American Bar Association
Business Law Section
Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes

Task Force on Attorney Discipline

Report:

Attorney Liability under § 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

September 20, 2005

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TABLE OF CONTENTS

§ 1. Scope of Report 7

§ 2. Scope of § 707(b)(4); Application 8
Recommendation (8)
Commentary (8)

§ 3. § 707(b)(4)(C) 10
§ 3.1 "Reasonable Investigation" 10
Recommendations (10)
Commentary (11)
§ 3.2. "Well Grounded in Fact" 15
Recommendation (15)
Commentary (15)
§ 3.3. "Warranted by Existing Law or a Good Faith Argument for Extension, Modification or Reversal of Existing Law" 16
Recommendation (16)
Commentary (17)
§ 3.4. "Not an Abuse Under Section 707(b)(1)" 17
Recommendation (17)
Commentary (18)

§ 4. § 707(b)(4)(D) 19
§ 4.1 "Inquiry" 19
Recommendation (19)
Commentary (20)
§ 4.2. "Knowledge" 23
Recommendation (23)
Commentary (24)
§ 4.3. "Incorrect" 24
Recommendation (24)
Commentary (24)

APPENDIX A: Case Annotations 26
Time Constraints: 26
Court's Review of Attorney's Conduct: 26
Attorney's Verification of Client's Information, Especially If Client's Information Signals Inaccuracies 27
Attorney's Reliance on Documents Prepared by Third Parties, Such as Tax Returns 28
"Good Faith" and "Totality of the Circumstances": 28
Requiring Documentary Evidence from Debtors: 29
"Knowledge" as a "Should Have Known" Standard: 30

APPENDIX B: Task Force Member Biographies 31

American Bar Association
Business Law Section
Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes

Task Force on Attorney Discipline

Report on Attorney Liability under § 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

September 20, 2005

The Ad Hoc Committee on Bankruptcy Court Structure and the Insolvency Processes is a Committee (the "Committee") housed in the Business Law Section of the American Bar Association consisting of members representing a number of ABA entities concerned with bankruptcy and its implications, including the Business Law Section, the GP|Solo Division and the Judicial Division. In response to two issues, the Business Law Section authorized the Committee to establish a Task Force to draft a proposed model local rule for the Bankruptcy Courts regarding attorney discipline.

The first issue involved a perception that the bar and the bankruptcy courts have not adequately addressed attorney misconduct in bankruptcy cases. This perception has led to fairly broad support for the attorney liability provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[1] The second issue is related to the new BAPCPA provisions establishing attorney liability. Those provisions are likely to result in an increase in attorney disciplinary proceedings in the bankruptcy courts. The Committee also concluded that the state bars are not well-suited to discipline bankruptcy attorneys who violate the Rules of Professional Conduct because the violations often involve a bankruptcy law issue

[1] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

outside the expertise of the state bars and because of the lengthy period before the state bar process might ever result in disciplinary action.

The bankruptcy courts, as federal courts, have the power to police the members of the bar that practice before them; however, many bankruptcy courts do not have established procedures to deal with attorney misconduct and the procedures that have been established are not uniform. Hence, the Committee formed the Task Force to propose a model local rule to assist the bankruptcy courts in policing bankruptcy lawyer misconduct.

During its initial deliberations, the Task Force determined that, in addition to a procedural rule for attorney discipline, guidance regarding the new "reasonable investigation" and "inquiry" requirements imposed on attorneys under BAPCPA would be helpful. The Task Force started with the idea of developing a model local rule to address § 707(b)(4), reasoning that, if the Task Force could define the procedures that an attorney must follow in carrying out his or her new obligations under BAPCPA, not only would attorneys be able to understand the behavior necessary to comply with the new obligations, but also debtors and the courts would benefit as well.

The Task Force concluded that, in addition to the longer term goal of drafting a model rule and in light of the October 17, 2005, effective date for BAPCPA (and the new § 707(b)(4)), it would be helpful to the bench and bar for the Task Force to publish a report with recommendations on interpreting the provisions of § 707(b)(4), particularly with a view as to how existing law may be applicable. This Report is the result of the Task Force's efforts.

§ 1. Scope of Report

BAPCPA imposes new certification standards directed at attorneys who represent debtors whose debts are primarily consumer debts[2] in Chapter 7 cases. These new standards, codified at § 707(b)(4)(C) and (D), provide:

> (C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has –
> (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
> (ii) determined that the petition, pleading, or written motion –
> (I) is well grounded in fact; and
> (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).
>
> (D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.[3]

This Report examines several key words and phrases in § 707(b)(4) and, where appropriate, makes recommendations regarding the interpretation of those words and phrases. Specifically, this Report examines:

- "reasonable investigation"
- "warranted by the facts"
- "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"
- "not an abuse"
- "inquiry"
- "knowledge"
- "incorrect"

This Report offers recommendations for interpretation of the provisions of § 707(b)(4). The Task Force has supported its recommendations using existing case law interpreting language

[2] BAPCPA Section 102(a)(2)(B), amending Code § 707(b) to provide that the court "may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts … if it finds that the granting of relief would be an abuse of the provisions of this chapter."

[3] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(4).

from Rule 9011 of the Federal Rules of Bankruptcy Procedure,[4] because it contains language that is the same or similar to new § 707(b)(4). The Task Force also has included as an Appendix case annotations setting forth a much fuller annotation of the law developed under Rule 9011.

§ 2. Scope of § 707(b)(4); Application

Recommendation

Section 707(b)(4) should be limited to the pre-filing conduct of attorneys representing consumer debtors in Chapter 7 cases to ensure that the debtor's case is not an "abuse" under the means test and is not filed other than in good faith.

Commentary

Despite the seemingly broad language used in § 707(b)(4), its scope is limited to a specific set of cases: Consumer debtors seeking relief under Chapter 7 of the Bankruptcy Code subject to the new "abuse" standard adopted by BAPCPA, which is reflected in the means test[5] and the good faith requirement.[6] That § 707(b)(4) applies only in Chapter 7 cases is mandated by § 103(b),[7] which BAPCPA does not amend. Subparagraphs (A)[8] and (C)[9] expressly relate to

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[4] Fed. R. Bankr. P. 9011. In this Report, all references to "Rule 9011" or the "Rule" mean Rule 9011 of the Federal Rules of Bankruptcy Procedure.

[5] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(2).

[6] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(3). The Report uses "good faith" as a shorthand for the requirements of new § 707(b)(3), which provides in full:

> In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or has been rebutted, the court shall consider –
>
> (A) whether the debtor filed the petition in bad faith; or
>
> (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

[7] 11 U.S.C. § 103(b) ("Subchapters I and II of chapter 7 apply only in a case under such chapter").

[8] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(4)(A), which reads:

> The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorney's fees if –
>
> (i) a trustee files a motion for dismissal or conversion under this subsection; and
>
> (ii) the court –
>
> (I) grants such motion; and
>
> (II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

[9] *Id*. *See supra* note 2 and accompanying text for the language of § 707(b)(4)(C).

"abuse" as defined in § 707(b), which, in turn, applies only to consumer debtors. Thus, it is only two provisions of § 707(b)(4), subparagraphs (B)[10] and (D),[11] that are capable of broad application to all Chapter 7 debtors' attorneys.

Applying §§ 707(b)(4)(B) and (D) broadly in the face of these specific limitations is not consistent with well-accepted principles of statutory construction. As one commentator explains:

> Applying the maxims of *ejusdem generis* (general terms should be understood in context of specific ones) and *noscitur a sociis* (a term is known by the company it keeps), courts have applied narrow definitions to otherwise broad words, phrases, or subparts of various statutes, recognizing that to do otherwise would create anomalous results, create broader applicability than legislatively intended, or both.[12]

Although few would doubt that Congress meant to tighten judicial oversight with respect to debtors' counsel, nothing in BAPCPA or its legislative history suggests that this intent was directed at any attorneys other than those representing consumer debtors.[13] In addition to Congressional intent, § 707(b)(4) is preceded by the means test and the good faith filing requirement and succeeded by a paragraph (5),[14] which provides for sanctions against creditors relating to improper motions to dismiss a debtor's petition as an abuse. Therefore, § 707(b)(4) is limited to the pre-filing conduct of attorneys representing consumer debtors in Chapter 7 cases

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[10] Id. New Code § 707(b)(4)(B) provides:

> If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest in accordance with such procedures, may order –
>
> (i) the assessment of an appropriate civil penalty against the attorney for the debtor; and
>
> (ii) the payment of such civil penalty to the trustee, the United States trustee (or bankruptcy administrator, if any).

