Chapter 13 Trustee's Best Practices Manual[1]

by

Jason Wilson-Aguilar
Chapter 13 Trustee
Seattle, Washington

The Intake

Debtor attorneys need sufficient information from their clients to file the case and to prepare all schedules, statements, means test forms, plan[2] and other documents. The Court's *Rights and Responsibilities of Chapter 13 Debtors and their Attorney (Consumer Case)*[3] sets out many but not necessarily all the attorney's responsibilities.

Attorneys must conduct sufficient due diligence when filing the case for the debtor.[4] Too much information is better than not enough. In addition to meetings, most attorneys ask their clients to complete a questionnaire from which the attorney can draft the schedules, Statement of Financial Affairs and other documents before reviewing them with the client. Attorneys also have at least some duty to verify information provided by their clients and failure to do so could result in disgorgement of fees.[5]

Meeting of Creditors

Debtors are obligated to submit to the Trustee a complete Chapter 13 Information Sheet[6] at the time the debtor files the case.[7]

Debtors are obligated to provide the following information to the Trustee *at least seven days before the originally scheduled meeting of creditors*:[8]

1) Copies of all paystubs received in the sixty days prior to the petition date;
2) A copy of the debtor's most recently filed federal income tax return; and

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[1] These materials are not an official statement of the Chapter 13 Trustee's policies or procedures. These materials are not intended as legal advice, but they are for general assistance in representing debtors in Chapter 13 cases. These materials are subject to change.
[2] Local Forms W.D. Wash. Bankr. 13-4.
[3] Local Forms W.D. Wash. Bankr. 13-5.
[4] *See generally* Fed. R. Bankr. P. 9011.
[5] *In re Tatro*, 2020 WL 534715 (Bankr. C.D. Ill. Jan. 31, 2020) (attorney took his client's word in a Chapter 7 case that a consumer finance company's claim was not secured and the attorney had to disgorge fees he charged to have his client's case reopened to seek avoidance of the lien).
[6] Local Forms W.D. Wash. Bankr. 13-2
[7] Local Rules W.D. Wash. Bankr. 3015-1(h).
[8] 11 U.S.C. §§ 521(a)(1)(B)(iv) and(e)(2)(A)(i); Fed. R. Bankr. P. 4002(b)(2) and (3); and Local Rules W.D. Wash. Bankr. 4002-1.

3) Copies of all bank, investment, mutual fund and brokerage account statements that reflect the balance of the accounts *on the petition date*.

→ It is unfortunate how many debtors fail to timely provide this information to the Trustee so that he can properly prepare for the meeting of creditors and review the case. Too frequently the Trustee must continue meetings because debtors did not provide the information timely so that the Trustee could review it. This is an inconvenience to the debtors, their attorneys, the Trustee's office and any creditors who appear at the meetings. *The Trustee strongly recommends that debtors' attorneys obtain all the necessary information so that they can provide the information to the Trustee timely.* This saves all parties a significant amount of time and moves the debtor's plan toward confirmation more rapidly.

→ For debtors who do not have their most recently filed federal income tax return for some reason, we recommend that the debtor's attorney at the intake with their client request a tax transcript from the Internal Revenue Service so that the transcript can timely be provided to the Trustee for the meeting of creditors.

→ Please be sure the bank and other depository statements provided reflect the balance on the petition date. The Trustee frequently receives statements that do not include the balance on petition date. This causes additional work for the debtor, debtor's attorney and the Trustee.

Debtors who are self-employed (including someone who receives a 1099-NEC) should provide profit and loss statements for the six month period prior to the petition date in lieu of paystubs. Depending on the nature of the business, the Trustee may also request additional information such as:

1) Current business license;
2) Current proof of insurance policies;
3) Current lease agreements;
4) Current balance sheet;
5) Itemization and value of the business assets (including inventory) at the time of the petition date and currently;
6) Current bond information; and
7) Copies of federal and state tax returns, along with supporting schedules, for the two years prior to filing.

The Trustee is obligated to investigate the debtor's business and the desirability of continued operation of the business, so he may need information beyond what an employed debtor is required to provide.[9] The debtor is also obligated to cooperate with the Trustee so that the Trustee may perform his duties.[10]

[9] 11 U.S.C. § 1302(c), 1106(a)(3).
[10] 11 USC § 521(a)(3).

Debtors Must Keep Their Address with the Court Updated

Please impress upon debtors that they must keep their address updated with the Court. This is important for many reasons, including that the Trustee uses this address to communicate with the debtors. Debtors also have the duty file a statement of any change of the debtor's address.[11] Service on the address the debtor designates constitutes effective service on the debtor.[12] Both Federal Rule of Bankruptcy Procedure 4002(a)(5) and 7004(b)(9) "place the burden squarely upon the debtor to apprise the clerk of the bankruptcy court of any change of address."[13]

Pre-Petition Credit Counseling

Debtors must complete the pre-petition credit counseling.[14] A bankruptcy court may dismiss a case due to debtor's failure to comply with this provision of the Bankruptcy Code.[15] According to the Bankruptcy Appellate Panel of the Ninth Circuit, "[t]he bankruptcy court has no discretion to fashion its own exceptions or to otherwise excuse noncompliance with 109(h)'s eligibility requirement."[16]

Wage Deductions

The Trustee strongly recommends that employed debtors make their plan payments from a wage directive issued to their employers. The Trustee has found this to be both efficient and to further the success of debtors in obtaining a discharge.[17]

Income

The debtor's monthly net income on Schedules I and J (Line 23c. on Schedule J) should generally match the debtor's proposed plan payment with perhaps one exception – where the debtor is proposing to pay 100% to allowed unsecured claims but the debtor is (perhaps unadvisedly) and unnecessarily stretching out the payments.

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[11] Fed. R. Bankr. P. 4002(a)(5).

[12] Fed. R. Bankr. P. 7004(b)(9); Local Bankr. R. 9011-1(b); *Cossio v. Cate (In re Cossio),* 163 B.R. 150, 155 (B.A.P. 9th Cir. 1994) (noting that "Rule 7004(b)(9) allows service on the debtor at the listed address until he files a change of address").

