (1964).

5. **Do Not Help Your Client Commit a Crime!**

Every bankruptcy Trustee and every United States Trustee Attorney is directed by the Code and by the Department of Justice to spot and report bankruptcy crimes. BAPCPA was designed to give the Government more tools and authority to enforce the criminal laws related to bankruptcy.

Chapter 18 of the United States Code contains most of the definitions relating to bankruptcy crimes. These provisions mostly require scienter and are very broad.

18 U.S.C. § 153 makes it a crime to embezzle from the estate. This applies to a trustee custodian, marshal, attorney or other officer of the court engaged to perform a service with respect to the estate.

18 U.S.C. § 154 makes it illegal for trustee to purchase property of the estate, directly or indirectly, to refuse to permit a reasonable opportunity for inspection of documents and accounts when ordered by the court, or knowingly refusing to permit a reasonable opportunity for inspection by the U.S. Trustee of documents relating to affairs of the estate for the trustee.

18 U.S.C. § 155 makes it illegal for a party in interest to knowingly and fraudulently enter into any agreement with another party for purposes of fixing the fees to be paid to an attorney or any party in interest for services from assets of the estate.

18 U.S.C. § 156 relates to criminal provisions regarding bankruptcy petition preparers and is after BAPCPA.

18 U.S.C. § 157 makes it a bankruptcy crime to devise a scheme, to defraud relating to the filing of a fraudulent involuntary petition. This is a new section after BAPCPA.

Bankruptcy Crimes would also include obstruction of justice under 18 U.S.C. § 1519; wire and mail fraud under 18 U.S.C. § 2516; aiding and abetting under 18 U.S.C. § 2; conspiracy § 371, false statement § 1001; perjury § 1621, Rico § 1962; and money laundering § 1956.

The Panel Trustees are under a statutorily mandated duty under Section 305(7) of the United States Code to report crimes. They have to report crimes if there is reasonable grounds to believe a crime has been committed. The Trustee refers the case to the U.S. Attorney. Eventually, those crimes get referred out for prosecution. BAPCPA added 28 U.S.C. §§ 158, 586(a)(3)(F) and 586(a)(6).

How can you help your client to commit a crime? Easy!

(1) Advise him to conceal assets.
(2) Advise him not to be truthful on their Schedules.
(3) Advise them not to tell the truth at a deposition, § 341 Meeting, or 2004 Examination.
(4) Make a false claim against the estate.
(5) Advise a child to receive property from a parent in anticipation of a bankruptcy with the intent to defeat the Bankruptcy Laws.
(6) Try to offer a bribe to a Trustee or something of value to a Trustee.
(7) In a corporate case, do the same thing.
(8) Destroy documents.
(9) Withhold information from the Trustee, including the books and records of the debtor.

All of the bankruptcy crimes are subject to aider and abettor provision, so if you help your client do those sort of things, you are not only helping your client commit a crime, you end up committing a crime. Don't commit a Crime!

6. **Read The Good Book**

When I was a young man, the minister of my church would hold up the Bible in front of the congregation and tell everyone that "if you want to get into heaven, you gotta read the Good Book. Well, the Bankruptcy Code is the Good Book in Bankruptcy and so are the Bankruptcy Rules. If you have access to the Mini Code, then reading the Bankruptcy Code, and Rules, is not an undaunting process. I dare say that many of you in the audience picked up bankruptcy after law school, perhaps never really studied it and have simply tried to become a bankruptcy practitioner by doing forms and reading Code Sections as needed. There is a lot chalked into these Statutes, so it does help to have a basic understanding of the structure of the Code and the way it all works with together. The definitions are particularly important because there are many words of art that are used throughout the Code which have different meanings in different places. The same could be said for the Bankruptcy Rules. You cannot be an effective bankruptcy practitioner unless you have read the Good Book.

