

**Minutes of the Bankruptcy Bench Bar Committee
Topeka Courthouse
April 8, 2019**

Members Present: Hon. Robert E. Nugent III, Judges Representative
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
J. Christopher Allman
Wendee Elliott-Clement

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

Members Absent: Emily B. Metzger, Chair, US Attorney's Office
Thomas Gilman

The meeting commenced at 10:00 am. Chris Allman 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.

Old Business

A. CourtSpeak Update (pdf with embedded ECRO recording)

Mr. Zimmerman reported that the Clerk's Office is working toward deploying CourtSpeak to test it and determine how much additional burden it will impose on the Clerk's Office staff if it is adopted. Judge Nugent has agreed to be the test pilot for the program.

B. Chapter 13 Direct Payments

Mr. Griffin reported that a surprisingly large number of Chapter 13 debtors erroneously report that they are current on their mortgages when they are not, or they are in a loan modification that require the first three payments to be made directly. He reported that creditors submit claims for fees to the trustee even though it is a direct pay case. He says his office does not pay the fee, but he forwards a copy to debtor's attorney if he believes a copy was not sent to the debtor.

This issue was closed.

Mr. Griffin also observed that some attorneys propose to make car payments directly rather than through the plan to avoid paying the trustee fee. Judge Nugent noted that the Judges generally encourage cars to be paid through the plan, but they are reluctant to require it when no one objects to payments being paid directly. There was brief discussion and no recommendations resulted from the discussion.

This issue was closed.

C. Presumptive Time to Unseal Documents

Mr. Zimmerman reported that no further input was required on this topic because the Committee previously provided adequate feedback on this issue to the Judges.

This issue was closed.

D. Rule Change to Permit Clerk's Office to Scan and Destroy Original of Form 121 (Statement About SSNs) and Retention of Documents Bearing Original Signatures (D. Kan. Rule 5.4.7 and D. Kan. LBR 5005.1)

Judge Nugent reported that the District Court Bench Bar Committee met the previous week and did not oppose the proposal to reduce the retention period in D. Kan. Rule 5.4.7. In fact, the District Court Bench Bar Committee decided to recommend eliminating the retention period mandated by the rule. The recommendation will next be presented to the District Court Judges for review and approval.

New Business

A. Potential Change to D. Kan. LBR 4001(a).1(e)

January Bailey proposed a change to LBR 4001(a).1(e) that would add subparagraph (5) to clarify that the letter required by LBR 3002.1.1(d)(4) must be sent (when applicable) before a movant seeks post-petition stay relief for defaulting on post-petition payments. Initially, she proposed: "(5) a certification that the creditor has complied with D. Kan. LBR 3002.1.1(d)(4) if applicable." However, after discussion the Committee decided to change the word "certification" to "statement" so that the movant could include the statement as part of the motion for stay relief.

The Committee unanimously recommended adding a subparagraph (5) to LBR 4001(a).1(e) stating "(5) a statement that the creditor has complied with D. Kan. LBR 3002.1.1(d)(4) if applicable."

B. Potential Change to D. Kan. LBR 2004.1

Judge Nugent asked whether it would be helpful to add a statement in D. Kan. LBR 2004.1(d) that a subpoena to witnesses other than the debtor shall substantially conform with Director's Procedural Form 2540 - Subpoena for Rule 2004 Examination. It was noted that the

“Notice of Rule 2004 Examination” form (rev. 3/17/19) immediately following the rule references the form. He explained that Director’s Form B2540 is now a permanent form rather than a proposed form.

The Committee recommended no change to the text of Local Rule 2004.1, but recommended that Director’s Form B2540 be included as an attachment to Local Rule 2004.1 (after the local “Notice of Rule 2004 Examination” form) to make it clear that Form B2540 must be used when a witness other than the debtor is to appear at the 2004 examination.

C. Chapter 13 Savings Program.

The Judges invited the Committee’s views on a formalized savings program for Chapter 13 debtors. Some jurisdictions offer an option for a formalized savings program for Chapter 13 debtors. Debtors who are otherwise unable to save may include a monthly savings amount as part of their plan payment. The trustee holds the savings until the debtors need it for various emergencies. The amount placed into the savings account is not included in the disposable income calculation.

Prior to the Committee meeting, Bill Griffin reported that all of the Chapter 13 trustees agreed that this would be administratively burdensome for the trustees' offices. Judge Nugent reported that the Judges were satisfied with the trustees’ response and would not take further action unless someone else expressed a different view.

The issue was closed.

D. Duty to Give Notice of Text-Only Orders and Motions

Mr. Zimmerman reported that the court planned to eliminate the following instructional language from the docket text of all text-only orders to simplify and shorten the dockets.

THE MOVING PARTY IS TO SERVE THIS ORDER ON PARTIES NOT RECEIVING ELECTRONIC NOTICE AND FILE A CERTIFICATE OF SERVICE WITH THE COURT.
(When filing a certificate of service for this order, relate it back to the **epo** category.)

This Notice of Electronic Filing is the Official ORDER for this entry. No document is attached.

The local rules require non-filing users (those who do not receive a notice of electronic filing) to be given notice or service of electronically filed documents, but they do not unambiguously specify who has the duty to provide service. Therefore, he asked whether LBR 5005.1, Appendix 1-01, Paragraph IX or X should be amended to say:

IX. Service of Documents by Electronic Means

A. Notice of Electronic Filing. The “Notice of Electronic Filing” that is automatically generated by the court’s Electronic Filing System constitutes service or notice of the filed document on Filing Users. Unless directed otherwise by the

court, parties who file documents electronically shall provide notice or service of any pleading or other document electronically filed to parties who are non-Filing Users~~Parties who are not Filing Users must be provided notice or service~~ in accordance with the Federal Rules of Bankruptcy Procedure and the local rules.

