CHAPTER 7

Bankruptcy Ethics Issues for Solos and Small Firms

by Nancy B. Rapoport

Now that you’ve decided to work on a bankruptcy case, you need to make sure that you understand enough about the quirks of bankruptcy practice to keep yourself, your client, and your bar card safe for years to come. As with any other new representation, you should start by determining whether you can take on a new matter. A conflicts check is essential, but in bankruptcy cases, it can be extremely tricky to do correctly. Here’s why.

I. “DTACs” and Conflicts Checks

I fell in love with bankruptcy law when I tried to do a conflicts check at my law firm, and I marked everyone in the case as “potentially adverse” to everyone else in the case. The conflicts check came back several inches high, the law firm wasn’t amused, and I realized that there were some tricky conflict of interest issues in this field.

Normally, a conflicts check just isn’t that hard: buyers are adverse to sellers; plaintiffs are adverse to defendants. State ethics rules (discussed below) can handle these easy situations. But what happens in those fields where parties can switch sides over and over, regrouping several times over the course of a given case? Such a possibility isn’t as rare as you might think. For example, in family or probate law, Mom and Dad might be on opposite sides of a divorce but on the same side when contesting Grandma’s will. Then Mom

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1. The views expressed in this Chapter are mine alone and not those of the faculty or administration of the University of Houston or the UH Law Center. Special thanks go to Cathy Vance and Corinne Cooper for their invitation to contribute to this book, to Jeff Van Niel and Morris Rapoport for their always-helpful edits, and to Kelli Cline for always helping me find the time for my projects.
and one of the 2.5 kids might agree on the best interest of Child .5, but Dad and the other kids might disagree. The combinations will depend on the choices that Mom, Dad, and their 2.5 kids make during the course of their lives.

Bankruptcy law has the same side-switching problem. During the course of a bankruptcy case, each party may potentially oppose every other party—or not—depending on the choices made during the case. If the conflicts check that you do at the beginning of the case doesn’t take this potential side-switching into account, you might find yourself conflicted out of one or more representations in the middle of the case.

The problem with conflicts of interest in bankruptcy is that there are several types of conflicts, and state ethics rules can cope with only a few of those types. There are:

- obvious actual conflicts;
- obvious and likely potential conflicts (which you should treat as if they were actual conflicts);
- obvious and unlikely conflicts;
- conflicts that, if they crop up, will continue for the duration of the case; and
- conflicts that, if they crop up, will disappear after the issue that triggered them gets resolved.

Whew! That’s a lot to remember.

If two parties are adverse at the beginning of the bankruptcy, you’re not going to be able to represent both sides during the case. But what of those potential conflicts listed in the previous paragraph—they might or might not ever happen, so what should you do about them? Do you simply say, “This whole idea is too complex—I’m only going to represent one party in this case?” Well, you could say that (and I wouldn’t blame you), but you might not want to say that. What if you’ve done a very tiny representation for one client (for example, you’ve filed a proof of claim on behalf of that client), and then a more interesting (read: lucrative) client comes along? That second client doesn’t look adverse to the first client—at least not at first—but can you be sure?

Many conflicts in bankruptcy cases are single-issue conflicts that may or may not pop up, depending on the various parties’ decisions in the case. I call these issue-specific conflicts “DTACs” (dormant, temporary, actual conflicts).²

². I first wrote about DTACs in 1994. See Nancy B. Rapoport, Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy, 26 CONN. L. REV. 913 (1994). Since then, I’ve made the issue of conflicts of interest in bankruptcy cases the focal point of my career, at least so far. Some would say I’m obsessed by
- They're dormant because they might never arise.
- If they do arise, they're temporary because they're only single-issue conflicts.
- But while they're "on," they're actual conflicts, and they may present a real problem for you.

Take a look at Exhibits 7-1, 7-2, and 7-3, describing some simple DTACs. When you review these charts, remember that the dotted lines represent conflicts and the solid lines represent an alignment of parties in interest.

**Exhibit 7-1**

![Diagram showing relationships between debtor, secured creditors, and unsecured creditors.]

This is the normal situation. The interests of the debtor and the creditor are adverse, but the secured and unsecured creditors aren't sniping at one another—yet.

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Later in the case, it's possible to see the debtor and the unsecured creditors ganging up on secured creditors that say they're protected but forgot to file.

Still later, the unsecured creditors might like a reaffirmation agreement between the debtor and the car dealer, where the car loan is only partially secured.
What's the take-away lesson I want you to learn? Don't be lazy when you do your conflicts check—think hard about the parties' relationships and what they might become.3

Let's make things even more complicated: bankruptcy practice is a federal practice, but the ethics rules in the U.S. Bankruptcy Court in which your case has been filed could include:

1. the ethics rules of the state in which the court sits;
2. the rules that the court has, itself, decided to adopt; or
3. a combination of the two.4

So before you can take on a new matter for a potential client, you're going to have to clear two separate hurdles—the non-bankruptcy ethics rules and those additional rules imposed by the Bankruptcy Code.

II. State Ethics Rules and Conflicts of Interest

Most state ethics rules prohibit you from representing concurrent clients whose interests are directly adverse (see, e.g., Model Rule of Professional Conduct 1.7). Concurrent client ethics rules are designed to protect client confidences from being used against the client(s), and they're also designed to protect the clients from a "Mom always loved you more" situation (pulling your punches in favor of one client, also known as zealousness). When it comes to representing two current clients in the same matter, you have to make sure that confidentiality and zealous representation (on behalf of both clients) are foremost in your thoughts.

Those same state ethics rules also prohibit you from taking on a new client whose interests are materially adverse to those of a former client5 (one whom

3. If I weren't compulsive in addition to being obsessive, I'd leave off nagging you about conflicts checks. But I do need to remind you that you need to be accurate in conducting your check. Don't forget that people change names (and some don't, even after they marry). Assumptions here can get you in a heap of trouble.

4. Feeling queasy yet about taking on this new representation? To make matters worse, if you are admitted in more than one jurisdiction (check your wallet—how many bar cards are you carrying?), then an ethics violation in one jurisdiction may create a snowball effect, leading to reciprocal discipline in all of your other jurisdictions. This problem gets more complicated if a particular behavior is well within the bounds of ethics in one state but is prohibited in another state.

5. Many lawyers are awfully sloppy when it comes to closing files, to the consternation of their malpractice carriers. When you are done with a matter, send a termination letter politely closing your file. See Chapter 10. The more definite you can make the separation between "current client" and "former client," the more likely it is that a court will apply the less-stringent "former client" rule (protecting confidentiality only) rather than the more-stringent "current client" rule (protecting confidentiality and zealousness).
you no longer represent) if the new matter and the former matter are substantially related to each other. With former clients, your duty is to protect all confidences you obtained in the course of the former client’s representation. Because the former client is, well, former, you don’t have the issue of pulling your punches on the former client’s behalf.

Can you represent more than one client in a bankruptcy case? Don’t forget about DTACs: you might think, at the beginning of the case, that the interests don’t conflict, but developments in the case could change that calculus. If no DTACs appear likely, and no actual conflicts exist, then you may represent more than one client in the case—at least under the state ethics rules (see Exhibit 7-4).
Exhibit 7-4
Checklist: State Ethics Rules

1. Can you take on the new representation under the state ethics rules? It depends.
   a. Do you have a current client whose interests appear to be directly adverse to the interests (or materially limited by your representation) of the new client?
      • If the answer is yes, unless you can get informed consent in writing from both clients, you can't take on the new representation.
      • Don't count on getting informed consent in this situation. The closer the interests of the two clients are to a concurrent conflict, the less likely it is that you'll be able to persuade a court that you acted reasonably in seeking the conflict waiver letters, even if you were able to get those letters signed.
      • Remember: when you have a current client and are thinking of taking on a new client, you have to protect the current client's confidences and assure yourself that you won't be tempted to pull your punches against either client in representing the other. (Confidentiality and zealousness ethics issues.)
   b. Do you have a former client whose interests may be materially adverse to the interests of the potential client?
      • If the answer is yes, then you need to determine whether the matter in which you represented the former client is substantially related to the matter in which you want to represent the potential client.
        1. If there's a substantial relationship, then it's likely that you'll have confidential information from the former client that you will not be allowed to use in representing the potential client. You won't be able to take on the potential client.
        2. If there's not a substantial relationship between the old and potential matters—and there's little risk that you'd be able to use confidential information that you obtained from the former client against the former client in your representation of the potential client—then you may take on the potential client's new matter.

The trick is, of course, the specific facts that you're facing. Before you agree to take on a new representation, look at your state's ethics rules and make sure that you fit within the case law interpreting those rules.

6. We'll get to the special bankruptcy ethics rules next.
III. Bankruptcy Ethics Rules—Creditor (or Other Non-estate) Representation

Now that you think your state bar card will be safe, let’s add those extra bankruptcy ethics rules. These rules govern two types of representation in bankruptcy:

- those for which the debtor’s estate pays your bills, and
- those for which the estate doesn’t pay your bills.

Let’s do the easy one first—where the estate doesn’t pay your bills (where you’re representing, say, a creditor).

A. Representing Creditors

The good thing about representing a creditor or other, non-estate entity in a bankruptcy case is that you don’t need to get the bankruptcy court’s permission before you take on the representation. As long as your representation passes muster under your state’s ethics rules, you may take on that representation. The only twist occurs when you represent more than one creditor (or equity security holder) in a Chapter 9 (unlikely) or in a Chapter 11 case. Even this twist doesn’t require court approval, but it does require that you file something called a Rule 2019 statement. That statement acts as a brief cross-check

7. Rule 2019 says:

Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases
(a) Data required
In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof. The statement
for the court (and anyone else) to determine how many entities you’re representing in the case.

**B. Representing the Estate**

When the bankruptcy estate pays your bills, you do need prior court permission to represent the particular estate entity. Different chapters have different estate entities (see Exhibit 7.5).

### Exhibit 7.5

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Typical estate entities</th>
</tr>
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<tbody>
<tr>
<td>7</td>
<td>Trustee(^a)</td>
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<tr>
<td>9</td>
<td>Municipality</td>
</tr>
<tr>
<td>11</td>
<td>Debtor-in-possession; creditors’ committee</td>
</tr>
<tr>
<td>12</td>
<td>Debtor-in-possession (family farmer); trustee</td>
</tr>
<tr>
<td>13</td>
<td>Debtor-in-possession (individual); trustee</td>
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</tbody>
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shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(b) Failure to comply; effect

On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by an entity or committee who has not complied with this rule or with § 1125(b) of the Code.

8. In a Chapter 7 case, the debtor doesn’t take on the role of administering the estate.
In order to determine whether you can represent an estate entity, turn to § 327. Under § 327(a):

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.9

In Congress's Department of Redundancy Department of Drafting, § 327(a) refers to professionals who don't "hold or represent an interest adverse to the estate" and who are "disinterested persons." Section 101(14) defines "disinterested person" to include a person who:

(A) is not a creditor, an equity security holder, or an insider;

...and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor.

...or for any other reason ....

So, as long as you don't:

(1) hold or represent an adverse interest and

(2) have a materially adverse interest (!)

you're disinterested and may file an application to approve your appointment as a professional in the case. You'll also need to file a Rule 2014 statement.10

10. Rule 2014 says:

Employment of Professional Persons
(a) Application for an order of employment

An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall
Then, at intervals, upon application, you'll be able to be paid from the estate.

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**A Note About Limited Representation**

Some lawyers explain very well in their engagement letters that the initial fee covers only certain parts of the representation. For example, filing the petition and schedules and appearing at the § 341 meeting is covered, but defending an attack on the client's good faith in filing is not.

Will this work under state ethics rules (or under my take on how state ethics rules would be interpreted)?

- This unbundling of representation may work fine when the client is relatively sophisticated and can understand the ramifications of a carve-out of representation.
- For the less sophisticated client, though, an engagement letter that limits representation may not be enforceable. A court is likely to ask whether the client understood the engagement letter. The clearer the letter—in plain language and with several examples of what is and isn't covered—the better.

Don't forget that once a lawyer signs on to represent a client, the lawyer must actually represent the client. Leaving a client in the lurch—with or without a properly worded engagement letter—is only asking for trouble.

Some bankruptcy courts acknowledge that limited representation low-
ers the cost of filing bankruptcy and will enforce these agreements. Others rule that the lawyer is in for the entire case, regardless of the engagement letter.

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13. For more on this topic, see Chapter 6. For more information on engagement letters, see Chapters 10 and 11.
IV. The Three Cs: Competency, Confidentiality, and Conflicts
(Avoidance of)

In order to represent a client well, a lawyer should remember the Three Cs:

- providing competent representation,
- keeping client confidences, and
- avoiding conflicts of interest.

Although there are many other ethics rules, a lawyer who is conscious of the Three Cs will likely stay on the straight and narrow.

A. Competency

Under Model Rule 1.1, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Woe betrays a lawyer who thinks that she can just start representing a debtor or creditor in a bankruptcy case without understanding the Bankruptcy Code. Bankruptcy is a specialty practice, and bankruptcy lawyer wanna-bes often find themselves in trouble because they don’t understand various terms of art that more experienced bankruptcy practitioners use. Moreover, thanks to the BRA, there are countless new traps for the novice bankruptcy lawyer.¹⁴ Your mantra: when in doubt, ask someone who knows bankruptcy law. Don’t hurt your client—or yourself—by pretending that you know more than you do.

Competency issues are more likely in consumer cases, not because consumer bankruptcy lawyers aren’t smart (they are), but because there tend to be fewer bankruptcy lawyer wanna-bes in high-stakes Chapter 11 cases.

B. Confidentiality

Under Model Rule 1.6:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

¹⁴. For specific issues that you will face if you represent a consumer debtor, see, e.g., American Bar Association, Business Law Section’s Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes, Task Force on Attorney Discipline, Report: Attorney Liability Under § 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Oct. 6, 2005).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
(4) to secure legal advice about the lawyer’s compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
(6) to comply with other law or a court order.

The raison d’etre of the confidentiality rule is to encourage a client to tell his lawyer everything, even embarrassing things, so that the lawyer can best represent the client. Will a client tell you everything? Probably not, especially if you don’t ask the right questions (see competency discussion above).

C. Conflicts of Interest

This issue is explained more fully above.

My research indicates that different types of bankruptcy practice tend to implicate different ethics rules. Conflicts of interest are less likely in consumer cases (but beware of issues involving family and friends) than they are in business cases.

V. Money, Money, Money, Money—MONEY!\textsuperscript{15} (Reasonable Fees)

If you’re planning on getting paid by any client, here are four things to keep in mind:

1. All attorneys must keep their fees reasonable, per each state’s ethics rules. No matter how tempting “fees without work” might be (or any other arrangement), remember that all fees are bounded by reasonableness, whether or not the fees are being paid from estate funds.

\textsuperscript{15} This is an old O’Jays song. See http://primetimetv.about.com/cs/lyrics/a/theapprentice.htm.
2. Fees being paid from estate funds are, of course, also bounded by various provisions in the Bankruptcy Code, the Rules, and any local rules. These provisions include (a) court appointment of professionals (§ 327), and (b) compliance with guidelines set by the particular bankruptcy court, the U.S. Trustee’s office, or the district court (if the bankruptcy court hasn’t spoken).

3. Communication is key. If you get the sense that the court, the U.S. Trustee, the client, or a creditor just “ain’t happy,” then you should try to touch base with the appropriate people to get a feel for why there’s a problem. Sometimes the unhappiness is caused when people don’t understand how expensive it is to resolve problems via the legal system. Sometimes, though, it’s because the lawyer really did do something wrong, for example, by charging too much for routine work, by missing an important deadline, by charging over the market price for expenses (like faxes or copying costs), or by not returning a client’s phone calls in a timely manner. Ethics issues often get raised in the medium of fee disputes.

**WARNING!!**

Courts can approve fee enhancements for extraordinary work, but courts can also approve fee reductions for poor work. Don’t assume that any interim fees are equivalent to final fees—the court has the power to issue reductions in its final fee order.

VI. What the Heck Is “Bankruptcy Assistance,” Anyway?

According to Code § 101(4A):

>[l]he term ‘bankruptcy assistance’ means any goods or services sold or otherwise provided to an assisted person [itself a term of art, defined in § 101(3)] with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors’ meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.16

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16. Congress decided to use single quotation marks, instead of the more proper double quotation marks, in its definitions section. I’m sure that Lynne Truss, of *Eats, Shoots, and Leaves*, would not be amused.
That’s a pretty expansive definition, so let’s parse it in terms of seeing what counts as bankruptcy assistance under the BRA and what counts as legal advice under state law.

This issue is a tough one. Think of legal advice as a continuum. On one side of the continuum is technical legal advice, such as whether something is or is not a preference. On the other side is purely business advice, such as whether the font used in an advertisement looks good. Somewhere in the middle is legal advice embedded inside business advice (“you could do it, but it would be wrong”).17 Defining legal advice is “squishy,” at best, but it probably involves using a lawyer’s training in substantive law and in other, related areas, such as business, economics, sociology, and psychology, to come up with the best resolution of an issue.

“Bankruptcy assistance,” thanks to Congress, is not nearly as “squishy” a concept. It’s very broad:

- any goods or services sold or otherwise provided
- to an assisted person
- with the express or implied purpose of providing
  - information,
  - advice,
  - counsel,
  - document preparation, or
  - filing,
- or attendance at a creditors’ meeting or
- appearing in a case or proceeding on behalf of another or
- providing legal representation with respect to a case or proceeding under this title.

The concepts of “legal advice” and “bankruptcy assistance” intersect without overlapping completely. If I teach a bankruptcy course to our students and speak to them about the nondischargeability of their student loans, I’m not giving them legal advice, because they have no expectation that I am representing them in a lawyer-client relationship—and that relationship is a necessary precursor to the provision of legal advice.18 But because the definition of

17. No, I’m not trying to channel President Nixon’s famous quote here. Another, better version is from former Secretary of State and Nobel Laureate Elihu Root: “The law lets you do it, but don’t . . . It’s a rotten thing to do.”

18. Don’t sigh with relief about that “necessary precursor” business. The creation of a lawyer-client relationship is amazingly easy to do—if the client reasonably thinks that you are his lawyer and seeks your advice, you are his lawyer, even if you never asked him for money, never sent him an engagement letter, and never took any formal action to open his case. (It’s a good thing that asking our advice at cocktail parties doesn’t create a “reasonable” belief that a lawyer-client relationship has been created!)
bankruptcy assistance is so broad, and because most law students would qualify as assisted persons under § 101(3), my advice is “bankruptcy assistance” and I’m a “debt relief agency.” Does this result make sense? No. There should be arenas in which information given to consumers doesn’t trigger the BRA. But in the meantime, I’m planning on telling our associate dean that I’ll be sticking to the Professional Responsibility course that I currently teach, rather than moving back into the Basic Bankruptcy course.

