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**ETHICAL ISSUES AND MALPRACTICE
PREVENTION:**

**PREPARATION OF THE SCHEDULES
AND THE STATEMENT
OF FINANCIAL AFFAIRS**

Presented by:

**Kevin M. Lippman, Esq.
Davor Rukavina, Esq.
MUNSCH HARDT KOPF & HARR, P.C.
3800 Lincoln Plaza
500 North Akard Street
Dallas, Texas 75201-6659
(214) 855 7500**

**klippman@munsch.com
drukavina@munsch.com**

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I.	INTRODUCTION	1
II.	SOURCES OF LAW AND DUTIES.....	2
	A. BANKRUPTCY CODE AND RULES	3
	B. RULE 11 AND THE DUTY OF INDEPENDENT INVESTIGATION	3
	C. EXPANDED DUTIES UNDER THE BANKRUPTCY AMENDMENTS	5
	D. POTENTIAL SANCTIONS AGAINST A DEBTOR’S ATTORNEY	6
	E. STATE BAR ETHICAL REQUIREMENTS	8
	F. POTENTIAL BROADENING OF DUTIES TO CREDITORS	9
III.	MOST COMMON PITFALLS RESULTING FROM SCHEDULING ERRORS	10
	A. FAILURE TO PROVIDE NOTICE – DISCHARGE / CONFIRMATION NOT BINDING ...	10
	1. Importance of Proper Notice.....	10
	2. Failure to Notice Creditors of a Closely Held Entity	11
	3. New Noticing Requirements Under the Amendments	12
	B. FAILURE TO SCHEDULE LAWSUITS – JUDICIAL ESTOPPEL	15
	C. LOSS OF EXEMPTIONS	16
	D. DENIAL OF DISCHARGE	18
	E. LOSS OR INAPPLICABILITY OF THE AUTOMATIC STAY	19
IV.	TEN STEPS TO AVOID PITFALLS AND MALPRACTICE.....	20
	1. DO NOT RELY ON NON-ATTORNEY ASSISTANTS FOR LEGAL ANALYSIS	20
	2. DO NOT ASK THE DEBTOR TO MAKE LEGAL CONCLUSIONS	22
	3. DO NOT RELY ON AMENDMENTS TO SCHEDULES	22
	4. RUN A PACER SEARCH FOR PRIOR BANKRUPTCIES	23
	5. RUN A CREDIT REPORT AND OTHER REPORTS	24
	6. REDUNDANCY OF ADDRESSES	25
	7. WHEN IN DOUBT – SCHEDULE IT	25
	8. OBTAIN COPIES OF FINANCIAL DOCUMENTS	26
	9. FILE THE MATRIX WITH THE PETITION	27
	10. BE EXTREMELY WARY OF DISHONEST DEBTORS	27

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I. INTRODUCTION

The authors¹ of this Article have, collectively, practiced in the realm of bankruptcy law for sixteen years, and both previously were judicial clerks for bankruptcy judges with heavy consumer dockets. In that time, they have personally seen (and litigated) certain issues that arise more frequently in consumer debtor cases than one might expect – issues rooted in basic scheduling problems, and issues which can have dire consequences for the debtor and, by extension, the attorney for a debtor. Accordingly, this Article identifies some of the most prevalent scheduling problems, the potential consequences thereof, and provides suggested means by which attorneys with practices that include representing consumer debtors can avoid the problems.

The authors' personal experiences regarding the frequency of scheduling errors, including litigating both sides of some of the issues addressed in this Article, are supported by empirical evidence. In 1998 and 1999, the Honorable Steven W. Rhodes, United States Bankruptcy Judge for the Eastern District of Michigan, undertook a comprehensive study of scheduling errors in cases filed in his district, which was published by the National Conference of Bankruptcy Judges in the *American Bankruptcy Law Journal*.² Judge Rhodes' findings, and the conclusions drawn therefrom, are enlightening. For purposes of this Article, however, the conclusion drawn by Judge Rhodes that is most on point is his conclusion that "the lack of care and understanding of the debtors and their attorneys in fulfilling the disclosure requirements is palpable and disturbing," although Judge Rhodes points to other contributing factors, beyond the control of debtors and their attorneys, as contributing to scheduling problems.³

Judge Rhodes' findings include the following: (i) 54% of married debtors failed to disclose whether property was owned separately or jointly; (ii) 81% of debtors paying rent failed to schedule security deposits; (iii) 73% of debtors failed to schedule life insurance assets, although they scheduled life insurance expenses; (iv) 54% of debtors who scheduled pension income, pension expenses, or union expenses failed to schedule pension interests; (v) 16% of married debtors failed to schedule whether debts were separate, joint, or community; (vi) 83% of

¹ Kevin M. Lippman is a shareholder in the Reorganization / Corporate Finance section of Munsch Hardt Kopf & Harr, P.C. Mr. Lippman began his legal career with a four year judicial clerkship for the Honorable Houston Abel, Chief United States Bankruptcy Judge for the Eastern District of Texas. Since his clerkship, Mr. Lippman's practice has focused almost exclusively in the field of bankruptcy and creditor's rights. Davor Rukavina is an associate in the Reorganization / Corporate Finance section of Munsch Hardt Kopf & Harr, P.C., having joined Munsch Hardt after a two year judicial clerkship for the Honorable Robert L. Jones, United States Bankruptcy Judge for the Northern District of Texas.

² Honorable Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Paper*, 73 AM. BANKR. L. J. 653 (Summer 1999).

³ *Id.* at 653-54.

debtors with business income or expenses failed to attach the required detailed statements of income and expenses; (vii) 85% of renting debtors failed to schedule leases; and (viii) 14% of debtors with secured debt failed to address some secured debt in their statements of intention.⁴ These are but a few of the most common scheduling errors, and Judge Rhodes' article includes additional frequent categories of errors which should be of interest to attorneys representing debtors. Admittedly, some scheduling errors are minor, and they do not necessarily evidence any dishonest motive. But, as explained in this Article, seemingly minor scheduling errors can, and frequently do, give rise to draconian results.

It is against this backdrop that the authors write this Article, although it must be understood that it is not their purpose to scold attorneys representing debtors. The authors fully understand the pressures that a debtor's attorney works under, and the lack of sophistication of some of the attorney's clients. The authors have represented both consumer and business debtors, and they are aware of the difficulties attendant to the preparation of schedules, as well as the consequences of scheduling errors, which is why they approach this topic with an appreciation of the difficulties encountered by a debtor's attorney. The authors also appreciate the "Catch-22" that a debtor's attorney faces: additional expenses related to the preparation of the schedules and the statements to ensure accuracy may price bankruptcy out of the average debtor's price range.

By this Article, the authors have tried to identify some of the most frequent and most problematic issues that arise as a result of scheduling problems, and they attempt to provide real-world advice to attorneys representing debtors on how to minimize these problems. As will be seen below, minimizing these problems is integrally related to an attorney's ethical duties, because scheduling errors are frequently the result of a misunderstanding or a lack of appreciation of ethical duties – not those that relate to honesty, but rather those related to the basic organization of one's practice. Accordingly, Part II of this Article provides a synopsis of the various statutory, regulatory, and case law provisions addressing ethical duties of a debtor's attorney, as they relate to the preparation of the schedules and statements. Part III addresses some of the most frequent problems, and the consequences thereof, that arise as a result of scheduling errors and omissions. Part IV provides simple, practical suggestions to the consumer debtor's attorney to ensure that scheduling problems are minimized, and that both negative consequences for the debtor, and potential liability for the attorney, are avoided.

II. SOURCES OF LAW AND DUTIES

It is fair to say that an attorney representing a debtor has broader, more complicated, and more layered duties than do other attorneys, and the attorney's duties may even extend to parties other than just to the debtor. Although it is impossible to address each of these duties in the confines of this Article, a brief discussion of some of the chief duties, and their sources, is helpful in providing guidance to attorneys representing debtors.

⁴ *See id.* at 666-71.

A. BANKRUPTCY CODE AND RULES

Bankruptcy provides a fresh start to debtors, but only to honest debtors.⁵ An honest debtor is expected to “bear his chest” to the world as the price for obtaining a discharge. In furtherance of the openness requirement, a debtor must file schedules and statements that are “complete, thorough and accurate in order that creditors may judge for themselves the nature of the debtor’s estate.”⁶ A debtor’s complete disclosure is essential to the proper administration of the bankruptcy estate and, since it is the debtor that knows best the status of the debtor’s assets and liabilities, it is the debtor that is charged with accurately and fully preparing the debtor’s schedules and statements.⁷ It is, therefore, the burden of the debtor to complete the schedules and statements accurately, a burden that has been described as a “strict obligation.”⁸ Thus, “a debtor may not pick and choose which assets and liabilities to disclose.”⁹

Section 521 of the Bankruptcy Code provides the basic requirements for the debtor’s preparation of the schedules and statements. Among other things, the debtor is required to file on the prescribed official forms a list of creditors, a schedule of assets and liabilities, a schedule of current income and expenditures, and a statement of financial affairs.¹⁰ Bankruptcy Rule 1007 implements section 521 of the Bankruptcy Code, and provides specific details regarding the information that must be disclosed,¹¹ as well as the timing of that information, while Bankruptcy Rule 1008 requires the debtor to verify under oath the accuracy of the debtor’s schedules and statements.¹² Bankruptcy Rule 9009 requires that the official forms prescribed by the Judicial Conference of the United States be used, subject to appropriate alteration.¹³ Among the primary roles of a debtor’s attorney is to assist the debtor in preparing accurate and complete schedules and statements – a role which, as explained below, is not simply to transcribe or type the debtor’s answers, but rather to help ensure that the schedules are accurate and complete.

B. RULE 11 AND THE DUTY OF INDEPENDENT INVESTIGATION

While scheduling obligations are principally on the debtor, it is the responsibility of a debtor’s attorney to reasonably ensure that a debtor fulfills the debtor’s obligations. Hence, the

⁵ See, e.g., *Rawlings v. Tapp (In re Tapp)*, 339 B.R. 420, 428 (Bankr. W.D. Ky. 2006); *Cooke v. Cooke (In re Cooke)*, 335 B.R. 269, 278 (Bankr. D. Conn. 2005) (“it is clear that the important benefits of the fresh start belong to the honest debtor, not all debtors” (quoting *In re Fosco*, 14 B.R. 918, 922 (Bankr. D. Conn. 1981))).

