Considerations at the Intersection of Bankruptcy and Divorce

TOPICS COVERED INCLUDE:

-When bankruptcy should/could come first

-When divorce should/could come first

-Filing together vs. filing separately

-When one spouse or ex-spouse files on their own – before, during, or after divorce

-Considerations in drafting the marital property settlement agreement & support

-Protecting your client's best interests

CLE CREDITS:

Approved by Wyoming State Bar for 1.0 hour CLE credit, including .25 ethics.

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Different Courts, Shared Jurisdiction and Pre-emptive Powers

Wyoming district courts enter divorce decrees, divide marital assets, award maintenance and child support and allocate debt between the divorcing parties. The U.S. Bankruptcy Court for the District of Wyoming has jurisdiction to administer the bankruptcy estate, and resolve matters related to the automatic stay, preferential payments, turnover of assets to the trustee, fraudulent conveyances and at times shares concurrent jurisdiction with the states concerning the dischargeability of debt. The automatic stay (which applies to creditor action, even spouses and child support agencies) is preemptive to the property division of a marital estate, but does not apply to certain actions to recover a domestic support obligation.

Chapter 7 and Chapter 13 Bankruptcy

The scope of this CLE, and most likely your actual practice experience when divorce and bankruptcy issues are shared, focuses on the filing of Chapter 7 and Chapter 13 bankruptcies. A Chapter 7 bankruptcy may be known to your clients as a "normal" bankruptcy. A discharge is typically granted within three months of filing with any non-exempt assets administered by a Chapter 7 panel trustee.

A Chapter 13 bankruptcy is know as a "wage earner's plan" or "debt reorganization." A Chapter 13 debtor submits a plan to be confirmed by the court which will allocate a certain amount of their income to the Chapter 13 estate per month for a 3-5 year period. The allocation of those funds are then paid by the Chapter 13 to creditors by degree of priority, according to filed claims, and there are rules which prevent the debtor from incurring debt or transferring certain property during the procedure without permission of the court and the trustee.

Bankruptcy cases may be converted between one Chapter and another, and you should be aware of the limitations as to whether a debtor gets a discharge depending on the timing and effect of previous bankruptcy filings.

THE MEANS TEST - 11 USC § 707

Debtors are required to submit a Means Test and I'll break it down for folks brand new to the concept. The Means Test largely relies on household size, county of residence and gross income to determine if the debtors should pay unsecured creditors over the life of a Chapter 13 plan. The gross income relies on the last six months of wages, and review of recent tax returns for possible adjustment. One "passes" the Means Test if there is little or no monthly disposable income available to pay unsecured creditors. "Failure" of the Means Test may result in an objection by the US Trustee for a debtor to remain in their Chapter 7 and require the debtor to convert their case to a Chapter 13. If you filed a Chapter 13 to begin with, the Means Test determines what you should pay unsecured creditors over the life of your plan.

For those of you versed in logic: the next three to five years of a debtor's budget in a Chapter 13 plan is established by an analysis of what they grossed in the last six months of their life.

Definition: Non-filing Spouse ("**NFS**") is somebody who doesn't participate in the bankruptcy filing by a spouse or ex-spouse.

Definition: Filing Spouse refers to somebody filing a *bankruptcy*, not a divorce.

Debtor and NFS live together on date of petition: Include NFS income on one part of the means test, then deduct whatever NFS doesn't contribute to Debtor's household expenses on other part of the means test.

Joint Debtors live separately on date of petition: Must use shared Means Test and include both sets of income. May be permitted to deduct duplicated expanses as a special circumstance, highly fact-specific.

Practice Pointer: How should a divorce attorney handle the existence of a Chapter 13 plan payment, if it applies to one, or both spouses? A divorce can be grounds for conversion to a Chapter 7 bankruptcy, but perhaps one spouse is ineligible to convert to a Chapter 7 based on the means test? Also keep in mind that DSOs are allowable expenses for the Means Test if incurred prior to the bankruptcy filing....

