



AMERICAN
BANKRUPTCY
INSTITUTE

2019 Central States Bankruptcy Workshop

Skills Track

Effective Client Interviews, Deposition Strategies, Techniques and More

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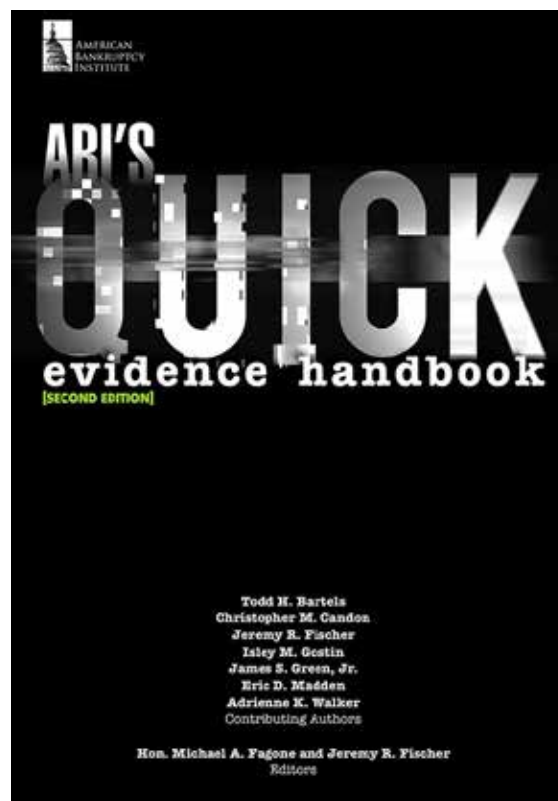
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Using a set of facts, the panel will provide practical advice on the following:

1. Initial Client Interview through preparation of the Petition, Schedules and Statement of Financial Affairs for a corporate debtor and an affiliate.
2. Preparation for the 341 Meeting of Creditors and questioning by a creditor at that examination.
3. How to choose between a Deposition and a Section 2004 Examination of a corporate representative for the Debtor.
4. How to approach preparing for and taking or sitting for either the deposition or the 2004 exam.

The idea is to approach this as a mock case getting quickly to the heart of issues that regularly come up. The issues can be avoided through proper counseling and preparation of the Debtor for the filing, 341 meeting and 2004 exam, and can also be exploited by a creditor to reach the creditor's particular goals. The same may be true of the United States Trustee depending upon the goals and degree of involvement in particular districts. This will be interactive for the people in the room, encouraging the others to jump in with questions, follow up or suggestions as we go.

Session attendees are encouraged to view an ABI webinar on this subject, which can be accessed at <https://cle.abi.org/product/no-cle-abi-live-presenting-evidence-bankruptcy-court-tips-and-best-practices>. Also, be sure to visit store.abi.org to order your copy of *ABI's Quick Evidence Handbook, Second Edition* (log in first to obtain ABI member pricing).



Factual Scenario

Part I

A potential client contacts the office seeking information related to chapter 11 bankruptcy. The contact requests a meeting for the Manager / CEO of the company, and the company is one whose name you recognize. You have heard through the grapevine that the company was having serious financial trouble. The caller indicates that a foreclosure is scheduled to take place within a month, so you schedule a meeting the following morning.

At the meeting, the CEO provides a high level overview of the business, its capital structure, operations and debt. She also explains that there is a foreclosure scheduled as a result of a maturity default on a loan of approximately \$50 million. She spends a significant amount of time describing the amount of money that went into building the large commercial development, which was supposed to be an absolute cash cow for the company, but experienced what amounted to unheard of (industry wide) losses during two consecutive months, depleting cash reserves to the point that continuing operations without a significant cash infusion would not be permitted by regulatory bodies.

The CEO proceeds to complain about the refusal of the mortgagee to appreciate the value of its collateral, which she asserts is nearly \$150 million, based upon construction costs, the costs of trade fixtures and personal property. She further conveys her anger that certain tax incentives were not forthcoming from the government, and that despite an aggressive search for new capital, the prospects were looking dim. She does believe, however, that a new lender would see the value in the hard assets and understand the profit margins of her industry. That new lender, though not yet identified, would quickly provide take out capital for the mortgagee and infuse working capital allowing for continued operations.

You ask about junior secured debt, trade creditors, executory contracts, and she informs you that there was no junior secured debt, some trade creditors but nothing that would be a real problem, and only a handful of equipment leases. There is a union contract in place, but she has no interest in upsetting that contract.

You hand the CEO a standard intake sheet, and ask that she take it to an appropriate person to have it completed and scanned back to you, and then begin to request financials, the operating agreement, information related to corporate governance, but before you can get through any more of your thoughts, the CEO tells you that she has another meeting, and hands you a business card for her CFO, who “has been instructed to provide whatever you need.” The CEO quickly shakes your hand and leaves without your intake sheet or the generic document request form attached to it, on which you had been making notes regarding which additional items you would need.

You gather your thoughts and complete your revisions to the document request, then call the CFO and get his voicemail. You introduce yourself and let him know that you’ve sent him a form to complete, and a request for documents. While he does not return your call, he does send you a link to retrieve the relevant documents. You also determine the date of the foreclosure sale. After a brief review of the financials, you email your engagement letter to the CEO and CFO along with your wiring instructions and receive a wire the next morning.

Factual Scenario

Part II

You have diligently worked for over a week on nothing but this new case, of which you are quite proud and about which you are quite excited. Based upon the documents that the CFO provided, you have pieced together the Schedules and SOFA, as well as the other relevant documents. There are a few things that don't quite add up, but this is bankruptcy, so you chalk this up to failings of the debtor that led to the need to file. The CEO is coming in to review and sign the pleadings, so you go over your list of financial issues that do not make sense to you, and those that are not as tidy as you would prefer. You then go over your approach to the appointment and put together an agenda for the meeting.

Much like before, the CEO arrives and is clearly in a hurry. She is talking on the phone, on speaker, while responding to an email when you walk into the meeting. She looks up at you, finishes the email, presses mute on the phone and says, "hand me the papers I have to sign and let me have a quick look. I have a meeting in 30 minutes across town with someone who might be able to sell my business, they've just flown in from New York and we have reservations at [expensive steak house] for lunch / dinner and drinks." She completes her call, asks where to sign, and inquires, "this will stop the foreclosure, right? I seriously think that I just need a month or two to get a buyer; by the way, we are closing down the portion of our business that lost money unexpectedly for a short period of time in order to get our feet under us."

You explain (or try to) that she is signing under oath subject to penalty of perjury, to the accuracy of the information on the documents in front of her. She responds, "you got the information you wanted from the CFO, right? I trust his numbers, and you're the lawyer my friend sent me to, so I'm sure we're good. This will stop the sale?" You indicate that based on what you were given, which did not include a completed intake form, it should stop the sale, and try to get her to look at your agenda, but she interrupts to remind you of her meeting and inform you that the meeting is important for you too, since the sale will pay you your "huge fee" for the rest of the case. And she takes a phone call then gets up and leaves having signed where required, but clearly not having looked closely at the documents.

You email her and the CFO the signed documents and ask them to review the documents again, so you can file them late in the day. You remind both of them that accuracy is necessary to be certain to accomplish the company's goals. She responds, likely from the restaurant after a couple of quick manhattans, that CFO will take care of it. The CFO responds immediately after the CEO that the information he gave you was accurate.

You file the case at 5:45 pm, a couple of days before the scheduled foreclosure sale, email the notice to the mortgagee, lean back in your chair with a glass of scotch, then run to dinner with your spouse who you've been neglecting to share the news about the huge case that you just filed. You expect to be on the news that evening or at least the next morning, and this case will bring in business for the next year if you can make it work. Your client issues a press release that is contrite about the financial problems, but stating that it has filed bankruptcy to stop the unnecessary foreclosure and protect its investors, employees, and the impact it is having on the community and economy. It is not proud of the losses it suffered, but is confident that the bankruptcy filing, as advised by its astute legal counsel, is the best and only path forward. It is

Factual Scenario

suspending some operations and looking for an investor to purchase a significant share of the business, or for a new lender to replace the unnecessarily aggressive lender that has been pursuing foreclosure.

But, you arrive home that night around 11 pm after a wonderful and relaxing dinner during which your phone was turned off, and you have a bunch of messages, but watch the local news before listening or reading them. Some messages are from different news outlets asking for comment, but five are from your associate frantically looking for you, and one is from the lawyer handling the foreclosure on your client's real estate. There are also a bunch of emails, one being a reply from the mortgagee's associate attorney that says: "I think you sent me the wrong notice. I will check PACER a minute also, because you have clearly left the office, but while the debtor listed on this notice is a borrower under the note, it is not the owner of the land or the mortgagor. I assume this was a small mistake and we'll get it cleared up with a quick search. No need to respond until tomorrow presuming that both entities have filed."

Five minutes after the mortgagee's associate attorney's email, you receive another email from the partner on the file for the mortgagee, which says "Jim, we've known each other for a long time, so I thought I'd email you about this personally, and I'll call you on your cell too. My associate searched, like he said he would, but the owner of the land has not filed, and the debtor you filed is not the mortgagee, and in fact has no recorded interest in the land. Normally, I'd probably give you a short window to figure out what is going on, but honestly, my client has bent over backward to give your client a chance. We've even done two forbearance agreements, but this was supposed to be a six-month bridge loan and we're now into the third year. My hands are tied, so we plan to proceed with the sale the day after tomorrow."

The next morning you call a groggy CEO to inform her of the issue. Her response is, "Fix it! Do not let the property go into foreclosure!" Then she hangs up the phone.

Factual Scenario

Part III

At 7:30 am, your associate downloads the mortgage and deed information, which was in the file because the client had provided unrecorded copies. It turns out that the deed and mortgage were not the same as the recorded copies, so you send your associate and a junior partner to the client's office, where they obtain copies of the executed promissory note. This is the first you learn of the related company that owns the real estate, took the loan and granted the mortgage. The CFO informs your colleagues that the note and mortgage are the only debt owed by that entity, and that the entity leases the improved real estate and licenses all intellectual property to the debtor. You inform your colleagues to find out who owns this entity and who manages it. The CFO says that he does not quite understand how all of it works, but 110 mostly Chinese investors own all Class B membership interests in the company, and the Class A membership interest is split between the CEO, another prominent businessman in the area, and something called a Regional Center. The Regional Center is the manager, and is managed by the CEO of Debtor. 95% of the financial interest in the company is owned by the Class B membership group, and 5% is owned by the Class A group.

The lease and licensing agreement provides that Debtor only needs to pay rent and licensing fees if Debtor is profitable. Otherwise all rent and licensing fees convert to a loan with no collateral and no recourse to anyone other than Debtor. All decisions except those statutorily requiring a vote of all members, shall be made by the manager.

You contact the CEO to determine whether a conflict of interest exists, and whether the CEO, as manager of the Regional Center, which is the manager of the real estate owning entity, would like to file it in bankruptcy. The CEO tells you to just get it done, she'll sign what she needs to. You draft the petition, and file it without the schedules, statement of affairs or any other related documents.

Factual Scenario

Part IV

You appear with the CEO at the section 341(a) meeting of creditors. Once she is sworn, the UST's trial attorney begins by asking about the information contained in the schedules, SOFA and related documents (all of which were prepared, signed and filed). The CEO says, "my attorney prepared them based upon the information provided by my CFO. I trusted that each was capable and asked the right questions so that the documents could be completed. So, since I was trying to get money to save my company, I signed what they told me I had to in order to stop the foreclosure." When asked if she reviewed the documents, she informed the UST attorney that she did not think it was needed because that "is what I pay people for."

When asked about the contracts between the two debtors, the CEO said she didn't think it was a problem that the creditors were different, that the terms were terrible for the real estate entity, or that the estates may have a different interest or purpose, because the investors didn't really need a return and she was in charge of both companies.

Multiple creditors sought 2004 examinations, and one elected to take an ordinary deposition. You file fee applications in both estates, and defend your position that conflicts of interest do not exist presently, and did not exist upon filing.

Client Intake

RISK MANAGEMENT HANDOUTS OF LAWYERS MUTUAL

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DISCLAIMER: This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.

updated December 2009

INTRODUCTION

Many malpractice claims result from attorney-client relationships that began sour and grew steadily worse. That's why it is important to start off on the right foot with new clients.

One risk management solution: make sure the client's first impression of you and your firm is positive. The ensuing relationship will blossom.

