Consumer Practice Extravaganza

Bankruptcy Ethics & Malpractice

Laura L. Donaldson
Law Office of Laura L. Donaldson, LLC | Gladstone, Ore.

Matthew T. Girardi
Robin Weiner, Standing Chapter 13 Trustee | Fort Lauderdale, Fla.

Hon. Peter C. McKittrick
U.S. Bankruptcy Court (D. Ore.) | Portland

Randy Nussbaum
Sacks Tierney P.A. | Scottsdale, Ariz.

2023

BANKRUPTCY ETHICS & MALPRACTICE

AMERICAN BANKRUPTCY INSTITUTE
Consumer Practice Extravaganza
November 1, 2023

PANELISTS

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US Bankruptcy Court, District of Oregon

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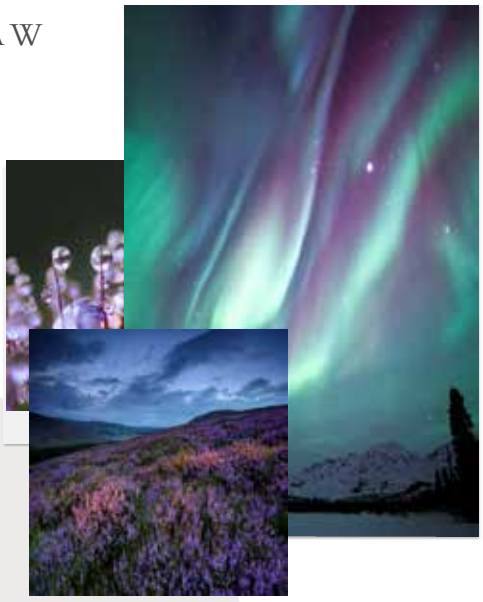
INTRODUCTION

Practicing Consumer Bankruptcy Law can be precarious and deceptively complicated. Potential Minefields are to be found in every aspect of this area of the law. Even a cautious practitioner needs to be wary of the multitude of ways that a lawyer can commit one of the following Seven Deadly Sins of Consumer Bankruptcy Law.

SEVEN DEADLY SINS OF CONSUMER BANKRUPTCY LAW

- ✓ ***Failure to stay abreast of the national law.*** 11 U.S.C. § 329; Bankruptcy Rule 2016; ABA Model Rules of Professional Conduct ("Model Rules") 1.1.; 1.3.
- ✓ ***Not knowing the Bankruptcy Code and Rules.*** Model Rule 1.1.
- ✓ ***Disregarding your ethical obligations.*** Model Rule 1.7; 1.9; 7.1.
- ✓ ***Not following local rulings and procedures.***
- ✓ ***Not communicating consistently and clearly with your clients.*** Model Rule 1.4
- ✓ ***Stepping over the line in one's representation.*** Model Rule 2.1; 7.1; 7.3.
- ✓ ***Not always remembering what is in your client's best interests***. Model Rule 1.5; 3.2.



CHAPTER 7 CASES

- Failure to wait the two-year statutory period to utilize local exemptions.
- Failure to remember your client must have "acquired" their residence more than three and one-half years prior to filing to utilize the full local homestead exemption.
- Do not forget about the rest of the Sec. 522 alphabet!
- Has the client made any property transfers in the avoidable transfer period?
- Has the client made any large/extraordinary payments on the mortgage secured against their residence in the 10-year period before filing?
- Has the client been convicted of a felony?

CHAPTER 7 CASES (CONT.)

- Failure to understand preference law.
- Not understanding the ramifications of the *Bartenwerfer* decision.
- Failure to seek abandonment of an asset which is appreciating.
- Allowing your client to incur a non-dischargeable tax debt before bankruptcy
- Not understanding Chapter 7 eligibility.
- Filing a bankruptcy case before a tax becomes dischargeable.
- Not considering other forms of bankruptcy.
- Understand pre-bankruptcy planning and property of the estate and exemptions.

CHAPTER 7 CASES (CONT.)

- Dischargeability exposure.
- Documenting and disclosing your fee arrangement.
- Understanding a creditor's right for stay relief.
- Right of a creditor to continue State Court litigation under appropriate circumstances.
- A client does not understand his/her disclosure responsibilities.
- Be familiar with the Judges' practices and the Trustees' biases and approaches.
- Not understanding how distributions are made in asset cases.
- Not recognizing the interplay between bankruptcy and other areas of the law, such as domestic relations, construction, real estate, and criminal.
- Ignoring conflicts of interest.

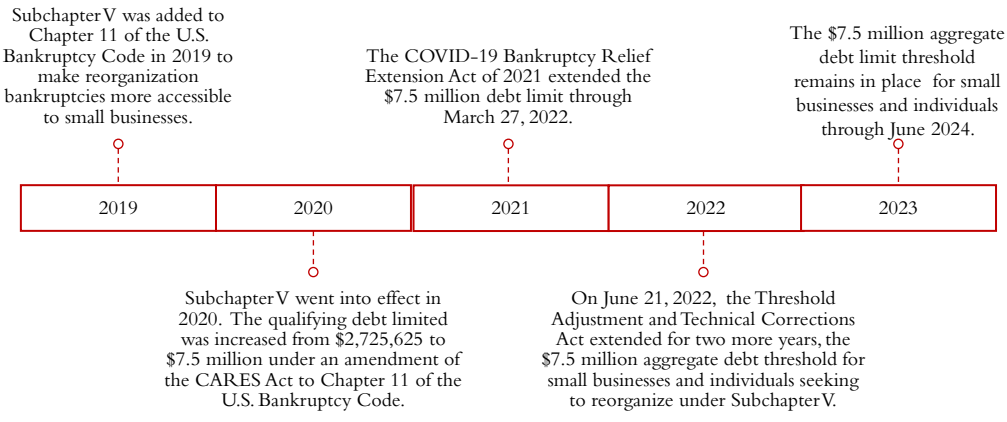
CHAPTER 13 CASES

- Executory contracts.
- Dismissal motions.
- Plan prepayments.
- Disposable income.
- Chapter 13 debt limit.
- Bankruptcy estate appreciation.
- Bad faith.
- Dismissal after conversion from Chapter 7
- Pre-filing expenses.
- Preferences and fraudulent transfers.
- Unmet obligations and case dismissal.
- Non-filing spouse's income.
- How marijuana affects a debtor's case.

