

A FUNNY THING HAPPENED ON THE WAY TO THE 341 MEETING¹

By

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I. Attorney Requirements of “Reasonable Investigation”

A. In the 2005 amendments to the Bankruptcy Code, Section 707² was amended to add subsection 707(b)(4)(C) and (D) and impose the following requirements on counsel for a debtor:

(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 other 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.

B. Section 707 was also amended in 2005 to add section 707(b)(4)(A) to statutorily incorporate Federal Rule of Bankruptcy Procedure 9011 as an obligation of counsel for a debtor and as a basis for sanctions where the court

(I) grants a section 707(b) motion to dismiss or convert; and

(II) finds that the action of the attorney for the debtor in filing the case under [Chapter 7] violated Rule 9011 of the Federal Rules of Bankruptcy Procedure.

¹ With due respect to Stephen Sondheim, Burt Shevelove, Larry Gelbhart, and the inimitable Zero Mostel.

² Pursuant to section 103(b) of the Bankruptcy Code, section 707 is only applicable to cases under Chapter 7. However, given the incorporation of Rule 9011 into this section, this provision’s guidance to counsel is nonetheless helpful in cases under other chapters of the Bankruptcy Code.

C. The 2005 amendments also created section 526, which included subsection 526(a)(2), which prohibited debtor's counsel (and other debt relief agencies) from:

(2) mak[ing] any statement or counsel or advise any assisted person or prospective assisted person to make a statement in a document filed in a case or proceeding under this title, that is untrue or misleading, or that upon the exercise of reasonable care, should have been known by such agency to be untrue or misleading.

D. At least with regard to Rule 9011 and section 707(b), the attorney's violation occurs when the petition or other documents is signed by the attorney. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126, 110 S. Ct. 456, 460 (1989). This Rule & statute places the responsibility for investigating the factual and legal basis for statements made in the filed petition or documents on the person who actually signs the document. *In re Computer Dynamics, Inc.*, 252 B.R. 50, 56, Bankr. E.D. Va. (1997). An objective standard of reasonable inquiry is imposed on anyone signing a pleading or paper filed with the court. *Business Guides, Inc. v. Chromatic Comm. Enters., Inc.*, 498 U.S. 533, 554, 111 S. Ct. 922, 934-35 (1991).

II. Reasonable Inquiry in Preparing Petitions, Schedules, & Statements: Are the Client's Answers Good Enough? (Probably Not).

A. Real Property Issues

1. Most, if not all, Chapter 7 Trustees in the Western District, assert that, at a minimum, Debtor's counsel should have obtained and reviewed the following in a case where the debtor owns real property: (a) the source deed, will, or other instrument by which the debtor became the holder of an interest in property, (b) any recorded deed of trust, (c) a payoff statement or other evidence of the amount secured by the property, and (d) evidence of the fair market liquidation value of the property.

2. Valuation of Real Property: The tax assessed value assigned to the property by the local taxing authority is rarely an accurate indicator of the actual fair market value of the property, though in many instances, such values tend to be in excess of the fair market values. Other possible indicators are the original purchase price, an opinion from a real estate broker, and of course, an appraiser.

3. Joint Debt: In cases where there may be equity, the real property will receive heightened trustee scrutiny. If the property is held as tenants by the entirety, then credit reports for each spouse (whether filing or not) and copies of monthly statements are essential.

4. Judgment Liens: If there has been prior creditor legal action against the debtor, a search of the judgment lien records in the Circuit Court of the jurisdiction where the debtor holds real property is also essential. Not only is this important in cases where there appears to be equity in the real property, but in cases where the judgment lien can be avoided under section 522(f) of the Bankruptcy Code.

5. Division of Property in Divorce Proceedings: In cases where the debtor holds or held real property that was subject to equitable distribution in a prior divorce proceeding, a search of the Circuit Court land records is essential. Pursuant to Virginia Code § 20-107.3 (1950, as amended), real property that is subject to an equitable distribution agreement incorporated into a Final Decree of Divorce or to such a decree ordering the transfer of the real property to one of the parties can only be conveyed by either a deed of transfer recording in the land records or by the recordation of the Final Decree of Divorce in the judgment lien book in the jurisdiction in which the real property lays. *See, In re Robinson*, 346 B.R. 172 (Bankr. E.D. Va. 2006).

