



AMERICAN
BANKRUPTCY
INSTITUTE

2017 Rocky Mountain Bankruptcy Conference

Consumer Workshop III

Practice and Procedure: General Practice Tips for Consumer Attorneys

Hon. Kevin R. Anderson, Moderator

U.S. Bankruptcy Court (D. Utah); Salt Lake City

Hon. Thomas B. McNamara

U.S. Bankruptcy Court (D. Colo.); Denver

Hon. Cathleen D. Parker

U.S. Bankruptcy Court (D. Wyo.); Cheyenne

CONCURRENT SESSION

2017

GENERAL PRACTICE TIPS FOR CONSUMER ATTORNEYS

Hon. Kevin R. Anderson

District of Utah

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1. Observations After 17 Months on the Bench.

- a. The Benefits of the Adversary System. The best decisions are made when disputed facts and interpretations of law are vigorously, thoroughly, knowledgeably, passionately, and professionally presented to an impartial judge.
- b. I Only Know What You Tell Me. As a judge, I no longer know every detail, every communication, every document, or every action taken by the parties or their lawyers. I only know what you communicate to me by way of pleadings, argument, and evidence. It is difficult for a judge to draw correct conclusions based on incomplete information.
- c. Good Lawyers are Good Story Tellers. As stated by Chief Justice Roberts:

It's got to be a good story. I mean every lawsuit is a story, and you've got to tell a good story. No matter how dry it is, something's going on that got you to this point and you want it to be a bit of a page-turner, to have some sense of drama, some building up to the legal arguments. Certainly here at the Supreme Court, we're looking for a couple of hooks in the facts that are going to catch our interest and frame the legal issues in a way that allows us to immediately appreciate what is at stake.¹
- d. Good Lawyers are Good Teachers. You should be the expert on the facts and controlling law of your case. Your task as an advocate is to assist the Court in knowing what you know about the facts and the law. While it is my job to make decisions, it is your job to ensure I make well-informed decisions.

“The world judges me by the decisions I make, but it seldom sees the options I had to choose from.” *Anonymous Sage*
- e. Good Lawyers Know and Rely on Applicable Statutes and Case Law. Any exercise of judicial authority, especially by the bankruptcy court, must be founded upon an applicable statute or legal precedent. My chambers will do independent research, but (1) we may miss something; (2) it will give me more confidence in your argument if I know that you know the applicable law; and (3) your perspective on the meaning and application of statutory language or case law may change my opinion in your favor.
- f. Admissible Evidence – Good Lawyers Know What It Is & How to Use It. Any finding of fact must be based on admissible evidence. If you don't put on admissible evidence, I can't make a finding of fact. The Rules of Evidence apply in bankruptcy. Know how to use them both

¹ Bryan A. Garner, *Interview with Justice John G. Roberts Jr.*, 13 THE SCRIBES JOURNAL OF LEGAL WRITING, 16-17 (2010).

offensively and defensively. And proffers and judicial notice are not the “skeleton keys” of evidence (e.g., they don’t open every evidentiary door).

- g. Good Lawyers Solve Problems – They Don’t Become One. Civility to opposing counsel and the court during hotly contested matters is the sign of a true professional. Pursue compromise and resolution whenever possible, even if only as to elements of a dispute. Invectives and *ad hominem* attacks against opposing counsel and their clients have no place in the courtroom, pleadings, or briefs. If the other side is indeed a crook, liar, cheat, fraud, scoundrel, rascalion, etc., don’t tell me; show me (using admissible evidence). There is a time and a place for “scorched-earth” litigation, but it is seldom appropriate (or effective) in bankruptcy matters.
- h. Good Lawyers Give Straight Answers and Acknowledge When They Don’t Know the Answer. Listen for when the court asks a simple “yes-or-no” question and respond accordingly. Don’t risk your credibility with the Court by “guessing” as to the facts or the law. Indeed, you may gain credibility when (on what should be a rare occasion) you candidly admit you do not know the answer.
- i. Good Lawyers Under Promise and Over Deliver. Sociologists tell us that big promises create big expectations, and when such expectations are not met, it results in big disappointment with an accompanying loss of trust and credibility. Be realistic and conservative in your representations to the Court and then exceed those expectations. Don’t be the attorney who says, “Let me briefly respond,” and then rattles on for an hour. Also, don’t be the attorney who says “I am not only going to prove that this man is guilty, but that he is also innocent of being not guilty.”²
- j. Lawyers Can Make or Break a Case, But the Facts Ultimately Control. A bad lawyer can lose a good case, but in a bench trial before a bankruptcy judge, even the best lawyer likely can’t save a case with patently problematic facts. Know when to hold ‘em, and know when to fold ‘em.
- k. Good Lawyers Leverage Technology. The federal system has embraced technology in the courtroom to facilitate the administration of justice. Take advantage of technology to not only make your practice more efficient (and profitable), but also to make you a more effective advocate. It can be daunting when parties deliver to my chambers hundreds of pages of printed documents with hundreds of cross-references therein. It is much more efficient if such documents are provided in an electronic, text-searchable format with external hyperlinks to all case citations and internal links to sections in the brief and the attached exhibits.
- l. Good Lawyers Simplify Complex Facts. Even consumer cases can involve a plethora of transactions among a multitude of parties. Creating time lines, flow charts, and organizational charts can help the judge focus on the legal issues rather than trying to understand (and recall) a complex factual history. Further, our ability to understand and retain information is highest when we can read it, hear it, and see it.
- m. Good Lawyers Proofread Pleadings and Do Not Blindly use Forms or Recycled Pleadings. In a bulk practice, such as consumer bankruptcies, forms and templates are essential to an efficient operation, but they carry certain risks. Chief among them is including inapplicable language or recycled facts from another case. At best, it is amateurish; at worst, it is misleading. The key to