CHAPTER 11 CASES

- Subchapter V eligibility.
- Subchapter V deadlines.
- Subchapter V cost effective.
- Chapter 11 plan payments will not be adjusted.
- Certain debts are not dischargeable in Chapter 11.
- No absolute priority rule Subchapter V.
- You may not be able to use disposable income to fund defense of non-dischargeability litigation.
- Know how marijuana affects a debtor's case.

HISTORY- SUBCHAPTER V DEBT LIMIT



CREDITORS' CONCERNS IN CHAPTER 7

- If allowed to do so, always file a Proof of Claim unless you don't want to be under the jurisdiction of the Bankruptcy Court.
- Understand your right to have matters proceed in courts besides Bankruptcy Court.
- Be fully aware of the strict rules regarding the need to timely file a Complaint under 11 U.S.C. §§ 523 or 727.
- In certain instances, take advantage of the chance to question the debtor at a 341.
- Recognize what forms of pre-bankruptcy planning may be tolerated versus which may not.
- Understand the parameters of when a debtor is or is not eligible for a Chapter 7.

CREDITORS' CONCERNS IN CHAPTER 13

- The above Chapter 7 concerns apply in most situations.
- Understand what may constitute a bad faith filing in your jurisdiction.
- Understand the deadlines of when you have to object to a Chapter 13 Plan.
- Scrutinize the debtor's calculation of disposable income.
- Know whether the Debtor has an absolute right to dismiss a case or not, and know how and when to use 11 U.S.C. § 349 to obtain non-dischargeability of debts in which a debtor has an absolute right to dismiss the Chapter 13.

CREDITORS' CONCERNS IN CHAPTER 11

- Understand Subchapter V eligibility. § 1182(1)(A).
- Don't forget to calendar the deadline to object to/move to strike the Subchapter V election if such election is prejudicial to your client. FRBP 1020(b).
- Be aware of a debtor's obligations under Chapter 11 and Subchapter V.
- Recognize when moving for a dismissal or conversion may be advantageous.
- Understand your client's potential dividend entitlement before deciding how to proceed.

LIMITING REPRESENTATION, CLIENT CONFIDENTIALITY, AND DUTY OF CANDOR UNDER THE ABA MODEL RULES OF PROFESSIONAL CONDUCT

LIMITING REPRESENTATION

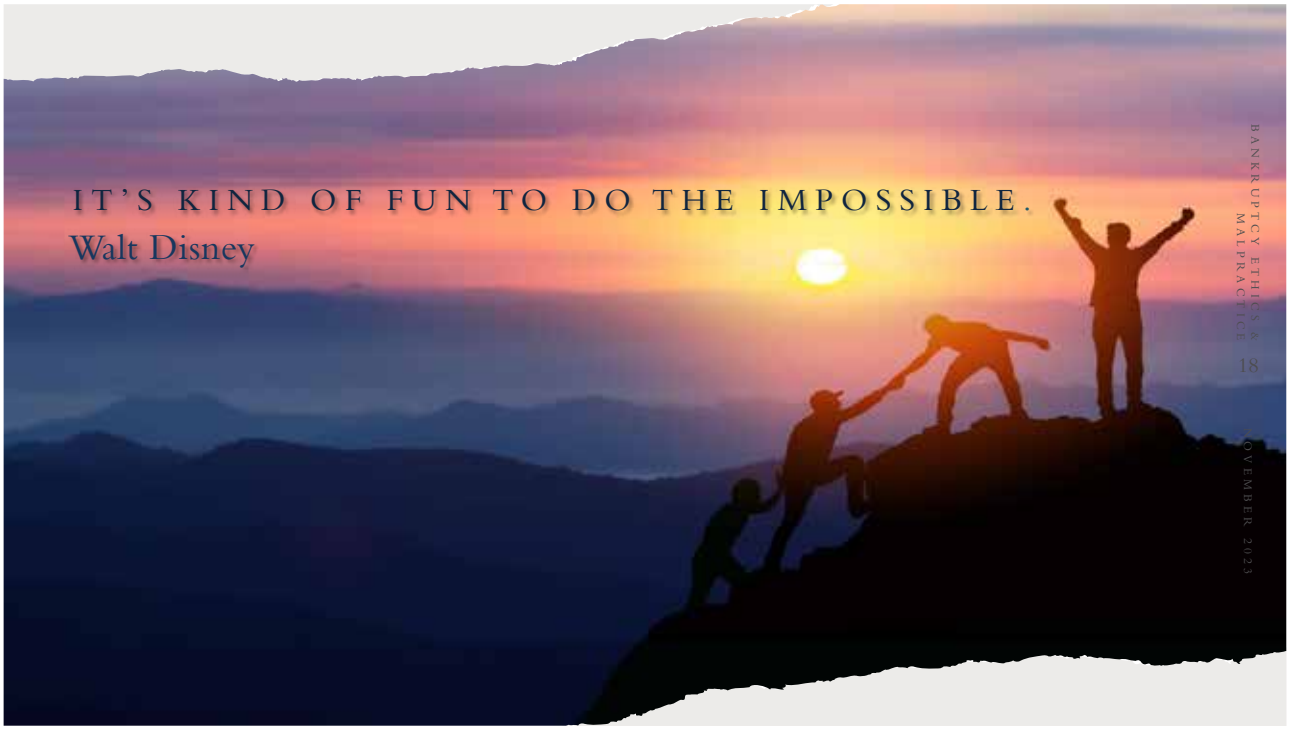
- Model Rule 1.2(c) "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."
- Courts recognize that an attorney may limit representation as long as the limitation is reasonable, meaning that the limitation cannot exclude core or critical services. Hale v. U.S. Trustee, 509 F.3d 1139 (9th Cir. 2007).
- Check the local rules as they may have additional requirements or guidance for limiting representation.