Exhibit 7-4

VII. The Pen Is Mightier Than the Sword: Rule 11 of the Federal Rules of Civil Procedure and Bankruptcy Rule 9011

One of the things that will get a lawyer into trouble quickly is failing to investigate an allegation properly before filing a pleading, motion, or other paper. Both Rule 11\(^\text{19}\) and its bankruptcy equivalent, Rule 9011, essentially

\footnotesize

19. This issue is discussed at length in Chapter 4.

20. Rule 11 provides:

Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,
require a lawyer's signature to be as good as (or, in cases of a bad lawyer, better than) her word. Both rules give the party whose filed document is being attacked up to 21 days to retract the document before the court may entertain a motion for sanctions.\textsuperscript{21}

\begin{itemize}
\item[(1)] it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
\item[(2)] the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
\item[(3)] the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
\item[(4)] the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.
\end{itemize}

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto....

\textsuperscript{21} Failure to wait the 21 days before filing the motion (already served) with the court will jeopardize the motion for sanctions. See, e.g., In re Kitchin, 327 B.R. 337, 360 (Bankr. N.D. Ill. 2005) ("Several Courts have found that failure to follow the safe harbor provision requires denial of a sanctions motion.") (citations omitted).
Note that, under the BRA, consumer lawyers must be extremely careful. For example, under new § 707(b)(4):

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—
   (i) performed a *reasonable investigation* into the circumstances that gave rise to the petition, pleading, or written motion; and
   (ii) determined that the petition, pleading, or written motion—
   (I) is well grounded in fact; and
   (II) 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 under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a *certification that the attorney has no knowledge after an inquiry* that the information in the schedules filed with such petition is incorrect.22

The italicized phrases above should strike fear into the heart of any consumer debtor’s attorney, even though they look innocuous. There’s no good case law yet that will give a lawyer a sense of comfort that her pre-filing discussions with the debtor will pass muster, but there is a great discussion in Chapter 13 on § 707(b). My advice: if something that the debtor tells you doesn’t ring true, investigate further if at all possible. Failure to act as a reasonable bankruptcy lawyer would act will cost you.23

VIII. Just When You Thought It Was Safe to Go Back in the Water: You’re a Debt-Relief Agency!

Lawyers representing consumer debtors are now, thanks to the BRA, “debt relief agencies.”24 Chapter 4 covers who actually fits the debt relief agency definition, and Chapters 9 and 11 include guidance on what debt relief agencies must, and may not, do. As a “debt relief agency,” you must

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22. Emphasis added. Chapter 13 discusses these provisions in detail.
23. *See, e.g.*, *In re Bailey*, 321 B.R. 169 (Bankr. E.D. Pa. 2005) (client omitted several prior filings from her conversations with her attorney, and attorney found a “bar order” prohibiting more filings, yet continued to prepare a new filing); *Grunewalt v. Mutual Life Ins. Co. (In re Coones Ranch)*, 7 F.3d 740 (8th Cir. 1993) (filining a Chapter 11 proceeding four days after debtor had incorporated was a suspicious circumstance that the lawyer should have investigated; filing was deemed to have been in bad faith).
24. Section 101(12A) defines a “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110 [with some exceptions not relevant here].”
comply with §§ 526-528.\textsuperscript{25} As such, under § 527, you must “Mirandize” your debtor client, in writing, informing him that:

- any information that he or she provides must be truthful;
- he or she must disclose all assets and liabilities;
- his or her current monthly income and disposable income need to be stated accurately; and
- his or her information can be audited.

Moreover, thanks to § 527(b), Congress has now given you new material to provide to your consumer clients in a clear and conspicuous writing,\textsuperscript{26} and § 528 has provided you with an outline of what your engagement letter should say, including the following statement: “We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.”\textsuperscript{27}

IX. Am I My Client’s Keeper? Reaffirmations under the BRA

The BRA changes the relationship between lawyer and client dramatically with a new provision that makes the lawyer essentially the guarantor of the client’s reaffirmation agreement.\textsuperscript{28} Under amended § 524(c):

An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if—

\[\ldots\]

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that—

(A) such agreement represents a fully informed and voluntary agreement by the debtor;

\[\ldots\]

\textsuperscript{25} Even if you represent a creditor, you might be held to be a debt relief agency. See Chapters 4 and 15, and Catherine E. Vance & Corianne Cooper, \textit{Nine Traps and One Slap: Attorney Liability Under the New Bankruptcy Law}, 79 AM. BANKR. L.J. 283, 295 (2005) (“Lawyers who do no more than fill out a proof of claim form on behalf of their consumer clients could get swept into the torture chamber Congress has created. ‘Document preparation,’ without more, appears to be enough to constitute ‘bankruptcy assistance.’”).

\textsuperscript{26} You can find a complete discussion of the new “notice” issues in Chapter 11.

\textsuperscript{27} BRA Section 229, adding Code § 528, especially subsection 528(d). See Chapter 9 for a discussion of this provision. Although there is an argument that the engagement letter does not need the “Scarlet Letter” language, it’s a good idea to include it.

\textsuperscript{28} Reaffirmations are discussed in detail in Chapter 14.
such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and
the attorney fully advised the debtor of the legal effect and consequences of—
(i) an agreement of the kind specified in this subsection; and
(ii) any default under such an agreement. . . .

Lawyers have always had the obligation to think critically about the information that a client has given them and to investigate further if the information seems bogus. But lawyers have never had to act as the guarantors of a client’s decision. Under Model Rule 1.2(a), “a lawyer shall abide by a client’s decisions concerning the objectives of representation.” So if your client decides—foolishly—to reaffirm a debt, and you don’t withdraw from the representation (see below), now you’re on the hook with a certification. Withdrawal might not be easy, but if you’re not comfortable with the client’s decision, don’t sign anything that implies (let alone states) that you believe that your client’s choice to reaffirm is a good idea.

X. The Final Word: Withdrawal

What if, after reading this book, you decide to get out of the consumer bankruptcy business and enter a new, less stressful profession, such as air traffic control? Just remember one last thing: you can’t abandon your clients once you’ve taken on their representation without withdrawing from that representation. Until you withdraw, you must be diligent in representing them, even at a high cost to (and a high risk of potential liability for) yourself. Thanks to the BRA, all of these new demands on lawyers—especially consumer bankruptcy lawyers—have added increased costs and stress. Depressed? Well, the only good news I can offer is that every consumer bankruptcy lawyer is going through the same feelings that you are.

Those who think that law is mostly a business would advise you right now to get out: if the profit margins (small enough, even before the BRA) have declined to the point where your income isn’t sufficient to balance out your risks, don’t stay in the business. If, however, law is more of a profession—a calling—then my guess is that you’ll stay in “the biz,” at least for now, hoping that the BRA pendulum eventually swings back to center.

29. Emphasis added. See also Code § 524(k)(5) (attorney certifies that the debtor can make the payments).
30. See also Chapter 14.
31. See Model Rule of Prof’l Conduct 1.16 for the rules concerning withdrawal.
32. See, e.g., Model Rule of Prof’l Conduct 1.3 concerning diligence.
AN EMPIRICAL STUDY OF CONSUMER BANKRUPTCY PAPERS

Honorable Steven W. Rhodes [FN1]

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I. INTRODUCTION

An empirical study was performed on the schedules, the statements of financial affairs and other initial papers in 200 randomly chosen consumer bankruptcy cases filed in the first half of 1998 in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division at Detroit. The objective of the study was to measure the care and understanding with which consumer debtors and their attorneys prepare these initial bankruptcy papers. [FN1] The methodology was to test the completeness and internal consistency of nineteen specific disclosures. Other errors were noted and catalogued as found.

Three conclusions are drawn from this study. First, the lack of care and understanding of the debtors and their attorneys in fulfilling the disclosure requirements is palpable and disturbing. Second, the Official Bankruptcy Forms do not adequately communicate the disclosure requirements. Third, in some ways, the disclosure requirements are unrealistic and unnecessary, and serve only to make knives of otherwise honest debtors and their attorneys. [FN2] *654 Any effort to motivate more complete, accurate and careful disclosures must address all of these issues.

The study also compared subgroups of the sample to determine whether the disclosure problems predominated in any of these subgroups. Individual debtors were compared to joint debtors. Married, separated and single debtors were compared. Debtors whose attorneys filed in higher volumes were compared to debtors with other attorneys. None of these comparisons revealed any significant distinctions in the results.

The study also examined for any correlations with the economic characteristics of the cases, including fees charged and paid, assets, liabilities, expenses and income, and again found no significant correlations.

Part II reviews the disclosure obligations established in the Bankruptcy Code and the Bankruptcy Rules, and the standards established in the case law. Part III discusses the methodology of the study. Part IV reviews the specific test questions and their results. Part V compiles the results of the study and reviews the subgroup and the correlation analyses. Part VI reviews the current remedies for incomplete or inaccurate schedules and concludes that because these remedies are cumbersome, time consuming and expensive, they have not been effective in addressing the issues raised here. Finally, Part VII suggests some remedies, both local and national, to address the problem.

The scope of this study is limited in significant respects. First, no investigation was made beyond the filed papers to determine the truth of any disclosures. The study was not designed to detect or measure fraud or intentional concealment. Second, although the motivation for this study was the author's nagging suspicion that consumer debtors' bankruptcy papers are a persistent and widespread problem, [FN3] this study was not designed to prove that *655 suspicion beyond the one court location and the limited time period from which the study cases were drawn. Third, because only a portion of the disclosures was tested, the study was not designed to expose all of the omissions and inconsistencies in the papers. The study cases may have additional problems not quantified in this study. Nevertheless, the study does establish substantial cause for concern, and for further study and consideration.

II. THE DISCLOSURE REQUIREMENTS IN CONSUMER BANKRUPTCY CASES

A. THE STATUTORY BASIS

Section 521(1) of the Bankruptcy Code requires the debtor to file "a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." [FN4] With respect to consumer debts secured by property of the estate, § 521(2)(A) requires the debtor to file "a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property." [FN5]

Rule 1007(b)(1) of the Federal Rules of Bankruptcy Procedure supplements the requirements of the Bankruptcy Code by requiring that the debtor also file "a schedule of executory contracts and unexpired leases." [FN6] This rule requires that all of these disclosures be "prepared as prescribed by the appropriate Official Forms." [FN7] Rule 1007 then provides that all such papers "shall be verified or contain an unserved declaration as provided in 28 U.S.C. § 1746." [FN8] Rule 9009 provides, "The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations "656 as may be appropriate." [FN9]

In addition, the Code and the Rules create a special obligation on the debtor in disclosing assets. Section 521(3) obligates the debtor to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties." [FN10] Under Rule 2015(a)(1), the trustee's duties include filing a complete inventory of the debtor's property, if that has not already been done. [FN11] Further, Rule 4002(4) specifically requires the debtor to "cooperate with the trustee in the preparation of an inventory." [FN12]

Very little official comment is available relating to the purposes of the required disclosures. The purposes of the disclosures are not discussed in the advisory committee notes to Bankruptcy Rules 1007 or 9009. The advisory committee note to Official Bankruptcy Form 1 (the voluntary petition) states the purposes of only a few of its disclosure requirements. [FN13] The advisory committee note to Official Bankruptcy Form 6 (the schedules) obliquely suggests that the requirements of the schedules relate to the trustee's functions, stating, "The schedules require a complete listing of assets and liabilities but leave many of the details to investigation by the trustee." [FN14] Finally, nothing in the notes to Official Bankruptcy Form 7 (the statement of financial affairs) suggests the purposes of any of its required disclosures.

B. THE REQUIREMENTS ACCORDING TO CASE LAW

In describing the nature and extent of the disclosure obligations of debtors in chapter 7, the judicial pronouncements in the cases are firm: [FN15]

"657 "A debtor's complete disclosure is essential to the proper administration of the bankruptcy estate." [FN16]
"The veracity of the [debtor's] statements is essential to the successful administration of the Bankruptcy Code." [FN17]
"The obligation of full disclosure is crucial to the integrity of the bankruptcy process." [FN18]
"The debtors have a duty to truthfully answer questions presented in the various schedules and filings carefully, completely and accurately." [FN19]

"The debtor is imposed with a paramount duty to carefully consider all questions included in the Schedules and Statement and see that each is answered accurately and completely." [FN20]
"658 "The burden is on the debtors to complete their schedules accurately." [FN21]
"The burden is on the debtors to use reasonable diligence in completing their schedules and lists." [FN22]
"Candor, accuracy and integrity are required of a debtor in bankruptcy." [FN23]
"Even if the debtor thinks the assets are worthless he must nonetheless make full disclosure." [FN24]
"Schedules are to be complete, thorough and accurate in order that creditors may judge for themselves the nature of the debtor's estate." [FN25]

"The bankruptcy laws impose a strict obligation on debtors to file complete and accurate schedules." [FN26]
"If there is any doubt or uncertainty whatsoever as to a possible interest in any property, the asset should be scheduled with an appropriate explanation." [FN27]

The obligations of the debtor's attorney in this context have also been addressed in the cases: [FN28]
The duty of reasonable inquiry imposed upon an attorney by Rule 11 and by virtue of the attorney's status as an officer of
the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor. [FN29]

The connection between the debtor's obligation to file complete and accurate schedules and the fair administration of the bankruptcy case is clear. [FN30] This administration includes "determining whether crimes have been committed, whether objections to exemptions should be filed, and whether property should be claimed for the estate or abandoned." [FN31] To a substantial extent the trustee's ability to perform the duties set forth in 11 U.S.C. § 704 depends on the accuracy and completeness of debtor's disclosures. [FN32] Under 11 U.S.C. § 554(c), only scheduled property (not otherwise administered) is deemed abandoned to the debtor when the case is closed. [FN33] In addition, the debtor's financial rehabilitation can be advanced by preparing and filing complete and accurate papers. [FN34]

In chapter 13 cases, the schedules play a uniquely significant role. For example, the schedules are considered in determining whether the debtor meets the eligibility requirements for the debt limits in chapter 13. [FN35] The schedules also assist in determining whether the debtor's plan was filed in good faith, [FN36] and whether to dismiss or convert the case for cause. [FN37] They are also considered in determining whether the plan proposes to pay creditors at least what they would receive in a hypothetical chapter 7 liquidation. [FN38] Finally, the schedules are used to evaluate whether the plan meets the confirmation requirement to propose the debtor's best effort. [FN39]

The disclosure obligations of consumer debtors are at the very core of the bankruptcy process [FN40] and meeting these obligations is part of the price debtors pay for receiving the bankruptcy discharge. [FN41] This study seeks to measure the responses of consumer debtors to their disclosure obligations and thus the extent to which debtors keep their end of the "bankruptcy bargain." [FN42]

III. THE METHODOLOGY OF THE STUDY

A. SELECTING RANDOM STUDY CASES

The first task was to select consumer bankruptcy cases at random from the cases filed during the first half of 1998 in the Eastern District of Michigan, Southern Division at Detroit. The criterion to identify consumer cases was the debtor's statement on the petition that the debts are primarily consumer in nature, although the study establishes that this statement is not always accurate. [FN43]

Initially, it was thought that a study sample of 100 cases would be sufficient, and the first group of that number, Group 1, was selected. After a preliminary analysis of Group 1, it was concluded that a second group of 100 cases, Group 2, should also be selected, to provide a larger sample and to attempt to assure some greater reliability of the final results.

The two groups of cases were chosen in different ways. The cases in Group 1 were chosen from cases filed on three dates. For each date, the cases that were chosen were consecutive filings. No particular method was used to select the dates or the set of consecutive cases on each date. Table 1 shows the number of cases chosen on each date for the Group 1 cases.

TABLE 1. THE GROUP 1 CASES

<table>
<thead>
<tr>
<th>Filing Date</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>April 14, 1998</td>
<td>15</td>
</tr>
<tr>
<td>April 16, 1998</td>
<td>68</td>
</tr>
</tbody>
</table>

April 17, 1998 17
Total 100

The cases in Group 2 were chosen using a formula based upon a computer random number generator to return a random series of actual case filing numbers during the six-month study period.

B. RECORDING THE DATA FROM THE STUDY CASES

For each of the 200 study cases, a copy of the petition, the schedules, the statement of financial affairs, the statement of intention and the attorney's fee statement under Rule 2016(b) was obtained. Thirty-nine items of data from each case were then reviewed and manually entered into a computer database program. [FN44] These data and their sources are listed below. A question mark indicates that information was recorded yes or no; otherwise, the actual data were recorded.

In addition, it was noted whether the debtor's residence appeared to be a home that the debtor owned, a mobile home or a rental. [FN45] Also, other incidental findings regarding problems with the papers were recorded.

Petition:

Case number
Joint filing?
Chapter
Stated consumer case but actually business?
Stated asset/no asset
Attorney
Date petition filed

Summary of Schedules:

Total assets
Total liabilities
Income
Expenses
Date schedules filed
Schedules A & B:
HWJC disclosed?
*663 Schedule B:
Cash on hand

Security deposit disclosed?
Life insurance disclosed?
Pension interest disclosed?

Schedule D:
Secured creditors?

Schedules D, E & F:
HWJC disclosed?

Schedule G:
Lease disclosed?

Schedule I:
Marital status
Union dues?
Pension income?
Pension plan contribution?

Schedule J:
Rent or mortgage payment
Life insurance expense?
Auto expense but no auto disclosed in Schedule B or G?
Includes all debt to be reaffirmed per Statement of Intent?

Schedules I & J:
Debtor in business?
Detailed statement attached?

Verification:
Date signed

Statement of Financial Affairs:
Question 3a answered other than "none"?
Answer to question 9 regarding fees paid

Statement of Intent:

All secured creditors disclosed?

Any debt to be reaffirmed?

2016(b) Statement:

Total fee

Fee paid

Other fee disclosure problems

C. EXAMINING THE SAMPLE CASES

The next task was to determine whether the sample of 200 cases is reasonably representative of the universe of consumer cases filed in the Eastern District of Michigan, Southern Division at Detroit during the study period, based on available data. The bankruptcy clerk provided demographic data pertaining to this universe of cases from the court's official BANCAP computer data base. The available demographic data consisted of (1) the proportion of consumer cases filed under chapter 7 and chapter 13, and (2) the proportion of cases filed as individual cases and as joint cases.

Table 2 demonstrates that the demographics of the sample cases in Groups 1 and 2, and the combined sample, are similar to the demographics of the universe of cases.