² Quote from the Simpsons, “*The Boy Who Knew Too Much*,” Season 5, Episode 20.

using forms is to (1) keep them updated and polished (see below); (2) thoroughly train all staff that prepare forms for filing; and (3) review any pleading before filing it with the Court.

- n. Good Lawyers Strive to Maintain Quality in a Quantity Practice. The consumer bankruptcy practice is particularly amenable to the effective use of well-written forms because the issues usually involve two or three dozen variations on legal and factual themes. No need to reinvent the wheel when a well-crafted form can save you time and money while setting you apart from your opposition and your competition.

Organize your existing pleadings by type and fact pattern. Find the best ones for each category and use them as a template for future pleadings. The first time you prepare a new pleading-type, start with the intent that it will serve as a template. The following approach can help.

- ✓ Carefully craft the pleading using your best writing and most effective organization of its contents.
- ✓ Conduct thorough research on the applicable law, and be sure to list (and distinguish) any controlling case law that is contrary to your position. It reflects especially well on your preparation when you cite to a written decision by the judge deciding your case. Keep your research up to date by doing a quick citation check each time you use the template (you don't want to be citing to a case overturned on appeal).
- ✓ If pleadings have reoccurring variations in facts or issues, prepare alternative paragraphs and that can be added or deleted as are relevant to the case at hand. Just be sure to exclude inapplicable paragraphs before filing the pleading.
- ✓ Tweak and polish the form language until it exudes professionalism.

2. The Challenges of Serving as Debtor's Counsel.

In the practice of law, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from the following conflicts—

- a lawyer's responsibilities to the client,
- a lawyer's responsibilities to the legal system, and
- a lawyer's interest in remaining an ethical person while earning a satisfactory living.

Such issues must be resolved through the exercise of sensitive professional and moral judgment.³

3. The Attributes of Competent Counsel.

Legal Knowledge – Debtors' counsel should have a solid, working knowledge of the Bankruptcy Code and Rules. They should be familiar with the elements of common legal proceedings (e.g., confirmation, relief from stay, objections to exemptions or discharge, etc.). They should be familiar with local procedures and the predilections and preferences of the judge before whom they are

³ Model Rules of Professional Conduct: Preamble – A Lawyer's Responsibilities, at [9].

appearing

Advocacy Skills – Debtors’ counsel should have a working knowledge of the rules of evidence and how to use them both offensively and defensively. They should know how to elicit from their clients, through effective direct examination, the requisite factual elements from their clients when put on the stand, and they should know how to appropriately put in question the credibility and relevance of testimony from an adverse witness. Debtors’ counsel should be comfortable handling common legal hearings

Thoroughness – Debtors’ counsel should carefully cover with their clients all obvious and less obvious aspects of their financial affairs so that the requirements of full, complete, and accurate disclosure are satisfied.

Preparation – Debtor’s counsel should prepare their clients for the 341 meeting and for any court hearings. They should immediately review objections and motions to dismiss or for relief from stay so that the client can be contacted, documents gathered, and a cogent response filed. When appearing at the 341 meeting or at court hearings, counsel should have reviewed the file and given some thought as to the best way to handle the hearing. Always play “devil’s advocate” and try to anticipate issues that could be raised by the Court, the trustee, or opposing counsel. Have a plan A, B & C if the hearing has serious consequences for your client (e.g., motion to dismiss, motion for relief from stay, denial of discharge, etc.), and things begin to go south.

Promptness – I am truly amazed (and not in a good way) how often lawyers arrive unacceptably late – or not at all – to scheduled court hearings. I understand that consumer lawyers in particular have a large case load with demanding clients and must juggle appearances before multiple judges while also covering 341 meetings (often scheduled over non-contiguous hours and in remote locations). I am also aware that sometimes “stuff” happens such as a sudden illness, traffic, weather, or some other “act of God.” If you are going to miss or be late to a hearing, a simple phone call to my chambers can usually prevent any serious repercussions. Nonetheless, while we are all human and at times the vicissitudes of life upend our best laid plans, it can become a serious issue when the same lawyer continually makes the same mistakes or offers the same excuse for substandard performance.