⁶ *Garcia v. Coombs (In re Coombs)*, 193 B.R. 557, 563-64 (Bankr. S.D. Cal. 1996).

⁷ See, e.g., *Cohen v. McElroy (In re McElroy)*, 229 B.R. 483, 488 (Bankr. M.D. Fla. 1998); *Van Roy v. Watkins (In re Watkins)*, 84 B.R. 246, 250 (Bankr. S.D. Fla. 1988).

⁸ *In re Dubberke*, 119 B.R. 677, 680 (Bankr. S.D. Iowa 1990). *Accord Rion v. Spivey (In re Springer)*, 127 B.R. 702, 707 (Bankr. M.D. Fla. 1991).

⁹ *In re Armwood*, 175 B.R. 779, 785-86 (Bankr. N.D. Ga. 1994). *Accord Poolquip-McNeme Inc. v. Hubbard (In re Hubbard)*, 96 B.R. 739 (Bankr. W.D. Tex. 1989).

¹⁰ See 11 U.S.C. § 521(a)(1)(A) – (B).

¹¹ FED. R. BANKR. P. 1007(a) – (c).

¹² FED. R. BANKR. P. 1008.

¹³ FED. R. BANKR. P. 9009.

attorney shares some of the obligations of ensuring accurate schedules.¹⁴ The attorney's obligations in this respect are provided by, among other things, Bankruptcy Rule 9011, which applies to filings submitted by an attorney to the bankruptcy court. Bankruptcy Rule 9011 has been interpreted as being analogous to Rule 11 of the Federal Rules of Civil Procedure, and cases construing Rule 11 have been applied to Bankruptcy Rule 9011 motions.¹⁵ Although various courts have described an attorney's duties in this respect in different terms, they agree that an attorney is charged with the duty of reasonable inquiry:

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.¹⁶

Certain other opinions, albeit significantly fewer in number, go beyond the "duty of *reasonable inquiry*" and hold that a debtor's attorney, "as an officer of the court," has the duty "to take *all possible steps* to assure himself that the information listed in his clients' petition is correct."¹⁷

In any event, case law holds that "[p]lacing a burden of pre-filing investigation upon a debtor's attorney is not onerous," especially in this age of electronic data storage and access.¹⁸ Since a debtor's attorney is receiving payment in full at the expense of other creditors, it is reasonable to impose upon the attorney some duty to independently investigate the accuracy of the debtor's schedules and statements. There are certain things that a debtor's attorney should already independently know and must ensure appear on the schedules and statements. For example, the attorney's fee arrangement and whether the attorney has a prepetition claim against the debtor.¹⁹ It is easy to see why an attorney is expected to ensure that matters such as these, which are within the attorney's personal knowledge, be properly disclosed, and it is easy to

¹⁴ *In the Matter of McKain*, 325 BR. 842, 851 (Bankr. D. Ne. 2005) ("[b]oth the debtor and her attorney share the responsibility for the current situation. They each had a duty to make sure the schedules and statement of financial affairs were correct.").

¹⁵ See *Findlay v. Banks (In re Cascade Energy & Metals Corp.)*, 87 F.3d 1146, 1150 (10th Cir. 1996); *In re Armwood*, 175 B.R. at 788.

¹⁶ *In re Armwood*, 175 B.R. at 789 (citing *In re Matthews*, 154 B.R. 673 (Bankr. W.D. Tex. 1993); *In re Huerta*, 137 B.R. 356 (Bankr. C.D. Cal. 1992)).

¹⁷ *Aetna Fin. Co. v. Martinez (In re Martinez)*, 22 B.R. 419, 421 (Bankr. D.N.M. 1982) (emphasis added). Accord *In re Shebel*, 54 B.R. 199, 203 (Bankr. D. Vt. 1985).

¹⁸ *In re Armwood*, 175 B.R. at 790.

¹⁹ See FED. R. BANKR. P. 2016(b).

understand why the attorney can be held accountable if they are not.²⁰ More than that, however, a debtor's attorney must understand that the attorney is charged with the duty to conduct an independent, reasonable investigation into the facts and the law to conclude that the filing of the petition and the accompanying documents is meritorious.²¹

C. EXPANDED DUTIES UNDER THE BANKRUPTCY AMENDMENTS

Whatever one's opinions of it may be, and whatever its ultimate fate may be as it faces constitutional challenges on multiple fronts, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Amendments") is a present reality that must be taken into account, particularly by attorneys representing consumer debtors. As most attorneys are now aware, the Amendments impose new duties and burdens on them within the specific context of the schedules and statements.²²

The Amendments changed section 707 of the Bankruptcy Code in several significant ways, including adding several provisions specifically addressed to a debtor's attorney. Among the new provisions is the following requirement imposed on a debtor's attorney:

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).²³

In many ways, this provision is nothing more than the codification of prior case law that applied most of the same duties on a debtor's attorney under Bankruptcy Rule 9011. However, since the Amendments include the "means test," filing a petition under Chapter 7 presumably means that the attorney has investigated not only the accuracy of the schedules, but also whether the debtor is eligible for Chapter 7 protection in light of the "means test," which arguably expands the duties of a debtor's attorney to analyzing the debtor's income and expenses under state and local standards, as well as all other factors that go into the "means test" matrix.

Additionally, the Amendments provide that "[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the

²⁰ See, e.g., *In re Thomas*, 337 B.R. 879, 891-92 (Bankr. S.D. Tex. 2006) (discussing unpublished case, and approving of it, wherein a Chapter 13 debtor's attorney was sanctioned for failure to schedule in excess of \$700,000 in personal claims against the debtor).

²¹ See, e.g., *In re Weaver*, 307 B.R. 834, 841 (Bankr. S.D. Miss. 2002).

²² This Article will not provide a detailed analysis of the Amendments. Instead, the Article will merely highlight certain aspects of the Amendments applicable to the preparation of the schedules and statements.

²³ 11 U.S.C. § 707(b)(4)(C).

information in the schedules with such petition is incorrect.”²⁴ It is unclear how this provision affects prior case law, since this provision is phrased in terms of the negative, whereas under Rule 11 the duty is affirmative; *i.e.*, not knowing of any inaccuracy is different from certifying accuracy. However, this provision speaks in terms of the petition date and, in situations where the schedules are prepared and filed after the petition is filed, it may be impossible or inappropriate for the attorney to certify to the accuracy of schedules when they have yet to be prepared and filed. It is unclear how the courts will address this situation. Additionally, the Amendments fail to define the “inquiry” that an attorney has to undertake in ensuring that the schedules do not contain incorrect information. Because an attorney had a duty of some level of independent investigation prior to the Amendments, one can argue that Congress intended to impose a higher level of inquiry by the Amendments. Otherwise, Congress presumably would have relied on the established case law. However, an argument may be made that the standard has been lowered, since not knowing of any inaccuracy requires less effort than knowing of accuracy.

In any event, a review of the case law does not reveal any published opinions to date interpreting the new provisions of section 707, and only time will tell how courts interpret those provisions and what levels of “inquiry” they impose. Attorneys representing consumer debtors are encouraged to review the cases addressing these new provisions. Additionally, such attorneys should undertake the broadest inquiries and investigations that their resources will permit when preparing the schedules, keeping in mind that Congress intended by the Amendments to address what it perceived as insufficient care by attorneys in the preparation of the schedules.

D. POTENTIAL SANCTIONS AGAINST A DEBTOR’S ATTORNEY

Even before the Amendments, case law provided that a debtor’s attorney could be sanctioned for scheduling omissions and errors. In this respect, the attorney’s duties can be broken down into three categories of scheduling errors: (i) those in which the attorney has personal knowledge; (ii) those in which the attorney can easily ascertain accuracy; and (iii) those in which the attorney cannot easily ascertain accuracy.

With respect to the first and the third categories, the analysis is fairly simple. If the attorney has personal knowledge of information which is omitted from the schedules or statements, or is disclosed incorrectly, the attorney may well face sanctions. Perhaps the most common form of sanctions is the denial of compensation for failing to provide the necessary disclosures concerning the attorney’s fee arrangement – a sanction that seems appropriate since the attorney can have little excuse for failing to include this information in light of the attorney’s personal knowledge thereof.²⁵ With respect to the third category, where the attorney cannot easily ascertain accuracy, the attorney is probably not subject to sanctions since, at the end of the day, many things that must be disclosed are within the unique knowledge of the debtor, and therefore susceptible to the debtor’s honesty or dishonesty.

²⁴ See *id.* § 707(b)(4)(D).

²⁵ See 11 U.S.C. § 329(a); FED. R. BANKR. P. 2016(b). See also, generally, *Lavender v. Wood Law Firm*, 785 F.2d 247 (8th Cir. 1986).

It is the second category, in which the attorney can readily ascertain accuracy, that the duty of inquiry plays the biggest role. This category and the duty of inquiry are exemplified by the situation of previous bankruptcy filings by the debtor. This is because of the general principle that an attorney is not entitled to rest on what the client tells the attorney if sources are reasonably available to corroborate that testimony.²⁶ In this respect, not only does the petition itself require that prior cases be disclosed, but the potential that a prior case was dismissed with prejudice raises serious Bankruptcy Rule 9011 implications for a debtor's attorney.²⁷ This falls squarely within the attorney's duty of inquiry:

This Bankruptcy Court provides at least three methods of determining whether a debtor has filed prior bankruptcy cases. . . . The information was easily attainable and not time consuming. A mere review of the docket sheet for the Debtors' Chapter 13 . . . would have revealed the entry of the *Agreed Orders* barring refiling. . . . Thus, rather than simply questioning his clients as to prior Chapter 7 proceedings, Mr. Moore would have been able, using easily accessible methods, to have determined not only the actual number of bankruptcy cases filed by the Debtors but also to have ascertained the entry of the *Agreed Orders* precluding refiling.²⁸

Indeed, a debtor may not even know that a prior dismissal was with prejudice. But even in that instance the attorney can readily ascertain whether any such order was entered.²⁹ A debtor's attorney has a duty of inquiry in this respect and, as an officer of the court, is charged with ensuring that court orders are not violated.³⁰ A heightened duty may exist with respect to previous bankruptcy cases because such prior cases suggest that the debtor is a serial filer.³¹

Another potential problem occasioned by prior filings is that such filings may include scheduled information that is different than that in the new filing. For example, prior schedules may disclose the existence of assets or liabilities that the debtor has not included in new schedules. At a minimum, in such instances, a debtor's attorney must consult the prior schedules and inquire into why there are changes, and whether those changes are justified. This is required by the attorney's duty of inquiry, and an attorney can be sanctioned for failing to consult

²⁶ See, e.g., *In re Weaver*, 307 B.R. 834, 844-45 (Bankr. S.D. Miss. 2002); *In re Bono*, 70 B.R. 339, 344 (Bankr. E.D.N.Y. 1987).