DUTY OF CONFIDENTIALITY & DUTY OF CANDOR

- 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)."
- Model Rule 3.3 Candor Toward the Tribunal
- Rule 3.3(c) provides that the duty of candor applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6."

REVEALING CONFIDENTIAL INFORMATION & WITHDRAWING FROM REPRESENTATION

- Rule 1.6(b) Exceptions to the Duty of Confidentiality
- Rule 1.16(a) Mandatory Withdrawal from Representation
- Rule 1.16(b) Permissive Withdrawal from Representation



THANK YOU

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Topic:

BANKRUPTCY ETHICS & MALPRACTICE

Panelists:

Hon. Peter C. McKittrick
US Bankruptcy Court, District of Oregon
Peter_McKittrick@orb.uscourts.gov

Laura L. Donaldson
Law Office of Laura L. Donaldson
Laura@kunidonaldson.com

Matthew T. Girardi
Robin Weiner Ch 13 Standing Trustee
Matt@ch13weiner.com

Randy Nussbaum
Sacks Tierney P.A.
Randy.Nussbaum@SacksTierney.com

BANKRUPTCY ETHICS & MALPRACTICE

INTRODUCTION

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1) Failure to stay abreast of the national law. ABA Model Rules of Professional Conduct ("Model Rules") 1.1.
2) Not knowing the Bankruptcy Code and Rules. Model Rule 1.1.
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6) Stepping over the line in one's representation. Model Rule 2.1
7) Not always remembering what is in your client's best interests.

CHAPTER 7 CASES

Debtors' Attorneys

1. Failure to wait the two-year statutory period to utilize local exemptions. In other cases, if you don't want to be bound by the local exemptions, waiting two years could be devastating to your client. 11 U.S.C § 522(b)(3)(A).

2. Failure to remember that your client needs to have "acquired" their residence more than three and a half years prior to the filing of the case to utilize the full local homestead exemption. Even if a client has resided in the same state for which they plan to file, but they acquired their residence within the 1215 days prior to filing their case, § 522(p)'s federal cap is triggered. Further, confirm title history for client's home to be sure no transfers of title affect the 1215 rule. *See Kane v. Zions Bancorporation* (N.D. Cal. 2022) in which the district court held that the debtor's homestead exemption was limited by the 522(p) cap because the debtor transferred his residence into his name (i.e., "acquired" title), from his single member LLC, just before days before filing his Chapter 7 bankruptcy. Also, assuming your jurisdiction allows for doubling of the 522(p) cap, it is important to have both spouses file if they need the increase in the cap to exempt equity in a residence. Additionally, it is imperative to be sure title to the client's residence is held

by the client. Compare *Schaefers v. Blizzard Energy, Inc. (In re Schaefers)*, 623 B.R. 777 (B.A.P. 9th Cir. 2020) which disallowed debtor's homestead exemption in debtor's residence held in an LLC versus *In re Nolan*, 618 B.R. 860 (Bankr. C.D. Cal. 2020) (*affirmed* by the Ninth Circuit) in which the bankruptcy court allowed the debtor's automatic homestead exemption in a beneficial interest in a trust that held title to the debtor's residence. Please note that the only published opinion directly on point in Arizona is *In re McNabb,* and that case found that the federal cap does not apply. In other instances, if you're in a jurisdiction with a relatively low homestead which does not allow the stacking of homestead exemptions, relinquishing the ability to utilize the federal statute, which may allow stacking, could be detrimental to your client.

3. Do not forget about the rest of the § 522 alphabet! With the increase in the homestead exemption in multiple states after the global pandemic (CA, CO, WA, NM, and HI to name a few) litigation over the homestead exemption is on the rise in many states. Look under the hood:

a. Has the client made any transfers of property to anyone in the avoidable transfer period? § 522(g) balancing such case law as *In re Wudrick*, 451 F.2d 988, 989 (9th Cir. 1971) (Watch out for increased litigation over transfers made between spouses prior to filing and the use of non-exempt funds to pay down mortgages before filing);

b. Has the client made any large/extraordinary payments on the mortgage secured against their residence in the 10-year period before filing? § 522(o); and

c. Has your client been convicted of a felony? § 522(q)(A).

4. Failure to understand preference law in instances in which you don't want the payment recovered either because the payment was made to a friend, family member, or a third party who you want to see paid. Along the same lines, in a situation in which the client needs the recovery of the preference because that recovery could be used to pay priority and non-dischargeable claims, such as taxes, waiting too long can be extremely disadvantageous to your client. 11 U.S.C. § 547.