B. Personal Property Issues:

1. Valuation: Pursuant to section 506(a)(2), the debtor is required to value personal property securing an allowed claim at the replacement value of the property as of the petition date without deduction for the costs of sale. Replacement value for personal, family, or household goods means the price at which a retail merchant would charge for a replacement of the item.

2. Motor Vehicle Liens: As noted on the Trustee Document Demand spreadsheet attached to this outline, some trustees require production of both the document creating a security interest and the document evidencing perfection of that security interest. Several circumstances will increase the need for those documents to be produced even when not required by a particular trustee. Those circumstances include: (a) a transaction with a family member or other non-traditional lender, (b) a transaction occurring within one year before the petition date, and (c) where there is potential equity in the property.

C. Pay advices Issues:

1. The Statutory Requirement: Section 521(a)(1)(iv) and Bankruptcy Rule 4002(b)(2)(A) establish the requirement that the debtor provide copies of pay advices for wages, salary, or other income received within sixty (60) days prior to the date of the petition.

2. The Dilemma: How can the debtor fully comply with this requirement and provide accurate statements of income in the schedules? Trustees understand the difficulty in getting the last one (or two) pay advices for the statutorily required period before the filing of the petition. However, we often receive pay advices that date back several months. While those stale pay advices are most useful for preparing and analyzing the Schedule I and the Means Test when the debtor has stable income, such as a salary, the calculation of income in other instances can potentially be incorrect, with disastrous results in some cases. In addition, in all circumstances, the use of stale pay advices to disclose the current year income for Statement of Financial Affairs question 4 will result in an inaccurate amount.

3. The Trustees' Solution: It is suggested that counsel, whenever circumstances permit, require their clients to produce the most recent pay advices at the time of their signing of the petition and that counsel proceed to immediately thereafter file the petition. Not only will this increase the accuracy of the schedules filed, it will also reduce staff and attorney time in obtaining additional pay advices for the trustee's document production and in amending the statements and schedules to reflect current income.

4. The Need for Redaction of personal identification information. See Note below.

D. Tax Return Issues:

1. The Statutory Requirement: Section 521(e)(2)(A)(i) of the Bankruptcy Code and Bankruptcy Rule 4002(b)(2)(B) establish the requirement that the debtor provide a copy of the debtor's most recently filed federal income tax return by not later than seven (7) days prior to the petition date.

2. The Dilemmas: Trustees experience a number of problems with the production of tax returns, including (1) copies not timely provided, (2) unsigned returns, (3) summary statements from tax preparers instead of the returns, (4) illegible copies of returns, (5) no affidavit when debtor is no longer required to file a return, and (6) no exemption under Virginia Code § 34-26(9).

3. The Trustees Solutions (We need your help)

a. The seven day deadline is important to many of us because the length of time it takes us to review a case. For example, for a full docket of 40 cases, I am likely to spend twelve (12) to sixteen (16) hours on reviewing the cases. I will typically review a docket on the weekend before the upcoming docket.

b. Have your assistant look at the image before uploading it. If he or she cannot read it, neither can we read it. Make sure the assistant is sending the right document that meets the requirement.

c. Anticipate the need for an Affidavit of Non-Filing of Tax Returns and get one signed at the same time as the petition is signed, so that we both save time and effort.

d. Look at the returns (both Federal and State) before the petition is filed and include the exemption of Earned Income and Child Tax credits on Schedule C.

III. Verification of Debtor Identity & Social Security Number

A. Pursuant to Section 521(h) and Bankruptcy Rule 4002(b)(1)(A) & (B), each individual debtor must present **original** government-issued photo identification and confirmation of the social security number listed in the petition filed in the case.

B. Acceptable forms of picture identification are as follows:

1. Current driver's license
2. U.S. government identification card
3. State government identification card
4. Educational institution-issued student identification card
5. Passport or current visa (**NOTE:** neither of these documents contains the holder's social security number)
6. United States military identification card
7. United States resident alien identification card
8. Identification card issued by a national government authority

C. Acceptable forms of proof of Social Security Number are as follows:

1. Social Security Card
2. Medicare Card
3. Medicaid Card
4. Medical insurance card
5. Pay advices
6. Form W-2 or Form 1099
7. Statement from Social Security Administration

D. Original versus Copy: With the exception of a Form W-2, Form 1099, or a recent pay advice, which the trustee may accept in his or her discretion, ALL forms of proof of Social Security Number must be ORIGINALS.