²⁷ See, e.g., *In re Weaver*, 307 B.R. 834 (Bankr. S.D. Miss. 2002) (imposing monetary sanction against attorney for filing new bankruptcy case during prejudice period imposed under section 109(g) in prior case).

²⁸ *In re Weaver*, 307 B.R. at 844. Accord *In re Bailey*, 321 B.R. 169 (Bankr. E.D. Pa. 2005) (sanctioning attorney for filing petition where previous case was dismissed with prejudice to refiling).

²⁹ See *In re Bailey*, 321 B.R. at 174-75.

³⁰ See *id.* (recognizing attorney's role as officer of court, and acknowledging potential tension between that role and duty of zealously representing client).

³¹ *Id.* at 179 (“[w]here the client identifies a prior case, and in particular where a review of the docket in that discloses a bar order [dismissal with prejudice], failure to further investigate the client's bankruptcy history, is inexcusable.”).

previous schedules.³² As explained by one court, “[a]wareness of the prior cases filed by Debtor should have prompted Debtor’s attorney to engage in a thorough and conscientious pre-filing investigation.”³³ Where the prior case was recently dismissed, the attorney may be held to “an even greater duty of inquiry.”³⁴

Finally, it is important to note that the Amendments raise the potential of additional sanctions on a debtor’s attorney. Among other things, the attorney may be required to pay the trustee’s fees incurred in successfully prosecuting a motion to dismiss a Chapter 7 case under the “means test.”³⁵ Additionally, if the court finds that an attorney violated Bankruptcy Rule 9011, the court may impose sanctions against the attorney, although it is unclear why the Amendments contain this provision since this was the prior state of the law under Bankruptcy Rule 9011 anyway.³⁶

E. STATE BAR ETHICAL REQUIREMENTS

In addition to the duties imposed on a debtor’s attorney under the Bankruptcy Code, Bankruptcy Rules, and case law, attorneys are also governed by the applicable state bar rules of professional discipline and rules of ethics. In this respect, there are two rules in particular that attorneys must be cognizant of when preparing the schedules and statements.

First, “[a] lawyer should not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence.”³⁷ This rule has a substantive and a procedural component. Substantively, the attorney must be competent with respect to the subject matter of the representation, which is the most familiar component of the rule. However, it is the second component of the rule that has frequently gotten a debtor’s attorney into problems, because the rule also requires that attorneys have the resources to undertake the contemplated representation.³⁸ With respect to a debtor’s attorney with a volume practice of consumer cases, this requires, for example, that the attorney have a well organized and competent staff such that cases can be filed quickly in the event of an emergency, hearings are properly scheduled, staffing resources exist to address debtors’ needs and inquiries, and the attorney is available to meet with the debtors if necessary. In short, do not accept more cases than you and your office are capable of handling in a professional, responsive manner.

The second rule governs the unauthorized practice of law by non-attorneys. In this respect, the attorney is directly prohibited from assisting a person who is not a member of the bar

³² See *In re Armwood*, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994) (sanctioning attorney due to, in part, attorney's failure to prepare schedules containing information that appeared on debtor's prior schedules without undertaking reasonable inquiry).

³³ *Id.* (citing *In re Huerta*, 137 B.R. 356 (Bankr. C.D. Cal. 1992)).

³⁴ *Id.*

³⁵ See 11 U.S.C. § 707(b)(4)(A).

³⁶ See *id.* § 707(b)(4)(B).

³⁷ Texas Disciplinary R. Prof'l Conduct 1.01(a).

³⁸ See *id.* cmt. 6 & 7.

in the unauthorized practice of law.³⁹ The attorney is directed by the rule to make reasonable efforts to ensure that a non-attorney assistant's conduct is compatible with the professional obligations of the attorney, and the attorney is subject to discipline if the non-attorney assistant improperly practices law.⁴⁰ For example, for the most part, attorneys rely upon non-attorney assistants to prepare the schedules and statements. While this is a cost effective way to prepare the schedules and statements, the attorney must exercise proper supervision and oversight to ensure that the rule against the unauthorized practice of law is not violated. True, there are several aspects of preparing the schedules and statements that may be best left to non-attorney assistants, such as clerical work, review of Pacer for prior cases, review of public information regarding the values of assets, and the mechanics of filing. However, a debtor's attorney can get into trouble if the attorney permits a non-attorney assistant to practice law by providing a debtor with advice on, among other things, the chapter of the Bankruptcy Code under which to file the case and drawing legal conclusions on whether something should be disclosed. The relevance of this critical rule as it pertains to the preparation of the schedules and statements is discussed in some detail below.

F. POTENTIAL BROADENING OF DUTIES TO CREDITORS

Attorneys are aware that they owe fiduciary duties to their clients. However, the fiduciary duties of an attorney representing a debtor may extend past the debtor to include the debtor's creditors (as a collective body).⁴¹ The extent such duties extend to the estate's creditors is a fluid concept.⁴² Certain opinions suggest that an attorney representing a debtor in possession owes certain fiduciary duties to the estate's creditors.⁴³ Other opinions do not go so far as imposing on a debtor's attorney fiduciary duties to the estate's creditors. But, it is recognized in such opinions that the attorney's fiduciary duties require the attorney to ensure that the debtor, in the case of a debtor in possession, properly fulfills the debtor's fiduciary duties to the estate's creditors. As explained by one court, "[t]he debtor's attorney, while not a trustee, nevertheless is charged with the duty of counseling the debtor in possession to comply with its duties."⁴⁴ Hence, "[a]n attorney for a Chapter 11 debtor cannot simply close his or her eyes to matters having an adverse legal and practical consequence for the estate and creditors."⁴⁵ In any event, regardless

³⁹ See *id.* 5.05(b).

⁴⁰ See *id.* 5.03(a)-(b).

⁴¹ *In re St. Stephen's 350 E. 116 St.*, 313 B.R. 161, 171 (Bankr. S.D.N.Y. 2004); *In re Kendavis Indus. Int'l Inc.*, 91 B.R. 742, 757 (Bankr. N.D. Tex. 1988); *In the Matter of E. Paul Kovacs & Co. Inc.*, 16 B.R. 203 (Bankr. D. Conn. 1981).

⁴² See *In re Cenargo Int'l PLC*, 294 B.R. 571, 599 (Bankr. S.D.N.Y. 2003).

⁴³ See, e.g., *In re Adam Furniture Indus. Inc.*, 158 B.R. 291, 301 (Bankr. S.D. Ga. 1993) ("Even though the law firm acts as attorney for the debtor-in-possession, it also has certain fiduciary duties to the estate, including insuring that the rights of creditors are protected").

⁴⁴ *In re St. Stephen's*, 313 B.R. at 171 (quoting *Zeisler & Zeisler P.C. v. Prudential Ins. Co. of Am. (In re JLM Inc.)*, 210 B.R. 19, 25 (B.A.P. 2d Cir. 1997)).

⁴⁵ *Id.* Accord *In re Texasoil Enters. Inc.*, 296 B.R. 431, 435 (Bankr. N.D. Tex. 2003) ("While counsel to a debtor in possession may not owe a duty directly to creditors, counsel does have an obligation to ensure that the debtor properly maintains the estate").

of the standard, it is reasonably clear that the attorney for a debtor in possession represents the estate, which is run for the benefit of creditors, and that such an attorney must therefore take the interests of the creditors into account: “[t]he attorney for a debtor in possession is not merely a mouthpiece for his client.”⁴⁶

Admittedly, these opinions expand the attorney’s fiduciary duties in the context of Chapter 11 cases, and it appears difficult to see how an attorney representing Chapter 7 debtors can or should have any expanded duties to the estate’s creditors since a Chapter 7 debtor does not manage the estate and is truly separate from the trustee, with distinct and frequently adversarial interests. However, given the similarities between Chapter 11 and Chapter 13, it is possible that an attorney representing a Chapter 13 debtor may be charged with certain broadened and heightened duties to the estate’s creditors. Accordingly, attorneys representing Chapter 13 debtors may wish to consult applicable Chapter 11 cases and be mindful that their actions, while in the zealous interests of their clients, may be questioned when they are not in the best interests of the estate.

III. MOST COMMON PITFALLS RESULTING FROM SCHEDULING ERRORS

It is impossible in the confines of this or any other article to provide a comprehensive discussion of all pitfalls, or to provide a checklist for the avoidance of the same. Instead, the authors of this Article offer the following as a list of the most common pitfalls stemming from scheduling errors and omissions, as informed by their personal experiences from their years working for the judiciary and in private practice.

A. FAILURE TO PROVIDE NOTICE – DISCHARGE / CONFIRMATION NOT BINDING

1. Importance of Proper Notice

It is elemental that only those parties with notice of the bankruptcy case are bound by it: “due process in the bankruptcy context requires that individual notice be given before rights can be affected.”⁴⁷ The bar date, for one thing, is not binding on those creditors that did not receive at least notice of the filing of the bankruptcy case.⁴⁸ A confirmed plan is binding on only those creditors with knowledge of the bankruptcy case.⁴⁹ In circuits other than the Fifth Circuit, such as the Tenth and Eleventh Circuits, notice or knowledge of the bankruptcy case itself may not be enough, and the creditor must additionally be provided notice of the confirmation hearing in order to be bound by the confirmed plan.⁵⁰ A discharge in an asset case is binding only on those

⁴⁶ *In re Sky Valley Inc.*, 135 B.R. 925, 939 (Bankr. N.D. Ga. 1992).

