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Processes

Task Force on Attorney Discipline
Best Practices Working Group

Working Paper:
Best Practices for Debtors' Attorneys

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The views expressed herein have not been adopted by the House of Delegates or the Board of Governors of the American Bar Association and consequently should not be considered the policy of the American Bar Association.

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SUMMARY TABLE OF CONTENTS

Section	Page
1. Introduction	6
2. Voluntary Petition	18
3. Schedule A: Real Property	25
4. Schedule B: Personal Property	26
5. Schedule D: Creditors Holding Secured Claims; Schedule E: Creditors Holding Unsecured Priority Claims; Schedule F: Creditors Holding Unsecured Nonpriority Claims	38
6. Schedule G: Executory Contracts and Unexpired Leases	42
7. Schedule H: Codebtors	44
8. Schedule I: Current Income of Individual Debtor(s); Schedule J: Current Expenditures of Individual Debtor(s)	45
9. Statement of Financial Affairs	57
10. Form 22A: Chapter 7 Statement of Current Monthly Income and Means-Test Calculation	73

TABLE OF CONTENTS

Section	Page
1. Introduction	6
1.1. Scope and Purpose of the Best Practices Working Paper	6
1.1.1. Working Paper vs. Report	6
1.1.2. Content and Recommendations	7
1.1.3. Audience	9
1.2. Organization; Key Terms	9
1.3. Legal Standard: Reasonably Inquiry	10
1.4. Other Applicable Legal Standards	12
1.4.1. Generally	12
1.4.2. Judicial Standards on Disclosure	12
1.4.3. “Primarily Consumer Debts”	16
2. Voluntary Petition	18
3. Schedule A: Real Property	25
4. Schedule B: Personal Property	26
5. Schedule D: Creditors Holding Secured Claims; Schedule E: Creditors Holding Unsecured Priority Claims; Schedule F: Creditors Holding Unsecured Nonpriority Claims	38
5.1. General Comments and Inquiry Recommendations	38
5.2. Comments on Schedule D	39
5.3. Comments on Schedule E	40
5.4. Comments on Schedule F	41
6. Schedule G: Executory Contracts and Unexpired Leases	42
7. Schedule H: Codebtors	44
8. Schedule I: Current Income of Individual Debtor(s); Schedule J: Current Expenditures of Individual Debtor(s)	45
8.1. General Comments	45
8.2. Schedule I: Current Income of Individual Debtor(s)	47
8.3. Schedule J: Current Expenditures of Individual Debtor(s)	51
9. Statement of Financial Affairs	57
10. Form 22A: Chapter 7 Statement of Current Monthly Income and Means-Test Calculation	73

10.1. Introduction	73
10.2. Who Must Complete Form 22A?	73
10.2.1. “Primarily Consumer Debts”	74
10.2.2. Conversion from Chapter 13	74
10.2.3. Exclusion for Certain Disabled Veterans	74
10.3. Note on January 2008 Amendment to Form 22A	75
10.4. Form 22A: Chapter 7 Statement of Current Monthly Income and Means-Test Calculation	76

Section 1 Introduction

On September 20, 2005, the Task Force on Attorney Discipline, which operates under the authority of the American Bar Association's Business Law Section's Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes, issued its Report on Attorney Liability under § 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Task Force Report on § 707(b)(4)" or "Report").¹ That report provided general recommendations in the interpretation of key words and phrases in new §§ 707(b)(4)(C)² and (D),³ which became law via the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), including:

- "reasonable investigation"
- "inquiry"
- "knowledge"
- "incorrect"

This Working Paper on Best Practices for Debtors' Attorneys ("Best Practices Working Paper" or "Working Paper") is a continuation of that initial effort. The Best Practices Working Group (or the "Working Group") was formed to examine both the legal standards and practical considerations for attorneys representing clients who may become debtors under the Bankruptcy Code (the "Code")⁴ and to present recommendations as to what constitutes "best practices" in the preparation of a bankruptcy case.

¹ Task Force on Attorney Discipline, Ad Hoc Comm. on Bankr. Court Structure and Insolvency Processes, *Attorney Liability Under Section 707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 61 Bus. Law. 697 (2006). The report is available at <http://www.abanet.org/media/youraba/200602/article06.html>.

² Section 707(b)(4)(C) provides: "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)."

³ Section 707(b)(4)(D) provides: "The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

⁴ Unless otherwise noted, all sections cited herein refer to the Bankruptcy Code, 11 U.S.C. § 101 et seq.

1.1. Scope and Purpose of the Best Practices Working Paper

1.1.1. Working Paper vs. Report

The Best Practices Working Group considered at some length whether this effort should culminate in a working paper or a report. The distinction is an important one. In general terms, a report is intended to be authoritative, while a working paper is intended to create a basis for further discussion or debate.

The Working Group decided that a working paper was the better approach for two key reasons. The first reason concerns consequences that could result in producing a report. As an authoritative text, a report could create a “one size fits all” approach to debtor representation, which serves neither attorneys nor their clients well. Attorneys must have the flexibility needed to deal with the unique circumstances their clients present.

The Best Practices Working Group was also cognizant that a report could inadvertently create minimum standards that would serve as a basis for attorney liability. As discussed below, Rule 9011 is a critical governing authority and the Working Group sought to avoid designating specific inquiries or document reviews as required in order to meet the Rule 9011 standards.

The second reason for choosing to craft a working paper rather than a report is to serve the very purpose intended: to create a basis for discussion among debtors’ attorneys. Even within the small community of the Best Practices Working Group, issues arose that generated robust disagreement and some of the recommendations included in the Working Paper are the result of compromise. The Working Group prefers to expand the discussion and is confident that the debtors’ bar will agree with this paper’s goals of maintaining high standards among seasoned practitioners and assisting attorneys new to bankruptcy practice in preparing a high-quality work product. These goals serve not just clients, but also the standards of professionalism expected of attorneys.⁵

Because the case law related to the topics discussed in this Working Paper is constantly evolving, especially with regard to the means test and the changes encompassed in BAPCPA, the citations provided herein should always be updated and shepardized before utilizing them to support a legal position. Additionally, this Working Paper does not provide every case cited with regard to each legal issue, but rather provides some of the significant cases decided on the legal topics contained within the Working Paper.

1.1.2. Content and Recommendations

The scope of this Working Paper is narrow. The Working Paper examines only the various forms that are required of bankruptcy debtors, specifically:

⁵ It should go without saying that nothing in this Working Paper is intended to supplant authorities, such as state ethical rules, governing attorney conduct.

- The Petition⁶
- Schedules A, B and D through J⁷
- The Statement of Financial Affairs
- Form 22A⁸

The Best Practices Working Group's goal is to make recommendations regarding matters into which attorneys should inquire to ensure legally sufficient disclosure of information in the filing of a non-emergency bankruptcy case.⁹ The Working Group also makes suggestions regarding the types of documents attorneys can review to obtain information for disclosures about which the client is uncertain or to verify, where needed, the information the client has provided.

Excluded from the Best Practices Working Paper is advice on attorneys' representation of their debtor clients. The information clients provide can raise any number of issues the resolution of which requires an attorney's skill and expertise to resolve. Such issues and their resolution are well beyond the scope of this Working Paper, although some "practice pointers" are provided along the way.

⁶ For the purposes of the Best Practices Working Paper, the Best Practices Working Group utilized the petition and schedules revised in April 2007.

⁷ The Best Practices Working Group chose not to include Schedule C within this Working Paper. Although there are exceptions, a good deal of Schedule C preparation turns on state law and there are significant differences among the states in the types and amounts of property that may be exempted. The Best Practices Working Group does note that proper inquiry as described in this Working Paper with respect to Schedules A and B is a precursor to declaring exemptions. The legal standard for disclosure discussed in Section 1.4.2., however, may not apply, as some courts require greater specificity when exempting property than when disclosing it. See *In re Park*, 246 B.R. 837, 842 (Bankr. E.D. Tex. 2000) (discussing the requirement of full disclosure in bankruptcy schedules and later noting that "[t]he required degree of specificity increases when itemizing property that is claimed as exempt under section 522."); *In re Mohring*, 142 B.R. 389, 394-95 (Bankr. E.D. Cal. 1992) (same).

⁸ The Best Practices Working Group chose not to include Forms 22B and 22C in this Working Paper for a variety of reasons. The 22B form is the simplest of the means testing forms and is used for debtor's filing for chapter 11, requiring only the calculation of the debtor's CMI and the debtor's signature of the verification, so a detailed analysis of this form would be of limited usefulness. The 22C form is very similar to the 22A form in that it also requires determination of the debtor's CMI, but the form is used to determine the debtor's commitment period and projected disposable income in a chapter 13. A detailed discussion of these two forms in greater detail is beyond the scope of this Working Paper.

⁹ Although the Best Practices Working Group does not address emergency filings, it concurs with the following as a recommendation of what, at a minimum, attorneys should do:

- 1) conduct as much of the normal client interview as possible;
- 2) make reasonable attempts to contact the attorney for the party that is taking action against the debtor;
- 3) check the electronic case dockets for prior bankruptcy filings by the debtor;
- 4) if possible, obtain a credit report on the client; and
- 5) obtain a prompt prebankruptcy credit counseling briefing for the client or otherwise comply with section 109(h).

See Henry J. Sommers, *Best Practices for Consumer Bankruptcy Cases (including commentary)*, (Feb. 8, 2006) (copy on file with chair of Best Practices Working Group and available at http://www.amercol.org/images/CLI_1388157_v1_Best_Practices_Committee_Update_and_Sommer_Report_and_Questionnaire.DOC%20Update%20and%20Sommer%20Report%20and%20Questionnaire.DOC).

1.1.3. Audience

This Best Practices Working Paper is broader in reach than was the Task Force Report on § 707(b)(4), which had as its focus specific statutory provisions affecting only attorneys representing clients with primarily consumer debts in chapter 7 cases. The Report, therefore, did not apply to a host of other debtors' attorneys, including those representing business entities, chapter 13 debtors or individuals whose debts are not primarily consumer debts.

The Best Practices Working Group attempts to reach this larger universe of debtors' attorneys, with two caveats. First, in some areas, most notably the discussion of Form 22A,¹⁰ the discussion does tend to have an emphasis on consumer cases. This is merely a reflection of the fact that consumer filings are the most common among bankruptcy cases. Second, the Working Group recognizes the unique character of chapter 11 bankruptcies of large corporations, where, for example, Schedules are typically filed well after the petition date, if at all. As such, this Working Paper is likely of limited utility to attorneys who represent large business entities.

1.2. Organization; Key Terms

This Best Practices Working Paper is organized in a two-tier format, an "Initial Inquiry and/or Document Review" and a "Further Inquiry," the relevance of which is dependent upon the client's responses to the initial inquiry or for other reasons, such as where a particular disclosure expressly states that specificity is required.

- **Initial Inquiry and/or Document Review.** This phrase is used to indicate that the attorney is reasonably confident that the client understands the scope and nature of the question asked and has provided a thoughtful, accurate answer. In many cases this level of investigation is achieved through discussion with the client. In other cases, the client's written responses to a checklist may suffice. For example, no discussion would likely be necessary if the client is an urban wage earner and simply answers, "no" when asked about crops or farming equipment. On the other hand, the attorney may determine that, for a particular client or for specific matters in the preparation of that client's case, document review should be a part of the initial inquiry.
- **Further Inquiry.** A further inquiry is triggered when, in the attorney's professional judgment, the information provided by the client is insufficient, incomplete or in need of verification. Further inquiry is usually accomplished by reference to source documents, public records or experts, such as appraisers. Further inquiry may also be triggered where a particular disclosure or jurisdiction requires more than usual detail.

¹⁰ Form 22A must be prepared only by individuals in chapter 7 whose debts are primarily consumer debts. The phrase "primarily consumer debts" is discussed at Section 1.4.3.

The Working Group has also provided Comments and Practice Pointers on various subjects. These are intended to give fuller explanation to points made in this Working Paper and to give debtors' attorneys some practical considerations to keep in mind when preparing these documents for clients.

1.3. Legal Standard: Reasonable Inquiry

The legal standard that underlies the Best Practices Working Paper is Rule 9011 of the Federal Rules of Bankruptcy Procedure and the case law interpreting and applying it.¹¹ Rule 9011 provides, in relevant part:

(b) Representations to the court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The Working Group anticipates that this Best Practices Working Paper will be read in light of the recommendations set forth in the Task Force Report on § 707(b)(4) regarding application of Rule 9011. This means that consumer debtors' attorneys, to whom § 707(b)(4)'s "reasonable investigation" and "inquiry" requirements apply, should be able to look to, and be governed by, the Rule and its judicial application.¹²

¹¹ The Best Practices Working Group is, however, mindful of the degree of scrutiny given to chapter 7 consumer debtors with respect to means testing.

¹² The Task Force Report on § 707(b)(4) specifically recommended that "reasonable investigation" and "inquiry" be governed by Rule 9011 case law.

More specifically, as in the Task Force Report on § 707(b)(4), the Best Practices Working Group accepts the following general articulation of an attorney's reasonable pre-filing 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.¹³

In addition, the Best Practices Paper incorporates the other recommendations of the Task Force Report and, because those recommendations were premised on Rule 9011 jurisprudence, expects that the recommendations will apply to all debtors' attorneys. These recommendations include the following:

- Attorneys should be able to rely on case law that allows time constraints to be taken into account.
- The reasonableness of the attorney's inquiry should not be analyzed with the benefit of hindsight; rather, the analysis should, as under Rule 9011, focus on the attorney's inquiry at the time that the inquiry was made.
- Attorneys should verify information supplied by the debtor if such verification may be accomplished with a reasonable expenditure of time and expense and, in the attorney's professional judgment, the information provided by the client is inconsistent or contains other indications of inaccuracy.
- Attorneys should be able to rely upon documents prepared by third parties in the scope of their employment, including tax returns, credit and title reports, child support enforcement agency statements, or information from the debtor's prepetition credit counseling agency.¹⁴

Although the Task Force Report on § 707(b)(4) was addressed to attorneys representing consumer debtors in chapter 7 cases, these recommendations were premised on Rule

¹³ Task Force Report on § 707(b)(4), *supra* n.1 at 704 citing *In re Robinson*, 198 B.R. 1017, 1024 (Bankr. N.D. Ga. 1996); *In re Armwood*, 175 B.R. 779, 789 (Bankr. N.D. Ga. 1994); *In re Matthews*, 154 B.R. 673, 680 (Bankr. W.D. Tex. 1993), *See also In re Thomas*, 337 B.R. 879, 892 (Bankr. S.D. Tex. 2006); *In re Huerta*, 137 B.R. 356, 379 n.8 (Bankr. C.D. Cal. 1992).

¹⁴ *Id.* at 710.

9011 jurisprudence. Accordingly, the Best Practices Working Group expects that the recommendations will apply to all debtors' attorneys, irrespective of the chapter under which the bankruptcy case will proceed or the character of the client's debt.

1.4. Other Applicable Legal Standards

1.4.1. Generally

Discrete discussions within this Working Paper rely to varying degrees on case law on point or, in some case, jurisdictional splits. Citations to authority are provided within those discussions.

1.4.2. Judicial Standards on Disclosure

There are any number of cases describing generally a debtor's duty of disclosure in the bankruptcy schedules, statement of financial affairs and other required bankruptcy forms.¹⁵ Debtors must make full disclosure and complete their forms fully, accurately and honestly.¹⁶ This duty of disclosure is the tradeoff for the discharge of indebtedness the debtor receives.¹⁷

Less clear, however, is the degree of specificity required of the debtor in completing the petition, statement of financial affairs, and other filing documents.¹⁸ Obviously, it is inappropriate for a debtor to actively conceal assets or information, to play "fast and loose," or to be generally indifferent to the importance of full disclosure.¹⁹ At the same time, courts tend not to punish debtors for imperfection or for failing to exhaustively investigate and fully document the details relating to every asset, liability and financial transaction.²⁰

The Best Practices Working Group believes that notice is the guiding principle underlying the debtor's duty of complete and accurate disclosure. In other words, disclosure should be sufficient to put the trustee and creditors on notice of the possible existence of assets available for distribution and of actions that may be taken against the debtor.

There are a variety of reasons underlying our belief that notice is the appropriate standard. Foremost among them is the trustee's affirmative duty to investigate the

¹⁵ See, e.g., *In re Colvin*, 288 B.R. 477 (Bankr. E.D. Mich. 2003) (collecting cases).

¹⁶ *Id.* (citations omitted).

¹⁷ *Id.* (citations omitted).

¹⁸ See, e.g., *Kuehn v. Cadle Co.*, 2007 WL 1064306, 2007 U.S. Dist. LEXIS 18387 (M.D. Fla., Mar. 15, 2007) (court was "unable to find any legal authority which explains the level of detail a debtor must include when listing assets on bankruptcy schedules").

¹⁹ *In re Hamo*, 233 B.R. 718, 725 (6th Cir.BAP 1999) (court noted that purpose of the Code is to ensure that "those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs").

²⁰ See, e.g., *In re Price*, 211 B.R. 170 (Bankr. M.D. Pa. 1997) ("literal compliance with the Official Schedules is the exception rather than the rule").

financial affairs of the debtor.²¹ Requiring the debtor and the debtor's attorney to undertake a comprehensive and detailed pre-filing investigation would render this duty superfluous, especially in light of the debtor's post-petition obligation to cooperate with the trustee.²²

The Advisory Committee Note to the schedules likewise assumes a notice standard in aid of the trustee's duty of investigation. As one court explained:

The 1991 Advisory Committee Notes to the Form 6 Schedules (Schedules A-J) explain that "the schedules require a complete listing of assets and liabilities *but leave many of the details to investigation by the trustee.*" Indeed, the schedules were intended to be summaries that could serve as a quick and easy list of relevant information. The Notes state that Schedule C, for example, was simplified in 1991 by "eliminating the duplication of information provided" on other schedules. Similarly, a former requirement in Schedule C that the debtor state the present use of property was "eliminated as best left to inquiry by the trustee." The requirements for listing personal property in Schedule B also reflect the basic purpose of the schedules. The Notes state that this schedule requires that debtors declare whether they have "any property in each category on the schedule." They add that the trustee "can request copies of any documents concerning the debtor's property necessary to the administration of the estate." The Advisory Committee Notes elaborate that "Section 521(3)²³ of the Code requires the debtor to cooperate with the trustee, who can *administer the estate more effectively by requesting* any documents from the debtor *rather than relying on descriptions in the schedules which may prove to be inaccurate.*"²⁴

²¹ 11 U.S.C. § 704(a)(4).

²² See 11 U.S.C. § 521(a)(3).

²³ Section 521(3) is now, pursuant to a BAPCPA amendment, § 521(a)(3).

²⁴ *White v. Mitchell (In re Hardee)*, 1998 WL 766699, *4, 1998 U.S. App. LEXIS 26859, *13, (4th Cir. Oct. 20, 1998) (citations omitted).

Relevant case law is in agreement.²⁵ In *Cusano v. Klein*,²⁶ for example, Cusano was involved in litigation a few years after he exited his chapter 11 bankruptcy case. Among the issues in that lawsuit was Cusano's claim for unpaid royalties for songs written for the rock band KISS. In his bankruptcy, Cusano scheduled "songrights in ... songs written while in the band known as KISS" and listed their value as "unknown." The district court dismissed the claims on the basis of Cusano's lack of standing because of his alleged failure to schedule in his bankruptcy his copyright and entitlement to royalties in the songs he composed.

On appeal, the court determined that the "question of ownership turns on the validity and effect of Cusano's listing of his 'songrights' as an asset in his bankruptcy schedules." The court found that Cusano did, in fact, own the assets because the disclosure Cusano made "was not so defective that it would forestall a proper investigation of the asset."

The "songrights" asset as described by Cusano can reasonably be interpreted to mean copyrights and rights to royalty payments for songs written for the band KISS prepetition ... Although it would have been more helpful for Cusano to break down the description further so that it named songs, albums, and dates of and parties to royalty and copyright agreements, the additional detail would not have revealed anything that was otherwise concealed by the description as it was, which provided inquiry notice to affected parties to seek further detail if they required it.²⁷

Cusano did not prevail, however, regarding his claims for prepetition royalties and other claims that accrued ahead of his bankruptcy filing. These, the court determined, "were subject to a separate scheduling requirement as accrued causes of action," which are separate assets that must be scheduled as such. "Simply listing the underlying asset out of which the cause of action arises is not sufficient."²⁸

²⁵ It should be noted that although informative, decisions in § 727 actions to deny the debtor's discharge are, in some respects, of limited utility. On the one hand, that section is generally construed strictly against the objecting party because of the harshness of the remedy and bankruptcy's "fresh start" policy. *In re Akhtar*, 368 B.R. 120 (Bankr. D. N.Y. 2007) (indicating that "[t]his rule of construction gives effect to the bankruptcy goal of providing honest debtors with a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' Citing *Cazenovia College v. Renshaw (In re Renshaw)*, 222 F.3d 82, 86 (2d Cir. 2000). On the other hand, when successful, § 727 actions often involve egregious disclosure failures and other misconduct on the part of debtors. Thus, the § 727 cases do not fully address situations where a debtor (and the debtor's attorney) may face sanctions for inadequate disclosure that would be insufficient to deny the debtor's discharge. Compare *Jensen v. Groff (In re Groff)*, 216 B.R. 883 (Bankr. M.D. Fla. 1998) (discharge denied where, among other things, debtor failed to disclose \$50,000 tax refund received) with *In re Colvin*, 288 B.R. 477 (Bankr. E.D. Mich. 2003) (where debtors failed to disclose \$10,000 income tax refund, their only asset, appropriate remedy was to deny debtors' claim of exemption in that refund).

