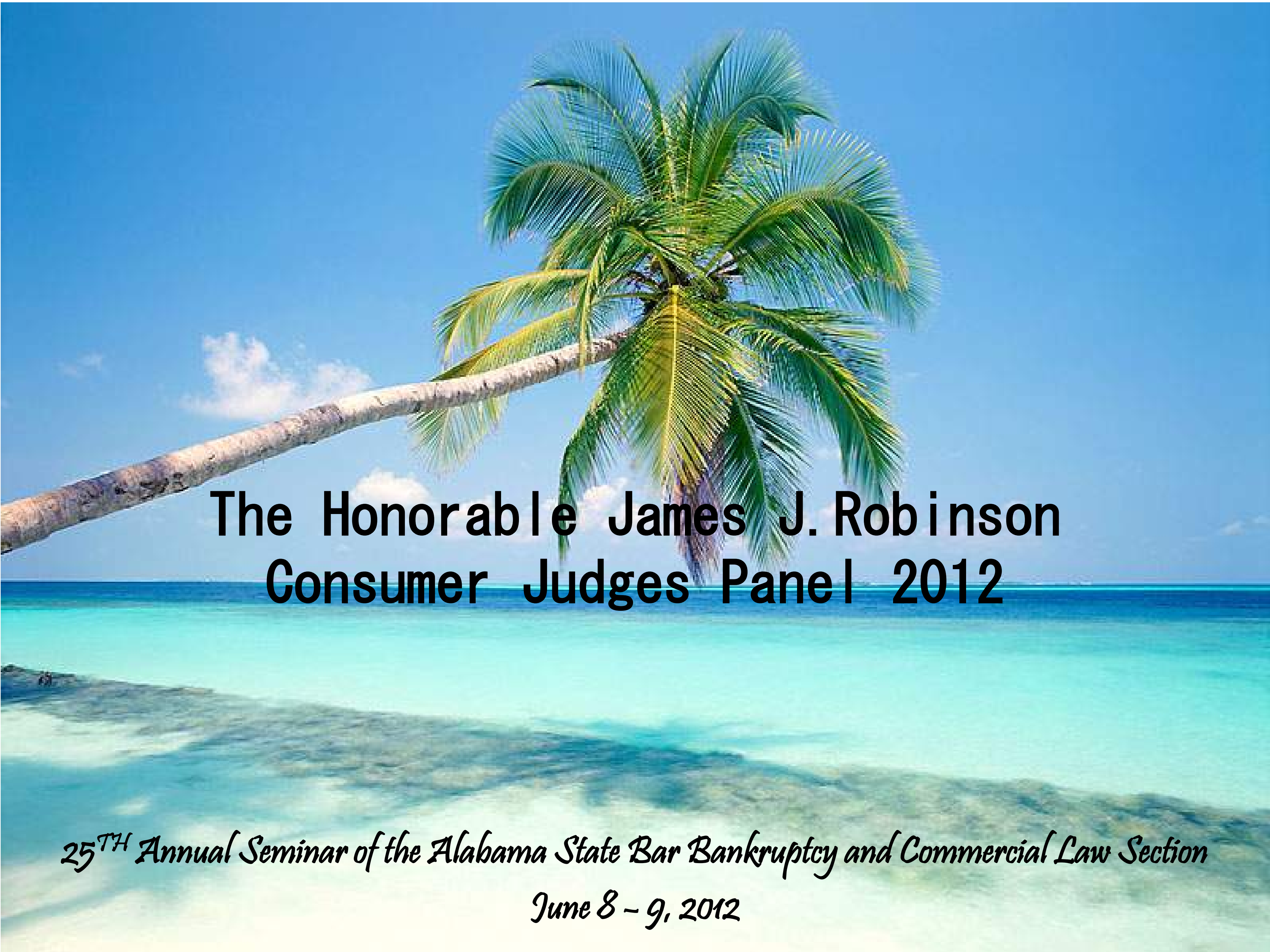

The Honorable James J. Robinson
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Do your Debtor a Favor:

The "Best Interest" Inquiry for Debtors' Counsel

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Debtors' attorneys face the daunting task of walking their clients through the bankruptcy process, with all of its attendant twists and turns. The goal at the end of the journey, with very few exceptions, is to gain for their clients a discharge from their debts. Both the Supreme Court and the Eleventh Circuit have spoken to the overarching importance of the discharge in bankruptcy: "To begin with, the [Supreme] Court provided guidance by setting forth the three *critical* in rem functions of bankruptcy courts: '[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a "fresh start" by releasing him, her, or it from further liability for old debt.=@ *State of Florida v. Diaz (In re Diaz)*, 647 F.3d 1073, 1084 (11th Cir. 2011) (quoting *Central Virginia Community College v. Katz,* 546 U.S. 356, 363-64 (2006) (emphasis added)). *See also In re Wald*, 208 B.R. 516, 561 (Bankr. N.D. Ala. 1997) ("Bankruptcy courts must jealously guard the debtor's right to a discharge which, in the final analysis, is the primary purpose of bankruptcy.").