[11] *See supra* note 3 and accompanying text for the language of § 707(b)(4)(C).

[12] Catherine E. Vance, *Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition of Sanctions Against Debtors' Counsel*, 106 COM. L.J. 241, 245 (2001).

[13] *See* House Rep. 109-31 at 17 ("The bill's consumer protections include provisions strengthening professionalism standards for attorneys and others who assist consumer debtors with their bankruptcy cases.").

[14] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(5).

to ensure that the debtor's case is not an "abuse" under the means test and is not filed other than in good faith.

That § 707(b)(4) is limited to the attorney's pre-filing conduct is also suggested in the language of the new provision. The "reasonable investigation" requirement in § 707(b)(4)(C) is expressly directed at "the circumstances that gave rise to the petition, pleading, or written motion." In addition, as discussed above, § 707(b)(4) is limited to "abusive" filings. A motion alleging abuse must be filed in short order; Rule 1017(e)(1)[15] requires that a § 707(b) motion to dismiss be filed no later than 60 days from the first date set for the § 341 meeting of creditors. BAPCPA, moreover, requires the United States Trustee to file a statement within ten days of the meeting of creditors as to whether the debtor's case would be presumed to be an abuse and, not more than 30 days later, file either a motion to dismiss or a statement indicating why no motion will be filed.[16] This restricted timeframe regarding whether the debtor's case will be challenged as "abusive" leaves no room for § 707(b)(4) to encompass the attorney's post-petition activities.

§ 3. § 707(b)(4)(C)

§ 3.1 "Reasonable Investigation"

Recommendations

As a standard, "reasonable investigation" should be governed by the case law interpreting and applying the "reasonable inquiry" standard under Rule 9011.

- Attorneys should be able to rely on case law that allows time constraints to be taken into account.
- The reasonableness of the attorney's inquiry should not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney's inquiry at the time that the inquiry was made.

[15] Fed. R. Bankr. P. 1017(e)(1).
[16] BAPCPA Section 102(c), adding Code § 704(b).

- Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney's professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy.

- Attorneys should be able to rely upon documents prepared by third parties in the scope of their employment, including tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor's pre-petition credit counseling agency.

Unless and until the courts articulate new standards for § 707(b)(3)'s good faith requirement, attorneys should be able to rely on case law developed under § 707(a), specifically those cases interpreting and applying the "bad faith" and "totality of the circumstances tests.

Case annotations relevant to these recommendations are attached as Appendix A and incorporated herein.

Commentary

Because of the general rule of statutory construction that, where different words are used by Congress, it is presumed that different meanings are intended,[17] a "reasonable investigation" under new § 707(b)(4)(C) should differ somehow from the "reasonable inquiry" standard under Rule 9011. However, there is no discernable difference between the two terms. Rather, they are commonly used interchangeably and each is often used to define the other. In this regard, the following case excerpt typifies the judicial discussion:

> Rule 11 requires an attorney to make a ***reasonable inquiry*** into the factual and legal basis for the claims asserted. The failure of an attorney to make an objectively ***reasonable investigation*** of the facts underlying a claim or the applicable law justifies the imposition of Rule 11 sanctions.[18]

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[17] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 741 n.9 (2004) *quoting* 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th ed. 2000).

[18] *In re* Ronco, Inc., 838 F.2d 212, 217 (7th Cir. 1988) (emphasis added). *See also, e.g.,* Hamer v. Career Coll. Ass'n, 979 F.2d 758, 759 (9th Cir. 1992) (after noting Rule 11's *reasonable inquiry* standard, court stated "an affidavit should be sufficient to constitute *reasonable investigation* for purposes of Rule 11"); *In re* Excello Press, 967 F.2d 1109, 1112-13 (7th Cir. 1992) (under Rule 9011 an attorney is required to make a *'reasonable inquiry'* before filing a document, but "how much *investigation* is reasonable in a given case is a question of line drawing."). *See also* 2 James W. Moore et al., Moore's Federal Practice ¶11.11[2] (3d Ed.) (using the words "inquiry" and "investigation" interchangeably).

Accordingly, in interpreting and applying § 707(b)(4)(C)'s "reasonable investigation" requirement, attorneys and the courts should use the "reasonable inquiry" standard articulated under Rule 9011 jurisprudence. Any other conclusion would put consumer bankruptcy attorneys in the untenable position of having to guess about their behavior before any case law regarding such behavior has been developed.

More specifically, the Task Force accepts the following articulation of an attorney's reasonable pre-filing investigation:

> The duty of reasonable inquiry imposed upon an attorney by Rule 11 and by virtue of the attorney's status as an officer of the court owing a duty to the integrity of the system requires that the attorney (1) explain the requirement of full, complete, accurate, and honest disclosure of all information required of a debtor; (2) ask probing and pertinent questions designed to elicit full, complete, accurate, and honest disclosure of all information required of a debtor; (3) check the debtor's responses in the petition and Schedules to assure they are internally and externally consistent; (4) demand of the debtor full, complete, accurate, and honest disclosure of all information required before the attorney signs and files the petition; and (5) seek relief from the court in the event that the attorney learns that he or she may have been misled by a debtor.[19]

The court's reference to "attorney" does not necessarily preclude the use of paraprofessionals where appropriate and under proper supervision in the course of the attorney fulfilling the reasonable inquiry requirement. However, it is clear under pre-BAPCPA decisions, that attorneys cannot evade their responsibilities by relying on those paraprofessionals. Rather,

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[19] *In re* Robinson, 198 B.R. 1017, 1024 (Bankr. N.D. Ga.1996); *In re* Armwood, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994); *In re* Matthews, 154 B.R. 673, 680 (Bankr. W.D. Tex. 1993). *See In re* Huerta, 137 B.R. 356, 379 n.8 (Bankr. C.D. Cal. 1992). Another court explained:

> Litigation lawyers have a broad responsibility under Rule 11 and the Code of Professional Responsibility (now the Model Rules of Professional Conduct): to confer with the client about the facts -- and not to accept the client's version on faith, but to probe the client in that respect ('reasonable inquiry'); to do the lawyers' homework on the law; and then to counsel the client about just which claims the law reasonably supports in terms of the facts the lawyers' proper investigation has disclosed. That often involves counseling the client -- sometimes against the tide of the client's displeasure -- as to how best to vindicate the client's interests without abusing another's. In some instances that may involve advising a client not to pursue a claim or a theory of recovery that in a technical sense (of surviving a Rule 12(b)(6) motion) might perhaps go forward, but by rights should not.").

Fleming Sales Co., Inc. v. Bailey, 611 F. Supp. 507, 519 (N.D. Ill. 1985).

all attorneys must exercise not only supervision, but, more importantly, professional judgment that derives only through personal involvement in the case and evaluation of the client's needs.

The Task Force notes that new statutory mandates will lead to satisfaction of these considerations in certain respects, especially if the attorney is also a "debt relief agency."[20] For example, attorneys representing consumer debtors who fit the definition of "assisted person"[21] must give the debtor *and* file with the court the § 342(b) notice,[22] which includes a statement that debtors who make false statements under penalty are subject to fine or imprisonment and that information the debtor provides is subject to Attorney General review.[23] If the attorney is a debt relief agency, additional required disclosures include written notice to the debtor that:

- all information that the debtor is required to provide with a petition and thereafter during the case is required to be complete, accurate and truthful;[24]
- all assets and liabilities are to be completely and accurately disclosed in the documents filed to commence the case; and[25]
- information that the debtor provides during the case may be audited, and failure to provide such information may result in dismissal of the case or other sanction, including a criminal sanction.[26]

Compliance with these notice requirements would presumably satisfy the first and fourth of the attorney's duties in performing a reasonable inquiry, as set forth above because that compliance makes clear to the debtor that complete, accurate, and truthful disclosure is required. Similarly, the debtor must file with the court payment advices or other evidence of payment

[20] BAPCPA Section 226, adding Code § 101(12A).
[21] BAPCPA Section 226, adding Code § 101(3).
[22] BAPCPA Section 315, amending Code § 521(a).
[23] BAPCPA Section 104, amending Code § 342(b).
[24] BAPCPA Section 227, adding Code § 527(a)(2).
[25] Id.
[26] Id.

received within the 60 days preceding the petition,[27] thus satisfying to a degree the attorney's investigation of the debtor's income.

