Training Manual for
Pro Bono Bankruptcy Training Program

# MODULE 2 –
# PRE-FILING CONSIDERATIONS

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# Contents

# MODULE 2 - PRE-FILING CONSIDERATIONS

Determining the best course of action for a client in financial distress requires a thorough understanding of that client's specific financial situation. Therefore, the first step in advising a client about bankruptcy is to gather the necessary information. After the information is collected, it can be analyzed to determine whether bankruptcy is the best option for the client or whether other possible avenues for relief are available. If bankruptcy is the right choice for the client, the next decisions are what is the most appropriate chapter of the Bankruptcy Code under which to file and when to file the petition for relief. Finally, the client should be advised about satisfying the prepetition credit counseling requirement and making arrangements to pay, or seek a waiver of, the bankruptcy filing fees and related expenses. This Module reviews these pre-filing considerations. It also discusses several attorney responsibilities and client representation issues that are unique to bankruptcy practice.

## 1. GATHERING INFORMATION

### 1.1 Interviewing the Debtor

Normally the first step in gathering information is to interview the client. In addition to establishing a relationship, this interview will usually serve to quickly identify most cases in which bankruptcy is not appropriate. The initial interview is also a good time to impress upon the client the importance of providing full and accurate information. Usually the best way to do so is to paint a vivid picture of the worst consequences that can result from less than full disclosure, while at the same time emphasizing the confidentiality of the attorney-client relationship. The debtor should be advised that debts not listed may not be discharged and property not disclosed may be lost. In giving incomplete or false information under oath on the bankruptcy forms, the debtor risks losing the ability to obtain a discharge and could also face criminal prosecution.

These initial questions should be asked (using language the client will understand) in order to get a general sense of the client's problems:

- What types of debt are causing the most trouble?
- How and when were the debts incurred and are they secured?
- What significant assets does the client have?
- What is the debtor's monthly income and what type of income is it (employment, public benefits, Social Security, and so forth)?
- What does the debtor estimate his or her monthly expenses to be?
- How imminent is creditor action which may limit the client's options?
- Has the debtor filed bankruptcy before and, if so, when and what type of case?
- Has the debtor moved from one state to another within the preceding two and a half years?

Answers to these general questions will reveal not only the likelihood of relief in a bankruptcy case but also many other dimensions of the client's problems: their causes, their scope, whether they are likely to continue or recur, and whether other solutions seem obviously preferable.

If answers to the initial questions suggest that bankruptcy is an appropriate option and the debtor wishes to proceed with a bankruptcy filing, much more information will need to be obtained from the debtor. It is often helpful to have prospective clients fill out responses to a written questionnaire. The questionnaire may be provided to prospective clients early so that it may be filled out before the interview. However, even if the questionnaire is filled out before the interview, it is important that the attorney carefully review the questionnaire with the debtor during the interview to ensure that the questions and answers are understood.

### 1.2 Other Sources of Information

Although the debtor in most cases will be the primary source of the information needed to complete the petition and schedules, the following are some other sources of information that may prove helpful.

***Creditors.*** One source of information that should not be overlooked is the creditor to whom a debt is or may be owed. Creditors may respond to inquiries regarding the balance due and the security interests that they have. For some types of loans, consumer protection statutes may give the debtor the right to make a formal demand for account information. For example, a "request for information" on mortgage loans may be sent under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(e), and a request for the amount due or deficiency amount on car loans may be sent under the state version of the Uniform Commercial Code sections 9-210 and 9-616.

***Credit Reporting Agencies.*** A recent credit report is essential for checking and supplementing the information provided by the debtor. Because credit reports often contain errors, however, the debtor should be asked to review the report for inaccuracies.

Credit reports may be obtained by the debtor at no cost or for a small fee. Consumers are permitted under federal law to receive one free copy of a credit report per year from each of the national reporting agencies. The three nationwide consumer reporting agencies have set up one central website, toll-free telephone number, and mailing address through which free annual reports can be ordered. The client can call (877) 322-8228, visit www.annualcreditreport.com, or complete the annual credit report request form and mail it to: Annual Credit Report Request Service, P.O. Box 105281, Atlanta, Georgia 30348-5281.

Alternatively, credit reports may be obtained directly from any or all of the three national consumer reporting agencies. Most agencies impose a small charge, usually under $10, for a basic credit report.

***PACER.*** The consequences of repeat bankruptcy filings can be significant, as discussed in Module 1. As a result, it is important to verify through the Public Access to Court Electronic Records (PACER) system whether the client has any prior bankruptcy filings. PACER is an electronic public access service that allows users to obtain case and docket information from most federal courts, including the bankruptcy courts. A national search of bankruptcy filings can be made on PACER using the "U.S. Party/Case Index" by selecting "All Courts" for the region in the bankruptcy search index. The search may be done using the debtor's full name entered under "Party Name," as well as by using the debtor's Social Security number or tax identification number, or the prior case number. PACER can be used to identify missing information about a known previous filing such as the case number, date filed, date of discharge or dismissal, and so forth. Documents from the previous filing may also be available. Access to the system is available at www.pacer.gov.

***Department of Education Federal Student Aid Database***. The United States Department of Education's central database for student aid can be found at http://studentaid.gov. This database receives data from schools, guaranty agencies, the Direct Loan program, and other Department of Education programs. Clients that have outstanding student loans should be asked to use the website to obtain a complete list of the client's federal student loans by logging in with their FSA ID. Borrowers can also call the Federal Student Aid Information Center at 1-800-4-FED-AID (1-800-433-3243) or 1-800-730-8913 (TTY).

## 1.3 Important Documents

The debtor may have or may be able to obtain various documents that will assist in preparing the bankruptcy filing. Some of these documents may also be needed to satisfy a filing or document production requirement. In addition to the key documents discussed here, a document checklist is provided as Appendix A to this Module.

***Payment Advices.*** Section 521(a)(1)(B)(iv) requires debtors, unless the court orders otherwise, to file copies of all pay stubs (referred to as "payment advices") or other evidence of payment received from an employer within sixty days before the filing of the petition. Some districts have adopted local rules which instruct debtors to provide these payment advices to the trustee, rather than filing them with the court. Some local rules also permit debtors to submit, in lieu of actual payment advices, a certification setting forth the reasons the actual payment advices are unavailable and an estimate or other evidence of payments received within the sixty days prior to filing.

The pay stubs should be reviewed to determine what payroll deductions are being made. This information will be needed to fill out Schedule I of the bankruptcy schedules. Payroll deductions (or electronic fund transfers or preauthorized payments from the debtor's checking account) being made to creditors on bank or credit union loans that will not be reaffirmed in the bankruptcy should be terminated. Termination usually prevents later complications in trying to recover money deducted after a bankruptcy is filed. It also increases the client's available income. If the debtor's pay is being garnished, review of the pay stubs will help

determine, based on the amount and timing of the garnishment, whether the funds may be recovered after the bankruptcy case is filed.

In order to prepare Official Forms 122A-1 and 122C-1 and determine the debtor's "current monthly income," pay stubs or other evidence of the debtor's income for the six-month period prior to filing will also need to be reviewed. Debtors receiving Social Security benefits, unemployment compensation, child support, or public assistance should be asked to provide benefit award letters, statements, or support orders showing the amount received, even though some of this income may not be counted as "current monthly income" based on the definition in section 101(10A).

***Tax Information.*** Copies of the debtor's tax returns for the past two years should be obtained prior to filing a bankruptcy petition. If filing under chapter 13 is a possibility, copies of tax returns for the prior four years are recommended. If the debtor was not required to file a tax return (for example, because of insufficient income), that fact should be noted for each applicable year. If the debtor has debts owing to the Internal Revenue Service, tax transcripts for the years in question should be obtained to determine if the debts may be dischargeable, as discussed below.

***Bank Statements.*** Obtaining bank statements for the three months prior to filing is advisable if the debtor has them. Bank statements can be reviewed to identify any unusual withdrawals from deposit accounts that may raise concerns about preferential transfers. Bank statements may prove useful in helping the debtor calculate her monthly expenses, which will be listed in Schedule J. Additionally, the debtor will be required at the meeting of creditors to provide the trustee with a bank statement that covers the date on which the petition was filed.

Retirement and investment account statements should also be reviewed so as to properly list the debtor's interest in these accounts on the bankruptcy schedules and claim any available exemptions.

