American Bankruptcy Institute Law Review

Volume 6 Number 2 Winter 1998

BANKRUPTCY FRAUD:

A ROUNDTABLE DISCUSSION

MS. HESTON: We're here today to discuss the area of bankruptcy fraud. We have assembled a panel for this roundtable that includes Joan Safford, formerly the Deputy U.S. Attorney in Chicago; Sandy Rasnak, formerly the Assistant U.S. Trustee in the Chicago U.S. Trustee's office, and presently the National Fraud Coordinator for the U.S. Trustee Program; Judge Robert D. Martin, Chief Bankruptcy Judge for the Western District of Wisconsin; Douglas Hyde, a special agent with the FBI who has done quite a few bankruptcy cases; and Ross Silverman, formerly an Assistant U.S. Attorney in the Chicago U.S. Attorney's Office and currently a private practitioner emphasizing white collar criminal defense work with Katten, Muchin & Zavis.

To begin with, I would like to get a perspective from the people that are here that have worked in the bankruptcy system for several years, either on the criminal side or the bankruptcy side, or maybe both, about what the evolution has been both in terms of the types of bankruptcy cases that are being prosecuted, and the level of prosecution that has evolved over the last five years.

MS. SAFFORD: Well, I think I can address that matter. When I started doing bankruptcy fraud prosecutions about five years ago, they were very much focused on debtor fraud [1] and on individual debtor fraud. [2] Except in rare cases, we were not prosecuting professionals [3] −now we are not prosecuting people who were involved in large corporations. [4] That was in part because of our own lack of experience in the area and the lack of access to the resources which would allow us to both detect and prosecute those cases. [5]

In the last five years or so, we have broadened our prosecutions a great deal so that we now look to prosecutions in the business area of both small and large corporations, of individuals who are of substantial means who have been involved in bankruptcy fraud and of professionals (not just limited to lawyers and trustees). This is an area where there had been a number of prosecutions where we had prosecuted some trustees and professionals who had stolen funds of the estates. [6] We now also are focusing on the area of accountants [7] and on the area of other people such as auctioneers. We're interested in the prosecution because of the strongly−felt view that the prosecution of the people who become involved as professionals in bankruptcy and who are criminally liable will have more of a deterrent effect than just focusing on the prosecution of individual debtors who may be many in number, but who only do it once or twice and don't have the opportunity to counsel people into committing bankruptcy fraud. [8]

MS. HESTON: What has happened, do you think, to the level of prosecution over the last five years?

MS. RASNAK: I think prosecutions have increased across the country for a couple of reasons. [9] One, as bankruptcy task force groups have been put together, I think working relationships between the FBI, the U.S. Attorney, the U.S. Trustee, the IRS Criminal Investigation Division, the Postal Inspectors and other law enforcement agencies have been established. This facilitates the referral and investigation of the process. [10] I also believe that the U.S. Trustee functions as a consultant to the U.S. Attorney and the law enforcement agencies. [11] We are available to guide them through the bankruptcy process.

Another factor that has really helped to increase prosecution is Operation Total Disclosure. [12] This effort, spearheaded by Attorney General Reno, was a nation−wide take−down day for bankruptcy fraud. [13] And on that day, I believe it was 42 districts indicted, 115 individuals. [14] And almost all of those indictments have resulted in convictions. [15] Operation Total Disclosure focused national attention on bankruptcy fraud and that the Department of Justice was committed to the prosecution of those crimes. [16] Attorney General Reno has made the prosecution of bankruptcy fraud one of her priorities. [17]

JUDGE MARTIN: I think that the incidence of bankruptcy fraud is probably exaggerated in the press and may be exaggerated even by things like the take−down day. [18] However, there is some fraud out there, and it has become sufficiently more sophisticated over the last twenty years. [19] It is comforting to know that it is prosecuted at a greater rate. [20]

I think as debtors have become more familiar with bankruptcy law and how they operate, at least in the twenty years I have observed from the bench, there are more elaborate concealments, there is more care taken and more skill used. [21] Additionally, but on the other side, the prosecutors are certainly way, way ahead of where they were twenty years ago. [22] I can probably tell some unflattering stories of having to deal with investigators or prosecutors in those days. Now it is handled at a much more sophisticated level, [23] so I think there has been a big difference on both sides.

There is a real focus on the crime. I think historically the abuses were treated by dischargeability actions, and we found that that doesn't deal with all the issues involved. [24] So, to know there is a higher level of prosecution for criminal activity is comforting.

MS. HESTON: In Operation Disclosure, what was the scope of the crimes pursued?

MS. SAFFORD: There was a very great variety of cases. [25] For example, there were individual debtors who had failed to reveal assets of fairly moderate size, but who had done so in a way that made it clear that they had criminal intent when they did it both because it was omitted from their schedules and because in later hearings they took actions which made it clear that they were concealing the information or destroying records or whatever else. [26]

And then there were also a number of cases at that time which involved much larger debts, bust−out schemes, basically where people were running up credit and then not paying for it, and there was clearly a pattern of activity on the part of the corporations that were involved in that or the businesses that were involved in that. [27]

We also had in those cases a number of cases that involved major frauds on the Internal Revenue Service in the employment tax area. [28]

There also were cases involving petition mill schemes where the individual cases were very small, but the practice was very widespread. [29] In these cases we were specifically going after the practitioners who were involved in these petition mills because we were looking for broad based deterrence. [30]

The good thing for us about Operation Total Disclosure Day was that by simultaneously indicting people all over the country, and by calling attention to it through a national press conference by the Attorney General, we did get a lot of attention. [31] This led not only to additional referrals, [32] but to a higher public consciousness of the problem. [33] It also led to a feeling in the FBI, the U.S. Trustee's Office and the U.S. Attorney's office that this was something that mattered and something that the Attorney General cared about and that, therefore, we could and should all work together. [34] And Sandy − if I could just intercede for a minute − Sandy didn't mention the Internal Revenue Service; but in the task forces increasingly around the country, the Internal Revenue Service is also an integral part of the prosecution team. [35]

MS. RASNAK: And the postal inspectors.

MS. SAFFORD: Right, and the postal inspectors. [36]

JUDGE MARTIN: I know it is hard to measure, but I assume that Operation Disclosure also had an enormous deterrent effect, or you assume that it has had a deterrent effect. If people are aware that there is scrutiny given to these activities they would be less apt to engage in them. [37]

MS. SAFFORD: That's our aim. Of course, in any white−collar area our assumption is that people are more deliberative about their crimes and that they also are more − they are less accustomed to thinking that they might end up in jail. [38] It is the one area of crime in which one can hope that the prosecution might, in fact, lead to deterrence. And certainly with the Operation Total Disclosure, that was our aim. [39]

MS. RASNAK: Right. For example, when Chicago announced our indictments under Operation Total Disclosure, I was at the U.S. Attorney's Office. By the time I got back to my office − we do our chapter 7 meetings here − the lawyers were already talking about the indictments because the media was already reporting on the story. [40]

MS. HESTON: Just to play devil's advocate − do you think that somebody could perceive this as something, like the big wave has gone through and now I'm safe?

AGENT HYDE: I will tell you within the FBI, I mean, our focus is on deterrence. [41] It is specifically deterring entities who are engaged in the systematic presentation of bankruptcy fraud. And I know they are supposed to do a second Operation Total Disclosure, that it wasn't a one−time deal, that there are certainly enough cases out there nationwide to do a second indictment package like that, and that this is currently under consideration. [42]

MS. SAFFORD: And it may be that the Attorney General will decide that doing a National Total Disclosure again is not the appropriate way to go, but certainly within particular districts, packaging of cases in a way that brings the attention of the press on the fact that those prosecutions are going forward is a much better way, in our view, of presenting white−collar cases so that the attention is drawn. In other words, an individual case is not going to be noticed, but a group of cases is going to be noticed. [43]

JUDGE MARTIN: There is a down side for those of us who are concerned about the bankruptcy system as a whole to these efforts at publicity. It brings attention to the fraud in bankruptcy, which the members of Congress seem to be able to seize on rather more than I think it probably is justified. They then try to cure these perceived widespread abuses through Congressional activity that probably is better handled by individual prosecutions. Anytime that the whole bankruptcy system is brought into disrepute by the presence of fraud, it has a negative impact too. [44] So, while I'm glad you get the attention for the deterrence and the prosecutorial benefits, it causes a lot of political problems if people view bankruptcy as very badly riddled with fraud, that isn't the case, I don't think, at all. I think we're still talking about a very, very small percentage of cases in which anything approaching criminal activity takes place.

MR. SILVERMAN: Of course the problem is that if the U.S. Attorneys don't give people a reason to think that they might get caught, and if they get caught something bad might happen to them, it's going to get worse because I do think people are very deliberate. [45] I think people are very deliberate about every decision they make. And everybody does their own risk−benefit analysis before they do anything, including the commission of a bankruptcy fraud. [46]

JUDGE MARTIN: Well, that's true except that most of the debtors that we've seen, as has the most recent surveys done by Warren and Westbrook and Sullivan's show, are getting poorer. [47] They don't have much to plan with. So you're right in a broad sense. But most are not deliberative at the point of bankruptcy. [48] They file bankruptcy after crossing a threshold of financial despair that is brought on by debts far outstripping their assets. [49]

MS. SAFFORD: Well, this is one of the reasons why it is so critical that we encourage bankruptcy fraud task forces, that we get the FBI and the postal inspectors and the IRS involved and that their level of skill increases with the enormous assistance of the U.S. Trustee program because of the large numbers of bankruptcies being filed. [50] The greatest portion of them, of course, are as Judge Martin said, poor people who have gotten themselves into some kind of very substantial difficulty and who need the fresh start that the bankruptcy laws contemplate. [51] The major area of fraud, which previously was unaddressed, and it can be addressed now, is not that group of people where the consequences are less for the system; [52] it is the group of people who are involved in business or in substantial economic activity who are engaged in fraud. [53] We need to increase our skills in dealing with these people, because they are the ones who, as Ross was describing, are going to be deliberative about their criminal conduct, weigh their risks of prosecution against the benefit of getting away with defrauding the creditors or working out side deals within a bankruptcy in order to receive benefits at the expense of the creditors. [54]

AGENT HYDE: Also taking what the judge said is true, that there is a huge group of individuals who are in real desperate situations, it leads to an increase in individuals or entities who sort of prey on those people by promising them things which will never come true. [55] You know, the bankruptcy petition mills, [56] they bill themselves out as credit counselors, as anything other than bankruptcy; [57] and for a couple of hundred bucks, they will promise you the world, throw you into bankruptcy with no intention of ever seeing you successfully through bankruptcy. And while maybe for a few months the debtors' creditors leave them alone because they get notice that a bankruptcy has been filed, the rules don't help the debtors through the process and the cases ultimately get dismissed for want of prosecution. [58] In the end, the debtors are out another couple hundred bucks and are no further along in dealing with their debt problems. [59] The system is bogged down because literally there are hundreds of bankruptcies coming through that are filed without any intention of being successfully completed. [60] And that's where part of our focus in the FBI has been in going after not the individuals who are really in sorry shape, but the individuals or entities who prey on them. I mean, they may not make a lot of money on each individual person, but literally there are people who will handle thousands of these cases for two or three hundred dollars apiece. [61]

MS. SAFFORD: In some of these cases that were involved in Total Disclosure, [62] ones in the 9th Circuit in the Central District of California [63] and then here in the Northern District of Illinois, [64] in both instances we had the FBI involved in undercover projects in order to bring out of the woodwork the petition mill lawyers, [65] paralegals [66] and credit counselors [67] and all those people who were preying on homeowners in foreclosures or people who were renting property and subject to unlawful detaining actions. [68] These people were going to lose their homes and there was nothing else that could happen to them but that they would lose their homes, [69] and the question was how long could they delay losing their homes. These mills came along and swooped down on these poor people, promising them that they could keep them from losing their homes and sometimes, in fact, persuading them to pay their mortgage payments to these counselors in the interim period while the stay was in effect. [70]

AGENT HYDE: The credit counselors would promise to negotiate with the banks on their behalf and you pay me your $600 a month mortgage payment, and I will take that and I will work with the bank and you pay me this. [71]

MS. RASNAK: Or they deed their houses over to the mill counselors, [72] and they are told that, "We'll rent it back to you."

AGENT HYDE: Like the judge has stated, those people are desperate.

MS. SAFFORD: A new area which had not been explored before, is using undercover agents playing the parts of debtors with homes in the case of the Northern District of Illinois, [73] and then having their homes go into foreclosure, having the advisements of the sale of their homes, and luring out of the woodwork those people who prey upon the little people. [74] And what was so interesting in the particular undercover project, as I think I've said before, is that those ads appeared and it brought out all the birds. I mean, the ones we knew about. And over a period of time we had been receiving referrals from various bankruptcy judges, lots of referrals

from them, of what looked like very small, isolated cases of people who were either coming in purportedly pro se, but where the judge or someone else had noticed that the petitions were similar, [75] and also cases in which the debtors were coming in represented but, nothing was ever carried through. [76] And so we were getting individual cases. And the amounts of money were very small. They would not have been of interest to us at all under the ordinary guidelines. They, of course, were of interest to us because the judges were referring them and we're required to look at cases when the judges refer them. But, nonetheless, individually the cases were small and under the federal sentencing guidelines, they looked like insignificant cases because they would not have any significant jail sentence. [77] By doing the undercover project we began to see the broad scope of the criminal activity is on the part of these mills. By identifying several cases we also get a significant sentence because of the change in the sentencing guidelines, so it makes a big difference.

MS. HESTON: What have you seen, Ross, in terms of the sensitivity of the bar to criminal prosecution of bankruptcy fraud, particularly the bankruptcy bar? And I guess a follow−up question to that would be: What role do you see the bankruptcy lawyer playing in terms of preventing or assisting the client in not filing cases where there is potential for criminal charges?

MR. SILVERMAN: I think there probably is some increased awareness and sensitivity among bankruptcy lawyers, but not as much as there ought to be. By contrast, white collar criminal defense lawyers who get involved in situations with people who either in bankruptcy or contemplating bankruptcy, have a keen awareness of the potential criminal issues, that are raised with the bankruptcy spectra.

I think that lawyers ought to be sensitive to the potential criminal issues when a client is either contemplating bankruptcy or is in bankruptcy, and to the extent that you suspect that your client is possibly committing or contemplating committing a bankruptcy fraud of some sort, that you need to be aware of the potential exposures that are going to be created by virtue of what happens in the bankruptcy proceeding. [78] People are going to testify. [79] Documents are going to be produced. Things are going to happen by virtue of the obligations that are created in the bankruptcy proceedings that could increase the likelihood that you and others may be prosecuted. [80] So I think it is very important to be aware of those issues. And further, to the extent that you don't want to increase the potential for prosecution, that you be in a position to counsel your client about ways to avoid increasing the risk of prosecution: possibly getting out of bankruptcy before the situation gets worse, or perhaps not filing a bankruptcy at all.

MS. HESTON: Have you had situations where bankruptcy lawyers have contacted you before they file bankruptcy for a client?

MR. SILVERMAN: I've been involved in situations where as a creditor's attorney I was aware that a debtor was contemplating filing bankruptcy, and I've been involved in situations where a debtor a was contemplating filing a bankruptcy and has chosen not to after deciding that the disadvantages that would inure to them by virtue of filing the bankruptcy outweighed the benefits of the bankruptcy protections that they might obtain.

And I think it's something that attorneys need to be very sensitive to because essentially they are creating and generating information that ultimately can be used against the client for criminal purposes, and the debtor may potentially be committing more crimes than may have already been committed through the filing that could subject you to enhanced prosecution. [81]

AGENT HYDE: We have seen numerous cases where someone under investigation for non−bankruptcy crime files bankruptcy, and in these cases invariably there is bankruptcy fraud.

