

**Minutes of the Bench Bar Committee
Topeka Courtroom 210
May 8, 2015**

Members Present: Emily B. Metzger, Chair
Hon. Janice M. Karlin, Judges Representative
Jordan Sickman, U.S. Trustee's Office
David Arst
Wendee Elliott-Clement
Laurie B. Williams
Jill A. Michaux
Steven Rebein,
Justin W. Whitney
Andrew J. Nazar
David Lund

Court Staff Present: David Zimmerman, Clerk
Stephanie Mickelsen, Chief Deputy Clerk

Members Absent: None

Emily Metzger called the meeting to order at 10:05 am. She noted that the committee had approved the minutes from the previous meeting via e-mail.

Old Business

*Possible Modification to D. Kan. Bk. Standing Order 08-4(b)(5)
to Require Email Notice of Letter Alleging Default*

Emily Metzger noted that, apart from the ongoing question of any possible amendments to our Chapter 13 Form Plan, the only outstanding old business item is the possible modification of D. Kan. Bk. Standing Order 08-4(b)(5) to require a mortgage creditor to email any letter alleging default to the debtor and the debtor's attorney. Jill Michaux reported that the speed of delivery by surface mail of the warning letter that is required before a creditor seeks to modify the automatic stay is not improving. She renewed her request that when the warning letter is sent by U.S. mail, a copy should also be sent electronically to debtor's counsel because it takes a large part of the 10-day period provided by the rule for the letter to arrive. She stated that there is a movement to address this issue nationally, but that would take years before a national rule could be promulgated. It was suggested that the letter might be filed with the court, thereby prompting an ECF notification to counsel. Jill Michaux responded that that would be acceptable, but it would highlight the debtor's default (and perhaps result in the trustee or the judge invoking the conduit mortgage rule). It was suggested that from a creditor's point

of view, filing it could help demonstrate that there were multiple defaults and multiple cures. It was also suggested that changing the 10-day period to a 14-day period would help resolve the concern and would bring the rule into conformity with the counting periods used by the federal rules generally.

The Committee resolved unanimously to recommend the period of time in Standing Order 08-4(b)(5) be increased from 10 days to 14 days. It further resolved that creditors' counsel are encouraged to contemporaneously email a copy of the letter alleging default to debtor's counsel at the same time the letter is sent by regular mail.

Judge Karlin and David Zimmerman will consult about the best way to implement this proposed change to Standing Order 08-4.

New Business

Debtor Electronic Bankruptcy Noticing (DeBN) and Proposed D. Kan. Bk. S.O. 15-1

David Zimmerman advised that Debtor's Electronic Bankruptcy Noticing (DeBN) is a new program that allows debtors to open an account with the Bankruptcy Noticing Center so they can receive copies of court-issued notices and orders by email rather than by regular mail. It is different from the Notice of Electronic Filing (NEF) issued by CM/ECF. Proposed Standing Orders 15-1 and 15-2 are proposed to govern DeBN. Previous drafts containing the substance of these orders were unanimously approved by the Committee by email. The question presented to the Committee is what the effective date should be, i.e. from what date forward will debtors in every new voluntary case be required to file a DeBN opt-in/opt-out form.

David Zimmerman introduced the DeBN Request Form and explained how it is designed to minimize errors by requiring debtors to enter their email twice in all capital letters. It would be filed as a private entry, but the debtors' emails will be publicly visible on the certificate of mailing.

Standing Order 15-2 merely adds a new subparagraph to LBR 1007.1(a)(2) so that it requires the DeBN Request Form to be filed in CM/ECF as a document separate from the petition. This is to allow the Clerk's Office to track debtors using DeBN and (it is hoped) eventually to automate what is now a manual process used by the Clerk's Office to create DeBN accounts.

When asked whether the DeBN Request Form will be provided to software vendors, David Zimmerman advised that he already has a list of vendors to whom the form will be provided. It is hoped that the vendors will include the forms in the

bankruptcy software packages so the program will be as easy as possible for attorneys. Some court DeBN Request Forms from other jurisdictions have already been picked up by at least one software vendor.

