



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Consumer Practice Extravaganza

Pre-Filing Issue-Spotting

J. Scott Bovitz

Bovitz & Spitzer; Los Angeles

Hon. Daniel P. Collins

U.S. Bankruptcy Court (D. Ariz.); Phoenix

David P. Leibowitz

Law Offices of David P. Leibowitz, LLC; Chicago

*A chapter 7 trustee, a bankruptcy litigator, and a judge
walk into a bar:
pre-bankruptcy issue spotting*

Hon. Daniel P. Collins

United States Bankruptcy Court, District of Arizona
230 North 1st Avenue, Suite 101
Phoenix, AZ 85003
azb.uscourts.gov/content/judge-daniel-p-collins

David P. Leibowitz

Law Offices of David P. Leibowitz
3438 N. Elaine Place, Suite 4
Chicago, IL 60657
312-662-5750
dleibowitz@lodpl.com
lodpl.business.site
lakelaw.business.site

J. Scott Bovitz

Bovitz & Spitzer
1100 Wilshire Boulevard, Suite 2403
Los Angeles, CA 90017-1961
213-346-8300
bovitz@bovitz-spitzer.com
bovitz-spitzer.com
bovitz.com

Your new client will tell you just as much and she thinks you need to know. The debtor-to-be wants a discharge of claims, as quickly and efficiently as possible. What could go wrong? Just get on with it.

But your job (as debtor's counsel) is more complicated. Before a petition is filed, debtor's counsel must consider (and inform their client about)

avoidance powers, impediments to discharge or dischargeability of claims, exemptions, and so much more.

Attorneys should think like an adverse creditor, a chapter 7 or chapter 13 trustee, and the U.S. Trustee.

And cover your better side. You may be liable for statements or omissions in your client's petition and schedules. 11 USC §707(b)(4) provides:

(A) 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 attorneys' 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.

(B) 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 the bankruptcy administrator, if any).

(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.*

What "investigation" or "inquiry" is required? How much investigating does Congress expect from debtor's counsel, when the market price for a simple chapter 7 is so very low?

Did you comply with your state's advertising rules when seeking your debtor clients? Did you use a lead generation service? The North Carolina Bar does not like Google Local Service Ads.¹

Are you permitted to advertise that you are a specialist or a "certified specialist"?² While certification is promoted in some states, other states don't recognize certification at all.³

¹ Proposed 2021 Formal Ethics Opinion 5, North Carolina Bar.

² Of the 16 active state certification programs, nine are run through the state bar (Arizona, California, Connecticut, Florida, Idaho, Louisiana, Nevada, North Carolina, and Texas). Seven are operated under state supreme court programs (Indiana, Minnesota, New Jersey, New Mexico, Ohio, South Carolina, and Tennessee). The American Board of Certification (abcworld.org) certifies specialists in Consumer Bankruptcy Law, Business Bankruptcy Law, and Creditor's Rights. Mr. Bovitz is a past chair of the California Board of Legal Specialization and the American Board of Certification; he strongly recommends certification as a way to get a leg up on the competition.

³ Illinois does not recognize certifications but will allow attorneys to mention their certification as long as they state that certification is not a requirement for the practice of

In your advertising, consider the limitations of 11 U.S.C. §528(b) (such as, "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code.").

Can you refer to reviews in your advertisements and on the website? Probably. But you have to be careful that you don't offer anything of substance in soliciting a review or you might run afoul of Rule 8.4(c) of your state's Code of Professional Conduct.

Once the client is on the telephone, ask yourself if the client is serious. Mr. Leibowitz sends a questionnaire to each prospective debtor. The prospect must complete the questionnaire before Leibowitz will meet with the client. After the initial contact, Mr. Leibowitz also sends the mandatory disclosures in 11 U.S.C. §342 and §527 along with a brief explanation of chapter 7 and chapter 13. If the debtor client returns the questionnaire, Leibowitz knows the client has skin in the game. It has been his experience that the more he has to "chase clients" after an initial lead, the more difficult the client becomes. More frequently, the hesitant client will come back on their own accord when they are good and ready.

