

KEEPING YOUR CLIENT OUT OF JAIL



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¹ The views expressed are the author's own and are not intended to reflect the views of the U. S. Department of Justice or the Executive Office for United States Trustees.

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I. DO A LITTLE E-SLEUTHING YOURSELF

A. **Run an “All Courts” search on PACER:**

https://pacer.uspci.uscourts.gov/cgi-bin/search_all.pl?puid=01210786894

The All Courts search will turn up all bankruptcies filed in the country and any federal civil and criminal proceedings. Pending criminal proceedings, prior convictions and significant civil cases will alert you to issues which may have criminal components. Experienced U.S. Attorneys teach that bankruptcy fraud is often the last crime, committed at the end of numerous types of frauds, including health care, government, and tax fraud, Ponzi schemes, and money laundering.

Remember: Failing to disclose prior bankruptcies as required on the Petition may subject your client to prosecution. Frequent filers are especially prone to prosecution.

B. **Use your local state and local jurisdictions’ data bases.**

Check for prior and pending civil and criminal proceedings. Check real estate ownership and transactions.

C. **Do a Google search.**

A simple search will often yield assets and business ventures the client has forgotten. Newspaper articles often turn up information about your client’s prior ventures. And sometimes lottery winnings!

II. STUDY OTHER SWORN PAPERS

A. **Reviewing other sworn documents.**

Tax returns, insurance declarations, financial statements, mortgage applications and the like will help your client avoid creating discrepancies between sworn documents. You may also find undisclosed assets and discrepancies in valuations.

The “dueling oaths” situation helps the prosecution of a bankruptcy (or other fraud) case in several ways. Even if your client remains silent in his criminal trial, in the hands of an experienced prosecutor, such documents may sink a plea for leniency at the sentencing. They may also be admissible in the criminal trial to prove an intent to commit fraud, e.g., the client’s deteriorating financial situation, as evinced on the sworn papers, may reveal the motive for bankruptcy

fraud, etc.

B. Don't forget to compare sworn bankruptcy papers from your client's other bankruptcy cases.

When assets which were scheduled in an earlier, recent case are omitted in a subsequent one, questions arise.

III GIVE GOOD ADVICE

A. Stress the criminal implications of the civil bankruptcy process.

B. Stress the absolute need for full disclosure and truthful answers on the Statement of Financial Affairs, Schedules, the meeting of creditors, Rule 2004 examinations, adversary proceedings and all other related proceedings.

Debtors must disclose assets even if they are uncertain about the assets' status. See *United States v. Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984) ("the statute requires a bankrupt to disclose the existence of assets whose immediate status in bankruptcy is uncertain. Even if the asset is not ultimately determined to be property of the estate under the technical rules of the Federal Bankruptcy Code, Section 152 properly imposes sanctions on those who preempt a court's determination by failing to report the asset.").

Some debtors' attorneys advise that the attorney obtain a signed statement from the client verifying that the importance of full disclosure has been fully explained.

Don't forget: a debtor has no reasonable expectation that information will be kept confidential if it must be disclosed in bankruptcy filings. *In re French*, 162 B.R. 541, 547 (Bankr. D.S.D. 1994) citing *U.S. v. White*, 970 F.2d 328, 430 (7th Cir. 1992) ("When information is disclosed for the purpose of assembly into a bankruptcy petition and supporting schedules, there is no intent for the information to be held in confidence because the information is to be disclosed on documents publicly filed with the bankruptcy court . . . 'information imparted to counsel without any expectation of confidentiality is not privileged.'"). And see *United States v. Naegele*, 468 F.Supp. 2d 165, 170 (D.D.C. 2007) (noting that "any legal advice sought or obtained on the basis of confidential communications between a client and his attorney, even in the context of the preparation of a bankruptcy petition, is protected by the attorney-client privilege").

C. Don't forget to stress the importance of obedience to the orders of the court.

Prosecutions for criminal contempt pursuant to 18 U.S.C. § 401(3) and Rule 42 of the Federal Rules of Criminal Procedure may occur in the bankruptcy context.

D. Do not forget that the wisest advice may be: "Don't file!"

E. Always do what you know to be right.

There is no such thing as a little lie on sworn bankruptcy papers. Do not permit anyone, no matter how compelling their circumstances, to put your profession, reputation and liberty in jeopardy.

F. Not just your debtor clients face prosecution.

Potentially all players are subject to prosecution, including creditors who file false claims.

G. Beware the ex-factor.

Ex-wives, ex-husbands, ex-business partners all may have a motive to reveal information which they may have otherwise kept to themselves.

IV. REFRESH YOUR KNOWLEDGE OF BANKRUPTCY CRIMES

A. Most bankruptcy crimes are set out in 18 U.S.C. §§ 152-157, as well as § 1519.

Concealment of assets, false oaths and statements, and bankruptcy schemes to defraud seem to be the most common.