It is beyond the scope of this Report to detail all the documentation requirements that, if undertaken by the attorney, could satisfy the "reasonable inquiry" standard under Rule 9011. The point, rather, is to alert the bench and bar that BAPCPA itself may supply the requirements of a reasonable inquiry in certain respects.

On the other hand, § 707(b)'s "abuse" standard, whether defined by the means test or by the good faith restriction, presents numerous opportunities for litigation. With respect to good faith, this potential is obvious, because the court is required under certain circumstances to determine whether the debtor filed the petition in bad faith or whether the totality of the circumstances demonstrates abuse.[28] The means test itself also requires judicial interpretation. For example:

- The debtor's expenses will include amounts "reasonably necessary" for health and disability insurance, health savings accounts, and "to maintain the safety of the debtor and the family of the debtor."

- It is unclear what income will be excluded from "current monthly income" as a benefit received under the Social Security Act.

- Housing and utility expenses may exceed the IRS guidelines based on the actual expenses for home energy costs if the "actual expenses are reasonable and necessary."[29]

- If the presumption of abuse arises, it may be rebutted only by "demonstrating special circumstances…that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative."[30]

[27] BAPCPA Section 315, amending Code § 521(a).
[28] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(3).
[29] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(2)(A)(ii)(V).
[30] BAPCPA Section 102(a)(2)(C), adding Code § 707(b)(2)(B)(ii).

Each of these issues, along with many other permutations of amended § 707(b) and its abuse standards,[31] provides a basis for the court to determine that the attorney has not made a reasonable inquiry. Adoption of the Task Force's "reasonable investigation" recommendations will allow the courts to interpret and apply § 707(b)(4)(C) in a manner consistent with Congressional intent, but without subjecting attorneys to liability before the many litigable aspects of § 707(b) are given meaning, thus establishing clearer rules for the attorney's pre-filing investigation.

§ 3.2. "Well Grounded in Fact"

Recommendation

None.

Commentary

BAPCPA has created a rather odd relationship between new § 707(b)(4)(C)(ii)(I)'s "well grounded in fact" language and Rule 9011. The Task Force, therefore, concludes that the interpretation of "well grounded in fact" must await judicial development.

The problem with the use of "well grounded in fact" in § 707(b)(4)(C) is that it resurrects language used in Rule 9011 before Rule 9011 was amended in December 1997. This may be the product of Congressional oversight: the earliest versions of BAPCPA were introduced prior to the effective date of the Rule amendment.[32] Even if true, the oversight is of no moment because it is the language of the statute that matters most.

[31] See e.g., H.R. Rep. No. 109-31, at 656 (2005) ("Judge Randall Newsome testified on behalf of the National Conference of Bankruptcy Judges that at least 16 potential sources of litigation are contained in the means testing provisions alone, and that another 42 litigation points have been identified in the other consumer provisions, noting that "[t]his is probably only the tip of the iceberg.").

[32] See e.g., H.R. 3150, introduced October 21, 1997.

The courts have two options. The first is to apply those Rule 9011 cases decided after the 1997 amendment, treating the "well grounded in fact" language as largely synonymous with the Rule's current language. As one commentator has noted:

> Despite the different treatment of factual allegations under the legislation and Rule 9011, it is doubtful that there will be any significant practical effect. Except in cases involving very close calls, the distinction between the two is slight. Moreover, many of the facts that support the bankruptcy petition will need to be filed with the court, including detailed statements of net monthly income, payment advices, tax returns, and other information that bears on means test eligibility. Thus, much of the factual support will be provided along with the petition, or shortly thereafter.[33]

Alternatively, the courts might be constrained to rely on case law decided under the pre-amendment Rule 9011. Although the difference between the statute and the Rule is not significant, it is possible that Congress, which is presumed to have knowledge of this Rule change, intended to revert to the pre-amendment Rule. The most important consequence of reverting to the cases interpreting the pre-amendment Rule is that such a reversion will necessarily cause an increase in disputes over whether the attorney should be sanctioned.[34]

§ 3.3. "Warranted by Existing Law or a Good Faith Argument for Extension, Modification or Reversal of Existing Law"

Recommendation

None.

Commentary

Like the "well grounded in fact" language discussed in § 3.2., the "good faith" language of § 707(b)(4)(C)(ii)(II) also resurrects language used in Rule 9011 before the rule was amended

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[33] Vance, *supra* note 12, at 262.

[34] Fed. R. Civ. P. 11 advisory committee's note (1993 Amendments):

> This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision to the rule…The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of sanctions presented to the court.

in December 1997. The amendment replaced "good faith" with "nonfrivolous" in an effort to forestall "pure heart, empty head" types of argument. Again, the difference is slight:

> Like the factual distinction, the difference here is one of degree rather than kind, and the two can easily become blurred. Prior to being amended, courts examined objective good faith by looking, in part, at whether the argument was frivolous; post-amendment, determining whether an argument is not frivolous seems to involve at least some measure of good faith.[35]

The likely effect of the statute, then, is that courts will apply current Rule 9011 standards, with the possible addition of defenses associated with the term "good faith."

§ 3.4. "Not an Abuse Under Section 707(b)(1)"

Recommendation

An attorney's certification that the case is not an abuse should be analyzed from the perspective of the pre-filing investigation and what the attorney knew or should have known based on that investigation.

Attorneys should determine if debtors qualify under § 707(b)(2)(D), an exception to the application of means testing.

- In cases subject to means testing, attorneys should perform the analysis set forth in § 707(b)(2)(A) to determine whether a presumption of abuse arises.

- In cases where a presumption of abuse arises, attorneys should determine whether special circumstances exist to rebut the presumption (including required documentation) exist under § 707(b)(2)(B).

- Unless and until the courts articulate new standards for § 707(b)(3)'s good faith requirement, attorneys should be able to rely on case law developed under § 707(a), specifically those cases interpreting and applying the "bad faith" and "totality of the circumstances" tests.

Case annotations relevant to these recommendations are attached as Appendix A and incorporated herein.

[35] Vance, *supra* note 12, at 264.

Commentary

Section 707(b)(4)(C) provides, among other things, that an attorney's signature on a petition is a certification that the petition does not constitute an abuse under § 707(b)(1).[36] Under § 707(b), the granting of relief may be an abuse if the debtor either "fails" the means test of § 707(b)(2) or, under the relatively looser standards of § 707(b)(3), the debtor filed the petition in bad faith or the totality of the circumstances of the debtor's financial situation demonstrates abuse.

If an individual debtor whose debts are primarily consumer debts fails the means test, the granting of relief is presumed abusive as a matter of law. At a minimum, following a reasonable inquiry and a determination that a filing is lawful, an attorney should perform the analysis described in § 707(b)(2) to determine whether the filing is presumptively abusive, and, if so, whether good faith grounds for rebuttal exist.

Section 707(b)(3) additionally requires a court to determine whether the case was filed in bad faith or whether the totality of the circumstances demonstrate abuse in any case in which the means test presumption does not arise or has been rebutted. Unlike finding abuse by application of the means test, a finding of abuse based on bad faith or the totality of the circumstances is not often readily or reliably predictable,[37] although experienced counsel may identify cases where the issues are more likely to be raised.

The attorney's obligation to assess bad faith or abuse based on the totality of the circumstances is analogous to the attorney's obligation to assess possible affirmative defenses when filing a civil action. The case law regarding that obligation varies from circuit to circuit. For example, the Ninth Circuit has decided that an attorney need not

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[36] Section § 707(b)(1) refers to the circumstances under which the *granting of relief* will be considered an abuse.
[37] In addition, the "abuse" standard is new, replacing the "substantial abuse" standard. *See* BAPCPA Section 102(a)(2)(B), amending Code § 707(b).

> step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable. It is not in the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client.[38]

On the other hand, the Tenth Circuit has held that "[p]art of a reasonable attorney's pre-filing investigation must include determining whether any obvious affirmative defenses bar the case."[39] The Tenth Circuit, however, further commented that an attorney does not run the risk of sanctions if, despite the relevance of an affirmative defense, counsel proceeds with a nonfrivolous argument as to why the defense should not apply.[40] Because an attorney's assessment of bad faith and totality of the circumstances issues are governed by the standards of Rule 9011 that differ from circuit to circuit, counsel should determine the standards which apply in a particular jurisdiction.

