

Consumer Corner

BY WESLEY H. AVERY¹

So You Want to Be a Ch. 7 Trustee?

Bankruptcy trustees are integral to every chapter 7 case. While anyone who files a chapter 7 petition will probably never meet the bankruptcy judge assigned to their case, they will certainly be examined in person under oath by their trustee. These trustees investigate the financial affairs of the debtors, monetize their nonexempt assets, review proofs of claim filed by creditors and might oppose the discharge of the debtor (if appropriate).² Each of the 21 regions of the Office of the U.S. Trustee (OUST) selects and maintains a panel of standing chapter 7 trustees to whom the bankruptcy court assigns new chapter 7 cases. Chapter 7 trustees should expect to obtain a new set of bankruptcy cases every month, and should commence a review of a debtor's assets and liabilities upon receipt.

There are various national software providers that assist trustees, such as Stretto, Epiq, Olofson, KCC and Trustee Solutions. Only approved financial institutions can serve as depositories for the funds of bankruptcy estates, and software providers act as an interface between bankruptcy trustees and these banks. These software providers do not charge the trustees for their services. They provide unique software and cloud database storage for the preparation of final reports and for the maintenance of OUST Form 1 and Form 2, which are used to monitor trustee performance and safeguard estate funds.

These cloud-based databases create files where the pleadings, correspondence, emails and documents of a bankruptcy case might be imaged and stored without paper. The software providers also assist in cybersecurity to safeguard the personally identifiable information of debtors, and provide blank checks with security features to be issued to creditors after a final report has been approved by the Department of Justice (DOJ) and the court.

As discussed herein, the minimum qualifications for appointment are set forth in 28 C.F.R. § 58.3. To be eligible for appointment as a chapter 7 trustee, an applicant must possess strong administrative, financial and interpersonal skills. A successful applicant must also undergo a thorough background check, which includes fingerprinting, a review of the applicant's credit history and Internal Revenue Service verification that tax payments are in good standing. A chapter 7 trustee must be bonded and must allow

the DOJ ongoing access to his/her financial information. Although chapter 7 trustees are not federal employees, appointments are made consistent with Federal Equal Opportunity policies. Almost all chapter 7 trustees are licensed attorneys or accountants.

First Step: Representing Trustees as an Attorney

Prior to the appointment, most chapter 7 trustees who are attorneys have practiced bankruptcy law representing debtors and/or creditors. Many of these attorneys previously represented trustees as clients. An attorney retained by a trustee to represent him/her on a bankruptcy case is often seen as the quarterback and the trustee as the head coach. Over time, by representing trustees, an attorney learns the trade in terms of both legal and administrative disciplines. As such, the first step to becoming a trustee for many is to successfully represent trustees. Here are some tips to break into this field:

- Become active in ABI, a bar group or a local bankruptcy Inn of Court. A cooperative attitude is key, and the bankruptcy community is small.
- Join the National Association of Bankruptcy Trustees and participate in its listserv. A lot of practical knowledge about being a chapter 7 trustee can be found here.
- Become a certified specialist in bankruptcy law through the American Board of Certification or your state bar. If nothing else, by becoming a certified specialist you will in time learn to speak the vernacular of bankruptcy, which is through Code sections.
- If you have an MBA, an undergraduate business degree or real-world business experience, a chapter 7 trustee may retain you as counsel where a debtor's business is operated for a short time pursuant to court order under 11 U.S.C. § 721.
- In California, at least, many chapter 7 asset cases involve real estate. Being a licensed real estate professional (even if you never represent buyers or sellers of real estate) gives you a clear advantage in getting employed to sell houses or commercial buildings, as does an existing legal practice that involves real estate law.
- Demonstrate an ability to resolve asset cases quickly and efficiently while staying on top of your existing cases.
- Build a strong reputation with the OUST as a competent litigator (*e.g.*, if you represent debtors in your practice, avoid means-test inquiries and failure to respond to inquiries).



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¹ The author thanks chapter 7 trustee Nancy Hoffmeier Zamora of the Central District of California for her comments on an earlier draft of this article.

² See 11 U.S.C. § 704.

- Get free visibility to trustees by submitting articles to the *ABI Journal* or bar journals, then mailing professional-looking reprints of those articles to panel trustees with a handwritten card.
- Obtain appointments to speak on panels at conferences, such as those with ABI, that discuss consumer bankruptcy issues.
- Be courteous and responsive to a trustee's staff. These are often the individuals who recommend to the trustee who they want to employ on a case.
- Be knowledgeable about case pacing, deadlines and dates. If requested, send in a timely manner calendar items, status reports and case summaries to the trustees you represent.
- Always think, "How can I make money for the trustee while also maximizing disbursements to creditors?"
- Get a § 727 objection to a discharge adversary proceeding under your belt at the first opportunity. If it turns out that you are forced to go to trial, all the better: Word gets around.
- Network within the insolvency community, which comes back to the first point: The bankruptcy community is small.

What if You Are an Accountant?

Like attorneys, many accountants who are chapter 7 trustees started out by doing accountancy work for bankruptcy estates. This can be especially challenging and might involve forensic accounting. A chapter 7 debtor's financial records are often in disarray and/or scattered, which might have been a cause of the bankrupt's insolvency in the first place. Typical tasks conducted by accountants for chapter 7 trustees are as follows:

- Gathering and collating a debtor's records;
- Advising the trustee on the storage, destruction or abandonment of the debtor's records;
- Working with IT professionals to gather financial information from the debtor's computers;
- Reclamation analysis;
- Determining preferential and fraudulent transfers;
- Identifying post-petition transfers;
- Evaluating gap claims in involuntary bankruptcy cases;
- Serving as an expert witness on issues such as the time of a debtor's insolvency or whether various preference defenses are applicable;
- Preparing tax returns for bankruptcy estates;
- Examining complex proofs of claim (such as lease-rejection claims) and making recommendations to the trustee on whether to object to same;
- Preparing monthly operating reports, budgets, projections, tax-reporting documents and payrolls if the trustee is running a debtor's business;
- Assisting auctioneers in the liquidation of personalty owned by the debtor;
- Estimating capital gains on the sale of property by the estate;
- Assisting in the administration of the asset-recovery process (e.g., spreadsheet maintenance); and
- Insider transaction analysis.