JUDGE MARTIN: You know, there is the other side of that, I have seen where creditors think there is some criminal activity afoot, they file an involuntary bankruptcy [82] against an individual or a business in hopes that they can enhance the likelihood of criminal prosecution by bringing the disclosures of bankruptcy into play and to get the attention in the bankruptcy context in a hearing on an involuntary. Have you run into that?

MR. SILVERMAN: I haven't run into that exact situation. But from a creditor's perspective, if somebody is about to file bankruptcy, you look at it and say, well, if they are about to file bankruptcy, I am going to be able to do 2004 examination [83] not only of them, but of the other people who may have relevant information.

As an attorney you not only have to be aware of the disclosure issues for your client, but if the attorney is involved with that debtor in some untoward activity, then the attorney may be subjected to discovery in the context of the bankruptcy proceeding. [84] Even if the attorney is not subjected to discovery, the debtor may very well say something in the bankruptcy proceeding or do something in the bankruptcy proceeding that increases the likelihood of prosecution. [85]

MS. HESTON: Let's talk about that a little bit because I know that is a topic that you have dealt with, Joan.

What kinds of things have you seen that lawyers have done that have gotten them into trouble, such as ending up in front of a grand jury or even being prosecuted?

MS. SAFFORD: Just thinking back over the years of prosecutions where lawyers who are not trustees ended up in trouble, it has often been in situations in which a lawyer had an opportunity to know a situation or an asset, and then later was involved in a bankruptcy where disclosure of the asset or issue was required by the Bankruptcy Code [86] and failed to disclose.

Cases, for instance, where a person has been the family's or the business' lawyer over a long period of time and the lawyer is then handling the bankruptcy for that business, but they were also involved in creating the parallel company into which go the assets but not the liabilities during the course of the chapter 11 or just prior to the chapter 11. That is the kind of situation where a lawyer is two steps along the way so to speak and therefore can be held to know that the assets of one company have gone into another. [87]

MS. HESTON: And not disclosed it?

MS. SAFFORD: And not disclosed it.

MS. SAFFORD: In the context of estate counseling, people who have been involved with a family and are aware of the assets in the nature of inheritances, for instance, and at the same time are counseling with a client in a manner that will avoid their listing the fact that they are a beneficiary of a yet unsettled estate. [88]

Similarly, are cases where an attorney has been involved in filing a lawsuit and therefore has knowledge of a lawsuit and the possibility that the client is going to be receiving some kind of settlement proceed and has then filed a bankruptcy in a way that does not disclose the fact of that lawsuit. [89] That's the kind of situation in which we see professionals becoming involved where they are really involved in kind of two stages of a transaction. [90]

MS. HESTON: What about just the straight pre−bankruptcy planning? I mean, let's say that somebody comes to you and they have assets that are not exempt and they want you to figure out a way to shelter these assets. So the attorney sets up the trusts then doesn't handle the bankruptcy case so that there isn't the two steps, there is just the one. Is there exposure in that kind of situation?

JUDGE MARTIN: I guess I have a little trouble understanding your hypothetical. If it is a failure to disclose issue, then it deals with the disclosure itself. If it's a bankruptcy planning issue where you are taking advantage of available exemptions, I don't see how you can distinguish that from tax planning. So long as you don't lie when you do your tax planning, you can take advantage of whatever loopholes the tax law affords. It's only when you lie or fail to disclose in your returns that you start to get into trouble. [91]

So in terms of planning exemptions, there may be state laws that would make the planning ineffective. For example, in Wisconsin, the exemption is denied if a debtor obtains the exemption by fraud. That might be a separate issue. But in terms of taking available exemptions, I've always found that an illusory example. It just

doesn't speak to the real issue.

AGENT HYDE: Or it comes up with what the judge is saying−The attorneys who, you know, if they move a house from personal ownership into trust or close accounts, or something like that, and the bankruptcy comes up and it asks those questions, "What have you done in the last year?" and they write down "nothing" or "haven't closed any accounts," that's where they come into trouble. [92] It is not as much as I have seen in the planning stages. It's in the bankruptcy when it asks those far−reaching − tell us everything that you have done − questions where they don't disclose. [93]

JUDGE MARTIN: There is a wonderful case out of the 5th Circuit, *Ballard*, [94] in which the lawyer does a lot of nifty movement of assets, and then when the client comes back and wants to file bankruptcy, the lawyer advises him that he has to disclose all of that. [95] Later, the lawyer learns that the client retained a different lawyer to file his bankruptcy, and obviously didn't tell the other lawyer about all of the planning. [96] That case raises some of the issues where it's not the planning lawyer who gets into trouble but the next lawyer who doesn't disclose. [97]

MS. SAFFORD: But the next lawyer obviously is not with the same ability to know.

JUDGE MARTIN: No.

MS. SAFFORD: And the cases which we have seen are ones where we were able to show it. I mean there was one case where we prosecuted a debtor, though not the attorney who had filed the original chapter 11 in which there were many, many assets the chapter 11 was voluntarily dismissed, and then filed a chapter 7 a year and several days later. And now, on chapter 7 petition, there are no assets and the trustee finds that it is a no−asset estate. Obviously, with the same attorney in both positions the question comes up not only "When did you transfer this? Was it more than a year ago?" That's not the question. The question is: "What happened?" Because now you are able to show that there was planning between them to file both bankruptcies.

MS. RASNAK: These referrals we make on pre−bankruptcy planning are based on the time line when the transfers occurred, how the future debtor is dealing with his creditors, and whether the transfers are disclosed when the case is filed. [98]

I agree with the Judge and Doug. Debtors don't disclose the transfers. What people call pre−bankruptcy planning is, "We don't want to tell you that we moved our assets." [99] That's what it basically boils down to.

MR. SILVERMAN: I think we have a consensus. I think the grayer area for a practitioner, however, is where the client says, "Well, here are my assets; here's my liabilities," and it just doesn't sound right. It doesn't sound right to you. What do you do? Do you go ahead and file it? What is your duty in any particular circumstance? Do you have a duty to act reasonably?

What is your duty of inquiry before you go off and file something? At what point do you go from being an unwitting participant in somebody else's bankruptcy fraud to criminal complicity? And that's the more difficult situation, I think, for the practitioner.

MS. RASNAK: I think bankruptcy attorneys are concerned about that. I have talked to many attorneys who are concerned that the bankruptcy judges expect them to conduct some kind of basic inquiry about the debtor and not rely solely on what they are told.

For example, some consumer lawyers check on PACER, [100] to see if their clients have filed before. These lawyers are concerned about serial filers and being criticized by the court for not discovering the earlier cases. They are also concerned about criminal complicity.

MS. RASNAK: I want to make one other point on disclosure that we haven't touched on. I think the other area that needs to be addressed is professionals' failure to disclose their conflicts and how that may result in

criminal liability. Certainly the recent case involving Milbank Tweed [101] and John Gellene, [102] who has been convicted, demonstrates that lawyers must make full and complete disclosure. [103]

MS. HESTON: Well, from a prosecutorial standpoint, let's get a little more specific because you're raising the hackles, I'm sure, of every bankruptcy lawyer that will read this. What would you look at by way of proving intent in that kind of a situation and what factors would lead you to prosecute a failure to disclose a significant conflict?

MR. SILVERMAN: I think where an attorney clearly has problems is where he or she is asked very specific questions and he or she and lies to the court. That was the allegation in the Milbank Tweed Case. [104]

JUDGE MARTIN: That's a false oath issue, I think.

MR. SILVERMAN: Yes.

MS. HESTON: So it was not a case where one party in a large firm was working on a case that another party didn't know about it. [105] It was a clear and intentional nondisclosure. [106]

MR. SILVERMAN: That was the allegation.

AGENT HYDE: Was he prosecuted on one of the bankruptcy statutes or was he prosecuted for perjury?

MS. RASNAK: I think the issue is that lawyers need to fully disclose all their potential conflicts. If it is an innocent mistake, you come in and supplement your affidavit. [107]

JUDGE MARTIN: Ironically, it wasn't the failure to disclose that caused the problem in that case. It was the failure to pursue an asset because of the conflict. [108] It was the actual problem that arose from the conflict existing, not from the disclosure. [109]

We always retreat to, "you have to disclose," and then the failure to disclose sounds like it's the criminal activity. The criminal activity is to not act with appropriate fidelity under the situation where you have a fiduciary relationship to two different parties or you have a relationship that may have fiduciary implications. [110]

MR. SILVERMAN: But couldn't it be both?

MS. RASNAK: It's both, yes.

MR. SILVERMAN: Because the false oath is, "did you make a false oath?" and if you failed to disclose something you should have disclosed, liability may attach to that point. And then if you fail to exercise your fiduciary obligations, have you committed another crime?

MS. SAFFORD: Yes.

MS. HESTON: Throughout this discussion, there have been several references to the assistance of the U.S. Trustee. How has the U.S. Trustee role evolved and how would you describe that role in terms of today's criminal bankruptcy prosecution?

MS. RASNAK: Historically, the program has worked to try and improve its working relationships with the Department of Justice's other components − the FBI, the U.S. Attorney as well as other law enforcement agencies as we've mentioned before, postal inspectors IRS and CID.

In 1992, the U.S. Trustee program hired a former U.S. Attorney, Joe Brown, to establish a strong referral process and to build strong working relationships with prosecutors and agents. Over the last several years the

Program has conducted extensive bankruptcy fraud training conferences for U.S. Trustee employees and trustees. This has allowed us to prepare better referral and to better detect criminal activity.

The Program has participated in bankruptcy fraud training courses for Assistant U.S. Attorneys, Assistant U.S. Trustees and other law enforcement agencies. One of our main objectives is to emphasize that the integrity of a uniquely federal system must be protected even if the dollar loss may be small. Serial filers are examples of how the dollar loss may be small but the integrity of the system is at stake.

We have also encouraged the formation of bankruptcy fraud working groups. The efforts of these groups has resulted in prosecutions and better referrals. [111]

I believe we have made steady progress, and I am confident we will continue to do so in the future. The U.S. Trustees are dedicated to bankruptcy fraud−and Jerry Patchen, our director, has made it clear that bankruptcy fraud is one of the U.S. Trustee's programs high priorities.

MS. HESTON: How have some of the rest of you been utilizing the U.S. Trustee's system in the context of criminal prosecution?

JUDGE MARTIN: Well, since the U.S. Trustee system has been in place, I think judges, although they continue under an obligation to refer suspected criminal activity to the U.S. Attorney, [112] often rely on the U.S. Trustee as an intermediary. [113] This works very, very well. The U.S. Trustee has more experience in dealing with the U.S. Attorney [114] and they have served as a clearing house. I think it's been more effective from both ends because of that.

But I don't think it has changed the responsibility of the judges. I think it's just the way that the responsibilities are carried out in reporting suspected activity.

AGENT HYDE: The FBI uses the Trustee's Office all the time, especially regarding who the players are in a certain bankruptcy. You know, there's always things underlying each bankruptcy: Who the trustee is, who the trustee's attorney is, who the bankruptcy attorney is. Relationships like that you can talk with the U.S. Trustee's Office who knows everybody and who can say, "Oh, with a phone call, we can get you the information you need."

So we use the U.S. Trustee's Office, as I mentioned earlier, in cases where someone under investigation for something else files bankruptcy. [115] You can work with the Trustee's Office to look at that bankruptcy filings and minutes of the section 341 rules, [116] if you have some indication that there's going to be fraud.

MS. SAFFORD: Let me just say since this is an area of great sensitivity that Doug is not suggesting that the FBI calls the U.S. Trustee's Office and says, "Make sure that these questions get asked by the trustee."

We are very sensitive to the fact that we cannot direct the civil discovery process for the sake of the criminal case. [117] But we have worked together. And certainly the U.S. Trustee has been the critical and leading force in the efforts to educate the appointed private trustees [118] as bankruptcy crime issues, and with the FBI coming in and speaking, with our office coming in and speaking at those gatherings of trustees, to raise their general consciousness about the kinds of areas in which fraud can occur so that in those 341 Meetings [119] and other meetings in which they have an opportunity to question the debtor or to question anybody, that their sensitivities to where their problems may occur are increased and that they, therefore, as good trustees are now asking a broader range of questions.

MS. HESTON: What principle directs the separation between someone on the criminal side not directing someone on the civil side?

MS. SAFFORD: Well, there are two issues. First, if the person were being questioned by the criminal prosecutors directly, they would of course have the right to invoke the Fifth Amendment; and second, if we

use a subterfuge to ask our questions, namely that we tell the trustee what our questions are − please ask this question, this question, and this question − what we have done essentially is to deny the person the opportunity to invoke their Fifth Amendment rights with the knowledge that the person who is asking that was somebody involved in a criminal prosecution.

JUDGE MARTIN: I find that interesting because my experience, and it hasn't arisen that often, is that people even without representation by lawyers are amazingly aware of their Fifth Amendment rights. There is nothing in bankruptcy that abrogates those Fifth Amendment rights.

MR. SILVERMAN: Right. I think the issue is if the person knew there was a criminal investigation, would the person have responded differently?

And if you are conducting a criminal investigation under the guise of this being a civil bankruptcy matter, or a civil audit that comes up with the IRS quite a bit, the person is really being tricked. I think, "gees, this is routine nice bankruptcy matter, I am going to talk to you all day."

If you walked in and said "I am the FBI" and I wanted to ask you the same questions, a person would more likely take the Fifth because now he, or she, knows the context in which the FBI is asking the questions.

U.S. vs. Tweel, [120] a 5th circuit case, is, I think, the seminal case on this. It dealt with the IRS conducting a criminal investigation under the guise of a civil audit, [121] and the court concluded that this amounted to trickery which violated the defendant's rights. [122]

JUDGE MARTIN: That surprises me.

MR. SILVERMAN: That was the constitutional analysis.

MS. SAFFORD: Well, since Tweel was decided, there have been many, many, many cases which have explained that they are not the same as Tweel, which − I mean the courts have distinguished it. [123] But it did raise a question. For instance, in the bankruptcy context, if the trustee were asked the direct question, "is this information," you know, "is there a criminal investigation going on," the trustees are asked please not to say that there is a criminal investigation going on if they know it. But if they are asked a direct question, in a Tweel−like context, it is our belief that they should answer the question.

MS. RASNAK: Yes. They are instructed if they are asked a direct question, you answer what the truth is.

JUDGE MARTIN: My experience has just been that when people are on the stand − and I used to sit at First Meetings of Creditors, I was actually a referee under the Bankruptcy Act, so I go way back − if people are asked questions, they will invoke the Fifth on their own initiative whenever they think they're getting into danger. I haven't seen people be unaware of their right to invoke the Fifth Amendment. In fact kids, playing in the backyard, seven years old invoke it.

MR. SILVERMAN: I don't think that it is a matter of people misunderstanding their right to take the Fifth. If I'm sitting across from Sandy Rasnak and answering questions, I may tend to take one approach. And if I'm sitting across from an FBI agent answering questions, I may take a different approach.

AGENT HYDE: Yes, but Sandy would swear you in and say, "before we begin, this is under penalty of perjury. Do you swear to tell the truth?" If you sat down with me, I wouldn't do that.

MR. SILVERMAN: Just a real quick analogy. If an FBI agent walked in and said to me "I'm a U.S. Trustee, you can talk to me," and I talk to him because I think that he is a U.S. Trustee−I don't think that's fair.