²⁶ 264 F.3d 936 (9th Cir. 2001).

²⁷ *Id.* at 946-47. See also *In re Blum*, 41 B.R. 816, 819 (Bankr. S.D. Fla. 1984) (debtor's failure to properly value two automobiles was not grounds for denial of discharge because the assets were properly disclosed to the Trustee who could perform an appraisal of the vehicles). *In re Price*, 211 B.R. 170, 172 (Bankr. M.D. Pa. 1997) (although the debtor is required to file accurate schedules, substantial compliance is enough).

²⁸ *Id.* at 947 citing *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991).

In *Tilley v. Anixter, Inc.*,²⁹ the court distinguished the facts regarding claim ownership in the case before it from *Cusano* and, consequently, reached a different result. In *Tilley*, the debtor disclosed claims arising from ongoing domestic relations disputes with her former spouse, but the question arose as to whether she properly disclosed the specific claim of intentional infliction of emotional distress. Holding that the debtor did not make adequate disclosure, the court reasoned that the language she used to describe her claim “show[s] that she scheduled a state court claim for unpaid child support, not for intentional infliction of emotional distress.” That the latter claim may have arisen from her former husband’s actions relating to his child support obligations “did not absolve her of a duty to schedule it separately” because “a claim ‘for back child support’ does not . . . inform a trustee of the need to investigate” whether the debtor has a claim for emotional distress.³⁰

The notice standard described above should not be confused with a lax standard. The Best Practices Working Group does not suggest or wish to be interpreted as concluding that it is appropriate for debtors to make minimal disclosure in the expectation that the trustee will follow up in filling in the details. Overly vague and incomplete disclosure not only fails to put the trustee on notice of specific inquiries that should be made, but can also give rise to actions against the debtor, up to and including denial of discharge.

The reasoning above regarding disclosure applies with equal force to the value stated for a client’s assets.³¹ Although valuing assets can be difficult, the Best Practices Working Group believes that an attorney should always be as specific as reasonably possible under the circumstances. This does not mean that an attorney must hire a professional to value every asset, such as the debtor’s home.³² The Working Group merely believes that its endorsement of specificity with regard to valuing assets means avoiding the use of “unknown” except when a reasonable inquiry indicates that “unknown” is the most accurate description of an asset’s value. The Working Group’s belief is fostered by some courts’ statements that (1) an approximate value may be the

²⁹ 332 B.R. 501 (D. Conn. 2005).

³⁰ *Id.* at 510-11. See also *In re Doyle*, 209 B.R. 897 (Bankr. N.D. Ill. 1997) (where court stated that “‘Household Furnishings-4 rooms’ inadequately described contents of those four rooms, and thus exemption was not listed with requisite degree of specificity”. The court also stated that the debtors did not list their bank account, life insurance policy, and retirement with the required specificity. *In re Dickson*, 114 B.R. 740, 742 (Bankr.N.D.Okla.1990) (court denied the debtors’ claim of exemption because the debtor did not indicate the statutory basis for the exemption); *In re Wenande*, 107 B.R. 770, 772 (Bankr.D.Wyo.1989) (debtors’ listing of “stocks” “mineral interest,” “accounts,” “intangibles,” and “personal property” was not sufficient to provide notice to the trustee of the property claimed as exempt.

³¹ An important distinction, however, is that for purposes of exempting property, courts often expect more precision than for other filing documents such as Schedule B. See, e.g., *In re Bell*, 179 B.R. 129, 131 (Bankr. E.D. Wisc. 1995) (“A debtor is in a far better position than the trustee to know the value of the property being claimed as exempt. To permit the debtor to exempt such property by use of the term ‘entirely exempt’ would required a trustee in almost every case to obtain an appraisal.”).

³² See *In re Seruntine*, 46 B.R. 286, 288 (Bankr. C.D. Cal. 1984) (“A debtor who lives in an area in which his home is comparable to those of his neighbors will usually have a good idea of its value from simply living in the area and talking to neighbors about recent sales.”).

best information; (2) if an approximate value cannot be obtained, then an estimate is appropriate; and (3) finally, if no educated estimate may be made, then the use of “unknown” may be proper.³³

The Best Practices Working Group does not seek to specify or define what is entailed within the Working Group’s recommendation. Such a determination must be made by individual attorneys on a case-by-case basis and should be consistent with the foregoing discussion of the appropriate standard for disclosure. A useful example is a prepetition cause of action, which is quite difficult to value prior to settlement or final judgment.³⁴ If a lawsuit has been actually commenced, counsel could include a statement in the property’s description indicating the amount of damages prayed for in the complaint.

In some circumstances, it might not be possible to provide a reasonable estimate of an asset’s value, in which case the use of “unknown” is likely an appropriate description of value. Attorneys should not have to make a guess simply to provide a numeric value because a guess could be more inaccurate – and misleading – than candidly stating that the value, after reasonable inquiry, is not known. When “unknown” is used, however, the Best Practices Working Group believes that more detailed information should be provided regarding the property itself. For example, if the client is a member of a class action against a defendant that has sought chapter 11 relief, the attorney should provide a description of the lawsuit, the name of the defendant, contact information for class counsel and the case number and jurisdiction of the defendant’s bankruptcy.

1.4.3. “Primarily Consumer Debts”

The phrase “primarily consumer debts” makes several appearances throughout the forms discussed in this Best Practices Working Paper. There is not, however, a definition

³³ See, e.g., *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001) (In a chapter 11 case, the court noted: “Although there are no ‘bright-line rules for how much . . . specificity is required,’ [a debtor is] required to be as particular as is reasonable under the circumstances. . . . If possible, [the debtor should] list the ‘approximate dollar amount’ of each asset. . . . If faced with a range of values, [a debtor should] ‘choose a value in the middle of the range.’ . . . There are assets, however, the value of which is unknown; when that is the case, ‘a simple statement to that effect’ will suffice.”); *In re Wenande*, 107 B.R. 770, 772 (Bankr. D. Wyo. 1989) (“This court’s position is that ‘value,’ as set forth on the official form, generally means an approximate dollar amount . . . [V]alue is the type of information that is not always available on the date a petition is filed. Where it is not, an estimation, so designated, may serve the purpose of the B-4 Schedule, e.g., ‘approximately \$1,500.’ If the value is unknown, a simple statement to that effect serves the purpose of the B-4 Schedule.”).

³⁴ See *Wissman v. Pittsburgh Nat’l Bank*, 942 F.2d 867, 871 (4th Cir. 1991) (“A cause of action . . . is an asset that is not easily valued because there is no market where it is bought and sold.”).

of that phrase in the Code;³⁵ neither are the courts in full agreement as to when an individual's debts are primarily consumer debts.³⁶

"Consumer debt" is a defined term and it means a debt incurred by an individual primarily for a personal, family or household purpose.³⁷ Taxes³⁸ and debts incurred with a profit motive³⁹ are generally not consumer debts. However, the character of many other debts is not facially apparent. As the definition indicates, the determination here rests on the purpose of the debt. Many individuals, for example, have debt relating to automobiles purchased for everyday life, which clearly fits the "consumer debt" definition. Others, however, may have a vehicle that is dedicated to business, in which case the underlying debt is not for personal, family or household purposes.⁴⁰

³⁵ "Consumer debt" is defined in § 101(8) as a "debt incurred by an individual primarily for a personal, family, or household purpose."

³⁶ See generally, Deborah Sprenger, What are "primarily consumer debts," under 11 U.S.C.A. § 707(b), authorizing dismissal of chapter 7 Bankruptcy case if granting relief would be substantial abuse of chapter's provision? 101 A.L.R. FED. 771 (1991).

³⁷ See *In re Bell*, 65 B.R. 575, 577-78 (Bankr. E.D. Mich. 1986).

³⁸ See *IRS v. Westberry (In re Westberry)*, 215 F.3d 589 (6th Cir. 2000) (courts that have addressed the issue have "almost without exception" held tax debts are not consumer debts).

³⁹ See *Citizens Nat'l Bank v. Burns (In re Burns)*, 894 F.2d 361 (10th Cir. 1990) (loan not a "consumer debt" when taken out for purpose of playing the stock market); *Toyota Motor Credit Corp. v. Johnson*, 2007 WL 2702193, 2007 U.S. Dist. LEXIS 67820 (W.D. La. Sept. 11, 2007) (while interpreting the definition of "personal use" in the hanging paragraph contained in 11 U.S.C. § 1325(a)(5), the Court stated: "the relevant inquiry for purposes of defining the term 'personal use' as opposed to 'business use' within the context of the 'cramdown' provision and the 'hanging paragraph' is twofold, that is: (1) whether the individual is using the vehicle to travel to and from work, or (2) whether the vehicle is actually utilized in the performance of the individual's job duties." The Court found this distinction in conformity with the definition of "consumer debts" included in 11 U.S.C. § 101(8) as being those debts incurred for "personal" use); *Davis v. Melcher (In re Melcher)*, 322 B.R. 1 (Bankr. D.D.C. 2005) (Plaintiff alleged that defendant-debtors utilized fake building permits and an unlicensed contractor to renovate their home, thereby causing damage to a neighbor's home. In finding the debt not to be a consumer debt, the Court stated: "[t]he debt must be viewed from the perspective of the plaintiff's theory of a fraud debt which entailed a profit motive because the defendants engaged in fraud to perform construction on the cheap." Moreover, since the damage was caused as a result of the contractor's negligence, the debt owed by defendant-debtors was not incurred for a consumer purpose since "negligence by definition is unintended and thus cannot be a debt incurred for a household purpose."); *In re Pedigo*, 296 B.R. 485 (Bankr. S.D. Ind. 2003) (despite the debtor incurring mortgage expenses to acquire building adjacent to his home, the Court held that this expense did not constitute "consumer debt" since the debtor's purpose in acquiring the adjacent land was to rent it out). But see *Frazier v. Bank of Virginia (In re Lindamood)*, 21 B.R. 473 (Bankr. W.D. Va. 1982) (Debtor asked plaintiff, a friend, to co-sign a loan from defendant-bank. Plaintiff did so as a personal favor to debtor. Unbeknownst to plaintiff, Debtor used the proceeds of the bank loan in the debtor's automobile business. In determining the applicability of the co-debtor stay, the court held that, from the standpoint of the debtor and the co-debtor, the loan was a "consumer debt" despite the fact the debtor used the loan proceeds in the debtor's business.); *Boitmott v. United Virginia Bank (In re Boitmott)*, 4 B.R. 122 (Bankr. W.D. Va. 1980) (Title to two vehicles was taken in one of the debtor's name. Later, title to the vehicles was transferred to a corporation owned by the debtors. Subsequently, the bank holding liens on the vehicles consented to the re-titling of the vehicles in one of the debtor's names. For the convenience of the bank, the Debtor consolidated the notes on the vehicles with various other notes of the corporation. The Court held that the consolidation of the vehicle debts with debts of the debtors' business did not change the fact that the debts on the vehicles were consumer debts.)

⁴⁰ See *In re Shaffer*, 315 B.R. 90 (Bankr. W.D. Mo. 2004) (where debtor money borrowed by debtor from father to purchase a truck, debt was a non-consumer debt because truck was used primarily in farming

“Primarily” is defined differently among the courts. Most agree that “primarily” means the total amount of consumer debt should exceed 50 percent of overall indebtedness. In some jurisdictions, the inquiry stops here because of holdings that consideration should rest on the dollar amount owed.⁴¹ In others, such as the Fifth Circuit, the court may look also at the number of consumer debts relative to the number of non-consumer debts.⁴²

business). But see *In re Lowder*, 2006 WL 1794737, 2006 Bankr. LEXIS 1769 (Bankr. D. Kan. Aug. 14, 2006), holding that “when a vehicle is not used within the scope of employment and the vehicle is acquired for the joint purpose of traveling to and from work and for conducting a debtor’s private affairs, it is properly classified as ‘personal use’ for purposes of the Bankruptcy Code.

⁴¹ See, e.g., *Stewart v. United States Trustee (In re Stewart)*, 175 F.3d 796 (10th Cir. 1999) (consumer debt must be more than fifty percent); *In re Kelly*, 841 F.2d 908 (9th Cir. 1988) (same).

⁴² *In the Matter of Booth*, 858 F.2d 1051 (5th Cir. 1988). See also *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, n.2 (1st Cir. 1998) (in dicta, citing *In re Booth* in defining “primarily”); *In re Vianese*, 192 B.R. 61 (Bankr. S.D.N.Y. 1996) (adopting *Booth* approach).

Section 2 Voluntary Petition

Current Name of Debtor and Joint Debtor

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Because the trustee or U.S. trustee may request verification of Debtor's identity, a copy of Debtor's driver's license, passport or other identifying document should be copied (scanned) and saved in the file (folder).

Practice Pointer: Joint petitions are limited to individuals who are married to each other. Other relationships among individuals, such as parent and child, do not qualify and neither do non-individual relationships, such as corporate parent and subsidiary.

Although rare, issues of whether a couple is legally married can arise. Resort to state law is usually appropriate, such as with a common law marriage, but that may not be the case with same sex marriages or civil unions because of the federal Defense of Marriage Act.⁴³ Under DoMA, "spouse" in Code § 302 can only mean "a person of the opposite sex who is a husband or a wife."⁴⁴

Prior Name(s) of Debtor and Joint Debtor

Initial Inquiry and/or Document Review: Ask client about past names, including dba's and fdbs, over the prior eight years.

Further Inquiry: Confirm that information about dba's or fdbs is consistent with info in SoFA Item #18.

Practice Pointer: Compare with information on tax returns (IRS Schedule C) to determine if client has been self employed or in businesses within the last 8 years. The tax returns may disclose f/dba information that the client has overlooked.

Social Security, EIN or Other Tax Identification Number

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Confirm via tax returns, W-2's, 1099's etc.

Practice Pointer: Note that only the last four digits of an individual's Social Security number should be listed, but other tax identification numbers should be listed in full.

⁴³ 1 U.S.C. § 7.

⁴⁴ See, e.g., *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Address/Mailing Information

Initial Inquiry and/or Document Review: Ask client about current physical address and mailing address. If mailing address and physical address are different, disclose this information in the proper section. For business clients, inquire about location of principal assets and disclose.

Further Inquiry: For married clients contemplating separation or divorce, confirm accuracy of address and mailing information just prior to filing.

Practice Pointer: This inquiry can be far more complicated than it seems with consumer debtors who are separated and/or divorcing and moving around while filing bankruptcy at the same time.

Type of Debtor (Form of Organization)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: If the client is an artificial entity, conduct a search of jurisdiction of organization to confirm the type or form of the organization and verify the exact correct name of the entity.

Practice Pointer: Confirm the governing body of the organization has authorized the filing of the petition and obtain a copy of the authorization or resolution from the client's governing body.

Nature of Business (including Tax Exempt Entity)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: In most cases none should be required.

Practice Pointer: For the most part, this Item allows easy identification of cases for which the Code provides some form of unique treatment, such as healthcare debtors, which must comply with the various Code amendments in Title IX of BAPCPA. If "other" is selected, a general description (e.g., "auto repair" or "retail") should suffice.

Chapter under which Case will Proceed

Initial Inquiry and/or Document Review: None.

Further Inquiry: None.

Practice Pointer: Chapter selection requires the attorney’s professional determination formed after:

- Analyzing the client’s goals and financial circumstances;
- Explaining to the client the purpose and requirements of the various chapters;⁴⁵ and
- Applying controlling statutory and judicial eligibility rules.

Counsel should retain work product confirming the explanation, recommendation and client’s informed consent to chapter choice.

Nature of Debts⁴⁶

Initial Inquiry and/or Document Review: Ask client, as appropriate. Much of counsel’s inquiry into the nature of the client’s debts will stem from the analysis required to complete Schedules D, E and F.

Further Inquiry: In close cases, inquire about underlying nature of debts, particularly credit card debts that may have been incurred for business purposes. In individual cases, if counsel concludes that the debts are not primarily consumer debts, a memo to the file and/or retention of the internal work product used to make that determination is advisable. Cross reference the information provided by the client with information provided in any credit reports to confirm non-consumer vs. consumer purposes.

Practice Pointer: The “Nature of Debts” box in the petition provides for only two choices: a) primarily consumer debts; and b) primarily business debts. These two choices fail to account for cases in which the debts are not primarily either business or consumer (a case in which the debt is primarily tax debt or tort debt). In cases such as those, counsel will need to determine if either box should be checked or an explanatory statement added to the official form.

Filing Fee. No comment.

Chapter 11 Debtors/Small Business and Pre-Packaged Chapter 11 Cases

Initial Inquiry and/or Document Review: Whether the client will file a plan with the petition and has solicited acceptances prepetition should not require separate inquiry by the attorney. Except under unusual circumstances, the attorney will have been involved

⁴⁵ If counsel is a “debt relief agency,” the client must be given the notice required under § 342(b)(1), which explains the chapter choices. *See* 11 U.S.C. § 527(a)(1).

⁴⁶ *See* Section 1.4.3. for a discussion of “primarily consumer debts.”

in the prepetition plan development and vote solicitation and, accordingly, whether these boxes need to be checked will be self-evident.

The attorney should be able to determine whether the client is a “small business debtor,” as defined in § 101(51D),⁴⁷ from the information required to complete Schedules D, E and F.

Further Inquiry: Verification may be required regarding whether the client’s debts are in fact noncontingent, liquidated or owed to insiders or affiliates.

Practice Pointer: A “small business debtor” is defined not just by reference to the client’s indebtedness, but also based on whether a creditors’ committee has been appointed and is active in the case. This language is obviously not applicable to prepetition document preparation because a case must be actually commenced before committees can be appointed. Accordingly, attorneys should be guided by the debt ceiling portion of the definition of the petition, even though the information would appear to be repetitive.⁴⁸

Prior Bankruptcy Cases

Initial Inquiry and/or Document Review: Ask client.

⁴⁷ As amended by BAPCPA, “small business debtor”:

(A) subject to subparagraph (B), means a person engaged in commercial or business activities (including any affiliate of such person that is also a debtor under [Title 11] and excluding a person whose primary activity is the business of owning or operating real property or activities incidental thereto) that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount not more than \$[2,190,000] (excluding debts owed to 1 or more affiliates or insiders for a case in which the United States Trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and

(B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$[2,190,000] (excluding debt owed to 1 or more affiliates or insiders).

Note that § 101(51D) itself imposes a \$2,000,000 debt ceiling, but that amount is subject to triennial adjustment pursuant to § 104.

⁴⁸ The Best Practices Group is unsure why a small business debtor would have to check two boxes, one indicating that the debtor is a small business debtor and the other that the relevant debts are below the statutory ceiling. The Advisory Committee Note provides no clarification, stating only that “chapter 11 debtors whose aggregate noncontingent debts owed to non-insiders or affiliates are less than \$2 million are directed to identify themselves in this section.” Indeed, the Note appears to be inconsistent with the petition and Code definition because, although debt owed to affiliates is excluded from the definition, the Advisory Committee Note suggests it should be included for purposes of the “aggregate debt” box on the petition.

Further Inquiry: Some courts require PACER search for prior cases, at least in certain circumstances.⁴⁹ If the prior case terminated because of the individual client’s failure to obtain prepetition credit counseling, determine whether the prior case should be treated as having been dismissed or, conversely, never filed.⁵⁰

Practice Pointer: If there are two or more prior cases, the attorney should ensure that no court has entered an injunction prohibiting the filing the client is currently contemplating or for which the attorney is currently preparing.⁵¹

Pending Bankruptcy Cases of Debtor’s Spouse, Partner or Affiliate

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: The attorney should run a PACER search to confirm any information that the client provides about related cases.

Exhibit A: Publicly traded companies disclosures

Initial Inquiry and/or Document Review: The information disclosed in Exhibit A is for publicly traded companies only. Ask client if it is required to file periodic reports with the SEC. If so, counsel should obtain these reports and provide Exhibit A as required.

Further Inquiry: None.

Practice Pointer: Note that the information sought in Item 4 of Exhibit A is the same information requested in Item 21(b) of the Statement of Financial Affairs.

Exhibit B: Attorney declaration regarding chapter selection

Initial Inquiry and/or Document Review: None.

Further Inquiry: None.