***Domestic Court Orders.*** The Bankruptcy Code provides special treatment for child support payments and other domestic support obligations. Regardless of whether your client pays or receives support, obtain a copy of the divorce judgment or support order. In addition, an early estimate of any support arrearage will be helpful in determining the best course of action for the client. If your client was awarded property in the domestic court order, you should inquire about whether your client still owns and has possession of the property.

***Vehicle Information.*** In many cases an automobile is not only the debtor's most significant asset from a financial standpoint, but also in terms of day-to-day use. Many people rely on their motor vehicle to get to work, to take the children to school, and even to go to the grocery store. Loss of a car can have an enormous effect on the debtor's ability to obtain a fresh start. Information about the car's value and any applicable security interests will be needed to determine whether the debtor will be able to retain the car.

If the debtor owns a motor vehicle, you should obtain copies of the certificate of title, any loan or lease documentation, and evidence of insurance. If valuation is an important issue, the average wholesale and retail values for most models can be obtained from industry guides such as the Kelley Blue Book (www.kbb.com), the NADA Used Car Guide (www.nadaguides.com), or other Internet sources such as www.carprices.com or www.edmunds.com.

It is also important to learn the date when the debtor purchased the vehicle. As discussed in Module 1, the debtor's options for treatment of a car loan in a chapter 13 case are more limited if the car was purchased within 910 days before the petition filing date.

***Residential Lease Information.*** Certain limitations on the automatic stay apply in cases in which a landlord has obtained a judgment for possession of the debtor's residential, leased property before a bankruptcy case is filed, as discussed in Module 1. If the client is behind on rent payments, it is critical to determine whether the landlord has taken any action to evict a client. If a judgment for possession has not been entered in a state court proceeding, but is imminent, there is a strong case for filing a bankruptcy petition before the judgment enters. If a judgment for possession has already been entered, a delay in filing for bankruptcy in order to obtain relief from the judgment in state court may be appropriate.

Whether or not an eviction action is pending, it is useful to have a copy of the client's lease, if available, and to know whether the client is current or behind in rent payments. The lease may also indicate whether the debtor's landlord is holding a security deposit, which is property of the debtor to be listed in the bankruptcy schedules.

***Real Property Information.*** Clients who own homes may be unaware that some of their debts are secured by mortgages, municipal liens, or judgment liens. A lien or title search will identify any encumbrances on the property and a determination can then be made as to how to deal with these claims in bankruptcy. A title search will also reveal whether the debtor has recorded a homestead exemption on the property in states in which that is required.

The value of the debtor's home is often an important issue in a bankruptcy case. The home's property tax assessment should be obtained by reviewing the client's property tax bill or the local taxing authority's website. Information on real estate values also is available on websites such as www.zillow.com, www.homegain.com, and www.realtor.com, or by obtaining an informal appraisal (for example, a broker's price opinion or an Internet valuation). However, if the value of the property is of significant importance or if there is likely to be a contested court hearing on valuation, a current formal appraisal may be required.

A copy of the deed and any security instruments should be obtained. The deed and security instrument (whether known as a mortgage, deed of trust, etc.) should be available from the local land records office if the debtor has not kept them. If the debtor is responsible for making property tax payments directly rather than under a mortgage escrow account, bills and notices from the local taxing authority should be reviewed for notification of any outstanding balances, tax liens, and tax sales. Lastly, hazard insurance coverage should be verified.

***Periodic Billing Statements and Collection Letters.*** Some debtors may come to your office with a shopping bag full of credit card and other billing statements they have been collecting for months. Although you will not need all of these documents, you should ask the debtor to provide you with a copy of the most recent statement for each account. These will help in listing creditor addresses, account numbers, and approximate balances on the bankruptcy schedules. Collection letters may be helpful in determining who is the current holder of the account, especially if the account has been sold to a debt buyer. Parties and other information identified in these letters may be compared with what is listed on the credit report.

***Court Documents.*** Debtors should be asked to provide documents relating to any litigation in which they are involved. In actions brought against the debtor, a review of the documents may reveal other parties to be potential creditors or counterclaims that could be potential property interests of the debtor. These documents may also indicate whether any postjudgment collection action is imminent or whether judicial liens may exist on the debtor's home. In actions brought by the debtor, potential claims can be identified so that they may be properly listed and possibly exempted on the debtor's bankruptcy schedules. Failure to list such claims, no matter how contingent or speculative the claims may be, can have significant consequences. The debtor may be deprived of standing to pursue the claim either during or after the bankruptcy. After the bankruptcy case is closed, the doctrine of judicial estoppel may prevent the debtor from pursuing the claim.

### 1.4 Frequently Missed Information

Certain types of information are frequently overlooked in the initial fact gathering stage. Given the broad definition of estate property and claims in the Bankruptcy Code, the Official Forms cannot be exclusively relied upon as a means of inquiring into nontraditional types of assets and debts. Some of the most commonly missed items in consumer bankruptcy cases are listed below. Inquiry should always be made into the following matters:

| Assets | Liabilities |
|---|---|
| Tax refunds | Debts of others that client cosigned |
| Alimony or support arrearages | Deficiencies from automobile repossession |
| Security deposits | Rent-to-own contract damages |
| Pledged goods at pawnbrokers | Lease termination damages |
| Personal injury claims | Student loans |
| Consumer law claims | Public benefit overpayments |
| Employment-related claims | Payday loans |
| Pending insurance claims | Utility bills |
| Property being used by another person (cars) | Loans on retirement funds |
| Retirement plans | Campground and timeshare contracts |
| Cash value in whole life insurance policies | Parking tickets and traffic fines |
| Education savings accounts | Criminal restitution debts |
| Department store layaway deposits | |

| | |
|---|---|
| Inherited property (including heir property)<br>Burial plots | |

### 1.5 Valuing Property

One of the most important purposes of the initial client interview and the pre-filing investigation is to identify the debtor's assets and estimate their value. This is necessary in order to advise the debtor about whether she has nonexempt assets that could be lost in a chapter 7 liquidation, as well as estimating how much she would have to pay to unsecured creditors in a chapter 13 plan. It is important to ask about common larger assets, like the debtor's home or car, and also to check for the frequently missed assets listed above. Section 1.3 identifies helpful sources of information for valuing real estate and cars. (Local practice in your district may favor one particular car valuation source, such as Kelly Blue Book or the NADA Used Car Guide.) In addition, the debtor's opinion about the value of her assets can be admissible evidence. Attorneys should ask the debtor to create a list of all property, including individual household goods and furnishings, and put an estimated value on each item. (Trying to estimate a total dollar value for all household goods is usually not accurate, and may not allow you to properly evaluate applicable exemptions.) This can be done on a written questionnaire provided to the client, as suggested in Section 1.1. The value assigned to most ordinary household goods should be what the debtor thinks she could sell each item for at a garage sale or on ebay.

## 2. APPLICATION OF THE MEANS TEST

### 2.1 Overview of the Means Test

Advising the client about which type of bankruptcy to file requires consideration of the "means test" under section 707(b). 11 U.S.C. § 707(b). Application of this test based on standards set out in section 707(b) may create a presumption that the filing of a chapter 7 case is an abuse. If the debtor is not able to rebut the presumption or show that there are special circumstances, the debtor might consider filing a chapter 13 case rather than a chapter 7 case. In the event that the debtor files a chapter 13 case, the means test may determine the amount that must be paid to unsecured creditors.

The abuse provisions in section 707(b) apply only to a chapter 7 debtor whose debts are primarily consumer debts. Section 101(8) defines "consumer debt" as "debt incurred by an individual primarily for personal, family, household purpose." Thus, section 707(b) does not apply to debtors whose debts are primarily incurred through business activities, investment losses, or tort liability.

### 2.2 Determining If the Safe Harbor Applies

Most consumers who file bankruptcy, especially those served by pro bono programs, are not affected by the means test because of its safe harbor provisions. Section 707(b)(7) provides that if

the debtor's current monthly income is below the median family income for this household size in the debtor's state of residence, no United States Trustee (or bankruptcy administrator), trustee, and or party in interest may file a motion seeking to apply the means test.

**Step 1 – Current Monthly Income.** The first step in determining whether the debtor falls within the safe harbor's protection is to calculate the debtor's "current monthly income." Section 101(10A) defines current monthly income as the monthly average of all income (whether or not taxable) received by the debtor during the six-month period ending on the last day of the calendar month preceding the bankruptcy filing. In addition to the debtor's gross wages, salary, and commissions, current monthly income includes amounts paid to the debtor on a regular basis for household expenses of the debtor or the debtor's dependents. It does not include benefits received under the Social Security Act, most forms of veterans' disability benefits, and payments to victims of war crimes, crimes against humanity, and acts of terrorism. If a joint case is filed, current monthly income includes all income received by the debtor and the debtor's spouse. If a married debtor files alone, the non-debtor spouse's income is considered for purposes of the safe harbor unless the debtor files a statement under oath that the debtor and the debtor's spouse are separated (and the separation is not for the purpose of evading the means test).