DEFINING THE DEBTOR'S ESTATE

Separate Estate for each Spouse - W.S. § 20-1-201

Property of each spouse remains property of each spouse throughout marriage. Upon filing a divorce, the interest of each spouse in the other's estate vests, but remains undefined until the entry of a divorce decree that allocates property settlement. *Kane v. Kane*, 706 P.2d 676 (Wyo. 1985) Wyoming encourages equitable distribution of the resulting combined estate, and therefore the estates of either spouse are open season for a judge to divide property.

Practice pointer: Dividing property after a bankruptcy filing, and even within 180 days or a year after discahrge, can present all kinds of problems as I'll present later, unless both spouses file and complete their bankruptcy prior to filing divorce. If only one spouse files bankruptcy, prior to the divorce, the debtor's estate may include assets that belong, or are intended to become, property of the NFS!

DEFINING THE BANKRUPTCY ESTATE

The Bankruptcy Estate Generally - 11 USC § 541

Property rights between spouses filing a joint petition, or between a spouse and the NFS are determined by state law. *Butner v. US*, 440 U.S. 48 (1979). All legal and equitable interests of the debtor(s) are included in the bankruptcy estate, upon filing the bankruptcy petition. *In re Wenande*, 107 B.R. 770 (Bankr. D. Wyo. 1989). Any interest by a debtor in property held as tenants by the entirety is property of the bankruptcy estate. *Id*. At 775.

The trustee, which represents the bankruptcy estate, can also pursue preferences, avoid fraudulent conveyances, recover amounts received by inheritance, act as a successor to certain claims against the estate.

Amounts recovered or turned over to the trustee are then administered to creditors, according to priorities and claims. Secured creditors are rarely the beneficiary of such distributions, because of how secured liens are protected from discharge. Thus, most, if not all of the work performed by the trustee in administering an estate, is for the benefit of unsecured creditors.

Inheritances, Property Division or Life Insurance Proceeds 11 USC § 541(a)(5)

Practitioners should note 180 days after a bankruptcy filing. Any inheritance, property division award from a divorce, or nonexempt proceeds as a beneficiary of a life insurance, are included in the bankruptcy estate, and the debtor is required to disclose such assets within that time period to their bankruptcy counsel, the trustee and the court.

Practice Pointer: Be aware that the trustee could sue the person who received proceeds of a property settlement,180 days after the payor files bankruptcy. Add another reason to close a divorce prior to filing bankruptcy when there is only one person filing. Needless contempt actions look bad on everyone involved. Further, the trustee can hold an estate open to see what the property division might be, as the trustee stands in the shoes of the debtor....

Preferences - 11 USC § 547

Payments on debts that existed prior to filing, made to friends and family within **one year** of filing prior to filing the bankruptcy may be considered a preferential transfer. Payments of $600 or more made to other creditors within **90 days** prior to filing the bankruptcy may also be considered a preferential transfer. The trustee would then pursue the friend, family member or unsecured creditor for the amounts paid during the time period and redistribute the amounts recovered to all creditors, pro rata, according to claim. Two exceptions are that the payments

were for domestic support obligations, or payments made for a contemporaneous exchange of value.

I'll give a quick example of a preferential transfer. *In re Paschall*, 403 B.R. 366 (Bankr. E.D. Vir. 2009):

Wife had lots of money prior to marriage, and used half a million dollars of her own funds to buy a property that she soon deeds to herself and Husband. Husband and Wife later agree that Husband will deed the property back to Wife for a certain amount of money from Wife. Wife pays the money, Husband sits on the deed, and as you saw this coming, Wife files for divorce from Husband, who in the middle of the divorce and pursuant to a MSA, deeds the house back to Wife. Husband files bankruptcy less than a year later after the transfer....trustee prevailed in a preference recovery against Wife!