5. Not understanding the ramifications of the *Bartenwerfer* decision. No one knows how far the Bankruptcy Courts will go in "enforcing" *Bartenwerfer*, but if your client is trying to claim, "innocent spouse," it's even more crucial to create a proper paper trail

because of the obstacles standing in the way of that defense. If the alleged bad acts of a spouse ("bad actor") may haunt an "innocent spouse" think about proceeding with a "Beauty and the Beast" filing. In other words, in some situations, it may be best to put the innocent spouse into a bankruptcy on their own, of course, listing all of the marital debts. Assuming none of the creditors, with claims against the bad actor, object to the innocent spouse's discharge in accordance with FRBP 4004, the non-filing spouse will receive the benefit of the "community discharge" pursuant to § 524(a)(3).

6. Failure to seek abandonment of an asset which is appreciating in value. While the Tenth Circuit provides that post-petition appreciation does not enter the chapter 7 estate upon conversion from chapter 13, Ninth Circuit case law provides that appreciation inures to the benefit of the bankruptcy estate and when real estate prices are rising, it's very crucial to obtain an abandonment order. Evidently, California has recently enacted a statute so that the appreciation does not inure to the benefit of the estate, but it's the only State I'm aware of which has done so, at least in the Ninth Circuit. Compare *In re Castleman,* (9th Cir. 2023) and *In re Barrera*, 22 F.4th 1217 (10th Cir. 2022).

7. Allowing your client to incur a non-dischargeable tax debt before bankruptcy. The discharge of debt in bankruptcy is not a taxable event, whereas debt forgiveness prior to bankruptcy triggers a non-dischargeable obligation. A debtor may have a defense to potential debt forgiveness liability, but it's better to avoid the potential exposure if possible. *Example:* Foreclosure of a rental property, pre-petition, with a capital gain associated with the "sale"/foreclosure that creates a possible taxable event.

8. Not understanding Chapter 7 eligibility. You need to carefully consider whether your client's debt is primarily non-consumer and the impact of the six-month lookback period in determining whether your client can proceed in Chapter 7. Generally, no one wants to mess with this issue, including the U.S. Trustee's Office, the Chapter 7 Trustee, or the Judge. Make it easier for them by considering all the factors that come into play in determining Chapter 7 eligibility. Also, remember that non-consumer debt does not always have to be traditional "business debt." See *In re Cherrett*, 873 F.3d 1060 (9th Cir. 2017) and *Centennial Bank v. Kane*, 616 F.Supp.3d 990 (N.D. Cal. 2022).

9. Filing a bankruptcy case before a tax becomes dischargeable. § 523(a)(1) and § 507. In many instances, waiting an additional day will be enough to convert any tax obligation from a non-dischargeable to a dischargeable one. If you will be representing clients with extensive tax debt, you need to understand the law in regard to discharging

taxes and make sure you have accurate information from the taxing authorities as to when the taxes may have been assessed, incurred, or liened. Also, filing a case where a client has an IRS lien that a bankruptcy trustee may use to sell the client's residence without paying the homestead exemption. *See* 11 U.S.C. § 724.

10. Not considering other forms of bankruptcy. Certain clients are simply not appropriate Chapter 7 candidates. At the same time, that client may actually be much better off in either Chapter 13 or even Chapter 11, especially if Subchapter V is available.

11. Understand pre-bankruptcy planning and property of the estate and exemptions. Many attorneys confuse the role of the lawyers in this consideration. A lawyer should never *advise* a client to engage in pre-bankruptcy planning. Instead, a lawyer should explain to the client the option and let the client decide on his/her own.

The following is the boilerplate I provide all clients regarding these topics, which has to be continuously updated.

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PROPERTY OF THE ESTATE AND EXEMPTIONS

When you file for bankruptcy, all property that you have an interest in becomes property of your bankruptcy estate. This includes both tangible and intangible property and your interest in corporations, LLC s, partnerships, or any business entity. Property of your estate is an all-encompassing concept and includes rights of action, personal and real property, claims and money owed to you as of the time of bankruptcy filing though not payable at that time, such as a tax refund. Any inheritance that you become entitled to within 180 days after your bankruptcy filing also becomes property of your bankruptcy estate.

Under Bankruptcy and Arizona law, you are allowed to exempt certain of your property. Exemptions exist so that debtors do not become wards of the state because of bankruptcy. The exemptions in Arizona are relatively liberal and include $400,000 worth of equity in your house (unless you have owned the house for less than 40 months, in which case your exemption cap may be just under $190,000) and most household goods and possessions. You may also claim as exempt property $15,000 equity per car in two different

cars (if filing a joint petition), although only $5,000 per spouse can be claimed in a single bank or credit union deposit account. You must include checks that have not cleared in calculating that balance. You must also anticipate that such accounts may be frozen by the financial institution upon its notification of your bankruptcy filing, and you must be prepared to terminate any automatic payments and deposits or provide a new account created after your bankruptcy filing to accommodate those transactions. The greater of Ninety Percent (90%) or Sixty (60) times the minimum wage of any wages owed at the time of your bankruptcy filing are exempt. If an asset contains equity beyond the exemption amount, then your Trustee can seize and liquidate it and distribute the proceeds to your creditors.

Though monies invested in a qualified retirement plan are normally exempt, any contributions you may make to that plan within 120 days of bankruptcy are not.

Additionally, assets that are held in a living trust may not be exempt except for your homestead.

Changes made in 2005 in the bankruptcy law impact on certain of these exemptions. However, as a general rule, the Arizona exemptions will still be allowed as long as you have resided in Arizona for at least two years prior to filing for bankruptcy protection.

