

**THAT'S THE STUFF YOU GOT TO WATCH:
Avoiding Missteps in Representing Consumer Debtors Under Chapter 7**

For the Annual Seminar for Pro Bono Volunteers
Pro Bono Committee, Bankruptcy Section, Minnesota State Bar Association
July 20, 2010

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- I. Initial client contacts, interview, terms, expectations.
 - A. Via telephone or in person?
 - B. Free or for a fee?
 - C. Threshold information relating to eligibility to file, to proceed, to get a discharge.
 - 1. Prior bankruptcy filings and outcomes: 11 U.S.C. §§ 727(a)(7) - (9)
 - 2. Assets
 - 3. Income: 11 U.S.C. §§ 707(b)(2)(A), 707(b)(3)
 - 4. Venue of case: 28 U.S.C. § 1408
 - 5. Legal status as married (joint petition): 11 U.S.C. § 302(a)
- II. Gathering and analyzing information, preparing the file.
 - A. Interview form
 - B. Extrinsic documents
 - 1. Bank statements
 - 2. Tax returns
 - 3. Mortgage loan documents
 - 4. Loan applications
 - 5. "Payment advices," i.e., paycheck stubs, etc.: 11 U.S.C. § 521(a)(1)(B)(iv)
 - 6. Divorce decrees/family court orders
 - C. The post-BAPCPA punch

1. The attorney certifications: 11 U.S.C. §§ 707(b)(4)(C) - (D)
2. Possibility of sanctions and penalties: 11 U.S.C. §§ 707(b)(4)(A) - (B)

III. One necessity, and an additional consideration.

- A. Pre-petition credit counseling, a prerequisite for eligibility to file: 11 U.S.C. §§ 109(h)(1) and 521(b)
 1. Exigent circumstances override: 11 U.S.C. § 109(h)(3)
 2. (Very) limited dispensation from requirement: 11 U.S.C. § 109(h)(4)
 3. 180-day proximity requirement
- B. Waiver of filing fee for low-income debtors: 28 U.S.C. § 1930(f)(1)
 1. Detailed information; a clear picture of means
 2. Signature by debtor, or express reference in general signature declaration
 3. A 2-step inquiry into qualification
 - a. Income (*household*)
 - b. Other means to pay fee (liquid assets, third parties)
 4. Application addressed in-chambers by the individual judge

IV. Preparing the initial filing

- A. "Partial filing" permitted, FED. R. BANKR. P. 1007(a)(1) and 1007(c), but try to avoid this
- B. Use of *all current* forms
- C. Petition
 1. Prior filings (use a CM/ECF search)
 2. Related cases
 3. Debt structure (primarily consumer- or primarily business-generated)
- D. Schedules
 1. Schedule A: real estate
 - a. *Full* legal description (plat or survey), with county

- b. Value
 - i. Estimated market valuation for taxes (county)
 - ii. Opinion of real estate agent
 - iii. Appraisal
 - iv. Time-sensitivity during current economic downturn
- 2. Schedule B: personal property
 - a. Often forgotten, but never missed
 - i. Cash on hand
 - ii. Bank accounts, especially active ones: *the Article 3 trap*
 - iii. Library items; collectibles
 - iv. Household goods and furnishings
 - v. Tax refunds (all varieties)
 - b. Items with nuance
 - i. Interests in business operations and entities
 - AA. Sole proprietorship, versus corporation, versus LLC, etc.
 - BB. Exhibit of entity's assets and liabilities
 - CC. Shareholder-corporate transactions and liabilities, especially loans
 - ii. Automobiles
 - AA. Record title: the state-law presumption in Minnesota
 - BB. Joint versus individual, title versus "ownership"
 - CC. The kid's car
 - DD. Debtor not on title (yet)
 - iii. "Spousal interests" in property not reflected by record title
 - iv. Leases held by debtor (rental property)

- v. Property entitlements generating regular payment (structured settlements, annuities, workers' compensation, etc.)
 - vi. Rights to payment/"rights to receive", versus actual funds received and retained (workers' compensation, social security disability)
 - vii. Inheritance in prospect or upcoming life insurance benefit payment: 11 U.S.C. §§ 541(a)(5)(A) and (C)
 - viii. Causes of action, interests in pending lawsuits (personal injury, consumer protection, wrongful termination of employment): *beware* the judicial-estoppel trap, *Stallings v. Hussman Corp.*, 447 F.3d 1041 (8th Cir. 2006)
 - ix. Rights to payment under divorce decree
 - x. Potential and exemptible preference recoveries
3. Schedule C: exemptions
- a. Election (11 U.S.C. § 522(b)(1) - (2)) between federal (Bankruptcy Code) and state law governance still available in Minnesota
 - b. As between spouses
 - i. Joint filing: common election
 - ii. Separate filings: ?
 - iii. Cumulation of values of interests on jointly-held property
 - iv. Application of exemption limits limited to each individual's statutory rights (joint administration of estates only, LOC. R. BANKR. P. (D. MINN.) 1015-1)
 - c. Prior residence in another state, affecting legal governance on exemption rights: 11 U.S.C. § 522(b)(3)
 - d. Significance of scheduling a specific value for exempted asset: *Schwab v. Reilly*, ___ S.Ct. ___, 2010 WL 2400094 (June 17, 2010)
4. Schedule D: secured claims
- a. Mortgage-secured creditors (lender *and* servicer; lawyer if foreclosure commenced)
 - b. Vehicle-secured loans