Practice pointer: Wait a year after post-divorce court ordered transfers are completed before filing the bankruptcy if the transfers are related to debt repayment between spouses. Further, fees paid to an attorney by the debtor within 90 days preceding the bankruptcy filing, could be avoided by the trustee and recovered by the bankruptcy estate. Consider offering family to help debtor with fees, instead. Another practice pointer is what I call the "but I love my dentist phenomenon" (explained in presentation)

Fraudulent Transfers - 11 USC § 548

A trustee can avoid certain transfers as "fraudulent" (don't confuse this with embezzlement, fiduciary crimes - it's a term of art - a scary one, at that) if the transfer was made within 2 years prior to filing the bankruptcy:

a) with actual intent to hinder, delay, or defraud creditors; or
b) while the debtor was insolvent , or if the transaction would make debtor insolvent when the transfer was made, and for less than reasonably equivalent value.

A trustee can avoid a fraudulent transfer as defined by the Wyoming Uniform Fraudulent Transfer Act, *W.S. § 34-12-201 though 34-14-212*, for a period of up to four years preceding the filing of debtor's bankruptcy, or within one year after the transfer could by reasonably discovered. *W.S. § 34-14-210*.

Divorce and bankruptcy practitioners should be aware that a trustee can avoid a transfer between spouses when made in contemplation of bankruptcy when the transfer is made to defraud creditors. *U.S. vs. Arthur*, 582 F.3d 713 (7th Cir. 2009) (Debtor and NFS attempted to hide debtor's assets via a property classification agreement in a community property state, while contemplating bankruptcy, for which both were sentenced to prison.)

Trustee as Successor or Creditor - 11 USC § 544

The trustee has many powers enumerated to administer the estate and recover preferences and avoid transfers. Several parts of the U.S. Bankruptcy Code require the debtor(s) to appear, submit by examination or written request, and to cooperate with the trustee as necessary for the trustee to administer the estate. Cooperation with a trustee is not only mandated in certain cases, it is the professional path to walk; in my humble opinion, trustees are grossly underpaid for most of their cases and often have limited resources to support costly measures to obtain required information.

Advice: **Remember that a trustee may avoid a MSA on the grounds of preference, fraudulent conveyance, lien creditor or to avoid post-bk/post-divorce transfers!**

Trustee stands in shoes of debtor and also represents interests of creditors.

Filing a bankruptcy in the middle of a divorce invites a trustee to the table, and adds time and expense for all parties involved.

PROTECTING ASSETS: EXEMPTIONS

Values of a debtor's property are based on the FMV of the items on the date of the filing bankruptcy petition, which will usually be different than the FMV determined by parties at the filing of the divorce petition.

The exemptions apply per person. In a bankruptcy context, the exemptions are only available for the debtor(s). Thus, without a joint filing, you could lose half the exemptions otherwise available to jointly held property, or property that is vested in divorce proceedings!

Exemptions are only available to residents of Wyoming. Different exemptions *may* be available if your clients have recently moved to Wyoming pursuant to changes under the 2005 Law, where you would analyze how long the debtors have been domiciled over the last two years, and if that includes two or more places, the exemptions of where the debtor resided over the greater part of the 180 days leading up to the filing of the bankruptcy petition are used.

Exemptions - W.S. § 1-20-201

Homestead (intent + occupation) - $20,000 per joint owner
- *unlimited acreage, trailer-friendly
- *May be doubled, but in a divorce situation, failure to occupy could jeopardize

Wearing Apparel - $2,000 - jewelry not included except wedding rings

Family bible, pictures and school books (no max)

Burial plots (no max)

Furniture and household goods - $4,000 per person (each has separate exemption)

Motor Vehicle - $5,000

Tools of the trade/library - $4,000

Interest in a retirement plan, pension or annuity (no max, some qualifiers)

Nonassignable pensions or annuities paid by employers or government (no max)

Tax-deferred IRA (no max, some qualifiers)

HSA Accounts (no max, I'd be careful on the timing of funding the account, however)

Practice Pointer: Trustees may review financial statements and valuations disclosed during divorce proceedings, and divorce attorneys may use bankruptcy schedules as a benchmark for valuations. Consulting with all involved counsel on valuations can avoid problems on all fronts.

THE AUTOMATIC STAY - 11 USC § 362

The automatic stay applies to all entities, the property of the estate and the property of the debtor, upon filing a bankruptcy petition. To proceed against the debtor, an entity would have to file for relief of the automatic stay, or be excepted from it. The golden rule to remember is that the division of any property of the bankruptcy estate is a violation of automatic stay: thus property settlement in divorce court would violate the automatic stay. Most other divorce proceedings are excepted from the stay, especially those related to a domestic support obligation.