MS. HESTON: Isn't the distinction that, what you can't do is have the FBI come and tell the private trustee, "well, I want you to ask this, this, and this question," but you can train private trustees to ask those questions

and have them sit in the back of the room − or have the FBI sit in the back of the room and accomplish the same thing.

MS. SAFFORD: But there is a big difference.

MS. RASNAK: We encourage our trustees to call us even if they just have a concern about a case. When trustees contact us about problems, we act as a clearing house for complaints. Frequently we will have different trustees calling about the same problem, and what you then have is a good referral. But as individual trustees, they would not have all the information.

Trustees are an extremely important source of referrals. Their written referrals with accompanying documentation greatly facilitate investigations. Other important sources of referrals include the bankruptcy judges and creditors.

MR. SILVERMAN: At some point, this raises a real issue for the civil practitioner and for the bankruptcy petitioner. You were talking about sensitivities to possible criminal exposures and investigations. And at some point, does a debtor in bankruptcy have a right to be told that the trustee is contemplating a criminal referral, that there is a potential for a criminal referral, or that a criminal referral has been made?

For example, even if you are not explicitly acting at the direction of a law enforcement agency, the U.S. Attorney's Office or the FBI, and they're not saying, "Well, make sure that you ask A, B and C," if you as the chapter 7 trustee are sitting in on a 341 Meeting and you've decided that a crime has been committed −

MR. SILVERMAN: At some point, does somebody have an obligation to advise the debtor?

Obviously, if they are represented by counsel, their counsel ought to be zealously protecting them against saying anything that may tend to incriminate them. But let's say they're pro se and they're sitting in there answering your questions. And, really, what you are doing, you are attempting to gather facts that may support a basis for a criminal referral.

MS. SAFFORD: In my view, the appointed trustee carrying out their duties to find out about assets and whatever else are under no obligation to give anybody any warnings anymore than even an IRS revenue agent coming to your house would be under any obligations to give you any warnings about − if it wasn't provided for in federal regulations − to give you warnings with regard to your possible criminal exposure.

Each bankruptcy petition, each thing that you file with the bankruptcy court, cautions you that that this is true and correct to the best of your knowledge and belief, that everything you've said is true, that what you said last month was true and is true still. [124] There is just repeated warnings within the documents themselves within the procedure that says you can't lie or cheat or steal when you're in a bankruptcy context. [125] So I don't think that − you're not in a custody situation, you're not in a criminal situation, and I don't think there is any obligation.

I agree with you that a pro se person may be at greater risk, just as a person who is at home when the FBI arrives to ask them questions, but the key issue is whether the party is in custody. I don't think there is a reason under the Constitution and I don't think that there's a reason for purposes of good law enforcement that a new requirement of a warning of possible criminal liability should be instituted.

JUDGE MARTIN: I would think it would be very infrequent that the questioning undertaken by a trustee would ever go beyond the scope that would be not only permissible but required under 521 [126] to get the debtor's disclosures.

I suppose the best case you could make, Ross, would be if all those questions had been asked and then there were some additional questions pursued purely for seeking prosecution on a separate ground or something like that. But I would think that would be such a rare instance, it would be hardly worth worrying about.

MS. RASNAK: And as a practical matter I agree with Joan you don't have to do that. But I think that trustees, when they think somebody is really getting themselves in trouble, will basically suggest to the person that they take a break, talk to their lawyer, or if they are pro se, come back a different day.

MS. SAFFORD: May I just go back to the one other point, I think one of the most significant things that has happened with the U.S. Trustees, working together through this instrument of this working group that the Executive Office for U.S. Trustees and Executive Office for U.S. Attorneys has created, is that there is now not only training for appointed private trustees and for Assistant U.S. Trustees, but there is joint training for Assistant U.S. Trustees and Assistant U.S. Attorneys in the area of bankruptcy fraud where Assistant U.S. Attorneys receive instruction on a basic bankruptcy and Assistant U.S. Trustees receive instruction on basic fraud. [127] And then the rest of the program is to talk together about bankruptcy fraud. And this is a program which has been going on now for a number of years. [128]

JUDGE MARTIN: I guess now that you raise it, I would like to take one broader step. The inquiry was raised as to whether attorneys practicing in bankruptcy were more aware of crimes and deterred by their awareness.

I do a lot of national seminars, and I have seen bankruptcy crimes as a topic on more seminars in the last five years than ever before.

Joan does a lot of speaking on it, but a lot of other people do too. And it has become an area where even in local bar associations, it is a topic that will come up as a discussion topic. So I think there is an awareness of crimes that is much greater than there was certainly 20 years ago, even 10 years ago. A lot of it has come out of the Task Forces and the awareness of Operation Total Disclosure and things like that. [129]

MS. HESTON: On the issue of the interaction between the private civil side of bankruptcy cases and the criminal side of bankruptcy cases. Let's say that in the course of the FBI investigation the FBI turns up assets that could be used to pay creditors. May the FBI turn this information over to the private trustees?

MS. SAFFORD: It's a problem. Because if there is a Grand Jury investigation going on and in the course of the Grand Jury investigation we discover assets which were not disclosed in the bankruptcy case − and I'm assuming at this point that there is not a bankruptcy fraud case going on, but we can do it both ways − we are limited under Rule 6(c) of the Federal Rules of Criminal Procedure [130] in our ability to disclose to the appointed trustee − either chapter 7, chapter 11, or whatever − the fact that we have found those assets.

Now, it's often true that there is an awareness of a problem out there already. There have been cases where at the conclusion of the criminal case the bankruptcy is reopened because these assets are now free to be pursued. [131]

JUDGE MARTIN: For example, where assets have been disclosed in an actual trial, but not in the Grand Jury.

MS. SAFFORD: That's right. And we will go further such that if the case is resolved in a plea, we are not going to allow our proceeding to be a way of deep−sixing Grand Jury information which could reveal the existence of an asset. In our plea agreements we describe the disclosed assets in a way that any good trustee is going to pursue the asset.

AGENT HYDE: What you mentioned earlier about the FBI locating assets without the trustee knowing. Usually we're not looking for assets unless the trustee has referred the case to us. And usually in that situation, they're looking for assets, too, and they're using the subpoena power of the bankruptcy court or private investigators or something, and usually they're finding the assets through the same means we are using. [132]

MS. HESTON: Does the U.S. Attorney have any way to keep an asset from being dissipated while the investigation is going on?

MS. SAFFORD: There are a few statutes under which you can keep the assets from being dissipated. [133] Under the mail fraud statute there is a provision for restraining an asset which relates directly to the fraud. [134] Under the racketeering statute, there is a provision for a pre−prosecution restraint of the proceeds of the fraud even better, properties belonging to the person − if that person has been

conducting his business through a pattern of racketeering activity. [135] So you can restrain proceeds in that situation. [136]

And also under the civil money laundering statutes or the forfeiture statutes relating to money laundering crimes, [137] you could proceed civilly and seize assets. [138] This approach has some advantages, obviously; it holds the asset. [139] It has some disadvantages in that a later sale of the assets forfeited are sold, the value may not be as great as if a trustee had liquidating them. On the other hand, they've now been identified. [140] And one thing that can happen is that we can seize assets under our federal criminal statutes and then we can dismiss that forfeiture proceeding, usually with an agreement at the time of conviction, that the assets are going to be turned over to the trustee. [141]

But this is a brand−new area. We are really trying to work out what the roads are by which we can take the proceeds of fraud and assure that they get to the people who were being defrauded by some other means than under restitution laws which can take many years to restore monies to the victims. [142]

MS. HESTON: What's been everyone's experience with using private investigators in cases where maybe there doesn't appear to be enough initial information to get an FBI agent interested or involved?

MR. SILVERMAN: I think that creditors are using private investigators a lot more frequently now than they ever have in the past to try to do their own investigations of the debtor's assets. [143] And there's an abundance of former federal, state and local law enforcement people who are taking their pensions and hiring themselves out to the private sector to do investigations. [144] In bankruptcy matters, more and more people are using private investigators. [145]

MS. RASNAK: Many accounting firms have groups that offer fraud investigation services. [146]

MS. SAFFORD: As far as we are concerned, we are always grateful to have as much of a case investigated as possible in order for us to determine whether the prosecution should go forward. And I am regularly visited − I would say at least twice a month − by attorneys who are in private practice here in Chicago who have done a very thorough investigation through a combination of investigators and discovery in which they have put together a case which they, you know, believe should be prosecuted as a criminal matter. And it comes to us. When we receive information from private investigators, we have to look at the source, reliability of the information, and the manner in which the investigators have gathered the information because of privacy and other federal laws. [147] For instance, bank information is subject to privacy considerations, so that if there is bank information that has not come through regular discovery procedures, we need to be concerned about how that information was obtained. [148]

Another example is tax information. Just by way of example, I've had a case presented to me wherein it came and had the document locator number from the Internal Revenue Service across the top. Well, there's no way that came from any other source except the Internal Revenue Service. The Internal Revenue Code is very, very strict on the question of disclosure. [149] I've got a different problem then. I've now got a problem of who is disclosing something within the Internal Revenue Service.

MS. HESTON: But once you get the information since you weren't the wrongdoer, can't you take it and run with it?

AGENT HYDE: What we've done in the past is if we get information like that, you take it as sort of an allegation and you get a federal grand jury subpoena and you go subpoena the bank, or whatever else, to see if it is true or not because it could just as easily be wrong information that they're providing you.

JUDGE MARTIN: Especially photocopies that can be easily doctored.

AGENT HYDE: One, you're concerned it was gotten inappropriately, and two, you want to know if it's true or not. You know, just because someone gives it to you − I mean, it could have been gotten inappropriately and be true and that's problematic − but it also could have been gotten inappropriately and be completely false.

MS. SAFFORD: You have to independently investigate any of that kind of information.

MR. SILVERMAN: Assuming that the evidence was improperly obtained by the private investigator who was working for a private−sector client, there wouldn't be anything that would preclude you from using that evidence in a trial. It wouldn't render the evidence inadmissible so long as that person was not acting as your agent when it was improperly obtained. [150]

And I think, though, that something that bankruptcy practitioners should be aware of, or creditors or debtors, if you are using private investigators, you have to be really careful about what they're doing because they are operating as your agents. [151] And if they're getting information that they are not supposed to have, or getting information that they're supposed to have through improper means, criminal and civil liabilities can attach not only to them but to the hiring party as the principal for whom they are conducting those activities. [152]

The situation Joan raises is a very interesting one if somebody comes to her and says, "Here's this tax return information." Well, Joan knows that person shouldn't have that tax return information and, ultimately, what I assume happens is there is an investigation of how they got that tax return information that can create all sorts of bad problems for everybody who was involved in obtaining that information.

MS. HESTON: Ross, what can you do to protect yourself if you're going to hire a private investigator?

AGENT HYDE: A lot of times if someone is involved in fraud in say a bankruptcy case, they're involved in fraud in some other situation. We've seen plenty of bankruptcy fraud cases where there was also bank fraud being committed, or tax fraud, or something else, and there are tax returns or bank statements which were fraudulently created for another purpose which you might come across. [153]

There have been plenty of cases where someone fakes up a tax return for a bank loan or fakes up a bank record for a bank loan or something like that. [154] But, if you just rely on something a private investigator gives you, you're going to have big problems.

MS. SAFFORD: Doug has alluded several times to something that I think it is really important to note − and it goes back to one of your earlier questions − which is what are we seeing now.

Because of the higher level of scrutiny and increased ability of the people who are involved in the prosecution now, we are looking at all fraud cases which end up in a bankruptcy, or all bankruptcy fraud cases, to see what other fraud is going on. We always find that if there is a bankruptcy fraud involving a business, there is other fraud there as well. [155] And if there is a fraud such as a Ponzi scheme, [156] or whatever else, and then it is followed by a bankruptcy, then the bankruptcy will be fraudulent also. [157] In other words, the bankruptcy fraud is a means and manner of carrying out the larger fraud. [158]

JUDGE MARTIN: Well, that confirms a suspicion I've always had that even if you can find bankruptcy fraud, there's probably less fraud committed in the harsh light and obvious scrutiny of a bankruptcy context than there is right next−door to it where there isn't as much scrutiny or as much harsh light put on it. The chances are that fraud in other commercial endeavors is greater than it is in bankruptcy. [159]

MS. SAFFORD: Well, you know, the emphasis is usually one priority area over another. I mean ten years ago, the emphasis was on bank fraud and we were not prosecuting the bankruptcy frauds that went along with it. [160] Now, we have just shifted our spotlight as to what it is we're doing and focused more on bankruptcy fraud. [161] But one should certainly not forget that we're doing both those things at the same time.

MS. RASNAK: And to go back to a question earlier about what we've seen in terms of changes in prosecution is very much that, is that the U.S. Attorney is now calling us saying, "we have this investigation. We found a bankruptcy fraud. We would like you to get involved in and help us and get that count done." [162] And that's a tremendous change. That really increases the number of cases that are being prosecuted for bankruptcy fraud. [163]

MR. SILVERMAN: The first thing to do is to make sure that private investigator is licensed, make sure they're bonded. Get proof of those things. You need to familiarize yourself with the issues that are going to be involved in whatever investigation you are asking them to do, so you need to know what your trespass laws are, you need to know what your privacy laws are. You need to talk to them: what are you going to do and how are you going to do it? And you need to really assure yourself and feel comfortable that whatever they're doing is going to be legal and in hindsight, if anybody looks back on the way the investigation is done, you aren't going to have any problems. [164]

Once I've done that, I put into the terms of my engagement letter with the investigator: here's what you are being hired to do−you are not to do A, you are not to do B, you are not to do C.

So I make it very explicit what I am asking him or her to do and not to do. And that's about as much protection as you can get. But beware because 9 out of 10 of them will say: "Don't worry. I do this all the time. I know what I'm doing. Don't worry, it's perfectly legal," and, it's not. I really do think that not only do you have an obligation to do it, but it's good practice to satisfy yourself through inquiry that you know what they're doing and that you're comfortable that what they're doing is perfectly legal.

MS. SAFFORD: And the most dangerous area is any kind of wire tap situation − So, you know, we, they − I mean "we" the defense attorneys, the creditors' attorneys − we all have to be aware of what the federal and state laws are which prohibit certain kinds of conduct, and then be sure that information is being obtained in the proper way. [165] And if in the case of material being brought to us, if it has not been obtained in a proper way, can we redo the work and get it in a proper way? Yes. But we do have to be cautious.

MS. HESTON: What kind of trends are you seeing over the last five years in terms of types and severity of the sentences being imposed?

MS. SAFFORD: Well, the Federal Sentencing Guidelines, [166] which are the only ones with which I am familiar, are based on the amount of fraud on a whole. [167] And in the bankruptcy area, there is an additional enhancement of the sentence because under the law, at least of our circuit, every bankruptcy fraud involves a violation of a judicial order. [168] Because judicial orders − the standing orders require so much disclosure that it pretty much covers what's going on. You've got to tell the truth, you've got to disclose, and so on. So the court here has held in the 7th Circuit that in almost every instance there would be an enhancement for that. [169]

So if you put that together, it's the amount of the fraud, and then it is the enhancement for a violation of a judicial order. Additionally, under the sentencing there is an enhancement for any violation of a fiduciary duty. [170] And in the case of a person who is a chapter 11 debtor−in−possession, [171] that person is considered to be a fiduciary to their estate. In all those cases, you would have an enhanced sentence. [172] So the sentences for bankruptcy fraud are much more substantial now than they were before the sentencing guidelines came in approximately ten years ago. [173]

Additionally, prosecutors have become increasingly adept at using the enhancements to maximize the sentences. [174] Whereas for instance if you did $10,000 worth of fraud ten years ago, there was not any kind of a sentence. Now it may, in fact, involve some brief period of incarceration. And when you start getting up in $120,000 to $300,000 range, you now are more definitely into an area where there will be some sentence of incarceration. [175] So the white−collar crimes as a whole are going up in the bankruptcy fraud area because they involve fiduciaries, and because they involve violations of judicial orders. [176]

MS. RASNAK: And there is an enhancement for lawyers or accountants or anybody who has special skills. [177]

MS. SAFFORD: That's right. And more than minimal planning. And, of course, a bankruptcy almost inevitably involves more than minimal planning. [178]

So there are many enhancements built into the sentencing guidelines that are making bankruptcy fraud carry significant penalties. [179]

MS. HESTON: I would just like to end with everybody giving their views about what changes will be taking place over the next few years in the area of criminal prosecutions.