⁴⁷ *Bayoud v. Medical Ctr. Hosp. of Garland Inc. (In re American Dev. Int'l Corp.)*, 188 B.R. 925, 933 (N.D. Tex. 1995).

⁴⁸ *Greyhound Lines Inc. v. Rogers (In re Eagle Bus. Mgf. Inc.)*, 62 F.3d 730, 734 (5th Cir. 1995) (“[a] creditor’s claim can be barred for untimeliness only upon a showing that it received reasonable notice.”).

⁴⁹ *See, e.g., Bank of Louisiana v. Pavlovich (In re Pavlovich)*, 952 F.2d 114, 117 (5th Cir. 1992). *See also Sequa Corp. v. Christopher (In the Matter of Christopher)*, 28 F.3d 512, 517-18 (5th Cir. 1994).

⁵⁰ *See Dalton Dev. Project # 1 v. Unsecured Creditors Committee (In re Unioil)*, 948 F.2d 678, 683 (10th Cir. 1991); *Spring Valley Farms Inc. v. Crow (In re Spring Valley Farms Inc.)*, 863 F.2d 832, 834-35 (11th Cir. 1989).

creditors with notice of the case, and hence the opportunity to contest discharge/dischargeability,⁵¹ while creditors who obtain notice of a bankruptcy case only after discharge are usually afforded a period of time in which to object to dischargeability *and* discharge.⁵² Similarly, a creditor may not be sanctioned for violating the automatic stay if the creditor does not have knowledge of the bankruptcy case, since such a violation cannot be willful.⁵³

Proper notice of the filing of the bankruptcy case is critical, and failure to provide notice is frequently the biggest pitfall occasioned by scheduling errors. At a logical minimum, proper notice requires the identification (*i.e.*, name) of the creditor and the creditor's address. Because the creditor matrix is prepared, in part, using the names of creditors listed in the schedules, inaccurate or incomplete schedules will impact the matrix. Most bankruptcy courts send the notice of the filing of the case (including notice of the bar date, trustee identification, etc.) to the matrix that is filed by the debtor with the petition. If the matrix omits creditors, has incorrect addresses, or is not filed promptly, but the debtor's attorney is relying on the court to notice creditors of the filing of the case, that notice may not be provided and the attorney may not be aware of the problem until it is too late. Failure to file a matrix, or filing the matrix *after* the bankruptcy court sends its notice to creditors, can have disastrous effects on the debtor, the trustee, and the case as a whole, since the result is a failure to provide proper notice. Therefore, a debtor's attorney must understand that providing proper notice to creditors of the commencement of the case is ultimately the attorney's responsibility, and the attorney must prepare and file a full, complete, and accurate matrix of creditors with the petition (or the equivalent filing required by any given district).

2. Failure to Notice Creditors of a Closely Held Entity

Many consumer debtors are partners in general or limited partnerships, or are an officer, director, or substantial shareholder in a closely held entity. For a variety of reasons, however, the partnership or the closely held entity may not file bankruptcy with the debtor, especially if the entity is solvent. Yet, although most attorneys include in the debtor's schedules the creditors of a partnership (whether a general or limited partnership) when the debtor is a general partner (given the debtor's joint and several liability for the debts of the partnership), many attorneys fail to schedule creditors of other entities closely held by a debtor.

Although observance of corporate formality may shield an officer, director, or shareholder from personal liability, this shield can be breached under a variety of theories. From the exotic, such as alter ego and substantive consolidation, to the (far more frequent) statutory bases for imposing personal liability, a debtor could be personally liable for corporate debts. For example, if a Texas entity forfeits its corporate charter for failure to pay franchise taxes, each

⁵¹ See 11 U.S.C. § 523(a)(3).

⁵² See, e.g., *In re Smith*, 179 B.R. 437, 445 (Bankr. E.D. Pa. 1995); *In re Szczepanik*, 146 B.R. 905, 911 (Bankr. E.D.N.Y. 1992); *In re Behimer*, 119 B.R. 667, 671 (Bankr. W.D. Ark. 1990).

⁵³ See 11 U.S.C. § 362(k)(1).

officer and director of the entity may be personally liable for the corporation's debts incurred after the forfeiture.⁵⁴

The result, therefore, may be that a debtor, having obtained a discharge, may once again be in economic peril as a result of a liability that arose prepetition if the debtor is subsequently determined to be personally responsible for the debts of the closely held entity. To avoid this result, even if presently considered an unlikely one, a debtor's attorney should schedule the creditors of the closely held entity as contingent and unliquidated creditors or, at a minimum, note on the schedules that these creditors are listed for "notice purposes only". There is nothing impermissible about scheduling the creditors of the closely held entity since they hold contingent, albeit potentially speculative, claims.⁵⁵ This approach will greatly limit, if not eliminate, the ability of the entity's creditors to subsequently argue that the debtor's contingent personal liability to them was not discharged in a previous bankruptcy because of lack of notice of the bankruptcy filing.

3. New Noticing Requirements Under the Amendments

Many of the prevalent problems concerning proper notice to creditors deal with address issues. This is especially the case with respect to those consumer debtors who have multiple revolving credit accounts (primarily credit cards) where the only address the debtor may have for the creditor is the address to which payments are mailed. Frequently, the address is for a lock box maintained by a third party to collect payments.

In the 'good old' pre-Amendments days, notice sent to the creditor at any address used by that creditor was typically considered by courts as adequate and sufficient notice. As noted by one court, "while an octopus may have eight legs, it is still the same octopus."⁵⁶ Hence, "a creditor's 'election to operate through a complex system of distant agents must be responsible for consequences of breakdowns in that system.'"⁵⁷ Moreover, mail that is properly addressed, stamped, and deposited is presumed to have been received by the recipient.⁵⁸ Under this legal matrix, it was frequently held that a debtor's mailing of notice of the bankruptcy filing to any of the creditor's addresses typically used by the debtor for correspondence or payment constituted sufficient notice to the creditor even if the notice was not sent to the creditor's correct internal department.⁵⁹

⁵⁴ See TEX. TAX CODE ANN. §§ 171.251, *et. seq.* (Vernon 2005).

⁵⁵ See 11 U.S.C. § 101(5) (defining "claim" broadly to include unliquidated, contingent, and disputed claims); *Johnson v. Home State Bank*, 501 U.S. 78, 88 (1991) (noting "Congress' intent that 'claim' be construed broadly").

⁵⁶ *In re Perviz*, 302 B.R. 357, 367 (Bankr. N.D. Ohio 2003).

⁵⁷ *Id.* (quoting *In re Withrow*, 93 B.R. 436, 439 (Bankr. W.D.N.C. 1988)).

⁵⁸ See, e.g., *Moody v. Bucknum (In re Bucknum)*, 951 F.2d 204, 207 (9th Cir. 1991).

⁵⁹ See, e.g., *In re Rayborn*, 307 B.R. 710, 723 (Bankr. S.D. Ala. 2002) ("The fact that the address where the trustee's motion was sent is, according to FMCC, only a location for FMCC to receive customer payments does not alter the Court's finding . . . it is FMCC's responsibility to see that important mail received at FMCC's post office boxes and other locations around the nation are appropriately handled by whatever person or entity that maintains FMCC's lock box").

The Amendments have changed this accepted practice, and a debtor’s attorney must take appropriate steps to ensure that the attorney’s staff no longer just relies on any address provided by the debtor as the appropriate address for the creditor. A debtor’s attorney must become familiar with each of the changes to section 342 of the Bankruptcy Code, and with the potential consequences of failing to comply therewith. In short, the ‘good old’ practice of sending notice of the bankruptcy case to the creditor at the creditor’s payment address may not suffice and may lead to potentially serious consequences.

Section 342 establishes mechanisms a creditor may use to inform a debtor where notices should be given and what must be included in such notices to the creditor. The procedure is relatively simple for the creditor:

If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at *least* 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.⁶⁰

In situations where the creditor is prohibited by nonbankruptcy law from sending the foregoing communications to the debtor within the ninety-day period, and the “creditor supplies the debtor in the *last* 2 communications with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.”⁶¹ Further, the notice to a creditor that the schedules have been amended to add that creditor must “include the full taxpayer identification number in the notice set to the creditor” even though the copy of such notice filed with the court includes only the last four digits of the taxpayer identification number.⁶²

In addition to allowing a creditor to file in an individual debtor case under either Chapters 7 or 13 a notice of address for communications to such creditor,⁶³ section 342 now enables a creditor to provide an address for purposes of service in any bankruptcy case under either Chapters 7 or 13. Specifically, “[a]n entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such entity at the time such notice is filed, to provide notice to such entity in all cases under Chapters 7 and 13”⁶⁴ Any notice to such a creditor must be sent to the address so provided, unless the creditor files a notice of address in any particular case specifying a different address.⁶⁵

⁶⁰ 11 U.S.C. § 342(c)(2)(A) (emphasis added).

⁶¹ *Id.* § 342(c)(2)(B) (emphasis added).

⁶² *Id.* § 342(c).

⁶³ *Id.* § 342(e)(1).

⁶⁴ *Id.* § 342(f)(1).

⁶⁵ *Id.* § 342(f)(2).