Do you know why Chapter 7 is called Chapter 7? Do you know why Chapter 11 is called Chapter 11? Well, it is because it is in Chapter 7 of the Bankruptcy Code, or Chapter 11 of the Bankruptcy Code. Have you ever heard attorneys refer to the 500 causes of action? This refers to the causes of action that can be found in Chapter 5 of the Bankruptcy Code. Lots of shorthand words are used by attorneys who practice in bankruptcy and a familiarity with all of these terms will make your life a lot easier as a practicing attorney and help you in giving advice to your client, because if you have not read the Code and the Bankruptcy Rules before you advise clients on bankruptcy, you likely will not be successful in giving those clients advice.

7. **Understand What Is Exempt in Your State**

Section 522 of the Code is the provision that sets forth exemptions. Whole programs and books are written on this Section of the Code. If your State is an "Opt-Out State", then you have to be familiar with the States Laws. If you do not know your exemptions cold, then it is impossible for you to properly advise your client. I have seen many lawyers commit malpractice in bankruptcy and the biggest area that I have seen it committed are with improper advice with respect to exemptions.

For instance subsection (p) of Section 522 of the Bankruptcy Code limits the amount a debtor may claim exempt under the applicable homestead exemption in the following manner:

> (p)(1)Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the

> debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate $125,000 in value in—
>
> (A) real or personal property that the debtor or a dependent of the debtor uses as a residence;
>
> (B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;
>
> (C) a burial plot for the debtor or a dependent of the debtor; or
>
> (D) real or personal property that the debtor or dependent of the debtor claims as a homestead.

11 U.S.C. §522(p).

About a year after BAPCPA went into effect, I was appointed Trustee in the individual case of a single man who claimed a $2,000,000 home with no mortgage exempt, as his homestead. He had purchased the home about 1140 days prior to his filing. It happened to be a very large individual case with a number of fraudulent transfers and other interesting issues. When my office sat down to initially look at the case, and looked at the deed to the home, it struck us that the home had been purchased recently. We counted the days and realized that it did not qualify as a full homestead under the new BAPCPA provisions of Section 522. We were astounded. Had the attorney who filed the case simply waited a few more months to file the case, his client would have kept a $2,000,000 homestead. It is just so easy to make that kind of error.

8. **GPS**

Where are you? Where does your client live? Is your client domiciled of the State where he lives? Understand the new domicile requirements of BAPCPA.

In 2005 the Bankruptcy Abuse Prevention and Consumer Protection Act amended section 522(b)(3)(A), formerly section 522(b)(2)(A), increasing the period for determining the debtor's domicile to 730-days. The determination of where the debtor is domiciled is necessary to establish which exemption scheme the debtor may apply in his or her bankruptcy case.

To start, where the debtor is currently residing may not be the debtor's domicile. In general, a debtor's domicile is "established by [the debtor's] physical presence in [a] place with intent to remain there." In re Morad, 323 B.R. 818 (Bankr. D.Mass. 2005).

Where a debtor has not been domiciled in a single place for the 730-day period, then the Court will look to the laws of the state in which the debtor was

domiciled, for the longest period, during the 180-day period prior to the 730-day period.

9. **Choice of Law Issues**

Be sure to review the documents that are the subject to the claims against the client. See if there are any contractual obligations which have Choice of Law provisions in them. Many mortgages, promissory notes and contracts have those provisions and they may apply the law of another State, which could drastically affect how your case is going to come out. For instance, some States have different Statutes of Limitations, which may give creditors longer periods of time to sue for fraudulent transfers. You may think that if you waited four years and a day to file a bankruptcy you have avoided that fraudulent transfer against Uncle Fred. Only to find out that New York law applies in this particular situation. In New York the Statute of Limitations to bring an action for a fraudulent transfer is six years, and the Trustee can use that Statute to bring the fraudulent transfer action, which your client violated.

10. **Do Not Give a Hammer To Your Opponent**

I always tell the young attorneys who I have trained that when they are advising a client, do not create a situation where you give a creditor or someone on the other side something to hit you over the head with. Do not give the other side a hammer.

