

Consumer Chapter 7 Potpourri

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“Help! I am losing my home!”

Loan Modifications, HAFA Short Sales and Loss Mitigation Programs

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Case Study:

Brad and Angelina purchased a home during the real estate boom in 2004. They purchased the home for \$700,000.00 with a mortgage payment of \$3500.00 per month. After several years of making successful movies, Brad's career stalled in 2011. Apparently, Brad had made one too many negative comments about his ex-wife Jennifer Appleton and could not get any acting jobs or cologne commercials. Angelina did everything she could to keep the mortgage current but with 6 hungry children to feed they fell hopelessly behind. After the couple failed to pay their mortgage payments for 18 months, their mortgage company began the foreclosure process in early 2013. The house is underwater.

The couple have now come to you for advice on how to keep their home. Brad is recently back to work but they simply cannot afford the large Chapter 13 payment which would force them to remain current while paying off the large arrearage over 5 years. The property values in their area are coming back up but their house is still underwater. They do not have any other debt but they anticipate a large deficiency if the house were to go to foreclosure. What are their options inside and outside of bankruptcy?

LOAN MODIFICATION

Loan modifications can work inside bankruptcy, in conjunction with a Chapter 13 plan, post-discharge, or as an alternative to filing bankruptcy. Loan modifications offer the options of lowering interest rates, lowering the principal, extending the life of the loan to lower monthly payments, and in many cases, putting the arrearage or a portion of the arrearage on the back end of the loan. Many bankruptcy practitioners are skeptical of the entire loan modification process. With good reason, as navigating the loan modification process is difficult even for financial

savvy clients. Most distressed homeowners need to know if the loan modification process will work for them, or whether it will be a big waste of time that will cause the foreclosure clock to run out. There are in house loan modification programs specific to the mortgage company but most mortgage companies participate in the Home Affordable Modification Program.

Home Affordable Modification Program (HAMP) is the government-created and government-supported loan modification program through the Departments of Treasury and Housing and Urban Development. (See <http://www.makinghomeaffordable.gov/about-mha/Pages/what-is-mha.aspx>) Each mortgage company who participates in the HAMP program is listed on the website. Many mortgage companies prefer that the client use the mortgage company's own HAMP packet which includes information for that specific mortgage company. The first step in the HAMP program is evaluating whether or not the client is eligible for the program.

HAMP Eligibility Checklist:

- The client obtained the mortgage on or before January 1, 2009.
- The client owes up to \$729,750.00 on their primary residence or single unit rental property.
- The client owes \$934,200 on a 2-unit rental property; \$1,129,250 on a 3-unit rental property; or \$1,403,400 on a 4-unit rental property.
- The property has not been condemned.

MID-ATLANTIC BANKRUPTCY WORKSHOP 2013

- The client must have a financial hardship and are either delinquent or in danger of falling behind on their mortgage payments (non-owner occupants must be delinquent in order to qualify).
- The client must have sufficient, documented income to support a modified payment.
- The client must not have been convicted within the last 10 years of felony, larceny, theft, fraud or forgery, money laundering or tax evasion, in connection with a mortgage or real estate transaction.

*Practice Tip: If your client appears to be eligible for HAMP, the client must contact the client's mortgage servicer to see if the mortgage company participates in the HAMP program because not all servicers do. Each mortgage company has its own HAMP package and it may be a waste of time for your client to use the general HAMP form from the HAMP website.

Your client will also need the following documentation, though the mortgage company may ask for more.

Document Checklist:

- Mortgage Monthly Statement,
- Documents or information regarding other mortgages on the property,
- Two most recent paystubs for all household members contributing to the mortgage,
- Last two years of tax returns,
- If self-employed, the most recent quarterly or year to date profit and loss statement,

- Documentation of income from other sources (alimony, child support, social security etc.),
- A utility bill showing homeowner name and address,
- Unemployment Insurance letter, if applicable,
- Account balances and minimum monthly payments due on all credit cards,
- Information about savings accounts and other assets,
- The hardship letter, a letter describing any circumstances that caused your income to be reduced or expenses to be increased (job loss, divorce, illness, death, etc.).

*Practice tip: According to most loan modification specialists, the hardship letter is the single most important document your client can provide. If your client will be attempting the loan modification process on his/her own, please stress to them how critical the hardship letter can be and/or work with them to craft a letter that is sufficiently dramatic to hold the attention of the mortgage company. No sad detail should be overlooked.

Included as Appendix A is the Request for Mortgage Assistance form (RMA). Before completing this document, please have the client contact the client's mortgage company. The mortgage company may have its own loan modification packet with a modified "RMA." Also included as Appendix B are Tax return and Transcript Requests in the event your client cannot find the client's tax return. Your client's local IRS office also will provide tax transcripts for the last three years free of charge.

Do Loan Modifications Work?

Well, let's start with the premise that a mortgage company does not want an underwater property back. Your client's only leverage is the threat of foreclosure. So why do so many loan modifications fail? The loan modification process is very similar to purchasing a home. Remember the underwriting process? The loan modification process requires that documents be submitted per the direction of the mortgage company and completed to its specifications. Sloppy document production is the death knell of most loan modifications. Many of the documents requested are time sensitive and can expire after 30, 60, or 90 days if not updated timely. Many applicants do not have the time due to work constraints to spend all day on the phone reviewing problems with their RMA or addressing document issues. So many times, documents expire and the RMA is denied.

If the RMA is accepted, the client now moves to the 90-day trial period where the client is asked to pay an amount for 3 months which will be very close to what their anticipated payment under the loan modification will be. Once the 90-day trial period ends successfully, the mortgage company (the servicing company) will ask the investor (the owner of the mortgage) for final approval. Clients typically cannot ask for modifications directly such as interest or principal reduction. The investor maintains complete control of the final outcome of the process. The investor decides what concessions or what programs the client will receive.

Should your Client Use a Loan Modification Specialist?

Most people attempt the loan modification process on their own. When their loan modifications fail, they either retain a bankruptcy attorney or a loan modification specialist. These specialists act very much like mortgage brokers who try to get the customer qualified for a

mortgage. Consequently, these loan modification specialists can be a huge benefit to your client if your client does not have the time to devote to the loan modification process. However, there are a lot of foreclosure rescue scams and a client should be very wary of paying anybody to help save the client's home. The loan modification programs change and are updated monthly. A reputable loan modification specialist will be knowledgeable of these changes.

Red Flags Checklist:

- The loan modification specialist promises your client interest and/or principal reduction at the very first meeting. Warning: Despite these promises, the final outcome is never known at the time of the first meeting and is wholly within the power of the investor.
- The loan modification specialist charges a fee to assist with the loan modification process. Warning: Before paying any money to anyone, please ask for references. Your client should demand a proven track record of successful loan modifications.
- The loan modification specialist pressures your client to sign over the deed. Warning: "We Buy Houses" is a foreclosure scam and not a loan modification.
- The loan modification specialists demands that payment be sent to a company other than the client's mortgage company. Warning: Always work directly with the mortgage company and never allow the client to pay the mortgage to anyone but their mortgage company even during the 90-day trial period.

*Practice tip: Even if your client does not meet the eligibility requirements for HAMP, each mortgage company has its own in-house loan modification program. A reputable loan modification specialist can assist with the in-house programs by working directly with the mortgage company. If your client is not able to devote the time to this process, recommend a

reputable loan modification specialist because each rejected RMA will effect the success of later applications.

HAFSA SHORT SALES

The Loan Modification Process Fails.

Unfortunately for Brad, Angelina, and their six children, they were not approved for a loan modification because Brad lost his job, again, during the trial period and they do not have sufficient income to pay for the estimated monthly payment under the offered loan modification program. Brad and Angelina's only debt is the expected deficiency judgment if their house goes to foreclosure. They would like to avoid bankruptcy and are willing to move out. Are there any programs that meet their needs?

Home Affordable Foreclosure Alternatives Program (HAFSA) is also a government-supported program through the Departments of Treasury and Housing and Urban Development. HAFSA provides two options for transitioning out of the mortgage via a short sale or a Deed-in-Lieu of Foreclosure (DIL). In a short sale, the mortgage company allows a sale of the client's home for less than what is owed. In a DIL situation, the mortgage company allows your client to transfer title back to the mortgage company.

Many bankruptcy practitioners do not realize the benefits of a HAFSA short sale because they assume, erroneously, that the benefit only inures to the potential buyer and the debtor/client really receives nothing in return for the client's efforts. While this may still be true for traditional or conventional short sales, the HAFSA short sale is remarkably different.

The biggest advantage to a HAFSA short sale is a complete release of the mortgage debt after the sale of the property. The deficiency is guaranteed to be waived by the servicer. This

means that clients like Brad and Angelina can avoid bankruptcy all together. Through the HAFA program, the mortgage company works with you or your representative to determine an acceptable sale price. Once that price is determined, the client retains some control over the manner in which the client moves out of the property. HAFA apparently has a less negative effect on credit scores than foreclosures and conventional short sales. Surprisingly, HAFA provides up to \$3,000 in “move out” money, after closing.

The first step is to determine eligibility.

HAFA Eligibility Checklist

- The client must have a documented financial hardship (the hardship letter),
- The client must not have purchased the home within the last 12 months,
- The first mortgage must be less than \$729,750.00,
- The client must not be convicted in the last 10 years of felony larceny, theft, fraud, forgery, money laundering or tax evasion in connection with mortgage or real estate transaction.

To begin the HAFA process, have your clients contact the mortgage company directly to see what programs they qualify and request the mortgage company’s specific RMA. If your client has already received an offer on the home, the client will need to submit the Alternative Request for Approval of Short Sale (Alternative RASS) and executed sales contract.

LOSS MITIGATION PROGRAMS

When Bankruptcy Cannot Be Avoided...

Brad and Angelina are forced into bankruptcy to avert foreclosure because they are unable to qualify for either HAMP, HAFA or an in-house loan modification. They elect to file a Chapter 7 with the hope that they can save their home by participating in a loss mitigation program through the Bankruptcy Court. What can you tell them about it?

