

**Minutes of the Bankruptcy Bench Bar Committee
Topeka Courthouse
December 1, 2017**

Members Present: Hon. Dale L. Somers, Judges Representative
Emily B. Metzger, Chair
Bill Griffin, Chapter 13 Trustee
Christopher Redmond, Chapter 7 Trustee
January Bailey
Scottie Kleypas
Eric Lomas
Luke Sinclair
Colin Gotham (via telephone)
Thomas Gilman

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

Members Absent: Jordan Sickman, U.S. Trustee's Office

The meeting commenced at 10:06 am. Emily Metzger conducted the meeting. 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. Sealed Documents Rule Change

David Zimmerman reported that at the June 2017 meeting, the Committee endorsed the proposed changes to the rule governing sealed documents. The Judges subsequently reviewed the proposed language and asked for the procedural language to be broken into two parts: (1) a brief statement replacing Section VI of Appendix 1-01 to LBR 5005.1 that will require documents to be electronically filed according to the procedures published on the court's website and (2) the detailed instructions to be posted on the court's website. During a subsequent Judges Meeting, the Judges approved the language of Section VI. They also approved the detailed instructions after requesting some minor editions. The new language of Section VI is expected to be published for public comment with a proposed effective date of March 17, 2018.

Chris Redmond noted that he has, in the past, filed sealed motions and obtained "fully sealed orders," e.g., a sealed order to allow the trustee to obtain information about fraudulently hidden assets without alerting the debtor to move them. He asked whether the revised rule would continue to allow that practice in the future. Others noted that the rule as written would not preclude such a request nor impair the Judge's ability to authorize the request. It was specifically noted that the preamble to Section VI indicates that the published procedures would govern "unless the Court orders otherwise."

The Committee unanimously agreed that they had no suggested changes to revised Section VI of Appendix 1-01 to LBR 5005.1.

B. Reformatting LBR 1007.1 into a Table

During the June meeting, the Committee unanimously supported January Bailey's suggestion to reformat LBR 1007.1(a)(1) and (a)(2) into a table. Shortly after the June meeting, January Bailey reformatted LBR 1007.1(a)(2) and slightly abbreviated a few of the sections and that "slightly-abbreviated text" version was circulated by email to the Committee with the minutes of that meeting. Meanwhile, the Judges reviewed the draft and endorsed the concept in principle, but asked for a review of the text to confirm that it was accurate. David Zimmerman reviewed the text, restored some text that had been abbreviated, corrected a few typographical errors and, at the invitation of the Court, circulated a full-text version as well as the slightly-abbreviated-text version to the Committee to provide feedback.

The Committee discussed whether the DeBN Request Form should be added as an appendix to the local rules, just as the declaration regarding pay advices is an appendix. David Zimmerman noted that the DeBN Request Form had not been added as an appendix previously because that allowed it to be revised quickly without having to publish it for public comments.

January Bailey asked whether Form 101A should be added to LBR 1007.1(a)(2)(I). She then observed that Form 101A is referenced specifically in Form 101 and would be included as part of the petition (Form 101), when necessary. In the end, the Committee thought there was no need to change LBR 1007.1 to add a reference to Form 101A.

The Committee recommended that the Court adopt the full text version of LBR 1007.1 in table format.

C. Clerk's Entry of Default Without a Request from the Plaintiff

Jordan Sickman, who proposed this topic for the agenda, was unexpectedly unable to attend the meeting. Prior to the meeting, Jordan Sickman had asked Chief Judge Karlin whether the Clerk's Office could generate a Clerk's Entry of Default in adversary proceedings when the time to answer has expired without requiring the Plaintiff to request it.

Judge Somers reported that the Judges had discussed this issue and did not approve it.

D. LBR 2004(c) Examination

Prior to the June 2017 meeting, Chris Redmond submitted materials to the Committee from the American Bar Association, Business Bankruptcy Committee. They proposed adding a proportionality standard to Rule 2004 examinations. As follow-up during today's meeting, Chris Redmond reported that the Business Bankruptcy Committee will meet next spring to discuss the issue further. They hope to present something next fall to the ABA. Mr. Redmond said he will

forward the ABA's final recommendation to the Bench Bar Committee when it becomes available.

This item will be carried forward to future meetings.

E. Additional Follow-Up Items

Emily Metzger mentioned that she is still reviewing whether it is necessary to notice the U.S. Attorney's Office when an agency of the United States is a creditor [*see* LBR 2002.2(b)]. She is working with David Zimmerman to receive electronic noticing of court notices through the Electronic Bankruptcy Noticing (EBN) program, but that would not substitute for notices that debtors must provide. She noted that national rule changes will require notice under Rule 7004 for some items, so that might make it unnecessary to include the U.S. Attorney's Office in all cases where the United States is a creditor.

