AMERICAN BANKRUPTCY INSTITUTE

2018 Annual Spring Meeting

CONCURRENT SESSION

Consumer: Access to Chapter 13 Justice

Hosted by the Ethics & Professional Compensation and Consumer Bankruptcy Committees

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2018

Access to Justice in Chapter 7 and Chapter 13 Bankruptcy

A Noble Profession

- "Lawyers have a license to practice law, a monopoly on certain services. But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities."

– U.S. Supreme Court Associate Justice Ruth Bader Ginsburg (March 2014)

RULE 6.1
VOLUNTARY PRO BONO PUBLIC SERVICE

"A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."

RULE 6.1
VOLUNTARY PRO BONO PUBLIC SERVICE

- Substantial portion of these hours should be provided, without fee or expectation of fee, to:

1. persons of limited means; **or**
2. charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means…

RULE 6.1
VOLUNTARY PRO BONO PUBLIC SERVICE

- Some of these 50 hours, however, may be provided to:

1. delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;
2. delivery of legal services **at a substantially reduced fee** to persons of limited means; or
3. **participation in activities for improving the law, the legal system or the legal profession.**

Important Take-Aways

- There is an expectation that lawyers will help make the benefits of the law and our legal system accessible.
- Pro bono service can encompass more than just direct services to the poor. It is no less valuable to provide services to nonprofits or to devote time to improving the legal profession.
- Legal services may be provided at no or reduced costs.

Access to Justice Problems in Bankruptcy

- The *pro se* party in bankruptcy
- Fee only plans
- No money down Chapter 7
- Petition Preparers
- Ghostwriting

Addressing the Access to Justice Problem

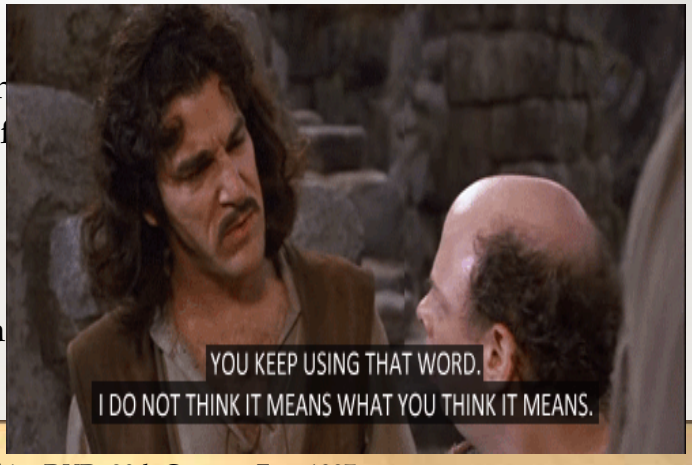
- Pro Se Assistance Centers
- Clinical programs
- Legal Aid Organizations
- Upsolve

Conflicts of Interests

- As a general matter, conflicts of interest rules apply in pro bono matters in the same way they apply to matters involving legal services for a fee.
- Exception - Rule 6.5

Competence – Rule 1.1

- Finding the right balance between "out of comfort zone" and "out of competence zone" can be difficult.
- Business bankruptcy attorneys may find doing pro bono work in the consumer space challenging.



*The Princess Bride. Dir. Rob Reiner. Mandy Patinkin. DVD. 20th Century Fox, 1987.

Duty of Adequate Supervision – Rules 5.1 & 5.3

- Rule 5.1(b):

A lawyer having direct supervisory authority over **another lawyer** shall make **reasonable efforts** to ensure that the other lawyer conforms to the Georgia Rules of Professional Conduct.

- Rule 5.3(b):

A lawyer having direct supervisory authority over **[a] nonlawyer** shall make **reasonable efforts** to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

Scope of Representation – Rule 1.2

- "A lawyer may limit the scope and objectives of the representation if the limitation is r**easonable under the circumstances and the client gives informed consent**."

MRPC Rule 1.2(c) (emphasis added).

- "Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."
- MRPC Rule 1.2, Comment 7.

Student Practice and Unauthorized Practice of Law

- "Practice of law" includes both representing clients in court and providing legal advice
- Student practice rules permit students to act as attorneys, eliminating UPL concerns
- Goal: allow student to participate in conveying advice but ensure participation or supervision of volunteer attorney

QUESTIONS?

Access to Justice and Ethical Issues in *Pro Bono* and Low Bono Representation

B. Summer Chandler

I. Introduction

The Model Rules of Professional Conduct ("MRPC") encourage members of the bar to provide *pro bono* legal services to the indigent and to organizations that provide assistance to the indigent. Rule 6.1 of the MRPC provides that all lawyers should aspire to provide at least fifty (50) hours of *pro bono* legal services each year.[1] The Rule is not to be enforced by disciplinary means but, "[e]very lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay."[2] Justice Ginsberg explained, "Lawyers have a license to practice law, a monopoly on certain services. But for that privilege and status, lawyers have an obligation to provide legal services to those without the wherewithal to pay, to respond to needs outside themselves, to help repair tears in their communities."[3] In addition, "personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer."[4]