POST-BAPCPA DISCHARGE - 11 USC § 523(a)(5) and (15)

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) made several changes to the bankruptcy code, and now that almost ten years have passed, I'm ditching the habit of calling the 2005 Act the "new" law. This CLE will not focus on questions concerning dischargeability under the "old law", or pre-BAPCPA. What some may remember was that a Chapter 13 could get an ex-spouse off the hook for certain domestic support obligations.

DSO Excepted from Discharge - 11 USC § 523(a)(5)

The 2005 Act excepts from discharge any obligations owed to a spouse, former spouse, child, child's parent, child's legal guardian or responsible relative, governmental unit or other entity, when such obligations are in the nature of "alimony, maintenance or support." 11 USC § 101(14A) contains the Code's definition of "domestic support obligation."

Practice Pointer: Focus on who is owed, and what it is for. If the DSO is something owed to a former spouse and it is in the nature of "alimony, maintenance and support" then it is most likely nondischargeable in a Chapter 7 or 13 bankruptcy. Case law is changing concerning claims under 523(a)(5) when enforcement is sought by parties other than those listed in the Code, i.e., the ex-spouse's attorney for attorneys' fees, so tread carefully if your facts aren't clear.

Non-DSO Excepted from Discharge - 11 USC § 523(a)(15)

This is the kitchen sink exception to discharge. Sometimes literally. Obligations from a former spouse that are not support as defined in 523(a)(5) and are incurred in connection with a divorce decree or order of a court of record, are discharged under 523(a)(15). Notice that property division may be excepted from discharge in a Chapter 7, but the act of property division could be a violation of the automatic stay.

Practice Pointer: This is where the classic "hold harmless" clauses come into play used to put each divorcing party on notice that a Chapter 7 will not save them from a divorce decree in most cases. Please be cognizant that more encompassing language in the divorce decree could receive a challenge if it attempts to expand, or limit, the definition of what is dischargeable under the Bankruptcy Code. A recent decision on motion for summary judgment by Hon. Judge McNiff outlines the effect of both 523(a)(5) and 523(a)(15), *Bean v. Bean,* Unpublished Opinion, District Court of Wyoming, Cae No. 12-20359, AP 12-2025, April 29, 2013.

Chapter 13 Can Discharge Property Division and Hold Harmless Orders! 11 USC § 541(a)

Reread, and sometimes weep. If your client is on the receiving end of a Chapter 13 stay, and you don't understand Chapter 13's, ally yourself with counsel that does, file claims to protect any DSO or arrears, and remember that if the plan fails, it's open season again. If you represent a client who needs to have the property division or hold harmless order discharged, you should evaluate with their divorce counsel on how that may affect future relations between spouses. I realize that by the time a Chapter 13 is filed to discharge a property settlement agreement, that things are most likely in a state of scorched earth anyway, but one can always hold out hope.

TIMING AND DISCHARGE EXAMPLES

Spouse files Chapter 7 bankruptcy, NFS then files for divorce (USUALLY BAD)

Debts held by Spouse and jointly with NFS are discharged *as to Spouse*. The debts held by NFS and held jointly with Spouse, *as to NFS*, are not discharged.

Tactical Problem: The divorce judge must wait until the trustee abandons the interest in Spouse's bankruptcy estate, or until fully administered, before proceeding with property division.

Possibility One: NFS files bankruptcy, too (can get messy! Exemption planning shot)

Possibility Two: Judge allocates one half of remaining debt to Spouse despite the bankruptcy discharge of Spouse, and post-bankruptcy-petition debts are not included in Spouse's discharge, so now Spouse has fresh liability *to NFS* via divorce order and a hold harmless, for some of the debt discharged in Spouse's bankruptcy, which can only be discharged by Spouse filing a subsequent Chapter 13 (wait four years from filing the 7.)

Moral of Story: Spouse should have filed bankruptcy after the divorce was final. The hold harmless would still be nondischargeable if Spouse filed a Chapter 7, but discharged if Spouse chose to file a Chapter 13 instead.