This is so easy to do. Such as, giving in to your client's request to let them transfer a property prior to filing, titling assets in protective names, or otherwise attempt very clever and aggressive asset protection moves. All you are doing is giving the creditors and the Trustee a hammer to hit your client over the head with. Don't do it!

11. **Get That Diploma**

The only reason someone enters into a bankruptcy proceeding is to receive a bankruptcy discharge. I tell my clients this is like their diploma and they need to do whatever is necessary to obtain that desired result – a discharge of their debts. Section 727 used to be referred to as Bankruptcy Crimes, and I still express that to my client when we discuss the implications of 727. You need to be familiar with all of those and think through those issues as you advise your client. As I said at the beginning of this lecture, it is so easy to create problems or harm your client through poor advice. Sometimes clients are very strong willed people and if they are paying you a lot of money, you will want to try to make them happy. You are not going to make them happy if they do not get their discharge. They are going to blame you. As you advise a client, you need to go through a mental checklist of Section 727 and it helps to run through that

checklist with your client. Do not be afraid to pull the Code out and put it on your table as you discuss the case with them.

12. **727 Parallels**

Don't forget that Section 727 provides that if the debtor in a corporate case conceals property, commits a fraudulent transfer, conceals property within a year of the case, conceals or destroys records, makes a false oath, fails to explain the loss of assets to meet the debtor's obligations, or refuses to obey orders of the Court or invokes the Fifth Amendment Privilege, those acts can be used in his individual Chapter 7 case to block his discharge under 727(a)(7). I bet that 95% of the consumer bankruptcy attorneys that practice in this Country do not understand this Section. It is a trap for your client and a very good weapon to use if you are a creditor's attorney.

**13. What Does the Future Bring?**

Well, the Debtor's future in the first six months after bankruptcy is very important under Section 541. Is your client about to inherit money or receive life insurance proceeds? Is your client about to receive proceeds from a divorce? Section 541(a)(5) provides that property of the estate includes property which the debtor acquires within 180 days after filing by bequest, devise or inheritance, as a result of a property settlement agreement or a final divorce decree or as a beneficiary of a life insurance policy or of a death benefit plan. So, you need to learn to ask you client "is your mother and father healthy?", "do you have a rich uncle who is about to croak?", "do you understand the consequences of this six-month rule?". If they have wealthy parents, perhaps the parents estate plan needs to be examined and that parent might want to set up some sort of a protective trust, under applicable law, to protect those assets from a subsequent Chapter 7 bankruptcy trustee for at least six months.

If you are representing a debtor and that debtor does receive these sorts of assets within six months of bankruptcy, you have an obligation to notify the Trustee, and if you don't, you have now aided and abetted your client in the commission of a bankruptcy crime. Reference should be made back to the bankruptcy crime provisions we discussed earlier. This should be clearly explained to your client prior to bankruptcy so that if someone does receive these kinds of assets, they are not caught by surprise.

14. **Timing Is Everything**

When you file a bankruptcy, it is like you have sued the world. You file as the petitioner and all of the creditors are named as defendants. They have certain obligations to respond or their rights may be waived and they have rights to bring actions. A third party is brought in, namely a Panel Trustee, who is the representative of the Estate. That Trustee is going to look for possible fraudulent

transfers, preferential transfers, and other ways to recover assets. You need to understand the law of fraudulent transfer, both under the Bankruptcy Code, the Chapter 500 Causes of Action, and under various applicable State Law. The Bankruptcy Code allows the Trustee in Bankruptcy to use either State Law or Bankruptcy Law in order to bring certain causes of action. With the application of the various laws different Statutes of Limitations may apply. If you have an understanding that there were fraudulent transfers from your interview with the client, or view of his documents, you need to understand the timing and which limitations period will apply. If there is a claim against a relative, which is almost at the Statute of Limitations expiration date, perhaps you need to delay the filing. Timing can help your client a lot. Understanding these Rules is key to giving competent bankruptcy advice.

