

# Tidewater Bankruptcy Bar Association



## *Justice Delayed!*

(Well, ACCESS to justice delayed, maybe.)

### **Special Notice: Newport News Courthouse**

The reopening of the Newport News Courthouse has been delayed for two additional months. Practitioners should continue to put the NORFOLK court address on all notices of hearings scheduled for September and October. The Court will send separate notice, and post on its web site, information on how correction notices will be circulated. The dates and times scheduled for September hearings will remain the same, but the location will be NORFOLK. Please be sure to notify your clients of this change!

#### President:

Jeffrey L. Marks  
491-4045  
[jlmarks@kaufcan.com](mailto:jlmarks@kaufcan.com)

#### Secretary:

Beth Ann Shapiro  
583-8411  
[bashap@aol.com](mailto:bashap@aol.com)

#### Treasurer:

John D. McIntyre  
628-5585  
[jmcintyre@wilsav.com](mailto:jmcintyre@wilsav.com)

#### At Large Reps:

Peninsula:  
John Raymond  
565-0423  
[raymondbky@aol.com](mailto:raymondbky@aol.com)

#### Southside:

Donald C. Schultz  
623-3000  
[dschultz@cwm-law.com](mailto:dschultz@cwm-law.com)

#### Programs Chair:

Treneta J. Stewart  
687-1666  
[tstewart@logs.com](mailto:tstewart@logs.com)

#### Membership Chair:

Heidi B. Shafer  
340-4895  
[heidi.shafer@mernalaw.com](mailto:heidi.shafer@mernalaw.com)



## *Cries and Whispers*

Gossip and Good News Heard Round the Bar

Information is rushing into the newsroom like Chinese Water Torture. Your Editor is hard pressed to fill a fifty word space with all the hullabaloo. However, there are some gleanings worth repeating at least in subdued tones behind one's hand....

Congratulations are hereby extended to Robert Van Arsdale, who leaves us for a better place. Robert has taken the position of Assistant U. S. Trustee for the Richmond Division. Robert was very active in our Association and will certainly be missed here. We wish him all the best in his new position.

Mention of Robert Van Arsdale's good fortune leads cleverly to the potential for good fortune for HIS REPLACEMENT at the Norfolk Division Office of the United States Trustee.

**Position Available: Trial Attorney - Office of the U.S. Trustee. Deadline for applications is August 22, 2006. (That's tomorrow!) The official announcement along with instructions for applying are posted at: <http://www.usajobs.opm.gov/USAJOBS.com>.**

Ellen Carlson writes: I am happy to welcome my son and daughter in law - and two beautiful granddaughters, Abbey and Olivia - to the Hampton Roads area, where they have taken up residence as a result of my son's new job with NCIS.

Happy news for a couple of Board Members - family additions! John Ryan and Kirsti welcomed baby Nicholas on June 3; Don Schultz and Kimberly Crenshaw became the parents of Louis McClellan Schultz on June 7. Not much sleep ahead for our colleagues, but what fun! Best wishes to the parents AND children.

FUN times ahead indeed for Jeannie Wright, Bankruptcy Analyst with the U.S. Trustee's office, will be retiring on October 3, 2006, after 30 years of dedicated government service.

# OPEN LETTER TO CHAPTER 7 FILERS

Members of the Bankruptcy Bar:

Pursuant to 11 U.S.C. §521 (e) (2) (A) (I) a debtor is required to provide to the trustee a copy of the debtor's federal income tax return required by applicable law for the most recent tax year ending immediately before the commencement of the case for which a federal income tax return was filed. In addition, the debtor must also provide to the trustee copies of "pay advices" received by the debtor from an employer for the sixty days prior to filing bankruptcy.

It appears the debtor's attorneys have been very diligent in providing these documents to the chapter 7 trustees;. however, some attorneys are providing other documents that the chapter 7 trustees do not need in order to administer the debtor's case. It is **not** necessary to send the chapter 7 trustee any of the following documents unless the chapter 7 trustee specifically requests the documents.

1. Credit counseling certificate
2. Engagement letter
3. Copy of disclosures made to the debtor pursuant to 11 U.S.C. 527 and 528
4. Bank statements

In addition, it would be helpful if the tax returns and pay information were sent to the chapter 7 trustee by mail or by facsimile. Please do **not** use both means of transmission since it only doubles the time of the chapter 7 trustee in searching for files.

We hope this information is helpful to the you and we appreciate your cooperation in this matter.

Chapter 7 Panel Trustees

## **THE DISAPPEARING AUTOMATIC STAY of 11 U.S.C. § 362(c)**

**By Mark C. Leffler, Boleman Law Firm, P.C.**

I always wondered when I would start talking about “the good old days.” That day came in December 2005, when an elderly lady whose previous bankruptcy case had been dismissed a couple of weeks earlier came to our firm’s Virginia Beach office for a bankruptcy consultation. She explained that her lawyer filed her case but had given her no instructions about where and when to send her Trustee payment. Her case had been certified and dismissed for this reason, and her lawyer had been refusing to answer her calls.

“In the good old days before October 17,” I said, “Getting dismissed was not the end of the world.” In the old days, we took a little extra time before re-filing to make sure the problems that led to the dismissal of the previous case would not persist and lead to the same problems in a new case. Creditors would look a bit more critically at the Chapter 13 Plan, and we could count on an admonishment from the Trustee at the 341 Meeting – something along the lines of “let’s make this one work.” But these are not the good old days, especially if you are a debtor whose previous bankruptcy case was recently dismissed.