FIRST IMPRESSIONS

THANKS FOR COMING

New clients should be warmly welcomed. Thank them for choosing you, and tell them you appreciate their business. Give them a professional introduction to your firm. Escort them through the office. Introduce your staff, especially those who will be assisting on the case. Explain your procedures for handling appointments and telephone calls.

In the initial interview, open your ears before your mouth. A good technique is to ask clients to tell their story in their own words. Listen closely without taking notes. Parrot key phrases back to the client to show you're paying attention.

Clients may be tense, anxious and rambling. Be patient. Don't belittle their concerns, even if unfounded. "Listening is not the simple ability to decode information," says Kevin J. Murphy in *Effective Listening*. "It is a two-way exchange. One must compel others to do the same. Be sensitive to subtle signs of dissatisfaction. Early detection and prevention of client disenchantment might prevent a serious blowup down the road."

INTERVIEW FORM

After the client has finished with the story, you can take it once more from the top, this time taking notes and probing with questions. Here, a client interview form is critical.

Develop an interview form that suits your practice needs. Be sure it covers all necessary information, including pending deadlines and conflicts of interest data. However, as you fill in the blanks on the form, don't lose sight of the person sitting on the other side of the desk.

"Lawyers collect facts about their clients instead of information about people," writes Milton Zwicker in the September 1994 *Law Practice Management*. Firms focus their systems on files and not people. It is more important to know what kind of client has a legal problem than what kind of legal problem the client has.

NEW CLIENT QUESTIONNAIRE

It's a good idea to develop a simple questionnaire that prospective clients can complete while they are waiting to see you.

Have your secretary bring you the form after it is completed. At a glance, you will know who the prospective client is and what the case is about. When the client comes into your office, you can greet him or her by name and jump right into the interview.

The questionnaire also protects you. It provides documentation in the client's own hand of what the client thinks the problem is and what relief the client seeks.

EFFECTIVE INTERVIEWING

Think about the best experience you have ever had being interviewed. Try to recall what made the experience positive. Most likely there were comfortable surroundings and an interviewer that seemed interested in you and what you had to say. It is unlikely you were made to feel intimidated or uncomfortable.

When you are interviewing a prospective client, remember that most people are unfamiliar with the legal system and will be uneasy at best, frightened at worst. It is important to establish a good rapport early in the process. When making the initial contact, be sure to advise the client of who you are and your purpose.

Begin the interview with small talk if it makes the situation more comfortable, but do not make the client feel you are wasting their time.

There should be no distractions like office phones ringing. Sit side by side or across from each other without invading each other's body space and without establishing barriers like desks.

Don't let note-taking become a distraction. Maintain good eye contact. Do not attempt to take down every word said. Instead, look for pertinent and relevant information. This is where your knowledge of the case is helpful.

TYPES OF QUESTIONS

- *Open* -- Allows interviewer to talk, more information is given; more time-consuming; interviewer has minimum control. Example: "Why don't you tell me everything you remember about the accident?"
- *Closed* -- Requires a yes/no answer; interviewer is in control; answers are not as reliable; shows inconsistencies. Example: "Did you see the car run the red light?"
- *Double-barreled* -- Requires more than one response; causes interviewee to lose train of thought. Avoid, because it tends to leave both of you confused. Example: Did you see the other car run the red light and how fast was it going?

- *Bi-polar* -- Effect is similar to closed; gives interviewee two options; usually at end of interview after problem has been identified. Example: Do you agree or disagree that you were speeding?
- *Leading* -- Invites interviewee to answer one way or another; requires careful use; might use with children; best used for cross-examination of adverse party. Example: You did not see the car in the intersection as you approached, did you?

Use techniques such as nonverbal and verbally supportive communication, active and passive listening, and body language. They influence the gathering of information. The interviewer should not adopt a hostile or confrontational stance. Nodding during the interview indicates your acceptance of the client's story. Verbal expressions of empathy can assist in bonding between you and the client.

BARRIERS TO EFFECTIVE LISTENING

- *Talking* -- You cannot effectively listen if you are mentally preparing what you are going to say.
- *Mentally arguing* -- You cannot effectively listen if you are mentally forming your argument. Also, you need to be objective in listening.
- *Preoccupation* -- Keep your mind on the subject at hand.
- *Impatience* -- Do not become frustrated by the speaker's slow speech or inability to make a point.
- *Poor environment* -- Do not become distracted by noise, people, or temperature. Take care of these distractions before the interview begins.
- *Inattentiveness* -- Effective listening requires all your attention. You must try to absorb what the speaker says.
- *Mental or physical fatigue* -- Be "up" for the interview.
- *Failure to understand body language* -- Is the client sending a message with facial expressions or body language that is different from what is being said with words?

TIPS FOR INTERVIEWING CLIENTS

Establishing a good rapport with the client early in the relationship can help you avoid problems later on. Additionally, a close working relationship and open lines of communication make case preparation go more smoothly and efficiently. Clients who feel comfortable with you are more likely to provide you with the information you need to better represent them. The appendix to this manuscript includes forms, checklists, and other materials related to attorney-client interaction. Following are some key considerations for the initial interview:

- Be on time for appointments.
- Personally greet clients in the reception area.
- Strive to put your clients at ease. Many people are unfamiliar with and intimidated by the legal system. Clients are most likely coming to see you because of some stressful event in their lives, so go out of your way to make their experience as pleasant as possible (offer them a beverage, consider interviewing them in a sitting area rather than from behind your desk, etc.).
- Avoid interruptions while meeting with a client (hold all calls, restrict others from coming in and out of

your office, etc.). Regardless of how large or small the case, each client's problem is important to them. They deserve your undivided attention.

- Hear the client's full story before jumping in with questions.
- Be direct. Do not overcomplicate things. Avoid the use of legal jargon. Instead, discuss the problem in layman's terms. Think practical advice and real solutions.
- Do not overwhelm clients with information. Give them a manageable range of options.
- Understand the client's objectives and clearly define the scope of your representation. This gives the client realistic expectations and focuses your advice.
- Be realistic about what you can accomplish.
- Make sure the client understands the billing system.
- Explain the time and cost legal matters can entail. Urge clients to carefully consider how this might impact their lives.
- Follow up the initial interview with a letter of engagement, nonengagement, or disengagement.

KEEP IN TOUCH WITH CLIENTS

- Return phone calls promptly (preferably within half a day).
- Communicate regularly and provide periodic status reports. Sending "case update" letters is a good way to do this. Point out new cases, developments, and trends. Provide mission statements and, if applicable, send the client newsletters and brochures. Use illustrations and graphics to make the issues easier to understand.
- Keep the client informed. Send the client a copy of all correspondence, memoranda, pleadings, briefs, and other meaningful documents.
- Schedule individual meetings as needed.
- Do not delay the delivery of bad news. Breaking the news sooner rather than later can help defuse the situation before it gets out of control.
- Treat the client as a partner. Bring clients into strategy development and include them in decision-making. Keep in mind that ultimately it is the client's case.
- Treat the client as an important customer. Get feedback.
- Document everything. This protects both you and your client.
- Do the work within the time promised.
- Give clients value for their money.
- Conduct exit interviews and/or have clients fill out questionnaires about their experience with your firm.

BEWARE THE BAD NEWS CLIENT

Client screening is an important part of risk management. Sometimes the best way to prevent a claim is to decline to represent a potentially troublesome client in the first place. All seasoned practitioners know there are some prospective clients who are best shown the door.

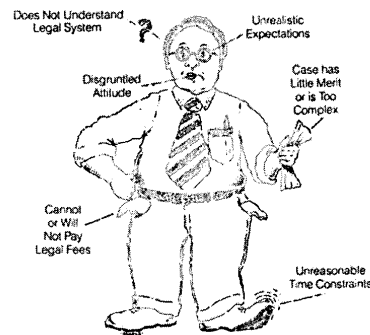
Following are some characteristics of high-risk clients:

- Clients who have had multiple lawyers or who have been rejected by every other lawyer on the block.
- Clients looking for a free lawyer or the cheapest lawyer available.
- Clients who quibble about your fee or who do not pay the retainer when requested.
- Clients who are high rollers and want to cut you in on the action.
- Clients who have unreasonable expectations or who seek relief no court can grant. Example: "I know this is a multi-million dollar case. I saw someone on Jenny Jones who had a claim like mine, and they recovered \$1 million. My case is even better."
- Cases with extreme time pressure.
- Clients who make unreasonable demands of you or who ask you to engage in unethical or illegal behavior.
- Clients looking for a shoulder to cry on or who need psychological counseling more than legal counseling. Remember you are not a shrink.
- Perpetual victims.
- Clients suing on principle.
- Overzealous clients driven by a need for vengeance or vindication. Example: "I don't care how much it costs as long as you make that jerk's life a living Hell!"
- Clients who have done research on their own.
- Clients who know enough about the law to make your life miserable. They may refuse to follow your advice because they think they know more about the law than you do.
- Clients who want to tell you how to run the case.
- Clients who habitually lie.
- Clients who are abusive, rude, mean, overly argumentative, or who threaten you or your staff.
- Clients with rotten attitudes about lawyers, courts, and the legal system in general.
- Two or more clients seeking joint representation.
- Social contacts such as friends, relatives, drinking buddies, etc. The emotional entanglements will only make your job harder. Besides, these clients might simply be looking for free legal advice.

When interviewing a potential client, listen to your gut. What is your first impression of the person? Is this someone you feel like you can work with? You may want to enlist your support staff to help interview and evaluate new clients.

Consider another bit of advice from Elihu Root, "About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop." Regardless of how badly you need the business, no client is worth the headaches of a malpractice suit.

Characteristics of a Troublesome Client



**Interview Form
Personal Injury**

Statute of Limitations

Out of State case: Yes or No _____
State accident occurred in: _____
SOL Date: _____
SOL Date has been confirmed by:
(attorney's name) _____
SOL date has been docketed by:
(staff name) _____

1. Personal and Family History

Full Name: _____
Home address: _____
Business address: _____

Home phone: _____ Business phone: _____
E-Mail: _____

2. Details of Injury or Accident

Date of Incident: _____
Location of Accident: _____

Out of State: Yes or No _____
Names and addresses (if known) of potential defendants:

Out of State: Yes or No _____
Names and addresses (if known) of potential witnesses:

Out of State: Yes or No _____
Will suit need to be filed out of State? Yes or No _____
If yes, which state: _____
Attorney signature acknowledging out of state status: _____

3. List all other names by which you have ever been known. Include marital and maiden names, nicknames, and aliases:

4. List the addresses where you have resided during the past 10 years. Indicate the period of time at each residence, including dates:

CLIENT INTAKE

5. **Place and Date of Birth:** _____

6. **Are you presently married?** Yes No (Circle One)

Date of Marriage: _____ Place of Marriage: _____

Full name of spouse: _____

Have you ever been divorced or legally separated? Provide details:

7. **List the names, ages, and addresses of everyone, including children, who are dependent upon you for support, and your relationship to each:**

Name	Address	Age	Relationship
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

8. **Employment History**

Social Security Number: _____

Most Recent Employer: _____

Employer Address: _____

Beginning Date: _____ Ending Date: _____

Job Description: _____

Beginning Pay Rate: _____ Current Pay Rate: _____

Have you ever missed work due to your injuries? Yes No (Circle One)

If yes, list the dates you were unable to work:

From: _____ To: _____

Reason for leaving job: _____

Employer Prior to last one listed: _____

Prior Employer's Address: _____

Beginning Date: _____ Ending Date: _____

Job Description: _____

Beginning Pay Rate: _____ Ending Pay Rate: _____

Have you ever missed work due to your injuries? Yes No (Circle One)

If yes, list the dates you were unable to work:

From: _____ To: _____

Reason for leaving job: _____

Employer Prior to last one listed: _____

Prior Employer's Address: _____

Beginning Date: _____ Ending Date: _____

Job Description: _____

Beginning Pay Rate: _____ Ending Pay Rate: _____

Have you ever missed work due to your injuries? Yes No (Circle One)

If yes, list the dates you were unable to work:

From: _____ To: _____

Reason for leaving job: _____

[Have client bring in Tax Returns for prior years.]