Similarly, unless a debtor's bankruptcy case is plainly not permitted under the jurisdiction's interpretation of the "bad faith" and "totality of the circumstances" tests, an attorney should not be required to anticipate the various arguments parties might put forth in post-petition challenges to the debtor's motivation in seeking bankruptcy relief.

§ 4. § 707(b)(4)(D)

§ 4.1 "Inquiry"

Recommendation

Attorneys should conform their "inquiry" requirement under § 707(b)(4)(D) to the "reasonable inquiry" standard under Rule 9011.

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[38] Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986).

[39] White v. General Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990). *See also* Hewitt v. City of Stanton, 798 F.2d 1230, 1233 (9th Cir. 1986) ("[A] competent attorney admitted to practice before the district court" has a duty to know about contrary authority and cannot rely on a good faith lack of knowledge for Rule 11 purposes.); *In re* Global Envtl. Solutions, Ltd., 2000 BNH 23, 10-11 (Bankr. D.N.H. 2000) (Although also agreeing that investigating affirmative defenses is part of counsel's duty to make a reasonable investigation/inquiry, the court noted that this does not mean that counsel needs to make "a detailed analysis of every possible defense.").

[40] *White*, 908 F.2d at 682.

- Attorneys should be able to rely on case law that allows time constraints to be taken into account.

- The reasonableness of the attorney's inquiry should be not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney's inquiry at the time that the inquiry was made.

- Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney's professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy.

- Attorneys should be able to rely upon documents prepared by third parties in the scope of their employment, including tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor's pre-petition credit counseling agency.

Case annotations relevant to these recommendations are attached as Appendix A and incorporated herein.

Commentary

Section 707(b)(4)(D) marks the first time that attorneys have been responsible, via the threat of sanctions, for the accuracy of debtor's schedules. Under Rule 9011(a), schedules and the statement of financial affairs are expressly excepted from the signature requirement.[41] Although BAPCPA does not amend Rule 9011, the § 707(b)(4)(D) certification requirement certainly overrides the Rule's exception.[42] This is not to say that attorneys enjoyed a free ride before BAPCPA. Courts have sanctioned attorneys based on the inaccurate or incomplete schedules, using § 105 or their inherent authority to control the conduct of parties and attorneys.[43] These other means of sanctions, however, often require a higher threshold of wrongdoing, such as bad faith, than will be necessary under § 707(b)(4)(D).[44] Some courts use

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[41] Fed. R. Bankr. P. 9011(a).

[42] *See, e.g.*, *In re* Barnes, 308 B.R. 77, 81 (Bankr. D. Colo. 2004) (Conflicts between the Bankruptcy and Rules "must be settled in favor of the Code").

[43] *See, e.g.*, *In re* Kelley, 255 B.R. 783 (Bankr. N.D. Ala. 2000) (using § 105(a) to impose sanctions).

[44] *See* Glatter v. Mroz (*In re* Mroz), 65 F.3d 1567, 1575 (11th Cir. 1995) *citing* Chambers v. NASCO, Inc. 501 U.S. 32 (1991).

their power over the attorney's compensation, reducing or ordering the return of funds that exceed the reasonable value of the services performed.[45]

The most prominent aspect of § 707(b)(4)(D)'s language is the absence of "reasonable" before "inquiry." This departs from both § 707(b)(4)(C) and Rule 9011 and presents immediate interpretive difficulty because where Congress includes particular language in one section of a statute but omits it in another section of the same statute, it is presumed that Congress intended different meanings.[46] This leaves "inquiry" subject to very diverse interpretations ranging from simply asking the debtor about the debtor's assets and liabilities, to conducting an exhaustive investigation of the debtor's assets, liabilities and other information called for in the schedules, including appraisals, title check other verifications.[47]

Neither of these alternatives is acceptable. The latter would be onerous in effect, particularly with respect to information that is itself in a constant state of flux, such as the amount of cash in the debtor's checking account or the balance on a credit card that continues to accrue late charges and interest.[48] The former, a bare inquiry that requires the attorney to do no more than ask the debtor for information needed to complete the schedules, sets the bar too low and would be inconsistent with Congressional intent, as well as the real need to heighten the quality of disclosure in the schedules.[49]

Reasonableness creates an acceptable middle ground. Moreover, despite the fact that the § 707(b)(4)(D) inquiry is not qualified with "reasonable," it is possible to interpret "inquiry" as

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[45] *See* Hon. Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 AM. BANKR. L.J. 653, 693 (1999) (hereinafter "Rhodes").
[46] *See, e.g.*, Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) *citing* Russello v. United States, 464 U.S. 16, 23 (1983).
[47] Vance, *supra* note 12, at 268-69.
[48] *Id*.
[49] *See generally* Rhodes, *supra* note 43.

incorporating a reasonableness standard. The Task Force finds the analogy one commentator drew between § 707(b)(4)(D) and § 523(a)(2) to be sound:

> Section 523(a)(2) of the Code presents an analogous situation. Subparagraph (B) provides that a debt obtained by the debtor's use of a material false statement in a written financial statement, on which the creditor reasonably relied, is nondischargeable. Subparagraph (A) renders nondischargeable debts incurred through the debtor's misrepresentation, false pretenses, or actual fraud, without reference to reliance.
>
> The disparity was resolved in Field v. Mans, in which the Supreme Court held that the inclusion of "reasonable" in section 523(a)(2)(B), but not section 523(a)(2)(A), meant that the latter required something different, which the Court determined to be the more lenient standard of justifiable reliance.
>
> Of course, the context of *Field v. Mans* differs from that with which this Article deals because the *Field v. Mans* Court relied heavily on common law tort doctrines, but this distinction does not detract from the usefulness of the case in the present context. Because the *Field v. Mans* Court rejected the argument that the absence of a specific standard meant that only actual reliance was required, courts dealing with attorneys under the legislation can require more than a bare inquiry and the attorney's subjective position within it. A bare inquiry is at odds with Congressional intent because the legislation plainly attempts to impose greater liability on debtors' counsel than that which currently may be imposed. Moreover, courts would no doubt be constrained to permit such liberality on the part of counsel because it would represent an abdication of the courts' desire and authority to control attorney conduct before them.
>
> The level of inquiry required, then, may be gleaned in part from *Field v. Mans*, in which the Court stated:
>
>> [I]t is only where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own.
>
> To continue the analogy between the reasoning of *Field v. Mans* and the language of the legislation, then, an "inquiry," which need not be "reasonable" or "reasonable under the circumstances," is required when information given by the client appears incorrect on its face or serves as a warning of an inaccuracy. Although this interpretation lessens the inquiry requirement under Rule 9011, which is arguably inconsistent with what Congress wants to do, the case law supports this reading of the actual language employed in the legislation itself.

> If we take this reasoning one step further, the ironic conclusion is that the standard departs little, if at all, from that currently required, save for the clarification that, under Rule 9011, counsel is accountable for information in the schedules. *Field v. Mans* discusses justifiable reliance from the standpoint of "one of [the person's] own knowledge and intelligence," which, here, would be debtors' counsel generally. Thus, something very close to reasonableness emerges. The analysis would not be one that is purely subjective; instead, the courts would examine counsel's conduct in light of that of a knowledgeable and intelligent attorney who represents Chapter 7 debtors.[50]

Adopting the reasoning of this analogy allows incorporation of a reasonableness standard into § 707(b)(4)(D) without opening the courts to charges of so-called "judicial activism" because of the reliance on precedent from the nation's highest court. The *Field v. Mans* analogy also avoids the unacceptable alternatives of a bare inquiry, and the laxity such a standard would invite, and absolute verification, which would prove so onerous that courts would be tempted to decline to impose sanctions.

Incorporating reasonableness into § 707(b)(4)(D) also allows for a standard that is consistent with § 707(b)(4)(C)'s reasonable investigation requirement as well as the standard in § 527(c),[51] applicable to debt relief agencies, that speaks of the attorney's "reasonably diligent inquiry so as to obtain such information reasonably accurately for inclusion on the petition, schedules, or statement of affairs."

§ 4.2. "Knowledge"

Recommendation

"Knowledge" should be interpreted to include what the attorney knew or should have known with respect to the accuracy of the debtor's schedules.