Implicit in an attorney's duty to represent a debtor competently in the quest for a discharge is the obligation to ensure that you are diligently providing your client as much benefit

[1] Judge Robinson greatly appreciates the hard work and assistance of his law clerk, Alyssa Ross, with respect to the preparation of these materials.

from the bankruptcy case as possible. In other words, you need to make sure the bankruptcy strategy you are advocating and advancing is in your debtor's best interest and is moving your client closer to a discharge whenever possible. While by no means exhaustive, the following is a list based upon my observation of some recurring situations in which debtor attorneys could do their clients a favor, and better improve the benefits of bankruptcy for their clients.

(1) Know your client, by sight. It goes without saying that you should be doing the representation here, including meeting with your client and examining the relevant facts, prior to the case ever being filed. However, it is also the case that in many firms, one lawyer may conduct the initial consultation and handle the signing and filing matters, another lawyer may cover the 341 meeting, and yet another lawyer may attend hearings on particular contested matters. The result: a lawyer who spends an hour sitting through an entire docket call, three feet away from his client, who came in five minutes after his case was called and has no clue he is three feet away from his lawyer. Aside from the real cost and inconvenience to the client who may be missing work already to be in court, this situation just does not look good.

Consider keeping a photocopy of your client's photo ID with your file, and refer to it as needed. Another tip is to refer to the aforementioned photo, and scan the crowd before bellowing to the masses prior to the docket call, "JOHN DOE! Is John Doe here?" This will only work if you actually bring your file to court, which is another topic altogether.

(2) Check for prior cases. Competent representation begins before the bankruptcy case is even filed. Regardless of which chapter of the Code your client may file under, the existence and timing of prior cases can have enormous ramifications. Always check the national PACER directory for prior filings. If your client is a repeat filer, you must discuss with your client

BEFORE filing the case whether the client is eligible for discharge, and whether an extend- or impose-stay motion will be needed. It is unfortunately common that discharge eligibility issues are overlooked until after the case is filed. When a chapter 7 case is filed where the debtor is not eligible for a discharge, it is standard practice in the Northern District for the court to order the attorney to reimburse any fees received for the case and refund the debtor's filing fees. If the existence or duration of the stay is at issue due to repeat filings, remember that a thirty-day clock is ticking. Extend- or impose-stay motions should be filed immediately upon commencement of the case.

(3) Schedules are more important that credit reports. If your firm uses a credit report as the starting point for completing the schedules, *always* review that information with your client for accuracy and relevancy. This issue looms particularly large in extend- and impose-stay cases, and in chapter 13 cases where no discharge is available under 1328(f), in which cases the dates debts were incurred may be examined by the Court very closely in determining whether a change in circumstances exists, and whether the debtor is acting in good faith in invoking bankruptcy protection. As explained in *In re Beasley*, 2011 WL 4498942 (Bankr. N.D. Ala. 2011), "When presented with a chapter 13 case . . . in which no discharge is attainable, a critical element of the ' 1325(a)(7) good faith analysis is consideration of whether the case furthers the intended, legitimate functions of the bankruptcy system. In a case that cannot provide the debtors with a financial fresh start, perhaps the most critical function of bankruptcy for individual debtors, because a discharge is statutorily prohibited, the reasons for nonetheless invoking the court's jurisdiction and protection under the Code must be closely examined."[2]

[2] The reasoning behind this close examination was also set out in the *Beasley* opinion, at footnote 7:

In particular, remember that the date a debt was sold to a servicer or collector was not the date the debt was incurred by the debtor. Sloppy schedules can make things much worse for your debtor, when the dates used make it appear that debts are recent, and possibly even purchase money secured. Similar logic applies to refinance situations: you may show the most recent refinance date, but do so in a way that indicates it was a refinance and not a new obligation. Also, avoid "notice only" items on the schedules. Failure to list an actual creditor as such, instead showing them as only a "notice" recipient, could possibly deprive the debtor of discharge as to that creditor. (Does such a "notice only" listing equate to being "provided for by the plan" for purposes of Code § 1328(a)? – probably not).

