Consumer Track

Starting Off on the Right Foot: Client Intake and Its Practical and Ethical Issues

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Written Materials

1. G. Thomas Curran, Jr., *How Much Diligence is Due? Defining an Attorney's Duty to Perform a Pre-Petition Inquiry* , ABI JOURNAL, November 2013
2. Randy Nussbaum, *The Initial Client Interview – Is it More than Meets the Eye?*
3. Randy Nussbaum*, Determining Which Chapter to File:What Key Questions Will Tell You*
4. Legal Aid Center of Southern Nevada, *Bankruptcy Client Intake Packet* cover sheet
5. Excerpt from United States Trustee Program Annual Report, FY 2012

Importance of the Intake

- Attorney's Duties
  - **11 U.S.C. §526(a)(2) – Reasonable Inquiry**
    - Debt relief agency shall not…make any statement…in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading;
    - §526(a) added by BAPCPA in 2005
    - Negligence standard
    - Failure to provide reasonable inquiry can subject attorney to penalties, including disgorgement of fees to debtor, actual damages, and attorney's fees and costs of debtor, U.S. Trustee, and state.
  - **Rule 9011 – "…inquiry reasonable under the circumstances"**
    - Similar standard to §526(a)(2) inquiry
    - Five part "reasonable inquiry" test
  - **11 U.S.C. §707(b)(4)(D) – Reasonable Investigation**
    - Compare to §526(a)(2) – dismissal of case plus civil penalties and attorney's fees.
    - *In re Kayne*, 435 B.R. 372 (BAP 9th Cir. 2011) – "reasonable inquiry"

Intake Issues

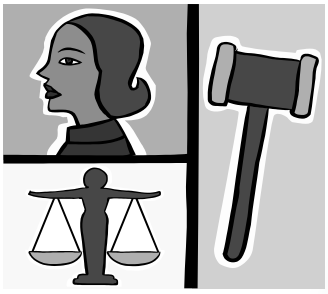
- **Initial Interview and Gathering Information**
  - **What debtor should bring**
    - **Identification**
    - **Questionnaire/Checklists**
    - **Documents (see Legal Aid Center of Southern Nevada Intake)**
  - **Questions for the interview**
    - **How to elicit necessary information**
  - **Paralegal's role/supervision**
  - **Research by attorney**
    - **Property records**
    - **Prior bankruptcies**
    - **Court dockets**

Intake Issues (Continued)

- **Advising Client**
  - **Which Chapter to File**
  - **Need for full disclosure/consequences**
  - **What to expect**
  - **Need to read before signing**
- **Fees/Engagement Letters**
  - **Carve outs / unbundled services**
- **Special Issues**
  - **Gambling**
  - **Potential non-dischargeability claims**
  - **Reaffirmations**
  - **Claims of Debtor**
  - **Student Loans**

Consequences

- **United States Trustee's Perspective**
  - Trustee's Annual Report
    - Attorney misconduct and sanctions
  - Case Study*: In re Roloff,* Eastern District of California (Fresno Division) Case No. 13-15819-B-7
- **Court's Perspective**
  - Preparation
  - Candor with court
  - Sanctions



- **Bar Complaints/Malpractice**

Straight & Narrow

BY G. THOMAS CURRAN JR.

How Much Diligence Is Due?

Defining an Attorney's Duty to Perform a Pre-Petition Inquiry

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With the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), it is more important than ever for us, as debtors' attorneys, to acknowledge the duties that we owe to our clients before filing a petition for bankruptcy relief. An attorney's duties of full disclosure and candor to the court are essential to maintaining the integrity of the bankruptcy system. Moreover, with the addition of 11 U.S.C. § 526(a)(2) (along with other pre-existing Bankruptcy Code provisions), a debtor's attorney who fails to disclose information on a petition or pleading risks civil penalties, attorneys' fees and costs, attorney disciplinary measures[1] or even criminal charges.[2]

The Bankruptcy Code has always emphasized an attorney's duty to truthfully disclose all known assets, liabilities and financial affairs in the debtor's schedules and pleadings. At least as early as the Bankruptcy Reform Act of 1978,[3] a debtor's attorney who signed a petition or other pleading certified that the attorney performed a reasonable investigation into the financial affairs of his or her client to ensure that the pleading was well grounded in fact.[4]

However, BAPCPA extended this duty through the enactment of 11 U.S.C. § 526(a)(2) to apply to any person who qualifies as a "debt relief agency,"[5] which aims to prevent abusive practices by bankruptcy professionals, as well as to ensure that all of a debtor's financial information is taken into account in administering his or her estate.[6] Although most debtors' attorneys make it a habit to review online court records, official records, property appraiser's reports and other available information, provisions like 11 U.S.C. §§ 526(a)(2) and 707(b)(4)(D), as well as Federal Rule of Bankruptcy Procedure 9011, may require additional probing prior to filing a bankruptcy petition.

The "Reasonable Inquiry" Standard under 11 U.S.C. § 526(a)(2)

Section 526(a)(2) of the Bankruptcy Code provides the following:

> A debt relief agency shall not ... make any statement, or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading.

The requirement that an attorney exercise reasonable care in determining the accuracy of the information contained in a debtor's petition and schedules is often referred to as the "reasonable inquiry" standard. Section 526(a)(2) makes the attorney or debt-relief agency liable to the client for erroneously omitting critical information without investigating the truth or falsity of the alleged facts. An attorney who fails to perform a reasonable inquiry can be subject to disgorgement of fees to the debtor and civil penalties, and can be required to pay the attorneys' fees and costs of either the debtor, the state or U.S. Trustee.[7]

In re Gutierrez: Application of a Traditional Negligence Standard

Since 2005, several courts have explored the scope of a debt-relief agency's duty to perform a reasonable inquiry under § 526. In *In re Gutierrez*, a debtor sought the full return of all fees paid to his attorney after alleging that the attorney failed to exercise reasonable care before filing his petition.[8] The debtor first met with the attorney on March 13, 2006. The attorney prepared the debtor's petition, schedules and statements, which disclosed a home owned by the debtor. After their first meeting, but before filing the petition, the debtor quit-claimed his interest in the home to his nonfiling spouse and recorded the deed. The debtor met with the attorney to file the petition almost two months after their first meeting, but the attorney did not ask whether any information had changed or become inaccurate since their last meeting, so the transfer was not disclosed.

The U.S. Bankruptcy Court for the Northern District of California held that the attorney did not violate 11 U.S.C. § 526(a)(2) by failing to ask whether the debtor's circumstances had changed prior to the filing.[9] The court applied a negligence standard, reasoning that the debtor would not have

1 Most states' rules regulating attorney conduct require an attorney to be candid with the court. *See, e.g.*, Model Rules of Prof'l. Conduct R. 3.3.
2 *See* 18 U.S.C. §§ 151-158.
3 S. Rep. No. 95-989 (1978).
4 *See, e.g.*, 11 U.S.C. § 707(b)(4)(C).
5 A "debt relief agency" includes any person who provides bankruptcy assistance to a consumer debtor for a fee, which generally includes attorneys. For a more complete discussion on whether attorneys are considered "debt relief agencies," *see Milavetz, Gallop & Milavetz PC v. U.S.*, 559 U.S. 229, 235-39 (2010).
6 *Id.* at 236 n.3.
7 11 U.S.C. § 526(c).
8 *In re Gutierrez*, 356 B.R. 496, 500 (Bankr. N.D. Cal. 2006).

told the attorney about the transfer even if the attorney had asked.[10] The debtor had more than one opportunity to tell the attorney about the transfer and still failed to do so. As a result, the debtor was not able to prove causation, a crucial element to any negligence claim.[11]

Comparing § 526(a)(2) to Rule 9011

Other courts have compared the reasonable-inquiry standard under § 526(a)(2) to the one set forth in Bankruptcy Rule 9011.[12] Rule 9011 similarly requires an attorney to perform an "inquiry reasonable under the circumstances" before signing or filing any petition or pleading. A party that violates Rule 9011 is subject to a fairly broad range of sanctions, including monetary and non-monetary sanctions, as well as attorneys' fees and costs.[13]

For example, in *In re Garrard*, a slip opinion from the U.S. Bankruptcy Court for the Northern District of Alabama, the court applied the Rule 9011 definition of "reasonable inquiry" to a violation of 11 U.S.C. § 526(a)(2).[14] In this case, an attorney's duty to perform a reasonable inquiry requires five things:

> (1) to explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) to ask probing and pertinent questions designed to elicit [such disclosure]; (3) to check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) to demand of the debtor full, complete, accurate, and honest disclosure ... before the attorney signs the petition; and (5) to seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.[15]

If an attorney fails to meet one of these requirements, he or she has breached the duty to perform a reasonable inquiry. In other words, an attorney cannot turn a blind eye to potential inconsistencies in the debtor's petition and absolve himself or herself from liability. He or she must take an active role in the debtor's case to ensure that the documents are complete, accurate and honest.