TABLE 2. THE DEMOGRAPHICS OF THE STUDY SAMPLE CASES COMPARED TO THE UNIVERSE OF CONSUMER CASES DURING THE STUDY PERIOD

<table>
<thead>
<tr>
<th>Study Sample</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Group 1</td>
<td>Group 2</td>
<td>Total</td>
<td>Universe of Cases</td>
</tr>
<tr>
<td>--------------</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Chapter 7</td>
<td>80%</td>
<td>72%</td>
<td>76%</td>
<td>74%</td>
</tr>
<tr>
<td>Chapter 13</td>
<td>20%</td>
<td>28%</td>
<td>24%</td>
<td>26%</td>
</tr>
<tr>
<td>Individual</td>
<td>78%</td>
<td>76%</td>
<td>77%</td>
<td>77%</td>
</tr>
<tr>
<td>Joint</td>
<td>22%</td>
<td>24%</td>
<td>23%</td>
<td>23%</td>
</tr>
</tbody>
</table>

*664 IV. TESTING THE DISCLOSURES

To accomplish the goal of objectively measuring the care with which the initial papers in consumer bankruptcy cases are prepared, a series of tests were performed on the data recorded from papers in each case. These tests examine for specific instances of (a) incomplete disclosures, (b) inconsistent disclosures, and (c) disclosures that, although not themselves demonstrably inaccurate or incomplete, raise a substantial question about the care with which the other disclosures were made.
A. INCOMPLETE DISCLOSURES

Eleven areas were examined for incomplete disclosures. Each of these questions tests whether the debtor made a disclosure that was required either (1) by the Official Forms in every case, or (2) in the debtor's case based on other information that the debtor did disclose.

1. Does the petition state the required estimate of whether funds will be available for distribution to unsecured creditors?

The petition requires the debtor to estimate whether the case is an "asset" case or a "no-asset" case by checking the appropriate box to indicate either that "funds will be available for distribution to unsecured creditors," or that "after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors." [FN46] In each study case, the debtor's response or failure to respond was recorded. [FN47] 4% of debtors failed to indicate on the petition whether the case was asset or no asset. (8 of 200 cases)

2. If the debtor is married, do schedules A & B disclose *665 whether the property is owned by the husband, wife or both?

The instructions at the top of schedules A and B state, "If the debtor is married, state whether husband, wife, or both own property by placing an 'H', 'W', 'J' or 'C' in the column labeled 'Husband, Wife, Joint, or Community.' Dg = EQP.00296 =" [FN48] This question tests whether married debtors made these required disclosures regarding property ownership. The debtor's marital status was recorded from schedule I. In 90 cases, the debtor was married.

54% of married debtors did not state whether the property listed in schedules A and B was owned by the husband, the wife, jointly, or as community property. (49 of 90 cases)

3. If the debtor pays rent for a residence or a mobile home lot, does schedule B disclose a security deposit?

Line 3 of schedule B requires the debtor to disclose, "Security deposits with public utilities, telephone companies, landlords, and others." [FN49] It was inferred that a debtor was in a residential rental arrangement if (1) the debtor did not disclose owning either real property on schedule A or a mobile home on schedules A or B, and (2) the debtor disclosed an amount on the first line of schedule J for "Rent or home mortgage payment (include lot rented for mobile home)." [FN50] By these criteria, one hundred seven debtors paid rent for a residence. [FN51] Similarly, it was inferred that a debtor was in a mobile home lot rental arrangement if (1) schedule A or B disclosed a mobile home, (2) schedule A did not disclose real property, and (3) the first line on schedule J disclosed rent. By these criteria, fifteen debtors paid rent for a mobile home lot. [FN52] This test assumes that a security deposit is a part of any arrangement under which the debtor pays rent for a residence or a mobile home lot. [FN53] 81% of debtors paying rent disclosed no security deposit. (99 of 122 cases) This is divided as follows:

*666 81% of debtors paying rent on a residence disclosed no security deposit. (87 of 107 cases) 80% of debtors paying rent on a mobile home lot disclosed no security deposit. (12 of 15 cases)

4. If schedule J discloses expenses for life insurance, is life insurance disclosed in schedule B?

Line 9 of schedule B requires the debtor to disclose, "Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each." [FN54] A debtor who discloses an expense for life insurance on schedule J should disclose an interest in that insurance on schedule B. [FN55] In 37 cases, the debtor disclosed an expense for life insurance.

73% of debtors who disclosed an expense for life insurance disclosed no life insurance. (27 of 37 cases)

5. If schedule I shows income from a pension, or if schedule J shows contributions to a pension, or if schedule I or J shows an expense for union dues, does schedule B show an interest in a pension?

Line 11 of schedule B requires the debtor to disclose and itemize, "Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans." [FN56] This question tests whether the debtor disclosed a pension interest when it appeared that the debtor would have such an interest. Certainly a debtor must disclose a pension interest if the debtor discloses pension income in schedule I or pension contribution expenses on schedule I or J. In addition, this question assumes that a debtor who is a union member has an interest in a pension plan that must also be disclosed. [FN57] The debtor's union membership was determined through the disclosure of union dues as a payroll deduction on schedule I or as an expense on schedule J. In 50 cases, the debtor disclosed pension income, pension expense or union dues.

54% of debtors who disclosed pension income, pension expense or union dues disclosed no pension interest. (27 of 50 cases)

6. If the petition is a joint petition, do schedules D, E and F disclose whether the debts are owed by the husband, wife,
jointly or as community debts?

The instructions at the top of schedules D, E and F in each state, "If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an 'H,' 'W,' 'J,' or 'C' in the column labeled 'Husband, Wife, Joint, or Community.'" [FN58] This question tests whether joint debtors made the required disclosures regarding liability on debts. In 49 cases, a joint petition was filed.

16% of debtors who filed joint petitions did not state whether the debts were owed by the husband, the wife, joint, or community. (8 of 49 cases)

7. If the debtor rents either a residence or a mobile home lot, is the lease disclosed in schedule G?

The instructions for schedule G require the debtor to disclose "all executory contracts of any nature and all unexpired leases of real or personal property." [FN59] This question tests whether the debtor disclosed an expense for rent for a residence or a mobile home lot in schedule J and did not disclose the lease in schedule G. [FN60] One hundred seven debtors rented a residence and paid rent. [FN61] Fifteen debtors owned a mobile home and paid lot rent. [FN62]

*668 83% of renting debtors did not disclose a lease. (104 of 122 cases) These are divided as follows:
88% of debtors paying rent for a residence did not disclose a lease. (94 of 107 cases)
67% of debtors paying mobile home lot rent did not disclose a lot lease. (10 of 15 cases)

8. If the debtor is in business, did the debtor attach a detailed statement of income and expenses to schedules I and J?

The line on schedule I that requires the debtor to disclose "Regular income from operation of business or profession or farm" and instructs the debtor to "attach detailed statement." [FN63] Schedule J imposes a similar requirement for business expenses. [FN64] Thus, a debtor with business income or expenses is required to attach detailed statements of income and expenses. This was determined by examining the specific disclosure on the business income line on schedule I and the business expense line on schedule J, as well as other similar disclosures, for example, on the "other monthly income" line on schedule I. [FN65] Twelve debtors had such business income or expenses. [FN66]

83% of debtors with business income or expenses failed to attach the required detailed statements of income and expenses. [FN67] (10 of 12 cases)

9. In a chapter 7 case, does schedule J address payments for all debts that the debtor intends to reaffirm?

Section 521(2)(A) requires the debtor to file a statement of intent regarding secured consumer debts. [FN68] When a debtor states an intention to reaffirm a secured debt, schedule J requires the debtor to disclose the resulting monthly payment. [FN69] A notation was made in each case in which monthly *669 payments on debts to be reaffirmed are not included in schedule J. In seventy-seven chapter 7 cases, the debtor's statement of intention stated an intent to reaffirm debt.

21% of chapter 7 debtors who stated an intent to reaffirm secured consumer debt did not include in schedule J the monthly payments for all of the debts to be reaffirmed. (16 of 77 cases)

10. Are the declarations concerning the debtor's schedules and statement of financial affairs dated?

Official Bankruptcy Form 6 includes a signed declaration concerning debtor's schedules, and to the left of the debtor's signature line, there is a blank for a date. [FN70] Similarly, Official Bankruptcy Form 7 includes a signed declaration concerning the statement of financial affairs, with a blank line for a date to the left of the debtor's signature line. [FN71] This question tests whether the debtor filled in a date on the declaration for either the schedules and the statement of financial affairs. [FN72]

10.5% of debtors failed to date the schedules and the statement of financial affairs. (21 of 200 cases)

11. In a chapter 7 case, does the statement of intention under § 521(2)(A) address all secured creditors?

A debtor must list all secured creditors in schedule D. Further, § 521(2)(A) requires a chapter 7 debtor to disclose whether the debtor intends to reaffirm each secured consumer debt or to redeem the collateral. Official Bankruptcy Form 8 requires the debtor to state an intention either to surrender the collateral or to avoid the lien under § 522(f). This question tests whether the debtor's statement of intent addresses all secured creditors holding consumer debt. Ninety-one chapter 7 debtors disclosed secured consumer debt in schedule D.

14% of chapter 7 debtors with secured consumer debt did *670 not address all of their secured debt in their statements of intention. [FN73] (13 of 91 cases)

B. INCONSISTENT DISCLOSURES
Six areas were examined for inconsistent disclosures:

12. Does schedule J show an expense for an automobile payment but schedules B and G disclose no automobile?

Generally, a debtor disclosing an expense for automobile payments in schedule J will have an interest in the automobile that must be disclosed. [FN74] If the debtor owns the automobile, the disclosure would be on schedule B. If the debtor leases the automobile, the disclosure would be on schedule G. This question tests whether the debtor inconsistently disclosed an expense for automobile payments but no interest in any automobile.

5% of debtors inconsistently disclosed expenses for automobile payments but no automobile. (10 of 200 cases)

13. In a chapter 7 case, are the expenses in schedule J within 10% of the income in schedule I?

In many cases, the debtor has established a pattern of increasing borrowing to carry on a lifestyle beyond the debtor's means, which has caused the debtor's bankruptcy. It is entirely reasonable to expect that as part of the bankruptcy process, the debtor will come to understand and appreciate the basic economic fact that one's income provides a natural limit on one's expenses. Without assets or credit, one's expenses simply cannot exceed one's income. This fact applies with special urgency to a debtor in bankruptcy because as the bankruptcy approaches, during the bankruptcy, and for a time after the bankruptcy, the debtor's assets and credit are likely to be limited. If the debtor's expenses still substantially exceed the debtor's income, the debtor has a problem, or soon will. Indeed it might be questioned whether such a debtor yet understands and appreciates the basic economic principles of budgeting income and expenses. This question tests the debtor's understanding and appreciation of this fact of life as of the moment of filing bankruptcy. [FN75]

*671 On the other hand, if a chapter 7 debtor's income substantially exceeds the debtor's expenses, so that there is net disposable income under 11 U.S.C. § 1325(b), there may be a question of whether the case is a "substantial abuse" under 11 U.S.C. § 707(b). [FN76]

Accordingly, this question tests whether a chapter 7 debtor's disclosures regarding income and expenses are consistent. Somewhat arbitrarily, a 10% leeway was structured into the test. This leeway was chosen because schedules I and J require the disclosure of any anticipated changes in income and expenses of more than 10% within one year.

43% of chapter 7 debtors disclosed expenses not within 10% of income. [FN77] (66 of 152 cases) These debtors are further described as follows:

6% of chapter 7 debtors showed no income. (9 cases)
35% of chapter 7 debtors showed expenses more than 10% above income. (53 cases)
3% of chapter 7 debtors showed expenses more than 10% below income. (4 cases)

14. Is the debtor's disclosure of the attorney fee paid in response to question 9 of the statement of financial affairs consistent with the attorney's disclosure of attorney fee paid in the Rule 2016(b) statement?

Question 9 of the statement of financial affairs requires the debtor to disclose all attorney fees paid within one year before filing for "consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy ...." [FN78] Rule 2016(b) requires the debtor's attorney to disclose the information required by 11 U.S.C. § 329(a), which includes the compensation paid within one year of the filing for "services rendered or to be rendered in contemplation of or in connection with the case ...." [FN79] This *672 question tests whether these disclosures are consistent. [FN80]

In 12.5% of cases, the debtor's disclosure about the fee paid was not consistent with the attorney's disclosure. (25 of 200 cases)

15. Are there other problems with the fee disclosures?

Other problems with the debtor's disclosure in response to question 9 of the statement of financial affairs and with the attorney's disclosure in the Rule 2016(b) statement were noted and catalogued as they were found.

10% of cases had other fee disclosure problems. (20 of 200) These are further described as follows:

Seven attorney statements indicated that the source of the fee was "wages," but the debtor disclosed no wages in schedule J.

Five attorney statements indicated that the balance due from the debtor was a negative amount. In four of these cases, the attorney stated that the debtor had paid $495; that the debtor had agreed to pay $0; and that the balance due was "$495." In the other case the stated balance due was "$650." [FN81]

Two attorney statements regarding the attorney fees were inconsistent with the statements of the attorney fees in the chapter 13 plans.
Six cases had other similar problems. [FN82]

*673 16. Is the estimation of whether assets will be available for distribution to creditors consistent with the disclosures in the schedules or in the chapter 13 plan?

In chapter 7 cases, the statement regarding the estimated availability of funds for distribution to unsecured creditors was compared with the schedules. [FN83] If the debtor exempted all unencumbered property on schedule C, and if the debtor disclosed no preferences or fraudulent conveyances, the debtor should have estimated that no funds would be available for distribution. In chapter 13 cases, the debtor's estimate was evaluated according to whether the debtor's plan proposed a distribution to unsecured creditors. [FN84]

25.5% of debtors incorrectly estimated whether funds would be available for distribution to creditors. (51 of 200 cases) By chapter, the results are:

11% of chapter 7 debtors estimated that funds would be available for distribution to creditors *674 when the schedules suggested otherwise. [FN85] (17 of 152 cases)

71% of chapter 13 debtors improperly estimated that no funds would be distributed to creditors. [FN86] (34 of 48 cases)

17. Is the statement that the debts are primarily consumer debts consistent with schedules D, E and F?

The petition requires the debtor to state, by checking the appropriate box, whether the "nature of debt" is "non-business/consumer" or "business." [FN87] As noted, pursuant to the selection criterion for this study, all 200 debtors stated that the nature of the debt was consumer debt. [FN88] This question compares that statement with the information regarding the debts disclosed in schedules D, E and F.

2% of debtors who indicated primarily consumer debt should have indicated primarily business debt. [FN89] (4 of 200 cases)

*675 C. DISCLOSURES THAT RAISE QUESTIONS

Three areas were examined, not because the responses are demonstrably inaccurate, but rather because they raise substantial questions about the care with which the papers were prepared:

18. Are the schedules dated more than fifteen days before the petition was filed?

Neither the Bankruptcy Rules nor the Official Forms establish any requirement or provide any instruction on when the debtor should date the schedules. The study tested whether the schedules and the statement of financial affairs were dated more than fifteen days before the case was filed. Although somewhat arbitrary, this criterion was selected because under Bankruptcy Rule 1007(c), the debtor has fifteen days after filing the petition to file the schedules and statement of financial affairs. [FN90]

Although the Official Bankruptcy Forms provide no instruction on this point, dating the disclosures on or near the filing date is important in administering the bankruptcy case because the financial information required in the forms naturally changes over time. Stale information is less likely to be accurate. Also, several of the required disclosures are explicitly time sensitive. [FN91] In any event, questions regarding the current accuracy of the disclosures arise when the papers are dated substantially before they are filed.

19% of debtors dated the papers more than fifteen days before the petition was filed. [FN92] (38 of 200 cases) Half of those debtors dated the papers more than thirty days before the petition was filed. (17 of 200 cases) The two longest time periods were 154 and 145 days.

*676 19. Were the schedules filed after the petition but dated before?

Another circumstance raising questions about the preparation of the schedules occurs when the schedules are dated before the petition is filed, but are then held for filing until after the petition is filed. [FN93] The explanation for this odd circumstance was not investigated further.

5.5% of debtors signed their papers before filing the petition but filed them after filing the petition. (11 of 200 cases)

20. Is there any substantive response to question 3a on the statement of financial affairs regarding payments aggregating more than $600 to any creditor within ninety days before the petition?

Question 3a on the statement of financial affairs requires disclosure of payments aggregating more than $600 to any creditor.
within 90 days before the filing. [FN94] In testing the responses to this question, the initial effort was to identify the subset of debtors who were most likely to have made a payment required to be disclosed. The criteria were (1) a monthly rent or mortgage payment on schedule J over $600, and (2) monthly income on schedule I over $2,000. Thus, a debtor in this subset who makes even one rent or mortgage payment within the ninety days before filing bankruptcy would be required to respond affirmatively to question 3a. [FN95] Twenty debtors had monthly incomes over $2000 and monthly rent or mortgage payments over $600. The lack of response to question 3a, especially by the higher income debtors in the study sample, raises questions about the care and understanding of debtors in completing these papers.

85% of the debtors with over $600 in monthly rent or mortgage payments and with over $2000 in monthly income disclosed nothing in response to question 3a on the statement of financial affairs. (17 of 20 cases)

21. Other errors

Other errors were incidentally found and recorded.

26.5% of the cases had other errors. These included:
Schedule A listed a mobile home.
Schedule B listed cash on hand in a "Brokerage Account." Schedule C did not exempt a mobile home.

Schedules D and F did not disclose a debt on a loan from a pension plan, the payments on which were disclosed in schedules I or J.
Schedule E included debts that are not priority debts. [FN97]
Schedule I did not disclose spouse employment information, or did not identify the spouse, or did not list payroll deductions for taxes, or stated that the marital status is "single" but disclosed spouse information.
Schedule J disclosed payments for property that the statement of intent indicated would be surrendered, or for property that was not disclosed as collateral in schedule D.
The statement of intent included creditors not listed in schedule D, or for creditors listed as unsecured creditors.

V. COMPILING THE RESULTS

A. FOR THE STUDY CASES AS A WHOLE

The results are disturbing by any measure. Six of the eleven specific inquiries into missing disclosures turned up problems in more than 50% of the cases in which the missing disclosures were required. [FN98] Ten of these eleven inquiries revealed problems in more than 10% of the cases in which disclosures were required. [FN99] Three of the five specific inquiries into inconsistent disclosures revealed problems in more than 10% of the cases. [FN100] Two of the three specific inquiries designed to expose disclosures that raise substantial questions revealed problems in more than 10% of the cases. [FN101]
Table 3 compiles these results.