Diligence – Debtor’s counsel has the difficult task of shepherding individuals through the many hoops and potential pitfalls of a bankruptcy case. There are several absolute deadlines and document requirements – many with automatic and serious consequences. It requires a superior kind of lawyer to help clients understand and comply with the requirements of the law, to diligently prosecute or defend their case, and to get Chapter 7 debtors to discharge and Chapter 13 debtors to (at least) confirmation.

FROM THE PRESIDENT



by Devon O'Connell
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What You Should Know as a New Lawyer

I have been a member of this Bar and of this profession for 16 years now. As I was pondering what I might write to the new and budding lawyer that is meaningful, poignant and masterful, the conveyance of profound wisdom...I fell flat.

So like any great intellectual, any weighty thinker, and any experienced litigator, I resorted to the late night television solution and developed a top 10 list of things you must know as a new lawyer. After all, I am a child of the Letterman age, so here goes.

10 Turn off your cell phone. Really, turn it off. Don't mute it; don't put it on vibrate; don't think the "Do Not Disturb" feature will work when you need it.

Trust me on this one: allegedly an attorney whose name will go unmentioned but rhymes with "Bevin O'Schmonnell," in a packed House Judiciary Committee meeting, preparing for her testimony, heard a phone ring. This lawyer thought the ringer had been silenced, but the alarm had not. The ring tone: Justin Timberlake's "Sexy Back," at a volume envious of an AC/DC concert. "I'm bringin' sexy back, you other brothers watch how I attack." Ugh. Save yourself... Turn. It. Off.

9 In the words of the lawyer of all lawyers, Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man (woman). There will still be business enough."

Even as litigators we must remember

and honor this sage advice. There is something special about Wyoming attorneys—high standards of professionalism and a sincere respect for one another that is not found in all jurisdictions. Always remember, the dispute is between the litigants, not between the lawyers.

8 Treat court staff and clerk staff with the utmost respect and dignity. Their ability to make your life miserable or heavenly cannot be underscored. Be nice.

7 Return phone calls promptly. Seriously. It's one of the top complaints about lawyers from their clients. And something that is so easily done.

6 "Under promise and over deliver."¹ Never, never, never the other way around.

5 George Bernard Shaw once said, "The biggest problem in communication is the illusion that it has taken place." Communicating with your client can be a challenge. Remember, it is not simply the telling, it is communicating, which means the listener has understood.

4 You don't need to use all of your retainer. You don't. You don't. View your bill as one of value to the client rather than money earned for you.

3 Take notes. Always. Every phone call, every meeting, every hearing, every court appearance, everything. You will never regret having too many notes, but you will regret not having written some-

thing down.

2 You may have to take a few cases you feel are "beneath you" before you can take on the biggies. Remember, each case gets you experience and closer to your goals. (And always remember your pro bono obligation.)

1 In the words of my beloved criminal law professor Ted Lauer who passed away just a few years ago: "No client is worth your integrity and reputation." Wyoming is a small and very close bar. If you lie, cheat, misrepresent or hide the ball, the word will get out and your credibility might be lost forever. Don't risk it.

And finally, thank you. Thank you from the bottom of my heart for choosing this profoundly honorable profession. "Anyone who believes a better day dawns when lawyers are eliminated has the burden of explaining who will take their place. Who will protect the poor, the injured, the victims of negligence, the victims of racial discrimination, and the victims of racial violence?... Lawyers are the simple yet essential means by which people seek to vindicate their rights and we must not foreclose that means." John Curtin, remarks at American Bar Association annual meeting, Aug. 13, 1991.

I rest my case. §

ENDNOTES

¹ Tariton, Merrilyn Astin, *25 Tips for the New Lawyer*, <https://www.attorneyatwork.com/wp-content/uploads/2011/11/25TipsfortheNewLawyer.pdf>

ABI Rocky Mountain Conference

Consumer Workshop III: General Practice Tips for Consumer Attorneys

United States Bankruptcy Judge Thomas B. McNamara

I. General Guidance.

The Court appreciates and commends both the professionalism and high quality practice demonstrated by most Colorado consumer bankruptcy lawyers who appear before the Court. Further, the Court recognizes some of the unique challenges faced by consumer bankruptcy counsel, including time and cost pressures, difficulties in contacting and communicating with clients, and the complexity of consumer bankruptcy cases. The Court offers these Practice Tips, not as criticism, but rather as constructive suggestions to encourage a high level of practice which will benefit debtors and other parties in interest. Practitioners should be aware that each Colorado Bankruptcy Judge carries an active load of over 4,000 – 5,000 consumer bankruptcy cases. Accordingly, attention to the Practice Tips also will assist the Court in efficiently and economically advancing consumer cases.