Courts in the First Circuit have implemented a similar five-factor test to evaluate violations of 11 U.S.C. § 707.[16] Like the test in *Garrard*, the First Circuit requires an attorney to advise the debtor of the importance of full disclosure; check for internal consistency throughout the petition, schedules, and statements; and promptly correct information that he or she discovers to be inaccurate. However, in *In re Withrow*, the court also required the attorney to employ "external verification tools," such as title records, court records, lien searches and tax transcripts, as long as the tools that were used were not overly costly or time-consuming for the attorney.[17]

The courts in *Gutierrez* and *Garrard* agreed that a negligence standard should apply to violations of § 526. *Gutierrez* applied the typical "but-for" test to address the issue of causation, which prompted the court to ask whether a more detailed inquiry by the attorney would have revealed the undisclosed information. *Garrard*, on the other hand, defined a "breach." Comparing an offending attorney's conduct to that of a reasonably competent attorney measures whether the attorney breached his duty of reasonable care. Based on the language of the statute and the prevailing case law, a court should only find that a violation of § 526 exists after it fully analyzes the claim under a traditional negligence standard. Although no court has explicitly stated this, it can be inferred from its application.

The "Reasonable Investigation" Standard under 11 U.S.C. § 707

The "reasonable inquiry" standard is often compared to the "reasonable investigation" standard under 11 U.S.C.

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9 Even though the court absolved the attorney of violations under 11 U.S.C. § 526, it ultimately ordered the disgorgement of fees due to violations of 11 U.S.C. §§ 527 and 528 for failure to provide required notices and a fully executed copy of the fee agreement. *Id.* at 506.

10 *Id.* at 501-02.

11 *See also Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 103 n.22 (2d Cir. 2010) (stating that violation of 11 U.S.C. § 526 is not based on strict liability, but instead requires culpable state of mind by showing either negligence or intent).

12 *See In re Casavalencia*, 389 B.R. 496 (Bankr. S.D. Fla. 2008); *In re Garrard*, Nos. 13-40418-JJR13, 13-40419-JJR13, 2013 WL 4009324 (Bankr. N.D. Ala. 2013) (applying same five-factor "reasonable inquiry" test to violations of 11 U.S.C. §§ 526 and 707, and Rule 9011).

13 Fed. R. Bankr. P. 9011(c)(2).

14 *Garrard*, 2013 WL 4009324, at *4.

15 *Id.* (quoting *In re Thomas*, 337 B.R. 879, 892 (Bankr. S.D. Tex. 2006).

16 *In re Withrow*, 391 B.R. 217, 228 (Bankr. D. Mass. 2008) (holding that attorney who failed to list six bank accounts on Schedule B and claim any exemptions on Schedule C was subject to sanctions for failing to perform reasonable investigation under 11 U.S.C. § 707(b)(4)(C) and (D)).

17 *Id.*

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§ 707(b)(4)(D).[18] Under § 707(b)(4)(D), an attorney who signs a petition certifies that he or she has no knowledge that the information contained in the client's petition is incorrect after performing an inquiry. Unlike § 526(a)(2), violations of § 707 usually result in the dismissal of the debtor's case. However, similar to § 526(c), if a debtor's attorney violates § 707(b), the court may also assess civil penalties and award attorneys' fees and costs.[19]

The Ninth Circuit noted this comparison in *In re Kayne*.[20] In *Kayne*, a debtor told her attorney prior to filing that she had filed a lawsuit against a third party to recover money that was owed under a promissory note. To make matters worse, the debtor provided the attorney with a binder of documents that included a copy of a settlement agreement on the note and a list of payments received by the debtor, which the attorney did not review. As a result, the attorney did not disclose the note on the Schedule B and failed to list payments received as income on the Schedule I. The attorney believed that the payoff on the note was approximately $7,000 (an amount that would have been protected by the debtor's exemptions), and he explained this to the chapter 7 panel trustee at the meeting of creditors. After reviewing the settlement agreement, however, the trustee discovered that there was actually $61,250 owed on the note. The attorney admitted that he should have conducted a more thorough investigation before filing the petition.

The Ninth Circuit Bankruptcy Appellate Panel held that the debtor's attorney did not conduct a reasonable investigation into the facts of the case prior to filing the petition.[21] The court applied the same "reasonable inquiry" standard to both violations of Rule 9011 and § 707(b)(4)(D). It reasoned that the "reasonable inquiry" standard is an objective one wherein the attorney's conduct should be compared to that of "a competent attorney admitted to practice before the involved court."[22] Because the attorney did not ask pertinent and probing questions or otherwise gather adequate information, the court imposed $20,000 in sanctions.

Other courts in the Ninth Circuit have looked favorably on the analysis in *Kayne*. In *In re Seare*, the U.S. Bankruptcy Court for the District of Nevada applied *Kayne*'s reasoning in holding that an attorney violated § 707(b)(4)(D) when he failed to investigate the dischargeability of a debt that arose from a judgment for fraud.[23] Even though the debtor's attorney filed the debtor's petition on an "emergency" basis to stop a garnishment, the court did not excuse him from compliance with § 707(b)(4)(D).[24] The attorney quickly reviewed the documents that the debtor provided to him prior to filing and made the incorrect determination that the debt underlying the garnishment would be dischargeable. The debtor did not have a copy of the judgment on the debt and therefore did not provide it to the attorney.

The court reasoned that if the attorney had reviewed the records on the court's PACER website and read the judgment prior to filing, he would have discovered that the debt was incurred due to the debtor's fraud upon the court and that the debt would be nondischargeable. The court concluded that an attorney cannot rely on the information that his or her client provides if it is clear that the information is "incomplete or inconsistent, or raises a 'red flag.'"[25] The existence of a judgment against the debtor should have alerted the attorney to the fact that a further inquiry was necessary. After that discovery, the attorney had an obligation to take an active role in the debtor's case and thoroughly review the judgment.

> **If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor.**

Conclusion

Although various courts have different ways of defining "reasonable inquiry," they are generally aligned when determining what constitutes a violation. The standard is an objective one: An attorney cannot defend himself or herself by claiming that he or she was subjectively ignorant to the murky facts of the debtor's case. Allowing such a defense would promote purposeful ignorance and result in many unwelcome surprises for unsuspecting debtors. Although not every circuit has specifically defined "reasonable inquiry" as it applies to § 526, the current trend suggests that an attorney should apply the Rule 9011 standard in the absence of such a definition.