9. Education

List your highest educational level (high school, college, graduate school, professional training) with the name/address of the institution(s):

Do you have any special job training? Describe: _____

10. Military Background

Have you ever been in the military? Yes No (Circle One)

Service Number: _____ Type of Discharge: _____

Branch: _____ Dates of Service: _____

Have you had any service-related injuries/disabilities? Explain: _____

_____ Percentage of Disability: _____

Present condition of service-related injury/disability: _____

Do you receive payments for service-related injuries? Yes No (Circle One)

If yes, explain: _____

Have you ever been rejected for military service because of physical, mental, or other reasons? Yes No

(Circle One) If yes, explain: _____

CLIENT INTAKE

11. **Prior Claims and Lawsuits**

(Our adversaries will inquire about your history of legal claims and lawsuits. It is important that you disclose your complete history to us. It is not fatal if you have been involved in prior legal actions. You won't be penalized by a court or jury if the claims were reasonable and genuine.)

List every claim you have ever made for personal injury or property damage. Give details. (Attach additional page if necessary.)

Date: _____ Nature of Claim: _____
Against Whom: _____
Result: _____

Date: _____ Nature of Claim: _____
Against Whom: _____
Result: _____

Date: _____ Nature of Claim: _____
Against Whom: _____
Result: _____

12. **Police Record**

(The defense will investigate your background. We must be prepared against any unfavorable evidence that is uncovered. Evidence of prior criminal acts might be used against you at trial, no matter how mitigating the circumstances.)

List all prior arrest information:

Date	Place	Charge	Result
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

13. **Workers' Compensation**

Have you ever made a claim for workers' compensation? _____

What was your injury? _____ Date of injury: _____

Are you presently receiving payments? Yes No (Circle One) If yes, explain: _____

Who is handling your workers' compensation action? _____

Are you receiving disability payments from sources other than worker's compensation? Yes No (Circle One)

If yes, explain: _____

14. **Prior Physical Conditions**

List every physical examination you ever had during the last 10 years for any purpose, including employment, promotion, insurance, selective service, and armed forces. (Attach additional page if necessary.)

Date: _____ Place: _____
Name of Doctor: _____
Purpose: _____ Result: _____

Date: _____ Place: _____

Name of Doctor: _____

Purpose: _____ Result: _____

Date: _____ Place: _____

Name of Doctor: _____

Purpose: _____ Result: _____

Date: _____ Place: _____

Name of Doctor: _____

Purpose: _____ Result: _____

Date: _____ Place: _____

Name of Doctor: _____

Purpose: _____ Result: _____

15. Prior Accidents and Injuries

(Failure to mention other accidents or injuries can undermine a lawsuit, no matter how trivial they may seem.)

List all prior accidents, whether they resulted in a claim for damages or not.

Date Place Nature of Accident Extent of injuries

16. Illness or Disease

(We must know about all prior illnesses, either before or since your accident. This is particularly true if there is any connection with your present physical complaints. The defendant will have access to a complete history of your past physical condition as well as your veteran's records, insurance records, and medical/hospital records.)

Date: _____ Nature of Illness: _____

Duration: _____ Treated by: _____

Hospitalized? _____ When? _____

Name/address of hospital: _____

Date: _____ Nature of Illness: _____

Duration: _____ Treated by: _____

Hospitalized? _____ When? _____

Name/address of hospital: _____

Date: _____ Nature of Illness: _____

Duration: _____ Treated by: _____

Hospitalized? _____ When? _____

Name/address of hospital: _____

Date: _____ Nature of Illness: _____

Duration: _____ Treated by: _____

Hospitalized? _____ When? _____

Name/address of hospital: _____

CLIENT INTAKE

Date: _____ Nature of Illness: _____
 Duration: _____ Treated by: _____
 Hospitalized? _____ When? _____
 Name/address of hospital: _____

Have you ever had trouble with your eyes? _____ Ears? _____

Please check all that apply:

Glasses/contacts: _____ Artificial eye: _____ Hearing aid: _____

Have you ever worn a brace or back and neck support? _____

Have you ever worked with radioactive substances, asbestos, or any other substance alleged to cause diseases, such as cancer? _____

Have you ever been denied health or life insurance? _____ If so, by which company? Give details: _____

Have you ever been treated for alcoholism, drug addiction or venereal disease?

17. The Injury

State all injuries known to be a result of the accident: _____

Length of time confined to bed: _____

Length of time confined to house: _____

State present physical conditions, including scars, disabilities, deformities and discomforts due to the injuries: _____

18. Physicians and Surgeons

List all physicians and surgeons you have seen (attach additional page if necessary):

Name: _____

Address: _____

Nature of treatment: _____

Still under care? Explain: _____

Name: _____

Address: _____

Nature of treatment: _____

Still under care? Explain: _____

Name: _____
 Address: _____
 Nature of treatment: _____
 Still under care? Explain: _____

Name: _____
 Address: _____
 Nature of treatment: _____
 Still under care? Explain: _____

Name: _____
 Address: _____
 Nature of treatment: _____
 Still under care? Explain: _____

19. Nurses, Therapists and Health Care Professionals

List all nurses, therapists, and health care professionals other than doctors and surgeons that you have seen (attach additional page if necessary):

Name: _____
 Address: _____
 Nature of treatment: _____
 Still under care? Explain: _____

Name: _____
 Address: _____
 Nature of treatment: _____
 Still under care? Explain: _____

Name: _____
 Address: _____
 Nature of treatment: _____
 Still under care? Explain: _____

20. Calendar Information

Has client been served with pleadings? Yes No (Circle One)

When is response due? _____

Statute of limitations expires: _____

Enter case and upcoming activity in office calendar system: _____

ATTACH TO THIS INTERVIEW FORM:

Medical Authorization
 Fee Agreement

CLIENT INTAKE

Interview Form Domestic Relations

Date: _____

1. Personal Information

Name: _____

Address: _____

Home Phone: _____ Work phone: _____

Place of work: _____ Occupation: _____

Date of Birth: _____ Date Married: _____

Where (city, county, state): _____

Date of Separation: _____ Referral to our office: _____

2. Spouse's Information

Name: _____

Address: _____

Home Phone: _____ Work phone: _____

Place of work: _____ Occupation: _____

Date of Birth: _____

3. Prior Divorces

Dates of prior divorces: _____

Please check all that apply:

Separation agreement: _____ Divorce decree: _____ Custody/Support order: _____

4. Children of the Marriage

Name: _____ Date of Birth: _____

Do you or your spouse have any children outside the marriage? _____

Name: _____ Date of Birth: _____

Your income: _____ net/month _____ gross/month

Opposing party's income: _____ net/month _____ gross/month

Are you a military veteran or in active service? Give details: _____

Is your spouse a veteran or in active service? Give details: _____

5. Medical

Your general health: _____

Any specific medical problems: _____

Disabilities: _____

Your spouse's general health: _____

Any specific medical problems: _____

Disabilities: _____

6. Financial

[Use Financial Affidavit or detailed form for collecting property information. Following are some topics to cover.]

Vehicle (year/make/model): _____ Monthly payment: _____ In whose name? _____

Name of bank(s) where you have accounts: _____

Name of bank(s) where your spouse has accounts: _____

7. Residence

Location: _____

Rent or own? _____ Time lived there: _____

Whose name residence in: _____

Mortgagee/lender: _____

Monthly payment: _____

Mortgage balance: _____

Estimated net market value: _____

Other real property: _____

Whose name under: _____

Mortgagee/lender: _____

Monthly payment: _____

Mortgage balance: _____

Estimated net market value: _____

Intangible property (stocks, bonds, etc.): _____

Other sources of income: _____

CLIENT INTAKE

List all bankcards, charge cards, and revolving credit cards.

Account:

Whose Name:

Balance:

List all pensions, military benefits, retirement accounts for you and your spouse.

List other debts and liabilities.

[Bring in Income Tax Returns for the past 5 years.]

Prospective Client Questionnaire

Name (include maiden or other marital name): _____

Home Address: _____

Date of Birth: _____ Home phone: _____

Name of Employer: _____ Position: _____

Employer address: _____

Employer phone: _____

Where you prefer to be contacted: _____

Spouse's name: _____

Opposing party name and address: _____

Name of associated and/or related parties: _____

Name of current opposing counsel: _____

Address: _____

Please state briefly the nature of the problem you wish to discuss with this office.

Please check type of legal category that applies:

Domestic/Family Law: _____	Auto Accident: _____
Other personal injury: _____	Criminal: _____
Employment problem: _____	Juvenile case: _____
Estates or wills: _____	Traffic ticket: _____

Have you or any member of your family been seen by anyone in this office? Yes No (Circle One)

If yes, state person's name and nature of the legal matter with which he/she assisted.

How you were referred:

Phone: _____	Advertising: _____	Former client: _____
Bar referral: _____	Court assignment: _____	Other lawyer: _____

CLIENT INTAKE

Optional: A consultation fee of \$50 is due at the time of your initial visit. Our office accepts Visa and MasterCard for your convenience.

Optional: for client to sign: "I understand that no legal relationship was created by my visit because my case was not accepted by this office."

Signature: _____ Date: _____

For Office Use Only:

Initial Interview Date: _____	Type of Case: _____
Initial Interview By: _____	Case Assigned to: _____
Client referred by: _____	Nonengagement: _____
Office File no.: _____	Court file no.: _____
Deadlines: _____	Conflicts check: _____

Notes: _____

OFFICE INTAKE: FORM A
NEW CLIENT

Today's Date: _____

Client's full name: _____

Date of Birth: _____ Social Security No. _____

Spouse's full name: _____

Date of Birth: _____ Social Security No. _____

Street Address: _____

City: _____ State: _____ Zip Code: _____

Home phone: _____ Client work: _____ Spouse work: _____

Client's employer: _____

Spouse's employer: _____

Emergency Contacts:

Name: _____ Relationship: _____ Phone no.: _____

Referred by: _____ Conference with attorney regarding: _____

OFFICE USE ONLY:

Primary Attorney: _____ Hour: _____

Attorney 2: _____ Hour: _____

Attorney 3: _____ Hour: _____

Paralegal: _____ Hour: _____

Fee Type:

C – contingency F – fixed R- retainer T- time/expense

Billing Frequency:

M – monthly Q – quarterly S – semi-annually O – other

Checklist:

Conflicts Check: _____ Fee Contract: _____ First Appearance due: _____

Statute of Limitations Deadline: _____ Other deadlines: _____

File Review Frequency: _____ Instructions: _____

Initials:

Date:

Intake sheet prepared by: _____

Conflicts checked by: _____

Deadlines docketed by: _____

CLIENT INTAKE

Office Intake: Form B
New Client

Client Information

File No. _____ Date Opened: _____
 Client: _____
 Address: _____
 City: _____ State: _____ Zip Code: _____
 Work Phone: _____ Home Phone: _____
 New Client: _____ Previous Client: _____

Case Information

Matter: _____
 Claim No.: _____ Insured: _____
 Misc.: _____
 Contact Name: _____ Referred by: _____
 Originating Attorney: _____
 Billing Attorney: _____
 Supervising Attorney: _____

Fee Arrangements

Hourly Rate: _____ Standard: _____ Other: _____
 Flat fee of \$ _____
 Hourly rate of \$ plus contingent (Check Below):
 Contingent Fee of _____% of amount
 Recovered: _____ Saved: _____ Other: _____
 Fee to be determined on basis of all relevant factors: _____
 Retainer of \$ _____ per Month _____ Year _____
 Number of hours of service covered by retainer: _____
 Excess hours to be billed at rate of \$ _____ per hour
 Other: _____

Billing Arrangements

Frequency: Monthly _____ Quarterly _____ Completion _____ Other: _____
 Retainer of \$ _____ Minimum fee (to firm account): _____
 Apply to final statement (to trust account): _____
 Apply as earned (trust account): _____
 Special: _____

Invoice Formats

Print past due message:	Yes _____	No _____
Print initials:	Yes _____	No _____
Service charge:	Yes _____	No _____
Cover statement:	Yes _____	No _____

Conflict Information

Client and other parties associated with client: _____

 Adverse parties: _____

 Names associated with other files for this client: _____

Case Type

- | | | |
|----------------------------|------------------------------|-------------------|
| 10 Estate Planning | 34 Contracts – litigation | 58 Collections |
| 11 Estate administrations | 35 Other litigation | 59 Other business |
| 12 Wills | 40 Worker's compensation | 60 Domestic |
| 13 Guardianship | 41 Employment law | 61 Juvenile |
| 20 Residential real estate | 42 Employee plans | 80 Criminal |
| 21 Commercial real estate | 50 Incorporation | 81 Government law |
| 23 Environment law | 52 Non-profits | 82 Education |
| 24 Foreclosures | 53 Limited liability company | 83 Insurance law |
| 30 Personal injury – pl. | 54 General corporate matters | 84 Bankruptcy |
| 31 Personal injury – def. | 55 Tax – individual | 85 Trademarks |
| 32 Personal injury – other | 56 Tax – business | 86 Patents |
| 33 Product liability | 57 Banking | 87 Copyright |

Other: _____

Intake Form B p.2



OPPENHUIZEN LAW FIRM, PLC
25 Division Avenue S., Suite 525
Grand Rapids, MI 49503
616-730-1861

**CONFIDENTIAL
DEBT RELIEF INTAKE FORM
Individual Client**

Please complete entire form in your hand-writing.