[13] *Ruiz v. Loera (In re Ruiz),* 2006 WL 6811033 (B.A.P. 9th Cir. 2006) (this case has persuasive, but not precedential, value pursuant to Fed. R. App. P. 32.1 and 9th Cir. B.A.P. R. 8013-1).

[14] 11 U.S.C. § 109(h)

[15] *In re Gibson*, No. 10-1399, 2011 WL 7145612, at *4 (B.A.P. 9th Cir. Dec. 1, 2011) (designated as persuasive and not precedential value); *see also In re Fridman*, No. 21-10513, 2022 WL 18670791, at *2 (Bankr. C.D. Cal. Oct. 31, 2022) (noting that the majority of cases hold that the statute is unambiguous and mandatory).

[16] *In re Raybould*, No. 17-1326, 2019 WL 1448015, at *4 (B.A.P. 9th Cir. Mar. 26, 2019) (designated as persuasive and not precedential value).

[17] "Payroll deduction is usually desirable for the debtor, as it simplifies keeping the chapter 13 plan current. For individuals paid biweekly, it can transform the monthly payment into a bi-weekly deduction, reducing the need to budget the plan payment amount over the course of a month. The chapter 13 office takes care of setting the deduction up once it has been duly authorized." www.eastwakebankruptcy.com/frequent-questions/what-chapter -13-payroll-deduction

Only an individual with regular income may be a debtor under Chapter 13.[18] An individual with regular income means an individual whose income is sufficiently stable and regular to enable that individual to make payments under a chapter 13 plan.[19]

Gifts or gratuitous payments from family or friends do not qualify as regular income.[20] However, where the family member or friend commits to making the payments to allow the debtor to fund his or her plan *and there is direct evidence of that commitment*, those payments can constitute regular income.[21] To establish that regular income, the debtor should file *with the Schedules I and J* a sworn declaration from the family member or friend committing to make payments to the debtor so that the debtor can qualify as a debtor under Chapter 13 and establish feasibility of the plan.

Exemptions

Please remember that a debtor cannot claim a homestead exemption above $214,000 (which next adjusts upward on April 1, 2028) for property that was acquired by the debtor in the 1,215 days before the petition date.[22] The two exceptions to the cap are for a family farmer and where the debtor transferred the principal residence from one property to another in the same state.[23] In other words, "Section 522(p)(1) imposes a limitation on the homestead exemption a debtor can claim regardless of the applicable state law exemptions."[24]

Motions to Extend or Impose Stay

Two Cases Pending in One Year

Debtors must move to extend the stay and have the hearing held within thirty days of the new case or the stay expires with respect to the debtor.[25] Because this is a such a short timeframe, debtors will often need to file a motion to shorten time so that the hearing is held within thirty days of the petition date. Visit the U.S. Bankruptcy Court's website to review the shortening time procedures for the assigned Judge.[26]

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[18] 11 U.S.C. § 109(e).
[19] 11 U.S.C. § 101(30).
[20] *See In re Cregut*, 69 B.R. 21, 22-23 (Bankr. D.Ariz. 1986); *In re Hanlin*, 211 B.R. 147, 148 (Bankr. W.D.N.Y. 1997).
[21] *See In re Campbell,* 38 B.R. 193, 196 (Bankr. E.D.N.Y. 1984); *In re Jordan*, 226 B.R. 117, 119 (Bankr. D.Mont. 1998).
[22] 11 U.S.C. § 522(p)(1).
[23] 11 U.S.C. § 522(p)(2).
[24] *Caldwell v. Nelson (In re Caldwell)*, 545 B.R. 605, 609 (B.A.P. 9th Cir. 2016) (citation omitted).
[25] 11 U.S.C. § 362(c)(3)(A). *See also Ortola v. Ortola et al. (In re Ortola),* No. 11-1222, 2011 WL 7145793, at *5 (B.A.P. 9th Cir. Dec. 16, 2011) ("Any motion under § 362(c)(3)(B) must have been filed, heard, and ruled upon before expiration of the 30-day period.") (this case is cited for persuasive value only, as it does not have any precedential value);
[26] www.wawb.uscourts.gov

To establish a change in circumstances between the current case and the last, the debtor should file a sworn declaration with the motion. Those circumstances include the timing of the second petition; how the debts arose; the debtor's motive in filing the second petition; how the debtor's actions affected creditors; why the debtor's prior case was dismissed; the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to fund a plan; and whether the trustee or creditors object to the motion to extend the stay.[27] "[T]wo issues are very significant for purposes of determining good faith under § 362(c)(3): 1) why the previous plan failed and 2) what has changed so that the present plan is likely to succeed."[28]

Many courts have written on what terminates if the stay is not extended when the debtor files a second case within one year. The confusion arises with the phrase "with respect to the debtor" in the statute. Some courts have held that the phrase is critical and conclude that the stay terminates *only* with respect to the debtor, but not as to property of the estate. The Bankruptcy Appellate Panel of the Ninth Circuit held that the stay terminates in its entirety on the thirtieth day after the second case is filed *unless* the debtor files a motion to continue the stay, the court holds a hearing within the thirty day period and the court then extends the stay.[29] However, not all bankruptcy courts in the Ninth Circuit agree with the Panel.[30] For the debtor's purposes, this should be immaterial. The debtor should treat the stay as expiring in its entirely and act accordingly.

