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A. Fee Agreements and Pre-petition Retainers.

- §2.1 Enter into a Written Fee Agreement.

State law generally requires that your fee agreement with your client be in writing, unless the client is a corporation or an emergency exists. Bankruptcy law (§327(a) and FRBP 2014(a)) requires that fee arrangements be disclosed to all parties in interest and approved by the court. It follows that you need a written engagement agreement. See **Appendix 3** for a sample Debtor in Possession Engagement Agreement.

§2.2 Obtain a Retainer and Deposit it into Your Client Trust Account.

Experienced counsel typically request a retainer large enough (i) to cover fees reasonably anticipated to be incurred through the end of the case (in a non-operating case), or (ii) to cover fees reasonably anticipated to be incurred during the first few months of the case (in an operating case, where operating revenues are expected to be sufficient and available to pay for the balance of their fees). State law may require an attorney to deposit client retainer payments for future services in a client's trust account until fees have been earned and are undisputed by the client. Possibly in violation of this rule some counsel take the view that their retainers are "earned on receipt" and can therefore be deposited immediately in their general account. These counsel fear that a retainer placed in the client's trust account becomes property of the estate which cannot be drawn on to pay fees as earned without a court order.

Most bankruptcy judges in most districts do not recognize earned on receipt retainers. *In re Burnside Steel Foundry Co.*, 90 B.R. 942 (Bankr. N.D.Ill. 1988); *In re Chapel Gate Apartments, Ltd.*, 64 B.R. 569 (Bankr. N.D.Tex. 1986). *In re Knudsen Corp. (Knudsen Corp. v. U.S. Trustee)*, 84 B.R. 668 (9th Cir. BAP 1988); *In re McDonald Bros. Constr. Inc.*, 114 B.R. 989 (Bankr. N.D.Ill. 1990). It is, therefore, recommended that the retainer be placed in your client's trust account and not drawn upon post-petition except in accordance with court order or U.S. Trustee guidelines in some regions. You protect your interest in the retainer by providing in the engagement agreement that the client gives you a security interest in the retainer to secure payment of your fees and costs.

§2.3 Pre-petition Retainers for Other Professional Persons.

If considerable internal reorganization is necessary to restore your client to profitability, seriously consider having the debtor retain a turnaround consultant. Not only will the professional benefit your client, creditors will be reassured that someone is helping run the show other than those who caused the problem to begin with. Such professionals will usually want a pre-petition retainer.

You will need help from either an accountant or a sophisticated in-house accounting staff in preparing many of the financial reports required to be added as exhibits in a disclosure statement, as well as tax returns.

If adequate interim compensation procedures are put in place, retainers may not be required.

B. Individual Debtor's Exempt Property.

§2.4 Don't Forget to Plan Your Client's Exemptions.

If your client is an individual, you need to help him/her take maximum advantage of allowable exemptions, the most valuable of which are homesteads and interests in retirement plans. Exempt property is discussed briefly in **§5.3**.

C. Petition, Schedules, Statements and Lists.

§2.5 Gathering the Data for the Petition, Schedules, Statements and Lists.

Use the Client Questionnaire For Business Debtor (**Appendix 2**¹) to gather data for preparing the petition (including the schedules, statements and lists). In the process of completing the client data questionnaire, you will either find out everything about your client's financial affairs, or you will learn that your client's records are a mess. In an ideal world, you should be able to give the questionnaire to your client to be completed by its bookkeeping department. The information required is clearly set out. Experience indicates, however, that works a small percentage of the time. You should consider sending your bankruptcy paralegal to the client's place of business to meet with the bookkeeping staff to collect the required information.

§2.6 Form Preparation Software.

Once the questionnaire is filled out completely, the bankruptcy forms software sold by several companies make preparing the schedules, statements and lists an easy secretarial task. Check out, for example, the software available from the following companies: Best Bankruptcy Case at www.BestCase.com, New Hope Software at www.bankruptcysoftware.com, National Law Forms at www.nationallawforms.com, Law Firm Software at www.lawfirmsoftware.com, and EZ Filing at www.ezfilling.com.

The forms software automatically prepares the list of creditors required to be filed, which is used by the clerk, you and parties in interest for mailing notices. Information on Schedule G to the Petition (Executory Contracts and Unexpired Leases), however, is not reflected in the list. It is important that all lessors and parties to executory contracts receive notices. Therefore, insert the names and addresses of these parties into Schedule F to the Petition. To the extent there are past due payments, insert the amount due on the petition date (not the balance of payments or rents due in the future). Also explain on Schedule F that the claim arises out of an executory contract or unexpired lease.

§2.7 Review All Important Documents.

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Be sure to obtain copies of all leases of real and personal property and other contracts, including loan documents. As to secured loans, be sure you are given the loan agreement, the promissory note, the security agreement, any deed of trust with evidence of recording and the UCC-1 financing statement. Ask also for copies of guaranties and any documents that purport to secure them. As to personal property leases, ask for UCC-1 financing statements. As you read these documents, look for defects.