Loss Mitigation Program and Procedures

The Loss Mitigation Program (“LMP”) is not the loss mitigation department of the client’s mortgage company. LMP is a program conducted with the assistance of the bankruptcy court to provide a forum for debtors and lenders to reach a solution when the debtor’s home is at risk for foreclosure. Warning: Not every jurisdiction has this program. For example, the bankruptcy courts of Maryland do not have a LMP, while New Jersey and Pennsylvania courts do. Please check your jurisdiction to confirm availability of the LMP. Attached as Appendix C is the United States Bankruptcy Court District of New Jersey Loss Mitigation Program and Procedures.

The LMP for each jurisdiction may have separate and distinct procedures and may employ Local Rules to effectuate the program. Consequently, the bankruptcy practitioner must be aware of notice requirements, deadlines, and forms the LMP employs. Most jurisdictions allow Chapter 7, 11, 12, or 13 debtors, including joint debtors, to participate in the program. For purposes of this presentation, New Jersey’s LMP will be discussed.

One of the benefits of the LMP, is the ability for the debtor’s counsel to actively participate in the loan modification or resolution process. The debtor does not have to work with call centers in faraway countries. The debtor does not have to continually contact customer service representatives who know nothing about the debtor or the property. The typical hurdles

to communication are removed. If necessary parties are required for a global resolution, any party may request or the court may direct multiple creditors, co-debtors, other third parties, or even the Chapter 13 Trustee to participate in the LMP.

The process is typically started after the debtor files bankruptcy and then files a notice, (in New Jersey, Local Form, Notice of Request for Loss Mitigation, together with a proposed Local Form, Loss Mitigation Order, at any time after the commencement of the case until three days before the first date of the scheduled first meeting of creditors) which is served upon the creditor, and its counsel (if known). Creditors can also requests LMP and file with the court the same notices, and Local Forms. In New Jersey, the Debtor has 14 days to object, and if no objection is filed, the bankruptcy court may enter the Local Form, Loss Mitigation Order. The bankruptcy court may also direct debtor and creditor to participate in LMP as long as both sides have had the opportunity to object and be heard.

Each Loss Mitigation Order should have timeframes for action by the parties. (See Appendix C page 4). Furthermore, a debtor who is not in compliance with the Loss Mitigation Order, is at risk for the stay to be lifted since the court in many cases will condition the stay upon compliance with the Loss Mitigation Order. Once the Loss Mitigation Order is entered, the parties must negotiate in good faith and provide adequate protection payments.

Adequate protection payments in New Jersey must be at least 60% of the monthly principal and interest payment that is contractually due, plus 100% of any required monthly escrow payment. The creditor can object and the court will rule after a hearing to consider the objection. Each side must participate in loss mitigation sessions in person, or telephonically. Extensions can be obtained if an agreement is not reached. However, if an agreement is reached, the parties must request approval from the bankruptcy court in their jurisdiction.

In conclusion, the client now has more alternatives to foreclosure than ever before. As bankruptcy practitioners it is important to know what programs are available both inside and outside bankruptcy to better assist a client's needs. The first step is to assess the needs of the client and then determine whether or not the client is eligible for programs that can save the client's home. Often times, bankruptcy will be the only alternative but HAMP, HAFA, LMP and in-house loan modification requests can still work inside a bankruptcy. For Brad and Angelina, they successfully participated in the LMP and negotiated a global resolution which allowed their happy family of eight to keep their home.

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Form **4506T-EZ**
(October 2009)
Department of the Treasury
Internal Revenue Service

Short Form Request for Individual Tax Return Transcript

OMB No. 1545-2154

▶ **Request may not be processed if the form is incomplete or illegible.**

Tip: Use Form 4506T-EZ to order a 1040 series tax return transcript free of charge.

1a Name shown on tax return. If a joint return, enter the name shown first.	1b First social security number on tax return
2a If a joint return, enter spouse's name shown on tax return.	2b Second social security number if joint tax return
3 Current name, address (including apt., room, or suite no.), city, state, and ZIP code	
4 Previous address shown on the last return filed if different from line 3	
5 If the transcript is to be mailed to a third party (such as a mortgage company), enter the third party's name, address, and telephone number. The IRS has no control over what the third party does with the tax information.	
Third party name	Telephone number
Address (including apt., room, or suite no.), city, state, and ZIP code	
6 Year(s) requested. Enter the year(s) of the return transcript you are requesting (for example, "2008"). Most requests will be processed within 10 business days.	

Caution. If the transcript is being mailed to a third party, ensure that you have filled in line 6 before signing. Sign and date the form once you have filled in line 6. Completing these steps helps to protect your privacy.

Note. If the IRS is unable to locate a return that matches the taxpayer identity information provided above, or if IRS records indicate that the return has not been filed, the IRS may notify you or the third party that it was unable to locate a return, or that a return was not filed, whichever is applicable.

Signature of taxpayer(s). I declare that I am either the taxpayer whose name is shown on line 1a or 2a. If the request applies to a joint return, **either** husband or wife must sign.

Note. This form must be received within 60 days of signature date.

Sign Here	<table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:60%; border-right: 1px solid black; padding: 5px;">Signature (see instructions)</td> <td style="width:40%; padding: 5px;">Date</td> </tr> </table>	Signature (see instructions)	Date	<table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:60%; border-right: 1px solid black; padding: 5px;">Spouse's signature</td> <td style="width:40%; padding: 5px;">Date</td> </tr> </table>	Spouse's signature	Date	Telephone number of taxpayer on line 1a or 2a
	Signature (see instructions)	Date					
Spouse's signature	Date						

For Privacy Act and Paperwork Reduction Act Notice, see page 2.

Cat. No. 54185S

Form **4506T-EZ** (10-2009)

Purpose of form. Individuals can use Form 4506T-EZ to request a tax return transcript that includes most lines of the original tax return. The tax return transcript will not show payments, penalty assessments, or adjustments made to the originally filed return. You can also designate a third party (such as a mortgage company) to receive a transcript on line 5. Form 4506T-EZ cannot be used by taxpayers who file Form 1040 based on a fiscal tax year (that is, a tax year beginning in one calendar year and ending in the following year). Taxpayers using a fiscal tax year must file Form 4506-T, Request for Transcript of Tax Return, to request a return transcript.

Use Form 4506-T to request the following.

- A transcript of a business return (including estate and trust returns).
- An account transcript (contains information on the financial status of the account, such as payments made on the account, penalty assessments, and adjustments made by you or the IRS after the return was filed).
- A record of account, which is a combination of line item information and later adjustments to the account.
- A verification of nonfiling, which is proof from the IRS that you did not file a return for the year.
- A Form W-2, Form 1099 series, Form 1098 series, or Form 5498 series transcript.

Form 4506-T can also be used for requesting tax return transcripts.

Automated transcript request. You can call 1-800-829-1040 to order a tax return transcript through the automated self-help system. You cannot have a transcript sent to a third party through the automated system.

Where to file. Mail or fax Form 4506T-EZ to the address below for the state you lived in when that return was filed.

If you are requesting more than one transcript or other product and the chart below shows two different RAIVS teams, send your request to the team based on the address of your most recent return.

Where to mail . . .

If you filed an individual return and lived in:	Mail or fax to the "Internal Revenue Service" at:
Alabama, Delaware, Florida, Georgia, North Carolina, Rhode Island, South Carolina, Virginia	RAIVS Team P.O. Box 47-421 Stop 91 Doraville, GA 30362 770-455-2335
Kentucky, Louisiana, Mississippi, Tennessee, Texas, a foreign country, or A.P.O. or F.P.O. address	RAIVS Team Stop 6716 AUSC Austin, TX 73301 512-460-2272
Alaska, Arizona, California, Colorado, District of Columbia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Mexico, New York, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, Wyoming	RAIVS Team Stop 37106 Fresno, CA 93888 559-456-5876
Arkansas, Connecticut, Illinois, Indiana, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, West Virginia	RAIVS Team Stop 6705-B41 Kansas City, MO 64999 816-292-6102

Signature and date. Form 4506T-EZ must be signed and dated by the taxpayer listed on line 1a or 2a. If you completed line 5 requesting the information be sent to a third party, the IRS must receive Form 4506T-EZ within 60 days of the date signed by the taxpayer or it will be rejected.

Transcripts of jointly filed tax returns may be furnished to either spouse. Only one signature is required. Sign Form 4506T-EZ exactly as your name appeared on the original return. If you changed your name, also sign your current name.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to establish your right to gain access to the requested tax information under the Internal Revenue Code. We need this information to properly identify the tax information and respond to your request. Sections 6103 and 6109 require you to provide this information, including your SSN. If you do not provide this information, we may not be able to process your request. Providing false or fraudulent information may subject you to penalties.

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and cities, states, and the District of Columbia for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file Form 4506T-EZ will vary depending on individual circumstances. The estimated average time is: **Learning about the law or the form**, 9 min.; **Preparing the form**, 18 min.; and **Copying, assembling, and sending the form to the IRS**, 20 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making Form 4506T-EZ simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the form to this address. Instead, see *Where to file* on this page.

AMERICAN BANKRUPTCY INSTITUTE

Form **4506-T**
 (Rev. January 2012)
 Department of the Treasury
 Internal Revenue Service

Request for Transcript of Tax Return

▶ **Request may be rejected if the form is incomplete or illegible.**

OMB No. 1545-1872

Tip. Use Form 4506-T to order a transcript or other return information free of charge. See the product list below. You can quickly request transcripts by using our automated self-help service tools. Please visit us at IRS.gov and click on "Order a Transcript" or call 1-800-908-9946. If you need a copy of your return, use **Form 4506, Request for Copy of Tax Return**. There is a fee to get a copy of your return.

1a Name shown on tax return. If a joint return, enter the name shown first.	1b First social security number on tax return, individual taxpayer identification number, or employer identification number (see instructions)
2a If a joint return, enter spouse's name shown on tax return.	2b Second social security number or individual taxpayer identification number if joint tax return
3 Current name, address (including apt., room, or suite no.), city, state, and ZIP code (see instructions)	
4 Previous address shown on the last return filed if different from line 3 (see instructions)	
5 If the transcript or tax information is to be mailed to a third party (such as a mortgage company), enter the third party's name, address, and telephone number.	

