Debtors Deserve Better: Quality of Representation Raises Troubling Questions

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Most of us hold our fellow bankruptcy practitioners in high regard. We view them as intelligent, ethical, hard working, and talented. Certainly the readers of this Journal are among those truly interested in the law and professional development.

It comes as no surprise, then, that many practitioners were unsettled by certain provisions in the pending bankruptcy reform legislation that seem targeted at requiring the performance of duties that should be second nature to attorneys.

As defined in the legislation, for example, "debt relief agency"[2/] includes a debtor's attorney. A debt relief agency must not fail to perform the work it promised to perform. It must not make misrepresentations to a debtor, and it must not fail to advise a debtor of his or her options.[3/]

Moreover, the proposed bill would require debtor's counsel to certify that counsel has fully advised the debtor of the legal effect of any reaffirmation agreement.[4/] Additionally, the bill would render debtor's counsel liable for failing to "perform[] a reasonable investigation into the circumstances that gave rise to the petition, pleading or written motion."[5/]

These and other proposals are not intended to address provisions of the current Bankruptcy Code that proponents see as

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[1/] All views expressed in this article are those of the author and do not necessarily represent the views of the U.S. Trustee Program or the U.S. Department of Justice.

[2/] S. 420 § 226. All references to the proposed legislation in this article are to the Senate version of the bill.

[3/] *Id.* at § 227.

[4/] *Id.* at § 203. To be sure, debtors' counsel have not been singled out. The major thrust of § 203 is to cure abusive creditor practices.

[5/] *Id.* at § 102(a).

too generous or subject to abuse. They are not intended to alter the substantive rights of debtors and creditors. Nor do they seem intended to directly address debtor misconduct. Instead, they address something that is taken for granted under the current Bankruptcy Code: attorney professionalism. They mandate the type of attorney conduct that clients should already have been able to count on.

In doing so, these provisions certainly indicate that Congress thinks attorneys--and, to be frank, debtors' attorneys--are not doing their jobs.

Like it or not, there is considerable reality behind that perception. At any given Section 341 calendar, you may see any or all of the following:

- Attorneys who do not know their clients and ask them to identify themselves.
- Attorneys who are rude to their clients.
- Clients obviously unprepared to testify.
- Schedules that contain internal inconsistencies.
- Schedules that contain clearly incorrect information, such as clothing valued at zero dollars and "average" bank balances.
- Schedules that significantly predate the filing.
- Budgets that are incomplete or not credible on their face.
- Debtors with minimal debt who are probably not well served by bankruptcy.
- Chapter 13 plans that are not mathematically possible.
- Ill-advised reaffirmations.
- And the list goes on.

Beyond the anecdotal, there is objective evidence of a problem. In 1999, Bankruptcy Judge Steven W. Rhodes of the Eastern District of Michigan conducted a limited study dealing solely with the accuracy of filed schedules and statements of affairs,.[6/] The study tested for 20 specific types of errors, plus one category of miscellaneous problems. All errors had to be apparent from the face of the filings. For example, a filing that disclosed a pension expense but no pension interest would be considered to have an error.[7/] Similarly, a filing that

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[6/]Steven W. Rhodes, An Empirical Study of Consumer Bankruptcy Papers, 73 Am. Bankr. L.J. 653 (1999).

[7/] *Id.* at 666.

identified the debtor as a renter but disclosed no security deposit would be considered erroneous.[8]

No attempt was made to go beyond the documents themselves.[9] As a result, the data are both over- and under-inclusive. In the cases of renters who did not disclose security deposits, for instance, the data may have included renters who actually did not have security deposits–-although that does not diminish the significance of the eye-popping finding that "81% of debtors paying rent disclosed no security deposit."[10]

On the other hand, the study dealt solely with questions that were incompletely or inconsistently answered. It did not attempt to discover responses that were otherwise incorrect or assets that were otherwise omitted. Nor did it deal with problems that could not be discerned from the face of the documents. A number of the 200 cases examined very likely contained other problems.

Even given these uncertainties, the results are sobering. The study found that 198 of 200 cases examined had at least one disclosure problem or presumptive error, with an average of 3.4 problems or errors per case.[11]

The import of the study is not what, if anything, it reveals about debtor honesty, but what it says about the competence of counsel.[12] Debtors were represented in all cases. Ninety-nine percent of these cases had inconsistencies apparent on their faces. The problems were not noticed by counsel.

And the study dealt only with the simplest aspect of bankruptcy: filling out the forms. The implications for the quality of the individual legal advice given debtors is disheartening.

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[8] *Id.* at 665.

[9] *Id.* at 654.

[10] *Id.* at 665.

[11] *Id.* at 678.

[12] Indeed, Judge Rhodes is careful to note that the Official Forms, themselves, are a source of confusion and, even if that were not the case, certain of the disclosure requirements are "unrealistic and unnecessary." *Id.* at 653.

It is tempting to see the source of the problem as economic. There are significant pressures on debtors' counsel. Consumers on the brink of bankruptcy do not want to or cannot spend a great deal on attorneys' fees. Some counsel feel competitive pressure from bankruptcy petition preparers. Interestingly, though, Judge Rhodes found no correlation between the number of errors and fees charged.[13/]

The problem of poor--but less than disastrous--legal service is difficult to deal with under current law. Courts are understandably reluctant to take action against debtors for problems likely caused by their attorneys. In cases where courts do act, there are a variety of remedies available. Courts may condition, temporarily enjoin, or permanently bar attorneys from appearing in front of them.[14/] Severe remedies are for egregious acts, however, and are not generally employed for simple sloppy practice.[15/]

The most common remedy is disgorgement or reduction of fees under Section 329 of the Bankruptcy Code. Although the burden of poor representation often falls most heavily on debtors and chapter 7 and 13 trustees, the amounts involved in individual consumer cases are usually too small to merit an objection to fees. Therefore, the U.S. Trustee is often the most active entity in the area, and most U.S. Trustee activity of this type to date has been directed against something more than routine inaccuracies.

The proposed legislation would have addressed the issue of inaccurate filings head on by requiring that attorneys make some sort of inquiry, thereby, at a minimum, assuring filings that were not improbable or impossible on their face. It might even have served to improve the level of service and care given to many debtors' cases. Absent the legislation, the only reasonable prospect of dealing with the issue is systematic action by U.S. Trustees on a district by district basis.

In the past, the bar, the bench, and the U.S. Trustee Program have made earnest efforts to deal with the most unethical

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[13/] *Id.* at 680.

[14/] *Chambers v. NASCO, Inc.*, 501 U.S. 32,45-46 (1991); *In re Hessinger & Associates*, 192 B.R. 211, 214-216 (N.D. Cal, 1996); *In re MPM Enter.*, 231 B.R. 500 (E.D.N.Y., 1999).

[15/] See, *e.g.*, *In re MPM Enter.*, *supra*, at 506.

practitioners. We have not been as successful at addressing more general problems associated with debtor practices. Over the next year, U.S. Trustee offices will begin looking at these and similar issues more closely. We hope that with the help of panel trustees, standing trustees, and the bar, improvements will be made so debtors can rely upon the diligence and professionalism of their legal counsel.