**Step 2 - Median Family Income.** The next step is to obtain the applicable median family income. These figures for each state and household size can be found on the United States Trustee Program's website at www.justice.gov/ust. The specific income figure used will be for the debtor's household size. As the Bankruptcy Code does not define household, some courts apply the Census Bureau definition, which generally includes all people who occupy a housing unit regardless of relationship. Other courts use the "economic unit" approach, which counts all individuals who share expenses. Still other courts adopt the more limited view that household consists of the debtor and dependents of the debtor that could be claimed on the debtor's federal tax return.

**Step 3 - Safe Harbor.** The final step is to compare the debtor's current monthly income multiplied by twelve with the state median family income for the debtor's household size. If the debtor's income is less than or equal to the state's median family income, the debtor is protected by the safe harbor and the means test does not apply. As discussed more fully in Module 3, all individual debtors whose debts are primarily consumer debts are required to prepare and file Official Form 122A-1, *Chapter 7 Statement of Your Current Monthly Income*. In Part 1 of the statement, the debtor lists the income information used in calculating current monthly income for purposes of the section 707(b)(7) safe harbor. If this current monthly income amount multiplied by twelve falls below the state median income, as reflected in Part 2 of the statement, the debtor is not required to fill out Official Form 122A–2, *Chapter 7 Means Test Calculation*.

## 2.3 Means Test Formula

Debtors whose income exceeds the state's median family income must fill out the entire Official Form 122A-2, reporting detailed information about their income and expenses, to determine whether a presumption of abuse exists under the means test formula. The debtor's "current monthly income" is used once again on the formula's income side. Section 707(b)(2)(A) specifies which of the debtor's allowed expenses are deemed reasonable for purposes of the abuse analysis. Some expense item amounts are determined based on the three categories of allowable expenses provided for in the Internal Revenue Service's collection guidelines: National Standards, Local Standards, and Other Necessary Expenses. The amounts for these expense allowances may be obtained on the United States Trustee Program's website at www.justice.gov/ust. Other expense deductions are calculated based on the debtor's actual expenditures if they fall within one of the categories specifically referred to in the statute, such as secured debt payments, child support and other priority payments, and charitable contributions. The various expense amounts are listed by the debtor on Official Form 122A-2. Once the allowed expenses are determined and totaled, this amount is subtracted from the debtor's current monthly income and then multiplied by sixty. This amount is the debtor's 60-month disposable income under section 707(b)(2). Much like an income tax form, these calculations are made on Official Form 122A-2 based on figures from other parts of the form.

## 2.4 Application of the Means Test

The debtor "flunks" the means test, meaning that a presumption of abuse exists, if the debtor's current monthly income after all allowed expenses are deducted, multiplied by 60, exceeds: (1) $9,075 or 25% of nonpriority unsecured debt, whichever is greater, or (2) $15,150. (These dollar amounts apply to cases filed April 1, 2022 to March 31, 2025; the dollar amounts in Code section 707(b) change every three years). Put another way, a debtor may file a chapter 7 case without a presumption of abuse arising if his or her monthly income after expenses is less than $151.25 per month ($9,075÷ 60). On the other hand, a chapter 7 filing is presumed to be abusive if the debtor's monthly income after expenses is greater than $252.50 per month ($15,150÷ 60). If the debtor's income after expenses falls between $151.25 and $252.50 per month, this amount multiplied by 60 must be less than 25% of the nonpriority unsecured claims for the debtor to file without a presumption of abuse arising. For example, a presumption of abuse would exist if the debtor's income after expenses is $151.25 or more and the debtor has nonpriority unsecured debts of $36,300 or less, and also if the debtor's income after expenses is $252.50 or more and the debtor has nonpriority unsecured debts of $60,600 or less. A "Means Test Flowchart" that helps illustrate the application of the means test is attached as Appendix B.

## 2.5 Rebutting the Presumption: Special Circumstances

To rebut the presumption of abuse if a motion to dismiss or convert is filed, section 707(b)(2)(B)(i) states that the debtor must demonstrate that "special circumstances" exist

which would cause the debtor to fall below the presumed abuse tolerances set by the means test formula. The special circumstances must "justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative." The statute provides that these circumstances may include, for example, a "serious medical condition or a call or order to active duty in the Armed Forces." Other examples might include additional fuel costs for a debtor who has a long commute to work.

### 2.6 General Abuse

If the presumption of abuse does not arise by application of the means test the debtor may still be subject to the general abuse provision of section 707(b)(1), which permits the court to dismiss a chapter 7 case (or convert the case to chapter 11 or 13 with the debtor's consent) if granting relief under chapter 7 would be "an abuse." Creditors and other parties in interest, including panel trustees, are not permitted to file dismissal motions under section 707(b)(1) if the debtor's income is below the state's applicable median family income. If the debtor's income falls below the median only the bankruptcy judge or United States trustee (or bankruptcy administrator) may file such a motion. 11 U.S.C. § 707(b)(6). In addition, in cases in which the presumption of abuse "does not arise or is rebutted," section 707(b)(3) instructs the court when ruling on general abuse motions to consider whether the "debtor filed the petition in bad faith" or "the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse."

## 3. CHOOSING THE TYPE OF BANKRUPTCY

The Bankruptcy Code provides for two main types of consumer cases: chapter 7 and chapter 13. The debtor will need to decide which chapter is better for him or her. Although the debtor may be able later to convert from one type of bankruptcy to another, it is always best to give this choice due consideration from the start. A general description of the various types of bankruptcy cases is covered in Module 1.

Whether, how, and when to file a bankruptcy petition is probably the single most important decision made in a bankruptcy case. Like most questions of legal strategy, it is rarely simple. It involves the interplay of a number of factors. Many of these factors are unique to each client; others turn on state law, custom, or practice in a community, or on the provisions of the Bankruptcy Code. This section discusses some basic reasons to choose one chapter over another.

### 3.1 Reasons for Filing Chapter 7

The following factors may favor filing a chapter 7 case:

- All of the debtor's property may be claimed as fully exempt.

- The debtor has all or mostly unsecured debts and the exceptions to discharge under section 523 do not apply.

- The debtor's total debt exceeds the eligibility limits for chapter 13 cases found in section 109 (currently this amount is $2,750,000 in liquidated, noncontingent debts).

- The debtor may not have any income in excess of necessary household expenses that could fund a chapter 13 plan.

- The debtor may wish to avoid a lien on secured property under section 522(f) which would impair his or her exemption, such as a judicial lien on a home or a non-possessory, non-purchase money security interest in household goods (note that this may also be done in chapter 13).

- The debtor may simply have an immediate need for a "fresh start," particularly a client who is having great difficulty handling stress from collection efforts.

### 3.2 Reasons for Filing Chapter 13

The following factors may favor filing a chapter 13 case:

- Chapter 13 may be the only way for a debtor to stop a home foreclosure sale and cure a prepetition default, as permitted under section 1322(d)(5).

- The debtor may wish to stop a motor vehicle repossession or compel turnover of property already repossessed.

- The debtor may have nonexempt assets, such as a large amount of equity in the home, that she would lose if she filed under chapter 7.

- The debtor may be able to reduce the ongoing monthly payments or balance due on certain secured debts, and eliminate the creditor's lien.

- The debtor may wish to pay unsecured debts, either in full or a percentage of the amount owed, over a three to five year period. Late charges and interest may be avoided on unsecured debts, except when non-exempt property exists.

- Chapter 13 may provide some relief for a debtor who has received a chapter 7 discharge within the past eight years. Depending upon the type of bankruptcy filed in the prior case, the debtor may obtain a discharge in a new chapter 13 case filed within two or four years after the earlier case.

- The debtor has excess disposable income that would warrant the dismissal of a chapter 7 case under section 707(b) (in other words, the debtor fails the means test).

- The chapter 13 discharge is somewhat broader than the chapter 7 discharge in that certain debts not dischargeable in chapter 7 may be discharged in chapter 13. However, the bankruptcy court may look closely at the "good faith" requirement of section 1322(a)(2) in this situation.