Practice Pointer: This exhibit is used only in individual cases with primarily consumer debts and confirms that counsel has provided the notice required by § 342(b).⁵² As noted above, chapter selection requires the attorney’s professional determination formed after:

⁴⁹ See, e.g., *In re Oliver*, 323 B.R. 769 (Bankr. M.D. Ala. 2005); *In re Bailey*, 321 B.R. 169 (Bankr. E.D. Pa. 2005).

⁵⁰ See *In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006) (court has authority to determine whether petitions should be stricken or dismissed based on the circumstances).

⁵¹ Although a full discussion is beyond the scope of this Working Paper, the Best Practices Working Group notes that a prior filing can legally impact the currently contemplated case in a variety of ways including limited applicability of the automatic stay.

- Analyzing the client’s goals and financial circumstances;
- Explaining to the client the purpose and requirements of the various chapters; and
- Applying controlling statutory and judicial eligibility rules.

Counsel should retain work product confirming the explanation, recommendation and client’s informed consent to chapter choice.

Exhibit C: Debtor ownership or possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Follow up on information by obtaining and reviewing documents from client related to matters disclosed. Complete Exhibit C as required.

Practice Pointer: If a chapter 7 case is being filed, prepare an information package for the trustee to make a prompt decision regarding abandonment.

Exhibit D: Individual debtor statement regarding consumer credit counseling requirement.

Initial Inquiry and/or Document Review: Explain requirement to client and ask client to obtain and provide certificate.

Further Inquiry: Confirm certificate has not expired at time of filing.

Practice Pointer: Advise clients to obtain these late in the case preparation process.

Venue

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Check client’s responses to Item 15 in Statement of Financial Affairs regarding whether the client has moved in the prior three years.

Practice Pointer: The test for venue is still 180 days although the test for exemption eligibility is 730 days.

⁵² The statutory authority for the Exhibit B declaration is § 521(a)(1)(B)(iii)(I), not § 342(b). The latter requires the clerk to provide the debtor with the required notice.

Statement of Debtor who Resides as Tenant of Residential Property

Initial Inquiry and/or Document Review: Ask if the client: a) is a tenant of real property; b) is in default and other items related to the tenancy.

Further Inquiry: Determine if client can cure the monetary default and whether a deposit or rent for the 30 days postpetition should be included.

Section 3

Schedule A: Real Property

Initial Inquiry and/or Document Review: Determine that client has an understanding of the types of real property interests involved.

Further Inquiry: Check public records, such as those maintained by county recorders, online asset search or valuation services (where feasible), tax notices, appraisals, deeds, mortgages or deeds of trust, title reports, leases and land contracts, environmental notices, divorce judgments.

Comment: In his 1999 study of the accuracy of bankruptcy schedules and statements of financial affairs, Judge Rhodes found that a common error was the failure to designate who has an interest in property. Accuracy in designating ownership interest is especially important with respect to real estate, as is accurately disclosing how the property is held, i.e., joint tenancy, tenancy by the entireties, etc. Because of the significance of real property in the debtor's overall financial status, disclosure problems on Schedule A can lead to serious consequences, from the loss of the homestead exemption or the home itself to the denial of discharge.

Practice Pointers: Attorneys should determine whether property is community or common law property and whether the property is held as a tenancy by the entireties.

With respect to the value of real property, counsel should consider including a brief description of the valuation method or source, such as a real estate broker's drive-by or the value ascribed by the local taxing authority. Attorneys are reminded that where the debtor owns real property with a non-filing individual, only the value of the debtor's interest should be scheduled. Check local rules for § 341 meeting documentation requirements.

Section 4

Schedule B: Personal Property

Certain aspects of the attorney's inquiry are common to all types of personal property on Schedule B while others warrant unique consideration. The Best Practices Working Group's discussion here reflects these commonalities and distinctions, with general considerations discussed first and, below, the Working Group present issues unique to each subpart of Schedule B.

General Comments: Long standing case law construing § 541 has expansively defined property interests by reference to state law.⁵³ In *Segal v. Rochelle*,⁵⁴ the Court stated that “the term ‘property’ has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.”⁵⁵ Subsequently, the broad reach of estate property was confirmed in *United States v. Whiting Pools*.⁵⁶

Thus, the Best Practices Working Group suggests that 1) attorneys analyze the existence of property interests using this framework; and 2) that if the property exists under state law, all such interests be scheduled or disclosed on the appropriate schedule; and 3) any ambiguity over the existence of property be resolved in favor of disclosure.⁵⁷ Additionally, attorneys should avoid using “unknown” as the value of an asset unless, after reasonable inquiry, “unknown” is the most accurate description that can be provided.⁵⁸

Practice Pointer: Attorneys should determine whether property is community or common law property and whether the property is held as a tenancy by the entireties.

⁵³ See *Butner v. United States*, 440 U.S. 48, 54 (1979) (“Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law”).

⁵⁴ 382 U.S. 375 (1966).

⁵⁵ *Id.* at 379.

⁵⁶ 462 U.S. 198 (1983).

⁵⁷ See, e.g., *In re Cheatham*, 309 B.R. 631 (Bankr. M.D. Ala. 2004), in which the debtors scheduled, and claimed as exempt, prepaid tuition purchased for the debtors' children through a plan offered by the state. A threshold issue was whether the plans were property of the debtors or the debtors' children. The court determined that the plans were not property of the estate, but noted that the schedules do not allow easy disclosure for this kind of property and advised:

The best course of action is to schedule the property and then claim it exempt, thereby making full disclosure and giving notice that the debtor believes that the property is not subject to distribution to creditors. Another option may be to make the disclosure in Paragraph 14 of the Statement of Financial Affairs, which calls for a listing of “property held for another.”

Id. at 637-38 citing *In re Stevens*, 177 B.R. 619, 620 n.2 (Bankr. E.D. Ark. 1995); *In re Avis*, 1996 WL 910911 1996 Bankr. LEXIS 1948 (Bankr. E.D. Va. Mar. 12, 1996). The court further rejected the argument that, by making disclosure, the debtor waived the argument that the property was excluded from the estate.

⁵⁸ See Section 1.4.2. for a more detailed discussion of the use of “unknown.”

Item B.1: Cash on Hand

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Examine bank records for large withdrawals and missing deposits such as payroll.

Item B.2: Checking, savings or other financial accounts, certificates of deposit, or share in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.

Initial Inquiry and/or Document Review: Discuss various types of accounts and the difference between bank balance and checkbook balance. Determine that the value is recent.

Further Inquiry: Obtain and review bank records. Check local rules for § 341 meeting documentation requirements.

Practice Pointers: The amounts payable on checks written but not yet cleared as of the petition date are likely property of the debtor and, therefore, of the estate.⁵⁹ Outstanding checks should be noted separately because, when presented and paid, the checks are postpetition transfers of property of the estate and subject to avoidance by the trustee. Note also that the trustee might seek to recover the funds from the debtor.

Item B. 3: Security deposits with public utilities, telephone companies, landlords, and others.

Initial Inquiry and/or Document Review: Inquire regarding the various types.

Further Inquiry: Examine leases, other agreements, cancelled checks, etc.

Item B. 4: Household goods and furnishings, including audio, video, and computer equipment.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom, items purchased recently, antiques, electronics, and insurance riders.

Further Inquiry: Obtain and review receipts or credit card statements setting out purchase price, appraisals or eBay-type valuations, walk-through.

⁵⁹ See *Brown v. Pyatt (In re Pyatt)*, 486 F.3d 423 (8th Cir. 2007).

Comment: The degree of specificity presents an especially tricky question with respect to this Item. Overgeneralizations, such as “miscellaneous household goods,” are likely insufficient to put the trustee on notice of whether the client has property that is not exempt and of value to estate creditors. On the other hand, a detailed itemization might require significant effort that, on balance, is not merited because the value of the various goods will lead to no return for creditors, especially after exemptions are taken into account.

Practice Pointer: Attorneys should be satisfied with the client’s responses to questions regarding items to be disclosed here. Further, the consequences of attempting to hide property should be made clear.

Item B. 5: Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom, items purchased recently, antiques, electronics, and insurance riders.

Further Inquiry: Obtain and review receipts or credit card statements setting out purchase price, appraisals or eBay-type valuations, walk-through.

Practice Pointers: It can be helpful to simply ask the client, “Do you collect anything?” or, “Do you have a lot of [books, movies, CDs, etc.]?” In addition, clients need to understand the distinction between ordinary items and those that may have value.

Item B. 6: Wearing apparel.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice and custom, items purchased recently, antiques, electronics, and insurance riders.

Further Inquiry: Obtain and review receipts or credit card statements setting out purchase price, appraisals or eBay-type valuations, walk-through.

Practice Pointer: Clients need to understand the distinction between ordinary wearing apparel and items that may have value. Most used wearing apparel is normally worth about ten percent of its retail value.

Item B. 7: Furs and jewelry.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice or custom, items purchased recently, antiques, electronics, and insurance riders.

Further Inquiry: Obtain and review receipts or credit card statements setting out purchase price, appraisals or eBay-type valuations, walk-through. Review insurance riders, as applicable.

Practice Pointer: Most everyone has something that can and should be disclosed in the “furs and jewelry” category and in some jurisdictions listing “none” will raise a red flag for the trustee. Clients may be less than candid regarding items to which the client feels a sentimental attachment or to those items that are family heirlooms.

Item B. 8: Firearms and sports, photographic, and other hobby equipment.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value in accordance with local practice or custom, items purchased recently, antiques, electronics, and insurance riders.

Further Inquiry: Obtain and review receipts or credit card statements setting out purchase price, appraisals or eBay-type valuations, walk-through.

Item B. 9: Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.

Initial Inquiry and/or Document Review: The question requires a detailed response. Exemptions may depend on the response.

Further Inquiry: Review the declaration sheet and statement of current cash surrender value. Check local rules for § 341 meeting documentation requirements.

Practice Pointer: Counsel should exercise discretion regarding insurance policies that have no value unless a stated contingency occurs, such as term life insurance policies. However, any insurance policy, including home and auto policies, against which the client or some other person may have a claim should be disclosed and the claim should be scheduled or listed in the Statement of Financial Affairs, as appropriate. Life insurance policies in which the client has a beneficial interest should be scheduled under Item 20.

Item B.10: Annuities. Itemize and name each issuer.

Initial Inquiry and/or Document Review: The question requires a detailed response. Exemptions may depend on the response.

Further Inquiry: Declaration sheet and statement of current cash surrender value.

Comment: It is unclear how the value of annuities should be scheduled. Keeping in mind that the use of “unknown” is discouraged and that the disclosure standard is to put the trustee and creditors on notice of the asset,⁶⁰ attorneys should exercise professional judgment in determining how to list value.

Item B.11: Interests in an education IRA as defined in 26 U.S.C. § 530(b)(1) or under a qualified State tuition plan as defined in 26 U.S.C. § 529(b)(1). Give particulars. (File separately the record(s) of any such interest(s). 11 U.S.C. § 521(c); Rule 1007(b)).

Initial Inquiry and/or Document Review: The question requires a detailed response. In addition, if exemption rights cannot be determined with reasonable certainty, recent statements or consultation with a plan administrator may be necessary.

Further Inquiry: Declaration sheet and statement of current cash surrender value.

Comment: This Item was necessitated by the enactment of §§ 541(b)(5) and (6) in 2005. A number of questions arise, such as who is the owner of funds and whether the funds are excluded or may be exempted from the estate, but as yet these questions have not been addressed by the courts.⁶¹

Practice Pointer: If the education IRA is for a child of the client, it should still be scheduled. Do not include names of minor children.

⁶⁰ See Section 1.4.2, *supra*.

⁶¹ New § 541(b)(5) and (6) purport to alter the amount of these education funds that is property of the estate by excluding from the estate only contributions made within a year of filing the petition (along with other restrictions and conditions). However, this does not answer the question of who owns the funds. In *In re Cheatham*, 309 B.R. 631 (Bankr. M.D. Ala. 2004), for example, the court held that, under Alabama law, pre-paid tuition credits were property of the debtors’ children and, therefore, excluded from the estate. If the beneficial interest is in a non-debtor, then it is difficult to see how the funds could be administered for the benefit of the debtor’s creditors. Bankruptcy law should not, and likely cannot, be construed as requiring a forfeiture of property owned by a non-debtor. See, e.g., *In re Persky*, 134 B.R. 81, 97 (Bankr. E.D.N.Y. 1991) (“When Congress, however, determines that property of a third party, not a creditor or insider of the debtor, and having nothing to do with the bankruptcy process, can be taken, affected or appropriated, wholly or partially, for the benefit of the debtor’s estate or its creditors, it has gone beyond that which is permissible under the Bankruptcy Clause.”).

Item B.12: Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Give particulars.

Initial Inquiry and/or Document Review: The question requires a detailed response. In addition, if exemption right cannot be determined with reasonable certainty, recent statements or consultation with a plan administrator may be necessary.

Further Inquiry: Review recent statements, plan documents, declaration sheet and statement of current cash surrender value.

Comment: It is unclear how the value of these assets should be scheduled. Keeping in mind that the use of “unknown” is discouraged and that the disclosure standard is to put the trustee and creditors on notice of the asset,⁶² attorneys should exercise professional judgment in determining how to list value. Counsel should inquire about loans from these assets and discuss the effect of the discharge. Apparently, if the personal liability to repay the loan is discharged and any loans from these plans are not repaid, a plan administrator can treat the unpaid loan as an early distribution, thus triggering tax consequences.⁶³

Item B.13: Stock and interests in incorporated and unincorporated businesses. Itemize.

Initial Inquiry and/or Document Review: The question requires a detailed response. Closely held interests must be discussed in detail to determine the nature and value of the debtor’s interest.

Further Inquiry: Tax returns, account statements regarding publicly traded stocks. Closely held interests may call for a review of the books, buy-sell agreements, bankruptcy clauses, etc, or consultation with the client’s or company’s accountant.

Item B.14: Interests in partnerships or joint ventures. Itemize.

Initial Inquiry and/or Document Review: The question requires a detailed response. Closely held interests must be discussed in detail to determine the nature and value of the debtor’s interest.

⁶² See Section 1.4.2, *supra*.

⁶³ See *In re Herndon*, 289 B.R. 629 (Bankr. E.D. Mich. 2003) In *Herndon*, the debtor took loans from her ERISA-qualified retirement account and later filed for bankruptcy. The debtor defaulted on the repayment of these loans and, based on Sixth Circuit precedent, was forbidden from repaying them under a chapter 13 plan that paid unsecured creditors less than 100%. The court held that the representative of the retirement fund was not prohibited by the automatic stay from reporting the early distribution to the IRS.

Further Inquiry: Tax returns, account statements regarding publicly traded stocks. Closely held interests may call for a review of the books, buy-sell agreements, bankruptcy clauses, etc, or consultation with the client's or company's accountant.

Item B.15: Government and corporate bonds and other negotiable and non-negotiable instruments.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review account statements.

Item B.16: Accounts receivable.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review of books, promissory notes and other records.

Item B.17: Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.

Initial Inquiry and/or Document Review: Review judgments and applicable orders. If a divorce or custody hearing is pending, make detailed inquiry or confer with the client's family law counsel. Inquire regarding whether obligor is in arrears.

Further Inquiry: None.

Practice Pointer: With respect to arrearages, the face amount should be disclosed in the explanatory text and the factors used to discount that face value due to doubtful collectability should be briefly identified. For the numerical value in the "Current value of the debtor's interest in property" column, counsel may make a good faith collectability assessment and discount the face value accordingly.

If there is a matter pending in the state domestic relations court, ensure required information is listed in Item 4.a. of the Statement of Financial Affairs.

In some jurisdictions, child support arrearages are not property of the estate because ownership is in the child.

Item B18: Other liquidated debts owed to debtor including tax refunds. Give particulars.

Initial Inquiry and/or Document Review: Explain liquidated debts, including tax refunds, to client and inquire.

Further Inquiry: Review documents, if any, which support underlying obligations. Review last year’s tax refund, if any, and disclose an estimated amount for the current year.

Practice Pointer: Under 26 U.S.C. § 1398, a debtor can elect to split the tax year into two parts: the first period ending on the date prior to the filing of the petition and the second period starting from the date of filing the petition to the end of the year. This election presents various planning opportunities that counsel should consider and is very useful if there are assets in the estate and the debtor has engaged in year-to-date activities that resulted in prepetition tax liability.

Professional (usually attorney) retainers or other pre-paid items are a common source of confusion and could be listed in several locations throughout Schedule B. The Best Practices Working Group has selected Item 18, “Other liquidated debts,” for purposes of this discussion. Assuming a retainer is not a flat fee that has been earned upon receipt, and therefore is not property of the estate, funds in the client trust account of an attorney retained by a debtor become property of the estate upon filing the bankruptcy petition because the retainer belongs to the client until the funds are earned by the attorney.⁶⁴ Therefore, the debtor should list any unearned retainers on his Schedule B as other liquidated debts.

Additionally, it remains at issue whether an attorney with a prepetition retainer possesses a secured lien for unpaid fees against such retainers and whether the debtor may be required to list the attorney on Schedule D as a secured creditor.⁶⁵

Item B.19: Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A – Real Property.

Initial Inquiry and/or Document Review: Ask client if: a) any relatives have died and left a surviving spouse; b) if there are any family trusts.

Further Inquiry: Review of court orders, settlements or documents, or circumstances underlying the interest.

⁶⁴ See *In re Hill*, 355 B.R. 260 (Bankr. D. Or. 2006).

⁶⁵ See *In re Printcrafters*, 233 B.R. 113, 118 (D. Colo. 1999) (“[m]ost bankruptcy courts have concluded that a prepetition retainer paid by a debtor to counsel for services in connection with a case is security for, or held in trust for, payment of fees and costs to be incurred.” (citations omitted)); *In re Golf Augusta Pro Shops, Inc.*, 2003 WL 22176082, 2003 Bankr. LEXIS 2024 (Bankr. S.D. Ga. Aug. 28, 2003) (holding the same, and noting that, regarding whether a conflict of interest exists, “there is an exception to § 327 where the attorney holds a prepetition and postpetition claim for money owed for future bankruptcy services and/or where the legal fees that accrued prepetition have been incurred solely for services rendered in contemplation of and in connections with the bankruptcy case.”); *In re Office Products of America, Inc.*, 136 B.R. 964 (Bankr. W.D. Tex. 1992) (holding the same under Texas law.)

Practice Pointer: Be sure your client understands what is being asked. Most of the terms used in this Item are legal and may be confusing to the client.

Item B.20: Contingent and noncontingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.

Initial Inquiry and/or Document Review: Ask client if: a) any relatives have died and left a surviving spouse; b) if there are any family trusts.

Further Inquiry: Review of court orders, settlements or documents, or circumstances underlying the interest.

Practice Pointer: The term “Life insurance policy,” as used here, means a policy under which the client is a beneficiary. If the client is the insured, rather than the beneficiary, the policy should be scheduled at Item 9.

Item B.21: Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.

Initial Inquiry and/or Document Review: Ask if the client is: a) party to a lawsuit; b) has any counterclaims pending; c) has any rights to sue anyone for anything, d) has consulted with an attorney for any matter other than bankruptcy in the past two years.

Further Inquiry: Review facts and circumstances surrounding such claims. Contact counsel handling any such claims.

Practice Pointer: Keep in mind claims that may have arisen from prepetition debt collection activity, such as violations of the Fair Debt Collection Practices Act⁶⁶ and state laws governing debt collection.

Item B.22: Patents, copyrights, and other intellectual property. Give particulars.

Initial Inquiry and/or Document Review: Ask client

Further Inquiry: Obtain and review all patents, copyrights and trademarks. Consult with IP counsel as necessary.

⁶⁶ See 15 U.S.C. § 1692 et seq.

Item B.23: Licenses, franchises, and other general intangibles. Give particulars.

Initial Inquiry and/or Document Review: Ask client and ensure client understands the nature of the interest subject to disclosure here.

Further Inquiry: Review related documents.

Practice Pointer: Counsel may consider whether to include occupational licenses here and, if so, make appropriate inquiry.

Item B.24: Customer lists or other compilations containing personally identifiable information (as defined in 11 U.S.C. § 101(41A)) provided to the debtor by individuals in connection with obtaining a product or service from the debtor primarily for personal, family, or household purposes.

Initial Inquiry and/or Document Review: Explain to client and inquire.

Further Inquiry: None

Comments: In some cases, the presence of a customer list or similar database should be obvious, such as a business client that sells goods via the Internet. Be on guard, however, that such lists can be involved in consumer cases. For example, a client might run an open forum-style weblog and might have information about registered users.

Item B.25: Automobiles, trucks, trailers, and other vehicles and accessories.

Initial Inquiry and/or Document Review: Review title, if available, or other evidence of liens. Perform online search if documents are electronically available. Inquire about untitled vehicles.

Further Inquiry: Confirm values with Kelly Blue Book or other Internet source. Have vehicle appraised if the client intends to redeem the property.