Spouse files Chapter 13 bankruptcy, NFS then files for divorce (DISASTER)

Debts held by Spouse and jointly with NFS are discharged *as to Spouse* after Spouse completes a Chapter 13 Plan (years down the road.) The debts held by NFS and held jointly with Spouse, *as to NFS*, are not discharged.

Problem One: The income of NFS must be a consideration on the Means Test, which could result in a much higher plan payment until modified by the Court.

Problem Two: Divorce judge will require permission from Court and trustee before proceeding with property division.

Problem Three: Debtor must apply for permission with Court to incur debt during Chapter 13 plan - which could limit asset allocation strategies by decree (ie, getting the mortgage in Spouse's name only) and nearly all bank are very wary to extend credit during a Chapter 13, which could cause problems for jointly held property and the NFS down the line.

Problem Four: The filing of the divorce decree and the equitable division by the divorce judge could alter Spouse's bankruptcy estate - at a minimum the Trustee will take an interest and look for any potential transfers that took place during or before the Chapter 13 bankruptcy filing.

Problem Five: As in the previous scenario, any decision by the judge to allocate debt arises after the filing of the petition, and there is no way to "add" the hold harmless debt in the middle of an ongoing Chapter 13.

Moral of Story: If you know that your client will have a hard time filing a Chapter 7 bankruptcy, wait until after the divorce is finalized. If you gain a client who is in a Chapter 13 and heading for divorce, consider voluntary dismissal of the Chapter 13 prior to the divorce and then consider refiling at least six months later (and after the divorce is final, of course!) Be careful - this could lead to an abuse of the bankruptcy system and you should work closely with other counsel to document the reasons for the dismissal and the necessity to refile after the divorce is final: keep things in "good faith" as required!

Client files Chapter 13 bankruptcy, then wants to get married (ADVISE AGAINST)

The marriage will be considered a material change of circumstances and any income brought into the life of the Chapter 13 Debtor via their new spouse can be considered additional income available for unsecured creditors for the remainder of the plan. I always advise and warn my clients about marrying during a Chapter 13. Have your client wait until after discharge if possible.

Spouse files for divorce, then files for bankruptcy prior to final divorce decree

Be ware that equitable distribution would apply, even if the Trustee enters as an interested party and depending on the facts, *theoretically*, there may be some assets of NFS that could be exposed to the bankruptcy estate. Only the exemptions available to Spouse could be used to protect the assets in the bankruptcy estate.

Tactical Problem: The divorce judge must wait until the trustee abandons the interest in Spouse's bankruptcy estate, or until fully administered, before proceeding with property division.

Advice: Uncover every single possible asset and get a valuation before you file a bankruptcy. Any asset that can't be protected by an exemption, may provide grounds for waiting until after the divorce is final to file a bankruptcy.

A common example - the tax refund - which can't be exempted in bankruptcy. Spouse files for divorce, depending on half of tax refund to pay attorneys and living expenses. Spouse

will have to turnover tax refund to trustee. Spouse can't petition the divorce court to allocate the tax refund as an emergency necessity because the refund belongs to the bankruptcy estate. Had Spouse waited until after the divorce is final, or at a minimum, when the tax refund was available by court order, the refund could have been used for necessities prior to filing the bankruptcy.

Moral of Story: Uncover every single possible asset and get a valuation before a bankruptcy is filed for divorce clients. Spend (within reason) the tax refund or other asset prior to filing the bankruptcy.

NOW FOR SOME HAPPY EXAMPLES

Both spouses consult with divorce attorneys, then both file a joint bankruptcy using separate bankruptcy counsel, and wait to file their divorce after the bankruptcy closes

There is little or no debt to allocate between the spouses, the divorce court doesn't have to wait on the bankruptcy trustee and the exempt assets are (ideally) divided in an equitable manner.

Moral of Story: This is the best path, whenever possible. Keep your guard for possible post-decree transfers between spouses to avoid preferences (wait one year) or when one spouse is getting something more than 'equitable' by design (don't get greedy.)

