

Transcript of Simulated Presentation on the Chapter 7 Trustee and Counsel

The following is a transcript of a simulated presentation to an audience of lawyers at the monthly meeting of a Bankruptcy Association. The participants are Professor Arnold B. Cohen, who serves as the moderator, Mitchell Marvin, Esq., and Camille Simons, Esq. Mr. Marvin has served as a trustee in thousands of Chapter 7 cases, and Ms. Simons has served as counsel for Chapter 7 trustees in thousands of Chapter 7 cases.

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The following transcript is provided to explain the general Chapter 7 process. The bankruptcy code, some case law and, hence, some documents to which Professor Cohen refers have been revised since the date of publication, and the links to them have, therefore, been disabled. The questions that the Debtor will encounter may vary from that which is given below. Although the transcript is dated, it provides an accurate overview of that portion of the Chapter 7 process that Debtor will encounter. A review of the following transcript might be helpful before attending the first Creditors' Meeting.

Professor Cohen: Good morning. I'd like to welcome everyone to the monthly meeting of our Bankruptcy Association. Our guest panelists today are Mitchell Marvin and Camille Simons. Mitchell has represented consumer debtors in bankruptcy cases for more years than I am permitted to say, and he and I have co-authored a book on Consumer Bankruptcy. Camille's practice is slightly more varied, covering both commercial lending as well as consumer bankruptcy matters. Mitchell also has served as a Chapter 7 panel trustee in many thousands of bankruptcy cases, while Camille has served as counsel for numerous Chapter 7 trustees.

Prior to today, our Association has had numerous panel discussions that have focused on how lawyers got their bankruptcy clients, what information they needed, and how they made a determination as to the operating chapter under which a petition should be filed. We've also had discussions about property of the estate, exemptions, and exemption planning. These discussions have focused on the role of the debtor's lawyer and the work that these lawyers have done during the start of the case. Today, we shift our attention to several other players in the bankruptcy game - the bankruptcy trustee and her counsel.

During our past panel discussions, we've noted that out of all the bankruptcy cases that are filed each year - more than 1.3 million during the year ended September 30, 1997 - about 70% are Chapter 7 cases. And every Chapter 7 case has a Chapter 7 trustee.

Mitchell. You've been a Chapter 7 trustee in thousands of cases. How has this occurred?

Mr. Marvin: The Bankruptcy Code provides that a trustee is automatically appointed upon the filing of a Chapter 7 petition. This appointment is made by the United States Trustee for the region in which the petition was filed. There are 21 regions in the U.S. The U.S. Trustee for a region is appointed by the Attorney General of the United States. The appointment is for a 5 year term. Each U.S. Trustee establishes a panel of private trustees - nongovernmental employees - from which the Chapter 7 trustee in a particular case is selected.

Technically, the panel trustee is initially appointed as the interim trustee in a Chapter 7 case. The regular trustee in a Chapter 7 case may be elected by the debtor's creditors. In the absence of an election, however, the interim trustee automatically becomes the regular trustee.

In Philadelphia, there are 7 panel trustees. They receive cases on a rotating basis - that is, as each case is filed, it is assigned to the next panel trustee.

Professor Cohen: About how many cases are assigned to the Philadelphia area panel trustees each year?

Mr. Marvin: In our district, we each get appointed to 700-800 cases a year.

Professor Cohen: Are these all consumer cases?

Mr. Marvin: No. All Chapter 7 cases are initially assigned to a panel trustee, but I think that 98% of our cases are consumer cases.

Professor Cohen: How are the panel trustees compensated?

Mr. Marvin: We receive a minimum of \$60 per case. This payment comes out of the Chapter 7 filing fee, which currently is \$175. However, if there is property of the estate that is available for distribution to creditors, then our compensation is determined by the bankruptcy judge, although it is capped by a statutorily determined percentage formula.

Professor Cohen: Would you briefly run through the current percentage amounts?

Mr. Marvin: In Chapter 7 cases, trustee fees cannot exceed 25% on the first \$5,000 of the estate; 10% on amounts between \$5,000 and \$50,000; 5% on amounts between \$50,000 and \$1 million; and 3% on any amounts in excess of \$1 million.

As I noted, however, the amounts resulting from these percentages are maximums. The statute leaves it to the court - i.e., the bankruptcy judge - to determine the exact amount of the fee, which is to be a "reasonable" amount, "based on the nature, the extent, and the value of [the actual and necessary services provided by the trustee], the time spent on such services, and the cost of comparable services [in nonbankruptcy cases]."

Professor Cohen: In how many of the 700-800 cases that a panel trustee will handle in a year, are there assets so that the trustee's compensation will be more than the \$60 minimum?

Mr. Marvin: Most of the Chapter 7 cases are so-called "no asset" cases. These are cases in which there is no distribution of property to the debtor's unsecured creditors. I would say that about 98% of our Chapter 7 cases are no asset cases. This means that about 15 or so of the cases that I handle each year are asset cases.