Although a creditor may advise a debtor of the address to be used for notices required under the Bankruptcy Code in “communications sent to the debtor,” the actual notices provided to the creditor, whether by the debtor or the court, is not effective “until such notice is *brought to the attention* of such creditor.”⁶⁶ And, if such creditor has designated a specific person or subdivision to receive the notices on behalf of the creditor and establishes reasonable procedures for the delivery to such person or subdivision, “then a notice provided to such creditor . . . shall not be considered to have been brought to the attention of such creditor until such notice is *received* by such person or such subdivision.”⁶⁷

While the intention of the changes to section 342 appear logical in many respects, in that the changes attempt not only to ensure notice to creditors but also provide a mechanism for a debtor’s attorney to fulfill the debtor’s noticing obligations, the problem lies in the language of the statute: “[a]n entity may file with *any bankruptcy court* a notice of address to be used by *all the bankruptcy courts* or by *particular bankruptcy courts*.”⁶⁸ Thus, taken to the extreme, a creditor may file, for example, a notice of address in the Northern District of Illinois directing that all notices to it from any bankruptcy court go to a particular address or that notices from only the Southern District of New York go to a particular address, while directing that notices from the Western District of Washington go to a different address, and that same creditor can file a notice of address in the Middle District of North Carolina specifying that notices from the Northern District of Texas go to a third address entirely! How can a debtor’s attorney be expected to consult all of the bankruptcy courts across the country for such notices and make sense of the patchwork of specified addresses, which may indeed be amended or withdrawn by the creditor at any time?⁶⁹

Many of the issues dealing with so-called “preferred creditor addresses,” as described above, continue to be worked out. To assist in the implementation of the new noticing requirements in section 342, the National Creditor Registration Service has been established, and may be consulted at www.ncrsuscourts.com. Also, certain bankruptcy courts have entered standing or general orders providing procedures for creditors to file notices of preferred addresses.⁷⁰ Thus, the “madness” is beginning to be sorted out. Nevertheless, attorneys are advised to become familiar with the national system and with the practices of their local bankruptcy courts so as to avoid situations in which a creditor is not noticed at its preferred address.

The changes to section 342 of the Bankruptcy Code are facially logical, in that they reflect the fact that creditors frequently transfer debt to other departments or to outside agencies, and it is only fair that notice of the bankruptcy case be provided to the department or agency actually handling the debtor’s account. However, these changes will have potentially serious negative consequences to the debtor. Indeed, the debtor may not even be aware of any new

⁶⁶ *Id.* § 342(g)(1) (emphasis added).

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.* § 342(f)(1) (emphasis added).

⁶⁹ *See id.* § 342(f)(3) (providing for withdrawal of notice of address by creditor).

⁷⁰ *See, e.g.*, Bankr. N.D. Tex. General Order 2005-06;

address for the creditor because, for example, the debtor did not open mail from that creditor or agency (as many debtors will do after they go into default in order to avoid having to think about their troubles and to avoid harassing mail) or the new address is contained in the fine print on the back page of the correspondences (who actually reads that stuff). Failure to fully comply with the noticing requirements in section 342 could invalidate the legal effect of the non-compliant notices served on a creditor,⁷¹ or limit the ability of the debtor to recover monetary penalties arising from a creditor's violation of the automatic stay.⁷²

B. FAILURE TO SCHEDULE LAWSUITS – JUDICIAL ESTOPPEL

With disturbing frequency debtors fail to schedule a cause of action (or a potential cause of action) that they own as of the petition date, or they fail to amend their schedules if a cause of action arises postpetition in a reorganization case. Frequently – and growing more frequent – the result is that the defendant succeeds in having the debtor's cause of action dismissed under the doctrine of judicial estoppel, regardless of substantive merit.

Judicial estoppel is a common law doctrine by which a party who has assumed one position in the party's pleadings may be estopped from assuming an inconsistent position.⁷³ Accordingly, a debtor may be judicially estopped from commencing litigation based on a prepetition claim not scheduled by the debtor as an asset.⁷⁴ The policies underlying the doctrine of judicial estoppel “include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment.”⁷⁵ Stated differently, “a party cannot advance one argument and then, for convenience or gamesmanship after that argument has served its purpose, advance a different and inconsistent argument.”⁷⁶

The Fifth Circuit has identified two requirements for the application of judicial estoppel: (1) the position of the party to be estopped is clearly inconsistent with its previous position; and (2) such party must have convinced the court to accept the previous position.⁷⁷ The defendant's knowledge of the existence of claims against the defendant is irrelevant (at least in the Fifth Circuit),⁷⁸ and detrimental reliance by the defendant on the prior statement is likewise not an element in the Fifth Circuit (but detrimental reliance or prejudice stemming from the prior

⁷¹ See 11 U.S.C. § 342(c)(1) (deletes the statement that “failure of such notice to contain such information shall not invalidate the legal effect of such notice”).

⁷² See 11 U.S.C. § 342(g)(2).

⁷³ *Browning Mfg. v. Mims (In the Matter of Coastal Plains Inc.)*, 179 F.3d 197, 205 (5th Cir. 1999).

⁷⁴ *Internal Revenue Serv. v. Constance Luongo (In the Matter of Luongo)*, 259 F.3d 323, 335 n.13 (5th Cir. 2001) (“[i]n cases where the debtor does not list the claim as an asset, yet later commences a proceeding based on that claim, she would likely be judicially estopped from prosecuting her action”).

⁷⁵ *Id.* at 206 (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)).

⁷⁶ *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 397 (5th Cir. 2003).

⁷⁷ See *In the Matter of Coastal Plains Inc.*, 179 F.3d 197 at 206. See also *Hall*, 327 F.3d at 396-99; *In re Cafeteria Operators, L.P.*, 299 B.R. 384, 393 (Bankr. N.D. Tex. 2003).

⁷⁸ *In the Matter of Coastal Plains Inc.*, 179 F.3d 197 at 210.

inconsistent statement is a requirement in certain other circuits).⁷⁹ Nor, for that matter, is it an element that the party making the previously inconsistent statement benefited from the party's prior position.⁸⁰ Ignorance of the law or lack of sophistication may also fail as an excuse: "[t]he debtor must only know that she may have a *possible* cause of action in order to be required to disclose the claim in a bankruptcy proceeding. This duty to disclose extends to any potential claim, including those that may be contingent, dependent, or conditional."⁸¹

All that is required, therefore, is the prior inconsistent statement and its acceptance by the court, two elements that are usually easily met in the case of scheduling omissions. The debtor's representation on the schedules that the debtor does not own a cause of action against a third party is a statement made by the debtor that is clearly inconsistent with the subsequent assertion of an unscheduled cause of action.⁸² The second element is met when a court "necessarily accepted, and relied on a party's position in making a determination."⁸³ The grant of a discharge, for example, necessarily means that the court accepted the debtor's representation on the schedules.⁸⁴ Thus, a simple failure to schedule a cause of action can result in the potentially valuable asset being dismissed, thereby potentially causing sizable injury to the debtor or to the estate. It appears both from experience and from the case law that the judicial estoppel doctrine is being more strictly applied by the courts with respect to unscheduled causes of action.

C. LOSS OF EXEMPTIONS

As shown above, the failure to schedule a cause of action may lead to its loss. In addition, the failure to schedule the cause of action – indeed any asset – may also lead to the loss of the debtor's otherwise appropriate exemption in the asset (which frequently takes the form of an unliquidated and contingent cause of action). This is because, unlike what some may think, there is no absolute right to amend Schedule C, and a debtor's attempt to amend the schedule of exemptions after the debtor's exemptions have been sustained, and especially after the case has been closed, may be denied under equitable doctrines.

⁷⁹ See *id.* at 205.

⁸⁰ See *id.* at 206; *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996) (finding no requirement that "a party must have benefited from her prior position in order to be judicially estopped from subsequently asserting an inconsistent one").

⁸¹ *Heckler v. Product Dev. Corp.*, 2002 U.S. Dist. LEXIS 7550, *7 (N.D. Tex. 2002) (emphasis added) (*citing Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F. Supp. 859, 867 (E.D. Tex. 1996)).

⁸² See *Heckler*, 2002 U.S. Dist. LEXIS 7550 at *11.

⁸³ *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 399 (5th Cir. 2003).

⁸⁴ See *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001); *Wakefield v. SWS Sec. Inc. (In re Wakefield)*, 293 B.R. 372, 379 (N.D. Tex. 2003) (reversing bankruptcy court's finding that judicial estoppel did not apply, but affirming holding that "the second prong of Coastal Plains had been satisfied by the Court's granting of the discharge" (internal quotation omitted)); *Heckler*, 2002 U.S. Dist. LEXIS 7550 at *11 ("[t]he Bankruptcy Court relied on Heckler's asset representations in his Schedules and Statement of Financial Affairs, as evidenced by the bankruptcy discharge . . . [s]imilarly, in Coastal Plains, the Fifth Circuit found that a bankruptcy discharge was proof that the debtor convinced the bankruptcy court to accept her previous position").

An unscheduled asset remains property of the estate after the closing of the bankruptcy case, even if the trustee is otherwise aware of the asset.⁸⁵ Only scheduled property that is not administered is abandoned to the debtor at the closing of a case.⁸⁶ Unscheduled property necessarily remains property of the estate in perpetuity.⁸⁷ If a debtor has failed to schedule property that the debtor wishes to claim as exempt and the case has been closed, the debtor must first move to reopen the case under section 350 of the Bankruptcy Code.⁸⁸ This, in and of itself, may represent a significant obstacle for the debtor, since reopening a closed case is not a matter of right.⁸⁹ If the debtor succeeds in reopening the case, or if the case had not yet been closed by the time that the failure to schedule the asset is discovered, the debtor must amend Schedule A and/or B (depending on whether the unscheduled asset is real or personal property), and the debtor must amend Schedule C so as to claim an exemption in the newly scheduled asset. It is here that the debtor's prior failure to schedule the asset may lead to the disallowance of the exemption to that asset even if that exemption is otherwise an entitlement and absolutely appropriate under applicable law.

Bankruptcy Rule 1009 appears to provide the debtor with an absolute right to amend the schedules: “[a] voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.”⁹⁰ Case law generally agrees that the debtor does indeed have a right to amend the schedules, at least before the case is closed, including Schedule C. However, as bankruptcy is equitable and its purpose is to offer the *honest* debtor a fresh start, case law has also engrafted an equitable condition on the debtor's ability to amend Schedule C: the amendment may be denied upon a showing of the debtor's bad faith, concealment of assets, or upon a showing of prejudice to creditors, regardless of the merits of the claimed exemption.⁹¹ This holding is the law in at least the First, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits, all of which agree that the amendment may be denied upon a showing of bad faith or prejudice.⁹² Moreover, this same principal appears to apply regardless of whether the case had been closed at some point.⁹³

With respect to prejudice to creditors, such prejudice does not occur merely because an amendment, if properly allowed, “permits the debtor to assert a claim that ultimately prevails on

⁸⁵ See, e.g., *Vreugdenhill v. Navistar Int'l Transport. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991).