As this Court discussed in its opinion in *In re Gaddis*, Case Number 11-40050-JJR13, Doc. 72 filed on June 20, 2011, the enactment of ' 1328(f)(1) most likely prohibits the filing of a case under chapter 13 until the four-year period is satisfied. This reading of the Code is supported by the United States Supreme Court=s opinion in *Johnson v. Home State Bank*, 501 U.S. 78 (1991), wherein the Court analyzed eligibility for bankruptcy relief by reference not just to ' 109, but also to the provisions of ' ' 727(a)(8) and (a)(9), which are directly analogous to ' 1328(f)(1) and which were explicitly stated by the Court in *Johnson* to be Aprohibitions@ on serial filings. It was the Aabsence of a like prohibition on serial filings of Chapter 7 and Chapter 13 petitions, combined with the evident care with which Congress fashioned these express prohibitions@ that convinced the Supreme Court in *Johnson* that such serial filings (chapter 13 following chapter 7) were not foreclosed. Congress is presumed to have been aware of that interpretation when it enacted current ' 1328(f)(1) . *See Johnson*, 501 U.S. at 86. To dismiss as dicta and ignore entirely the Aprohibition@ analysis in *Johnson* is to ignore the prevailing interpretation against which Congress was working when it enacted ' 1328(f)(1), and is directly opposed to the rationale, if not the holding, in *Johnson*. *Contra Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 281-82 (4th Cir. 2008) (dismissing the prohibition language in *Johnson* as dicta and finding the plain language of ' 1328(f)(1) does not address eligibility to be a debtor, but only to receive a discharge). Apparently, under the explanation offered in *Bateman* and similar cases, the plain language means one thing in chapter 7 and another in chapter 13. Nonetheless, this Court declines to reach the eligibility issue in the instant case.

<u>(4) Keep your eye on the goal: discharge, discharge, discharge.</u> It bears repeating: one of the critical purposes of bankruptcy relief is to attain for the debtor a discharge of debts. The discharge is the crystal football of the bankruptcy world, its injunctive shield impossible to shatter (unlike some other trophies which shall remain nameless). This focus must be particularly intense in chapter 13 cases. Section 1322(d)(2) provides that for below-median debtors, "the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years." Rather than automatically put every debtor into a 5-year plan on the theory that payments being lower will make it easier to complete the plan, discuss with your client a shorter plan commitment when at all possible. This means more than saying "do you want to pay $50 a week or do you want to pay $65 a week." This means spending some time analyzing what can be done to shorten the plan life and get the debtor to discharge as expeditiously as possible, including surrendering unnecessary collateral to secured creditors.

That will lead, inevitably, to a hard discussion on what the word "unnecessary" means. You should explain to your clients that being *in* bankruptcy is not as advantageous to them as being *out of* bankruptcy with a discharge and fresh start in hand. A less-than-five-year plan may mean a lower percentage to unsecured creditors. Some debtors may honestly be motivated by a desire to pay as much as possible to their unsecured creditors, and may want to stay in the case longer in order to accomplish that goal. Remind your clients that they can repay their debts voluntarily at any time, notwithstanding the discharge, if that truly is a concern. Section 524(f) of the Bankruptcy Code explicitly provides, "Nothing contained in subsection (c) or (d) of this section prevents a debtor from voluntarily repaying any debt." Saddling a debtor with a 5-year plan when a 3-year plan will do is simply not in your client's best interest and delays, by years, the discharge.

The same can be said of invoking chapter 13 when chapter 7 relief better serves your client's needs. Strongly consider chapter 7 for below-median debtors. This consideration may require you to call secured creditors prior to filing and see if they would be willing to reaffirm, and on what terms. When your client is below median income, has little or no equity to protect, has no secured debt, and is chapter 7 eligible, is it in your client's best interest to nonetheless commit to a 3-year minimum sentence in chapter 13 as a means of paying your attorney fees? This is a difficult question that requires consideration of the totality of the circumstances, and which leads to my next point.

