

**Minutes of the Bankruptcy Bench Bar Committee
Topeka Courtroom 210
May 12, 2016**

Members Present: 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

Others Present: Bill Griffin, Chapter 13 Trustee

Court Staff Present: David Zimmerman, Clerk of Court (temporary Chair)
Stephanie Mickelsen, Chief Deputy Clerk

Members Absent: Emily B. Metzger, Chair (excused)

Judge Karlin called the meeting to order at 10:01 am. She noted that Emily Metzger was excused and that she had asked Clerk of Court David Zimmerman to serve temporarily as the Chair. It was noted that the Committee had approved the minutes of the previous meeting via e-mail and the minutes are posted on the Court's public website.

Old Business

A. LBR 1007.1(a)(2) (documents that must not be filed as attachments to the petition)

Last meeting, the Committee decided that this rule should be reviewed in the future to determine whether there are any items listed that should be deleted because they were outdated or no longer used.

The Committee formed a subcommittee to review this subsection of the LBR and provide a recommendation. Jill Michaux (Chair) and David Zimmerman will serve as members.

B. LBR 2016.1 (dealing with compensation of professionals)

Last meeting the Committee decided to consider during a future meeting whether to expand the Rule's scope to Chapter 7 and Chapter 13.

The primary question is whether notice must be provided to the entire matrix or to a lesser list.

The Committee formed a subcommittee to review the proposed change. Jill Michaux, Andrew Nazar and Bill Griffin will serve as members.

C. Interpreters

Last meeting the Committee recommended that the Bankruptcy Court should request the use of Bench Bar funds to provide interpreters when it would benefit the trier of fact. David Zimmerman reported that he is preparing proposed language to submit to the District Court Bench Bar fund so it may be considered in the next budget. Funds would generally be used to pay for the reasonably priced telephone interpreter services. Appropriated funds cannot be used for interpreters in most circumstances.

Laurie Williams suggested it could be helpful to include a line in the pretrial orders where a party could note if an interpreter would be needed.

The Committee recommended that the Bench Bar Fund authorize the expenditure of up to \$4,000 per year for interpreter services (i.e., \$1,000 per Bankruptcy Judge) to be overseen by the Bankruptcy Judges.

[Editor's Note: In following up with the District Court on this action item, we learned that the Bench Bar Fund now has a line item budgeting up to \$10,000 to fund interpreters in "civil matters not instituted by the United States," including bankruptcy cases.]

It was noted that some of the District Bench Bar funds will be used to provide a three-day district CLE program in 2017 (probably February). The date will be set once they decide on a location. There are already a number of impressive, nationally recognized presenters and performers who have committed to present on a wide range of topics.

New Business

A. Local Chapter 13 Form Plan: Should a Committee be formed to review the Chapter 13 Form Plan in Kansas?

There is increasing probability that national rules could require use of a national Chapter 13 Form Plan unless a local jurisdiction adopts a conforming plan that has been appropriately vetted (by notice and a public comment period). Judge Karlin wants to assure that Kansas has a conforming local plan ready to publish for public comment by August 1, 2017, well in advance of the anticipated deadline of December 2017. She noted that the national form plan has some elements that, if adopted locally, could improve our local plan. She suggested that all Chapter 13 Trustees, at least two debtors' lawyers, at least two creditors' lawyers, and a representative of the Clerk's Office serve on a new committee to review the local plan. She indicated that if the new committee desired to have a Judge participate, that could be arranged. David Zimmerman suggested that there are staff in the Clerk's Office who could format a new form plan visually once the substance is finalized. Jill Michaux advised that proposed Rules 3015 and 3015.1 have been approved by the Rules Advisory Committee and will be published in August 2016 with a proposed 3-month, shortened notice period. The plan and implementing rules were previously adopted by the Rules Advisory Committee and are being held to be submitted to the Standing Committee in a package with Rules 3015 and 3015.1. The package could eventually go into effect as early as December 1, 2017. It appears that our current plan essentially conforms to the national requirements, but that our local plan could use a "hard look" to see where it could be improved, e.g., to cover issues on which the current version of the local plan are silent, to clarify provisions, and/or to include small changes we have made via standing order over the last few years. David Zimmerman explained that arrangements could be made for members of the new committee to participate from multiple locations via telephone conference calls and share screens using remote screen software to make it easy for them to participate in meetings without the need to travel long distances. Jill Michaux expressed her desire to serve on the new committee. David Zimmerman will announce the new committee on the bklistserv and the Court's website. Attorneys who wish to participate should send an email to David Zimmerman, Clerk of the Court.

