

# 06 - BK - 060

February 13, 2007

The Honorable Thomas S. Zilly  
United States District Court  
West District of Washington  
U.S. Courthouse  
700 Stewart Street  
Seattle, WA 98101-9906

Dear Judge Zilly:

This letter is submitted by the undersigned in their individual capacities. While we are members of the Ad hoc Committee on Bankruptcy Court Structure and the Insolvency Process of the Business Law Section of the American Bar Association, the views expressed in this letter are presented on behalf of the undersigned only. These views have not been approved by the American Bar Association, the Business Law Section or the Ad hoc Committee and should not be viewed as representing the position of the Association, the Section or the Committee.<sup>1</sup>

Since the enactment of BAPCPA,<sup>2</sup> the Ad hoc Committee has undertaken a number of projects designed to assist attorneys in complying with pre- and post-BAPCPA legal standards. Among these standards is the degree of accuracy required of consumer debtors' schedules and statements of financial affairs and, more specifically, the circumstances in which a debtor's attorney may be held liable for errors.

We are concerned that the nature of the schedules and statement of financial affairs hinders the provision of accurate, useful debtor information - in part because these forms are not written in language that is easily understood by consumer debtors. For example, Schedule B asks for information about "contingent and unliquidated claims of any nature." This is fundamentally different from asking questions such as, "Do you think anyone owes you money because you were in a car accident or you fell down on his property? If someone owes you money, do you and that person agree on the amount that you are owed?" Similarly, most consumer debtors would not think of their expected tax refunds as "liquidated debts."

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<sup>1</sup> The ABA is submitting separate comment letters on proposed Federal Rule of Evidence 502(b), on other aspects of proposed FRE 502 (dealing with a proposed new subsection on "Effect of Disclosure of Factual Summaries of Internal Investigations"), and on Federal Rule of Criminal Procedure 29. Numerous individual leaders of the ABA Litigation Section also are submitting a separate comment letter in their individual capacities only with respect to various other issues surrounding FRE 502 on which the ABA has not taken a position. In addition, on January 29, 2007, the ABA submitted comments on Rule 17 of the Federal Rules of Criminal Procedure.

<sup>2</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

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Schedule C, which lists the debtor's exemptions, is another example of the Official Forms' lack of clarity. Schedule C requires debtors to state the value of each claimed exemption, but without any indication of whether the debtor claims the full value, or only part, of the underlying asset. This creates problems for debtors who may not understand that, notwithstanding the exemption, the property might still be lost to the bankruptcy estate if there is sufficient equity for the trustee to administer.

Other commentators have expressed similar concerns. In a 1999 article, Judge Steven W. Rhodes, Chief Judge of the United States Bankruptcy Court for the Eastern District of Michigan, conducted a study on the accuracy of these forms. Among his conclusions were that "the Official Bankruptcy Forms do not adequately communicate the disclosure requirements" and that "in some ways, the disclosure requirements are unrealistic and unnecessary, and serve only to make knaves of otherwise honest debtors and their attorneys."<sup>2</sup> Later in the same article, Judge Rhodes recommended "a complete overhaul of the Official Forms,"<sup>3</sup> with certain objectives to consider, including:

- making plain English a primary goal;
- incorporating functional and organizational efficiencies; and
- expanding and clarifying the instructions that accompany the official forms.<sup>4</sup>

We believe that the Forms should be written in language that is easily understood by consumer debtors and that the instructions that accompany the Official Forms should be expanded and clarified. We have attached a proposed form of notice that represents a positive step in this regard. Created as a response to the notice requirements of new Code § 527(c) and included in the book *Attorney Liability in Bankruptcy*,<sup>5</sup> the notice is an easy-to-read explanation of basic points about bankruptcy, including debtors' statutory obligations and other aspects of bankruptcy that are too often misunderstood.

We believe that a notice like the one in *Attorney Liability in Bankruptcy* should be considered for Judicial Conference adoption as either an Official or a Director's form. Debtors should be given information that they need before they commence their bankruptcy cases, and any such notice should be in user-friendly language that consumer debtors can understand. Better educating debtors in this manner will improve communication between debtors and their attorneys, provide for more accurate information on debtors' schedules and statements of financial affairs, and reduce potential liability for both debtors and their attorneys.

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<sup>2</sup> Hon. Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 *AM. BANKR. L.J.* 653, 653 (1999).

<sup>3</sup> *Id.* at 703.