At the first meeting, review the client's identification and Social Security Number. Look on Pacer for prior filings. Establish the rules for communication (in person, Zoom, email, text). Think about how you will document your file. Prepare to preserve all email and text messages – both incoming and outgoing.

law and that certification is not recognized by the Supreme Court of Illinois. Mr. Leibowitz is Board Certified both as a business bankruptcy attorney and as a consumer bankruptcy attorney. He's not sure that it generates much business but feels that it's a lot like chicken soup. It can't hurt.

A common client complaint is that "my lawyer won't return my calls." At the initial meeting, explain that you will return messages when you can, usually within 24 hours, unless you are in trial. Explain that you are also have a family and a life beyond bankruptcy and are not always able to respond to messages outside of business hours.

At the initial meeting, review the client's questionnaire. Inform the client of non-bankruptcy and bankruptcy options. Get the client's informed consent on the course of action, fees, and payment arrangements. Get the client to sign an engagement agreement and pay the fee. (Don't run a credit card for your fees – well maybe you can run a credit card from the debtor's mother.) Some lawyers will charge a service fee for credit card payments in order to make up for the fee charged by the credit card company. If you decide to do that, be sure you disclose it on your fee disclosure form filed with your case. Mr. Leibowitz has found that using services such as Zelle have been convenient for many clients.

Are there non-dischargeable claims? Domestic support obligations? Intentional torts? Fraud claims? False financial statements? Student loans? Taxes more than three years old where the return was timely filed?⁴ You may avoid problems by getting a tax transcript.⁵ And if there is any chance of a complaint to determine discharge or dischargeability, make sure you cover that in the initial engagement agreement. Attorneys have been forced to disgorge fees that they took an advance to litigate potential discharge or dischargeability matters.

Another area of concern is to consider what your local bankruptcy court requires of you as an attorney in connection with your standard

⁴ *In re Fahey*, 779 F.3d 1, 6 (1st Cir. 2015), *In re Mallo*, 774 F.3d 1313, 1318 (10th Cir. 2014), and *In re McCoy*, 666 F.3d 924, 932 (5th Cir. 2012) all hold that late filed returns disqualify three-year old taxes for discharge. But see *Mass. Dept. of Rev. v. Shek*, No. 18-14922 (11th Cir. Jan. 23, 2020) to the contrary.

⁵ <https://www.irs.gov/individuals/get-transcript>

engagement agreement. Some bankruptcy courts will not allow you to exclude various aspects of representation, or to charge extra for them, such as lien avoidance, appearances at extensive Rule 2004 examinations, response to U.S. Trustee or creditor investigations or other contested matters. Make sure that your engagement agreement anticipates the matters that might arise in connection with your case and that the fee you charge is commensurate with what might reasonably be anticipated.

Speaking of fees, various state bars differ in connection with how you can handle your fee. Some states will allow you to take fees, as received, into income immediately, on the theory that they represent an advance retainer. Some states require you to keep all fees received in installment payments in clients' funds until the case is actually filed, at which time the fee is earned. Most states will require you to keep that portion of receipts representing costs to be maintained in client funds until you actually file the case. So, make sure that your accounting is in order and commensurate with your state's regulatory scheme.

Consider the timing of a petition. Has it been eight years from a prior chapter 7 or six years from a prior (less than 100%) chapter 13? 11 U.S.C. §727(a)(8), (9).

If there are only a few claims, can you negotiate deals with those creditors? Is a former student eligible for a forbearance or income based reduction in payments?

Were there preferential payments within the 90 days before the petition-to-be? How about payments to insiders within a year? 11 U.S.C. §547.

Were there fraudulent transfers to anyone within the past ten years? (Yikes.) Consider 11 U.S.C. §548 and state law on fraudulent transfers (11 U.S.C. §544). Trustee are reaching back a decade to recover fraudulent transfers if there is a debt to the United States or an agency. (Bovitz says, "Trustees are being a little greedy here." Leibowitz retorts, "Trustees are

simply doing their job pursuant to Section 704 of the Bankruptcy Code). In Chicago, many debtor's attorneys ask themselves WWLD ("What would Leibowitz do?") when counseling their client's pre-petition. It's a good idea to imagine the worst-case scenario so that you might get your client's informed consent before taking action. It's also a clever idea to imagine the worst-case scenario to avoid malpractice claims.

