

# Best Practices for Consumer Bankruptcy Practitioners

By Stuart Gold

**F**ull and complete disclosure of a debtor's financial affairs is the quintessential cornerstone of every bankruptcy filing,<sup>1</sup> a material failure of which may result in denial of the very relief a debtor seeks—the discharge of indebtedness.<sup>2</sup> In an effort to improve bankruptcy law and practice<sup>3</sup> and create a baseline for consumer<sup>4</sup> bankruptcy practitioners, Congress created as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 an entity known as a debt relief agency.<sup>5</sup> A debt relief agency is defined under the bankruptcy code<sup>6</sup> as any person who provides “bankruptcy assistance”<sup>7</sup> to an “assisted person.”<sup>8</sup> Accordingly, it is essential that a consumer bankruptcy practitioner be aware of the mandatory statutory requirements governing debt relief agencies before engaging in the practice of bankruptcy law. These statutory provisions include certain restrictions,<sup>9</sup> disclosures,<sup>10</sup> and requirements<sup>11</sup> for debt relief agencies. Additionally, the act imposes several mandatory requirements on debtors seeking relief under the bankruptcy code, including providing information and documentation to the court,<sup>12</sup> bankruptcy trustee,<sup>13</sup> and other parties in interest.<sup>14</sup>

By providing a framework to which all consumer bankruptcy practitioners and their clients must adhere, Congress has set the bar and provided a foundation on which all

participants in the bankruptcy process can rely. Additionally, failure to meet these mandatory prescribed standards may result in a malpractice action against practitioners who do not engage in the requisite due diligence.

## Reasonable investigation

With that in mind, those representing consumer debtors are more than just collectors and conduits of documents and scribes of bankruptcy forms and schedules. Indeed, the bankruptcy code and rules require the debt relief agency to be an active participant in the process.

The attorney's signature on a petition, pleading, or written motion shall constitute a certification that the attorney has performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and determined that the petition, pleading, or written motion is well grounded in fact; and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse.<sup>15</sup>

Additionally, “[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after a reasonable inquiry that the information

in the schedules filed with such petition is incorrect.”<sup>16</sup>

## Securing the right documents

To fulfill these statutory mandates and not run the risk of sanctions, it is essential that counsel for consumer debtors review the client's financial documents as part of the process of preparing the bankruptcy petition and schedules. In doing so, counsel is not only fulfilling the statutory mandates, but also supplementing the debtor's own recollection of his or her financial affairs and limiting the client's exposure to attempts made by creditors or the trustee to deny the debtor's bankruptcy discharge.<sup>17</sup>

The bankruptcy code requires the debtor to provide to the trustee “payroll advices” for the 60 days before the bankruptcy filing and income tax returns for the two previous years.<sup>18</sup> As part of their statutory duties, the court-appointed bankruptcy trustees will review these documents for information relating to one-time bonuses, deductions for retirement accounts, bank depository accounts or debit cards, payment of loans, etc.<sup>19</sup> This information will be used to match up with what debtors disclose in their petitions and schedules. Substantial and material underreporting of income or assets provides grounds for denial of the debtor's discharge.<sup>20</sup>

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## Filing a bankruptcy and securing a discharge provide a tremendous benefit to the honest, but unfortunate, debtor in the form of a fresh start—free from the financial burdens and mistakes of the past.

A review of the debtor's required income tax returns may disclose income from multiple sources, including interest and dividends or business income,<sup>21</sup> as well as bank accounts in which income tax refunds have been deposited. Additionally, the receipt of a large income tax refund leads to additional inquiry as to disposition of the funds if they are no longer on hand on the bankruptcy petition date and not otherwise disclosed in the debtor's bankruptcy schedules or statement of financial affairs. Trustees routinely discover that debtors have repaid friends and family members from the income tax refunds, which then may be avoided and set aside as preferential payments.<sup>22</sup> By reviewing the returns and making the right inquiries *before* the bankruptcy filing, counsel will be in a better position to address any issues and concerns that may arise and ensure that proper disclosures are made in the bankruptcy filing.