Caution. If the tax transcript is being mailed to a third party, ensure that you have filled in lines 6 through 9 before signing. Sign and date the form once you have filled in these lines. Completing these steps helps to protect your privacy. Once the IRS discloses your IRS transcript to the third party listed on line 5, the IRS has no control over what the third party does with the information. If you would like to limit the third party's authority to disclose your transcript information, you can specify this limitation in your written agreement with the third party.

6 Transcript requested. Enter the tax form number here (1040, 1065, 1120, etc.) and check the appropriate box below. Enter only one tax form number per request. ▶ _____

a Return Transcript, which includes most of the line items of a tax return as filed with the IRS. A tax return transcript does not reflect changes made to the account after the return is processed. Transcripts are only available for the following returns: Form 1040 series, Form 1065, Form 1120, Form 1120A, Form 1120H, Form 1120L, and Form 1120S. Return transcripts are available for the current year and returns processed during the prior 3 processing years. Most requests will be processed within 10 business days

b Account Transcript, which contains information on the financial status of the account, such as payments made on the account, penalty assessments, and adjustments made by you or the IRS after the return was filed. Return information is limited to items such as tax liability and estimated tax payments. Account transcripts are available for most returns. Most requests will be processed within 30 calendar days

c Record of Account, which provides the most detailed information as it is a combination of the Return Transcript and the Account Transcript. Available for current year and 3 prior tax years. Most requests will be processed within 30 calendar days

7 Verification of Nonfiling, which is proof from the IRS that you **did not** file a return for the year. Current year requests are only available after June 15th. There are no availability restrictions on prior year requests. Most requests will be processed within 10 business days

8 Form W-2, Form 1099 series, Form 1098 series, or Form 5498 series transcript. The IRS can provide a transcript that includes data from these information returns. State or local information is not included with the Form W-2 information. The IRS may be able to provide this transcript information for up to 10 years. Information for the current year is generally not available until the year after it is filed with the IRS. For example, W-2 information for 2010, filed in 2011, will not be available from the IRS until 2012. If you need W-2 information for retirement purposes, you should contact the Social Security Administration at 1-800-772-1213. Most requests will be processed within 45 days

Caution. If you need a copy of Form W-2 or Form 1099, you should first contact the payer. To get a copy of the Form W-2 or Form 1099 filed with your return, you must use Form 4506 and request a copy of your return, which includes all attachments.

9 Year or period requested. Enter the ending date of the year or period, using the mm/dd/yyyy format. If you are requesting more than four years or periods, you must attach another Form 4506-T. For requests relating to quarterly tax returns, such as Form 941, you must enter each quarter or tax period separately. _____

Check this box if you have notified the IRS or the IRS has notified you that one of the years for which you are requesting a transcript involved **identity theft** on your federal tax return

Caution. Do not sign this form unless all applicable lines have been completed.

Signature of taxpayer(s). I declare that I am either the taxpayer whose name is shown on line 1a or 2a, or a person authorized to obtain the tax information requested. If the request applies to a joint return, **either** husband or wife must sign. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, trustee, or party other than the taxpayer, I certify that I have the authority to execute Form 4506-T on behalf of the taxpayer. **Note.** For transcripts being sent to a third party, this form must be received within 120 days of the signature date.

	Phone number of taxpayer on line 1a or 2a
Sign Here ▶	Signature (see instructions) _____ Date _____
▶	Title (if line 1a above is a corporation, partnership, estate, or trust) _____
▶	Spouse's signature _____ Date _____

Section references are to the Internal Revenue Code unless otherwise noted.

What's New

The IRS has created a page on IRS.gov for information about Form 4506-T at www.irs.gov/form4506. Information about any recent developments affecting Form 4506-T (such as legislation enacted after we released it) will be posted on that page.

General Instructions

CAUTION. Do not sign this form unless all applicable lines have been completed.

Purpose of form. Use Form 4506-T to request tax return information. You can also designate (on line 5) a third party to receive the information. Taxpayers using a tax year beginning in one calendar year and ending in the following year (fiscal tax year) must file Form 4506-T to request a return transcript.

Note. If you are unsure of which type of transcript you need, request the Record of Account, as it provides the most detailed information.

Tip. Use Form 4506, Request for Copy of Tax Return, to request copies of tax returns.

Where to file. Mail or fax Form 4506-T to the address below for the state you lived in, or the state your business was in, when that return was filed. There are two address charts: one for individual transcripts (Form 1040 series and Form W-2) and one for all other transcripts.

If you are requesting more than one transcript or other product and the chart below shows two different addresses, send your request to the address based on the address of your most recent return.

Automated transcript request. You can quickly request transcripts by using our automated self-help service tools. Please visit us at IRS.gov and click on "Order a Transcript" or call 1-800-908-9946.

Chart for individual transcripts (Form 1040 series and Form W-2 and Form 1099)

If you filed an individual return and lived in:	Mail or fax to the "Internal Revenue Service" at:
Alabama, Kentucky, Louisiana, Mississippi, Tennessee, Texas, a foreign country, American Samoa, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, or A.P.O. or F.P.O. address	RAIVS Team Stop 6716 AUSC Austin, TX 73301 512-460-2272
Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, Wyoming	RAIVS Team Stop 37106 Fresno, CA 93888 559-456-5876
Connecticut, Delaware, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia	RAIVS Team Stop 6705 P-6 Kansas City, MO 64999 816-292-6102

Chart for all other transcripts

If you lived in or your business was in:	Mail or fax to the "Internal Revenue Service" at:
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming, a foreign country, or A.P.O. or F.P.O. address	RAIVS Team P.O. Box 9941 Mail Stop 6734 Ogden, UT 84400 801-620-6922
Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, Wisconsin	RAIVS Team P.O. Box 145500 Stop 2800 F Cincinnati, OH 45250 859-669-3592

Line 1b. Enter your employer identification number (EIN) if your request relates to a business return. Otherwise, enter the first social security number (SSN) or your individual taxpayer identification number (ITIN) shown on the return. For example, if you are requesting Form 1040 that includes Schedule C (Form 1040), enter your SSN.

Line 3. Enter your current address. If you use a P. O. box, include it on this line.

Line 4. Enter the address shown on the last return filed if different from the address entered on line 3.

Note. If the address on lines 3 and 4 are different and you have not changed your address with the IRS, file Form 8822, Change of Address.

Line 6. Enter only one tax form number per request.

Signature and date. Form 4506-T must be signed and dated by the taxpayer listed on line 1a or 2a. If you completed line 5 requesting the information be sent to a third party, the IRS must receive Form 4506-T within 120 days of the date signed by the taxpayer or it will be rejected. Ensure that all applicable lines are completed before signing.

Individuals. Transcripts of jointly filed tax returns may be furnished to either spouse. Only one signature is required. Sign Form 4506-T exactly as your name appeared on the original return. If you changed your name, also sign your current name.

Corporations. Generally, Form 4506-T can be signed by: (1) an officer having legal authority to bind the corporation, (2) any person designated by the board of directors or other governing body, or (3) any officer or employee on written request by any principal officer and attested to by the secretary or other officer.

Partnerships. Generally, Form 4506-T can be signed by any person who was a member of the partnership during any part of the tax period requested on line 9.

All others. See section 6103(e) if the taxpayer has died, is insolvent, is a dissolved corporation, or if a trustee, guardian, executor, receiver, or administrator is acting for the taxpayer.

Documentation. For entities other than individuals, you must attach the authorization document. For example, this could be the letter from the principal officer authorizing an employee of the corporation or the letters testamentary authorizing an individual to act for an estate.

Privacy Act and Paperwork Reduction Act Notice.

We ask for the information on this form to establish your right to gain access to the requested tax information under the Internal Revenue Code. We need this information to properly identify the tax information and respond to your request. You are not required to request any transcript; if you do request a transcript, sections 6103 and 6109 and their regulations require you to provide this information, including your SSN or EIN. If you do not provide this information, we may not be able to process your request. Providing false or fraudulent information may subject you to penalties.

Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and cities, states, the District of Columbia, and U.S. commonwealths and possessions for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file Form 4506-T will vary depending on individual circumstances. The estimated average time is: **Learning about the law or the form, 10 min.;** **Preparing the form, 12 min.;** and **Copying, assembling, and sending the form to the IRS, 20 min.**

If you have comments concerning the accuracy of these time estimates or suggestions for making Form 4506-T simpler, we would be happy to hear from you. You can write to:

Internal Revenue Service
Tax Products Coordinating Committee
SE:W:CAR:MP:T:M:S
1111 Constitution Ave. NW, IR-6526
Washington, DC 20224

Do not send the form to this address. Instead, see *Where to file* on this page.

Amended May 29, 2012

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

LOSS MITIGATION PROGRAM AND PROCEDURES

I. PURPOSE.

The Loss Mitigation Program (“LMP”) is designed to function as a forum for debtors and lenders to reach a consensual resolution when a debtor’s residential property is at risk of foreclosure. The LMP aims to facilitate such resolution by opening and maintaining the lines of communication between the debtors’ and lenders’ decision makers. The LMP encourages the parties to finalize a feasible and beneficial agreement with the assistance and supervision of the Bankruptcy Court.

II. LOSS MITIGATION DEFINED.

The term “loss mitigation” includes the full range of solutions that may prevent either the loss of a debtor’s property to foreclosure, increased costs to the lender, or both. Loss mitigation includes, but is not limited to, loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction. The terms of a loss mitigation solution will vary in each case according to the particular needs and goals of the parties.

III. ELIGIBILITY.

The following definitions describe the types of parties, properties and loans that are eligible for participation in the Loss Mitigation Program.

A. DEBTOR.

The term “debtor” means any individual debtor in a case filed under Chapter 7, 11, 12 or 13 of the Bankruptcy Code, including joint debtors.

B. PROPERTY.

The term “property” means any real property used as a principal residence in which an eligible debtor holds an interest.

C. LOAN.

The term “loan” means any mortgage, lien or extension of money or credit secured by eligible property, regardless of whether the loan: (1) is considered to be “subprime” or “non-traditional,” (2) was in foreclosure prior to the bankruptcy filing, (3) is the first or junior mortgage or lien on the property, or (4) has been “pooled,” “securitized,” or assigned to a servicer or to a trustee.