(5) Your client's best interest must come first, even when it hurts. You practice law to make money. That is reality. It is also reality that a constant tension exists between your need to get paid, and the obligation you have to put your client's need for a discharge (not just stopping collection calls and letters during a temporary respite in a doomed chapter 13 case) ahead of your need to get paid. Rarely will a "fee only" chapter 13 case, in which the primary purpose is to finance attorney fees rather than accomplish a meaningful adjustment of debt or protection of assets, satisfy the good faith requirements for confirmation. The majority of courts to address the issue of such "fee only" plans have agreed that in almost all circumstances, they abuse the purpose and spirit of Chapter 13 and do not satisfy the good faith standard. *See, e.g., In re Puffer,* 453 B.R. 14 (D. Mass. 2011), *rev'd and remanded,* --- F.3d ---, 2012 WL 954860 at *4 (1st Cir. 2012) (reversing on grounds that a *per se* rule against fee only plans was inappropriate; but confirming that such plans must be analyzed in light of the totality of the circumstances on a case-by-case basis for good faith, that the "fundamental purpose" of chapter 13 is to pay creditors over time, and that fee only plans should be considered only in "special circumstances, albeit relatively rare, in which this type of odd arrangement is justified"); *In re Buck*, 432 B.R. 13 (Bankr. D. Mass. 2010) (collecting cases); *In re Jackson*, 2012 WL 909782 (Bankr. N.D. Ala. 2012), *In re Nelson*, 2009 WL 2241567 (Bankr. M.D. Ala. 2009).

Sometimes your would-be debtor's best interest is served when you just say no, come back when you have the money to file chapter 7, because chapter 13 does nothing for you but temporarily stop the phone calls, and needlessly delay the discharge. The respite provided by chapter 13 is too often a brief one for debtors under those circumstances, who will, upon dismissal, be right back in the pay-day lender, title-loan whirlwind having accomplished nothing in terms of debt adjustment but to get further behind. Perpetuating that cycle with ill-advised fee only chapter 13 cases is not in your client's best interest.

(6) Examine the claims filed and object when necessary and appropriate. An effective chapter 13 practice requires debtors' counsel to examine the claims filed in your client's case and file objections and lien avoidance motions early. Also consider checking the probate office for recorded certificates of judgment. If you see perfection issues that could give rise to avoidance actions, flag those for the trustee. *See In re Mitrano*, --- B.R. ---, 2012 WL 1081175 (E.D. Va. 2012) (discussing lines of cases and finding that the majority of cases, as well as the cases decided by higher courts, find that debtors do not have access to the trustee's avoidance powers, as such powers are not included within Code § 1303). Avoid judgment liens while the case is open--the first time. Reopening a case in order to file a lien avoidance motion will cost your client more money, and may not be successful in any event if the judge is not sympathetic to omitted lien avoidance motions that should have been filed when the case was open the first time.

(7) File claim objections prudently. Do not waste the court's time or your client's by objecting to claims that the debtor does not dispute owing, simply on grounds that the claimant did not attach sufficient supporting documents. If your client has scheduled the debt as undisputed, no other creditor has filed a claim for that debt, your client has no evidence to dispute the ownership of the debt, and the claim has enough information for you to match the claim with your client's schedules, an objection to that claim is not only inappropriate, but may lead to sanctions under Bankr. Rule 9011. This scenario was recently analyzed in detail in *In re Velez*, 465 B.R. 912 (Bankr. S.D. Fla. 2012) (sanctioning attorney for filing claim objections on technical grounds when the debtor had admitted owing the debts under penalty of perjury.) *See also In re Reynolds*, --- B.R. ---, 2012 WL 1190296 (Bankr. D. Colo. April 9, 2012) (allowing claims over debtors' objection despite noncompliance with revised Bankr. Rule 3001(c)(1) based on remedy of disallowance not being authorized by the Rule, and alternatively on judicial estoppels grounds based upon debtors' scheduling the claims as being undisputed).

(8) File claims yourself. Although it may sound counterintuitive, sometimes the best thing you can do for your debtor is to file a claim for a creditor that fails to do so on its own behalf. Bankr. Rule 3004 provides in relevant part, "If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable." We all know this is the case with secured collateral that the debtor wants to pay for and keep, but far fewer seem to take that step for nondischargeable unsecured claimants. You are not acting in your client's best interest if you fail to file claims for student loan claimants, tax claimants and long-term mortgage claimants, for instance, which will not be discharged. In a related vein, do not offer interest on mortgage arrears unless you are certain the underlying contract allows for interest on amounts in default.