E. Common problems:

1. Lost Social Security card

2. Left Social Security Card at home
3. Thought passport had Social Security Number on it
4. Copy of driver's license produced

F. Trustee Suggestions:

1. Have client produce required documents to you as soon as they arrive.
2. If copy of Form W-2, Form 1099, or a recent pay advice is to be used, make a copy for your file and bring it with you to the section 341 meeting.
3. Contact client and remind them of these requirements before the date of the section 341 meeting.

G. Safeguarding Social Security Numbers and Other Personal Identifiers in Documents Produced to the Trustee.

1. Bankruptcy Rule 9037 requires that filings in Bankruptcy Court not contain, with certain specific exceptions noted therein, an individual's social security number, taxpayer identification number, or birth date, the names of minors, financial account numbers.

2. While all trustees take significant steps to safeguard the information and documents produced for review prior to the section 341 meeting, it is important that those documents be produced with the following information redacted:

- a. Social Security numbers
- b. Names of minor children
- c. Dates of birth
- d. Financial account numbers.

IV. Official Form 122A-1, Current Monthly Income Details for the Debtor.

A. Most bankruptcy filing software, such as Best Case, includes a detail of the monthly or weekly gross wages that are used to calculate the monthly income for the Means Test. However, the majority of Chapter 7 cases are filed without this detail.

B. Including this detail as a part of the Means Test allows the trustees to more easily review pay advices as we verify the accuracy of Schedule I and the Means Test. So, please include this detail in the filings with the Court.

V. Document Production for the Section 341 Meeting.

Attached is a spreadsheet of the documents required by each trustee for the section 341 meeting.

CHAPTER 7 TRUSTEE DOCUMENT DEMAND

DOCUMENT REQUIRED	TRUSTEE							
	WEC	SLH	ASG	GIV	SSF	HWH	WSS	RSS
Recorded deed of transfer and current tax bill for any interest in real property	OR	M	M	M	M	M	OR	OR
Recorded deeds of trust for any interest in real property	OR	M	M	M	M	OR	OR	OR
Documentation for each unsecured debt if there is real property held as tenants by entirety that has equity	OR	M	M	M	M	OR	OR	OR
Evidence of value of any real and personal property in excess of \$3,000 (NADA, tax appraisal, etc.)	OR	M	M	M	M	OR	OR	OR
Payoff statement and balance for all secured debts	OR	M	M	M	M	OR	OR	OR
Copy of security agreements and/or financing statements for each debt secured by personal property	OR	M	M	M	OR	OR	OR	OR
Title certificates or DMV transcript on vehicles or mobile homes worth \$3K or more	OR	M	M	M	M	OR	OR	OR
Retirement Plan or 401(k) documentation showing plan is ERISA qualified	OR	M	M	M	OR	OR	OR	OR
Federal and state tax return for previous year	M	M	M	M	M	M*	M	M
Proof of cash value of life insurance policy	OR	M	M	M	M	OR	OR	OR
Recorded homestead deed(s) past and present	M	M	M	M	M	M	M	M
Complaint or claim in which debtor is seeking money	OR	M	M	M	M	OR	OR	OR
Pay advices for 60 days prior to petition	M	M	M	M	M	M	OR	OR
Divorce judgment and property settlement if filed or pending within last year	OR	M	M	M	M	OR	OR	OR
Financial reports of any business in which debtor owns an interest	OR	M	M	M	M	OR	OR	OR
Bank statements for (3) months, including petition date	OR	M	M	M	M	OR	OR	OR
Pay advices for 60 days prior to petition for non-filing spouse	OR	M	M	M	OR	OR	M	M
Transfer documents for property transferred in 2 years before petition	OR	M	M	M	OR	OR	OR	OR
Domestic Support Obligation Disclosure Form- information on payee	M	M	M	M	M	M	M	M

M = MANDATORY

OR = ON REQUEST

* two years



Chapter 7 Trustee

Suggestions/Tips/Recommendations

by
Scot S. Farthing

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- Trustees looking for two main things from bankruptcy attorneys—
 - (1) disclosure, and
 - (2) accuracy.