- Chapter 13 may help debtors who want to pay their debts but lack the discipline to do it on their own. In cases in which the debtor is employed, wage orders which provide that the chapter 13 plan payment will be taken directly out of the debtor's pay may be advisable, or may be required by local rule.

- Chapter 13 may protect a codebtor on an obligation, based on the stay provided under section 1301. In some situations however, such as if the debtor's plan does not propose to pay the joint debt, the creditor may seek relief from the stay to pursue the codebtor.

- A chapter 13 discharge, particularly if it is entered after the completion of a one-hundred percent repayment plan, may possibly have a less negative impact on the debtor's credit rating.

### 3.3 Certification Regarding Available Chapters

Section 342(b) requires the Clerk of bankruptcy court to give each consumer debtor a notice describing:

- each chapter under which a consumer may proceed,
- the services of credit counseling agencies, and
- the possible consequences of bankruptcy fraud.

However, section 521(a)(1)(B)(iii) requires the debtor's attorney to certify that he/she delivered to the debtor the notice required by section 342(b) before the petition is filed. The attorney certification is made on the Petition (Official Form 101). The attorney should give the debtor a copy of the section 342(b) notice and have the debtor sign an acknowledgement that he/she received it. This can be done when the attorney reviews the petition and schedules with debtor prior to filing the case, or during an earlier client meeting. The section 342(b) notice is designated as Director's Form 201A and can be obtained at: http://www.uscourts.gov/FormsAndFees/Forms/BankruptcyForms.aspx.

# 4. GENERAL TIMING CONSIDERATIONS

One factor to be considered when deciding upon a course of action is the timing of the petition. It is often stated that bankruptcy should be considered as a "last resort" for financially troubled consumers. This advice is oversimplified. In some cases, legal rights may be lost by delay. In many other cases, even after the debtor decides that a bankruptcy should be filed, it is advisable to wait before filing. This section discusses some of the factors to be considered when advising a client on the timing of a bankruptcy filing.

## 4.1 Reasons to Wait

It often wise for a debtor to wait to file if there is no emergency reason to file now and if the debtor is still incurring debt. If a decision is made to temporarily delay the filing for one or more of these reasons discussed below, the debtor should be advised to avoid obtaining goods or services on credit if the debtor has no intention to pay for them. Debts incurred in this manner may be declared nondischargeable when the bankruptcy is eventually filed.

If the debtor is currently "judgment-proof," there may be little advantage to filing at a time when creditors' attempts to collect will not result in the loss of the debtor's property or income. Moreover, if the debtor files bankruptcy when the debtor's income is not yet sufficient to cover her monthly expenses, she risks incurring more debt post-petition that will not be included in the discharge. If a bankruptcy is filed at a time when the debtor does not have adequate auto or health insurance, the debtor may be worse off should he or she face a catastrophic event resulting in substantial obligations after filing. Such debts incurred after the bankruptcy filing will not be discharged, and section 727(a)(8) provides that a debtor may not obtain another chapter 7 discharge for **eight years** after receiving a chapter 7 discharge (although a chapter 13 filing may be possible).

It may be advisable to delay a bankruptcy filing for reasons related to the dischargeability of certain debts. For example, if the bankruptcy filing is delayed certain tax debts may be dischargeable based on section 523(a)(1), as discussed more fully below. Also, a presumption under section 523(a)(2)(C) that a debt is nondischargeable may not arise if the bankruptcy case is filed more than 90 days after consumer debts for luxury goods and services (more than $800) have been incurred or more than 70 days after extensions of credit on an open-end credit account (more than $1,100) have been incurred.

The timing of a bankruptcy may affect which state's exemption law a debtor is entitled to use based on the domiciliary requirements of section 522(b)(3)(A). It may also determine whether interested parties may object to the debtor's claim of exemption for homestead property based on section 522(o), (p), and (q). These issues are discussed in Module 1.

If the debtor is unable to claim funds in a checking account as exempt, the debtor should delay filing until all outstanding checks written by the debtor have been negotiated. Filing a case

when there are outstanding checks drawn on the account could result in the trustee seeking to recover funds in the account on the petition date as non-exempt property of the estate.

It may be advisable to delay a bankruptcy filing until the debtor can use nonexempt assets. We discuss this further in section 4.6, Exemption Planning.

By waiting to file until more than one year after a prior bankruptcy dismissal, the debtor may avoid automatic stay limitations under sections 362(c)(3) and (c)(4). Delaying a bankruptcy filing might also reduce a debtor's "current monthly income," thereby potentially avoiding a presumption of abuse in chapter 7 or reducing the debtor's disposable income in chapter 13 based on the means test under section 707(b)(2). Waiting until more than 910 days after a car purchase or one year after other secured debt purchases might permit the debtor to obtain more favorable treatment of certain secured debts in chapter 13 by avoiding the hanging paragraph at the end of section 1325(a).

### 4.1.1 Preferences and Fraudulent Transfers

Concerns may arise about potential avoidable transfers. If a debtor has made payments to an unsecured creditor that total more than $600 over the 90 days prior to the bankruptcy filing (or one year prior, if the creditor is an insider), this is considered a preferential transfer to the creditor (because this creditor is getting better treatment than the other unsecured creditors). The trustee can recover these preferential transfers from the creditor unless the creditor can assert certain defenses set out in the statute. 11 U.S.C. § 547.

A trustee may also avoid fraudulent transfers: transfers of property made within two years of the bankruptcy filing if the debtor was insolvent and did not receive reasonably equivalent value for the transfer. 11 U.S.C. § 548. Although referred to as "fraudulent" transfers, no fraud need be proven. Many debtors make such transfers unwittingly, with no bad intent. For example, a debtor might have a paid-for car that she bought with the intention that her son would own it, but it was previously titled in her name. Transferring that car to her son (without receiving reasonably equivalent value in return), if she was insolvent at the time of the transfer, amounts to a fraudulent transfer, and the trustee can recover any property that was transferred in this manner within 2 years before the case was filed.

Other debtors may attempt to transfer property specifically intending to protect it from their creditors. Such a transfer within two years of the bankruptcy filing is also avoidable under section 548 if it was done with the intent to hinder, delay, or defraud a creditor. In addition to using section 548 to undo this kind of transfer, a trustee may be able to use state law fraudulent transfer and avoidance powers that have a longer reach back period of four years or more. 11 U.S.C. § 544(b).

### 4.2 Reasons to File Quickly

By contrast, in some cases a debtor has no choice but to file immediately. A debtor may wish to file before a home foreclosure if there is a possibility that the debtor will be able to cure a mortgage default through a chapter 13 plan. Such a cure may be possible even after the foreclosure if the sale process has not been completed and the debtor's rights in the property under state law have not been terminated. However, some courts have construed section 1322(c)(1) as permitting the right to cure only until such time as the gavel effectively falls at the foreclosure sale, so every effort should be made to file the bankruptcy before the foreclosure sale.

While typically the debtor will want to delay a bankruptcy filing to prevent the trustee going after a fraudulent transfer of property, there are instances when the debtor may wish to have the trustee avoid a transfer. For example, the debtor may have been induced to transfer her home as part of a foreclosure rescue scam. Or the debtor may want to use the trustee's avoiding powers to recover property, such as garnished wages, if the transfer was not voluntary and the property may be exempted. 11 U.S.C. § 522(g) and (h). In those cases the debtor will need to file before the statutory avoidance periods expire.

Prompt action may be necessary to forestall an auto repossession, eviction, execution sale, or utility shut-off. An immediate filing may also be the only way to stay a state court proceeding and thereby avoid much unnecessary work therein. Under section 108, filing before the expiration of a statute of limitations or a period for redemption can provide the debtor with an extension of the time period to commence a lawsuit or take other action.

### 4.3 Special Timing Concerns for Tax Refunds

For many lower-income debtors, tax refunds, Child Tax Credits, and Earned Income Tax Credits (EITC) are significant and needed assets. Because the right to receive a tax refund or credit is property of the debtor's bankruptcy estate, how the refund or credit will be treated in the bankruptcy process should be carefully considered before a bankruptcy is filed. The attorney should first determine whether the debtor may claim the tax refunds as exempt (for example, under a wildcard exemption). In some jurisdictions in which tax refunds and credits may not be fully exempted, trustees often try to determine if there has been any excessive withholding from the debtor's pay during the tax year in which the bankruptcy is filed and seek to recover the prorated portion of any future refund related to the prepetition period. If the debtor does not need to file bankruptcy immediately, this problem can often be avoided by delaying the filing until after the debtor has received the tax refund and used the funds for ordinary expenses or property that can be exempted in the bankruptcy.