In addition to the bankruptcy code's required documents, local bankruptcy rules require that debtors furnish additional documentation relating to their financial affairs, including recorded deeds, mortgages and titles to vehicles, and bank statements.<sup>23</sup> Large deposits and withdrawals as well as transfers from one account to another should be inquired about before the bankruptcy case is filed. Trustees are also on the lookout for crypto-currency transactions that may be disclosed in the debtor's financial records. Documents relating to the debtor's titles to real and personal property such as recorded deeds, mortgages, and vehicle titles must be reviewed before the debtor's bankruptcy filing to verify proper perfection. A simple search of the county's register of deeds online records can provide the requisite information and documents,

thereby fulfilling the attorney's obligation to conduct a reasonable inquiry.<sup>24</sup>

Public records searched through Westlaw or Lexis may turn up forgotten interests in real property, vehicles, and corporate holdings. Likewise, a check of Michigan's unclaimed property website for assets that belong to the debtor but may have been escheated to the state should be undertaken.<sup>25</sup>

Gone are the days one could simply point a finger at the client if anything went amiss. The Bankruptcy Abuse Prevention and Consumer Protection Act now places the debtor's counsel in the proverbial hot seat by making him or her an active participant in the information-gathering process. Debtor's counsel is tasked with the affirmative duty to look beyond the client's responses to ferret out and provide accurate and complete responses to comply with the bankruptcy code's mandatory disclosure requirements.

To obtain as much information as possible, it is highly suggested that a detailed questionnaire be provided to the client to initially secure the information needed to complete the bankruptcy schedules and related documentation. By having the client sign the questionnaire, acknowledging that the information and documents provided represent an accurate compilation of his or her financial affairs, counsel can help the debtor avoid any potential future misunderstandings.

Every conceivable liability must be listed. The bankruptcy code contains an expansive definition of the nature of every claim the debtor has or may later become liable for.<sup>26</sup> Securing your client's free credit report is essential to this process.<sup>27</sup> Proper notice to the creditor is also important to protect your client from potential inadvertent violations of

the automatic stay. While payment addresses for institutional creditors may suffice to provide notice of a bankruptcy filing, the better practice is to check the actual billing statement for an address for sending correspondence;<sup>28</sup> as for federal and state governmental units and certain taxing authorities, the court's clerk generally has the most current address.<sup>29</sup> Obviously, if the creditor is represented by an attorney, that address should be provided as well. If the obligation is in collection and litigation has ensued, debtor's counsel should prepare and file an administrative stay order with the appropriate court.<sup>30</sup> In the case of a pending foreclosure action, notice of the bankruptcy filing should be emailed or faxed directly to counsel for the lender immediately after the petition is filed.

Likewise, the bankruptcy code contains a broad definition of the debtor's property interests.<sup>31</sup> Failure to ascertain the extent of the debtor's property rights and interests may result in their unexpected loss to a liquidating trustee, loss of the debtor's discharge, or a potential criminal violation.<sup>32</sup> Potential claims, even if not actively being pursued, should be scheduled. Not only is it required that the potential claim be scheduled in the debtor's bankruptcy filing, failure to do so may result in a judicial estoppel defense being raised to bar the claim if pursued post-bankruptcy.<sup>33</sup>

In addition to fulfilling the mandatory statutory obligations described above, the consumer bankruptcy attorney must provide the client with a plain-English retainer agreement that clearly sets forth the duties and obligations of *both* the attorney and client.<sup>34</sup> The attorney should not attempt to unbundle basic and essential services which may result in abandonment of the client and may become detrimental to the client's interests before conclusion of the bankruptcy case.<sup>35</sup>

### The petition signing

Lastly, it is highly recommended that signing of the bankruptcy petition, schedules, statement of financial affairs, and other related documents be conducted in person and with an attorney present. It is essential that the attorney review with the client each inquiry and response described in the

documents to be filed with the court. Attempts to shortchange this process by having a paralegal conduct the signing, mailing the documents to the client with Post-it notes indicating where to sign, or having the client sign the signature pages in front of the attorney without a thorough review of their contents are discouraged.

