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COUNSELING CONSUMER DEBTORS TO MAKE THEIR OWN INFORMED CHOICES—A QUESTION OF PROFESSIONAL RESPONSIBILITY

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Introduction

Lamenting the lack of financial rewards to debtors from high percentage chapter 13 plans, a chapter 13 trustee has written:

Creditors benefit when a debtor completes a 100% chapter 13 plan, but there is little recognizable benefit for the debtor upon successful completion of a 100% chapter 13 plan. To complete a 100% plan, the debtor must struggle in committing all of his disposable income for the full repayment of creditors. Frequently, if the debtor had chosen chapter 7 bankruptcy, he would be on his way to re−establishing credit within a year or two of the case being discharged.

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When a debtor goes to an attorney seeking advice regarding bankruptcy alternatives, the debtor relies on the unbiased evaluation of his particular circumstances by counsel. As part of that review the attorney is obligated to fully disclose the benefits and the disadvantages of pursuing either a chapter 7 or a chapter 13 bankruptcy. How can an attorney advise a client to complete a 100% plan when there is no benefit given current credit reporting practices and given current credit grantor attitudes? [*FN:* David M. Howe, How Can Debtors be Motivated to Complete 100 % chapter 13 Plans , chapter 13 Trustee Messenger, Southern District of Ohio, Eastern Division (publication of office of chapter 13 Trustee Frank M. Pees), Feb. 1996, p. 1. See generally Teresa A. Sullivan et al., As We Forgive Our Debtors 231−52 (1989) (discussing differences between chapter 7 and chapter 13) ; see also infra Part III. (concerning how to counsel debtors about chapter choice).]

chapter 13 Trustee David Howe's analysis is fundamentally sound. [*FN:* See William C. Whitford, Has the Time Come to Repeal chapter 13? , 65 Ind. L.J. 85, 92−93 (1989) (discussing lack of benefits of and high failure rates in chapter 13) [hereinafter Whitford I]. Although Mr. Howe is accurate in stating that 100% plans are not now financially beneficial to debtors, he suggests that changes in credit reporting and loan granting procedures could make these plans more beneficial. See supra note 1. Repaying substantial debt, however, to improve ability to receive credit in the future is unlikely to benefit a debtor financially as much as discharging that debt and starting to save. See William C. Whitford, The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy , 68 Am. Bankr. L. J. 397, 414 n.55 (1994) (stating it is no longer common belief that chapter 13 is better way to protect credit rating) [hereinafter Whitford II].] Yet a number of lawyers regularly put many clients into high repayment chapter 13 plans. [FN: See Whitford II, supra note 2, at 415 (concluding that "too many debtors are being steered into chapter 13 cases and especially high payment chapter 13 plans"); id . at 405 n.40. 410−11 (noting that in 1993 survey of chapter 13 bankruptcy trustees, reports of percentage of plans proposing 100% payouts varied from region to region from high of 52% to low of 6%, with average of 28% full payout plans); Jean Braucher, Lawyers and Consumers Bankruptcy: One Code, Many Cultures, 67 Am Bankr. L. J . 501, 519 (1993) (describing use of chapter 13 by high−volume and low−volume bankruptcy attorneys); Sullivan *et al.* , supra note 1 at 36, 44 n.19 (1989) (noting that 36% of chapter 13 debtors in this three−state study filed full repayment plans, and that average repayment plan was for 55%); id . at 339−40 (describing chapter 13 as "a bill of goods" for many debtors and questioning "formal and informal restructuring of the bankruptcy system to channel people into chapter 13.").] While studying lawyers' counseling behavior in consumer bankruptcy practice, I interviewed a number of lawyers who justified giving this kind of advice in moral terms. [FN: See Braucher, supra note 3, at 562−65 (noting that lawyers who do the most chapter 13 work are more likely to emphasize that clients want to do what is morally right); Whitford II, supra note 2, at 413 (noting that "many people believe that debtors are better off if they repay as much of their debt as possible, because it is the moral thing to do").] In addition, some of these lawyers made clear that they were imposing their own moral views on their clients, while others admitted that they encourage chapter 13 out of self−interest. [*FN:* See infra notes 35−69, and accompanying text (discussing conflict for lawyer between serving lawyer's own financial interests and doing what is best for debtor clients); Braucher, supra note 3, at 546−47, 550−51 (noting that chapter 13 practice is generally more profitable than chapter 7); Whitford I, supra note 2, at 91 (stating that it is in attorney's financial self−interest to "steer" clients into one chapter because doing so promotes standardization of practice, which, in turn, leads to greater efficiency and profits).]

If allowed to make their own informed decisions, consumer debtors are likely to be motivated, at least in part, by moral and social concerns. [FN: See Whitford I, supra note 2, at 90 (noting that debt repayment involves "deeply felt moral considerations"); Whitford II, supra note 2, at 401 (indicating that many debtors have ethical reservations about obtaining relief from debts for which they have no defense). Chapter 13 addresses these concerns by providing debtors the satisfaction of repaying at least some portion of their debts. See H.R. Rep. No . 95−595, at 118, reprinted in 1978 U.S.C.C.A.N. 5963, 6079 (1977); S. R ep. No. 95−989 at 13 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5799; see also Ravenot v. Rimgale (In re Rimgale), 669 F.2d 426, 427 (7th Cir. 1982) (discussing chapter 13 debtors' avoidance of stigma of straight bankruptcy).] They will worry about doing the right thing and will consider how their experiences and choices fit into the social institution of consumer credit. Lawyers have a professional responsibility to explore both financial and social concerns with clients. [*FN:* See M odel Rules of Professional Conduct Rule 1.4(b) (1983) (requiring lawyers to explain matters sufficiently to allow clients to make informed decisions); id . Rule 2.1 (permitting lawyers to refer to other relevant, albeit "nonlegal, considerations, such as moral, economic, social, or political factors."). Some commentators have expanded this list of nonlegal considerations to include psychological ramifications, while noting that lawyers are particularly ill−equipped to deal with such ramifications. See David A. Binder et al., Lawyers as Counselors 8−9, 16−19, 407 (1991); David A. Binder & Susan C. Price, Legal Interviewing and Counseling: A Client Centered Approach 168−69 (1977) (advocating discussion of possible consequences or concerns with client); Serena Stier , R eforming Legal Skills: Relational Lawyering, 42 J. Legal Educ. 303, 303 (1992) (commenting on feasibility of "client−centered" counseling). Although a lawyer is not required to deal with nonlegal factors, because these may "decisively influence how the law will be applied," lawyers should refer to such factors when purely technical advice would be inadequate. See Model Rules of Professional Conduct Rule 2.1 cmt. [2] (1983); Nancy B. Rapoport, Seeing the Forest and the Trees: The Proper Role of the Bankruptcy Attorney , 70 Ind. L.J. 783, 789 (noting that as counselor, bankruptcy attorney has obligation to explain to clients possible legal and nonlegal consequences and ramifications of cases).] However, not all social considerations favor high percentage chapter 13 plans. [*FN:* See infra Part III.C.4. (discussing social issues associated with chapter 13).]

At a minimum, a lawyer for consumer debtors should permit clients to separate a sense of moral obligation from the choice of a legal option. For example, debtors with a strong sense of obligation to repay all their debts are free to try to do so after getting a chapter 7 discharge or after completing a low percentage plan in chapter 13. [FN: See 11 U.S.C. § 524(f) (1994) (stating that "[n]othing contained in subsection (c) or (d) of this section [concerning reaffirmation] prevents a debtor from voluntarily repaying any debt"); Whitford I, supra note 2, at 94−95 (noting that chapter 7 debtors often repay unsecured debts after discharge because they wish to retain advantageous relationship with particular creditor).] Lawyers should advise clients of these alternatives, rather than pushing them into high repayment plans that are likely to fail [FN: See Whitford II, supra note 2, at 411 (stating that "a majority of chapter 13 plans are not completed in all regions of the country"); Sullivan *et al.* , supra note 1, at 215−17 (reporting 63% of chapter 13 plans in multi−district study had either failed, meaning that cases had already been dismissed or converted to chapter 7, or debtors were in trouble in making their payments when their files were examined after confirmation). But see Marjorie L. Girth, The Role of Empirical Data in Developing Bankruptcy Legislation for Individuals, 65 Ind. L. Rev. 17, 40−42 (1989) (reporting 63% of chapter 13 plans in Buffalo area of the Western District of New York were eventually completed successfully). Cf. Whitford II, supra note 2, at 411 n.50 (referring to results in Buffalo District in Girth's study as "extraordinary . . . far from typical for the country as a whole.").] or that will usually only result in discharge after a three − to five−year struggle. [FN: See 11 U.S.C. § 1328(a) (mandating debtor complete confirmed chapter 13 plan before court will grant discharge). But see id . § 1328(b) (providing for hardship discharge upon satisfaction of three−part test).]

Lawyers who take seriously the social motivation of clients must do much more. They should make it their business to become informed about consumer creditors' practices and to inform clients of those practices. Lawyers should encourage their clients to view themselves as part of the social system of consumer credit rather than as isolated individuals with strictly personal problems. [*FN:* See infra Part III.C.4.] An important implication of this point about what good counseling requires is that consumer bankruptcy lawyers should be a prime audience for empirical studies of the consumer credit system.

Generally, lawyers have professional obligations to represent their clients zealously within the bounds of the law, [*FN:* See Model Code of Professional Responsibility DR 7−101, 102 (1980) (mandating that lawyer not fail to represent client zealously within bounds of law); id. EC 7−1 (stating that it is duty of lawyer to represent client zealously within bounds of law); Model Rules of Professional conduct Rule 1.3 (1983) (requiring diligence) and its cmt.[1] (stating that lawyer should pursue client's interests with commitment, dedication, and zeal in advocacy).] to give their clients sufficient information to make their own informed choices of the goals of the legal representation [*FN:* See Model Rules of Professional Conduct Rule 1.4 (mandating that lawyer keep client reasonably informed and explain matter to extent reasonably necessary to permit client to make informed decisions regarding representation); Model Code of Professional Responsibility EC 7−8 (stating that lawyer should exert best efforts to insure that client makes decisions only after being informed of relevant considerations); see also Rapoport, supra note 7, at 789 (noting that bankruptcy attorney has obligation to explain both legal and nonlegal ramifications of contemplated action to client).] and to abide by their clients' decisions. [*FN:* See Model Rules of Professional Conduct Rule 1.2 (requiring lawyer to abide by client's decisions regarding objectives of representation); Model Code of Professional Responsibility DR 7−101(A)(1) (1983) (mandating that lawyer not intentionally fail to seek lawful objectives of client through reasonably available means within bounds of law); id. EC 7−7 (providing that, in areas of representation affecting merits of cause or substantially prejudicing rights of client, client has exclusive decision−making authority).] In the representation of consumer debtors in bankruptcy, particularly for lawyers who want to maintain high−volume practices, these are difficult but not impossible professional responsibilities to meet reasonably well. Remarkably, however, consumer debtor autonomy, even as an ideal that can only be achieved imperfectly, seems to be controversial among some bankruptcy lawyers, judges and trustees. Ironically, this is the same segment of the bar and bench that tends to stress individual responsibility of debtors, but only to pay debts, not to make their own choices about how to make use of the rights that bankruptcy law gives them.

Part I of this article describes some of the conditions that encourage underzealousness (or even sloth) in the counseling of consumer debtors. Part II describes the need for lawyers to engage in more advocacy and negotiation to

better serve their consumer debtor clients. Part III provides practical ideas for consumer debtors' lawyers on how to counsel their clients.

The primary purpose of this article is to provoke well−intentioned consumer debtors' lawyers to reflect upon how they could better serve their clients, particularly how to counsel clients to make their own informed decisions. It should be noted that many lawyers for consumer debtors do provide thorough and realistic counseling. Every one of the suggestions for more effective counseling that I make is used by some lawyers, so these are ideas from the realm of the possible.