Other details about the DeBN program that were discussed include the following. DeBN will only email copies of documents that the court would otherwise mail to debtors. Attorneys will continue to receive ECF notices immediately when items are filed in CM/ECF but DeBN notices are sent the night after the items are filed (still several days before debtors would likely have received documents by regular mail). If the debtor has a DeBN account from a prior case, the account will remain active for subsequent cases. DeBN became active in Kansas on May 5, 2015, so debtors in existing cases are permitted to enroll in DeBN now. One email address is permitted per debtor and joint debtors can opt to use the same email address. It is unlikely that a DeBN account could send an email notice to multiple email addresses (e.g., to notify several individuals working for a corporate debtor), but if the debtor provides an email that is configured by the debtor to be forwarded to a distribution list then that action might allow distribution to multiple recipients. DeBN is at least 9 times more cost effective than mail notice. The DeBN Request Form should be filled out and signed electronically and filed, rather than printing the form, scanning, and filing the wet-ink-signed document.

Judge Karlin explained that there will be a strong presumption that a debtor with a DeBN account received items by email (since the court would receive a “bounce back” notice if the account has been closed). When asked about enforcement for failure to file a DeBN Request Form, David Zimmerman advised that a Notice of Deficiency will be issued. Judge Karlin stated that she herself has not had to decide what the consequences will be for failing to file.

Judge Karlin also noted that at the national level there is a proposed change to Fed. R. Bankr. P. 9036 to require entities to register for electronic noticing if they are sent more than 100 notices via BNC within a month. Some creditors receiving huge numbers of notices are not registered for electronic noticing. The enforcement mechanism for the proposed rule change is controversial. The Administrative Office of the U.S. Courts is considering setting up an email account for the creditors who meet the threshold and electronically sending all notices to that account (and giving the creditor access to the account with the ability to set up its own preferred email address).

Jill Michaux indicated that there is a proposal at the national level to allow attorneys to use the BNC to serve mailings and take advantage of preferred addresses provided by creditors to the BNC.

David Zimmerman explained that DeBN has been tested for an extended period of time in Central California and Central Illinois. In response to questions,

he also explained that DeBN will only provide electronic noticing of court-issued orders and notices to debtors. Service of documents by other parties won't change; they will need to be served as before. Creditors who desire electronic notification through the BNC can sign up for an EBN account with the BNC.

The principal question presented to the Committee about DeBN is when the court should begin to require debtors to file the DeBN Request Form in new cases. Jill Michaux recommended that the date be the first day of a calendar month. When asked how the new requirement will be publicized, Judge Karlin observed that the court can post it to the court's website and make an announcement on the bklistserv and post the requirement as part of this meeting's minutes. Jill Michaux suggested that the court post a PowerPoint showing how to file the DeBN form. David Zimmerman agreed that can be done. He also explained that some delay in implementing the requirement to file the DeBN form is advisable to (1) educate the attorneys about the new requirement and (2) to allow the court to provide the DeBN form to software vendors. He also explained that the court is making a fillable pdf version of the form available that will prompt the user to fill in the email address twice and verify that it was entered the same both times.

When asked how long software providers will need to make the DeBN form available to its attorney users, David Zimmerman answered that because there are so many software vendors it is unknown how much time they would each need to make the form available as part of their software.

July 1 was suggested as the mandatory start date. David Zimmerman opined that education about DeBN could be accomplished by July 1, but suggested that August 1 would provide software vendors additional time to include the DeBN form in their packages. Jill Michaux offered to begin using DeBN immediately.

The Committee unanimously recommended adoption of Standing Order 15-1 with August 1, 2015, as the date to begin requiring debtors in every new voluntary case to begin filing the DeBN opt-in/opt-out form.

In response to various questions about the DeBN Request Form, David Zimmerman answered that it was drafted locally using the best features from forms used by other courts around the country. It is acceptable for attorneys to replicate the form without individual cells for each letter of the email address if it is typed. All caps should be used to enter the email address on the form, particularly if handwritten, to make it easier to read and reduce errors. The pdf form will automatically use all caps.

David Zimmerman also explained that FAQs about DeBN are already posted on the court's website.