### 4.4 Special Timing Concerns for Tax Dischargeability

Tax debts most often are nondischargeable in bankruptcy cases. However, some tax debts may be discharged in both chapter 7 and 13 cases if the conditions specified in several Code

provisions are satisfied. By following the steps below, an attorney can determine if income tax debts may be discharged (and also whether they must be treated as a priority claim and therefore paid in full in a chapter 13 case).

***Step 1 – Gather the Necessary Information***

To determine if state or federal income taxes owed for a particular tax year may be discharged, a practitioner will need the following information:

- date that the debtor's tax return was due for the year the taxes are owed
- date that the debtor's tax return was filed for that tax year
- date that the tax was assessed by the taxing authority for that tax year

For federal income taxes, this information can be obtained by reviewing an "Account Transcript" prepared by the IRS for the tax year in question.

***Step 2 – Apply the Three-Part Test***

This test should be applied based on the anticipated filing date for the debtor's bankruptcy case. In other words, the relevant time periods are considered by looking back from the bankruptcy filing date. Taxes owed for the particular tax year may be discharged if **ALL** three of the following conditions apply:

- **Three-Year "Due Date" Rule: A return for the tax year in question was last due more than three years before the bankruptcy filing date.** 11 U.S.C. § 507(a)(8)(A)(i). (If the debtor flunks this part of the test, the debt is nondischargeable in a chapter 7 case and is a priority debt in both chapter 7 and 13 cases.)

**Practice Tips.** The three-year period is measured by the last date the return was due. This date is usually April 15 of the year following the year in question, but the due date will be later if the debtor obtained an extension to file the return.

If the due date for a federal return falls on a weekend or holiday, the due date does not change for purposes of the three-year rule even though a return filed the day after a weekend or holiday would be considered timely filed. However, an extension of the due date by the IRS based on a natural disaster or other event may extend the three-year period.

**Example A.** The debtor's tax return for the 2018 taxes was due on April 15, 2019. On April 12, 2019, the debtor requested an automatic six-month extension to file the return, until October 15, 2019. On October 10, 2019, the debtor's return was filed with the IRS. The debtor filed a bankruptcy petition on October 16, 2022. The

2018 income taxes may be dischargeable because the last due date, including the extension, was more than three years before the filing of the bankruptcy petition.

- **Two-Year "Filing Date" Rule: A return for the tax year in question was filed on time, or was late-filed more than two years before the bankruptcy filing date.** 11 U.S.C. § 523(a)(1)(B)(ii) and § 1328(a)(2).

**Practice Tips.** The filing date of a federal tax return for purposes of this rule depends upon whether the return is filed before or after its due date. If a federal tax return is filed after the due date, the return filing date is the date when the taxing authority actually receives the return (and not simply when it was mailed or sent). For federal tax returns filed before the due date, the return filing date is the due date. The applicable return filing date can be obtained by reviewing a tax transcript.

In some cases the IRS will prepare a substitute for return for taxpayers. A substitute for return prepared by the IRS for the debtor will count for the two-year rule if it is prepared with the assistance of the debtor and the debtor signs the return under penalty of perjury. A late return filed by the debtor after the IRS has assessed the tax may prevent the debtor from satisfying the two-year rule. (*See* "hanging paragraph" following section 523(a)(19)).

**Example B.** The debtor requested an automatic six-month extension to file the return for the 2018 tax year, until October 15, 2019. The debtor's tax return for the 2018 taxes was mailed to the IRS on October 15, 2019. The debtor filed a bankruptcy petition on October 16, 2022. The 2018 income taxes may be dischargeable because the debtor's return was filed more than two years before the filing of the bankruptcy petition, and the three-year rule is also satisfied.

If in the above example the debtor had mailed the return on November 3, 2020 and the return was received by the IRS on November 7, 2020, the 2018 income taxes would not be dischargeable because the return was filed less than two years before the petition. To satisfy the two-year rule (and the three-year rule), the debtor's bankruptcy petition may be filed on or after November 8, 2022.

- **240-Day "Assessment" Rule: The tax was assessed more than 240 days before the bankruptcy filing date.** 11 U.S.C. § 507(a)(8)(A)(ii).

**Practice Tips.** Any tax assessed within 240 days before the date of filing is nondischargeable. Certain events may extend this 240-day period. Any time during which an offer in compromise with respect to the tax was pending or in effect, plus 30 days, is not counted towards the 240-day period. Any time during which collection of

the tax was stayed by a prior bankruptcy case or a request for an IRS due-process hearing, plus 90 days, is also not counted towards the 240-day period (and this 90-day tolling period also applies to the three-year rule).

The assessment date is typically noted on the IRS tax transcript. If an amended tax return is filed, a new 240-day period begins for any additional taxes assessed.

**Example C.** The debtor's tax return for the 2018 taxes was mailed to the IRS on October 15, 2019, after receiving a six-month extension to file the return. On December 31, 2019, the debtor filed a chapter 13 petition. The debtor's chapter 13 case was dismissed on March 20, 2022. The debtor then filed a chapter 7 bankruptcy petition on October 15, 2022. The 2018 income taxes would not be dischargeable because the automatic stay in the prior chapter 13 case, plus 90 days, tolled the 240-day period. To satisfy the 240-day rule (and the two-year rule and the three-year rule), the debtor's bankruptcy petition must be filed on or after November 29, 2022.

***Step 3 – Interview Client About Potential Fraud or Willful Evasion***

The final step is to inquire about whether your client has engaged in the following prepetition activities that would render the tax debt nondischargeable even if the three-part test is satisfied:

**Fraudulent Return.** The tax debt is nondischargeable if the debtor filed a fraudulent return for the year in question. 11 U.S.C. § 523(a)(1)(C) and § 1328(a)(2).

**Willful Tax Evasion.** The tax debt is nondischargeable if the debtor willfully attempted to defeat or evade the tax. 11 U.S.C. § 523(a)(1)(C) and § 1328(a)(2).

## 4.5 The Emergency Bankruptcy Filing

In some cases the debtor may to need to file immediately to prevent a foreclosure, repossession, eviction, execution sale, or utility shut-off. Bankruptcy Rule 1007(c) provides for such actions by allowing the debtor to initiate a bankruptcy case by filing only the three-page petition and a few other documents. The remaining forms must be completed and filed within fourteen days (although courts may grant an extension of another fourteen days, upon the debtor's motion). Although the attorney may not be able to gather all the information ordinarily obtained before filing, every effort should be made to conduct the normal client interview and obtain as much information as possible so that the debtor may be advised on whether the filing is in his or her best interest. And as discussed below, the debtor must complete a credit counseling briefing before filing the bankruptcy, or have sufficient grounds to request a temporary deferral or permanent waiver of the requirement.

### 4.6 Exemption Planning

The debtor can, within certain limits, take a number of steps to improve his or her legal position prior to filing bankruptcy. These steps are generally called "exemption planning." Basically, exemption planning means arranging one's affairs so that a maximum amount of property can qualify as exempt, and a minimum amount lost to creditors. In some cases, it may simply involve the timing of when the bankruptcy is filed.

Exemption planning prior to bankruptcy is similar to making arrangements to take maximum advantage of tax laws and, if done reasonably, is perfectly legal. However, an excessive transfer of property to create exempt assets can sometimes be found to be in bad faith. Also, the debtor cannot simply give away non-exempt property or sell it at nominal cost. Any transfer of property within two years before the filing must be disclosed. Transfers of property to third parties where the debtor did not receive reasonably equivalent value in exchange can be recovered by the trustee. Improper transfers made with the intent to hinder, delay, or defraud a creditor or trustee may be grounds for denying a discharge.

## 5. SATISFYING THE COUNSELING REQUIREMENT

Most debtors who have given serious thought to filing bankruptcy have probably already considered other options and concluded that the alternatives to bankruptcy are not feasible. Nevertheless, the debtor must receive a "briefing" from an approved budget and credit counseling agency within 180 days before a bankruptcy case is filed. This eligibility requirement for all individual debtors is found in section 109(h). As soon as the debtor has made a decision to proceed with bankruptcy, he or she should be advised to promptly complete the counseling requirement.