Comments: Check local rules for § 341 meeting documentation requirements.

Item B.26: Boats, motors, and accessories.

Initial Inquiry and/or Document Review: Review title, if available, or other evidence of liens. Determine whether property is titled under state or federal law. Perform online search if documents are electronically available. Inquire about untitled property. Inquire whether client lives aboard.

Further Inquiry: Confirm values with Internet, eBay, www.usedboats.com, or other Internet resource. Have boat, motor, or accessories appraised if the client intends to redeem the property.

Item B.27: Aircraft and accessories.

Initial Inquiry and/or Document Review: Request bills of sale and lien information available to the client regarding aircraft and accessories. Request appraisals completed regarding the aircraft or accessories. If no appraisal is available, perform a valuation of the aircraft via online sources.

Further Inquiry: If feasible, obtain and review “title” for any aircraft and/or accessories.

Practice Pointer: Obtaining “title” to an aircraft is not a simple process. The FAA records are not available online and it is a tedious process to obtain them. Moreover, the FAA may not have copies of all liens and bills of sale because the parties do not always timely provide them. A company specializing in aircraft title searches may be the most efficient way to determine the liens on the aircraft or accessories and the true owner of these items.

Item B.28: Office equipment, furnishings, and supplies.

Initial Inquiry and/or Document Review: For individual clients, ask about items purchased for more than a threshold, items purchased recently, antiques, electronics, and insurance riders. For business clients, request a listing of relevant items.

Further Inquiry: Obtain and review receipts or credit card statements setting out purchase price, appraisals or eBay-type valuations, walk-through.

Item B.29: Machinery, fixtures, equipment, and supplies used in business.

Initial Inquiry and/or Document Review: Ask about items purchased for more than a threshold value, items purchased recently, antiques, electronics, and insurance riders.

Further Inquiry: Obtain and review receipts or credit card statements setting out purchase price, appraisals or eBay-type valuations, walk-through.

Item B.30: Inventory.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Confirm consistency with response to Item 20 in the Statement of Financial Affairs. Compare to Item 20 of the SoFA and understand any discrepancies.

Item B.31: Animals.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: None

Comments: Be sure that clients understand that family pets, even those without any apparent monetary value, should be included here. Livestock may require a detailed inventory as of petition date for § 552 purposes. Breeding stock may give rise to income.

Practice Pointer: Be sure your client provides expense information relating to pets for inclusion in Schedule J.

Item B.32: Crops – growing or harvested. Give particulars.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: None

Comments: The attorney may want detailed documentation for § 552 purposes. Consider photos or independent appraisal of crops on date of petition. Include quantity and quality descriptions. Consider the effect of § 552 as to crops planted after filing.

Item B.33: Farming equipment and implements.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Detailed inventory of year, make, model and hours on each unit. Use Internet sources for valuation. Photos of equipment at time petition filed. Consider obtaining a prepetition appraisal.

Item B.34: Farm supplies, chemicals, and feed.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Consider photos or independent appraisal of supplies, chemicals and feed on date of petition. Need quantity and quality descriptions.

Item B.35: Other personal property of any kind not already listed. Itemize.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Inquire about such items as golf, tennis, health, club, and other memberships; frequent flier miles; season tickets; lottery tickets.

Section 5

Schedule D: Creditors Holding Secured Claims Schedule E: Creditors Holding Unsecured Priority Claims Schedule F: Creditors Holding Unsecured Nonpriority Claims

5.1. General Comments and Inquiry Recommendations

Certain aspects of the attorney's inquiry are common to Schedules D, E and F, while others warrant unique consideration. The Best Practices Working Group's discussion here reflects these commonalities and distinctions, with general considerations discussed first and, in the "Commentary" section, the Working Group presents issues unique to each of Schedules D, E and F.

Initial Inquiry and/or Document Review: Ask client and request all documentation the client has regarding debts. Regarding debts that are contingent, unliquidated or in dispute, ask the client in simple terms whether the client believes he or she should not have to pay any of the debts. Review documents to determine when the debts were incurred. If documentation is not available, ask client.

A review of the client's credit report is an emerging trend among attorneys and may become the standard practice. The Best Practices Working Group believes this is a positive development both because of the breadth of information available and because most consumer clients can access the report without charge via the Federal Trade Commission website.⁶⁷ The Working Group suggests that attorneys incorporate this practice as part of their customary reasonable inquiry and, that attorneys should be able to rely on the information obtained from credit reports without further inquiry.⁶⁸

Further Inquiry: If the client has filed another bankruptcy case within the prior year, or such other time frame that the attorney determines is appropriate under the circumstances, the attorney should retrieve the schedules from that case and compare the lists of creditors to ensure full disclosure.

If the client indicates that any debt is contingent, unliquidated or in dispute, inquire whether the debt is the subject of a judicial or other proceeding and determine, to the extent possible, whether the client has a claim against the other party.

⁶⁷ Credit reports are available at <http://www.annualcreditreport.com> or through the FTC's website, <http://www.ftc.gov>.

⁶⁸ See Task Force Report on § 707(b)(4), *supra* n.1 at 710. See also, *In re Debtor's Attorney Fees in Chapter 13 Cases*, 374 B.R. 903, 907 (Bankr. M.D. Fla. 2007) (apparently recognizing the importance of credit reports by allowing attorneys practicing before the Middle District of Florida to charge debtors for the expense of obtaining the debtor's most recent credit report); *In re Habiballa*, 337 B.R. 911 (Bankr. E.D. Wisc. 2006) (where debtor relied exclusively on his credit report in scheduling his credit card indebtedness, the court granted the debtor's objection to a proof of claim to the extent it claimed a higher amount than the amount listed in the debtor's schedules).

Practice Pointers: The phrasing of questions in this item of inquiry can make a great deal of difference in how the client understands what information the attorney is seeking. Many clients will not understand the technicalities of whether a debt is contingent, liquidated or in dispute, but clients usually are well aware of debts they think they should not have to pay.

General Comments: The timing of obtaining a credit report should be left to the attorney's judgment on a case-by-case basis. Some clients may present a complicated financial situation that will take time to sort out and, if the report is pulled early in the representation, the report may be dated by the time the case is actually commenced. Other clients may have no documentation regarding their debts or may strike the attorney as being less than candid, making the report a valuable tool in completing the schedules.

The Best Practices Working Group has no comment on the various notice provisions in § 342, which were enacted as part of BAPCPA other than to remind attorneys of the changes and to make appropriate inquiry regarding addresses for notice to creditors.

5.2. Comments on Schedule D

The degree of document review will depend on the type of collateral and the circumstances of the case. For real property, attorneys should obtain proof of recordation and the payoff amount at or near the time the petition is filed. The Best Practices Working Group believes that a title report is generally not necessary unless the facts of a specific case suggest otherwise. Similarly, for titled and UCC-1 property, the attorney should obtain proof of the lien, if available, and the payoff amount at or near the time the petition is filed.

In individual cases, clients might have credit cards in which the issuing retailer takes a security interest in items purchased at the store with the credit card. Sears is a common example. The Best Practices Working Group believes that prepetition review of these arrangements is not necessary. Most consumers do not have the underlying agreement and the value of the property is often low.

If a secured creditor has retaken collateral and the client's equitable right of redemption has expired, the debt should not be listed in Schedule D.⁶⁹ Deficiencies belong in Schedule F or, in certain circumstances, Schedule E.

If the item has been given to the client as a gift or if the client is a co-signor without any interest in the collateral, the debt should not be listed on Schedule D. It is an unsecured debt as to the client and should be listed on Schedule F.

⁶⁹ The property, likewise, should not be listed in Schedule A or B, as the case may be, but should be included in Item 5 (repossessions, foreclosures and returns) of the Statement of Financial Affairs.

5.3. Comments on Schedule E

The extent of inquiry regarding priority claims will depend on the circumstances. For clients whose incomes are below the state median and whose cases will result in a “no asset” report, the expense of a detailed inquiry may not be justified. This is especially true with respect to tax claims, where separating the amounts entitled to priority from those that are not can be complicated and time consuming, and may be more easily accomplished after the bankruptcy case has been commenced.

A more searching analysis is required, however, for clients where 1) income is above the state median, 2) debts are primarily consumer debts, and 3) the case will proceed under chapter 7. Priority debt is calculated into the means testing formula and, if done improperly, could lead to a motion to dismiss the client’s case as abusive.

For all clients, the attorney should make reasonable efforts to determine whether debts that appear to be priority debts are actually secured by a lien on property. To the extent there is security, the debt should be listed on Schedule D. Where the debt has secured and priority aspects, attorneys should be careful when listing the amount of each to avoid improperly overstating the total amount owed.

Further inquiry in other cases should be left to the discretion of the attorney. In some cases, for example, the client may be better served by allowing the priority determination to proceed through a contested proceeding after the case is filed. In others, a more searching pre-filing inquiry may be necessary based on the client’s needs, goals and financial circumstances.

The Best Practices Working Group also notes that some attorneys confuse priority debts with those that are not dischargeable but not entitled to priority. Only three types of debts fit both categories: certain tax debts, domestic support obligations and certain personal injury claims resulting from the client’s operation of a motor vehicle while under the influence.⁷⁰ Student loans owed to the government, for example, are not priority debts, but they are nondischargeable. Similarly, property settlements in divorce proceedings should not be confused with domestic support obligations; both types of debt are nondischargeable, but only the latter has priority status.

As a general rule, the IRS and the state taxing authority should always be scheduled, especially in chapter 13 cases. This will ensure notice to the taxing authority and put the onus on it to file a claim and start the process of resolving what amounts are owed and whether those amounts are secured, priority or general unsecured debts. Scheduling these tax authorities also protects the client who does not realize that he or she has outstanding tax liability.

⁷⁰ Note that although these three types of debt are entitled to § 507(a) priority and are nondischargeable under § 523(a), their character under either statute may differ. For example, if a debtor caused personal injury while operating an aircraft under the influence, the debt is nondischargeable but not entitled to priority.

5.4. Comments on Schedule F

The Best Practices Working Group recognizes that credit cards pose a problem in identifying the “date incurred” as the Schedule F calls for.

Section 6

Schedule G: Executory Contracts⁷¹ and Unexpired Leases

Initial Inquiry and/or Document Review: Ask client in plain language and exercise judgment regarding information the client provides for other purposes, such as income from rental property.

If the client is a business, ask about equipment that is commonly leased and contracts that are common, such as business premises or copy machine leases or contracts for regular delivery of water for the office cooler.

Further Investigation: If the client responds affirmatively or, in the attorney's judgment, there is an executory contract or unexpired lease, request relevant documentation from the client. If there are no documents, ask the client for the terms.

Practice Pointer: Clients often think of bankruptcy in terms of debts, which doesn't capture all of what Schedule G requires. They will better understand the type of information required for Schedule G if examples are given. Some items to suggest as examples and to be on the lookout for include:

- Household goods acquired from “rent-to-own” retailers
- Property acquired through a lease rather than a sale⁷²
- Land contracts
- Real property the client leases as the client's residence (including mobile home lots)
- Real property the client leases to others for residential or commercial purposes
- Farm land the client operates but which is owned by another person
- Unperformed contracts for services the client provides for extra income, such as home improvement or car repair
- Personal property, such as a car, equipment from a failed business or sporting equipment, the debtor permits another to use on a continual basis in exchange for consideration
- Property on consignment

⁷¹ “Congress intended the term [executory contract] to mean a contract ‘on which performance remains due to some extent on both sides.’” *NLRB v. Bildisco*, 465 U.S. 513, 523 n.6 (1984) quoting H.R. Rep. No. 95-595, p. 347 (1977). “More precisely, a contract is executory if ‘the obligation of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other.’” *Unsecured Creditors' Comm. v. Southmark Corp. (In re Robert L. Helms Constr. and Dev. Co. Inc.)*, 139 F.3d 702, 705 (9th Cir. 1998) quoting *Griffel v. Murphy (In re Wegner)*, 839 F.2d 533, 536 (9th Cir. 1988).

⁷² Because of variances among jurisdictions and in the facts presented from one case to the next, the Best Practices Working Group makes no comment on transactions that have the appearance of being leases but which may in fact be secured transactions. Counsel should inquire in accordance with controlling precedent and local practice and custom.

Schedule G disclosures will often trigger, or be triggered by, disclosures required in other Schedules or in the Statement of Financial Affairs.⁷³

⁷³ For example, in his 1999 study, Judge Rhodes found that 122 debtors listed rent as an expense in Schedule J (107 for a residence and 15 for a mobile home lot). Of those, 85 percent (88 percent for residential renters, 67 percent for those leasing mobile home lots) failed to disclose the lease on Schedule G. In addition, 81 percent of these debtors listed no security deposit in Schedule B. Hon. Steven W. Rhodes, *An Empirical Study of Consumer Bankruptcy Papers*, 73 Am. Bankr. L.J. 653, 667-68, 666 (1999).

Section 7

Schedule H: Codebtors

Initial Inquiry and/or Document Review: Ask the client if any other person is obligated under any debt listed in Schedules D, E or F, or if the client has co-signed or guaranteed someone else's debt.

Further Inquiry: If the client's case will proceed under chapter 13, determine whether the subject debt is a consumer debt for purposes of the co-debtor stay.

Practice Pointer: Individual clients may not be candid about co-debtors, especially if the obligation involves a family member. The client might be ashamed and assume that the bankruptcy can be kept secret if the codebtor isn't disclosed. Some clients might try to protect the other person by "keeping them out" of the bankruptcy. Divorced clients may likewise wish to hide the fact of the bankruptcy from the former spouse or may not realize that the domestic relations court cannot alter either spouse's legal liability on a debt.

Section 8

Schedule I: Current Income of Individual Debtor(s) Schedule J: Current Expenditures of Individual Debtor(s)

8.1. General Comments

Generally speaking, much of the information needed to complete Schedules I and J is also necessary for disclosures in other forms discussed in this Best Practices Working Paper and, therefore, the inquiry and document review are substantially similar.⁷⁴ For example, child support that the client receives must be listed here, in Form 22 and in Item 2 of the Statement of Financial Affairs. Attorneys should check for consistency across forms insofar as the information ought to be consistent;⁷⁵ inconsistency could give rise to investigation by the trustee or United States Trustee.

Note that Schedules I and J require information about spouses irrespective of whether the case will be filed by both spouses jointly or by just one of the spouses, unless the couple is separated. Attorneys should be prepared to deal with the resistance some non-filing spouses exhibit in providing information.

Regarding income, attorneys should be clear about whether the client is utilizing historical averages or projected income in supplying information for Schedule I. That information will likely be relevant to the trustee. By the same token, itemization of expenses that are out of the ordinary is useful.

Clients need to be clear on what is and is not income. Gifts should not be included, but regular contributions to the client's household should be included.⁷⁶ Remember also that clients may not be candid about all sources of income. They might also be less than forthcoming with expenses. Attorneys can look for clues to ferret out information, such as where a client is months behind on bills despite a showing of available cash when income less expenses is determined.

Finally, a note on the relationship between Form 22 and Schedules I and J is warranted. The six-month look-back period for "current monthly income" creates several distinct issues when determining whether a presumption of abuse arises and whether a debtor has projected disposable income. This determination depends on the definition of "current

⁷⁴ A key difference, however, is that Schedule I is based on an estimated average or projected monthly income, measured at the time the case is filed. By contrast, Form 22 income follows the "current monthly income" formula set out in the means test.

⁷⁵ The facts may dictate inconsistency. Again using the child support example, if the obligor stopped paying four months ago, Form 22 will include the two months that were paid, with the amount averaged over six months. Schedule I, on the other hand, will reflect the current circumstance, i.e., that no child support is currently being received. Expenses present an even starker example because Form 22 relies on figures from the Internal Revenue Service while Schedule J utilizes actual expenses.

⁷⁶ A declaration from the donor of gratuitous contributions may be in order for other purposes in the representation, such as plan feasibility or approval of reaffirmation agreements.

monthly income,” which has been colloquially described as being “not current, not monthly and not income” and it can create the appearance of monthly income that is not in fact available to the client. On the other hand, the “current monthly income” definition can create an opportunity for prepetition income manipulations by, for example, taking an unpaid leave of absence from work, refusing formerly welcomed overtime or quitting a job.⁷⁷

Thus, courts might look to Schedule I (and correlatively, regarding the means test’s expense formula, to Schedule J) to ascertain the individual debtor’s true income and expense circumstances.⁷⁸ However, there are decisions, mainly in chapter 13 cases, in which courts have held that they lack the authority to review Schedules I and J, a conclusion seemingly compelled by the Code’s plain language.⁷⁹

⁷⁷ *In re Johnson*, 346 B.R. 256, 264 (Bankr. S.D. Ga. 2006), citing Culhane & White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 Am. Bankr. L. Rev. 665, 689 (2005).

⁷⁸ *See, e.g., In re Edmunds*, 350 B.R. 636 (Bankr. D.S.C. 2006) (court rejected mechanical application of Form 22C); and *In re Kibbe*, 342 B.R. 411 (Bankr. D.N.H. 2006) (same).

⁷⁹ *See In re Farrar Johnson*, 353 B.R. 224 (Bankr. N.D. Ill. 2006), *In re Rezentos*, 368 B.R. 55 (Bankr. D. Haw. 2007), *In re Dalton*, 2007 WL 4554024, 2007 Bankr. LEXIS 4387 (Bankr. S.D.Miss. Dec. 19, 2007).

8.2. Schedule I: Current Income of Individual Debtor(s)

Marital Status; Dependents of Debtor and Spouse

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Inquire whether someone other than the client's spouse or children qualifies as a dependent of the client or review tax returns. Note the age and birth date for minor children. Review divorce judgments to determine allocation of dependent status.

Comments: Information provided should be consistent with Form 22. Generally, attorneys should be able to rely on what clients tell them regarding spouses and children. Do not disclose names of minor children.⁸⁰

Employment

Initial Inquiry and/or Document Review: Ask client or review payment advices.

Further Inquiry: Review payment advices.

Practice Pointer: If the client receives regular income from the operation of a business, profession or farm, that income should be listed at Line 7 and appropriate disclosure should be made at Item 1 of the Statement of Financial Affairs.

Line 1: Monthly gross wages, salary, and commissions

Initial Inquiry and/or Document Review: Review income tax returns or transcripts, payment advices, employment contracts and W-2 and 1099 forms.

Further Inquiry: Inquire whether the client's income is expected to change over the next year.

Line 2: Estimate monthly overtime

Initial Inquiry and/or Document Review: Review past pay information.

Further Inquiry: Inquire whether client anticipates any changes on a going-forward basis.

⁸⁰ 11 U.S.C. § 112.

Line 4: Payroll Deductions

Initial Inquiry and/or Document Review: Review payment advices..

Further Inquiry: Review income tax returns or transcripts for current and prior years, client's W-4 form. Review employment manuals or obtain a statement from the client regarding mandatory deductions.

Practice Pointer: Accurate information about current payroll deductions should be given regardless of the nature of the deductions. Whether or not a deduction should be included as part of the client's current monthly income or disposable income (either because of its type or amount) should be dealt with elsewhere (for example, Line 17).

Line 7: Regular income from operation of business or profession or farm

Initial Inquiry and/or Document Review: Review income tax returns including Schedule C and K-1 and Form 1120, business bank statements and profit and loss statements.

Further Inquiry: The form requires that a detailed statement be attached.

Practice Pointers: Attorneys should exercise professional discretion in obtaining relevant information and may want to consider listing the efforts undertaken including whether the client used the prior year's tax return or IRS Schedule C.

The District of Oregon has local forms that must be filed and which could be used by attorneys in other jurisdictions to meet the specificity requirement.

Line 8: Income from real property

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review lease/rental agreements, income tax returns and bank statement.

Comment: The client's interest in the property should be included in Schedule A and any lease/rental agreements should be included in Schedule G.

Line 9: Interest and dividends

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review income tax returns, broker statements and bank statements.

Comment: Be sure to make related disclosures in Schedule B and the Statement of Financial Affairs.

Line 10: Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above

Initial Inquiry and/or Document Review: Review divorce judgments and related documents, including modifications. Note birth dates of minor children.

Further Inquiry: Determine whether the obligor is currently making payments and whether there is any arrearage.

Practice Pointer: Where payments current, one is likely due to the client at time of filing. Attorneys should schedule and exempt that expected payment.

Line 11: Social security or government assistance

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review bank statements, payment advices or benefit award determination letters.

Comment: Note that the form requires that the client specify the source or type of payment. For purposes of Form 22, certain payments under the Social Security act are not included in "current monthly income."⁸¹

Line 12: Pension or retirement income

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review bank statements, income tax returns, payment advices or benefit determination award letters.

Comment: Include relevant information in Item 12 of the Schedule B.

⁸¹ See 11 U.S.C. § 101(10A)(B).

Line 13: Other monthly Income

Initial Inquiry and/or Document Review: Inquire regarding family assistance received on a routine basis, inheritances, life insurance benefits, annuities, disability income and structured settlements.