[50] Vance, *supra* note 12, at 270-71.
[51] BAPCPA Section 228, adding Code § 527(c).

Commentary

As with "inquiry," the absence of qualifying language leaves room to argue that the "knowledge" requirement in § 707(b)(4)(D) requires that attorneys have *actual* knowledge that information in the schedules is incorrect before sanctions may be imposed, but this is not the standard courts should glean from the statute. Rather, "knowledge" should encompass what the attorney should have known.

The "should have known" standard is required under the Rule 9011 "reasonable inquiry" requirement and has been recommended by the Task Force to apply to § 707(b)(4)(C)'s "reasonable investigation" in § 3.1. of this Report and the § 4.1. discussion of "inquiry" as used in § 707(b)(4)(D). It should also apply here because it is also in keeping with the intent of Congress to heighten the accountability of consumer debtors' attorneys; "actual knowledge" would implement too lenient a standard. Moreover, interpreting § 707(b)(4)(D) as encompassing what the attorney should have known is more in keeping with the degree of quality that courts, other attorneys and the public have a right to expect from the legal profession.

§ 4.3. "Incorrect"

Recommendation

Attorneys should be liable for "incorrect" information only where, after reasonable inquiry, the attorney knew or should have known of the incorrectness. Further, an attorney should not be liable for information not discoverable prior to the filing of the petition.

Commentary

As articulated in § 2 of this Report, § 707(b)(4) applies only to an attorney's pre-bankruptcy conduct. Accordingly, § 707(b)(4)(D)'s reference to "incorrect" information in the schedules should be limited to what the attorney knew or should have known after a reasonable

inquiry conducted prior to the filing of the bankruptcy petition. This interpretation resolves the conflict that could arise for attorneys who learn of the need to correct the schedules only after the bankruptcy case has been commenced. Attorneys are, of course, under a continuing duty to ensure their debtor clients make all required disclosures, including amendments to the schedules as needed.[52] No attorney should face sanctions under § 707(b)(4)(D) because, in honoring this duty, the attorney reveals that the schedules, as originally filed, were incorrect.

[52] *See* Vance, *supra* note 12, at 271-72 (discussing amendments to schedules and potential for conflict).

APPENDIX A

Case Annotations

Time Constraints:

In a Chapter 7 proceeding, debtor's first attorney was replaced. Subsequent counsel attempted to convert the Chapter 7 case to Chapter 11. Although finding that a Chapter 11 reorganization would be impossible, the court declined to sanction counsel because he "was retained … on short notice, and had a limited period of time in which to research the facts of the case." *Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472 (6th Cir. 1996).

In determining whether an attorney has fulfilled his or her duty under the "reasonable investigation/inquiry" standard, courts have noted that a relevant factor is the time that an attorney had to conduct an investigation. *See, e.g., Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90, 95 (3d Cir. 1988); *Thomas v. Capital Sec. Servs., Inc.,* 836 F.2d 866, 875 (5th Cir. 1988); *Glatter v. Mroz (In re Mroz),* 65 F.3d 1567, 1573 (11th Cir. 1995).

The debtor's complaint listed the rule under which jurisdiction was based and the date the Chapter 7 petition was filed. The creditor's attorney, who was required to reply three days after being assigned to the case, answered that neither he nor his client had enough knowledge to verify the truth of the above allegations. Finding this to be easily ascertainable by asking the court's clerk, the bankruptcy judge imposed sanctions. However, the district court vacated the order of sanctions, noting that the attorney's answer was not wholly frivolous since he raised a successful lack of jurisdiction argument, did not waste any of the court's time or resources, and was operating under time constraints. *In re Two Star Surgical Supply, Inc.*, 92 B.R. 26 (E.D.N.Y.1988).

Court's Review of Attorney's Conduct:

"The district court … 'is expected to avoid using the wisdom of hindsight and should test the signor's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted.' The attorney's conduct must be tested by an objective standard of reasonableness. The determination of whether an attorney conducted 'reasonable inquiry' is judged by objective norms of what reasonable attorneys would have done. That is, what was reasonable for the attorneys to believe at the time the bankruptcy petition was filed?" *Silverman v. Mutual Trust Life Ins. Co. (In re Big Rapids Mall Assocs.)*, 98 F.3d 926 (6th Cir. 1996).

"The court's inquiry [under Rule 9011] should only focus on the merits of the pleading gleaned from the facts and law known or available to the attorney *at the time of filing.* The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." *Glatter v. Mroz (In re Mroz)*, 65 F.3d 1567 (11th Cir. 1995) (internal quotations omitted).

Rule 11 “requires that a lawyer conduct a ‘reasonable inquiry’ before certifying that the filing is well-grounded in fact and law or is a good faith argument for extension, modification, or reversal of existing law. A court, however, should be wary about the benefit of hindsight; it is only reasonableness under the circumstances that the Rule requires.” *In re Anderson*, 128 B.R. 850 (D.R.I. 1991).

“The Court must use an objective standard to determine if the requirements of Rule 9011 have been met. It is not proper, however, to judge the conduct of a party by utilizing the benefit of hindsight. Instead, it is important to focus upon the facts and circumstances as they existed at the time of the filing.” *Leeds Bldg. Prods. v. Moore-Handley, Inc. (In re Leeds Bldg. Prods.)*, 181 B.R. 1006 (Bankr. N.D. Ga. 1995).

Attorney’s Verification of Client’s Information, Especially If Client’s Information Signals Inaccuracies:

Debtor, who had filed numerous prior bankruptcy petitions, informed her new attorney of only one prior filing. Counsel investigated the prior case and learned that a Bar Order had been imposed against the debtor. Since the Bar Order had already expired, counsel continued to assist the debtor in filing a new petition. Nevertheless, the debtor was still hindered from filing a new petition under a subsequent Bar Order, of which counsel was unaware. Counsel argued that since his client only disclosed one prior bankruptcy filing, he should not be held liable for violating a subsequent Bar Order of which his client failed to inform him. The court disagreed: “Where the client identifies a prior case, and in particular where a review of the docket in that case discloses a bar order, failure to further investigate the client's bankruptcy history, is inexcusable. A bar order is entered only where there have been prior filings and usually more than two.” A thorough pre-filing investigation would have involved investigating the court’s electronic records and attempting to uncover all prior cases, if any, of the debtor. Since counsel failed to satisfy this standard, the court imposed both monetary and non-monetary sanctions against him. *In re Bailey*, 321 B.R. 169 (Bankr. E.D. Pa. 2005).

In a Chapter 11 case, debtor, a Wyoming rancher, filed for bankruptcy in Wyoming. Upon failing to satisfy the requirements of a stay on his property, debtor incorporated Coones Ranch in South Dakota. Days after incorporating, Coones, with the help of a South Dakota attorney, filed for Chapter 11. The bankruptcy court held that the Chapter 11 filing was done in bad faith. On appeal to the Eighth Circuit, the attorney argued that the time constraints under which she was operating led to her inability to discover the truth behind her client’s misleading factual information. Although recognizing the time constraints under which counsel was operating, the Eighth Circuit nonetheless upheld the imposition of sanctions, concluding that since the corporation filed for Chapter 11 only four days after incorporating, the attorney “should have known Coones contemplated the bankruptcy filing at the time of incorporation.” *Grunewaldt v. Mutual Life Ins. Co. (In re Coones Ranch)*, 7 F.3d 740 (8th Cir. 1993).

Although recognizing that Rule 9011 sanctions are not warranted against attorneys based on inaccuracies in schedules, the court, in dicta, found that it would not otherwise sanction the attorney since the debtor’s “bookkeeping methods were inadequate and unconventional[, thus making it] possible for the debtor to conceal his true financial condition and hamper his

attorney's ability to verify the accuracy of the information provided by the debtor." *In re Alderson*, 114 B.R. 672 (Bankr. D.S.D. 1990).

Attorney's Reliance on Documents Prepared by Third Parties, Such as Tax Returns:

While attempting to determine whether debtor could pay back his loans while maintaining a minimal standard of living, the court placed its reliance on the debtor's pay stubs and tax returns in order to determine debtor's income. *Cota v. U.S. Dep't of Educ. (In re Cota)*, 298 B.R. 408, 414-15. (Bankr. D. Ariz. 2003).