PLEASE PRINT

Date: _____

GENERAL INFORMATION

1. Why did you choose our firm? _____
2. Were you referred to our office? _____ By whom? _____
3. Your Name: _____ S.S. # _____
4. Your Birth Date: _____
5. Spouse's Name: _____ S.S. # _____
6. Spouse's Birth Date: _____
7. Your prior name(s): _____
8. Divorced? _____ If yes, what year? _____
9. Current Address: _____

10. County: _____
11. Prior addresses (within last two years): _____

12. Work Phone: _____ Home Phone: _____
13. Cell Phone: _____ Email: _____
14. Dependents (names, genders and ages): _____

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YOUR EMPLOYMENT *

Employer's Name: _____

Address: _____

Your Job Description: _____

Length of Time on Job: _____

Hourly Wage: \$ _____ Pay Frequency: _____

Average Hours Worked Per Pay Period: _____

Take Home Pay Per Pay Period: \$ _____

Additional Income: \$ _____ Source: _____

How much did you make in: 2017 - \$ _____ (year to date)

2016 - \$ _____

2015 - \$ _____

SPOUSE'S EMPLOYMENT *

Employer's Name: _____

Address: _____

Spouses Job Description: _____

Length of Time on Job: _____

Hourly Wage: \$ _____ Pay Frequency: _____

Average Hours Worked Per Pay Period: _____

Take Home Pay Per Pay Period: \$ _____

Additional Income: \$ _____ Source: _____

How much did you make in: 2017 - \$ _____ (year to date)

2016 - \$ _____

2015 - \$ _____

* If self-employed, please fill out the business expense sheet as well.

2019 CENTRAL STATES BANKRUPTCY WORKSHOP

MONTHLY LIVING EXPENSES

(Circle One)

Rent/Home Mortgage Payment/Land Contract \$ _____

Are Property Taxes Included? YES NO

Is Property Insurance Included? YES NO

Utilities:

Electricity and Heat \$ _____

Water and Sewer \$ _____

Telephone \$ _____

Other:

Trash Removal \$ _____

Security \$ _____

Cable \$ _____

Home Maintenance \$ _____

Food \$ _____

Clothing Purchases \$ _____

Laundry & Dry Cleaning Expenses \$ _____

Medical & Dental Expenses \$ _____

Transportation \$ _____

Recreation, clubs and entertainment \$ _____

Charitable contributions \$ _____

Daycare Expenses \$ _____

Insurance:

Homeowner's or renter's \$ _____

Life \$ _____

Health \$ _____

Auto \$ _____

Other \$ _____

Taxes:

Real Estate (property) Taxes \$ _____

Alimony, maintenance, and support paid to others \$ _____

Support of additional dependents not living at your home \$ _____

TOTAL \$ _____

Total owed on Unsecured Debts (Medical Bills, Credit Cards, etc.) \$ _____

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MONTHLY BUSINESS EXPENSES *

2018 Gross Income _____

Avg. Monthly Gross Income _____

In lieu of answering the following questions, if you have a Profit/Loss Statements,
you may bring one for each of the last 6 months, as well as a current balance sheet.

	YES	NO
1. Do you have employees? (If No, skip to #5)		
If yes, Net employee payroll	\$ _____	
2. Payroll Taxes	\$ _____	
3. Unemployment Taxes	\$ _____	
4. Worker's Compensation	\$ _____	
5. Other Taxes (i.e. self-employment tax)	\$ _____	
6. Inventory Purchases (Including raw materials)	\$ _____	
7. Purchase of Feed/Fertilizer/Seed/Spray	\$ _____	
8. Rent (Other than residence)	\$ _____	
9. Utilities	\$ _____	
10. Office Expenses & Supplies	\$ _____	
11. Repairs & Maintenance	\$ _____	
12. Vehicle Expenses	\$ _____	
13. Travel, Meals & Entertainment	\$ _____	
14. Equipment Rental & Leases	\$ _____	
15. Legal/Accounting/Other Professional Fees	\$ _____	
16. Insurance	\$ _____	
17. Employee Benefits (e.g. Pension, Medical, etc.)	\$ _____	

ASSETS

REAL PROPERTY

RESIDENCE: Payment: \$ _____ # Months Behind: _____
(Per Month)

Fair Market Value (e.g. two times state equalized value) \$ _____

Balance on Existing First Mortgage..... \$ _____

Balance on Second Mortgage..... \$ _____

Balance on Land Contract..... \$ _____

Amount of Property Taxes Owing..... \$ _____

Amount of Other Liens..... \$ _____

OTHER REAL ESTATE: Payment \$ _____ # Months Behind: _____
(Per Month)

Address: _____

Fair Market Value (e.g. two times state equalized value) \$ _____

Balance on First Existing Mortgage..... \$ _____

Balance on Second Mortgage..... \$ _____

Balance on Land Contract..... \$ _____

Amount of Property Taxes Owing..... \$ _____

Amount of Other Liens..... \$ _____

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VEHICLES

Year/Make/Model: _____

Whose name is on the title? _____

How much are the payments? \$ _____ # Months Behind: _____

Your opinion of the fair market value: _____

Is there a Secured Creditor on the title? YES NO

If yes, what is the Creditor's Name? _____

Balance Owed: \$ _____

Year/Make/Model: _____

Whose name is on the title? _____

How much are the payments? \$ _____ # Months Behind: _____

Your opinion of the fair market value: _____

Is there a Secured Creditor on the title? YES NO

If yes, what is the Creditor's Name? _____

Balance Owed: \$ _____

RECREATIONAL VEHICLES OR MOBILE HOME

Year/Make/Model: _____

Whose name is on the title? _____

How much are the payments? \$ _____ # Months Behind: _____

Your opinion of the fair market value: _____

Is there a Secured Creditor on the title? YES NO

If yes, what is the Creditor's Name? _____

Balance Owed: \$ _____

PERSONAL PROPERTY

Cash on hand \$ _____

Security Deposits with Landlords or elsewhere..... \$ _____

Bank Accounts:

Bank: _____ Checking..... \$ _____

Bank: _____ Savings..... \$ _____

Bank: _____ Checking..... \$ _____

Bank: _____ Savings..... \$ _____

Craig's List, Facebook Sale Group or Quick Sale Value:

Your household goods and furnishings, include audio, video, and computer equipment..... \$ _____

Collectable books, pictures and other art objects; antiques; stamps, coins, record, tape, compact disc and other collections..... \$ _____

Wearing Apparel..... \$ _____

Furs and Jewelry..... \$ _____

Sporting Goods..... \$ _____

The value of any savings element in your insurance policy (e.g. cash value in whole life insurance or universal life insurance policy)..... \$ _____

Stocks and interests in incorporated and unincorporated Businesses..... \$ _____

Interests in partnerships or joint ventures..... \$ _____

Accounts Receivable..... \$ _____

Boats, Motors, and Accessories..... \$ _____

Tools of the Trade..... \$ _____

Animals \$ _____

Recreational Vehicles \$ _____

Other personal property of any kind not already listed..... \$ _____

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RELATED INFORMATION

- | | | | |
|-----|---|-------|----|
| 1. | Have you, your spouse, or any member of your family been injured or involved in an automobile or any other type of accident in the last three years? | YES | NO |
| 2. | Do you or your spouse presently have an interest in the estate of anyone who is deceased? | YES | NO |
| 3. | Do you have any living relative or friend who you think might leave you something in his/her will or trust? | YES | NO |
| 4. | Have you at any time within the past two years been engaged in business for yourself? (This does not mean working for someone else.) | YES | NO |
| 5. | Have you received your 2018 income tax refunds? | YES | NO |
| | a. If so, how much? | _____ | |
| | b. If not, how much are you expecting? | _____ | |
| | c. Are you owed any previous year's refund? | YES | NO |
| 6. | Do you owe any money to the Internal Revenue Service or the State of Michigan? | YES | NO |
| 7. | Are your wages currently being garnished, or are you having money deducted from your paycheck by a credit union, or is a wage assignment causing money to be deducted out of your paycheck? | YES | NO |
| 8. | Have you made any payments totaling more than \$600.00 to any single creditor within the last 90 days? | YES | NO |
| 9. | Have you repaid any family members more than \$600.00 in last year? | YES | NO |
| 10. | Have you had any items repossessed within the last year? | YES | NO |
| 11. | Have you filed a prior bankruptcy? | YES | NO |
| 12. | Is a foreclosure threatened? | YES | NO |
| 13. | Is a foreclosure sale scheduled? | YES | NO |
| 14. | Have you refinanced your home in the past year? | YES | NO |
| | If yes, how much cash was received? | _____ | |

2019 CENTRAL STATES BANKRUPTCY WORKSHOP

15. Does your name appear on a Deed or title to anyone else's property, vehicle or recreational vehicle? YES NO

RELATED INFORMATION CONTINUED

16. Are you a part of a Family Trust or are you a part of a Trust for yourself? YES NO
17. Have you taken a cash advance on any of your credit cards within the past year? YES NO
- a. If yes, how much? _____
18. Have you transferred any credit card balances to a different credit card within the past year? YES NO
19. Have you transferred any property in or out of your name in the last **six years**? For example, your home or a car. YES NO
20. Have you used any credit cards at all in the last 3 months? YES NO
21. Do you have a student loan? YES NO
- a. If yes, what is the balance? _____
22. Have you gambled in the past 2 years? YES NO
- a. If yes, have you reported any winnings or losses on your income tax returns? YES NO
- b. If yes, how much? (indicate whether winnings or losses) _____
23. Are there any pending lawsuits against you? YES NO
24. Are there any pending lawsuits that you have filed against another party? YES NO
25. Do you owe the Bank where your checking and/or savings account is held any money? i.e. Overdraft account? Vehicle loans? Credit cards? YES NO
26. Are you on any bank account with anyone other than your Spouse? YES NO

Please proceed to the next page:

AMERICAN BANKRUPTCY INSTITUTE

Please read the following carefully, and sign below to acknowledge your agreement and understanding:

I hereby certify and agree that the information I am providing is true and correct to the best of my information, knowledge and belief, base upon my current knowledge and understanding of the questions I have answered above. I further acknowledge that this information will be kept confidential by OPPENHUIZEN LAW FIRM, PLC if I do not retain OPPENHUIZEN LAW FIRM, PLC to file bankruptcy.

By completing this questionnaire and meeting with OPPENHUIZEN LAW FIRM, PLC or any of its attorneys, I understand that I have not engaged its services or the services of any of its attorneys for any purpose beyond this initial consultation. I recognize that, aside from a duty of confidentiality in relation to this questionnaire and our discussions, after I leave the office, neither OPPENHUIZEN LAW FIRM, PLC nor its attorneys have agreed to act as my attorneys, unless or until I have signed a Fee Agreement and paid the required fee, as set forth in the Fee Agreement, in full.

I also understand that the information contained on this form will be used as part of the process of preparing any documents that must be filed with the United States Bankruptcy Court. I will inform OPPENHUIZEN LAW FIRM, PLC if any answers change, and will also provide all requested and required documents in order to verify my answers and support the Petition, Schedules and Statement of Financial Affairs, as well as the other documents to be filed with the Bankruptcy Court or provided to the Trustee in my case. This questionnaire can be requested by the United States Trustee, and the United States Bankruptcy Court may require that this questionnaire be turned over under certain circumstances. I acknowledge and agree that Oppenhuizen Law Firm, PLC may turn this questionnaire over to the United States Trustee if requested by the United States Trustee or if a dispute arises between the undersigned and Oppenhuizen Law Firm, PLC.

I have read the preceding statements, and agree that I understand them, and that they are true to the best of my knowledge, information and belief.