Three Cases Pending in One Year

When debtors have three cases pending in one year, the stay does not go into effect in the third case.[31] Instead, "if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors."[32]

Means Test

Most of the means test issues have worked themselves out since introduction of the means test to the Bankruptcy Code in 2005.[33] Please keep in mind that above median debtors cannot substitute their actual expenses for those beyond what the means test and Bankruptcy Code

[27] *In re Elliott-Cook*, 357 B.R. 811, 814-15 (Bankr. N.D. Cal. 2006).
[28] *Id*. at 815.
[29] *Reswick v. Reswick et al. (In re Reswick),* 446 B.R. 362, 372-73 (B.A.P. 9th Cir. 2011).
[30] *See, e.g., Rinard v. Positive Investments, Inc. (In re Rinard),* 451 B.R. 12, 20 -21 (Bankr. C.D.Cal. 2011) (Under Section 362(c)(3)(A), the stay terminates only as to the debtor and not as to property of the estate.). The Circuit Courts are also divided on this issue. *Compare Smith v. Maine Bureau of Rev. Servs. (In re Smith)*, 910 F.3d 576, 591 (1st Cir. 2018) ("§ 362(c)(3)(A) terminates the entire stay – as to actions against the debtor, the debtor's property, and property of the estate – after thirty days for second-time filers.") *with Rose v. Select Portfolio Servicing*, 945 F.3d 226 (5th Cir. 2019) ("§ 362(c)(3)(A) terminates the stay only with respect to the debtor; it does not terminate the stay with respect to the property of the bankruptcy estate.").
[31] 11 U.S.C. § 362(c)(4)(A)(i).
[32] 11 U.S.C. § 362(c)(4)(B).
[33] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. 109-8).

allow. "For a debtor whose income is above the median for his State, the means test identifies which expenses qualify as 'amounts reasonably necessary to be expended.' The test supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations."[34] And unless specifically allowed, "[i]f a debtor's actual expenses exceed the amounts listed in the tables, for example, the debtor may claim an allowance only for the specified sum, rather than for his real expenditures."[35] In other words, debtors cannot opt out of the means test simply because it is not representative of their asserted out-of-pocket expenses.[36]

This leads to the main area of the means test that tends to be misunderstood. Line 43 of Form B122C-2 includes a space for deduction for special circumstances. This is not a catch-all provision where debtors can add whatever expense they want. "Special circumstances" are circumstances such as a serious medical condition or a call or order to active duty in the Armed Forces "to the extent such special circumstances [ ] justify additional expenses or adjustments of current monthly income *for which there is no reasonable alternative*."[37] In other words, merely incurring expenses does not make them necessary and reasonable so that they can be deducted as special circumstances on Form B122C-2. If that were the case, the Internal Revenue Service standards would be meaningless. Debtors could simply claim any deduction for any expense they incur. That would eviscerate Form B122C-2.

→ To claim a deduction for special circumstances, debtors must show that there is no reasonable alternative to the expense and that the expense is necessary and reasonable. They also must document and explain in detail the expense. As the Ninth Circuit observed, "Congress did not provide an exhaustive list of 'special circumstances,' but it did indicate examples of situations it would consider sufficient to rebut the presumption of abuse. . . . [B]oth examples given by Congress share 'a commonality; they both constitute situations which not only put a strain on a debtor's household budget, but they arise from circumstances normally beyond the debtor's control.'"[38]

Deviation from Means Test (i.e., *Lanning* deviation)

For above median income debtors with a positive projected disposable income (i.e., a positive figure on Line 45 of Form B122C-2),[39] the court has discretion to consider a debtor's known or virtually certain change in circumstances when projecting disposable income.[40] That does not mean, however, that Schedules I and J wholly control the debtor's plan payments and what

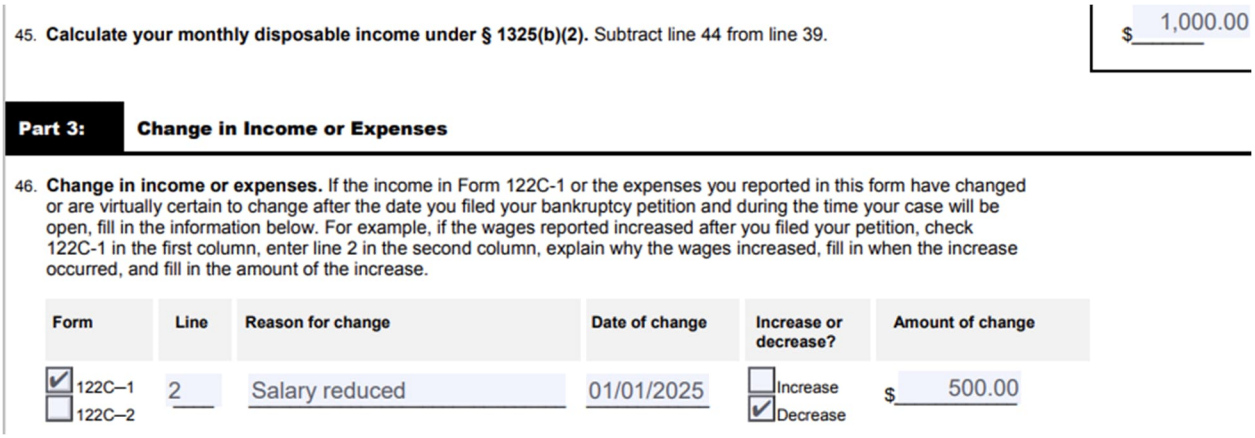
[34] *Ransom v. FIA Card Services*, 562 U.S. 61, 65 (2011).
[35] *Id.* at 75. Conversely, debtors may deduct some actual expenses for certain items related to health and welfare. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I).
[36] *In re Thiel*, 446 B.R. 434, 438-39 (Bankr. D.Idaho 2011).
[37] 11 U.S.C. § 707(b)(2)(B)(i) (emphasis added).
[38] *Egebjerg v. Anderson (In re Egebjerg)*, 574 F.3d. 1045, 1053 (9th Cir. 2009) (citation omitted).
[39] Chapter 13 Calculation of Your Disposable Income
[40] *Hamilton v. Lanning (In re Lanning)*, 560 U.S. 505, 517 (2010).

must be paid to nonpriority unsecured claims.[41] Instead, the change in circumstances is applied to the means test and the debtor has to pay the resulting projected disposable income.[42]

To determine the debtor's projected disposable income that must be included in Section IV.E. (Nonpriority Unsecured Creditors) of the plan when the debtor has a known or virtually certain change in circumstances, the debtor must:

1) Include the known or virtually certain change in circumstances on Line 46 of Form B122C-2
2) Deduct that figure from the debtor's monthly disposable income on Line 43 and
3) The remaining amount, if any, must be included in Section IV.E.