You represent your clients, but you also have duties to the court—balance these two things this way—

- 1) Tell the Truth, and
- 2) Do Not Let Your Client Lie.



Preparing Case to File

- Proofread—make sure documents you file are correct—do professional job, if you cannot do this job professionally on what you are charging, then charge more or do something else.
- Trustees review disclosure of compensation and determine whether fees are excessive; if we think the fees are excessive, i.e. sloppy schedules with large attorney fee, we refer the case to UST. (11 U.S.C. 704(a)).



Valuing assets

- Debtor has duty to file a schedule of assets and liabilities. (11 U.S.C. 521(a)(1)(B)(i))
- Even assets with nominal or no value must be scheduled.
- The value of assets are not determinative of their materiality. In re Unruh, 278 KB.R. 796, 805 (Bankr. D. Minn. 2002).
- Undervalued assets can lead to denial of exemptions, denial of discharge, bad-faith findings, sanctions and even criminal penalties.



Valuing assets

- changes in the forms in December 2015 provide this instruction:
- *In this form, report the current value of the property that you own in each category. Current value is sometimes called fair market value, and, for this form, is the fair market value as of the date of the filing of the petition. Current value is how much the property is worth, which may be more or less than when you purchased the property. (Instructions to Schedule A/B Property (Official Form 106 A/B) (12/15))*



Valuing assets

- Judicial Estoppel prevents a party from taking a position in one case that is inconsistent with a position taken in another case, and this can arise if a debtor does not properly value assets.



Neidenbach v. Amica Mutual Insurance Co., 842 F.3d 560 (8th Cir. 2016)

- Neidenbachs, the debtors, filed Chapter 13 case declared – under penalty of perjury – that they jointly owned only \$7,000 worth of household goods and furnishings, clothing, furs, jewelry, firearms, hobby equipment, and other personal property. Home value at \$300,000.00.
- Within a year after filing Chapter 13, a fire destroyed the debtors' home and everything in it.



Neidenbach

- Debtors claimed a loss on their homeowner's policy of \$262,000 for their personal property; their proof of loss was a sworn statement to the insurance company.
- There was a \$255,500 discrepancy between the insured's Proof of Loss and the property value reported in their bankruptcy petition a year earlier.
- The debtors did not dispute that they did not accumulate \$255,500 worth of personal property between filing the bankruptcy petition and submitting the Proof of Loss.



Neidenbach

- Debtors sued the insurance company for reimbursement.
- The court said, "[I]n the absence of contrary proof," a verified bankruptcy petition is assumed to be "a true and accurate representation of [the petitioner's] personal property." *Citing Liberty Mut. Fire Ins. Co. v. Scott*, 486 F.3d 418, 423 (8th Cir. 2007).



Neidenbach

- The claim that the bankruptcy and the insurance valuations were garage sale vs actual cash value was insufficient to show why the valuations were so different.
- The debtors stated in their affidavits that their bankruptcy attorney instructed them to use the "garage sale value" of their personal property in their bankruptcy petition.



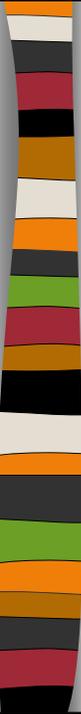
Neidenbach

- On a motion for summary judgment, the district court concluded that no reasonable jury would be able to reconcile the difference between the value of the personal property the debtors reported as lost in the fire and the value of personal property they reported in their bankruptcy petition a year earlier. Accordingly, the district court determined that the insurance policy was void as a matter of law, and granted summary judgment to the insurance company on the debtors' claims. The 8th Circuit affirmed the judgment of the District Court.



Schedule A

- fill out all the information
- provide a physical address, a tax map number will also be appreciated. We use local governments GIS systems to look at real estate.
- Provide the nature of ownership: fee simple, Joint Tenants, Tenants by Entirety, etc...
- A description that debtor owns 10.4 acres with no further description is bound to make you have to address extra communication from Trustee for details about the real estate.
- Sch. A value of real estate should match the value shown on Sch. D for the same property.



Schedule B

- list acct numbers with the bank accounts (the last four numbers)—so we can match the statements you provide with the accounts listed on Sch. B.
- For example the debtor lists one checking account and one savings account, then the debtor's attorney sends bank statements for two different checking accounts and one savings accounts.