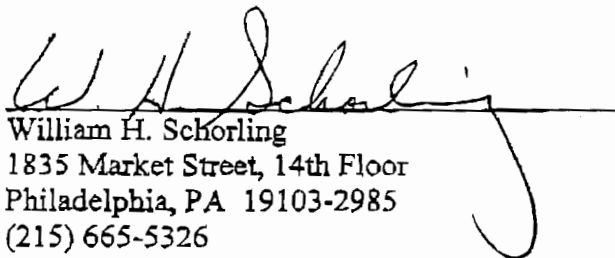
<sup>4</sup> *Id.* at 703-04.

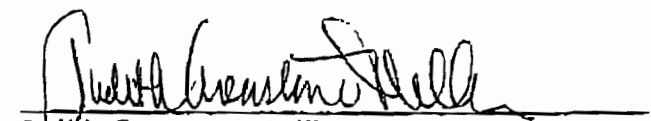
<sup>5</sup> Corinne Cooper & Catherine E. Vance, *Attorney Liability in Bankruptcy*, American Bar Association


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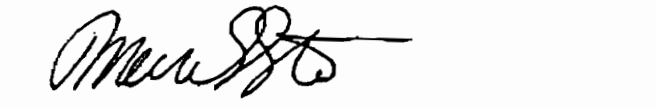
We appreciate this opportunity to share our concerns with you regarding the Bankruptcy Forms and we hope that you and the Advisory Committee will take these views into account as you consider the legislation in the near future. Thank you for your consideration, and if you or your staff have any questions or would like to meet and discuss these issues in greater detail, please call William H. Schorling at (215) 665-5326 or Judith Greenstone Miller at (248) 727-1429.

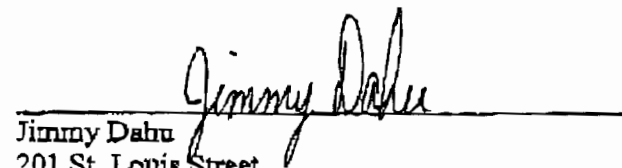
Sincerely,

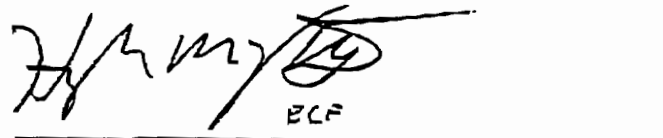
  
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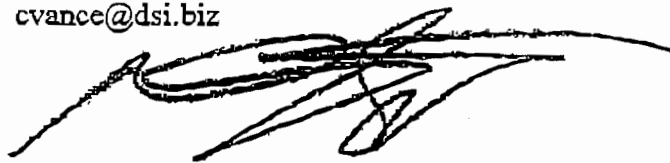
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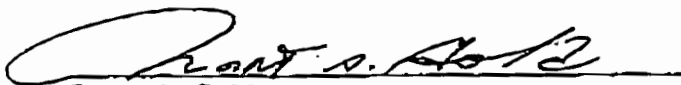
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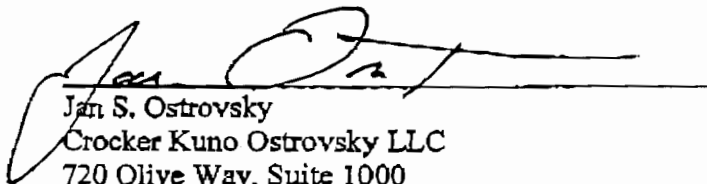
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Enclosure

## The "How To" Notice

### Filing a Bankruptcy Case: Things You Need to Know [Adapted § 527(c) Notice]

This Notice is intended to provide you with reasonably sufficient information about your bankruptcy case and the information you have to provide. Be sure to ask your attorney if you have any questions.

#### Some Basics about Bankruptcy

In addition to the general information you were given in the notice entitled, "Notice to Individual Consumer Debtor under § 342(b) of the Bankruptcy Code," there are some things you need to know about bankruptcy.

The goal in filing a bankruptcy case is to get a "discharge" of your debts. The "discharge" is a court order that prevents your creditors from collecting the amounts you owed before you filed for bankruptcy. Some of your debts, like child support or student loans, might not be discharged. You and your lawyer will talk about any of your debts that might not be discharged.

The most important thing for you to understand is what is expected of you when you file for bankruptcy. In exchange for getting rid of your debts, you must make "full disclosure." This means you must give complete and accurate information about everything you own and everything you owe. Do not leave anything out.

Most people who file for bankruptcy are not dishonest and they don't plan on not telling the complete truth to the trustee and the bankruptcy court. What's more common is for people to fail to disclose all the required information because they don't want certain people to know they're filing for bankruptcy, because they want to protect a friend or family member by "keeping them out of the bankruptcy," or for similar reasons.

