

LOU JONES BREAKFAST CLUB PRESENTATION:
Filing an Emergency Petition

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- 1) Why file an Emergency Petition?
 - a) Last minute retention as counsel and
 - b) Immovable Deadline:
 - i) WE Energies Disconnect
 - ii) Foreclosure Deadlines
 - iii) Car Repossession
 - iv) Garnishment
 - v) Levy of Assets
 - vi) Suspension of Driver's License/Registration

- 2) Risks of Filing Emergency Petition for Debtor:
 - a) General Risks
 - i) Amendment Fee to add creditors: \$30
 - ii) Inability to do exemption planning
 - iii) Inability to affect the dischargeability of certain debts (e.g., taxes)
 - iv) Shortened timeframe to file completed schedules
 - v) Uncertainty about passing the means test
 - b) Chapter 7
 - i) Inability to voluntarily dismiss case

- 3) Risks of Filing Emergency Petition for Attorney:
 - a) Malpractice Claims:
 - i) Client's notice of risks of filing emergency petition
 - b) Violation of Fed. R. Bankr. P. 9011(b):
 - (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.
- c) Violation of 11 U.S.C. § 707(b)(4)(C) and (D):
- (C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—
- (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
 - (ii) determined that the petition, pleading, or written motion—
 - (I) is well grounded in fact; and
 - (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).
- (D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.
- d) Sanctions for those violations pursuant to Fed. R. Bankr. P. 9011(c) and § 707(b)(4)(B)
- i) Rule 9011(c)(1)(A) provides the opportunity for the violating attorney to fix the challenged document by withdrawing or correcting it in all situations *except* when "the conduct alleged is the filing of a petition in violation of subdivision (b)."
 - ii) Rule 9011(c)(2) provides "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation."
 - iii) Section 707(b)(4)(B) adds: (B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative or on the motion of a party in interest, in accordance with such procedures, may order—
 - (i) the assessment of an appropriate civil penalty against the attorney for the debtor; and
 - (ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).
- e) *Matter of Love*, 957 F.2d 1350 (7th Cir. 1992)
- i) Chapter 13 debtor who was a tax protestor and whose case was dismissed pursuant to § 1307(c) because the court determined that the case had been filed in a bad faith, which constituted cause for dismissal.
 - ii) 7th Circuit declines to give a precise definition of good faith and adopts a totality of the circumstances test to determine whether a case is filed in good or bad faith.
 - (1) Burden of proof is on the creditor to prove bad faith. *Id.*, at 1355.
 - (2) Question boils down to "is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions?" *Id.*, at 1357.

- (3) Inquiry is both subjective and objective. *Id.*, at 1357.
- (4) A non-exhaustive list of relevant factors to be considered are:
 - (a) Nature of the debt;
 - (b) Whether the debt would be nondischargeable in a chapter 7;
 - (c) Timing of the petition;
 - (d) How the debt arose;
 - (e) Debtor's motive in filing the petition;
 - (f) How the debtor's actions affected creditors;
 - (g) Debtor's treatment of creditors both before and after petition was filed; and
 - (h) Whether the debtor has been forthcoming with the bankruptcy court and creditors. *Id.*
- f) *In re Moffett*, 10-71920, (Bankr. C.D. Ill., 2012)
 - i) Emergency Chapter 7 Petition filed; Structured settlement for payment of \$55,000 and pending litigation with ex-spouse over disposition of proceeds from personal injury claim were not disclosed until debtor's testimony at the § 341 meeting; Trustee filed and won adversary objecting to debtor's discharge; Court entered a *sua sponte* order to show cause for violation of § 707(b)(4)(C) and (D).
 - ii) "[The attorney] cannot absolve himself of the duty to conduct a reasonable investigation by affirmatively allowing clients to bring in only the bare minimum of information and then claiming that it is not his fault that he did not have sufficient information to review. Implicit in the statutory obligation to do a reasonable investigation is the obligation to require clients to provide the information necessary to do that investigation." *Id.*, at 6.
 - iii) Attorney's privileges to electronically file were suspended for 6 months. Could only be reinstated after completed 4 hours of CLEs (3 covering basic consumer bankruptcy issues and 1 covering ethics and professional responsibility issues).
- 4) Best Practices for Filing Emergency Petitions:
 - a) Disclosures to new client:
 - i) Sign retainer agreement with client and explain the risks of bankruptcy in general and of filing an emergency petition specifically. This is especially important because the very things that are risky to the client are also the sorts of things that are normally excluded from the standard fee arrangement (*e.g.*, § 707(b) motions by the U.S. Trustee, chapter 7 trustee's strong-arm powers, §§ 523 or 727 adversaries by creditors or the U.S. Trustee).
 - ii) Disclose nondischargeable nature of most tax claims before filing case and that the date of filing has a great impact on whether tax claims are dischargeable.
 - b) Do reasonable investigation of client's situation.
 - i) Confirm that the immovable deadline is real
 - ii) Run Credit Report before filing case
 - iii) Review PACER to see if any previously filed cases:
 - (1) Is client eligible to be a debtor in chapter 7 or 13?
 - (2) Does the automatic stay need to be extended or imposed?