JUDGE MARTIN: I guess I would anticipate that as bankruptcy sophistication increases, just an understanding of the law means that frauds that are attempted will probably be somewhat more sophisticated. There may be some downturn for awhile if the majority of cases continue to be filed and if there aren't as many reorganization cases. Sophistication will advance very rapidly. I would expect that we would see more complex frauds.

MR. SILVERMAN: Yes. I think that you're going to have more prosecutions as more and more prosecutors and trustees and law enforcement people become more aware and more educated, more interested, more motivated to do these cases. I think as a result of that, you're going to have a deterrent effect on the amount of fraud. So I think the amount of fraud is going to go down; I think the number of prosecutions is probably going to go up.

And I think that over time everybody who participates in the system is going to become much more keenly aware of what they are doing and more careful about how they are doing it.

So hopefully it's going to work to the benefit of everybody who participates in the system and five years from now, everybody will sit down and say, hey, the system got better.

MS. SAFFORD: I think because the large law firms have become involved in the bankruptcy cases of large companies that we will have more referrals of increasingly sophisticated cases because during the course of civil discovery of these cases, experienced practitioners with a whole range of experience in the economic areas will develop much better referrals of sophisticated cases. And increasingly, I believe the U.S. Trustees are getting referrals of that sort from the large law firms.

MS. RASNAK: We are. And I think what Ross said is very true. For I hope that some day bankruptcy fraud will not be unique anymore. Prosecutors and agents will be used to dealing with these crimes; thus, prosecutions will increase.

I also hope that our program will be able to dedicate more resources to referring, investigating and assisting the U.S. Attorney and law enforcement agencies in pursuing bankruptcy fraud prosecutions.

Hopefully in five years I will be able to say that the U.S. Trustee was able to add additional personnel just to work on the fraud aspect.

AGENT HYDE: I think unfortunately, also, as more and more information becomes available and more and more national data bases get out there like PACER [180] and National Public Records [181] data bases, you're going to see a decrease in the sort of asset fraud because more and more of that information will be easily obtainable. But you're going to see an increase in more sophisticated or multilayered fraud as people realize that to hide assets, they can't just not list it − because it will be much easier for someone on a computer to do some sort of a search and come up with something − they will have to do multilayered transfers or something like that to try and conceal their assets. I think the schemes are really going to be much more difficult to figure out.

MS. RASNAK: I just want to add one other thing, too. The U.S. Trustee program is very committed to trying to do what I call civil law enforcement in the sense of increasing our filing of discharge complaints and doing the best we can with the civil remedies that are available. And, again, that goes to the resources. I hope that in the future we can increase the time we dedicate to pursuing those remedies.

MS. HESTON: Thank you all for your time and insight.

FOOTNOTES:

[1] *See* United States v. Swigert, 18 F.3d 443, 446 (7th Cir. 1994) (affirming sentence of individual debtor who pled guilty to bankruptcy fraud); United States v. Robinson, 8 F.3d 398, 418 (7th Cir. 1993) (affirming conviction of debtors for knowingly defrauding bankruptcy court); United States v. Goodstein, 883 F.2d 1362, 1372 (7th Cir. 1989) (affirming conviction of debtor for, among other crimes, bankruptcy fraud); United States v. Franklin, 837 F. Supp. 916, 918, 920 (N.D. Ill. 1993) (sentencing bankruptcy attorney for using his professional knowledge to facilitate client's fraudulent chapter 7 filings).Back To Text

[2] *See* United States v. Michalek, 54 F.3d 325, 327, 334 (7th Cir. 1995) (upholding conviction of individual debtor for bankruptcy fraud where debtor had father−in−law claim debtor's personal assets as his own); United States v. Ellis, 50 F.3d 419, 428 (7th Cir. 1995) (affirming conviction of individual debtor for bankruptcy fraud in chapter 7 filing); *Swigert*, 18 F.3d at 446 (sentencing of individual debtor who pled guilty to bankruptcy fraud).Back To Text

[3] Of those reported federal prosecutions for bankruptcy fraud in the Seventh Circuit between 1992 and 1995 a majority dealt with non−professional debtors. *See, e.g.*, *Michalek*, 54 F.3d at 327 (affirming conviction of debtor for bankruptcy fraud); United States v. Mohammad, 53 F.3d 1426, 1428 (7th Cir. 1995) (affirming conviction of family members who devised "bust−out" scheme to defraud creditors); *In re* McGaughey, 24 F.3d 904, 907−908 (7th Cir. 1994) (approving appointment of receiver where IRS proved independent debtor defrauded creditors in chapter 7 proceeding by filing false tax returns); Levinson v. United States, 969 F.2d 260, 266 (7th Cir. 1992) (stating government may use taxpayer's fraud as defense to taxpayer's attempt to discharge personal debt in bankruptcy); *see also* Michael M. Neltner, *Government Scapegoating, Duty to Disclose, and the S & L Crisis: Can Lawyer's and Accountants Avoid Liability in the Savings and Loan Wilderness?*, 62 U. Cin. L. Rev. 655, 711 (1993) (intimating that by 1993 federal government had not yet decided what ethical standards to hold professionals to).Back To Text

[4] Majority of reported cases in Seventh Circuit since 1995 have not involved persons with connections to large corporations. *See, e.g.*, United States v. Alexander, 135 F.3d 470, 472−73 (7th Cir. 1998) (affirming conviction of debtor on four counts of fraudulent small business filings and seven counts of fraudulent personal filings); United States v. Madoch, 108 F.3d 761, 762−63 (7th Cir. 1997) (affirming conviction of debtor found guilty of fraudulently concealing property from bankruptcy court).Back To Text

[5] *See* Craig Peyton Gaumer, *"Operation Total Disclosure:" A Commentary on the U.S. Department of Justice and the Prosecution of Bankruptcy Crimes*, Am. Bankr. Inst. J., Apr. 1996, at 10 (describing unfamiliarity of many U.S. Attorneys with bankruptcy fraud cases); Gregory E. Maggs, *Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument*, 69 Am. Bankr. L.J. 1, 28 (1995) (stating action often is not taken against bankruptcy attorneys due to lack of resources and difficulty of proving case); *see also id.* at 7 (asserting that due to limited resources, bankruptcy fraud cases worth less than $100,000 go unprosecuted).Back To Text

[6] *See* United States v. Knox, 68 F.3d 990, 1002 (7th Cir. 1995) (affirming conviction of creditor's shareholder for attempted bankruptcy fraud); United States v. Gunderson, 55 F.3d 1328, 1329 (7th Cir. 1995) (upholding conviction of debtor−in−possession who was secretary−treasurer of company filing in chapter 11 for bankruptcy fraud); *see also* United States v. Franklin, 837 F. Supp. 916, 920 (N.D. Ill. 1993) (sentencing bankruptcy attorney for using his professional knowledge to facilitate clients fraudulent chapter 7 filing).Back To Text

[7] *See* Hon. William Houston Brown, *Political and Ethical Considerations of Exemption Limitations: The "Opt−Out" as Child of the First and Parent of the Second*, 71 Am. Bankr. L.J. 149, 205 (1997) (recognizing possible fraud in federal prosecution of professionals who assist in debtor's fraud).Back To Text

[8] *See* Pamela H. Bucy, *Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves*, 29 Ariz. St. L.J. 639, 642 (1997) (stating IRS's Criminal Investigation Division has placed bankruptcy fraud high on priority list of actions to prosecute because of bankruptcy fraud's high deterrent effect); Ralph C. McCullough, II, *Bankruptcy Fraud: Crime Without Punishment* II, 102 Com. L.J. 1, 3−5 (1997) [hereinafter *Punishment II*] (acknowledging that statutory provisions alone are not enough of deterrent to debtor to prevent debtor from committing bankruptcy fraud); Hon. Geraldine Mund, *Paralegals: the Good, the Bad and the Ugly*, 2 Am. Bankr. Inst. L. Rev. 337, 349 (1994) (noting that prosecution of operators of petition mills would better deter fraud than targeting individuals).Back To Text

[9] *See* James M. Cain, *Proving Fraud in Credit Card Dischargeability Actions: A Permanent State of Flux?*, 102 Com. L.J. 233, 256 (1997) (stating that 1,400 bankruptcy criminal fraud cases were under investigation in December of 1996); Lawrence S. Feld, *Bankruptcy Fraud: A New Prosecution Priority*, Bus. Crimes Bull.: Compliance & Litig., Dec. 1996, at 5 (acknowledging new federal interest in prosecution of bankruptcy fraud); Maggs, *supra* note 5, at 7 (revealing that only 137 cases went forward under § 152 in 1992).Back To Text

[10] *See Bankruptcy Fraud Prosecutions in the Middle District of Florida*, Bankr. Ct. Dec., Mar 31, 1998, at A5 [hereinafter *Florida Fraud*] (noting February 1996 establishment of Bankruptcy Fraud Working Group, task force established by U.S. Trustee, U.S. Attorney and F.B.I., has increased number of federal prosecutions of bankruptcy fraud); Judith Benderson, *Bankruptcy Crime: Balancing the Scales*, Am. Bankr. Inst. J., July−Aug. 1994, at 21 (finding that through cooperation with other departments, Justice Department has increased number of bankruptcy cases prosecuted 4 to 6 times); Gaumer, *supra* note 5, at 10 (discussing role of interagency cooperation in Justice Department's bankruptcy fraud initiative). Back To Text

[11] *See* Glenn W. Merrick, *Representing the Debtor: Counsel Beware!*, 23 Colo. Law. 539, 542 (1994) (asserting that U.S. Trustee must work in partnership with U.S. Attorney prosecuting fraud); *see also* Gaumer, *supra* note 5, at 10 (stating importance of interdepartmental cooperation in facilitating discovery of bankruptcy fraud); Hon. Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 Seton Hall L. Rev. 1329, 1408 (1993) (stating that under 1986 Bankruptcy Act, Office of U.S. Trustee was to share its case management information with Department of Justice and other federal agencies).Back To Text

[12] *See* Craig Peyton Gaumer, *Protecting the Bankruptcy Process: The Propriety of Enhancing a Bankruptcy Criminal's Sentence for Abuse of Judicial Orders or Process*, Am. Bankr. Inst. J., Sept. 1997, at 12 (discussing Justice Department's increased interest in prosecuting bankruptcy fraud cases); *Punishment II*, *supra* note 8, at 5 (illustrating "Operation Total Disclosure" and Justice Department's emphasis on bankruptcy fraud).Back To Text

[13] *See Bankruptcy Fraud Crackdown Produces Charges Against 127*, Wall St. J., Mar. 1, 1996 [hereinafter *Charges Against 127*] (stating Attorney General Janet Reno launched "Operation Total Disclosure" because bankruptcy system was being "misused to cheat neighbors and merchants"); *DOJ Announces Major Bankruptcy Fraud Initiative***,** Cons. Bankr. News, Mar. 28, 1996, at 1 [hereinafter *DOJ Initiative*] (noting "Operation Total Disclosure" was spurred by executive office for U.S. Trustees estimation that 10% of bankruptcy filings involve some form of fraud); *Attorney General Unveils Nationwide Crackdown on Bankruptcy Fraud*, Dept. of Just. News Release, Feb. 29, 1996, *available in* 1996 WL 85144, *1−2 (announcing that Department of Justice had launched "Operation Total Disclosure" at behest of Attorney General Janet Reno to assist U.S. Treasury in recovering some of $12 billion which it is owed as one of the nation's largest creditors).Back To Text

[14] *See* Tracy L. Klestadt & Wayne D. Holly, *Bankruptcy Crimes Under the Federal Criminal Code*, N.Y.L.J., Jan. 22, 1998, at 1, n.2 (noting "Operation Total Disclosure" has led to filing of criminal charges against 123 defendants in 36 federal districts); *DOJ Initiative*, *supra* note 13, at 5 (stating that as of Feb. 29, 1996 "Operation Total Disclosure" had resulted in total of 100 individuals being indicted for bankruptcy fraud); Sandra Taliani Rasnak & Joe Brown, *Our First Line of Defense in Bankruptcy Fraud: The U.S. Trustees*, Bus. Credit, Apr. 1998, at 2 [hereinafter Rasnak & Brown] (revealing "Operation Total Disclosure" resulted in 43 districts returning 118 indictments leading to 134 defendants charged and convicted of bankruptcy fraud);; *see also Punishment II*, *supra* note 8, at 5 (confirming that 127 people were charged in "Operation Total Disclosure").Back To Text

[15] *See* Jaret Seiberg, *Docket: Bankruptcy Initiative Gets 152 Convictions*, Am. Banker, May 6, 1998, at 2 (noting in first ten months of 1997 "Operation Total Disclosure" had resulted in 152 fraud convictions and $22 million in restitution and fines); *see also supra* note 14 and accompanying text.Back To Text

[16] *See* Gaumer, *supra* note 5, at 10 (examining policies represented by "Operation Total Disclosure"); *Punishment II*, *supra* note 8, at 5−6 (describing "Operation Total Disclosure" and Justice Department's commitment to attacking bankruptcy fraud); *2 Lawyers Here Among 127 Charged in National Bankruptcy Probe*, Chi. Daily L. Bull. February 29, 1996, at 1 [hereinafter *2 Lawyers*] (observing effects of "Operation Total Disclosure" in Chicago area and underlying policies).Back To Text

[17] *See supra* notes 13−16 and accompanying text.Back To Text

[18] *See generally* Susan D. Kovac, *Judgment−Proof Debtors in Bankruptcy*, 65 Am. Bankr. L.J. 675, 675−76 (1991) (listing negative effects on bankruptcy system of media reports of abuses of bankruptcy system).Back To Text

[19] *See* Max P. Liphart, *Crime in the Suites*, Am. Bankr. Inst. J., Mar. 1994, at 28 (discussing complexity of certain types of bankruptcy fraud such as "Ponzi" schemes); *see also* Gaumer, *supra* note 5, at 10 (stating how unscrupulous businesses take advantage of bankruptcy system through complicated schemes). *See generally* Levy v. Runnells (*In re* Landbank Equity Corp.), 66 B.R. 949, 953 (Bankr. E.D. Va. 1986) (involving complex conspiracy to defraud bankruptcy trustee).Back To Text

[20] *See* Benderson, *supra* note 10, at 21 (observing increase in bankruptcy fraud "task forces" has led to increase in prosecutions); Ralph C. McCullough, II, *Bankruptcy Fraud: Crime Without Punishment*, 96 Com. L. J. 257, 274 (1991) [hereinafter *Punishment I*] (comparing bankruptcy act to Code and finding Code makes prosecutions easier); *see also Florida Fraud*, *supra* note 10, at 6 (stating bankruptcy fraud prosecutions in Middle District of Florida have increased significantly since "Operation Total Disclosure").Back To Text