The Committee decided to form a new committee to review emerging national requirements and recommend changes to assure that our local Chapter 13 Plan conforms. Membership will include the three Chapter 13 Trustees, David Zimmerman as representative of the Clerk's Office, Jordan Sickman as representative of the U.S. Trustee's Office, Jill Michaux as a member of the Bankruptcy Bench Bar Committee, and a set of attorneys who are interested in participating. The new committee will be formed effective July 1, 2016.

B. Committee Membership Changes

The appointments of the following Committee members expire effective June 30, 2016:

Justin Whitney
Andrew Nazar
David Arst
Wendee Elliott-Clement
Laurie Williams (Chapter 13 Trustee)
Steve Rebein (Chapter 7 Trustee).

The Committee expressed deep appreciation for the valuable and meaningful service these members have rendered to the Bankruptcy Court and community.

C. LBR 4001(a).2: Is LBR 4001(a).2 moot and should it be abrogated?

David Zimmerman reported that as of February 10, 2016, there are no longer any open Chapter 12 or Chapter 13 cases filed before 10/17/05.

The Committee unanimously decided to recommend that LBR 4001(a).2 be abrogated as moot effective March 17, 2017.

D. Electronic Proof of Claim (ePOC): Should the District adopt use of ePOC?

David Zimmerman described how ePOC allows users to generate and submit an electronic proof of claim along with supporting documentation to CM/ECF without the need for an attorney filing account or a limited user account. This feature will save Clerk's Office time spent processing paper claims. Andrew Nazar described the positive experience his firm has had with this system around the country and said he is very much in favor of adopting it locally. He also explained that ePOC works much like claims services in mega cases. David Zimmerman described the results of his survey of other courts across the country: no other court responded that it had problems with filers dumping fake claims into CM/ECF. He explained how the Captcha feature prevents automated filing of "junk" documents. Filers affix their electronic signature to the claims when filing.

The Committee unanimously decided to recommend that the Court adopt ePOC.

E. Attorney Registration for CM/ECF Account: Should CM/ECF homework and training exercises be made optional for an attorney to obtain a CM/ECF login and password?

David Zimmerman explained that the Clerk's Office is considering ways to streamline the process for attorneys to obtain a CM/ECF login and password. Now that on-line systems are much more commonplace, and an increasing number of bankruptcy practitioners are more familiar and comfortable with electronically filing documents, he proposed to make the homework assignments and filing exercises optional. The Clerk's Office would continue offering training resources that include the on-line Training CM/ECF system so attorneys can practice filing documents. The Clerk's Office will also continue to offer practice exercises and in-person or on-line training when requested. Jill Michaux recommended that it be emphasized to attorneys that the CM/ECF login and password is the equivalent of a signature under Rule 11. David Zimmerman explained that the current application for attorneys to receive CM/ECF filing access explicitly indicates that their login and password serve as their electronic signature for purposes of Rule 9011. This application requires a wet ink signature.

Jill Michaux also commented that attorneys should be reminded that they must retain the wet ink signed original of documents signed by their clients until six years following the conclusion of the case. [Editor's Note: D. Kan. Rule 5.4.7 states: "Filing Users must maintain in paper form all electronically-filed documents that require original signatures of non-Filing Users until 6 years after all time periods for appeals expire. If the court requests, the Filing User must provide original documents for review."] Judge Karlin noted that the Clerk's Office provides one-on-one training on CM/ECF when needed. David Zimmerman said the Clerk's Office has the ability to share screens with remote attorney's offices to make training even easier and more accessible for new users, including new staff for attorneys.

