

Talk Amongst Yourselves; I'll Give You A Topic:

WHEN YOU ARE UP TO YOUR EYEBALLS IN ALIGATORS, IT'S TIME TO DRAIN THE SWAMP

Or

IF YOU DON'T HAVE TIME TO DO IT RIGHT WHEN WILL YOU FIND TIME TO DO IT OVER?

We are all up to our eyeballs in alligators and we all (including the Trustee) need to start draining our swamps. My staff and I have prepared the following list of issues that make unnecessary work for everyone. If you adjust your procedures to comply with these suggestions, you will find that it will eventually save time for YOU and YOUR STAFF, in addition to helping the Trustee, her staff, the Court, and all parties in interest. **I strongly encourage you and your staff to go through this list carefully and adjust your practice accordingly. I also encourage you to give me feedback. I am working to drain my swamps too.**

- A. Handouts Via Email And Available at www.dcktrustee.com/forms.htm:
1. Sample plan with preferred language for conduit payments (Thank you Mr. Ollason). NOTE THAT THIS IS NOT THE MOST CURRENT VERSION OF THE MODEL PLAN.
 2. Sample Stipulated Order Confirming (Thank you Trustee Maney)
 3. Sample Notice of Submitting Proposed Stipulated Order on Confirmation (Thank you Mr. Mortensen)
 4. Sample Notice of Request to Trustee to Begin Adequate Protection Payment (with pen change by Trustee)(Thank you Mr. Mortensen)
 5. When a Debtor is Not Eligible for a Chapter 13 Discharge After An Earlier Case Was Filed (Thank you Mr. Morris)
 6. Sample Waiver of Statute of Limitations
 7. UST Correction Procedures When the SSN is not correct on the petition
 8. UST Policy on Debtor Tax Returns
 9. Salient Points on Tax Treatment Under the Half-Act Code
 10. So Let It Be Written: What a Chapter 13 Plan Says vs. What the Trustee Can Do
 11. General Order No. 104 REQUIRING the use of model plan form 13-2
 12. Model Plan Form 13-2
 13. Local Rule 2084-8 Serving the Plan or Motion for Moratorium
 14. Local Rule 2084-9 Creditor Objection to Plan or Motion for a Moratorium
- B. Updated model plan form 13-2. **Please use the updated model plan form 13-2, which is required by General Order No. 104.** Using the model plan is also the best way to avoid unintended errors. It also expedites confirmation. See General Order No. 104, Model Plan Form 13-2.
- C. Preferred Language For Conduit Plans. **Please use the language in this example plan.** See Sample Plan from Ollason.

- D. Motion to Dismiss for Failure to Comply with standing order on mortgage conduits. Trustee Kerns has adopted a new procedure and is now filing a motion to dismiss for failure to comply with the standing order on conduit payments. This will occur as soon as the plan is reviewed for the first time and there appears to be a mortgage default and the plan does not include a conduit. **This will give you an opportunity to address the conduit issue in a timely fashion so that the debtor is either excused or starts making conduit payments before s/he gets so far behind that s/he can't catch up.**
- E. Debtor Names on Petitions/B21/SS Card. **Please make sure that the name on the petition and the Form B21 matches the name on the SS Card. BY DEFINITION THIS MEANS THAT YOU MUST ACTUALLY SEE THE SS CARD BEFORE YOU FILE THE CASE.** Please obtain a copy of your clients' SS Cards BEFORE you file the petition. **Bring your copy of the SS card to the 341 as a backup in case your client forgets his/her SS card.** If an error is identified at the 341 meeting, you will have to correct it by amending, filing, and serving the Form B21 (for any error) and petition (for errors in the last 4 digits). Failing to provide proof of SSN's at the original 341 is a completely avoidable waste of energy for everyone. Don't be penny wise and pound foolish on this issue. See USTP Correction Procedures at www.dcktrustee.com/forms.htm.
- F. Continuing Initial 341 Hearings. **If you need to continue the first meeting of creditors, please appear at the meeting and make the request when the hearing is called. Alternatively, you may obtain a continued hearing date in advance, however, you need to notice the MML.** There have been too many times that the attorney requests an advance continuance and a creditor drives from out of town only to be told they have to come back again.
- G. Debtor Access to Website: **Please encourage your debtors to subscribe to the National Data Center (www.ndc.com) or www.13network.com and to regularly check the status of their plan payments and plan disbursements.** Debtors ask their attorneys fewer questions when they can answer their own questions on the internet. Data on these websites is 24 hours old. Everyone is on the internet these days. Let's use that resource. See website access agreement at www.dcktrustee.com/forms.htm.
- H. Proof of plan payments. **Please do NOT send the trustee confirmation copies of plan payments sent in by debtors.** If you are concerned about whether we have received a payment, check one of the two websites available to you: www.13network.com or www.ndc.com. If the payment does not appear within a week, ask the debtor to obtain a negotiated copy of the payment (that means a copy of both front and back of the cashed check). We will research the payment based on the negotiated copy.
- I. Eligibility for a Chapter 13 Discharge. **Please pay attention to prior bankruptcy filings and determine, prior to filing the case, whether the debtor is eligible for a chapter 13 discharge.** A general discharge is statutory and ignoring it will not improve the chances of getting a discharge. Debtors can complete a plan even if they are not eligible for a discharge. So do not assume that your client will receive a discharge merely because they are making payments under a plan. See When a Debtor is Not Eligible for a Chapter 13 Discharge After An Earlier Case Was FILED at www.dcktrustee.com/forms.htm.
- J. Tax Returns Issue One. **Tax returns should be transmitted to the trustee by email or fax ONLY.** Faxes are automatically converted to PDF format on the trustee's side. Because tax returns include personally identifiable information, there are new requirements to protect the