Date: _____

Print: _____

Date: _____

Print: _____

The Nuts and Bolts of the 2004 Exam Discovery Tool

*By: James Patrick Shea & William A. Gonzales
Kolesar & Leatham, Las Vegas, NV*

From a surface level, a Federal Rule of Bankruptcy Procedure Rule 2004 exam may seem the same as a deposition existing outside the world the Bankruptcy Court, but after a deeper look, they are inherently different. This paper will discuss the basics of Rule 2004 exam, the limits of the 2004 exam, and the procedures for seeking a 2004 exam.

I. Rule 2004 Exam: The Basics

The scope of a Rule 2004 exam is different from any type of discovery occurring outside of bankruptcy, or even an adversary proceeding, due to the broad scope of the examination. In general, the purpose of a 2004 exam is “designed for the purpose of discovering and unearthing frauds” and to assist the parties in “revealing the nature and extent of the estate.”¹ The scope of the 2004 exam is broader and more comprehensive than discovery governed by FRCP 26 and is typically referred to as a “fishing expedition”² to obtain additional information after the Rule 341 meeting.³ It is similar to a deposition in that the trustee, creditor, or even the debtor, can ask questions to any party under oath, as well as request documents to facilitate the bankruptcy proceeding, yet it is without as many limitation as an FRCP 26 Deposition.

II. Limits of the 2004 Exam

Although characterized as a “fishing expedition”, the 2004 exam does have its limits. Pursuant to Rule 2004, the exam may only relate to acts, conduct or property or to the liabilities and financial condition of the *debtor*, or to any manner effecting the administration of the debtor’s

¹ *In re Washington Mutual, Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009); *In re Wilcher*, 56 B.R. at 428,433 (Bankr. N.D. Ill. 1985); *In re Isis Foods, Inc.* 33. B.R. 45, 46-47 (Bankr. W.D. Mo. 1983).

² *In re Washington Mutual, Inc.*, 408 B.R. at 50.

³ *In re Duratech Industries Inc.* 241 B.R. 283, 289 (E.D.N.Y 1999).

estate or right to discharge.⁴ Additionally, the exam must be used for a legitimate purpose, cannot stray into areas of abuse or harassment, and must stay focused on areas relevant to the basic inquiry of the exam.

One of the most pivotal restraints on the 2004 Exam is known as the “pending proceeding” rule. It states that once an adversary proceeding or contested matter⁵ has been commenced in another forum, discovery is made pursuant to Federal Rules of Bankruptcy Procedure 7026, rather than by a 2004 examination.⁶ Discovery pursuant to Rule 7026, is identical to the Federal Rules of Civil Procedure Rule 26.⁷

The two lead cases on the “pending proceeding” rule are *In re Washington Mut., Inc.*, 408 B.R. 45 (Bankr. D. Del. 2009) and *Matter of M4 Enterprises, Inc.*, 190 B.R. 471 (Bankr. N.D. Ga. 1995). In *In re Washington Mutual*, Washington Mutual Bank (“WMB”) was closed and transferred to the FDIC as its receiver.⁸ FDIC then sold substantially all of the assets to JP Morgan Chase (“JPM”).⁹ Various debtors asserted claims against FDIC by filing proof of claims with FDIC in its capacity as a receiver of WMB.¹⁰ FDIC denied all of the claims.¹¹ The debtors then filed suit in the United States District Court for the District of Columbia asserting five causes of actions against FDIC.¹² JPM then moved to intervene and filed an adversary proceeding against the

⁴ Fed. R. Bankr. P. 2004(b).

⁵ The contested matters exception and the courts discretion to apply Rule 7026 will be discussed in-depth below.

⁶ *In re Washington Mutual Inc.*, 408 B.R. at 50.

⁷ Fed. R. Bankr. P. 7026.

⁸ 408 B.R. at 47.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 47 – 48.

Debtors.¹³ The Debtors then responded with filing an adversary proceeding of their own.¹⁴ The Debtors then moved for a Rule 2004 exam directing an exam of JPM.¹⁵

The court discussed the limits of the 2004 exam, explaining the “pending proceeding” rule. The court stated that once an adversary proceeding or contested matter has been commenced, discovery is made pursuant to Federal Rules of Bankruptcy Procedure 7026 (FRCP 26), rather than by a 2004 examination.¹⁶ Reasoning that a 2004 may be inappropriate where the party requesting the 2004 exam could benefit their pending litigation outside of the bankruptcy court against the proposed 2004 examinee.¹⁷ The court eventually determined that the information being sought was not relevant to any of the adversary proceedings and allowed the 2004 exam.¹⁸

In *In re M4 Enterprises*, the court also discussed the issue of a pending adversary proceeding. The requesting party requested a 2004 exam to question the Trustee on the value on the claims he proposed to release, as well as the extent to which a settlement would benefit the estate.¹⁹ The Trustee claimed that the presence of a pending adversary or contest matter barred the use of a 2004 exam.²⁰ In its opinion, the court agreed with the Trustee, stating that once the parties have commenced an adversary proceeding, they may not employ Rule 2004 as a discovery device to uncover evidence related to that [pending] proceeding.²¹

The court *In re Washington*, provided two policy reasons behind the purpose of the pending proceeding rule. First, normal discovery applies in both adversary and contested matters. Second, and arguably the one that carries the most weight, is that a 2004 Exam does not carry with it the

¹³ *Id.* at 48.

¹⁴ *Id.*

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 50.

¹⁷ *Id.*

¹⁸ *Id.* at 52 – 53.

¹⁹ *In re M4 Enterprises*, 190 B.R. 471, 473 (Bankr. N.D. Ga. 1995)

²⁰ *Id.*

²¹ *Id.* at 475.

same safeguards as a deposition under FRCP 26.²² For example, in a 2004 Exam parties do not have the right to counsel, while the right to object to improper or immaterial questions is limited.²³

As with any rule, there are exceptions that limit the scope of the pending proceeding rule. The court in *In re Washington* and *M4 Enterprises* stated that discovery *related* to the pending proceeding must be accomplished in accordance with Rule 7026 (FRCP 26), while *unrelated* discovery should not be subject to those rules simply because there is an adversary proceeding pending. In short, if the 2004 Exam does not relate to the pending adversary litigation/contested matter but to another matter, the pending proceeding rule does not apply.²⁴ Thus, the relevant inquiry when determining whether or not the pending proceeding rule applies is whether the Rule 2004 exam will lead to discovery of evidence related to the pending proceeding or whether the requested examination seeks to discover evidence unrelated to the pending proceeding.²⁵

The court in *M4 Enterprises* provided an additional exception in regards to “contested matters” stating that if the pending proceeding is a contested matter under Rule 9014, that Rule 7026 applies “unless the court otherwise directs.”²⁶ Thus, Rule 7026 (FRCP 26) offers a preferable default from which the court may deviate from.²⁷

III. Procedure for a 2004 Exam

In order to effectuate a 2004 Exam, the party must file a motion with the court explaining, with good cause, why the exam is needed. To show good cause, the requesting party needs to demonstrate that the exam is reasonably necessary to protect its legitimate interests or that denial of the request would result in undue hardship to the requesting party.²⁸ It is important to keep local

²² 408 B.R. at 50.

²³ *Id.*

²⁴ *Id.*; *In re M4 Enterprises, Inc.*, 190 B.R. 471, 475 n. 4 (Bankr. N.D. Ga. 1995).

²⁵ *Id.*

²⁶ Fed. R. Bankr. 9014.

²⁷ 190 B.R. at 475.

²⁸ *In re Hammond*, 140 B.R. 197 (S.D. Ohio 1992); 480 B.R. 45 (Bankr. D. Del. 2009).

rules in mind regarding *ex parte* motions. If communication is required, make sure to keep a detailed record of communication between you and opposing counsel prior to filing the motion to prove that you attempted to communicate and come to amicable agreement on the issue.

Along with the Rule 2004 examination, comes the power to compel individuals and production of certain necessary documents by issuing a subpoena in accordance with Rule 9016.²⁹ If a 2004 Exam is ordered, the debtor is required to appear without a issuing a subpoena. If an individual is not the debtor or is a nonparty, the requesting party must issue a subpoena for the person to appear, as well as subpoena any documents relevant to the exam.³⁰ Additionally, if the individual/entity is in possession of information identified in Rule 2004(b), it is compelled to participate. Moreover, attendance at a 2004 exam may be compelled anywhere in the United States, whether it is a court within or outside the district in which the bankruptcy is pending, up to 100 miles from the place where the person resides, is employed, or regularly transacts business in person³¹

A common hurdle in regards to the subpoena is: who issues the subpoena? The answer to the question can be found in Rule 9016, which incorporates FRCP 45. In sum, the subpoena must be issued by the clerk of district where the exam is going to be held or by the attorney, if the attorney is authorized to practice in the issuing court³². While a subpoena for production or inspection *only*, must be issued by the court for the district where the production or inspection is to be made.

²⁹ The rule incorporates Fed R. Civ. P. 45, along with its limits, except when the examination of the debtor is pursuant to a court order.

³⁰ Fed. R. Bankr. P. 2004(c), (d); Fed. R. Civ P. 45 (c)(2)(a).

³¹ *Id.*

³² Fed. R. Civ. P. 45 (a)(2).

Additional Resources

ABI has produced an informative webinar on *Presenting Evidence in Bankruptcy Court: Tips and Best Practices*, presented by the authors of ABI's *Quick Evidence Handbook, Second Edition*, available in tradition and e-book formats.

Webinar:

<https://cle.abi.org/product/no-cle-abi-live-presenting-evidence-bankruptcy-court-tips-and-best-practices>

Print Handbook:

<https://store.abi.org/abi-s-quick-evidence-handbook-second-edition-print-plus-digital.html>

E-book Handbook:

<https://store.abi.org/abi-s-quick-evidence-handbook-second-edition-digital-version.html>

At ABI's Southeast Bankruptcy Workshop 2013, Nancy Whaley, Jennifer McLemore, Jennifer Kimble and B. Summer Chandler gave the presentation *Seeking the Truth: How to Effectively Take and Defend a 2004 Exam*. The materials are available to ABI members at <https://www.abi.org/node/201898>

Seeking the Truth: How to Effectively Take and Defend a 2004 Exam

CONCURRENT SESSION

Nancy J. Whaley, Moderator

Standing Chapter 13 Trustee (N.D. Ga.); Atlanta

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**Seeking the Truth:
How to Effectively Take and Defend a 2004 Exam**

**American Bankruptcy Institute 18th Annual Southeast Bankruptcy
Workshop
July 18-21, 2013**

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I. The Rule 2004 Examination.

An examination pursuant to Federal Rule of Bankruptcy Procedure 2004 is distinct to bankruptcy and is different from any discovery tool existing outside of the world of bankruptcy. Bankruptcy Rule 2004 provides “[o]n motion of *any* party in interest, the court may order the examination of any entity.”¹

The purpose of a Rule 2004 examination and its scope is drastically different than an examination occurring outside of bankruptcy or even in an adversary proceeding. A 2004 examination is “designed for the purpose of discovering and unearthing frauds” and to assist parties in “revealing the nature and extent of the estate.”² Accordingly, its scope is more comprehensive and much broader than discovery governed by the Federal Rules of Civil Procedure.³ Many courts have described a 2004 examination as being “unfettered and broad” and have compared a 2004 examination to a “fishing expedition.”⁴ An examination pursuant to Rule 2004 is not objectionable merely because it is nothing more than a “fishing expedition.”

Any person other than the debtor can be compelled to attend a 2004 examination and produce documents by subpoena. Rule 2004(c) clarifies that the method for compelling the attendance of a party against whom discovery is sought differs depending on whether the party is the debtor or another entity. However, as long as the entity in

¹ Fed. R. Bankr. P. 2004 (emphasis added).

² *In re Washington Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009); *In re Wilcher*, 56 B.R. 428, 433-34 (Bankr. N.D. Ill. 1985); *In re Isis Foods, Inc.*, 33 B.R. 45, 46-47 (Bankr. W.D. Mo. 1983).

³ *In re Wilcher*, 56 B.R. at 433; *In re Isis Foods, Inc.*, 33 B.R. 46-47.