As debtors' attorneys, we should always review relevant court records, online title and lien searches, tax transcripts, and other readily available documents. We have a clearly defined duty to ask probing questions that elicit honest and accurate answers, resolve internal and external inconsistencies by conducting a cost-effective investigation, and verify information provided by clients by requesting pertinent documents. If a debtor fails to provide certain requested documents or cannot explain inconsistencies in his schedules, the attorney can wait to file the case, refuse to file altogether, or refuse to represent the debtor. A brief and effective investigation before filing a petition can help prevent the potential costs of a violation of § 526 or Rule 9011. Even more importantly, it can facilitate the successful administration of a debtor's case. abi

18 The "reasonable investigation" language actually derives from § 707(b)(4)(D)'s sister statute, 11 U.S.C. § 707(b)(4)(C), which provides that an attorney's signature certifies that he or she "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion."
19 11 U.S.C. § 707(b)(4)(A) and (B).
20 453 B.R. 372 (B.A.P. 9th Cir. 2011).
21 *Id.* at 380.
22 *Id.* at 382 (quoting *Smyth v. City of Oakland (In re Brooks-Hamilton)*, 329 B.R. 270, 283 (B.A.P. 9th Cir. 2005)).
23 *In re Seare*, 493 B.R. 158 (Bankr. D. Nev. 2013).
24 *Id.* at 212.
25 *Id.*

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THE INITIAL CLIENT INTERVIEW: IS IT MORE THAN MEETS THE EYE?

A. What the Debtor Should Bring

The initial question is not what the debtor should bring to the initial consultation, but instead what information should the debtor provide to your office before you even meet with that individual. Your firm needs to do a complete conflict search before an attorney has any direct contact with the potential client. Presumably this goes without saying, but even when an attorney has a pure consumer practice, and does no creditor work, a comprehensive conflict search should be a prerequisite to any other contact with the potential client.

My firm charges for initial consultations and they are regularly scheduled for an hour, though they may take longer. Because the initial consultation is normally a substantive meeting and not used for the purpose of convincing the potential client to retain the firm, the client is asked to bring to the initial meeting any pertinent documentation which the client may want me to review. Actually, in many instances, my assistant will ask that the individual email us the documentation in advance. I have discovered that the initial meeting proceeds much smoother if I know prior what I need to review.

Most of the potential clients I see have specific and discrete concerns prompting them to meet with me. They are rarely individuals simply facing overwhelming credit card debt or similar obligations. I therefore request that the client feel free to bring in as much documentation as they so desire. If the person is being sued for a million dollars in a failed real estate transaction, I would normally like to see the lawsuit. Oftentimes, the few minutes I may spend in reviewing the different counts in the lawsuit alert me to potential complications with the case, including non-dischargeability issues. Separate and apart from what the client would like me to review or what I

have specifically requested because of concerns regarding potential complications, I am not a big fan of clients bringing miscellaneous and oftentimes superfluous documentation to the first meeting.

B. Disclosures

Not too many years ago many experienced bankruptcy practitioners were careful not to ask too many questions at the initial consultation. The basic premise behind the approach was that if you were careful about what you asked and therefore not aware of your client's concealments, you and your client would be better off in the future and awkward situations could be avoided.

Those days ended in 2005 when bankruptcy reform placed more of a duty on the attorney to investigate his client's financial affairs. However, even before the passage of the Reform Act, the practice of controlled disclosure was extremely precarious for a number of reasons.

First of all, from the onset, your client needs to be told in unequivocal terms that he is to reveal everything about his financial affairs as required under the Bankruptcy Code. Not doing so could subject your client to very serious ramifications, including a fine, denial of his discharge, and even incarceration in extreme circumstances. Unless such a strong message is sent to your client, your client may not understand the seriousness of his obligations. As importantly, if you as the lawyer of record had reason to believe that your client was not being forthright, you yourself can be liable under certain circumstances. Our job is difficult enough. Why make it any more difficult by creating exposure for yourself?

In many instances, if your client is caught, your client will probably turn on you as the lawyer and allege that either he had given you the information and you failed to include it or he did what he did with your specific consent. You cannot necessarily avoid your client advancing this claim, but you can minimize the chances by sending a strong message from the onset, both in writing and verbally, that full disclosure is mandatory.

Finally, by mandating full disclosure from the onset, you may discover that you really don't want to represent the individual sitting before you. Many years ago I was representing a young woman who begrudgingly began revealing to me certain assets she possessed which she believed she shouldn't have to list or was not required to do so. When she threatened to fire me if I did not go along with her desires, I quit. She went to a highly regarded debtor's attorney who had a reputation for not being as aggressive in his questioning and she filed the bankruptcy while concealing those interests. Years later I discovered while sitting on a panel on bankruptcy fraud that she had filed bankruptcy with the other lawyer, had intentionally concealed her interest in real estate, and upon being caught, ended up being sentenced to the harshest sanction ever meted out in recent Arizona history. The lawyer survived what occurred, but it was probably still embarrassing to him and, even though I don't know the details of exactly what occurred, I'm guessing that one of her defenses was that the lawyer knew full well what was going on. All of these complications can be avoided by not just requesting full disclosure, but by making it a specific condition of your retention from day one.

C. Must-Ask Questions for the Debtor

Because my firm represents individuals normally facing large amounts of oftentimes unusual debts, the questioning we utilize is untraditional.

In many instances, I actually test the potential client at the first conference by determining as quickly as possible if the client will be honest with me. For example, if I suspect that the client has a gambling problem and may have lost large sums of money at the casinos, I will ask the client in the middle of our exchange when the last time was that he went to a casino. I watch the non-verbal response, while listening to the verbal one.

If the client has expended an inordinate amount of money on credit cards within six months of bankruptcy and I have reason to believe that the client's monthly ordinary expenses would not explain the credit card use, I immediately begin questioning the client about non-necessary expenditures at the initial conference. I am not looking to torture the client or to make the client uncomfortable; I'm just trying to make sure that the client will be totally candid with me from the beginning. Many times a client may not at the initial conference want to talk about certain assets that that client may be hoping to not have to disclose. However, if the client has had large expenditures prior to bankruptcy, a high likelihood exists that the client may have accumulated some assets or otherwise engaged in activity that needs to be fully disclosed.

D. Is the Debtor the Best Source of Information?

A non-bankruptcy attorney may find this inquiry rather curious. Common sense dictates that the client would be the best source of procuring information regarding the debtor's financial affairs. Who than the actual individual you will be representing would know more about his individual assets, liabilities, and pre-bankruptcy transactions?

Curiously enough, sometimes the very client you are representing is not the best source for necessary information. That person may not be for three different reasons:

1. He simply doesn't have the information you may be seeking;
2. He does not understand what information you need for the filing; or
3. He is simply hoping he won't have to reveal certain information.

So what can you do to make sure that the filing is complete since material concealments or misrepresentations can result in your client's discharge being denied or revoked?

One of the easiest ways to procure additional support information is to have your client provide you with a recent credit report. In certain instances, your client may have forgotten about

certain debts or may not even realize that he is liable for them. The credit report will not only educate you about your client's financial affairs, but oftentimes be a reminder for your client who may be acting in good faith, but is simply forgetful. Remember, it is not unusual for an individual to want to forget as much as possible the obligations which may be causing him so much duress.

If your client may owe taxes, have your client go to the taxing authorities and procure his tax transcripts. When dealing with taxes, the filing and assessment dates are crucial and many clients simply don't recognize or understand the significance of those dates. Once again, your client may be dealing in good faith, but simply doesn't know any better.

My firm subscribes to an online search service, which requires the client's consent to utilize, but can be invaluable with complicated cases. In recent years, it has been helpful when clients don't even realize that they still have real estate in their name since many clients assume that once they quit making payments for an extended period of time, their property would have been foreclosed upon. The cost is minimal and clients should be very happy to have you utilize it just to be safe.

With very few exceptions, you need to check the County Recorder's Office and the Secretary of State because reviewing the source documentation can be crucial in many instances. I cannot tell you the number of ways that these types of searches can be beneficial since in recent years I have surprised clients when they discovered how many different LLCs and corporations their names may be associated with and how they may have been holding title to real estate and, finally, the presence of judgments they knew nothing about.