Trust but verify the debtor's information. Read the bank statements (at least one year). Look for expenditures that do not show up on Schedule J. Look for undisclosed assets. Also, when looking at expenditures that occur on a regular basis, ask what they are for. Expenditures to automobile dealers or auto service centers might reflect an undisclosed vehicle. Expenditures to a marina might reflect an undisclosed boat. Expenditures for aviation fuel on a credit card might reflect an airplane. When in doubt, order a search about your client on a service like Accurint to see what might be going on. You might also want to take a look on social media. You might be surprised to find that your client's social activities reflect undisclosed assets.

What chapter? Is this a family farmer or fisherman? Consider chapter 12. Is this debtor eligible for chapter 7? Is lien stripping needed? Have you checked to see whether there are judgment liens that impair a homestead exemption?

Consider chapter 13 if the debtor needs the slightly broader scope of the discharge, the debtor wants to keep possession of non-exempt assets, a bifurcated fee is not possible, or the debtor does not fit under the means test (11 U.S.C. §707(b)).

Should this be a solo or joint bankruptcy petition? Will community property laws come into play? If it is a solo bankruptcy petition, be sure that you'll be able to have the cooperation of the non-filing spouse for purposes of preparing the means test analysis and Schedules I and J.

Exemption planning. Pigs get fat, hogs get slaughtered. Conversion of non-exempt assets to exempt assets could be both unethical but also subject the attorney to discipline. Bovitz says: "It is your job to maximize exempt assets, within your ethical duties. Your debtor will have read about 'asset protection' on the internet but does not understand the differences between exemption planning and offshore trusts." Leibowitz says: "Be alert to state statutes that may limit your work in this area."⁶ Judge Collins says: "I know it when I see it." If you see a case involving an Alaska Trust or assets in the Cook Islands, consider running in the opposite direction. And if you find a client who tells you that he is a "sovereign citizen," decline the case.

Does this debtor have property that may be excluded from property of the estate? Certain funds in an educational IRA within a year prior to case for certain family members under 11 U.S.C. §541(b)(5). Certain funds for tuition credit or certificate within a year prior to the case for certain family members under 11 U.S.C. §541(b)(6). Sums withheld by employer for Health Savings Account or ERISA qualified retirement plan under 11 U.S.C. §541(b)(7). Spendthrift trusts will be protected to the extent protected by state law -- but not self-settled trusts -- and must be disclosed with a 10 year look back period.

What exemptions apply? Check debtor's residence in the past two years and determine if the exemptions of the former residence -- if applicable -- are extraterritorial or not -- you may end up with federal exemptions.

Is the real estate subject to avoidable liens? Get a title search or at least check online records to see if there are any liens that might be avoided as

⁶ An unnumbered paragraph in 735 ILCS 5/12-1001 (that's in the Illinois Code of Civil Procedure) states: "If a debtor owns property exempt under this Section and he or she purchased that property with the intent of converting nonexempt property into exempt property or in fraud of his or her creditors, that property shall not be exempt from judgment, attachment, or distress for rent. Property acquired within 6 months of the filing of the petition for bankruptcy shall be presumed to have been acquired in contemplation of bankruptcy."

impairing exemptions. Who owns the real estate? Contact the recorder of deeds to be 100% sure about title to real estate. Don't take client's word for it.

Who owns the car? Look at the title and registration. Again, don't take client's word for it.

Are there lawsuits? Check Pacer. Check dockets of local courts and any other jurisdictions associated with client.

Are there insurance policies? Who are the beneficiaries of insurance policies? Look at the declarations page of the actual insurance policy. Is the cash value exempt?

Is the retirement plan actually exempt? Ask for and look at the summary plan description. Did the debtor borrow from the plan? How was that documented?

Taxes. Look for clues on the tax returns. Stocks on which there are dividends. Accounts on which there is interest. Assets that are being depreciated. Gifts that were undisclosed on which deductions were taken that might be avoided as fraudulent transfers. Assets on a depreciation schedule that are not on the questionnaire.