<table>
<thead>
<tr>
<th>Question</th>
<th>Test Criteria</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Not state asset or no asset</td>
<td></td>
<td>4.0%</td>
</tr>
<tr>
<td>2 Married debtor not state H, W, J or C for property</td>
<td></td>
<td>54.0%</td>
</tr>
<tr>
<td>3 Renting debtor not disclose security deposit</td>
<td></td>
<td>81.0%</td>
</tr>
<tr>
<td>4 Debtor with life insurance expense not disclose life</td>
<td></td>
<td>73.0%</td>
</tr>
</tbody>
</table>

insurance

5 Debtor with likely pension interest not disclose 54.0%
   pension interest

6 Joint debtors not disclose H, W, J or C for debts 16.0%

7 Renting debtor not disclose lease 85.0%

8 Debtor in business not attach detailed statement 83.0%

9 Chapter 7 debtor not list expenses for all debts to be reaffirmed 21.0%

10 Not date papers 10.5%

11 Chapter 7 statement of intent not address all secured creditors 14.0%

12 Not disclose automobile 5.0%

13 Chapter 7 debtor with expenses not within 10% of income 43.0%

14 Attorney fee disclosures inconsistent 12.5%

15 Other fee disclosure problems 10.0%

16 Asset/no asset estimation incorrect 25.5%

17 Consumer debt statement incorrect 2.0%

18 Papers dated more than 15 days before filing 19.0%

19 Schedules dated before petition but filed after 5.5%

20 Not disclose prepetition debt payments 85.0%

21 Other errors 26.5%

A total of 687 errors and problems were found. These errors and problems were observed in 99% of the study cases. (198 of 200 cases) The median number is 3.0 per case. The mean (average) is 3.4 per case, with a standard deviation of 1.6.

Chart 1 shows the number of cases with each number of errors. This chart demonstrates that 26% of the cases had five or more errors and problems. (52 of 200 cases) Nearly 10% of the cases had six or more errors and problems. (19 of 200 cases)

*679 B. COMPARISONS BASED ON DEBTOR CHARACTERISTICS

Subgroups of debtors were analyzed by certain identifiable characteristics. This was done in an attempt to determine
whether remedial efforts should be more focused on any of the subgroups. However, none of the subgroups did significantly better or worse compared to the others.

When an adjustment is made to compare the results on the eighteen questions applicable in both chapter 7 and chapter 13, the average number of problems for the one hundred fifty-two chapter 7 cases is 2.93, and for the forty-eight chapter 13 cases, 3.04. [FN102] The average for the ninety-four single debtors was 3.17, for the fourteen separated debtors, 3.07, and for the ninety married debtors, 3.74. [FN103] For the one hundred fifty-four individual petitions, the average was 3.42, and for the forty-six joint petitions, 3.48. [FN104]

For both chapter 7 and chapter 13, the cases filed by the higher volume firms had slightly better averages. The thirty-six chapter 7 cases filed by the *680 nine firms that filed the most chapter 7 cases during the study period had an average of 3.31; the average of the other one hundred sixteen chapter 7 cases was 3.64. [FN105] The twenty-three chapter 13 cases filed by the nine firms that filed the most chapter 13 cases during the study period had an average of 2.74; the average of the other twenty-five chapter 13 cases was 3.32. Thus, this effect was somewhat greater in chapter 13, where the filings are more concentrated in the higher volume firms. [FN106]

These results suggest that the observed differences have no functional significance.

C. CORRELATIONS WITH THE FEE AND FINANCIAL DATA IN EACH CASE

1. The Chapter 7 Fee

The data permit an examination of the premise that the chapter 7 fee fixed in the marketplace is too low to permit debtors' attorneys sufficient time to prepare fully accurate and complete schedules and statements of financial affairs. [FN107] This premise was examined in Chart 2, a scatterplot in which each point represents a chapter 7 case with its associated fees and number of errors. [FN108] The nearly flat trendline on Chart 2 demonstrates that there is no significant relationship between the chapter 7 fee and the number of errors found in this study. [FN109]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*681 2. The Prepetition Fee Paid

Whereas Chart 2 addresses the total attorney fee, Chart 3 addresses the actual fees paid before the petition was filed, for both chapter 7 and chapter 13 cases. Again, this is to test whether a higher "up front" fee permits the attorney the time necessary to file more complete and accurate papers.

However, Chart 3 appears to demonstrate somewhat the opposite. It shows that the number of errors actually increases slightly with the amount of the fee paid before the petition is filed. At the lower end, where the prepetition payment is up to $200, the errors approximate 3. At the other end, where the prepetition payment is over $800, the errors approximate 4. The explanation for this was not examined further.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

*682 3. The Income, Expenses, Assets and Liabilities

An analysis was made of whether other available financial data in each case could be correlated with the number of problems and errors in each case. Charts 4 (Income), 6 (Assets) and 7 (Liabilities) showed no significant correlations. Chart 5 (Expenses) shows a slight direct correlation between expenses and errors, but the basis for this was not further examined. In any event, the correlation does not appear to have much functional significance.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

VI. THE INADEQUACY OF PRESENTLY AVAILABLE REMEDIES

The data reviewed in this article suggest that the bankruptcy papers filed by consumer debtors and their attorneys are not accurate and complete, and are not prepared with the necessary care and understanding. The fundamental question raised by this study is how to motivate consumer debtors to file more accurate and complete disclosures.

The bankruptcy process offers a wide array of remedies for a debtor's intentionally wrongful conduct in a bankruptcy case. [FN110] This Part demonstrated that these remedies were not designed to address the issues raised in this study. For several reasons, attempts to invoke them for this purpose have not been and cannot be effective. First, these remedies are largely based upon a degree of wrongful intent that is well beyond the carelessness and inadvertence that this study found. Second, the parties with standing to pursue these remedies often lack the economic motivation to do so in these cases, because the processes that must be undertaken to invoke these remedies are time consuming, cumbersome and expensive. In this Part, each remedy was reviewed and its inadequacy explained.

The next Part will discuss other possible solutions that may be more effective.

A. DISMISSAL OF THE CHAPTER 7 OR 13 BANKRUPTCY CASE

The Bankruptcy Code firmly establishes the bankruptcy court's authority to dismiss chapter 7 and chapter 13 cases for "cause." [FN111] The debtor's "bad faith" can constitute cause for dismissal in either chapter 7 or chapter 13. [FN112] *686 In weighing whether there is bad faith constituting cause for dismissal, the bankruptcy court may consider the intentional concealment of assets or the lack of candor and completeness in the debtor's bankruptcy papers. [FN113] The focus of the court's inquiry is upon the debtor's honesty of intention. [FN114] Thus, inadvertent omissions or omissions due to the attorney's failure to properly review the papers do not establish cause for dismissal for bad faith. [FN115]

The court can also dismiss a consumer bankruptcy chapter 7 case if granting relief would be a "substantial abuse" of the provisions of chapter 7. [FN116] In defining "substantial abuse," many cases hold that the primary or exclusive focus is upon the debtor's ability to pay creditors through a hypothetical chapter 13 plan; in this view, the accuracy and completeness of the debtor's papers are not explicitly considered. [FN117] Other courts apply the "totality of circumstances" test, [FN118] and some of the courts adopting this approach explicitly consider, as one factor, whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the debtor's true financial condition. [FN119] Despite the differences in the approaches to this issue, there is general agreement that in adopting § 707(b), Congress was concerned about chapter 7 filings by "non-needy debtors." [FN120] Nevertheless, it is reasonably clear that a chapter 7 case will not be dismissed for "substantial abuse" merely because of inadvertent omissions in the debtor's papers. [FN121]

*688 Moreover, § 707(b) implicitly prohibits the trustee from bringing a motion to dismiss for substantial abuse. [FN122] Prohibiting the one who may be in the best position to discover and assert problems with the debtor's papers further suggests that this remedy was not designed to address those problems.

In denying a motion to dismiss under § 707(b), one court summarized the difficulty of using this remedy to address the problems with many debtors' papers:

Mistakes and omissions are too frequent for this Court to assume that deceit is evident simply because mistakes are present. Insufficient information or poor advice is more likely one of the causes. A large percentage of income and expense statements are probably erroneous in some fashion or other, either because of simple negligence or oversight, or because of a lack of understanding of the forms or the significance of the questions asked, or because of miscommunication between debtors and their attorneys or, in joint cases, because of miscommunication between spouses. [FN123]

B. DENIAL OF DISCHARGE IN CHAPTER 7 CASES

A chapter 7 debtor's discharge may be denied for an omission from or *689 misstatement in a schedule or a statement of financial affairs, [FN124] if it was knowing and fraudulent, and related to a material matter. [FN125] In addition, the discharge may be denied for intentionally concealing property by failing to disclose it in the schedules. [FN126] However, denying the discharge is not warranted for misstatements or omissions resulting from confusion, misunderstanding, haste, inadvertence or attorney error. [FN127] Further, this remedy does not apply to a chapter 13 debtor. [FN128]
An adversary proceeding is required to deny a debtor's discharge. FN29 This process involves a complaint, an answer, discovery, motions, a trial, and, possibly, multiple appeals. FN30 The party objecting to the discharge bears the burden of proof by a preponderance of the evidence. FN31

An objection to the discharge can be filed by a creditor, the trustee or the United States Trustee. FN32 However, it is rare for a creditor to be motivated to object to the debtor's discharge, probably because in most cases the debtor's conduct does not meet the strict requirements for denying the discharge and the creditor's debt does not justify the expense. FN33 Similarly, although the trustee is under a duty to oppose the discharge "if advisable," FN34 the trustee rarely has sufficient assets to fund such litigation. FN35 Even if the trustor has assets, allocating them to opposing the debtor's discharge may well reduce the dividend to creditors. FN36 The United States Trustee rarely objects to the discharge, probably as a matter of resource allocation and prioritization within that program. FN37 As a result, this remedy is of little value in motivating more accurate schedules in consumer chapter 7 cases. FN38

C. DENIAL OR LIMITATION OF THE DEBTOR'S EXEMPTIONS IN CHAPTER 7

The inadequate disclosure of a debtor's assets in chapter 7 may result in denying or limiting the debtor's exemptions, but only if accompanied by bad faith, concealment, fraud, abuse of process or intention to deceive. FN39 In the absence of such circumstances, the court will permit the debtor to amend the schedules to exempt any omitted property. FN40 Moreover, the focus of the exemption issue is strictly upon asset disclosure, while the problems observed in the study involved many other disclosure obligations. Also, exemption issues are much less significant in chapter 13 cases. FN41 Accordingly, like the remedies previously reviewed, this remedy does not address the problems observed in the study.

D. DENIAL OR REDUCTION OF FEES FOR DEBTOR'S ATTORNEY

11 U.S.C. § 329(b) allows the bankruptcy court to order the return of any payment to the debtor's attorney, or cancel any fee agreement, if the compensation exceeds the reasonable value of the attorney's services. In a few reported cases, courts have reduced or denied fees for consumer debtor attorneys due to inaccurate or incomplete disclosures in the bankruptcy papers. FN42 However, nothing suggests that this remedy has been used on a regular basis to address problems in debtors' papers.

E. MONETARY SANCTIONS UNDER BANKRUPTCY RULE 9011

On December 1, 1997, major changes took effect in Bankruptcy Rule 9011. Previously, the rule provided that the bankruptcy court could sanction a party for signing and filing any paper that was not well grounded in fact "to the best of the party's knowledge, information and belief, formed after a reasonable inquiry." FN43 If the debtor's initial bankruptcy papers violated this rule, the debtor could be sanctioned. FN44 However, the debtor's attorney was excused from the requirement to sign the schedules or the statement of financial affairs, and was not ordinarily subject to sanctions under this rule. FN45 FN94 Nevertheless, on occasion, courts did impose sanctions against attorneys. FN46 In several cases, joint liability was imposed. FN47 However, in several cases involving inaccurate schedules, courts refused to impose sanctions under this rule. FN48

The amended rule effects four substantial changes. FN49 First, although the debtor's attorney is still excused from the signing requirement, the new rule provides that the act implicating the legal responsibility for a paper is presenting the paper to the court, whether by signing, filing, submitting or later advocating it. FN50 Second, the new certification that is triggered upon presentation of the paper is that to the best of that person's knowledge, information and belief, "the allegations and other factual contentions have evidentiary support." FN51 This may well be interpreted to require a greater standard of pre filing inquiry than the "well grounded in fact" standard of the old rule. Thus, taken together, these two changes appear to place on a debtor's attorney FN95 substantial new responsibilities for the debtor's schedules and statement of financial affairs. FN52

The third change is that generally, a motion for sanctions under the rule must be served twenty-one days before filing, to give a "safe harbor" opportunity to correct the alleged deficiency. FN53

The fourth change is that even if a violation of the rule is found, the imposition of sanctions is now discretionary, not
mandatory. [FN154]

Even though the debtor's attorney now bears responsibility for the schedules and statement of financial affairs, it is unlikely that Rule 9011, as amended, will have any substantial impact on the problems of incomplete and careless schedules. Even when the rule mandated sanctions for a violation, bankruptcy courts were reluctant to do so unless the circumstances were outrageous. [FN155] Further, as noted, the imposition of sanctions is now explicitly discretionary. [FN156]

F. ADMINISTRATIVE SANCTIONS AGAINST THE DEBTOR'S ATTORNEY

In extraordinary circumstances, the court may respond more severely. For example, in In re Ludwick, the bankruptcy court suspended debtor's attorney from practice for two years for forging the debtor's signature on the petition and lying about it to the court. [FN157] In O'Connell v. Mann (In re Davila), an attorney representing chapter 13 debtors was denied fees in one hundred fifty-five cases and suspended from practice for failing to support the fees, for inaccurate and incomplete disclosures, and for incompetent and inadequate representation. [FN158] In In re Brantley, the court found that the schedules prepared by the debtor's attorney were inaccurate and warned the attorney that if the conduct continued in future cases, the court would recommend a hearing on suspension from practice. [FN159] Nevertheless, disciplinary actions against bankruptcy attorneys are rare. [FN160]

G. LEGAL MALPRACTICE CLAIMS

A debtor who suffers injury from an attorney's improper or inadequate advice in preparing the bankruptcy papers may assert a claim for legal malpractice. [FN161] However, several legal and practical obstacles explain why this remedy does not address systemic problems with bankruptcy papers. First, a substantial majority of courts have concluded that because the debtor must have known of any problems with the papers before they were filed, the malpractice claim accrued prepetition and is therefore property of the bankruptcy estate under 11 U.S.C. § 541(a)(1). [FN162] In these circumstances, the trustee is the only proper party to pursue the claim, [FN163] but may not have the resources or motivation to do so.

Second, if, as the majority of courts hold, the debtor who claims malpractice either knew or should have known of any problems with the papers, it would seem that an attempt to fault the attorney for the subsequent consequences may not succeed. [FN164] This might be especially so when the consequences were imposed based on a judicial finding of the debtor's fraudulent intent, such as would be necessary for a criminal conviction for bankruptcy fraud [FN165] or denial of the discharge. [FN166]

Third, the estate's recovery on the debtor's legal malpractice claim may result in a windfall, because the estate may have actually benefitted from the malpractice. [FN167] The prospect of a windfall might impair the viability of the claim.

Addressing the malpractice remedy for consumer debtors, one bankruptcy judge recently lamented:

To operate "profitably" in this area, a consumer debtors' lawyer has to do a high volume business. So if a court suspects that a chapter 7 lawyer ineffectively represents a client in one case, that level of poor performance is likely to affect many other clients. The most frustrating aspect of this judicial position is opening case files on a daily basis and discovering clients who are not effectively represented by their lawyers. A bankruptcy court should not adopt an existential posture by wryly or sadly observing: if a chapter 7 debtor suffers from malpractice, then tort remedies are available to that victim. Many chapter 7 debtors, in fact, never discover that their attorneys have committed malpractice. [FN168]

*698 H. CRIMINAL REFERRAL AND PROSECUTION

Under 18 U.S.C. § 152, [FN169] knowingly and fraudulently omitting assets from bankruptcy papers is a crime. [FN170] When there is reasonable cause to believe that a bankruptcy crime has been committed, 18 U.S.C. § 3057(a) authorizes the bankruptcy judge or the trustee to refer the case to the United States Attorney for investigation and prosecution. [FN171] The United States Trustee has similar authority. [FN172] Again however, the threat of criminal prosecution is too remote to be effective in addressing the problems disclosed in this study. [FN173]

These kinds of negative reinforcements were not designed to address the problems of inaccurate and incomplete schedules in consumer cases, nor are they effective for that purpose. Indeed, the results of this paper demonstrate as much. Three reasons appear for this. First, these procedures are designed primarily to address intentional misconduct, rather than

carelessness or inadvertence in completing the bankruptcy forms. Second, imposing these consequences on a debtor may be seen as too severe in such circumstances. Third, because the case is most likely a no asset case, the trustee probably does not have the resources in the case to hire counsel to initiate and pursue these remedies in court. Therefore, motivating more careful disclosures will require more creative responses.

VII. SUGGESTING SOME REMEDIES

This part will review some national and local responses that might be considered in addressing the problems revealed in this study, including: (a) revising the official forms and expanding their instructions; (b) creating *700 local guidelines for completing the official forms; (c) creating inexpensive and expedited procedures in the bankruptcy court to resolve these issues concerning the completeness of the papers; and (d) creating continuing legal education opportunities for attorneys and paralegals for improving client interview skills and for understanding the legal requirements of the forms. [FN174]

The suggestions made in this part reflect the judgment that the problems of inadequate disclosure revealed in this study have two primary causes. First, the official forms are in legal language and are ambiguous. Second, debtors and their attorneys are insufficiently motivated to exercise the care necessary to complete the forms. These distinct causes will be discussed with potential remedies for them.

A. THE OFFICIAL FORMS

1. Issues Debtors Face in Completing the Forms

The results of some of the test questions in this study can be explained, at least in part, by the interpretive issues that debtors and their attorneys face in completing the Official Forms: [FN175]

*701 Under what circumstances should a debtor estimate that funds will be available for distribution to creditors? [FN176]

Should the debtor determine whether the "nature of the debt" is consumer or business based on the preponderance of the number of debts, the preponderance of the amount of the debts or some other test? [FN177]

Should a debtor disclose all types of insurance, including health, dental, long term care, disability, home, renter, auto and life, or only insurance in which the debtor has some equity, such as whole life or prepaid insurance? [FN178]

Should a debtor disclose a pension interest even if it would not be property of the estate under 11 U.S.C. § 541(c)? [FN179]

Should a debtor disclose a month to month lease or other verbal rental arrangement? [FN180]

What detailed income and expense information should a debtor in business disclose? [FN181]

Should the debtor sign the schedules and statement of financial affairs within a fixed time, such as 15 days, before they are filed? [FN182]

Should the debtor disclose payments to secured creditors and on executory contracts, or only to unsecured creditors? [FN183]

*702 In addition to the issues specifically reviewed in this study, many other questions may arise in completing the official forms:

   How should the debtor disclose those matters that change often, or even daily, such as cash on hand and deposits in financial institutions? [FN184]

   How much detail is required in disclosing household goods? [FN185]

   How much detail is required in disclosing wearing apparel? [FN186]

   How much detail is required in disclosing information relating to unsecured creditors regarding the date the claim was incurred and the consideration for the claim, especially when the debt is on a credit card? [FN187]

   How should a debtor estimate current monthly income, especially when the debtor's hours and overtime are uncertain? [FN188]

   Should the debtor's disclosure of property held for another person include property of the minor children in the household? [FN189]

These are only examples of the issues that debtors and their attorneys face in attempting to respond to the legal requirements of filing bankruptcy. There may well be similar questions of interpretation for every disclosure requirement. Even regarding a matter as simple as prior names used by the debtor, [FN190] a question can arise about disclosing a prior corporate name that the debtor used. Or, concerning the disclosure of the debtor's social security number, a debtor may face an issue of whether to
disclose an incorrect number attributed to the debtor by a creditor.

