

Mental Health, Ethics, & Bankruptcy

Presented by
Meagan Alise Preece McClure

MOOD DISORDERS

Depression:

- Early months of 2020 reported depression increased from 8.4% to 27.8%.
- In 2021, reported to be 32.8% or 1 in 3 American adults.
- Mood Changes:
 - Sadness, irritability, pessimism, guilt, low self-esteem, lack of initiative, inability to find pleasure from joys in life, preoccupation with death, suicidal thoughts
- Physical Symptoms:
 - Sleep disturbance, lack of appetite or comfort eating, fatigue, low sex drive, trouble concentrating or remembering, psychosomatics issues

Anxiety is a normal response to perceived danger.

It becomes a disorder when anxiety is severe enough to cause substantial discomfort and/or impaired functioning.

An estimated 40 million Americans suffer from anxiety or 1 in 4 people.

Subjective distress:

- Worry, hyper-alertness, hyper-reactivity

Physiological reactions:

- Trembling, sweating, palpitations, flushing, nausea, and shortness of breath

ANXIETY DISORDERS

SUBSTANCE USE DISORDER

Substance use disorder is frequently comorbid with other mental disorders.

Drug addiction and alcoholism create mental and physical cravings for alcohol or drugs.

West Virginia suffers from a substance use epidemic.



DEBTS AFFECT ON MENTAL HEALTH

Credit card debt is reported to affect one's happiness.

Financial problems can lead to divorce.

Income or job loss can lead to at least one adverse effect on mental health.

Financial distress increases chronic disease and mortality risk.

Financial stress is a significant risk factor for suicide.

DEBT IN AMERICA

PEW Research—First few months of the pandemic more than 14 million people lost their jobs.

April 2020 unemployment was 14.4%. Now, 3.6%.

Average household debt is now \$155,622, which is up 6.2% from a year ago.

Cost of living has increased by nearly 7%, but average median income fell 3%.

1/3 of households have said their financial situation has gotten worse over the past year.

WHAT CAN YOU DO?



LISTEN



COMBAT THE
STIGMAS OF
BANKRUPTCY



HELP CLIENT
FORGIVE THEIR
MISTAKES



HELP CREATE A
BUDGET



OFFER
RESOURCES

RESOURCES

www.help4wv.com

National Alliance on Mental Illness

- 1-800-950-NAMI

Substance Abuse and Mental Health Services Administration

- SAMHSA Helpline 1-800-662-HELP

National Suicide Prevention Lifeline

- 1-800-273-TALK

www.betterhelp.com

The Dark Side of Business Bankruptcy: 10 Practice Pointers for the Restructuring Professional



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Chapter 11 Business Bankruptcy Law May Involve Any of the Following:

- Embezzlement
- Addiction
- Suicide
- Bad checks
- Murder
- Divorce
- Affairs
- Sickness
- Mental illness
- Sleep deprivation
- Death threats
- Frozen accounts
- Depleted retirement accounts
- Locked premises
- Seizure of home and car
- Envy
- Switching loyalties
- Greed
- Fear
- Prison



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Catalysts for Bankruptcy



- Natural catastrophes
- Bankruptcy crimes
- Cooked books
- Fatal accidents
- Serious medical issues

- Executive compensation
- Theft
- Fraud
- Broken lending relationships



- Skyrocketing operational penalties
- Loss of major customers
- Rise in competition
- Legal changes
- Tax evasion and mounting penalties

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Slide 4

MCM1 Megan C. McLachlan, 11/9/2020

Practice Challenges



Getting paid



Dealing with people who are at their absolute worst or are criminal in nature



Building a book of repeat businesses



Dangerous



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Top 10 Things a Practitioner Should Do to Protect Oneself



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1. Filter out the bad actors in the initial client interview.



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2. Set the tone regarding payment.