The proffered Practice Tips are specific to consumer bankruptcy cases. However, counsel would be well-advised to follow the more universal attorney norms such as: be professional; be courteous; be prepared; be timely (for Court and filings); be honest; be a strong advocate; and be a lawyer with integrity. If a lawyer follows such common-sense maxims, then that lawyer will develop a strong and positive reputation in the eyes of the Court, its staff, and professional colleagues.

II. Consumer Case Filing: Petition and Required Documents.

Section 521(a)(1) requires, unless the Court orders otherwise, that the debtor file: (1) a list of creditors; (2) a schedule of assets and liabilities; (3) a schedule of current income and current expenditures; (4) a statement of financial affairs; (5) payments advices received within 60 days before the petition date; and (6) other information. Under Section 521(i), all of the foregoing information must be filed no later than 45 days after the petition date. Section 521(i) further provides that if the Section 521(a)(1) information is not timely filed, “the case shall be automatically dismissed effective on the 46th day after the date of filing of the petition.”

Section 521(e)(2)(A) requires that the debtor provide the trustee with a copy of the debtor’s most recent Federal income tax return “not later than 7 days” before the Section 341 meeting of creditors. Under Section 521(e)(2)(B), if the debtor fails to meet the deadline, “the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.” Dismissal for failure to comply with the requirements of 11 U.S.C. § 521(a) is not discretionary with the Court and is not subject to reconsideration. *In re Daniel*, 407 B.R. 443, *2 (10th Cir. BAP Feb. 17, 2009) (unpublished opin.).

The Bankruptcy Code is replete with numerous other strict deadlines.

Practice Pointer 1: Initial Documents. The filing deadlines are strict. Some of the deadlines require automatic dismissal for failure to comply. Both the debtor and counsel should be extremely diligent (and double-check) to ensure compliance with all applicable deadlines. The Court frequently is presented with after-the-fact justifications for failure to comply with initial case filing requirements (such as, debtor’s counsel “made a mistake” or “mis-calendared the deadline”). For the most part, failure to comply with initial case filing requirements will result in dismissal. And, the Court has little or no discretion to change the result.

III. Consumer Case Motions Practice for Chapter 7 and Chapter 13.

A. General Motions Practice.

Motions in Colorado consumer bankruptcy cases come in all shapes and sizes. Many are fairly routine and most are not contested. Following the Practice Tips and complying with the Local Bankruptcy Rules will assist the Court in promptly adjudicating all types motions filed in consumer bankruptcy cases.

Practice Pointer 2: Citations to Authority. Fed. R. Bankr. P. 9013 requires that all motions “shall state with particularity the grounds therefor . . .” But many motions do not provide any citation to legal support. As a consequence, the Court struggles to ascertain the basis for such motions. At a minimum, counsel always should make reference to the applicable supporting law including specific sections of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure and/or the Local Rules of Bankruptcy Procedure. Case law citations also are encouraged strongly. The Court tries to review all cited precedent before any decision or hearing.

Practice Pointer 3: Relief Requested and Order. Fed. R. Bankr. P. 9013 requires that all motions “set forth the relief or order sought.” Practitioners should be specific in what they want and always include a proposed form of order that is consistent with the relief requested in the body of the motion.

Practice Pointer 4: Facts and Evidence. If the motion requires the Court to make findings of fact or to assess evidence, the motion should include a statement of facts and evidence. Evidence may be

provided along with the motion through an affidavit or appropriate verification.

Practice Pointer 5: Non-Prosecution of Motion. Sometimes a motion is filed and set for a hearing but movant’s counsel decides not to continue to prosecute the motion. If the movant does not intend to pursue the motion, counsel should promptly withdraw the motion, file a stipulation, or otherwise take appropriate action to notify the Court and adverse parties of the status. It is not appropriate for counsel simply not to show up at the scheduled hearing and assume the motion will be denied. Since both the Court and opposing counsel likely will have prepared for the motion before the scheduled hearing, movant’s counsel’s failure to prosecute, withdraw, or appear at the hearing likely will result in the Court issuing an Order to Show Cause why movant’s counsel should not be sanctioned.

Practice Pointer 6: Settlement. Motions often are resolved by settlement. The Court appreciates the efforts of counsel in reaching resolution and encourages settlement. However, if a motion is settled, the parties should promptly notify the Court. A phone call to Chambers is helpful to alert the Court that the parties have reached a resolution. However, the parties should file a motion to approve settlement, a settlement stipulation, a motion to continue hearing to facilitate settlement, a status report, or take other appropriate action to formally notify the Court. Any such document filed should include a corresponding form of order. The Court understands that settlements sometimes are achieved at the “last minute” or “on the courthouse steps.” But, to the extent possible, advance notice to the Court is preferable.