Judge Karlin invited David Zimmerman to provide an update about NextGen, the new version of CM/ECF that is eventually coming to Bankruptcy Court. David Zimmerman explained that the Bankruptcy Court will eventually move to NextGen and users will access CM/ECF through PACER at that time. Bankruptcy Court filers currently login to CM/ECF directly rather than through PACER. NextGen will change the mechanism for attorneys to access CM/ECF, but the attorney interface will not change significantly in other regards. Attorneys who have electronically filed in District Court in recent months would already have taken the steps to get a PACER account through which they access District Court's NextGen system. NextGen likely will not be deployed in the Bankruptcy Court until Spring 2017 at the earliest. The Clerk's Office will provide plenty of notice and instructions before making the transition to NextGen.

The Committee unanimously agreed to recommend that formerly mandatory homework and electronic filing exercises should be made optional for attorneys seeking a login and password to file documents in the Bankruptcy Court's CM/ECF system.

F. LBR 5005.1 Appendix 1-01, § VI: Should the Committee recommend a change to LBR 5005.1 Appendix 1-01, § VI (the rules governing submission of sealed documents) so parties can submit documents they want to file under seal by uploading them electronically rather than in paper?

David Zimmerman explained that LBR 5005.1 Appendix 1-01 § VII requires filers to submit sealed documents to the Bankruptcy Court in paper format. By contrast D. Kan. Rule 5.4.6 requires sealed documents to be file electronically by default. He noted benefits and drawbacks to converting to an electronic system. Storing sealed documents electronically would allow parties and judges (who are granted electronic access to the sealed documents) to more easily view the sealed documents remotely through CM/ECF. On the other hand, electronically storing documents does create a somewhat higher risk of inadvertent disclosure. Paper documents are more easily lost. Electronic documents are easily backed up electronically.

A possible procedure that could be adopted was introduced:

1. Party electronically files a public motion to seal documents in CM/ECF.

- a. Party uploads the proposed documents to be sealed by using a separate dictionary event that links back to the pertinent motion to seal and automatically seals the attachments temporarily (pending a ruling by the court) and allows court eyes only access.

- b. Under special circumstances (e.g., pro se filers) the party submits hard copy candidate documents to the court. The court scans the candidate documents into CM/ECF under temporary seal (pending a ruling by the court) and allows court eyes only access. The original documents may be retrieved by the filing party 30 days after they were filed. If the filing party does not retrieve the originals during the next 30 days (i.e., between 30 and 60 days after they were filed), the Clerk may destroy the hard copy originals.

- c. If a non-document object is filed under seal (e.g., a hard drive), the party submits the candidate item and the Clerk's Office retains it until the court orders its release or destruction.

d. Party uploads a proposed order electronically via CM/ECF.

2. The court rules on the motion.

a. If the motion is granted, the document remains in CM/ECF under seal until further order of the court. Sealed documents are retained or disposed as directed by the governing Records Disposition Schedule dictated by the Guide to Judiciary Policy and the National Archives and Records Administration (NARA).

b. If the motion is denied, the candidate document may be unsealed or stricken, according to the instructions in the court's order. If the document is stricken, generally it will not be deleted from CM/ECF.

Jordan Sickman asked what should be done if a document is inadvertently filed that should not have been submitted. David Zimmerman answered that the filer should contact the Clerk's Office immediately or file a motion to redact because it immediately emails the supervisors in the local office alerting them to temporarily seal the document that needs to be redacted.

It was asked whether the proposed dictionary event for filing a motion to seal could prohibit a party from attaching any documents to the motion to seal—to prevent a filer from accidentally disclosing protected information publicly—and whether the filer could use a separate dictionary event that would automatically seal the attachments that are uploaded and relate them back to the motion to seal. David Zimmerman answered that CM/ECF has the ability to do that. Judge Karlin noted that if a filer made the sensitive documents part of the motion to seal itself (e.g., by including the sensitive documents within the same pdf file as the motion to seal) then CM/ECF would not be able to prevent their disclosure.

Jordan Sickman asked whether guidance could be issued to explain what documents ought to be sealed. David Zimmerman referred to Rule 9037 but said that the Clerk's Office cannot provide legal advice. Judge Karlin explained that the Judges would not want to issue advisory opinions.

Jill Michaux suggested that if a rule change is adopted, this should be a CLE topic for the Clerk to cover.