Finally, since the bankruptcy trustee will want copies of the underlying paperwork anyway, procure copies of all statements from any accounts your clients may have for at least six months pre-bankruptcy, including bank, brokerage, and retirement accounts. Also, review at least six months worth of credit card statements. I have also found it amusing how often clients have a resurgence of

memory when you ask them about the $5,000 purchase at the jewelry store two months before bankruptcy the day before Valentine's Day.

It is important to stress at this time that in most cases, you should not be concerned about having to use alternative sources of information because your client cannot be trusted; you just want to make sure that a client acting in "good faith" is protected. If, on the other hand, you are being forced to engage in all of this due diligence because your client is not willing to be forthright, it is time to end the relationship.

E. Retainer Agreement

Consumer bankruptcy lawyers charge in three different ways:

1. A fully earned retainer in which the parties agree on an amount and specified services are included;
2. An advanced deposit understanding in which the attorney simply charges an hourly rate against the advanced deposit; or
3. A combination of the above.

To some extent, how much and how lawyers charge are determined by market conditions as much as anything else. As the number of bankruptcy filings have plummeted in recent years, and consumer bankruptcy lawyers have become more competitive, I have seen a basic fully earned retainer amounts drop to below $1,000. Presumably, lawyers charging in the lower range are hoping that they can handle the case quickly and efficiently and won't run into any complications.

The greatest concern lawyers and their clients need to have regarding using advanced deposits is that in certain instances, an aggressive bankruptcy trustee can try to grab any part of the advanced deposit not expended prior to the bankruptcy filing. Until two years ago, my office always used advanced deposits, but have now started converting those advanced deposits to fully earned

retainers because some of the trustees tried to seize monies that were left on account when the case was filed. It is rather unfortunate that this firm had to start converting our fees to fully earned retainers because in the past, if the advanced deposit was not fully utilized, it would be turned over to the bankruptcy trustee. But, by using fully earned retainers, this possibility no longer exists.

A word of warning regarding the use of fully earned retainers with the option of charging clients if fees are incurred beyond the agreed upon amount.

I cannot stress enough the importance that instances in which additional fees can be incurred, that the practitioner from the onset fully discloses the relationship and when and how additional fees will be charged. Some of our judges have been very sensitive as to any such charges and in this situation "an ounce of prevention" is preferable to "a pound of cure."

You also have to be sensitive to the need to demonstrate that your fully earned retainer is reasonable. I have found that the Chapter 7 bankruptcy trustees will not object to your fees if you can show why your charges are higher than the norm. Be forewarned, though, that if you are charging a premium, your work product should be consistent with those fees.

Finally, and very importantly, if you engage in pre-petition representation for a client related to the ultimate bankruptcy filing, make sure to be as clear as possible in delineating the scope of that representation since simply stating an amount being charged without any such description can be misleading and lead to challenges to your fees.

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DETERMINING WHICH CHAPTER TO FILE: WHAT KEY QUESTIONS WILL TELL YOU

A. What does the Debtor want to Accomplish?

Almost all debtors have the same goal; debtors want to be relieved of their debt. However, from the first moment you start consulting with a potential debtor, you need to immediately determine why the debtor is really seeking by filing bankruptcy.

First of all, you will meet individuals who are willing to pay a reasonable amount of their debt, but can't pay it all. You need to ascertain from the onset if this is what your client is hoping to achieve.

Many clients are hoping to retain secured assets, but need to have their debt restructured. They may be trying to keep their residence or investment property, but you need to know from the very beginning.

Your client may be facing overwhelming tax obligations that will need to be addressed in the bankruptcy. Especially in the case of taxes, the form of bankruptcy can make a big difference as to the consequences to your client.

Your client may be facing obligations arising from a divorce and recognizing the disparate treatment of such obligations depending on the form of bankruptcy is crucial if you want to assist your client properly.

Your client may have engaged in certain conduct pre-petition which could lead to non-dischargeable claims and some simple strategizing as to which bankruptcy to file can make a major difference as to your client's ultimate financial future.

Finally, and very importantly, whether your client wants to keep non-exempt assets can make a crucial difference in which type of bankruptcy your client ultimately files.

B. Is All Property Exempt?

Interestingly enough, the question of whether the client has non-exempt property itself is usually not the crucial issue as to whether the client files for Chapter 7 or reorganization. Most of my higher end clients have non-exempt assets so the real issue becomes when the client weighs the cost and hassles of either trying to protect the assets or relinquishing them versus reorganizing, which one makes the most sense?

From the onset, clients have to be pragmatic regarding their non-exempt assets. If a client is trying to discharge hundreds of thousands of dollars of debt, but doesn't want to file for Chapter 7 because the client has a few thousand dollars of excess equity in a vehicle, that client needs to either be willing to engage in some pre-bankruptcy planning or face the consequences of filing for Chapter 7. Though Chapter 13 can be relatively straightforward and inexpensive, to put a client into Chapter 13 over a few thousand dollars of non-exempt assets rarely makes any sense. Or, forcing a client to proceed in Chapter 11 under similar circumstances is normally not justified.

I am not suggesting, though, that the presence of non-exempt assets never justifies a reorganization. Occasionally clients come along who have thought the matter through and can demonstrate why reorganizing is a superior option when they own non-exempt property. For example, if a client owns a rapidly appreciating asset and by quick action, the asset is valued at a relatively low amount for purposes of repayment through the reorganization Plan, reorganizing can make a lot of economic sense. However, this is rarely the case and as the lawyer for the client, you will need to make sure that before your client considers reorganizing because of the presence of non-exempt assets, the client has considered all aspects of the reorganization and has exhausted all planning options available. Especially in the case of personal property, for a client to reorganize

when that individual can probably buy back those assets for pennies on the dollar would be rather foolish.

C. Does the Debtor Qualify for Chapter 7 Based Upon Income?

The following is verbiage I provide almost all of my clients with when they first hire this firm regarding Chapter 7 eligibility.

An individual is not eligible for Chapter 7 relief unless:

1. Their income for the six months prior to bankruptcy filing is less than the median income for the same size household in Arizona, or

2. Their monthly "disposable income" (the amount of income left over per month after subtracting living expenses per modified IRS guidelines) is less than a minimal allowed amount (income is based on an average of the six months prior to filing), or

3. Their debts are not primarily "consumer debts."

With the exception of social security and certain other discrete benefits, most amounts are considered income, including inheritances and general retirement benefits. On the other hand, certain capital income, such as the proceeds from the sale of a house, may not be included in the definition of income.

These eligibility rules have many subtleties and nuances. Determining whether a person is eligible for Chapter 7 can be complicated and requires thorough financial information.

The timing of the bankruptcy becomes very important because in most instances, an individual not eligible for Chapter 7 relief will have to fund a Chapter 11 or 13 plan for five years. A Chapter 11 or 13 debtor will be allowed to pay

necessary expenses out of their income but must turn over all remaining income to creditors as part of a plan of reorganization. Furthermore, expenses are based upon certain IRS or other localized expense averages, and are designed to force reorganizing debtors to maintain a very basic lifestyle.

Therefore, it is very important that a substantial amount of thought is given to this issue before an individual files for bankruptcy because of the consequences of ending up in reorganization versus being able to liquidate under Chapter 7.

With one or two exceptions, Chapter 7 eligibility simply has not been an issue in our bankruptcy filings. I have found that the trustees simply don't have the stomach to challenge clients who may technically be eligible for Chapter 7, but really don't have enough extra income to make a substantial difference. Nine years after the 2004 Bankruptcy Reform Act, everyone has figured out that targeting the poor soul who earns a few extra thousand dollars a year is a waste of judicial time and resources.