Practice Pointer 7: Notice. Notice and due process are key requirements for obtaining judicial relief. Counsel should always ensure (and double-check) that proper service has been provided for all motions. The Court frequently denies motions or issues compliance orders because of service or notice problems. If a motion is subject to the notice procedures in Colo. L.B.R. 9013-1, counsel should ensure that descriptions of motions or requested relief in the notice are sufficiently detailed so that interested parties can read only the notice and know what the movant has requested. For example, in the context of a Section 554 motion, it is insufficient to state only that: “[t]he Debtor has filed a motion for abandonment of property.” At a minimum, the notice must advise: “The Debtor has filed a motion for the Court to order the Chapter 7 trustee to abandon the Debtor’s interest in the real property located

at 1234 Park Street, Denver, Colorado, pursuant to 11 U.S.C. § 554.”

Practice Pointer 8: Certificates of Contested and Non-Contested Matters. With respect to all motions governed by Colo. L.B.R. 9013-1, counsel should carefully comply with the procedural requirements. Counsel should be aware that the Court takes no action on such motions unless the appropriate certificate of contested matter or certificate of non-contested matter is filed. In general, unless a certificate of contested matter or certificate of non-contested matter is filed, the matter is not considered ripe and never reaches Chambers. Certificates should be filed no sooner than three (3) court days after the response date set forth in the notice, consistent with Colo. L.B.R. 9013-1(c).

Practice Pointer 9: Certificates of Contested Matter and Request for Hearing. In the event that counsel files a Certificate of Contested Matter under Colo. L.B.R. 9013-1 and requests a hearing, the Certificate should specify in detail the nature of the hearing requested and the specific issues in dispute. Such information is key for the Court in determining how much time to allocate for an initial hearing.

Practice Pointer 10: Motions for Reconsideration. As noted by the Tenth Circuit Court of Appeals, “[g]rounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.” *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)(citation omitted). Thus, a motion for reconsideration is proper only when the court has “made a mistake not of reasoning but of apprehension . . . [or] if there has been a significant change or development in the law or facts since submission.” *In re Zamora*, 251 B.R. 591, 595 (D. Colo. 2000)(citing *Federal Deposit Ins. Corp. v. Hildenbrand*, 892 F. Supp. 1317, 1319-20 (D. Colo.1995)). A motion for reconsideration is not a license for a losing party to get a “second bite at the apple.” *Zamora*, 251 B.R. at 595 (citing *Shields v. Shetler*, 120 F.R.D. 123, 126 (D. Colo.1988)). The Court grants exceptionally few motions for reconsideration. If a motion for reconsideration is pursued, counsel should ensure that the motion for reconsideration has merit and addresses the prevailing standards for reconsideration. If a party is aggrieved by a ruling, appellate remedies are available.

B. Common Types of Consumer Bankruptcy Motions.

1. Section 362(c)(3) Motions for Extension of Stay.

Section 362(c)(3)(A) provides that if a debtor files a consumer bankruptcy case “and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed,” then the Section 362(a) automatic stay “with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case”

While Section 362(c)(3)(A) is self-executing and the automatic stay automatically terminates on the 30th day after the petition date, there is an exception. The debtor may file a motion for continuation of the Section 362(a) automatic stay under Section 362(c)(3)(B) upon notice and a hearing. But, any hearing on the Section 362(c)(3)(B) motion must be “completed before the expiration of the 30-day period” and “only if the debtor “demonstrates that the filing of the later case is in good faith as to the creditors stayed.” Further, under Section 362(c)(3)(C) the second bankruptcy case is “presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)” Note that the prior case must have been *dismissed* within the prior year. If a debtor has another pending case or a prior closed case which was not dismissed, Section 362(c)(3) does not apply.

Practice Pointer 11: Timeliness. Because the Section 362(a) stay automatically terminates 30 days after the commencement of the bankruptcy case, it is imperative that any motion for continuance of the automatic stay be filed with the petition or shortly thereafter so that the Court may “complete[]” the hearing “before the expiration of the 30-day period.” Colo. L.B.R. 4001-2(c)(3). Further, Colo. L.B.R. 4001-2(c)(1) requires a 14-day period of time to respond to such a motion. Thus, prompt filing of such a motion is critical. The Court frequently receives Section 362(c)(3) motions for continuance of the automatic stay just a few days before the expiration of the 30-day period. In such circumstances, it is impossible for the debtor to provide timely and adequate notice. And, it is impossible for the Court to act, or conduct a hearing (if necessary) within the required timeframe. Thus, the Section 362(a) stay will expire and the Court will deny late motions for continuance of the automatic stay.

Practice Pointer 12: Evidence. Motions for continuance of the automatic stay often are filed with inadequate and completely cursory factual allegations. Practitioners should be reminded that it is the debtor’s burden to prove good faith by “clear and convincing evidence.” Thus, best practice suggests that the debtor should submit a detailed motion for continuance of the automatic stay along with a supporting affidavit and evidence. In any event, if there is an objection, the debtor must be prepared at the initial

hearing date to present clear and convincing evidence to support the debtor's position. Otherwise, the motion for continuance of automatic stay may be denied.

