

Confirming a Plan – Avoiding The Pitfalls

The Honorable Roger L. Efremsky
US Bankruptcy Court, Northern District of California

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Due Diligence –What do you need to know?

- Section 521 requires the debtor to provide accurate and complete disclosures of assets and liabilities
- BUT Sections 526 and 527 require the debtor's attorney to attest to that accuracy.
- You need to ask for documents and proof from the debtor that will aid you in preparing the Petition and Schedules.

What do You Want from the Client?

- Tax returns for the last two years
- Payment advices for the last 3-6 months
- Statements from creditors for the last 2-3 months
- Bank statements
- Notices of Collections or Lawsuits
- Deeds of Trust and Title Documents

What You Should Obtain

- Credit Report
- Title Search with Copies of Deeds of Trust
- Valuation of Real Property – Broker's Price Opinion, Debtor's Opinion or Appraisal
- Tax Transcript

Chapter Selection – Is the Client Eligible?

- Determine the debt level and classification – Section 109 (e) determines the amounts in Chapter 13.
- Do lien strips or surrenders of property alter the debt limits? In re Scovis, 249 F.3d 975,982 (9th Cir.2001)

Eligibility Continued

- Determine the income – Tax returns and paychecks are critical to determine the income of the debtors.
- Is the debtor below or above median income? If below what purpose will a Chapter 13 serve? Motions to Value under Section 523 are helpful but is it a disguised Chapter 7? In re Dewsnap, 502 U.S. 410 (1992)

Credit Counseling Certificate

- Section 109(h) is very specific about the timing and what constitutes an exigent circumstance
- 109(h)(1) the debtor must have a certificate that is not older than 180 days – Stale certificates have become a problem

Credit Counseling Certificates Continued

- Section 109(h)(3) is full of pitfalls for the unwary debtor and unorganized attorney
 - (3)(A)(i) The debtor may submit to the court a certification that describes the circumstances that merit a waiver – Foreclosure – probably not
 - Couldn't find a counselor – maybe

And More Credit Counseling

- (3)(A)(ii) states the debtor REQUESTED credit counseling services from an approved agency during the 7 days prior to the filing
- (3)(A)(iii) is satisfactory to the Court
- (4) does not apply if in active duty military combat zone or incapacitated due to mental impairment – be careful with incapacity. If they aren't capable of credit counseling how can they sign the petition?

Did the Client File a Prior Case?

- Section 109(g) provides for prior cases dismissed within 180 days of the next filing
 - Was the prior case dismissed for willful failure to abide by an Order? 109(g)(1)
 - Did the debtor voluntarily dismiss after a relief from stay motion was filed? 109(g)(1)

Did the Client get a Prior Discharge?

- Section 1328(f)(1) does not allow a debtor to obtain a Chapter 13 discharge if they received:
 - (1) a 7, 11 or 12 discharge during the 4-year period prior to the filing of the current case, or
 - (2) a 13 discharge during the 2-year period prior to the filing of the current case.

The Pitfalls of the Means Test

- Once you determine income if they are over the median income then you determine expenses.
- Many problem areas on the means test which the programs don't catch
- Always bear in mind the case law – In re Ransom, 131 S. Ct. 716(2011) and In re Hamilton (Lanning) 130 S.Ct.2464 (2010)

Problem Areas of the Means Test

- Are you using the most up to date numbers?
You should be double checking the numbers in your program with the UST website – www.usdoj.gov/ust
- Do you have documentation to support the numbers? If the text says to provide proof, you should have it ready to provide to the Trustee

Cars – Buying, Leasing Or Own Outright

- Line 27A – Operating expenses of a car
- Lines 28 and 29 – Ownership expense – Make sure that payments are being made on the vehicle
- What about that extra \$200 for a car that is really old? Better have proof

Subpart B Additional Living Expenses

- Line 40 – Care of household member – elderly and reasonable and necessary
- Line 41 – Protection against family violence – Not your regular alarm for the house
- Line 43 – Education expenses for dependent child under 18

Now What?

- Documents prepared and Petition is filed
- Month go by and it is time for the Meeting of Creditors or Confirmation Hearing...

Future Payments on Secured Debt

- Line 47 – On going debt service - DO NOT include payments on debts that are being stripped or surrendered
- Line 48 – Arrearages – Once again make sure the debtors are keeping the property secured by the debt

Preparing for Hearings

- You have a dozen cases set for a docket and you don't know whether your client will show up
- You may have a pretty good idea of what happened two months ago in your office – but does your client?
- How can you maximize minimal time?

Give the Witness Warning

- SEND A LETTER PRIOR TO THE HEARING!!
 - Include in the letter that your client must appear at the Meeting of Creditors or Confirmation Hearing or Trial in person.
 - Tell her she will be either be in a courtroom or meeting room
 - Tell her to arrive ahead of time and discuss access to the building

Prepare by Telephone

- Set up a procedure in your office where you or your staff call the client a few days in advance.
- Review with your client the format of the hearing and what is expected of her. Go over any problems that have arisen such as objections or request for additional information. Ask them to bring their papers with them to the Court

Tell the Client Where

- Make sure the Client knows exactly where to go.
Discuss Security and access to the building
- Give your client a quick tour of the room or courtroom where they will sit, where you will sit, where the Judge or Trustee will sit
- If there will be others questioning the client let them know

Meet Your Client At the Hearing

- Even if you have several matters meet with your client prior to the hearing
- Give them an envelope or folder of a distinct color at the meeting in your office and have them bring that to Court. Then you will be able to spot them in a crowd
- Go over the process AGAIN. They are nervous and need reassurance

Use the Magic Words

- Tell the Truth
- DO NOT Tell them what to say

Remind Your Client Why

- Tell them why the Meeting of Creditors is necessary to the case
- Remind them why they are needed to testify at a Confirmation Hearing
 - “You and I believe your house is worth \$250,000 but the Judge has never seen it. We need to give the Judge the facts to make a decision.”

Understand Cultural Differences

- You need to understand your client's possible cultural biases. What might seem like evasion to us is polite to others
- If you client will need language assistance let the Trustee or Court Clerk know EARLY.

Describe the TYPES of Questions

- Tell the client the kinds of questions the Trustee will ask.
- If it is a trial tell the client the questions you will ask – DO NOT tell the client what answers you expect in return

Tell the Witness to LISTEN

- Advise the client to listen to the questions and wait until the question is finished before answering
- Answer the question asked
- Don't argue!!!

Tell the Witness it is Recorded

- Remind the client of the need to answer verbally
- Shaking or nodding the head is not recorded

Tell the Witness it is OK Not to Know

- If the client does not know the answer it is OK to say “I am sorry I do not know”
- But caution your client not to overuse the term.
- Show the client the critical documents – contract, petition, the photo

Prepare for Objections or Problems

- Remind the client that an objection is not about them – it is about the question.
- Remind the client to WAIT until the objection is resolved
- Tell them what sustained and overruled mean.

Tell the Witness the Focus is Limited

- If it is a Confirmation or Valuation Hearing advise the client that the hearing has a specific limited purpose.
- If it is a Meeting of Creditors remind them it is the Trustee's duty to examine all of your client's financial life.

Expect Cross Examination

- At a Meeting of Creditors – Although rare prepare your client for the possibility of a creditor attending.
- Advise your client NOT TO ARGUE with opposing counsel, creditor or the Trustee.