Emily Metzger also provided an update about the current requirement for signed documents to be retained for six years [*see* D. Kan. Rule 5.4.7]. She said she had spoken with prosecutors who do fraud cases and, based on their feedback, if a change were proposed then the U.S. Attorney's Office would not be the roadblock to a change. She suggested that the U.S. Trustee's Office should have the opportunity to comment before a change was recommended. This is a District Court rule, so any change would need to proceed through District Court channels. Chris Redmond noted that title companies or other interested parties might have an interest in preserving original signatures. Scottie Kleypas also observed that ethics rules might require a long retention period. Several Committee members commented that some attorneys will consider it safest to retain original signatures and copies of key signed documents such as settlement agreements indefinitely to protect themselves. January Bailey clarified that she was recommending that originals be scanned and the electronic image retained so that the hard copy original need not be retained. January Bailey offered to draft an analysis of the issue. Scottie Kleypas offered to share her thoughts based on her recent review of ethics rules.

The Committee did not affirmatively recommend that District Court consider changing D. Kan. 5.4.7 until the issue was more thoroughly studied. The issue will be continued to a future meeting.

New Business

A. LBR 2002.2 Addresses Are Being Updated

David Zimmerman reported that the Clerk's Office sent letters to federal and state agencies whose addresses are listed in LBR 2002.2 to verify that they remain accurate. Changes will be made for agencies that respond. So far the Veterans Administration and the Kansas Department for Aging and Disability Services have provided updated addresses.

B. Informational Updates from the Clerk of Court

Chapter 13 Plan Form Updated. The Court made two minor revisions to the new Chapter 13 Plan Form on November 16, 2017, when it issued Second Amended Standing Order 17-1: (1) eliminating a separate line item in Section 1 for avoidance of a judicial lien, since it is subsumed within the first line dealing with limiting or eliminating the amount paid to a secured claimant; and (2) eliminating the parenthetical in the second block of Section 10.5 (“(upon the filing and proper service of a motion or complaint and entry of a final order)”), since a debtor has the option to strip off a mortgage within the plan itself.

Service of Chapter 13 Plan. Although the Court notices the Chapter 13 Plan (if it is filed contemporaneously with the petition), the Court will not perform service of process for parties under Fed. R. Bankr. P. 7004. Amended Rules 3012(b) and 4003(d) (effective Dec. 1, 2017) require debtors to serve Chapter 12 and Chapter 13 plans under Rule 7004 in certain situations. Parties should not assume that service through the Bankruptcy Noticing Center or through CM/ECF will satisfy the service requirements of Rule 7004.

Filing the Chapter 13 Plan. The CM/ECF event for filing a Chapter 13 Plan is changing slightly to prompt filers to check boxes that indicate which types of motions are embedded in the plan. The purpose is to gather statistics for the Administrative Offices of the U.S. Courts. The screen looks like this:

File a Plan: :

[17-10101 Kristina Lynn Timpy](#)

Type: bk	Chapter: 13 v	Office: 6 (Wichita)
Assets: y	Judge: REN	Case Flag: DeBN

Select ALL of the following requests that are contained in the Chapter 13 Plan (Click Next if none of these requests is included.):

- Surrender--Relief from stay regarding property to be surrendered in Section 9
- Valuation--A limit on the amount of a secured claim, set out in Section 10.3 or 11.5, which may result in a partial payment or no payment at all to the secured creditor
- Avoidance--Avoidance of a lien in Section 10.5
- Assume Executory Contracts/Leases--Request to ASSUME executory contracts and/or unexpired leases in Section 13
- Reject Executory Contracts/Leases--Request to REJECT executory contracts and/or unexpired leases in Section 13

Next Clear

David Zimmerman further explained that CM/ECF is designed to list the embedded motions as part of the Chapter 13 Plan docket entry when the electronic filer checks the boxes in CM/ECF. Several Committee members were concerned that it might create controversy or confusion if the Chapter 13 Plan docket text listed embedded motions and those were inconsistent with the provisions of the plan. They worried whether the docket text or the terms of the plan itself would control.

The Committee requested that the CM/ECF event for Chapter 13 Plan be modified so that embedded motions are not listed as part of the Chapter 13 Plan docket text.

[Editor's note: This change was implemented immediately following the meeting.]

January Bailey observed that someone cannot tell from the language of the plan alone whether it rejects executory contracts and leases. She asked if the plan should be changed to make it more obvious. Eric Lomas observed that the current plan language—which rejects all executory contracts and leases that are not assumed--benefits the debtors.