D. CREDITOR.

The term “creditor” refers to any mortgage holder, assignee, servicer or trustee of an eligible loan.

IV. ADDITIONAL PARTIES.

A. OTHER CREDITORS.

Where it may be necessary or desirable to obtain a global resolution, any party may request, or the bankruptcy court may direct, that multiple creditors participate in loss mitigation.

B. CO-DEBTORS AND THIRD PARTIES.

Where the participation of a co-debtor or other third party may be necessary or desirable, any party may request, or the bankruptcy court may direct, that such party participate in loss mitigation, to the extent that the bankruptcy court has jurisdiction over the party.

C. CHAPTER 13 TRUSTEE.

The Chapter 13 Trustee may participate in loss mitigation to the extent that such participation would be consistent with the Chapter 13 Trustee’s duties under the Bankruptcy Code.

V. COMMENCEMENT OF LOSS MITIGATION.

A. BY THE DEBTOR.

1. Except as provided in subsection (3), a debtor seeking to commence the LMP must file with the court and serve on the creditor and its counsel, if known, the Local Form, *Notice of Request for Loss Mitigation*, together with a proposed Local Form, *Loss Mitigation Order*, at any time after the commencement of the case until three (3) days before the first date scheduled for the First Meeting of Creditors. The debtor must also file a certificate of

service. The Local Form, *Notice of Request for Loss Mitigation* shall specify the amount of adequate protection payments proposed to be made by the debtor to the creditor during the loss mitigation period. (See Section VII. B). The creditor shall have fourteen (14) days to object. If no objection is filed, the bankruptcy court may enter a Local Form, *Loss Mitigation Order*.

2. Except as provided in subsection 3., if a debtor seeks to engage in loss mitigation after the time prescribed in subsection 1., the debtor must file a motion with the court, on notice to the creditor and where applicable, the Chapter 13 trustee, establishing good cause for the failure to have filed the Notice of Request for Loss Mitigation within the time period specified in Section V. A.1. The motion must specify the amount of adequate protection payments proposed to be made by the debtor to the creditor during the loss mitigation period. (See Section VII. B).

3. A debtor whose bankruptcy case is pending on the effective date of the LMP (August 1, 2011), may seek to commence the LMP as prescribed in subsection 1.

B. BY A CREDITOR.

A creditor seeking to commence the LMP must file with the court and serve on the debtor and debtor's counsel, if any, the Local Form, *Notice of Request for Loss Mitigation*, together with a proposed Local Form, *Loss Mitigation Order*. The creditor must also file a certificate of service. The debtor shall have fourteen (14) days to object. If no objection is filed, the bankruptcy court may enter the Local Form, *Loss Mitigation Order*.

C. BY THE BANKRUPTCY COURT.

The bankruptcy court may enter a Local Form, *Loss Mitigation Order* at any time, provided that the parties bound by said order have had notice and opportunity to object and to be heard.

D. OPPORTUNITY TO OBJECT.

Where any party files an objection, a Local Form, *Loss Mitigation Order* shall not be entered until the bankruptcy court, after adequate notice, has either held a hearing to consider the objection, or overrules the objection without a hearing for failing to include specific grounds why loss mitigation would not be successful. Grounds for objection may include, but are not limited to, the assertion that loss mitigation has been requested in bad faith, or the assertion that loss mitigation has been previously

requested by the debtor and has been denied. If a party objects on the grounds that loss mitigation has been requested in bad faith, the assertion must be supported by objective reasons.

VI. LOSS MITIGATION ORDER.

The Local Form, *Loss Mitigation* Order required by Section V. must set forth the time frames for action by the parties, as specified below.

A. REQUIRED TIME FRAMES FOR ACTION BY THE PARTIES.

1. Designation of contact persons: 14 days from entry of order.
2. Requests for information: 14 days from entry of order.
3. Responses to requests for information: 21 days from receipt of request.
4. Status Report: 60 days from entry of order.
5. Termination of loss mitigation: 90 days from entry of order.
6. Final Report: 14 days from termination of the loss mitigation period.

Upon the submission of a consent order on notice to the trustee or an application on notice to the other party and the trustee, the Court may modify the time frames for action by the parties. For extension or early termination of the loss mitigation period, see Sections IX.B. and C.

B. EFFECT.

Upon the entry of a Loss Mitigation Order, the following shall apply to the Loss Mitigation Parties:

1. If a relief from stay motion pursuant to section 362(d) is pending when a Loss Mitigation Order is entered or if such a motion is filed during the loss mitigation period, the court may condition the stay upon compliance by the debtor with the fulfillment of the debtor's obligations under the Loss Mitigation Order. If the debtor fails to comply with the loss mitigation-process and Loss Mitigation Order, the creditor may apply to terminate the Loss Mitigation Order as specified in Section IX.C., and to obtain relief from the stay.

2. In a Chapter 13 case, the Standing Trustee may recommend entry of an Interim Confirmation Order pending the resolution of the loss mitigation process. Under the terms of the Interim Confirmation Order, distribution to administrative, priority, and secured creditors, including the payment of arrearages, if any, and adequate protection, may be set forth, and a date for a Confirmation Hearing, consistent with the terms of the Loss Mitigation Order, will be fixed.

3. Pursuant to Federal Rule of Evidence 408, all communications and information exchanged by the Loss Mitigation Parties during the loss mitigation procedure are without prejudice, and will be inadmissible in any subsequent judicial proceedings.

VII. DUTIES UPON COMMENCEMENT OF LOSS MITIGATION.

Upon entry of a Loss Mitigation Order, the Loss Mitigation Parties shall have the following obligations:

A. GOOD FAITH.

The Loss Mitigation Parties shall negotiate in good faith. A party that fails to participate in loss mitigation in good faith may be subject to sanctions.

B. ADEQUATE PROTECTION PAYMENTS BY DEBTORS.

Upon filing a Request for Loss Mitigation, the debtor must make adequate protection payments to the creditor in an amount that is at least 60% of the monthly principal and interest payment that is contractually due, plus 100% of any required monthly escrow payment. If the creditor objects to the amount of the adequate protection payment proposed by the debtor, after adequate notice, the court shall hold a hearing to consider the objection.

If the debtor is required to direct adequate protection payments to a different address than the debtor utilized prior to the filing of the bankruptcy case, the creditor shall promptly advise the debtor of the correct address and any other requirements to ensure the proper posting and processing of the payments.

C. STATUS AND FINAL REPORTS.

1. The Loss Mitigation Parties shall file the Local Form, *Loss Mitigation Status Report* within the time set by the bankruptcy court in the Loss Mitigation Order. The debtor shall be responsible for submitting the status report, but must do so on notice to and in cooperation with the creditor. A Status Report may include a request for an extension of the loss mitigation period.

2. The Loss Mitigation Parties shall file the Local Form, *Loss Mitigation Final Report* within the time set by the bankruptcy court in the Loss Mitigation Order. The debtor shall be responsible for submitting the Loss Mitigation Final Report, but must do so on notice to and in cooperation with the creditor. The Loss Mitigation Final Report must set forth the outcome of the loss mitigation process in the particular case, including, but not limited to the terms of any loss mitigation reached between the parties as identified in Section II.

D. BANKRUPTCY COURT APPROVAL.

The Loss Mitigation Parties shall seek bankruptcy court approval of any agreement reached during loss mitigation in accordance with Section X.

VIII. LOSS MITIGATION PROCESS.

A. INITIAL CONTACT.

1. Within seven (7) days after the designation of contact persons and contact information by the parties, as provided in the Loss Mitigation Order, the contact person designated by each creditor shall contact the debtor's attorney, or the debtor, if specifically authorized, and any other Loss Mitigation Party. The debtor may contact the person or persons designated by the creditor as the loss mitigation contact at any time. The purpose of the initial contact is to create a framework for the discussion at the loss mitigation session and to ensure that each of the Loss Mitigation Parties will be prepared to participate meaningfully in the loss mitigation session – it is not intended to preclude the introduction of additional issues or proposals that may arise during the session. During the initial contact phase, the Loss Mitigation Parties should agree upon:

- (a.) The time, place and method for conducting the loss mitigation sessions.
- (b.) The types of loss mitigation solutions under consideration by each party.

2. The parties shall also confirm the dates included in the Loss Mitigation Order for the exchange of requested information prior to the loss mitigation session, including the due date for the debtor to complete and return any information request or other loss mitigation paperwork that each creditor may require. All such information shall be provided within the time set forth in the Loss Mitigation Order.

B. LOSS MITIGATION SESSIONS.

Loss mitigation sessions may be conducted in person, telephonically, or by video conference. Prior to the conclusion of each loss mitigation session, the Loss Mitigation Parties should discuss whether additional sessions are necessary and set the time and method for conducting any additional sessions, including a schedule for the exchange of any further information or documentation that may be required.

C. BANKRUPTCY COURT ASSISTANCE.

At any time during the loss mitigation period, a Loss Mitigation Party may request a settlement conference or status conference with the bankruptcy court.

D. SETTLEMENT AUTHORITY.

Each Loss Mitigation Party must have a person with full settlement authority present during a loss mitigation session. During a status conference or settlement conference with the bankruptcy court, the person with full settlement authority must either attend the conference in person or be available by telephone or video conference.

IX. DURATION, EXTENSION AND EARLY TERMINATION.

A. INITIAL CONTACT.

The initial loss mitigation period shall be proposed by the parties and shall be set by the bankruptcy court in the Loss Mitigation Order.

B. EXTENSION.

1. Agreement.

The Loss Mitigation Parties may consent to an extension of the loss mitigation period. A party may file a request for extension in writing or include the request for extension in the Status Report. A request for extension must be supported by a factual statement in support of the extension and served on all parties in interest. Any objection to such request shall be filed within three (3) business days of the request.

2. No Agreement.

Where a Loss Mitigation Party does not consent to the request for an extension of the loss mitigation period, the bankruptcy court shall schedule a hearing to consider whether further loss mitigation sessions are appropriate. The bankruptcy court may order an extension if it appears that:

- (a.) a further loss mitigation session is likely to provide a substantial benefit to a Loss Mitigation Party;
- (b.) the party opposing the extension has not participated in good faith or has failed in a material way to comply with these procedures;
- (c.) the party opposing the extension would not be prejudiced, or
- (d.) for other cause shown.