[21] *See* William D. Brown & Robert G. Richardson, *Insurance Fraud: The New Frontier in Bankruptcy*, Am. Bankr. Inst. J., Oct. 1994, at 15, (discussing intricacies of business failure fraud schemes in bankruptcy context); William I. Kampf & Jay M. Quam, *The Intersection of Bankruptcy and White Collar Crime*, 97 Com. L.J. 70, 70 (1992) (noting bankruptcy fraud is usually integrated with other crime); Maggs, *supra* note 5, at 3 (asserting that consumer debtors possess sufficient knowledge to devise fraud schemes without assistance of bankruptcy professionals). Back To Text

[22] *See* 3 Norton Bankruptcy Law & Practice § 49.1 (William L. Norton, Jr. et al., eds. 2 ed. 1997) (stating bankruptcy crimes have been given higher priority in recent years); *Punishment II*, *supra* note 8, at 5 (acknowledging Justice Department's recent recognition of need to prosecute bankruptcy fraud with persistence and continuity); *see also* Gaumer, *supra* note 5, at 10 (stating that federal prosecutors will be facing uncharted waters in their fairly recent effort to prosecute bankruptcy fraud).Back To Text

[23] *See, e.g.*, Gaumer, *supra* note 5, at 10 (noting that federal prosecutions will become easier as prosecutors become more familiar with bankruptcy law); Kampf & Quam, *supra* note 21, at 71 (noting that increased number of bankruptcies led to increased resources devoted to detection and prosecution of individuals charged

with bankruptcy crimes); *Punishment II*, *supra* note 8, at 5 (observing Attorney General Reno's emphasis on bankruptcy fraud prosecutions).Back To Text

[24] *See* Cain, *supra* note 10, at 256 (observing that withholding of discharge is often empty threat to debtors whose lack of assets removes fear of civil remedies); *Punishment I*, *supra* note 20, at 257−60 (discussing failure of withholding discharge as deterrent); Luther Zeigler, Note, *The Fraud Exception to Discharge in Bankruptcy: A Reappraisal*, 38 Stan. L. Rev. 891, 917 (1986) (arguing that penalty of nondischargeability is not effective penalty for debtor fraud).Back To Text

[25] *See* Cain, *supra* note 10 at 5 (stating that Total Disclosure resulted in prosecution of 127 different individuals for 111 bankruptcy crimes); Gaumer, *supra* note 5, at 10 (noting variety of cases brought under "Operation Total Disclosure"); *2 Lawyers*, *supra* note 16, at 1 (listing examples of variety of cases brought under "Operation Total Disclosure"). Back To Text

[26] *See generally* Gaumer, *supra* note 5, at 10 (describing examples of concealment of assets discovered in "Operation Total Disclosure"); Liphart, *supra* note 19, at 13 (citing FBI figures indicating concealment of assets is most common form of bankruptcy fraud); *2 Lawyers*, *supra* note 16, at 1 (noting that concealment of assets was frequent charge against debtors indicted in "Operation Total Disclosure").Back To Text

[27] *See Punishment I*, *supra* note 20, at 280 (stating "bust out" schemes where individuals drive their company into bankruptcy by exploiting credit are typical fraud schemes carried out by businesses); *see also* Janine Anderson Castle et. al, *Bankruptcy Crime Statutes Governing Debtors*, 15 No. 9, Bankr. Strategist, July 1998, at 6 (recognizing use of bust out schemes creating debt by running up credit for business purposes and escaping liability through bankruptcy). *See generally* United States v. Crockett, 534 F.2d 589, 592 (5th Cir. 1976) (explaining process of "bust out" scheme from beginning to end).Back To Text

[28] *See* Berkery v. Commissioner, 192 B.R. 835, 843 (Bankr. E.D. Pa. 1996), *aff'd*, 111 F.3d 125, 125 (3d Cir. 1997) (affirming tax court ruling that debtor's debts were nondischargeable due to finding of tax fraud); Cassidy v. Commissioner, 814 F.2d 477, 482 (7th Cir. 1987) (upholding tax court ruling that debts were nondischargeable where defendant attempted to escape liability for tax fraud through bankruptcy petition). *See generally* Anthony Michael Sabino, *When Tax Evaders Go Bankrupt: The Bankruptcy Exception to Debt Discharge and "Willfulness" in Tax Crimes*, 27 Suffolk U. L. Rev. 5, 5−6 (1993) (discussing intersection between tax evasion and bankruptcy fraud).Back To Text

[29] *See* Gaumer, *supra* note 5, at 10 (describing petition mills taking advantage of unsuspecting and vulnerable individuals); Kovac, *supra* note 18, at 678 (noting incidence of potential debtors being steered into bankruptcy against their interests by petition mills); Mund, *supra* note 8, at 350 (positing that mills operated by unscrupulous paralegals are significant source of fraud).Back To Text

[30] *See* Gaumer, *supra* note 5, at 10 (stating that petition mills are source of fraud examined by Justice Department); Mund *supra* note 8, at 348−50 (discussing prosecution of petition mill operators as means of deterrence); Michael Connelly, *Petition Mills Dupe Many into False Bankruptcies*, L.A. Times, May 8, 1989, at 1 (stating growth of Petition Mills has prompted federal authorities to begin widespread investigation).Back To Text

[31] *See Punishment II*, *supra* note 8, at 5 (stating that "Operation Total Disclosure" was advertised as effort to deter fraud); *DOJ Initiative*, *supra* note 13, at 1 (discussing numerous indictments nationwide as result of "Operation Total Disclosure"); *Fraud: Attorney General Reno Discloses Crackdown on Bankruptcy Fraud*, Bankr. L. Daily, Mar. 1, 1996, at D2 [hereinafter *Attorney General Crackdown*] (discussing announcement of "Operation Total Disclosure" to public on Feb. 2, 1996).Back To Text

[32] *See* Benderson, *supra* note 10, at 21 (discussing yearly increase in referrals after bankruptcy "task forces" were introduced); *DOJ Initiative*, *supra* note 13, at 1 (stating that "Operation Total Disclosure" cases were referred from all over country). *But see Attorney General Crackdown*, *supra* note 31, at D2 (stating there are

nearly one million bankruptcy petitions filed each year and estimated number of referrals before "Operation Total Disclosure" was only between 1,000 and 1,500).Back To Text

[33] *See* Gaumer, *supra* note 5, at 10 (stating "Operation Total Disclosure" was effort on part of Department of Justice to enhance public confidence in bankruptcy system); *Fraud: Arizona Woman Sentenced to 21 Months for Engaging in Bankruptcy and Bank Fraud*, Bankr. L. Daily, Apr. 16, 1998, at d4 (discussing Arizona resident's sentence and its effect on public consciousness on issue of bankruptcy fraud). *See generally Attorney General Crackdown*, *supra* note 31, at D2 (quoting U.S. Trustee Marcy Tiffany's statement that "the public needs to know the bankruptcy system is operating honestly").Back To Text

[34] *See Punishment II*, *supra* note 8, at 5 (describing Attorney General Reno's role in prioritizing prosecution of bankruptcy fraud); *Attorney General Crackdown*, *supra* note 31, at d2 (stating "Operation Total Disclosure" is multiagency effort among U.S. Trustee Program, U.S. Attorneys, F.B.I., Department of Justice, I.R.S. and Postal Inspection Service); *2 Lawyers*, *supra* note 16, at 1 (quoting Justice Department stating "Operation Total Disclosure" was meant to demonstrate commitment of Attorney General's Office and Department of Justice to pursue prosecution of bankruptcy fraud).Back To Text

[35] *See* Benderson, *supra* note 10, at 21 (noting joint training of "task forces" includes I.R.S.); Gaumer, *supra* note 5, at 41 n.4 (observing frequent involvement of Internal Revenue Service in bankruptcy fraud cases).Back To Text

[36] *See* Benderson, *supra* note 10, at 21 (noting involvement of postal inspectors); Gaumer, *supra* note 5, at 41 n.3 (acknowledging postal inspector involvement); *Attorney General Crackdown*, *supra* note 31, at d2 (including postal inspectors in "Operation Total Disclosure").Back To Text

[37] *See Punishment II*, *supra* note 8, at 5 (citing increased criminal prosecutions were intended to deter bankruptcy fraud); Zeigler, *supra* note 24, at 915−18 (discussing need to focus on bankruptcy fraud as criminal to properly deter behavior); *see also Attorney General Crackdown*, *supra* note 31, at d2 (quoting Attorney General Janet Reno's stating "we want to make it clear that such conduct is criminal and will be prosecuted").Back To Text

[38] Pamela H. Bucy, *White Collar and the Role of Defense Counsel*, 50 Ala. Law 226, 230 (1989) (observing sentences of white collar criminals may consist of restitution, fines and minimal jail time); Brown & Richardson, *supra* note 21, at 15 (discussing deliberate abuse and bankruptcy fraud perpetrated in wider criminal schemes); *Punishment I*, *supra* note 20, at 280 (noting debtors planning in advance to accomplish their fraud).Back To Text

[39] *See supra* note 37 and accompanying text.Back To Text

[40] *See infra* note 43 and accompanying text. **Back To Text**

[41] *See supra* note 37 and accompanying text..Back To Text

[42] *See In re* Lazar, No. LA 92−39039−SB, 1993 WL 513037, at *4 (Bankr. C.D. Cal. 1993) (arguing that more federal criminal investigations are needed in bankruptcy area).Back To Text

[43] *See id*. at *9; *see also* Maggs, *supra* note 5, at 29 (stating that greater publicity of fraud prosecution creates more deterrent effect); *Punishment II*, *supra* note 8, at 5 (noting increase in criminal prosecutions increases deterrent effect).Back To Text

[44] *See* Elizabeth Warren, *Why Have a Federal Bankruptcy System?*, 77 Cornell L. Rev. 1093, 1096 (1992) (noting that issue of utility of bankruptcy does exist). *See generally* Kovac, *supra* note 18 at 675−76 (noting media coverage of wealthy individuals discharging thousands of dollars of debt has fueled perception that bankruptcy system is too lenient).Back To Text

[45] *See supra* note 30 and accompanying text.Back To Text

[46] *See supra* note 43 and accompanying text.Back To Text

[47] *See* Teresa A. Sullivan et al., *Consumer Debtors Ten Years Later: A Financial Comparison of Consumer Bankrupts 1981−1991*, 68 Am. Bankr. L.J. 121, 133 (1994) (theorizing that increase in credit card debt extension to poor people will push them further into debt and more bankruptcy will result). *See generally* Note, *A Reformed Economic Model of Consumer Bankruptcy*, 109 Harv. L. Rev. 1338, 1339−40 (1996) (discussing general behavior change of debtors evaluating bankruptcy).Back To Text

[48] *See* Cain, *supra* note 9, at 236 n.13 (referring to Alan Greenspan's observation that people generally end up in bankruptcy unwillingly); Kovac, *supra* note 18, at 680−82 (observing that many vulnerable and misinformed debtors are coaxed into bankruptcy); *see also* Lynn M. LoPucki, *Common Sense Consumer Bankruptcy*, 71 Am. Bankr. L.J. 461, 461 (1997) (concluding most common debtors who go bankrupt are spendthrifts who do not realize that they are bankrupt).Back To Text

[49] *See* LoPucki, *supra* note 48, at 461 (observing many bankruptcies include debts so large that it is impossible for debtors to repay them); Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans*, 71 Tul. L. Rev. 139, 178 n.251 (1996) (noting that debtors are not always persons with low income because only requirement for bankruptcy is that debts outweigh assets); Teresa A. Sullivan et al., *Folklore and Facts: A Preliminary Report From the Consumer Bankruptcy Project*, 60 Am. Bankr. L.J. 293, 309 (1988) (recognizing problem of how to classify small business run by consumer which results in debt three to four times greater than their assets). Back To Text

[50] *See* Frederic J. Baker, *The Rush of Judgment*, 17 Am. Bankr. L.J. 16, 17 (1998) (stating that U.S. Trustee program advocates that needs of debtor must not overtake rights of creditor). Back To Text

[51] *See* Grogan v. Garner, 498 U.S. 279, 286 (1991) (recognizing debtors' fresh start as one central purpose of bankruptcy); American Express Travel Related Serv. Co. v. Christensen (*In re* Christensen), 193 B.R. 863, 866 (N.D. Ill. 1996) (stating fresh start to debtor as primary purpose of bankruptcy law); *In re* Hessinger & Assocs., 192 B.R. 211, 217 (N.D. Cal. 1996) (providing fresh start as purpose of bankruptcy law).Back To Text

[52] *See* Gerard E. Lynch, *Rico: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 748−49 (1987) (finding bankruptcy to be white collar crime under RICO).Back To Text

[53] *See* United States v. Tashjian, 660 F.2d 829, 839 (1st Cir. 1981) (concluding bustout bankruptcy is crime under RICO when individuals conspire in business scheme).Back To Text

[54] *See* 11 U.S.C. § 523(a)(2)(A) (1994) (stating that no discharge will take place where debtor made false statement as to his financial condition). *See generally* Zeigler, *supra* note 24, at 912 (observing that debtor who opts for bankruptcy and splurges on eve of bankruptcy to maximize his exempt estate is blatantly abusing bankruptcy system).Back To Text

[55] *See infra* notes 59−60 and accompanying text.Back To Text

[56] *See* Marquand v. Smith (*In re* Smith), 105 B.R. 50, 52 (Bankr. C.D. Cal. 1989) (discussing various methods used by "petition" or "bankruptcy mills" with intention of taking advantage of renters in financial difficulty). The mills charge a fee, ensuring protection to debtor from eviction. The protection, often unknown to debtor, is a bankruptcy petition which provides only temporary relief. *See id.*; *see also* Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self−Help*, 41 UCLA L. Rev. 759, 836−39 (1994) (stating that petition mills offer tenants free rent); Mund, *supra* note 8, at 348 (1994) (discussing methods of petition mills).Back To Text

[57] *See* 11 U.S.C. § 110(a)(1) (defining "bankruptcy petition preparer" as non−attorney who files petitions for compensation and provides protections to unknowing customers); *In re* Chamberland, 190 B.R. 972, 973 (Bankr. M.D. Fla. 1996) (enforcing § 110 against petition filer); *In re* Cordero, 185 B.R. 882, 886 (Bankr. M.D. Fla. 1995) (enforcing sanctions on petition filer for overcharging debtor).Back To Text

[58] Fed. R. Civ. P. § 41(b). Section 41 (b) states:

> Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Id. *See also* 11 U.S.C. § 305 (authorizing bankruptcy court to dismiss case). *See generally In re* Bluestein & Co., 68 F.3d 1022, 1025 (7th Cir. 1995) (discussing dismissal for want of prosecution).Back To Text

[59] *See Smith*, 105 B.R. at 52 (noting "[t]hese 'bankruptcy mills' often take several hundreds of dollars in fees from debtor/tenants who cannot afford to pay rent in the first place"); Mund *supra* note 8 at 348 (noting that mills regularly deplete $200 to $1,000 from money that would potentially be paid as rent); *see also* 11 U.S.C. § 110 (providing sanctions for preparers who overcharge for filing of petitions). In some instances, petition mills file bankruptcy petitions without homeowners consent or knowledge. Eventually, the homeowners are evicted, and they have no one to turn to. *See* David Rosenweig, *News & Insights on Business in the Golden State Man Gets Prison Term in Bankruptcy Case*, L.A. Times, Aug. 25, 1998, at D2 (discussing bankruptcy petitioner who targeted homeowners).Back To Text