In addition to suggesting ways attorneys can better counsel clients, this article seeks to cast some light on the dubious lack of allegiance to client autonomy reflected in the practices of some debtors' lawyers. These lawyers are aided and abetted by some bankruptcy judges and chapter 13 trustees, a problem discussed in Part IV. For current law to work fairly, [*FN:* See text infra at notes 200−06 (concerning National Bankruptcy Review Commission's preliminary suggestions for changes in law, which seem to be based on the view that current law does not work fairly).] a change in attitude is needed in segments of the bankruptcy bench and bar, particularly a recognition that lawyers have a fundamental professional responsibility to allow clients to make informed choices within the bounds of the law.

A lawyer who fails to counsel clients thoroughly can do well financially and can nonetheless avoid adverse consequences, such as malpractice liability or professional discipline, so perhaps it is surprising that many lawyers do a good job. While some lawyers take client autonomy seriously, others seem to ignore it. The practice of steering debtors into high percentage chapter 13 plans, in the face of high failure rates, has led one scholar to label consumer bankruptcy a "new consumer protection problem," with consumer debtors needing protection from their own lawyers. [FN: See Whitford II, supra note 2, at 403 (stating "[c]onsumer bankruptcy presents a new consumer protection problem"); id . at 406 (noting that decision−making in consumer bankruptcy too often reflects best interests of debtor's attorney rather than interests of debtors themselves).] Lawyers who oversell chapter 13, with little warning to their clients of its risks and no encouragement to consider alternatives, are at best making moral choices for their consumer clients and at worst are preying upon them for financial gain, in breach of fiduciary duty.

I. Some Factors That Perpetuate Inadequate

Lawyering By Debtors' Attorneys

A.

Little Risk of Malpractice or Disciplinary Actions

Lawyers who fail to inform their clients adequately or to represent them zealously face little risk of malpractice actions or professional disciplinary proceedings. [*FN:* See Gregory E. Maggs, Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument , 69 Am. Bankr . L. J. 1, 28−29 (1995) (discussing why lawyers have little to fear when they give clients erroneous advice concerning disclosure of assets and income). Professor Maggs also notes that disciplinary actions against lawyers are rare because: (1) enforcement agencies have very limited resources; and (2) malpractice is very difficult to prove. *Id.*] Clients may never discover the information that would have led them to make different choices or learn about the legal arguments that could have been made on their behalf, so they are unlikely to sue or make complaints to bar authorities. [*FN:* See Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues , 5 Hum. Rights 1, 17 (1975) (discussing fact that professional's expert knowledge means that "the client is in a poor position effectively to evaluate how well or badly the professional performs").] Even when a consumer debtor does learn that she was badly advised, she is unlikely to find a lawyer willing to represent her in a malpractice action against her bankruptcy attorney. The relatively small amounts in controversy and the difficulties of establishing the facts concerning a lawyer's inadequate counseling make malpractice actions in the consumer bankruptcy context unpromising.

For example, consider the case of a client with minimal disposable income, no secured debts and no debts nondischargeable in chapter 7. Suppose a lawyer put that client into a 100% chapter 13 plan, using an unrealistically tight budget in order to show sufficient disposable income to fund the plan. [FN: See 11 U.S.C. § 1325(b) (1994) (setting forth disposable income test for chapter 13 confirmation) .] Suppose further that the lawyer did not present chapter 7 as a serious alternative or discuss the possibility of a lower percentage plan. If the chapter 13 case was later dismissed for nonpayment, [*FN:* See id. § 1307(c)(6) (providing for dismissal of case for material default by debtor under confirmed plan).] the client would not be entitled to a discharge unless the client filed in chapter 7. [*FN:* See id. § 1328(a) (providing that ordinarily debtor does not receive discharge until completion of

plan).] Alternatively, the client could convert to chapter 7 before dismissal occurred. [*FN:* See id . § 1307(a).] The client might have to pay another fee for a chapter 7 filing or a conversion to chapter 7. [FN: See Braucher, supra note 3, at 547 (noting that some lawyers will convert case at discount, but others charge full fee amount).] The loss due to the lawyer's malpractice could then be measured by the amount of payment made before dismissal of the chapter 13 case that would have been dischargeable in chapter 7, [*FN:* Assuming the case would have been a no asset case in chapter 7, the debtor would not have had to pay dischargeable unsecured debts, so payment of them in a chapter 13 plan filed without the informed consent of the debtor is properly counted as loss caused by the malpractice of the debtor's lawyer. See 11 U.S.C. § 727(b) (permitting all debts that arose prior to order for relief to be discharged with certain exceptions detailed in § 523).] plus the attorney's fee for the chapter 13 case. This would usually amount to no more than a few thousand dollars. Furthermore, given the difficulty of portraying the bankruptcy lawyer's behavior as willful or malicious, as opposed to merely negligent, recovery of punitive damages would be unlikely. Therefore, a malpractice lawyer who generally gets paid on a contingent fee basis would be unlikely to be willing to take the case.

As with other consumer protection problems, [*FN:* See Stewart Macaulay, Lawyers and Consumer Protection Laws , 14 Law & Soc. Rev . 115, 124−29 (1979) (describing how lawyers avoid undertaking actual representation of consumers in most disputes); Whitford II, supra note 2, at 397−98 (noting that small amounts in controversy, together with complexity of facts and law, make individualized justice unattainable ideal in most consumer disputes); see also id. , supra note 2, at 397 (noting that money in dispute is often insufficient to justify necessary investment in legal fees).] private rights of action against bankruptcy lawyers are not generally employable as a practical matter. Public enforcement should be more feasible, but it is not now vigorously pursued. For a lawyer who fails to counsel clients adequately, the risk of facing disciplinary proceedings is remote. Even when a lawyer advises a client to perpetrate bankruptcy fraud, there is little risk of disciplinary action because the disciplinary authorities have limited resources. [FN: See Maggs, supra note 18, at 28−29. Professor Maggs also discusses some criminal convictions of attorneys for bankruptcy fraud, id . at 4, but reports that an anonymous government official has stated that the United States Attorneys will not prosecute bankruptcy fraud cases involving less than $100,000. Id . at 7.] Furthermore it can be difficult to prove that a lawyer knowingly gave wrong advice. [*FN:* See id. at 28.] Swamped disciplinary authorities are unlikely to focus on cases of inadequate counseling or advocacy that result in the discharge of less personal debt for a bankruptcy client than permitted by law. A leading book on consumer bankruptcy explains, "the complexity of the subject matter makes it possible to justify almost any path chosen." [*FN:* See Sullivan et al ., supra note 1, at 251.] With authorities often concluding that it is too difficult to discipline attorneys even in cases where the attorney has advised the commission of a fraud, they are unlikely to bring disciplinary action where the professional lapses in question are underzealousness in pursuing debt relief and a failure to allow clients to choose the objectives of the representation. [FN: SeeIn re Slaughter, 191 B.R. 135, 140 (Bankr. W.D. Wis. 1995). In Slaughter , the bankruptcy court ordered sanctions against a debtor's lawyer who filed an objection to a motion to dismiss a chapter 13 case, and the court also referred the matter to the state bar for possible disciplinary action because the lawyer had conducted "virtually no factual inquiry during the course of this case" to serve as a basis for opposing dismissal motion. Id. at 140. The court said the lawyer filed the case without adequate supporting information and failed to obtain it later in a timely fashion, and thus had no basis to oppose dismissal. Id. at 140−41. It is noteworthy that the debtor's lawyer was subjected to sanctions for attempting to preserve the bankruptcy stay without grounds for doing so, not for settling for less debt relief than permitted by law. Id . at 145.] From the perspective of current professional responsibility law in action, this article concerns aspirational ethics, in the sense of "objectives toward which every member of the profession should strive," [*FN:* See Model Code of Professional Responsibility , Prelim. Statement (1980).] not behavior likely to get a lawyer in trouble.

On the other hand, from the perspective of professional responsibility law on the books, lawyers are required to have clients decide the objectives of representation and to explain matters to clients so that they can make informed decisions. These are mandatory rules, and failure to meet them is grounds for professional discipline. [*FN:* See Model Rules of professional conduct Rules 1.2(a) and 1.4(b) (stating that lawyer "shall" permit client to make decisions and abide by those decisions). The Scope section at the beginning of the Model Rules states that rules cast as imperatives, using the word "shall," "define proper conduct for purposes of professional discipline." See id. Scope of Representation [1].] Disciplinary authorities, if interested in doing so, could discipline attorneys for failure to counsel clients adequately. [*FN:* See, *e.g.* , Model Rules of Professional Conduct Rule 1.3 (1983) (requiring attorney to act with reasonable diligence and promptness); id. Rule 1.4 (requiring lawyer to keep client reasonably informed and to explain matter to extent reasonably necessary).]

Here is how a disciplinary case could be constructed: Suppose a lawyer for consumer debtors regularly filed plans all providing for the same high percentage of repayment and using the same boilerplate schedules of expenses. Suppose further that many of these plans did not add up (because income was insufficient to cover expenses plus the plan payments) and many were not completed. [*FN:* See Sullivan et al., supra note 1, at 54−56 (describing chapter 13 case that was confirmed even though debtor's expenses, not including plan payment, already exceeded income from all sources and although debtor in addition promised 100% repayment; debtor made only few payments and faced dismissal of case as of time that file was examined in this study). The case described would never have been confirmed if the chapter 13 trustee and judge were applying the feasibility test in 11 U.S.C. § 1325(a)(6). See infra notes 183−86 and accompanying text.] A record of such filings, when combined with the testimony of one or more debtors that the lawyer did not discuss the possibility of a lower percentage plan or of chapter 7, should be enough to establish clearly and convincingly that the lawyer had failed to counsel these clients to make their own choices of the goals of the representation. The first step toward the bringing of such disciplinary cases would be for chapter 13 trustees and bankruptcy judges to refer such misconduct to

disciplinary authorities, as discussed in Part IV below.

B. The Tension Between the Lawyer's Interests and Those of the Client

The Preamble to the ABA Model Rules of Professional Conduct states: "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." [*FN:* See Model Rules of Professional Conduct Preamble[8].] Ethical dilemmas in representing and counseling consumer debtors in bankruptcy fall squarely into this core category of conflict. In an article concerning attorneys' fees and inherent conflicts of interest in chapter 11, Professor Jay Westbrook has written, "[e]very lawyer has an inherent conflict with every client as to fees. On some level, every client would prefer to get first−rate professional services for free." [FN: See Jay Lawrence Westbrook, Fees and Inherent Conflicts of Interest , 1 Am. Bankr. Inst. L. Rev. 287, 296 (1993). See generally , Douglas E. Rosenthal , Lawyer and Client: Who's In Charge? (1974) (concerning lawyer−client conflicts of interest).] The same conflict exists for consumer bankruptcy lawyers. These lawyers seek to earn a good living from fees paid by their clients, and the clients want good counseling and advocacy for the lowest possible fee.

All lawyers for consumer debtors who are in private practice need to attract paying clients. Lawyers' financial self−interest generates two goals: to get clients, and to get those clients to pay the highest fees possible. At the same time, however, lawyers must keep a good reputation in order to continue to attract clients. In the representation of consumer debtors, the first interview typically has an element of a sales presentation to the prospective client. Some lawyers even use high pressure sales tactics, [FN: See Braucher, supra note 3, at 576−78 (describing one lawyer's high pressure techniques).] although probably most do not. It is important to note that many lawyers do not act in a purely self−interested fashion and take to heart the responsibility to put their clients' interests ahead of their own.

For most consumer debtors considering bankruptcy, there are three options: no bankruptcy, chapter 7 or chapter 13. [FN: See Gary Neustadter, When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office , 35 Buffalo L. Rev . 177, 185−94 (1986) (discussing options available to debtors).] It has been observed that when a debtor with the means to pay a fee visits a bankruptcy lawyer, the likely advice will be to file a bankruptcy petition of one sort or another. [*FN:* See id. at 239−40.] Usually this is the right choice, but not always. Nearly all debtors who visit a bankruptcy lawyer have debts they cannot pay. However, some of these debtors have modest debts, little to lose in collection efforts and little prospect of saving any money anytime soon, so that they do not have a clear need for a discharge, at least not yet. [FN: See Braucher, supra note 3, at 522−26 (discussing factors that go into lawyers' advice concerning whether to file in bankruptcy).] Some lawyers put nearly all debtors into bankruptcy, thus collecting more fees, while others send more debtors away with the advice that they should just tell their creditors to "go to hell." [*FN:* See id . at 524 (quoting lawyer who gave this advice, and also noting that pro bono bankruptcy network advised this strategy for some debtors).]