Both spouses consult with divorce attorneys, then both consider filing a joint bankruptcy using separate bankruptcy counsel, and wait to file their divorce after the bankruptcy closes, **but they discover one spouse makes a ton of money compared to the other spouse and will have to file a Chapter 13**

They could file a Chapter 13 together and try to manage the payments after the divorce. MESSY. LOTS OF CONFLICT. JUST DON'T.

Or

They could wait until after the divorce is final, where spousal maintenance and perhaps child support are awarded to, say, the Wife. Wife then files a Chapter 7 and the Husband might be eligible to file a Chapter 7 because *court-ordered* DSOs are deductible on the Means Test.

Fixing the Broken Chapter 13 That is Already Filed Prior to Divorce

Convert to a 7 if possible and plausible, if not, dismiss the 13 and refile separate bankruptcies for each spouse after a finalized divorce. I've had ONE 13 plan survive the divorce...ONE.

GENERAL RULES:

If both spouses need bankruptcy, and are eligible to file a Chapter 7, complete the bankruptcy prior to filing the divorce.

If both spouses need bankruptcy, and only one is eligible for Chapter 7, finish the divorce first, then file separate bankruptcies for each.

If one person wants to file bankruptcy and the other does not, wait until after the divorce, realizing that the hold harmless will be an issue for the filing spouse, but which could be discharged in a Chapter 13.

PLANNING FOR BANKRUPTCY THROUGH THE DIVORCE

Clearly define your DSOs

A DSO is in the nature of "alimony, maintenance and support" paid by the former spouse, and fall outside the bankruptcy estate, immune from trustee recapture, and an allowable deduction against disposable income of the spouse who owes the same.

Most important, is that DSOs are nondischargeable and careful attention should be made to clarify the purpose and nature of the debt and state that the spouse has the right to enforce the same. If you want the attorneys' fees to be nondischargeable in a Chapter 13, it would be prudent to describe the purpose of the obligation and tie it into the "nature" of maintenance and support. Assigning the right to pursue supplemental maintenance down the line for failure to pay won't likely cut it.

Hold Harmless

If both spouses are going to file bankruptcy, consider eliminating the clauses.

Wait 180 Days!

Property received in a divorce settlement can be the property of the bankruptcy estate if the Debtor files bankruptcy within 180 days of receiving it.

File Lis Penens and Perfect Transfers

Don't keep property titled in a potential debtor's name. Clean it up. File a lien before the trustee can on property that won't belong to the debtor as a precaution.

A Preference Judgment Can Be Discharged

The trustee would sue whomever received the preference, and so as to between spouses, if there was an award from Wife to Husband, the trustee could recover from Husband to recapture what Wife had given him if Wife filed bankruptcy within a year. However, if Husband files a bankruptcy on the heels of Wife's bankruptcy, the preference action may be discharged. *What happens if Husband filed first?*

Choose State Courts to Determine Dischargeability

If the language defining a DSO is bad, or you aren't confident of it, consider allowing the divorce court to determine nondischargeability of marital debt under Federal law.

Approaching the Intersection: Looking Both Ways

Clients are best served when their divorce or bankruptcy attorneys are familiar with both areas of law.

Rule 1.1 of the Rules of Professional Conduct: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

What is reasonably necessary? Debt issues and the scope and division of the marital estate prevail in both divorce and bankruptcy. Failure to at least contemplate the option or possibility of both divorce and bankruptcy could result in unfavorable outcomes for your clients, or create complications that could result in wasted fees and lost opportunity to mitigate negative events.

Practice pointer: Even if you know a lot about both areas of the law, clients are best served with separate divorce and bankruptcy counsel. Divorce counsel should ask their clients about marital debt and be realistic with clients who clearly won't be able to shoulder the debt beyond the divorce.

Not Best to Be All Things to All People: Looking Both Ways, *Twice*

Careful consideration should be made by bankruptcy counsel before agreeing to represent both debtor spouses in a joint bankruptcy filing when it is clear a divorce is imminent: there are ethical traps for the unwary bankruptcy attorney that agrees to represent both spouses.