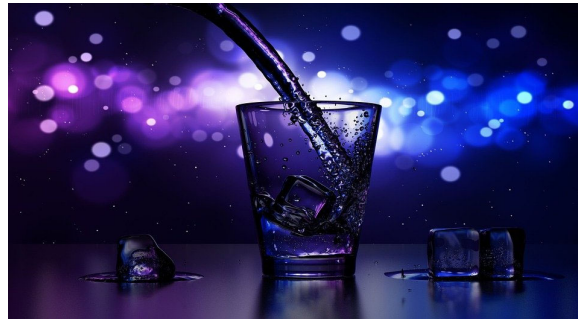
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3. Diversify your client base.



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4. Avoid substance abuse; find outlets.



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5. Be very clear with clients about fiduciary duty.



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6. Explore the appointment of a Chapter 11 trustee or conversion to Chapter 7.



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7. Be mindful of ethics canons requiring a duty to disclose.



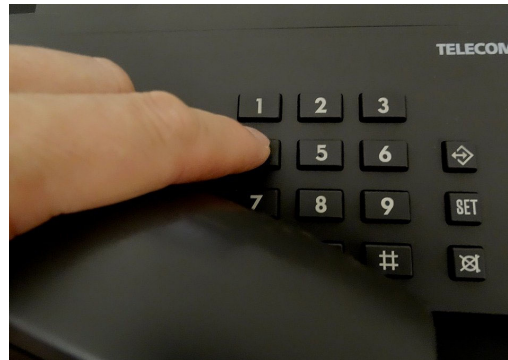
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8. Be prepared to withdraw at any given moment.



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9. Don't get too personal with clients after engagement is over.



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10. Remember: You didn't create the facts;
your client did.



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Conclusion

- Work is a privilege
- Rewarding to help



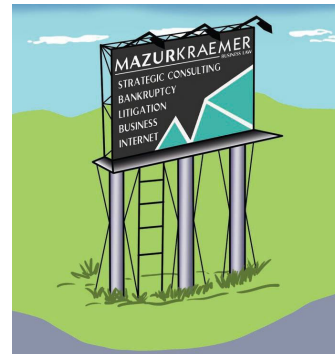
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Thank you

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The Dark Side of Business Bankruptcy: 10 Practice Pointers for the Restructuring Professional

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BUSINESS LAW



The practice of Chapter 11 business bankruptcy law, can, at any given time, involve any of the following:

Embezzlement. Addiction. Suicide. Bad checks. Murder. Divorce. Affairs. Sickness. Mental illness. Sleep deprivation. Death threats. Frozen accounts. Depleted retirement accounts. Locked premises. Seizure of home and car. Envy. Switching loyalties. Greed. Fear. Prison.

I have personally witnessed all but 2 of these.

Catalysts for bankruptcy can be external and/or internal: Natural catastrophes. Bankruptcy crimes. Cooked books. Fatal accidents. Serious medical issues for a key executive. Excessive compensation. Theft. Fraud. Broken lending relationships. Sudden skyrocketing of operational costs. Loss of major customers. Rise in competition. Legal changes. Tax evasion and mounting penalties. A Global pandemic. See *Business Bankruptcy Primary Causes* by Reese Baker & Associates, <https://www.bakerassociates.net/bankruptcy-blog/chapter-11/business-bankruptcy-primary-causes/> (April 11, 2017); see also *Main Causes of Business Bankruptcy – and How to Deal with Them*, by Kevin Scott Neiman <https://www.avvo.com/legal-guides/ugc/maine-causes-of-business-bankruptcy-and-how-to-deal-with-them> (July 8, 2018).

I have practiced business bankruptcy for over 20 years now. This is a fast-paced, hybrid practice (involving both transactional and litigation work). One can work with multiple parties toward efficient settlement. It is a privilege becoming the mastermind behind the restructuring of a business, outfitted with the unique ability to harness the tools of the Bankruptcy Code to help people, saving them from ruin, enabling employees to keep jobs, and principals to keep assets. A debtor's attorney can be the hub of the reorganization wheel with the goal of persuading creditors to support a restructuring plan. At the helm of selling businesses and properties, you can become an important contributor to the engines of a local economy. In some ways, we are financial front

line workers. I enjoy this practice area so much I became Board-Certified by the American Board of Certification in Business Bankruptcy.