Assuming some form of bankruptcy is advisable, recommending chapter 13 is often the best way for a lawyer to make both a sale of services quickly and get the highest fee. [*FN:* See id . at 543−56 (discussing myriad factors affecting lawyers' financial interests in consumer bankruptcy practice); id . at 546 (noting that in four cities studied fees for chapter 13 were substantially higher than chapter 7).] chapter 13 has more immediate appeal to many debtors, making it an easier way for an attorney to attract clients. It permits debtors to pay mortgage arrearages and retain possession of their homes. [FN: See 11 U.S.C. § 1322(b)(5) (1994) (permitting debtor to cure default and maintain payments on items such as real property); see also DiPierro v. Taddeo (In re Taddeo), 685 F.2d 24, 26−28 (2d Cir. 1982) (holding § 1322(b)(5) permits mortgagors to de−accelerate mortgages and reinstate original payment schedules).] In addition, chapter 13 allows debtors to keep their cars and to cram down the amount that must be repaid to the car's value if less than the debt. [*FN:* See 11 U.S.C. § 1325(a)(5)(B)(ii) (setting as confirmation test for secured claims that plan pay at least present value of collateral) and id . §1322(b)(2) (permitting modification of rights of secured creditors, except for those with security interest in principal residence); see also United Carolina Bank v. Hall, 993 F.2d 1126, 1130 (4th Cir. 1993) (allowing debtor to retain property under cram down provision when secured creditor is undersecured if debtor pays not less than present value of collateral);In re Hernandez, 175 B.R. 962, 963−67 (N.D. Ill. 1994) (allowing chapter 13 debtor to strip down creditor's lien on debtor's automobile to fair market value).]

Debtors usually have been looking for a way to pay all or some of their debts, without making any major life changes. Chapter 13 often sounds like a good solution. Debtors' optimism can make them unwilling to come to terms with the fact they must reduce consumption, for example by giving up a home or a car that is more expensive than they can realistically afford. Particularly for lawyers seeking to do a high volume practice, presenting chapter 13 in a very positive light can help them to close sales of services quickly and routinely.

If the lawyer recommends a chapter 13 plan involving repayment of a low percentage of unsecured debt, it can be a major relief to a client to find that a large amount of debt can be discharged, leaving a manageable monthly payment,

while collateral can be retained. [FN: See 11 U.S.C. § 1325(b)(1)(A) (setting as confirmation requirement that disposable income be committed for three years); see also 8 Collier on Bankruptcy ¶ 1325.08(1) (Lawrence P. King *et al.* eds. 15 ed. rev. 1996) (stating that good faith under 11 U.S.C. § 1325(a)(3) does not require any minimum amount or percentage of repayment, although some courts consider ability to pay as factor in good faith).] Sometimes debtors could do even better with a chapter 7 petition, for example by affirming a home mortgage and a car loan, while discharging all unsecured debts. [FN: See 11 U.S.C. § 524(c) (allowing debtor to enter reaffirmation agreement with creditor in order to retain possession); Braucher, supra note 3, at 529−30; see also Sullivan et al., supra note 1, at 141 (discussing chapter 7 as less risky way to save home for debtors who do not need chapter 13's cure provision to deal with lender recalcitrance).] A lawyer cannot promise that secured lenders will allow reaffirmations, however, so an immediate decision to use chapter 7 may not be possible where a client seeks to retain collateral. [FN: See General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053, 1057 (6th Cir. 1983) (allowing creditor to repossess property after chapter 7 unless debtor redeems in lump sum or reaffirms); Braucher, supra note 3, at 528 (noting that some bankruptcy judges have even taken position that debtor is not required to reaffirm or redeem in order to keep collateral so long as debtor keeps payments current); see also infra notes 121−22 (noting circuits are split on that issue).] The lawyer may have to negotiate a reaffirmation first, as will be discussed below. [*FN:* See discussion infra Part II.B. (discussing negotiation of agreements to retain collateral in chapter 7).] To avoid that work and to be able to promise the desired result, a lawyer can instead push chapter 13 as the way to save collateral. The cost to the client of using chapter 13, when chapter 7 would have worked to save collateral, is the amount of unsecured debt repayment undertaken in the chapter 13 plan that could have been discharged in chapter 7. In addition, in view of the high failure rates in chapter 13, a disadvantage of using chapter 13 to hold on to collateral is that the client may not succeed in this goal if the client fails to keep up plan payments. [FN: See In re Smith, 104 B.R. 695, 699−700 (Bankr. E.D. Pa. 1989) (granting relief from stay to mortgagee when debtor failed to comply with terms of plan).]

A lawyer's self−interest sometimes dictates not only using chapter 13, but also putting clients into high percentage plans. This is because, as will be discussed further below, [*FN:* See infra Part II.A.] some bankruptcy judges and chapter 13 trustees make life difficult for lawyers who try to use low percentage plans, even when this is justified by debtors' limited disposable income. [*FN:* See Teresa A. Sullivan et al, , The Persistence of Local Legal Culture: Twenty Years of Evidence from the Federal Bankruptcy Courts , 17 Harv. J.L. & Pub. Pol'y 801, 846 (1994) (stating that judges who routinely approve high repayment chapter 13 plans, while scrutinizing all low repayment plans, may affect both number of people who attempt chapter 13 and promised repayment rates in chapter 13 generally). But see Barnes v. Whelan, 689 F.2d 193, 198 (D.C. Cir. 1982) (concluding that chapter 13's "good faith" requirement does not require any particular level of minimum repayment).] Also, judges and chapter 13 trustees sometimes reward attorneys for filing high repayment plans, using favorable fee policies. [FN: See 11 U.S.C. § 503(b)(4) (requiring that judges approve attorney's fees in all bankruptcy cases).] For example, the chapter 13 trustee can adopt a policy of paying the entire first payment made by the debtor under the plan to the attorney for the attorney's fees. [FN: See Braucher, supra note 3, at 558 (describing this fee practice of chapter 13 trustee in San Antonio, Texas).] This creates an incentive for lawyers to make plan payments as large as possible.

Another important reason some lawyers present chapter 13 as the preferred option is that chapter 7 can be harder to sell to a debtor immediately because it can seem too good to be true. [*FN:* See id . at 554, 556.] For a person who has been struggling for a long time under a heavy load of unsecured debt, such as large credit card and medical bills, it can come as a shock to learn that the law provides the option of immediate discharge of all debts. In contrast, chapter 13 strikes many debtors as the sort of relief that they can believe the law would provide.

Fee considerations may make the lawyer only too ready to encourage filing in chapter 13 even though chapter 7 may be more realistic and a better financial deal for the debtor. As a general rule attorneys' fees are higher in chapter 13, [*FN:* See S ullivan et al ., supra note 1, at 250 (finding lawyers in three−state study of 1981 filings received on average $535 for chapter 13 and $459 for chapter 7); see also Sullivan *et al.* supra note 51, at 844 (describing judicial practice of setting higher fees in chapter 13); American Bankruptcy Institute, National Report on Professional Compensation in Bankruptcy Cases 172 (1991) (reporting that attorney's fees granted in chapter 13 are routinely higher than in chapter 7, based on 1991 national sample finding mean chapter 7 fees of $637 and mean chapter 13 fees of $820).] and can be as much as twice the fees charged in chapter 7 cases. [FN: See Braucher, supra note 3, at 546−47.] In addition, chapter 13 trustees often pay attorneys' fees early in the plan, typically in the first year. [*FN:* See id. at 548 (noting that the San Antonio trustee set payment within year as goal).] Thus, if the plan lasts merely a year, the lawyer is paid in full, with the chapter 13 trustee acting as collection agent.

Having debtors pay all or most of attorneys' fees in their chapter 13 plans, rather than in advance, makes it easier for lawyers to make immediate sales of services. With chapter 13, lawyers feel less of a need to get the client to pay more of the attorney's fee before filing [FN: See Bankr. S.D. Oh. R. D−3.18.5 (under local rule in Dayton, Ohio, lawyer is not allowed to collect any of chapter 13 attorney's fee in advance of filing); see also Braucher, supra note 3, at 548 (stating that in other cities, lawyers often take relatively small amount in advance, such as $100 or $200, to attract clients into chapter 13).] because the debtor will not get the continuing protection of bankruptcy if plan payments are not made. [FN: See 11 U.S.C. §§ 1307(c)(6) (1994) (allowing dismissal for material default) and 1328(a) (providing for discharge after completion of plan).] In chapter 7, some lawyers give credit, but others do not and thus the debtor may need to save money merely to afford the fee. [FN: See Braucher, supra note 3, at 549 (discussing possibility of credit).] If the lawyer demands advance payment and the debtor cannot come up with it, the lawyer cannot make an immediate sale of services. The debtor may or may

not come back later when he has saved the fee amount. In contrast, chapter 13 legal services are routinely sold on an "easy credit" basis, involving little or nothing down, with the attorney's fee rolled into the one monthly payment to the trustee, often made by payroll deduction. [*FN:* See id . at 547−48 (discussing "easy credit").] This makes it easier to sell chapter 13 immediately and at a higher price to the debtor.

Lawyers frequently justify higher attorneys' fees in chapter 13 on the ground that chapter 13 involves more work. [*FN:* See Sullivan et al ., supra note 1, at 250.] The additional work includes moratoriums and modifications during the life of plans and extra paper work. [FN: See Braucher, supra note 3, at 550 (finding that most lawyers do not charge extra for moratoriums and modifications and that preparation of chapter 13 plans is often done by staff and streamlined with computerization).] Moreover, clients who want to borrow more money during the life of the plan may seek help in getting the chapter 13 trustee's approval. [FN: See 11 U.S.C. § 1305(c) (1994).] It is doubtful, however, that this additional work justifies how much higher the fees are in some areas of the country. [FN: See Braucher, supra note 3, at 551 (estimating that chapter 13 work is more profitable for lawyers than chapter 7 work and reporting that many lawyers confirm this view).] In some communities judges and chapter 13 trustees only allow slightly higher fees in chapter 13 than in chapter 7, providing evidence that the judges and chapter 13 trustees who allow double the typical chapter 7 fee are doing so to promote chapter 13, not as a reward for more work. [*FN:* See id. at 546−47.] In fact, chapter 13 can involve less work. For example, in chapter 13 cases, it is not necessary to negotiate a reaffirmation to retain collateral. [*FN:* See discussion infra Part II.B. (discussing benefits of negotiating reaffirmation agreements).] Furthermore, counseling time is not necessarily shorter for a debtor who files in chapter 7. It is true that if the debtor does not have regular income or is obviously incapable of making plan payments, the lawyer will not have to discuss chapter 13 in any depth. On the other hand, if the debtor seriously considers chapter 13 but ultimately decides on chapter 7, counseling time will be as great as for chapter 13 debtors.

Even if chapter 13 involves more work, however, the lawyer's self−interest favors more work for more pay. Most lawyers who regularly do consumer bankruptcy work are constantly seeking business and thus do not turn away paying clients. Consumer bankruptcy practice is carried on in a highly competitive market, with ads in the Yellow Pages as the main medium for marketing. [FN: See Braucher, supra note 3, at 543.] Although getting more work that brings more money is good for the lawyer, it is not necessarily good for the client, who may be better served by a more simple, less expensive chapter 7 that brings immediate discharge. [*FN:* See U.S. General Accounting Office, Report to Chairman, Comm. on the Judiciary, House of Representatives, Bankruptcy Reform Act of 1978: A Before and After Look , 56−57 (1983) (noting that chapter 7 filing will usually involve loss of little or no property because most debtors own few assets and reporting 97% of chapter 7 cases had no assets for distribution to creditors).] In short, in many instances an informed debtor would wisely forego any additional work involved in a chapter 13.

