LAW360 | Bankruptcy Authority

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5 Myths In Bankruptcy Practice Debunked

By **Yun Park**

Law360 (March 29, 2024, 3:37 PM EDT) -- Attorneys who are just starting their careers in bankruptcy practice may have certain notions about what their days will be like.

But lawyers with longer tenures told Law360 that junior attorneys have plenty of misconceptions, from how fast cases move and which other lawyers will be working with them to how much time newbies could get in front of a judge. Below, lawyers quash some of those fallacies.

Petition, Then Plan

From not needing to plan in advance to expecting a predictable case, Law360 asked experts of bankruptcy law to tackle the biggest myths about the field. (iStock.com/utah778)

Sure, the petition comes first. But attorneys also prepare an exit plan well in advance, even before the debtor files for bankruptcy.

"If you don't know how you're going to get out of bankruptcy before you go in, you're going to be stuck there for a long time," David G. Dragich of The Dragich Law Firm PLLC said.

Michael Sirota of Cole Schotz PC, who frequently works with prominent debtors counsel Kirkland & Ellis LLP, said his firm doesn't usually get involved unless an exit plan is already in process.

"We don't file Chapter 11 and then try to figure it out after. The only way you do that is if there's some

unknown or unanticipated judgment that comes down the road that you need to respond to right away and maybe not have the time to develop a plan," Sirota said. "Even in that circumstance, if you're in litigation and have the potential of facing a judgment, you should still already be working on what the exit plan is. You don't let Chapter 11 overcome you, you plan for it."

Preparation is key in order to handle the many deadlines and technical requirements demanded by bankruptcies. Procrastination is the worst possible trait, while organization and time management are the most important skills for an attorney practicing bankruptcy, said Paul Hammer of Barron & Newburger PC.

"Being proactive and organized gives attorneys back control of their schedule and docket and makes them better practitioners, both to clients and colleagues alike," Hammer said.

Bankruptcy Counsel Only

Bankruptcy is more of a consensual practice than other fields, allowing attorneys to work with larger groups of people.

"Most cases end in deals. Bankruptcy is much more communal and sort of a cooperative practice than a lot of other practices are," said Eve H. Karasik of Levene Neale Bender Yoo & Golubchik LLP.

It's not unusual to have 20, 30 or more lawyers working on the bankruptcy of a publicly traded company or other large case, according to Dragich. In such cases, a core bankruptcy team can expect to work with other lawyers specializing in regulatory issues, M&A, environment, and intellectual property, depending on the type of company, he said.

Juniors Stay on the Bench

Newbies may get a chance to lead a case more often than they would think, even under changing circumstances in bankruptcy proceedings.

"I've observed that young associates not only meet but often surpass expectations," said Seth Lieberman of Pryor Cashman LLP, who added it's more common nowadays to witness younger associates taking the lead and presenting in court. "Young practitioners may perceive emergency situations as insurmountable when, in reality, they're often well-equipped to handle those pressures."

Judges also don't want to see senior partners "hogging the podium," said Amy Vulpio of White and Williams LLP.

"Younger practitioners may be apprehensive about appearing in court or think it is better for a more senior colleague to handle arguments, but judges have been increasingly vocal about how much they appreciate seeing junior attorneys appear in front of them to help develop their courtroom skills," she said.

She added that it's not true that more experienced lawyers have all the answers. "Bankruptcy Code provisions change over time, new decisions come out, and even the most seasoned practitioner may be able to flag issues but will look to the associate to assist with the granular application of current law to the facts."

Karasik suggested that younger attorneys should also use their own gut and always check details. When Karasik was an associate as a local counsel for another firm out of state, the firm sent a brief to be filed, but she made sure to double-check that all the case law citations were good.

"I stayed late, checked the case, and lo and behold, one of the cases was overruled, and it was a big argument that they're making in the pleading. The brief had to be rewritten," Karasik said. "You need to trust yourself and need to know that you're there for a reason. If something doesn't seem right, you need to double-check. If you don't, and something got filed like that, that could be a problem."

Slow, Steady and Predictable

Narratives can shift quickly in bankruptcy proceedings, and time is often the company's biggest challenge.

"The flow is moving all the time, so there are things that need to be done immediately," Dragich said. "It's not like a litigation practice where a complaint is filed, and 30 days later, an answer is filed, and then you

conduct discovery, and this sort of volleying back and forth."

For example, Vulpio once represented a debtor who had been accused of financial irregularities and was under intense pressure from multiple creditors. At one hearing, it was found that a state agency swept the debtor's bank account in violation of the automatic stay, and the agency's attorney got an earful from the judge. By the end of the day, the debtor was able to retrieve the money. The case eventually got converted, but the debtor at least was able to fight another day.

"You've got to move from one turn," Karasik said. "If the judge doesn't like this, what can I do to get the best for my client? You have to be flexible and change the path that you thought you were going to be on."

Bankruptcy Is the Only Option

Rather than the complex and expensive process of bankruptcy proceedings, attorneys noted the prevalence of many alternatives for companies in financial distress — including receiverships, assignments for the benefit of creditors, or general out-of-court workouts.

"The bankruptcy process is so expensive because of reporting requirements and professional fees required to comply with the Bankruptcy Code and rules that it's really only useful for a limited scope of companies. Several other alternative proceedings or out-of-court options can be utilized," Dragich said.

State court insolvency proceedings are common alternatives, where the assets are transferred by an agreement from the company to a fiduciary and the fiduciary either sells them to a third party or liquidates the company.

"If it's a situation where a company is not going to restructure, ending up owning itself again at the end of the day, it can be very efficient," Karasik said. "It's almost more of a corporate transaction than a litigation transaction."

Dragich explained that the most common scenario involves a private equity fund with a portfolio of companies. Often, the fund appoints an independent director to handle the wind-down and liquidation of one of the companies.

"You just simply do that under the state law and dissolve the company, and we help sell the assets and then pay creditors," Dragich said. "It's a less formal process, but it's quieter, cheaper, faster and more efficient."

David Gordon of Polsinelli PC said a lot more getting done out of court than in court is usually what the client wants.

"For every debtor we have to file, we have five more where we pull off an out-of-court transaction or workout that prevents a filing."

--Editing by Orlando Lorenzo.
