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BREEZING YOUR WAY THROUGH CHAPTER 7

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BREEZING YOUR WAY THROUGH A CHAPTER 7 CASE

I. PRE-FILING CONSIDERATIONS

A. Prior Bankruptcy: Consider the debtor's eligibility for discharge and applicability of the automatic stay.

B. Real Estate:

(i) Determine debtor's ownership interest in real estate, including property in which the debtor may be a co-owner, life tenant, remainderman or beneficiary under a real estate trust.

Trap for the unwary: Note that a common practice among estate planners is to advise their clients to convey real estate to their children while reserving a life estate for themselves, as a means of avoiding probate of the property. In many cases, the planners recommend that the clients NOT disclose the transfer to the children. As a result, your client may have an interest in real estate without his/her knowledge. Clients should make due inquiry prior to filing the bankruptcy petition.

(ii) Determine whether any real estate has been transferred by the debtor within four years of the bankruptcy filing. In the event the debtor is divorced, review the separation agreement to determine whether the debtor retains any right to proceeds in the event of a future sale of the property.

(iii) Check encumbrances on the debtor's property, the current amount due and amount in arrears. Review the debtor's credit report, which should list all mortgages against the property. Ask the debtor to provide current statements from all lenders to verify amounts owed as of the petition date.

(iv) Determine value of property; how does debtor's opinion of value compare with assessed value or internet valuation.

Trap for the unwary: Do not rely upon the debtor's opinion of value without independent confirmation, particularly with respect to vacation, income producing property, vacant land or property that has been owned for several years. Upon receipt of the appraisal, contact the broker to determine the basis for the opinion of value (interior inspection vs drive-by vs desktop appraisal) and whether the broker was "guided" toward a particular figure by the debtor. Be aware that Trustees routinely obtain their own opinion of value, which can vary dramatically with values listed in bankruptcy schedules. Listing a property well below its actual fair market value, even once, will likely mean that future cases before the Trustee will result in stricter scrutiny.

(v) Check Declaration of Homestead and record a Declaration if the debtor doesn't have one or if there is a question about the validity of an existing Declaration.

C. Personal Property:

(i) Motor Vehicles: Determine debtor's ownership of vehicle and existence of lien holder, confirm balance due to any lien holder with debtor, conduct internet search for value of motor vehicle. Note that NADA guides tend to overstate the value of vehicles, while Kelly Blue Book often understates value. Choose Kelly Blue Book "good condition" for value absent some compelling reason (e.g., car is not roadworthy) to select a lesser standard.

(ii) Bank Accounts: Confirm amounts on deposit and review pre-petition transfers for the one year period prior to the bankruptcy filing. Disclose all payments made outside the ordinary course of business where required in the *Statement Of Financial Affairs*.

(iii) Life Insurance: Determine ownership, beneficiaries, death benefit and cash value of all policies.

(iv) Tax Refunds: Review prior years' tax returns to estimate current accrued tax refunds. Make inquiries of your client as to any changes (income level, sale or foreclosure of income-producing property) that may affect current year's refund.

(v) Personal Injury Claims: Assemble information regarding personal injury claims including, if available, a report from personal injury counsel. Be prepared to provide rationale for value of claim asserted in debtor's bankruptcy schedules. Note that the Trustee is likely to require information regarding damages, liability and collectability.

(vi) Closely Held Corporations: Consider issues that may arise if the corporation is still operating and determine whether the debtor's equity interest has any value for the estate. Consider whether the debtor has any claims against the corporation as a result of officer loans, etc. Obtain tax returns and financial statements that will be required by the Trustee.

(vii) Sole Proprietorships: Inform debtor that no operation that utilizes property of the estate may be conducted post-petition prior to the abandonment of the property or the entry of an Order of the Bankruptcy Court. Identify the assets of the proprietorship including receivables, work-in-process and inventory. Be prepared to provide the Trustee evidence of liability and workers' compensation insurance for the business.

D. Miscellaneous:

(i) Informed Decision: Prior to filing the bankruptcy petition, review with your client all of the information contained in the *Statement Of Information Required Under 11 U.S.C. §342*, which, in a nutshell, provides general information regarding the purpose, benefits and burdens involved in the filing a Chapter 7 bankruptcy, and contains similar information regarding other options available to the debtor under the Bankruptcy Code. The purpose of the *Statement of Information* is to ensure that the debtor has made an informed decision to file a Chapter 7 petition, and the Trustee is required to confirm at the 341 meeting that the debtor has received and reviewed the information.