Lawyers who do nearly all chapter 7 cases and avoid chapter 13 are not necessarily acting altruistically. Factors such as lack of ambition and the desire for a simple practice with low overhead also come into play. [FN: See Braucher , supra note 3, at 563 (describing some lawyers as motivated by desire for low overhead and low risk in their decisions not to use chapter 13 more often); id . at 575 (concerning low−volume lawyer who only does chapter 7 and likes to work part time to have time for hobbies); see also Sullivan et al ., supra note 1, at 250 (mentioning complexity and risk of error as reasons for avoiding chapter 13).] Although required to explain chapter 13 before putting a client into chapter 7, [FN: Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98−353, § 322, 98 Stat. 357 (1984) and Exhibit B to Official Form 1 (requiring declaration of consumer debtor's lawyer in chapter 7 that lawyer has explained all bankruptcy options).] some lawyers slight the chapter 13 option both as a financial remedy and as a possible means of affirming morals and protecting social standing and self−esteem. However, lawyers who primarily use chapter 7 typically do some chapter 13 cases or make referrals to other lawyers specializing in chapter 13 so that the debtor may save a home or get a broader discharge. [FN: See Braucher, supra note 3, at 562−63.] As a result, lawyers who mostly use chapter 7 tend to serve clients' financial interests better than lawyers who promote chapter 13, particularly those who push high percentage chapter 13 plans, because chapter 7 brings an immediate discharge from prepetition debts. [FN: See 11 U.S.C. § 727(b) (1994) (allowing discharge). In chapter 13, discharge ordinarily depends on competing a repayment plan. See id. § 1328(a).]

II. The Need for Advocacy and Negotiation

A

. *Resisting Judicial and Trustee Rules of Thumb Not Supported By Law*

The essence of professionalism is to find a way to make a living while remaining tenaciously committed to the service of clients. My primary focus is counseling, but advocacy is necessary in a few cases to make good counseling possible.

In order to charge low fees and make a good living, consumer debtors' lawyers need volume. To handle that volume, they need routine procedures and uncontested cases. [FN: Whitford II, supra note 2, at 406.] These pressures can lead lawyers to go along with the preferences of some chapter 13 trustees and bankruptcy judges for high repayment plans, because these officials can determine how smoothly cases proceed. [*FN:* Given that virtually all consumer bankruptcy cases are fixed fee cases and consumer debtors are frequently unable to pay more than modest fees, even small differences in procedure that permit one kind of case to operate more smoothly and with less attorney involvement may make the difference between profitability and disaster in an attorney's practice and thus influence attorney's representation of clients. Sullivan et al ., supra note 51, at 843.] For instance, if a chapter 13 trustee makes clear that he will challenge any plan not meeting a certain percentage of repayment [FN: See Braucher, supra note 3, at 532−34 (concerning rules of thumb about percentage of unsecured debt repayment expected by chapter 13 trustees and judges in four cities).] and if local judges listen respectfully to such challenges, a lawyer must either submit to the rule of thumb or be willing to challenge it and spend extra time to do so.

In all four of the cities studied in an empirical investigation, judges and trustees used rules of thumb about how much repayment they expected as a minimum in chapter 13. [*FN:* See id . at 532.] In Dayton, Ohio, and Austin, Texas, low percentage plans were routinely accepted, but in San Antonio, Texas, and Cincinnati, Ohio, judges and trustees pushed for high repayment. [*FN:* See id . at 532−34.]

San Antonio had the highest repayment expectation, 100%. [*FN:* See id. at 533.] The chapter 13 trustee there challenged confirmation of any three−year plan that was for less than 100% repayment, pushing for extension of the plan to five years. [*FN:* See id.] Even if the plan was set up for a term of five years, the San Antonio trustee pressured debtors and their attorneys to increase the repayment to 100% if that was not proposed in the plan. [FN: See Braucher, supra note 3, at 533−34.] Finally, in mid−1993, a lawyer was willing to challenge this practice and succeeded in getting a three−year, 38% plan confirmed. [FN: See Braucher, supra note 3, at 533−34, n. 117. Judge Leif Clark, who approved that confirmation, had ruled two years earlier, in a case heard in El Paso, Texas, that a partial repayment, three−year plan was not, on that basis alone, proposed in bad faith and thus in violation of 11 U.S.C. § 1325(a)(3) (1994);In re Baker, 129 B.R. 127 (Bankr. W.D. Tex. 1991). The Bankruptcy Code deals directly with how much repayment must be made in chapter 13, so it would be a strained reading to hold that the "good faith" requirement imposed an additional test concerning repayment. See 11 U.S.C. § 1325(a)(4), (5). Under 11 U.S.C. § 1325(a)(4), a debtor must pay at least what would be paid in a liquidation. Under the so−called "best interests" test. Most chapter 13 cases would be no−asset in chapter 7, and the best interests test does not impose any requirement of repayment in those cases. In addition, a chapter 13 plan can be challenged if the debtor does not commit disposable income for three years. See 11 U.S.C. § 1325(b). Most debtors who draw up reasonable budgets of expenses do not have enough disposable income to pay 100% of their debts, or even 70%, in a three−year plan.]

In Cincinnati, lawyers were also reluctant to make legal arguments against expected high repayment plans in chapter 13, although they did finally begin to do so. For a number of years, Cincinnati had an expectation of 70%. [FN: See Braucher, supra note 3, at 532−33.] This expectation for a high percentage repayment gradually eroded as lawyers were willing to argue for confirmation of lower percent plans. [*FN:* See id. at 533.] In 1991, three−quarters of the chapter 13 plans in Cincinnati provided for repayment of 70 % or more; a few years earlier, 95 % had followed the 70 % "rule." [*FN:* See id. at 532−33.] Cincinnati bankruptcy lawyers report that the repayment expectation has continued to erode through the mid−1990s.

Obviously, constant litigation is not feasible in a low−fee, flat−rate practice. However, a basic question such as how much repayment must be made in a chapter 13 case should be argued and appealed, if necessary. Professionalism demands a willingness on the part of lawyers to use legitimate legal arguments to challenge and change local legal culture. At a minimum, if a lawyer is not willing to include in her flat fee the time necessary to make a good argument for lower repayment, she should inform the client that such an argument could be made and provide the client with a fee or rate for the argument. [FN: See Whitford II, supra note 2 , at 412−13 (discussing consumer bankruptcy attorney's obligation to help client make judgment that serves client's interests, not interests of lawyer, and economics of test case litigation).]

It takes courage to stand up to bankruptcy judges and trustees and make arguments that they have made it clear they do not want to hear. These officials are in a position to make a lawyer's life more difficult. Judges and chapter 13 trustees can hold up confirmations, which may embarrass lawyers in front of their clients, or they can examine fee applications more closely. [FN: See Braucher, supra note 3, at 557−59 (discussing how chapter 13 trustees in San Antonio, Texas, and Dayton, Ohio influence chapter 13 proceedings); Sullivan et al ., supra note 1, at 248−49 (describing judicial methods of pressuring lawyers to file in one chapter or another).] On the other hand, lawyers who represent their clients vigorously are likely to win grudging respect eventually. In the meantime, they get the satisfaction of knowing they are doing what professional responsibility requires.

B

. The Need for More Negotiation

Some lawyers do workouts outside bankruptcy on behalf of consumer debtor clients in certain circumstances. For example, a workout can sometimes be negotiated where only one or a few debts are troublesome. [FN: See Braucher, supra note 3, at 525 (describing lawyers' views about workouts for consumer debtors).] Most debtors' lawyers, however, do not do consumer workouts. These lawyers believe that workouts would not be cost−effective because some creditors refuse to cooperate, making bankruptcy the only feasible alternative. [*FN:* See id .] At most, some of these lawyers coach clients to negotiate for themselves. [*FN:* This reluctance to provide representation is typical of lawyers' responses to consumer disputes in general. See Braucher, supra note 3, at 504 (noting typically lawyers are reluctant to provide representation for consumer disputes and that from perspective of consumer law generally, the remarkable thing about consumer bankruptcy practice is that it exists); see also Macaulay, supra note 26, at 124−29 (noting lawyers avoid representing consumers in most disputes).]

While workouts are not practical when a debtor has defaulted on many debts, more negotiation should be undertaken as a prelude to chapter 7. Particularly for a debtor who has not defaulted on secured debts, a lawyer may be able to avoid chapter 13 and still permit the debtor to hold on to collateral by negotiating reaffirmations with secured lenders. [FN: See 11 U.S.C. § 524(c) (1994) (allowing reaffirmation).] Alternatively, some judges will protect chapter 7 debtors from repossession and foreclosure so long as they have not defaulted on their secured loans. [FN: See Braucher, supra note 3, at 528 (concerning position taken by judges in Austin and San Antonio, Texas, that debtor is not required to reaffirm or redeem in order to keep collateral so long as debtor keeps payments current); see also infra notes 121 and 122 (noting that circuits are split on issue).] Furthermore, lenders will sometimes permit debtors to retain collateral, even without reaffirmation or judicial protection, when debtors keep current on secured loan payments. [FN: See Braucher, supra note 3, at 528 (discussing use of this practice in Cincinnati and Dayton, Ohio).] Lawyers can test this possibility by filing in chapter 7, but be prepared to file in chapter 13 if the creditor pursues the collateral. Lawyers who attempt to negotiate reaffirmations and who test the willingness of creditors to acquiesce to repayment without reaffirmation learn in time whether there is a reasonable chance of succeeding and can channel their efforts accordingly.

Some lawyers believe that chapter 13 is useful to reduce a secured loan, other than one for a home, to collateral value. [FN: See 11 U.S.C. § 506(a) (setting amount of secured claim at collateral value); id . § 1322(b)(2) (allowing plan to modify rights of secured creditors except for home mortgagees); id . § 1325(a)(5) (providing that secured creditors must be paid at least value of collateral).] But other lawyers, those willing to use aggressive negotiation, use the threat of cram down in chapter 13 to negotiate a reaffirmation in chapter 7 at less than the full loan amount. To avoid repayment to unsecured creditors that would be necessary under a chapter 13 plan but hold on to collateral, it can be worthwhile for a chapter 7 debtor to make a reaffirmation agreement to pay somewhere between the loan balance and the lower collateral value.

If debtors can keep possession of collateral in chapter 7, whether by court protection, creditor acquiescence or the use of reaffirmation agreements, this is often better financially than using chapter 13 to do so because the debtor can avoid committing disposable income to plan payments for three or more years. [FN: See 11 U.S.C. § 1325 (b)(1)(B) (1994) (requiring all debtor's projected disposable income for three years be applied to payments under plan).] In addition, because of the high noncompletion rates in chapter 13, [FN: See Whitford II, supra note 2, at 411 (stating majority of chapter 13's are not completed).] where discharge comes only after completion of the plan, [FN: See 11 U.S.C. § 1328 (discharging debtor only upon completion of all payments under plan).] debtors stand a better chance of saving the collateral by using chapter 7 rather than chapter 13.

Some lawyers, however, avoid the work of negotiating with secured lenders by routinely using chapter 13 to save collateral, even though chapter 13 could be avoided in some instances. These lawyers sell their services more quickly in this way and do less work, for a higher fee. As a result, clients find themselves bound to repayment of some or all unsecured debt as a condition to getting a discharge, rather than getting a quick discharge from the unsecured debt in chapter 7.

III. Effective Counseling

Although it ought to go without saying, unfortunately, it does seem necessary to note that lawyers for consumer debtors should not mislead clients or pressure them to make decisions contrary to their financial interests. To avoid misleading their clients, lawyers in their counseling should clear up common misconceptions and unmask wishful thinking. Lawyers should also explore the social as well as financial dimensions of chapter choice. [FN: See Braucher, supra note 3, at 561−65 (explaining financial and social concerns of clients).]