...

X. Notice of Court Orders and Judgments

Immediately upon the entry of an order or judgment in an action assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed. R. Bankr. P. 9022. ~~The clerk, or any other party as the court may direct~~ The moving [prevailing] party must give notice to a person who has not consented to electronic service in paper form in accordance with the Federal Rules of Bankruptcy Procedure.

After a discussion about the proposed language and whether the moving party or the prevailing party should be responsible to serve the text order, some members of the Committee expressed a preference to keep the instructional language as part of the text-only entries because they rely on it to remind their staff to send notice of the text-only entry. During the discussion, members also said that they like text-only orders because they make it easier to read the progress of the case from the docket text without having to open attachments. The Committee also favored placing the obligation of serving the text-only order on the movant rather than on the prevailing party.

The Committee recommended that the Judges keep the instructional language in the text-only orders. The Committee also recommended that the language continue to require the movant to serve the order. The text will continue to be included in text-only entries for now. The issue will be returned to the Judges and the Clerk's Office staff for further consideration in light of a larger question about the purpose of the docket.

The Committee also asked if there is a report in CM/ECF that shows docket entries that are linked to motions, and asked that the instructions on how to run that report be included in the minutes.

[Editor's Note: In response to the Committee's request, the Clerk's Office has provided two ways to view related items in a case.

*To see a **list of docket entries in a case with an abbreviated description of each related docket entry**, click on the *Query* tab, enter the case number (or other search terms such as case name), and click the *Run Query* button. Select the *Related Transactions* option, enter the docket number or the range of docket numbers or motions that you want to see, indicate if you want to see pending and/or terminated motions, and click the *Run Query* button. Leaving all filter criteria (such as document number range fields) blank and checking both the "Pending motions" and "Terminated motions" boxes will produce a report that lists each docket entry followed by the docket entries that are linked to that docket entry.*

To see a list of motions in a case with the full docket text of each linked docket entry, click on the Reports tab, select Motions and Related Filings, enter the case number, enter any search criteria that you want to use to narrow the scope of the results (such as filed date range, docket number range, or pending and/or terminated motions), and click the Run Report button. Leaving all filter criteria (such as document number range fields) blank and checking both the “Pending motions” and “Terminated motions” boxes will produce a report of each motion followed by the docket entries that are linked to that motion.

Please note that PACER charges you for the results of the query or report based on the number of pages in the results, and the charges for each query/report are not limited to a 30-page cap. Therefore, it may be a good idea to narrow your search results to a filed date range or a docket entry number range.]

E. Non- Sharing of CM/ECF and PACER Credentials With Third-Party Service Providers Who Share Documents

David Zimmerman explained that some attorneys subscribe to services that use the attorney’s login information to download and store documents using their “free look” from PACER. To protect oneself from becoming a “leak” that allowed clients’ Social Security Numbers or other sensitive information to become public, it is best for attorneys not to share their CM/ECF filing credentials and PACER account credentials with third-party services (e.g., PACER Pro, DocketBird, CourtDrive, RECAP, etc.). If an attorney shares login credentials with third parties, then once the court transitions to NextGen, it can allow the third-party to download copies of documents that the attorney has rights to access, including sealed documents filed by the attorney. If the third-party service provider places copies of those documents in internet repositories, they may become accessible by other users of the third-party service or by the public. Thus, the confidentiality of the sealed record and its contents could be compromised.

Mr. Zimmerman asked whether local CM/ECF security settings for documents that are automatically sealed (including Declaration Re: Electronic Filing and DeBN Request Forms) should be set to prevent attorneys from viewing sealed documents that they filed, or whether the Clerk’s Office should continue to allow attorneys to view the sealed documents that they filed.

The Committee recommended that the court limit access to sealed documents to court users only.

F. “Notice of Request to the Bankruptcy Clerk’s Office” (Request for Closing Costs)

Mr. Zimmerman explained that the Clerk’s Office plans to eliminate the “Notice of Closing Information” form that is captioned “Notice of Request to the Bankruptcy Clerk’s Office” and replace it with a simpler text-only-entry procedure that informs the Chapter 7 trustee of the amounts of unpaid fees. The Committee feedback on this proposal was positive.

The Committee supported this simplified approach.

G. Local Bankruptcy Rules in New Formats

Mr. Zimmerman reported that the Local Bankruptcy Rules are being posted to the court's website in pdf format with hyperlinks to cited statutes and rules. He also reported that the local rules will be provided in ebook format.

Judge Nugent inquired whether attorneys find the hard copy booklet helpful.

The Committee expressed strong support for the court to continue providing hard copy local rule booklets because they are used frequently.

H. Additional Discussion Topics

Chris Redmond shared that Rule 4003(c) states that the burden of proof is on the party objecting to an exemption, but the *Tallerico* line of cases [*In re Tallerico*, 532 B.R. 774 (Bankr. E.D. Cal. 2015)], held that the rule is invalid to the extent it assigns the burden of proof on an objection to a state-law claim of exemption because state law governs the exemption.

Judge Nugent led a brief discussion about the value of the Bench Bar Committee.

There was a discussion that in recent years there has been a notable increase in the number of cases where debtors have failed to disclose property and income.

The meeting concluded at 11:50 am.