⁸⁶ See 11 U.S.C. § 554(c).

⁸⁷ See *Vreugdenhill*, 950 F.2d at 526; *Stanley v. Sherwin-Williams Co.*, 156 B.R. 25, 27 (D. W.Va. 1993).

⁸⁸ 11 U.S.C. § 350(b).

⁸⁹ *In the Matter of Shondel*, 950 F.2d 1301,1304 (7th Cir. 1991).

⁹⁰ FED. R. BANKR. P. 1009(a).

⁹¹ *Stinson v. Williamson (In the Matter of Williamson)*, 804 F.2d 1355, 1358 (5th Cir. 1986).

⁹² See *Osborn v. Durant Bank & Trust Co. (In re Osborn)*, 24 F.3d 1199, 1206 (10th Cir. 1994); *In the Matter of Yonikus*, 996 F.2d 866, 872 (7th Cir. 1993); *In the Matter of Williamson*, 804 F.2d at 1358; *Doan v. Hudgins (In the Matter of Doan)*, 672 F.2d 831 (11th Cir. 1982); *Snyder v. Rockland Trust Co. (In re Snyder)*, 279 B.R. 1, 6 (B.A.P. 1st Cir. 2002); *Arnold v. Gill (In re Arnold)*, 252 B.R. 778, 784 (9th Cir. 2000).

⁹³ See, e.g., *In re Osborn*, 24 F.3d at 1206.

the merits.”⁹⁴ “Nor does prejudice to creditors occur merely because a claimed exemption, if held timely, would be granted.”⁹⁵ Rather, prejudice in this context requires a showing of “harm to the creditor’s litigation posture because of some detrimental reliance on the debtor’s initial position.”⁹⁶ As noted by one court, “the typical scenario in which prejudice is found is where expenses have been incurred by the estate in order to recover or monetize an asset for the benefit of creditors, only to have the debtor then amend his exemptions to include the asset.”⁹⁷ With respect to the debtor’s bad faith, or the debtor’s intentional concealment of assets, the denial of amended exemptions will be too heavily dependant on facts to meaningfully address in this Article. If the debtor has numerous scheduling errors, it is the authors’ experiences that bad faith may be found. Additionally, if the debtor has relied on the trustee to increase the value of an asset, only later to exempt that asset at the expense of the estate, bad faith may be found as well as prejudice.

D. DENIAL OF DISCHARGE

Perhaps the biggest potential consequence of inaccurate and incomplete schedules is the denial of a discharge. Discharge can be denied if, among other things, “the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account.”⁹⁸

A material error on, or omission from, the schedules or statements may constitute a false oath of the type required for a denial of discharge.⁹⁹ Reliance on the advice of an attorney may not be a valid defense, since it is the debtor that signs the schedules and statements under penalty of perjury and that bears the ultimate responsibility for ensuring the accuracy of the schedules and statements.¹⁰⁰ Moreover, not only is the intentional failure to schedule assets grounds for denying discharge (obviously), but so is the intentional failure to schedule claims against the debtor.¹⁰¹ In fact, since the debtor certifies under oath to the accuracy and completeness of the schedules and statements, strictly speaking it does not matter whether an error or omission gives the debtor some advantage or whether the error or omission was harmless, or within the knowledge of the trustee and others – if the schedules or statements are incorrect, the debtor may face a denial of discharge.

Where potential benefit to the debtor and materiality of omission play a role, however, is inferring the requisite *mens rea*: “knowingly and fraudulently.”¹⁰² With respect to intent,

⁹⁴ *In the Matter of Williamson*, 804 F.2d at 1358.

⁹⁵ *Doan v. Hudgins (In the Matter of Doan)*, 672 F.2d 831, 833 (11th Cir. 1982).

⁹⁶ *In the Matter of Williamson*, 804 F.2d at 1358.

⁹⁷ *In re Bowen*, 2005 Bankr. LEXIS 824 *11 (Bankr. N.D. Tex. 2005).

⁹⁸ 11 U.S.C. § 727(a)(4).

⁹⁹ *See, e.g., Calvin v. Clawson (In re Clawson)*, 119 B.R. 851, 852 (Bankr. M.D. Fla. 1990); *New World Mktg. Corp. v. Garcia (In re Garcia)*, 88 B.R. 695, 703 (Bankr. E.D. Pa. 1988).

¹⁰⁰ *See, e.g., Continental Bank v. Bobroff (In re Bobroff)*, 69 B.R. 295, 298 (E.D. Pa. 1987); *LaVangie v. Mazzola (In re Mazzola)*, 4 B.R. 179, 183 (Bankr. D. Mass. 1980).

¹⁰¹ *See A. V. Reilly Int'l Ltd. v. Rosenzweig (In re Rosenzweig)*, 239 B.R. 905 (Bankr. N.D. Ill. 1999).

¹⁰² 11 U.S.C. § 727(a)(4).

fraudulent intent is fairly easy to deduce if an unscheduled asset is valuable, since the debtor may well have had a reason other than mere oversight for failing to schedule the asset.¹⁰³ This principle declines as the value of the asset declines.¹⁰⁴ Other factors and guidance are available to infer actual intent, but actual fraudulent intent on the part of the debtor is difficult for a debtor's attorney to detect. What is far more important in the context of the preparation of the schedules and statements is not the potential of actual fraudulent intent, but the potential that honest errors and omissions will lead to a denial of discharge.

Namely, even if omitted assets or liabilities are not material and there is no actual fraudulent intent, each additional immaterial omission or error significantly increases the potential of a finding of a knowing and fraudulent falsehood. This is because “[f]raudulent intent may be proved by showing either actual intent to deceive *or a reckless indifference for the truth.*”¹⁰⁵ The debtor's alleged reckless disregard for truth increases with each additional error or omission on the schedules and statements, even if each error or omission, taken individually, is the result of an honest mistake.¹⁰⁶ It is in this respect that otherwise harmless scheduling errors and omissions become critically significant, because each additional error or omission increases the likelihood of a denial of discharge. If a creditor looks closely, it is likely that several or even numerous perceived trivial errors and omissions can be found: assets that are not properly identified as individual, joint, or community; security deposits omitted as assets; insurance and pension assets not disclosed; speculative assets not scheduled; and information regarding defunct companies in which the debtor was involved not disclosed.

This is a very serious problem, and is a problem that can be directly attributable to inattention, failure of communication, or failure of proper explanation at the time the schedules and statements are prepared. The reality is that, under the Fifth Circuit's interpretation of the law, the debtors' discharges can be denied for trivial and irrelevant scheduling errors and omissions, which is a fact that must be communicated in no uncertain terms to debtors.

E. LOSS OR INAPPLICABILITY OF THE AUTOMATIC STAY

The Amendments have fundamentally changed the application of the automatic stay with respect to debtors with previous bankruptcy filings. In fact, such debtors may find that the automatic stay does not protect their most significant and important asset – their homestead. This potential requires extra vigilance on the part of a debtor's attorney.

Pursuant to the Amendments, if the debtor was a debtor in a bankruptcy case pending within the year preceding the new case, the automatic stay with respect to a debt or property securing a debt “shall terminate with respect to the debtor on the 30th day after the filing of the

¹⁰³ See, e.g., *Crews v. Topping (In re Topping)*, 84 B.R. 840, 842 (Bankr. M.D. Fla. 1988).

¹⁰⁴ See *id.*

¹⁰⁵ *Cadle Co. v. Mitchell (In the Matter of Mitchell)*, 2004 U.S. App. LEXIS 13256 * 5 (5th Cir. 2004) (emphasis added). *Accord Sholdra v. Chilmark Fin. LLP (In the Matter of Sholdra)*, 249 F.3d 380, 382 (5th Cir. 2001).

¹⁰⁶ See *id.*

later case.”¹⁰⁷ The automatic stay may be extended after this thirty-day period, but only upon a motion and a hearing, at which the party requesting the extension of the stay must satisfy its factual burden for such extension.¹⁰⁸ Similarly, if the debtor was a debtor in two or more bankruptcy cases within the year preceding the new case, the automatic stay does not go into effect at all upon the filing of the new case, unless, within thirty days of the filing of the new case and after a motion and a hearing thereon, the bankruptcy court orders the automatic stay to take effect.¹⁰⁹

Therefore, it is critical for a debtor’s attorney to know, prior to the filing of the petition, whether the debtor has filed a previous case(s) and, if so, whether the prior case(s) was dismissed. A debtor’s attorney must know these things prior to filing the petition because of the short deadlines imposed by the Amendments. With respect to extending the automatic stay, the debtor must file a motion, the court must set the motion for an evidentiary hearing, and the evidentiary hearing must actually be held no later than the thirtieth day after the petition date, or else the automatic stay terminates (and probably cannot be revived).¹¹⁰ Since notice of the hearing must be adequate, filing a motion and requesting an emergency hearing the day before the expiration of the thirty-day period will probably not suffice, absent consent. Similarly, if the automatic stay did not go into effect in the first place, the debtor must file a motion before the expiration of the thirty-day period.¹¹¹ Filing the motion on the thirty-second day will not suffice.

A debtor’s attorney will only know about the need to file a motion seeking to extend or maintain the automatic stay if the attorney knows that the debtor was a debtor in one or more bankruptcy cases in the year preceding the new filing. It is here that a debtor’s potential failure to apprise the attorney of a prior filing becomes highly prejudicial. In this respect, the potential loss or inapplicability of the automatic stay is very much an intake and scheduling issue, and critical to that issue is accurate information regarding any prior filing by the debtor.