On the other hand, be aware that in the case of high income debtors who have primarily non-consumer debt, your client can face a challenge that his case should be converted to a Chapter 11. It is still unclear whether a Court can force an individual to be compelled to repay creditors in a Chapter 11, but you want to avoid this battle if at all possible. Interestingly enough, most everyone agrees that forcing high income individuals to reorganize even when they have primarily non-consumer debt is probably in everyone's best interest, but the Bankruptcy Reform Act failed to address this specific scenario.

D. Is the Debtor Current on House and Vehicle Payments?

When housing prices plummeted in 2008 through 2010, very few individuals found themselves seeking bankruptcy in hopes of saving their homes. The major exception was when

individuals had multiple loans on their houses and they could avoid junior liens as long as the house was worth less than the amount owing on the first mortgage. In that case, seeking reorganization made sense since a debtor cannot avoid a voluntary junior lien in a Chapter 7.

Before I recommend a client proceed in reorganization because they are trying to keep their house, notwithstanding a mortgage default, I always have the client try to work out a repayment agreement with the lender. Most lenders don't want the home back and will cooperate with your client once your client presents a realistic repayment plan. Furthermore, a variety of governmental backed or endorsed programs have also provided clients with avenues short of reorganization to address any deficiency.

Now that home prices are recovering, I have clients who are trying to retain their homes even though they have fallen behind. Obviously, in situations in which the client is facing the loss of the property and an uncooperative lender, reorganization is the superior choice since in a reorganization, you can compel a lender to wait over a reasonable period of time for the cure payments. However, it is very important that your client be aware of his obligation to keep the post-petition payment current as a condition of the reorganization.

A word of caution at this time concerning using a reorganization to buy your client time when your client really doesn't have any interest or the wherewithal to cure the default or keep the house.

This practitioner fully understands that many lawyers earn substantial revenue by devising strategies which allowed individuals to stay in their homes for months or even years even though those individuals really had no ability to ever make the payments on their houses. If an attorney charged the individual $5,000, and in the interim that person could stay in the house with a $2,500 a month payment for a year, the numbers made economic sense. Consequently, many individuals utilized this tactic.

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My only comment in this regard is to remember that as an officer of the Court, you need to make sure that you are forthright in your dealings with the Bankruptcy Court system, while protecting your client as much as possible and practical.

In determining which bankruptcy to select depending upon your client's status on his car loans, once again I have found that normally a reorganization can be avoided if the client commits to a repayment plan on the vehicle and then files for Chapter 7. Most lenders don't want the vehicle back, especially if the debtor is being otherwise discharged on any shortfall.

If your client has no choice but to seek reorganization relief so as to avoid the repossession of the vehicle, remember all the restrictions as to when the loan can be modified based on the age of the loan and remember the rules about adequate protection, etc.

E. Does the Debtor Owe Taxes or Have an IRS Lien?

The following is language which is included in letters sent to clients that owe any taxes at all. Separate and apart from this warning, it is absolutely crucial that you have your client procure for you a copy of the transcript from the appropriate taxing authority so you have a full grasp of the taxes that are owed.

> If more than three years have passed since a tax return was due for a certain tax year, that tax is now dischargeable so long as the tax return was filed on time. Consequently, 2009 and prior tax year obligations can now be discharged, while more recent ones cannot.
>
> According to the two-year rule, you cannot discharge taxes if less than two years have passed since a late return was filed.
>
> Certain taxes are not dischargeable at all, so long as they are still legally enforceable, such as withholding taxes, etc.

You can normally discharge the penalties that have accrued on taxes in both Chapter 7s and Chapter 13s. You cannot discharge pre-petition interest that has accrued on taxes unless the tax itself is dischargeable.

You cannot discharge taxes that have been assessed within 240 days of the bankruptcy filing date.

Regardless of whether the tax is otherwise dischargeable, if a tax lien has been filed, you have to pay the taxing authority at least an amount equivalent to the value of the property that is encumbered by the lien.

Finally, if you file a Chapter 13, so long as you pay back the non-dischargeable taxes, you do not have to pay post-petition interest and penalties on those taxes unless the tax is otherwise secured.

As you can see, the rules in regards to taxes are fairly complicated and each case needs to be analyzed separately.

The basic rules I follow with tax cases are straightforward.

First of all, if a client only owes a few thousand dollars or less, I never put them in reorganization, but instead have them negotiate a settlement with the taxing authority outside of bankruptcy.

If the client owes otherwise dischargeable taxes, but is facing a small lien on some assets, I once again do not put them in reorganization and have them simply negotiate a settlement with the taxing authorities through a Chapter 7.

On the other hand, when the client is facing a relatively large lien which the client otherwise cannot pay except over time or is facing a substantial amount of non-dischargeable taxes, then I have

the client consider either a Chapter 11 or 13. As a general rule, Chapter 13 is preferable because with the exception of liened taxes, the taxing authorities cannot charge interest in a Chapter 13, whereas the taxing authority will be able to at the statutory rate in a Chapter 11.

The last issue your client will normally face is the obligation to pay back the taxes within five (5) years from the order of relief. This is a rather absolute rule that the IRS can use to its benefit, but I have been able to occasionally negotiate around this deadline in certain instances.

F. Judicial Lien or Domestic Support Obligation?

When dealing with a judicial lien on the client's house, a client has the same rights to avoid that lien in a Chapter 7 or a reorganization. Therefore, the presence of an avoidable judicial lien which impairs the client's homestead is not a factor in determining whether the client will normally file for reorganization or Chapter 7.

When a client has judicial liens on other property that the client may want to keep, then normally the client will be proceeding under reorganization and requesting an avoidance of the judicial lien if placed within the preference period. Interestingly enough, since only the trustee has the power to avoid the judicial lien in a Chapter 7 except one that impairs the debtor's homestead, you cannot avoid a judicial lien on investment property even if it is preferential. The trustee has to do so and unless there is a benefit for the bankruptcy estate, the trustee will not take that step.

Remember, once a judicial lien has attached to the property beyond the preference period, with the exception of liens which impair your homestead exemption, the lien is not avoidable.

Deciding which type of bankruptcy to file because of outstanding domestic support obligations is a very complex one. If your client is facing a rather vindictive or aggressive ex-spouse on a past due support obligation, Chapter 7 will provide little relief because the stay has limited impact on those types of claims. However, a reorganization will provide relief to your client who

wants to pay the past due support back over time and will not be able to cure it quick enough after filing for Chapter 7.

However, if your client is facing an indemnification or property settlement obligation, then considering which form of bankruptcy to file can have a crucial impact on your client's obligations to the ex-spouse. For reasons that are still not clear to this practitioner, Chapter 13 allows your client to discharge obligations under 11 U.S.C. § 523(a)(15), which include both indemnification and property settlement obligations. Though your client could still face a good faith challenge for filing for Chapter 13 just to discharge such a responsibility, it is a very powerful arrow in your quiver, especially when negotiating on behalf of your client with an ex-spouse. The only caveat I tell clients considering this strategy is to make sure that your client really needs the relief and has acted in good faith during the course of his dealings with the ex-spouse. Negotiating a divorce settlement with the intention of then filing for relief under Chapter 13 specifically to alleviate this obligation can lead to not just a bad faith argument in Bankruptcy Court, but post-divorce relief in State Court under the *Britt* doctrine.

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LEGAL AID CENTER 1958
of Southern Nevada

Bankruptcy
Client Intake Packet

To apply for legal aid assistance through the *Pro Bono* Project of the Legal Aid Center of Southern Nevada, you will need to visit the Legal Aid Center office for an interview during the following walk-in hours:

Weekday	Morning Walk-in Hours	Afternoon Walk-in Hours
Tuesday	8:30 am – 11:00 am	1:00 pm – 4:00 pm
Wednesday	8:30 am – 11:00 am	1:00 pm – 4:00 pm

Due to the high demand at this time, please understand that we will make every effort to assist you during walk-in hours. However, we reserve the right to set up an appointment for another date and time in the event we are unable to meet with you during walk-in hours.