Andrew Nazar suggested that, although it is a good idea to handle sealed documents electronically rather than in paper, it would be most helpful to have the language of a proposed rule before voting on a formal recommendation.

The Committee agreed that David Zimmerman will prepare an initial draft rule for the Committee to review.

G. Declaration Re: Electronic Filing: Should the Committee recommend that Part II of the Declaration of Attorney be amended to remove the declaration under penalty of perjury regarding the petition and schedules?

David Zimmerman explained that on March 7, 2016, the Court issued an updated version of the local Declaration Re: Electronic Filing (hereinafter “Declaration”), a form that is required by LBR 1007.1(a)(3). Part II of the Declaration states:

I declare under penalty of perjury that I have reviewed the above debtor(s) petition, schedules, statements and that the information is complete and correct to the best of my knowledge. The debtor(s) signed this Declaration before I submitted the petition, schedules and statements. I will give the debtor(s) a copy of all pleadings and information to be filed with, or received from, the United States Bankruptcy Court, and have complied with all other requirements in the most recent Standing Order, Administrative Procedures for Electronic Case Filing Manual and this Court’s Local Rules. I have informed the individual petitioner that [he and/or she] may proceed under chapter 7, 11, 12 or 13 of Title 11, United States Code, and have explained the relief available under each such chapter. This declaration is based upon all information of which I have knowledge.

That language appeared in many earlier versions of the Declaration, including those dated June 16, 2004, October 22, 2004, and March 15, 2005. However, on March 21, 2005, Part II was amended at Jill Michaux’s request to state:

The debtor(s) signed this Declaration before I submitted the petition, schedules and statements. If applicable, I have informed the individual petitioner that [he and/or she] may proceed under chapter 7, 11, 12 or 13 of Title 11, United States Code, and have explained the relief available under each such chapter.

By June 5, 2009, Part II was amended again to contain the same language that appears in the current March 7, 2016 iteration of the Declaration. The June 5, 2009 version of the Declaration was used as the starting point for the March 7, 2016 version, and only minor formatting changes were made.

Shortly after the Court issued the March 7, 2016 version, Jill Michaux requested that the “penalty of perjury” language be removed from the Declaration—as it had been removed in 2005. Citing 11 U.S.C. § 707(b)(4)(B) and (D), and the NCLC Consumer Bankruptcy Law and Practice sections on those subsections, she urged that attorneys are not required to verify the petition and schedules under penalty of perjury. NCLC comments on § 707(b)(4)(C) states, for example, that

courts are likely to look to Rule 9011 and “require a good faith determination, after reasonable inquiry under the circumstances. The provision does not require an attorney to certify that the petition is not an abuse, but only that the attorney determined that it was not an abuse.” The NCLC comments on § 707(b)(4)(D) state that the signature for a debtor attorney “certifies that the attorney has no knowledge, after an inquiry, that the schedules are incorrect. This standard is a pretty low one . . . [and] requires an inquiry, which should be no greater than for other pleadings, perhaps less, because it does not use the word ‘reasonable.’”

After outlining that history, David Zimmerman invited the Committee to consider whether it might be appropriate to not only delete the penalty of perjury language, but entirely delete the attorney declaration. Page 7 of the new bankruptcy petition (Form 101) now contains many of the same representations about having informed the debtor about the various chapters. Rule 1008 states that all “petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration provided in 28 U.S.C. § 1746.” But within the context of Rule 1008, statements are factual representations that have to be presented under oath as verified or sworn statements. Because attorneys are not fact witnesses for purposes of the case—and they operate under Rule 9011—the need for attorneys to submit their documents under penalty of perjury appears to be unnecessary. In fact, Rule 9011 requires a “statement” to be signed by an attorney, but makes no reference to verification or under penalty of perjury. Thus, it appears that “statements” in the context of Rule 1008 do not apply to papers filed by attorneys, unless the attorneys are acting in the role as a fact witness. *Compare* Form 101 Part 7 (requiring an attorney to “declare” and “certify” without reference to Section 1746 and without the need for verification by a notary) *with* 11 U.S.C. §§ 110(b)(2)(B)(iii) and 110(h)(2) (in which a bankruptcy petition preparer is required to sign under penalty of perjury -- ostensibly because Rule 9011 sanctions would not apply to non-attorneys). Furthermore, LBR 1007.1(a)(3) requires the local Declaration Re: Electronic Filing to be filed in lieu of Official Form 121, but Form 121 only requires the debtor to provide the Social Security Number under penalty of perjury, without requiring the attorney to sign that form, much less under penalty of perjury.