IV. TEN STEPS TO AVOID PITFALLS AND MALPRACTICE

1. DO NOT RELY ON NON-ATTORNEY LEGAL ASSISTANTS FOR LEGAL ANALYSIS

The importance of this step cannot be overstated. The unauthorized practice of law by non-attorneys is prohibited. Permitting non-attorney legal assistants to make legal decisions, particularly during the preparation of the schedules and statements, will lead to scheduling problems and to the attorney getting into trouble with the court, the client, or the bar. Simply put, the preparation of the petition, schedules, and statements has clerical and legal components – you are the attorney, let your non-attorney legal assistant deal with the clerical issues and you deal with the legal ones.

¹⁰⁷ 11 U.S.C. § 362(c)(3)(A).

¹⁰⁸ *See id.* § 362(c)(3)(B).

¹⁰⁹ *See id.* § 362(c)(4)(A)(i) & (c)(4)(B).

¹¹⁰ *See id.* § 362(c)(3)(A) & (c)(3)(B).

¹¹¹ *See id.* § 362(c)(4)(B).

Obviously, offering advice geared towards deciding whether to file under Chapter 7 or Chapter 13 is legal work that the attorney must provide to the debtor. For the most part, such macro issues are understood by a debtor's attorney. Yet, there is a whole host of micro issues that many attorneys representing debtors do not consider, which lead directly to most of the problems resulting from scheduling errors, such as judicial estoppel, loss of exemptions, and denial of discharge. Many questions asked of the debtor during intake, while they may seem to be strictly factual, are in reality legal questions (*i.e.*, those requiring: (i) knowledge of the law; and (ii) application of the facts, as obtained from the debtor, to that law). The most common examples include the following:

- causes of action: do not expect your non-attorney legal assistant to be able to identify causes of action or to analyze a fact pattern to discern whether causes of action exist – usury is a perfect example of a claim that a number of debtors may have in states like Texas, but is something that non-attorney legal assistants are probably incapable of ascertaining;
- community property: do not expect your non-attorney legal assistant to be able to determine which assets and debts are individual, or are assets and debts of the community;
- claims: do not expect your non-attorney legal assistant to be able to determine which claims are contingent or unliquidated, or whether any basis exists to dispute claims; and
- exemptions: do not expect your non-attorney legal assistant to know in detail all of the various state and federal exemption statutes that any particular debtor may be able to claim.

Moreover, some of the information required by the schedules is broad and potentially confusing, as Judge Rhodes concluded in his article.¹¹² While disclosing “cash on hand” should be straightforward, what about the debtor's interest in a closely held entity? What if the debtor owns such interests indirectly? Question 18 of Schedule B requires the disclosure of “[e]quitable or future interests, life estates, and rights and powers exercisable for the benefit of the debtor.” Can a non-attorney legal assistant be expected to understand real property law? Question 19 of Schedule B requires the disclosure of contingent interests in the estate of a decedent, death benefit plan, or life insurance policy, yet an extraordinary number of debtors fail to adequately disclose these interests (the question is not limited, for example, to whole life policies), and question 20 of Schedule B is the broadest: a “catch-all” that requires a legal eye to discern whether rights, albeit highly contingent, may exist.

In short, the preparation of the petition, schedules, and statements is not merely secretarial work. When it is considered as such, errors and omissions occur with potentially draconian and irreversible consequences for the debtor and the debtor's attorney.

¹¹² See Rhodes, J., *supra* note 2, at 653.

2. DO NOT ASK THE DEBTOR TO MAKE LEGAL CONCLUSIONS

Akin to the above suggestion is the situation where the attorney asks the debtor to make legal conclusions without necessarily knowing that this is the result of asking certain questions in certain ways. For example, asking the debtor whether the debtor owns any causes of action is acceptable, but the questioning should not stop there because the non-attorney debtor cannot be expected to know all of the types of causes of action that the debtor may own. The debtor should be asked broader questions, such as whether the debtor had been in any type of car or work related accident, whether the debtor has been fired, whether the debtor has recently lent money or borrowed money from someone that has been repaid, and other questions designed to elicit factual responses from which the attorney can draw preliminary legal conclusions, as opposed to asking the debtor to make those conclusions. In this way, the attorney can minimize the likelihood that certain scheduling omissions will be made, primarily related to contingent and unliquidated assets.

Causes of action are not the only questions that are legal in nature. Rather than asking whether assets and debts are individual or joint, with respect to married debtors, questions should be in the form of when and how assets were acquired and liabilities incurred. Rather than relying on the debtor's analysis of whether a claim is secured, be sure to review prior to the filing of the schedules and statements the underlying security documentation so that a legal determination can be made, albeit preliminary, regarding the nature or perfection of the secured claim. For example, preliminary legal determinations should be made whether a lease for personal property is a true lease or a disguised financing statement, whether a financing statement or deed of trust has been issued and filed or recorded, and whether a claim is secured within the meaning of section 506(b) of the Bankruptcy Code. Other claims, too, must be analyzed for potential defenses, such as statute of limitations and setoff.

In short, do not phrase your intake questions to the debtor in terms of requiring the debtor to make legal conclusions – ask broad based factual questions from which you can make your own legal conclusions.

3. DO NOT RELY ON AMENDMENTS TO SCHEDULES

Too often, especially if in a rush to file the petition, a debtor's attorney (or the attorney's paralegal or secretary) will advise the debtor not to worry too much over the accuracy of the schedules because they can be amended as a matter of right. This is a dangerous practice that should be avoided. Aside from encouraging a debtor to verify under oath the accuracy of something that may be known by the debtor to be inaccurate, and the potential civil, criminal, and denial of discharge and exemption consequences that may result, simply put, there is no absolute right to amend schedules (at least with respect to exemptions). At a minimum, each new amendment is an implicit admission that a prior schedule or statement was in some respects deficient, which may raise eyebrows and further tighten the noose around the debtor's discharge.

Therefore, if possible, get it right the first time. Instruct your assistants to treat the matter most seriously and do not tolerate from them any nonchalance in this respect, and impress upon the debtor the importance of the schedules. The schedules and statements should be filed simultaneously with the petition. If you cannot file the schedules and statements with the petition, use the fifteen-day extension granted under the Bankruptcy Rules to finalize the

preparation of the schedules and statements.¹¹³ If you need more time, file a motion requesting an extension. This is definitely a case where a stitch in time saves nine.

4. RUN A PACER SEARCH FOR PRIOR BANKRUPTCIES

One of the easiest and relatively least expensive steps that an attorney can take to help ensure the accuracy of the schedules and to fulfill the attorney's duty of inquiry is to run a Pacer search for prior bankruptcies filed by the debtor. As explained above, past case information is important for several reasons, including: (i) the necessity that previous cases be disclosed; (ii) a potential dismissal of a previous case with prejudice; and (iii) the potential loss of the application of the automatic stay (or its failure to come into effect in the first instance).

The question ought to be a simple one to answer: have you filed a bankruptcy case before? Yet, surprisingly often, the debtor fails to provide the correct answer. Perhaps, somehow, a debtor forgot about a previous case. Perhaps a previous case was dismissed with prejudice, and the debtor fails to disclose the prior filing in an attempt to avoid the prejudice or is simply too embarrassed to disclose the previous filing. Perhaps an involuntary petition was filed against the debtor. For a whole host of potential reasons, a surprisingly large number of debtors fail to disclose previous filings. When debtors fail to make this disclosure to their attorney, such debtors could find themselves without the protections of the automatic stay, they (and you) could be risking sanctions for filing a case during a prejudice period, and they could face a denial of discharge. Debtors should be apprised of the foregoing possibilities so that they treat the matter most seriously.

The attorney must ask, in no uncertain terms, whether the debtor was ever a debtor in any bankruptcy case. The attorney should also ask whether a current or former spouse was ever a debtor in order to analyze the impact the spouse's prior filing may have on the debtor's filing. Additionally, and independent of the debtor's answer (since it could still be incomplete even if the debtor does reveal a prior filing because the debtor may not reveal all other prior filings or an order of dismissal with prejudice), the attorney should run a Pacer check. Given the ease and relative lack of expense associated with running a Pacer check, failure to perform a Pacer check is inexcusable. If for no other reason, a Pacer check should be done to protect the attorney from malpractice and questions from a court as to why the attorney's investigation failed to reveal a prior case. A Pacer account is easy to obtain. Thereafter, opening Pacer's main page at <http://pacer.psc.uscourts.gov>, and clicking the menu option labeled "U.S. Party Case Index," and logging on, the attorney can search bankruptcy court records from across the country to investigate whether the debtor filed a previous case. The attorney can search by name or Social Security Number, both of which are advised, to ensure that a/k/a's or maiden names are taken into account.

For an expense (currently) of less than one dollar, and a few minutes research at most, the attorney can independently verify whether the debtor did not file a prior case. True, mistakes can still occur. For example, the debtor could have filed under a different name or the Social Security Number could have been inputted incorrectly in the prior case. But, having asked the

¹¹³ See FED. R. BANKR. P. 1007(c).

debtor whether the debtor previously filed a case, and having independently searched Pacer (and reviewed the debtor's credit report, as discussed below), it is difficult to imagine what more the attorney could have done to fulfill the attorney's duties to the client, to the court, and under the Bankruptcy Code and the Bankruptcy Rules.

In one case where a debtor's attorney was sanctioned for failing to disclose information concerning past filings, the bankruptcy court offered the following comment:

Placing a burden of pre-filing investigation upon a debtor's attorney is not onerous. This court's computerized docketing system, operational since September, 1991, is accessible on computer terminals available in the public area in the Clerk's office and by telephone either orally or electronically (by modem to a computer). Either procedure would have quickly provided Debtor's attorney with the case numbers of three (the second, third and fourth) of the four prior cases filed by Debtor. Simply viewing the dockets of those cases would have shown that they were all Chapter 13 cases and all had been dismissed The docket for the case filed immediately prior to this case shows that no Schedules or plan were filed and that the case was dismissed – any search for a case after the third case would have been a quick docket review.¹¹⁴

The above quoted opinion is from 1994. How much more rigorously would a court consider the duty of a debtor's attorney to review prior cases in this more advanced age of the internet with fast connection speeds and Electronic Case Filing, where actual docket entries can be viewed by .pdf?