These and other difficulties with the official forms reviewed below can be addressed both nationally and locally.

*703 2. National Remedies for the Official Forms

Substantial consideration ought to be given to a complete overhaul of the Official Forms, for several purposes. First, plain English ought to be the primary goal. [FN191] Second, a multidisciplinary approach is necessary to assure that the language on the forms maximizes the chances that unsophisticated debtors will understand what is required. [FN192] Third, the diversity of the experiences and cultures of consumer debtors ought to be given special consideration, along with the potential impact of that diversity upon debtors' ability to meet the bankruptcy disclosure requirements. [FN193] Fourth, functional and organizational efficiencies within the forms should be incorporated. [FN194] Finally, the instructions accompanying the official forms should be expanded *704 and clarified as necessary. [FN195]

3. Local Responses to the Problems with the Official Forms

On the local level, representatives of all participants in the process, including bankruptcy judges, debtor attorneys, creditor attorneys, trustees and representatives of the United States Trustee's office, can come together to create a set of published guidelines for completing the Official Forms. [FN196] These guidelines would express local needs and expectations regarding the content and detail of the required disclosures on the bankruptcy papers, line by line as necessary. They would also supplement and clarify the presently inadequate instructions on the official forms.

As part of the process of creating local guidelines, the bar and the court might also consider creating a local client interview form that attorneys could *705 use with their clients on an optional basis. Such a local interview form would be designed to carry out the local guidelines and to facilitate accuracy in the completion of the Official Forms.

B. REMEDIES FOR THE LACK OF CARE BY DEBTORS AND THEIR ATTORNEYS

1. The Lack of Care in Completing the Bankruptcy Papers

The results of a majority of the test questions in this study cannot be attributed to ambiguities in the forms, but rather reflect insufficient care in completing the forms. This is certainly true regarding the results of several of the questions that tested for incomplete and inconsistent disclosures, such as:

Did the debtor estimate whether assets will be available for distribution to creditors? [FN197]
If married, did the debtor state who owns the property? [FN198]
If renting, did the debtor disclose a security deposit? [FN199]
If a joint petition, did the debtors state who owes the debts? [FN200]
If intending to reaffirm debt, did the debtor include the expense for the monthly payments? [FN201]
Did the debtor date the papers? [FN202]
Did the debtor address all secured creditors in the § 521 statement of intent? [FN203]
Did the fee disclosures of the debtor and the attorney agree? [FN204]

In addition, the study noted other errors that reflect inadequate care. [FN205]

2. National Responses to the Lack of Care

Consideration should be given to creating inexpensive and prompt judicial processes that would be available in these circumstances and that would *706 motivate consumer debtors and their attorneys to file complete and accurate bankruptcy papers. One suggestion is a new bankruptcy rule that would give the trustee or the United States Trustee the authority to file, without an attorney, a simple paper identifying the deficiencies in the debtor's papers. The filing of such a paper would then have the effect of placing a hold on the debtor's discharge. [FN206] This hold could then be released upon an order of the court obtained upon a motion filed by the debtor establishing that the papers have been remedied (or are not in need of remedy.) The court would then grant relief upon such terms as it deems just.

Thus, for example, if it appears to the trustee that the debtor has not disclosed, say, pension or insurance interests, the trustee
could file a check-box form pleading identifying those deficiencies. That filing would then signal the court not to issue the discharge. The debtor would then be required to file an amended schedule B, and file either a motion or a stipulation to obtain an order permitting the discharge to be issued. In that process, the court could condition the order upon just terms, such as a reduction in attorney fees under § 329(a), or costs in favor of the trustee against either the debtor or the attorney as appropriate. If the court determines that the trustee’s filing violated Bankruptcy Rule 9011, the court could impose sanctions under that rule.

Such a procedure would have several advantages. First, it would be inexpensive and prompt. Second, it would restore meaning to that part of the bankruptcy bargain that states that full disclosure by the debtor is a major condition of the discharge. [FN207] Third, the availability of such a simple process might strongly motivate the accurate and complete disclosures that the law requires in the first instance. Fourth, because the process could not be invoked by a creditor, it would protect the debtor against creditor harassment. [FN208]

Another suggestion is to create a specific process for the trustee, the United States Trustee or any party in interest to file a motion to compel the debtor to amend. This rule might further require the imposition of costs in favor of the moving party if the court determines that the debtor’s papers are deficient, and in favor of the debtor if the court determines otherwise. Such a process would have advantages similar to the first suggested process.

A final suggestion on the national level is for the United States Trustee program to focus on this issue, to make it a priority and to bring its resources to bear upon it. [FN209] Such a priority could give the trustee substantial support in dealing with this problem.

3. Local Responses to the Lack of Care

The focus of a local response to this problem should be specific educational opportunities for the debtor bar. The agenda for such education might include both a review of the legal requirements for disclosure in the initial papers, as supplemented by the local guidelines, and workshop opportunities to improve client interview skills. [FN210] These workshops might be modeled after the trial advocacy skills workshops offered to trial lawyers, which include demonstration and mock trial opportunities for the participants. [FN211] Thus, under supervision and with review by experienced attorneys or others, each participant would interview a mock debtor for the purpose of eliciting the disclosures necessary and required to complete the forms. The participants would then complete the bankruptcy forms for the "debtor," and this work product would be reviewed for accuracy and completeness.

This study demonstrates a disturbing disconnect between the declared law of consumer bankruptcy disclosure and the actual execution of that law in consumer cases. Most fundamentally, this disconnect can affect the administration of bankruptcy cases. Beyond that, it can trap unwary debtors in highly prejudicial ways. Finally, it tends to undermine the confidence of the parties and public in the bankruptcy process. Accordingly, further examination of this issue is warranted and important.

[FNa1]. United States Bankruptcy Judge, Eastern District of Michigan; Adjunct Professor, University of Michigan Law School.

I want to thank the many individuals who assisted and encouraged this project. When preliminary results were presented to the Detroit Consumer Bankruptcy Association, the Bankruptcy Section of the Eastern District Federal Bar Association and the Eastern District Trustee’s Association, several listeners gave me very helpful comments and suggestions. Both Dean Nancy Rapoport of the University of Nebraska College of Law and Professor Elizabeth Warren of the Harvard Law School spent some time with me discussing the project, giving me guidance and encouragement. Tim Reagan of the Federal Judicial Center reviewed some of the statistical aspects of the study with me. Bankruptcy Judges Arthur J. Spector of Bay City and Keith M. Lundin of Nashville assisted with edits on the nearly-final draft. Finally, Kelli Dexter, Caroline Edwards and Lisa Harris performed their wonderful law clerk magic. Thanks to all. Of course, the mistakes are all mine.

[FN1]. The study examined only the initial papers. Amended papers were not examined.

[FN2]. This characterization is borrowed from Memphis Bank & Trust Co. v. Whitman, 692 F.2d 427, 432 (6th Cir. 1982) (Courts should not allow a debtor to obtain money through dishonesty and keep the gain by filing a chapter 13 case within a few days. This "runs the risk of turning otherwise honest consumers and shopkeepers into knaves."). As stated by the
National Bankruptcy Review Commission, "While there will never be a substitute for good legal advice, no one benefits when a system for financially distressed consumers becomes a trap for the unwary." 1 NATIONAL BANKRUPTCY REVIEW COMMISSION, BANKRUPTCY: THE NEXT TWENTY YEARS, NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT, 235 (October 20, 1997) (hereinafter, "COMMISSION REPORT").

This article is based on the premise that it is "a mistake to suppose that every act of bankruptcy is a fraudulent act, and every bankrupt, perforce, a knave." Summers v. Abbot, 122 F. 36, 38 (8th Cir. 1903). It is also presumed that most debtors qualify as "honest but unfortunate." Grogan v. Garner, 498 U.S. 279, 287, 111 S. Ct. 654, 659, 112 L. Ed. 2d 755 (1991); Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934). On the other hand, it is recognized that "[d]ebtors are not perfectly trustworthy," Payne v. Wood, 775 F.2d 202, 206 (7th Cir. 1985), cert. denied, 475 U.S. 1085, 106 S. Ct. 1466, 89 L. Ed. 2d 722 (1986), and therefore the trustee is empowered to "investigate the financial affairs of the debtor." 11 U.S.C. § 704(4) and 1302(b)(1).


Other investigators have observed these kinds of problems. See, e.g., Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, The Use of Empirical Data in Formulating Bankruptcy Policy, 50-SPG LAW & CONTEMP. PROBS. 195, 229 (1987) ("We have found a large number of errors in the completed bankruptcy forms."); Susan D. Kovac, Judgment-Proof Debtors in Bankruptcy, 65 AM. BANKR. L.J. 675, 676 n.56 (1991) (reporting that the specific information provided by debtors on the statement of financial affairs regarding lawsuits was "often wrong," and that some debtors who suggested that judgments or garnishments had been issued against them gave no specifics).


[FN7]. Id.

[FN8]. Fed. R. Bankr. P. 1008. Section § 1746 of the United States Code (1994) provides for this form of declaration, "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." The verification in the official form for the schedules is, "I declare under penalty of perjury that I have read the foregoing summary and schedules, consisting of ___ sheets, and that they are true and correct to the best of my knowledge, information, and belief." Official Bankruptcy Form 6. The verification in the official form for statement of financial affairs omits the language, "to the best of my knowledge and information and belief," and is thus closer to the statutory format. It provides, "I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct." Official Bankruptcy Form 7. There is no official explanation for the difference.


[FN13]. For example, this advisory committee note states that the requirement to disclose a prior bankruptcy in the petition is "to alert the trustee to cases in which an objection to discharge pursuant to § 727(a)(8) or (9) or a motion to dismiss under § 109(g) may be appropriate." Official Bankruptcy Form 1 advisory committee note. The same note states that the purpose of the requirement to disclose information about pending related cases is so that the clerk can "assign the case to the judge to whom any related case has been assigned." Id. The statistical information on the petition is required "to assist the clerk in providing statistical information required by the Director of the Administrative Office of the United States Courts pursuant to
the Congressional reporting requirements of 28 U.S.C. § 604. "Id.

[FN14]. Official Bankruptcy Form 6 advisory committee note.

[FN15]. Most of the case law interpreting the disclosure requirements arises in context of objections to the debtor's discharge under 11 U.S.C. § 727(a), which provides that the debtor shall be granted a discharge, unless:

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be, transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or
(B) property of the estate, after the date of the filing of the petition;

...
(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account[,] See infra notes 124-27 and accompanying text.


[FN23]. Holder v. Bennett (In re Bennett), 126 B.R. 869, 875 (Bankr. N.D. Tex. 1991). See also Wiethochter, 147 B.R. at 199 ("[A]ll debtors have a duty to update the schedules they file with the Bankruptcy Court[].


[FN29]. Armwood, 175 B.R. at 789 (citations omitted). See also Aetna Fin. Co. v. Martinez (In re Martinez), 22 B.R. 419, 421 (D.N.M. 1982) ("We would also remind the debtors' attorney that it is his duty as an officer of this court to take all possible steps to assure himself that the information listed in his clients' petition is correct.").

[FN30]. See supra notes 16-17 and cases cited therein. See also North River Ins. Co. v. Baskowitz (In re Baskowitz), 194 B.R. 839, 843 (Bankr. E.D. Mo. 1996) ("The dual purposes of a Chapter 7 bankruptcy case are to grant the honest debtor a discharge of his or her prepetition debts, and to provide a mechanism for the fair and orderly distribution of the debtor's assets that are subject to administration by the Trustee. These purposes are [only] realized when a debtor complies with the requirement to submit accurate and complete information concerning identification of creditors and assets.").

[FN31]. In re Gaines, 106 B.R. 1008, 1013 (Bankr. W.D. Mo. 1989), rev'd on other grounds, 121 B.R. 1015 (W.D. Mo. 1990). See also Payne v. Wood, 775 F.2d 202, 206 (7th Cir. 1985) ("The requirement that the debtor list the property serves at least two functions. One is to settle claims of title, so that on the day of discharge everyone knows who owns what. The other is to allow the trustee to decide which claims to challenge."); Andermahr v. Barrus (In re Andermahr), 30 B.R. 532, 533 (B.A.P. 9th Cir. 1983); First Nat'l Bank of Mason City, Iowa v. Cook (In re Cook), 40 B.R. 903, 906 (Bankr. N.D. Iowa 1984) ("The purpose of the question [on the statement of financial affairs asking whether the debtor has made any transfers of property in the year preceding the filing of the bankruptcy petition] is to allow the trustee and the creditors of the debtor to determine if there should be other assets in the bankruptcy estate.").

[FN32]. Section 704 provides:

The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

... (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor[.]

[FN33]. Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995). See also Vreugdenhill v. Navistar Int'l Transp. Corp., 950 F.2d 524, 525-26 (8th Cir. 1991). Section 554(c) provides:

[A]ny property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

[FN34]. "[T]he debtors themselves are better served in their financial rehabilitation efforts if they can develop clear and complete pictures of their financial condition." COMMISSION REPORT, supra note 2, at 108.

[FN35]. Section 109(e) establishes the secured and unsecured debt limits for chapter 13 debtors. See Comprehensive Accounting Corp. v. Pearson (In re Pearson), 773 F.2d 751, 757 (6th Cir. 1985) ("Chapter 13 eligibility should normally be determined by the debtor's schedules checking only to see if the schedules were made in good faith."). See also Henrichsen v.

[FN36]. Section 1325(a)(3) establishes that one of the requirements for confirmation of the plan is that "the plan has been proposed in good faith." See In re Lindsey, 183 B.R. 624, 628 (Bankr. D.Idaho 1995) (noting that the accuracy of the debtor's schedules is one factor to consider in judging the debtor's good faith in proposing the plan). See also New Jersey Lawyers' Fund For Client Protection v. Goddard (In re Goddard), 212 B.R. 233 (D.N.J. 1997); In re Allard, 196 B.R. 402 (Bankr. N.D. Ill. 1996); In re Cockings, 172 B.R. 257 (Bankr. E.D. Ark. 1994); In re Hagel, 171 B.R. 686, 688 n.3 (Bankr. D. Mont. 1994), aff'd, 184 B.R. 793 (B.A.P. 9th Cir. 1995); In re Siratz, 150 B.R. 710 (Bankr. D.Minn. 1993); In re Lawson, 93 B.R. 979 (Bankr. N.D.Ill. 1988).


Section 1325(a)(4) provides for confirmation of the plan if:

[T]he value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.


Section 1325(b)(1)(B) provides for confirmation if "the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan." Section 1325(b)(2)(B) states, "For purposes of this subsection, 'disposable income' means income which is received by the debtor and which is not reasonably necessary to be expended ... for the maintenance or support of the debtor or a dependent of the debtor."

[FN40]. See supra notes 16-18 and accompanying text.

[FN41]. In chapter 7 cases, § 727(b) discharges the debtor from all prepetition debts except those set forth in § 523(a). In chapter 13 cases, § 1328(a) discharges the debtor from all prepetition debts except those set forth in that subsection. Section 524 imposes an injunction upon the collection of any discharged debt.

[FN42]. Fidelity Nat'l Title Ins. Co. v. Franklin (In re Franklin), 179 B.R. 913, 927 (Bankr. E.D. Cal. 1995) (holding that the debtor "elected not to perform his end of the 'bankruptcy bargain' by fully, candidly, and completely disclosing all his financial affairs and debts").

[FN43]. See infra notes 87-89 and accompanying text.

[FN44]. The database program is Microsoft Access 97. The author is willing to share the database for any legitimate research purposes, or to verify the results of this study.

[FN45]. The residence was recorded as "home" if the debtor disclosed a home on schedule A and the address of that home.

matched the debtor's residence address on the petition. The residence was recorded as "mobile home" if the debtor disclosed a mobile home in schedule A or B and nothing suggested any other residence. The residence was recorded "rental" in all other cases.

[FN46]. Official Bankruptcy Form 1.

[FN47]. The accuracy of this response is tested in question 16, infra, at 673.

[FN48]. Official Bankruptcy Form 6, schedules A and B.

[FN49]. Id., schedule B.

[FN50]. Similar criteria were utilized in Marianne B. Culhane & Michaela M. White, Taking the New Consumer Bankruptcy Model for a Test Drive: Means-Testing Real Chapter 7 Debtors, 7 AM. BANKR. INST. L. REV. 27, 50 (1998).

[FN51]. Official Bankruptcy Form 6, schedule J. One hundred twenty debtors in the study sample disclosed no real property or a mobile home. Of these, thirteen disclosed no rent and were probably living rent-free with relatives or associates. Thus, 107 debtors paid rent for a residence.

[FN52]. Sixteen debtors disclosed mobile homes and no real property. One of these disclosed no rent. Thus, fifteen debtors owned mobile homes and paid lot rent.

[FN53]. This assumption is untested in this study. It is recognized that in some cases, a debtor's landlord might not require a security deposit. Nevertheless, it is appropriate and illuminating to examine how often debtors who were paying rent for a residence or a mobile home lot did not disclose a security deposit.

[FN54]. Official Bankruptcy Form 6, schedule B, line 9. Although nothing in this instruction limits the disclosure requirement to life insurance, no debtors disclosed any other kind of insurance. See Payne v. Wood, 775 F.2d 202, 207 n.6 (7th Cir. 1985) ("The cash surrender value of the [property damage] policy was an asset of the estate. In order to keep the policy, the [debtors] should have charged the surrender value against their maximum exclusion.").

[FN55]. It is possible that a debtor might pay for life insurance without having any interest in it. For example, a debtor might pay the premiums for a life insurance policy for a parent, spouse or child, without having any interest in the policy or its proceeds. However, this scenario seems rare and the inquiry was deemed appropriate for study purposes. In such a case, the debtor should, depending on the circumstances, disclose the payments on the statement of financial affairs as either payments to a creditor (question 3), gifts (question 7), or transfers (question 10). No such responses were made in the study sample.