Andrew Nazar suggested adding the word “publicly” to the DeBN Request Form (second sentence) so it will read “I understand that my email address will appear publicly on any certificate of mailing filed by the electronic noticing provider.” David Zimmerman agreed to make the edition.

The Committee unanimously recommended adoption of Standing Order 15-2 amending LBR 1007.1(a)(2).

Local Rule Addressing 11 U.S.C. § 521(f)

Judge Karlin posed the question whether a local rule should be adopted to govern requests pursuant to 11 U.S.C. § 521(f). As background, she explained that a local creditor had filed Section 521(f) requests in a number of Topeka Chapter 13 cases. This appeared to be the first time such requests had been made in this district. Judge Karlin indicated the statute required disclosure of the requested information in most instances, and that her biggest concern was with security, particularly of tax returns. She explained that there is a CM/ECF event that, if used, immediately locks the information and prevents others from seeing it. [Editor’s Note: Two such events are found under the Bankruptcy Events menu, Other category, as events named “Tax Documents” and “Tax Documents Small Business.”] And the concern for security might be less with a party who is already required by law to take prescribed measures to protect tax return information, such as a bank, as compared with a former spouse or a small entity (i.e., Joe’s Bait Shop).

It was observed that only one creditor has filed such requests and none have been filed since. When asked about the motivation behind the requests, Judge Karlin recognized that creditors may have a reason to seek updated information under this statute since Debtors often promptly move to modify their plans to pay less when their income decreases, but seldom do so when their income significantly increases. The Chapter 13 Trustee opposed the requests on the basis that the trustee routinely reviews the tax returns (especially in above median income cases) to see if there was a big change in debtor’s circumstances, but Judge Karlin noted that under the statute the creditor did not need to trust the debtor nor seek information through the trustee but could file a motion to formally obtain the records.

Laurie Williams stated that she was concerned about the risk of tax returns being made public. She opposed adoption of a local rule on the issue, explaining that if a debtor is concerned that a particular creditor, such as an ex-spouse or “Joe’s Bait Shop,” lacks the means to protect the sensitive tax information then the debtor could make a record of the concern and request ad hoc protection from the court.

Emily Metzger commented that a local rule might draw additional attention to the section. It was noted by another Committee member that it was not worth the time for most unsecured creditors to pursue these kinds of requests. Jill Michaux recommended against creating a local rule because it would encourage Section 521 requests. She also invited the court to look at two dictionary events that are similarly named. She thought one event might lock the tax information and the other might not, although she had not used either event. [Editor's Note: The "Tax Documents" and "Tax Documents Small Business" are found under the Bankruptcy Events menu, Other category. Documents filed using either of these events are restricted from public view.] Jill Michaux said that she tried to ascertain if Section 521 requests are being made in other courts around the country, but found no one who was routinely making such requests. She also said that if a non-bank made requests, she would want specific protections from the court and might want to file the documents with the court rather than submitting the information directly to the creditor. Judge Karlin said she would be open to such requests.

No one on the Committee thought that more formal action should be taken on this issue.

Requiring Filers to Provide Email Address for Service and Other Contact

Andrew Nazar brought two recommendations at the request of a non-committee member of the bar. The first request was that if a creditor or pro se debtor communicated by email, they should thereafter be deemed to consent to service by email. The request grew out of a situation where she was corresponding with a creditor who would send her materials by email but would not accept email from her so she had to also mail everything to the creditor by regular mail. Andrew Nazar voiced concern that because of Fed. R. Bankr. P. 9036 and 7004 and Fed. R. Civ. P. 5 the proposal was impermissible because a party had to take an affirmative step such as signing up for CM/ECF or requesting electronic service before the party could be served by email. Therefore, he thought a local rule could not enforce what was requested.

Jill Michaux asked if a creditor could be required to sign up for electronic noticing. David Zimmerman indicated that an amendment to Rule 9036 is under consideration. Judge Karlin noted that the amendment would apply only to creditors who received 100 notices per month by mail. Jill Michaux noted that the 3-day rule for service is being eliminated for electronic service but not for mailed service.

The Committee decided that no action could be taken on the request.