Pro bono representation may include direct services to individuals in need and services to nonprofit or charitable organizations.[5] The Rule states that lawyers should provide a majority of these fifty (50) hours of *pro bono* legal services to persons of

[1] MRPC Rule 6.1.
[2] *Id.* at cmt. 1.
[3] U.S. Supreme Court Associate Justice Ruth Bader Ginsburg (March 2014)
[4] *Id.* at cmt. 1.
[5] Nonprofit organizations, just like individuals and other legal entities, periodically have the need for legal services. Unfortunately, these needs often go unmet. *See, e.g.*, WAACO, *The Legal Needs of Nonprofits Serving Low Income Communities*, p. 10 (2012).

limited means ***or*** to "charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means."[6]

This Rule also provides that "additional services" should be provided through the "delivery of legal services at no fee or substantially reduced fee" to, among others, "organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate."[7]

The Rule further provides that *pro bono* services should also entail, "participation in activities for improving the law, the legal system or the legal profession."[8] With respect to this paragraph of the Rule, comment 8 to the Rule recognizes that, "[s]erving on bar association committees, serving on boards of *pro bono* or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession" as "examples of the many activities that fall within this paragraph."[9]

It is important to note that the services we are admonished to provide pursuant to Rule 6.1 do not all have to be provided at no cost to the client. Rather, while a "substantial majority" of these (50) hours of legal services should be provided, "without

[6] MRPC Rule 6.1.
[7] *Id.*
[8] *Id.*
[9] *Id.* at cmt. 8.

fee or expectation of fee,"[10] the rule also provides that "additional services" may be provided, "at a substantially reduced fee."[11] The phrase "low bono" is often used to describe the act of providing legal services at reduced fees.[12] Low bono legal services, however, may also be used to describe the practice of providing limited legal services, also known as "unbundling" legal services.[13] Limiting the scope of legal representation can have the effect of making necessary legal services affordable for individuals who might not be able to afford comprehensive representation.

Given the professional responsibility to provide *pro bono* legal services and given the current focus on the provision of low *bono* legal services, it is useful to consider provisions of the MRPC[14] and other ethical issues that may be encountered while providing *pro bono* or low *bono* legal services.

II. Scope of Representation

A. Generally

Pro bono clients may have a host of legal challenges that extend beyond the legal matter for which a volunteer attorney has been engaged. Of course, an attorney who agrees to provide *pro bono* services with respect to a particular legal issue is not required to assist the client in addressing all the client's legal matters. MRPC Rule 1.2 provides that, "[a] lawyer may limit the scope and objectives of the representation if the

[10] MRPC Rule 6.1(a).
[11] MRPC Rule 6.1(b).
[12] Forrest Carlson, *The Changing Contours of "Low Bono"*, March 28, 2016, https://nwsidebar.wsba.org/2016/03/28/the-changing-contours-of-low-bono-2/.
[13] *Id.*
[14] The American Bar Association reports that, "To date, California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct." American Bar Association, *About the Model Rules*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html.

limitation is r**easonable under the circumstances and the client gives informed consent**."[15] Importantly, a limitation on representation might not be reasonable if, under the circumstances, the representation is too limited to permit the attorney to provide competent legal advice as required under MRPC R 1.1.[16] Still, it should be noted that, "[a]lthough an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[17]

With respect to the *pro bono* client, just as is the case with paying clients, it is prudent to specify the scope of the work to be performed in an engagement letter that is executed at the outset of the engagement by both the attorney and the client. In describing the scope, in some circumstances, it may be wise to list examples of services that are <u>not</u> covered by the proposed limited engagement to help solidify the client's understanding of the agreement.

B. Ghostwriting

In some instances, lawyers may attempt to assist clients without appearing of record in the case. They may undertake such representation in an effort to save the client money, or, perhaps, for other reasons.[18] Some courts, however, may construe the attorney's actions as improper "ghostwriting." Ghostwriting consists of the preparation

[15] MRPC Rule 1.2(c) (emphasis added).

[16] MRPC Rule 1.1. MRPC Rule 1.1 provides that, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[17] *Id.*

[18] *See, e.g., In re Smith*, 2013 WL 1092059 (Bankr. E.D. Tenn. Jan. 30, 2013).

of documents for a party for filing, without signing and filing the documents on the party's behalf, thereby giving the appearance that the party is acting *pro se*.[19]

"Like the majority of federal district and appellate courts, the bankruptcy courts have taken a dim view of ghostwriting."[20] In *In re Mungo*,[21] the court asserted that:

> Attorneys cross the line .... when they gather and anonymously present legal arguments, with the actual and constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door.[22]

In re Hood,[23] however, demonstrates that not all assistance with the preparation of documents for filing *pro se* will be deemed "ghostwriting. In this case, the Bankruptcy Court had ruled that the law firm and attorneys acted as ghostwriters in failing to sign the Debtor's Chapter 13 petition and, thus, had perpetrated a fraud on the court. The United States District Court for the Southern District of Florida affirmed the decision. The Eleventh Circuit overturned this decision on appeal, finding that the actions taken by the law firm did not constitute "drafting" such as to warrant condemnation as improperly ghostwritten pleadings. In reaching its decision, the Circuit Court stated that, "Appellants recorded answers on a standard fill-in-the-blank Chapter 13 petition based on Hood's verbal responses."[24] The court also stated that, "a Chapter 13 petition stands in stark contrast to a ghostwritten pro se brief .... A legal brief