"Income tax returns are quintessential documents 'from which the debtor's financial condition or business transactions might be ascertained….' Without tax returns, the trustee would be forced to accept the uncorroborated statements of the debtors, as contained in their schedules. Tax returns are essential to the orderly administration of the debtors' estate, and necessary for the debtors to make a full presentation of their financial affairs to the trustee." *Lubman v. Hall (In re Hall)*, 174 B.R. 210, 215 (Bankr. E.D. Va. 1994); *In re Wolfson*, 152 B.R. 830, 833 (S.D.N.Y. 1993).

Debtor sought to merge two of his companies. He hired one attorney (attorney 1) to help him file the petition and another attorney (attorney 2) to effectuate the merger. Although the merger did not take effect until after the date of the Chapter 11 filing, attorney 2 orally asserted to attorney 1 that the merger was complete. Thus, attorney 1 characterized the two companies as merged entities in the petition. Despite the inaccuracy in the petition, the court found that attorney 1's exclusive reliance on the statements of attorney 2 did not warrant sanctions in this particular case. *H.J. Rowe, Inc. v. Spiegel, Inc. (In re Talon Holdings)*, 1999 Bankr. LEXIS 256 (Bankr. N.D. Ill. March 19, 1999).

"Good Faith" and "Totality of the Circumstances":

"Section 707(a) allows a bankruptcy court to dismiss a petition for cause if the petitioner fails to demonstrate his good faith in filing. Although the Code does not define 'good faith,' courts in this circuit have uniformly held that 'at the very least, good faith requires a showing of honest intention.' … Once a party calls into question a petitioner's good faith, the burden shifts to the petitioner to prove his good faith." Thus, where a debtor sought discharge of a debt that was ten times larger than his income and "could point to no marked calamity or sudden loss of income that precipitated his need to accrue such a comparatively large consumer debt[,]" the court found bad faith. *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205 (3d Cir. 2000).

"Dismissal based on lack of good faith must be undertaken on an *ad hoc* basis. It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish life-style, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." Therefore, where a debtor filed for Chapter 7 days after losing a court battle which led to the imposition of a $600,000 judgment, rearranged his debt obligations to creditors (such as his wife and mother) without explanation in an attempt to get

the above judgment discharged, and did not change his lavish lifestyle, the court found bad faith. *In re Zick*, 931 F.2d 1124 (6th Cir. 1991).

Courts should determine a debtor's bad faith under 707(a) by looking to the totality of the circumstances. Some factors relevant to the totality of the circumstances include: "1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition. 2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle. 3. The debtor filed the case in response to a judgment pending litigation, or collection action; there is an intent to avoid a large single debt. 4. The debtor made no effort to repay his debts. 5. The unfairness of the use of Chapter 7. 6. The debtor has sufficient resources to pay his debts. 7. The debtor is paying debts to insiders. 8. The schedules inflate expenses to disguise financial well-being. 9. The debtor transferred assets. 10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors. 11. The debtor employed a deliberate and persistent pattern of evading a single major creditor. 12. The debtor failed to make candid and full disclosure. 13. The debts are modest in relation to assets and income. 14. There are multiple bankruptcy filings or other procedural 'gymnastics.' Generally, the presence of only one of these factors is not sufficient to support a § 707(a) dismissal. However, where a combination of these factors are present, the courts have held that a § 707(a) dismissal is warranted." Thus, where debtor violated factors 2-6, 10-11, and 13, court found that the totality of the circumstances test for bad faith had been met. *In re Spagnolia*, 199 B.R. 362 (Bankr. W.D. Ky. 1995).

Applying the fourteen factors utilized in *In re Spagnolia*, the court determined that a debtor's following violations warranted a finding of bad faith under section 707(a): "(1) he decided not to carry medical malpractice insurance because it was too expensive; (2) he has a monthly gross income of $ 29,500; (3) he has only one major unpaid creditor and has paid and continues to pay all other creditors; (4) he has made no changes to his lifestyle that might show a willingness to sacrifice in order to fulfill his credit obligations; (5) he filed in response to the Kurily's judgment against him and has no intent to pay them; and (6) he has employed a deliberate and persistent pattern of evading the Kurily's, his single major creditor." *Cassell v. Kurily (In re Cassell)*, 1999 U.S. Dist. LEXIS 13349 (E.D. Mich. Aug. 13, 1999).

Requiring Documentary Evidence from Debtors:

"In her testimony, Debtor blithely used the word 'ballpark' three times to describe her method of calculating some items in her original schedules. She stated that when she met with her attorney, he asked her for 'ballpark' figures as he prepared her schedules. Both debtors and debtors' counsel alike should understand that the preparation of schedules, like any other sworn document, requires the most precision counsel and their clients can muster. Unsupported guesses are unacceptable." *Office of the U.S. Trustee v. Mottilla (In re Mottilla)*, 306 B.R. 782, 789 n.6 (Bankr. M.D. Pa. 2004).

Although recognizing that Rule 9011 sanctions are not warranted against attorneys based on inaccuracies in schedules, the court, in dicta, found that it would not otherwise sanction the attorney since the debtor's "bookkeeping methods were inadequate and unconventional[, thus making it] possible for the debtor to conceal his true financial condition and hamper his

attorney's ability to verify the accuracy of the information provided by the debtor." *In re Alderson*, 114 B.R. 672 (Bankr. D.S.D. 1990).

"Knowledge" as a "Should Have Known" Standard:

In a Chapter 11 case, debtor, a Wyoming rancher, filed for bankruptcy in Wyoming. Upon failing to satisfy the requirements of a stay on his property, debtor incorporated Coones Ranch in South Dakota. Days after incorporating, Coones, with the help of a South Dakota attorney, filed for Chapter 11. The bankruptcy court held that the Chapter 11 filing was done in bad faith. The Eighth Circuit upheld the imposition of sanctions, concluding that since the corporation filed for Chapter 11 only four days after incorporating, the attorney "should have known Coones contemplated the bankruptcy filing at the time of incorporation." *Grunewaldt v. Mutual Life Ins. Co. (In re Coones Ranch)*, 7 F.3d 740 (8th Cir. 1993).

In a case involving neither Rule 9011 nor Rule 11, one court declared: "If a person has knowledge of such facts as would lead a fair and prudent man, using ordinary thoughtfulness and care, to make further accessible inquiries, and he avoids the inquiry, he is chargeable with the knowledge which by ordinary diligence he would have acquired. Knowledge of facts, which, to the mind of a man of ordinary prudence, beget inquiry, is actual notice, or, in other words, is the knowledge which a reasonable investigation would have revealed." *Sands v. United States*, 198 F. Supp. 880, 884 (W.D. Wash. 1960) *quoting The Tompkins*, 13 F.2d 552, 554 (2d Cir. 1926).

Although recognizing that Rule 9011 sanctions are not warranted against attorneys for inaccuracies in schedules, the court noted that it would not otherwise impose sanctions against an attorney who relied primarily on his client's factual representations since the debtor's "bookkeeping methods were inadequate and unconventional[, thus making it] possible for the debtor to conceal his true financial condition and hamper his attorney's ability to verify the accuracy of the information provided by the debtor." Therefore, the court implicitly determined that there was no way that the attorney "should have known" the debtor was misleading him. *In re Alderson*, 114 B.R. 672 (Bankr. D.S.D. 1990).