C. EARLY TERMINATION.

1. Upon Request of a Loss Mitigation Party.

A Loss Mitigation Party may request that the loss mitigation period be terminated for cause, and shall state the reason(s) for the request. Except where early termination is necessary to prevent irreparable injury, loss or damage, the request shall be made on notice to all other Loss Mitigation Parties, and if necessary, the bankruptcy court may schedule a hearing to consider the request.

2. Dismissal of the Bankruptcy Case Not Required.

- (a.) A debtor is not required to request dismissal of the bankruptcy case in order to effectuate a resolution.

(b.) Upon the Request of a Debtor.

Where a debtor requests voluntary dismissal of the bankruptcy case during the loss mitigation period, the debtor's dismissal request shall indicate whether the debtor agreed to any settlement or resolution with a Loss Mitigation Party during the loss mitigation period or intends to accept an offer of settlement made by a Loss Mitigation Party during the loss mitigation period.

X. RESOLUTION.

The bankruptcy court will consider any agreement reached during loss mitigation and may approve same, subject to the following:

A. IMPLEMENTATION.

1. Subject to subsection 2., a resolution may be noticed and implemented in any manner permitted by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules"), including, but not limited to, a stipulation, sale, plan of reorganization or amended plan of reorganization, or a motion to approve a loan modification.

2. In a Chapter 13 case in which a loan modification has been agreed upon, the debtor shall file a motion to approve the loan modification, on 14 days' notice to the Standing Trustee and to all creditors whose claims are secured by liens against the residence. A copy of the loan modification agreement must accompany the motion. The form of order presented with the motion must provide the following, where applicable:

(a) If the loan modification approved by the Court impacts on the provisions of the debtor's Chapter 13 plan, a modified plan must be filed within 10 days of the entry of the order approving the loan modification.

(b) If the loan modification approved by the Court results in a material change in the debtor's expenses, the debtor shall file an amendment to the impacted schedules reflecting income and expenses (Schedules I and J) within 10 days of the entry of the order approving the loan modification.

B. FEES, COSTS OR CHARGES.

If a resolution provides for a creditor to receive payment or reimbursement of any fee, cost or charge that arose from loss

mitigation, all such fees, costs or charges shall be disclosed to the debtor, the trustee, the U.S. Trustee, and to the bankruptcy court prior to approval of the resolution.

C. SIGNATURES.

Consent to the resolution shall be acknowledged in writing by (1) an authorized representative of the creditor, (2) the debtor, and (3) the debtor's attorney, if applicable.

D. HEARING.

Where a debtor is represented by counsel, a resolution may be approved by the bankruptcy court without further notice, or upon such notice as the bankruptcy court directs. Where a debtor is not represented by counsel, a resolution shall not be approved until after the bankruptcy court has conducted a hearing at which the debtor shall personally appear.

**TIPS FOR CONSUMER BANKRUPTCY PRACTITIONERS
TO AVOID POTENTIALLY DRASTIC CONSEQUENCES
FOR BOTH YOU AND YOUR CLIENT¹**

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A. Overview

All bankruptcy lawyers are bound by rules elicited by both the applicable rules of professional conduct for their particular state (most jurisdictions utilize the Model Rules of Professional Conduct or similar rules patterned thereon, hereafter, generally referred to as the “MRPC”) and the Bankruptcy Code. Due to (in many instances) the heightened rules delineated in the Bankruptcy Code itself, bankruptcy lawyers frequently find themselves held to professional and ethical standards over and above those elicited by the MRPC. An attorney practicing in Bankruptcy Court must remember that, while bankruptcy law is federal law, the attorney must be admitted to practice in the state in which the bankruptcy case is filed and comply with such state’s rules of professional conduct. These materials will examine the interplay, overlap and required adherence to both the MRPC and the Bankruptcy Code in the context of *Avoiding Conflicts of Interest, Establishing Office Protocol for Electronic Filing to Avoid Ethics Violations, and Adhering to Appropriate Disclosure Rules*. The consequences of violations by both counsel and the debtor in the bankruptcy arena will also be briefly discussed. Hypotheticals, with appropriate written discussion of the hypotheticals, will be used after the initial discussion of the topics.

¹ Portions of these materials are updated from “For The Avoidance Of Doubt...Tips For Bankruptcy Practitioners To Avoid Ethical Dilemmas” prepared by Paula S. Beran, Esquire, The Honorable Douglas O. Tice, Jr., and Lynn L. Tavenner, Esquire for Virginia CLE, March 2013.

In the process of enacting the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), members of Congress suggested that there was “abuse by attorneys and other professionals.” H.R. Rep. No. 109-31, 109th Cong., 1st Sess. 5 (2005), reprinted at 2005 U.S.C.C.A.N. 88, 92. To correct this perceived abuse, Congress included in BAPCPA “provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with bankruptcy cases.” *Id.* at 103. These materials will identify major provisions of the MRPC and the Bankruptcy Code (as amended by BAPCPA) relating to ethical/professional issues of which lawyers practicing in bankruptcy courts must be intimately aware.

B. Avoiding Conflicts of Interest

An attorney representing a debtor in a bankruptcy case must remember that, while bankruptcy law is federal law, the attorney must be admitted to practice in the state in which the bankruptcy case is filed. Pursuant to Rules 1.6, 1.7, 1.8, 1.9 and 1.10 of the MRPC, counsel owes fiduciary duties of loyalty and care to his/her client, including the duty to maintain client confidentiality and prevent any conflict of interest. These duties to the client are also addressed in §§ 327, 328, 329 of the Bankruptcy Code, which sections address conflicts of interest and are generally much stricter than their counterparts in the MRPC.

In accordance with both Rule 1.7 of the MRPC and § 327 of the Bankruptcy Code, a lawyer should not represent a client if such representation results in a current conflict of interest. To avoid such conflict, the debtor’s attorney should ensure that she has a viable conflict of interest system in place. Examples of situations where the attorney should pay close attention are: (a) representation of creditors; (b) representation of relatives of debtors; and (c) representation of principals of corporate debtors or vice versa. Lawyers should also be wary of

situations where they undertake to represent both spouses in situations where the spouses are contemplating divorce. It is foreseeable that, while a conflict may not exist at the beginning of the representation, the relationship between the clients could deteriorate to the point that the attorney may have a conflict and is no longer able to represent either client. It is in the attorney's best interests to address potential conflicts immediately; otherwise, his/her license is subject to review and/or his/her fees are subject to disgorgement.

Hypothetical Discussion 1 – Don't Be A Marriage Counselor!

*Mary and John Squabblemuch divorced on September 20, 2009. At the time of the divorce, Mary was unemployed, having been the primary caretaker of the two children. The divorce agreement provided that the marital home would be transferred to Mary and that alimony and child support payments would be made by John in the amount of \$ 8,300.00 a month so that Mary would be able to pay the mortgage and other monthly expenses for herself and the children. Then in May, 2012, John filed, *pro se*, a Chapter 7 bankruptcy. During the course of his bankruptcy case, Consumer Mill, PLC (the "Mill"), substituted in as counsel for John on August 25, 2012. One year prior, however, the Mill had commenced its representation of Mary in her Chapter 13 bankruptcy case. According to Mary's bankruptcy petition, the majority of her income was derived from the alimony payments that were supposed to be made in the amount of \$ 8,300.00 a month. She also received gross pay of \$ 958.56 a month from employment at a department store. At the time of the August filing, Mary was behind on forty-one months of mortgage payments according to the proof of claim filed by the mortgagee. Mary's plan filed on August 24, 2012, provided that Mary would pay \$ 150.00 a month to the Trustee which would go to cure the pre-petition debt on the mortgage. The plan also provided that Mary would pay the regular monthly mortgage payment directly to the mortgage company at \$ 3,200.00 a month until a sale or refinance of the home on or before April 1, 2014.*

Question: What, if any, ethical issues does the Mill have in the joint representation of Mary and John?

Issues to Consider: Representation of Mary and John and Rules 1.3 and 1.7 of the Model Rules of Professional Conduct.

In the context of ethical (or unethical as the case may be) conduct, "the Federal Courts should hold attorneys that appear before them to the recognized standards of conduct in their jurisdiction." *In re Johnson*, 2008 Bankr. LEXIS 164 (Bankr. E.D. Va. Jan. 18, 2008) citing *In re Computer Dynamics, Inc.*, 252 B.R. 50, 64 (Bankr. E.D. Va. 1997), *aff'd*, 181 F.3d 87 (4th Cir. 1999). Furthermore, Rule 2090-1(I) of the Local Rules of Bankruptcy Procedure for the United States Bankruptcy Court for the Eastern District of Virginia provides that the ethical rules

applicable to the Court are the Virginia Rules of Professional Conduct. This is consistent with the rulings of other Bankruptcy Courts. *See In re Meridian Auto. Systems – Composite Operations, Inc.*, 340 B.R. 740, 744 (Bankr. D. Del. 2006) (noting that Model Rules of Professional Conduct govern conduct before Bankruptcy Court in Delaware). Accordingly, the Mill’s conduct should be first and foremost analyzed under Rules 1.3(a), (c) and 1.7 of the Model Rules of Professional Conduct.

Rule 1.3 (a) of the Model Rules of Professional Conduct provides that a lawyer shall act with reasonable diligence and promptness in representing a client. Rule 1.3 (c) prohibits an attorney from intentionally prejudicing or damaging “a client during the course of the professional relationship.” Rule 1.7 of the Model Rules of Professional Conduct provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) the consent from the client is memorialized in writing.

While there clearly is a potential for a conflict in the representation of both Mary and John, the potential for conflicts in dual representation alone is not enough to require a finding that the representation is improper. *See In re BH&P, Inc.*, 949 F.2d 1300, 1316-17 (3d Cir. 1991) (In addressing conflict of interest issues with regards to Trustee and Trustee’s professionals, the Third Circuit concluded that “denomination of a conflict as ‘potential’ or ‘actual’ and the decision concerning whether to disqualify a professional based upon that determination in situations not yet rising to the level of an actual conflict are matters committed to the bankruptcy court’s sound exercise of discretion.”)