15. **Love Your Trustee**

It constantly amazes me how poorly debtors' attorneys sometimes treat me and my staff. Bankruptcy Trustees sit in a position of authority and power over a case and can make your life good or bad depending on what they do. If you establish a good relationship with the Trustee and the Trustee's staff, it will go a long way to helping your clients achieve what they want – a successful bankruptcy outcome.

To begin with, you need to understand the Trustee's duties and obligations. The trustee is the main administrator of a Chapter 7 liquidation bankruptcy case. In general, the trustee is the representative of the estate with capacity to sue and be sued on behalf of the estate. The trustee may employ attorneys, accountants, or appraisers, but only with court approval. The trustee receives and deposits the estate funds to obtain a maximum reasonable return. If necessary, the trustee prepares any tax returns for the estate. If proofs of claim are required to be filed by creditors who fail to do so, the trustee may file them. When an individual is the debtor the trustee must object to exemptions which are improperly claimed. If warranted, the trustee should object to granting a discharge to the individual debtor or seek a revocation of the discharge. As part of the collection of the estate, the trustee even has been empowered to search and seize valuables from the debtor's home. The distinctive avoiding powers available to achieve fairness in bankruptcy are all powers bestowed upon the trustee to invoke. And, of course, the general management of the estate property, its liquidation and sale and the distribution of dividends to the creditors are the major duties of the trustee.

16. **Bad Faith Issues**

A lot of emphasis is placed on means testing, qualifying your client through means testing and much of the time attorneys spend on preparing Schedules is preparing the means test. This is very important. When it comes to

a higher income client, whose debts may be substantially more "non-consumer" debts, you need to be aware of the evolving law on "bad faith" as "cause" for dismissing Chapter 7 bankruptcies under Section 707(a). While the courts are currently split, the case law is out there and it is rolling, whether the Circuit Courts will uphold it, and what the Supreme Court will do with it, I do not know. I can tell you that the Case Law is expanding and the cases are prevalent. Let's review a few.

**In re Piazza, 451 B.R. 608 (Bankr. S.D.Fla. 2011), *motion for rehr'g denied* 460 B.R. 322(Bankr. S.F.Fla. 2011), *aff'd* 469 B.R. 388 (S.D. Fla. 2012)**

A recent case from the Southern District of Florida dealing with "bad faith" under 707(a) is In re Piazza. In Piazza the Debtor, a physical therapist, had a state court judgment entered against him pursuant to a personal guarantee of business debt. The day before the Debtor's deadline to produce documents relevant to the state court final judgment, the Debtor filed his petition for relief. The judgment creditor filed a motion to dismiss the Debtor's bankruptcy on grounds of "bad faith" under both Section 707(a) and (b). The Judgment Creditor argued that the Debtor had neglected to include certain debts as consumer debts and therefore, if those debts were included, the Debtor would fail the means test and the case should be dismissed under 707(b)(3). The Bankruptcy Court, found it was unnecessary to make the determination of that debt, because "bad faith" in filing a Chapter 7 case constitutes "cause" under section 707(a). In order to find "bad faith" for 707(a) the Bankruptcy Court employed a "totality of the circumstances" test, which was composed of 15 factors, although the Bankruptcy Court held that there is no "strict factor analysis" for a Court to engage in to determine bad faith.

> The Factors the Piazza Court used in its analysis were:
>
> (1) that debtor reduced his creditors to single creditor shortly before petition date;
>
> (2) that debtor made no lifestyle adjustments or continued living lavish lifestyle;
>
> (3) that case was filed in response to judgment, pending litigation or collection action;
>
> (4) that there was intent to avoid a large, single debt;
>
> (5) that debtor made no effort to repay his debts;
>
> (6) any unfairness in use of Chapter 7;
>
> (7) that debtor had sufficient resources to pay his debts;
>
> (8) that debtor was paying debts of insiders;
>
> (9) that bankruptcy schedules inflated debtor's expenses to disguise financial well-being;

(10) that debtor transferred assets;

(11) that debtor was over-utilizing protections of the Bankruptcy Code to unconscionable detriment of creditors;

(12) that debtor employed deliberate and persistent pattern of evading single major creditor;

(13) that debtor failed to make candid and full disclosure;

(14) that debtor's debts are modest in relation to his assets and income; and

(15) debtor's multiple bankruptcy filings or other procedural "gymnastics."