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[19] *In re Cash Media Systems*, 326 B.R. 655 Bankr. S.D. Tex. 2005); In re Mungo, 305 B.R. 762, 767 (Bankr. D.S.C. 2003); *In re Merriam*, 250 B.R. 724, 733 (Bankr. S. Colo 2000).
[20] *In re Smith*, 2013 WL 1092059, at *15 (Bankr. E.D. Tenn. Jan. 30, 2013).
[21] 305 B.R. 762, 767 (Bankr. D.S.C. 2003); *see also, In re Fengling Liu*, 664 F.3d 367, 370 (2d Cir.2011).
[22] Id. at 768 (quoting Ricotta v. Cal., 4. F.Supp.2d 961, 987 (S.D.Cal.1998)).
[23] 727 F.3d 1360 (C.A. 11 Aug. 29, 2013).
[24] *Id*. at 1364.

is a substantive pleading that requires extensive preparation; much more than is necessary for the completion of a basic, fill-in-the-blank bankruptcy petition."[25] The court further stated that, a "Chapter 13 petition is a publicly available form that is designed in a manner that lends itself to a pro se litigant. [The Debtor] could have personally completed the petition at issue in the exact same manner and likely obtained the same result."[26]

The court in *In re Ruiz*,[27] distinguishes *In re Hood*, explaining that:

> As opposed to the facts in Hood, the Law Firm here did much more than simply "fill in the blanks." They advised Mr. Ruiz on the type of bankruptcy he should file, ultimately selecting Chapter 7. They advised him on many complicated issues such as which assets to list and which to exclude from his bankruptcy schedules, which assets to retain and which to surrender. They advised him in selecting which exemptions from creditor claims were available to him under Florida and Federal law. They informed him of his options in completing his Statement of Financial Affairs that asks numerous, complicated questions regarding his financial history over the last six or more years. They agreed to help Mr. Ruiz both before and after the bankruptcy case was filed. This type of legal advice is not cookie-cutter, "fill in the blanks" work, even if a debtor currently is impoverished and has a simple financial history. The Eleventh Circuit's decision in *Hood* simply is inapplicable. The work performed for Mr. Ruiz by the Law Firm is in no way similar to the work performed for Mr. *Hood*.[28]

In *Ruiz*, the court determined that the law firm had improperly attempted to limit the scope of their engagement in a way that was unreasonable under the circumstances and that, as such, disgorgement of attorney fees was warranted.[29]

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[25] *Id.*
[26] *Id.*
[27] 515 BR 362 (M.D. Fla. 2014).
[28] *Id.* at 368.
[29] *Id.* at 368-69.

III. Competent Representation

MRPC Rule 1.1 provides that a lawyer must be competent to provide representation on matters she undertakes to handle. Competent representation as used in Rule 1.1, "means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence."[30] "Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[31] In taking on *pro bono* representation, attorneys may agree to handle matters that are outside their typical areas of practice.

In performing *pro bono* services, just as is the case with services performed for a fee, an attorney is obligated to exercise a reasonable degree of care and skill as an attorney.[32] Significantly, however, an attorney may address concerns regarding competence by, "associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question."[33]

IV. Duty of Adequate Supervision

In some instances, senior partners may accept *pro bono* matters and enlist the help of junior attorneys in completing the work. Whether engaged in *pro bono* legal services or paid legal services, lawyers have an obligation under Rule 5.1(b) to make reasonable efforts to ensure that those over whom they have authority comply with the rules of ethics, including the rule requiring competent representation.[34] Moreover,

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[30] *Id.*
[31] *Id.*
[32] *Wright v. Cook*, 556 S.E.2d 146, 148 (Ga. App. 2001).
[33] MRPC Rule 1.1.
[34] *See, e.g., In re Moore*, 494 S.E.2d 804 (S.C. 1997) (lawyer who turned over all discovery matters to associate had obligation to ensure that associate appropriately responded to discovery requests).

pursuant to Rule 5.1(c), a lawyer "shall be responsible *for another lawyer's* violation of the Rules of Professional Conduct" if that lawyer: (1) orders or ratifies the conduct; or (2) "is a partner *or* has comparable managerial authority in the law firm in which the other lawyer practices, *or* has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[35]

The duty to supervise is particularly critical when overseeing inexperienced attorneys.[36] Therefore, it is important for senior attorneys to remember to oversee the work of junior attorneys to the extent necessary to ensure matters are handled competently. In addition to ensuring competent representation, however, having senior attorneys actively engaged along-side junior attorneys in *pro bono* work likely signals to the junior attorneys that *pro bono* service is a worthy endeavor.

V. Conflicts of Interest

As a general matter, the same conflicts of interest rules that apply to client representation provided for pay also apply to *pro bono* representation. In some instances, however, an attorney providing *pro bono* services will meet with a client to provide short-term limited legal services and there is no expectation that there will be a continuing representation after the meeting. These meetings often occur without

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[35] MRPC Rule 5.1(c).