[60] *See* Marsch v. Marsch (*In re* Marsch), 36 F.3d 825, 830 n.2 (9th Cir. 1994) (noting "bankruptcy mills churn out large numbers of petitions . . . but pursue no further action"). "Estimates suggest that in the Central District [of California] alone, some 20,000 to 40,000 such petitions are filed every year for the sole purpose of delaying debtors eviction." *Id.* at 830 n. 2. *See Smith*, 105 B.R. at 52 (observing that bankruptcy courts in Central District of California are flooded with cases filed solely to delay eviction coupled with motions by landlords to relieve stays); *see also In re* Evans, 153 B.R. 960, 966 (Bankr. E.D. Pa. 1993) (stating that about 30,000 bankruptcy filings were attributed to bankruptcy mills in southern California in 1992); Mund, *supra* note 8, at 347 (noting that many bankruptcies are filed with no intention of seeing them through).Back To Text

[61] *See supra* note 59−60 and accompanying text.Back To Text

[62] *See* Gaumer, *supra* note 5, at 10 (describing "Operation Total Disclosure" as Justice Department operation that prosecuted petition mills as well as other organized bankruptcy fraud schemes); *Punishment II*, *supra* note 8, at 54 (noting Justice Department's enhanced prosecution of abusers of bankruptcy system through "Operation Total Disclosure"); Rasnak & Brown, *supra* note 14, at 30 (stating that by 1998, "Operation Total Disclosure" had resulted in 118 indictments from 43 districts); s*ee also* Seiberg, *supra* note 15, at 2 (discussing convictions resulting from "Operation Total Disclosure," including conviction of woman in Arizona who filed 12 petitions in seven years)Back To Text

[63] *See* Seiberg, *supra* note 15, at 3 (noting Los Angeles "has one of the most aggressive anti−bankruptcy fraud operations in the country"); *Charges Against 127*, *supra* note 13 (reporting that largest number of bankruptcy charges were filed in California in wake of "Operation Total Disclosure"); *DOJ Initiative*, *supra* note 13, at 1 (reporting charges brought against debtors for making false statements to delay foreclosure or eviction); Thomas S. Mulligan, *35 From Southland Indicted in Nationwide Bankruptcy Fraud Crackdown*, L.A. Times, Mar. 1, 1996, at D1 (noting that Los Angeles had one−third of all bankruptcy fraud indictments nationally as result of "Operation Total Disclosure"); *see also Smith*, 105 B.R. at 52 (discussing petition mills who abuse system); Mund, *supra* 8, at 347 (stating that in 1993, 12.8% of bankruptcy petitions filed in Los

Angeles were filed with no intention of seeing them to completion, and 67.4% of them were prepared by petition mills). *See generally* Josh Meyer, *A Plague Visits the Landlords; 'Petition Mills' Flood the Courts with Fraudulent Filings that Help Tenants Delay Eviction or Withhold Rent. Apartment Owners, Losing Millions, Face Foreclosure − and Renters End Up Paying A Price Too*, L.A. Times, Jan 9, 1993, at 1 (discussing history and operations of petition mills in Los Angeles).Back To Text

[64] *See* J.L. Allen, *Crackdown on Bankruptcy Fraud 16 Chicago−Area Residents Among 127 Charged Across Nation*, Chi. Trib., March 1, 1996, at 1, (reporting bankruptcy fraud charges brought as result of "Operation Total Disclosure." including indictment of teacher who allegedly hid inherited mansion and petition mills). The second largest number of charges for bankruptcy fraud as a result of "Operation Total Disclosure" was made in Illinois. *See Charges Against 127*, *supra* note 13; *2 Lawyers*, *supra* note 16, at 2.Back To Text

[65] *See In re* Skobinsky, 167 B.R. 45, 49 (E.D. Pa. 1994) (enjoining defendant who ran petition mill out of home from filing or assisting debtors in filing for bankruptcy, basing its decision on unauthorized practice of law); *Smith*, 105 B.R. at 52 (discussing involvement of attorneys in filing fraudulent petitions); *In re* Hidalgo, 96 B.R. 389, 390 (Bankr. S.D. Fla. 1988) (recognizing bad faith filings as extremely detrimental to court system and announcing they will not be tolerated); *see also* Mund, *supra* note 56, at 348 (noting that most petition mills are attorneys); Rasnak & Brown, *supra* note 14, at 12 (noting operations of attorneys who advertise to solicit those facing foreclosure or eviction promising help in exchange for fees); Allen, *supra* note 64, at 1−2 (reporting indictments of attorney and non−attorney who helped to file bankruptcy petitions in order to avoid foreclosure for large fees).Back To Text

[66] *See Smith*, 105 B.R. at 52 (noting involvement of paralegals in making fraudulent petitions); s*ee also* Rasnak & Brown, *supra* note 14, at 7 (discussing schemes by paralegals who file bankruptcy petitions to forestall eviction); Henry Weinstein, *Man Pleads Guilty in Bankruptcy Fraud Scheme: Former Operator of Paralegal Firms Pretended to Help Forestall Evictions and Snarled Court System with Bogus Filings*, L.A. Times, Mar. 8, 1996, at B3 (reporting guilty plea of man who ran three paralegal firms promising to help low−income individuals forestall evictions for fee).Back To Text

[67] *See Hidalgo*, 96 B.R. at 390 (discussing involvement of "services" that abuse system to forestall foreclosure); Rasnak & Brown, *supra* note 14, at 12−13 (discussing operations of counselors who abuse system by filing numerous petitions to forestall eviction or foreclosure); *see also* Bill Rankin, *2 Atlantans Accused of Scam Involving Bankruptcy System*, Atlanta J. & Atlanta Const., March 1, 1996, at G2, (relating indictment of two counselors who allegedly advertised to help poor "homeowners on the brink of losing their homes" for fee and then filed bankruptcies at times without victims knowledge); Rosenweig, *supra* note 59, at D2 (reporting conviction of man who promised to help those facing foreclosure or eviction for fee ranging from hundreds to thousands of dollars only to file bankruptcy petitions for them without their knowledge).Back To Text

[68] *See supra* notes 62−67 and accompanying text.Back To Text

[69] *See supra* notes 65−68 and accompanying text.Back To Text

[70] *See* Rasnak & Brown, *supra* note 14, at 13 (discussing tactics of mills, including having victims pay their rent or mortgage to mills while they "resolved" victims' financial problems).Back To Text

[71] *See id*.Back To Text

[72] *See id.* at 30 (discussing fees of petition mills, including transfer of deeds).Back To Text

[73] *See id.* (relating concerted efforts by U.S. Trustees, U.S. Attorneys and FBI agents to investigate petition mills, particularly, in Los Angeles and Chicago); s*ee also 2 Lawyers*, *supra* note 16 (stating that undercover agents and concealed weapons were used for first time in investigating bankruptcy fraud cases).Back To Text

[74] *See supra* notes 65−68 and accompanying text.Back To Text

[75] *See* Rasnak & Brown, *supra* note 14, at 14 (discussing referrals by trustees of pro se cases that look similar); *see also* Seiberg, *supra* note 15, at 3 (stating that over "300 tips on potential abuses" were received in 1997 in Los Angeles alone); Allen, *supra* note 64, at 5 (reporting that number or referrals are rising).Back To Text

[76] *See In re* Bluestein & Co., 68 F.3d 1022, 1025 (7th Cir. 1995) (dismissing case for lack of prosecution where attorney failed to file appellate brief four months after due date); *In re* Smith, 105 B.R. 50, 51−52 (Bankr. C.D. Cal. 1989) (stating that some attorneys file bankruptcy petitions for their clients just to delay foreclosure).Back To Text

[77] *See* U.S. Sentencing Commission Guidelines Manual § 2F1.1 (1995) [hereinafter Sentencing Manual]. Under § 2F1.1 (a), base offense level for offenses involving fraud or deceit is six. Under § 2F1.1 (b)(1)(A), base offense level remains unchanged if offenses involving losses of $2,000 or less. With base offense level of six, convicted person can face sentence ranging from 0−6 months to 12−18 months, depending on his prior history. *Id. See generally* Maggs, *supra* note 5, at 7 (relating information by anonymous FBI agent that, generally, cases involving losses less than $100,000 will not be investigated); *Punishment II*, *supra* note 8, at 30 (stating that FBI generally does not investigate losses less than $50,000).Back To Text

[78] *See* 18 U.S.C. § 152 (1994) (detailing criminally punishable actions in bankruptcy proceeding, which could result in up to $500 fine or five years imprisonment).Back To Text

[79] *See generally* 1 Collier on Bankruptcy ¶ 7.10[3][b], at 191 (Lawrence P. King et al. eds., 15th ed. rev. 1997) (confirming that debtor is afforded his constitutional rights to trial by jury, confronting all witnesses and self incrimination, in bankruptcy proceedings).Back To Text

[80] *See* 18 U.S.C. § 152 (preventing persons from fraudulently concealing debtors assets with intention of defeating bankruptcy); *see also* Ruby v. United States, 61 F.2d 617, 618 (6th Cir. 1932) (finding that attorney was guilty for counseling debtor in concealment of assets); Barron v. United States, 5 F.2d 799, 802 (1st. Cir. 1925) (stating that person may not aid debtor in concealing assets in bankruptcy proceeding).Back To Text

[81] *See* 18 U.S.C. § 152 (observing consequences of attorneys actions for participating in bankruptcy crime); *see also* Suffolk County Bar Ass'n v. Pfingst (*In re* Pfingst), 385 N.Y.S.2d 806, 807 (N.Y. App. Div. 1976) (affirming disbarment as punishment for violating 18 U.S.C. § 152); *In re* Muraskin, 3 N.Y.S.2d 976, at 976 (N.Y. App. Div. 1938) (supporting disbarring of lawyer convicted of concealing assets from creditor in bankruptcy proceeding).Back To Text

[82] *See* 11 U.S.C. § 303 (1994) (enumerating circumstances in which involuntary bankruptcy can be filed); *cf. In re* Vincent J. Fasano Inc., 55 B.R. 409, 418 (Bankr. N.D.N.Y. 1985) (claiming that bankruptcy courts are courts of equity and claims must be brought in good faith).Back To Text

[83] *See* Fed. R. Bankr. P. 2004(a) (mandating "on motion of any party in interest, the court may order the examination of an entity").Back To Text

[84] *See id.* 2004(b) (encompassing "any matter which may affect the administration of the debtor's estate" and "any other matter relevant to the case"); *see also* 9 Collier, *supra* note 79, ¶ 2004.01, at 4 (contending that third parties may be examined and compelled to appear).Back To Text

[85] *See generally In re* Wilcox, 109 F. 628, 631 (2d Cir. 1900) (stating that testimony of debtor, given under oath and reduced to writing, can be used as evidence against debtor in subsequent bankruptcy proceedings).Back To Text

[86] *See* 11 U.S.C. § 542(a) (requiring that all property that can be used or sold by trustee in bankruptcy, must be turned over to trustee); *see also* 18 U.S.C. § 152 (stating that any person knowingly and fraudulently concealing assets or issue would be fired or imprisoned). Back To Text

[87] If the lawyer created or helped create the parallel company intending to defraud creditors, and files the debtor's bankruptcy claim under chapter 11, he is guilty of bankruptcy fraud under 18 U.S.C. § 157 which states:

> A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so −
>
> (1) files a petition under title 11;
>
> (2) files a document in a proceeding under title 11; or
>
> (3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title, shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 157 (1994).Back To Text

[88] *See id.* A lawyer counseling an inheritance estate that has as a beneficiary the lawyer's debtor in a bankruptcy proceeding, would violate 18 U.S.C. § 152 for knowingly and fraudulently avoiding the listing of the inheritance as an asset. *See id*. § 152(1).Back To Text

[89] The knowledge of the lawsuit and failure to disclose the possible proceeds violates 18 U.S.C. § 152(1), where "[a] person who knowingly and fraudulently conceals . . . any property belonging to the estate of a debtor," and that person will be subject to a fine or imprisonment. *Id*.Back To Text

[90] The first stage occurring as the attorney in the previously pending lawsuit and the second stage being the bankruptcy filing; thus, stage one provides the knowledge and stage two allows the fraudulent concealment, placing the attorney in violation of 18 U.S.C. § 152(1). *See id.Back To Text*

[91] *See* Fed. R. Bankr. P. 9011 (authorizing sanctions against attorneys for misrepresentation to court). *See, e.g.*, Model Rules of Professional Conduct Rule 1.2(d) (1983) (stating "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent").Back To Text

[92] *See* 11 U.S.C. § 152 (1994) (stating that knowingly and fraudulently making false oath or account in or in relation to case under title 11 is offense against United States); *see also* United States v. Ballard, 779 F.2d 287, 295 (5th Cir. 1986) (explaining that statute clearly proscribes making false oaths in bankruptcy matter); Chalik v. Moorefield (*In re* Chalik), 748 F.2d 616, 618 (11th Cir. 1984) (claiming that deliberate omissions may result in denial of discharge).Back To Text

[93] *See* FDIC v. Sullivan (*In re* Sullivan), 204 B.R. 919, 943 (Bankr. N.D. Tex. 1997) (finding false statements and omissions by debtor rose to level of intentional and willful defrauding of creditors); *see also* Morton v. Dreyer (*In re* Dreyer), 127 B.R. 587, 594 (Bankr. N.D. Tex. 1991) (stating that failure to properly amend schedules constitutes "reckless indifference to truth" and is fraud); Banc One, Texas v. Braymer (*In re* Braymer), 126 B.R. 499, 504 (Bankr. N.D. Tex. 1991) (observing that debtors repeated unwillingness to reveal assets under oath, her "course of conduct showed a pattern of intentional deceit").Back To Text

[94] *See Ballard*, 779 F.2d at 294 (affirming district court's conviction of debtor for making false statements in his bankruptcy).Back To Text

[95] *See id*. at 292.Back To Text

[96] *See id*.Back To Text

[97] *See* Fed. R. Bankr. P. 9011(c) (providing for sanctions against attorneys who file improper documents)*; see also In re* United States Voting Mach., Inc., 224 B.R. 165, 171 (Bankr. D. Colo. 1998) (asserting courts have inherent power as well as statutorily granted authority to impose sanctions).Back To Text

[98] *See Sullivan*, 204 B.R. at 940 (stating that pattern or series of transactions, or course of conduct, is factor to be considered as evidence of fraudulent intent); *Dreyer*, 127 B.R. at 593 (noting that bankruptcy system relies on debtor making complete disclosures and dealing honestly with creditors); *Braymer*, 126 B.R. at 503 (discussing that property which debtor has transferred prior to bankruptcy must be honestly and accurately represented).Back To Text

[99] *See* Amidei v. Metz (*In re* Metz), 150 B.R. 821, 824 (Bankr. M.D. Fla. 1993) (stating failure to disclose assets on statement of assets and liabilities may prove actual intent of fraudulent concealment); March v. Sanders (*In re* Sanders), 128 B.R. 963, 973 (Bankr. W.D. La. 1991) (asserting that debtor's failure to disclose pre−petition transfers was unlawful); Dublina, Ltd., v. Sklarin (*In re* Sklarin), 69 B.R. 949, 955 (Bankr. S.D. Fla. 1987) (asserting that intent to hinder can be inferred when debtor fails to disclose assets in required bankruptcy statements).Back To Text

[100] PACER (Public Access Court Electronic Records) is an electronic public access service which provides access, via computer, to district and bankruptcy court case information and court dockets. (visited Nov. 5, 1998) <http://www.uscourts.gov/PubAccess.html>.Back To Text