Judge Somers commented that only approximately 10 bankruptcy courts across the country adopted the national Chapter 13 Plan form.

Judge Somers suggested that the Committee members and attorneys should begin collecting a list of recommended improvements for the local Plan. Bill Griffin shared that he is already monitoring the local plan form for issues and compiling a list of issues to raise to improve it based on their own experience and feedback from creditors and debtors.

C. Rule or Guideline Governing Maximum Fees that Bankruptcy Petition Preparers May Charge

This topic was submitted by Jordan Sickman, who was unexpectedly prevented from attending.

This topic will be continued to the next meeting.

Chris Redmond shared his concerns about petition preparers who not only fill out the forms but also provide bankruptcy advice, which sometimes injures debtors when the advice is inaccurate.

Judge Somers expressed interest in learning how widespread the problem of petition preparers overbilling is.

D. Turnover of Non-exempt Tax Refunds

This was another topic recommended by Jordan Sickman. January Bailey explained that she and Mr. Sickman had discussed this topic prior to the meeting. She suggested adopting a local rule to require Chapter 7 trustees to intercept tax refunds. The local rule would also call for an agreed order between the trustee and debtor that instructs how the refund will be divided. The intent was to speed up the process of getting refunds to the debtor and to reduce revocations of debtor discharges by preventing debtors from spending their refunds. Chris Redmond explained that in most of his cases the debtors provide a copy of their tax return to the trustee, the trustee sends the debtor a letter telling the debtor how much of the refund is payable to the trustee, the refunds are paid to the debtor in the form of a paper check rather than deposited in their bank account (to prevent debtors from spending the money), and the debtor sends the trustee the portion of the refund that is payable to the trustee. Thus, the trustee does not receive the portion of the refund that the debtor may keep. He asserted that this process does not delay the debtor

from receiving the refund and he opined that if a rule required the trustee to intercept the tax refund and forward the debtor's portion to the debtor it would take longer for the debtor to receive the money.

Judge Somers wondered why the U.S. Trustee is requesting a local rule, rather than just requiring the trustees to handle refunds in a particular fashion.

The Committee will continue this topic to the next meeting.

E. Availability of Audio Hearings Through PACER

This topic was recommended by Jordan Sickman. He had spoken with David Zimmerman about the topic prior to the meeting. David Zimmerman explained that some courts use a program that docket a recording of hearings as a pdf audio file so attorneys and the public can easily access the recording via CM/ECF or PACER. This could provide some benefits, such as allowing attorneys to replay the hearing when preparing an order. Our court has not implemented the program, but has been looking at it. Several Committee members expressed concern that making the recordings so readily accessible on PACER might discourage candid conversations on the record during the hearings, including between counsel and the Judge. Committee members also observed that recordings of court proceedings are already available by requesting copies from the Clerk's Office and paying the fee. Overall, the Committee preferred that recordings not be posted to the docket.

The Committee will continue this topic to the next meeting for further discussion.

F. LBR 9004.1(c)(1)(A)

This topic was recommended by Jordan Sickman. Mr. Sickman had spoken with David Zimmerman about the topic prior to the meeting, so Mr. Zimmerman explained that Mr. Sickman wondered if case caption should continue to be required on the signatory page of all orders. Mr. Zimmerman inferred that the purpose of this rule was to assure that the signature page was attached only to the right document. Mr. Zimmerman said that Jordan Sickman had explained that it could be a challenge to format the order so that the case caption information appeared on the signature page. Committee members offered that they include the caption information as a header on all pages—not just the first page and the signature page—thereby eliminating the need to specially format the signature page.

The Committee agreed that no change to LBR 9004.1(c)(1)(A) is needed.

G. Additional Discussion Items

January Bailey wondered if creditors will want to change the requirement that Chapter 13 plans be served under Rule 7004 when certain relief is requested. She said she is routinely listing the service address on the matrix so the creditor will receive the Chapter 13 plan whether or not a cramdown is included in the plan. She wondered whether the large number of plans coming to creditors will motivate them to request a rule change. Scottie Kleypas responded that

she is quite happy with the new rules and thought creditors ought to receive a copy of the Chapter 13 plan. She does not represent any creditors who have voiced concern about the new rule.

Judge Somers asked the Committee for feedback about electronic noticing via the Debtor Electronic Bankruptcy Noticing (DeBN) program. January Bailey commented that it works well for her and noted that debtors do not receive electronic notice of anything they would not otherwise receive by mail. Tom Gilman said he tells his clients not to use DeBN because he does not want his clients calling him frequently to ask what the email notice means. If the court notice is something significant then he alerts them about the development, he said.

The meeting concluded at 12:26 pm.