- c. Other secured consumer financing
 - d. Judgment creditors
5. Schedule E: priority unsecured creditors
- a. Child support obligees (schedule full addresses for individual obligee; enforcement agency; lawyer; claim amount at zero if current in obligation; *bring individual obligee's telephone number to meeting of creditors*)
 - b. Taxing authorities, state and federal
 - i. Proper office(s) and address(es)
 - ii. Separate scheduling for each claim by tax year
 - iii. If outside priority status, list on Schedule F
6. Schedule F: unsecured creditors
- a. All original lenders and issuers
 - b. Assignees
 - c. Collection agencies and collection attorneys
 - d. Proper address within corporate organization *important*
 - e. Security sensitivities for other scheduled information
 - f. Dischargeability consequences for omitted claims: 11 U.S.C. § 523(a)(3)
7. Schedule G: executory contracts
- a. Debtor's rights as property of the estate
 - b. Assumption or rejection by trustee: 11 U.S.C. § 365(a), *et seq*
 - c. Debtor's assumption of personal property leases: 11 U.S.C. § 365(p)(2)
8. Schedule H: co-debtors
- a. Necessity of scheduling; entitlement to notice
 - b. The non-filing spouse; the guarantor
9. Rule 2016(b) statement and disclosure of scope of engagement

- a. Scope dictated by LOC. R. BANKR. P. (D. MINN.) 9010-3(e)(4)
 - b. Software glitches (default language of limitation)
 - c. Enforcement of local rule by the bench
- 10. Statement of Financial Affairs
 - a. Item 3, payments in last 90 days
 - b. Item 4, lawsuits and court proceedings: remember the recent divorce
 - c. Item 10, transfers: levies and setoffs
- E. Amending schedules: LOC. R. BANKR. P. (D. MINN.) 1009-1, generally
 - 1. Asset and exemption schedules
 - 2. Debt schedules/added creditor notice: LOC. R. BANKR. P. (D. MINN.) 1009-1(b)
 - 3. Notice prescribed by LOC. R. BANKR. P. (D. MINN.) 1009-1 (varies according to identity of amended schedule)
 - 4. Filing fee for amended schedules
 - 5. The old shell game: amendments to Schedule C after objection to original claim of exemptions
- F. The large question of income and expenses, the means test versus Schedules I and J: 11 U.S.C. §§ 707(b)(2) - (3)
 - 1. Income: the past versus the future
 - a. Means test: current monthly income (“CMI”) under the (inflexible) statutory formula: 11 U.S.C. § 101(10A) and 707(b)(2)(A); *In re Robrock*, ___ B.R. ___, 2010 WL 2142999 (Bankr. D. Minn. May 21, 2010)
 - b. Schedule I: the most likely future, based on current and very recent experience
 - i. The look-back
 - AA. Year-to-date average
 - BB. The last calendar year
 - ii. The look forward

- AA. Hourly wage for specific work period
- BB. Salary, with and without commission or bonus
- CC. Sensitive points: reduction for tax liabilities (high past withholding and large past refunds; changes in deductions; effective tax rates)

G. Expenses: deemed versus actual-but-reasonable

1. Means test: incorporation of IRS expense standards: 11 U.S.C. § 707(b)(2)(A)(ii)
2. Schedule J: again, the most likely future, limited by reasonableness
 - a. Mortgage payment (house in foreclosure?)
 - b. Auto payment (near-future payoff? future need?)
 - c. Educational loan payments (deferment?)
 - d. Priority tax liability
 - e. Health care expenses
 - f. Clothing

V. After the filing

A. Completing a partial filing

1. Heeding the order
2. Consequences of failure: LOC. R. BANKR. P. (D. MINN.) 1007-4(a)
3. Extension: FED. R. BANKR. P. 1007(c); LOC. R. BANKR. P. (D. MINN.) 1007-4(b)

B. Meeting of creditors

1. Preparing debtor for interrogation
2. Bringing all required documents, *including identification*
3. Appearances by creditors
4. Dressing properly

C. The letter from the United States Trustee

1. Acknowledging it

2. Forwarding it to the debtor, explaining
 3. Personal meeting with client
 4. Response and ample production
- D. Post-petition personal financial management course: 11 U.S.C. §§ 111 and 727(a)(11)
1. Prompt arrangements and attendance advisable
 2. Deadline for filing of certificate set in Notice of Chapter 7 case
 3. Consequence of failure to timely file certificate: *not good*
- E. Contested matters; adversary proceedings
1. Counsel's duty of representation: LOC. R. BANKR. P. (D. MINN.) 9010-3(e)(4)
 2. Procedural governance for contested matters
 - a. Application of Federal Rules of Civil Procedure: FED. R. BANKR. P.
 - b. Local form, content, procedure: LOC. R. BANKR. P. (D. MINN.) 9006-1, 9013-2 and corresponding local forms, 9013-3, et al
 - c. Affidavits, declarations, signatures: LOC. R. BANKR. P. (D. MINN.) 9011-4