[36] *See, e.g., Florida Bar v. Nowacki*, 697 So. 2d 828 (Fla. 1997) (lawyer who, while undergoing cancer treatment, delegated entire case load to new associate was responsible for associate's conduct*); Kentucky Bar Ass'n v. Weinberg*, 198 S.W.3d 595 (Ky. 2006)(lawyers assigned total responsibility for case to new associate and then failed to supervise or otherwise direct him at all); *In re Wilkinson*, 805 So. 2d 142 (La. 2002) (lawyer let newly admitted attorney handle matter without making any effort to oversee his work); Maryland Attorney Grievance *Comm'n v. Kimmel*, 955 A.2d 269 (Md. 2008) (principals of firm hired inexperienced attorney to operate satellite office by herself and rejected her pleas for assistance).

information being provided to the attorney in advance. As such, it is not possible for the attorney to check for conflicts of interest in advance. Meeting with a person to provide legal advice, even if only intended to occur on one occasion, creates an attorney-client relationship.[37]

What is an attorney to do in circumstances in which he or she is unable to run a conflict check in advance of meeting with a *pro bono* client? It could be that, unknown to the lawyer, the client being advised is the opposing party in a matter being handled by another lawyer in the attorney's law firm. MRPC Rule 6.5 addresses the conflict of interest issues that arise out of advice-only *pro bono* representations. Under this Rule, an attorney is prohibited from providing short-term limited legal services to a client **only if** the attorney **knows** that a conflict exists. In addition, if an attorney provides short-term limited legal services to a *pro bono* client, other lawyers in the attorney's firm are not prohibited from undertaking the representation of a party adverse to that client in the same matter. The attorney who provided the representation, however, would be prohibited from undertaking such representation. Further, any information gained while the meeting with the *pro bono* client must be held confidential and may not be used in any subsequent representation adverse to the client.[38]

VI. **Working with Law Students**.

All states have rules or statutes that permit eligible law students to practice law under the supervision of qualified attorneys.[39] For example, Rules 91 to 95 of the Supreme Court of Georgia (the "Student Practice Rule") address the practice of law by

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[37] *See, e.g. Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686 (Minn. 1980).
[38] *See* MRPC Rules 1.6 and 1.9.
[39] For a comprehensive collection of these rules, see Student Practice Rules - Clinical Research Guide, Georgetown Law Library, http://guides.ll.georgetown.edu/StudentPractice, revised May 2016.

students in Georgia. These rules can be found on the Court's website. Rule 92 sets out the parameters of actions a law student will be authorized to take if registered under the Student Practice Rule. Specifically, eligible students may, when under the supervision of a member of the State Bar of Georgia, advise, prepare legal instruments, appear before courts and administrative agencies and otherwise take action on behalf of: (1) any state, local, or other government unit or agency; (2) any person who is unable financially to pay for the legal services of an attorney; or (3) any non-profit organization the purpose of which is to assist low or moderate income persons. To apply for certification under the new Student Practice Rule, law students must satisfy the following criteria: (1) the student must have completed at least 30 credit hours of law school courses; and (2) the student must have a cumulative grade point average of at least a 2.0 and otherwise be in good standing.

Many lawyers find supervising the work of law students on pro bono matters exceptionally rewarding. In addition, this type of service benefits both the student and the client being served. It would certainly seem to qualify as pro bono services consisting of "participation in activities for improving the law, the legal system or the legal profession."[40]

In working with law students, attorneys should carefully review the applicable rules to confirm compliance with any necessary requirements. Attorneys should also always be mindful of the fact that, regardless of how smart and driven the law student may be, he or she is not yet an attorney. It is easy to forget how much you have learned in law school and in your years of practice. With the right supervision and guidance, however, law students can play an important role in helping to fill unmet legal needs.

[40] MRPC Rule 6.1.

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Trustee Talk

BY MICHAEL B. JOSEPH

Consumer *Pro Se* Bankruptcy: Finding Hope in Hopelessness

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Pro se consumer bankruptcy cases create significant and unique issues for debtors who initiate the cases and the bankruptcy system administering them. *Pro se* chapter 13 cases are particularly onerous. A vast majority of these cases are dismissed prior to confirmation and many times are dismissed prior to an appearance at a § 341 meeting.

Most debtors have difficulty navigating the complexity of chapter 13 without the assistance of a bankruptcy attorney. Furthermore, when the ABI National Ethics Task Force focused on the differences between chapter 7 and chapter 13, it concluded that chapter 13 was not conducive to attorney limited service agreements.[1]

Unwary debtors create potential roadblocks for themselves should a case be dismissed and another proceeding be filed. These include issues of eligibility[2] and the imposition of the automatic stay.[3] A missed deadline or single error can cause enormous trouble for a *pro se* debtor. An individual may file for relief unnecessarily or file under an incorrect chapter of the Bankruptcy Code. In addition, a debtor might fail to comply with the deadlines to file schedules, or be unable to adequately prepare the schedules, correctly choose exemptions or comply with filling out the means test forms. Effective Dec. 1, 2015, the official bankruptcy forms were completely revised and require careful review and extensive information. Moreover, a *pro se* debtor might be unable to defend objections to discharge, adversary proceedings and motions, or to comply with the Federal Rules of Bankruptcy Procedure.