§2.8 Do a UCC Search and Credit Check.

Don't stop there. Contact the Secretary of State to obtain a report on all UCC filings affecting your client. In many states, you can do this on line at the web site of the Secretary or Department of State. Finally, order a credit report on your client. It may reveal information your client has forgotten about.

§2.9 Schedules to the Petition and Other Documents to Be Filed.

Within 15 days after the petition is filed (or preferably at the same time the petition is filed) the following documents must be filed (FRBP 1007):

<u>Schedule and/or Document</u>	<u>Official Form No.</u>
Schedule A Real Property	B6A
Schedule B Personal Property	B6B
Schedule C Property Claimed as Exempt (individuals only)	B6C
Schedule D Creditors Holding Secured Claims	B6D
Schedule E Creditors Holding Unsecured Priority Claims	B6E
Schedule F Creditors Holding Unsecured Non-Priority Claims	B6F
Schedule G Executory Contracts and Unexpired Leases	B6G
Schedule H Codebtors	B6H
Schedule I Current Income of Individual Debtor(s)	B6I
Schedule J Current Expenses of Individual Debtor(s)	B6J
Statement of Financial Affairs	B7
Names & Addresses of Equity Security Holders	
Compensation Statement of Attorney for Debtor(s)	B203
List of 20 Creditors Holding 20 Largest Unsecured Claims	B4

If necessary, the 15-day period can be extended on motion for cause. That can usually be done *ex parte*. Often, a U.S. Trustee's statement of position must accompany the motion. The motion for cause must be filed within the 15-day period.

These forms can be viewed and downloaded, together with instructions, at: www.uscourts.gov/bkforms/bankruptcy_forms.html. See the Bankruptcy Forms Manual,

Appendix 12, for a complete list of the Official Forms.

D. Emergency Filing.

§2.10 Requirements.

At a minimum, to commence a Chapter 11 case, the following documents must be filed:

<u>Document</u>	<u>Official Form No.</u>
Petition	B1
List of all creditors and their addresses (the “Master Mailing List,” created automatically by the bankruptcy forms software)	
List of the 20 Largest Unsecured Creditors	B4

The U.S. Trustee will solicit persons on the list of the 20 largest unsecured creditors to serve on an official creditors’ committee.

Check the local bankruptcy rules for additional requirements.

§2.11 Emergency Filing after Hours.

If, on rare occasions, a petition must be filed after working hours, on a weekend or holiday, it can be filed by presenting it to a bankruptcy judge. Better yet, simply e-file the petition. That can be done 24 hours a day - 7 days a week.

E. Electronic Case Filing System.

§2.12 Electronic Case Filing (ECF) Training.

In most districts, pleadings, including the petition, can be, and in most cases must be, filed electronically.

All persons in your office who will be using the ECF system (including you) will have to be trained by the bankruptcy clerk. Contact the clerk to schedule a training session.

§2.13 Paperless Court and a Paperless Office.

Bankruptcy courts lead the nation in electronic filing and document storage.

Some bankruptcy courts are virtually paperless. Instead of files on the judge's bench, you are more likely to see a computer. Some courts even provide computers at counsel tables that can access the case docket and its contents.

Instead of keeping copies of voluminous pleadings, consider using the court's docket which contains a copy of every document filed. Alternatively, keep your own electronic docket and identify each pleading by its court docket number.

F. Last Minute Considerations Before Filing the Petition.

§2.14 If Time Permits, Prepare First Day Motions.

First day motions are discussed in detail in **§§3.1 et seq.**

§2.15 Pay Yourself Fees Earned to the Moment of Filing.

By now you should have supplemented your initial retainer with additional funds in an appropriate amount. You will have a lot of work to do over the first two months and your retainer should be at least enough to cover fees for that work. With your client's consent, pay yourself (from retainer funds in your client's trust account) all fees earned and costs advanced with respect to pre-petition insolvency services. If your retainer is being paid on the eve of bankruptcy, be sure it is paid in cash or by cashier's check. If an ordinary check is used, it will not clear before the petition is filed. Uncleared funds belong to the estate and cannot be paid.

Do not pay yourself within 90 days of filing the petition for any past due fees (e.g., delinquent fees for prior services by you or your firm unrelated to the Chapter 11 planning and preparation). To do so would be to commit a preference (§547) causing you to have an adverse interest or be not disinterested. If your firm is owed such fees, you will probably be considered to be not disinterested unless the fees are waived.

§2.16 Consider Preparing a Press Release.

The media's business editors follow business bankruptcy filings. If you ignore a call from a reporter or the business editor asking for information or refuse to comment, you will be so quoted. Having a press release ready for distribution is not simply putting lipstick on the pig. It is a good strategy to put a positive spin on what you are doing, *i.e.*, saving jobs and ensuring that creditors will be paid.