For example, if the debtor's monthly disposable income on Line 43 of Form B122C-2 is $1,000 and the debtor claims a legitimate $500 change in circumstances adjustment on Line 46, the figure to include in Section IV.E. of the plan is $30,000 ($1,000 - $500 x 60 month applicable commitment period = $30,000):



45. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 44 from line 39. $ 1,000.00

Part 3: Change in Income or Expenses

46. **Change in income or expenses.** If the income in Form 122C-1 or the expenses you reported in this form have changed or are virtually certain to change after the date you filed your bankruptcy petition and during the time your case will be open, fill in the information below. For example, if the wages reported increased after you filed your petition, check 122C-1 in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
☑ 122C–1 ☐ 122C–2	2	Salary reduced	01/01/2025	☐ Increase ☑ Decrease	$ 500.00

Lanning is also applicable when the debtor has a positive change in circumstances (i.e., a reverse *Lanning* case). For example, an above median debtor with negative monthly income that has in increase in income may have to pay to nonpriority unsecured creditors the additional amounts based on the increased income.[43]

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[41] *In re Hefty*, 619 B.R. 215 (Bankr. E.D. Wis. 2020)

[42] *Id.* at 221-22. "Nowhere in the decision [*Hamilton v. Lanning*, 560 U.S. 505 (2010)] does the court imply that the existence of such changes transfers the calculation of projected disposable income from the means test over to Schedules I and J." *Id.* at 221.

[43] *See, e.g., In re Hefty*, 619 B.R. 215 (Bankr. E.D. Wis. 2020) ("Because [debtor] is an above-median debtor, his projected disposable income should be calculated by using the monthly disposable income reported on question 45 of Form 122C-2 [which was negative $97.92], adjusted upward to reflect the increase in income reported on question 46 of Form 122C-2, which results in projected disposable income of $993.05. Because the debtor's plan does not commit $59,583.00 ($993.05 x 60) to pay the claims of unsecured creditors, his plan cannot be confirmed over the trustee's objection.").

→ The Court's Local Rules of Bankruptcy Procedure and Form B122C-2 itself guide debtors on how to assert *Lanning*:

1) Provide the Trustee with evidence of the change in circumstances;

2) Include in Section IV.E of the plan the minimum amount the debtor shall pay to allowed nonpriority unsecured claims;

3) Include the following statement in Section X of the plan: "The debtor is unable to pay all or part of the debtor's $_____ projected disposable income (the monthly disposable income shown on line 45 of Official Form B 122C-2 multiplied by the sixty month applicable commitment period), and instead proposes to pay to allowed nonpriority unsecured claims at least the amount listed in Section IV.E."[44]

4) Complete Line 46 of Form B122C-2.

Chapter 13 Plan

Debtors must use the Court's local plan form (Local Forms W.D. Wash. Bankr. 13-4) and complete all appropriate blanks in the plan.[45] We have found certain plan sections to be more difficult than others. We recommend the following on how to complete certain sections of the plan:

Section I.A. Nonstandard Provisions

Be sure to mark "Yes" if there is a nonstandard provision in Section X. (although see below for more on nonstandard provisions).

Sections I.B. and I.C. Limit Claim or Avoid Security Interest

Mark "No" in both sections. If the debtor wants to limit the amount of a secured claim based on a valuation (e.g., a "cramdown" of a car) or avoid a security interest or lien (e.g., a judgment lien), file a separate claim objection or adversary proceeding as appropriate. Trying to handle this through the plan process is cumbersome, often done incorrectly, ends up being more work, costs more in attorneys' fees, and invariably slows down confirmation of the plan. You can save yourself and your client time and expenses if you file the separate claim objection, motion or adversary proceeding, as applicable.

Section III.A. Plan Payments

The Trustee recommends that debtors always indicate a monthly plan rather than using the other frequency options -- this is true even if the debtor is on a wage deduction and paid every

[44] Local Rules W.D. Wash. Bankr. 3015-1(e).
[45] Local Rules W.D. Wash. Bankr. 3015-1(a).

two weeks. The Trustee will issue any wage deduction based on how the debtor is paid, so the plan does not need to mirror the debtor's plan payment frequency.

→ Debtor's attorneys should make sure that the plan payment is sufficient for the debtor to complete the plan in sixty months (i.e., whether the plan is feasible). This is a common mistake that is avoidable.

If the debtor has a graduated ("step") plan payment, mark that the debtor's plan payments are "Monthly" in Section I.B. and use the following format in Section I.A.: "1,000 x 3; and then $2,000." Example:

III. Plan Payments to the Trustee:

No later than 30 days after the order for relief, the Debtor shall commence making payments to the Trustee as follows:

A. AMOUNT: $ 1,000 x 3 and then $2,000

B. FREQUENCY (check one):

___Monthly

☑ Twice per month

___Every two weeks

___Weekly

While graduated payment plans can serve a purpose, the proposed increase must be realistic and the debtor must present some evidentiary basis how she will be able to make the increased plan payment.[46] Ideally, the debtors should file a declaration with Schedules I and J demonstrating how they will make the increased plan payment. This is particularly so when the graduated plan payment increase is significant. While the declaration is better, including the information on the debtors' Schedule I may be sufficient in some cases. Example:

13. **Do you expect an increase or decrease within the year after you file this form?**

☐ No.

☑ Yes. Explain: I will receive a salary increase in four months that will allow me to make an increased plan payment

Section IV.A.3. Payment of Attorney's Fees

There are multiple ways to have attorney's fees paid, but creditors frequently object to how the fees will be paid if they believe that method inappropriately impacts the payments they will receive under the plan. The Trustee also needs to be able to administer the attorney's fees payments along with the other disbursements, so the language must be clear and precise.