The Bankruptcy Court, in Piazza, found that the Debtor had filed his petition in bad faith as he had: (1) filed his petition to avoid a final judgment; (2) the Debtor failed to disclose the amount of debt owed to American Honda Finance; (3) the Debtor had the ability to repay his debts or a portion of his debts; and (4) the Debtor continued to maintain high expenditures, including to or for the benefit of insiders, and a lavish lifestyle.

While the Eleventh Circuit has yet to weigh in on this issue, "ten of the thirteen judges within the Eleventh Circuit who have considered the issue have held that bad faith can constitute cause for dismissal under section 707(a)." Piazza v. Nueterra Healthcare Physical Therapy, LLC, 469 B.R. 388 (S.D. Fla. 2012)(affirming Piazza)

**Perlin v. Hitachi Capital America Corp., 497 F.3d 364 (3d Cir. 2007)**

The United States Court of Appeals for the Third Circuit, in Perlin, also held that "bad faith" constitutes "cause" for the purpose of dismissal under section 707(a) of the Bankruptcy Code. 497 F.3d at 369. The Third Circuit also found that a "totality of the circumstances" test should be applied in determining "bad faith." The Third Circuit looked to factors such as: (1) scheming to conceal or misrepresent income; (2) inflating expenses to hide income; (3) filing misleading statements or schedules in an effort to defraud their creditors; (4) unduly interfering with the judicial process; (5) or engaging in any other misconduct. In addition, the Third Circuit found that the Debtors had a substantial income and a comfortable lifestyle, yet the Court found those factors to be insufficient, at least in this case, to demonstrate the Debtors "bad faith" in filing the bankruptcy petition.

**Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829 (8th Cir. 1994)**

In Huckfeldt, the Debtor was a doctor with high-earning capabilities. The Debtor's ex-wife filed a Motion to dismiss the case under 707(a) on the grounds that it had been filed on bad faith, solely for the purpose of frustrating the state

court divorce decree. The Eighth Circuit acknowledged that there is a circuit split with respect to bad faith constituting cause under 707(a). Seeking to narrow the application of bad faith under Section 707(a), the Court distinguished bad faith from cause, while recognizing that "some conduct constituting cause to dismiss a Chapter 7 petition may readily be characterized as bad faith."

While not setting forth any test or factors, the Eighth Circuit did find "cause" existed for the case to be dismissed under the 707(a) where the case was filed by doctor with earning capacity of $110,000 to $120,000 per year, and there was sufficient evidence that petition was filed not for purpose of just liquidation by composition with creditors, but to frustrate provisions of divorce court decree and to push his ex-wife into bankruptcy.

17. **Cocktail Party Advice**

It is amazing to me that clients believe in the advice they receive at cocktail parties more than the advice then they receive from a licensed attorney who has been Board Certified for twenty years and has handled tens of thousands of bankruptcy cases. I see it every week in my practice and so will you. Now with the internet, it has become worse. Everybody now comes in thinking they are an expert in bankruptcy because they have been reading every attorney's web site and they take the generalizations in those web sites and apply it to their situation. Talk to your clients about advice they may have gotten from the internet, other reading materials and from talking to other laypersons. This advice sometimes gives them unrealistic expectations and may cause them to hide assets and not be truthful with you. I tell them that I am just like a doctor and they need to come clean with me. I cannot give them competent legal advice if I do not know the truth. The Truth is usually not what they tell me. The Truth is the Truth and they need to be told that. One of my clients once turned to me and said "Mr. Furr, do you want to know the truth, the real truth or the true truth?" I looked at him and said "there is only one truth, please tell me that" and I proceeded to get the real story which helped him solve a very difficult problem and took his case from heading towards the rocky shore to open sea and a safe course.