### 5.1 Finding an "Approved" Counseling Agency

The debtor must receive the required briefing from an agency that has been approved by the United States Trustee Program for the jurisdiction where the debtor is filing (debtors located in North Carolina or Alabama must use counseling agencies approved by the local bankruptcy administrator). A regulation sets out the qualifications for approval of counseling agencies at 28 C.F.R. part 58. A list of the approved counseling agencies may be found on the United States Trustee Program's website at www.justice.gov/ust. A list of approved agencies for the jurisdiction may also be found on the websites of most bankruptcy courts, accessible through www.uscourts.gov.

Some pro bono programs make arrangements for debtors to obtain the required briefing before a referral is made to the volunteer attorney. In this situation the volunteer attorney need simply verify that the counseling was completed and obtain a copy of the required certificate from the approved agency.

## 5.2 Filing the Certificate

Section 521(b) requires an individual debtor to file a certificate from an approved credit counseling agency stating that the debtor has received the briefing required by section 109(h). If the agency developed a debt management plan for the debtor, the debt management plan must be filed as well. The certificate and the debt management plan, if any, should be attached to the debtor's statement of compliance with the credit counseling requirement, which is provided on the petition (Official Form 101) filed to start the case. If the debtor has completed the briefing but the certificate of completion from the approved agency has not yet been obtained before the petition is filed, the debtor should indicate this fact on the petition by checking the appropriate box. The certificate will need to be filed within fourteen days after filing the petition.

## 5.3 Costs of the Pre-Filing Briefing

Most approved agencies charge between $10 and $40 for the pre-filing briefing (some agencies charge the same amount for a married couple if both spouses are counseled at the same time). Section 111(c)(2)(B) requires approved agencies to provide bankruptcy counseling and the necessary certificates without considering the consumer's ability to pay. If the debtor cannot afford the fee, he or she may request that the agency provide the briefing free of charge or at a reduced fee. It may be helpful if the agency is informed that the debtor is being represented pro bono.

## 5.4 The Pre-Filing Briefing

Approved agencies are allowed to provide the briefing in person, by telephone, or over the internet. Some agencies are able to provide the briefing immediately in an emergency case. At the counseling session, which usually takes about an hour, the agency will prepare a budget that reviews the debtor's income and expenses. Based on this budget, the agency will review possible options available to the debtor in credit counseling. In the vast majority of cases filed by low and moderate income debtors, agencies typically confirm the debtor's assessment that no other viable options exist for addressing the debtor's financial problems.

## 5.5 Waiver or Deferral of the Briefing Requirement

There are a few limited situations in which the debtor can request a permanent or temporary waiver of the briefing requirement. The request for a waiver or deferral must be in the form of a signed certification, which is part of the bankruptcy petition, and must be accompanied by a written motion. Courts have been very reluctant to grant waivers or deferrals so every effort should be made by the debtor to complete the briefing before filing the bankruptcy petition.

Because waivers and deferrals are not easily approved, it is important to check carefully that the debtor meets the requirements for a waiver or deferral before filing bankruptcy without the debtor having completed the briefing. If the case is dismissed because the waiver or

deferral is denied, the debtor may incur additional costs in refiling. More importantly, the debtor may lose certain protections when the case is refiled, such as the full extent of the automatic stay.

### 5.5.1 Incapacity, Disability, or Active Military Duty

A waiver of the briefing requirement may be requested if the debtor is disabled or incapacitated. However, the law sets out a rather strict standard on what it means to be disabled or incapacitated, based on the definitions of these terms found in section 109(h)(4), so debtors may have difficulty convincing a court to grant a waiver on these grounds. The debtor may also request a waiver if the debtor is on active military duty in a combat zone. If a waiver is sought on one of these grounds (disability, incapacity, or active combat duty), the debtor should check the statement on the petition that describes the basis for the waiver and file a motion for waiver of the requirement with the petition. If the waiver is granted, the debtor will not have to satisfy the briefing requirement at any point during the bankruptcy process.

### 5.5.2 Exigent Circumstances

If the debtor needs to file bankruptcy in an emergency to stop a home foreclosure, auto repossession, wage attachment, or some other "exigent circumstance," a temporary waiver of the counseling requirement may be requested. The court will grant this kind of waiver only if the debtor files with the bankruptcy petition, as set out on the petition, a certification that (1) describes the "exigent circumstances" that support the waiver request and (2) states that the debtor requested counseling services before filing bankruptcy from an approved agency but was unable to receive the services during the seven-day period following the request. 11 U.S.C. § 109(h)(3). The debtor must summarize the exigent circumstances in a space provided on the petition. If the temporary waiver request is approved by the court due to exigent circumstances, the counseling requirement is only postponed. The debtor must still receive counseling from an approved agency within thirty days after the bankruptcy case is filed. The court may, for cause, extend this period by giving the debtor an additional fifteen days.

It is almost never advisable to seek a delay of the briefing under this provision. Usually the briefing can be completed over the telephone or internet within an hour or two. Even in an emergency, debtors may be able to find an agency that will conduct the briefing with little or no advance notice, and some agencies provide extended business hours. Some courts have strictly interpreted the exigent circumstances requirement, so if a deferral is sought there is always a risk that it will not be granted and the case will be dismissed.

## 6. BANKRUPTCY RELATED FEES AND FILING FEE WAIVERS

There are several fees related to the initial filing of a bankruptcy case. For low-income debtors, these fees can be substantial. Thus it is important to discuss all anticipated fees with the

debtor early on so that the debtor can begin saving funds or making other arrangements for payment, or so that the attorney can determine whether applicable fee waivers may be sought.

## 6.1 Cost of Filing Bankruptcy

The following fees relate to the initial filing of a bankruptcy case:

- **Court Filing Fees.** A bankruptcy petition presently requires a $313 filing fee in a chapter 13 case and a $338 filing fee in a chapter 7 case. The Bankruptcy Code and Rules permit the filing fee to be paid in installments or waived entirely for some debtors. Some courts refuse to accept a personal check from the debtor, so the debtor may need to pay the filing fee in cash or money order.

- **Attorney Fees.** There may be costs associated with hiring an attorney to handle the bankruptcy. Fees charged by the attorney should be clearly specified in a retainer agreement with the debtor and all fees paid or agreed to be paid must be disclosed in a statement filed with the bankruptcy court. For purposes of this training guide, however, it is assumed that the debtor is eligible for pro bono services and that no fees will be charged for the attorney's services.

- **Counseling and Education Fees.** The debtor will need to pay approximately $10 to $40 for the prepetition credit counseling briefing (discussed above) and approximately $20 to $50 for the postpetition financial education course (discussed in Module 4). These fees may be waived if the debtor does not have the ability to pay them.

## 6.2 Filing Fee Waivers

Debtors are permitted to seek a waiver of chapter 7 filing fees. 28 U.S.C. § 1930(f)(1). The filing fee cannot be waived in a chapter 13 case but can be paid in installments, as discussed below. The chapter 7 fee waiver provision is implemented by Bankruptcy Rule 1006(c). This rule provides that a voluntary chapter 7 petition shall be accepted for filing if accompanied by a debtor's application requesting a fee waiver, prepared using Official Form 103B. Instruction on how to fill out this form is covered in Module 3.

Filing fee waivers are often granted by the court without a hearing based on the information provided in Official Form 103B. On occasion, usually when the court has questions about some aspect of the waiver application, a hearing will be scheduled. The debtor should be prepared to testify about his or her income, expenses and additional relevant circumstances.

### 6.2.1 Income Eligibility

To be eligible for a chapter 7 filing fee waiver, the debtor's income must be less than 150% of the federal poverty line based on family size. The poverty line figures used are those published

in the Federal Register by the Department of Health and Human Services. The current poverty figures can be found at http://aspe.hhs.gov/poverty, and many bankruptcy courts also provide the current figures on their websites.

In determining income eligibility, the debtor's income for comparison with the poverty figures is the monthly net income reported (or as will be reported) by the debtor on Line 10 of Schedule I (Official Form 106I), less any non-cash governmental assistance, such as food stamps or housing subsidies. A non-filing spouse is counted under family size, and his or her income must be included, unless the spouses are separated. Family size also includes any dependents listed on Schedule J (Official Form 106J). These income guidelines are discussed in: Judicial Conference of the United States Bankruptcy Case Policies, § 820, Chapter 7 Fee Waiver Procedures, available at: http://www.uscourts.gov/rules-policies/judiciary-policies/bankruptcy-case-policies.