documents. The trustee can delete the tax returns if they are submitted electronically. However, the trustee is required to return paper copies to the debtor. This is burdensome for everyone. Please submit tax returns in electronic version only and please remember to redact SSN's and the names of minor children. See UST Policy on Debtor Tax Returns at www.dcktrustee.com/forms.htm.

- K. Tax Returns Issue Two. **Please submit tax returns to the trustee NOT LATER THAN 7 DAYS BEFORE THE FIRST 341 HEARING.** This is REQUIRED by Sec. 521(e)(2)(A)(i). The consequence for failure is dismissal or conversion. Unfortunately many debtors provide tax returns late or not at all. Please re-familiarize yourselves with the provisions of BAPCPA that deal with tax returns and consider the remedies that are allowed by law, but which parties have not yet started enforcing. Things can, and most likely will, change. **Please note the Model Plan Form 13-2 paragraph (H) requires a statement regarding unfiled returns.** See Salient Points on Tax Treatment Under the Half-Act Code at www.dcktrustee.com/forms.htm.
- L. Tax Returns Issue Three: **Please make sure your clients file tax returns with the taxing authority NOT LATER THAN THE DAY BEFORE THE FIRST 341.** This is REQUIRED by 1308(a). 1307(e) REQUIRES dismissal or conversion as a consequences, if a request has been made. To date no one is really enforcing this. Things can, and most likely will, change. See Salient Points on Tax Treatment Under the Half-Act Code at www.dcktrustee.com/forms.htm.
- M. Tax Returns Issue Four. 1325(a)(9) requires that ALL tax returns be filed as a pre-requisite of confirmation. **Please do not send the trustee a SOC if the tax returns have not be filed with the taxing authority and provided to the trustee.**
- N. Tax Returns Issue Five. **Please make sure you are fully informed as to the status of tax returns and the dischargeability of tax obligations.** 1328(a)(2) provides exceptions to the discharge for many taxes that used to be dischargeable. Unfortunately, the taxing authorities do not yet do anything in Arizona to note on the record that a particular tax liability is nondischargeable. Trustee Kerns is working with the taxing authorities to see if this can change. In the mean time, you should re-familiarize yourself with Sections 1328, 507, and 523. You may be surprised about the taxes that are statutorily excepted from discharge. For instance, income taxes for two years prior to the petition are non-dischargeable if the return is unfiled or tardy. See 523(a)(1). These taxes are nondischargeable even if a claim is never filed or allowed and a non-dischargeability action is not required. To date there has been little enforcement by taxing authorities, but things can, and apparently are, changing. The SCOTUS decision in Espinosa may impact this, but we do not know how yet. The issue can be eliminated by making sure that tax returns are filed before you file the petition. See Salient Points on Tax Treatment Under the Half-Act Code at www.dcktrustee.com/forms.htm.
- O. Did I mention tax returns?
- P. Motion to Dismiss for Delinquency: The morning of scheduled chapter 13 dismissal calendars, the Trustee runs an updated delinquency report which includes all payments received in Tennessee through the night before the hearing. If the case is current at that time, the Trustee or Mr. Morris will announce that the hearing can be vacated as being moot. The Trustee is working with her various computer/internet providers to figure a way to email or post delinquency reports on a periodic basis. More information to come.