To begin the intake process you must bring the following documents to your interview.

√	Item #	Document Description
	1.	State photo ID – Driver's License, military ID, etc.
	2.	Copy of Social Security Card for everyone filing for bankruptcy.
	3.	Income verification - paystubs, etc. for the past six months. *If you are receiving Unemployment income, Social Security Income or Disability, please provide a letter of award indicating how much you receive.*
	4.	An itemized list of all debts including creditor's name, address, account # and balance (pages 1-4). *Please don't bring a bag/box/carton of unopened bills or your meeting will be rescheduled.*
	5.	Bank statements for the past three months (checking, savings and/or investment account).

To complete your intake, you will be required to provide Legal Aid Center with these remaining documents. You are encouraged to bring these documents to your first interview to expedite the process. ALL of the documents and information are required to be considered for pro bono placement.

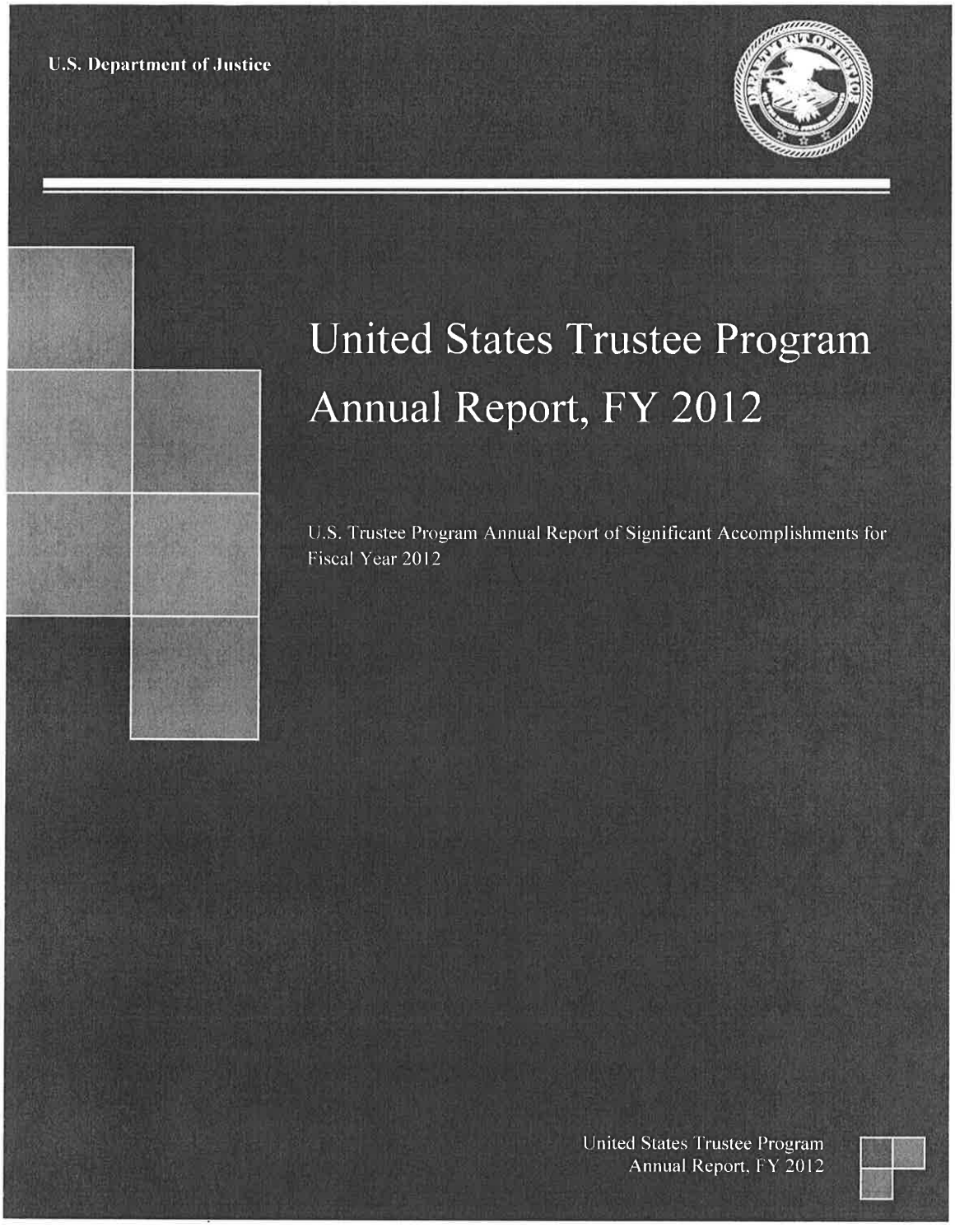
√	Item #	Document Description
	6.	Credit Counseling Certificate.
	7.	Two out of three credit reports. *www.AnnualCreditReport.com provides free reports.*
	8.	A copy of your tax return or tax transcripts for each of the past four years. *See the order form (4506-T) in the bankruptcy class manual. If you were not required to file taxes, provide a copy of transcripts and a letter from the IRS stating you were not required to file.*
	9.	A copy of a divorce decree if issued within the last eight years.
	10.	Any judgments or pending complaints against you.

Please be advised that you will meet with a Bankruptcy Intake Advocate -- not an attorney. The Advocate will interview you and collect all of the pertinent information and documents which will assist Legal Aid Center in determining whether free legal aid can be provided to file your bankruptcy case.

This is only an interview. You will not receive legal advice. Pro Bono assistance is not guaranteed. Legal Aid Center is not liable for delays caused by scheduling and does not guarantee any specific outcome in your matter.

725 E. Charleston Blvd., Las Vegas, NV 89104
www.lacsn.org

June 2014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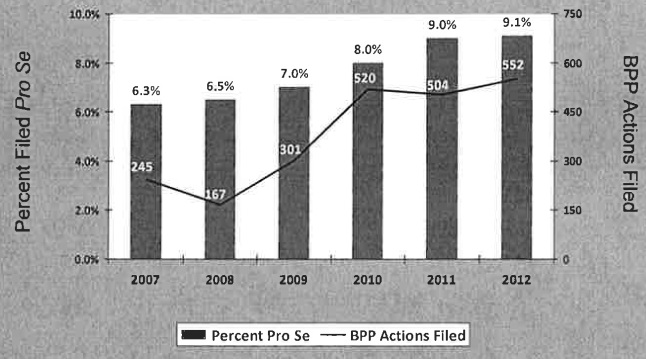
Trends–*Pro Se* Filings and Actions against Bankruptcy Petition Preparers

The percentage of consumer debtors filing *pro se*–without an attorney–has risen steadily in recent years. *Pro se* debtors may pay bankruptcy petition preparers to draft their bankruptcy documents. Not all BPPs comply with the Bankruptcy Code's restrictions on their activities, and the number of USTP actions against bankruptcy petition preparers has also increased.

Figure 3.1. Trends–*Pro Se* Filings and USTP Actions against BPPs, FY 2007-2012



Source: Executive Office for U.S. Trustees

Improper Conduct by Attorneys

U.S. Trustees take action against attorneys who engage in unethical conduct or provide substandard representation. For example, the U.S. Trustee may ask the court to order the attorney to disgorge fees; refer the matter to a state court disciplinary board or other regulatory body; and seek other appropriate sanctions. U.S. Trustees also enforce sections 526, 527, and 528 of the Bankruptcy Code, which govern debt relief agencies. Among other things, those provisions require attorneys to make certain disclosures to clients who are consumer debtors.