⁴ See, e.g., *In re Bounds*, 443 B.R. 729, 732-33, 736 (Bankr. W.D. Tex. 2010); *In re Washington Mut., Inc.*, 408 B.R. at 50; *In re North Plaza, LLC*, 395 B.R. 113, 122 (S.D. Cal. 2008); *In re Corso*, 328 B.R. 375, 383 (E.D.N.Y. 2005) (quoting *In re Wilcher*, 56 B.R. at 433 (“fishing expedition” allowed); *In re Duratech Indus., Inc.*, 241 B.R. 283, 289 (E.D.N.Y. 1999) (stating that scope of examination under Rule 2004 is broader than discovery under Federal Rules of Civil Procedure and may be in the nature of “fishing expedition”); *In re M4 Enters., Inc.*, 190 B.R. 471, 475-76 (Bankr. N.D. Ga. 1995); *In re Table Talk, Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985).

possession of information of the type identified in Rule 2004(b), such entity may be compelled to participate in a Rule 2004 examination.⁵ Attendance at a 2004 examination may be compelled anywhere in the United States, whether within or outside the district in which the bankruptcy case is pending.⁶

Given the broad range of permissible inquiries during a 2004 examination, the examination may be used as a pre-litigation device to discover evidence upon which future causes of action may be based, such as a preference or fraudulent transfer action.⁷ Examination requests can also be accompanied by request for documents to be produced either prior to or at the examination.⁸ This provides another mechanism for obtaining a wealth of information from both debtors and third parties prior to commencement of an action.

Generally, 2004 examinations are public so anyone can attend a 2004 examination. A more difficult topic is who is permitted to ask questions at a 2004 examination. **Practice Pointer:** If you want to ask questions, call the noticing party in advance and ask for permission to ask questions of the examinee. If the noticing party is the trustee, always call the trustee in advance if you would like to ask questions at the 2004 examination. There may be a number of situations where multiple parties can team and up and ask questions during a single examination of a witness instead of having multiple 2004 examinations.

⁵ Failure to provide discovery under Rule 2004 is grounds for a finding of civil contempt.

⁶ Fed. R. Bankr. P. 2004(c), (d).

⁷ See, e.g., *In re North Plaza, LLC*, 395 B.R. at 122; *In re Corso*, 328 B.R. at 383; *In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996).

⁸ Rule 2004(c) provides that attendance at a 2004 examination and the production of documents may be compelled in the same manner provided for under Rule 9016.

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II. Limits on the Use of Rule 2004 Examinations.

Although extraordinarily broad, there are recognized limits on the use and scope of a 2004 examination, which are set forth in the rules and have been established by case law. Bankruptcy Rule 2004(b) explicitly provides that a 2004 examination “may only relate to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge.”⁹ A 2004 examination must be used for a legitimate purpose and cannot be used for abuse or harassment. A 2004 examination cannot stray into matters which are not relevant to the basic inquiry.¹⁰ And although a 2004 examination may be conducted of non-debtors, the examination may not be used as a means to “launch into a wholesale investigation of a non-debtor’s private business affairs.”¹¹ The inquiry during the examination must be confined to matters affecting the debtor’s affairs or the overall administration of the bankruptcy estate.¹²

Another limit on 2004 examinations is the “pending proceeding” rule – once an adversary proceeding is pending, 2004 examinations may be prohibited because permitting their use would circumvent the procedural safeguards of the Federal Rules of

⁹ Fed. R. Bankr. P. 2004(b).

¹⁰ *M4 Enters., Inc.*, 190 B.R. at 475; *In re Table Talk, Inc.*, 51 B.R. at 145 (quoting *In re Mittco, Inc.*, 44 B.R. 35, 36 (Bankr. E.D. Wisc. 1984)). See also *In re Duratech Indus., Inc.*, 241 B.R. at 290 (affirming bankruptcy court order denying motion for 2004 examination because evidence supported finding that examination was intended to abuse and harass the debtors).

¹¹ *Wilcher*, 56 B.R. at 434; see also *In re Countrywide Home Loans*, 384 B.R. 373, 393 (Bankr. W.D. Pa. 2008) (providing that a party must demonstrate that “good cause” exists for taking the discovery when a third party, such as a creditor, objects to the examination); *In re Kelton*, 389 B.R. 812, 821 (Bankr. S.D. Ga. 2008) (“Generally, good cause is shown if the [Rule 2004] examination is necessary to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner undo hardship or injustice.”) (quotations omitted).

¹² *In re Refco, Inc.*, 2007 U.S. Dist. LEXIS 4993, at *9 (N.D. Ill. Jan. 16, 2007); *Wilcher*, 56 B.R. at 433; *In re Johns-Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984); see also *In re Gunn Allen Fin., Inc.*, Case No. 08:10-bk-9635-MGW (Bankr. M.D. Fla.) (permitting 2004 examination of non-party over its objection after expiration of liquidating agent’s deadline for pursuing adversary proceedings in order to investigate possible state law causes of action).

Civil Procedure.¹³ Discovery under Rules 7026 through 7037 is far more limited than it is under Rule 2004, and most courts conclude that a Rule 2004 examination should not be used as a mechanism for avoiding the discovery restrictions that apply in pending litigation.¹⁴ Because the scope of permissible discovery under Rule 2004 is so broad, there is an obvious tension when the entity seeking discovery is involved in litigation with the pending examinee, whether the litigation takes the form of a contested matter or adversary proceeding in bankruptcy, or if there is non-bankruptcy litigation pending. This tension is most obvious insofar as Rule 2004 examinations have been characterized as “nonadversarial in nature and aimed at discovering evidence upon which future causes of action may be based...”¹⁵ Accordingly, courts will either not authorize a 2004 examination while litigation is pending¹⁶ or authorize such examination only under conditions which ensure there is no prejudice to other litigants.¹⁷ The “pending proceeding” rule also recognizes that a litigant may gain an unfair advantage in litigation outside of bankruptcy if it can subject a party to a 2004 examination.¹⁸

Notwithstanding the “pending proceeding” rule, courts tend to allow 2004 examinations even during the pendency of an adversary proceeding if the discovery

¹³ See *Simms v. Deutsche Bank Nat'l Trust Co. (In re Simms)*, 2012 Bankr. LEXIS 3264, at *2-3 (Bankr. N.D. Ga. May 10, 2012); *In re Washington Mut. Inc.*, 408 B.R. at 50-51; *Sweetland v. Szadkowski (In re: Szadkowski)*, 198 B.R. 140, 141 (Bankr. D. Md. 1996); *M4 Enters., Inc.*, 190 B.R. at 475; *In re Sutera*, 141 B.R. 539 (Bankr. D. Conn. 1992); *Intercontinental Enters., Inc. v. Keller (In re Blinder, Robinson & Co.)*, 127 B.R. 267, 274-75 (D. Colo. 1991).

¹⁴ See, e.g., *First Fin. Sav. Assoc v. Kipp (In re Kipp)*, 86 B.R. 490, 491 (Bankr. W. D. Tex. 1988) (once adversary proceeding has been commenced, Rules 7026-7037 are applicable, rather than Rule 2004).

¹⁵ *In re North Plaza LLC*, 395 B.R. at 122.

¹⁶ *In re Bennett Funding Group, Inc.*, 203 B.R. at 24 (denial of request for 2004 examination where scope included issues and parties within scope of adversary proceeding); *In re Kipp*, 86 B.R. at 491 (request for examination denied).

¹⁷ See, e.g., *In re Analytical Sys., Inc.* 71 B.R. 408, 413 (Bankr. N.D. Ga. 1987) (examination would be ordered where examinee had been granted orders to protect due process rights in any collateral litigation).

¹⁸ See *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002).

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sought is unrelated to the adversary proceeding.¹⁹ Accordingly, when weighing a motion for authority to conduct a Rule 2004 examination, “the relevant inquiry is whether the Rule 2004 examination will lead to discovery of evidence related to the pending proceeding or whether the requested examination seeks to discover evidence unrelated to the pending proceeding.”²⁰ The rationale of the “pending proceeding” rule generally also applies to contested matters.²¹

There are a few instances where courts have not allowed 2004 examinations: (1) after a case is closed;²² (2) when an examinee claims certain testimony is privileged;²³ (3) post-confirmation when there is no longer any property of the estate;²⁴ and (4) where the 2004 examination involves matters barred by *res judicata*.²⁵ Courts have also declined to allow 2004 examinations of debtor’s counsel.²⁶

¹⁹ See *In re Washington Mut. Inc.*, 408 B.R. at 50-51; *Bennett Funding Group, Inc.*, 203 B.R. at 28; *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994).

²⁰ *In re Washington Mut. Inc.*, 408 B.R. at 51.

²¹ See *In re Job P. Wyatt & Sons’ Co.*, 2011 Bankr. LEXIS 4653, at *4 (E.D.N.C. July 14, 2011); but see *M4 Enters., Inc.*, 190 B.R. at 475-76 (noting that Bankruptcy Rule 9014(c) gives the court discretion to allow a 2004 examination in a contested matter if warranted); *Sweetland v. Szadkowski*, 198 B.R. at 141 n.1 (same).

²² *In re Kekahuna*, 35 B.R. 13, 14 (Bankr. D. Haw. 1983).

²³ *In re Fin. Corp. of Am.*, 119 B.R. 728, 733 (Bankr. C.D. Cal. 1990).

²⁴ *In re Carmelo Bambace, Inc.*, 134 B.R. 125, 130 (Bankr. S.D.N.Y. 1991); but see *Ernst & Young LLP v. Pritchard (In re Daisytex, Inc.)*, 323 B.R. 180, 186 (N.D. Tex. 2005) (2004 examination after plan confirmation may be permitted but such examination should be limited to issues which the court can still entertain, such as post petition administration of the estate).

²⁵ *In re Wilcher*, 56 B.R. at 440 (“res judicata and collateral estoppel operate as a bar not only to actual relitigation but also to discovery which can only lead to relitigation of closed matters.”).

²⁶ *In re French*, 145 B.R. 991, 993 (Bankr. D. S.D. 1992) (denying request for Rule 2004 examination of Certified Legal Assistant, holding that such paraprofessional “is an extension of debtor’s counsel” and that “[a]llowing debtor’s counsel to be subject to the this rule is simply going to far, is contrary to the Rules of Professional Conduct, and would quickly erode attorney-client relationships.”).

III. What is the Procedure for seeking a 2004 Examination?

A request for an examination pursuant to Rule 2004 must be made by motion and supported by just cause.²⁷ Any party in interest can seek a 2004 examination by filing a motion with the court, which may be heard either *ex parte* or on notice.²⁸ **Practice Pointer**: It is important to know your local bankruptcy practice and local rules when filing a motion for a 2004 examination. It is also very important to communicate with the other party. If your jurisdiction allows *ex parte* motions for 2004 examinations, call opposing counsel before you file your motion to attempt to set up a mutually convenient date and time. If all else fails and you must move to compel discovery, do not walk into court without evidence of your attempts to communicate with opposing counsel; and most importantly, be prepared to offer the court a resolution that indicates some compromise. Remember, judges hate discovery scraps and battles!

Generally, in order to show good cause for a 2004 examination, the party requesting the examination needs to demonstrate only that an examination is reasonably necessary to protect its legitimate legal interests.²⁹ If the requesting party makes such a showing, the examinee cannot avoid the examination by arguing that the examination is unduly burdensome or costly. Instead, if the examination is burdensome, the court should limit the scope of the examination appropriately. Although a Rule 2004 examination may be ordered *ex parte*, the debtor or entity may move to quash a subpoena

²⁷ *In re Metiom, Inc.*, 318 B.R. 263, 268 (S.D.N.Y. 2004) (“Generally good cause is shown if the [Rule 2004] examination is necessary to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner undue hardship or injustice.” (quoting *In re Dinubilo*, 177 B.R. 932, 943 (E.D. Cal. 1993)); *In re Wilcher*, 56 B.R. at 434.

²⁸ Fed. R. Bankr. P. 9014; *see, e.g.*, N.D.Ga. LBR 2004-1 (requiring a duty to confer and permitting examination by notice if examinee party consents); E.D.N.C. LBR 2004-1 (requiring a motion for examination to be reviewed by the court and allowed *ex parte*; subject to a motion to reconsider);

²⁹ *In re Hammond*, 140 B.R. 197 (S.D. Ohio 1992) (reversal of order denying request for Rule 2004 examination where bankruptcy court required that requesting party establish “extraordinary circumstances” justifying the examination).

or may object to entry of a court order setting the 2004 examination. Upon such an objection, the examiner bears the burden of proving good cause for the examination.³⁰

Any witness other than the debtor can be compelled to attend an examination and produce documents by a subpoena issued in accordance with Rule 9016, which incorporates Federal Rule of Civil Procedure 45.³¹ The debtor can be compelled to attend a 2004 examination either by court order or subpoena.³² The territorial limits on the place of examination that apply when an examination is compelled by subpoena do not apply when the examination is of the debtor pursuant to court order. Rule 2004(d) allows the court, for good cause shown, to order the debtor's examination at any place within or outside of the district where the debtor's bankruptcy case is pending.