The purpose of this article is to address the dark side of the business bankruptcy practice and how to better deal with it.

First, as a chapter 11 debtor's attorney, a challenging issue can be getting paid. As a solo or managing partner, not only do you have to do the legal work but you have to manage an office and be a bill collector. Each debtor case can be riddled with risk for any firm, big or small, given a client's poor cash position. Some clients may try to unilaterally convert your hourly structure to a contingent arrangement because he or she didn't like a Court's outcome through no fault of yours. Desperate, debtors may decide to only pay expenses that are absolutely necessary to corporate existence. Secured creditors of your debtor client may have liens on all of your client's cash, and block access to that money for legal fees. If you are not careful, your firm may become the debtor's creditor too! If your firm is owed money as of the filing of the bankruptcy case, you may be disqualified from representing the debtor unless your firm agrees to waive the claim for fees (the new subchapter 5 rules are more forgiving on this issue).

Second, building a book of repeat businesses over time can be challenging for debtor practitioners because the goal of a good debtor's lawyer is to make sure your client never needs you again for bankruptcy purposes.

Third, bankruptcy lawyers sometimes deal with people who are at their absolute worst and/or are criminal in nature. Given guilt, pride, and likely personal guarantees of business debt, the filing of a chapter 11 for a business owner may be the worst day of his or her life- with personal assets and long-term relationships on the line. Yet these clients have fiduciary duties to creditors. We often resolve serious financial problems with warring factions (i.e., lenders, employees, taxing bodies, judgment creditors, pension funds, suppliers, customers, etc.); a hostile and prolonged battle can cause inordinate stress, mounting legal fees, and emotional turmoil for principals and executives. Temptations to divert funds are real and require vigilance by debtor's counsel. Addictions can flare and mental illnesses can be exacerbated. I have seen spouses leave the executive. I have seen parties march right into open-heart surgery. A former client committed suicide.

Per United States Bankruptcy law, businesses are entitled to reorganize and move forward – equivalent to an individual debtor's "fresh start," with "breathing room" to reset. In my experience, I know now that not all businesses deserve that "fresh start". Some businesses abuse the system, repeatedly filing Chapter 11 to avoid legitimate debts, the non-payment of which sometimes places suppliers/vendors themselves in serious financial distress. Others commit bankruptcy crimes and the owners are jailed as a result. Perhaps management has perpetrated fraudulent schemes, "accidentally" underreported income, "inadvertently" hid assets, or just "forgot" to tell you key facts. In the field of business bankruptcy, assuming that all people are good and fair is a faulty assumption. The practice can be downright dangerous. You cannot aid your client's wrongdoing, and your duties to the court require a jaundiced eye and diligent inquiry.

One of my former bosses told me one of his debtors owed an “underworld” figure money; the creditor showed up at his 341 meeting of creditors and the debtor was never seen or heard from again.

Here are my top 10 things a practitioner should do to protect oneself and one’s firm:

1. *Filter Out Bad Actors in the Initial Client Interview.* Never take a case without ferreting out a client in person and doing a google search on the business and principals. Are there alias names? Conduct title searches and adverse filing checks to make sure the story of the demise of the business adds up. Watch out if you are filing on an emergency basis and may not have time to do this.
2. *Set the Tone Regarding Payment.* When you know you have your client’s attention, be very clear from the get-go that you will ask the court to authorize you to *stop* work if your compensation is at risk, including maintenance of a sufficient retainer. Has the secured bank consented to the use of its collateral to pay your fees? Will your fees be paid by a third party? If the client dances around the fee issue at the initial client meeting, or if you can tell there are insufficient unencumbered funds at the outset and/or insufficient projected income from operations to pay your fees, it may become a problem later.