[101] *See* Jackson Nat'l Life Ins. v. Greycliff Partners, Ltd., 2 F. Supp.2d 1164, 1166 (E.D. Wis. 1998) (discussing conflict of firm in representing debtor in chapter 11 proceedings while also representing their secured creditor without disclosing that information to debtor). In *Jackson*, the court appointed representatives of Bucyrus−Erie Company (who was represented by Milbank Tweed), and brought suit against Bucyrus' secured creditors. One of the creditors was the South Street Fund, which was run by Mikel Salovaara, who was also a Milbank Tweed client. The defendants used their leverage to cause Milbank Tweed to draft the bankruptcy plan detrimental to Bucyrus and beneficial to themselves. Milbank Tweed induced Bucyrus to enter a settlement of their claims against South Street Funds. John Gellene was the Milbank Tweed partner representing Bucyrus. *See id.*; *see also* Paul M. Barrett, *Inside a White−Shoe Law Firm's Conflict Case*, Wall St. J., Jan. 23, 1998, at b1 (outlining relationship of Milbank Tweed partner Lawrence Lederman and his clients Bucyrus & Salovaara before he joined Milbank Tweed); Matthew Goldstein, *Grand Jury Subpoenas Issued in Inquiry on Milbank Conflict*, N.Y.L.J., June 11, 1997, at 1 (discussing relationship between Bucyrus and Mikel Salovaara). Lederman brought both clients to the firm and when Bucyrus needed assistance with bankruptcy proceedings, Lederman introduced Milbank Tweed partner John Gellene to the company. *See* Barrett, *supra* note 101, at B1. *Back To Text*

[102] *See* Paul M. Barrett, *Former Milbank Tweed Partner Convicted of Misleading Judge*, Wall St. J., Mar. 4, 1998, at b13 [hereinafter *Milbank Tweed Partner Convicted*] (discussing trial and conviction of John Gellene for perjury in bankruptcy action); Barrett, *supra* note 101, at B1 (discussing firm's dual representation of debtor and creditor which caused conflict of interest); Dave Daley, *Perjury Trial Opens, Charges Stem from Lack of Lawyer's Disclosure in Bucyrus Bankruptcy Case*, Milwaukee J. & Sentinel, Feb. 24, 1998, at 1 (noting that Gellene was charged with three counts of perjury in bankruptcy action); *Milbank Tweed Ex−Partner is Sentenced to 15 Months*, Wall St. J., July 28, 1998, at 1 (discussing sentencing of former partner John Gellene for perjury in bankruptcy action).Back To Text

[103] *See supra* note 93 and accompanying text.Back To Text

[104] *See* Barrett, *supra* note 101, at B1 (discussing John Gellene's two formal conflict disclosures in 1994 and his failure to disclose Milbank Tweed's representation of creditor, Salovaara).Back To Text

[105] *See id*. at b1 (observing partner Lederman's introduction of partner Gellene to Bucyrus and discussion among partners at firm over issue of possible conflict in representing Salovaara as well).Back To Text

[106] *See id.Back To Text*

[107] *See* Jensen v. Unites States Trustee (*In re* Smitty's Truck Stop, Inc.), 210 B.R. 844, 850 (B.A.P. 10th Cir. 1997) (asserting that attorney's failure to disclose connections that have potential for creating conflict warrants denial of compensation); *In re* Bonneville Pacific Corp., 196 B.R. 868, 885 (Bankr. D. Utah 1996), *aff'd in part, rev'd in part sub nom*. Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434 (D. Utah 1998) (opining that attorney has duty to debtors−in−possession which can only be met by avoiding fraudulent behavior); Christopher M. Ashby, Comment, *Bankruptcy Code Section 327(a) and Potential Conflicts of Interest−Always or Never Disqualifying?* 29 Hous. L. Rev. 433, 461−62 (1992) (discussing need for attorney to disclose all potential conflicts of interest to bankruptcy court).Back To Text

[108] *See supra* notes 101−102 and accompanying text.Back To Text

[109] *See id.Back To Text*

[110] *See In re* Dynamark, Ltd., 137 B.R. 380, 381 (Bankr. S.D. Cal. 1991) (stating counsel for debtor and creditor in unrelated matters not precluded automatically from representation). *See generally* 1 Collier, *supra* note 79, ¶ 8.01[3], at 8−6 (describing duties of diligence, competence, and loyalty and duty to exercise independent professional judgment). *But see supra* note 101 and accompanying text. Back To Text

[111] *See* Ronald J. Ostrow, *U.S. Steps Up Bankruptcy Fraud Prosecutions in L.A.; Crime: Justice Department Expected to Announce 31 Cases Involving 35 Defendants Here, a Leading Trouble Spot in the Nation*, L.A. Times, Feb. 29, 1996, at 1 (noting surge in bankruptcy fraud prosecutions in Los Angeles accounts for almost one third of more than 100 cases filed under "Operation Total Disclosure"); *supra* note 10 and accompanying text.Back To Text

[112] *See* 18 U.S.C. § 3057 (a) (1994) (requiring judges or trustees having reasonable grounds for believing that violation under laws of United States relating to insolvent debtors has been committed to report all appropriate information to United States Attorney); *see also In re* Valentine, 196 B.R. 386, 387 (Bankr. E.D. Mich. 1996) (acknowledging duty of judges and trustees to report possible bankruptcy crimes to United States Attorney); *In re* Weintraub, 171 B.R. 506, 510 (Bankr. S.D.N.Y. 1994) (referring possible fraud to United States Attorney's Office).Back To Text

[113] *See In re* Holder, 207 B.R. 574, 585 (Bankr. M.D. Tenn. 1997) (discussing chapter 11 trustee's statutory duty to report all facts and circumstances of case to U.S. Attorney). *See, e.g.*, United States v. Coyne, 587 F.2d 111, 114 (2d Cir. 1978) (discussing trial court's direction to trustee to report facts surrounding possible crime to United States Attorney); *In re* Lawson Trucking Co., 56 B.R. 194, 195 (Bankr. D.R.I. 1986) (suggesting that if there are reasonable grounds, United States Trustee should refer matter to United States Attorney).Back To Text

[114] *See* 28 U.S.C. § 586(a)(3)(f) (1994) (requiring U.S. Trustee to refer acts which may constitute crimes to U.S. Attorney and to assist, at request of U.S. Attorney, in prosecution of such acts). *See generally Attorney General Crackdown*, *supra* note 31, at D2 (discussing number of possible crime referrals made by United States Trustee to United States Attorney).Back To Text

[115] *See generally Punishment II*, *supra* note 8, at 27 (explaining role of F.B.I. in bankruptcy crime reporting and investigation).Back To Text

[116] *See* 11 U.S.C. § 341 (1994) (authorizing trustee to convene meeting of creditors).Back To Text

[117] *See* United States v. (Under Seal) (*In re* Grand Jury Subpoena), 836 F.2d 1468, 1479 (4th Cir. 1988) (explaining prohibition of investigating using civil discovery as tool in criminal investigations). *See generally* Georgia A. Staton & Renee J. Scatena, *Parallel Proceedings − A Discovery Minefield*, 34 Ariz. Attorney 17, 18 (1998) (discussing hazards of using civil discovery in order to obtain information for criminal investigation).Back To Text

[118] *See* 3 Norton, *supra* note 22, § 49:8 (making it crime for bankruptcy petition preparer to knowingly disregard requirements of title 11).Back To Text

[119] *See* 11 U.S.C. § 341 (authorizing trustee to convene meeting of creditors).Back To Text

[120] 550 F.2d 297 (5th Cir. 1977).Back To Text

[121] *See id.* at 298 (discussing Internal Revenue Agent's criminal audit, at request of Organized Crime and Racketeering Section of Justice Department, violated subject's rights when agent led subject's accountant to believe it was civil audit).Back To Text

[122] *See id.* (finding that agent's behavior constituted illegal search in violation of Fourth Amendment because consent was given through deception); *see also In re* SEC v. ESM Gov't Sec., Inc., 645 F.2d 310, 315 (5th Cir. 1981) (finding that agent's failure to disclose to defendant criminal nature of investigation was deliberate attempt to deceive him, thus disregard of his rights); Jones v. Berry, 524 F. Supp. 645, 651 (D. Ariz. 1981) (finding agent's failure to disclose association with IRS was more severe violation than violation in Tweel).Back To Text

[123] *See* United States v. Powell, 835 F.2d 1095, 1099 (5th Cir. 1988) (contrasting Tweel by finding evidence was not product of fraud or trickery); United States v. Peters, 944 F. Supp. 646, 654 (N.D. Ill. 1996) (finding that agents were not involved in covert criminal investigations); Chris−Marine USA, Inc. v. United States, 892 F. Supp. 1437, 1453 (M.D. Fla. 1995) (distinguishing facts from Tweel because plaintiff's had actual knowledge of criminal investigation).Back To Text

[124] *See* 11 U.S.C. § 727(a)(4) (providing for "false oath" exception to discharge). *See, e.g.*, Asa S. Herzog et al., Herzog's Bankruptcy Forms and Practice, pt.6, form 8.02, *Declaration Under Penalty of Perjury on Behalf of a Corporation or Partnership* (containing an affirmation that information provided by debtor is "true and correct").Back To Text

[125] *See* Herzog, *supra* note 124, pt.6 form 8.02.Back To Text

[126] *See* 11 U.S.C. § 521(4) (requiring debtor to surrender to trustee all property of estate and any documents relating to estate).Back To Text

[127] *See* Benderson, *supra* note 10, at 21 (describing trustee training programs and their effects).Back To Text

[128] *Id.Back To Text*

[129] *See generally* Gaumer, *supra* note 5, at 10 (discussing success of government initiative to combat bankruptcy fraud).Back To Text

[130] *See* Fed. R. Crim. P. 6(e) (listing situations in which disclosures of grand jury information is permitted, but not including efforts to locate assets in separate bankruptcy proceeding); United States v. Theron, 116 F.R.D. 58, 60 (D. Kan. 1987) (raising issue of disclosure of grand jury records to bankruptcy trustee as violating secrecy provisions of Rule 6(e)).Back To Text

[131] *See* Abernathy v. United Mo. Bank (*In re* Abernathy), 38 B.R. 768, 769 (Bankr. W.D. Mo. 1983) (stating that bankruptcy proceeding may be reopened if new assets are discovered); *see also* Weston Burley House,

Inc. v. Pyles (*In re* Pyles), 38 B.R. 92, 94−95 (Bankr. W.D. Mo. 1984) (discussing creditor's right to reopen bankruptcy proceeding if new assets are discovered); *In re* Frank, 278 F. 390, 390 (D. Mont. 1922) (discussing ability for estate to be reopened in order for administration of newly discovered assets).Back To Text

[132] *See* Durkin v. Mazur (*In re* American Resources Corp.), 942 F.2d 790, 790 (9th Cir. 1991) (noticing debtors attempts to conceal books and records and fraudulent transfer of assets after requested by trustee); United States v. Murray, 751 F.2d 1528, 1532 (9th Cir. 1985) (discussing FBI agent who seized evidence of bankruptcy fraud while searching for evidence of tax evasion).Back To Text

[133] *See* 18 U.S.C. § 981(a)(1)(D) (1994) (granting government ability to seize assets directly or indirectly traceable to violations for mail fraud, wire fraud, or major fraud against United States); *see also id.* § 981(a)(1)(D)(ii) (permitting seizure of assets . . . "relating to fraud and false statements"); *id.* § 981(a)(1)(D)(vi) (allowing seizure of assets . . . "relating to wire fraud").Back To Text

[134] *See id.* § 981(a)(1)(D)(v) (relating to violations of 18 U.S.C. 1341, protecting against mail fraud); *see also* United States v. Amiel, 889 F. Supp. 615, 623 (E.D.N.Y. 1995) (discussing seizure of assets related to scheme involving sending counterfeit copies of artwork to victims by mail); United States v. 16899 S.W. Greenbrier, 774 F. Supp. 1267, 1274 (D. Or. 1991) (denying defendant's request for return of property seized in violation of 18 U.S.C. § 1341 and other sections of title 18).Back To Text

[135] *See* 18 U.S.C. § 1963(a)(3) (delineating what is to be forfeited in conjunction with imposed criminal punishments); *see also* United States v. Regan, 858 F.2d 115, 119 (2d Cir. 1988) (describing court's ability to restrain potentially forfeitable assets pursuant to violation of 18 U.S.C. § 1963, prohibiting racketeering activity); United States v. Berg, 998 F. Supp. 395, 398 (S.D.N.Y. 1998) (stating that § 1963 allows court to restrain assets of similar value of partnership interest at time of crime if assets cannot be divided without difficulty).Back To Text

[136] *See generally In re* Assets of Martin, 1 F.3d 1351, 1353 (3d Cir. 1993) (noting court's ability to restrain pre−trial and pre−conviction assets under § 1963); United States v. Eagleson, 874 F. Supp. 27, 28 (D. Mass. 1994) (explaining government's pre−trial restraint of defendant's assets that relate to his racketeering activity); *In re* Assets of Parent Indus., 739 F. Supp 248, 255 (E.D. Pa. 1990) (discussing court's authority to restrain potentially forfeitable assets regarding violations of § 1963).Back To Text

[137] *See* 18 U.S.C. § 1956(b)(1) (authorizing government to pursue property involved in violation of criminal money laundering); *see also id.* § 981 (b)(1)(D)(ii) (authorizing pursuit of property and assets related to money laundering crimes).Back To Text

[138] *See* United States v. Ursery, 518 U.S. 267, 267 (1996) (stating that civil forfeiture and in rem proceedings in relation to money laundering crimes do not constitute punishment for double jeopardy purposes); United States v. Cunan, 156 F.3d 110, 116−17 (1st Cir. 1998) (discussing government's ability to restrain assets civilly until after criminal proceeding and if unsuccessful, government may attempt to cease property civilly); United States v. One 1988 Prevost Liberty Motor Home, 952 F. Supp. 1180, 1210 (S.D. Tex. 1996) (stating that debtor who launders money and subsequently purchases motor home with proceeds may be forced to forfeit that property).Back To Text

[139] *See* United States v. Trost, 152 F.3d 715, 721 (7th Cir. 1998) (affirming forfeiture of seized assets due to money laundering and other fraud related crimes); United States v. Dowdy, No. 96−1545, 1996 WL 690139, at *1 (8th Cir. Dec. 3, 1996) (finding government's restraint and subsequent forfeiture of assets did not violate double jeopardy).Back To Text

[140] *See* United States v. Paccione, 948 F.2d 851, 856−57 (2d Cir. 1991) (discussing significant difference between sale of property from public auction as opposed to government auction); *see also* United States v. Salerno, 932 F.2d 117, 117 (2d Cir. 1991) (denying unsecured creditor's appeal from order authorizing

government to turn over to chapter 11 trustee assets that were forfeited under RICO where trustee then sold assets and unsecured creditor did not receive his interest).Back To Text

[141] *See* Myron M. Sheinfeld et al., *Civil Forfeiture and Bankruptcy: The Conflicting Interests of the Debtors, It's Creditors and the Government*, 69 Am. Bankr. L.J. 87, 101 (1995) (discussing different views and methods used by courts when confronted with creditor's claims to forfeited assets by government).Back To Text

[142] *See* United States v. Smith, 46 F.3d 1223, 1240 (1st Cir. 1995) (listing case law supporting district court's award of restitution for losses contributed to defendant's bank fraud); United States v. Mullins, 971 F.2d 1138, 1147 (4th Cir. 1992) (remanding to district court for determination of restitution, losses attributed to defendant's activities involving wire fraud); United States v. Angelica, 859 F.2d 1390, 1393 (9th Cir. 1988) (affirming court's award of over four million dollars in restitution to victims of wire and mail fraud, but only to extent that losses occurred after enactment of Victim and Witness Protection Act of 1982).Back To Text

