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## CONSUMER BANKRUPTCY

# Best Practices for Representing Your Clients

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The American College of Bankruptcy is an honorary organization of bankruptcy professionals dedicated to setting standards for professionalism within the practice of bankruptcy law. Several years ago they formed a Best Practice Committee to promote “best practice” guidelines and standards for bankruptcy attorneys. Earlier this year the committee updated their guidelines to take into consideration provisions contained in the 2005 Bankruptcy Amendment Act.

The primary reason for the update was the new controversial provision that permits the court to severely sanction attorneys if the court determines that a case is an abusive filing and also determines that the attorney failed to perform a reasonable investigation into the debtor’s circumstances. This statute, which is contained in Bankruptcy Code § 707(b)(4), has generated considerable debate about the standards a lawyer is expected to meet when gathering information to complete a consumer bankruptcy petition. The concern about attorney liability is one of the reasons why many general practitioners stopped handling consumer bankruptcy cases when the 2005 Bankruptcy Act went into effect.

This article will focus on some of the “best practice” guidelines adopted by the Fellows of the American College of Bankruptcy.

### Retainer Agreements

Attorneys should provide all debtors with plain-English written retainer agreements, setting forth the duties and obligations of the attorney and client. I have been tweaking my retainer agreement for about twenty years and it is now four to five pages long. The retainer agreement should be executed no later than when the first payment towards the legal fee is made. It should explicitly indicate the scope of services that are covered and not covered.

In addition, the agreement may provide for other services that will be necessary in that particular case, and should describe an hourly rate or other method of payment for unanticipated services that may be necessary. Making specific reference to what services are covered and what services are not is very important as some of the judges in this district will require counsel to represent a client on all matters not specifically excluded in the retainer agreement.

### Investigating the Facts

Your client is the primary source of information, and the information your client provides you should be presumed to be true, absent particular circumstances that give rise to a suspicion that it is not. I primarily



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obtain information in three ways: I have the client fill out and sign a confidential client questionnaire, I review certain documents and information that the client provides me, and I “cross-examine” the client during the intake conference. I find that some clients do not totally understand some questions and that it is necessary to verbally review all of the information provided. For example, some clients do not think checking accounts are bank accounts.

Generally, the practitioner should obtain all available documents that are necessary to complete the petition as fully and accurately as is reasonably possible. The attorney should advise the debtor that all information presented to the court must be truthful and complete. I do this by providing the client with the mandatory disclosures the new laws require. I also

have this obligation set forth in my retainer agreement and I make sure the client is aware of this during the intake.

There is no reason to believe that consumer bankruptcy debtors are any less honest than other clients, although due to lack of education or financial sophistication some may have less understanding of their legal and financial dealings. For example, debtors may have no expertise in valuing assets, so that they may, quite innocently, greatly overvalue or undervalue their own. Therefore, it is often necessary for counsel to assist the client in coming up with proper fair market valuations.

In virtually every case there will exist various types of documents, such as bills, collection letters, loan papers, pay stubs, tax returns, public records, and the like, which can provide more detail. It is very easy to check E.C.F. to see if there were prior bankruptcy cases. In addition, credit reports are relatively inexpensive and easy to come by. If other evidence, or other statements of the debtor, appear to contradict information given by the debtor, or if the debtor's answers seem implausible, the attorney should ask probing questions to ensure that the debtor understands the information that is being sought. If the debtor's responses still do not comport with other known facts or the attorney's general experience, further investigation is necessary.

### **Emergency Bankruptcy Case Filings**

Emergency bankruptcy filings present special and difficult issues for a debtor's counsel. When a bankruptcy petition must be filed very quickly to forestall imminent harm to a client, the debtor's attorney should gather as much information as possible before filing the case.

Obviously, in emergency circumstances, the attorney cannot obtain all of the information that would ordinarily be obtained before filing. Nonetheless, the attorney must determine everything that is reasonably possible to assure that the filing is in the client's best interest and that it is not an abuse of the bankruptcy system.

In addition, because debtors with emergency bankruptcy filings are somewhat more likely to be abusive than others, an E.C.F. search of prior bankruptcy filings should be done to verify the information provided by the client. Prior filings may also limit or

eliminate the applicability of the automatic stay and possibly require prompt action in that regard. Finally, because debtors who do not come in until the last minute are more likely to be confused or disorganized, a credit report, which will list not only debts but also court proceedings, should ordinarily be obtained. These days, credit reports can be obtained within minutes if an account is set up with a credit report agency.

### **Preparing the Schedules and Statements**

Reconstructing a debtor's financial information is at best an imprecise exercise. Nevertheless, an attorney preparing the schedules and statements required in a consumer bankruptcy case must set forth the required information in a way that is as clear and accurate as possible given the practical limitations on the information that can be gathered.

With respect to listing liabilities, the amount of a claim may be taken from a bill or collection letter received by the debtor, but with the understanding that it is not likely to be precisely accurate, as it will constantly increase because of interest and service charges. The address for the creditor should be ascertained as accurately as possible from the papers presented by a client, or from a credit report. Every conceivable liability should be listed to maximize the effect of the debtor's discharge, including for example debts of a corporation of which the debtor was a principal even if there is no reason to believe the corporate veil can be pierced.

The consideration for credit card debts incurred for a variety of purposes may be listed as "credit card debt," "consumer goods and services" or some similar general phrase. If debts were incurred over a period of time, the dates of the transaction may be listed as "various dates," although at least one local trustee has expressed an interest in seeing more exact dates. It is usually advisable, but not required, to list additional contacts such as attorneys or collection agents collecting the debt so that they will have notice of the bankruptcy and cease collection activities. All possible liabilities of the debtor should be listed.

The attorney should assist the debtor in describing assets. Unless

there is some basis for suspicion that the debtor is not disclosing significant assets, there is no need to investigate the debtor. However, the values given by the debtor should be questioned by the attorney if they seem too high or too low based on the attorney's experience or information that is readily available, such as industry valuation guides or readily accessible information about recent property sales in the debtor's neighborhood.

The debtor's listing of current expenditures should include projected expenses going forward, rather than past expenses. Since the primary purpose of the listing is to determine what, if anything, a debtor can afford to pay creditors in the future, it makes the most sense to list a reasonable budget going forward, taking into account the family's needs, even if they have not always been met in the recent past.

Studies have shown that most people do not have any idea as to how much they spend for various items. Therefore, figures provided by a debtor may have to be questioned in light of the attorney's experience and it is not impermissible for an attorney to suggest that a debtor adjust either actual expenditures going forward or a debtor's unrealistic estimate of expenses. However, the number ultimately listed should be the debtor's best estimate with the advice of counsel.

It is also not improper to list expenses that are greater than a debtor's income, since that may be the reality. It is also appropriate to include a modest amount for miscellaneous expenses that are not itemized and a "cushion" for unexpected expenses. A detailed statement of business expenses should be attached if the debtor's primary income is from a business with substantial expenses, but need not be attached for a debtor with minimal self employment income and few, if any, business expenses.

#### *Editor's Note (revised 2008):*

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