It is difficult for an inexperienced person to prepare and submit a feasible chapter 13 plan. *Pro se* case dismissals result in the loss of the automatic stay protections. Consequently, a debtor filing multiple cases due to previous dismissals might be characterized as a serial and abusive debtor, and thus barred from making future case filing(s).[4] This might delay necessary debt management such that financial distress might become irreversible and eventual relief out of reach. As stated in the ABI National Ethics Task Force's Final Report, "Although it is difficult to measure how many consumers in financial distress do *not* file for bankruptcy protection, the Consumer Bankruptcy Fee Study did reveal that *zero* cases filed *pro se* under chapter 13 ended with a debtor receiving a discharge."[5]

The system administering bankruptcy cases is also impacted, including bankruptcy judges, court personnel (especially in the clerk's office) and trustees. Each participant must devote extra time to address deficiencies in the *pro se* cases, and monitor each to ensure that the case is proceeding properly. Creditors are potentially affected, with multiple or no notices being sent about the status of a case.

Yet the number of *pro se* consumer bankruptcy case filings is considerable. During the year ending Dec. 31, 2015, there were a total of 49,344 chapter 7 *pro se* cases, or 9.2 percent of the national total, and 25,639 *pro se* chapter 13s, or 8.5 percent of the national total.[6] Some districts attract a greater percentage of *pro se* chapter 13 cases. For example, in calendar year 2015, the Eastern District of New York reported a 52 percent rate of its total chapter 13 case filings and the Central District of California reported a 37.5 percent rate of its total

1 *See* Lois R. Lupica and Nancy B. Rapoport, Am. Bankr. Inst., *Final Report of the ABI National Ethics Task Force* (April 21, 2013).
2 11 U.S.C. § 109(g).
3 11 U.S.C. § 362(c)(3)-(4).
4 *See, e.g., Kostyshyn v. Joseph (In re Kostyshyn),* 2011 WL 815103 (D. Del. March 1, 2011).
5 *See* fn.1 at p. 50 (citing Lois R. Lupica, "The Consumer Bankruptcy Fee Study: Final Report," 20 *Am. Bankr. Inst. L. Rev.* 17 Spring 2012), *available at* abi.org/member-resources/law-review/the-consumer-bankruptcy-fee-study-final-report; unless otherwise indicated, all links in this article were last visited on March 23, 2016.
6 Table F-28 U.S. Bankruptcy Courts, Bankruptcy Cases Filed by Pro Se Debtors, by Chapter, During the 12-Month Period Ending Dec. 31, 2015 (unpublished).

chapter 13s.[7] Last year, the U.S. Bankruptcy Court for the Eastern District of New York had an unusually high *pro se* case rate, with approximately 1,000 dismissal motions being filed and noticed by the chapter 13 trustees.[8] Most of these cases take months to process and are often filed individually by one spouse, only to be followed by another *pro se* case filed by the other spouse. Eventually, almost all of these cases are dismissed.

Bankruptcy court clerks' offices nationwide provide information about filing bankruptcy without an attorney and direct *pro se* debtors to their courts' websites.[9] Special assigned staff are designated by the clerks to handle the *pro se* case intake. All bankruptcy courts and clerks' offices face this problem every day, and many have developed their own processes and procedures. For example, judges in the Eastern District of New York refer *pro se* litigants to the Pro Se Legal Assistance Project.[10]

Several years ago, recognizing the significant impact of *pro se* consumer bankruptcy debtors in the District of Delaware, Bankruptcy Judge **Brendan Linehan Shannon** convened a special committee consisting of consumer bankruptcy attorneys, as well as representatives from the clerk's office, the U.S. Trustee's Office and the Chapter 13 Trustee, to consider the problem. After a significant amount of review, the committee determined that the best approach was to contact every *pro se* chapter 13 debtor and provide a referral contact and information about the need for representation. The initial contact would be Legal Services Corporation of Delaware (LSCD), which could provide bankruptcy representation to debtors who qualify for their services. Debtors who otherwise did not qualify for LSCD's services would be provided a referral to a panel of experienced bankruptcy attorneys. LSCD would make contact in all *pro se* chapter 13 cases and provide information and assistance to debtors in need.

With a grant from the American College of Bankruptcy and matching funds from the Bankruptcy Section of the Delaware State Bar Association, LSCD was able to establish the Delaware Pro Se Initiative. LSCD provided a *pro se* consumer bankruptcy coordinator to receive referrals from the bankruptcy court clerk's office, the New Castle County Sheriff's Office and the Delaware Legal Help Link, as well as direct calls from debtors. The bankruptcy coordinator is also available on site at the bankruptcy court clerk's office around the time of scheduled sheriff foreclosure sales in Delaware (when many *pro se* filings are made). The bankruptcy coordinator provides information and screening services to the prospective debtors to allow for quick and efficient access to appropriate bankruptcy representation. As part of this initiative, LSCD expanded its referral panel of bankruptcy attorneys. The referral panel agreed to initial free consultations with *pro se* debtors that are designed to help the filers learn about their obligations to the bankruptcy court and chapter 13 trustee, as well as encourage them to retain counsel to assist them in the complexities of chapter 13. If retained, the referral panel members would be permitted to charge the standard fees allowed in Delaware.