### 6.2.2 Inability to Pay in Installments

In addition to the income test, the debtor must be unable to pay the filing fee, even in installments. In determining whether the debtor has the ability to pay the filing fee in installments, the Judicial Conference's Fee Waiver Procedures instruct the court to consider the "totality of the circumstances" based on the information concerning the debtor's expenses and assets stated on Official Form 103B. For many debtors who seek a filing fee waiver, their inability to pay the fee in installments simply results from the dire economic situation they have experienced over an extended period of time. However, if there are unusual circumstances, such as a recent disabling illness or loss of employment, this information should be set forth in Part 1 of Official Form 103B. In addition, if the debtor has assets such as money in a bank account or an expected tax refund, it is important to explain why the debtor needs that money for other necessary expenses like shelter or medical care.

The Judicial Conference's Fee Waiver Procedures do not rule out the possibility that a court could grant a waiver even if the attorney representing the debtor is being paid; although this is a factor the court will consider. Part 4 of Official Form 103B requests that the debtor list all payments that have been made or promised to an attorney or petition preparer.

### 6.2.3 Case Conversion

If a case is converted from chapter 13 to chapter 7, the Judicial Conference's Fee Waiver Procedures provide that the debtor may seek a waiver of any unpaid balance of the filing fee. If the chapter 7 filing fee has been waived and the debtor later converts to a case under chapter 13, the debtor must then pay the chapter 13 filing fee. The order granting conversion should set a reasonable period of time for the debtor to pay the fee in full or in installments.

### 6.3 Payment in Installments

If the debtor is not eligible for a chapter 7 filing fee waiver or has filed a chapter 13 case, the filing fee may be paid in up to four installments over a period of 120 days (or up to 180 days with court permission). Bankruptcy Rule 1006(b) provides that the petition may be accompanied by an application signed by the debtor stating that the debtor is unable to pay the filing fee except in installments. The form for this application is Official Form 103A. Instructions on filling out the form are provided in Module 3. The form also contains a proposed order for payments in installments.

Applications to pay in installments are routinely granted by courts without a hearing. However, the debtor should be strongly advised that the failure to pay the installments will result in issuance of a deficiency notice or an order to show cause from the court and, ultimately, in dismissal of the case. In addition to providing the debtor with a copy of the signed order granting the application, the attorney should send a letter to the client providing clear instructions on how and when the installment payments are to be made, and the consequences of noncompliance.

### 6.4 Court Fees After Petition Filed

While most of the debtor's expenses are incurred when the petition is filed, there are some additional costs that may arise after the bankruptcy is filed. For example, an additional fee will be charged if the debtor amends the schedules to list additional creditors or files a motion to convert a case to chapter 7. The Judicial Conference of the United States sets the amount of these fees, which are listed on the Bankruptcy Court Miscellaneous Fee Schedule, available at: http://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule.

If a filing fee waiver is granted when the debtor initially files a chapter 7 case, the court has specific authority to also waive these additional fees under 28 U.S.C. § 1930(f)(2). In addition the court may, for good cause, waive many of these charges for other debtors and creditors under 28 U.S.C. § 1930(f)(3).

No fees may be charged to the debtor for filing a complaint in an adversary proceeding in the debtor's own bankruptcy case. In addition, the Miscellaneous Fee Schedule provides that no fee may be charged to reopen a closed bankruptcy case if the reopening is necessary: (1) to permit a party to file a complaint to obtain a dischargeability determination under Bankruptcy Rule 4007(b), or (2) for a debtor to seek relief when a creditor is violating the terms of the discharge under section 524. Thus the debtor should not be charged a fee for reopening a case to seek remedies for enforcement of the discharge injunction. However, the Judicial Conference has stated that a fee shall be charged if the purpose in reopening the case is to file the required financial education certificate in order to obtain a discharge.

### 6.5 Trustee Fees

In addition to court fees, the trustee in a chapter 13 case is usually entitled to a commission of up to ten percent of the payments disbursed under the plan. These commissions are typically included in the amount that is paid by the debtor to the trustee under the plan. Information about the actual expenses in your district for administering a chapter 13 plan is available on the United States Trustee Program's website under "Means Testing Information" at www.justice.gov/ust/index.htm. Chapter 7 trustees receive a set amount from the filing fee paid by the debtor. In the rare consumer chapter 7 case in which property of the debtor's estate is liquidated, the trustee is also entitled to compensation under section 326 based on the amount disbursed to creditors.

### 6.6 Utility Deposits

Finally, utility companies may be entitled to collect a security deposit following a bankruptcy (usually equal to approximately twice the average monthly bill). However, the debtor is given a breathing spell after the bankruptcy is filed to make arrangements with the utility. Section 366 provides that at least for the first twenty days after the petition is filed, the utility may not "alter, refuse, or discontinue service or discriminate against" the debtor solely on the basis of an unpaid prepetition debt or the filing of the bankruptcy case. The utility should treat the debtor's account as having a zero balance as of the petition date so as to reflect that the prepetition bill will be discharged. Some courts have held that this provision also requires the utility to restore service that was terminated prepetition. The utility may thereafter terminate service if the debtor does not within the twenty-day period provide "adequate assurance of future payment." It is helpful to become familiar with the local practice in your area because some, but not all, utility companies take advantage of this right by requesting a security deposit, and others may permit adequate assurance in a form other than a cash payment.

## 7. THE ATTORNEY-CLIENT RELATIONSHIP

Several statutory provisions of the Bankruptcy Code and Rules govern attorney conduct in bankruptcy matters. Local rules of court may contain additional requirements. Bankruptcy Rule 9011 sets forth the requirements for signing papers and making representations to the bankruptcy court. Like its counterpart, Rule 11 of the Federal Rules of Civil Procedure, this rule permits courts to sanction attorneys who file unwarranted or frivolous pleadings, or who file pleadings for an improper purpose. The 2005 Code amendments added some additional certification requirements for attorneys representing debtors in chapter 7 cases. However, as discussed below, these new statutory provisions do not add much to attorneys' obligations beyond the requirements of Rule 9011.

The most significant difference in the regulation of attorneys in bankruptcy courts, as compared to other courts, is the extent to which attorney fees are supervised. Even attorneys

representing debtors on a pro bono basis will need to comply with the fee disclosure requirements of the Code and Rules, though they are easily satisfied.

## 7.1 Attorney Certifications

### 7.1.1 Petition, Pleading, or Written Motion

Section 707(b)(4)(C) provides that the signature of an attorney on a petition, pleading, or written motion is a certification that the attorney has:

- Performed a reasonable investigation into the circumstances giving rise to the petition, pleading, or written motion;
- Determined that it is well grounded in fact;
- Determined that it is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and
- Determined that it does not constitute an "abuse" under paragraph (707)(b)(1).

### 7.1.2 Schedules

Section 707(b)(4)(D) provides that the signature of an attorney for the debtor on the petition certifies that the attorney has "no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." To the extent that the schedules filed in a bankruptcy case are subject to Bankruptcy Rule 9011(b), this provision does not appear to impose a more stringent standard than under Rule 9011. Certainly an attorney who signs and files a petition having actual knowledge that the information in the schedules is incorrect would violate the standard set out in Bankruptcy Rule 9011(b). This provision does clarify, at least in chapter 7 cases, that the information in filed schedules is subject to an attorney certification.

While the extent of the "inquiry" required by this provision is not entirely clear, an "inquiry" under section 707(b)(4)(D) should not be much different than a "reasonable inquiry" under Bankruptcy Rule 9011. This similarity should mean that unless an attorney has reason to disbelieve the client based on the attorney's knowledge and experience, information provided by the client may be relied upon without an extensive, independent investigation, such as the personal inspection of the debtor's home. On the other hand, steps that are easily performed at a minimal cost and likely to provide helpful information, such as obtaining credit reports or conducting PACER searches, should be taken. This general view concerning the section 707(b)(4) certifications is set out in a report prepared by the American College of Bankruptcy, entitled *Best Practices for Consumer Bankruptcy Cases*, and is available at: http://americancollegeofbankruptcy.com/publications/.

## 7.2 "Debt Relief Agency" Provisions

The 2005 Code amendments added several provisions regulating the activities of "debt relief agencies." A "debt relief agency" is defined as any person who provides bankruptcy assistance to an assisted person in return for compensation or who is a bankruptcy petition preparer as

defined in section 110. 11 U.S.C. § 101(12A). The United States Supreme Court in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), held that attorneys are within the debt relief agency definition, but that the debt relief agency provisions apply to attorneys only when they offer bankruptcy-related services to consumer debtors. As discussed below, pro bono attorneys who provide representation free of charge are not "debt relief agencies."