[FN56]. Official Bankruptcy Form 6, schedule B, line 11. Several courts have stated that a debtor must disclose a pension interest even if that interest would be either exempt under § 522(d) or excluded from the estate under § 541(c)(2) and Patterson v. Shumate, 504 U.S. 753, 112 S. Ct. 2242, 11 L. Ed. 2d 519 (1992). See, e.g., In re Turpen, 218 B.R. 908, 914 (Bankr. N.D. Iowa 1998); In re Comp., 134 B.R. 544, 553 (Bankr. M.D. Pa. 1991); In re Maide, 103 B.R. 696, 698 (Bankr. W.D. Pa. 1989).

But see Vaughn v. Aboukhter (In re Aboukhter), 165 B.R. 904, 910 (B.A.P. 9th Cir. 1994) ("Nonstate property need not be disclosed in the debtor's schedules."); Duval v. Portner (In re Portner), 109 B.R. 977, 986 (Bankr. D. Colo. 1989) (holding that the debtor's discharge cannot be denied for failing to disclose property that is not property of the estate.).

[FN57]. In the Detroit area, most union members belong to national unions associated with the auto industry or to other major national unions. In the author's experience, members of such unions do have pension interests. However, if a debtor is employed only part-time or if the debtor's union is a small unaffiliated local union, the debtor may not have a pension interest. In any event, although the assumption is untested, it is worthwhile to examine the issue for purposes of this study.

[FN58]. Official Bankruptcy Form 6, schedules D, E, and F.

[FN59]. Id., schedule G. This question assumes that schedule G requires the disclosure of both written and oral leases. However, it might be concluded that schedule G is ambiguous on this point. See infra note 180 and accompanying text.
Nevertheless, in light of the functional purposes of schedule G, the assumption is warranted in this study.

[FN60]. The criteria for determining whether the debtor rented a residence are set forth in the discussion on question 3, supra, at 665. See also supra note 45.

[FN61]. See supra note 51.

[FN62]. The criteria for determining whether the debtor rented a mobile home lot are set forth in the discussion on question 3, supra, at 665. See also supra note 52.

[FN63]. Official Bankruptcy Form 6, schedule I.

[FN64]. Id., schedule J.

[FN65]. Id., schedule I.

[FN66]. Only two of the twelve debtors with business income or expenses had debts that appeared to be primarily business debts. See infra question 17 at 674 and note 89. The other ten debtors with business income or expenses appeared to have primarily consumer debt. However, it can sometimes be difficult to determine from the schedules whether credit card debt or other bank debt is consumer debt or business debt. See, e.g., In re Goodson, 130 B.R. 897, 900 (Bankr. N.D. Okla. 1991); In re Berndt, 127 B.R. 222, 224 (Bankr. N.D. 1991); In re Hammer, 124 B.R. 287, 290 (Bankr. C.D. Ill. 1991), vacated on other grounds, sub nom., Meeker v. Pilgrim (In re Pilerim), 135 B.R. 314 (C.D. Ill. 1992); In re Bell, 65 B.R. 575 (E.D. Mich. 1986); In re Almendinger, 56 B.R. 97 (Bankr. N.D. Ohio 1985).

[FN67]. Of the two debtors who did attach statements of income and expenses, one attached a form that appeared to be a preprinted, commercially available form and the other attached schedule C from a Form 1040 federal tax return.


[FN69]. Schedule J has a line for the disclosure of "Installment payments." Official Bankruptcy Form 6. See In re Hovestadt, 193 B.R. 382, 385 (Bankr. D. Mass. 1996) ("This Court has observed that in the majority of cases in which reaffirmation agreements are filed pursuant to section 524(c) the debtors' Schedules I and J reveal that debtors do not have sufficient income to afford even the de minimis payments set forth in the reaffirmation agreements filed with the Court." (footnote omitted)); In re Bruzzese, 214 B.R. 444, 450 (Bankr. E.D.N.Y. 1997) ("[A] sampling of the debtors' schedules I and J in the 30 cases raised a prima facie concern whether the debtors could meet their repayment obligations under these agreements."). See also In re Melendez, 224 B.R. 252, 259 (Bankr. D. Mass. 1998); In re Kamps, 217 B.R. 836, 846 (Bankr. C.D. Cal. 1998); In re Latanowich, 207 B.R. 326, 335 (Bankr. D. Mass. 1997) ("[T]he Debtor's schedule of income and expenses showed no excess income with which to pay the debt he was reaffirming.").

[FN70]. See also supra note 8, and infra questions 18 and 19, at 675-76.

[FN71]. Id.

[FN72]. If either the schedules or the statement of financial affairs were dated, this was considered sufficient for purposes of this study, although perhaps not as a matter of fully completing the papers.

[FN73]. This includes one chapter 7 case in the study sample in which the required statement of intent was not filed.

[FN74]. There is an infrequent scenario in which a debtor makes payments on a vehicle that is formally titled or leased in another's name, such as a child. In that event, a response might not be required on either schedule B or G, depending on the circumstances. However, in such a case, the debtor should, again depending on the circumstances, disclose the payments on the statement of financial affairs. See supra note 55. No such responses were made in the study sample.

[FN75]. "One of the most difficult problems faced by every bankruptcy attorney is helping the debtors to prepare a realistic, post-bankruptcy budget, but this is probably the most important thing [the attorney] will do to help them. Their financial and

emotional rehabilitation starts with this." Hon. John C. Akard, The Human Side of Bankruptcy, 18-FEB AM. BANKR. INST. J. 28, 28 (1999). "The budgeting process is as important in a chapter 7 case as it is in a chapter 13. The chapter 7 should be a solution to the debtor's problems, not just temporary relief. Chapter 7 debtors must make some hard choices about what items they can really afford and must examine their lifestyle carefully. Their attorney must guide them toward a realistic budget so they can move forward in their lives without financial pressures." Id. at 29 n.3.

[FN76]. See infra notes 116-20. See also Jean Braucher, Counseling Consumer Debtors to Make Their Own Informed Choices - A Question of Professional Responsibility, 5 AM. BANKR. INST. L. REV. 165, 181 (1997) ("A debtor who chooses chapter 7 should not file schedules that show disposable income that would not be there if expenses had been listed accurately. Listing expenses realistically minimizes the risk of a substantial abuse challenge in a chapter 7 case.")

[FN77]. None of these debtors provided an explanation regarding anticipated changes in income or expenses.

[FN78]. Official Bankruptcy Form 7, question 9.


[FN80]. Literally taken, these requirements are slightly different, in that the debtor may have to disclose payments for debt consolidation services that the attorney might not have to disclose. Nevertheless, experience indicates that it is rare for the debtor's attorney to provide such debt consolidation services apart from the services provided in preparation for the bankruptcy. Most often, the consumer debtor goes to a bankruptcy attorney for legal services in filing a bankruptcy. In that event, the disclosures should be identical.

[FN81]. These five cases were filed by the same attorney.

[FN82]. The following problems were found, once each in different cases:

(1) The debtor's attorney did not file a Rule 2016(b) statement.
(2) The Rule 2016(b) statement disclosed a fee paid that was greater than fee agreed.
(3) The debtor's response to question 9 stated that the attorney fee was paid on a date after the petition was filed, but the attorney's Rule 2016(b) statement stated that the fee was paid before the petition was filed.
(4) The debtor's response to question 9 disclosed that the debtor paid Attorney A, but the Rule 2016(b) statement disclosed that the debtor paid Attorney B.
(5) The debtor's response to question 9 did not state amount of fee paid.
(6) The Rule 2016(b) statement indicated that the source of fee was "N/A".

In addition, the study revealed that in 46% of the chapter 7 cases, a balance on the attorney fees remained due when the bankruptcy was filed. (70 of 152 cases) Although the fee balance may constitute a prepetition debt, this debt was not listed in schedule F in any of the cases. "The practice of not scheduling debts for prepetition fees may mislead debtors as to the dischargeability of these debts." Marianne B. Culhane & Michaela M. White, Reaffirmation and Discharge Problems, 1114 PLI/Corp 703, 721-22 (April-May, 1999) (reporting empirical study results showing 38% of consumer debtors' attorneys extended fee credit and that none listed the debt in schedules D or F, although a few disclosed the representation agreement on schedule Q).

Granting fee credit raises the issue of whether the postpetition collection of these fees by the debtor's attorney violates the automatic stay of § 362(a) or the discharge injunction of § 524(a). On this issue one court of appeals recently stated:

This small-dollars but large-issue litigation poses a problem that pervades each of the many thousands of no-asset or low-asset personal bankruptcies in the federal court system: the legal posture of the attorneys' fees paid or payable by Chapter 7 debtors. Whether the debtor is required by his or her attorney to pay all of the fees up front—even before the filing in bankruptcy—or, as here, enters into a prefilling arrangement for payment of the fees (or a material portion of the fees) after filing, the legal status of the fees attributable to postpetition services does not fit comfortably within the provisions of the Bankruptcy Code.

Gordon v. Hines (In re Hines), 147 F.3d 1185, 1186 (9th Cir. 1998). This issue has not been addressed in the Eastern District of Michigan.

[FN83]. In the discussion of question 1, supra at 664, the language on the petition form establishing this requirement is quoted.
[FN84]. Although in chapter 7 cases the proper criteria is fairly obvious, in chapter 13 cases, attorneys appeared to use two different criteria. In estimating whether there will be a distribution to unsecured creditors, many chapter 13 attorneys applied a hypothetical chapter 7 liquidation analysis, while others relied on the chapter 13 plan. The Administrative Office of the United States Courts, which collects this data for statistical purposes, states that the proper test is whether the chapter 13 plan proposes a distribution to unsecured creditors. Telephone Interviews with Frank Szczepan, Director of the Bankruptcy Division, and Patricia Channon, Administrative Office United States Courts (August 13, 1999). Accordingly, that was the test utilized in this study.

[FN85]. Indeed, the schedules in all 152 chapter 7 cases suggested that all of them should have been estimated to be no asset cases.

[FN86]. In fact, the plans in all forty-eight chapter 13 cases provided for distribution of funds to unsecured creditors.

[FN87]. Official Bankruptcy Form 1. The term "consumer debt" is defined in 11 U.S.C. § 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." No further official instructions are provided for this disclosure. Some cases addressing the difficulties that can arise in distinguishing between consumer and business debt are cited supra note 66.

Inaccuracies in statement of whether the nature of the debt is business or consumer have been reported previously. Jennifer Conners Frasier, Caught in a Cycle of Neglect: The Accuracy of Bankruptcy Statistics, 101 COM. L.J. 307, 334 (Winter 1996) (reporting error rates of 7.5, 13 and 26% for business cases in chapter 7, 11, and 13, respectively); Hon. Lisa Hill Fenning & Craig A. Hart, Measuring Chapter 11: The Real World of 500 Cases, 4 AM. BANKR. INST. L. REV. 119, 123 (1996) ("T]he proportion of business chapter 11 cases is 7% higher than the number of business cases reported in the Administrative Office demographic data for our district. The understatement in the official statistics results primarily from a lack of adequate instructions to debtors on how to classify their cases."). The Administrative Office of the United States Courts is aware that on this point, "the information provided by some debtors is inaccurate." COMMISSION REPORT, supra note 2, Appendix C-1, Report of the Bankruptcy Statistics Task Force of the Administrative Office of the United States Courts, § 5, at 10. The task force explained, "Many small-capitalized debtors derive most of their income from their own businesses, and their business and personal assets and debts are often intertwined and not easily distinguishable, particularly if they do not maintain sound records." Id. As a result, the task force recommended changing the form to ask about the filing of federal tax schedule C or K, incorporation or business licenses, as well as verification of this information by the trustee. Id.

[FN88]. See supra note 43 and accompanying text.

[FN89]. Because the selection criterion for the study was the debtor's statement that the nature of the debt was consumer debt, these four cases were not excluded, even though the debtor's statement was incorrect. Including these cases allowed the study to measure how often the statement regarding the nature of the debt was inaccurate. Further observations regarding these four cases are made supra note 66.


[FN91]. The disclosures that are explicitly time sensitive include the responses to the questions in the statement of financial affairs about: income from employment or operation of business for the previous two calendar years and calendar year to date (question 1); other income during the previous two years (question 2); payments to creditors within ninety days, and within one year for payments to insiders (question 3); suits and administrative proceedings, executions, garnishments and attachments within one year (question 4); repossessions, foreclosures and returns within one year (question 5); assignments within 120 days and receiverships within one year (question 6); gifts within one year (question 7); losses within one year (question 8); payments related to debt counseling or bankruptcy within one year (question 9); other transfers within one year (question 10); closed financial accounts within one year (question 11); safe deposit boxes within one year (question 12); setoffis within ninety days (question 13); and, prior address of debtor within two years (question 15).

[FN92]. One explanation for this is that in these cases, the debtor's attorney completed the forms and held them for some reason, perhaps relating to the debtor's payment of the attorney fees and costs. Some evidence of this is reported in Jean Braucher, Lawyers and Consumer Bankruptcy: One Code, Many Cultures, 67 AM. BANKR. L.J. 501, 549 (1992) (finding that interviews with chapter 7 lawyers disclosed that fifteen of thirty-three lawyers did not grant credit on their fees; however,
some of these took fees in pre-filing installments of two to six months, but the petition would not be filed prior to full payment). This study did not test these hypotheses.

[FN93]. Perhaps the debtor's attorneys in these cases held the signed papers until the fee balance was paid. Id.

[FN94]. Official Bankruptcy Form 7, question 3a. The debtor's disclosure of such transfers facilitates prompt action by the trustee, the importance of which was explained by one court:
Recovery of property pursuant to § 548 is intended to insure fairness to the creditors in the distribution of the assets of the bankrupt's estate. As a fiduciary of the estate, the trustee has a duty to avoid such transfers if to do so would benefit the estate and it is usually advisable for the trustee to act quickly. By waiting, the trustee is merely risking the loss of his ability to trace the property and the transferees.
Lovell v. Mixon, 719 F.2d 1373, 1378 (8th Cir. 1983). See also supra note 31 and cases cited therein.

[FN95]. It appears that many attorneys perceive that question 3a on the statement of financial affairs is limited to payments to unsecured creditors. However, nothing in the language of the question justifies this conclusion. Thus, a debtor must also disclose payments to secured creditors and lessees.

[FN96]. Technically, this may not be a disclosure error, as a debtor could rationally choose not to exempt all exemptible property. In this case, however, it was an error, later corrected.

[FN97]. Priority debts are set forth in 11 U.S.C. § 507(a). The debts erroneously scheduled as priority debts included debts for student loans and for unemployment overpayments. Apparently, these debts were advised that any debt to a governmental unit is a priority debt. Also included here was a debt to "Best Buy," which was erroneously scheduled as a "consumer deposit" under § 507(a)(6).

[FN98]. See the results on questions 2 (54%), 3 (81%), 4 (73%), 5 (54%), 7 (85%) and 8 (83%), supra, at ___.

[FN99]. See, in addition to the results summarized in note 98, supra, the results on questions 6 (16%), 9 (21%), 10 (10.5%), and 11 (14%), supra. Only one inquiry in this category, question 1 (4%), supra, at 664, revealed problems in less than 10% of cases.

[FN100]. See the results on questions 13 (43%), 14 (12.5%) and 16 (25.5%), supra, at 670.

[FN101]. See the results on questions 18 (19%) and 20 (85%), supra, at 675-76.

[FN102]. Three test questions (9, 11 and 13) applied only to chapter 7 cases. For this comparison, the results of these questions were removed. Accordingly, these averages compare the results on the same eighteen test questions.

[FN103]. For this comparison, no adjustment was made for the results of the test question directed only to married debtors (question 2). These three subgroups total 198 debtors because 2 debtors did not state their marital status on schedule I.

[FN104]. For this comparison, no adjustment was made for the results of the test question directed only to joint debtors (question 6).

[FN105]. These chapter 7 averages are not adjusted as set forth supra note 102.

[FN106]. 48% of the chapter 13 cases were filed by the higher volume firms. Just 24% of the chapter 7 cases were filed by the higher volume firms.

[FN107]. No purpose is served in examining this issue in the chapter 13 cases in this study, because in the Eastern District of Michigan, Southern Division at Detroit, the fee in most such cases is $1200. In 81% of the chapter 13 cases in the study, the agreed fee was $1200 according to the attorney's Rule 2016(b) statement. (39 of 48 cases) In three chapter 13 cases, the fee was $0, probably because the attorney so agreed or because representation was provided by legal aid or a prepaid legal services program. In two chapter 13 cases, the fee was under $1200 ($950 and $1000), and in four cases it exceeded $1200 (one case at $1250 and three cases at $1500).
[FN108]. The fees reflected on Chart 1 are taken from the attorneys' Rule 2016(b) statements, not from the debtors' responses to question 9 on the statement of financial affairs. As noted in the discussion on question 14, supra at 671-72, the study found differences in the disclosures in these papers in 12.5% of the cases. The disclosure made in the Rule 2016(b) statement was chosen because it presumably better reflects what the attorney thinks the fee is, and this data point is more relevant to the attorney's economic incentives.

However, Chart 1 does reflect one set of adjustments to the fee data from the Rule 2016(b) statements, in an attempt to better approximate reality. As noted in the discussion on question 15 (relating to other fee disclosure errors), supra at 672, five statements filed by one attorney indicated that the agreed fee was $0, even though the debtor had paid either $495 or $650. For purposes of correlating the agreed fee and the number of errors, the paid fee data in these five cases was used rather than the agreed fee data. This adjustment assumes that the fee paid by the debtor was the actual agreed fee. See supra note 81 and accompanying text.

[FN109]. All of the scatterplots and their associated trendlines were created using the Microsoft Excel spreadsheet program. In six chapter 7 cases, the fee was $0, for the probable reasons indicated in note 107, supra. These cases were excluded from Chart 2 because the economic incentives under scrutiny here do not seem to apply when considerations other than those arising from market forces dictate the attorney fee.

Further, for presentation purposes only, Chart 2 also excludes two chapter 7 cases in which the fees were $1375 and $1600. These fees substantially exceeded the upper end of the primary range of fees (approximately $200 - $1000). There were four errors in each of these two cases, which is approximately what the trendline on Chart 2 would have predicted.

The median fee in the chapter 7 cases (excluding the six no fee cases) was $500 (range $199 - $1600). The average was $520 with a standard deviation of $209.


[FN111]. 11 U.S.C. § 707(a) and 1307(c) (1994).


In chapter 13: Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999); In re Williams, 144 F.3d 544, 550 (7th Cir. 1998); In re Lilley, 91 F.3d 491, 496 (3rd Cir. 1996); Molitor v. Edison (In re Molitor), 76 F.3d 218, 220 (8th Cir. 1996); Gier v. Farmers State Bank of Lucas, Kansas (In re Gier), 986 F.2d 1326, 1329 (10th Cir. 1993); Society Nat'l Bank v. Barrett (In re Barrett), 964 F.2d 588, 591 (6th Cir. 1992); Neufeld v. Freeman, 794 F.2d 149, 152 (4th Cir. 1986); Shell Oil Co. v. Waldron (In re Waldron), 785 F.2d 936 (11th Cir.) cert. dismissed, 478 U.S. 1028, 106 S. Ct. 3343, 92 L. Ed. 2d 763 (1986); Johnson v. Vanguard Holding Corp. (In re Johnson), 708 F.2d 865, 867-68 (2nd Cir. 1983); United States v. Estus (In re Estus), 695 F.2d 311, 316 (8th Cir. 1982).