Ms. Simons: Note that the rotation in the trustee assignments are not done separately for both asset and no asset cases. Accordingly, in any particular year or even over a several year period, it is possible that one panel trustee would receive more asset cases than another panel trustee. It simply depends when the asset cases are filed, since the case will go to the panel trustee who is next in line to receive an assignment.

Professor Cohen: And what is a typical fee that a panel trustee will receive in an asset case?

Mr. Marvin: The amount obviously depends on the size of the estate. And, it also depends on the

determination by the bankruptcy judge of the reasonable value of the trustee's services. But, apart from some off-the-scale liquidations that a panel trustee might handle every year or so, compensation to a panel trustee in an asset case would range between \$5,000 - \$10,000.

Professor Cohen: And how much will trustee's counsel receive in the typical asset case - again, ignoring the extremes?

Ms. Simons: About \$15,000, which actually ends up being about 30% of the amount of the estate. But you've asked for the middle level asset cases, ignoring those cases in which the estate is hundreds of thousands of dollars and also ignoring cases that are thought to be asset cases but which end up being no asset cases.

Professor Cohen: When does a case that starts out as an asset case wind up as a no asset case?

Ms. Simons: Oft-times, there is property that, after examination, won't generate any proceeds beyond the cost of administering the estate. For example, suppose that an initial examination of the debtor's Schedules indicates that \$10,000 would be generated from a sale of the debtor's nonexempt property. If this \$10,000 is made up of the debtor's equity in a home worth several hundred thousand dollars, the cost of selling the home would actually be more than \$10,000. Remember that the typical real estate broker's fee is 6-7% of the sale price, that the attorney for the trustee is entitled to be compensated for the work that they do - such as preparing an application to approve any sale, - and that the trustee would be entitled to a percentage of the estate. Since any attempt to administer this \$10,000 hypothetical estate would not generate any funds for general creditors, the property should be abandoned and the case treated as a no asset case.

Note that in these asset/no-asset cases, counsel for the trustee will not receive any compensation, even though counsel may have spent time on the case prior to determining that any property should be abandoned.

Professor Cohen: Mitchell. What do you do as a trustee in the typical no asset case?

Mr. Marvin: I spend about 20 minutes reviewing the Schedules, another 10-15 minutes presiding over the Section 341 meeting, and about 5 minutes preparing the Reports that I am required to file with the U.S. Trustee's office. And, in order to maximize my efficiency, I will schedule 28-30 meetings on a given day, and I do this 2 or 3 times a month.

Professor Cohen: This seems to me to be very little time? Is that typical of the time spent by other panel trustees?

Ms. Simons: Many panel trustees spend less time at the Section 341 meeting - some individuals scheduling their meetings every 5 minutes.

Professor Cohen: Mitchell. Is it fair to say that you spend about 30 minutes on each case and that at a minimum, you are compensated \$60 for that one-half hour of work?

Mr. Marvin: You are inferring that a panel trustee's compensation works out to \$120/hour. That is not true, even in the case of trustees who are able to limit the time of a Section 341 meeting to 5 minutes. Even in cookie cutter cases - i.e., those in which there is nothing unusual, complicated, or unforeseen - the trustee has numerous reports to prepare and file with the U.S. Trustee's office, has periodic

meetings with the U.S. Trustee and his or her staff, and has periodic audits in which every case file is examined.

By the way, I've placed on the front table samples of the reports that we file with the U.S. Trustee's office in each case. These consist of a debtor's oath form, a minute sheet, a trustee's report, and a no distribution report - at least in no asset cases.

Professor Cohen: How often do the meetings with the U.S. Trustee occur?

Mr. Marvin: Several times a year.

Professor Cohen: And who is present at these meetings?

Mr. Marvin: In addition to the U.S. Trustee, an analyst and a paralegal from the U.S. Trustee's office are present.

Professor Cohen: And what is discussed?

Mr. Marvin: Basically, we review the status of my cases with a view to determining what should have been done that wasn't done. Essentially, these meetings serve both a watchdog purpose and also serve as a mechanism to keep the case handling system moving as quickly as possible.

Professor Cohen: Let's return to the Section 341 meeting. In a no asset case, who is present and what takes place?

Mr. Marvin: Usually, the only persons present are myself, the debtor, and the debtor's attorney. I ask whether the debtor signed the petition, whether the debtor signed the Schedules, whether the information on the Schedules and the Statement of Financial Affairs is accurate. I also usually ask whether the debtor (1) is employed, (2) made any prepetition transfers to family members, friends, or others during the past four years, (3) is married, (4) owns or owned any property with his or her spouse that is not shown on the Schedules or the Statement, (5) was involved in any accidents within the past year or two, and (6) is entitled to any distribution from someone who has died. Apart from this, I also may ask questions based upon my reaction to the information contained on the Schedules and the Statement, such as how the debtor arrived at property values when property has been listed as exempt. For the most part, however, there will not be any property of the estate available for unsecured creditors.

Professor Cohen: Is there likely to be any creditor participation at the Section 341 meeting?

Mr. Marvin: Although creditors are invited to attend the meeting and ask questions of the debtor, it almost never occurs in a Chapter 7 no asset case.

