

**Minutes of the Bankruptcy Bench Bar Committee
Topeka Courthouse
August 28, 2018**

Members Present: Hon. Robert E. Nugent III, Judges Representative
Emily B. Metzger, Chair, US Attorney's Office
Chris Borniger, US Trustee's Office
Christopher Redmond, Chapter 7 Trustee
Carl Davis, Chapter 12 Trustee
Bill Griffin, Chapter 13 Trustee
January Bailey
Scottie Kleypas
Colin Gotham
Thomas Gilman
Chris Allman
Wendee Elliott-Clement

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

Members Absent: None

The meeting commenced at 10:00 am. Committee Chair 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 for the bar at large to review.

After introductions, Judge Nugent shared his vision for the Bankruptcy Bench Bar Committee, which is broader than the role of the former Rules Committee. The objective is to make the Committee the eyes and ears of the court to provide feedback and recommendations from the bar. He also recognized Judge Karlin's contributions to the Committee and noted that her retirement was approaching on September 1, 2018.

Old Business

A. Local Bankruptcy Rules Improvements

Mr. Zimmerman reported that the Clerk's Office is reviewing the Local Bankruptcy Rules to make non-substantive corrections to the formatting and grammar. He asked the Committee whether the bar would prefer for the minor editions to be made effective in 2019, resulting in a large pocket part, or in 2020 when the next complete hard copy rules booklet is scheduled to be published.

The Committee unanimously recommended that only substantive rule changes be made in 2019 and wait until 2020 to make non-substantive changes.

The Clerk will investigate providing the Local Bankruptcy Rules in electronic book formats.

The Clerk will investigate how to best create hyperlinks to rules and statutes cited by the Local Bankruptcy Rules.

B. Chapter 13 Direct Payments

This agenda item was carried forward from the last meeting. Mr. Griffin introduced the Chapter 13 Direct Payments rule used by the Bankruptcy Court for the Western District of Missouri:

WDMO Local Rule 3070-1:

Rule 3070-1. Chapter 13 Direct Payments. All payments to claimants shall be through the Chapter 13 trustee unless the Court orders or the trustee agrees otherwise, except debtors may pay directly: 1) unmodified payments on a note secured by real property when the debtor has no past due payments or charges due to the mortgagee other than the regular payment due in the month of filing or conversion; 2) ongoing support obligations pursuant to a court decree; and 3) payments under a lease which the debtor has assumed or intends to assume; and 4) payments under a contract for deed which the debtor has assumed or intends to assume.

Mr. Griffin suggested that some counsel are structuring circumstances to keep a non-filing spouse out of a bankruptcy case by paying secured car loans directly outside the plan. This impacts the Chapter 13 Trustee by reducing trustee fees, sometimes significantly. He observed that when a home loan goes into default then the payments are brought into the plan, but other secured debts are not. He will talk to the other Chapter 13 trustees about this. Committee members described various scenarios where payment of secured loans outside the plan would be preferable to debtors and non-filers. Mr. Griffin emphasized that he just wanted to raise the issue to get a discussion started. Judge Nugent encouraged the Committee to vet this issue and others like it with the bar for feedback.

This was carried forward for discussion during a future meeting.

C. Trustee's Access to IRS Website to Track Tax Refunds

Mr. Griffin had previously asked whether it was permissible for trustees to use the debtor's information to login to the IRS's website to access the debtor's tax refund information. Ms. Metzger reported that she had looked at the issue and she could not definitively state whether or not it was permissible but she did note that IRS Form 8821 allows access to tax information with the taxpayer's authorization.

D. Availability of Audio Recordings of Court Proceedings Through PACER

Ms. Metzger summarized prior discussions about the prospect of posting audio recordings of court proceedings in CM/ECF as pdf attachments so they could be accessed

through PACER. The Committee discussed: whether making recordings more accessible might discourage candor to the court and slow the process of attorneys resolving issues; the fact that the duty of candor to the court will exist regardless of whether recordings are posted; the expectation that it would be an advantage to the bar to be able to refresh their recollection by listening to recordings; whether public release of recordings should be subject to a delay; and how much of a burden it would impose on the Clerk's Office.

Judge Nugent offered to consult with the other Judges about making audio recordings available on PACER.

New Business

A. Clarification that Debtor in Possession Counsel May Be Appointed on Negative Notice Under D. Kan. LBR 2014.1

Judge Nugent reminded the Committee that D. Kan. LBR 2014.1 was revised recently, in part because Rule 6003 had been revised to require 21 days to pass after the petition was filed before the court could enter an order granting an application to employ professionals. He asked whether there was any reason why a motion under Rule 2014 should not be granted on negative notice rather than requiring a hearing. No concerns were voiced.