Further Inquiry: Family assistance should be documented.

Line 17: Describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of Schedule I

Initial Inquiry and/or Document Review: Ask client about expected bonuses, health issues (including childbirth), retirement, changes in job status and contingent benefits, such as workers' compensation or social security, which the client may begin to receive over the next year.

Further Inquiry: None

8.3. Schedule J: Current Expenditures of Individual Debtor(s)

Line 1: Rent or home mortgage payment (include lot rented for mobile home)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review current mortgage statement or lease agreement, bank records or receipts. Inquire whether taxes and insurance are included in the mortgage payment.

Practice Pointer: Because the amounts paid for rent or a mortgage will likely exceed \$600, these payments should be disclosed in Item 3 of the Statement of Financial Affairs.

Line 2: Utilities

Initial Inquiry and/or Document Review: Get an average from the client.

Further Inquiry: If expenses seem out of line with local standards, secure 12-month data from utility providers' websites or client's checking account.

Practice Pointer: Local practice and custom may bear on whether certain expenses are considered to be utilities, such as cell phones.

Line 3: Home maintenance (repairs or upkeep)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: None.

Practice Pointer: Local practice or custom may determine what can be properly listed. Items that might be included are association dues, garbage collection, security systems, yard work, pest control, wood or oil for heating the home and repair or replacement of older appliances and furniture. Remember that some clients may have put needed work off because of cost.

Line 4: Food

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Consider age and health of the client and any dependents, special dietary needs.

Practice Pointer: Commonly overlooked items include snacks, food eaten out, baby formula, lunch money for children, food for family pets and alcohol (but not cigarettes). In addition, the reality for many individual debtors is that some non-food items, usually trivial in amount, are purchased at the grocery store and will be captured in this Item.

Line 5: Clothing

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Consider age, health and occupational demands of the client and all dependents.

Item 6: Laundry and dry cleaning

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Consider age, health and occupational demands of the client and all dependents.

Practice Pointer: Clients commonly overlook this Item's expenses although everyone has them.

Line 7: Medical and dental expenses

Initial Inquiry and/or Document Review: Ensure client understands the full range of what this Item encompasses and ask client.

Further Inquiry: Review receipts and invoices from service providers. Note all health issues relating to the client and dependents.

Practice Pointer: Commonly overlooked items include deductibles and other charges not covered by insurance, eye exams, glasses, contact lenses and solution, over the counter medications, lab work, birth control, gym or health club memberships and items relating to special needs of the client or a dependent.

Line 8: Transportation (not including car payment)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review the average miles driven per year and compute with miles per gallon based on type of vehicle, age and condition. Inquire whether any major repairs are needed. Inquire whether any personal property taxes are due.

Comments: Clients commonly forget about oil changes, repairs, tires and other maintenance issues, as well as registration, titling and inspections. There are also transportation expenses unrelated to cars, such as taxi, bus, train and subway fares.

Line 9: Recreation, clubs and entertainment, newspapers, magazines, etc.

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review source documents, if any.

Comment: Local practice and custom may determine the reasonableness of expenses.

Practice Pointer: Commonly overlooked expenses include those relating to hobbies, sporting events, books, club dues, vacation travel, movies (whether bought, rented or seen at the theater), gambling (including lotteries, casinos, bingo, etc.) and children's activities such as scouting, summer camp, sports participation, extracurricular activities and gifts for birthday parties.

Line 10: Charitable contributions

Initial Inquiry and/or Document Review: Ask client, including questions about tithing and contributions to recognized charities and neighborhood or community organizations.

Further Inquiry: Review income tax returns, pay stubs.

Comment: Be sure to include the relevant information in Form 22 and Item 7 of the Statement of Financial Affairs and check for consistency.

Line 11: Insurance (not deducted from wages or included in home mortgage payments)

Initial Inquiry and/or Document Review: Ask client about life, health, auto, renter, burial and other insurance.

Further Inquiry: For homeowners' insurance, review the policy, statement and declaration page, or the client's most recent invoice.

For life insurance, review the policy and the last statement of the issuer. Review payment advices reflecting any deduction for premiums.

For health insurance, review payment advices reflecting deductions for premiums and review current statement from the provider.

For auto insurance, review a current statement from the insurance provider or the client's most recent invoice.

Practice Pointer: The attorney should note whether life insurance has a cash or surrender value and make the appropriate disclosure in Item 9 of Schedule B. Irrespective of type, if married clients are filing a joint petition, Schedule B should reflect whether the clients are the beneficiaries under their spouses' policies at Item 20.

Line 12: Taxes (not deducted from wages or included in home mortgage payments)

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review prior year's tax returns or transcripts, statements from taxing authorities. For property taxes not included in the client's mortgage payment, review tax statements or, if available, check the taxing authority's website. If client is self-employed, review Form 1040ES.

Comment: If the client is not receiving a paycheck and is self-paying, attorneys should be able to rely on the client, at least going forward. When looking back, review Form 1040 ES and copies of checks to determine the amount paid. Back taxes owed also need to be listed on Schedules D, E or F, or a combination thereof.

Line 13: Installment payments

Initial Inquiry and/or Document Review: Review promissory notes, security agreements, installment sales contracts and payment coupon books for all secured debts paid in installments. The commentary in Section 5, Schedule D of this Working Paper also outlines the scope of the initial inquiry for this Item.

Further Inquiry: In a chapter 7 case, installment payments included here should be consistent with property to be retained on the statement of intention.

Practice Pointer: Inclusion of installment payments on this Item may vary by district and by chapter. Determine local practice standards for completion of this Item.

Line 14: Alimony, maintenance and support paid to others

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Review divorce judgment and any modifications, tax returns.

Practice Pointer: Determine whether there is any arrearage and list that on Schedule E or Schedule F, as the case may be.

Line 15: Payments for support of additional dependents not living at your home

Initial Inquiry and/or Document Review: Determine if client makes payments of this type and, if so, identity and relationship of recipient and frequency, regularity and amount of payments.

Further Inquiry: Determine if the recipient of the payments is actually a “dependent” under applicable legal standards (parent, able-bodied, non-student adult child, disabled relative, etc.)

Practice Pointer: Determine local practice standards for completion of this Item.

Line 16: Regular expenses from operation of business, profession or farm (attach detailed statement)

Initial Inquiry and/or Document Review: Review income tax returns including IRS Schedule C and K-1 and Form 1120, business bank statements and profit and loss statements.

Further Inquiry: The form requires that a detailed statement be attached.

Practice Pointers: Attorneys should exercise professional discretion in obtaining relevant information and may want to consider listing the efforts undertaken including whether the attorney used the prior year’s tax return or Schedule C.

The District of Oregon has local forms that must be filed, which could be used by attorneys in other jurisdictions to meet the specificity requirement.⁸²

Line 17: Other

Initial Inquiry and/or Document Review: Inquire what the expense item is, the amount, frequency and regularity.

Further Inquiry: Confirm responses with checking account register or other document review.

Practice Pointer: This catch-all item is a good place for things like school lunches, pet food and care, auto registration fees and related items. Each item should be clearly

⁸² The District of Oregon form is “Exhibit D-2” and is available at [http://www.orb.uscourts.gov/orb/Documents.nsf/\(in\)?OpenView](http://www.orb.uscourts.gov/orb/Documents.nsf/(in)?OpenView).

labeled and pro rated to the monthly amount. Confirm local practice as some jurisdictions frown on inclusion of items such as gifts and savings for chapter 13 cases.

Section 9

Statement of Financial Affairs

Item 1: Income from employment or operation of business

Initial Inquiry and/or Document Review: For employment income, obtain and review income tax returns, W-2's, 1099's, IRS Schedule C and year-to-date reports, if available. If the client is an individual and is in business, or is the sole or controlling owner of a limited liability company, corporation or other entity, obtain and review tax returns for the entity, but disclose information for the client only. Disclose information for: a) the current year to date; and b) the two calendar years immediately preceding the current year.⁸³

Further Inquiry: As needed, depending on results of minimum investigation. Obtain statements or other documents confirming all income streams from employment, business or trade.

Practice Pointers: Confirm that information on this item matches source documents. Retain work copies of source documents showing internal calculations and other work product from which information was derived or that substantiates how counsel chose to disclose it. Compare information disclosed on this Item with information provided on Schedules I and Form 22⁸⁴ for consistency to the extent the information ought to be consistent.⁸⁵

⁸³ In *United States v. Naegele*, 341 B.R. 349 (D.D.C. 2006), the court held that the instructions to this Item were so “fundamentally ambiguous” that the debtor’s (a lawyer) responses were insufficient to support criminal charge under 18 U.S.C. § 153(3). The debtor had disclosed the gross income that the debtor, as an individual, had received *from* the business (gross from business operations less expenses) rather than the gross income *of* the business. The court observed that “the language of the question suggests that the debtor is, as defendant maintains, supposed to report his ‘take home’ income from the operation of his business.” *Id.* at 356-57. Although the law practice was a sole proprietorship and the gross of the business operations was reported on Schedule C, the court concluded that the gross income the individual received *from* the business, as shown on Line 12 of Form 1040, was the proper amount to be disclosed on the Item 1 of the SoFA.

⁸⁴ For convenience, the Best Practices Working Group uses “Form 22” to refer to Form 22A (chapter 7), Form 22B (chapter 11) and Form 22C (chapter 13).

⁸⁵ “Income” is not necessarily a uniform term across the Statement of Financial Affairs, Schedule I and Form 22. For example, Form 22 has a six-month lookback, irrespective of when a case is commenced, and the income is averaged. The SoFA, on the other hand, divides income by calendar year. Thus, a client who earned \$2,000 per month, but who became unemployed on February 1 and filed a bankruptcy case in March would list income differently in the various forms. The SoFA would list \$4,000 for the current year and \$24,000 for the prior calendar year. By contrast, the client’s “current monthly income” on Line 3 of Form 22 would be \$1,333.33 (\$2,000 x 4 months / 6), which, on a year-to-date basis, differs from the SoFA. Schedule I would be different still; in the simple hypothetical, income would be zero.

Item 2: Income other than from employment or operation of business

Initial Inquiry and/or Document Review: For income other than from employment, ask the client about social security, SSI, pensions, AFDC, food stamps, child support, investments, rental income and any other income streams. Review the income tax returns for prior years' refunds,⁸⁶ rental income, capital gains, pension distributions and any other types of income. Disclose information for a) the current year to date; and b) the two calendar years immediately preceding the current year.

Further Inquiry: As needed, depending on results of minimum investigation. Obtain statements or other documents confirming all income streams.

Practice Pointers: Confirm that information on this item matches source documents. Retain work copies of source documents showing internal calculations and other work product from which information was derived or that substantiates how counsel chose to disclose it. Compare information disclosed on this Item with information provided on Schedules I and J and Form 22 for consistency to the extent the information ought to be consistent.⁸⁷

Item 3: Payments to creditors

Initial Inquiry and/or Document Review: Counsel should obtain and review checking account register(s) and bank statements for the last 12 months. For Item:

- 3(a) (primarily consumer debts),⁸⁸ look for aggregate payments in excess of \$600 within the last 90 days;
- 3(b) (not primarily consumer debts), look for aggregate payments in excess of \$5,475⁸⁹ within the last 90 days;
- 3(c) look for and ask client if any relatives or other specifically defined categories of per se "insiders," per § 101(31), are creditors.

Counsel should ask clients if the client has: a) granted any liens or security interests to any creditor within the past 90 days including real estate refinance transactions; and b) used new credit to pay old debt.

Further Inquiry: Counsel should request copies of cancelled checks, receipts or money orders documenting all payments where the client's finances are complex or where the

⁸⁶ See, e.g., *Jensen v. Groff (In re Groff)*, 216 B.R. 883 (Bankr. M.D. Fla. 1998) (discharge denied where, among other things, debtor failed to disclose \$50,000 tax refund received).

⁸⁷ See n.85, *supra*.

⁸⁸ See Section 1.4.3, *supra*, for a discussion of "primarily consumer debts."

⁸⁹ The preference floor for transfers on debts that are not primarily consumer debts is subject to triennial adjustment pursuant to § 104(b). The last such adjustment occurred in 2007.

information provided by the client suggests that the attorney should probe more deeply. The latter is especially true where transferees are or may be insiders.

Comment: Preliminary determination of insider status can be particularly troublesome and fact intensive. Collier's suggests that the scope of counsel's inquiry regarding insiders should be:

[T]he attorney should probe the debtor or its principals to determine who might fall within this definition. Indeed, the attorney has a general obligation to probe the debtor regarding transactions and transfers in general, but must be particularly diligent in probing with regard to transactions with insiders. This is necessary not only because debtors or their principals often attempt to conceal such transactions, but also because of debtors' obligations to their creditors. Similarly, the attorney should also probe for facts relating to affiliates, board members, and creditors.⁹⁰

Adding to the complexity of this inquiry is the fact that although "insider" is a defined term,⁹¹ it does not lend itself to a precise definition that can be easily applied to the facts of the case at hand. The definition extends only to specific categories of "per se" insiders and the case law has expanded the meaning of "insider" beyond the entities expressly mentioned in the statute.⁹² Accordingly, the courts will look at the nature of the relationship between the debtor and the other person, including whether the relationship puts the person in a position to exercise some degree of control or influence over the debtor.⁹³ As the case law demonstrates, persons who are "per se insiders" that is, a

⁹⁰ *Collier on Bankruptcy*, 15th Ed. Revised, ¶ 101.31.

⁹¹ Section 101(31) of the Code expressly includes relatives, officers, partners and other specific entities within the term, but that section's use of "'insider' includes" means that the list presented is not exhaustive. *See* 11 U.S.C. § 102(3) ("includes" is not a limiting term). The legislative history of the 1978 Code defines an insider as a person or entity with "a sufficiently close relationship with the Debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the Debtor." H.R. Rep. 95-595, 1978 U.S.C.C.A.N. 5963, 6269 (1977).

⁹² *See Kunz v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072 (10th Cir. 2007).

⁹³ The inquiry into whether a person is an insider focuses on the nature of the relationship between the purported insider and the debtor. *Wake Forest v. Transamerica Title Ins. Co. (In re Greer West Inv. Ltd. P'ship)*, 1996 WL 134293, 1996 U.S. App. LEXIS 8495 (9th Cir. Mar. 25, 1996). Accordingly, the courts will look at the nature of the relationship, including "whether the relationship in question is fraught with the same potential for improper influence as the relationships specifically enumerated in the statute." *Id.* citing *In re Gilbert*, 104 B.R. 206, 210 (Bankr. W.D. Mo.1989). For example, one court has noted that although relatives do not necessarily exercise any "formal" control over the debtor's affairs, Congress nonetheless included relatives as insiders "because of the high probability that transactions between relatives will be motivated by affinity rather than independent business judgment." *Three Flint Hill Ltd. P'ship v. Prudential Ins. Co. (In re Three Flint Hill Ltd. P'ship)*, 213 B.R. 292, 299-300 (D. Md. 1997). The court continued: "Clearly, then, Congress did not intend the insider determination to rest on a finding of actual control, but a finding that, given the relationship and conduct of the parties, the relevant transaction or arrangement was entered into based on that relationship rather than an independent purpose or motivation." *Id.* at 300. *See also Freund v. Heath (In re McIver)*, 177 B.R. 366, 370 (Bankr. N.D. Fla. 1995) ("A business, professional, or personal relationship, that compels the conclusion that the transferee

person whose relationship with the client is expressly included in the § 101(31) definition, may in the end be found not to be insiders. Moreover, because the question of whether someone is an insider is highly fact dependent, it has produced answers that seem counterintuitive at first blush. There are decisions, for example, applying the “insider” label to former spouses,⁹⁴ live-in partners⁹⁵ and attorneys,⁹⁶ while other cases show that first-degree relatives,⁹⁷ directors⁹⁸ and current spouses⁹⁹ may not be insiders.

Practice Pointers: Ordinary course payments, such as an individual’s house payment, can be disclosed in summary fashion, such as “ordinary monthly mortgage payment of \$1,500.”

Rather than spend significant time and resources on making anything more than a preliminary determination as to insider status, a better approach is to simply err on the side of disclosure and include language such as “potential insider” or “insider status uncertain” in order to avoid making an admission of the recipient’s status as an insider or non insider.

Attorneys need to balance the requirements of accuracy against the practicalities of preparing bankruptcy documents when it may take several weeks or even months between the initial draft of the schedules and other documents and commencement of the case. The purpose of Item 3 is to enable the trustee to discern preferences and fraudulent conveyances. Consequently, in the case of repetitive regular payments to creditors scheduled, it is acceptable to note generally that the debtor has made regular payments in the ordinary course to creditors scheduled. In choosing this method of disclosure, the attorney should be satisfied that these are regular payments and that the payments were made in the ordinary course. In most consumer cases such payments will include the mortgage payment, the car payment, utilities payments, and, to the extent that they are regular, monthly credit card payments.

could be able to gain an advantage such as that attributable simply to affinity, would result in the transferee being classified as an insider.”).

⁹⁴ See, e.g., *Matter of Holloway*, 955 F.2d 1008 (5th Cir.1992) (ex-wife was an insider).

⁹⁵ *In re McIver*, 177 B.R. 366 (B.N.D.Fla.1995) (live-in girlfriend had relationship “close enough to gain an advantage attributable simply to affinity”) quoting *In re Friedman*, 126 B.R. 63 (9th Cir. B.A.P. 1991). Compare *Hunter v. Dupuis (In re Dupuis)*, 265 B.R. 878 (Bankr. N.D. Ohio 2001) (debtor and former spouse continued to share marital home; court held that that relationship, standing alone, did not make former spouse an insider).

⁹⁶ See, e.g., *In re Daddy's Money of Clearwater, Inc.*, 187 B.R. 750 (M.D. Fla.1995) (debtor's attorney was an insider with respect to funds the attorney disbursed to himself from money held in trust for debtor). As one court recently noted, however, where attorneys are held to be insiders, “that status has been imposed because of a relationship with the debtor that transcended the normal attorney-client boundaries.”

Glassman v. Heimbach, Spitko & Heckman (In re Spitko), 2007 WL 1720242, *10, 2007 Bankr. LEXIS 2050, *27, (Bankr. E.D. Pa. June 11, 2007) (citations omitted).

⁹⁷ See, e.g., *In re Anderson*, 165 B.R. 482 (Bankr. D. Or.1994) (debtor's brother, as representative of their mother’s estate, obtained a state court judgment lien against debtor; brother was not an insider due to actual hostility between him and the debtor).

⁹⁸ See, e.g., *In re Kunz*, 335 B.R. 170 (10th Cir. B.A.P. 2005) (director “emeritus” who did not have any decision making authority, was not a *per se* insider).

⁹⁹ See, e.g., *In re Busconi*, 177 B.R. 153 (Bankr. D. Mass.1995) (debtor’s wife was not an insider where bitter divorce was pending at the time of the transfer).

The responses to the Item 3 questions present powerful opportunities for pre-bankruptcy planning in terms of the timing of the filing of the case. Once any such payments or transfers are identified, the filing date of the petition can be accelerated or delayed, depending on the identity of the transferee and the client's goals.

Item 4: Suits and administrative proceedings, executions, garnishments and attachments

Item 4(a): Suits and administrative proceedings

Initial Inquiry and/or Document Review: Ask client about lawsuits; obtain and review lawsuit documents from client to attempt to determine status of each action. Include all lawsuits in which client is a named party, regardless of status.

Further Inquiry: If client has numerous suits, conduct a search of local court records to ensure completeness and accuracy of basic information provided by client. Consider searching the court records of states in which the client has lived, owns real property or conducted business. Contact and confer with counsel who defended suits for the client. Hire counsel in other jurisdiction(s) to conduct a lawsuit records search to confirm accuracy of information for both this Item and listings on creditor schedules.

If the lawsuit or administrative proceedings relate to environmental laws, disclose such matters in Item 17 of the SOFA as well or make a short notation here cross referencing the disclosure.

Practice Pointers: If judgment has been entered in prepetition lawsuits in a judgment lien state and client owns real estate, obtain a title search to confirm which judgments are liens for lien avoidance purposes or advise client of this option. Do not overlook other types of lawsuits such as administrative proceedings, divorce, child support enforcement, criminal cases or others.

If the client is a plaintiff, list such claims on Schedule B as well. If the client is a defendant, list the plaintiff as a creditor on Schedule D, E or F, as appropriate.

Item 4(b): Executions, garnishments and attachments

Initial Inquiry and/or Document Review: Ask about attachments, levies, garnishments and any other prepetition judgment collection activity. Obtain and review documents from client to determine status of lawsuits and judicial collection activity. Review paycheck stubs, bank account statements and related documents to confirm status of garnishments or levies.

Further Inquiry: Update the status of prepetition collection activity as case preparation goes through revisions.