Professor Cohen: Does the trustee have counsel in a no asset case?

Mr. Marvin: No. There will be no money to pay them.

Professor Cohen: Mitchell. What do you do in a typical asset case?

Mr. Marvin: The same as in an asset case - i.e., review the Schedules and the Statement of Financial

Affairs, and conduct the Section 341 meeting - plus everything necessary to gather the estate and arrange for its sale. My obligation in an asset case is to collect and sell property of the estate, and distribute the proceeds to the debtor's creditors. Thus, if there are funds in bank accounts that will not be entirely covered by the debtor's exemptions, it is my obligation to obtain those funds. And if there is real estate or personal property in which the debtor has equity and which is not fully covered by exemptions, it is my obligation to cause the property to be sold.

Professor Cohen: Do you do this alone or do you engage counsel?

Generally, counsel is engaged.

Professor Cohen: I gather that some panel trustees are non-lawyers.

Mr. Marvin: That is correct. There is no requirement that a trustee be a lawyer. Similarly, lawyers are not automatically precluded from serving as trustees. The panel trustees in Philadelphia include both lawyers and non-lawyers.

Professor Cohen: What is done by lawyers for the trustee in asset cases?

Ms. Simons: Everything to aid in gathering the property and in having it sold. In addition, we have to determine the extent to which property is encumbered or free of liens. Accordingly, we'll obtain a UCC, tax lien, and judgment search on the debtor and any real estate that the debtor owns.

Professor Cohen: How is this done?

Ms. Simons: Either a paralegal or I will engage the services of a search company. Since everything is computerized, the search company can accomplish the search and fax us the results in a day.

Professor Cohen: What is the cost?

Ms. Simons: The cost is \$25 per debtor.

Professor Cohen: What else do you do?

Ms. Simons: If, for example, the debtor transferred substantial property to a former creditor in the month or so preceding bankruptcy, the property might be recoverable as a preference. In this event, we would prepare a motion for turnover of the property or its value, and file the motion with the bankruptcy court. If the motion is contested by the creditor, we would have to litigate our entitlement before the bankruptcy judge.

In some cases, the debtor has equity in land that is not exemptible. This equity is property of the estate. Accordingly, the property might have to be sold in order for this equity to be captured. In these cases, we would prepare applications for the engagement of a real estate broker and, possibly, an appraiser. When a buyer is obtained, any agreement of sale would have to be approved by the court and we would be preparing the necessary applications.

By the way, like Mitchell, I've placed on the front table samples of some of these application forms, including ones for the engagement of counsel, for the engagement of a real estate broker, and for approval of a sale.

Professor Cohen: What else does the Chapter 7 trustee's attorney do? For example, are you at the Section 341 meeting?

Ms. Simons: Normally, we are not at the Section 341 meeting. This is because we will not have been appointed until after the meeting. After all, the trustee has to be relatively confident that there will be distributable property before seeking counsel. But, once we are appointed, we would be present at auctions, at real estate closing relating to the sale of property, and, as I noted earlier, at court hearings relating to contested motions.

Professor Cohen: Why doesn't a trustee who is an attorney also handle these functions?

Ms. Simons: Sometimes they do, but most of the time a separate person - who obviously must also be an attorney - handles them. This duality is a result of the compensation system. A trustee has certain obligations, and the performance of these obligations is compensable according to the "reasonable-services-capped-by-the-statutory-maximum" system that Mitchell referred to earlier. If a trustee also performed an attorney's function and sought additional compensation for such services, there might be difficulty in separating the trustee's functions from the attorney's functions so that both would be compensated. Moreover, some bankruptcy judges might view this as an attempt the individual appointed as trustee to be paid twice for essentially the same work. Rather than force the judge to draw lines between functions, and to run the risk of under compensation, the trustee-attorneys frequently do only the trustee work and have another individual do the attorney work. In some cases, the trustee-attorney is in a law firm that contains other experienced bankruptcy counsel. Since persons performing legal work are usually compensated at an hourly rate that is greater than the amount paid to the trustee-attorneys, the firm itself benefits from the segregation.

Professor Cohen: Are bankruptcy judges, who must approve the application of the trustee to engage someone as trustee's counsel, willing to approve someone who is a partner in the same firm?

Ms. Simons: Yes.

Professor Cohen: Why might trustee-attorneys farm out legal work to outside counsel, at least when there isn't another bankruptcy attorney in their office?

Ms. Simons: In some instances, the compensation rate of a trustee is not much different than the rate for the trustee's counsel. Thus, as long as the trustee-attorney has sufficient paying work to fill the day, there is no incentive to take on the dual role. And, there is always the risk that the trustee-attorney will be under compensated if the dual role is taken on.

Obviously, in cases where the trustee is not a lawyer, he or she must seek the engagement of a lawyer as trustee's counsel.

Professor Cohen: Mitchell and Camille. Thank you for addressing us today. I hope we can have you back in the future and that we can discuss other aspects of the bankruptcy process.

END of Transcript of Simulated Presentation on the Chapter 7 Trustee and Counsel