- (3) Has the client had a previous case dismissed for failure to pay the filing fee? If so, Court will require that filing fee be paid in full within 14 days of the filing.
- iv) In chapter 13 cases, confirm that the client has income or will have income sufficient to fund plan.
- v) Review before filing case the types of assets and transfers that may be pursued by a trustee after filing.
- vi) Hold full interview with client before filing case to get the full picture of the client's financial position. Why is the client filing bankruptcy?
- vii) Confirm:
 - (1) Are car liens perfected?
<https://trust.dot.state.wi.us/linq/linqservlet?whoami=linqp1>
 - (2) Is mortgage perfected?
 - (3) Have there been any UCC filings? <https://www.wdft.org/apps/UCCSearch/>
 - (4) Are there any tax warrants/levies against property?
 - (5) Client is not expecting an inheritance.
- c) Ensure that that completed schedules can be finalized:
 - i) Review and set strict, accelerated deadlines with client for providing documentation need to complete schedules
 - ii) Review with client the standards for granting additional time to file completed schedules: "[Fed. R. Bankr. R.] 1007 allows the court to enlarge the time in which to file the required documents only when the debtor files a motion showing cause: 'any extension of time to file schedules, statements, and other documents required under this rule may be granted only on motion for cause shown' and appropriate notice. Bankr. R. 1007(c)." (*In re Brown*, 13-23093-gmh, Order entered April 3, 2013)
- d) After filing, provide notice by fax, email, letter, and phone call to the relevant parties against whom the automatic stay is imposed
- e) Never file a case without having the original, wet ink signatures of your client:
 - i) *In re Wenk*, 296 B.R. 719 (Bankr. E.D. Va. 2002)
 - (1) Affixing an electronic signature to a petition or document without having the client sign the petition or document is forging the debtor's signature.
 - (2) Doing so violates Fed. R. Bankr. P. 9011(a) and 1008.
 - ii) Local Rule 1008 – "The filing of a petition, schedule, statement, amendment, a stipulation or other document requiring the signature(s) of a person(s) other than the registered user, constitutes a representation by the registered user that all parties whose signatures are required on the document have, in fact, signed the document."
 - iii) Local Rule 5005.1(a) – "Documents which must contain original signatures of the debtor(s) or other entities, including those which are: signed under penalty of perjury; require verification under Fed. R. Bankr. P. 1008; or contain an unsworn declaration as provided in 28 U.S.C. § 1746 must be maintained by the filer of the document for a period of five years after the closing of the case unless the Court orders a different period. On request of the Court or any party in interest, the filer must provide original documents for review."