Since the launch of the Delaware Pro Se Initiative in 2013, the program has seen a steady increase in the number of referrals. In 2015, recognizing the ongoing need to continue the program and with generous contributions from local law firms, the Delaware Consumer Bankruptcy Pro Se Foundation Fund was established under the Delaware Community Foundation. The aim is to maintain the future funding of the program.

While it may appear as though a number of *pro se* chapter 13 cases are filed without the intent to propose a plan or seek a discharge, there are certainly exceptions. Where the court or a trustee is faced with an honest-but-misguided debtor, it is an invaluable resource to have LSCD and the Pro Se Initiative available for a referral and consultation. Here are some recent examples.[11]

The Delaware Pro Se Initiative helped "JD," a 48-year-old single mother who filed her own chapter 13 to stop a sheriff's sale. JD's income had been limited to her daughter's Social Security and some financial assistance from a friend. She fell behind on making payments for her mortgage and could not catch up. Desperate to avoid foreclosure, she turned to filing a chapter 13 petition without any concept of how it might work. Fortunately, she made initial contact with a *pro se* coordinator and was screened and referred to an attorney whom she retained. At the time she filed her case, JD had gotten a new job and gained sufficient monthly income to support a chapter 13 plan. She successfully proposed a plan that is curing her mortgage arrears and pre-petition property taxes, and is on her way to saving her home.

Another debtor who benefited from the Pro Se Initiative is "LS," also a single mother supporting her household on Social Security, food stamps and minimal child-support payments. She previously filed a chapter 7 case in 2008 that was not closed until 2011. Her previous filing history would have caused concern if this new case did not proceed well. LS filed the chapter 13 *pro se* to stop a sheriff's sale. She was contacted by the *pro se* coordinator and accepted a referral to an attorney on the consumer bankruptcy panel. With that attorney's assistance, her plan has been confirmed, she has been able to retain her home, and she also avoided a second lien as unsecured.

"KN" has three children and two grandchildren living with her. She also filed a *pro se* chapter 13 case to stop a sheriff's sale that had been scheduled after the Delaware Mandatory Foreclosure Mediation was unsuccessful. KN also wanted to pursue a mortgage modification; however, her ex-husband refused to cooperate and sign a quitclaim deed to clear the title. Although KN has limited income from employment, child support and food stamps, she was able to pay a chapter 13 plan and cure her mortgage arrears. At the same time, with the assistance of counsel, she will pursue clearing the title so she may qualify for an affordable mortgage modification. She qualified for LSCD representation and retained LSCD after consulting with the *pro se* coordinator.

Finally, "WA" is a single man with limited income and a prior dismissed bankruptcy case filed in 2011. He has

7 *Id.*

8 As personally reported to the author by Marianne DeRosa and Michael Macco, standing chapter 13 trustees for the Eastern District of New York.

9 *See, e.g.*, "Filing Without an Attorney," Administrative Office of the U.S. Courts, *available at* uscourts.gov/services-forms/bankruptcy/filing-without-attorney.

10 *See* "Pro Se Centers Help Even the Odds for Litigants Without Lawyers," Administrative Office of the U.S. Courts, Aug. 20, 2015, *available at* uscourts.gov/news/2015/08/20/pro-se-centers-help-even-odds-litigants-without-lawyers.

11 Personal identifiable information has been changed to protect privacy.

questioned his alleged mortgage arrears and has had issues with delinquent city property taxes. WA commenced a *pro se* chapter 13 case and was referred to LSCD, whom he retained. With the assistance of an LSCD attorney and several months of sorting out the claims, resolving both income and property tax issues, an amended plan was approved and confirmed by the court.

Conclusion

The proliferation of *pro se* consumer bankruptcy cases is problematic. Although *pro se* chapter 7 debtors have a greater chance of completing their case, albeit without knowing potential pitfalls that competent legal advice could avoid, *pro se* chapter 13 debtors are the least likely to have successful outcomes and the most likely to detrimentally impact their financial futures. *Pro se* cases also require more support from court staff and trustees' offices. Developing a program that targets consumer bankruptcy *pro se* debtors helps alleviate this burden. Having a referral program as a resource for *pro se* debtors who are acting in good faith and who desire such assistance benefits everyone. abi

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Measuring Success in Chapter 13

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If you were to browse the Internet searching "chapter 13 bankruptcy success rate," you would think that chapter 13 is not a very successful strategy for debtors. The articles cited usually talk about a 33% rate of success. But if you drill down to where this number comes from, you find that the articles rely on outdated and imprecise statistics to measure the "success" rates of chapter 13 cases. *And* the issue turns on how "success" is defined.