B. Section 152 contains nine subparts, and each one constitutes a different crime.

Several circuits have recognized that § 152 is “a congressional attempt to cover all of the possible methods by which a debtor or any other person may attempt to defeat the intent and effect of the bankruptcy law through any type of effort to keep assets from being equitably distributed among creditors.” *United States v. Goodstein*, 883 F.2d 1362, 1369 (7th Cir.1989) (internal quotations omitted) (emphasis added); *United States v. Shapiro*, 101 F.2d 375, 379 (7th Cir.1939) (“The object of Congress in passing [predecessor of § 152] was to punish those debtors who, although wanting relief from their debts, did not want to surrender what property there was to the creditors.”)

1. Fraudulent Concealment of Property, 18 U.S.C. § 152(1)

“[A person who] knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor shall be fined . . . imprisoned not more than five years, or both.”

2. False Oath, Declaration, Account, Verification, or Statement, 18 U.S.C. § 152(2)

“[A person who] knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11 shall be fined . . . imprisoned not more than five years, or both.”

3. The making of a false declaration, certificate, verification, or statement under the penalty of perjury in or in relation to any case under title 11, 18 U.S.C. § 152(3)

[A person who] knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28 in or in relation to any case under title 11 shall be fined . . . imprisoned not more than five years, or both.”

4. False Claims, 18 U.S.C. § 152(4)

“[A person who] knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity, or as or through an agent, proxy, or attorney . . . shall be fined . . . imprisoned not more than five years, or both. ”

5. Fraudulent Receipt of Property, 18 U.S.C. § 152(5)

“[A person who] knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11, shall be fined . . . imprisoned not more than five years, or both.”

6. Extortion and Bribery, 18 U.S.C. § 152(6)

“[A person who] knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11 shall be fined . . . imprisoned not more than five years, or both.”

7. Fraudulent Transfer or Concealment, 18 U.S.C. § 152(7)

“[A person who] in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation shall be fined . . . imprisoned not more than five years, or both.”

8. Fraudulent Destruction or Alteration of Documents, 18 U.S.C. § 152(8)

“[A person who] after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor shall be

fined . . . imprisoned not more than five years, or both.”

9. Fraudulent Withholding of Documents, 18 U.S.C. § 152(9)

“[A person who] after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court, or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor, shall be fined . . . imprisoned not more than five years, or both.”

10. Embezzlement against Estate, 18 U.S.C. § 153

“(a) Offense.--A person described in subsection (b) who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined under this title, imprisoned not more than 5 years, or both.

(b) Person to whom section applies.--A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.”

11. Bankruptcy Fraud, 18 U.S.C. § 157

a. The statute provides:

“A person who, having devised or intending to devise a scheme or artifice to defraud and for the purpose of executing or concealing such a scheme or artifice or attempting to do so--

(1) files a petition under title 11;

(2) files a document in a proceeding under title 11; or

(3) makes a false or fraudulent representation, claim, or promise concerning or in relation to a proceeding under title 11, at any time before or after the filing of the petition, or in relation to a proceeding falsely asserted to be pending under such title,

shall be fined under this title, imprisoned not more than 5 years, or both.”

b. Types of Bankruptcy Schemes to Watch for

1. Real estate fraud schemes, including financial counseling, property title fraud and flipping
 2. Identity theft schemes, including falsely obtaining credit or services and serial filings
 3. Bust-out schemes, including credit card bust-outs and business bust-outs
- c. Some “Creative Conduct” Which May Fall under Section 157
1. Forging court orders and creating and providing a false notice of filing to obtain the benefit of the automatic stay and other false filings
 2. Some examples from the Eastern District of Virginia
- d. A Few Things to Consider about Section 157

Section 157 was patterned after the mail and wire fraud statutes. *United States v. Wagner*, 382 F.3d 598, 613, n.3 (6th Cir. 2004)(defendant “concealed” assets of his bankruptcy estate, within meaning of statute making it a criminal offense to conceal assets in a bankruptcy proceeding, by changing the locks on the doors of three unoccupied houses so as to obstruct Chapter 7 trustee's access to the property; by depriving trustee of access to the houses, even for a short time, defendant concealed the value of the property, which trustee wished to sell, and prevented potential buyers from seeing the property, and defendant acted with intent to delay or obstruct the trustee).

The scheme to defraud need not be a bankruptcy fraud scheme. *See, e.g., United States v. Milwitt*, 475 F.3d 1150, 1155 (9th Cir. 2007) (noting that “[a]s opposed to the historic bankruptcy crimes, as exemplified in § 152, which concerns [sic] acts committed in the bankruptcy context, the focus of § 157 is a fraudulent scheme outside the bankruptcy which uses the bankruptcy as a means of executing or concealing the artifice”). A successful scheme to defraud is not required. *See also United States v. Wagner*, 382 F.3d 598, 613 (6th Cir. 2004) (“there is simply no requirement that the fraudulent filing have its intended effect . . . to be liable under § 157(2)”).

12. 18 U.S.C. § 1519, part of the Sarbanes-Oxley Act of 2002

“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined . . . imprisoned not more than 20 years, or both.”