Counseling should take into account that many clients will be enthusiastic about chapter 13 when they learn about it, even if the feasibility of completion is questionable. [*FN:* See id . at 555−56, 566.] The idea of repaying their debts in a plan will be appealing to debtors because most of them will have been looking for a way to pay. [*FN:* See id . at 508−09 (discussing

benefits of chapter 13 plan).] A repayment plan will have moral appeal, even if this reason is never explicitly raised. [*FN:* See, *e.g.* , Margaret Howard, A Theory of Discharge in Consumer Bankruptcy , 48 Ohio St. L.J. 1047, 1073 (1987) (noting as reason to reaffirm debt that debtor may simply feel moral obligation to repay it).] Clients will also be pleased that they can keep their houses and cars (if they keep up with their plan payments). In addition, they may be only too willing to believe that a repayment plan will give them better credit access in the future than a chapter 7 discharge, even though this is unlikely. [*FN:* See discussions infra Part III.C.3. (concerning credit availability after each chapter).] Generally, people intuitively believe that making an effort to repay will be rewarded and need to be advised this is not necessarily so. In sum, because of the many reasons that clients may prefer chapter 13 on first impression, lawyers may in effect push them into chapter 13 unless they present this option cautiously and with many warnings.

A

. *Realistic Budgeting*

Consumer debtors tend to underestimate their expenses, [FN: See Braucher, supra note 3, at 536.] which can make chapter 13 look more feasible than it really is. Whether chapter 7 or chapter 13 is the ultimate choice, realistic budgeting should precede preparation of schedules of expenses. A debtor who chooses chapter 7 should not file schedules that show disposable income that would not be there if expenses had been listed accurately. Listing expenses realistically minimizes the risk of a substantial abuse challenge in a chapter 7 case. [FN: See 11 U.S.C. § 707(b) (1994) (authorizing court or United States trustee to dismiss chapter 7 case filed by an individual if granting relief would be substantial abuse); see also Green v. Staples (In re Green), 934 F.2d 568, 570−73 (4th Cir. 1991) (adopting totality of circumstance analysis in determining "substantial abuse," where accurateness of debtor's schedules is factor to evaluate); Zolg v. Kelly III (In re Kelly III), 841 F.2d 908, 913−15 (9th Cir. 1988) (adopting per se rule of substantial abuse if income exceeds reasonable expenses).]

Realistic budgeting is also crucial for a debtor considering chapter 13 to see whether payment under a plan will be feasible. Some lawyers start by computing the plan payment necessary to pay secured debts, including any arrearages, and a certain percentage of unsecured debt, such as 10, 25, or 75% of unsecured debt, depending on local legal culture. [FN: See Braucher, supra note 3, at 532, 536.] Then they work back from the desired plan payment to the budget. [*FN:* See id. at 536.] As one lawyer described this practice, the budget is a fiction. [*FN:* See id.] Even if a client ultimately decides to file in chapter 13 with an unrealistically tight budget in order to make a final attempt at keeping certain property such as a home, making a realistic budget first will ensure that the client goes forward with her eyes open, understanding the likelihood of failure. Moreover, she may save herself a significant amount of wasted effort and stress if the process of drawing up a realistic budget makes her realize that saving the home is not feasible and should not be attempted.

Three major pitfalls in budgeting are understating expenses for certain categories (such as food or clothing), omitting categories of regular expenses (forgetting a bill or two), and failing to plan for contingencies (such as medical expenses and car and home repairs). Lawyers or their paraprofessionals must go over budgets looking for these problems. They can help avoid omissions by providing forms that list nearly every conceivable category, including for example, birthday and holiday presents, haircuts, school lunches, school pictures, bus fare or parking expenses, and other routine items of expense that are easy to forget. It may not be advisable to list all of these categories on schedules because if the trustee or an unsecured creditor objects to the confirmation of the plan, [FN: See 11 U.S.C. § 1325(b) (1994) (providing trustee or unsecured creditor may object to confirmation).] the court may find some of these expenses to be luxuries or otherwise not "reasonably necessary," and may refuse to approve the plan. [*FN:* See id . § 1325(b)(2)(A) (requiring debtor to commit disposable income for three years, and defining disposable income as income "not reasonably necessary to be expended for maintenance or support . . .").] Including all possible expenses in interviewing questionnaires, however, helps to show debtors what they are really spending and what they will not be able to spend under a tighter budget.

B. Explaining The Two Chapters

Assuming some form of bankruptcy is advisable, lawyers should be certain to explain both chapter 7 and chapter 13 in ways that allow clients to understand what is at stake. Currently, most lawyers do not use pamphlets or videos to give clients information before the first interview, thus keeping maximum control over clients and not encouraging them to think over their options. [FN: See Braucher, supra note 3, at 551−52, 554.] Lawyers should experiment more with providing information in advance of the counseling sessions where clients make decisions.

When it comes to actual counseling sessions, some lawyers explain the two options in a general way, while others are

more concrete, making the explanation in terms of the particular client's situation (what would happen to each debt and to each asset). Probably some combination of these two approaches works best. The general overview might best be done by pamphlet or video in advance and then repeated in the first interview. The overview should present the options of a quick discharge in chapter 7 for a no−asset case (or liquidation if the debtor has nonexempt property) versus a three− to five−year chapter 13 plan of repayment.

The explanation in terms of the particular client's situation should describe what would happen to each debt and each asset in each chapter. The two basic topics are (1) what debts have to be paid in each chapter, and (2) what property can be kept in each chapter. The lawyer should also discuss the differences in attorney's fees and in likely future credit availability for each chapter. [*FN:* See discussions infra Part III.C.3 and 5.]

A brief description of the two chapters follows. It indicates where customized description based on the debtor's situation should be added.

Most commonly, in chapter 7 the case would be a no asset [FN: See Howard, supra note 101, at 1082 (stating most consumer debtor chapter 7 cases are no−asset); Michael Brody, Editorial Commentary: Visa Fights Back −− Launches an Overdue Attack on Credit Card "Bankrupts" , Barron's , Oct. 23, 1989 (generalizing that over 95% of chapter 7 filings are no−asset); see also U.S. General Accounting Office, Report to Chairman , supra note 69 (noting that 97% of chapter 7 cases are no−asset).] one, in which all the debtor's property is exempt. [FN: See 11 U.S.C. § 522(b)(1) (permitting debtors to exempt from liquidation property that would be exempt from claims of judgment creditor under state law); Robert G. Drummond, chapter 13 Practice and Procedure in Montana , 55 Mont. L. Rev. 145, 147−48 (1994) (citing Montana law and stating that most assets are exempt).] In a no asset case, the debtor should be informed that she can keep her property in chapter 7 (other than collateral, which should be explained separately). Furthermore, in a no−asset chapter 7, a debtor will not have to pay dischargeable unsecured debts, such as medical bills and most unsecured credit card debts. [FN: See 11 U.S.C. § 727(a) (providing that debtor is discharged from all debts that arose before date of order for relief). But see id . § 523 (stating that discharge under § 727 does not discharge debtor from any debt if debtor obtained credit fraudulently).]

If the debtor has nonexempt property, the process of liquidation in chapter 7 has to be explained to the debtor. However, nonexempt property may be retained by the debtor in chapter 13 by paying creditors at least its value in the plan. [*FN:* See id . § 1325(a)(4) (requiring plan to pay unsecured creditors what they would be paid in chapter 7 case).]

Any applicable exceptions to discharge, such as child support obligations [FN: See 11 U.S.C. § 1328(a)(2) (providing that debts for maintenance or support of spouse or child specified in § 523(a)(5) will not be discharged).] or educational loans, [*FN:* See id . (denying discharge of educational loans as specified in § 523(a)(8)).] also need to be identified and explained to the client. One or more nondischargeable debts may be a good reason to choose chapter 13, either to get the broader discharge [*FN:* Assuming no bad faith by the debtor, some debts that are nondischargeable in chapter 7 are dischargeable in chapter 13, such as those for money or other property obtained by fraud or for intentional torts. Compare 11 U.S.C. § 523(a)(2) and (6) with 1328(a)(2).] or to pay such debts in the plan. [*FN:* A debtor may choose chapter 13 to obtain protection from collection efforts while paying debts nondischargeable in either chapter, see 11 U.S.C. § 1328(a)(2), and to pay priority tax debts, see 11 U.S.C. §§ 1322(a)(2), 507(a)(8).]

In chapter 7, secured debts will also be discharged, but keeping collateral may depend on creditor acquiescence or on negotiating a reaffirmation agreement. [FN: See Braucher, supra note 3, at 528; supra note 48 and text accompanying notes 46−48, 91−92.] In some circuits and districts, judges will not permit creditors to foreclose on collateral if the debtor keeps current on payments, [FN: See Home Owners Funding Corp. of Am. v. Belanger (In re Belanger), 962 F.2d 345, 349 (4th Cir. 1992) (permitting debtor in chapter 7 to continue payments and retain possession of collateral pursuant to original contract of sale); Lowery Fed. Credit Union v. West, 882 F.2d 1543, 1544−45 (10th Cir. 1989) (same); Valley Nat'l Bank of Ariz. v. Avila (In re Avila) 83 B.R. 6, 7 (B.A.P. 9th Cir. 1987) (same).] although other courts reject this approach. [FN: See Taylor v. AGE Fed. Credit Union (In re Taylor), 3 F.3d 1512, 1513 (11th Cir. 1993) (requiring debtor who intends to retain secured property to either redeem under § 722 or reaffirm debt with creditor); In re Edwards, 901 F.2d 1383, 1384 (7th Cir. 1990) (same); General Motors Acceptance Corp. v. Bell (In re Bell), 700 F.2d 1053, 1057 (6th Cir. 1983) (not permitting debtor to redeem property via installment payments).] Where judges do not provide this protection, sometimes creditors simply acquiesce in the continuation of payments, so that reaffirmation is not necessary to keep collateral. [FN: See Braucher, supra note 3, at 528 (noting this practice in Dayton and Cincinnati, Ohio).] Without judicial protection or creditor acquiescence, reaffirmation will be necessary to avoid foreclosure. Sometimes, threatening to file under chapter 13 will influence a creditor to agree to reaffirmation or to acquiesce in repayment. For collateral other than a home, a threat to cram down the debt to collateral value in chapter 13 [FN: See 11 U.S.C. §§ 1322(b)(2) , 1325(a)(5).] can also help get a creditor to agree to a reaffirmation at less than the full debt amount but more than the collateral value. If the creditor refuses to reaffirm, chapter 13 can be used to keep collateral if the debtor has regular income. However, the debtor must in turn commit to pay all disposable income to creditors for three or more years. [FN: See 11 U.S.C. § 1325(b)(1)(B).]

If there is an arrearage on a home loan and the debtor cannot afford to pay it or get the creditor to permit the debtor to cure, the debtor will either have to give up the property or file in chapter 13. In chapter 13, the debtor will be required

to pay the arrearage within a reasonable time and keep current on regular mortgage payments. [FN: See 11 U.S.C. § 1322(b)(5); see also id . § 1322(e) (providing that amount of payment to cure default is to be determined according to underlying agreement and nonbankruptcy law).] If the debtor, however, chooses to give up the property and file in chapter 7, a deficiency can be discharged. [FN: See 11 U.S.C. § 727(b) (stating discharge under subsection (a) "discharges debtor from all debts that arose before the date of the order for relief").]