State law also provides that you can protect six months' worth of "food, fuel and provisions," which historically has allowed a Chapter 7 debtor to purchase six months' worth of groceries and pre-pay necessary utilities for six months prior to filing for bankruptcy. What is uncertain at this juncture is the definition of what constitutes fuel since the statute was written many years ago at a time in which fuel probably consisted of firewood, heating oil, and the like, but Trustees have normally permitted the prepaying of electricity, gas, and water with little objection. It is not clear as to whether telephone and cell phone service and cable are included; since the amounts involved are normally not that great, it is not commonly challenged. But in 2010 one Judge ruled against a debtor on this issue. On the other hand, you cannot claim this

exemption by purchasing a gift card from a grocery store or pre-pay on a gas credit card because doing so does not actually constitute the purchase of fuel and provisions, but rather the right to buy such provisions or the like in the future.

VALUING YOUR ASSETS IN A BANKRUPTCY CASE

We are relying upon the information you have provided us concerning the value of your assets and the current balances and enforceability of any liens or claims secured by those assets. As already explained to you, the personal property valuation should be based upon its liquidation or "garage sale" value, whereas real estate should be valued at what a ready, willing, and able buyer would pay under normal market conditions.

Nevertheless, if you have any concern or questions about the value of any asset you are listing of substantial worth, we strongly recommend that either you or we retain an expert to value that asset. We strongly recommend this because if you overvalue your asset and this results in equity in excess of your exemption or the current lien balance, your bankruptcy Trustee will have an absolute right to seize and liquidate that asset for the benefit of your creditors.

Similarly, if you are unsure or cannot provide us with confirmation of the lien balances and evidence of perfection of those liens (vehicle titles, recording information, etc.), we will need to investigate those matters as well. As just explained above, if a miscalculation of the enforceability or balance of a lien creates vulnerable equity for your Trustee, that asset may be lost.

Additional costs will be incurred if we need to help you in this regard, but it is money well spent if you can avoid potentially unexpected and unpleasant consequences.

PRE-BANKRUPTCY PLANNING

Pre-bankruptcy planning is the converting of non-exempt assets into exempt assets. This practice is not illegal or improper; Bankruptcy Code

legislative notes specifically permit this type of activity. This is not to say that this procedure is without risk.

In July of 1996, In re Elia, 198 B.R. 588 (Bankr. D. Ariz. 1996) became the first Arizona published opinion on pre-bankruptcy planning. The judge found nothing inappropriate with buying a house right before bankruptcy and other similar strategies. However, that case is persuasive but not binding on the other judges. In other courts throughout the country, this issue has been addressed and in certain instances pre-bankruptcy planning was vilified by the bankruptcy judges. Though no single test has been universally accepted by the courts in determining whether to tolerate pre-bankruptcy planning, a number of criteria continuously surface in case after case:

1. What is the amount of the transfer to exempt property?

2. What is the proximity to the bankruptcy filing?

3. Did the conversion to exempt property involve newly acquired funds or previously secured property?

4. Did the conversion benefit insiders of the debtor?

5. Did the debtor mislead creditors during the conversion?

Other courts have considered additional circumstances in determining whether the pre-bankruptcy planning is reproachable, but the best way to summarize whether pre-bankruptcy planning will succeed is to consider the old maxim, "pigs get fat, and hogs get slaughtered."

Your attorney would also be incurring some risk if the planning progresses to a stage where it could be interpreted as a fraud upon creditors. Though normally the bankruptcy courts do not sanction the attorneys for the planning, but rather punish the debtors, in past non-bankruptcy settings, the Arizona courts have penalized attorneys for overly zealous asset protection tactics.

Debtors whose pre-bankruptcy planning has been successfully challenged face a number and variety of repercussions. Oftentimes, the courts order that transfers be set aside and/or reversed. For example, if a debtor has utilized cash to increase his homestead by $50,000 in advance of bankruptcy,

an intolerant court can either require that the debtor find the means to replace the $50,000, or, in extreme circumstances, compel the debtor to sell the exempt property and remit $50,000 to the estate. In certain instances, reversing what has occurred is simple while at other times generates a new set of problems for the debtor.

In some situations, courts have found the pre-bankruptcy planning to be so egregious as to justify the denial of a discharge. Though this result is rare, being deprived of a discharge defeats the entire reason behind bankruptcy and is disastrous for the debtor. This risk is now even more pertinent because of the following change in the law.

One of the changes in the bankruptcy law which went into effect on April 20, 2005, specifically provides that the Court has the power to reduce a state law homestead exemption by any transfers of nonexempt property made to increase that exemption for an extended period of time (10 years) prior to bankruptcy filing if such transfers were done in fraud of creditors. Though this has always been the law, this change now incorporates the case law into the Bankruptcy Code itself although courts have been inconsistent in their enforcement of it. Unfortunately for you, it may increase the chances that your pre-bankruptcy planning could be successfully challenged, though you may still need to engage in the planning, nevertheless.

The BAPCPA was specifically designed to discourage debtors from engaging in pre-bankruptcy planning and in particular to stop the practice of Chapter 7 debtors paying down their mortgages in advance of bankruptcy. Some experts have even gone as far as to recommend that pre-bankruptcy planning be limited.

You need to consider your list of what is exempt and if you so desire, you can prepay provisions for six months, pay down the mortgage of your house, or use some of the excess money to pay additional legal fees on account. Please note that any planning you initiate needs to be totally completed before you file or it will not work. Furthermore, and even more importantly, it needs to be fully disclosed in your filings with the Court.

Finally, in certain situations you can fund an ERISA retirement plan for up to $100,000/year prior to a filing but you would need to confer with an expert in that area to confirm your eligibility for such a contribution.