But it doesn't matter if your intentions are good. THE LAW DOES NOT ALLOW YOU TO MAKE EXCEPTIONS.

It's also common for people to think they file bankruptcy "against" their creditors, and that they can choose to leave certain creditors out. This is not true. All of your creditors are included in your bankruptcy, whether you want them to be or not. If you don't provide information about your creditors so that they get notice of your bankruptcy, your debts to them might not be discharged. Worse, keeping creditors in the dark may lead to the denial of your discharge. In other words, all of your creditors can still collect what you owe them after the bankruptcy.

You also need to be sure you understand what "property" means before you begin compiling information for your attorney. Many people think "property" means only tangible goods, like furniture, a house, or a car. But "property" means much more, including:

- Money that anyone owes you, even the tax refund you expect to get next year
- Deposits, such as those held by landlords or utilities
- Your right to sue anyone for any reason (for example, if someone hurt you or damaged your property, or if someone didn't honor the promises they made in a contract with you)
- Repossessed property
- Interests in certain insurance policies, annuities and retirement accounts
- Rights in licenses, patents, copyrights, and other, similar items
- Animals
- Farm subsidies

Differences in state laws, the availability of exemptions, and other matters will determine what property you get to keep, and your attorney can help you with that.

What's important is for you to be sure you aren't leaving out information that the bankruptcy court expects you to disclose. People sometimes leave out information because they don't think of something as being "property" or because they think the property "isn't worth anything." Failure to list everything can hurt your chances of getting your bankruptcy discharge. It could also affect your own legal rights to property, meaning you might lose property that you could have kept if it was disclosed.

Remember, your duty is to disclose everything and cooperate with the trustee. The value is not as important as the fact that the item is listed. If you aren't sure whether anything in particular needs to be included, just ask your attorney.

### **Information Needed to Prepare the Official Bankruptcy Forms**

In order for your attorney to prepare all of your Official Forms completely and accurately, you need to provide the following information and, wherever possible, provide documentation relating to the information. For some of the items below, documentation is required. Indicate whether any of these documents are unavailable and provide a brief explanation why they are unavailable. Keep in mind that your attorney will ask you for other information, as needed.

#### **1. Information about Creditors**

You must provide the name and address for *all* of your creditors. If you have it, provide the account number as well.

The amount you owe each creditor must be stated in your bankruptcy papers. You can usually get this figure from your most recent bill or statement. Bring those bills and statements when you meet with your attorney.

You must provide statements, bills, collection letters or similar correspondence that includes the account number received from *each* of your creditors in the last 90 days. This might seem like a lot, but it is necessary so that your attorney has the right address to give your creditors notice of your bankruptcy. Your creditors have more rights against you if the notice of your bankruptcy is sent to the wrong address. If you don't have letters or statements going back 90 days, give your attorney whatever you have.

#### **2. Information about Your Property**

All of your property must be disclosed. Some types of property can be grouped into a single category, such as your clothing, which can be generally listed as "wearing apparel." Any particular item within that group that has a value that is unusual for that category must be listed separately. For example, you can group together all of your records and CDs, but if you have a copy of the Beatles "Abbey Road" autographed by John Lennon, it has to be separated from the group and listed on its own.

Some of your property might serve as "collateral" for a debt you owe. This is true for many people's cars, for example. While you are still making payments, the creditor has a "lien" on the car (the collateral), which allows the creditor to repossess the car if payments aren't made. A creditor in this situation is called a "secured creditor." For any of your property that is "collateral," you must provide a copy of the contract or other documents relating to your loan. You must also provide a copy of your registration showing who the legal owner of the car is.

Also make note of any of your property that you bought with a store credit card rather than a general credit card like Visa, MasterCard or Discover. The store might claim a lien on that property and may be a secured creditor.

The value of all of your property (meaning what your property is worth) must also be disclosed. For property that is *not* collateral, you can determine the value in different ways, but you must make a good-faith estimate. One method is to imagine you are going to replace a piece of property by buying it at someone else's garage sale. What would you pay for it? That is the value that needs to be listed. For some kinds of property there are guides available that provide estimated value, and some of these are available on the Internet.

The rules are very different if your property is collateral. The Bankruptcy Code requires that you value this kind of property at "replacement value." For property you acquired for personal, family, or household purposes, this means "the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined."

Here's an example. Suppose you bought a computer on credit. You still owe the financing company for the computer and they can repossess it if you don't pay. Your computer is "collateral" and you need to find out what its "replacement value" is. You can't use the garage sale example because that's not a "retail merchant." You need to know what a store would charge you for property that's like yours. That doesn't mean you have to find out what a *new* computer would cost. Instead, you need to know what a