[143] *See In re* Boyd, 143 B.R. 237, 240 (Bankr. C.D. Cal. 1992) (addressing private investigator hired to gather information about debtor's property interests); State Bank of India v. B.B. Chachra (*In re* B.B. Chachra), 138 B.R. 397, 399 (Bankr. S.D.N.Y. 1992) (discussing private investigation that revealed debtor's business interests in India); *see also* United States v. Gigli, 573 F. Supp. 1408, 1410 (W.D. Penn. 1983) (noting that private investigation coincided with FBI inquiry). Back To Text

[144] 11 U.S.C. § 327(a) (1994) (stating that trustee may be allowed by court to hire "other professional persons" to aid in trustee's duties).Back To Text

[145] *See In re* Zeus Am. Management Consultants, Inc., 27 B.R. 853, 854 (Bankr. N.D. Ohio 1983) (discussing reasons for court's denial of trustee's application for hiring of private investigator due to insufficient specificity of investigator's qualifications); Rosemary Williams, Annotation, *Approval of Employment of Professional Persons under 11 U.S.C. § 327(a) and Bankruptcy Rule 2014*, 133 A.L.R. Fed. 465, 476 (1996) (denoting *Zeus* as authority on ambiguity of private investigator status).Back To Text

[146] *See* Coleman Clearing Corp. v. Ensminger (*In re* Adler), No. 95−08203, 1998 WL 160039, at *1 (Bankr. S.D.N.Y. April 3, 1998) (describing firm that specializes in fraud investigation); Geni M. Gianotti & Jason J. Winters, *Fraud and the Troubled Company*, Am. Bankr. Inst. J., June 1993, at 36 (noting that since 1986, 9,200 accountants and law enforcement professionals have been recognized as Certified Fraud Examiners); Barry L. Zaretsky, *The Role of the Examiner*, 608 PLI/Comm. 157, 161 (1992) (discussing that accounting firm could be appointed to investigate operation of debtor). Back To Text

[147] *See* United States v. Vetter, 895 F.2d 456, 458 (8th Cir. 1990) (weighing heavily on FBI agent's testimony).Back To Text

[148] *See* Lepelletier v. FDIC, 977 F. Supp 456, 465 (D.C. Cir. 1997) (establishing that releasing names of depositors would constitute privacy violation); USAF v. Dep't of Air Force, 915 F. Supp. 1108, 1116 (D. Col. 1996) (stating that RFPA regulates disclosure of citizens' financial information maintained by private financial institution). Back To Text

[149] *See* 26 U.S.C. § 6103 (1994) (mandating rules of disclosure); *see also* Breuhaus v. IRS, 609 F.2d 80, 82 (2d Cir. 1979) (noting strict nature with which I.R.S. governs taxpayer disclosure); Fruehauf Corp. v. IRS, 566 F.2d 574, 578 (2d Cir. 1979) (acknowledging strict nature of revised § 6103).Back To Text

[150] *See* Sackler v. Sackler, 203 N.E.2d 481, 482 (N.Y. 1964) (admitting evidence illegally obtained by private investigators); New York v. Elliot, 501 N.Y.S.2d 265, 267 (N.Y. Sup. Ct. 1986) (stating that evidence obtained by unauthorized private person does not render evidence inadmissible).Back To Text

[151] *See* Burlington Indus., Inc., v. Ellerth, 118 S. Ct. 2257, 2274 (1998) (finding that principal liable for acts of agent if agent's position facilitates consummation of act); American Soc'y of Mechanical Eng'g, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565 (1982) (noting liability of principal for actions of agent); Harris v. Miller, 235 P. 981, 985 (Cal. 1925) (same). Back To Text

[152] *See supra* note 151 and accompanying text.Back To Text

[153] *See* United States v. Standard, No. 95−50069, 1996 WL 207157, at *11 (9th Cir. April 26, 1996) (discussing crimes committed in conjunction with bankruptcy fraud); United States v. Michelek, 54 F.3d 325, 329 (7th Cir. 1995) (noting multiple fraudulent acts uncovered in bankruptcy prosecution); United States v. Lindholm, 24 F.3d 1078, 1084 (9th Cir. 1994) (discussing numerous criminal charges filed against individual in fraudulent bankruptcy prosecution).Back To Text

[154] *See* People v. Termotto, 616 N.E.2d 496, 497 (N.Y. 1993) (discussing defendant's use of false tax return to obtain bank loan); People v. Ponnapula, 655 N.Y.S.2d 750, 751 (N.Y. App. Div. 1997) (examining fraud in obtaining bank loan); *In re* Ballinger, 543 N.Y.S.2d 447, 447 (N.Y. App. Div. 1989) (discussing defendant's use of another income tax return to obtain bank loan).Back To Text

[155] *See infra* note 159 and accompanying text.Back To Text

[156] *See generally* N.Y. Gen. Bus. Law § 359−fff(2) (McKinney's 1995) (defining illegal activity known as Ponzi scheme). Alleged scheme emphasizing not the sale of any product, but recruiting new organizational rows to boost existing members, would run afoul of section of New York's Martin Act banning so−called "chain distributor schemes." *See id.*; *see also* Don Leufven, *"Independent Contractor Brokers" and One−Broker Branch Offices: Where is the Supervision?* 1061 PLI/Corp 541, 543 (1998) (observing use of fraudulent investment information in perpetuating Ponzi scheme). *See generally* David Gray Carlson, *Secured Lending as a Zero−Sum Game*, 19 Cardozo L. Rev. 1635, 1661 (1998) (discussing investment into, and profits gained through Ponzi schemes);.Back To Text

[157] *See infra* note 159 and accompanying text.Back To Text

[158] *See* Fisher v. Apostolou, 155 F.3d 876, 880 (7th Cir. 1998) (giving example of connection between fraudulent bankruptcy and Ponzi Schemes); Damato v. Hermanson, 153 F.3d 464, 466 (7th Cir. 1998) (noting working of typical Ponzi Scheme).Back To Text

[159] *See* 3 Norton, *supra* note 22, § 49:2 (stating that bankruptcy fraud frequently involves other fraudulent activity); Giannoti & Winters, *supra* note 146, at 16 (perceiving other fraudulent schemes by company can lead to commission of bankruptcy fraud); Liphart, *supra* note 19, at 28 (noting there is often underlying fraud serving as impetus for bankruptcy fraud).Back To Text

[160] *See* Benderson, *supra* note 10, at 21 (discussing formation of task forces to combat bankruptcy fraud); Gaumer, *supra* note 5, at 10 (noting DOJ's new initiative's deterrent effect on bankruptcy fraud); *Bankruptcy Fraud Conviction Increase*, Cons. Bankr. News, Mar. 21, 1994, at 1 (illustrating new emphasis on prosecuting bankruptcy fraud).Back To Text

[161] *See supra* note 171 and accompanying text.Back To Text

[162] *See* Benderson, *supra* note 10, at 21 (observing increased cooperation between various government agencies in order to combat bankruptcy fraud more effectively); Gaumer, *supra* note 5, at 10 (discussing coordinated nationwide effort to fight bankruptcy fraud during Operation Total Disclosure); *DOJ Initiative*, *supra* note 13, at 1 (noting cooperation between various government agencies to combat bankruptcy fraud).Back To Text

[163] *See supra* note 10−11 and accompanying text (indicating that greater cooperation and enhanced training is resulting in more bankruptcy fraud prosecutions).Back To Text

[164] *See* 51 Am. Jur. 2D *Licenses And Permits* § 6 (1970) (stating inherent abuse of power by private investigators necessitates strict adherence to outlined guidelines); Leroy Cook, *How to Choose and Use Private Investigators*, 37 No. 3 Prac. Law. 29, Apr. 1991, at 29−36 (qualifying investigators by education, experience, knowledge, and certification to prevent material from being illegally obtained and employer's liability); John C. Williams, Annotation, *Regulation of Private Detectives, Private Investigators, and Security Agencies*, 86 A.L.R. 3d 691 (1978) (discussing issues connected with retaining services of private investigator).Back To Text

[165] *See generally* Karen Gross & Jeanne M. Weisneck, *Selected Bibliography on Ethics for Bankruptcy* Professionals, 68 Am. Bankr. L.J. 419, 422 (1994) (asserting increased number of bankruptcies requires guidance for ethical issues faced by attorneys); Carol Werner Gustovson, *The Ethical Role of a Debtor's Attorney In a Consumer Bankruptcy Filing*, 6 Geo. J. Legal Ethics 665, 666−67 (1993) (discussing ethical considerations faced by attorneys representing debtors in bankruptcy proceedings); Williams, *supra* note 164, at 691 (discussing state and federal statutes that regulate operation and conduct of private investigators).Back To Text

[166] Sentencing Manual, *supra* note 77, § 2F1.1 (recommending particular sentence for each incidence of fraud).Back To Text

[167] *See id.*; *see also* 3 Norton, *supra* note 22, § 49:13, at 49−29 (explaining sentencing and punishment for bankruptcy fraud); Gaumer, *supra* note 5, at 12 (stating federal sentencing guidelines apply where type of fraud was required to be completed by court order).Back To Text

[168] *See* United States v. Michalek, 54 F.3d 325, 330−31 (7th Cir. 1995) (stating that under sentencing guidelines, violating judicial process by concealing assets after filing bankruptcy deserves sentence enhancement); 3 Norton, *supra* note 22, § 49:13, at 49−30 (explaining that bankruptcy fraud usually implicates federal sentencing guidelines because of violation of judicial order); Gaumer, *supra* note 5, at 13−14 (enhancing sentence regularly where there are violations of court orders).Back To Text

[169] *See* United States v. Webster, 125 F.3d 1024, 1037 (7th Cir. 1997) (relying on previous decisions within circuit enhancing punishment due to violations of judicial process); United States v. Porretta, 116 F.3d 296, 302 (7th Cir. 1997) (finding sentencing enhancement was appropriate for leader of organized criminal activity because offense involved more than minimal planning); United States v. Mohammad, 53 F.3d 1426, 1438 (7th Cir. 1995) (finding enhancement of punishment for concealment of assets from creditors is not instance of double counting because enhancement is for both concealment of assets and for violating judicial order).Back To Text

[170] *See* Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 Harvard J. On Legis. 393, 408−9 (1988) (urging more detailed guidelines where fraud resulting from breach of fiduciary duty warrants additional criminal sanctions); Thomas M Scher, *Have the Federal Sentencing Guidelines Effectively Overruled Graham v. Allischalmers?*, 42 Wayne L. Rev. 1617, 1633−35 (1996) (noting sentencing guidelines enhancing punishment for criminal conduct have deferred such actions); Melvyn I. Weiss, Caremark And "Good Faith" Attempts, at 491, 509 (PLI Corp. Law Practice Course Handbook Series No. 134−7206 1997) (stating reform in sentencing guidelines provide incentives for corporations to report violations in addition to providing programs to detect such violations).Back To Text

[171] *See* Stephen McJohn, *Person or Property? On the Legal Nature of the Estate*, 10 Bank. Dev. J. 465, 474 (1994) (rejecting debtor−in−possession being viewed as new person, rather debtor −n−possession viewed as one holding all property existing prior to filing with rights similar to trustees); Gregory A. Nave, *Collective Bargaining Agreements in Bankruptcy Proceedings: Congressional Response to Bildisco*, 1985 U. Ill. L. Rev. 997, 999 (1985) (asserting under chapter 11 debtor−in−possession can remain in possession with operating

business unless court elects otherwise); John T. Roach, *The Fiduciary Obligation of the Debtor In Possession*, 1993 U. Ill. L. Rev. 133, 133 (1993) (stating that debtor−in−possession on should be held to standards of common law, owing fiduciary obligation to all those who have interest in property which remains under debtor's control). *Back To Text*

[172] *See* Sentencing Manual, *supra* note 77, § 2F1.1 (1998) (providing for enhancement of sentence where underlying crime involves fraud or deceit). *But see Punishment II*, *supra* note 8, at 287−89 (stating few courts have used threat of jail time in criminal charges in bankruptcies which have proven to encourage restitution); *See generally* Gaumer, *supra* note 5, at 40 (noting new drive to prosecute bankruptcy fraud and greater punishment for convictions). *But see Punishment II*, *supra* note 8, at 287−89 (stating few courts have used threat of jail time in criminal charges in bankruptcies which have proven to encourage restitution).Back To Text

[173] *See* United States v. Mistretta, 488 U.S. 361, 365−67 (1989) (stating sentencing guidelines used to provide broad discretion, indeterminate sentencing with many disparities among courts, current guidelines address these problems); Julia Kozaks et al., *Sentencing Guidelines*, 81 Geo. L.J. 1423, 1442−45 (1993) (discussing judges ability to increase sentences under new guidelines where criminal purpose or leadership in such activities are present); *see also* Robinson, *supra* note 170, at 1408 (stating bankruptcy law needs strict guidelines for sanctioning criminals). Back To Text

[174] *See* United States v. Lopreato, 83 F.3d 571, 574 (2d Cir. 1996) (upholding maximum sentence which was increased 11 levels due to intended "improper amount" being over $5 million, noting actual amount of benefit not determinative); United States v. Anderson, 68 F.3d 1050, 1055 (8th Cir. 1995) (determining enhancement of sentence by using intended loss rather than actual loss when continuation of concealment occurs); United States v. Kochekian, 938 F.2d 456, 464 (4th Cir. 1991) (noting sentencing beyond maximum is allowed for defendant leaders of criminal activity).Back To Text

[175] *See* Sentencing Manual, *supra* note 77, § 2F1.1 (providing for increased sentences in proportion to amount of money involved in underlying fraud); *see also Lopreato*, 83 F.3d at 574 (holding 11 level increase because of monetary amount of fraud did not violate sentencing guidelines); Thomas Hutchinson Et Al., Federal Sentencing Law And Practice, § 2 F1.1 at 394 (1998) (explaining sentencing increases where greater losses involved).Back To Text

[176] *See supra* note 168−170 and accompanying text.Back To Text

[177] *See* Sentencing Manual, *supra* note 77, § 2F1.1 (permitting enhancement by two levels where fiduciary relationship exists); John J. Byrne et al., *Examining the Increase in Federal Regulatory Requirements and Penalties: Is Banking Facing Another Troubled Decade?*, 24 Cap. U. L. Rev. 1, 20 (1995) (stating accountants, attorneys, and other independent professionals are subject to enhanced liability which dampers their businesses); David A. Forkner, *The United States Sentencing Guidelines*, 73 Denv. U. L. Rev. 963, 967 (1996) (asserting under federal sentencing guidelines where special skills are possessed by offenders enhancement of sentence is appropriate). Back To Text

[178] *See* United States v. Mohammed, 53 F.3d 1426, 1437 (7th Cir. 1995) (asserting, in bankruptcy, beyond minimal planning occurs in majority of cases); Sentencing Manual, *supra*, note 77, § 2F1(b)(2) (providing for sentence enhancement in fraud convictions involving planned deception); *see also* Gaumer, *supra* note 5, at 13−14 (noting that most bankruptcy frauds involve elements which meet requirements for minimal planning for sentence enhancement).Back To Text

[179] *See supra* note 166−175 and accompanying text.Back To Text

[180] *See supra* note 100 and accompanying text.Back To Text

[181] *See* Darlene Cedres, *Mobile Data Terminals and Random License Plate Checks: The Need for Uniform Guidelines and a Reasonable Suspicion Requirement*, 23 Rutgers Computer & Tech. L.J. 391, 394 (1997) (noting technological advancements revealing personal information on databases possibly infringing on privacy rights); Gail M. Daly, *Bibliographic Access to Legal Research Databases Reconsidered*, 87 L. Libr. J. 192, 192 (1995) (asserting electronic access to information solves past problems of organizing abundance of legal information). *But see* Alan R. Kabot, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 Am. Crim. L. Rev. 333, 343 (1998) (proposing to balance privacy rights of sex offenders against public's right to information revealed through database access).Back To Text