***

12. Alerting a client about dischargeability exposure. Your client needs to understand potential exposure for excessive credit card use, child support, spousal maintenance and property settlement obligations, criminal obligations, certain disfavored conduct, and taxes. You need to recognize the issue and alert the client of their potential exposure and the cost involved. To this day, it amazes me how often lawyers know when they're filing a bankruptcy case that the client will be facing non-dischargeability exposure, but the lawyer is not careful in identifying it for the client, outlining what may occur, and the potential cost involved in defending.

13. Documenting and disclosing your fee arrangement. Lawyers have become more innovative and even imaginative in offering fee arrangements for clients because of the competitive nature of Chapter 7 work. Some lawyers may accept a $1,000 or $2,000 retainer for a case which will obviously cost far more and involve issues that the lawyer either does not want to, or simply cannot, handle . In certain instances, this can place the client in a very vulnerable position in not being able to defend himself/herself, especially if properly warned, the client may have been engaged in more planning for that purpose. The case law is not totally clear as to the ongoing disclosure requirement in a Chapter 7 since certain judges have certain predilections, but as a general rule, payments received post-filing should also be disclosed or a motion to excuse the duty should be filed. *See* FRBP 2016(b) which mandates that a "supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed." Any amounts received prior to the filing absolutely have to be disclosed. Related is the concern that an astute lawyer cannot be paid a "war chest" in anticipation of complications in the case. *In re Boates* outlines the need for a lawyer to balance potential future work involved, the size of the retainer, and inevitable effort by the bankruptcy Trustee to recover the retainer. *In re Boates* (*Ulrich v. Schian Walker, PLC*), 551 B.R. 428 (B.A.P. 9th Cir.), *reh'g denied*, 554 B.R. 472 (B.A.P. 9th Cir. 2016)

Similarly, full disclosure of the source of payment is a given - An attorney cannot be paid in a Chapter 11 or 13 without court approval, and an attorney needs to recognize that payment from a non-debtor in a reorganization does not negate the need for compliance with the Bankruptcy Code's mandates.

14. Understanding a creditor's right for stay relief. Advising a client that a Chapter 7 bankruptcy will stay a foreclosure upon that client's house is proper and good advice, whereas failing to alert the client as to what to expect going forward is inexcusable.

15. Right of a creditor to continue State Court litigation under appropriate circumstances. In certain instances, a debtor's attorney must warn a client that in certain instances, especially if the Bankruptcy Court doesn't have jurisdiction, the matter may proceed in State Court. If the client doesn't have the money to defend the case, which is why the client filed for bankruptcy, and the client's fees are not being paid by a third party, the client could be worse off than if the client never filed for bankruptcy.

16. A client does not understand his/her disclosure responsibilities. For example, Randy's initial overview letter outlines in great detail the client's obligation to disclose. He also confirms that the client understands amendment rights so that the client doesn't believe an initial failure to disclose is necessarily fatal. This becomes especially important in situations in which the client has an interest in a non-liquidated claim, such as a potential personal injury recovery, particularly where the client hasn't even brought a claim as of the time of the bankruptcy filing.

17. Be familiar with the Judges' practices and the Trustees' biases and approaches. Many lawyers have figured out ways to increase their chances of drawing certain Trustees, but as a general proposition, you simply need to be aware of what you may be facing once a Trustee and a Judge are assigned the case. The goal of Trustees and Judges is to do their jobs and dispense justice in a consistent and balanced manner, but that is not the reality of what actually occurs in the real world.

18. Not understanding how distributions are made in asset cases. If your client's main creditor is a non-dischargeable and priority debt, you may not be as concerned about your client having to compensate the Trustee in consideration of a non-exempt asset. It's also very important to remember that in most instances, legal fees are not recoverable in a bankruptcy case even if your client is proven to be 100% correct. Always take this into account in determining whether you settle or fight.

19. Not recognizing the interplay between bankruptcy and other areas of the law, such as domestic relations, construction, real estate, and criminal. In certain instances, divorcing spouses can benefit if working together while filing for bankruptcy. For example, in some instances, only having one spouse file for bankruptcy prior to divorce can be advantageous to both, whereas in other situations, waiting until the divorce is

entered, can be beneficial to both the spouses. Not considering this kind of issue in certain instances can be absolutely horrendous in cases in which careful planning could have been extremely beneficial to both spouses.

20. Ignoring conflicts of interest. The Bankruptcy Code is very sensitive as to conflicts of interest, which is why it incorporates a disinterested standard. See 11 U.S.C. § 327. However, this issue can arise in a number of contexts, including representation of a husband and wife in circumstances in which their interests may not be perfectly aligned, representing a Chapter 11 business debtor and its principals in cases in which they may have engaged in preferential, fraudulent, or self-dealing transactions with each other, and the unusual case in which attorneys representing adverse parties have an ongoing personal relationship.

CHAPTER 13 CASES

1. You have to assume an executory contact in a Chapter 13 like in any bankruptcy case. Failure to do so in a timely manner results in an automatic rejection of the lease in almost all situations.

2. You need to move for the automatic dismissal of a 13 under the right statute. Failure to do so will leave discretion with the Court to deny the Motion.

3. The debtor cannot prepay Chapter 13 plan payments unless all listed creditors are paid in full.

4. Your client's payment obligation will be adjusted if more disposable income arises during the course of the case.

5. Debtors need to understand that certain debts are dischargeable in Chapter 13 that are not dischargeable in other forms of bankruptcy, such as property settlements and certain claims under 11 U.S.C. § 523.

6. The client needs to understand how to calculate the current 2.75-million-dollar debt limit. It does not include contingent or non-liquidated debt, but does include disputed debt.