*Proposed Amendment to the Court's Discharge Order to Reflect
Lack of Judgment Liens on Homestead Property*

Andrew Nazar explained that the second request grows out of title company requests for comfort orders stating that liens do not attach to homestead property even though Kansas law is extremely clear that liens do not attach and no order is necessary. Emily Metzger agreed that the law is clear. Judge Karlin observed that a generic recitation of the law in the discharge order is not likely to satisfy a title company (without a specific legal description actually identifying what real property is the homestead). She explained that she has a text order that she enters when these motions are filed, hoping it will discourage others from filing the motions, which she thinks are unnecessary under settled Kansas law. She finds it hard to believe that there is a title company that does not understand this point of law, though she does not mind signing the comfort orders in the rare cases where debtor's counsel is getting push back. [This is an example of the text Judge Karlin frequently uses: "I sign this as a 'comfort' order, only, since I believe the order is unnecessary under Kansas law. See *Deutsche Bank Nat. Trust Co. v Rooney*, 39 Kan. App.2d 913, 917 (Kan. App. 2008) (holding judicial lien doesn't even attach to homestead property), thus no lien to remove/release."]

Judge Karlin observed that the December 2007 version of the discharge order contains three provisions about nondischargeable debts that are only applicable to cases filed on and after October 17, 2005. All agreed that those lines can and should be removed since there should be no further discharge orders in pre-BAPCPA cases. But she recommended further review of the discharge order for any changes needed, and invited the Committee to review the discharge orders. Comments will be shared by email.

Jill Michaux observed that the discharge order under discussion was marked as Official Form B18, but is a variant of the national form, but if new Rule 9009 is adopted then it will not allow us to alter national forms.

David Zimmerman added as an aside that the court has now adopted an autodischarge feature that will automatically enter discharge in cases that meet the array of requirements. Therefore, if a party wishes to delay discharge (for example, to file reaffirmation agreements since some judges will not reopen cases for a post-discharge reaffirmation agreement), they should be sure to file a motion to delay entry of discharge.

David Zimmerman will send the Committee the current Chapter 7 and Chapter 13 discharge orders to review.

National Form Plan Update

Laurie Williams shared that the national form plan comment period ended in February and received more comments than any other rule has received, including a letter signed by 144 bankruptcy judges opposing the form plan. Most comments were in opposition. After a hearing on the plan, two judges proposed a last-minute compromise that would allow bankruptcy courts to use a single, locally-approved form plan, otherwise the national form plan would be required. In April, the vote was to pursue the compromise with further amendments to be made. It is now before a subcommittee.

Judge Karlin explained that a 9-judge subcommittee drafted the letter in opposition that the 144 judges signed. The letter basically said we do not need or want a national form plan. The two judges who proposed the compromise made the proposal without first clearing it with the other 142 judges. The compromise would not impact Kansas—at least today since we have our own form plan, but the concern is that it establishes a slippery slope and would be used as a means to impose the national form plan in a few years. Advocates of the national form plan are also proposing that provisions be included in the compromise plan to make it more like the national form plan. Those changes would require us to amend our plan to place certain things in certain places, but would not dictate most of the contents.

Laurie Williams explained that some are trying to minimize the number of changes so they can avoid republishing the plan for more public comments. That would allow it to become effective December 1, 2016, rather than in 2018. Jill Michaux explained that those asserting it need not be republished espouse that the compromise is a lesser included proposal so it need not be republished.

Jill Michaux listed those who testified in favor and in opposition to the national form plan. She also said there were 30+ bankruptcy judges who signed a letter in favor of the national form plan, 144 bankruptcy judges who signed a letter in opposition, and 83 trustees who oppose the plan. At the beginning of the hearing, the chair of the standing committee noted that because of the extent of the opposition, something like a lesser plan or interim pilot project should be considered, so questions were asked about what kind of lesser proposal should be considered. The proposed compromise grew out of that discussion. At a subsequent April 20 meeting, a general concept of a compromise plan was supported. Jill Michaux outlined the essential elements that would determine whether a local plan would qualify as a “conforming plan” under the compromise. Some of the initial supporters of the compromise no longer support it. Jill Michaux said everyone supports the concept of a compromise, but they dislike the compromise under consideration when they learn the details. Jill Michaux understood that NACTT, NACBA, and NCBJ refused to take a formal position on the national form plan

because members are on both sides of the issue. Judge Karlin said the Bankruptcy Judges Advisory Group refused to take a position for the same reason. Jill Michaux said the issue was assigned to the forms subcommittee to work on the details of the compromise. She is on the subcommittee. Judge Dow of the W.D. Mo. is the chair. There is concern about the politicization of the Rules Committee, due in part to increased access to information via the internet.