Mastery of all these tasks is good preparation for an eventual appointment by the DOJ as a chapter 7 trustee. Like

attorneys, accountants have to be appointed pursuant to court order on a case-by-case basis.

Most chapter 7 trustees are either attorneys or accountants.... Realize, however, that as a chapter 7 trustee, your primary responsibility is to administer bankruptcy estates by applying your business judgment.

Statutory Requirements to Be Appointed by the DOJ as a Chapter 7 Trustee

Pursuant to CFR 28 C.F.R. § 58.3(b), the statutory qualifications for appointment to the panel of chapter 7 trustees for a district are as follows:

- (1) Possess integrity and good moral character.
- (2) Be physically and mentally able to satisfactorily perform a trustee's duties.
- (3) Be courteous and accessible to all parties with reasonable inquiries or comments about a case for which such individual is serving as private trustee.
- (4) Be free of prejudices against any individual, entity, or group of individuals or entities [that] would interfere with unbiased performance of a trustee's duties.
- (5) Not be related by affinity or consanguinity within the degree of first cousin to any employee of the Executive Office for United States Trustees of the Department of Justice, or to any employee of the OUST for the district in which he or she is applying.
- (6)
 - (i) Be a member in good standing of the bar of the highest court of a state or of the District of Columbia; or
 - (ii) Be a certified public accountant; or
 - (iii) Hold a bachelor's degree from a full four-year course of study (or the equivalent) of an accredited college or university (accredited as described in part II, section III of Handbook X118 promulgated by the U.S. Office of Personnel Management) with a major in a business-related field of study or at least 20 semester-hours of business-related courses; or hold a master's or doctoral degree in a business-related field of study from a college or university of the type described above;
 - (iv) Be a senior law student or candidate for a master's degree in business administration recommended by the relevant law school or business school dean and working under the direct supervision of:
 - (A) A member of a law school faculty; or
 - (B) A member of the panel of private trustees; or

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(C) A member of a program established by the local bar association to provide clinical experience to students; or

(v) Have equivalent experience as deemed acceptable by the U.S. Trustee.

(7) Be willing to provide reports as required by the U.S. Trustee.

Most chapter 7 trustees are either attorneys or accountants. In the Central District of California, approximately 75 percent of the chapter 7 trustees are attorneys. Realize, however, that as a chapter 7 trustee, your primary responsibility is to administer bankruptcy estates by applying your business judgment. In small-asset cases, trustees who are attorneys might also be expected to perform legal work without being paid additional compensation beyond the statutory trustee fee.

Getting Appointed to the Panel of Chapter 7 Trustees

Chapter 7 trustees are appointed infrequently; in the author's district, no new trustees have been appointed in the last nine years. As such, when an announcement is made on the OUST website (which should be monitored religiously, as the application window might be short), you have to be ready to be considered. The following is what should be done beforehand:

- Talk to existing trustees and counsel who work for them, and make it known that you want to be selected. Campaign to be a trustee before the announcement is made.
- Familiarize yourself with readily available information (e.g., the *Chapter 7 Trustee Handbook*, which is available on the OUST's website).
- Interview software providers. Be ready to discuss with the OUST which software provider you would like to use and why.
- Observe other matters on the calendar when you are present in bankruptcy court to learn the issues that arise in cases involving chapter 7 trustees, and learn from others' mistakes instead of making your own. Compile a list of "best practices" through your observations.
- If time permits, obtain an MBA or a real estate broker's license, and deepen your knowledge of (and experi-

ence in) areas of applicable substantive law, such as real estate, secured transactions and corporate.

- Identify one or more mentors (whether formally or informally) from whom you can learn about trustee administration.
- Have a solid application ready to go, line up recommendations, and be ready for the security-clearance process from the Federal Bureau of Investigation.
- Make sure any individual tax or debt issues have been resolved before applying.
- Be realistic about the time it will take to get cases in the pipeline and get paid. You will probably see no cash flow from trustee fees for at least six months, and no significant cash flow for more than a year. As such, you will have to "float" your trustee practice with other resources (e.g., income from your law practice, a line of credit from your bank or savings).
- Expect to answer a variety of wide-ranging questions from the OUST if you get an interview. Develop a business plan. Be able to discuss how you will staff your office as a chapter 7 trustee, including identification of your future trustee administrator, and whether you will have additional staff such as asset or no-asset clerks. For many trustees, trustee administrators handle many of the OUST reporting requirements, even though the trustee remains responsible for all aspects of the trustee practice. Asset or no-asset clerks might help a trustee analyze new cases and determine whether there are nonexempt assets to administer. In smaller trustee offices, the trustee and his/her administrator might conduct this analysis without the assistance of additional staff.

As in your legal practice, your word is your bond. You must have integrity. Be ready to follow through on what you say with your actions, and be firm, but do not lose your empathy. Remember that you have a job to do and a fiduciary responsibility to the estate's creditors. Develop your own style and practice, and make sure it is one of which you can be proud.

If you are selected, you should start receiving chapter 7 cases within 90 days of your written appointment. Good luck! **abi**

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