18. **Statutes of Limitation**

Section 108(c) of the Bankruptcy Code extends the statute of limitations for certain creditors in certain circumstances. Under Section 108(c) the limitations period to commence or continue a civil action against the debtor is tolled during the "stay" period is in effect under sections 362, 922, 1201 or 1301.

This section of the Bankruptcy Code is adverse to a debtor's interest and could affect a debtor in two ways:

(1) If the Debtor must file the bankruptcy petition immediately and does not list a creditor who may have a potential claim and the statute of limitations has not run as of the petition date, then the creditor would be able to proceed on the civil action after the expiration of the "stay" period; or

(2) If the Debtor can delay the filing of the bankruptcy past the natural limitations period of the action, then the claim is extinguished entirely under the limitations period, the potential creditor has no claim in the bankruptcy estate or the potential for filing the suit after the "stay" period is extinguished.

This is an excellent tool for an attorney to use to get as much information from a debtor as possible. This corresponds to my last bit of advice and getting to the "Truth." By letting the client know that he or she may still be liable on something may bring about the recollection of an accident they may have gotten into a couple years back or the contract they breached but no one has yet sought to collect on.

If the Debtor can delay filing, or lists the potential creditor in the Schedules, then 108(c) becomes irrelevant, either because the applicable statute of limitations has run or the creditor was on notice of the bankruptcy and was properly discharged and therefore subject to the permanent stay under Section 524.

19. **Remember Ethics**

The Bankruptcy Rules of Procedure and the Federal Rules of Civil Procedure incorporate the rules of professional responsibility applied by the states. The application of these rules in bankruptcy present unique problems due to the nature of bankruptcy.

For instance:

(1) How does the rule that a lawyer owes a client a duty or loyalty and fidelity apply when an attorney is representing a corporation in Chapter 11 bankruptcy and knows that corporation's officers are violating bankruptcy procedures by dispersing a property?

(2) Does a lawyer owe a duty to the Creditors, that corporation and to the U.S. Trustee's office, in addition, to the corporation itself?

(3) Can a lawyer bring that matter to the court or the Creditors?

Clearly, in a non-bankruptcy setting, a lawyer cannot do anything unless a crime has been committed. Under the bankruptcy code, the lawyer may well owe a duty to the U.S. Trustee and the Creditors, even before a crime is committed.

***Commandment One - Thou Shalt Have Client Sign Proof of Claim When In Doubt***

***Commandment Two - Thou Shall Not Conspire With Debtor to Conceal Assets***

***Commandment Three - Thou Shalt Be Disinterested***

***Commandment Four - Thou Shalt Obtain Bankruptcy Court Approval for All Fees***

***Commandment Five - Thou Shalt Avoid Conflicts of Interest***

20. **Meet With Your Client And Attend the Meeting of Creditors**

So often in my tenure as a Trustee I find that the debtor has spent ten minutes with the attorney and the rest of the time with the paralegal. Then that attorney, who brought the case in and is responsible, does not even bother to appear at the § 341 Meeting and sends a younger attorney or a contract attorney. The Meeting of Creditors is probably the only time the client will have to appear in a court like proceeding during their bankruptcy. The §341 Meeting is a recorded, sworn testimony proceeding that could result in potentially serious consequences for the client. In a more complicated case, you should expect creditors to show up and try to pin the client to certain admissions or facts or to prove that the client is a liar or concealing assets at that §341 Meeting. A disaster at the § 341 Meeting will only create disaster further on.

21. **Open Your Eyes**

Too often, attorneys in Chapter 7 cases have not even bothered to think about their client's situation or to question the client. If your client appears at your office with a big diamond ring on her finger, or a Rolex watch on their wrist, you need to ask them about it. If the client comes in hobbling with a cane, you need to find out if they have been involved in an accident or fall. Almost every month I identify several personal injury causes of action, which are not scheduled simply by asking the question. Most Trustees are going to look for those kinds of assets, and with someone who has enjoyed a high income, they are going to ask about jewelry and other such items. Your failure to ask these questions is not proper representation of your client. Concealment of those items is very fertile ground for a 727 objection to discharge claim and to a possible criminal referral. At the least, it will result in embarrassment that you could easily avoid.