Practice Pointers: For many clients with primarily consumer debts, the garnishments and bank account levies are small amounts and the clients' records are poor. Counsel needs to balance the cost of obtaining more information with the benefit of that information to the administration of the case. In addition, collection activity will likely continue between the first meeting with the client and case commencement. The cost of updating the bankruptcy forms to reflect reality on the date of filing needs to be weighed against the general duty of a reasonable disclosure and local practice and custom should be considered. If a minimal disclosure is made due to the cost/ benefit of obtaining accurate information on the date of filing, this should be stated.

Item 5: Repossessions, foreclosures and returns

Initial Inquiry and/or Document Review: Ask client about all repossessions, foreclosures or voluntary returns within the last year.

Further Inquiry: Obtain a copy of any deficiency notice or notice of disposition.

Practice Pointers: Make sure the creditor is listed correctly on Schedule D, E or F, as the case may be. Consider if any of the information disclosed here gives rise to any claims under § 544(b) and the applicable reach-back period under the law of the attorney's jurisdiction and consider this in overall case planning.

Item 6: Assignments for the benefit of creditors

Initial Inquiry and/or Document Review: Counsel should ask the client about each Item:

- 6(a) ABCs made within 120 days immediately preceding case commencement
- 6(b) Property in the hands of custodian, receiver or court-appointed official within one year immediately preceding case commencement

Further Inquiry: If any such proceedings are identified, obtain and review all documents in client's possession. For Item 6(a) disclose the fact of the assignment along with the fiduciary's contact information and a general description of the property that is the subject of the assignment. For Item 6(b), the same basic information should be provided, with the property listing being derived from the order of appointment. Disclose whether the subject of the ABC or other proceeding is a business or an individual.

Practice Pointers: Confer with counsel for the assignee or other fiduciary and obtain available records of the proceeding, if court-supervised. Summarize the status of the proceeding for response to this Item.

Item 7: Gifts

Initial Inquiry and/or Document Review: Ask if, during the past year, the client made gifts over \$200 in value to a single person or charitable contributions over \$100. Obtain and review checking account registers or other records.

Further Inquiry: Obtain and review records of cash gifts including tax returns.

Practice Pointers: Check for consistency with monthly cash gifts on Schedule J. Depending on information disclosed by client, consider implications of §§ 544(b) or 548 in terms of overall case planning.

Item 8: Losses¹⁰⁰

Initial Inquiry and/or Document Review: Ask the client if any losses due to theft, casualty, gambling or other circumstance have been sustained in the past year. If so, follow up by requesting and reviewing records relating to theft losses (police reports), casualty losses (insurance claims) and gambling losses.

Further Inquiry: Obtain and review records regarding losses directly from third parties.

Practice Pointers: Many clients are embarrassed about gambling losses and will be reluctant to admit this information.

Insurable losses or those giving rise to a right to sue should be disclosed in Schedule B.

This Item also requests information on losses “since the commencement of the case.” The propriety and legal basis of this is unclear and this paper makes no comment on this issue.

Item 9: Payments related to debt counseling or bankruptcy

Initial Inquiry and/or Document Review: Ask client. Disclose dates and amounts of payments to the attorney’s law firm, other law firms, credit counselors, the credit counseling certificate provider, petition preparers and credit repair agencies. Examine client’s checking account register to confirm dates and amounts.

¹⁰⁰ Item 8 also requests information “since the commencement of the case.” The propriety and legal basis of this is unclear and the Best Practices Working Group makes no comment on the issue.

Further Inquiry: Obtain and review records regarding these payments directly from third parties.

Practice Pointers: If a client has paid amounts to another bankruptcy lawyer in the past 12 months this could be indicative of attorney shopping. This fact pattern occurs where a client:

- retains Attorney A and makes a truthful disclosure of financial or property matters;
- receives advice and counsel regarding the effect of the bankruptcy law on the issue;
- does not like the advice, counsel or consequences of the future bankruptcy filing
- still desires bankruptcy relief;
- hires Attorney B and fails to disclose the matter(s) on which Attorney A provided the undesired advice;
- files a case with Attorney B.

If Attorney A is a bankruptcy attorney, Attorney B should consider obtaining a waiver of the attorney-client privilege, speak to Attorney A and confirm that the information that the client provided consistent information to both attorneys, or that there is a reasonable explanation for any discrepancy.

Item 10: Transfers

Initial Inquiry and/or Document Review: Counsel should explain in plain language the meaning and scope of a “transfer” under § 101(54) of the Code. After explaining the scope of this concept in detail, counsel should inquire about items transferred outright, gifted, traded, sold, junked, disposed of in any other fashion or pledged as collateral (any type of a mortgage transaction would fall within this definition). Counsel is seeking information about the following:

- 10(a): All property transferred, other than in the ordinary course, within two years immediately preceding case commencement
- 10(b): Property transferred within ten years immediately preceding case commencement to a self-settled trust or similar device of which the client is a beneficiary

Ask the client to provide all documents evidencing such transfers, such as bills of sale, closing statements, deeds, security instruments or divorce decrees.

Further Inquiry: Obtain and review records regarding these transactions directly from third parties. If a client has filed a prior bankruptcy case within the past ten years and documents are readily available, retrieve and review the prior schedules to see whether items listed as assets in the prior bankruptcy are no longer in the client’s possession.

Practice Pointers: In addition to the transactions themselves, also inquire about the disposition of the proceeds from these transactions. The disposition of the proceeds may lead to other matters that should be disclosed on other parts of the SoFA. Many state fraudulent transfer statutes have a reach back period longer than the 2 years of § 548. If your state has such a statute, expand the scope of your inquiry to match the look back period of your state’s fraudulent transfer laws, due to the applicability of § 544(b) of the Code. If there are troublesome transfers, consider delaying the filing of the case until the look back period expires.

The ten-year look back is necessitated by the new provisions of a) § 548, which allows the avoidance of certain transfers; and b) § 522(o), which provides for the denial of homestead exemptions if the increase in value of the exemption was created within ten years of the petition. Another BAPCPA change to § 548 is the addition of a ground to avoid a transfer as fraudulent where the debtor made a transfer, or incurred an obligation, to or for the benefit of an insider “under an employment contract and not in the ordinary course of business.” Such transfers should be noted here and, if applicable, under Item 23.

Item 11: Closed bank accounts

Initial Inquiry and/or Document Review: Ask the client and request final statement for accounts in question. Review all relevant information, documents and account statements.

Further Inquiry: Obtain and review account statements and related information.

Practice Pointers: Counsel should confirm if the records (registers, statements and digital, i.e., Quicken, etc.) from closed bank accounts are available or not. For a client who has been in business, this is particularly important.

Item 12: Safe deposit boxes

Initial Inquiry and/or Document Review: Ask the client about any safe deposit boxes in the client’s name or in which the client had property in the past year. Request that the client provide all relevant information, including a written inventory of contents.

Further Inquiry: Review client’s written inventory and consider a personal review of contents, including documents. Inquire about and determine the identity and value of contents.

Practice Pointers: Although this Item includes a requirement to provide a description of the safety deposit box’s contents, appropriate disclosure should also be made in the schedules. For example, if the box contains a life insurance policy under which the client

is the beneficiary, the client's interest in the policy should be disclosed at Item 20 of Schedule B. If the client holds in a safe deposit box property belonging to a third party, make appropriate disclosure in Item 14 of the SoFA.

Item 13: Setoffs

Initial Inquiry and/or Document Review: Ask client about any setoffs against accounts. Request all documents related to any setoff.

Further Inquiry: Although it is the fact of the setoff, rather than its propriety, that needs to be disclosed, counsel may need to obtain and review documents relating to the setoff.

Practice Pointers: If the client owes child support or any debt to a government entity, be on guard for a setoff against money the government owes the client. Tax refunds are a common, but by far not the only, example.¹⁰¹

Setoffs can also give rise to preference issues. Analyze any setoff transactions for preference implications and disclose in Item 3 if appropriate.

Item 14: Property held for another

Initial Inquiry and/or Document Review: Ask the client about property that the client holds, controls or has physical possession of but is owned someone else. Pay particular attention to bank or financial accounts in the client's name but containing the funds of children or elderly relatives and vehicles that may be titled in the client's name but which the client refers to as belonging to someone else, usually a child, who may also be making the payments.

Further Inquiry: If ownership of the item is evidenced by a title certificate, review the title certificate to verify the client does not have an ownership interest.

Practice Pointers: Pay attention to non-titled personal property (usually household goods) that belongs to: a) a nonfiling spouse, live in, or significant other; b) other relatives; c) teenage or adult children; d) any other person. Consider making a minimal disclosure of all non-titled personal property in possession of the client or located at the client's residence that the client does not own as a prophylactic measure.

¹⁰¹ See, e.g., *United States v. Maxwell*, 157 F.3d 1099 (7th Cir. 1998) (Small Business Administration entitled to offset funds owed debtor based on contract awarded by U.S. Navy); *Small v. County of Hennepin (In re Small)*, 18 B.R. 318, 319 (Bankr. D. Minn. 1982) (allowing setoff of income and property tax refund for delinquent child support payments); *Barfknecht v. County of Hennepin*, 15 B.R. 463 (Bankr. D. Minn. 1981) (same).

If vehicles are titled in the client's name but are actually owned by others, consider the effect of state title statutes on the determination of ownership and the implications such ownership for the case and the client's goals.

Item 15: Prior address of debtor

Initial Inquiry and/or Document Review: Ask the client about prior residences.

Further Inquiry: Cross-check addresses from old creditor statements or loan documents.

Practice Pointers: Cross-check with addresses on credit report(s).

Item 16: Spouses and former spouses

Initial Inquiry and/or Document Review: If the client resides or resided in a community property state or territory,¹⁰² ask if a divorce occurred in the preceding eight years. If so, request a copy of the decree to determine the nature of the property settlement.

Further Inquiry: Contact divorce counsel to obtain decree or confirm necessary information.

Practice Pointers: None

Item 17: Environmental information

Initial Inquiry and/or Document Review: Ask client about the existence of:

- Sites for which the client received a governmental notice of violation of environmental law;
- Sites for which the client provided notice to a governmental unit of Release of Hazardous Material; and
- Any judicial or administrative proceedings under any environmental law to which the client is or was a party.

For any such sites, request that the client provide all notices and related documents including any lien notices or filings.

¹⁰² The community property limitation derives expressly from the Statement of Financial Affairs, which, according to the form, includes Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington and Wisconsin.

Further Inquiry: Contact the governmental entities in question to confirm status and accuracy of information provided by the client. Contact client's counsel of record in all such proceedings to determine status for proper disclosure.

Practice Pointers: Confirm that the governmental units or plaintiffs are provided notice of the case by listing them on Schedule D or F. For any judicial or administrative proceedings, request the relevant documents and disclose here and in Item 4(a).

If the client has been in any sort of business that may have these issues (gas station, lumber mill, manufacturing, etc.) and client or counsel even remotely suspects the existence of environmental issues, give notice to appropriate authorities anyway.

Item 18: Nature, location and name of business

Initial Inquiry and/or Document Review: Ask client and note that the information required of this Item is particularized on the SoFA, which will guide the questioning of the client. Obtain and review documents relating to the interests disclosed and client's tax returns and related forms and schedules.

Further Inquiry: Conduct an Internet search of each state in which the client has conducted business in the past six years. Check the Secretary of State or other business records custodian for each state. Print or PDF the information that is located. Contact any attorneys that set up any such businesses to confirm information provided by the client.

Attorneys should determine which of the business entities identified in the initial inquiry are single asset real estate as defined by § 101(51B) and disclose as required in Item 18.b.

Practice Pointer: For individual clients, the Mary Kay, Tupperware or AmWay-type of business interests would be included.

Items 19 through 35 are to be completed only where the debtor is a corporation or partnership or, if the debtor is an individual, where the debtor is or has been, with six years immediately preceding the commencement of the bankruptcy case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership, a sole proprietor, or self-employed in a trade, profession, or other activity, either full- or part-time.

Item 19: Books, records and financial statements

Initial Inquiry and/or Document Review: Ask client about:

- Bookkeepers and accountants that kept or supervised the keeping of the client's books within two years immediately preceding case commencement;
- Firms or individuals that audited the client's books or prepared a financial statement of the client within two years immediately preceding case commencement;
- Firms or individuals in possession of the client's books at the time of commencement; and
- Entities to whom the client issued a financial statement within two years immediately preceding case commencement.

Ask the client to provide copies of audit reports or financial statements. Ask the client to describe specifically which records are in possession of which bookkeeper or accountant.

Further Inquiry: Confer with bookkeepers and accountants to confirm accuracy of information provided by the client, obtain copies of financial statements and to confirm possession of records.

Practice Pointers: Obtain and review financial statements. Contrast financial statement information with information in bankruptcy papers for consistency. Ask the client to clarify or explain any discrepancies, depletion of assets or other irregularities. Ask specifically about Schedule D creditors whose debts were incurred during the past two years. Most secured creditors require a financial statement.

If records are unavailable, damaged, inaccessible or otherwise not readily available, document and explain the circumstances and compare those circumstances to the standards in § 727(a)(3).

Item 20: Inventories

Initial Inquiry and/or Document Review: Ask client about prior two inventories taken of the client's property. Inquire regarding the name and address of the person in possession of the records for each inventory and obtain and review those records.

Further Inquiry: Compare inventory records with information on Schedule B and understand any disparities.

Practice Pointers: Losses, such as through theft or fire, and claims based on losses, should be listed in Schedule B at Item 21.

Item 21: Current partners, officers, directors and shareholders

Initial Inquiry and/or Document Review: Ask client and management regarding:

- If the client is a partnership, the persons who currently have an ownership interest in the partnership and the nature and percentage of each such interest;¹⁰³
- If the client is a corporation, the persons currently serving as officers or directors and any stockholder who owns or controls five percent or more of the client's voting or equity securities.

Request, obtain and review current governing documents and recent minutes relevant to type of entity (articles, bylaws, operating agreement, etc.).

Further Inquiry: Contact corporate counsel or counsel who created the entity to confirm accuracy of information provided by the client.

Practice Pointers: The SoFA seems dated insofar as it omits limited liability companies and other forms of business of increased use in recent years. Counsel should consider making similar inquiry and disclosure for these business forms despite the SoFA's express reference to only partnerships and corporations.

Item 22: Former partners, officers, directors and shareholders

Initial Inquiry and/or Document Review: Ask client and management about:

- If the client is a partnership, each partner that withdrew from the partnership within the prior year and the date of each withdrawal;¹⁰⁴ former partners, officers and members if the client is a partnership (including members if the client is an LLC); and
- If the client is a corporation, officers and directors whose relationship with the client terminated within the prior year¹⁰⁵ and the date of each termination. Former officers, directors and shareholders if the client is a corporation.

Request, obtain and review current and past governing documents and past minutes relevant to type of entity (articles, bylaws, operating agreement, etc.) and documents specifically relating to the withdrawal or termination.

¹⁰³ The SoFA refers to "members" of the partnership; that term, however, is more accurately used to describe interests in limited liability corporations.

¹⁰⁴ *See id.*

¹⁰⁵ It is unclear why there is a comma in the phrase "list all officers, or directors whose relationship with the corporation terminated" in Item 22 because its presence, according to the plain language, suggests that the termination language does not apply to officers. That reading, however, is inconsistent with the apparent purpose of Item 22.

Further Inquiry: Contact corporate counsel to confirm accuracy of information provided by the client.

Practice Pointer: The SoFA seems dated insofar as it omits limited liability companies and other forms of business of increased use in recent years. Counsel should consider making similar inquiry and disclosure for these business forms despite the SoFA's express reference to only partnerships and corporations.

Item 23: Withdrawals from a partnership or distributions by a corporation

Initial Inquiry and/or Document Review: Ask client and management about all withdrawals or distributions given or credited to insiders within the prior year. Request, obtain and review current and past financial records of such withdrawals or distributions.

Further Inquiry: Confirm veracity of information provided by the client with client's accountants or bookkeepers.

Practice Pointers: The SoFA seems dated insofar as it omits limited liability companies and other forms of business of increased use in recent years. Counsel should consider making similar inquiry and disclosure for these business forms despite the SoFA's express reference to only partnerships and corporations.

In a small, closely held entity, pay careful attention to withdrawals by the owner(s), majority or controlling shareholder, directors or officers (who may all be the same person(s)). Withdrawals could include W-2 wages, 1099 income, shareholder or other distributions or loan repayments.

The information gleaned from this inquiry may provide the basis for claims against the recipients (transferees) who are insiders. These will typically be the same persons who are making the decision to file the case on behalf of the entity and there is potential for a clash of the insiders' duties to the entity vs. their self interest. Do not overlook new § 548(a)(1)(B)(IV), added by BAPCPA, which adds as a ground for fraudulent transfer avoidance a transfer made, or obligation incurred, to or for the benefit of an insider "under an employment contract and not in the ordinary course of business." Such transfers or obligations should be noted here and also under Item 10.

Item 24: Tax consolidation group

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Confirm with accountant.

Practice Pointers: None.

Item 25: Pension funds

Initial Inquiry and/or Document Review: Ask client.

Further Inquiry: Confirm.

Practice Pointers: None.

Section 10

Form 22A: Chapter 7 Statement of Current Monthly Income and Means-Test Calculation

10.1. Introduction

Official Form 22A (formerly known as B22A) is one of three forms created after the enactment of BAPCPA that are intended to implement new Code provisions dealing with consumer debtors' income and the application of the means test to debtors' cases. As explained in the 2005 Committee Note:

Among the changes introduced by [BAPCPA] are interlocking provisions defining "current monthly income" and establishing a means test to determine whether relief under Chapter 7 should be presumed abusive. Current monthly income ("CMI") is defined in § 101(10A) of the Code, and the means test is set out in § 707(b)(2). These provisions have a variety of applications. In Chapter 7, if the debtor's CMI exceeds a defined level the debtor is subject to the means test, and § 707(b)(2)(C) specifically requires debtors to file a statement of CMI and calculations to determine the applicability of the means test presumption. In Chapters 11 and 13, CMI provides the starting point for determining the disposable income that must be contributed to payment of unsecured creditors. Moreover, Chapter 13 debtors with CMI above defined levels are required by § 1325(b)(3) to complete the means test in order to determine the amount of their monthly disposable income, and pursuant to § 1325(b)(4), the level of CMI determines the "applicable commitment period" over which projected disposable income must be repaid to unsecured creditors.

This section discusses Form 22A, which was created for use in chapter 7 cases (with Forms 22B and 22C designed for chapters 11 and 13, respectively).

Notably, of all the sections in this Working Paper, none have as many ambiguities, uncertainties and unanswered questions as does Form 22A. Not only is Form 22A new, a result of BAPCPA, but it is also grounded on statutory language that most admit is not well crafted. As decisions emerge that interpret the various words and phrases relevant to Form 22A, the result has been judicial conflict.¹⁰⁶ Clear guidance remains elusive.

¹⁰⁶ For a discussion of various means testing issues, including where courts are divided, see David W. Allard & Katherine R. Catanese, *The Means Test: Seeing Clearly the CMI*, 26 Am. Bankr. Inst. J. 12 (Feb. 2007); David W. Allard & Katherine R. Catanese, *The Means Test: Part II, Deductions*, 26 Am. Bankr. Inst. J. 14 (March 2007); David W. Allard & Katherine R. Catanese, *The Means Test: Part III Keeping Up with Dismissals under BAPCPA*, 26 Am. Bankr. Inst. J. 16 (April 2007).

10.2. Who Must Complete Form 22A?

Official Form 22A must be completed, in whole or in part and in addition to Schedule I and J,¹⁰⁷ by every individual chapter 7 debtor whose debts are primarily consumer debts. In joint cases, only one Form 22A is required.

10.2.1. “Primarily Consumer Debts”

As noted above, Form 22A states that the form must be completed by individuals whose debts are “primarily consumer debts.” This limitation derives from § 707(b)(1), which limits the entire “abuse” framework, including the means test, to this particular class of debtors.¹⁰⁸

For a discussion of case law interpreting and applying the phrase “primarily consumer debts,” see Section 1.4.3 of this Working Paper.

10.2.2. Conversion from Chapter 13

The courts have produced mixed results in the few cases addressing the question of whether the means test applies to debtors whose cases were filed under chapter 13 but were converted to cases under chapter 7. The court in *In re Fox*,¹⁰⁹ held that the plain language of § 707(b)(1), which refers to cases “filed by” chapter 7 debtors, removes converted cases from § 707(b)’s means test provisions. On the other hand, in *In re Perfetto*,¹¹⁰ the court found the “filed by” argument to comprise too narrow a construction of § 707(b)(1).¹¹¹

10.2.3. Exclusion for Certain Disabled Veterans

Part I of Form 22A implements § 707(b)(2)(D), which provides an exclusion from means testing for some disabled veterans. Specifically, § 707(b)(2)(D) applies if:

- The client is a disabled veteran, as defined in 38 U.S.C. § 3741(1),¹¹² which means the client is a veteran¹¹³ and either:

¹⁰⁷ See Section 8 for a discussion of Schedules I and J.