(ii) Current and Accurate Schedules and SOFA: Before the debtor executes the *Declaration Regarding Electronic Filing*, review ALL of the information in the schedules and statement of financial affairs, on a line by line basis, to ensure that the debtor understands what is being requested and that the information is true, complete and accurate as of the petition date. This is particularly important in the event there has been a gap in time between the receipt of the information by counsel and the case filing. With respect to the value listed with respect to all assets listed in the debtor's bankruptcy schedules, be prepared to support the amounts listed, ideally by reference to independent, reliable sources.

II. PREPARATION PRIOR TO SECTION 341 MEETING

A. Tax Returns and Pay Advices: Assemble and timely deliver required tax returns and pay advices. Note that the untimely delivery of these items will always increase the level of scrutiny given by a Trustee and may result in a Motion to Dismiss. Note that the manner of delivery of these documents varies from Trustee to Trustee. Some Trustees prefer to receive these documents electronically; others prefer a hard copy.

B. Identification: Be sure that your clients attend the Section 341 meeting with acceptable identification, including photo ID such as a driver's license, Massachusetts Identification Card, US passport, or some other photo identification issued by a governmental agency. Clients should also have their social security card or some other evidence of their social security number (Medicare Card, some health insurance cards, signed tax return, etc.).

C. Interpreter: Make arrangements to attend the meeting with an interpreter or notify the office of the United States Trustee of the need for an interpreter in advance of the 341 meeting.

D. Problem Issues: There are many issues that, if brought to the attention of the Trustee immediately upon the filing of the case, rather than waiting until the 341 meeting, will be

beneficial to the debtor and the Trustee. These issues are more common in the case of corporate debtors, but also may apply to individuals and include, among things:

- i) Wasting Assets. Identify and notify the Trustee of any wasting assets, such as inventory stored in a location that has been abandoned by the debtor;
- ii) Securing Property. Notify the Trustee of any real or personal property that may need to be secured or protected against inclement weather, particularly in winter months;
- iii) Bank Accounts. In the case of business debtors, notify the Trustee of the branch location and bank account numbers for all accounts that may hold positive balances as of the petition date, even if there are checks in transit or not yet cleared;
- iv) Accommodations: Notify the Trustee of a debtor's physical impairments which may require some accommodation, including hearing or communication problems, or high anxiety.

E. Timely Attendance: Debtors should be reminded prior to the meeting to appear at the examination at the scheduled time.

F. Exemptions: Where an available exemption is limited by a dollar amount, the debtor should not attempt to exempt "100%" or "All" of its value. Rather, the debtor should only claim an exemption up to the maximum dollar amount permitted by the applicable exemption statute. Trustees are alert to debtors attempts to gain an advantage by claiming excessive exemptions and are likely to file objections in these circumstances. Objections to exemptions that are based upon excessive amounts may also result in sanctions against debtor's counsel.

III. POST-MEETING FOLLOW-UP

A. Documents Requested by Trustee: Promptly assemble and deliver all of the documents requested by the Trustee in a timely manner. Review the documents prior to delivery to be sure that they are complete and organized. Call to the Trustee's attention any deficiencies and inform the Trustee as to when remaining documents will be available. An understanding of what the Trustee is trying to accomplish will assist in complying with turnover requests. If the Trustee has asked for information regarding a debtor's banking activities in order to determine whether preferential or fraudulent transfers have been made, it is not sufficient to deliver bank statements without either cancelled checks or a check register. Failure to understand the Trustee's goals will almost inevitably result in requests for additional information.

B. Nonexempt Equity: There is nothing wrong with filing a bankruptcy case for a debtor that has non-exempt equity in assets. Most Trustees will work with a debtor to compromise claims for non-exempt equity so the estate can receive an appropriate recovery and the debtor can retain the essential assets. Prepare the debtor in advance of the filing of the bankruptcy for this eventuality. Make a proposal to the Trustee for settlement before the Trustee incurs fees and expenses to liquidate the assets that the debtor hopes to retain.

C. Exemption is Not Abandonment: Listing an asset as exempt does not remove it from the bankruptcy estate. Even if an asset has a scheduled value that is less than the claimed exemption, the property remains property of the bankruptcy estate until such time as it is abandoned. If a debtor needs to remove an asset from a bankruptcy estate that is not closed, i.e., to refinance a house or to trade-in a car, make a timely (i.e., NOT on the eve of a sale or refinance) request of the Trustee. In a no-asset case, offering to assist in the service of a Notice Of Intent To Abandon property, particularly in cases with a significant number of creditors, will expedite the process.

D. Discharge is Not Abandonment: The entry of an Order of Discharge also does not remove an asset from the bankruptcy estate. Many debtors assume that when they receive their Order of Discharge, they are free to sell or encumber property that remains property of their bankruptcy estate. Debtors should be advised that the Discharge relates to pre-petition liabilities, but has no effect on property of the estate.