Attorneys can explain that paying a significant retainer up front by a restructuring client can evidence the seriousness with which the client will take the endeavor and respect the value of your services. See *Clients Who Don't Pay: What Can Lawyers Do?* By Andrew Abramowitz, PLLC <https://aalegalnyc.com/what-can-law-firms-do-about-the-trump-approach-to-paying-legal-bills/> (July 27, 2016).

When you are owed money, be persistent and personal in asking for court-approved fees to be paid, and request interim approval of fees on a timely basis. Court approval is required under Bankruptcy Code Section 364 if a debtor attends to borrow money pay administrative expenses and such approval is unlikely to be given. Courts have repeatedly held that fees cannot be collected, even after a case is dismissed, if the fees have not been court-approved.

Be informed about how to record a judgment for any court-approved fees. The process may vary by jurisdiction. Be sure you know the terms of your malpractice insurance.

Are you able to have someone other than you in your firm contact the client regarding the fee issue?

3. *Diversify Your Client Base.* Diversify the work you do with creditor work or a completely unrelated legal practice. This will offset the risk of non-payment and give you breaks from all the stress you may be experiencing on your Chapter 11 matters. I work on business matters for healthy companies and also Italian dual citizenship cases because I love Italy!

4. *Avoid Substance Abuse; Find Outlets.* It is no secret that lawyering across the board can be a very difficult profession. Lawyers are 3.6 times as likely to be depressed as people in other jobs, while the landmark 2016 American Bar Association and Hazelden Betty Ford Foundation study found that 28 percent of licensed, employed lawyers suffer with depression. See *Lawyers Weigh In: Why Is There a Depression Epidemic in the Profession?* (May 11, 2018), by Dina Roth Port for the ABA Journal. The study also showed that 19 percent have symptoms of anxiety and 21 percent are problem drinkers. *Id.*

Most of us are type A perfectionists often dealing with overwhelming caseloads and clients in crisis while our adversaries are working as hard as they can to deconstruct our efforts. Tina Willis, founder of Tina Willis Law, personal injury firm in Orlando, Florida, writes, “Other than professional boxing, I can’t think of any other profession where the job requires constant fighting!” See Dina Roth Port for the ABA Journal, *supra*.

For me, I turn to hobbies and family and friends to help manage the adversarial nature and uncertainty of the practice- swimming, skiing, yoga, biking, photography. What will be your non-legal escape?

Avoid isolating yourself. Avoid substance abuse. This is difficult work. You are not alone. Get the help you need. Talk to trusted advisors. Get a counselor. Contact your local lawyer assistance program. See blog post, *A Dark Side of Practicing Law, Stephen Gustitis*, <https://www.gustitislaw.com/the-dark-side-of-practicing-law-bryan-college-station/> (May 25, 2018).

5. *Be Very Clear with Clients about Fiduciary Duty, Conflicts of Interest and Honest Disclosure; Keep a Paper Trail.* At the initial client meeting and also throughout the engagement, be very clear about the importance of honest disclosure and that you will withdraw if you suspect the client is not telling the truth, breaching a fiduciary duty, and/or is dishonest or committing fraud. Warn that bankruptcy fraud is a crime and will land the client in jail. Make sure the client understands that you represent the client entity, not the individual owners. Send out letters to the client to document your trail of conversations regarding any suspected wrongdoings by the debtor. Keep extra copies of the letters and be sure emails are saved.
6. *Explore the Appointment of a Chapter 11 Trustee or a Conversion to a Chapter 7; Vigorously Review Proposed Plans of Reorganization and Projections.* The Code provides for the mandatory appointment of a Chapter 11 trustee in the event of certain wrongdoing by a debtor. A party in interest wishing to dispossess a debtor of management of its business and control over its estate must prove, by clear and convincing evidence, that appointment of a trustee (i) is warranted for "cause" under 11 U.S.C.S. § 1104(a)(1), or pursuant to 11 U.S.C.S. § 1104(a)(2), (ii) is in the best interest of creditors. See recent case, *In re Sillerman*, 605 B.R. 631, 641-644 (Bankr. S.D.N.Y. 2019). Section 1104(a)(1) enumerates four types of misconduct that constitute cause: fraud, dishonesty,