APPENDIX B

American Bar Association
Business Law Section
Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes

Task Force on Attorney Discipline
Task Force Member Biographies

Judith Greenstone Miller, a partner at Jaffe Raitt Heuer & Weiss, P.C., focuses her practice on bankruptcy and insolvency, creditors' rights and commercial litigation, involving representation of debtors, secured and unsecured creditors, creditors' committees and trustees in bankruptcy proceedings, primarily involving Chapter 11 reorganizations. She also represents parties in litigation in complex commercial disputes. Ms. Miller is a graduate of the University of Michigan and obtained her law degree and received the Creditors' Rights Book Award at Wayne State University Law School. She is a member of the State Bar of Michigan, the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit. Ms. Miller is a member of the Commercial Law League of America and its Bankruptcy Section (Legislative Committee, Co-Chair, 1998-2002; Education Committee, Co-Chair, 1997-1998; Executive Council of the Bankruptcy Section; Chair, 2002; Chair Elect, 2001; Secretary, 2000; Co-Chair National Governmental Affairs Committee, 2002-2005; Vice-Chair NCBJ Committee, 2001-2005). Ms. Miller has testified before the Subcommittee on Commercial and Administrative Law on the Judiciary Committee of the United States House of Representatives and the Subcommittee on Administrative Oversight and the Courts on the Judiciary Committee of the United States Senate on recently proposed bankruptcy legislation. Ms. Miller is also a member of the American Bankruptcy Institute and the American Bar Association (Business Law Section; Business Bankruptcy Committee; Chair, Litigation Subcommittee, 2000-2004; Co-Chair, Appeals Subcommittee, 2005-2006); Federal Bar Association for the Eastern District of Michigan; Detroit Metropolitan Bar Association (Chair, Debtor/Creditor Section, 1997-2002: Chairperson of the Year, 1998); and the State Bar of Michigan (Co-Chair, Debtor's/Creditors' Rights Committee of the Business Law Section; Member of the Business Council; and Member of the Debtor/Creditor Committee of the Real Property Law Section). She is also a member of the Bankruptcy Court Advisory Committee and the Mediation Panel for the Eastern District of Michigan, Southern Division; the Chapter 11 Rules Committee; and the Bankruptcy Judges Tribute Committee. The Michigan Consumer Bankruptcy Association honored her in December 2000 as a local practitioner that is a nationally recognized bankruptcy leader. Ms. Miller is a frequent lecturer nationally and has authored numerous articles dealing with issues relating to bankruptcy practice and Revised Article 9 of the Uniform Commercial Code.

David W. Allard is a shareholder of Allard & Fish, P.C. Detroit, Michigan. The law firm specializes in bankruptcy, reorganization, insolvency, workouts, commercial law, real and personal property taxation, real estate and litigation. He has been a member of the Standing Panel of Chapter 7 Trustees in the Eastern District of Michigan ("EDM") since 1982. He is a

member of numerous other bar and bankruptcy associations and currently serves as the Chair of the Subcommittee on Trustees and Examiners of the Business Bankruptcy Committee of the Business Law Section of the American Bar Association. Mr. Allard is a Past President of the National Association of Bankruptcy Trustees where he served as President in 2000-2001. He has been an author and lecturer for numerous local and national groups concerning bankruptcy issues. He received his J.D. degree, cum laude from Wayne State University Law School in 1973.

James H. Cossitt practices in Kalispell, Mont., in the areas of bankruptcy & workouts, business and commercial litigation, real estate, secured transactions and consumer finance. He was a bankruptcy attorney with the FDIC in the Des Moines, Iowa, Consolidated Office of the FDIC from 1987-88, severed as a chapter 7 panel trustee in the N.D. of Iowa from 1988-95 and as a chapter 11 trustee in the W.D. of Michigan from 1997 to 2000. Mr. Cossitt is admitted to practice in the state and federal courts in Montana, Colorado, Michigan and Iowa, is board-certified in both business & consumer bankruptcy law and is a member of the American Bar Association, American Bankruptcy Institute, National Association of Bankruptcy Trustees and other bar and professional groups. In addition, he is the Montana editor of West Group's *Bankruptcy Exemption Manual.* A frequent speaker to professional and trade groups on bankruptcy and related topics, Mr. Cossitt was a member of a task force of U.S. bankruptcy judges, law professors and others who consulted with the Slovak Parliament and research institutes in Bratislava, Slovakia, in 1993 on drafting a new bankruptcy law and the transition to a market economy. He served as an invited lecturer at a Russian Bankruptcy School sponsored by the Iowa State University Center for International Agricultural Finance, held in Ames, Iowa, in July 1995. Mr. Cossitt received his B.A. with distinction in 1982 from Iowa State University and his J.D. in 1986 from the University of Iowa College of Law.

Jimmy F. Dahu is a third year law student at the University of Houston Law Center. He is currently serving as articles editor of the Houston Journal of International Law. Mr. Dahu received his undergraduate degree in political science and psychology at the University of Houston, where he was valedictorian of the College of Liberal Arts and Social Sciences. Born in Chattanooga, Tennessee, he moved with his family at the age of one to Jerusalem. One year later, Mr. Dahu's family relocated to Clarksdale, Mississippi, where he lived for most of his life until moving to Houston to continue his education. He is a published poet and dreams of publishing a novel one day. Mr. Dahu's deepest thanks go to Dean Nancy Rapoport for entrusting him with the responsibility to research and write for this Task Force.

Lisa Hill Fenning is a partner of Dewey Ballantine LLP, resident in the Los Angeles office as a member of the Corporate Restructuring and Bankruptcy Group. She joined the firm in 2001, following a long career as a U.S. Bankruptcy Judge for the Central District of California to which she was first appointed in 1985 and reappointed in 1999. Judge Fenning's practice focuses on bankruptcy, corporate and real estate restructurings, and related mediation and arbitration matters, including bankruptcy risk analysis and advice regarding protections to minimize such risk in business and commercial transactions. Significant matters include the

representation of creditors, commercial landlords, and contract counterparties in *Delta Airlines, United Airlines, Adephia Communications, Comdisco, Metromedia Fiber Network, Valley Media*, and the equity owners of *Pacific Gas & Electric Co.* and *Kaiser Aluminum*. Born in Chicago, she practiced there from 1975-1977 as a litigator at Jenner & Block, after clerking for Honorable Philip W. Tone of the U.S. Court of Appeals for the Seventh Circuit. She received her J.D. from the Yale Law School in 1974, and her B.A. from Wellesley College. Judge Fenning is a Fellow of the American College of Bankruptcy, and the American Bar Foundation. She has served on the boards of the American Bankruptcy Institute, the National Conference of Bankruptcy Judges, and the Los Angeles Bankruptcy Forum, and on the American Bar Association's Standing Committee on Federal Judicial Improvements. She is a former chair of the board of the NCBJ's Endowment for Education and the Ninth Circuit Council for the Board of Regents of the American College of Bankruptcy.

Jean K. FitzSimon is the Senior Vice President and General Counsel of Whitehall Jewellers, Inc., a publicly traded, mall-based, national retail jewelry chain with 388 stores in 38 states. She also serves as the Chief Compliance Officer and Corporate Secretary. Previously, Ms. FitzSimon was a principal with and the General Counsel of Bridge Associates LLC, where her practice concentrated on compliance consulting, corporate governance and enterprise-wide risk issues. Ms. FitzSimon also served as the Chief Compliance Officer and Vice President – Law for Compliance, Business Risk, and Regulatory Affairs at Sears, Roebuck and Co. Ms. FitzSimon joined Sears in 1998, taking on responsibility for all bankruptcy and collection legal matters. Among other things, she developed and implemented a complete revision of the compliance programs and was responsible for ensuring compliance with all federal, state and local laws for this Fortune 50 company. Ms. FitzSimon chairs the American Bar Association Committee on Corporate Compliance and is a regular speaker on compliance, ethics and corporate governance topics. She chairs and serves on the faculty of the Practicing Law Institute's advanced and basic compliance programs. Ms. FitzSimon is a member of the Executive Advisory Panel of the Open Compliance and Ethics Group.

Ms. FitzSimon started her career in the United States Department of Justice. She supervised litigation under the Freedom of Information and Privacy Acts, developed federal legal policy in a variety of areas, and served as the United States Trustee for the Northern District of Illinois, overseeing the administration of bankruptcy cases and trustees. Ms. FitzSimon spent the next several years in private practice in Phoenix, Arizona, primarily handling national business bankruptcy and workout matters and mergers and acquisitions. She served from 1986 to 2005 as an author for Collier on Bankruptcy, as well as authoring numerous articles on bankruptcy issues, and served as a Director of the American Bankruptcy Institute from 1999 to 2003. She graduated from the University of Notre Dame Law School and holds her BA from St. Johns College in Annapolis, Maryland, where she served on the Board of Visitors and Governors from 1998 to 2004.