5. RUN A CREDIT REPORT AND OTHER REPORTS

One of the most common scheduling errors concerns the existence and identity of creditors. Debtors may forget the existence of certain creditors, especially old creditors or those typically not thought of as creditors, such as individual medical service providers (*e.g.*, an anesthesiologist, radiologist, pharmacy, ambulance service, and hospital may all be separate creditors arising from one emergency hospital visit, though the debtor may consider the hospital to be the only creditor). A debtor may have a non-consensual creditor, and a creditor may have transferred its claim. Whatever the reason, failing to schedule a creditor may lead to that creditor not having notice of the bankruptcy case, and to its debt not being discharged, as well as to other potentially serious issues stemming from scheduling errors and omissions.¹¹⁵

Although by no means certain to catch all creditors and to obtain their correct addresses, a debtor's attorney may wish to consider running a credit report on the debtor. Running such a report will help ensure that all creditors, as well as their addresses, are included on the schedules, especially with respect to debts that may have been sold or referred for collection (see also the discussion above concerning section 342 of the Bankruptcy Code). A credit report should additionally contain information regarding any prior filings by the debtor, and will complement a

¹¹⁴ *In re Armwood*, 175 B.R. at 789.

¹¹⁵ *See* 11 U.S.C. § 523(a)(3).

Pacer search (but should not be relied upon as replacing the need for a Pacer search). Undertaking this minimal task will, therefore, help ensure that the debtor's attorney has fulfilled the attorney's duties of inquiry in preparing the schedules.

Other reports that may be helpful to ensure complete and accurate schedules include:

- Blue Book: this is an accepted, objective source from which to discover the values of automobiles, boats, and other items of personal property;
- Lexis/Westlaw: although too expensive for certain attorneys and debtors, Lexis and Westlaw reporting services can be highly effective at discovering lawsuits, judgments, and other adverse actions taken against a debtor, especially in the case of a wealthy debtor with assets spread over more than one district, including with respect to actions that the debtor may be unaware of (*e.g.*, default judgments and writs), and can also assist with locating assets of various kinds;
- Taxing Authorities: with respect to those taxing authorities with web pages or other simple means of access, data concerning values and delinquent ad valorem taxes can often be found quickly and for free; and
- State Secretary of State: if the debtor has interests in, or holds positions with, corporate entities, a secretary of state's web page is sometimes the best (and sometimes the only) way to untangle the debtor's corporate relationships, including the identification of any entities that the debtor may have served as an officer or director, and the present standing of such entities.

6. REDUNDANCY OF ADDRESSES

In most, if not all, bankruptcy courts, the bankruptcy clerk is responsible for mailing notice of the filing, the bar date, the meeting of creditors, and other initial notices. The court (or the appropriate noticing agency) covers the cost of providing this notice. There is no reason why a debtor's attorney would not include on the matrix and schedules multiple addresses for a creditor when the correct address is uncertain since the debtor will not be paying the costs of noticing the case. Where more than one address is known for a creditor, and for its attorneys, or even if a person may not be a creditor but may have interests such that the person should be notified of the bankruptcy case, such known address should be included on the matrix and the schedules. If necessary, an assistant should undertake basic internet research to obtain additional addresses. Moreover, in light of the Amendments and the potential that a creditor may have designated a preferred address for national or local mailing, the database of those preferred addresses should be consulted (depending on the practice that emerges regarding the preferred addresses).

7. WHEN IN DOUBT – SCHEDULE IT

The law is clear: "it is not for the debtor to pick and chose which questions to answer and which not to. Indeed, the debtor has no discretion – the schedules are to be complete, thorough

and accurate in order that creditors may judge for themselves the nature of the debtor's estate."¹¹⁶ Thus, "[e]ven if the debtor thinks the assets are worthless he must nonetheless make full disclosure."¹¹⁷ "If there is any doubt or uncertainty whatsoever as to a possible interest in any property, the asset should be scheduled with an appropriate explanation and the trustee, the creditors, and the Court can then make an independent determination as to whether a given asset should or should not be included in a Debtor's estate."¹¹⁸

There is no valid reason to exclude assets, liabilities, potential causes of action, and other matters on the schedules and statements, even if uncertainty exists regarding whether they are properly requested. No debtor has, to the authors' knowledge, been penalized for over-inclusion and for scheduling even highly contingent or speculative assets. Bonuses, and vacation pay, for example, are frequently left off of the schedules under the belief that creditors have no right to them under Texas law, and that they are not property of the estate. But, section 541 of the Bankruptcy Code is far broader than merely fixed, tangible assets, and even speculative interests to which the debtor may not have a right, such as bonuses and vacation pay, must be scheduled.¹¹⁹ Therefore, when in doubt, schedule it and use appropriate qualifiers or explanations if necessary so as to avoid a scheduling misrepresentation.

8. OBTAIN COPIES OF FINANCIAL DOCUMENTS

It never ceases to amaze how many debtors get into trouble because they fail to schedule assets, liabilities, and transfers that they included on their tax returns, or on financial statements given to prospective creditors, or on prior bankruptcy schedules. There are few things more likely to lead to a denial of discharge, finding of nondischargeability, dismissal of case, loss of exemptions, and general impeachment of the debtor's credibility than when the debtor's tax returns and other financial documents, prepared shortly prior to the bankruptcy filing, directly contradict the schedules and statements. The same holds true for the debtor's bank statements, from which prepetition transfers and amounts on account can be easily and accurately reconstructed.

A debtor's attorney should, at a minimum, request that the debtor provide the attorney with copies of: (i) tax returns for the previous five years;¹²⁰ (ii) financial statements provided to any third party in the previous five years; and (iii) copies of all bank statements, closed or open, for the previous eighteen months; and (iv) copies of the schedules and statements filed in previous bankruptcy cases filed by the debtor (which the attorney may also be able to retrieve from Pacer). A debtor's attorney or an able assistant should review these documents and inquire into any inconsistency to ensure the accuracy of the schedules and statements, and to be able to

¹¹⁶ *Armstrong v. Lunday (In re Lunday)*, 100 B.R. 502, 508 (Bankr. D.N.D. 1989).

¹¹⁷ *Id.*

¹¹⁸ *American State Bank v. Montgomery (In re Montgomery)*, 86 B.R. 948, 959 (Bankr. N.D. Ind. 1988).

¹¹⁹ *See, e.g., Booth v. Vaughan (In re Booth)*, 260 B.R. 281, 290 (B.A.P. 6th Cir. 2001) (holding that bonus was property of the estate even if debtor did not have enforceable right to bonus under nonbankruptcy law prior to its payment, because under bankruptcy law the bonus is nevertheless property of the estate).

¹²⁰ The Amendments now require the debtor to provide the trustee with copies of a prepetition tax return no later than seven days before the meeting of creditors. *See* 11 U.S.C. § 521(e)(2)(A).

predict whether any adverse actions may be taken against the debtor or any transferees. After completing this review, a debtor's attorney should advise the debtor accordingly. Where inconsistencies in financial records exist, a debtor's attorney must be aware of the inconsistency ahead of filing so that, should the attorney decide to represent the debtor, a problem does not come by surprise. Moreover, where an inconsistency requires an explanation or disclosure, it is better for the debtor to be the first to address it. Otherwise, a creditor could gain strategic advantages by bringing the inconsistency to the court's attention.

9. FILE THE MATRIX WITH THE PETITION

Remember that bankruptcy courts send notices of the filing of the bankruptcy case, and of critical deadlines, to the individual and/or creditor listed on the matrix filed or uploaded by a debtor's attorney with the petition. If that matrix is not filed, or if it does not contain an accurate list of creditors, some creditors will not have notice of the bankruptcy case. Indeed, in more than one consumer bankruptcy case of which the authors have personal knowledge, no creditor received notice of the filing of the case. Worse, since the service of pleadings and orders in Chapter 7 cases are usually undertaken by an agency hired for that purpose by the courts, which serves documents on the matrix, in some cases creditors did not receive notice of any document filed in the bankruptcy case. Thus, all proceedings had to be un-done once the error was discovered. Parties (such as trustees) are entitled to assume that the matrix is correct, and they may not necessarily review its accuracy or completeness until it is too late. The cost to the debtor may be an ineffective discharge, and the un-doing of all proceedings in the case.

Even if the schedules are not ready at the time the bankruptcy case is commenced, the matrix must be filed with the petition.¹²¹ If a matrix is deficient or needs to be amended, the attorney must ensure that it is supplemented or amended in the proper format as soon as possible. If it is discovered that notices were not provided due to a deficient matrix, and if there is still time, the attorney should send a new notice and file a certificate of service evidencing the proper notice.

10. BE EXTREMELY WARY OF DISHONEST DEBTORS

It goes beyond saying that one's professional reputation, and the potential of liability on account of dishonest debtors, does not make representing a dishonest debtor worth the relatively small amount paid for a consumer case. Moreover, there may be situations where the attorney-client privilege can be pierced, especially in Chapter 13 cases and in cases where a debtor's dishonesty can be construed as an ongoing crime. Indeed, the attorney may have an ethical duty to come forward so as not to permit perjury to the court – of which the attorney is an officer. In addition, an attorney may be obligated to defend a dishonest debtor on numerous fronts, including objections to discharge/dischargeability, and the attorney may find it impossible to be able to withdraw or to be paid for the services rendered.

It is much simpler not to represent a debtor that the attorney believes is dishonest and who may continue that dishonesty into the bankruptcy case. The honesty of a debtor may be

¹²¹ See FED. R. BANKR. P. 1007(a)(1).

ascertained during the process of preparing the schedules. For example, red flags should be raised when a debtor: (i) argues with the attorney regarding whether certain assets should be disclosed; (ii) is hesitant to disclose prepetition transfers so as to avoid liability for family and friends; and (iii) paints broad estimates of the debtor's income and expenses, as opposed to providing details. In this respect, obtaining the debtor's financial information (as discussed above), such as tax returns, financial statements provided to third parties, and bank statements, can help the attorney decide whether the debtor is purposefully misleading the attorney, and the attorney can ensure that the misleading does not extend to the court and the creditors. From the personal experiences of the authors, there is nothing worse than representing a dishonest debtor, and it is much easier to decline representation at the outset than spending one's time, money, and reputation addressing dishonesty at a later date.