Mortgages entered into after October 22, 1994 (the effective date of the Bankruptcy Reform Act of 1994)[3] are governed by Code § 1322(e), which provides in relevant part that "if it is proposed in a plan to cure a default, the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law." Most courts analyzing whether interest is required to be paid on mortgage arrears being cured over the life of the plan look to the language of the contract and state law, and require something more specific than simply saying "interest continues to accrue until paid in full." *See, e.g., In re Trabal*, 254 B.R. 99 (D.N.J. 2000) (discussing timing and effect of § 1322(e), and Congressional intent to overrule the result in *Rake*, 508 U.S. 464).

In practical experience, that will rarely be the case in most residential real estate note and mortgage forms. Treat lease-to-own or installment land sale contracts on residential real estate as secured mortgage debt when you can. Use the chapter 13 plan to cure arrears and maintain ongoing payments. I have never ruled on a landlord/seller objection to such treatment, as opposed to treating the arrangement as an executory contract under Code § 365. Unless and until you are faced with a ruling to the contrary, your debtor's best interest is served by the

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[3] For mortgages entered into prior to October 23, 1994, *Rake v. Wade*, 508 U.S. 464 (1993) still controls and requires the payment of interest on arrears and other charges for an oversecured mortgage creditor, regardless of whether the contract so provides.

binding effect of confirmation of a plan that treats those arrangements as long-term debt when applicable.

<u>(9) Represent your client in negotiating reaffirmations</u>. As the debtor's attorney in chapter 7, you have a duty to advise your client about the consequences of reaffirming versus not reaffirming, and the math behind the reaffirmation decision. The statement of intent cannot be completed without your having that conversation. Even if you cannot sign the form reaffirmation agreement certifying that you believe the debtor can make the required payments, you should nonetheless represent the debtor in the negotiations and at the hearing on court approval, where such hearing is required. Consider the following recitation of the duties that should be performed by attorneys in chapter 7 cases, quoted from *In re DeSantis*, 395 B.R. 162, 169 (Bankr. M.D. Fla. 2008):

> Attorneys representing individual debtors in consumer cases filed under Chapter 7 of the Bankruptcy Code have certain essential duties they must perform. They must help debtors file the necessary petition, schedules, statements, and pleadings. They must attend the scheduled meeting of creditors. Most relevant here, attorneys representing consumer debtors must advise and assist their clients in complying with their responsibilities assigned by Section 521 of the Bankruptcy Code, including helping their clients decide whether to surrender collateral or instead to reaffirm or to redeem secured debts. This obligation is one of a debtor's attorney's primary and essential responsibilities, particularly after the passage of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, which made the decision more difficult and more complicated. If a hearing is scheduled on a reaffirmation agreement, the attorney must attend the hearing with his or her clients. If an attorney cannot perform these necessary duties, the attorney should not accept bankruptcy cases.

(10) <u>File for fee waivers.</u> Remember to move for in forma pauperis waivers of the filing fee and other fees in chapter 7 when the debtor qualifies. 28 U.S.C. § 1930 establishes the formula for such waivers. The limits change annually, and a chart of household size and income levels may be found at www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources under the "Poverty Guidelines" section.

(11) Prepare, proffer and protect. There are certain scenarios, usually in routine matters such as claim objection, valuation, and extend stay hearings in my court, under which attorneys regularly proffer their client's would-be testimony. The proffer serves an important function in saving time while establishing a record of matters not in dispute. However, the proffer can be a problem when it becomes evident that the information proffered was false. Alabama Rule of Professional Conduct 3.3, Candor Toward the Tribunal, requires the bankruptcy attorney to persuade the client to immediately disclose the false nature of the evidence to the court. If the client refuses, the attorney must disclose the false nature of the evidence to the court and avoid being a party to a fraud upon the court.

Preparation can prevent such predicaments. Review with your client, before the hearing, what the client's testimony will be and have your client confirm for you (ideally in writing, and not just in quick whispers at the podium) that the facts you are going to proffer are indeed what your client would testify to under oath. This not only protects you from offering information that is inaccurate, it also forces the client to consider the relevant information and get it straight for you before you are put on the record.[4]

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[4] I recently began a new procedure for proffers in my court. As has always been the case, the debtor must be present in court. I have the debtor sworn and explain that the attorney will be proffering what the debtor's testimony would be. After the proffer, I ask the debtor to confirm the accuracy of the proffer and give the debtor an opportunity to add anything that might have been omitted from the proffer.

I appreciate very much the quality of the attorneys practicing in the field of debtor representation. The importance of your advice and its impact on the lives of your clients is difficult to overstate. I hope the points addressed above will help you in this important work.