incompetence and gross mismanagement. These examples are not exhaustive. *Id.* Examples of non-enumerated misconduct include: (i) failure to comply with provisions of the Bankruptcy Code; (ii) failure to make required filings; (iii) failure to abide by Court Orders; (iv) failure to file tax returns; (v) conflicts of interest; and (vi) failure to discharge fiduciary duties. *Id.* Your client needs to understand that your obligations to the court trump those to your client.

Courts have found a breach of fiduciary duty where the debtor is submitting plans of reorganization that the debtor cannot fulfill and projecting financial performances that the debtor fails to obtain. *Sillerman, at 649-652.* Debtor's counsel should carefully subject a plan and projections to rigorous examination, disclosing risk factors and assumptions to the Court and creditors.

The appointment of a trustee or the conversion of the case may impair your firm's ability to be paid, and the trustee will likely take over the client's attorney-client privilege and have the right to access your attorney files. Be prepared for this possibility at any given time and fully and formally inform the client of the consequences of the same.

7. *Be Mindful of Ethics Canons Requiring a Duty to Disclose; Monitor Client Health.* Maybe you now know something you don't want to know. Or, your client may not be competent enough to testify or meaningfully participate in the reorganization. He or she may not be reliable enough to provide statements. His or her ability to understand the consequences of the case may be impaired. Call your local bar's Ethics Hotline for their guidance on how to handle the client's mental crisis and how you as a professional should handle any suspicions of dishonesty or fraud. *See Mental Illness, Your Client and the Criminal Law, by Texas Tech University School of Law, p. 7, https://www.texasappleseed.org/sites/default/files/Mental_Health_Handbook_Printed2015.pdf (February 2015 (4th ed.)).*
8. *Be Prepared to Withdraw at Any Given Moment.* The better able you are to walk away from any client at any given time, the better quality clients you will attract and retain. Be sure your engagement letter covers this, but also realize that once you appear in a case, you will need court permission to withdraw.
9. *Don't Get Too Personal with Clients until After Engagement is Over.* Clients in dire straits are human and may envy you, your family and your vacations and may resent paying you money. Also, you never know when your client may turn on you, switching loyalties. Watch out! Keep the relationship professional and arms-length, at least until the matter has concluded. Establish clear boundaries regarding when you will be able to be on the clock. After 7 p.m.? On the weekends? Do you give your client your cellphone number? Explain that robust conversations must be had over the phone or in person during weekday work hours. Period. For safety reasons, do not disclose personal home address or too much personal information to clients. One night, I could not sleep for fear that the former client would hurt us!

10. *Remember You Didn't Create the Facts, Your Client Did.* Clients may try to place blame on everyone (including you). They are down in the trenches and may want you to be pulled down there with them. Repeat to YOURSELF that you as the attorney had nothing to do with the facts of the case. You didn't create them. You have been hired to identify what the client needs for the best outcome given that set of facts and given external factors over which you have no control (i.e., the case law precedent in that jurisdiction). Don't make the client's big problems your problems. See *Dina Roth Port, for the ABA Journal, supra.*

I do think this kind of work takes a special kind of lawyer and it is a calling. Despite the chaos and risk of chapter 11 practice, I view the work as a privilege. Business owners are relying on me to save their business and salvage their personal lives. For grateful clients, the work is extremely rewarding and can leave me with lifelong friends not to mention a now Reorganized Debtor who needs a business attorney.