Some attorneys want to be paid the remaining balance of the presumptive fee (currently $5,000)[47] and then the fees in excess of the presumptive fee in another manner. Examples:

[46] *See In re Riddle*, 410 B.R. 460, 464 (Bankr. N.D.Tex. 2009).

[47] Local Rules W.D. Wash. Bankr. 2016-1(e).

A. ADMINISTRATIVE EXPENSES:

1. Trustee: The percentage set pursuant to 28 U.S.C. § 586(e).
2. Other administrative expenses: As allowed pursuant to 11 U.S.C. §§ 507(a)(2) or 707(b).
3. The Debtor's Attorney's Fees: Pre-confirmation attorney's fees and/or costs and expenses are estimated to be $**5,000**. $**1,000** was paid prior to filing.

Approved attorney compensation shall be paid after ongoing domestic support obligations and then as follows (check one):

____ Prior to all creditors.
____ Monthly payments of $_____.
____All available funds after designated "Monthly Payment" amounts to the following creditors:_____.
__**X**__ Other: **An initial payment of $4,000 and then monthly payments of $500**.

If no selection is made, approved compensation will be paid at the Trustee's discretion.

A. ADMINISTRATIVE EXPENSES:

1. Trustee: The percentage set pursuant to 28 U.S.C. § 586(e).
2. Other administrative expenses: As allowed pursuant to 11 U.S.C. §§ 507(a)(2) or 707(b).
3. The Debtor's Attorney's Fees: Pre-confirmation attorney's fees and/or costs and expenses are estimated to be $**5,000**. $**1,000** was paid prior to filing.

Approved attorney compensation shall be paid after ongoing domestic support obligations and then as follows (check one):

____ Prior to all creditors.
____ Monthly payments of $_____.
____All available funds after designated "Monthly Payment" amounts to the following creditors:_____.
__**X**__ Other: **An initial payment of $4,000 and then all available funds after designated "Ongoing Monthly Payment" amounts to ABC Mortgage and "Monthly Payment" amounts to XYZ Car Creditor**.

If no selection is made, approved compensation will be paid at the Trustee's discretion.

Section IV.B. Ongoing Domestic Support Obligations

Include ongoing domestic support obligations (DSOs) being paid through the plan. For some reason, debtors frequently fail to include the DSO.

Section IV.C.8., Section IV.C.9. and Section IV.C.10. Real and Personal Property

Do not include factual findings or asserted valuation in these sections (e.g., "2012 Kia Sorento has 200,000 miles and is in bad condition"). The information included should be only enough to identify the collateral. Examples:

Ongoing Payments:

Monthly Payment	Creditor	Collateral
$ 1,000	ABC Mortgage	12 Main Street, Seattle, WA
$		
$		
$		

Monthly Payment	Creditor	Collateral	Pre-Confirmation Adequate Protection Monthly Payment	Interest Rate
$500	XYZ Car Creditor	2012 Kia Sorento	$ 500	6 %

Do not include interest for pre-petition mortgage arrears unless there is some unusual circumstance based on the loan documents.[48] Example:

Cure Payments:

Monthly Payment	Creditor	Collateral	Arrears to be Cured	Interest Rate
$200	ABC Mortgage	12 Main St, Seattle, WA	$12,000	0 %

However, the debtor should include appropriate interest for the following:

1) Pre-petition property tax arrears
2) Pre-petition homeowners' association arrears[49] and
3) IRS secured tax claims

Do not forget to provide for the Trustee to include *both* the ongoing *and* pre-petition cure payments on delinquent mortgage, homeowners' association obligations and property taxes.

Section IV.C.10. Payments on Claims Secured by Personal Property (910 Collateral v. Non-910 Collateral)[50]

[48] See generally 11 U.S.C. § 1322(e).

[49] *See* Wash. Rev. Code §§ 64.34.364(13), 19.52.020.

[50] The so-called "hanging paragraph" of 11 U.S.C. § 1325(a)(9) provides:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle . . . acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

The pertinent part of 11 U.S.C. § 1325(a)(5) referenced above is at § 1325(a)(5)(B)(ii) which reads:

> a) Except as provided in subsection (b), the court shall confirm a plan if – . . .
> (5) with respect to each allowed secured claim provided for by the plan – . . .

Including vehicles in the incorrect section of Section VI.C.10. is a common mistake that slows down the confirmation process and can require an amended plan that has to be noted for hearing. Debtors' attorneys should review the debtors' vehicle loan documents to make sure the vehicles are included in the correct section so that debtors do not end up paying more than required.

→ If Non-910 Collateral is included in the 910 Collateral section of the plan, the creditor will be paid in full when perhaps the debtor could have paid the lesser collateral value amount.

Section IV.E. Nonpriority Unsecured Claims

If the debtor is below median or if the debtor is above median with a zero or negative monthly disposable income on Line 45 of Form B122C-2 and the case is not a reverse *Lanning* case, check the second box and add zero. Example:

E. NONPRIORITY UNSECURED CLAIMS: Nonpriority unsecured claims may receive more than the "At least" amount below. The Trustee shall pay filed and allowed nonpriority unsecured claims as follows (check one):

___ 100%

✔ At least $ 0 .

If the debtor is above median with a positive monthly disposable income, multiple the monthly disposable income on Line 45 by sixty (the applicable commitment period), check the second box and add the figure. Example of an above median income debtor with $1,000 on Line 45 of Form B122C-2:

E. NONPRIORITY UNSECURED CLAIMS: Nonpriority unsecured claims may receive more than the "At least" amount below. The Trustee shall pay filed and allowed nonpriority unsecured claims as follows (check one):

___ 100%

✔ At least $ 60,000 .

> (B) (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the amount of such claim . . . .

11 U.S.C. § 506 reads in relevant part:

> (a)(1) An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim.