¹⁰⁸ Section 707(b)(1) states that “after notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, Trustee (or bankruptcy administrator, if any), or any party in interest may dismiss a case filed by an individual debtor under this chapter, whose debts are primarily consumer debts, or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.”

¹⁰⁹ 370 B.R. 639 (Bankr. D.N.J. 2007)

¹¹⁰ 361 B.R. 27 (Bankr. D.R.I. 2007)

¹¹¹ See also, *In re Kerr*, 2007 WL 21129291, 2007 Bankr. LEXIS 2474, (Bankr. W.D. Wash. July 18, 2007).

¹¹² The text of 38 U.S.C. § 3741(1) is: “The term ‘disabled veteran’ means (A) a veteran who is entitled to compensation under laws administered by the Secretary for a disability rated at 30 percent or more, or (B) a veteran whose discharge or release from active duty was for a disability incurred or aggravated in line of duty.”

- The disability is rated at 30 percent or more, or
- The client’s discharge or release from active duty was for a disability that was either incurred or aggravated in the line of duty; and
- The client’s indebtedness occurred primarily during a period in which the client was either:
 - On active duty, as defined in 10 U.S.C. § 101(d)(1),¹¹⁴ or
 - Performing a homeland defense activity, as defined in 32 U.S.C. § 901(1).¹¹⁵

According to the statutes cross-referenced in § 707(b)(2)(D), the “active duty” requirement is applicable to service members other than those serving in the National Guard. It is not clear whether Guard members are governed solely by the “homeland defense activity” prong of the test.

Inquiry suggestions for this exclusion are discussed under “Part I. Exclusion for Disabled Veterans” below.

10.3. Note on January 2008 Amendment to Form 22A

In January 2008, a substantial revision to the means test form went into effect. This revision was premised on the IRS changes to its Allowable Living Expenses. The most significant changes include adding a deduction for out-of-pocket health care, a deduction for cell phone usage, and changes to the allowable transportation expenses.

In the discussion below, Lines that are affected by the January 2008 Amendment are listed with an asterisk, i.e., *Line X, and a description of each change is provided as a footnote to the affected Line.

¹¹³ “Veteran” is defined at 38 U.S.C. § 101(2) as “a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.”

¹¹⁴ “The term ‘active duty’ means full-time duty in the active military service of the United States. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty.” 10 U.S.C. § 101(d)(1).

¹¹⁵ “The term ‘homeland defense activity’ means an activity undertaken for the military protection of the territory or domestic population of the United States, or of infrastructure or other assets of the United States determined by the Secretary of Defense as being critical to national security, from a threat or aggression against the United States.” 32 U.S.C. § 901(1).

10.4. Form 22A: Chapter 7 Statement of Current Monthly Income and Means-Test Calculation

Part I. Exclusion for Disabled Veterans

***Line 1: Veterans Declaration.**¹¹⁶

Initial Inquiry and/or Document Review: Ask client about Award Letter and Rating Decision from Veterans Administration for disability rating. Review client's DD Form 214¹¹⁷ for dates of service and compare to when client's debts were primarily incurred.¹¹⁸

Further Inquiry: None

Part II. Calculation of Monthly Income for § 707(b)(7) Exclusion

Line 2: Marital Filing Status.

Initial Inquiry and/or Document Review: If box 2(b) is marked on the means test form, review:

- Address of non-filing spouse,
- Legal separation papers, if any,
- If divorced, a copy of the judgment of divorce.

Further Inquiry: None

Line 3: Gross Wages, Salary, Tips, Bonuses, Overtime, Commissions.

Initial Inquiry and/or Document Review: Inquire about and review federal income tax returns or transcripts for the most recent tax year ending immediately before the commencement of the case. Ask client for payment advices for the six-month period ending on the last day of the calendar month immediately preceding the commencement of the case.¹¹⁹

¹¹⁶ The January 2008 amendment adds Section 1B, which requires the debtor to check the box if the debtor declares that his or her debts are primarily non-consumer debts.

¹¹⁷ The DD Form 214, Certificate of Release or Discharge from Active Duty, is a report of separation issued when a service member performs active duty or at least 90 days of active duty training. The DD Form 214 contains information normally needed to verify military service for benefits, retirement, employment, and membership in veterans' organizations and includes the dates of entry into and separation from active duty.

¹¹⁸ See Section 10.2.3. for further explanation of the veteran exclusion.

¹¹⁹ It is recommended that most records to be reviewed for Part II, except tax returns, should be reviewed for this six-month period.

Further Inquiry: Review W-2s and 1099s, especially if the debtor received tips, bonuses, or commissions. If client is calculating this amount, request detailed calculations of the number listed on this Line.

Practice Pointers: Section 521(e)(2)(i) requires that the debtor provide to the trustee a copy of the federal income tax return or transcript for the most recent tax year ending immediately before the commencement of the case. Consequently, federal tax returns or transcripts should be reviewed for the applicable period to look for support for the client's statements or for inconsistencies in all Part II categories.

Attorneys should note that tax transcripts provide much less information than returns do. Attorneys should consider the detail of information that they wish to provide when making a determination whether to submit a return or transcript.

Attorneys may also want to request payment advices after the petition date because some trustees will verify that income has not substantially changed after the filing, which could lead to a motion to dismiss under § 707(b)(3).

***Line 4: Income from the operation of a business, profession, or farm.**¹²⁰

Initial Inquiry and/or Document Review: Review federal income tax return or transcript for the most recent tax year ending prior to the commencement of the case for a business, profession or farm, if applicable. Review any financial statements and bank statements for the year ending prior to the commencement of the case.

Further Inquiry: None

Practice Pointer: For reimbursement of expenses, claim the income as business income and an offsetting business expense. It is clear that the reimbursed expense is not traditional income. However, it might be considered part of the debtor's gross income. In a chapter 13, this distinction will make a difference because of the applicable commitment period.

Line 5: Rent and other real property income.

Initial Inquiry and/or Document Review: Inquire about lease agreements, if any, together with written notices of any rent increase. Ask the client for cancelled checks or other business records regarding rent received, if available, and bank statements.

Further Inquiry: None

¹²⁰ The January 2008 amendment adds the following language: "If you operate more than one business, profession, or farm, enter aggregate numbers and provide details on an attachment."

Practice Pointer: Past due amounts owing to the client should be listed in Schedule B.

Line 6: Interest, dividends, and royalties.

Initial Inquiry and/or Document Review: Review bank and brokerage statements, federal tax return or transcript.

Further Inquiry: None

Line 7: Pension and retirement income.

Initial Inquiry and/or Document Review: Ask client about payment advices or statements showing the distributions.

Further Inquiry: Request bank statements from the client.

***Line 8: Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child or spousal support.**¹²¹

Initial Inquiry and/or Document Review: Review bank statements, statement of child support enforcement agencies, if any, regarding payments. Also ask the client for birth dates of minor children.

Further Inquiry: Review cancelled checks or a detailed description of contributions from other persons for household expenses. Review any judgments of divorce and any other written support agreements and any modifications to these agreements.

Practice Pointers: Among the problems that can emerge here is the dilemma of the non-filing spouse. To the extent a non-filing spouse's income is not included, the United States Trustee takes the position that a detailed statement together with supporting documentation should be provided explaining why such income is not included. (See Line 17 and the 2008 revisions to this Line-item requiring the basis documentation). A non-filing spouse, however, might refuse to turn over tax returns or other information that may not be in the debtor's possession. Issues regarding jurisdiction and privacy have not been addressed by the courts to date; but there are some cases that place emphasis on the extent to which a non-filing spouse or other household member's income can be included in CMI.¹²²

¹²¹ The January 2008 amendment omits the words "spousal support" and adds the following language: "Do not include alimony or separate maintenance payments or amounts paid by your spouse if Column B is completed."

¹²² See *In re Jewell*, 365 B.R. 796, 802 (Bankr. S.D. Ohio 2007) (income of a household member that is not used on a regular basis for household expenses is not included in the debtors' CMI). See also *In re*

The attorney may want to advise that each spouse retain separate counsel when spouses maintain separate financial existences.

The courts have not yet provided contours to this item regarding which financial contributions should be included or excluded. Attorneys should consider looking first at the “regular basis” component required by § 101(10A). Although the courts have not defined this phrase as it is used in the means test, there is an analogous body of case law addressing “regular income” as used in § 101(3), upon which chapter 13 eligibility turns.¹²³

Line 9: Unemployment compensation.

Initial Inquiry and/or Document Review: Review documents showing unemployment compensation payment advices.

Further Inquiry: Request and review bank statements and federal income tax return or transcript for the most recent tax year ending prior to commencement of the case.

Practice Pointer: Some courts have concluded that unemployment compensation should not be included in the means test.¹²⁴

Lightsey, 374 B.R. 377 (Bankr. S.D. Ga. 2007) (non-filing spouse’s income is included in CMI to the extent that it is expended on a regular basis for household expenses); *In re Quarterman*, 342 B.R. 647, 651 (Bankr. M.D. Fla. 2006) (same); *In re Travis*, 353 B.R. 520, 526 (Bankr. E.D. Mich. 2006) (same); *In re Baldino*, 369 B.R. 858, 861 (Bankr. M.D. Pa. 2007) (same); *In re Shahan*, 367 B.R. 732, 737 (Bankr. D. Kan. 2007) (“[I]f a debtor’s non-filing spouse has income, that portion of the spouse’s income not dedicated to paying household expenses is deducted from CMI.”); *In re Shahan*, 367 B.R. 732, 738 (Bankr. D. Kan. 2007) (non-filing spouse’s income is included in CMI to the extent that it is expended on a regular basis for household expenses).

¹²³ The term “regular basis” is not defined in the Code, but, by analogy, 11 U.S.C. § 101(30) defines “individual with regular income” as an “individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13.” “The benchmark for determining whether an individual has “regular income” for purposes of section 101(30) of the Bankruptcy Code is not the type or source of income, but “**its stability and regularity.**” *In re Antoine*, 208 B.R. 17, 20 (Bankr. E.D. N.Y. 1997), citing *In re Fischel*, 103 B.R.44, 48 (Bankr. N.D.N.Y. 1989); *In re Varian*, 91 B.R. 653, 654 (Bankr. D. Conn. 1988); *In re Campbell*, 38 B.R. 193, 195 (Bankr. E.D.N.Y. 1984) (quoting *In re Cole*, 3 B.R. 346, 349 (Bankr.S.D.W.Va.1980) (Congress made clear its intent to include even certain non-employed persons, provided that income was sufficiently stable and regular)); *see also In re Sigfrid*, 161 B.R. 220 (Bankr. D. Minn. 1993) (determining that where debtor is unemployed, debtor must establish that the source of the payment, such as a non-debtor spouse’s income, is sufficiently stable and regular and such a determination is made on a case-by-case basis); *In re Rowe*, 110 B.R. 712 (Bankr. E.D. Pa.1990) (finding debtor’s receipt of \$200 a month from the debtor’s son constituted stable and regular income).

¹²⁴ *See, e.g., In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007).

***Line 10: Income from all other sources.**¹²⁵

Initial Inquiry and/or Document Review: Inquire into inheritances, buyouts not already included, gifts, state benefits information not already accounted for, court ordered payments received by the debtor, distributions from retirement account, sale of stocks, any dividends not reinvested.

Further Inquiry: None

Practice Pointers: Benefits received under the Social Security Act are not included. One-time events, such as a stock sale within the six months before filing, may constitute a “special circumstance” under § 707(b)(2)(B)(i). If there has been an early distribution from a retirement account, check to see whether taxes are owing on the amount withdrawn.

Part III. Application of § 707(b)(7) Exclusion

Line 14: Applicable median family income.

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the United States Trustee’s website.¹²⁶ Verify “Household Size”.

Further Inquiry: None

Comments: Attorneys need to be sure that they are reviewing the **most recent** median family income tables for the debtor’s state. “Family Size” is not defined in the Code and case law, thus far, is limited.¹²⁷ Form 22A indicates that the median family income for the applicable state and *household* size should be reported, and the form refers the reader

¹²⁵ The January 2008 amendment revises Form 22A as follows: “Income from all other sources. Specify source and amount. If necessary, list additional sources on a separate page. Do not include alimony or separate maintenance payments paid by your spouse if Column B is completed, but include all other payments of alimony or separate maintenance. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, crime against humanity, or as a victim of international or domestic terrorism.

¹²⁶ <http://www.usdoj.gov/ust/ea/bapcpa/meanstesting.htm>.

¹²⁷ The Best Practices Working Group identified only a handful of cases on point. Two decisions address whether a pregnant debtor can include an unborn child as a member of the household, with both answering in the negative. *In re Pampas*, 369 B.R. 290 (Bankr. M.D. La. 2007); *In re Fleishman*, 372 B.R. 64 (Bankr. D. Ore. 2007). In *In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007), the court rejected both a broad “heads on beds” approach as well as a narrow definition found in an Internal Revenue manual. Striking a middle ground, the court looked at the dependence of the debtors’ adult daughter and her children on the debtors’ and the daughter’s contributions to the household. The court determined that the daughter and her children should be included within the household for purposes of the means test. The debtors’ adult son, by contrast, was merely a “head on a bed” and would not be counted as a member of the household, *In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007) adopting the “heads on beds” approach.

to the United States Trustee website.¹²⁸ The website reports the applicable *family* size. It is unclear why this discrepancy exists.¹²⁹

Part IV. Calculation of Current Monthly Income for § 707(b)(2)

***Line 17: Marital Adjustment.**¹³⁰

Initial Inquiry and/or Document Review: Review bank statements and credit card statements

Further Inquiry: Review payment advices for the non-filing spouse, tax return or transcript for the non-filing spouse (if separate from debtor) for the tax year ending prior to the commencement of the case, bank statements for any account of the non-filing spouse, detailed statement from the non-filing spouse together with supporting documentation regarding income that is not contributed to the household.

Practice Pointers: A non-filing spouse might refuse to turn over tax returns or other information that might not be in the debtor's possession. Issues regarding jurisdiction and privacy have not been addressed by the courts to date.¹³¹

¹²⁸ See <http://www.usdoj.gov/ust>.

¹²⁹ See *In re Plumb*, 373 B.R. 429 (Bankr. W.D.N.C. 2007), addressing this discrepancy.

¹³⁰ The January 2008 amendment adds the following language: "Specify in the Lines below the basis for excluding the Column B income (such as payment of the spouse's tax liability or the spouse's support of persons other than the debtor or the debtor's dependents) and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page." Additionally, this amendment includes a space for the debtor to specify the basis and amounts for the marital adjustment.

¹³¹ For a discussion of application of the marital deduction, see *In re Travis*, 353 B.R. 520 (Bankr. E.D. Mich. 2006). But see *Stapleton v. Baldino (In re Baldino)*, 369 B.R. 858 (Bankr. M.D. Pa. 2007) (questioning whether the existence of a non-filing spouse's significant earnings necessarily raises the debtor's standard of living).

Part V. Calculation of Deductions Allowed Under § 707(b)(2)
Subpart A: Deductions Under Standards of the Internal Revenue Service (IRS)

Line 19: National Standards: food, clothing, household supplies, personal care, and miscellaneous.¹³²

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the United States Trustee’s website.¹³³

Further Inquiry: None

Practice Pointer: It is unclear whether “gross monthly income,” which is used for this standard, is the same as “current monthly income.”

***Line 20A: Local Standards: housing and utilities; non-mortgage expenses.**¹³⁴

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the United States Trustee’s website.¹³⁵

Further Inquiry: None

Practice Pointer: The United States Trustee’s website states “[t]he Housing and Utilities Standards are published by the IRS by state (including Guam, the Northern Mariana Islands, Puerto Rico, the Virgin Islands, and the District of Columbia), county,

¹³² The January 2008 amendment revises the April 2007 form as follows:

19A. National Standards: food, clothing, household supplies, personal care, and miscellaneous and other items. Enter in Line 19A the “Total” amount from IRS National Standards for Food, Clothing and Other Items for the applicable household size. Allowable Living Expenses for the applicable family size and income level.” (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

The January 2008 amendment also includes a section 19B, which states:

National standards: health care. Enter in Line a1 below the amount from IRS National Standards for Out-of-Pocket Health Care for persons under 65 years of age, and in Line a2 the IRS National Standards for Out-of-Pocket Health Care for persons 65 years of age or older. (The information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) Enter in Line b1 the number of members of your household who are under 65 year of age, and enter in Line b2 the number of members of your household who are 65 years of age or older. (The total number of household members must be the same as the number stated in Line 14b.) Multiply Line a1 by Line b1 to obtain a total amount of household members under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for household members 65 and older, and enter the result in Line c2.

Line 19B then provides a chart for the debtor to complete regarding the above amounts.

¹³³ See <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.

¹³⁴ The January 2008 amendment revises the April 2007 form by changing the words “family size” to “household size”.

¹³⁵ See <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.

and family size. For purposes of these bankruptcy forms, the Housing and Utilities Standards are provided in two components -- non-mortgage expenses and mortgage/rent expenses.”¹³⁶ It is unclear what is meant by “non-mortgage” expenses.

***Line 20B: Local Standards: housing and utilities; mortgage/rent expense.**¹³⁷

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the United States Trustee’s website.¹³⁸ Verify county of residence for debtor, “family size” of debtor, if the debtor has “Non-Mortgage” or “Mortgage” expenses by reviewing mortgage, property tax bills, homeowner’s insurance payment information, cancelled checks regarding monthly mortgage/rent payment and utilities payments. Prepare statement indicating client’s intent to surrender or redeem property or to reaffirm the underlying debt, if applicable.

Further Inquiry: None

Practice Pointer: It is unclear if debtors are entitled to take this deduction when the debtor does not pay rent/mortgage or utilities expense.¹³⁹

Line 21: Local Standards: housing and utilities; adjustment.

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the United States Trustee’s website.¹⁴⁰

Further Inquiry: None

Practice Pointer: This Line anticipates that the debtor may challenge the process used to compute the household and utilities adjustment.¹⁴¹

¹³⁶ See <http://www.usdoj.gov/ust/eo/bapcpa/20071015/meanstesting.htm>.

¹³⁷ The January 2008 amendment revises the April 2007 form by changing the words “family size” to “household size.”

¹³⁸ See <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.

¹³⁹ See, e.g., *In re Farrar-Johnson*, 353 B.R. 224 (Bankr. N.D. Ill. 2006) (§ 1325(b)(3) allows housing deduction for above-median income debtors even where debtors have no actual housing expense).

¹⁴⁰ See <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.

¹⁴¹ See *In re Skaags*, 349 B.R. 594, 597 (Bankr. E.D. Mo. 2006), where the debtors were limited to the IRS standard housing expense even though their actual rent amount exceeded the IRS standard.

***Line 22: Local Standards: transportation; vehicle operation/public transportation expense.**¹⁴²

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the United States Trustee’s website.¹⁴³

Further Inquiry: None

Practice Pointer: The debtor is entitled to this expense regardless of whether the debtor pays the expense of operating a vehicle or uses public transportation.

***Line 23: Local Standards: transportation ownership/lease expense; Vehicle 1.**¹⁴⁴

Initial Inquiry and/or Document Review: Review the Census Bureau, IRS Data and Administrative Expenses Multipliers found on the United States Trustee’s website.¹⁴⁵

Review title to debtor’s vehicle (unless held by the secured creditor) or lease verifying that the vehicle is in the debtor’s name, bills indicating the amount the debtor pays each month, statement of intention regarding surrender, redemption or reaffirmation, if applicable.

Further Inquiry: None

¹⁴² The January 2008 amendment renumbers Line 22 to Line 22 A and adds the following language:
If you checked 0, enter on Line 22A the “Public Transportation” amount from the IRS Local Standards: Transportation”. If you checked 1 or 2 or more, enter on Line 22A the “Operating Costs” amount from IRS Local Standards: Transportation for the applicable number of vehicles in the applicable Metropolitan Statistical Area or Census Region. (These amounts are available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

Additionally, the January 2008 amendment adds a Line 22B, which states:
Local Standards: transportation; additional public transportation expense. If you pay the operating expenses for a vehicle and also use public transportation, and you contend that you are entitled to an additional deduction for your public transportation expenses, enter on Line 22B the “Public Transportation” amount from IRS Local Standards: Transportation. (The amount is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.)

¹⁴³ See <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.

¹⁴⁴ The January 2008 amendment revises the April 2007 form as follows:
Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation Standards, Ownership Costs, First Car (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 1, as stated in Line 42; subtract Line b from Line a and enter the result in Line 24. Do not enter an amount less than 0.

¹⁴⁵ See <http://www.usdoj.gov/ust/eo/bapcpa/meanstesting.htm>.