Under the “new world order” of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), filing a repeat bankruptcy within one year of the dismissal of a previous case triggers the “disappearing automatic stay” provisions of § 362(c)(3) and (4) of the Bankruptcy Code. Although there is debate about the extent to which the automatic stay terminates, if it’s your second or third filing within one year of the dismissal of your previous case, you had better be ready to move quickly, because the first month of the case is crucial. Practitioners who file such cases must be aware of the requirements and be prepared to act.

“In an Act in which head-scratching opportunities abound for both attorneys and judges alike, § 362(c)(3)(A) stands out,” wrote Hon. A. Thomas Small in In re Paschal, 337 B.R. 277 (Bankr. E.D.N.C. 2006). Some things are definitely true, however: if it’s your client’s second case within a year of the dismissal of your previous case, the automatic stay terminates to some extent unless you obtain a hearing within thirty days and the Court makes a finding of good faith. If your client has had more than one case dismissed within a year, you start out with no automatic stay at all and, if you want a stay at all, you must at least file a motion seeking imposition of the stay within the first 30 days.

Getting things done within 30 days may sound easy enough, but many practitioners in our area and elsewhere have slipped up, especially under § 362(c)(3), and failed to get a hearing within the first 30 days. The consequences can be irreversible. In fact, Judge St. John has already written that “the Court lacks the authority to extend the automatic stay under § 362(c)(3)” if the hearing on the motion

does not take place before the 30 days expire. In re Max J. Elliott, Case No. 05-77946-SCS, Memorandum Opinion entered January 12, 2006.

Once you get to your hearing within the first 30 days, you still have work to do. But good faith is not so hard to prove, right? After all, your client is a nice person, and isn't that really what matters? Not so fast. In most cases, you will have to establish your client's good faith by clear and convincing evidence, and the Norfolk and Newport News courts are applying a 7-step analysis set forth in In re Havner, 336 B.R. 98 (Bankr. M.D.N.C. 2006). At the very least, this probably means you need to have your client in court with you. Quite possibly, the judge will require testimony of some sort, whether in the form of live testimony or an affidavit from your client.

Since that first case in December, I've filed quite a few motions to continue the stay for other clients. So far, I've found each case to be quite different, and I've learned different lessons from each case. Most importantly in representing a repeat-filer debtor, counsel must spend time getting to know the client and the details of what transpired in their recently dismissed case before filing the new Petition. Second, strap on your helmet and get ready to accomplish a lot in a short period of time.

If possible, prepare your motion to continue the stay before filing the new case, and draft it in such a way that the Court and others can easily understand how the case meets the test for good faith. Make sure to obtain proper service on all creditors and parties in interest. Take the initiative with the Bankruptcy Court Clerk's Office to obtain a hearing date within 30 days, rather than waiting for them to send you a request for the notice of hearing. Communicate with your client to make absolutely certain he or she will be attending the hearing, and prepare yourself and your client fully so you are ready to present your evidence and argument to the judge. This will probably be your only opportunity to do so. And finally, if you have any objections from creditors or the Standing Trustee, communicate with the objecting party before getting to court to determine the nature of their objection and whether any changes might be made or conditions imposed in order to settle before the hearing.

It turned out well for my client in December. We got our hearing within 30 days, my client appeared in court with me, and the Court found that she had filed in good faith. Despite that success, it may be a while before I stop thinking about "the good old days" before BAPCPA and all the new "head-scratching opportunities." However, with every new case I see that we can still help honest people obtain relief from their debts. Even a dismissal is not the end of the world, and even the challenge of the disappearing stay can be met with preparation and care.



## **International Women's Insolvency & Restructuring Confederation ("IWIRC") Charters a Virginia Network**

IWIRC recently chartered the Virginia Network and is conducting a membership drive. Anyone can join IWIRC and/or the Virginia Network. Events are being planned around the state to give members (and non-members) an opportunity to foster relationships and perform community service.

IWIRC is not just another "lunch-meeting-CLE" professional organization to add to your resume. It is a dynamic international association that works to enhance the professional status and reputation of women in insolvency practice. Its purpose is to offer opportunities for networking, professional development, leadership and mentoring on a local, national and international level. IWIRC also seeks to increase the public's understanding of the impact of insolvency laws and proceedings on women and families. IWIRC's members and supporters include attorneys, accountants, appraisers, turnaround managers, financial advisors, bankers, judges, academics and other insolvency professionals from around the globe – and membership certainly is not limited to women.

If you are interested in receiving information from the IWIRC-Virginia Network regarding their upcoming events, community service opportunities and/or would like additional information on the benefits of becoming a member, please contact Sarah Boehm at 804-775-7487 or [sboehm@mcguirewoods.com](mailto:sboehm@mcguirewoods.com). Dues are only \$25.

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## **Dates and Deadlines**

The next TBBA Luncheon will be on September 13 at the Norfolk Marriot. The President of the Virginia State Bar will be the speaker. Watch for announcements and RSVPs.

The new RULES and the NEW CHAPTER 13 FORM PLAN take effect Sept 1. Both are posted on the Court's Web site. It is not necessary to wait to use the new form plan, might as well start now!

The TBBA Annual Seminar (the 15th!) will be held at the Hilton Ocean Front hotel at 31st Street, Virginia Beach on January 19th. Speakers will include the tag team of Hildebrand and Lundin, and the seminar will end at 4:30 p.m. and a reception will follow, all included in the price of admission. This looks to be a Most Informative session presented by experienced and entertaining speakers.