Please remember that the amount included in Section IV.E. is a floor and not a ceiling. Depending on the plan and the debtor's situation, the debtor may end up paying more to nonpriority unsecured claims than the amount listed in Section IV.E.

When thinking about a case and the plan pre-confirmation, it may be helpful to think of debtors in three categories:

1) Below median income
2) Above median income with a positive projected disposable income and
3) Above median income with zero or negative projected disposable income

For below median income debtors, the income and expense schedules (Schedules I and J) control the debtor's plan payment and what will be paid to nonpriority unsecured claims based on those plan payments (leaving aside the liquidation value of the estate).

For above median income debtors, the means test generally controls the minimum amount that must be paid to nonpriority unsecured claims. The interplay between Schedules I and J can become confusing for above median income debtors. Of course, the debtor also must establish that the plan is feasible[51] and the income and expense schedules come into that calculation.

Section V. Direct Payments to be made by the Debtor and not by the Trustee

Include creditors that are to be paid directly by the debtor. This will be a very limited list because the Trustee will make most payments to creditors. Payments the debtor is permitted to make directly are:

1) Domestic support obligation payments made by an assignment from a debtor's wages or that are in a current status as of the date of the petition;
2) Leases of real and personal property; and
3) Deeds of trust/mortgages that are in a current status as of the date of the petition[52]

The Trustee can also make these payments, as the debtor is not required to make them directly but is permitted to do so.

Payment of claims by the Trustee is necessary for many reasons, including administrative efficiency, monitoring of payments, fairness and treatment of creditors, reduction of plan failure and provision of an independent accounting in the event of a dispute between the debtor and a creditor.[53]

[51] The debtor must establish that the debtor will be able to make all payments under the plan and to comply with the plan. 11 U.S.C. § 1325(a)(6).
[52] Local Rules W.D. Wash. Bankr. 3015-1(j).
[53] *See In re Genereux*, 137 B.R. 411 (Bankr. W.D. Wa. 1992)

Section VII. Executory Contracts and Leases

If a debtor is assuming an executory contract or unexpired lease, the debtor must separately move to assume the executory contract or lease and the order must be entered prior to or at confirmation. Do not wait to file your motion, as that slows down the confirmation process.

→ The debtor should move to assume the executory contract or lease immediately after filing the petition rather than waiting for the Trustee to raise this issue in an objection to confirmation.

Please always consider whether an arrangement is a true lease or a month-to-month agreement or financing agreement that may not need to be assumed or rejected.[54]

Section IX. Liquidation Value

Debtors often forget to include:

1) The liquidation analysis figure in Section IX. of the plan and
2) The federal judgment interest rate when the bankruptcy estate is solvent.[55]

For an effective way to calculate the liquidation value of the estate, please use the Trustee's Liquidation Calculator at https://seattlech13.com/liquidation-calculator/

Section X. Nonstandard Provisions

This is likely the most incorrectly used section of the plan. For most debtors, nonstandard provisions are unnecessary because the form plan is so effective and contemplates most situations.

→ Do not clutter the plan with unnecessary plan provisions and, if a nonstandard provision is necessary, make the provision clear and concise.[56]

→ Do not include factual findings in the plan. This is a common mistake that always draws an objection from the Trustee.

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[54] *See, e.g., Alegre v. Michael H. Clement Corp. (In re Michael H. Clement Corp.*, 446 B.R. 394, 402 (N.D. Cal. 2011) ("What constitutes a lease as a matter of "economic substance" is generally determined by nonbankruptcy law, usually state law. However, an agreement that qualifies as a lease under state law is not necessarily a true or bona fide lease subject to [11 U.S.C.] § 365. The bankruptcy court may independently determine whether the economic substance of the agreement is of a type anticipated by § 365.") (citations omitted).

[55] Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1234 (9th Cir. 2002).

[56] "Adding language to the form plan, even innocuous language with no effect on parties' rights or actions, serves only to increase the burden on the court, trustee, and creditors to ferret out and interpret whatever provisions a debtor may choose to add." *In re Madera*, 445 B.R. 509, 519 (Bankr. D. S.C. March 1, 2011). "Efficiency," one court also noted, "is a valid purpose of a uniform plan." *In re Maupin*, 384 B.R. 421, 426 (Bankr. W.D. Va. 2007) (citation omitted).

If a nonstandard provision is necessary, the Trustee has recommended provisions for the most common scenarios. These recommended provisions can be found under the form *Nonstandard Plan Provisions* at https://seattlech13.com/forms/

Feasibility

Feasibility has multiple meanings in Chapter 13:

1) Whether the debtor can make the plan payments[57]
2) Whether the plan payment and any other plan funding is sufficient overall to pay what the debtor proposes to pay in the plan
3) Whether the plan payment is sufficient to cover the monthly payments provided for in the plan

→ While the plan payment may be enough overall to pay all obligations due under the plan, sometimes attorneys mistakenly include monthly payments in the plan that exceed the monthly payment. To avoid this, calculate the monthly payments provided for in the plan and account for the Trustee's fee to see if the plan payment is sufficient to cover the monthly payments.

The projected disposable income (PDI) that results from the debtor's means test and the liquidation value are of course different tests under Chapter 13 of the Bankruptcy Code. The key thing to remember is that priority unsecured claim amounts get applied against the liquidation value.

Service Issues

To use a tennis analogy, failure to properly serve documents (plans, objections, motions, etc.) is an unforced error.[58] The best policy is, if anything, to over-serve documents rather than under-serve them. Debtors need finality in the confirming order and other orders and proper service is critical.[59] Below are many common mistakes.

<u>Failing to Include Creditors on the Creditor Matrix</u>

Debtors have an absolute duty to file complete and accurate schedules,[60] which includes listing and providing notice of the bankruptcy to all creditors. Please remember that Washington

[57] 11 U.S.C. § 1325(a)(6).
[58] An unforced error is "a missed short or lost point . . . that is entirely a result of the player's own blunder and not because of the opponent's skill or effort." https://merriam-webster.com/dictionary/unforced%20error
[59] In any proceeding which is to be accorded finality, due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co. et al.,* 339 U.S. 306, 314 (1950).
[60] *In re Rolland*, 317 B.R. 402, 413 (Bankr. C.D.Cal. 2004) (citing *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001)) (other citations omitted).