Practice Pointers: The case law is mixed on whether a debtor is entitled to this deduction when the debtor owns the vehicle free and clear¹⁴⁶ or stated an intent to surrender the vehicle postpetition.¹⁴⁷

The debtor is permitted to subtract “the Average Monthly Payment for any debts secured by vehicle 1, as stated in Line 42” from the IRS Transportation Standard expense. However, § 707(b)(2)(A)(iii) defines “Average Monthly Payment” as “the total of all amounts contractually due to each secured creditor in the 60 months *following* the filing of the bankruptcy case, divided by 60” (emphasis added). Line 23 seems to contemplate a past or present expense, whereas Line 42 seems to contemplate a future expense. Although there seems to be an inconsistency, there have been no cases directly addressing this issue.¹⁴⁸

It should further be noted that it is unclear whether the Average Monthly Payment should be listed as the amortized amount or the amount as indicated in the contract between the debtor and the secured party.

***Line 24: Local Standards: transportation ownership/lease expense; Vehicle 2.**¹⁴⁹

Initial Inquiry and/or Document Review: Same as Line 23.

Further Inquiry: None

Practice Pointers: Same as Line 23.

¹⁴⁶ See *In re Ross-Tousey*, 368 B.R. 762 (E.D. Wis. 2007); *In re Barraza*, 346 B.R. 724 (Bankr. N.D. Tex. 2006); *In re Harris*, 353 B.R. 304 (Bankr. E.D. Okla. 2006); *In re Oliver*, 350 B.R. 294 (Bankr. W.D. Tex. 2006); *In re Pampas*, 369 B.R. 290 (Bankr. M.D. La. 2007); *In re Hardacre*, 338 B.R. 718, 727-28 (Bankr. N.D. Tex. 2006), *In re Hartwick (Fokkena v. Hartwick)*, 373 B.R. 645 (D. Minn. 2007), where a deduction for a vehicle owned free and clear was not permitted. But see *In re Fowler*, 349 B.R. 414 (Bankr. D. Del. 2006); *In re Wilson*, 356 B.R. 114 (Bankr. D. Del. 2006), *In re Zak*, 361 B.R. 481 (Bankr. N.D. Ohio 2007), *In re Billie*, 367 B.R. 586 (Bankr. N.D. Ohio 2007), *In re Zavorski*, 366 B.R. 758 (Bankr. E.D. Mich. 2007), and *In re Prince*, 2006 WL 3501281, 2006 Bankr. LEXIS 3404 (Bankr. M.D.N.C. Nov. 30, 2006) where a deduction for a free and clear vehicle was permitted.

¹⁴⁷ See *In re Singeltary*, 354 B.R. 455 (Bankr. S.D. Tex. 2006), where debtors were not permitted to take a deduction for a vehicle the debtors had surrendered prior to the motion date. But see also *In re Skaags*, 349 B.R. 594, 597 (Bankr. E.D. Mo. 2006), where the debtors were not permitted to take a deduction for a vehicle the debtors intended to surrender.

¹⁴⁸ See *In re Vesper*, 371 B.R. 426, 432 (Bankr. D. Alaska 2007) (court noted this distinction by stating that “[i]f the actual car payment exceeds the allowable expense amounts on Lines 23 and 24, the debtor may claim such excess as a deduction on Line 42 of the form, as a ‘future payment on secured claims’”).

¹⁴⁹ See n.144 *supra* regarding the January 2008 amendment to this Item, which is the same as the amendment to Line 23.

Line 25: Other Necessary Expenses: taxes.

Initial Inquiry and/or Document Review: Review payment advices, federal, state and local tax returns or transcripts for the most recent tax year ending prior to the commencement of the case including business tax returns or transcripts, if applicable.

Further Inquiry: None

Practice Pointers: The attorney should consider reviewing the debtor's payment advices to ensure that the debtor is not overwithholding taxes. This could be argued as grounds for a motion to dismiss pursuant to § 707(b)(3).

If the client has no payment advices, the attorney should get a declaration, under oath, to that effect. The declaration can be sent to the trustee in lieu of the payment advices.

Be sure to inquire whether the client cashed in a tax privileged account, such as an IRA, which is not uncommon when people are in financial distress. If so, determine whether taxes remain owing.

Line 26: Other Necessary Expenses: mandatory payroll deductions.

Initial Inquiry and/or Document Review: Review payment advices and 401(k) enrollment information, if applicable.

Further Inquiry: Inquire into whether the debtor has employment manuals or a statement from employer regarding mandatory deductions.

Comments: None

Practice Pointer: The client may have significant concerns regarding an employer's knowledge of an upcoming bankruptcy filing. Although the attorney should be clear that the fact of a bankruptcy cannot be kept hidden, the attorney may need to tailor the case to the client's unique concerns, especially in light of judicial interpretations of the Code's anti-discrimination clause¹⁵⁰ that limit that provision's protections to postpetition discriminatory conduct.¹⁵¹

¹⁵⁰ 11 U.S.C. § 525(b).

¹⁵¹ See, e.g., *In re Kanouse*, 168 B.R. 441 (S.D. Fla. 1994) (debtor terminated prepetition was not protected because § 525(b) applies only debtors and former debtors). See also *White v. Kentuckiana Livestock Mkt., Inc.*, 397 F.3d 420 (6th Cir. 2005) (strictly construing "solely because" language of § 525(b)).

Line 27: Other Necessary Expenses: life insurance.

Initial Inquiry and/or Document Review: Review bills for term life insurance, cancelled checks/Bank statements/Credit card statements showing subtraction of life insurance premiums.

Further Inquiry: None

Practice Pointers: This deduction is permitted only for amounts actually paid for the debtor; policies for dependents may not be deducted.

Form 22A distinguishes term life from whole life or other forms of life insurance, allowing a deduction only for the former. This distinction is not in the statute and the reason for its inclusion on the form is not clear.

Line 28: Other Necessary Expenses: court-ordered payments.

Initial Inquiry and/or Document Review: Review judgments, settlement agreements, releases, other court orders, judgments of divorce, property settlements, any other written support agreements and any modifications to these agreements, statement of child support enforcement agencies, if any, and garnishments

Further Inquiry: None

Practice Pointer: Support arrearages should not be included here. Arrearages are instead deducted as priority debts at Item 44, with the monthly amount averaged out over 60 months.

Line 29: Other Necessary Expenses: education for employment or for a physically or mentally challenged child.

Initial Inquiry and/or Document Review: Review bills or invoices for education as a condition of employment, bills or invoices for education of physically or mentally challenged dependant child, and doctor's proof of physically or mentally challenged child.

Further Inquiry: Review employment manual or statement from employer indicating mandatory education requirements.

Line 30: Other Necessary Expenses: childcare.

Initial Inquiry and/or Document Review: Review bills or invoices for day care expenses, bills, invoices, or cancelled checks for babysitting expenses or a statement

from the debtor indicating the average monthly cost for babysitting, judgments of divorce, child support orders.

Further Inquiry: None

Practice Pointer: This deduction is applicable only to childcare; education expenses do not qualify. It is unclear how to differentiate between applicable and inapplicable deductions when a young child, not yet eligible to attend public school, attends a Montessori or similar program that is intended as education rather than childcare.

Line 31: Other Necessary Expenses: health care.

Initial Inquiry and/or Document Review: Review bills or receipts, cancelled checks for health care expenses not reimbursed by insurance or paid by a health savings account.

Further Inquiry: Review health insurance policy.

Practice Pointer: Deduction cannot include payments made for health insurance or health savings accounts as listed on Line 34.

***Line 32: Other Necessary Expenses: telecommunication services.**¹⁵²

Initial Inquiry and/or Document Review: Review bills, invoices, cancelled checks for cell phones, pagers, call waiting, caller ID, special long distance, and internet service actually paid by the debtor.

Further Inquiry: None

Practice Pointers: The debtor cannot include an amount previously deducted. The debtor cannot include an amount for basic home telephone service because this expense is included in the IRS Local Standard for Housing and Utility.¹⁵³

Form 22A's list of possible telecommunication expenses is not in the statute, but is likely derived from IRS Manual 5.15.1.10 or other manuals as in effect on the date of the order for relief as indicated in § 707(b)(2)(A)(ii)(I).¹⁵⁴

¹⁵² The January 2008 amendment revises the April 2007 form as follows: "Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service – such as pagers, call waiting, caller I.D., special long distance, or Internet service – to the extent necessary for your health and welfare or that of your dependents. . . ."

¹⁵³ See *In re Stimac*, 366 B.R. 889 (Bankr. E.D. Wis. 2007) and *In re Lara*, 347 B.R. 198 (Bankr. N.D. Tex. 2006), where the debtors were allowed a deduction in addition to the standard deduction as an "other necessary expense" for a cellular telephone expense of \$183.00 per month and a monthly expense of \$26.00 for high speed internet access. See also *In re Haley*, 354 B.R. 340 (Bankr. D. N.H. 2006).

¹⁵⁴ But see *In re Jewell* 365 B.R. 796 (Bankr. S.D. Ohio 2007), which suggests that the IRS standards are not determinative.

The telecommunication expense can only be taken for the debtor and the dependents of the debtor.¹⁵⁵

Case law suggests that the debtor must provide documentation to the case trustee to support the debtor's deduction for telecommunication expense.¹⁵⁶

Part V. Subpart B: Additional Expense Deductions Under § 707(b)¹⁵⁷

***Line 34: Health Insurance, Disability Insurance, and Health Savings Account Expenses.**¹⁵⁸

Initial Inquiry and/or Document Review: Review payment advices showing the monthly expense withdrawn from the debtor's pay check for health insurance, disability insurance, or health savings accounts, invoices/cancelled checks for amounts paid by the debtor for health insurance, disability insurance, or health savings accounts.

Further Inquiry: None

Practice Pointer: Debtor can deduct payments made for the debtor's spouse and dependents.

Line 35: Continued contributions to the care of household or family members.

Initial Inquiry and/or Document Review: Review cancelled checks, credit card statements, bank statements showing the reasonably necessary¹⁵⁹ payments for the care and support of an elderly, chronically ill, or disabled member of the debtor's household or member of immediate family who is unable to pay for such expenses.

¹⁵⁵ See *In re Plumb*, 373 B.R. 429 (Bankr. W.D.N.C. 2007), where the court held that the debtors were permitted to take a telecommunication deduction for themselves and their dependents, but not for the entire household of ten. See also *In re Oltjen*, 2007 WL 2329695, 2007 Bankr. LEXIS 2761 (Bankr. W.D. Tex. Aug. 13, 2007).

Bankr. W.D. Tex. Aug. 13, 2007), where the debtor was not permitted to take a deduction for her sister's cell phone expense.

¹⁵⁶ *In re Renicker*, 342 B.R. 304 (Bankr. W.D. Mo. 2006), *In re Johns*, 342 B.R. 626, 628 (Bankr. E.D. Okla. 2006).

¹⁵⁷ See 11 U.S.C. § 707(b)(2)(A)(ii)(II).

¹⁵⁸ The January 2008 amendment revised the April 2007 form as follows: "List the monthly expenses in the categories set out in Lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents and total the average monthly amounts that you actually pay for yourself, your spouse, or your dependents in the following categories ..."

¹⁵⁹ "Reasonably necessary" is a statutory requirement. 11 U.S.C. § 707(b)(2)(A)(i)(II). See *In re Hicks*, 370 B.R. 919 (Bankr. E.D. Mo. 2007).

Further Inquiry: Obtain a doctor’s letter indicating that the care of the household member or immediate family member is reasonable and necessary, statement signed by the household member or family member indicating that that household member or family member is unable to pay for care.

Line 36: Protection against family violence.

Initial Inquiry and/or Document Review: Ask client. Counsel should make a judgment based on the client’s word and, if need be, ask for an *in camera* hearing so the client can provide relevant details while the court maintains the required confidentiality.¹⁶⁰

Further Inquiry: None

Practice Pointer: Although unlikely because of the peculiar circumstances associated with family violence, if there are expenses to be listed here, counsel should review the Family Violence Prevention and Services Act.¹⁶¹ This Act, along with unidentified “other federal law,” is the basis for this deduction.

Line 37: Home energy costs.

Initial Inquiry and/or Document Review: Review invoices or bills for home energy costs for the period the client is claiming the additional monthly amount.

Further Inquiry: Obtain a written explanation from the debtor explaining that the amount is reasonable and necessary together with other supporting documentation, if any.

Practice Pointer: The debtor is required to provide documentation to the case trustee demonstrating that the additional amount claimed is reasonable and necessary.

Line 38: Education expenses for dependent children less than 18.

Initial Inquiry and/or Document Review: Obtain invoices or bills establishing the average monthly expenses actually incurred by the debtor.

Further Inquiry: None

Practice Pointers: The debtor is required to provide documentation to the case trustee demonstrating that the amount claimed is reasonable and necessary and not already

¹⁶⁰ Section 707(b)(2)(A)(ii)(II) requires the court to maintain the confidentiality of expenses incurred “to maintain the safety of the debtor and the family of the debtor as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable federal law.”

¹⁶¹ 10 U.S.C. § 10421.

accounted for by the IRS standards. The deduction is limited to \$125.00 per child and the child must be less than 18 years old.

Line 39. Additional food and clothing expense.

Initial Inquiry and/or Document Review: Review documentation from the client regarding monthly food and clothing expense to see if it exceeds the allowable deduction. If it does, obtain all supporting documentation from the client since it is required by statute, and inquire into whether the expense is reasonable and necessary.

Further Inquiry: None

Line 40: Continued charitable contributions.

Initial Inquiry and/or Document Review: Review cancelled checks, bank statements, and credit card statements showing the contribution and any receipts for donations.

Further Inquiry: It may also be necessary to review federal and state income tax returns or transcripts.

Practice Pointer: “Continued” is not defined by the Code.¹⁶² “Charitable contribution” is defined under 26 U.S.C. § 170(c)(1)-(2).

Part V. Subpart C: Deductions for Debt Payment¹⁶³

***Line 42: Future payments on secured claims.**¹⁶⁴

Initial Inquiry and/or Document Review: See Lines 20B and 23. Review bills or invoices for mortgage and vehicles.

Further Inquiry: None

Practice Pointers: Recent case law is mixed as to whether 401(k) loan repayments may be “payments on account of secured debt” under 11 U.S.C. § 707(b)(2)(A)(iii).¹⁶⁵

¹⁶² See *In re Bender*, 373 B.R. 25 (E.D. Mich. 2007), holding that the debtors were entitled to take a charitable deduction for a \$260 per month charitable contribution that had been paid for the three years prior to filing, but not for the \$100 postpetition increase the debtors claimed on the debtor’s means test.

¹⁶³ See 11 U.S.C. § 707(2)(A)(iii).

¹⁶⁴ The January 2008 amendment revises the April 2007 form by requiring the debtor to check whether the secured payment includes taxes and insurance.

¹⁶⁵ See *In re Barraza*, 346 B.R. 724 (Bankr. N.D. Tex. 2006); *In re Lenton*, 358 B.R. 651 (Bankr. E.D. Pa. 2006); *In re Haley*, 354 B.R. 340 (Bankr. D. N.H. 2006). But see *Eisen v. Thompson*, 370 B.R. 762 (N.D. Ohio 2007); *McVay v. Otero*, 371 B.R. 190 (W.D. Tex. 2007).

With regard to a debtor taking a deduction for mortgage payments when the debtor did not intend to reaffirm, see *In re Nockerts*.¹⁶⁶

With regard to a debtor taking a deduction for mortgage payments when the property has been foreclosed, see *In re Brandenburg*.¹⁶⁷

Several courts have allowed a debtor to take a deduction for a vehicle or mortgage deduction for collateral the debtor intends to surrender,¹⁶⁸ while others have disallowed such a deduction.¹⁶⁹

The debtor is permitted to subtract “the Average Monthly Payment for any debts secured by vehicle 1, as stated in Line 42” from the IRS Transportation Standard expense. However, 11 U.S.C. § 707(b)(2)(A)(iii) defines “Average Monthly Payment” as “the total of all amounts contractually due to each Secured Creditor in the 60 months *following* the filing of the bankruptcy case, divided by 60” (emphasis added). Line 23 seems to contemplate a past or present expense, whereas Line 42 seems to contemplate a future expense. Although there seems to be an inconsistency, there have been no cases directly addressing this issue.¹⁷⁰

It should also be noted that it is unclear whether the Average Monthly Payment should be listed as the amortized amount or the amount as indicated in the contract between the debtor and the secured party.

¹⁶⁶ *In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006).

¹⁶⁷ *In re Brandenburg*, 2007 Bankr. 2007 WL 1459402, 2007 Bankr. LEXIS 1781, (Bankr. E.D. Wis. May 15, 2007).

¹⁶⁸ See *In re Longo*, 364 B.R.161 (Bankr. D. Conn. 2007) (where the court allowed a deduction for collateral that the debtor intended to surrender), *In re Walker*, 2006 WL 1314125, 2006 Bankr. LEXIS 845, (Bankr. N.D. Ga. May 1, 2006) (where the court held that the “[d]ebtors are entitled to deduct from CMI the average payments on debts secured by surrendered collateral”), *In re Singletary*, 354 B.R. 455 (Bankr. S.D. Tex. 2006) (where the court held that merely declaring an intent to surrender collateral on the debtor’s statement of intention is not enough to preclude the debtor from deducting those payments, but, the court added that the debtors would not be permitted to deduct these payments if the collateral had already been surrendered).

¹⁶⁹ See *In re Skaggs*, 349 B.R. 594 (Bankr. E.D. Mo. 2006) (where debtors were not permitted to take a deduction for a second vehicle that they intended to surrender), *In re Harris*, 353 B.R. 304 (Bankr. E.D. Okla. 2006) (where debtors were not permitted to deduct monthly payments for secured debt when they intended to surrender the collateral), *In re Love*, 350 B.R. 611 (Bankr. M.D. Ala. 2006) (where “payments on account of secured debts” in chapter 13 plan did not include payments for collateral the debtors intended to surrender).

¹⁷⁰ See *In re Vesper*, 371 B.R. 426, 432 (Bankr. D. Alaska 2007) (court noted this distinction by stating that “[i]f the actual car payment exceeds the allowable expense amounts on Lines 23 and 24, the debtor may claim such excess as a deduction on Line 42 of the form, as a ‘future payment on secured claims’”).

Line 43: Other payments on secured claims.

Initial Inquiry and/or Document Review: See Lines 20B and 23. Review any notices of foreclosure or repossession, judgment liens, and documents supporting purchases on credit cards that grant a PMSI to the issuer.

Further Inquiry: None

Practice Pointers: It is unclear whether the payments to be listed on Line 43 should be averaged over a 60-month period. It is also unclear as to whether future or past payments on secured claims should be included on Line 43.

It has been noted that the means test is “aimed at capturing a ‘snapshot’ of the debtor's financial state as of the date the petition is filed, rather than at constructing a forward-looking analysis of the debtor's financial situation.”¹⁷¹

This Item might require that the attorney balance the information needed to complete Form 22A and the client's resources. Tracking credit card agreements, payments and purchases, for example, can be time consuming and expensive. If the client is below median, or otherwise does not have apparent problems with the means test, such expenditure could prove needlessly burdensome to the client.

***Line 44: Payments on priority claims.**¹⁷²

Initial Inquiry and/or Document Review: Review any statements from child support enforcement agencies, if any. Review relevant tax records, such as returns, transcripts or notices from taxing authorities.

Further Inquiry: If child support listed as a priority: judgments of divorce, property settlements, any other written support agreements and any modifications to these agreements.

Practice Pointers: “Priority claims” are defined by § 507(a) and do not include amounts coming due after the petition date.

Priority claims are required to be amortized over 60 months.¹⁷³

Postpetition amounts due that have the same character as priority claims, such as future support obligations, are to be listed at Item 28.

¹⁷¹ *Fokkena v. Hartwick*, 373 B.R. 645 (D.Minn. 2007).

¹⁷² The January 2008 amendment revises the April 2007 form as follows: “Payments on prepetition priority claims. Enter the total amount, divided by 60, of all priority claims, such as priority tax, child support and alimony claims, for which you were liable at the time of your bankruptcy filing. Do not include current obligations, such as those set out in Line 28.”

¹⁷³ 11 U.S.C. § 707(b)(2)(A)(iv).

Claims listed here should also be included on Schedule E.

Attorneys should be careful not to confuse priority support with nonpriority property settlements. Both are nondischargeable in a chapter 7 case, but only support debts are entitled to priority.

Part VII. Additional Expense Claims

Line 56: Other Expenses.

Initial Inquiry and/or Document Review: Review bills or invoices for other expenses, and cancelled checks.

Further Inquiry: Obtain a statement from the debtor indicating the purpose of expense and that the expense is necessary for the health and welfare of the debtor or the debtor's family. Also review bank statements and credit card statements showing the expense paid by the debtor.

Practice Pointer: Must be for the health and welfare of the debtor or the debtor's family.¹⁷⁴

¹⁷⁴ See *In re Oliver*, 350 B.R. 294 (Bankr. W.D. Tex. 2006) and *In re Lara*, 347 B.R. 198 (Bankr. N.D. Tex. 2006).