For secured debts other than a home loan, such as a car loan, the debtor will have to pay the amount of the debt or the collateral value, which ever is less, in a chapter 13 plan. [FN: See 11 U.S.C. § 1325(a)(5); In re Hibbert, 14 B.R. 891, 893 (Bankr. E.D.N.Y. 1981) (noting that generally secured creditors are entitled to no less than allowed amount of their claims).] For unsecured debt, if the case would be an asset case in chapter 7 and thus require some payment to unsecured creditors in chapter 7, at least that amount must be paid in chapter 13. [FN: See 11 U.S.C. § 1325(a)(4); Hibbert, 14 B.R. at 893 (noting that generally unsecured creditors are entitled to no less than what they would receive in chapter 7 liquidation).] Whether or not the case would be no−asset in chapter 7, to avoid the risk of a confirmation challenge in chapter 13, the debtor must pay disposable income to creditors for at least three years. [FN: See 11 U.S.C. § 1325(b)(1); Anderson v. Satterlee (In re Anderson), 21 F.3d 355, 357−58 (9th Cir. 1994) (requiring that debtor commit projected disposable income determined at confirmation, not actual disposable income, and rejecting trustee's argument that debtor must agree at confirmation to let trustee adjust plan later, without court order, if debtor received additional disposable income).]

C. Some Warnings About chapter 13

If a client is seriously considering chapter 13, the following warnings should be given so that the implications of that choice are clear.

1. High Risk of Failure

In medical practice, doctors are expected to inform patients of relatively low probability risks of medical procedures and treatments in certain circumstances. [FN: See Marjorie Maguire Schultz, From Informed Consent to Patient Choice: A New Protected Interest 95 Yale L.J. 219, 225 (1985) (stating that general consent without awareness of risks involved is not sufficient basis upon which to authorize treatment).] In every part of the country, more than half of chapter 13 plans are not completed. [FN: See Whitford II, supra note 2, at 411 (reporting that in regional study, highest rates of completion were less than half of chapter 13 cases filed).] Surely, in order for consumer debtors to give informed consent to the filing of a chapter 13 case, their lawyers should inform them of the high risk of failure.

Debtors should be warned not only of the likelihood of noncompletion, but of what happens when a chapter 13 case is dismissed or converted. A debtor is not rewarded for struggling to pay for a year or two but failing to finish. In that case, the debtor gets no discharge and is still liable for outstanding debt, [FN: See 11 U.S.C. § 1328(a) (providing that chapter 13 discharge is normally granted upon completion of plan); see also id . § 1328(b) (noting hardship discharge can be granted if failure to complete is "due to circumstances for which the debtor should not justly be held accountable," although this will not allow debtor to keep collateral that has not been paid for).] unless the debtor converts to chapter 7 or files in chapter 7 after dismissal of the chapter 13 case, either of which may involve paying another attorney's fee. [FN: See Braucher, supra note 3, at 547.] If arrearages have not been paid prior to the dismissal or conversion of the chapter 13 case, the debtor will ultimately lose the property, such as a house or car, that was the reason for the struggle.

Debtors should also be told why there are so many noncompletions. It is very hard to commit all disposable income for three to five years, even with a realistic budget. Unrealistic budgets compound the difficulty. [*FN:* See discussion supra Part III.A.] Even if budgeting is realistic at the outset, it may not be by the end of the plan because of increased expenses or lower income. The birth of a child or a marital separation will affect family expenses, and modification of the plan may not be possible. Although a raise or other increase in income may suddenly make a chapter 13 plan more bearable, [FN: See 11 U.S.C. § 1329(a)(1) (permitting chapter 13 trustee or unsecured creditor to seek modification to increase amount of payments, although this is not frequently done).] the debtor may instead experience job loss, loss of hours, or reduced earnings making it impossible to complete the plan.

2. The Limits of chapter 13 As a Means to Save Collateral

chapter 13 is often touted as a means to save a home. [FN: See Lomas Mortgage USA Inc. v. Elmore (In re Elmore), 94 B.R. 670, 671 (Bankr. C.D. Cal. 1988) (stating majority of chapter 13 filers do so to save residence from foreclosure); In re Callahan, 158 B.R. 898, 902 (Bankr. W.D.N.Y. 1993) (stating that one policy underlying chapter 13 is to save home).] As has been noted, sometimes a home can be saved in chapter 7, either informally or using reaffirmation. [FN: See supra notes 91−97, 120−23 and accompanying text.] Furthermore, in chapter 7, dischargeable unsecured debts need not be repaid. [FN: See 11 U.S.C. § 727(b).] If saving the home in chapter 7 is not possible, chapter 13 is more

likely to succeed in that goal if the plan does not also try to achieve other goals (such as high unsecured debt repayment). A low percentage plan reduces the risk of failing to save the home.

Saving a home in chapter 7 is least likely to be possible if the debtor has an arrearage on the mortgage debt, because the creditor is likely to refuse to permit reaffirmation or to acquiesce to continued payment without attempting to foreclose. [FN: See Braucher, supra note 3, at 529 (reporting that most common reason to use chapter 13 cited by lawyers interviewed in two states was to cure arrearage on secured debt).] A debtor who has to make up a home mortgage arrearage and wants to save the home may need chapter 13, [*FN:* See id .] which is most likely to succeed if the repayment promised is manageable. Low percentage plans are less burdensome and thus easier to complete. Because risk of noncompletion is likely to be high in any event, planning for that risk makes sense. Payment of arrearages on secured debt should be front−loaded in the plan to the extent that the local trustee and judges will permit. [*FN:* See id . at 535 (discussing practice of using temporary chapter 13 to make installment cure of secured debt, followed by conversion to chapter 7, a practice that some chapter 13 trustees resist by requiring that some repayment of unsecured debt be made each month, not only after secured debt arrearages are cured).] If conversion or dismissal can be put off until after arrearages are repaid, a noncompletion may still be counted as a success when it saves a home. [*FN:* See id .]

When saving the home is not feasible or financially beneficial, the debtor needs to be told this in no uncertain terms. Particularly if the property has lost value so that the debt exceeds the value of the home, a debtor can benefit in the long run by admitting defeat early, giving up the home and filing in chapter 7 to discharge the deficiency.

Debtors sometimes use chapter 13 to retain a car and cram down payments to its value. If this is the only reason for using chapter 13, other courses of action should be carefully considered to save the debtor from committing to a plan as a condition of discharge. For example the debtor's lawyer may be able to negotiate a workout or a reaffirmation in chapter 7, or the debtor might even give up the car and plan on buying a used one out of exempt property or postpetition income.

3. No Better Credit Availability After chapter 13

The most cautious advice that a lawyer can give a consumer debtor is that better future credit availability is not a good reason to choose one bankruptcy chapter over the other, nor is it usually a good reason to avoid filing bankruptcy at all. A debtor who needs bankruptcy usually has already defaulted on multiple loans and thus already has a bad credit reputation. Consequently, filing in bankruptcy will not make it much worse.

Some lawyers are more willing to tell clients that filing in bankruptcy will not do additional damage to their credit reputations than to tell them that chapter 7 will probably have no worse impact than chapter 13. This is an example of self−interest creeping into lawyers' counseling of clients. Some lawyers even encourage the unrealistic belief that future creditors will look more favorably on chapter 13 than chapter 7. [*FN:* See id . at 538−39; see also Stephen E. Frank , Over Your Head in Debt? Bankruptcy Offers New Start , Wall St. J ., Aug. 23, 1996, at C1 (quoting Professor Elizabeth Warren of Harvard Law School, saying that it is a "myth" that consumer debtors will not be able to get credit following bankruptcy).] It is difficult to compile information on actual creditor practices, [*FN:* See Sullivan et al ., supra note 1, at 315−22 (piecing together available information concerning creditor risk−taking and concluding that reducing bankruptcy risk would require foregoing profits to be made on consumer credit and sales transactions).] but there are many indications that chapter 13 does not bring better credit access, and that chapter 7 may even be preferred by creditors. [FN: See Braucher, supra note 3, at 537−40.]

Furthermore, many credit reporting agencies do not list whether a bankruptcy was in chapter 7 or chapter 13 or the percentage of payment in a chapter 13 case. Even if a creditor knew that a debtor had received a discharge under chapter 7, as opposed to filing under chapter 13, a creditor could very well view the debtor as a better credit risk than he was before the chapter 7 filing or than he would be if he had filed in chapter 13. A debtor who gets a discharge under chapter 7 sheds his debt load, except for reaffirmed loans, making him better able to pay new debt. Also, he cannot file under chapter 7 again for 6 years after discharge. [FN: See 11 U.S.C. § 727(a)(8) (1994).]

In contrast, in chapter 13 a debtor may face a confirmation challenge if he does not commit all disposable income for at least three years. [*FN:* See id . § 1325(b).] Many debtors file five−year plans to make their plans feasible or to pay a high percentage on unsecured debts. A chapter 13 debtor who has committed all disposable income to fund his plan can only afford new credit during the plan if his income rises or his expenses decrease. The debtor needs the chapter 13 trustee's permission to incur new debt if the creditor wants to have an allowable claim. [*FN:* See id . § 1305(c).] In addition, the debtor could convert to chapter 7 and get a discharge. [*FN:* See id. § 1307(a).] Thus, new credit is often difficult for the

debtor to obtain during the life of the plan.

After a chapter 7 discharge, debtors frequently have access to new credit within a year or two, although this is by no means certain to occur. [FN: See Braucher, supra note 3, at 537−39; see also Robyn Meredith, Will Ford Become the New Repo Man? , N.Y. Times, Dec. 15, 1996, at C1, 15 (reporting that Ford Motor Credit Co. has established subprime lending division to lend to high−risk borrowers, including those with bankruptcy on their credit reports).] In a passage quoted at the outset of this article, chapter 13 Trustee Howe wrote, "[f]requently if the debtor had chosen chapter 7 bankruptcy, he would be on his way to re−establishing credit within a year or two of the case being discharged." [FN: See Howe, supra note 1.]

After a serious history of default or after any bankruptcy filing, a debtor may need higher income to obtain credit again. He may have to pay higher interest rates and larger downpayments and may get a low borrowing limit on credit cards. But the same increased credit costs and restrictions are also likely to be imposed on a chapter 13 debtor. [*FN:* An additional reason for creditors not to give better treatment to chapter 13 debtors is that it would be hard to keep track of how much repayment chapter 13 debtors achieved. Filing a chapter 13 plan does not mean 100% repayment; the plan may not be completed, it may be a low percentage plan or, even if it is a so−called 100% plan that the debtor completes, that does not include interest on unsecured debts during the plan.]

Even if completion of a chapter 13 plan gave a debtor lower cost credit than creditors would offer after a chapter 7 case, the debtor would typically pay some unsecured debt in order to be eligible for that credit. Particularly if the debtor's chapter 13 plan involved high repayment of unsecured debts and significant arrearage payments, cost−benefit and present value calculations would often show that all the debt repayment is not worth the lower cost credit three to five years later. Financially, the debtor would probably be better off with a chapter 7 discharge or a low percentage plan. The debtor's savings from not having to fund a high repayment plan could be invested, and the interest earned would more than pay the higher cost of later credit. Some lawyers mention a local chapter 13 trustee's credit re−establishment program to promote use of chapter 13. [FN: See Braucher, supra note 3, at 539 and n.131 (discussing program of trustee in San Antonio who helps debtors who complete their plans to obtain new credit and noting similar program in Columbus, Ohio).] Lawyers, however, should be careful to point out that credit may be available more quickly after filing in chapter 7 and that the benefits of a credit re−establishment program may not match its costs. [*FN:* See id. at 539−40.] For example, if the program is limited to those who complete 100 % plans, the cost of making those payments almost certainly would exceed the savings from credit re−establishment on more favorable terms three or five years hence.

Lawyers cannot promise a chapter 7 debtor will be offered credit within a year or two of discharge, but they can say that this occurs frequently. There is a burgeoning market in "second−chance" credit, offered to debtors with a bankruptcy or repossession on their credit records. [*FN:* See Saul Hansell, A Surge in Second−Chance Finance , N.Y. Times , March 17, 1996, Sec. 3, at 3; see also Meredith, supra note 151.] Lawyers can advise their clients that after filing a chapter 7 petition, that if an opportunity presents itself, they should consider borrowing a small amount and showing creditworthiness by meeting all obligations. Much of this credit will be "low quality," in the sense that it would be offered at high interest rates and with stringent practices on default, so lawyers should advise caution in using it.