During the signing meeting, counsel should make additional inquiries of possible claims for or against the client. Items such as past automobile accidents, residential lease defaults, and medical obligations are often overlooked. Clients tend to make their own exceptions to general inquiries such as “Have you listed all assets and debts?” They must be advised that it is irrelevant that they may believe an asset has no value and therefore need not be scheduled and, likewise, it is irrelevant that they may not want to list a creditor who may be a family member or a favorite physician. Clients must be instructed to list, *without exception*, all assets and debts. Explaining that even if a debt is discharged it can still be legally voluntarily repaid may ease your client’s concerns.<sup>36</sup> Additionally, clients should be advised that the bankruptcy code

contains several exemptions that protect their assets from liquidation by the trustee; generally, full disclosure is not detrimental to their retention.<sup>37</sup>

### Conclusion

Filing a bankruptcy and securing a discharge provide a tremendous benefit to the honest, but unfortunate, debtor in the form of a fresh start—free from the financial burdens and mistakes of the past. Spending the necessary time at the beginning of the engagement can result in a less stressful proceeding for you and your client. ■



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### ENDNOTES

1. *In re Colvin*, 288 BR 477, 481 (Bankr ED Mich, 2003) and *United States v Ellis*, 50 F3d 419, 424 (CA 7, 1995).
2. *Liebke v Thomas*, 116 US 605, 607–608; 6 S Ct 496; 29 L Ed 744 (1886).
3. *Milavtz, Gallop & Milavertz, P.A. v United States*, 130 S Ct 1324, 1329; 130 S Ct 1324; 176 L Ed 2d 79 (2010).
4. 11 USC 101(8).
5. Pub L No 109.8, 119 Stat 23.
6. 11 USC 101(12A).
7. 11 USC 101(4A).
8. 11 USC 101(3).
9. 11 USC 526.
10. 11 USC 527.
11. 11 USC 528.
12. 11 USC 521(a).
13. 11 USC 521(e).
14. *Id.*
15. 11 USC 707(b)(4)(C) and Fed R Bankr P 9011.
16. 11 USC 707(b)(4)(D).
17. 11 USC 727(a).
18. 11 USC 521(a)(1)(B)(iv) and 11 USC 521(e)(2)(A) and (f).
19. 11 USC 704(a)(4).
20. 11 USC 727(a).
21. 11 USC 521(e)(2)(A) and (f). If the tax return discloses business income, the schedules should reflect the debtor’s interest in a business. All too often, the debtor’s tax preparer has engaged in unlawful activity to increase the debtor’s income tax refund. Trustees routinely refer such matters to the U.S. Trustee for further investigation.
22. 11 USC 547.
23. ED Mich LBR 2003-2(b)(1–8) and Bankr WD Mich R 1007-2(e).
24. E.g., Register of Deeds, Wayne County <[www.waynecountylandrecords.com](http://www.waynecountylandrecords.com)>. All websites cited in this article were accessed October 2, 2019.
25. *Unclaimed Property*, Dep’t of Treasury, State of Michigan <<https://unclaimedproperty.michigan.gov/>>.
26. 11 USC 101(5).
27. You can access a free credit report every 12 months through an authorized site such as AnnualCreditReport.com <[www.annualcreditreport.com](http://www.annualcreditreport.com)>.
28. 11 USC 342(c)(2).
29. Fed R Bankr P 5003(e).
30. E.g., see Form MC 300, SCAO-Approved Court Forms, State Court Administrative Office, Michigan Courts, available at <<https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/mc300.pdf>>.
31. 11 USC 541.
32. 18 USC 152. For example, at a minimum under ED Mich LBR 2015-1, a trustee is required to file a notice of undisclosed asset, which may result in further inquiry from the United States Trustee of the debtor’s motives and intentions.
33. See *White v Wyndham Vacation Ownership*, 617 F3d 472 (CA 6, 2010).
34. 11 USC 528(a).
35. *In re Slabbinck*, 482 BR 576 (Bankr ED Mich, 2012).
36. 11 USC 524(f).
37. 11 USC 522.



## MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals in January and July of each year, from when the complaint was filed, and is compounded annually.

For a complaint filed after December 31, 1986, the rate as of July 1, 2019 is 3.235 percent. This rate includes the statutory 1 percent.

But a different rule applies for a complaint filed after June 30, 2002 that is based on a written instrument with its own specified interest rate. The rate is the lesser of:

- (1) 13 percent a year, compounded annually; or
- (2) the specified rate, if it is fixed—or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see <http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/interest.pdf>.

*As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.*