- E. **How Long?** Generally, the government has five years from the date of an offense to file criminal charges against a defendant. 18 U.S.C. § 3282. A special rule exists for concealment cases. See 18 U.S.C. § 3284 ("The concealment of assets of debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge")

V. UNDERSTAND THE ROLES OF THE U.S. TRUSTEE, JUDGES AND TRUSTEES

The United States Trustee Program is a component of the Department of Justice (Department), serving as a "watchdog" over the bankruptcy process. H.R. Rep. No. 95-595, at 4 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 5966. The USTP's mission is to promote the integrity of the bankruptcy system. Detecting and combating bankruptcy fraud is a U.S. Trustee Program priority. 28 U.S.C. § 586(a)(3)(F) requires the United States Trustee to refer to the United States Attorney "matters which relate to the occurrence of any action which may constitute a crime" and, if requested, to assist the United States Attorney in "carrying out prosecutions based on such action." For more information, including how to report a crime, see the UST Program's website: <http://www.usdoj.gov/ust/>.

Pursuant to 18 U.S.C. § 3057, bankruptcy judges and trustees who have reasonable grounds to believe that a crime has been committed or that an investigation "should be had," must report the facts and the names of all potential witnesses to the United States Attorney. 18 U.S.C. § 3057(a). Section 3057 requires the United States Attorney, after receiving such a report, to "inquire" into the facts and report to the bankruptcy judge. 18 U.S.C. § 3057(b).

VI. A SAMPLING OF CASES FROM THE EASTERN DISTRICT OF VIRGINIA

- A. **Meet Mrs. Marks:** The U.S. Trustee referred the case to the U.S. Attorney for devising a scheme to use the bankruptcy process to perpetrate a fraud in violation of 18 U.S.C. § 157 and making false oaths in violation of 18 U.S.C. § 152. Over a twenty year period, Mrs. Marks and her husband filed 18 cases, either jointly or individually, using variations of names, addresses, and social security numbers.

Conviction: Mrs. Marks plead guilty to one count of conspiracy and was sentenced to 33 months in prison.

- B. **And Mr. Hodges:** In a superceding indictment, he was charged with making false oaths in violation of 18 U.S.C. §152, falsely representing his social security number in violation of 42 U.S.C. § 408(a)(7)(B), identity theft, in violation of 18 U.S.C. § 1028(7), and using an unauthorized credit card, in violation of 18 U.S.C. § 1029(a)(2). His bankruptcy crimes were uncovered just as Mr. Hodges was to be indicted for other crimes, including using his father's social security number to obtain credit cards and charging over \$70,000 and using stolen credit cards to buy a Rolex, a 2003 Mustang convertible, a Ford F-250 pick up truck and lumber. Persuaded by the evidence of Hodges' additional wrongdoing in his chapter 13 and chapter 7 bankruptcy cases, the U.S. Attorney filed a superceding indictment adding counts relating to Hodges' false oaths in bankruptcy. The chapter 7 trustee began investigating the debtor when the debtor filed before he was eligible for a discharge, using a variation of his name. After the chapter 7 trustee chased the debtor in chapter 13, the chapter 13 trustee compared both sets of schedules and questioned Hodges at the meeting of creditors. The chapter 13 trustee became convinced that Hodges was abusing the process with his false oaths.

Conviction: Mr. Hodges plead guilty and was sentenced to 33 months and restitution in the amount of \$129,911.

- C. **And Mr. Williams:** An indignant business partner alerted the U.S. Trustee that Mr. Williams and his wife had sold their residence while in chapter 11, without seeking court approval, and spent most of the proceeds of the sale. Mr. Williams was referred for violating 18 U.S.C. § 152(1) and (7) and 18 U.S.C. § 153, among other crimes. While operating as a debtor in possession, Mr. Williams (and his wife) sold their residence, retaining the proceeds of \$86,897.31. They did not seek permission from the Court to sell the real property. Instead, they moved to dismiss their chapter 11 case and, in their motion to dismiss, did not disclose the pending sale. In fact, the motion obfuscated the value of the property, stating that the real estate had no equity at all. After Mr. Williams ex-business partner advised the U.S. Trustee of the wrongdoing, the case was converted to one under chapter 7. The debtor and his wife disbursed most of the funds before meeting the chapter 7 meeting of creditors.

Conviction: Mr. Williams plead guilty to one count of bankruptcy fraud and was sentenced to 12 months along with \$64,094 in restitution

- D. **And Ms. Flores - I mean Ms. Stallings:** Loretta had some financial troubles, and a roommate Kim. Loretta's troubles were more severe, so she used Kim's name and credit to incur more debt. Then, to prevent Kim from finding out about this ruse, she filed bankruptcy in Kim's name. When required to produce a picture ID

at the 341 meeting, she showed a false one with Kim's name and Loretta's photo she had made. This would have all worked out well except shortly thereafter Kim decided to file a petition herself. Then the real problems began.

Conviction: Loretta Stallings plead guilty to one count of bankruptcy fraud and one count of identity theft, and was sentenced to twelve months and one day along with \$12,878 in restitution.