7. The client needs to understand that whether appreciation inures to the bankruptcy estate is not clear. This becomes an issue if the case is converted.

8. In certain instances, a Chapter 13 filing can be found to be in bad faith. A debtor needs to be aware what constitutes indicia of bad faith.

9. You don't have the absolute right to dismiss a Chapter 13 after it was converted from Chapter 7.

10. Certain pre-filing expenses may not be allowed in Chapter 13 which would then increase disposable income.

11. A Chapter 13 does not shield potential recipients of preferences and fraudulent transfers from the debtor.

12. You need to keep certain obligations current, such as taxes or support post-filing or the case will be dismissed.

13. A spouse's income is normally included in calculating disposable income even if that spouse does not file for bankruptcy.

14. Know how "marijuana" affects a debtor's case. Compare *Burton v. Maney (In re Burton)*, 610 B.R. 633 (B.A.P. 9th Cir. 2020) and a more recently decided case *In re Hacienda Co.*, 647 B.R. 748 (Bankr. C.D. Cal. 2023).

CHAPTER 11 CASES

1. You need to be fully educated on the law of Subchapter V eligibility because of the benefits of that Subchapter. Pay careful attention to § 1182(1)(B) if your client's business entity filed a case prior to your individual client filing a Subchapter V because the business's debt may preclude the individual from being a debtor.

2. If your client proceeds under Subchapter V, you need to fully appreciate the tight deadlines and procedures and practices.

3. Filing? Subchapter Vs can be cost effective whereas normal Chapter 11s may not be.

4. In almost all Chapter 11 cases, Plan payments will not be adjusted once a Plan is confirmed.

5. Certain debts are not dischargeable in Chapter 11 that are dischargeable in a Chapter 13, such as property settlements and certain claims under 11 U.S.C. § 523.

6. In a Subchapter V, you do not have to deal with the absolute priority rule and you need to contribute new value.

7. You may not be able to use disposable income to fund the defense of non-dischargeability litigation.

8. Know how "marijuana" affects a debtor's case and ways to deal with it. Compare *In re Hacienda Co.*, 647 B.R. 748 (Bankr. C.D. Cal. 2023) to *In re Burton* above.

CREDITORS' CONCERNS IN CHAPTER 7

1. If allowed to do so, always file a Proof of Claim unless you don't want to be under the jurisdiction of the Bankruptcy Court.

2. Understand your right to have matters proceed in courts besides Bankruptcy Court.

3. Be fully aware of the strict rules regarding the need to timely file a Complaint under 11 U.S.C. §§ 523 or 727.

4. In certain instances, take advantage of the chance to question the debtor at a 341.

5. Recognize what forms of pre-bankruptcy planning may be tolerated versus which may not.

6. Understand the parameters of when a debtor is or is not eligible for a Chapter 7.

CREDITORS' CONCERNS IN CHAPTER 13

1. The above Chapter 7 concerns apply in most situations.

2. Understand what may constitute a bad faith filing in your jurisdiction.

3. Understand the deadlines of when you have to object to a Chapter 13 Plan.

4. Scrutinize the debtor's calculation of disposable income.

5. Know whether the Debtor has an absolute right to dismiss a case or not, and know how and when to use 11 U.S.C. § 349 in order to obtain non-dischargeability of debts in which a debtor has an absolute right to dismiss the Chapter 13.

CREDITORS' CONCERNS IN CHAPTER 11

1. Understand Subchapter V eligibility. § 1182(1)(A).

2. Don't forget to calendar the deadline to object to/move to strike the Subchapter V election if such election is prejudicial to your client. FRBP 1020(b).

3. Be aware of a debtor's obligations under Chapter 11 and Subchapter V.

4. Recognize when moving for a dismissal or conversion may be advantageous.

5. Understand your client's potential dividend entitlement before deciding how to proceed.

LIMITING REPRESENTATION, CLIENT CONFIDENTIALITY, AND DUTY OF CANDOR UNDER THE ABA MODEL RULES OF PROFESIONAL CONDUCT

1. Limiting Representation

    a. The Model Rules of Professional Conduct allow an attorney to limit the scope of representation. Specifically, Model Rule 1.2(c) states: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Informed consent occurs when a client agrees to a "proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Model Rule 1.0(e).

    b. The comments for this Rule further address limiting the scope of representation. For example, Model Rule 1.2(c), Comment 7 states:

> Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically

> uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

c. Courts recognize that an attorney may limit representation as long as the limitation is reasonable, meaning that the limitation cannot exclude core or critical services. Hale v. U.S. Trustee, 509 F.3d 1139 (9th Cir. 2007) (affirming determination that an attorney could not exclude critical and necessary services); In re Seare, 515 B.R. 599 (9th Cir. BAP 2014) (affirming determination that an attorney could not exclude adversary proceeding when the proceeding was "near certainty"); and In re Hodges, 342 B.R. 616 (Bankr. E.D. Wash. 2006) (criticizing exclusion of services that the attorney could "reasonably and commonly expect").

d. TIP: Get informed consent in writing. Although Model Rule 1.2(c) does not generally require an attorney to obtain informed consent in writing or to consult with independent legal counsel about the limited representation, a written engagement letter may minimize some of the risks of limiting representation by also describing the specific scope of representation, how the fee is to be computed, how the tasks are to be limited, what the client is to do, and by recommending that the potential client consult independent counsel about the proposed representation. See Hodges, 342 B.R. at 620 (explaining that an oral agreement creates a problem of proof); In re Seare, 493 B.R. 158, 203 (Bankr. D. Nev. 2013) (recommending a written agreement to avoid a "he said, she said" dilemma). The engagement letter should use simple language in describing the scope of representation and explaining the risks and alternatives.

e. Check the local rules as they may have additional requirements or guidance for limiting representation. See, e.g., U.S. Bankruptcy Court for the District of Oregon LBR 9010-1(e) (2022) (requiring, among other things, that the attorney clearly discloses additional duties the debtor may be required to perform without the attorney's assistance and the associated risks).