Actual conflicts are more problematic. And under the facts in this hypothetical, said conflict likely cannot be waived. Mary has a claim against John and his bankruptcy estate. Furthermore, proper representation of Mary calls for advice on her right to enforce John’s matrimonial obligations. On facts similar to the hypothetical, in *In re Nolan*, 2006 Bankr. LEXIS 1569 (Bankr. N.J. July 10, 2006), the Bankruptcy Court determined there was an

unwaivable conflict under the New Jersey Rules of Professional Conduct and denied compensation.

Hypothetical Discussion 2 – Who’s My Client?

Joe Filer, a consumer bankruptcy attorney, has represented Grandma and Dad in multiple bankruptcy cases, a number of which previously have been dismissed, and as a result, the automatic stay was unavailable to them in connection with certain real property. Just after receiving a foreclosure notice, the real property was transferred from Grandma and Dad to their 18 year-old granddaughter/daughter Chastity. Thereafter, Grandma and Dad asked Joe Filer to represent Chastity in connection with a bankruptcy case. Chastity had just graduated from high school three months earlier. Chastity’s primary assets, other than the real property, are schoolbooks, school supplies, clothes, electronics, and a computer. Chastity has no bank account and no employment. Chastity has relatively little debt and has never filed a tax return.

Question: Should Joe Filer represent Chastity in a bankruptcy case?

Issues to Consider: (i) Representation of Chastity and Rules 1.7(a), 1.4(b) and 1.3(c) of the Model Rules of Professional Conduct; and (ii) Representation of Chastity and Rule 9011(a) of the Federal Rules of Bankruptcy Procedure.

Here, Joe Filer’s representation of Chastity would likely violate Rule 1.7(a) of the Model Rules of Professional Conduct, which prohibits an attorney from representing a client if "there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Whose interest would Joe Filer be serving if he filed a bankruptcy petition for Chastity? Most likely, he would be serving the interests of Chastity’s father and grandmother. No reasonable attorney could maintain that Chastity’s filing for bankruptcy was in Chastity’s best interests. Chastity has no substantial debt. There is a significant risk that the actions Joe Filer would take during the course of Chastity’s representation would benefit Chastity’s father and grandmother to Chastity’s detriment. Accordingly, the representation would be in violation of Rule 1.7(a) of the MRPC.

Similarly, Rule 9011(a) of the Federal Rules of Bankruptcy Procedure requires Joe Filer to sign Chastity’s bankruptcy petition. Through this signature, Joe Filer certifies that the signed document:

- 1) . . . 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.

Fed. R. Bankr. P. 9011(b). Would not Chastity's petition (and entire bankruptcy case) be to "hinder delay and/or defraud" the secured creditor of the real property? Accordingly, the representation would likely also cause Joe Filer to violate Rule 9011(a) of the Federal Rules of Bankruptcy Procedure and subject Joe Filer to sanctions.

Joe Filer's representation of Chastity would also likely violate Rule 1.3(c) of the MRPC, which prohibits an attorney from intentionally prejudicing or damaging "a client during the course of the professional relationship." Comment 1 to Rule 1.3 (c) emphasizes that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Once again, whose interests would Joe Filer be representing if he filed a bankruptcy petition for Chastity? Chastity's credit report would reflect the bankruptcy for years to come. 15 U.S.C. § 1681(a)(1). A bankruptcy filing could prevent Chastity from purchasing or renting a home. Chastity would likely not be entitled to a discharge because of the "intent to hinder, delay and/or defraud". Would not Joe Filer's representation of Chastity actually damage Chastity?

Finally, Joe Filer's representation of Chastity would likely violate MRPC 1.4(b), which requires an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." How can Joe Filer adequately explain the situation to Chastity? Comment 3 to Rule 1.4(b) specifies that normally an attorney need only provide information "appropriate for a client who is a comprehending and responsible adult. . . . However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability." See Rule 1.14. MRPC 2.1 requires an attorney to "exercise independent professional judgment and render candid advice" to clients. Comment 3 to that Rule states that even though a client may ask for "purely technical advice" if that client is "inexperienced in legal matters . . . the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations." Moreover, Comment 5 to Rule 2.1 notes that "when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, moral or ethical consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation." How can Joe Filer represent Chastity based upon his representation of Dad and Grandma and his knowledge of the fraudulent transfer?

This fact pattern and analysis is taken from *In re Johnson*, 2008 Bankr. LEXIS 164 (Bankr. E.D. Va. Jan. 18, 2008). It is an excellent reminder/warning for all bankruptcy attorneys to think about the nature and purpose of a representation before accepting an engagement.

C. Electronic Filing Ethical Issues

Electronic case filing ("ECF" or "CM/ECF") can present a myriad of ethical issues.

Implementation of the Case Management/ Electronic Case Files (CM/ECF) system was first

introduced in bankruptcy courts in early 2001 but is now widespread and used in ninety-nine percent of the federal courts.² By local rule many bankruptcy courts have separately adopted and incorporated CM/ECF policies governing the electronic filings and docket management. *See generally Fed. R. Bankr. P. 5005(a)(2)* (“[a] court may by local rule permit or require documents to be filed by electronic means that are consistent with [judicially established] technical standards, if any, . . . [and] only if reasonable exceptions are allowed”). *See, e.g., Bankr. E.D. Va Local Rule 5005-2* (mandating use of CM/ECF system, subject to requirements and exceptions set forth in the *Court’s Electronic Case Files Policy*); *Bankr. W.D. Va. Local Rule 7* (essentially the same mandatory requirement). This system enables practitioners to access real-time information on active cases and to handle case filings at any time and from virtually any electronically connected location as long as you have appropriate available software applications.

CM/ECF enables registered users to electronically file documents over the internet. Any time a document is uploaded into the CM/ECF system it creates a docket entry. The registered user is responsible for input of accurate information necessary for the entry to appear properly on the case (or adversary proceeding) docket. In addition, each time that a registered user files a pleading, the CM/ECF system automatically generates a “Notice of Electronic Filing”, which is sent via e-mail to all other registered users who have made an electronic appearance in the case or adversary proceeding.

The CM/ECF system also enables practitioners to obtain on-line access to case dockets, as well as copies of previously filed documents, by use of the “PACER” fee-based system. Unlike the CM/ECF filing system, PACER is not interactive. It is instead a source for accessing information on a specific debtor, attorney, case or adversary proceeding.

² <http://www.uscourts.gov/FederalCourts/CMECF/FAQs.aspx>.

Registered users of the CM/ECF system are required to also maintain a PACER account. But PACER is available to the general public, and may be used nationally in all other on-line court systems regardless of whether the user has registered for CM/ECF. It is an extremely useful informational tool.

While this virtually universal, full-time access to court dockets is not only an enormous and empowering tool for the modern bankruptcy practitioner, it also brings with it potentially enormous new professional responsibilities as delineated below.

1. Signature Requirement.

Filing a document through the CM/ECF system without first obtaining “wet signature” violates many of the rules of professional conduct. For example:

Rule 1.1 of the MRPC provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Rule 1.2 of the MRPC provides: “A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued.”

Rule 1.3 (a) and (c) of the MRPC provides: “(a) A lawyer shall act with reasonable diligence and promptness in representing a client . . . (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship. . . .”

Rule 1.4 (a) and (b) of the MRPC provides: “(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representations.”

Rule 3.3 (a) (1) and (4) of the MRPC provides: “A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal” or “(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”

Rule 4.1(a) of the MRPC provides: “In the course of representing a client a lawyer shall not knowingly: (a) Make a false statement of fact or law.”

In addition, an ECF without first obtaining a “wet signature” violates Federal Rules of Bankruptcy Procedure and local rules of court. For example:

Rule 1008 of the Federal Rules of Bankruptcy Procedure (collectively, the “Bankruptcy Rules” and each a “Bankruptcy Rule”) requires that “[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 18 U.S.C. § 1746.”

Bankruptcy Rule 5005(a)(2) provides that “a document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules and § 107 of the Code.”

Pursuant to a standing order adopting case management/electronic case filing procedures for the United States Bankruptcy Court for the Eastern District of Virginia, “[a]ll filings, which (a) must contain original signatures (b) require verification under FRBP 1008 or (c) contain an unsworn declaration as provided in 28 U.S.C. § 1746, shall be filed electronically or in accordance with the ‘Notice of Electronic Filing Procedure.’ Originally-executed copies must be retained by the filer until three (3) years after the closing of the case unless the Court orders a different period.” The Appendix to the Local Rules for the New Jersey Bankruptcy Court delineates the requirement that original signatures of third parties on electronically-filed documents must be maintained for seven (7) years from the date of case closure.

Courts have imposed sanctions on debtor’s counsel for failing to obtain “wet signatures.”

For example, in *In re Wenk*, 296 B.R. 719 (Bankr. E.D. Va. 2002), Bankruptcy Judge Tice confronted the issue when counsel filed electronically a petition (which contained a typographic representation of the debtor’s signature) despite the fact that the debtor had not yet signed a paper original. Judge Tice issued a memorandum opinion resulting in monetary sanctions and a prohibition from filing any new cases for a period of thirty days. This decision is consistent with decisions that have addressed similar issues in the “old paper world”. See *In re Ludwick*, 185 B.R. 238 (Bankr. W.D. Mich. 1995) (holding that attorney’s forgery of debtor’s signature on petition and dishonest testimony warranted reimbursement of attorney fees, monetary sanctions, and suspension from practicing before court for two years); *In re Nesom*, 76 B.R. 101 (Bankr.

N.D. Tex. 1987) (holding that attorney's forgery of debtor's signature on statement of financial affairs and schedules warranted suspension from practicing before court for sixty days).