- Q. Motions for Moratoriums. **Please use Model Plan Form 13-2 when amending or modifying a plan, which includes, but is not limited to, changes in the proposed payment schedule, I.E. MORATORIUMS.** Pursuant to Local Rule 2084-8, you must notice and provide an opportunity for objection to all material changes in a plan. “To be regarded as nonmaterial, the modification must not delay or reduce the dividend to be paid on any claim or otherwise modify the claim of affected creditor’s consent.” Local Rule 2084-8(b). Because almost every moratorium delays payment to creditors or reduces the amount that will ultimately be available for general unsecured creditors, almost every moratorium is an amended plan pre-confirmation or a modified plan post-confirmation. **No matter what you call it, you still have to notice the MML (actually the BNC will do it for you). You still have to give an opportunity for objection. You still have to do the math. And you still have to resolve the issue with an order (which should not be uploaded prior to the expiration of the objection period).** There is no reason to file free-standing motions for moratoriums. All it does is create an extra, and very confusing, deadline that you and the trustee have to track, extra objections to which you must respond, and an extra order that you have to upload. **You will make things easier for yourself if you simply use the model plan form.** You already have it on your system. You already have the plan provisions typed in. **Check “amended” or “modified,” state the reasons for amendment/modification, change the plan payments in Paragraph (A), change the provisions that need to be changed, re-do the math, restate everything that stays the same (it is already in your system), and change your deadline for submitting the SOC.** You have to do all of this anyway (if you are not doing all of this, you are not doing moratoriums correctly anyway). You might as well do it all at once IN A SINGLE DOCUMENT. More importantly, you might as well save yourself from having to upload an extra order, track an extra deadline, and conform your proposed SOC to multiple documents.
- R. Partial Conduit Payments. Many conduit trustees make partial conduit payments and they rely on the mortgage company to hold the funds in an adjustment account until there is a full payment. Mortgage companies should automatically apply the funds when a full payment is received, but you may want to request them to apply the funds or return the partial payment to the trustee. To make things easier, Trustee Kerns has now changed her system and partial payments will no longer be made. Please let the trustee know if you have any problems with this.
- S. Deadlines for submitting the SOC. **Please submit your SOC in a timely fashion. If you cannot meet your deadline, please file a motion to extend with the court.** The trustee will file a notice of intent to dismiss (“NOID”) if you fail to meet the deadline for submitting a stipulated order on confirmation. However, this should be the exception, not the rule. Using NOIDs as a calendaring system places an unnecessary burden on the trustee’s office and the court and is not fair to the attorneys who manage their deadlines on their own.
- T. Preparing SOC’s. **Please, please, please, read the Trustee Plan Evaluation/Objection and makes sure that you address all issues in the SOC.** This is the number one reason that SOC’s are returned unsigned. A simply solution is to check off each paragraph in the Eval/Objection as it is addressed.
- U. Uploading SOC’s. **Please upload the actual signed SOC or authorize the trustee to upload the SOC for you.** In an effort to expedite confirmation, Trustee Kerns sometimes makes pen changes on SOC’s. If this happens, it is critical that you convert the actual signed SOC into PDF format and then upload it for signing by the judge. Some attorney offices are not doing this.

Instead they are uploading the SOC that was originally drafted and is in electronic format in the attorney's computer system. As a result, conformed order confirming does not include the pen changes. This creates issues on many levels. If incorrect SOC's continue to be uploaded Trustee Kerns will have to stop making pen changes and the confirmation process will be delayed in many cases. Please check with your staff and make sure they are handling SOC's correctly. Alternatively, sign the SOC before you send it over and authorize Trustee Kerns to upload the SOC for you.

- V. Required discharge language in SOC: Effective immediately, SOC's need to include the following standard language regarding Unsecured Nonpriority Claims: **"All other claims shall be classified as unsecured and nonpriority. Such claims shall be paid pro rata the balance of the payments under the Plan and any unsecured debt balance remaining unpaid at the end of the Plan may be discharged EXCEPT AS PROVIDED IN 11 U.S.C. SEC. 1328."** The trustee will make a pen change until you update your forms.

- W. Schedule D. **Please identify the secured asset by address (if real property) or description (if personal property)**. This information is required by the official form. Please do not just say "first deed of trust" or "vehicle loan."

- X. Waiver of Statute of Limitations. **Please make sure that you obtain a stipulated waiver of the statute of limitations executed by the TRANSFEREE in connection with a preferential payment.** This is necessary if you are electing NOT to pursue a preferential payment and, instead, are proposing to repay the amount through the plan. Trustee Kerns will not stipulate to confirmation unless a waiver has been executed. See Sample Waiver of Statute of Limitations at www.dcktrustee.com/forms.htm.

- Y. Be Prepared to Document Compensation Paid to Any Attorney, Law Firm, or Debt Settlement Agency. Please remember the obligations of attorneys under 11. U.S.C. Sec. 329 and *Fed.R.Bankr.P. 2016*, the debtor's duty to disclose on Question 9 on the Statement of Financial Affairs, and the debtor's obligation to cooperate with the trustee pursuant to 11 U.S.C. Sec. 521(a)(3) and (4) . If the trustee has questions about compensation, she may ask you to provide proof of the date and amount of compensation paid for debt relief services and/or compensation of professionals. Such proof should be provided in the form of copies of negotiated checks (front and back), bank statements showing the automatic debit and/or credit card statements. Alternatively, you can provide copies of your trust account ledger showing the dates and amounts you received from the debtor.