Chapter 3. Civil Enforcement

Table 3.4. Attorney Fee Disgorgements under § 329

Actions & Inquiries	FY 2012
Actions Filed	592
Actions Decided	519
Actions Success Rate	97.1%
Inquiries	1,328
Amount Disgorged	$4,518,489

Source: Executive Office for U.S. Trustees

Table 3.5. Other Attorney Misconduct

Actions & Inquiries	FY 2012
Motions for Sanctions Filed	164
Motions for Sanctions Decided	152
Motions for Sanctions Success Rate	97.4%
Inquiries	307
Sanctions	$198,507
Referrals to State Bar	72
Disciplinary Rulings Issued	67

Source: Executive Office for U.S. Trustees

The Bankruptcy Court for the Central District of California imposed sanctions totaling $27,500 against an attorney and a bankruptcy petition preparer who operated a foreclosure rescue scheme. Moreover, the attorney was suspended from all bankruptcy practice in the district for at least five years and the petition preparer was enjoined from future violations of section 110. The Woodland Hills office sought disgorgement and sanctions against the two individuals in 63 cases, demonstrating that they transferred partial interests in real properties to the names of sham corporations and then, solely to delay foreclosures, filed at least 82 bankruptcy petitions in the names of the corporations.

The offices in Milwaukee and Madison, Wisconsin, and Columbus, Ohio, worked together to obtain the disgorgement of more than $19,000 in attorneys' fees from a New York-based debt

settlement law firm and its principal. The U.S. Trustees charged that the firm front-loaded high legal fees before setting aside sufficient money for settlements with creditors. The U.S. Trustees filed motions in five cases, alleging that the firm collected unreasonable and excessive fees for pre-bankruptcy debt settlement representation.

Two attorneys in the Southern District of Texas entered into an agreed order with the Houston office in connection with their representation of debtors in nine cases. One of the attorneys was not admitted to practice before the federal courts. In an undisclosed arrangement, he contracted to use the other attorney's name and electronic case filing number in the cases, in exchange for paying the other attorney half the fees. The second attorney appeared to be the attorney of record in the cases, but he never met the debtors and knew nothing about the cases or bankruptcy law. Under the agreed order, the attorneys were barred from acting as debt relief agencies under section 526 and would return all attorneys' fees received.

Debtor Identification Issues

U.S. Trustees take action against debtors who intentionally use false names or Social Security numbers on bankruptcy documents. False filings may occur in an effort to avoid Bankruptcy Code restrictions on refiling bankruptcy within a particular time period, or to discharge debts that were falsely incurred using the identity of another individual. U.S. Trustees also assist, under certain circumstances, when an individual has a bankruptcy case falsely filed in his or her name. Assistance may include helping the individual to obtain a court order that expunges the bankruptcy case from the court record or asking the court to make a finding that the individual did not file the case.

Table 3.6. Debtor Identification

Actions & Inquiries	FY 2012
Actions Filed	35
Actions Decided	7
Actions Success Rate	100.0%
Problems Identified	1,752
Petitions Amended or Form B21 (Statement of Social Security Number) Filed	1,526

Source: Executive Office for U.S. Trustees

Granting a motion filed by the Baltimore office, the Bankruptcy Court for the District of Maryland struck from the court record all references to a Social Security number used in a false filing. The true holder of the Social Security number learned that a bankruptcy case had been filed

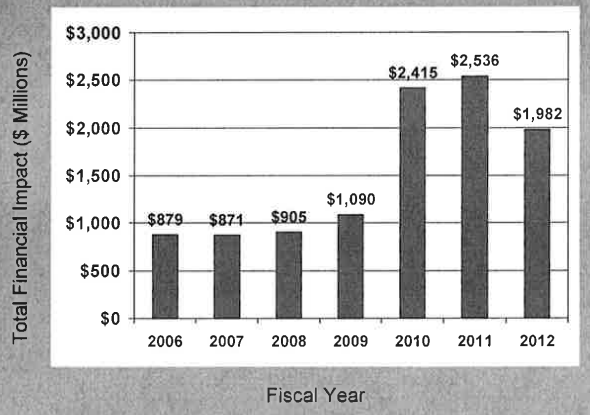
Chapter 3. Civil Enforcement

in her name when a creditor declined to accept her payments in order to avoid violating the Bankruptcy Code. The person who actually filed the bankruptcy case had used the victim's Social Security number for several years to obtain loans and open bank accounts.

Trends–Total Financial Impact of USTP Actions and Inquiries

The USTP tracks the financial impact of various USTP actions and inquiries. Over the last three years, the total impact was almost $7 billion. More than 99 percent of this amount consisted of debts not discharged in chapter 7 or funds potentially available for distribution to creditors. The remainder consisted of disgorgements returned to debtors or fines paid to the U.S. Treasury.

Figure 3.2. Trends–Total Financial Impact of USTP Civil Enforcement Actions and Inquiries, FY 2006-2012



Note: This chart does not include the $25 billion National Mortgage Settlement.
Source: Executive Office for U.S. Trustees

Enforcement Against Abusive Conduct by Debtors

The Program investigates and takes action against debtors who have a demonstrated ability to pay a portion of their debts out of disposable income, or who conceal their assets, file incomplete or inaccurate financial information, or otherwise fail to satisfy their obligations under the Bankruptcy Code. In addition, the Program takes action when debtors violate restrictions on refiling bankruptcy within particular time periods or fail to complete mandatory pre-bankruptcy credit counseling or post-bankruptcy debtor education. The most common of these actions are objections to a debtor's bankruptcy discharge and motions to dismiss a debtor's bankruptcy case.

Chapter 3. Civil Enforcement

Denial of Debtor's Discharge

U.S. Trustees may file complaints to deny or revoke a bankruptcy discharge under 11 U.S.C. § 727 if the debtor engaged in improper conduct such as concealing assets, withholding information on his or her bankruptcy papers, destroying property to hinder or defraud a creditor or trustee, knowingly making a false oath, or refusing to obey a court order. The debtor may voluntarily waive discharge under the same statutory section.

Table 3.7. Denial or Revocation of Discharge under § 727

Actions & Inquiries	FY 2012
Actions Filed	1,717
Actions Decided	1,554
Actions Success Rate	98.7%
Inquiries	2,176
Amount Not Discharged (General Unsecured Debt Listed by Debtor on Schedule F)	$1,432,140,001

Source: Executive Office for U.S. Trustees

Ruling for the Dallas office after a two-day trial, the Bankruptcy Court for the Northern District of Texas denied a debtor couple's chapter 7 discharge of more than $5 million in unsecured debt. An investigation revealed the husband previously owned a car dealership, personally guaranteed the debt on approximately 70 vehicles that were sold without paying back the lender, and was unable to explain what happened to the vehicles. The debtors also failed to disclose income, interests in businesses, and debts owed to the State of Texas for violations of laws governing the sales of used vehicles.

After a two-day trial on a complaint filed by the Eugene office, the Bankruptcy Court for the District of Oregon revoked a debtor's chapter 7 discharge of almost $3.7 million in unsecured debt. The discharge revocation was based on the debtor's failure to disclose an interest in real property, misrepresentation of the value of some of his business interests, and failure to disclose certain accounts receivable.

The Bankruptcy Court for the Eastern District of Michigan entered a default judgment denying a debtor's chapter 7 discharge of $509,524 in unsecured debt after the Detroit office objected to his discharge. The U.S. Trustee's investigation revealed the debtor did not disclose a

second home and $400,000 in pre-petition income, undervalued approximately $2.5 million in stock holdings and $300,000 in household furnishings, and failed to explain the disposition of the proceeds from his sale of a Lamborghini automobile.