IV. Subpoenas Pursuant to Rule 2004.

As noted above, a subpoena may be used to compel a witness to attend an examination that is ordered pursuant to Rule 2004. Federal Rule of Civil Procedure 45, governing the issuance of subpoenas, is applicable when a subpoena is issued under Rule 2004. Rule 2004(c) provides as follows:

The attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016³³ for the attendance of a witness at a hearing or trial.

Several questions may arise with respect to issuing a subpoena pursuant to Rule 2004. Some of these questions are addressed below.

➤ Do I need a subpoena?

³⁰ *In re Wilcher*, 56 B.R. at 434 (examiner must “show some reasonable basis to examine the material sought to be discovered.”).

³¹ Fed. R. Bankr. P. 2004(c).

³² Fed. R. Bankr. P. 2004(d), (e).

³³ Federal Rule of Bankruptcy Procedure 9016 incorporates the Federal Rules of Civil Procedure.

- A subpoena is not needed if the debtor is the subject of the Rule 2004 examination or production request.³⁴
- **Should I use a subpoena even if the would-be subject of the subpoena has agreed to appear at the examination and/or produce documents?**
 - **Practice Pointer:** It is good practice to use a subpoena even when the target of the subpoena has agreed to be examined and/or provide the requested documents. An examinee that is initially agreeable to providing information may change his or her mind. A subpoena that has been properly issued and served can be backed up by the contempt powers of the court.
- **What court must issue the subpoena?**
 - A subpoena for the examination of a witness should issue from the district where the examination will be held.³⁵
 - A subpoena for production or inspection **only** must be issued by the court for the district where the production or inspection is to be made.³⁶
- **Where must the examination be held or the documents be produced?**
 - A subpoena for examination may require a person to travel to an examination up to 100 miles from the place where that person resides, is employed, or regularly transacts business in person.³⁷
 - A subpoena for the production of documents applies to all documents within the possession, custody, or control of the party subject to the subpoena, regardless of where the documents are located. As such, a party

³⁴ Compare Fed. R. Bankr. P. 2004(c) (providing method for compelling attendance for any entity, including debtor), with Fed. R. Bankr. P. 2004(d) (providing method for compelling attendance of debtor for which no subpoena is required and there are no territorial limits on service).

³⁵ Fed. R. Civ. P. 45(a)(2)(B).

³⁶ Fed. R. Civ. P. 45(a)(2)(C).

³⁷ Fed. R. Civ. P. 45(c)(3)(ii).

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may subpoena documents to be produced in a district other than where the documents are located, provided the issuing court has personal jurisdiction over the person or entity subject to the subpoena.

➤ **Who may sign the subpoena?**

- As an officer of the court, an attorney may sign a subpoena, provided he or she (1) is authorized to practice in the jurisdiction of the issuing court; or (2) is authorized to practice in the jurisdiction of the court in which the bankruptcy case is pending.³⁸

- Alternatively, the clerk of court of the issuing court must, at the request of a party, issue a subpoena, signed, but otherwise blank, to the requesting party. The requesting party must complete the subpoena before service.³⁹

➤ **How should the subpoena be served?**

- **Practice Pointer:** It is best practice to serve a subpoena by hand-delivery to the subject of the subpoena.
- Serving a subpoena requires “delivering” a copy of the subpoena to the person named in the subpoena.⁴⁰ Courts are divided on whether “delivering” a subpoena requires personal service.⁴¹
- Many courts that do permit service of a subpoena by methods other than personal service, however, require the party attempting service to attempt

³⁸ Fed. R. Bankr. P. 2004(c)

³⁹ Fed. R. Civ. P. 45(a)(3).

⁴⁰ Fed. R. Civ. P. 45(b)(1).

⁴¹ Compare, e.g., *Klockner Namaso Holdings Corp. v. Daily Access.com, Inc.*, 211 F.R.D. 685, 687 (N.D.Ga. 2002) (finding that service of a subpoena was invalid where it had not been personally served on the target of the subpoena), with *King v. Crown Plastering Corp.*, 170 F.R.D. 355, 356 (E.D.N.Y. 1997) (finding that service is proper “so long as service is made in a manner that reasonably insures actual receipt of the subpoena by the witness”).

personal service *before* permitting an alternative form of service to suffice.⁴²

- **Do I need to include with the subpoena a check for witness and mileage fees?**
 - Yes. Rule 2004(e) provides that, “[a]n entity other than the debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day’s attendance shall be first tendered.”⁴³
 - Failure to deliver the requisite witness and mileage fees at the time of service of a subpoena may invalidate the subpoena.⁴⁴
 - Computation of the fees and allowances to be paid a witness for attending a Rule 2004 examination is governed by 28 U.S.C. § 1821.

V. Protective Orders.

While the procedural safeguards of the Federal Rules of Civil Procedure generally do not apply to a 2004 examination, an entity from which discovery is sought may seek a protective order in appropriate circumstances.⁴⁵ Bankruptcy Rule 2004(b) references Federal Rule of Bankruptcy Procedure 9016 which makes Federal Rule of Civil Procedure 45 applicable in bankruptcy cases. Federal Rule of Civil Procedure 45 allows an entity to seek a protective order from a subpoena if the discovery seeks privileged

⁴² See, e.g., *OceanFirst Bank v. Hartford Fire Ins. Co.*, 794 F. Supp. 2d 752, 754-55 (E.D. Mich. 2011) (requiring a showing of attempted personal service).

⁴³ Fed. R. Bankr. P. 2004(e). With respect to the debtor, Rule 2004(e) provides, “[i]f the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor’s residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.”

⁴⁴ See *In re Dennis*, 330 F.3d 696, 704-05 (5th Cir. 2003).

⁴⁵ See, e.g., *In re Comm. Fin. Servs.*, 247 B.R. 828, 842 (Bankr. N.D. Okla. 2000). Additionally, depending on the jurisdiction and local practice, a party opposing a 2004 examination may file opposition papers to the motion for 2004 examination to try to persuade the court that a 2004 examination is not appropriate based on the circumstances.

information or it is unduly burdensome and costly.⁴⁶ Further, because of broad and potentially intrusive nature of 2004 examinations, protective orders may be obtained with “good cause” shown to prevent private financial information and affairs from coming into public view, especially when the person or entity against whom an examination is sought is a third party.⁴⁷

⁴⁶ *In re Comm. Fin. Servs.*, 247 B.R. at 842.

⁴⁷ See, e.g., *In re Symington*, 209 B.R. 678, 689 (Bankr. D. Md. 1997); *In re Apex Oil Co.*, 101 B.R. 92, 102-03 (Bankr. E.D. Mo. 1989).

Suggested Rescues from a Nightmare Rule 2004 Examination

In the spirit of proper preparation, you can use this list to prepare your client in advance of the examination! There are no guarantees that it will give rise to a perfect examination, but it may save you a few headaches.

Defending the Examination:

1) The client is rushing through her answers.

After the most recent question is answered, take a break. Take a moment to talk to the client in private.

Remind the client that the record won't reflect whether it took a long time to answer, so the client should take their time to think through the answer.

Make any necessary clarifications to the record on rebuttal, if rushing answers led to mistakes.

2) The client is answering questions in a manner suggesting that they do not understand what they are being asked or counsel is asking questions in a manner that is clearly beyond the client's understanding.

Wait until the most recent question asked is answered, and request a break.

In private, remind the client to communicate with opposing counsel on the record when they don't understand a question. In addition suggest that a haphazard guess at what might be the right answer is far worse than a proper "I don't know" or "I don't understand the question." They do not have to know everything.

Make sure to clarify the record on rebuttal if there were any questions answered in a way that was wrong or could lead to an incorrect conclusion.

3) The client is guessing at the answers.

The client is guessing because s/he is afraid to say that s/he does not know the answer or cannot recall a fact.

A Rule 2004 Examination is not like a high school math test where the deponent has to answer every question. The client needs to understand that if s/he does not know the answer to a question, or cannot remember certain events, s/he can simply say, "I do not know" or "I can't recall."

The client needs to be reminded that s/he is testifying to his/her knowledge regarding the events of which s/he is aware.

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The client is not there to guess about the facts or circumstances.

Remind the client to restrict her/himself to answering things of which s/he is personally aware. If the client is asked to guess, her/his answer should be that s/he does not want to guess, and that s/he does not know.

4) The client is clearly uncomfortable with silence and continues to speak well beyond the scope of the question asked.

After the most-recent question is answered, take a break.

In private remind the client that their focus should only be on the question answered. Explain that the attorney taking the deposition is using silence (very effectively) to her advantage. There is no need for the client to be an expert on anything but their own truth. Expressing opinions or providing unnecessary facts and information could play right into the other side's plans.

5) The client is not carefully reviewing the documents that are the subject of counsel's questions or the client is not keeping the exhibits organized.

After the question about the most recent exhibit has been answered, take a break.

In private explain to the client that they need to be testifying about the importance of the documents presented. If the documents are shuffled or not closely examined, it could be harmful to the record and the story that they need to be presenting.

Correct the record on rebuttal if necessary.

6) The client is answering before objections can be resolved.

After the most recent question has been answered, take a break.

Advise the client that before answering any question they need to wait to see if the question is objectionable in some way. If counsel wants to argue about the nature of the question, that must be resolved prior to the answer. Sometimes a question is not appropriate, and answering over the objection before it is resolved can be harmful to the record and later at trial.

Suggest that the client wait a beat after each question before answering.

Also remind the client that if objections are being resolved, she should listen carefully to what counsel is saying. The nature of the objection or the words used by counsel can be a guide to what information may be protected or is risky to disclose.

7) The client seems to be lying.

In private, explain to the client that they don't seem to be giving answers consistent with prior discussions with counsel, or, if the case may be, with discussions from earlier in the deposition.

Seek to determine whether the record can be clarified in some way. Perhaps there is a way that the answer is truthful, when framed correctly.

8) The client has contradicted her/himself on a key fact.

Just like lying, self-contradiction will sink a case. Clients who say one thing at the beginning of an examination and then contradict themselves later on will find themselves vulnerable to an opposing attorney who will expose the contradiction at trial to show that the client cannot be trusted to tell the story straight and should not be believed.

If, during an examination, your client realizes that he or she made a mistake earlier on, the client should be instructed to correct the testimony. This is much less damaging than the client trying to pretend that he or she did not give an opposite answer an hour or a day before.

9) The client has lost her temper.

After the most recent question has been answered, seek a break.

Allow the client some time to get calm.

10) The client's anger continues.

Seek additional time to restore calm to the process. If the anger is due to inappropriate behavior of opposing counsel, seek guidance from the court.

11) The client cannot/refuses to continue due to a personal emergency.

Seek a continuance from opposing counsel, citing that they do not want a record from a distracted witness. That could be an easy ground to destroy the strength of the testimony procured.

If counsel will not release the witness, seek counsel of the court.

12) Video or telephonic examinations can pose their own challenges.

Take extra measures to make sure that everyone is looking at the same document and that the record is clear. **Practice Pointer:** Video examinations must be noticed as such. You cannot surprise a witness with a video examination and should seek a protective order if the noticing party tries to surprise your client with a video deposition without notice.

13) Your client's technical testimony is above your head.

If you want to confirm your client's testimony, but you cannot understand it yourself, utilize the court reporter. Have her read back the record after each question you don't understand, and have the client confirm the accuracy of each statement.

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14) The client is being evasive in their answers.

Under the Federal Rules of Civil Procedure 30 and 37 (made applicable to Rule 2004 examinations by Federal Rules of Bankruptcy Procedure 7030 and 7037), a court can sanction an attorney for advising conduct that leads to evasive or incomplete deposition responses by a witness and for conduct that “impedes, delays, or frustrates the fair examination of the deponent.” A court also possesses inherent power to sanction attorneys for misconduct in a court proceeding. Attorneys should avoid obstreperous behavior, as well as advocating, encouraging, condoning, or even failing to stop, such behavior by their clients.