B. Request for Clerk's Extension No Longer Requires a Proposed Order to Be Submitted to the Clerk's Office Under LBR 5075.1

Mr. Zimmerman reported attorneys do not need to draft and submit a motion or a proposed order to obtain a Clerk's extension of time to answer a pleading. They can file a request by using a new event that will generate a text-only entry: Adversary > Other > Request for Entry of Clerk's Extension of Time Pursuant to LBR 5075.1(a). If the requested extension meets the requirements of the rule, the Clerk's Office will enter a text-only Notice Approving Request for Entry of Clerk's Extension of Time. This new event walks the filer through the process to comply with the rule. *Pro se* filers will still file a hard copy request and the Clerk's Office will issue a text-only order. The Committee considered whether section (a)(3) of LBR 5075.1 should be deleted because a proposed order is no longer required.

The Committee unanimously recommended that LBR 5075.1(a)(3) be deleted.

C. Proposal to Revise LBR 9072.1 to Clarify That Multi-page Exhibits Be Numbered and That Parties Must Provide Copies of Exhibits.

Judge Nugent proposed to revise LBR 9072.1 to clarify that multi-page exhibits must be paginated. Likewise, he proposed that section (b)(2) of this rule should specify that parties provide copies of their exhibits to the Clerk's office—one for the witness, two for chambers, and one for each participating adversary. The Committee discussed whether to require parties to bates stamp all pages of all exhibits from the beginning to end, or whether to simply assure that each separate document bears page numbers. There was consensus that the primary objective

was to make pages easy to reference to avoid confusion during trial. Judge Nugent said that a possible sanction available to the court is to exclude noncompliant exhibits.

The Committee unanimously supported changing LBR 9072.1 to require each exhibit to be page numbered (bates numbering of all exhibits is permitted but not required), and parties must provide an original set of exhibits plus two copies to the court and must provide a copy for each participating party unless the court orders otherwise.

D. New Bankr. D. Kan. Standing Order 18-2 and the Updated Declaration Re: Electronic Filing Form

Mr. Zimmerman reported that pursuant to Standing Order 18-2, beginning September 1, 2018, bankruptcy attorneys will be required to electronically file the Declaration Re: Electronic Filing under seal rather than filing it conventionally.

The specific event used to file the Declaration under seal is in CM/ECF under Bankruptcy > Other > Declaration Re: Electronic Filing. Attorneys must use this event to file the Declaration. Using any other event will not place the Declaration under seal, which would allow the public to view the debtor's full Social Security Number on the Declaration.

Ms. Mickelsen reminded the Committee that when the court makes significant changes CM/ECF events or issues a new event, it posts an announcement on its public website. People who want to receive email alerts about the new announcements can subscribe to GovDelivery by following the link at the bottom of the court's website (<http://www.ksb.uscourts.gov>).

E. Proposal to Electronically File and Then Destroy Hard Copy Official Form 121 (Statement About Social Security Number) and Hard-Copy Petitions Filed by Pro Se Debtors

Official Form 121 is used by *pro se* debtors to provide their Social Security Number. Standing Order 18-2 now requires represented debtors to electronically file the analogous Declaration Re: Electronic Filing as a scanned document. Mr. Zimmerman asked whether the Clerk's Office should be permitted to scan, electronically file, and then dispose of wet-ink signed originals of Official Form 121 and Petitions. He noted that there is a difference between the two procedures because attorneys are currently retaining hard copy originals of the Declaration. Ms. Bailey commented that Chief Judge Somers was working with the District Court Bench Bar Committee to change D. Kan. Rule 5.4.7 to allow retention of signed copies as electronic images rather than in hard copy. She suggested that until such a change is made, the Clerk's Office should not dispose of the hard copy originals of Official Form 121. Ms. Metzger and Mr. Borniger agreed that the U.S. Attorney's Office and the U.S. Trustee's Office were not concerned, just as they had said they were not concerned about changing the requirements for electronically filing the Declaration Re: Electronic Filing. Ms. Metzger added that there remains some possibility that the absence of a wet-ink signature might impact some prosecution in the future, but the possibility did not warrant halting progress toward more electronic practice.

The Committee voiced no concerns about the proposal to allow the Clerk’s Office to electronically file Official Form 121 and then shred the hard copy original as long as the Judges and the Clerk agreed.

F. Presumptive Time to Unseal Documents

Mr. Zimmerman asked whether the court should adopt a local rule setting a presumptive time to unseal documents that had been sealed. Federal Judiciary policy encourages courts to set presumptive time frames for unsealing documents. The court currently has no policy that sets a presumptive time to unseal documents so a seal typically lasts indefinitely. The Committee discussed: that storage of previously sealed documents is not a material factor because newly sealed documents are now stored electronically; whether notice should be given to parties that the seal was about to expire; what procedure could be followed if the court chose to unseal old documents; whether including an expiration date on a seal would impose a duty on an attorney to take action on behalf of the former client to extend the seal; and the benefits of including any expiration date in the order that granted the seal, so the attorney could advise a client of the expiration date and make the client responsible to request assistance in the future if the client wants to extend the seal. Judge Nugent commented that it is unlikely that the Bankruptcy Court would take action on this subject before the District Court, so the Bankruptcy Judges will talk with the District Court to see if any action should be taken.