Jill Michaux noted that the Declaration Re: Electronic Filing is needed so that the Court has the debtor’s wet ink signature, but there is no similar requirement for the wet ink signature of the attorney because the Court has authority over the attorney because of Rule 9011. Steve Rebein asked whether it would still be best to have the attorney signature on the form as the one who submitted it because this is a document that is submitted in paper. Judge Karlin suggested that the attorney declaration was unnecessary.

The Committee unanimously recommended that the entire paragraph in Part II be deleted, that the headings for Part I and Part II be

removed, and that the attorney signature block be preceded simply by the statement “Submitted by (if represented by an attorney):”.

Jill Michaux asked whether a bankruptcy petition preparer (BPP) should sign the Declaration Re: Electronic Filing. It was noted that BPPs need to sign their own form under penalty of perjury.

H. LBR 9027.1 Removal/Remand: Is there a need to amend LBR 9027.1(b) to address cases in which an answer was already filed before the case was removed to Bankruptcy Court?

David Zimmerman set the context for this question by noting that in a typical removal setting, there is a narrow window after a state court case is filed for a party to remove the case to federal court, followed by another narrow window for another party to move for the case to be remanded to state court. In the bankruptcy context, however, a case might be properly removed long after the state court case was filed. For example, a foreclosure action might have been filed and a year later the defendant could file bankruptcy that triggers the opportunity for the case to be removed to federal bankruptcy court, even though the case could not have been removed to federal court initially. Rule 9027(g) allows an answer to be filed within the longest of three periods: (1) “21 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based,” (2) “21 days following the service of summons on such initial pleading” or (3) a formula to compute a 7-day period.

LBR 9027.1(b) sets the deadline to file a motion to remand based only on computing a 21-day answer deadline under Rule 9027(g). There is no explicit incorporation of the seven-day formula. In a case where removal could only take place months after the answer date had expired (*see* Fed. R. Bankr. P. 9027(a)(2)), under LBR 9027.1(b) a motion to remand would always be untimely—the 21 day period would have long expired under either 21-day formula in Rule 9027(g). Thus, the only way a party could file a timely motion to remand under LBR 9027.1(b) would be to infer that the seven-day formula applied. David Zimmerman suggested that, to remove any ambiguity, the Committee should recommend a simpler rule: “A motion to remand under Fed. R. Bankr. P. 9027(d) must be served within 21 days [or some other fixed number of days that is greater than 7 days and fewer than 22 days] following the filing of the notice of removal.”

Andrew Nazar asked whether there is a deadline by which a party must file a motion to abstain, stating that a motion to remand is often accompanied by a motion to abstain.

Judge Karlin suggested that 21 days generally makes the most sense rather than a shorter time. Jill Michaux commented that if a party wanted a shorter period they could file a request to shorten time. Andrew Nazar suggested that this is an issue that may interrelate to other issues and rules, so he requested time to allow the Committee to look at the rules—especially those governing motions to abstain—and consider its implications before taking action.

The Committee is considering a change to LBR 9027.1(b) that would say “A motion to remand under Fed. R. Bankr. P. 9027(d) must be served within 21 days following the filing of the notice of removal.” However, before voting on this language, Andrew Nazar will consult with colleagues and study the issue and update the Committee on his findings. The Committee will consider how the concept of abstention applies to the rule. The Committee will then vote on the proposed rule change at its next meeting.