Once the petition is filed, problems will come to light in the bankruptcy court. What are the common problems that Judge Collins sees on the bench?

Faculty

J. Scott Bovitz is a senior partner with Bovitz & Spitzer in Los Angeles, where he practices both consumer and business bankruptcy law and represents debtors and creditors. He is Board Certified in Business Bankruptcy Law by the American Board of Certification, which he chaired, and he is a Certified Specialist in Bankruptcy Law for the State Bar of California Board of Legal Specialization, which he also chaired. Mr. Bovitz is rated AV-Preeminent by Martindale-Hubbell and has been selected as *Southern California Super Lawyer* in bankruptcy and creditor/debtor rights. In addition, he is a lawyer representative for the Ninth Circuit Judicial Conference, a coordinating editor of the *ABI Journal*, a former member of the California Committee of Bar Examiners, a former adjunct professor of law at Loyola Law School in Los Angeles, a former executive editor and author of *Personal and Small Business Bankruptcy Practice in California*, a contributing editor to *Bankruptcy Mediation News* for the U.S. Bankruptcy Court for the Central District of California, a former president of the Los Angeles Bankruptcy Forum and a former education and conference co-chair of the California Bankruptcy Forum. In addition, he sits on the Information Technology Committee for the Central District of California Bankruptcy Court and is webmaster of bankruptcydog.com, a calendar site for bankruptcy professionals. Mr. Bovitz received his J.D. in 1980 from Loyola Law School in Los Angeles.

Hon. Daniel P. Collins is a U.S. Bankruptcy Judge for the District of Arizona in Phoenix, appointed on Jan. 18, 2013. He served as chief judge from 2014-18. Previously, he was a shareholder with the law firm of Collins, May, Potenza, Baran & Gillespie, P.C. in downtown Phoenix, practicing primarily in the areas of bankruptcy, commercial litigation and commercial transactions. Judge Collins serves on the Ninth Circuit's Bankruptcy Education Committee, is the education chair for the National Conference of Bankruptcy Judges, will be NCBJ's president in 2022-23, is a member of ABI's Board of Directors, sits on ABI's Education Committee and Diversity Committee, is on the Board of the Phoenix Chapter of the Federal Bar Association, is a Fellow of the American College of Bankruptcy and is a member of the University of Arizona Law School's Board of Visitors. He also is a founding member of the Arizona Bankruptcy American Inn of Court. Judge Collins received both his B.S. in finance and accounting in 1980 and his J.D. in 1983 from the University of Arizona.

David P. Leibowitz is founder and managing member of the Law Offices of David P. Leibowitz, LLC in Chicago. He is a former member of ABI's Board of Directors and co-chairs ABI's Consumer Practice Extravaganza 2021. Mr. Leibowitz has co-chaired ABI's task force on individual chapter 11 cases, and he co-chaired ABI's Consumer Bankruptcy Committee and Commercial Fraud Committee. In addition, he was co-author and editor-in-chief of the *ABI Fraud Handbook*. Mr. Leibowitz is Board Certified as both a Consumer Bankruptcy Attorney and a Business Bankruptcy Attorney by the American Board of Certification. He is recognized in *Super Lawyers*, is rated AV-Preeminent by Martindale-Hubbell, has been recognized in *The Best Lawyers in America*, and has been named one of the top 500 bankruptcy lawyers in the U.S. by *Lawdragon*. Mr. Leibowitz is a Fellow of the Wisconsin Bar Foundation and has received awards for *pro bono* excellence from the U.S. District Court for the Northern District of Illinois and from the Circuit Court for Lake County, Ill. He also has been a panel chapter 7 trustee for more than 30 years and served as a member of the board of directors of the National Association of Bankruptcy Trustees. As a chapter 7 trustee, he has administered

more than 30,000 cases and is certified as a mediator by the Chicago Bar Association. Mr. Leibowitz received his B.A. in economics from Northwestern University and his J.D. *cum laude* from Loyola University of Chicago School of Law, where he was note editor of its law review.