Take a break.

Remind the client that s/he is making a record that can be used at trial. Assure the client that s/he can ask for questions to be repeated or re-phrased, if they are confusing or feel like a “trap,” but that, generally, s/he should answer in a straightforward and honest way.

15) Examining counsel’s questions are objectionable.

An objection may alert the witness to the fact that a question is or may be defective, but objections should not be used to signal to the witness that he/she should not answer the question if the witness is able to do so. In fact, an objection is made for the record and does not prevent the witness from answering the question after the objection, unless the question calls for disclosure of privileged information.

16) Opposing counsel is being abusive to the witness.

If opposing counsel harasses the witness, then the defending attorney should do the following:

Make a record of that harassment for purposes of a potential motion later (such as a motion for a protective order to prevent further deposition of the witness);

Instruct the witness not to answer if the harassing questions continue; and,

Finally, stop the deposition if the opposing counsel fails to cease the harassment.

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Taking the Examination:

- 1) If you are local counsel, and do not know the case inside and out like your co-counsel, ask for the pressure points. Where might the other side lie? What would the truth sound like?
- 2) If the examination is on a highly technical subject, have someone who will understand what is being said present. This will ensure that proper follow-up questions are asked.
- 3) If the examination is on a highly technical subject, and you do not have the ability to bring a back-up observer, take the time to confirm your client's testimony after each answer. Utilize the court reporter's record. Have the reporter read back the record after each question you don't understand, and have the client confirm the accuracy of each statement.
- 3) Keep asking follow up questions until you are satisfied.
- 4) Take your time. The record won't reflect how long it took you to gather your thoughts.
- 5) Build a rapport, if possible.
- 6) Control your temper.
- 7) If the witness is taking control of the deposition, be more direct with your questions.
- 8) Make a very clear record. If you are referencing documents, make sure that the record of what you are asking is clear out of context.
- 9) If you mostly got the answer you want, ask a summary question to get the details put together so that you have a clear "quotable" statement on the record.
- 10) Do not let the witness direct the examination. You have a lot of latitude under a Rule 2004 examination, don't squander it.
- 11) If opposing counsel is not being cooperative, use chambers.
- 12) You do not need counsel to be answering your questions. Clear up your record so that your desired responses are in the examinee's words.

Experts—Outside of a Rule 2004 Exam:

The opposing expert has hijacked the deposition.

Many court regulars make a small fortune by providing expert services, and they know they can win or lose a case during deposition. Thus, they are not only experts in their field of study, but they are experts at providing testimony (or lack thereof).

Expert deponents often evade the tough questions, debate or berate their deponents, and generally refuse to stray from “the script” provided to them by opposing counsel. This is where attorney preparation is paramount:

Study the expert’s report(s) carefully.

Know the subject matter about which s/he will testify, even if that means hiring a consultant to prepare you for likely subjects of examination.

Review the expert’s relevant publications and look for conflicting information that could help your client’s cause.

Follow the expert’s testimony closely. If s/he evades a question, ask the reporter to read it back and press for an answer.

Above all, try to maintain control of the deposition.

If, after asking a question in several different forms, the expert refuses to answer, pause the deposition and ask whether opposing counsel wishes to take the matter up with the Court. An expert who is a frequent court witness may not want his/her first introduction to the Judge to come in the form of emergency deposition intervention.

Often, the value of a deposition is lost when an opposing expert successfully diverts attention away from key subjects, and the deposing attorney fails to follow up.

The Nuts and Bolts of the 2004 Exam Discovery Tool

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From a surface level, a Federal Rule of Bankruptcy Procedure Rule 2004 exam may seem the same as a deposition existing outside the world the Bankruptcy Court, but after a deeper look, they are inherently different. This paper will discuss the basics of Rule 2004 exam, the limits of the 2004 exam, and the procedures for seeking a 2004 exam.

I. Rule 2004 Exam: The Basics

The scope of a Rule 2004 exam is different from any type of discovery occurring outside of bankruptcy, or even an adversary proceeding, due to the broad scope of the examination. In general, the purpose of a 2004 exam is “designed for the purpose of discovering and unearthing frauds” and to assist the parties in “revealing the nature and extent of the estate.”¹ The scope of the 2004 exam is broader and more comprehensive than discovery governed by FRCP 26 and is typically referred to as a “fishing expedition”² to obtain additional information after the Rule 341 meeting.³ It is similar to a deposition in that the trustee, creditor, or even the debtor, can ask questions to any party under oath, as well as request documents to facilitate the bankruptcy proceeding, yet it is without as many limitation as an FRCP 26 Deposition.

II. Limits of the 2004 Exam

Although characterized as a “fishing expedition”, the 2004 exam does have its limits. Pursuant to Rule 2004, the exam may only relate to acts, conduct or property or to the liabilities and financial condition of the *debtor*, or to any manner effecting the administration of the debtor’s

¹ *In re Washington Mutual, Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009); *In re Wilcher*, 56 B.R. at 428,433 (Bankr. N.D. Ill. 1985); *In re Isis Foods, Inc.* 33. B.R. 45, 46-47 (Bankr. W.D. Mo. 1983).

² *In re Washington Mutual, Inc.*, 408 B.R. at 50.

³ *In re Duratech Industries Inc.* 241 B.R. 283, 289 (E.D.N.Y. 1999).

estate or right to discharge.⁴ Additionally, the exam must be used for a legitimate purpose, cannot stray into areas of abuse or harassment, and must stay focused on areas relevant to the basic inquiry of the exam.

One of the most pivotal restraints on the 2004 Exam is known as the “pending proceeding” rule. It states that once an adversary proceeding or contested matter⁵ has been commenced in another forum, discovery is made pursuant to Federal Rules of Bankruptcy Procedure 7026, rather than by a 2004 examination.⁶ Discovery pursuant to Rule 7026, is identical to the Federal Rules of Civil Procedure Rule 26.⁷

The two lead cases on the “pending proceeding” rule are *In re Washington Mut., Inc.*, 408 B.R. 45 (Bankr. D. Del. 2009) and *Matter of M4 Enterprises, Inc.*, 190 B.R. 471 (Bankr. N.D. Ga. 1995). In *In re Washington Mutual*, Washington Mutual Bank (“WMB”) was closed and transferred to the FDIC as its receiver.⁸ FDIC then sold substantially all of the assets to JP Morgan Chase (“JPM”).⁹ Various debtors asserted claims against FDIC by filing proof of claims with FDIC in its capacity as a receiver of WMB.¹⁰ FDIC denied all of the claims.¹¹ The debtors then filed suit in the United States District Court for the District of Columbia asserting five causes of actions against FDIC.¹² JPM then moved to intervene and filed an adversary proceeding against the

⁴ Fed. R. Bankr. P. 2004(b).

⁵ The contested matters exception and the courts discretion to apply Rule 7026 will be discussed in-depth below.

⁶ *In re Washington Mutual Inc.*, 408 B.R. at 50.

⁷ Fed. R. Bankr. P. 7026.

⁸ 408 B.R. at 47.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 47 – 48.

Debtors.¹³ The Debtors then responded with filing an adversary proceeding of their own.¹⁴ The Debtors then moved for a Rule 2004 exam directing an exam of JPM.¹⁵

The court discussed the limits of the 2004 exam, explaining the “pending proceeding” rule. The court stated that once an adversary proceeding or contested matter has been commenced, discovery is made pursuant to Federal Rules of Bankruptcy Procedure 7026 (FRCP 26), rather than by a 2004 examination.¹⁶ Reasoning that a 2004 may be inappropriate where the party requesting the 2004 exam could benefit their pending litigation outside of the bankruptcy court against the proposed 2004 examinee.¹⁷ The court eventually determined that the information being sought was not relevant to any of the adversary proceedings and allowed the 2004 exam.¹⁸

In *In re M4 Enterprises*, the court also discussed the issue of a pending adversary proceeding. The requesting party requested a 2004 exam to question the Trustee on the value on the claims he proposed to release, as well as the extent to which a settlement would benefit the estate.¹⁹ The Trustee claimed that the presence of a pending adversary or contest matter barred the use of a 2004 exam.²⁰ In its opinion, the court agreed with the Trustee, stating that once the parties have commenced an adversary proceeding, they may not employ Rule 2004 as a discovery device to uncover evidence related to that [pending] proceeding.²¹

The court *In re Washington*, provided two policy reasons behind the purpose of the pending proceeding rule. First, normal discovery applies in both adversary and contested matters. Second, and arguably the one that carries the most weight, is that a 2004 Exam does not carry with it the

¹³ *Id.* at 48.

¹⁴ *Id.*

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 50.

¹⁷ *Id.*

¹⁸ *Id.* at 52 – 53.

¹⁹ *In re M4 Enterprises*, 190 B.R. 471, 473 (Bankr. N.D. Ga. 1995)

²⁰ *Id.*

²¹ *Id.* at 475.

same safeguards as a deposition under FRCP 26.²² For example, in a 2004 Exam parties do not have the right to counsel, while the right to object to improper or immaterial questions is limited.²³

As with any rule, there are exceptions that limit the scope of the pending proceeding rule. The court in *In re Washington* and *M4 Enterprises* stated that discovery *related* to the pending proceeding must be accomplished in accordance with Rule 7026 (FRCP 26), while *unrelated* discovery should not be subject to those rules simply because there is an adversary proceeding pending. In short, if the 2004 Exam does not relate to the pending adversary litigation/contested matter but to another matter, the pending proceeding rule does not apply.²⁴ Thus, the relevant inquiry when determining whether or not the pending proceeding rule applies is whether the Rule 2004 exam will lead to discovery of evidence related to the pending proceeding or whether the requested examination seeks to discover evidence unrelated to the pending proceeding.²⁵

The court in *M4 Enterprises* provided an additional exception in regards to “contested matters” stating that if the pending proceeding is a contested matter under Rule 9014, that Rule 7026 applies “unless the court otherwise directs.”²⁶ Thus, Rule 7026 (FRCP 26) offers a preferable default from which the court may deviate from.²⁷

III. Procedure for a 2004 Exam

In order to effectuate a 2004 Exam, the party must file a motion with the court explaining, with good cause, why the exam is needed. To show good cause, the requesting party needs to demonstrate that the exam is reasonably necessary to protect its legitimate interests or that denial of the request would result in undue hardship to the requesting party.²⁸ It is important to keep local

²² 408 B.R. at 50.

²³ *Id.*

²⁴ *Id.*; *In re M4 Enterprises, Inc.*, 190 B.R. 471, 475 n. 4 (Bankr. N.D. Ga. 1995).

²⁵ *Id.*

²⁶ Fed. R. Bankr. 9014.

²⁷ 190 B.R. at 475.

²⁸ *In re Hammond*, 140 B.R. 197 (S.D. Ohio 1992); 480 B.R. 45 (Bankr. D. Del. 2009).

rules in mind regarding *ex parte* motions. If communication is required, make sure to keep a detailed record of communication between you and opposing counsel prior to filing the motion to prove that you attempted to communicate and come to amicable agreement on the issue.

Along with the Rule 2004 examination, comes the power to compel individuals and production of certain necessary documents by issuing a subpoena in accordance with Rule 9016.²⁹ If a 2004 Exam is ordered, the debtor is required to appear without a issuing a subpoena. If an individual is not the debtor or is a nonparty, the requesting party must issue a subpoena for the person to appear, as well as subpoena any documents relevant to the exam.³⁰ Additionally, if the individual/entity is in possession of information identified in Rule 2004(b), it is compelled to participate. Moreover, attendance at a 2004 exam may be compelled anywhere in the United States, whether it is a court within or outside the district in which the bankruptcy is pending, up to 100 miles from the place where the person resides, is employed, or regularly transacts business in person³¹

A common hurdle in regards to the subpoena is: who issues the subpoena? The answer to the question can be found in Rule 9016, which incorporates FRCP 45. In sum, the subpoena must be issued by the clerk of district where the exam is going to be held or by the attorney, if the attorney is authorized to practice in the issuing court³². While a subpoena for production or inspection *only*, must be issued by the court for the district where the production or inspection is to be made.

²⁹ The rule incorporates Fed R. Civ. P. 45, along with its limits, except when the examination of the debtor is pursuant to a court order.

³⁰ Fed. R. Bankr. P. 2004(c), (d); Fed. R. Civ P. 45 (c)(2)(a).

³¹ *Id.*

³² Fed. R. Civ. P. 45 (a)(2).