David A. Greer is a partner in the Real Estate Section at Williams Mullen. His practice is focused on commercial litigation and transactions, primarily involving real estate, business relationships and bankruptcy. Before joining the firm, Mr. Greer was a partner at Hofheimer Nusbaum, P.C., which merged with Williams Mullen in 2004. Mr. Greer has represented commercial landlords in bankruptcy cases of national retailers. A substantial portion of his practice is devoted to commercial leasing, problems in real estate transactions and collateral protection and recovery. He also provides legal expertise for commercial lending work-outs and enforcement, student loans, bankruptcy discharge, consumer transactions and contract disputes. Mr. Greer appears regularly in the U.S. Bankruptcy Court for the Eastern District of Virginia and state courts. He is vice chair and former chair of the ABA's Business Law Section's Consumer Bankruptcy Committee and past president of the Tidewater Bankruptcy Bar Association, and has organized and presented programs concerning important and emerging aspects of bankruptcy law. Mr. Greer currently serves on the U.S. Bankruptcy Court for the Eastern District of Virginia Local Rules Committee as well as this task force. He is a member of the Bankruptcy Section and Legislative Committee for the Virginia Bar Association and the James Kent American Inn of Court. Mr. Greer received his law degree from the Marshall-Wythe School of Law at the College of William & Mary in 1984. He earned his bachelor of arts degree in journalism cum laude, from Washington & Lee University in 1980.

Robert R. Keatinge Robert Keatinge is Of Counsel to the Denver law firm of Holland & Hart LLP. He practices in the areas of business organizations, taxation, and professional responsibility. Mr. Keatinge has represented a wide variety of business organizations and their owners from small start-up companies to publicly traded corporations. He has written and spoken nationally in the areas of business law, taxation and professional responsibility. He is the co-author of Ribstein and Keatinge on Limited Liability Companies, as well as law review and other articles on business, tax, and professional responsibility subjects. He is a fellow of the American College of Tax Counsel, a member of the American Law Institute, and is listed in the current Best Lawyers in America (corporate law), Who's Who in America, and other publications. He is a current member of the ABA Business Law Section/National Conference of Commissioners on Uniform State Laws (NCCUSL) Joint Editorial Board on Unincorporated Business Organizations and the Association of Professional Responsibility Lawyers. He is ABA Advisor to the NCCUSL Drafting Committee on a Uniform Limited Liability Company Act and the Revision to the Uniform Limited Partnership Act and an ABA Section of Real Property Probate and Trust Law adviser on the Model Entity Transactions Act and a member of the Ad Hoc Subcommittee to Comment on the Revised Uniform Partnership Act. He is Chair of the Colorado Bar Association Business Law Section and former Chair of the CBA Taxation Section. He is former chair of the Committees on Taxation and on Partnerships and Unincorporated Business Organizations of the ABA Business Law Section and of the Joint Editorial Board for the ABA/BNA Lawyer's Manual on Professional Conduct. He is a former Member of the American Bar Association House of Delegates.

Jan Ostrovsky is with Crocker Kuno Ostrovsky, a Seattle law firm primarily representing individual and business debtors. From 1995 through 2002, Mr. Ostrovsky was the United States

Trustee for the region covering Washington, Oregon, Alaska, Montana and Idaho. He is a contributing author to the Collier treatise and has served as a fee auditor in the Enron and other bankruptcies. Mr. Ostrovsky has taught bankruptcy as the University of Washington College of Law.

Nancy B. Rapoport is Dean and Professor of Law at the University of Houston Law Center. After receiving her B.A., summa cum laude, from Rice University and her J.D. from Stanford Law School, she clerked for the Honorable Joseph T. Sneed on the United States Court of Appeals for the Ninth Circuit and then practiced law (primarily bankruptcy law) with Morrison & Foerster in San Francisco. She started her academic career at The* Ohio State University College of Law in 1991, and she moved from Assistant Professor to Associate Professor to Associate Dean for Student Affairs and Professor in 1998 (just as she left Ohio State to become Dean and Professor of Law at the University of Nebraska College of Law). She served as Dean of the University of Nebraska College of Law from 1998-2000. She has been the Dean at the University of Houston Law Center since 2000. Her specialties are bankruptcy ethics and law and popular culture. She has taught Contracts, Sales (Article 2), Bankruptcy, Chapter 11 Reorganization, Legal Writing, Contract Drafting, and Professional Responsibility. Among her published works is Enron: Corporate Fiascos and Their Implications (Foundation Press 2004) (co-edited with Professor Bala G. Dharan of Rice University). She is admitted to the bars of the states of California, Ohio, Nebraska, and Texas and to the United States Supreme Court. In 2001, she was elected to membership in the American Law Institute, and in 2002, she received a Distinguished Alumna Award from Rice University. She is a Fellow of the American Bar Foundation and a Fellow of the American College of Bankruptcy. In her spare time, she competes in international Latin dance with her teacher, Billy King.

William H. Schorling practices in the area of bankruptcy and corporate reorganization. Mr. Schorling has represented debtors, indenture trustees, creditors' committees, secured creditors, and unsecured creditors in bankruptcy proceedings. Mr. Schorling received his bachelor of arts degree, *cum laude*, in 1971 from Denison University. He received his legal education at the University of Michigan, where he graduated *cum laude* in 1975. Mr. Schorling is admitted to practice in Pennsylvania, Delaware and New Jersey. Mr. Schorling is a fellow of the American College of Bankruptcy and a past chair of the Business Bankruptcy Committee, Chair of the Ad hoc Committee on Bankruptcy Court Structure and a past member of the Section Council of the Business Law Section of the American Bar Association, and a member of the Founders' Council of the Commercial Finance Association Education Foundation, the Board of Directors of the Consumer Bankruptcy Assistance Project, the executive council of the Bankruptcy Section of the Commercial Law League of America and the Eastern District of Pennsylvania Bankruptcy Conference. He is also a past Chairperson of the Bankruptcy and Commercial Law Section of the Allegheny County Bar Association and an exofficio member of its Governing Council. Mr. Schorling is a fellow of the American Bar Foundation.

* "The" really is capitalized as part of The Ohio State University's official name.

Mr. Schorling was actively involved in the legislative process which resulted in the 1994 Bankruptcy Amendments Act and was actively involved in the activities of the Bankruptcy Review Commission as a Member of the 12 person Alliance for Bankruptcy Legislation consisting of representatives of the American Bar Association, American Law Institute, National Conference of Bankruptcy Judges and the National Bankruptcy Conference. Mr. Schorling has been actively involved in the legislative process leading up to the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and has testified on behalf of the American Bar Association before the House Subcommittee with responsibility for bankruptcy legislation. Mr. Schorling has been an adjunct professor of law at the Temple University School of Law and has lectured and written frequently on the topics of bankruptcy and lending law for a number of organizations.

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Marc S. Stern is a solo practitioner in Seattle, Washington where his practice emphasizes Insolvency and Bankruptcy. He is Board Certified as a Business Bankruptcy Specialist by the American Board of Certification and has been since 1993. He has represented both creditors and debtors in all phases of bankruptcy proceedings. Mr. Stern currently serves of Co-Chair of the Bankruptcy Section of the GP|Solo Division of the ABA. In this position he has been active in the ABA's lobbying efforts opposing the attorney liability provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act. He is also the co-editor of the forthcoming book, "Letters for Bankruptcy Lawyers." Mr. Stern is admitted to practice in the U.S. Supreme Court, the Ninth Circuit Court of Appeals, the Court of Appeals for the Armed Forces, the District and Bankruptcy Courts for both the Eastern and Western District of Washington and the Washington State Supreme Court. He earned his J.D. University of Idaho, College of Law, Moscow, Id. in December 1977 and his A.B. *cum laude* from Washington University, St. Louis, Mo. in May in 1975.

Paul G. Swanson

Catherine E. Vance, Task Force Co-Reporter, is Vice President of Research and Policy and Associate General Counsel at Development Specialists, Inc., resident in the firm's Columbus, Ohio, office. Ms. Vance has written extensively on matters related to bankruptcy, bankruptcy reform, privacy, and other matters affecting the debtor/creditor relationship and insolvency proceedings. Her recent articles include *The Facts & Fiction of Bankruptcy Reform*, 1 DEPAUL COM. & BUS. L.J. 361 (2003), co-authored with Paige Barr, and *Attorneys and the Bankruptcy Reform Act of 2001: Understanding the Imposition of Sanctions against Debtors' Counsel*, 106 COM. L.J. 241 (2001). *Nine Traps and one Slap: Attorney Liability under the New Bankruptcy Law,* 79 AMERICAN BANKR. L. J. 283 (2005), co-authored with Corinne Cooper, Prior to joining Development Specialists, Inc., Ms. Vance served as the Commercial Law League of America's legal writer and analyst. In this capacity, she acquired a thorough understanding of bankruptcy reform legislation pending in the United States Congress since the late 1990s. Ms. Vance is a regular contributor to the Bankruptcy Yearbook and Almanac, co-authoring the publication's

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