I. Debtor Electronic Bankruptcy Notification (DeBN)

David Zimmerman informed the Committee that the DeBN Request Form is being updated slightly in two ways. First, a sentence has been added stating “If I already have a different electronic noticing account, you may deactivate that account and create this DeBN account.” A small number of debtors are submitting requests for DeBN when they already have EBN (Electronic Bankruptcy Noticing) accounts. Under the Bankruptcy Noticing Center’s (BNC) system, only one electronic noticing account can exist for a person with the same name and address. Thus, creating a new DeBN account will terminate an existing EBN account if one existed for that account holder. The new DeBN Request Form adds a sentence that alerts people who have an EBN account that if they sign up for DeBN then their EBN account will be deactivated. Second, the phrase “Under penalty of perjury,” above the signature line will be bolded. The reason to convert an account from EBN to DeBN in this circumstance is because if an emailed notice bounces back as undeliverable, DeBN account holders will automatically revert to receiving paper notices.

David Zimmerman further explained that because Kansas requires all voluntary debtors to file a form opting in or opting out of DeBN, the participation rate here has skyrocketed compared to other jurisdictions, but there are still many debtors who opt not to participate. He then asked what can be done to resolve attorneys’ concerns about recommending DeBN. It was noted that some debtors do not have printers, so they cannot print the electronic notices. David Lund said he neither encourages nor discourages participation but leaves the choice entirely up to the client. Steve Rebein discourages participation because clients are more likely to delete an email and then request a hard copy replacement from the attorney. Jill

Michaux explained that she has great success sending clients all documents electronically, but some clients only have email service on their cell phone, making electronic documents hard to read, some clients have difficulty maintaining uninterrupted cellphone service, and many clients do not have a printer.

Jill Michaux noted that the new 341 Notice [Official Form 309 Series] no longer has the 341 Meeting information on the first page of the three-page document. David Zimmerman noted that the 341 Notice has now been reduced to a maximum of two pages for all versions. Jill Michaux asked whether the 341 Meeting information could be moved to the first page, even though it is an Official Form. David Zimmerman explained that it is possible to modify the 341 Notice.

The Committee unanimously recommended that the 309 Series Official Forms be modified to place the 341 Meeting date, time and location on the first page of each 341 Notice.

J. Update on Rules Committee, Bankruptcy Rules, and National Chapter 13 Form Plan

Jill Michaux informed the Committee that proposed Rules 3015 and 3015.1 governing the Local Chapter 13 Plan are scheduled to be published in August with a shortened 3 month comment period (rather than the usual 6 months). The Rules Committee is meeting in November to vote on them. If approved they will go to the Standing Committee, the Judicial Conference, and the Supreme Court for review, then they will be promulgated and ultimately submitted to Congress. If Congress does not act then they will become effective automatically.

Jill Michaux added that the next big national rules project is to review the many bankruptcy noticing requirements. If anyone wishes to make a suggestion on this or any other rule or form, they can submit it by going to the website of the Administrative Office of the U.S. Courts. Every suggestion is considered. [Editor's Note: The website with information about "How to Suggest a Change to the Rules of Practice and Procedure and Forms" is located at <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-suggest-change-rules-practice-and-procedure-and-forms>. It provides contact information if a person wishes to suggest a change:

By Email: Rules_Support@ao.uscourts.gov

By Mail:

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544]

There was a discussion of a proposed change to Rule 9036 that would require entities that receive a large number of notices by mail to sign up for electronic noticing. The benefits of electronic noticing were discussed, including faster delivery.

Jill Michaux informed that there is a noticing related change proposed for Rule 5005, but that is two to three years in the future.

K. Other Items Not on the Agenda

David Zimmerman related that a Wichita attorney contacted the Clerk's Office earlier that morning asking that an issue be raised at the Bench Bar Committee Meeting. The attorney stated that it is difficult to use the new forms to prepare an amendment to a schedule that was originally prepared on the old (pre-December 2015) forms. The attorney asked the Committee to discuss permitting amendments to be filed using the old forms. David Zimmerman explained that the Judges initially afforded attorneys some leeway as they became accustomed to the new forms, but the Judges eventually decided it was time to use the new forms, so the Clerk's Office was contacting attorneys if they filed old forms and asking them by telephone or email to refile the documents using the new forms. [Editor's Note: The Clerk's Office does not normally issue an order to correct when an old form is filed, and the Clerk's Office is no longer contacting filers who submit old forms.] When a party files an old form the Clerk's Office does not reject it, but the presiding judge may conclude that an old form is unacceptable, and other parties may object when a new form should have been used.

The meeting was concluded at 1:59 pm.