In one way, however, credit availability concerns do legitimately favor chapter 13. Home mortgage lenders are often the most conservative creditors, and after any bankruptcy this may be the most difficult kind of credit to obtain, [FN: See Braucher, supra note 3, at 540 (reporting view among lawyers that small loan companies and used car dealers are more likely to lend to debtors right after chapter 7 than home mortgage lenders).] although not impossible. [*FN:* See Handbook 4155.1 Rev −4, U.S. Dept. of Housing and Urban Development, Departmental Staff and Program Participants, Mortgage Credit Analysis for Mortgage Insurance on One−To−Four−Family Properties at 2−5, September 1995 (noting that in underwriting guidelines for HUD−insured mortgage loans, borrower is not disqualified by chapter 7 at least two years before, or one at least twelve months ago if debtor can show bankruptcy was caused by circumstances beyond debtor's control and can meet other criteria).] A debtor who holds onto a home in chapter 13 will not need to find a new home mortgage lender, thus eliminating the problem of lack of availability of credit to finance a home. However, this reason alone does not justify using a high repayment chapter 13 plan. Because a debtor is more likely to be able to complete a low percentage plan, this is the most likely way for a debtor to succeed in holding on to a home.

Furthermore, for some debtors the risk of lack of credit availability is lower than for other debtors. Persons with good income potential will probably be able to re−establish home mortgage credit after a bankruptcy and thus can more prudently take advantage of a chapter 7 discharge. On the other hand, a low−income person who defaults on one home loan will have a more difficult time getting another loan. [FN: See Braucher, supra note 3, at 542.] A debtor in this situation who has a manageable arrearage and who cannot negotiate a reaffirmation may be best served by a low percentage chapter 13 plan because of limited future prospects for home mortgage credit after a chapter 7 bankruptcy, especially if the

cost of rental housing would be high. If the debtor used chapter 7 and lost the home, that debtor might have to pay more for a rental than the mortgage and arrearage payments under a chapter 13. [*FN:* See id. (discussing cases where mortgage payments are lower than rent for suitable home).] A debtor with low income might have trouble getting new home mortgage credit for quite a few years. If the debtor can front−load the arrearage in a chapter 13 plan, he would be in a position to convert to chapter 7 after paying the arrearage if necessary or desired. Furthermore, use of a low percentage plan would minimize the amount that would have to be paid to unsecured creditors during the time necessary to pay the arrearage.

In sum, future credit availability may be better after chapter 7 than after chapter 13. However, lack of credit availability for a home mortgage after bankruptcy can be a good reason to choose a low repayment chapter 13, especially for a low−income person.

4. The Social Question Has More Than One Side

Some lawyers have developed a strong sense that debtors benefit morally, psychologically and socially from the use of chapter 13. [*FN:* See id. at 540−43 (discussing social concerns of debtor clients).] If successful with their chapter 13 plans, debtors learn to live within a budget and may get moral satisfaction and feel better about themselves. On the other hand, more than half of those who file in chapter 13 do not complete their plans and never experience these

advantages. [FN: See Whitford II, supra note 2, at 405, n. 40, and 410−11.] Debtors who cannot complete their chapter 13 plans may suffer a new blow to self−esteem from failing even in bankruptcy. [*FN:* See David Caplovitz, Consumer in Trouble: A study of Debtors in Default , 280−83 (1974) (discussing impact that debt problem has on debtor's happiness and health).]

While it is appropriate for lawyers to discuss social (including moral) considerations, the choice about whether to forego a legal option because of these considerations is for the client to make. [*FN:* See Model Code of Professional Responsibility EC 7−8 (1995) (providing lawyer should ensure, with best efforts, that clients' decisions are made after being informed of all relevant considerations).] In addition, to be effective counselors to consumer debtors, lawyers must recognize that the social considerations are not all on one side of the chapter choice question.

Obviously, most people feel a moral obligation to repay debts, even when they are not legally obligated. [*FN:* See Sullivan et. al., supra note 1, at 337 (explaining that people generally repay their debts because it is "the right thing to do" and that legal enforcement is rarely required).] A discharge from a legal obligation does not necessarily mean a discharge from a moral obligation, and debtors may feel guilty about getting a discharge. [FN: See Braucher, supra note 3, at 540−41 (noting that debtors are often ashamed or embarrassed about bankruptcy); see also Sullivan et al., supra note 1, at 337 (explaining that sense of obligation causes debtor to reaffirm debts).] Lawyers who do not understand this will fail to be responsive to their clients' need to take moral responsibility into account. [FN: See Braucher, supra note 3, at 564−65 (concerning lawyers who say that because chapter 7 is legal, it must be moral).]

Clients may be less able to articulate the other side of the moral question. The stress of dealing with excessive indebtedness may jeopardize debtors' health, family and other relationships and even family integrity. [*FN:* See generally Caplovitz, supra note 163 at 280−85 (discussing research showing negative effects on debtors' health and marriages due to strain of debt problems).] Lawyers should present debtors with the option of admitting defeat in repaying their current debts and vowing to turn over a new leaf, with more cautious use of credit in the future. Lawyers should specifically raise the question of moral and emotional obligation of debtors to their children and their spouses if debtors do not. Lawyers can also tell debtors that they are acting responsibly by facing up to their financial difficulties and taking steps to avoid future problems, no matter which course they ultimately select.

Some lawyers use clients' feelings of guilt and stigma to pressure them into chapter 13, an unconscionable practice. It is not a neutral approach for an attorney to ask the question, "Do you want to repay your debts?" and use a "yes" answer as the basis for a 100% chapter 13 plan. [FN: See Braucher, supra note 3, at 541 (some lawyers even admit they do this to funnel clients into chapter 13 quickly, in the lawyer's own financial interest).] A fair presentation ought to start from the premise that the client wants to repay his or her debts but may not realistically be able to do so. Lawyers should give clients the tools to separate the choice of legal option from moral concerns by pointing out that they can still choose to pay creditors after getting a chapter 7 discharge. [FN: See 11 U.S.C. § 524(f) (1994) (permitting debtor to voluntarily repay debt).] chapter 7 preserves the option to repay, without making discharge dependent on successful completion of a plan. Lawyers can give clients "permission" to make the more realistic choice of chapter 7 by offering the client advice that is not self−serving. [FN: See supra notes 55−61

and accompanying text (discussing lawyers encouraging filing under chapter 13 because of higher fees for lawyers).] For instance, an attorney may say, "Of course you want to pay these debts, but you barely have enough to pay your regular expenses. You can get a discharge, and then if your finances improve later, you could decide to pay back some or all of the debt at that time."

The choice of chapter 7, with voluntary repayment in part, can serve a client financially and morally. This approach leaves it up to the client whether to follow through on the moral commitment. The lawyer may even want to ask a client bent on using chapter 13 for moral reasons, "Why do you want to be bound to repay according to a plan in order to get your discharge? You can get the discharge, and make the decision whether to repay later based on what is realistic then."

In addition to bringing up moral considerations that clients may not have thought of and allowing them to distinguish moral and legal obligations, a lawyer committed to thorough counseling ought to explore with clients their place in the social institution of consumer credit and their social situation more generally. The individual's responsibility ought to be considered, if only to give clients the opportunity to learn from their mistakes. Especially for clients who have suffered no reversal of fortune, overindebtedness and overconsumption are topics that could bear examination.

We live in a culture where advertising promotes unrealistically lavish consumption. Some clients may welcome the opportunity to think about what they did wrong. Others may not want to take any blame, but they may nonetheless be interested in a forward−looking perspective that implicitly acknowledges past mistakes. With all consumer debtor clients, lawyers should attempt to engage in counseling concerning living within their means in the future.

In addition, lawyers should raise questions about the adequacy of debtor clients' preparations for such major financial events as their own retirement or their children's higher education. Since most debtors in bankruptcy will have done little or no planning for either of these events, raising these topics puts in perspective the questionable wisdom of repaying old debts for three to five years before beginning to save. Additionally, bankruptcy lawyers should be armed with facts about the size of Social Security checks for retired persons who worked in jobs typical among their clients. Providing this information will help impress on debtors the need to save.

While failure of personal responsibility is certainly part of what leads to bankruptcy, lawyers who wish to be balanced in counseling should also discuss with clients the idea of creditor improvidence and the connection between bankruptcy and the insecure aspects of modern life. Many creditors constantly encourage consumers to borrow, sometimes paying little or no attention to their debtors' ability to repay. [*FN:* See Vern Countryman, Improvident Credit Extension: A New Legal Concept Aborning? , 27 Me. L. Rev 1, 2−3 (1975) (noting that consumer creditors emphasize volume rather than thorough credit investigation).] Lenders' improvidence goes hand in hand with the improvidence of debtors. [*FN:* See id.] Lawyers should be sure to inform debtor clients that consumer lending is a highly profitable, aggressively marketed and expanding sector and that lenders expect defaults as a cost of doing business, which they predict in advance and figure into interest rates.

For many debtors, a common form of social insecurity is an important factor leading to default on debts. For example, employment loss, marital break−up or both commonly precede bankruptcy. [*FN:* See David T. Stanley & Marjorie Girth, Bankruptcy: Problems, Process, Reform , 47−56 (1971) (discussing study of leading reasons for personal bankruptcy).] For other debtors, their financial problems are due to lack of health insurance. [*FN:* See id. at 47(noting that family health considerations account for twenty−eight percent of underlying causes of bankruptcy) .] In a culture of insecurity, people are paradoxically awash in media images of material excess and hedonism. Debtors should come away from counseling realizing that one day creditors are likely to offer them excessive credit again. Bankruptcy can be presented as an opportunity to rethink how a person should try to live in a culture both socially insecure and materialistic. A lawyer need not turn client counseling into a seminar on the work of Max Weber [*FN:* See generally Max Weber, The Protestant Ethic and the Spirit of Capitalism (Talcott Parsons trans., 1958).] to raise some of these themes in a down−to−earth way. Rather than focusing on getting new credit in the future, lawyers will better serve debtor clients if they stress saving as crucial to future financial health and stability. [FN: See Braucher, supra note 3, at 538 (describing lawyers who try to get clients to focus on living within their means in the future and on saving rather than borrowing).]

Armed with information about the social context of their situation, some clients may nonetheless decide that personal responsibility is their paramount concern and that it dictates the choice of a 100% plan. Other clients are likely to decide that a quick fresh start is not merely expedient, but the right thing to do to begin building a secure financial future for themselves and their families. Still others may arrive at their "fresh start" decision by reasoning that the

consumer credit system could use negative feedback to stimulate correction of its excesses. To allow consumer debtors to make their own choices, lawyers must present alternative views of the

consumer credit system, as well as perspective about prudent personal financial practices and planning.

Finally, the social aspects of bankruptcy may call for group solutions. Some communities already have debtor support groups, [*FN:* For example, these exist in Austin, Texas, and Cincinnati, Ohio.] and lawyers should investigate these and make referrals if appropriate. Another option is for attorneys to start their own debtor support groups as an element of representation. Lawyers should experiment with bringing groups of debtors together to see whether this would be helpful to clients and former clients. Ideally, teams of lawyers and therapeutic professionals would lead or at least guide such groups. New clients might get support and comfort from learning that their problems are not unique. Moreover, former clients might gain much needed self−esteem and perspective from being able to pass on the lessons of their experiences. In this way, lawyers might even serve as catalysts for interest group formation, which could result in collective action to bring legal or political pressure to curb consumer credit abuses. In consumer debtor practice, there is a tendency to "too narrowly . . . focus[ ] on the individual lawyer/client microworld." [*FN:* See Gary L. Blasi, What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship , 48 U. Miami L. Rev . 1063, 1087 (1994) (discussing need to put particular clients' stories in larger social context in order to draw any useful lessons about how to address problems).] With more than a million consumer bankruptcies a year, [*FN:* See Consumer Filings Top the Million Mark in 1996 , Consumer Bankruptcy News , Sept. 12, 1996, at 1 (reporting 1,125,006 consumer filings in 1996, up from 874,642 filings in 1995).] consumer debtors' lawyers should break out of this way of thinking. Debtor groups may be able to provide lawyers with information about creditor practices that would not otherwise be apparent. This information may be useful in representing debtor clients in the future.