Dismissal of Case for Abuse

The U.S. Trustee may file a motion to dismiss under 11 U.S.C. § 707(b) if the debtor's chapter 7 filing is presumed abusive under the means test because the debtor has sufficient monthly disposable income to make payments to creditors, and the debtor demonstrates no special circumstances to rebut that presumption. In some cases where abuse is presumed under the statute, the U.S. Trustee may decline to seek dismissal if the debtor rebuts the presumption by demonstrating that dismissal is not appropriate due to job loss or other factors. In addition, even if the filing is not presumed abusive, the U.S. Trustee may seek dismissal under section 707(b) if the case would be abusive considering the totality of the circumstances of the debtor's financial situation, including the debtor's ability to repay, or under a bad faith analysis.

In FY 2012, approximately 13 percent of chapter 7 debtors had income above their respective states' medians. Of the cases filed by debtors with income above the state median, 6 percent were presumed abusive under the means test. After considering a debtor's special circumstances, however, the Program exercised its statutory discretion to decline to seek dismissal in about 60 percent of the cases presumed abusive.

Table 3.8. Dismissal for Abuse under § 707(b)

Actions & Inquiries	FY 2012
Actions Filed	2,743
Actions Decided	2,201
Actions Success Rate	98.9%
Inquiries	15,002
Amount Not Discharged (General Unsecured Debt Listed by Debtor on Schedule F)	$375,334,397

Source: Executive Office for U.S. Trustees

A debtor in the Central District of California was prevented from discharging $929,000 in unsecured debt after he agreed to dismissal of his case with an 18-month prohibition against re-filing bankruptcy. The Los Angeles office pursued the dismissal for bad faith. The debtor

disclosed minimal income from the years before he filed bankruptcy, but he incurred more than $900,000 in gambling debt at high-end casinos and reached the credit limits on all of his credit cards by purchasing fine wine and luxury goods.

The Bankruptcy Court for the Northern District of Oklahoma dismissed the case of a medical doctor who sought to discharge $552,690 in unsecured debt. The Tulsa office filed a motion to dismiss based on the debtor's monthly income of more than $14,000 and her excessive expenses for clothes, travel, gourmet items, and other goods and services.

Debtor Audits

The Program is authorized by law to contract with independent firms to perform audits of consumer chapter 7 and chapter 13 cases. The audits are designed to provide baseline data to gauge the magnitude of fraud, abuse, and error in the bankruptcy system; to assist the Program in identifying cases of fraud, abuse, and error; and to enhance deterrence.

The Program designates for random audit a specified uniform percentage of consumer bankruptcy cases within each judicial district, and designates for exception audit additional cases in which the debtor's income or expenses deviate from a statistical norm of the district where the case is filed. In a case designated for audit, the debtor is required to cooperate with the audit firm, and a debtor's discharge may be revoked for failure to explain either a lack of cooperation with the audit firm or a material misstatement reported by the audit firm. For budgetary reasons, the USTP suspended the designation of cases for audit in FY 2012 until January 2012.

Ruling for the Jackson office, the Bankruptcy Court for the Southern District of Mississippi denied a couple's chapter 7 discharge of $245,937 in unsecured debt, based on items of interest uncovered during a debtor audit. The audit revealed that an outboard boat and jet ski registered to the debtor husband were not listed on the debtors' bankruptcy documents. The debtors amended their schedules after the U.S. Trustee made inquiries, but a subsequent examination under oath revealed another jet ski and a pontoon boat.

Annually, the Attorney General is required to make a public report of the audit results, including the number of material misstatements in each judicial district. More information regarding debtor audits can be found in the report, which is posted on the Program's Internet site at www.justice.gov/ust/eo/public_affairs/reports_studies/index.htm.

PRACTICE TIPS FOR EFFECTIVE ADVOCACY

Hon. Bruce T. Beesley

United States Bankruptcy Court

District of Nevada

1. Prepare Filings Which are Concise, Persuasive, Supported by Admissible Evidence, and Appropriate

- Understand the elements of your motion
- Begin with a clear, concise statement of the relief requested and why merited
- On a routine motion (e.g. lift stay) the court does not need five pages of generic cites on the automatic stay. Get to the point.
- Charts and diagrams may be helpful but make sure that they are simple and legible.
- Provide competent evidence to support factual statements
- Analyze legal authority, applying the facts to the law
- Controlling precedent must be cited (distinguish if possible)
- Avoid run on sentences, string cites, footnotes (except for citations)
- Don't be repetitive (or redundant, or keep saying the same thing over and over)
- Consider Cost/Benefit of Filing
- Attempt resolution of part or all of the issues (early and often)
- Don't file for improper purpose (such as filing a summary judgment motion to "educate" the judge) although education of the judge can be a factor if the motion has independent merit.
- Be professional, not condescending or snippy, in your arguments
- Make sure that filings are properly served and in compliance with any procedural rules

2. Argument is a Time to Persuade the Judge, Not Argue With the Judge

- Assume that the court has read your papers unless you are aware that the particular judge doesn't always read the papers. Some courts are prepared and some aren't.
- Utilize oral argument as an opportunity to dialog with the court, addressing any areas of concerns and fleshing out facts and legal arguments which may tip the decision in your favor

- Pay attention to the judge's reactions-both verbal and non-verbal. If the judge isn't paying attention (e.g. shuffling papers or looking at his computer screen) stop talking until the judge is either no longer distracted or tells you to continue.
- Be familiar with the facts and the law and how to fit the two together
- Know when to hold 'em and know when to fold'em - concessions may be required, and helpful, particular when not your strongest (or hopefully key) arguments.
- Know how to respectfully stand firm when necessary
- Be respectful of the court, opposing counsel, and the parties but don't be intimidated by the court or opposing counsel.
- Don't over object to questions. Sometimes you may have a legitimate technical objection but sustaining the objection doesn't really help your case.
- Be proficient in the use of technology, but be prepared with a back up plan. If using the Elmo projector, make sure the material is readable from the bench. Technology is most effective when used sparingly.
- Do no express displeasure with the court's ruling.

3. Do the Preparation Necessary to Expedite Presentation of Evidence

- Prepare your questions and witnesses before the hearing.
- Focus your questions on some aspect of what you are trying to prove.
- Be courteous to witnesses.
- Prepare exhibits and demonstrative exhibits well in advance-and review them to make sure they are legible and complete.
- Only introduce exhibits that have direct bearing on what is being heard.
- Meet with opposing counsel to eliminate duplicates and agree on admission whenever possible
- Always numbering all binder pages consecutively
- Do not print the exhibits on both sides of the paper.
- Prepare sufficient exhibit binders for all parties. At a minimum, exhibit binders should be provided for the witness, opposing parties, and the judge. The court should not have to make copies of your exhibits for you.
- Follow court procedures for designations, objections to designations, use, and presence of originals of depositions. Technology is very useful in connection with presentation of deposition testimony (ONLY IF THE COURT CAN READ IT WHERE IT IS PROJECTED), particularly for impeachment purposes.
- Do not underestimate the importance of opening statement but don't let the hearing get off

track if you really need to present live witness testimony.

- Remember that court is not necessarily familiar with names and timeline, provide charts whenever possible to assist the court in following the evidence.
- Present direct in a logical manner and only ask questions that are necessary to present your case. Ask simple questions.
- Don't lead the witness on direct examination.
- Know how to (and remember to) qualify expert
- Know how to introduce a business record.
- Present cross designed to illustrate true issues and errors (not to quibble). Be nice to the opposing witness.
- BRING ALL OF THE NECESSARY AND APPROPRIATE WITNESSES
- Consider preparing draft findings of fact and conclusions of law, and note which witnesses/exhibits establish the necessary proof for each fact Some courts require proposed findings and conclusions.

4. Courtroom Decorum

- Appear for hearings on time
- Be appropriately attired for court appearances
- Have witnesses appear on time and in appropriately attired (not dressed like they just returned from Burning Man)
- Be respectful to courtroom, clerk and chambers staff (possible repercussions due to lack of civility)
- Refrain from ex parte communication with courtroom staff, judicial assistant and law clerks