### 7.2.1 Restrictions on Debt Relief Agencies

Several provisions in section 526 restrict practices that generally had been considered improper even prior to the 2005 amendments. For example, subsections 526(a)(1) and (2) prohibit debt relief agencies from failing to perform services as promised, from making or advising a client to make untrue or misleading statements, or advising clients to make statements that an agency should know are misleading. Section 526(a)(3) also prohibits debt relief agencies from misrepresenting the services to be provided to an assisted person or the benefits and risks of bankruptcy.

Section 526(a)(4) prohibits an attorney who is a debt relief agency from advising an assisted person to incur ***more*** debt in contemplation of filing a bankruptcy case or in order to pay bankruptcy fees to an attorney or petition preparer. Because there are legitimate reasons why an attorney may advise an assisted person to incur more debt, several courts had found this provision to be an unconstitutional infringement upon an attorney's First Amendment right to provide lawful and proper advice to clients. To avoid the constitutional issue, however, the Supreme Court in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010), narrowly construed this provision to prohibit a debt relief agency from advising an assisted person to incur more debt only "when the impelling reason for the advice is the anticipation of bankruptcy." The Supreme Court specifically found that "advice to refinance a mortgage or purchase a reliable car prior to filing because doing so will reduce the debtor's interest rates or improve his ability to repay is not prohibited, as the promise of enhanced financial prospects, rather than the anticipated filing, is the impelling cause. Advice to incur additional debt to buy groceries, pay medical bills, or make other purchases 'reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor,' [*citation omitted*] is similarly permissible." *Id*., 130 S. Ct. at 1339 n.6.

### 7.2.2 Debt Relief Agency Disclosures and Other Requirements

Section 527 requires that debt relief agencies provide various disclosures to all assisted persons being provided bankruptcy assistance. A debt relief agency must execute a written contract with an assisted person within five days after the date the agency first provides bankruptcy assistance to the assisted person, and prior to filing a petition. 11 U.S.C. § 528(a)(1). The written contract must explain, clearly and conspicuously, the services that will be provided and the fees, charges, and terms of payment. Finally, section 528(b)(2) requires that certain information be disclosed on advertisements by a debt relief agency, including the statement: "*We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code*," or a substantially similar statement. In response to the concern that consumers might be confused about whether an advertisement that includes the statement "We are a debt relief

agency" is for attorney services, the Supreme Court in *Milavetz* held that attorneys may add language identifying themselves as law firms or attorneys to avoid being confused with non-attorney petition preparers.

### 7.3 Applicability of Debt Relief Agency Provisions to Pro Bono Attorneys

A "debt relief agency" is defined as any person who provides bankruptcy assistance to an assisted person "in return for the payment of money or other valuable consideration." 11 U.S.C. § 101(12A). Thus pro bono attorneys who provide representation free of charge are not "debt relief agencies." Some commentators initially suggested when BAPCPA was enacted that pro bono attorneys might be covered by the definition based on the view that the good will, community recognition, or professional credits gained in providing pro bono bankruptcy assistance could be deemed "other valuable consideration." This position has been rejected by several courts and is contrary to the official position of the United States Trustee Program (see Answers to Frequently Asked Questions concerning Debt Relief Agencies at: http://www.justice.gov/ust/eo/bapcpa/trustees_faqs.htm#dra_issue1).

It may be argued, based on the present-tense language found in section 110(12A), that a person is a debt relief agency only in those cases in which it is providing bankruptcy assistance to an assisted person for compensation. This interpretation would excuse an attorney who is a debt relief agency due to paid representation in other cases from complying with the debt relief agency provisions in pro bono cases. Although the Supreme Court's decision in Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) did not specifically address this issue, the Court's narrow reading of the statutory language supports the view that the provisions do not apply to an attorney who is providing bankruptcy-related services to a consumer debtor without compensation, even if that attorney is a debt relief agency in other cases.

### 7.4 Attorney Compensation

Attorney compensation in bankruptcy proceedings is generally subject to more rigorous court supervision than in many other areas of legal practice. The debtor's attorney must file in every case a disclosure of fees paid or agreed to be paid. 11 U.S.C. § 329; Bankruptcy Rule 2016(b). The disclosure is made on Director Form 2030, which must be filed within 14 days after the case is filed. If an attorney is providing representation on a pro bono basis, the form, discussed in Module 3, should still be completed and filed. Attorneys representing pro bono clients may simply enter "$0.00" on the lines of the form that request disclosure of compensation.

In general, the disclosures provided on the form permit the court to monitor fees and make sure they are reasonable. Section 329(b) authorizes a bankruptcy court to cancel any fee agreement if the compensation exceeds the reasonable value of the services provided, and to order the return of any excessive payments to the debtor. Section 504(a) prohibits the debtor's attorney from sharing or agreeing to share with another person any compensation received from the debtor. However, section 504(b) permits the sharing of compensation with a member, partner, or regular associate in a professional association, corporation, or partnership,

and section 504(c) permits sharing, or agreeing to share, compensation with qualified public service attorney referral programs.

### 7.5 Local Ethics Issues

As in other areas of legal practice, attorneys should become familiar with any local bankruptcy court opinions, rules, or standing orders that address attorney ethics issues. For example, some courts have local rules or model form agreements that describe the rights and responsibilities of debtors and their attorneys in chapter 13 cases.

Another area that raises ethical concerns in bankruptcy practice is the unbundling of legal services, often referred to as limited assistance representation. Under this approach, an attorney represents the client with respect to specific aspects of the case, but excludes representation as to others, such as a contested adversary proceeding involving the dischargeability of a debt. Even where attorneys are generally required to provide full representation, some courts have adopted a more flexible approach to limited representation by pro bono attorneys. Where such limited assistance representation is permitted, the attorney must have a detailed retainer agreement with the client that specifies the portions of the case the attorney will and will not handle. Because bankruptcy courts and even individual judges have different opinions on the extent to which an attorney may limit his or her representation of a debtor in a particular case, it is important that attorneys become familiar with any local court opinions or rules on this issue.

### 7.6 Managing Client Expectations

Representation of consumer debtors in bankruptcy cases can be extremely gratifying for both client and attorney. Rarely in legal matters, especially those involving litigation, can a client obtain significant relief in such a short period of time. Often in less than six months and without a significant time commitment, the attorney can help clients overcome serious financial problems with permanent protection from creditor actions and a chance for a fresh start. Few things are more satisfying than saving a senior's home she may have lived in most of her life or stopping the garnishment of a young parent's wages so desperately needed to support the family. Unlike some areas of the law in which successful outcomes may not be so readily achieved or understood by the client, pro bono consumer bankruptcy clients are often most thankful for their fresh start and appreciative of the attorney's assistance.

The flip side of these positive aspects of pro bono representation is that a bankruptcy is not likely to solve all of an eligible client's legal problems. The pro bono client may assume that the attorney is available to assist with a divorce or some other legal problem. Setting clear boundaries with the client as to the scope of the representation, as confirmed in a retainer agreement, will help to avoid unreasonable expectations by the client.

## Appendix A

**Fact Gathering Document Checklist**

- ☐ Credit Reports
- ☐ PACER Report
- ☐ Bank Statements (past three months)
- ☐ Retirement and Investment Account Statements
- ☐ Payment Advices (past sixty days, plus past six months if available)
- ☐ Government Assistance Award Letters
- ☐ Tax Returns or Transcripts (past two years)
- ☐ Divorce Judgment/Support Order
- ☐ Proof of Debtor's Identity and Social Security Number
- ☐ Periodic Billing Statements and Collection Letters
- ☐ Motor Vehicle Information
  - ☐ Title Certificate
  - ☐ Loan Agreement or Lease
  - ☐ Default/ Repossession/ Deficiency Notices
  - ☐ Proof of Insurance
  - ☐ Valuation
    - Amount: _____
    - Source: _____
- ☐ Residential Lease
  - ☐ Rental Agreement
  - ☐ Eviction Notices
  - ☐ Judgment for Possession
    - No: _____
    - Yes: _____
- ☐ Real Property
  - ☐ Deed
  - ☐ Mortgage Documents
  - ☐ Escrow Account Statements
  - ☐ Property Tax Bill
  - ☐ Foreclosure Notices
  - ☐ Lien Search
  - ☐ Proof of Insurance
  - ☐ Valuation
    - Amount: _____
    - Source: _____

**Appendix B**

# MEANS TEST FLOWCHART