In Chapter 13: Molitor v. Edison (In re Molitor), 767 F.3d 218, 220 (8th Cir. 1996) ("The bad faith determination focuses on the totality of the circumstances, specifically: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court.") See also Leavitt v. Soto, 171 F.3d 1219, 1224 (9th Cir. 1998); Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994); In re Love, 957 F.2d 1350, 1356.
(7th Cir. 1992); Hardin v. Caldwell (In re Caldwell), 851 F.2d 852, 859 (6th Cir. 1988); Estus, 695 F.2d at 317 (Among the factors to be considered are "the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court."); In re Graffy, 216 B.R. 888, 891 (Bankr. M.D. Fla. 1998); In re Fernandez, 212 B.R. 361, 368 (Bankr. C.D. Cal. 1997), aff'd, 227 B.R. 174 (B.A.P. 9th Cir. 1998); New Jersey Lawyers' Fund for Client Protection v. Goddard, 212 B.R. 233, 238 (D.N.J. 1997); In re Cockings, 172 B.R. 257, 261 (Bankr. E.D. Ark. 1994) (Bad faith due in part to "incomplete schedules, most noteworthy, inadequate breakdown of expenses"); In re Bandini, 165 B.R. 317, 319 (Bankr. S.D. Fla. 1994); In re Meinsen, 155 B.R. 519, 520 (Bankr. D. Neb. 1993); In re Standfield, 152 B.R. 528, 535 (Bankr. N.D. Ill. 1993), appeal dismissed, 1993 WL 192957 (N.D. Ill. 1993); In re Powers, 48 B.R. 120, 121 (Bankr. M.D. La. 1985).


Chapter 13: In re Stoutamire, 201 B.R. 592 (Bankr. S.D. Ga. 1996) (dismissing the case for failing to disclose an injury claim, but refusing to dismiss with prejudice because the attorney's interview form was inadequate to elicit the correct information); In re Fulton, 148 B.R. 838, 842-43 (Bankr. S.D. Tex. 1992) (holding that the debtor's failure to disclose his non-filing wife's interest in community property was not bad faith because debtor intended to disclose community nature of the interest).


[FN118]. See, e.g., Stuart v. Koch (In re Koch), 109 F.3d 1285, 1288 (8th Cir. 1997); Huckfeldt v. Huckfeldt (In re Huckfeldt), 39 F.3d 829, 831 (8th Cir. 1994); Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992); Zolg v. Kelly (In re Kelly), 841 F.2d 908, 914 (9th Cir. 1988).

In any event, § 707(b) provides "There shall be a presumption in favor of granting the relief requested by the debtor."

[FN119]. In re Krohn, 886 F.2d 123, 126 (6th Cir. 1989) ("It is not possible, of course, to list all the factors that may be relevant to ascertaining a debtor's honesty. Counted among them, however, would surely be the debtor's good faith and candor in filing schedules and other documents [ [.] ]. See also Stewart v. United States Trustee (In re Stewart), 215 B.R. 456, 464 (B.A.P. 10th Cir. 1997), aff'd, 171 F.3d 796 (10th Cir. 1999); In re Rodriguez, 228 B.R. 601, 603 (Bankr. W.D. Va. 1999); In re Wiser, 222 B.R. 634, 637 (Bankr. D. Colo. 1998); In re Hasley, 217 B.R. 82, 87 (Bankr. N.D. Tex. 1998); In re Adams, 206 B.R. 456, 460 (Bankr. M.D. Tenn. 1997), vacated on other grounds, 209 B.R. 874 (Bankr. M.D. Tenn. 1997); United States Trustee v. Duncan (In re Duncan), 201 B.R. 889, 894 (Bankr. W.D. Pa. 1996).

Several courts of appeals have adopted the "totality of circumstances" test without explicitly suggesting that the accuracy of the schedules should be considered. Stewart, 175 F.3d 796; Kornfield v. Schwartz (In re Kornfield), 164 F.3d 778, 781 (2nd Cir. 1999); First USA v. Lamanna (In re Lamanna), 153 F.3d 1, 5 (1st Cir. 1998); Kestell v. Kestell (In re Kestell), 99 F.3d 146, 149 (4th Cir. 1996); Green v. Staples (In re Green), 934 F.2d 568, 572 (4th Cir. 1991).

[FN120]. Stewart v. United States Trustee, 175 F.3d 796, 806 (10th Cir. 1999); In re Lamanna, 153 F.3d at 3-4; Stuart v. Koch (In re Koch), 109 F.3d 1285, 1290 (8th Cir. 1997); United States Trustee v. Harris, 960 F.2d 74, 76 (8th Cir. 1992); Green v. Staples (In re Green), 934 F.2d 568, 570 (4th Cir. 1991); In re Krohn, 886 F.2d 123, 125-26 (6th Cir. 1989); In re Walton, 866 F.2d 981, 983 (8th Cir. 1989).
In a comprehensive study of published decisions under § 707(b), one commentator found, "Despite rhetoric to the contrary, the preponderance of cases shows that the courts routinely apply only an excess income test." Felsenfeld, supra note 117, at 1369. This commentator concluded, "Courts frequently give lip service to the totality of the circumstances test(s) but fail to apply it in any meaningful sense." Id. at 1394.

See also Coulson, supra note 117, at 279 (explaining that ability to pay is the primary factor in totality of circumstances test); Cuevas, supra note 117, at 407 ("the real focus of [the totality of the circumstances] test is whether the debtor has the ability to pay").

[FN121]. In re Hudson, 56 B.R. 415, 420 (Bankr. N.D. Ohio 1985), order modified, 64 B.R. 73 (Bankr. N.D. Ohio 1986) (explaining that under § 707(b), the court may examine whether debtor has exhibited good faith and has made full and accurate disclosure, but primary focus should be ability to pay); In re Penna, 86 B.R. 171, 173 (Bankr. E.D. Mo. 1988) (denying a motion to dismiss because there no evidence that the debtor's original understatement of income and expenses was intentional). See also In re Laury-Nervell, 157 B.R. 14, 16 (Bankr. N.D. Ohio 1992) (denying motion to dismiss because the inaccuracies in the debtor's schedules were properly attributable to the debtor's counsel rather than the debtor).

[FN122]. Section § 707(b) provides that "the court, on its own motion or on motion by the United States Trustee, but not at the request or suggestion of any party in interest, may dismiss ..." See In re Christian, 804 F.2d 46, 48 (3rd Cir. 1986) (holding that a creditor lacks standing to file a motion to dismiss under § 707(b)); In re Wisher, 222 B.R. 634, 636 (Bankr. D. Colo. 1998); Perniciaro v. Natale (In re Natale), 136 B.R. 344, 352 (Bankr. E.D.N.Y. 1992). This limitation was designed to insure "that such motions are not routinely made in every Chapter 7 case," Kornfield v. Schwartz (In re Kornfield), 164 F.3d 778, 784 (2nd Cir. 1999), and to protect the debtor from harassment by the creditors. Zolg v. Kelly (In re Kelly), 841 F.2d 908, 917 (9th Cir. 1988); United States Trustee v. Joseph (In re Joseph), 208 B.R. 55, 60 (B.A.P. 9th Cir. 1997); In re Fitzgerald, 155 B.R. 711, 715 (Bankr. W.D. Texas 1993).

Nevertheless, the United States Trustee can rely on information from the trustee and creditors, and on the United States Trustee brings a motion to dismiss, these parties may participate. 11 U.S.C. § 707(b) (1994); United States Trustee v. Clark (In re Clark), 927 F.2d 795, 797 (4th Cir. 1991). Contra, In re Restea, 76 B.R. 728, 732-34 (Bankr. D.D.C. 1987) (denying the United States Trustee's motion to dismiss because creditors suggested to the United States Trustee's office that it should investigate the case for abuse).

If panel trustees are given standing under § 707(b), one court speculated, probably accurately: unfortunately, most panel trustees would never bring such motions anyway, as there is no economic incentive to do so, especially in no-asset cases where the trustee will only be paid $45 for handling the case. The cost of bringing the action is, in the usual case, not compensable unless the estate has assets. In re Fitzgerald, 155 B.R. 711, 713 n.1 (Bankr. W.D. Tex. 1993).


Boroff v. Tully (In re Tully), 818 F.2d 106, 111 (1st Cir. 1987) ("Nor can an attorney's willingness to bear the burden of reproach provide blanket immunity to a debtor; it is well settled that reliance upon advice of counsel is, in this context, no defense where it should have been evident to the debtor that the assets ought to be listed in the schedules."). See also Gregory E. Maggs, Consumer Bankruptcy Fraud and the "Reliance on Advice of Counsel" Argument, 69 AM. BANKR. L.J. 1 (1995).


[FN133]. In re Sebok, 182 B.R. 912 (Bankr. M.D. Fla. 1995). Some courts allow attorney fees as an administrative expense under § 503(b) to a creditor that prosecutes an objection to discharge. In re Zedda, 169 B.R. 605 (Bankr. E.D. La. 1994); Jacobson v. Reeve Speece Properties, Inc. (In re Speece), 159 B.R. 314 (Bankr. E.D. Cal. 1993); In re Rumpza, 54 B.R. 107 (Bankr. D.S.D. 1985); Johnson Mem'l Hosp. v. Hess, 44 B.R. 598, 600 (W.D. Va. 1984); In re George, 23 B.R. 686, 687 (Bankr. S.D. Fla. 1982) (trustee was awarded fees of $330, the trustee's attorney, $2,000, and the creditor's attorney, $1,873 plus $486 in costs; the funds in the estate were $4970).

There is a split in the cases where prior prior court approval is required for an award of fees. Some cases hold that such approval is not required. E.g., Zedda, 169 B.R. 605. However, other courts deny fees in the absence of such approval. In re Lagasse, 228 B.R. 223 (Bankr. E.D. Ark. 1998); In re Monahan, 73 B.R. 543 (Bankr. S.D. Fla. 1987); In re Romano, 52 B.R. 590 (Bankr. M.D. Fla. 1985); In re Spencer, 33 B.R. 280 (Bankr. N.D. Ga. 1983); Lazar v. Casale (In re Casale), 27 B.R. 69 (Bankr. E.D.N.Y. 1983); In re Johnson, 72 B.R. 115, 118 (Bankr. E.D.N.C. 1987) ("The reason for a rule prohibiting compensation for unauthorized services is to enable the court to maintain control of costs and to insure that estate assets are not wasted. Duplication of services between a creditor and the trustee or a creditors' committee is to be avoided. By asking for prior approval to bring a complaint, a creditor provides the trustee with an opportunity to indicate whether he is willing and able to pursue the action in question." (citations omitted)). One court requiring prior approval granted that approval nunc pro tunc and allowed fees to the creditor's attorney for objecting to the debtor's discharge. In re Antar, 122 B.R. 788 (Bankr. S.D. Fla. 1990).

[FN135]. As observed in note 85, supra, all of the chapter 7 cases in this study were no asset cases. "It may be true that the cost of opposing a discharge may be too great to make opposing a discharge 'advisable,' particularly where all creditors are given notice of the trustee's dilemma but not a single one shows interest in helping the trustee deal with the problem of costs," Moister v. Vickers (In re Vickers), 176 B.R. 287, 289 (Bankr. N.D. Ga. 1994).

See also Jacobson v. Robert Speece Properties, Inc. (In re Speece), 159 B.R. 314, 322 n.12 (Bankr. E.D. Cal. 1993) ("The realities are that trustees commonly take a back seat when a creditor objects to discharge in order to conserve resources[]."); Mary Jo Heston, The United States Trustee: The Missing Link of Bankruptcy Crime Prosecutions, 6 AM. BANKR. INST. L. REV. 359, 361 (1998) ("Bankruptcy trustees are often unable to thoroughly investigate estates where there are no readily accessible assets available to fund the costs of administration.") (footnote omitted)); Ralph C. McCullough II, Bankruptcy Fraud: Crime Without Punishment II, 102 COM. L.J. 1, 12 (1997) ("In these 'no asset' cases, the trustee, who represents the unsecured creditors, does not see the ability to recover money for them, and he sends the bankruptcy case through with little questioning; not necessarily because the trustee doesn't wish to bother with the case, with the tremendous demands on his time, rather it is simply impossible for him to do so.") Hon. Jim D. Pappas, We've Got to Stop Meeting Like This, 14-SEP AM. BANKR. INST. J. 35, 35 (September, 1995) ("As a practical matter, these 'meetings' are a joke. Depending upon the local practice, 10 or more meetings are scheduled per hour, guaranteeing that no meaningful examination of the debtor occurs.") (footnote omitted).

"If the trustee has information that would support an objection to discharge but deems such an action inadvisable, the trustee should promptly bring such facts to the attention of the United States Trustee." United States Department of Justice, Executive Office for United States Trustees, HANDBOOK FOR CHAPTER 7 TRUSTEES, pp. 6-9 (effective October 1, 1998).

[FN136]. See, e.g., In re Arnold, 162 B.R. 775 (Bankr. E.D. Mich. 1993) (awarding trustee's counsel fees of $4053.75 from the estate for prosecuting an unsuccessful objection to discharge); In re Kearns, 162 B.R. 10 (Bankr. D. Kan. 1993) (awarding trustee's attorney fees of $6361.75 to pursue objection to discharge; estate had funds of $1347.65).

The trustee's economic disincentive to pursue an objection to discharge is further exacerbated by the public policy against settling an objection to discharge claim upon the debtor's payment of money. See Vickers, 176 B.R. at 290 ("Discharges are not property of the estate and are not for sale. It is against public policy to sell discharges. Selling discharges would be a disease that would attack the heart of the bankruptcy process, its integrity." (citation omitted)); In re Moore, 50 B.R. 661, 664 (Bankr. E.D. Tenn. 1985) ("Under no circumstances, not even where the intent is innocent, may a debtor purchase a release from objections to discharge. A discharge in bankruptcy depends on the debtor's conduct; it is not an object of bargain."). See also In re Wilson, 196 B.R. 777, 778-79 (Bankr. N.D. Ohio 1996); Jacobson, 159 B.R. 314.

But see In re Bates, 211 B.R. 338, 348 (Bankr. D. Minn. 1997) ("[T]he proposed settlement represents an attempt by the Trustee to act in the best interests of the estate by limiting the estate's exposure to the risks and expenses of trial in the face of an uncertain outcome."). See also In re Mavrodie, 205 B.R. 716 (Bankr. D.N.J. 1997).

Whatever the merits of these considerations, it must also be recognized that a trustee's incentive to file an objection to discharge might well be impaired if the trustee will not be permitted to settle it and must either take it to trial or seek to dismiss it.

[FN137]. Nothing in the United States Department of Justice, UNITED STATES TRUSTEE MANUAL, volume 1 (August 1988) or volume 2 (October 1996), addresses the circumstances under which the United States Trustee will object to a debtor's discharge.

[FN138]. In 1998 in the Eastern District of Michigan, in 20,905 consumer chapter 7 cases, 108 objections to discharge were filed (0.5%). These objections to discharge were not further analyzed to determine the number that alleged false oath under § 727(a)(4) or concealment of property under § 727(a)(2).

Exemptions may be limited in value due to inadequate disclosure. In re Doyle, 209 B.R. 897, 902 (Bankr. N.D. Ill. 1997) ("The Schedules filed in this case are illustrative of the problems resulting from last minute and incomplete draftsmanship - inadequately detailed information which effectively precludes the Trustee, the creditors, and the Court from learning what the Debtor's assets really are, especially what is being properly claimed exempt."). Ambiguities in the claim of exemption may be construed against the Debtor. Addison v. Reavis, 158 B.R. 53, 59 (E.D. Va. 1993), aff'd sub nom., In re Grabowsky, 32 F.3d 562 (4th Cir. 1994); Anislie v. Grabowsky (In re Grabowsky), 149 B.R. 402, 406 (Bankr. E.D. Va. 1993); In re Mohring, 142 B.R. 389 (Bankr. E.D. Cal. 1992).

See also 11 U.S.C. § 522(g)(1) (1994), which permits the Debtor to exempt property recovered by the trustee, but only if the transfer of the property was neither voluntary nor concealed by the Debtor. Glass v. Hitt (In re Glass), 60 F.3d 565, 568 (9th Cir. 1995); Sherk v. Texas Bankers Life & Loan Ins. Co. (In re Sherk), 918 F.2d 1170, 1176 (5th Cir. 1990); Simonson v. First Bank of Greater Pittston (In re Simonson), 758 F.2d 103, 106 (3rd Cir. 1985); Redmond v. Tuttle, 698 F.2d 411 (10th Cir. 1983); Trujillo v. Grimmert (In re Trujillo), 215 B.R. 200, 204-05 (B.A.P. 9th Cir. 1997), aff'd, 166 F.3d 1218 (9th Cir. 1999).

The party objecting to the exemption has the burden of proof. Fed. R. Bankr. P. 4003(c).


[FN141]. exemptions, which are set forth in § 522(d) and state law, apply in both chapter 7 and chapter 13. 11 U.S.C. § 103(a) (1994); In re Schnabel, 153 B.R. 809, 817 (Bankr. N.D. Ill. 1993). However, in chapter 13 cases, their significance is "greatly diminished." 11 U.S.C. § 103(a) (1994). In chapter 13, the Debtor is permitted to keep all assets, exempt or not. In re Cornelius, 195 B.R. 831, 835 (Bankr. N.D.N.Y. 1995); In re Mitchell, 80 B.R. 372, 380 (Bankr. W.D. Tex. 1987) ("On confirmation of the plan, all the property of the Debtor, whether claimed exempt or not, will belong to the Debtor, and upon completion of the plan, the Debtor and all of his or her unencumbered property will be discharged from creditors' claims. See 11 U.S.C. § 1327(b), 1328(a). The reason d'etre for objecting to a Debtor's exemption claims thus evaporates in a chapter 13 case"). Exemptions under chapter 13 are only informational. In re Morris, 48 B.R. 313, 314 (W.D. Va. 1985). Exemptions are listed in chapter 13 only to permit the court to determine in confirming the plan that the creditors receive more under the plan than they would in a chapter 7 liquidation, pursuant to § 1325(a)(4) (1994). Armstrong v. Lindberg (In re Lindberg), 735 F.2d 1087, 1089 (8th Cir. 1984), cert. denied, 469 U.S. 1073, 105 S. Ct. 566, 83 L. Ed. 2d 507 (1984). See also In re Edwards, 105 B.R. 10, 11 (Bankr. W.D. Va. 1989).


impose sanctions against debtors for claiming property as exempt in bankruptcy schedules without any legal basis, because "mistake in bankruptcy schedules was due to admitted error of counsel").