G. Standing Order 18-3 Order Amending Rules to Allow Payment by ACH

Mr. Zimmerman reported that attorneys will have the option to pay fees through Pay.gov using either ACH or a credit card. The Clerk’s Office is also going to begin allowing trustees to generate a “fee due record” in CM/ECF so they can make payments to the court (such as unclaimed funds deposits) that are not automatically generated by a related filing. If this initial test goes well, the court may eventually allow all attorneys to submit payments for copies or exemplifications through Pay.gov rather than by requiring them to pay for such services in cash or by check. The goal is to allow the Clerk’s Office to respond to requests more quickly, rather than having to wait for payment to arrive. The Clerk’s Office is also working to support batch processing of payments for trustee’s offices.

H. Proposed Changes to D. Kan. Rules 83.5.2 and 83.5.3 Governing Pro Bono Work

The District Court has solicited comments about proposed changes to D. Kan. Rules 83.5.2 and 83.5.3 that would require attorneys admitted to the District of Kansas federal bar to consent to *pro bono* service when requested by the court. The Committee voiced many concerns about the proposal: (1) some expect that the rule would have a disparate impact on select groups of federal bar members, particularly large firms; (2) government attorneys are not exempted; (3) the rule would force attorneys to work without pay when the court directs rather than allowing them to choose when to volunteer; (4) experience under a similar rule in Jackson County, Missouri, has demonstrated that the rule was burdensome, even to the point that attorneys have had to pay another attorney to handle a case that was outside their area of practice; (5) appointments typically last for a lengthy period of time, sometimes years; (6) when

a court has to appoint counsel it is often because the case has no merit, which is why no attorney would take the case voluntarily; (7) the rule could have adverse impact on the attorneys' capacity to obtain malpractice insurance coverage, or it could require attorneys to purchase more expensive coverage than they already carry; and (8) a Kansas Supreme Court ruling was said to have held that requiring an attorney to work without pay was similar to indentured servitude.

I. Text Orders for Entry of Appearance

Ms. Kleypas recommended that the court allow attorneys to enter their appearance using a text-only entry in the case. The Committee supported the proposal.

Ms. Kleypas will send some proposed language to Ms. Metzger who will circulate it by email to the Committee for review and comment rather than waiting until the next meeting.

J. Proportionality Standards for Rule 2004 Examinations

Mr. Redmond reported that the national Rules Committee had considered an amendment of Rule 2004 to include a proportionality standard patterned after Rule 26, but the Rules Committee had voted 7 to 6 not to adopt the new language.

K. Local Rules to Govern Chapter 12

Mr. Davis reported that he is still weighing whether to propose local rules to govern Chapter 12 cases.

L. Removal Actions

Mr. Davis reported that when a large case was recently removed from state court to federal bankruptcy court, the state court case record was filed in bankruptcy court but the file sizes were too large for his office to download. It was observed that this is a "mechanical" problem with the capacity of a local computer system to handle large electronic files. Mr. Zimmerman suggested that the best practice is for attorneys to call the Clerk's Office if they have a large record to upload in a removal case.

M. Mortgage Statements

Ms. Bailey reported that because mortgage companies are required to send statements to debtors, she has many debtors calling her with questions about whether fees listed in the statements are being paid by the Chapter 13 trustee in a non-conduit mortgage payment case. She asked whether the Local Rules should contain a provision that governs when the debtor must pay the fees and when the trustee must pay the fees. Judge Nugent suggested that the bar monitor this issue and see if they can work out a non-judicial practice to clarify when the trustee pays the fees or the debtor pays the fees. Mr. Griffin indicated that if there is a proof of claim for the fee then his office pays the fee, even if the mortgage is being paid directly by the debtor.

N. New Industry Development Involving Mortgages

For informational purposes, Mr. Redmond alerted the Committee that there are a number of national companies that are approaching trustees saying that they represent the mortgage lender and they want the estate to sell the property because they do not want to have to go through foreclosure. They offer to either give the estate the equity or, if there is no equity then they offer to give the estate a carve-out of the sale proceeds (e.g., \$7,500) to give the estate a stake in the issue. They also say that “if the house after 60 to 90 days is not salable, then the lender will, with a trustee sale, pay the \$7,500 to the trustee so the bankruptcy estate actually retains the property.” He said he will consider these offers, but he requires documentation including the title report, payment schedule, and appraisal from a reputable appraiser. Judge Nugent observed that there is a state statutory restriction on trafficking in redemption rights. Mr. Redmond would require the mortgage company to waive a deficiency. The Committee commented that this might have tax consequences for the debtors.

The meeting concluded at 1:48 pm.