Value assets appropriately—

- \$3,000 purchase from Schewel's two months before the petition was filed (hopefully the secured debt is on Schedule D) and a \$500 collective valuation on household goods and furnishings; where is the furniture debtor purchased from Schewel's?



Describe assets appropriately—the more detail the better

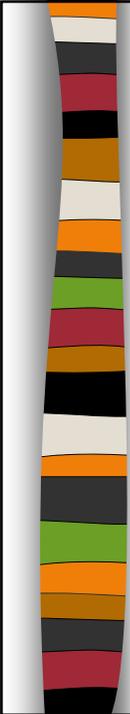
- Year, make, model--in the case of vehicles, trim level (short bed, long bed, crew cab, extended cab) and options (2WD, 4WD, engine size, etc.); if such details are not disclosed in the schedules, there may be more questions at the 341 meeting.
- Once a debtor scheduled "drank cans" under "collectibles," with a scheduled value of \$20.00. The trustee asked debtor what made the cans collectible, whether they were full or empty, etc. Debtor responded that it was a bag of crushed aluminum cans he was getting ready to recycle, and that \$20 was what the aluminum was worth at the recycler. Not a typo--they were cans that had been drank.

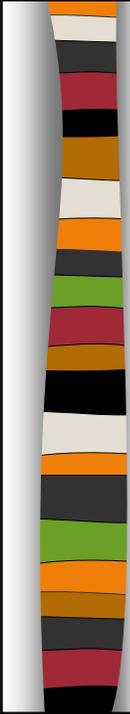


Schedule C

If exempting equity in real estate because debtors own land as Tenants by Entirety, then provide a copy of the credit report for the husband and wife, and/or a copy of bill heads to show there is not joint debt, with the other documents required to be produced by the Chapter 7 Trustee.

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- Verify debtors pay stubs/proof of income, match Sch. I, SOFA #4 and Means Test. We do look at the pay stubs/proof of income you provide to us. If numbers do not look consistent, we may inquire why. (11 U.S.C. 521(a)(1)(iv) and Rule 4002(b)(2)(A)).

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- Do not put debtors into Chapter 7 when they belong in Chapter 13. If the debtor's have equity in their house, or other assets, the Chapter 7 trustee will sell it. (11 U.S.C. 544, 704; 28 U.S.C. 586)



Preparing for 341 Meeting

- Provide all documents requested by Trustee at least 7 days before the 341 meeting, if not sooner. Hopefully you already have these documents to assist in preparing the bankruptcy case, so just forward to us, preferably upload to DocLink, for our review.
- When providing tax returns — provide all schedules to those returns; returns without the attached schedules are of little value. (11 U.S.C. 521(e)(2)(A)(i) and Rule 4002(b)(2)(B)). If it is a complex return with lots of depreciation, the worksheets to prepare those returns may be requested by the Chapter 7 Trustee.



Preparing for 341 Meeting

- Have debtors bring the appropriate ID to the 341 meeting. (list approved IDs listed in Mr. Callahan's materials)
- Have debtors have their driver's license and social security card, or other ID, out of their wallets/purses, and in their hand when their case is called, so we do not have to wait for the debtors to find their ID after they sit down for the examination.



Preparing for 341 Meeting

- If you need a translator, let us know ahead of time so we can make arrangements for an interpreter. We cannot use debtor's cousin as in interpreter – we have a number we can call to obtain an interpreter and can conduct the meeting with interpreter on speaker phone.
- If you know there are going to be problems with the case, or something unusual with the case, let the trustee know ahead of the meeting of creditors – it will help things go easier; this also applies to creditor attorneys. The sooner we know about problems the better prepared we as Trustees will be for the hearing/meeting of creditors. The more information you provide about the difficult issues, the less we have to pester you for that information in pieces.



After 341 Meeting

- Provide requested documents within 10 days of the 341 meeting.
- If schedules need to be amended, please do so within 10 days, so we can close the case, if that is our next action.
- The longer the case it open, the more we will look at it and will follow up with your office to obtain the needed documents and/or amended schedules.



Creditors

- when file Motion for Relief and ask for our consent to an order, it is nice to have language in the order that states any surplus funds from repossession or foreclosure shall be paid to the Chapter 7 Trustee.
- Occasionally foreclosure sales have surplus funds.