I believe that trustees and practitioners are missing opportunities to point out the real, practical "successes" that can be found from chapter 13 when relevant measurements are used. A prime example of an article critical of chapter 13 was by Professor Katherine Porter, a leader in the field of consumer bankruptcy law, published in 2011 in the Texas Law Review, "The Pretend Solution: An Empirical Study of Bankruptcy Outcomes,"[1] which was very critical of chapter 13. However, the article relied on three studies. Two were done in 1989 and 1994, which relied on case filings from 1980 to 1988.[2] And the third was her own study, which considered just 303 chapter 13 debtors across the nation from 2008 to 2010, and depends not on statistics, but on interviews with debtors about their experience.[3]

Part of the reason statistics are imprecise has to do with the fact that the numbers most easily available are from the United States Trustee's annual reports of chapter 13 cases, measured by individual chapter 13 trustees, which present for each calendar year raw/gross numbers of filings, dismissals, and disbursements. The reports, though, do not measure the results of specific cohorts of cases. You cannot tell from those reports what happened to a given year of chapter 13 filings over their lifespan.

To get a better sense of how successful a more current and focused measurement of chapter 13 cases might be, recently I asked Mike Malaier, the chapter 13 trustee for the Tacoma Division of our bankruptcy court in the Western District of Washington, to make available to me statistical data for all of the chapter 13 filings in the Tacoma Division for cases filed in 2010. There were 2,358 chapter 13s filed in 2010 in the Tacoma Division. Of those, 451 were dismissed or converted prior to confirmation. The remaining 1,907 cases had confirmed

chapter 13 plans. Another 523 of those cases were dismissed or converted post-confirmation. But 1,342 of the cases, or 70.4% of confirmed cases (which is almost 57% of all cases filed), had completed as of the beginning of 2015.[4] There were still 57 cases which had not dismissed, converted or completed by December 31, 2015 (when he gave me the statistics), but which appear likely to close within the next few months.[5] The information provided an accurate depiction of what happened to those cases, their completion rate, the attorneys' and trustees' fees paid, and the distributions to creditors. They also show that, at least in the Tacoma Division of Western Washington, chapter 13 is much more successful than we have been led to believe in the national articles.

1. **Completion rate**. First, I believe the best measure of success in chapter 13 is the rate of cases that complete to discharge. But the measure should not be the overall completion rate for all cases filed, but the rate of completion of cases which have a confirmed plan of reorganization. For example, 177 of the 2010 filings in Tacoma were *pro se* filings. Virtually none of the cases that started out as *pro se,* and did not obtain counsel in the confirmation process, successfully completed. As people who work in chapter 13 will tell you, there is no filter stopping debtors who are ineligible, or are simply filing to gain the benefit of the automatic stay with no intent of confirming a plan, from filing one or more chapter 13 petitions. Counting only the cases that make it through the confirmation process vets those bad cases from the system.

As seen above, if you look only at Tacoma's rate of cases that reached confirmation, just over 70% of those were "successful" in that they resulted in a discharge. If the other 57 cases that were still open complete as expected, the completion rate for confirmed cases filed in 2010 will exceed 73%. These statistics are far more current and precise than the "one in three" success rate commonly quoted in the national articles about chapter 13 success.

A word should be said about the argument that some chapter 13 cases may "succeed" even though they do not complete, because they buy time for debtors or allow debtors to achieve their goals by other means. Critics of chapter 13 disparage this argument. Professor Porter intimated that those making this argument are apologists who offer no data to back up their argument that debtors benefit even when cases are dismissed.[6] She is right that this argument is very difficult to quantify and is also very subjective. The argument also fails to

acknowledge that there are occasionally cases which complete but are not truly successful, e.g., where a debtor ends up having to surrender a house which the debtor had been trying to save, but completes the plan anyway to pay their attorneys' fees incurred in the case and receive their discharge of unsecured debt. There is truly no way to measure such cases from the statistical data available, but even if there are a number of each type – where a dismissed case gave a debtor what he or she needed or where a completed case did not - we are still looking at least a 70% or more success rate in our division based on completion to discharge, which shows there is real benefit to consumer debtors under chapter 13.

2**. Cost.** After completion success, the cost of chapter 13 to the debtors should be high on any measurement of success. That is the other criticism which Professor Porter pins on chapter 13—that it is far costlier than chapter 7.[7] The two major contributors to the cost are attorneys' fees and trustee's fees. In the Tacoma Division, excluding the 57 cases not yet completed, the total of attorneys' fees disbursed to attorneys on the 1,342 completed cases filed in 2010 was $4.393 million, or an average of $3,361 per case. That represents 6.18% of all disbursements per case. The trustee's fee for completed cases averaged $1,965 per case, or 3.71% of disbursements. So, for cases filed in 2010, the cost to debtors with completed cases in our division, between their attorney and the trustee, averaged $5,326, or 9.89% of disbursements.

3. **Disbursements to Non-Priority Unsecured Creditors**. Many debtors, their attorneys, and some trustees would argue that paying money out to nonpriority unsecured creditors is not high on their criteria for success in chapter 13. But creditors would disagree. At a minimum, it is a statistic which might be used to compare with disbursements in chapter 7.