2. Duty of Confidentiality and Duty of Candor

a. Counsel owes a duty of confidentiality to their client and a duty of candor toward the tribunal. Under the Model Rules, the duty toward the tribunal trumps the duty of client confidentiality. However, in some jurisdictions the duty of confidentiality trumps the duty of candor toward the tribunal. See, e.g., Oregon Rule of Professional Conduct 3.3(c).

b.

c. Model Rule 1.6 discusses confidentiality of information. Model Rule 1.6(a) prohibits revealing "information relating to the representation of a client" unless the client has given informed consent, the disclosure is impliedly authorized, or certain exceptions, set out in Model Rule 1.6(b), apply.

d. Model Rule 3.3 concerns duty of candor toward the tribunal. If a client has offered material evidence and the attorney comes to know of its falsity, the attorney "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(c) states that this duty applies even if compliance requires disclosure of information otherwise protected by Rule 1.6.

3. Revealing Confidential Information and Withdrawing from Representation

a. Model Rule 1.6(b) outlines circumstances in which an attorney may reveal confidential information. Model Rule 1.6(b)(3) permits disclosure 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." Disclosure under Model Rule 1.6(b) is permissive but not mandatory.

b. Whether it is advisable for you to reveal the information is another issue. On the one hand, the integrity of the bankruptcy system and the interests of creditors may suggest disclosure. On the other hand, confidentiality is the core value of the legal profession. If clients fear that their lawyers will reveal information in circumstances such as these, they will be reluctant to be forthcoming in discussing their legal matters and lawyers may lack the information necessary to successfully pursue the client's goals.

c. Model Rule 1.16 governs permissive and mandatory declining or terminating representation. For example, an attorney may motion to withdraw from representation if "the client persists in a course of action involving the lawyer's services that the lawyer reasonable believes is criminal or fraudulent." Model Rule 1.16(b)(2). Alternatively, an attorney must withdraw from representation if, for example, "the representation will result in violation of the rules of professional conduct or other law." Model Rule 1.16(a)(1).

Faculty

Laura L. Donaldson is a chapter 7 and 13 consumer and small business bankruptcy attorney with Law Office of Laura L. Donaldson, LLC in Gladstone, Ore., where she has been practicing since 2002 in the District of Oregon and Western District of Washington. Her practice focuses primarily on assisting debtors with their insolvency issues, restructuring and litigation. Ms. Donaldson focuses on asset and risk analysis, debt negotiation and settlement, dispute resolution, tax analysis, foreclosure defense, trials and consumer rights. She received her J.D. from Lewis and Clark College.

Matthew T. Girardi is a senior staff attorney for Robin Wiener, Chapter 13 Trustee, in Fort Lauderdale, Fla. He has been licensed to practice bankruptcy law for 13 years. Mr. Girardi received his J.D. from Florida State University College of Law.

Hon. Peter C. McKittrick is a U.S. Bankruptcy Judge for the District of Oregon in Portland, appointed in 2015. Before his appointment, he was a partner in the law firm of McKittrick Leonard, LLP. Judge McKittrick served as a panel chapter 7 trustee from 2005-15 and was appointed as a chapter 11 trustee and receiver in many cases. Prior to starting McKittrick Leonard, he practiced law with Farleigh Wada Witt PC for 27 years. His law practice emphasized the representation of trustees and other fiduciaries, chapter 11 debtors and committees, and small business workouts. Judge McKittrick received his B.S. from Lewis and Clark College in 1981 and his J.D. *cum laude* from Willamette University College of Law in 1985.

Randy Nussbaum is an attorney with Sacks Tierney P.A. in Scottsdale, Ariz., and has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction and litigation matters for more than 40 years. He has represented secured and unsecured creditors, surety companies, creditors' committees, lessors, professional athletes, doctors, lawyers, and trustees in chapter 5, 7, 11 and 13 proceedings, including adversary actions (bankruptcy litigation). The cases have involved such diverse matters as real estate, construction, manufacturing, trucking, asset-based lending, bankruptcy related to divorce, and high-value and complex individual bankruptcies. Mr. Nussbaum is a Certified Bankruptcy Specialist by the Arizona Board of Legal Specialization and is Board Certified in Business Bankruptcy Law by the American Board of Certification. He has been named to the *Super Lawyers* "Top 50" list of Arizona attorneys multiple times and has been listed in *The Best Lawyers in America* annually since 2010; he was selected as its "Lawyer of the Year" (Scottsdale) for Bankruptcy and Creditor Debtor Rights in 2019 and for Bankruptcy Litigation in 2021. Mr. Nussbaum is a 1990 graduate of Scottsdale Leadership and has volunteered for the organization for nearly 30 years, serves on its advisory board, and is a recipient of the prestigious Frank W. Hodges Alumni Achievement Award. He also served as a Sterling Awards Jurist for the Scottsdale Chamber of Commerce and received the Chamber's Volunteer of the Year Award for 2017. In 2018, he was inducted into the Scottsdale History Hall of Fame. Mr. Nussbaum received his B.A. *cum laude* and in 1977 his J.D. in 1980 from Arizona State University, graduating in the top 25 percent of his class.