Judge Karlin noted that once the Rules Committee adopts a rule, it goes to the Judicial Conference, then to the Supreme Court.

Jill Michaux said that if there had been a vote on approving the plan or no plan, there would have been only one or two votes against adopting the national form plan notwithstanding the comments.

National Rules Changes Update

Jill Michaux provided a detailed report on changes to national rules and forms. She said there will be form changes to address ABLE accounts, which are like health savings accounts for disabled persons.

Separate forms will be issued for individuals as a 100-series and non-individual entities as a 200-series. The 300-series are for notices and 400-series will be claim forms.

Form questions will be different so software will be different. Forms were changed to make it easier for pro se debtors to fill them out by hand. They are longer and may ask several questions where the previous form asked only one.

Amending forms will be more complicated because of the mismatch between old and new forms. Jill Michaux suggested that debtors might seek leave to amend using the old forms.

Lengthy instruction booklets will accompany the forms, similar to IRS instruction booklets for Form 1040.

Electronic Self Representation (ESR) is available in California Central, New Mexico, and New Jersey. This software helps Chapter 7 pro se debtors enter data and print forms to file with the court, similar to TurboTax. This is an effort to relieve the Clerk's Office from typing pro se forms, Jill Michaux says. ESR users will be permitted to use old forms because ESR software is not ready for the new forms. Jill Michaux has concerns that it will encourage pro se filers and internet petition preparers.

New Form 410A will replace Attachment A to automate mortgage companies' itemizing charges by date and amount.

Rule 5005(a) will conform to Fed. R. Civ. P. 5(d). Electronic filing will be required by everyone but pro se filers because of concerns about prisoner filers.

Rule 1006(b) is being amended to say individual districts can have their own rules about paying filing fees in installments, but they must accept a petition even if the filing fee is not paid. Courts cannot refuse to file the petition for failure to pay but can issue a deficiency order. Judge Karlin noted that our court has tightened its enforcement of installment fee payments and is more frequently dismissing cases (especially in Chapter 7, where there is no plan on file, as in Chapter 13s, to pay the fees). Jill Michaux said she fought vigorously to protect the debtors' ability to pay the filing fee through the plan.

Additional discussion of federal civil rules and evidence rules will take place during the Committee's next meeting. Judge Karlin said she will volunteer one of her law clerks to review the changing rules to determine how they will impact our court rules.

As an aside, David Zimmerman asked for feedback about a new CM/ECF dictionary event that the Clerk's Office is considering. It would allow parties to create a record on appeal by clicking buttons next to a list of docket items in the case. The event would then generate the record on appeal including hyperlinks to the selected docket items. Exhibits, which are not filed in the case, would need to be listed in addition to the selected items. The Committee enthusiastically supported the proposal. The bankruptcy court is talking with the district court to learn whether it would accept a notice of electronic availability of the record in lieu of the record on appeal itself.

Jill Michaux noted that proposed Rule 9009 would prohibit local amendments to national forms. That was geared principally to preventing local courts from modifying the national form plan, but she notes that there may be unintended consequences. She invites people to let her know of any examples.

Jill Michaux advised that the Proof of Claim Form is also changing.

Jill Michaux explained that all of the new proposed forms will go into effect on December 1, 2015. The new forms are located in the agenda books. Judge Karlin suggested that the link be included in the minutes. [Editor's Note: The Standing Committee agenda books for the April 20-21, 2015 meeting and the May 28-29, 2015 meeting can be downloaded from <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/agenda-books>.]

The meeting was concluded at 12:31 pm.