State is a community property state, so be sure to schedule all creditors of the community.[61] Creditors that debtors often forget to schedules are lessors, domestic support obligees and the Internal Revenue Service accurate addresses. For the domestic support obligations, we recommend that debtors serve the obligee *and* any entity that collects the obligation such as the State of Washington Division of Child Support.

Plan Service

If the plan is filed at the same time as the petition, the Clerk of Court will serve the plan.[62] If the plan is served after the petition, the debtor is required to serve the plan on all creditors at least fourteen days prior to the originally scheduled meeting of creditors.[63]

→ Debtors often forget to serve the original plan *at least* fourteen days prior to the original meeting date, so service ends up being defective.

Service Periods for Different Matters

30 Days: Objections to Claim[64]

28 Days: Pre-Confirmation Motions to Confirm Plan[65]
Motions for Summary Judgment[66]
Motions to Avoid Liens[67]

21 Days: Post-Confirmation Motions to Modify Plan[68]
All other motions not addressed by the Federal Rules of Bankruptcy Procedure or the Local Bankruptcy Rules[69]

→ One of the most common mistakes is not providing 28 days' notice of a motion to confirm a plan (i.e., pre-confirmation). The confusion occurs because a motion to modify a post-confirmation plan requires only 21 days' notice.

[61] *See In re Soderling*, 998 F.2d 730 (9th Cir. 1993); *In re Cowser,* 19-21008, 2020 WL 974973 (Bankr. C.D. Cal. Feb. 28, 2020) (in California, community property is liable for all debts of either spouse); Wash. Rev. Code § 26.16 (Rights and Liabilities – Community Property).
[62] Local Rules W.D. Wash. Bankr. 3015-1(c)(1).
[63] Local Rules W.D. Wash. Bankr. 3015-1(c)(2).
[64] Local Rules W.D. Wash. Bankr. 9013-1(d)(2)(C).

[65] Fed. R. Bankr. P. 2002(b).
[66] Local Rules W.D. Wash. Bankr. 9013-1(d)(2)(D).
[67] Local Rules W.D. Wash. Bankr. 9013-1(d)(2)(D).
[68] Local Rules W.D. Wash. Bankr. 9013-1(d)(2)(F).
[69] Local Rules W.D. Wash. Bankr. 9013-1(d)(2)(F).

Mailing Matrix

Use the master mailing matrix when serving all creditors. Notice is presumed adequate if the debtor:

1) Obtains the current mailing matrix from the Clerk's Office within seven days of service;
2) Mails the document to all the parties; and
3) Attaches the copy of the matrix used with the proof of service so that the date the matrix is obtained is evident. [70]

→ Do not re-type or create your own matrix – that is a waste of time and almost always ends up being defective in some manner (e.g., a missed creditor or a mis-typed address). To make sure you have the presumption of adequate service, *use a current matrix and attach it to your proof of service.*

→ A common mistake is for debtors' attorneys to use a matrix that is older than seven days. That creates a problem the Trustee may raise for the Court's consideration because the debtor will not have a presumption that notice is adequate.

Service of Claim Objections on the Internal Revenue Service

Debtors frequently fail to properly serve the Internal Revenue Service (IRS) with an objection to claim. Debtors must serve an objection to claim on the IRS to:

1) The IRS itself
→ The best practice is to serve the IRS at its Washington, DC headquarters *and* the local IRS office.
2) The Civil Process Clerk at the local U.S. Attorney's Office and
3) The U.S. Attorney General in Washington, DC[71]

Presumptive Fee and Fee Applications

The current presumptive fee in Chapter 13 cases through confirmation is $5,000 and up to that amount is approved without the necessity of a fee application when the Court confirms the

[70] Local Rules W.D. Wash. Bankr. 2002-1(e).

[71] Service of an objection to a proof of claim filed by the Internal Revenue Service, as an agency of the United States, requires service in the manner of a summons and complaint by Federal Rule of Bankruptcy Procedure (FRBP) 7004(b)(4) or (5). Fed. R. Bankr. P. 3007(a)(2)(A)(i). FRBP 7004(a) governs service on the Internal Revenue Service. FRBP 7004(a) requires service by mailing a copy of the objection to claim to the civil process clerk at the office of the United States Attorney in the district where the objection to claim is filed, to the Attorney General of the United States and to the Internal Revenue Service itself. *See also Scott v. United States (In re Scott)*, 437 B.R. 376, 379 (B.A.P. 9th Cir. 2010).

plan provided the amount is properly included in Section IV.A.3. of the plan.[72] To obtain more than the presumptive fee amount, attorneys must file and note for hearing a fee application within twenty-one days of the confirmation order date.[73]

Debtor attorneys must file Chapter 13 fee applications using Local Bankruptcy Form 13-9 and the order must conform to Local Bankruptcy Form 13-10.[74] The fee application must include an itemized time record that identifies:

1) The date the service was rendered;
2) The identity of the person who performed the service and the hourly rate of the person,
3) A detailed description of the service rendered and the time spent performing the service; and
4) The total number of hours spent and the total compensation requested.[75]

→ While Local Bankruptcy Form 13-9 is mostly self-explanatory, the most common mistakes are (1) attorneys in confirmed cases include the full amount of their fees rather than the amount above the approved fees up to the presumptive amount. For example, if the Court approved the $5,000 in the confirming order and the attorney has an additional $2,500 in fees, the fee application and order should provide only for the additional $2,500; and (2) the applicant must still include the entire itemized time record that includes the approved $5,000 so that the Court can determine that the applicant is entitled to fees in excess of the presumptive amount.[76]

Sale of Real Property

To sell real property in a Chapter 13, the debtor must:

1) File, note and properly serve a motion to sell the real property;
2) Include the purchase and sale agreement and any amendments;
3) Include a declaration from the debtor whether the sale is an arm's length transaction for fair market value; and
4) File the estimated settlement statement prior to the response date for the motion.[77]

→ It is best if you can attach the estimated settlement state to the motion as an exhibit rather than filing it later. That may not always be possible if you are waiting for the estimated

[72] Local Rules W.D. Wash. Bankr. 2016-1(e)(1). The Court's form confirming order provides that "the attorney for the Debtor's compensation is approved in the lesser amount of $5,000 or the estimated amount listed in section IV.A.3 of the Plan."
[73] Local Rules W.D. Wash. Bankr. 2016-1(e)(2).
[74] Local Rules W.D. Wash. Bankr. 2016-1(e)(3).
[75] Local Rules W.D. Wash. Bankr. 2016-1(e)(3).
[76] Local Rules W.D. Wash. Bankr. 2016-1(e)(1).
[77] Local Rules W.D. Wash. Bankr. 9013-1(l).

settlement statement, but it is the best practice to hopefully prevent an objection to the motion for lack of the statement.

Post-Confirmation Plan Modification

To modify the plan post-confirmation based on one of the four numerated reasons,[78] the debtor must:

1) File, note and properly serve:
    a. A proposed post-confirmation modified plan;
    b. A declaration from the debtor explaining the need for the plan modification (e.g., a change in income);
    c. Supplemental Schedules I and J;
    d. A proposed order on Local Bankruptcy Form 13-6; and
    e. A motion to approve the amended plan that identifies all proposed changes by reference to the plan section number and with the specific changes listed; and
2) Provide the Trustee with documentation of the debtor's income received within the last thirty days.[79]

While the Western District of Washington Bankruptcy Court is quite permissive on post-confirmation plan modifications, debtors cannot simply modify their plans "willy nilly."[80] Pursuant to the binding effect of 11 U.S.C. § 1327(a), "a confirmed plan is *res judicata* as to any issues resolved or subject to resolution at the confirmation hearing."[81] "A plan," according to the Bankruptcy Appellate Panel of the Ninth Circuit, "is a contract between the debtor and the debtor's creditors. The order confirming a chapter 13 plan, upon becoming final, represents a binding determination of the rights and liabilities of the parties as specified by the plan."[82]

Moreover, a post-confirmation modified plan must be proposed in good faith.[83] As part of the good faith analysis, the Court may consider whether the proposed modification correlates to the debtor's change in circumstances.[84] The debtor has the burden to establish that the modified plan is proposed in good faith.[85]

→ The most common mistakes in modifying plans post-confirmation include:

1) Failure to file the proposed modified plan as a separate document from the motion. This is important because the order approving the plan will reference the docket number of the modified plan itself;

[78] 11 U.S.C. § 1329(a).
[79] Local Rules W.D. Wash. Bankr. 3015-1(i).
[80] *In re Meeks*, 237 B.R. 856, 859-60 (Bankr. M.D. Fla. 1999)
[81] *Id*. at 858-59.
[82] *Derham-Burk v. MrDutt (In re MrDutt)*, 600 B.R. 72, 76-77 (B.A.P. 9th Cir. 2019).
[83] 11 U.S.C. §§ 1329(b)(1); 1325(a)(3).
[84] *Mattson*, 468 B.R. at 371.
[85] *Id.* at 372.

2) The proposed plan payment not equaling the debtor's monthly net income on Schedules I and J. Of course, the debtor's Schedules I and J should accurately and honestly reflect the debtor's current income and expenses;
3) Failure to provide the Trustee with documentation of the debtor's current income;
4) Failure to explain in the *debtor's* declaration the change in circumstances requiring the modification. This is the evidence needed to establish that the proposed modified plan is proposed in good faith, so make sure to include sufficient facts to support the proposed modification; and
5) Failure to identify in the motion all proposed changes by reference to the plan section number and with the specific changes listed.

Claims and Notice Review and Objections

Whether a claim is filed timely or late, it is allowed unless a party in interest objects.[86] Debtor attorneys should always review the case after the claims bar deadlines have passed. This is a critical component of representing debtors in Chapter 13 cases. By reviewing the debtor's case after the claims bar deadlines have passed, attorneys can identify and rectify numerous issues such as feasibility problems, claim problems (e.g., perhaps the need to object to a claim), the need to file claims under Federal Rule of Bankruptcy Procedure 3004, etc.

Similarly, it is also critical that you review notices of mortgage payment changes, notices of fees and any amended claims to prevent any problems (e.g., feasibility problems). The bottom line is that representation of a debtor does not end at confirmation. Chapter 13 plans generally run from thirty-six to sixty months and debtors need the assistance of counsel throughout the process.

Claims objections in Chapter 13 cases must be filed and served no later than 270 days from the petition date, unless good cause is shown.[87] However, the Chapter 13 disburses on claims prior to the 270 days passing and so it is unwise to wait to file a claim objection if it is being paid by the Trustee through the plan; in other words, promptly file claim objections.

Please remember that claim objections require thirty days' notice.[88] Attorneys sometimes forget the difference in service timing for objections to claims.

Discharge

One of the frequent impediments or delays in debtors receiving a discharge is failure to complete the financial management course.[89] The Trustee recommends that debtors complete this course as soon as possible after filing the petition. Debtors can take the class and obtain the certificate for free at www.13class.com.

[86] 11 U.S.C. § 502(a); *In re Smith*, No. 09-43823, 2010 WL 5018379, at * 2 -3 (Bankr. W.D. Wa. Dec. 3, 2010).
[87] Local Rules W.D. Wash. Bankr. 3007-1(b).
[88] Local Rules W.D. Wash. Bankr. 9013-1(d)(2)(C).
[89] 11 U.S.C. § 1328(g)(1).

Debtors must also complete the Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q).[90] The debtors need to complete at the end of the case.[91]

[90] Form B2830

[91] The debtors must complete the form "as soon as practicable after completion by the debtor of all payments under the plan." 11 U.S.C. § 1328(a).