Furthermore, representing a client for both the divorce and the bankruptcy is possible, if the other spouse won't participate in the bankruptcy filing (what the courts and bankruptcy people tend to label a 'non-filing spouse'). However - the issue of fees may create an inherent conflict between you and your client if you agree to perform both services, and you are best to at least give a client informed consent concerning the issue before proceeding.

Attorneys' fees are unsecured debt, and dischargeable under 11 U.S.C. § 524 and the U.S. Supreme Court has held that the consumer bankruptcy attorney cannot be paid from the estate in *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004). Imagine filing the bankruptcy realizing that any outstanding divorce fees would be discharged, which, in turn could (not in Wyoming , we hope) inspire the more reckless in the profession to not disclose their unpaid fees in the bankruptcy schedules, which would create tremendous complications, and perhaps criminal inquiry for both the attorney and the client. Therefore, you would have to time the bankruptcy in such a way that ultimately, involves cajoling your billable time to the potential detriment of services to your client, unless you are communicating and timing your divorce services to coincide with a fully

paid bill. Once you file the bankruptcy for your divorce client, a new divorce retainer would be required as the old one is likely unenforceable, which is a matter you should discuss with your client before agreeing to handle both matters.

The cleanest route is to encourage the client to retain independent bankruptcy and divorce counsel. If the circumstances warrant handling both the bankruptcy and the divorce, or representing both clients in a joint filing bankruptcy, keep these rules in mind:

Rule 1.4(b) of the Rules of Professional Conduct: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"

Rule 1.5(a) and (b) of the Rules of Professional Conduct: " (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." "(b)The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client..."

Rule 1.6(a) of the Rules of Professional Conduct "A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent."

Rule 1.7 of the Rules of Professional Conduct: (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) gives informed consent, confirmed in a writing, signed by the client.

Rule 1.8 of the Rules of Professional Conduct: "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Practice Pointer: All involved attorneys should gain an early and firm grasp of the facts concerning debt and the scope and valuation of marital assets. The ideal situation is where each divorce attorney is able to ascertain the debts and marital assets, and forward the information to the bankruptcy attorneys.

However, it is also natural that the spouses retained the same bankruptcy counsel prior to contemplating or filing divorce, and the bankruptcy attorney would have a general idea of the same that, with permission and full disclosure and informed consent of the inherent conflict of representing each spouse, could be shared with divorce counsel. It is always best to fully disclose and inform the clients of the potential conflicts that arise when sharing financial and valuation data with third parties, even additional counsel.

Practice Concern: What happens when the divorcing spouses both approach the bankruptcy attorney because their divorce attorneys recommend that the spouses file a joint petition to save the costs and fees of filing a second, separate bankruptcy? This is VERY common.

The bankruptcy attorney is best to disclose the nature of the conflict and recommend separate bankruptcy counsel the moment it appears that either client would be better served by separate counsel. One provision in the retainer between the shared bankruptcy attorney and the spouses should limit the scope to bankruptcy advise and allow the attorney to withdraw if one party oversteps in 'recruiting' the attorney to their divorce cause., and warn each spouse that a separate bankruptcy attorney might be needed in the future if the shared bankruptcy attorney withdraws.

REMEMBER: DON'T ENCOURAGE A SPOUSE TO FILE BANKRUPTCY ALONE PRIOR OR DURING THE DIVORCE

QUESTIONS?

I like to use the same quote that was used often by the Hon. Thomas Utschig who retired from the Western District of Wisconsin Bankruptcy bench a couple years ago:

"Pigs get fed, Hogs get slaughtered"

His tone was to appreciate the advantages your bankruptcy clients receive from a discharge, and could be applied to encourage divorce clients to resolve matters in a fair manner.

Applying too many 'tricks' and structuring settlement agreements to disadvantage creditors without careful and conscious planning would certainly run afoul of the "smell test" that bankruptcy trustees spend their careers honing.

Good luck and contact me if you ever need assistance with these issues, or better yet, you identify anything I might have missed or mis-stated. I've returned to Wyoming after eight years in the Midwest and I'm already appreciating the differences across all areas of the law.

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