In the Tacoma Division, the total of disbursements to nonpriority unsecured claims on cases filed in 2010 that completed was $17.38 million, an average of $16,362 per completed case. These are substantial numbers.

Nationwide Comparison. In 2013, an article appeared in the ABI Journal, where the author, Ed Flynn, a highly regarded bankruptcy statistician who previously worked for the United States Trustee and now works with the American Bankruptcy Institute, attempted to use statistics from the United States Trustee's chapter 13 annual reports to extrapolate successful completions, costs, and disbursements to unsecured creditors.[8] He analyzed cases filed between 2007 and

2013. As discussed, because he relied on EOUST trustee annual reports, his calculations are extrapolations and do not measure actual completion rates, costs, or disbursements for a given filing year.

Flynn estimated that about 70% of chapter 13 cases were confirmed nationwide over the period from 2007–13. By comparison, the 2010 statistics of the Tacoma division showed approximately 81% of chapter 13 cases were confirmed. Slightly more than 50% of confirmed cases in the 2007–2013 period completed nationally, by Flynn's calculation. That is roughly 20% less than the completion rate in the Tacoma Division discussed above, but it is still quite a bit better than the one-third success rate cited in the general literature.

In that same period, nationally, Flynn estimated that 9.8% of the funds disbursed by trustees went to attorneys' fees and 6% went to trustee fees and expenses. That is about 6% more than what was paid to attorneys and trustees in Tacoma, although admittedly the statistics from Tacoma are only for completed cases. Lastly, Flynn looked at the disbursements to general unsecured creditors, and calculated the average disbursement on confirmed cases to be $7,983. The Tacoma Division statistics for 2010 showed disbursements to unsecured creditors on completed cases was an average of $16,632, approximately double the national average for confirmed cases. The relative payouts as to general unsecured debts may vary significantly given relative mortgage costs in different areas of the country and how large a percentage of income is available for unsecured debt versus secured. In short, while Flynn's analysis estimates lower "success" rates than the information from the Tacoma division, it does show that at least 50% of debtors with confirmed plans are receiving a discharge benefit from their filings, that it is costing them less than 16% of distributions and unsecured creditors are getting distributions over what they would receive in a chapter 7 case.

Conclusions. While I think the trustee and practitioners in my division can justly take pride in these numbers**, the primary takeaway of this article is not the success of chapter 13 in the Tacoma Division. It is that trustees and proponents of chapter 13 have been neglecting the job of measuring and promoting the success story of chapter 13.** In the process, they are ceding ground to opponents of chapter 13, who often use outdated, empirically deficient and imprecise statistics to make their case against chapter 13. Yes, there are flaws in the chapter

13 system, and we should do what we can to acknowledge and address them. Success rate, costs and disbursement rates are subject to lots of local variables. But it is possible, I submit even likely, that we will find that taking a hard look at the most meaningful and current numbers bears out what the chapter 13 community believes to be true: that chapter 13 provides an efficient and economical tool for individuals caught in difficult financial straits.

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[1] Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103 (2011).
[2] *See id.* at 105 n.13 (citing TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 232–33 (1989)), *id* at 108 n.33 (citing Michael Bork & Susan D. Tuck, *Bankruptcy Statistical Trends: Chapter 13 Dispositions*, 4 graph 1 (Admin. Office of the U.S. Courts, Working Paper No. 2, 1994)).
[3] *Id.* at 111–13.
[4] Nine of those cases were hardship discharges.
[5] Cases are supposed to complete within 60 months of the date the first plan payment is due, which is 30 days after the case was filed. But when cases are close to completion, and the debtors have made their plan payments, the trustee and the court are reluctant, to dismiss those cases if they will complete in a few months.
[6] Porter, *supra at* 90 Tex. L. Rev. 108-111.
[7] Porter, *supra* note 1, at 107–08.
[8] Ed Flynn, *Chapter 13 Outcomes by State*, ABI Journal, Aug. 2014, at 41, 76–78.

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For detailed information about which jurisdictions require mandatory reporting of pro bono activities, voluntary reporting policies and no reporting policies:
https://www.americanbar.org/groups/probono_public_service/ts/pbreporting.html

For detailed information about which jurisdictions allow lawyers to earn part of the continuing legal education credits by taking pro bono cases:
https://www.americanbar.org/groups/probono_public_service/policy/cle_rules.html

For basic information provided to debtors, creditors, court personnel, the media and the general public on different aspect of the federal bankruptcy laws, including glossary and bankruptcy forms, see Bankruptcy Basics, a publication of the Administrative Office of the U.S. Courts:

www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics

See below for information on the South Carolina pro bono programs:

http://www.scb.uscourts.gov/news/pro-bono-week-debtors-assistance-program

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For information on Bankruptcy Basic including videos in English and Spanish, visit
www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics

For information on Bankruptcy Pro Se Debtors and Creditors: Resources for Parties, Court Staff, and Judges prepared by the Federal Judicial Center, visit: http://fjc.dcn/content/265557/bankruptcy-court-internet-pages-pro-se-debtors-and-creditors (A parallel internet site is forthcoming.)

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