5. Chapter 13 is Not Necessarily the Best Buy of Legal Services

Most lawyers charge more for chapter 13 than for chapter 7, sometimes much more. [FN: See supra note 55−56 and accompanying text.] Lawyers should inform clients of the fee differential. They should also explain fully what future services are or are not covered in the chapter 13 fee, including whether there will be additional charges for moratoriums, modifications or a conversion to chapter 7.

Many lawyers offer installment fees in chapter 7. All attorneys should experiment with providing credit and make it as widely available as possible, consistent with avoiding bad debt losses. This would reduce use of chapter 13 as a means to finance fees. If not willing to offer credit in chapter 7, the lawyer should at least explain the possibility of saving to pay for a chapter 7 (assuming no imminent foreclosure or other reason for immediate action), rather than filing in

chapter 13. Debtors may be able to save enough to pay the fee for a chapter 7 filing fairly quickly by ceasing to pay debts that will be discharged.

Furthermore, if a portion of the fee is to be paid postpetition in a chapter 7, a lawyer has an obligation to disclose that the bankruptcy discharge will also discharge the debt owed to the attorney for unpaid fees. Under the Bankruptcy Code, fees are administrative expenses to preserve the estate, payable as first priority unsecured debts out of liquidated property, if the attorney files a claim, [FN: See 11 U.S.C. § 503(b)(1)(A) (providing for expenses of preserving estate, including services rendered after commencement of case, to be allowed as administrative expenses); id . § 507(a)(1) (1994) (providing that administrative expenses are allowed as first among priorities); id. § 726(a)(1) (providing for distribution of property of estate); see also id. § 727(b) (providing for discharge of prepetition debts). Although some attorney services in chapter 7 are provided postpetition, such as attending the meeting of creditors required by section 341, the debtor's obligation for these services would arise when the debtor retained the attorney.] but if the case is a no asset one, payment after the petition is filed cannot be legally enforced. Precisely because the lawyer knows this and the client usually does not, the lawyer as a fiduciary has an obligation to disclose the information. The disclosure can be softened with a bit of salesmanship, for example by the lawyer saying, "I'm going to let you pay part of my fee after we file, and I won't be able to legally enforce your obligation to pay me. I'm going to give you credit because I think you're going to be very satisfied with what bankruptcy accomplishes for you and you'll want to pay for my services."

IV. The Responsibility of Judges and chapter 13 Trustees

An important piece of the consumer counseling picture is the climate created by bankruptcy judges and chapter 13 trustees. These officials should not condone, much less promote, the routine abandonment of basic professional responsibilities. A glaring indication that chapter 13 is being oversold is the fact that more than half of chapter 13

plans are not being completed. [FN: See Braucher, supra note 3, at 583 (stating that study reported in article lends support to concern that chapter 13 is being oversold); see also supra note 10 (concerning noncompletion rates).] Furthermore, judges and chapter 13 trustees review the schedules and plans filed by lawyers, and some of these surely should raise questions about whether the debtors chose high repayment with full warning of the risks and lack of rewards.

One tool with which chapter 13 trustees and judges may police ineffective and insufficient counseling by debtors' attorneys is by enforcing the feasibility requirement for confirmation of a chapter 13 plan. [FN: See 11 U.S.C. § 1325(a)(6).] Some chapter 13 trustees make sure that debtors have budgeted enough to live on, as part of a feasibility review. [FN: See Braucher, supra note 3, at 559 (concerning this practice by Dayton, Ohio, chapter 13 trustee).] If the chapter 13 trustee does not raise this question in appropriate cases, the court can and should do so sua sponte. [FN: SeeIn re Fricker, 116 B.R. 431, 436−38 (Bankr. E.D. Pa. 1990) (stating in dictum that although courts typically confirm chapter 13 plans absent objections from creditors or trustees, courts are empowered to raise § 1325(a)(6) objections sua sponte).] Furthermore, when the same lawyers repeatedly use high percentage plans, funded by dubiously tight budgets, this should prompt questions, not kudos, from chapter 13 trustees and bankruptcy judges. They should be prompted to question the counseling being given to debtors.

These officials should also make disciplinary referrals where they see signs that a lawyer's regular practice is not to counsel clients adequately. [FN: See supra notes 16−17, 34 and accompanying text.] If more trustees and judges raised feasibility challenges, however, it would probably become rare for lawyers to funnel clients into unrealistic chapter 13 plans, making it largely unnecessary to use disciplinary referrals.

In some bankruptcy districts, chapter 13 trustees, backed by bankruptcy judges, have set themselves up as vigorous moral boosters of high percentage plans. [FN: See Braucher, supra note 3, at 557−58 (concerning practices of San Antonio, Texas, chapter 13 trustee); see also Sullivan et al., supra , note 51, at 844−46 (describing how judges influence chapter choice and repayment rates in chapter 13). The power of chapter 13 trustees is in part due to the fact that they are the only full−time consumer bankruptcy officials. Some judges spend little of their time on consumer cases, and chapter 7 trustees are not standing trustees. See 28 U.S.C. § 586(a)(1) (authorizing U.S. trustee to establish panel of trustees for chapter 7) and id . § 586(b) (authorizing standing trustee for chapters 12 and 13).] For example, they can challenge all plans that do not provide for 100% repayment, or some other rule−of−thumb amount, and they can cause problems for "disobedient" lawyers by questioning fee petitions. [FN: See Braucher, supra note 3, at 533, 558.] They can reward lawyers with chapter 13 fees twice as high as chapter 7 fees and with payment of fees early in the plan. [*FN:* See id . at 546−51.] Courts can allow the practice of paying the attorney with the first full plan payment, less the trustee's percentage, giving lawyers an incentive to make plan payments as large as possible. [*FN:* See id . at 548, 558.]

Judges should not set up or support trustees' rules of thumb concerning how much repayment of unsecured debt is expected to avoid a confirmation challenge. They should make clear that best efforts [FN: See 11 U.S.C. § 1325(a)(4) (1994) (providing that chapter 13 debtors must pay unsecured creditors their liquidation share, if any).] and disposable income [*FN:* See id . § 1325(b)(1)(B) (requiring all of chapter 13 debtor's projected disposable income to be applied to plan).] are the tests provided by law and thus the only appropriate ones to use. Furthermore, judges should allow fees based on a goal of providing reasonable compensation, [*FN:* See id . § 329 (granting judge authority to cancel compensation agreement between debtor and attorney if fee exceeds reasonable value of services); s ee also supra note 45 (concerning "good faith" under §1325(a)(3) as additional test).] and

should refuse to approve fees designed to provide incentives for lawyers to use chapter 13, particularly high percentage plans. [FN: See supra notes 55−56 and accompanying text; see also Model Rules of Professional Conduct Rule 1.5 (1983) (explaining various factors used in determining reasonableness of attorney's fees).]

chapter 13 trustees who act as cheerleaders to whip up lawyers to use chapter 13 indiscriminately, stressing high percentage plans, are encouraging malpractice and unethical behavior. [FN: See supra notes 13−15, 18−34 and accompanying text.] Using financial incentives to encourage chapter 13 filings is particularly unseemly. Trustees should show more willingness to tolerate low percentage plans, as some do now. [FN: See Braucher, supra note 3, at 559 (concerning Dayton, Ohio, chapter 13 trustee's tolerance of low percentage plans).] chapter 13 trustees are public officials and most of them are lawyers with a professional responsibility not to induce unprofessional conduct by other lawyers. [*FN:* See Model Rules of Professional Conduct Rule 8.3(a) (1983) (providing that lawyer with knowledge that another lawyer has violated rules of professional conduct has an obligation to inform appropriate professional authorities); id . Rule 8.4(a) (stating that it is professional misconduct to knowingly induce another to violate rules of professional misconduct).] San Antonio chapter 13 trustee Marion "Al" Olson, for example, has made clear that he knows that lawyers' self−interest, and not informed client decision−making, drives chapter choice. He stated that "the biggest factor in chapter choice is who your lawyer is," and added, "we want lawyers to be happy" in explaining his policies on attorneys' fees. [FN: See Braucher, supra note 3, at 558.] Judges are in a position to stop this kind of trustee behavior and also bear the responsibility if

they choose to tolerate it.

The Consumer Working Group of the National Bankruptcy Review Commission has recently made suggestions for reform of bankruptcy law that seem to be based on the conclusion that legal change is necessary to make the system work fairly. [*FN:* See National Bankruptcy Review Commission, Consumer Bankruptcy Working Group, Draft Memorandum 1, March 5, 1997.] The Consumer Working Group's framework addresses several kinds of unfairness, including: (1) the difference in when chapter 7 and chapter 13 debtors receive a discharge, [*FN:* A chapter 13 debtor ordinarily gets a discharge only upon completion of a plan, which usually lasts at least three years. See 11 U.S.C. §§ 1328(a), 1325(b). A chapter 7 debtor gets a discharge under section 727(b) much more quickly, typically about four months after the petition is filed. See Sullivan et al., supra note 1, at 25−26 (explaining that debtor's choice between chapter 7 and chapter 13 may lead to very different legal and financial circumstances that may affect debtor for years to come).] and (2) the non−uniformity in local practices that leads to very different payment expectations in chapter 13 in different bankruptcy districts. [FN: See Braucher, supra note 3 at 532 (concerning minimum repayment expectations for routine confirmation of chapter 13 plans, ranging from 100% in San Antonio, Texas, to 10% in Dayton, Ohio).]

To address the first kind of unfairness, the commission's Consumer Working Group in its first draft memorandum recommends that chapter 13 debtors get a discharge upon confirmation. [*FN:* Consumer Working Group memorandum, supra note 201, at 4.] The memorandum explains that "debtors currently must put their discharges at risk when they attempt repayment in chapter 13, a risk not faced by those debtors who simply choose chapter 7. This would be changed." [*FN:* See id. at 1.]

To address the second kind of unfairness, the memorandum recommends that the amount of required repayment in chapter 13 be based on a graduated percentage of income. [*FN:* See id. at 5.] The memorandum states "[t]his framework would eliminate many non−uniform practices that result in very different treatment for similar debtors and creditors in different regions and districts." [*FN:* See id. at 2.]

Together these two reforms would dramatically change the nature of chapter 13, particularly in districts where debtors currently are pushed into high repayment plans. Discharge on confirmation would make failure to complete a plan less hard on a debtor, who would no longer have to convert to chapter 7. It would thus ameliorate the problem of unrealistically high repayment plans in chapter 13. The other recommended change in the law, basing how much repayment is required in chapter 13 on income, would make it easier for debtors' lawyers to get low percentage plans confirmed for those who need them. It would have the added benefit of taking courts out of the business of ruling on "lifestyle" questions reflected in debtors' schedules of expenses.

The framework of the draft memorandum may be revised by the full commission, and the commission's recommendations may never become law, but its preliminary work supports the argument made here that chapter 13, and particularly high repayment plans, are being oversold in some districts. There is no reason the bench and bar in these districts cannot reform themselves, rather than waiting for a mandate from Congress to do so.

Conclusion

Too many consumer bankruptcy practitioners exhibit insufficient allegiance to their most basic professional obligations, to counsel debtors to make their own informed decisions and to represent their clients zealously within the bounds of the law. As a result of lapses of professional responsibility, chapter 13 is being oversold, at a huge cost to clients.

If counseled effectively, debtors will and should take financial, moral and social considerations into account in their decisions about whether to file and if so, in which chapter. This does not necessarily mean they will choose high percentage chapter 13 plans. Lawyers should encourage debtors to think about both their sense of responsibility to repay creditors and about their hope of achieving greater financial security in the future. Attorneys should also discuss with debtor clients their responsibilities to their families and themselves, as well as the responsibility of creditors and society in general for the situations in which debtors find themselves when they are considering filing in bankruptcy. What weight to give these various considerations is for clients to decide, in light of as much information and perspective as their lawyers can provide.