**22. The Continuing Obligations**

A recent issue that has become prominent has to do with dues owed to Home Owners Associations. The HOA dues do not stop accruing because the

Debtor has filed for bankruptcy. With the downturn in the economy, and specifically the housing market, many people are and were "underwater" on their mortgages. In an attempt to relieve the heavy burden associated with the mortgages they have been carrying, or allowing to accrue, they seek relief in bankruptcy. However, in addition to not paying the mortgage these debtors fail to pay their Home Owners Association dues. Unbeknownst to these debtors, the dues owed to the Home Owners Association continue to accrue after the filing of the petition and are non-dischargeable under Section 523(a)(16) of the Bankruptcy Code.

Be sure to let the debtor know that as long as the property remains in his or her name, liability for the post-petition HOA dues remains with them. In addition, as of now the courts cannot force the banks to take back the property by accepting a quit-claim deed or through foreclosure.

**23. Banks, Banks, Banks**

There are some major issues with respect to banks, bank accounts and debtors in bankruptcy.

First, find out where your client is banking. Some banks, in particular Wells Fargo, will place an administrative freeze on a debtor's account once they have notice that your client has filed for bankruptcy. The Courts have found that the banks have the right to do this and are not in violation of the automatic stay. See, Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L. Ed. 2d 258 (1995). See also, In re Young, 439 B.R. 211 (Bankr. M.D.Fla. 2010).

The effect of this freeze can be far reaching, as not only would the debtor not have access to the funds for cash, but, as we are in the technology age, any automatic payments the debtor may have linked to that account will not be honored and would be a post-petition default.

In addition, it is important to see if the debtor has any credit card through a bank in which the debtor currently has checking, savings or other accounts. Under Section 553 of the Bankruptcy Code the bank may be entitled to a setoff against the debtor's accounts and may freeze the account and seek relief from the Automatic Stay to set the obligations off. If the debtor is currently holding a credit card that is linked to an institution where the debtor also currently holds any account, it may be wise to have the debtor close that account and open another account at a different institution.

**24. Reaffirmations**

Reaffirmation issues generally arise with respect to automobiles and real property. Pre-BAPCPA a debtor in bankruptcy who was current on a secured loan, e.g., a vehicle loan, did not have to indicate their intent to reaffirm that

obligation, they could simply continue paying on the loan and the loan would just "ride-through." With the adoption of BAPCPA in 2005, a major change occurred with respect to reaffirming a debt. Section 521(a)(2)(A) requires a debtor to indicate the intent to reaffirm, redeem or surrender the subject property. The debtor must file this "statement of intention with the court within thirty days of the filing of the petition, or on or before the date of the first meeting of creditors, whichever is earlier."

If a debtor fails to file this statement of intention with respect to real property and the debtor wishes to remain in the property and fails to file a statement of intention indicating the intent to reaffirm the mortgage, the secured creditor would be within its rights to pursue its *in rem* remedy to foreclose on the property.

With respect to personal property that the debtor wishes to retain, such as a vehicle that has been pledged as collateral, the statement of intention is even more important as failing to timely file a statement of intention indicating an intent to reaffirm the debt will result in the termination of the automatic stay as to that personal property. Therefore, the creditor will be free to proceed against that collateral.

**25. Make Sure Bankruptcy Is The Proper Avenue For The Client**

Not every debtor should file bankruptcy. So many times I see debtors in bankruptcy who just shouldn't be there. Just because a client is sitting in your office contemplating bankruptcy doesn't mean they necessarily need to file bankruptcy. If the client has a lot of non-exempt assets that are going to end up being liquidated, the client may be better off hiring you to try to negotiate with the creditors and reduce the debtor's exposure in that manner. This way the Debtor may be able to pay the creditors while retaining more of the assets that would otherwise be administered in bankruptcy.