2. **Section 362(c)(4) Motions for the Stay to Take Effect.**

Section 362(c)(4)(A) provides that if a debtor files a consumer bankruptcy case “and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed,” then the Section 362(a) automatic stay “shall not go into effect upon the filing of the later case.”

While Section 362(c)(4)(A) is self-executing and the automatic stay generally does not become effective in such circumstances, there is an exception. Under Section 362(c)(4)(B), the debtor may file a motion for “the stay to take effect in the case as to any or all creditors” after notice and a hearing. For the stay to take effect, the motion must be filed no later than 30 days after the petition date. And, the debtor must “demonstrate[] that the filing of the later case is in good faith as to the creditors stayed.” Further, under Section 362(c)(4)(D) the later case is “presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)”

Practice Pointer 13: Timeliness. Unlike Section 362(c)(3) which permits the Section 362(a) stay to go into effect for a period of 30 days from the filing of the petition, the Section 362(a) stay does not go into effect at all with respect to circumstances involving multiple prior cases that have been dismissed. Section 362(c)(4)(B) requires that any motion for the stay to take effect be filed “within 30 days after the filing of the later case. . . .” Colo. L.B.R. 4001-2(c)(4) parrots that requirement. However, there is no requirement that the hearing be held and completed within that 30-day period. Practitioners should be aware that the stay will not go into effect until an order enters. 11 U.S.C. § 362(c)(4)(C). Thus, the sooner a motion to have the stay take effect is filed within that 30-day period, the sooner the motion can be considered and the stay imposed, if appropriate.

Practice Pointer 14: Evidence. Motions for the stay to take effect often are filed with inadequate and completely cursory factual allegations. Practitioners should be reminded that it is the debtor's burden to prove good faith by “clear and convincing evidence.” Thus, best practice suggests that the debtor should submit a detailed motion for the stay to take effect along with a supporting affidavit and evidence. In any event, if there is an objection, the debtor must be prepared at the initial hearing date to present clear and convincing evidence. Otherwise, the motion for the stay to take effect may be denied.

Practice Pointer 15: Motions for Determination that the Stay is Not in Effect. Where a debtor had a single or joint case pending within the preceding 1-year period which was dismissed, and that debtor has not taken action to continue the stay within the appropriate time frame under 11 U.S.C. § 362(c)(3), the stay automatically terminates after 30 days by operation of law. With respect to a debtor who has had 2 or more single or joint cases pending within the previous year that were dismissed, the stay does not go into effect unless the debtor takes action under 11 U.S.C. § 362(c)(4). In both of these cases, creditors need not file motions for relief from stay; however, in order to expedite proceedings in state court or foreclosure proceedings, some creditors might wish to obtain a “comfort order” from the Court confirming the absence of the stay pursuant to 11 U.S.C. § 362(c)(4)(A)(ii). Notice of such motions is pursuant to Colo. L.B.R 4001-1 is not required, as they do not require notice and a hearing and can be determined as a matter of law.

3. Motions to Reinstate.

Many Chapter 7 cases are dismissed for failure to timely pay Court filing fees (typically pursuant to a payment schedule). Such dismissals frequently are followed by a motion to reinstate along with an offer to pay the delinquent fees.

Chapter 13 cases frequently are dismissed for failure to timely make plan payments either before or after confirmation. Typically, the Chapter 13 Trustee files a motion to dismiss. Often, the debtor and counsel fail to respond to the motion to dismiss and the Court dismisses the case. Often, such dismissals are followed by a motion to reinstate along with an offer to pay the delinquent plan payments. Debtors use motions to reinstate in an attempt to remedy other types of errors and problems.

Practice Pointer 16: Reinstatement. Neither the Bankruptcy Code, nor the Federal Rules of Bankruptcy Procedure specifically address “reinstatement.” Nevertheless, motions to reinstate somehow have become almost ubiquitous in Colorado. As best as the Court has been able to ascertain, motions to reinstate might be predicated on Fed. R. Civ. P. 59 or 60, as incorporated by Fed. R. Bankr. P. 9023 or 9024. However, very few motions to reinstate appear to comply with any of the procedural rules. The Court strongly discourages the seemingly routine practice of attempting to “reinstate” dismissed cases and denies most motions to reinstate. Many motions to reinstate could have been avoided by initial compliance with Court deadlines and plan terms, as well as, adequate responses to motions to dismiss. And, granting a motion to reinstate raises a myriad of thorny legal issues such as: Does the

debtor need to file a new Chapter 13 plan? What happens if a creditor foreclosed on property after dismissal but before reinstatement? Does reinstatement somehow re-impose the automatic stay? Many jurisdictions simply do not allow for reinstatement in the way presented in Colorado.