Courts have also imposed sanctions on debtors where the debtors participated in a fraud on the court. See *In re Leija*, 270 B.R. 497, 503-04 (Bankr. E.D. Cal. 2001) (denying debtor's discharge where "unsworn verifications themselves are therefore materially 'false oaths.' Further, the execution of those documents in blank was intended to perpetrate a fraud on the court—to give the appearance that the documents were truthful and accurate when they in fact were not."); *Scimeca v. Umanoff*, 169 B.R. 536, 543 (D. N.J. 1993) ("Discharge may be denied 'to debtors who have claimed that they did not read the [bankruptcy] schedules prior to signing, and therefore did not know they were making a false oath.'" (citations omitted)).

In addition, while not an ECF issue, courts have refused to allow the debtors to proactively pursue claims which were not scheduled in their bankruptcy cases. Throughout the country, bankruptcy courts and district courts refuse to allow a debtor to prosper from a cause of action that conveniently was not addressed in the bankruptcy process. Moreover, every circuit that has addressed the issue has found that judicial estoppel is justified to bar a debtor from pursuing a cause of action in district court where that debtor deliberately fails to disclose the pending suit in a bankruptcy case. See *Eastman v. Union Pac. R.R.*, 493 F.3d 1153, 1157-60 (10th Cir. 2007); *Cannon-Stokes v. Potter*, 453 F.3d 446, 447-48 (7th Cir. 2006); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 599-601 (5th Cir. 2005); *Barger v. City of Cartersville*, 348 F.3d 1289, 1293-97 (11th Cir. 2003); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782-85 (9th Cir. 2001); *United States ex rel. Gebert v. Transp. Admin. Servs.*, 260 F.3d 909, 917-19 (8th Cir. 2001); *Payless Wholesale Distribs., Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570 (1st Cir. 1993); see also *Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 898-99 (declining to apply

judicial estoppel where failure to disclose the claim to the bankruptcy court appeared inadvertent).

D. What More Can Happen?

More and more decisions are popping up where attorneys are finding themselves in trouble caused by issues with their failure to act on electronic notices from the courts. For example, an attorney who failed to appear at a settlement conference in Colorado was hit with judgment for opposing counsel's fees when his firm's spam filter blocked the court's electronic notice of the conference. *Pace v. United Serv. Auto. Ass'n*, 2007 U.S. Dist. Lexis 49425 (D. Colo. July 9, 2007). The issue arose when the firm adjusted the spam filter, which also blocked the court's email domain. The firm attorney suffered the consequences.

Similar issues have found their way to the United States Court of Appeals for the 8th Circuit, which was not sympathetic upon the untimely filing of a notice of appeal because a law firm employee accidentally deleted an e-notice informing the parties that a final order had been issued. *American Boat Co. v. Unknown Sunken Barge*, 567 F.3d 348 (8th Cir. 2009)(the Court did allow the firm to present evidence as to the actual receipt as opposed to just relying on the electronic noticing protocol generated by the Court's system). In *Kinsley v. Lakeview Reg'l Med. Ctr. LLC*, 570 F.3d 586 (5th Cir. 2009) the plaintiff inadvertently uploaded the wrong document to the CM/ECF system. The Fifth Circuit refused to agree that a deficiency notice directing him to refile the correct document within the stated timeframe automatically extended the time for electronically filing a notice of appeal.

The Fourth Circuit also has been unyielding when faced with electronic service arguments. Indeed, the Fourth Circuit upheld the dismissal of a wrongful termination case when the plaintiff's lawyer failed to respond to a motion for summary judgment, which was apparently

served (in accordance with local rule) upon the plaintiff's attorney by electronic means only. Because no timely response was filed by the plaintiff, the district court had entered an order granting summary judgment and the Fourth Circuit affirmed the ruling. The plaintiff's lawyer told the court he never received electronic notice of the motion because of his various computer problems, including a malware virus. *Robinson v. Wix Filtration Corp.*, 599 F.3d 403 (4th Cir. 2010). The lawyer did not find a sympathetic audience especially since he knew the deadline for dispositive motions in the case was pending during the time his firm was experiencing a computer meltdown. He never checked the ECF system for docket activity and failed to inform the court of his inability to receive e-notices. To make matters worse, when Robinson became aware that the deadline had passed, he made a strategic decision not to contact opposing counsel or the court!

Within ten days of entry of summary judgment, the plaintiff's attorney filed an alternative motion to amend the entered judgment (*Fed. R. Civ. P. 59*) or for relief from the entered judgment (*Fed. R. Civ. P. 60*). The plaintiff's attorney explained that his office computer system was non-functional during the period in which the summary judgment motion was filed, and that he, therefore, never received the CM/ECF-generated electronic notice of the filed summary judgment motion. The district court, considering the matter under Rule 59 only, denied the motion on the stated basis that the plaintiff's attorney's "computer problems did not relieve ... counsel of his obligation to continue to monitor the docket in this case." *Id.* at 407.

On appeal, the Fourth Circuit's two to one majority (there were also two dissenting opinions) ruled that the plaintiff's attorney, knowing of the pre-established deadline for filing of dispositive motions and the fact of the malfunction of his office computer system during this period, had chosen to engage in "willful blindness". *Id.* at 409. Under the principle that the

client bears the consequences of acts or omissions by his freely selected agent, the Fourth Circuit panel affirmed the district court's entry of summary judgment and denial of the post-judgment motion.

Question: How Can Lawyers and Staff Avoid These Traps?

- *Understand Your Court's Specific CM/ECF System And the Applicable Court Rules*
- *Manage Your Email Carefully...Do NOT Rely On Others*
- *Secure Your Computer System But Give Specific Instructions to IT Departments*
- *Find a Safety Net/Back-up Plan*

Hypothetical 3—Doing Nothing or Everything...Which is Worse?

Janice Bad Luck Debtor ("Bad Luck"), visits Lawyer DoNothing ("DoNothing") and after discussing the various options, retains DoNothing to file a Chapter 7 bankruptcy for Bad Luck. She pays the filing fee as well as the retainer and proceeds to provide DoNothing with the necessary information to file the petition and schedules. Thereafter, the same are prepared and DoNothing has Bad Luck review and sign the petition and schedules. DoNothing then directs his paralegal to file the petition, which she does as she is on the way out the door on her last day of employment. The paralegal does not, however, use DoNothing's credit card (standard operating procedure) to pay the filing fee. As a result, the clerk issues an ECF notice to DoNothing of the deficiency and the deadline to fix the issue. Do Nothing does not timely pay the fee but attempts to re-file the petition (without getting a new signature from Bad Luck). Ultimately, the case is dismissed, and BadLuck receives a notice of the same in the mail. DoNothing fails to answer BadLuck's calls. As a result, BadLuck calls her Chapter 7 Trustee, Aim to Please, to see what the problem is. Aim to Please Trustee speaks to BadLuck and pulls up the case on PACER during the call and explains the issue to BadLuck and then calls and emails DoNothing (with a copy to the UST) advising BadLuck of the conversation and suggesting that he rectify the matter with Bad Luck right away.

Issues: 1) Is DoNothing responsible for the paralegal's failure to follow the office protocol for payment of filing fees? 2) Should DoNothing be sanctioned for his effort to rectify the problem by simply re-filing the petition? 3) Should Aim to Please Trustee be commended for her efforts in obtaining a solution for Bad Luck(absent consent)?

Failure to follow mandatory CM/ECF payment procedures can be problematic for the practitioner. Specifically registered participants must pay required fees electronically via the internet by means of on-line credit card payments. The clerk is not authorized to reject a petition that is not accompanied by the proper filing fee. Instead, the petition must be accepted as filed and the case is commenced even if the fee is not paid. The clerk thereafter issues a notice for the need to cure the filing fee deficiency. If the fee is not paid by the close of business on the next business day after the notice to cure is given, only then will the clerk dismiss the petition. *See, e.g., Local Eastern District of Virginia Bankruptcy Rule 1006-3(c).* The clerk may give the notice of a need to cure the filing fee deficiency personally, electronically, telephonically or by

mail. The notice period commences for personal, electronic and telephonic notice when the notice is given. *Id.*

The case of *Office of the United States Trustee v. Jones (In re Alvarado)*, 363 B.R. 484, 486-492 (Bankr. E.D. Va. 2007) delineates just how badly things can go once the downward spiral begins. In *Alvarado*, the petition was filed without payment of the filing fee. The notice to cure the filing deficiency was issued by the clerk's office electronically on the next business day, October 23, 2006. The notice stated that "failure to provide payment, or the appropriate application as set forth under voluntary/involuntary petitions, by 4:00 p.m. on the business day following this notice will result in the . . . bankruptcy case being dismissed." In addition to the electronic notice that was given, the clerk's office also gave telephonic notice to cure the filing deficiency to counsel, Mr. Jones, on the same day. Unfortunately, Mr. Jones neglected to respond to either notice. The filing fee was not paid within the requisite grace period provided by the Court, and an order was entered on October 26, 2006, dismissing the case for failure to cure the filing fee deficiency. Notice of dismissal was served electronically on Mr. Jones on October 27, 2006, and it was served by first class mail on the Debtor on October 28, 2006.

The first indication that the Debtor received that anything was amiss in her case was the receipt of the notice of dismissal from the clerk's office. The Debtor contacted the Office of the U. S. Trustee for an explanation when she was unable to reach Mr. Jones. The Debtor was alarmed that her bankruptcy case had been dismissed because she knew that she had paid the filing fee to her attorney. Official Form B203 -- Disclosure of Compensation of Attorney for Debtor -- filed by Mr. Jones with the bankruptcy petition indicated clearly that the \$ 299 filing fee had been paid to him by the Debtor. Mr. Jones did not file any response to the motion of the U. S. Trustee within 10 days as was permitted by the Rules of Court and Judge Huennekens thereafter granted the motion for an order to show cause and set an evidentiary hearing for December 13, 2006. Mr. Jones appeared at the hearing and testified that in all bankruptcy cases that he handles it has been his practice, as a registered participant in the Court's CM/ECF system, to use a credit card to pay the filing fee. Mr. Jones testified that his failure to pay the filing fee in this case was not caused by a lack of availability on his credit card, but rather it resulted from the termination on the petition date of a paralegal who had been in his employ for eleven years. Mr. Jones testified that his paralegal had failed "inadvertently" to use the credit card to pay the filing fee when she filed the case electronically on his behalf. Mr. Jones was adamant that this was the only reason the filing fee was not timely paid when the bankruptcy petition was filed.