In Eatman, 182 B.R. at 396, the court concluded that although sanctions against the attorney were not appropriate under Rule 9011, the attorney should be sanctioned under 11 U.S.C. § 105 and 28 U.S.C. § 1927. See also White v. Mitchell (in re Hardie), 165 F.3d 18 (4th Cir. 1998) (unpublished table decision available at 1998 WL 766699).


[FN148]. In re Bove, 29 B.R. 904 (Bankr. D.R.I. 1983), the petition and schedules contained significant omissions and misstatements, but the court declined to hold the debtors in contempt or to impose monetary sanctions against the debtors, because the capacity and general awareness of one debtor was diminished and she bore none of the responsibility, and the misrepresentations made by the other debtor were induced partly by the principal of a consumer credit organization, probably on behalf of an attorney, and no action was sought against the principal of the credit counseling firm or the attorney.


[FN152]. "The new Rule 9011, which requires attorneys to make reasonable inquiry into the accuracy of the information being provided to the courts, will remind lawyers that they serve as gatekeepers for the truth." The Commission's Consumer Bankruptcy Recommendations, Consumer Bankruptcy News, November 20, 1997, at 3. The Bankruptcy Review Commission actually recommended making Rule 9011 explicit that "an attorney's responsibility to make a reasonable inquiry into the accuracy of information extends to the bankruptcy schedules, statement of affairs, lists and amendments." COMMISSION REPORT, supra note 2, at 113.


[FN154]. "If ... the court determines that subdivision (b) has been violated, the court may ... impose an appropriate sanction ..." Fed. R. Bankr. P. 9011(c).

[FN155]. Nathalie D. Martin, Fee Shifting in Bankruptcy: Deterring Frivolous, Fraud-Based Objections to Discharge, 76 N.C. L. REV. 97, 147 (1997) ("Bankruptcy courts still are reluctant to impose sanctions under Rule 9011 unless the behavior in question is truly outrageous and not just ignorant.").

[FN156]. See supra note 154.


[FN160]. See Maggs, supra note 127, at 28:
Disciplinary actions against bankruptcy attorneys, however, seldom occur for two reasons. First, state bars and federal law enforcement agencies have very limited resources. They learn about bankruptcy fraud mostly through referrals and they usually have more serious matters to address. Second, charges against attorneys may be difficult to prove. Merely showing that an attorney gave bad advice does not suffice; the prosecutor also must demonstrate, at a minimum, that the lawyer knew that advice was wrong. It is often difficult to obtain such evidence. (Footnotes omitted.)


[FN162]. See supra note 161 and cases cited therein.

[FN163]. Id.

[FN164]. "If it is truly the debtor who is attempting to take advantage of the bankruptcy system, then the debtor's chances of recovering against his professionals are slim." Swift v. Seidler (In re Swift), 198 B.R. 927, 938 (Bankr. W.D. Tex. 1996).


[FN166]. Swift, 198 B.R. at 927.

[FN167]. As the court stated in Swift, 198 B.R. at 927:
Assuming for the sake of argument that the Debtor's contentions are meritorious, i.e., that but for the negligence and
breaches of the Defendants the debtor would have been able to successfully claim his IRA as exempt and would not have been denied his discharge, then the estate has actually benefited from the alleged misconduct of the Defendants. Because of the alleged conduct of the Defendants, the IRA, which would otherwise have been the Debtor's exempt property, became property of the estate and subject to the claims of the Debtor's creditors. The Debtor's creditors also benefited, allegedly because of the Defendants' actions, in that the Debtor remains personally liable to them for the full amount of their claims since his discharge was denied.


[FN169]. 18 U.S.C. § 152 provides in pertinent part:

A person who-

... (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;
(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

... shall be fined under this title, imprisoned not more than 5 years, or both.

[FN170]. United States v. Mohamed, 161 F.3d 1132, 1136 (8th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1345, 143 L. Ed. 2d 508, (1999) (the act of concealing assets when filing a bankruptcy petition suffices to warrant a two-level sentencing enhancement for violation of judicial process, due to increased culpability when the defendant conceals assets from bankruptcy court officers and thus hinders the bankruptcy process); United States v. Hernandez, 160 F.3d 661 (11th Cir. 1998); United States v. Holland, 160 F.3d 377 (7th Cir. 1998); United States v. Guthrie, 144 F.3d 1006, 1010 (6th Cir. 1998); United States v. Scheinbaum, 136 F.3d 443 (5th Cir. 1998), cert. denied, ___ U.S. ___, 119 S. Ct. 1808, 143 L. Ed. 2d 1011 (1999); United States v. Shadduck, 112 F.3d 523 (1st Cir. 1997).


Debtors' attorneys are also subject to prosecution. See, e.g., United States v. Webster, 125 F.3d 1024 (7th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 698, 139 L. Ed. 2d 642 (1998); United States v. Dolan, 120 F.3d 856 (8th Cir. 1997); United States v. Smithson, 49 F.3d 138 (5th Cir. 1995); United States v. Edgar, 971 F.2d 89 (8th Cir. 1992); United States v. Brown, 943 F.2d 1246 (10th Cir. 1991); United States v. Zimmerman, 943 F.2d 1204 (10th Cir. 1991).


18 U.S.C. § 3057 (1985) provides:

(a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

Several cases have concluded "that § 3057 was intended primarily as an administrative measure - a congressional directive to the district offices of the United States Attorneys to become more active in the prosecution of bankruptcy fraud cases." United States v. Filiberti, 353 F. Supp. 252, 253 (D. Conn. 1973) (citing congressional record). See also United States v. Laurenti, 581 F.2d 37 (2d Cir. 1978), cert. denied, 440 U.S. 958, 99 S. Ct. 1499, 59 L. Ed. 2d 771 (1979); In re Valentine, 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.


[FN173]. Indeed, it is not clear that threat of prosecution even deters debtors intent on committing fraud. "In 1996, the Attorney General announced 'Operation Total Disclosure,' which resulted in the prosecution of 127 defendants for their involvement in 111 bankruptcy crimes between December 1995 and February 1996. After the initial fanfare associated with Operation Total Disclosure, the prosecution of bankruptcy crimes has slowed." Ogie & Williams, supra note 170, at 325-26 (footnote omitted). "[T]he vast majority of prosecutions occur in cases involving substantial sums of money, particularly egregious behavior, concealments, transfers or misrepresentations by the debtor and/or his attorney." Id. at 348. "The lack of prosecution means that there is little motivation for a dishonest debtor to sober up and not attempt to defraud his creditors." Id. at 349. "[P]rosecutions under § 152 itself are comparatively infrequent." McCullough, supra note 135, at 2. "[I]t is incredible that out of nearly 883,457 bankruptcies filed in 1995, only one hundred fifty eight criminal complaints were filed." Id. at 41.

[FN174]. In an effort to address asset disclosure problems in bankruptcy, the Bankruptcy Review Commission recommended, "The Bankruptcy Code should direct trustees to perform random audits of debtors' schedules to verify the accuracy of the information listed." COMMISSION REPORT, supra note 2, § 1.1.2, at 107. In expanding on the concept of audits, the Commission stated, "Information could be verified by the submission of recent to pay stubs, tax returns if available, and other similar documentation. Trustees would report material irregularities to the bankruptcy courts ... Whether irregularities warrant revocation of discharge or criminal prosecution would be subject to the discretion of the parties and Department of Justice, as under current law." Id. at 109.

However, such audits would not address the problems identified in this study. Although auditing may be a useful tool in identifying concealed assets and transfers, and in discouraging fraud, the Commission proposes resolving such problems through the traditional processes and remedies. It offers no new remedies specific to the problems of careless and inadvertent omissions and inconsistencies identified in this study. See Gary Klein, Consumer Bankruptcy in the Balance: The National Bankruptcy Review Commission's Recommendations Tilt Toward Creditors, 5 AM. BANKR. INST. L. REV. 293, 300-301 (1997) ("Audits would supplement Rule 9011, objections to discharge, complaints to determine dischargeability, good faith requirements, Rule 204 examinations, creditor's meetings, dismissals for substantial abuse, and criminal sanctions as tools to root out fraud." (footnotes omitted)).

[FN175]. Recognizing that the forms require interpretation, one court of appeals attempted to give debtors and their attorneys some guidance:

It would be silly to require a debtor to itemize every dish and fork, even to list the electric knife separately from the crock pot. The necessary degree of specificity varies with the value of separate listings. The lower the value of the items, the less reason to identify each. But it does not follow that a generic listing always encompasses the low-value items within a category.

... The debtor must furnish enough information to put the trustee on notice of the wisdom of further inquiry. The trustee, who protects the interests of the creditors, then may make a calculation of the benefits of more detailed listing in each case, and he may ask the bankruptcy court to require the debtor to do more.

... No bankrupt will itemize every possession; none should. Every bankrupt must do enough itemizing to enable the trustee to determine whether to investigate further.[] Payne v. Wood, 775 F.2d 202, 205-07 (7th Cir. 1985).

Nevertheless, this standard for disclosing assets is too vague to provide any functional guidance to consumer debtors. Another court suggested an equally vague standard. "There are, however, no bright-line rules for how much itemization and specificity is required. What is required is reasonable particularization under the circumstances." Mohring, 142 B.R. 389, 395 (Bankr. E.D. Cal. 1992). The instructions on Official Bankruptcy Form 6 simply state, "[L]ist all personal property of the debtor of whatever kind" and, "if additional space is needed in any category, attach a separate sheet[]."

[FN176]. Official Bankruptcy Form 1, voluntary petition. As noted in the discussion on test question 16, supra at 673-74, this
is a more acute problem in chapter 13 cases.

[FN177]. See supra note 176. See supra test question 17, at 674.


[FN179]. Official Bankruptcy Form 1, schedule B, line 11. See supra test question 5, at 666-67. See also the conflicting decisions discussed supra note 56.

[FN180]. Official Bankruptcy Form 1, schedule G. See supra test question 7, at 668.

[FN181]. Official Bankruptcy Form 1, schedules I and J. See supra test question 8, at 668.

[FN182]. Official Bankruptcy Forms 6 and 7. See supra test questions 18 and 19, at 675-76.


[FN184]. Official Bankruptcy Form 6, schedule B, lines 1 and 2.

[FN185]. Id., schedule B, line 4. See, e.g., Payne v. Wood, 775 F.2d 202 (7th Cir. 1985); Mohring, supra, 142 B.R. at 395-96 ("The one thing that is certain about this debtor's lists and schedules is that the generic listing of 'household goods' worth $1,000 is incomplete and ambiguous. There is no description of the household goods; they are merely said to be 'at debtor's residence' and worth $1,000. This does not substantially comply with the requirements of Official Form 6. And it is not adequate to permit the trustee and creditors to determine whether the property is validly exempt.").

[FN186]. Official Bankruptcy Form 1, schedule B, line 6.

[FN187]. Id., schedule F.

[FN188]. Id., schedule I.


[FN190]. Official Bankruptcy Form 1, voluntary petition.

[FN191]. Several definitions have been offered for "plain English" in legal writing. See, e.g., Cal. Gov't Code § 11342(c) (West 1995) ("Plain English' means language that can be interpreted by a person who has no more than an eighth grade level of proficiency in English."). Another commentator lists the ten typical elements of plain English: (1) a clear, organized, easy-to-follow outline or table of contents, (2) appropriate captions or headings, (3) reasonably short sentences, (4) active voice, (5) positive form, (6) subject-verb-object sequence, (7) parallel construction, (8) concise words, (9) simple words and (10) precise words. George H. Hathaway, An Overview of the Plain English Movement for Lawyers, 62 Mich. B.J. 945, 945 (1983). See also, Michael S. Friman, Plain English Statutes: Long Overdue or Underdone?, 7 Loy. Consumer L. Rep. 103 (1995) (reviewing the various statutory approaches to plain English and critiquing the various federal and state attempts to legislate it.); George D. Oken, The State of Legal Writing: Res Ipsa Loquitur, 86 Mich. L. Rev. 333 (1987).

The Advisory Committee on Bankruptcy Rules has begun to address plain English considerations. The 1997 committee notes refer to plain English in connection with amended Form 9 (Notice of Bankruptcy Case, Meeting of Creditors, and Deadlines), amended Form 18 (Discharge of Debtor in a Chapter 7 Case), and new Form 20A (Notice of Motion or Objection). The suggestion here is to expand those considerations to the other forms.

[FN192]. This approach could involve the sciences of linguistics, communication, sociology, psychology and survey research. This effort could also involve the Federal Judicial Center, the statutory purpose of which is "to further the development and adoption of improved judicial administration in the courts of the United States." 28 U.S.C. § 620(a) (1993).

[FN193]. See Kathryn M. Stanchi, Resistance Is Futile: How Legal Writing Pedagogy Contributes to The Law's

[FN194]. Presently, the organization of the official forms must create a struggle both for those who complete them and for those who review them after filing. For example, locating the pertinent information regarding a debtor's vehicle in a chapter 7 case now requires reference to five different papers: (1) schedule B for ownership and value, (2) schedule C for exemption, (3) schedule D for the secured debt on the vehicle, (4) the statement of intent regarding the debtor's intent to surrender the vehicle or reaffirm the debt, and (5) schedule J for payment on the debt if it is to be reaffirmed. The first four pieces of data could and should be disclosed in a combined format on a single schedule. Such organizational efficiencies would enhance the likelihood of complete and accurate disclosures, and would make it easier for trustees and creditors to review the information after it is filed.

In the same vein, consideration might be given to creating a national electronic filing form for the required bankruptcy disclosures. This electronic form could be used either for printing paper copies of the official forms or for electronic filing. Functionally, the electronic form could include barriers to the kinds of omissions and inconsistencies found in this study.

[FN195]. In Payne, 775 F.2d at 206, the court suggested that clarifying and simplifying the official forms is a national issue, not a local issue:

[A] court may not announce a specific rule such as: "List separately each item that a trustee might think could be sold for $25 or more." When writing the bankruptcy code Congress had to choose between a specific set of rules, such as a $25 line of demarcation, and a more general standard. The code selects a standard rather than a rule, and a court may not reverse this choice just because the rule seems more easily administrable. The degree of specificity must be left in the charge of those who draft the bankruptcy schedules, and so far they have allowed many items to be lumped together for a single valuation.

[FN196]. It appears that a few bankruptcy courts have adopted local rules establishing limited expectations for completing the official forms. See O'Connell v. Mann (In re Davila), 210 B.R. 727, 729 n.2 (Bankr. S.D. Tex. 1996) ("The Court notes that at least since 1989 the local rules of the Bankruptcy Courts for the Southern District of Texas have required a debtor's schedules to contain a detailed inventory of the debtor's assets with a separate valuation for each item."); In re Reid, 97 B.R. 472, 479 (Bankr. N.D. Ind. 1988) ("For guidance on specificity the parties should refer to the local rules of this court, which provide: 'When property of the debtor is claimed as exempt under applicable law, such property shall be adequately described and itemized in the schedules in the place provided therefore. General terms of description (i.e. 'automobiles,' 'common stock,' etc.) are not sufficiently descriptive.' Rules of the United States Bankruptcy Court for the Northern District of Indiana, Rule B-206].").

See also C.D. CAL. LBR 1002-1(c) ("If the petition fails to specify the chapter under which relief is being sought, the case will be deemed to have been filed under chapter 7. If the petition fails to specify whether it is a consumer or business case, it will be presumed to be a consumer case. If the petition fails to indicate the number of creditors or equity holders, or the amount of assets or debts, it will be presumed that the case falls in the smallest category of each."); D. MAINE LBR 4003-1 ("A debtor's claim of exemptions shall be specific and shall, as to each item or category of items claimed as exempt, designate by title, section and subsection, the statutory basis for the claim. Exempt assets need not be inventoried and valued item by item in every case. However, the schedules must disclose the debtor's exemption claims with meaningful particularity and the debtor must be prepared to provide detailed information regarding assets claimed as exempt at the meeting of creditors. In joint cases, exemptions claimed by each debtor shall be listed separately."); D.R.I. LBR 4003-1, (same); D.N.J. LBR 1007-1, ("In addition to the requirements of D.N.J. LBR 1002-1(a) in a joint petition, the assets and liabilities of each debtor shall be separately listed and tabulated on the schedules and statements under appropriately identified columns or entries. Joint assets and liabilities of the debtors shall be listed and tabulated as such, under appropriately identified columns or entries.").

The suggestion in the text is for substantially more extensive guidance.

[FN197]. Official Bankruptcy Form 1, voluntary petition. See supra note 46 and accompanying question and text.

[FN198]. Official Bankruptcy Form 6, schedules A and B. See supra test question 2.

[FN199]. Official Bankruptcy Form 6, schedule B, line 3. See supra note 49 and accompanying question and text.

[FN200]. Official Bankruptcy Form 6, schedules D, E and F. See supra note 58 and accompanying question and text.

[FN201]. Official Bankruptcy Form 6, schedule J. See supra note 68 and accompanying question and text.

[FN202]. Official Bankruptcy Forms 6 and 7, schedules and statement of financial affairs. See supra note 70 and accompanying question and text.

[FN203]. Official Bankruptcy Form 8, statement of intent. See supra question and text accompanying note 73.


[FN205]. See test questions 15 at p.672 (other fee disclosure errors) and 21 at p.677 (other errors).

[FN206]. In Detroit, one mechanism that trustees occasionally use in these circumstances is to continue the meeting of creditors to give the debtor an opportunity to correct the deficiencies. Reportedly, this can be effective in motivating correction of the problem.

However, trustees are under a mandate from the United States Trustee program to close no asset cases promptly and are evaluated accordingly. HANDBOOK FOR CHAPTER 7 TRUSTEES, supra note 135, at 6-14 and 10-1; United States Department of Justice, UNITED STATES TRUSTEE MANUAL, volume 2, page 43-44 (October 1996). As a result of this unfortunate disincentive, a trustee may decide to conclude the reconvened meeting even if the problems with the papers have not been fully remedied.

Obviously, the United States Trustee would have to allow some leeway in this mandate for cases in which the trustee invokes the suggested new process.

[FN207]. See Fidelity National Title Ins. Co. v. Franklin (In re Franklin), 179 B.R. 913, 927.

[FN208]. This consideration is the basis for the current limitation permitting only the United States Trustee to bring a motion to dismiss for substantial abuse under § 707(b). See supra note 122.

[FN209]. Presently, neither the HANDBOOK FOR CHAPTER 7 TRUSTEES, supra note 135, nor the UNITED STATES TRUSTEE MANUAL, supra note 137, provides any guidance to United States Trustees or to chapter 7 trustees in dealing with the problems identified in this study.


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