While strongly discouraging motions to reinstate, if a motion to reinstate is filed, it should at the very least: (a) be filed very promptly after dismissal; (b) provide the legal basis including citation to statutes, procedural rules, and case law justifying reinstatement; (c) contain a fulsome factual recitation explaining the basis for reinstatement and showing how the facts meet the legal standards; (d) state the position of the Chapter 7 or 13 Trustee; and (e) explain what, if anything, has happened since the case was dismissed (*i.e.*, whether creditors have taken action against the debtor or the debtor's property after dismissal). Although most motions for reinstatement are denied, be prepared to present evidence and argument in support of any motion for reinstatement.

4. Motions Served on Insured Depository Institutions.

Many common consumer bankruptcy motions (such as a motion to avoid a judicial lien under 11 U.S.C. § 522(f)) require service of process on an insured depository institution (typically, a bank). Insured depository institutions are protected by special service provisions in Fed. R. Bankr. P. 7004(h). The Court frequently is presented with motions failing to establish proper service under Fed. R. Bankr. P. 7004(h). Such motions may be denied or a notice of non-compliance may be issued.

Practice Pointer 17: Special Service for Banks. Counsel should carefully comply with Fed. R. Bankr. P. 7004(h) when serving insured depository institutions. Generally, unless counsel has entered an appearance for the bank or the Court orders otherwise, service must be by “certified mail addressed to an officer of the institution.”

IV. Chapter 13 Cases.

Chapter 13 cases present many special issues and tend to be much more time-consuming for counsel and the Court. Furthermore, not all Divisions of the United States Bankruptcy Court for the District of Colorado follow the same case processing procedures. Accordingly, until such time as more uniformity is achieved, counsel should be aware of the differences in procedures between Chambers. Nevertheless, at least some Practice Tips should apply across all Divisions.

Practice Pointer 18: Communication with Chapter 13 Trustee.

The Chapter 13 Trustee plays a critical and central role in administration of all Chapter 13 cases. The Court believes that many, many issues that result in hearings (whether contested motions to dismiss or plan objections) could be resolved by more timely and fulsome communication with the Chapter 13 Trustee in advance of any hearing. Counsel are well-advised not to wait until the day of the hearing --- or even during the hearing --- to have initial communications of disputed issues.

Practice Pointer 19: Multiple Amendments to Proposed Plans.

Relatively few Colorado Chapter 13 initial plans reach confirmation. Instead, debtors and their counsel frequently submit amended Chapter 13 plans --- sometimes as many as 5, 6, 7 or 8 amended Chapter 13 plans. In some cases, there are real and legitimate reasons why amendments are necessary to achieve confirmation. However, in the Court's view, many of the amendments are required only because of the lack of diligence and attention to detail in the initial plan or follow-up plans. The Court discourages repeated amendments as a matter of standard practice. Although the Court is amenable to a few amendments if the case is progressing and if the amendments resolve objections, the Court views the third or fourth amendment with a jaundiced eye. At that stage, counsel should expect to justify the need for further amendments and why the case should not be dismissed under 11 U.S.C. § 1307(c)(1).

Practice Pointer 20: No Objections to Plan. Colo. L.B.R. 3015-1(f)(1) governs when no objections are timely filed to a Chapter 13 plan. If the debtor wishes to pursue confirmation of the Chapter 13 plan, counsel must file a Verification of Confirmable Plan "no later than four (4) court days prior to the original hearing on confirmation." Many practitioners fail to timely file a Verification of Confirmable Plan. Such failure causes confusion for the Court and may lead to an order to show cause, sanctions, or delay in confirmation. Counsel are advised to timely file a Verification of Confirmable Plan if there are no objections.

Practice Pointer 21: Objections to Plan. Colo. L.B.R. 3015-1(g) governs if objections are timely filed to a Chapter 13 plan. Counsel must "meet and confer" with the objector -- usually the Chapter 13 Trustee -- to try and "resolve or narrow the issues." The Court strongly encourages meaningful communications on such issues. If no resolution is possible and the debtor intends to proceed to the hearing on confirmation of the pending Chapter 13

plan (or file an amended plan in the future after the scheduled confirmation hearing), then counsel must file a Certificate and Motion to Determine Notice “no later than four (4) court days prior to the hearing on confirmation.” The Court carefully reviews all Certificates and Motions to Determine Notice the day after they are due to determine the status and how to proceed. This is debtor’s counsel’s chance to propose the path forward. Therefore, it is imperative for counsel to submit meaningful and informative Certificates and Motions to Determine Notice and to do so in a timely manner. (Unfortunately, not all counsel comply.) If counsel fails to timely submit a Certificate and Motion to Determine Notice, the Court may require counsel to appear in person, issue an order to show cause, impose sanctions, or dismiss the case. Such adverse actions can be avoided by timely submitting the Certificate and Motion to Determine Notice.