Mr. Jones also testified that he does not recall receiving the electronic deficiency notice from the clerk's office but did not address the telephonic notice that he also had received from the clerk's office. Mr. Jones admitted that he was aware of the dismissal of his client's case by "at least" the week after the case had been dismissed. According to Mr. Jones, in the perfect storm that ensued, he developed a "computer problem" that prevented him from paying the filing fee electronically once he became aware that the case had been dismissed. However, Mr. Jones did not contact the clerk's office, in person or by phone, either to offer explanation or to make other payment arrangements. Only after the order to show cause had been entered on the docket, on November 28, 2006, was the filing fee finally paid to the clerk in this case. Instead of filing a motion to vacate the dismissal order, Mr. Jones compounded the problem by instituting a new bankruptcy case for the Debtor. Judge Huennekens opined that it was apparent that Mr. Jones

was unfamiliar with the 2005 amendments to the Bankruptcy Code, including that that the automatic stay would expire in the second bankruptcy case 30 days following the petition date and that as a result of the 2005 amendments to § 707 of the Bankruptcy Code, his signature on a petition certified that he had performed a reasonable investigation into the circumstances surrounding the filing of the petition and that he had concluded that the filing of the petition did not constitute an abuse. He was unaware that he was required to make reasonable inquiry into the information contained in the documents filed with the Court. Moreover, the Debtor never subsequently signed the second bankruptcy petition. Further it was of great concern to the Court that the Debtor may not have authorized Mr. Jones to file the second petition.

Referencing the Virginia Rules of Professional Conduct (the “VRPC”), which are substantially similar to the MRPC, Judge Huennekens wrote: “Attorneys owe both a duty of competence and a duty of care to their clients. As a fiduciary for his client, Mr. Jones owed the most fundamental of all obligations -- the duty of trust. Clients must be able to impart complete trust and confidence in their counsel. The Debtor was entirely justified in relying on Mr. Jones to timely file her petition and to simultaneously pay the filing fee she had previously delivered to him in trust. No particular expertise was required of Mr. Jones in this instance. No matter how menial these tasks may appear to be, the Debtor had the right to expect that they would be accomplished in a professional and conscientious manner. A simple attention to detail was all that was necessary. Care for a client's well being demands nothing less.” Moreover, Mr. Jones could not absolve himself of these responsibilities by claiming to have delegated them to a subordinate. Mr. Jones retains the ultimate responsibility for providing competent representation to his client. Counsel must effectively communicate with clients. An attorney must render candid advice and must explain matters sufficiently to enable clients to make informed decisions. Holding himself out as a “registered participant” under the Court's CM/ECF system, Mr. Jones assumed additional responsibilities to keep his client informed of court proceedings. These responsibilities included an obligation to review and to respond to electronic communications received from the clerk's office and an obligation to forward such electronically transmitted information to the Debtor. It is unconscionable that Mr. Jones' client had to learn about the reason for the dismissal of her case from the Office of the U. S. Trustee instead of from her lawyer.” *Alvarado* at 490. Judge Huennekens had no trouble finding that Mr. Jones not only violated the VRPC, but also Bankruptcy Code § 707(b)(4)(C) and Local Bankruptcy Rule 5005-1(D)(1)(e), which mandates that every petition that is filed include an unsworn declaration bearing the debtor's signature. Judge Huennekens also had no problem finding Mr. Jones in contempt for attempting to cover up his error by filing the second petition. *Alvarado* at 491-492.

While not discussed in *Alvarado* (given that in the facts of the case the Debtor actually made the call to the UST and not the Chapter 7 Trustee), the Virginia State Bar recently elicited Legal Ethics Opinion 1861, which addresses whether a lawyer serving as a bankruptcy trustee can communicate with the debtor without the consent of the debtor’s lawyer. In LEO 1861, the Bar Committee read MRPC 4.2, which prohibits lawyers from communicating with a person that the lawyer knows to be represented by another lawyer in the matter (absent consent from opposing counsel), to also prohibit the Chapter 7 Trustee from communicating with the Debtor “unless the debtor’s lawyer consents or the communication is authorized by law. Examples of communications that are authorized by law are notices that, by statute or court rule, must be sent to the debtor personally, or a scheduled and noticed proceeding such as a meeting of creditors

pursuant to 11 U.S.C. § 341.” The reasoning for the ruling is that the lawyer/trustee may be in a position to take advantage of the debtor with the direct communication and such activity is not sanctioned by Rule 4.2. The LEO creates a fairly inflexible rule and as a result despite Aim to Please Trustee’s good intentions, not only will she not be commended for her efforts in obtaining a solution for Bad Luck, but she also may be subject to discipline for her actions.

E. Other Consequences of Ethical Violations Under Bankruptcy Code.

In addition to the sanctions pertaining to electronic filing infractions, an ethical violation by debtor’s counsel could trigger one or more of the following: 1) malpractice suit brought by the debtor or, as applicable, trustee; 2) requests for disgorgement of all or part of the fees charged by counsel; 3) grievance being filed with the applicable State Bar; and 4) in the event the attorney’s actions have resulted in a bankruptcy crime, potential prosecution by the United States Department of Justice (with the assistance of the Federal Bureau of Investigation).

BAPCPA provides for additional requirements and ramifications. Specifically, new § 707(b) addresses certain attorneys’ actions. By signing the petition or pleading, the attorney now certifies that he has: (a) performed a reasonable investigation into the circumstances giving rise to the petition, pleading or motion; (b) determined that the petition, pleading or motion is well-grounded in fact and warranted by existing law or a good faith extension, modification, or reversal of existing law and does not constitute an abuse; and (c) no knowledge after an inquiry that any information in the schedules filed with the petition is incorrect. If a motion for dismissal or conversion is successfully prosecuted and the court finds that the debtor’s attorney violated Federal Rule 9011 in filing the case, the court, on its own initiative, or on the motion of a party in interest, may order the debtor’s attorney to reimburse the trustee for reasonable costs and attorneys’ fees. *See In re Antonelli*, 2012 Bankr. LEXIS 426 (Bankr. D.N.J. Jan. 30, 2012) (Finding that the debtor’s petition was filed in bad faith by counsel, the court awarded sanctions under Rule 9011 as well as noting that the actions were sanctionable under § 105(a), the court’s

inherent powers, and/or 28 U.S.C. § 1927, because the debtor's attorney had multiplied the proceedings unreasonably and vexatiously, causing larger fees to the objecting creditor.),

F. Consequences to Debtor for Improper Conduct.

While these materials have focused upon the pitfalls for consumer debtor counsel, the discussion would not be complete without mentioning the resulting problems for the debtor herself when bad behavior occurs. Ordinarily courts will begin with the premise that the debtor is honest and trustworthy and entitled to a fresh start. Indeed, courts often recognize that it is prudent for a debtor to attempt to maximize the value of his estate. Specifically, in *In re Thomas*, 477 B.R. 778, 782 (Bankr. D. Idaho 2012), the court reflected that “debtors may maximize their exemptions, even when they do so shortly before the filing of a bankruptcy petition.” *See also* House Report of Bankruptcy Reform Act of 1978, H.R. REP. NO. 95-595, at 361 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317 (“As under current law, the debtor will be permitted to convert nonexempt property into exempt property before filing a bankruptcy petition. The practice is not fraudulent as to creditors, [**11] and permits the debtor to make full use of the exemptions to which he is entitled under the law.”). The problem arises when the debtor steps over the line into a fraudulent fact pattern and among other things the debtor’s discharge becomes at risk. The comments of the Ninth Circuit Bankruptcy Appellate Panel, in discussing the line between legitimate exemption planning and an intent to defraud creditors in the context of a discharge denial action, are instructive:

Only two things are certain about the line.

First, . . . denial of discharge involving exemption planning requires that there be evidence other than the mere timing of the transformation of property from nonexempt to exempt status.

Second, there is a principle of “too much.” . . . The reality is that cases finding discharge-disqualifying intent to hinder, delay, or

defraud creditors typically involve some combination of large claims of exemption and overtones of overreaching.

In re Beverly, 374 B.R. 221, 245 (9th Cir. 2007) (internal citations omitted).

Similarly, the case of *Henry v. Rizzolo*, 2012 U.S. Dist. LEXIS 131895 (D. Nev. Sept. 17, 2012) tells us that if there is proof of an intent to defraud creditors, state law exemptions likely will not be upheld. In *Rizzolo* the District Court held that intent to defraud, which may be inferred from the circumstances, including badges of fraud, will invalidate any claims for state exemptions in the property impacted by the fraudulent intent—in this instance it was an annuity. The court also held that the defrauded creditors held an equitable lien against property or funds placed in an otherwise exempt asset.

Finally, it is also important to remember that it is possible to fraudulently transfer an otherwise exempt asset. In *Tavener v. Smoot*, 265 B.R. 128 (Bankr. E. D. Va. 1999), *aff'd*, 257 F.3d 401 (4th Cir. 2001), *cert. denied*, 534 U.S. 1116 (2002), Bankruptcy Judge Tice examined § 522(g), which provides that while a debtor may exempt property recovered by a trustee pursuant to § 550, such exemption rights only apply to the extent that the debtor could have exempted such property absent the initial transfer and if such transfer was not a voluntary transfer by the debtor and not concealed. The Court held, pursuant to 11 U.S.C. § 522(g)(1)(A), a debtor is not permitted to claim exemptions in property recovered by a trustee through an avoidance action if the debtor, initially, voluntarily made the transfer subject to avoidance. This is true even if the property transferred was otherwise exempt under state law.

Conclusion.

One bankruptcy judge succinctly stated: “[A]s officers of the court, attorneys have a special responsibility for upholding the quality of justice within the judicial process. Attorneys may not take this responsibility lightly. They are obligated to maintain a professional demeanor

at all times. The Court depends on the veracity, integrity and competence of the attorneys that practice before it. Courts have a strong interest in insuring that a high quality of service is consistently rendered by the legal profession.” *Alvarado*, 363 B.R. at 489-490 Let’s resolve to uphold the special responsibility entrusted to us by the courts and bankruptcy system as a whole.