Practice Pointer 22: Be Proactive and Communicate with Debtors Post-Confirmation. Confirmation is not the end of the Chapter 13 case. The Court recognizes that many events may occur during the 3 or 5-year term of a Chapter 13 plan. Some of the events (such as job loss or catastrophic injury) may negatively impact a debtor’s ability to comply with plan terms. Counsel should try to communicate with their clients to the extent feasible. If a modification of a Chapter 13 plan is necessary, it should be pursued in a timely fashion. Counsel should not wait until after a case has been dismissed to propose a modification, and should not fail to respond to a motion to dismiss only by means of modification (counsel should still respond to the motion to dismiss). Motions to modify should be informative and fully disclose the reasons for the modification and the impact the modification will have on each class of creditors. Motions to modify should also be accompanied by the filing of amended Schedules I and J so that the Court and parties in interest have the information necessary to assess the validity of the debtor’s reasons for the proposed modification.

Practice Pointer 23: Discharge Issues. The real end of a successful Chapter 13 case is discharge. However, all Divisions of the United States Bankruptcy Court for the District of Colorado have determined that debtors cannot receive a discharge under 11 U.S.C. § 1328(a) unless they have completed *all payments* under their confirmed Chapter 13 plans (including “direct payments” to secured lenders detailed in plans). Debtors should be counseled concerning this requirement from the beginning of their cases and periodically thereafter. Waiting to month 59 to discover a large

delinquency may be too late.

V. **Some Additional Thoughts from Chambers Staff.**

Bankruptcy Judges do not work alone. Instead, they rely extensively on very capable staff. In the United States Bankruptcy Court for the District of Colorado, each Bankruptcy Judge has a team composed of 2 experienced law clerks, a judicial assistant or courtroom deputy, and 4-5 case managers or case administrators. All parts of the team serve important functions in bankruptcy cases.

Practice Pointer 24: Careful Communications. The Bankruptcy Court exists to assist debtors, creditors, other parties in interest, and their lawyers in resolving legal issues under the ambit of the Bankruptcy Code and applicable law. It is a public service organization. Although counsel may wish to communicate directly with Chambers on some issues from time to time, lawyers should be aware of that such contact may raise special *ex parte* communications concerns for opposing counsel. The Court and staff are sensitive that the integrity of the judicial process --- including transparency and fairness --- must be preserved. Accordingly, it is not appropriate for counsel to try to secure advantage by communications with Chambers staff. Counsel should not attempt to argue the merits of their respective positions with Chambers or Court staff. Instead, communications with Chambers personnel should be limited and focused on questions concerning such things as: scheduling; the receipt of pleadings; the delivery of voluminous materials; arrangements for electronic evidence presentation; and the like. Neither Chambers staff nor the Clerk’s staff can explain or change compliance orders. If counsel does not understand an order, after carefully reviewing the order, the motion to which the order is directed and applicable rules, counsel should file a motion or response to the order within the time set by the order.

Practice Pointer 25: Status of Decisions. As noted previously, each Bankruptcy Judge in the District of Colorado has more than 4,000 consumer cases. Accordingly, the Court simply cannot act on all motions instantaneously. The Court strives to adjudicate matters expeditiously but must balance competing needs and priorities among the cases before it. Generally, it is not good practice to call the Court --- or to call the Court again and again --- to demand a ruling. However, in some circumstances, such as an emergency or if a particular motion seems to have “fallen-through-the-cracks,” a call to Chambers may be appropriate. Counsel should simply advise Chambers of the pendency of the matter, how

long it has been pending, and any special circumstances. The matter will be brought to the attention of the Judge who ultimately will decide. Chambers staff are not authorized to make decisions on the merits of any judicial matters and cannot provide legal advice.

Practice Pointer 26: Consideration for Chambers Personnel.

Chambers personnel, like consumer bankruptcy counsel, work under substantial pressures and time constraints in their jobs. There are times when counsel in a highly charged environment, may call Chambers staff to complain or vent about judicial decisions, scheduling, or other matters. Such calls are not appropriate and counter-productive. Chambers staff are not responsible for the merits of a decision. The Judge is. And, being disrespectful to Chambers personnel does not serve anyone's interest. Chambers staff are trained to be respectful and courteous to lawyers and *pro se* litigants. So, counsel should extend courtesy and respect to Chambers staff. Counsel may contact the Clerk or Deputy Clerk of the United States Bankruptcy Court if special circumstances warrant.

Practice Pointer 27: Rules and Practices. Most procedural questions raised by consumer bankruptcy counsel can be answered by careful review of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the Local Bankruptcy Rules. Furthermore, all Colorado Bankruptcy Judges maintain detailed information about their respective practices and requirements under the "Judge's Info" Tab on the website for the United States Bankruptcy Court for the District of Colorado: www.cob.uscourts.gov.