

BANKRUPTCY CLERK OF COURT UPDATE (December 2018)

National Rule Changes Effective December 1, 2018

On December 1, 2018, changes to these Federal Rules of Bankruptcy Procedure became effective:

Amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, and 9025

New Bankruptcy Rule 8018.1

New Bankruptcy Rule Part VIII Appendix

Amended Official Forms 411A and 411B (formerly Director's Forms 4011A and 4011B), 417A, and 417C

Amended Directors Forms 2000 and 3180W

New Director's Form 4170 (Declaration of Inmate Filing)

(Note: Form 3108WH had been considered for amendment, but ultimately was not modified.)

Details are available at:

<http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments>

<http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments/pending-changes-bankruptcy-forms>

Impact of National Rule Changes on CM/ECF in Bankruptcy Court

The national rule changes prompted a few changes to CM/ECF in our court:

Fed. R. Bankr. P. 3002.1(b), Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence: A creditor must file and serve a notice when the payment amount changes on a security interest in the debtor's principal residence and that payment is being made through the Chapter 13 plan. Subsection 3002.1(b)(2) was added to allow a party in interest to challenge the payment change proposed by the creditor. The new subsection says that a "party in interest who objects to the payment change may file a motion to determine" whether the payment change is required to cure a default and maintain payments while the case is pending.

Practice Tip: File the "Objection" to the Payment Change as a Motion: A party in interest who objects to the proposed payment change must file their objection in CM/ECF as a *motion*, not an "objection." Thus, this is how the matter should be queued up in CM/ECF:

First, the creditor would file the Notice of Mortgage Payment Change by using the event under *Bankruptcy > Claim Actions > Notice of Mortgage Payment Change*.

Second, the objecting party would file a Motion to Determine Validity of Payment Change by using the newly created event under *Bankruptcy > Motions/Applications > Determine Validity of Payment Change*.

Note: The party who files the Motion to Determine Validity of Payment Change must give either negative notice (i.e., notice with an opportunity for hearing if an objection is filed) or notice of hearing (and set the matter to the appropriate docket). Negative notice is preferred.

Impact on Local Bankruptcy Rules: The deadline for filing the motion to determine validity of the payment change is “the day before the new amount is due,” otherwise, the payment change goes into effect. Fed. R. Bankr. P. 3002.1(b)(2). To account for this new procedure, LBR 3015(b).2(f)(5) is being amended slightly to say “The Trustee is authorized to disburse the new conduit payment or fees as soon as practicable **after resolution of any motion under Fed. R. Bankr. P. 3002.1(b)(2) and** without seeking formal modification of the plan.”

Fed. R. Bankr. P. 5005, Filing and Transmittal of Papers: Formerly, Rule 5005(a)(2) permitted courts to issue local rules to govern electronic signatures and electronic filing. The federal rule was amended to:

- Generally require represented parties to file electronically.
- Permit unrepresented parties to file electronically if the court allows it.
- Define an electronic signature as
 - o An electronic filing using the person’s electronic account
 - o If authorized by the person, and
 - o If the person’s name appears on a signature block (Rule 5005 does not specifically require the name to be preceded by “s”).

Impact on Local Bankruptcy Rules: To eliminate overlap between the new Federal Rules of Bankruptcy Procedure and the Local Bankruptcy Rules, the court will amend LBR 5005.1, Appendix 1-01, Paragraph VIII; and LBR 9011.4. Changes to those LBRs will delete duplicate provisions including:

- The *local* definition of what constitutes the signature of a Filing User.
- The *local* requirement that every pleading, motion or paper be signed by an attorney.
- The *local* statement that an electronic signature subjects the filer to Fed. R. Bankr. P. 9011.

- The requirement to include an “s/” in front of the name of the Filing User in the signature block.
- The requirement to include an “s/” in front of the name of a non-Filing User in a signature block.

Fed. R. Bankr. P. 8006, Certifying a Direct Appeal to the Court of Appeals: Rule 8006(e)(2) already allows a party to file a short supplemental statement within 14 days after the bankruptcy court certifies a matter for direct appeal to the circuit court. Rule 8006(c) was changed to allow a bankruptcy court the same opportunity to file a short supplemental statement about the merits of the parties’ joint certification of a matter for direct appeal to the circuit court.

Practice Tip: Use the New CM/ECF Event to File a Party’s Supplemental Statement if the Court Certified the Matter for Direct Appeal. Although Rule 8006(e)(2) was not changed, a new event was added to CM/ECF for a party to use when filing a short supplemental statement if the *Bankruptcy Court* certified the matter for direct appeal. The new event is accessed under *Bankruptcy [or Adversary] > Appeal > Supplemental Statement Re: Certification of Direct Appeal*.

Fed. R. Bankr. P. 8018.1, District-Court Review of a Judgment that the Bankruptcy Court Lacked the Constitutional Authority to Enter: Rule 8018.1 is new. It states: “If, on appeal, a district court determines that the bankruptcy court did not have the power under Article III of the Constitution to enter the judgment, order, or decree appealed from, the district court may treat it as proposed findings of fact and conclusions of law.” This codifies the Supreme Court’s ruling in *Executive Benefits Insurance Agency v. Arkison (In re Bellingham Insurance Agency, Inc.)*, 573 U.S. 25 (2014).

Official Form 3180W (Chapter 13 Discharge Order): The second bullet point on page 2 of the order form was changed from “debts for most fines, penalties, forfeitures, or criminal restitution obligations” to “debts for restitution, or a criminal fine, included in a sentence on a debtor’s criminal conviction.” The amended language is derived from 11 U.S.C. § 1328(a)(3).

Key Local Bankruptcy Rule Changes Effective March 17, 2019

On November 20, 2018, the Bankruptcy Court published the “Notice of Proposed Changes to the Local Rules of the United States Bankruptcy Court for the District of Kansas to Become Effective March 17, 2019” on its website. On December 7, 2018, the court published a “Notice of Additional Proposed Changes . . . to Become Effective March 17, 2019.”

The Court proposes to amend the following Local Rules of the United States Bankruptcy Court for the District of Kansas (LBR): LBR 1007.1(a); the Notice of Rule 2004 Examination form appended to LBR 2004.1; LBR 2090.1(b); LBR 3015(b).2(f); LBR 5005.1, Appendix 1-01, Paragraph I.D and Paragraph VIII; LBR 5075.1; LBR 9011.4; LBR 9019.2(b); LBR 9029.3; and LBR 9072.1.

The Court further proposes to abrogate Standing Order 17-2, Standing Order 18-1, Standing Order 18-2, Standing Order 18-3, and Standing Order 18-4 as moot because of the proposed amendments to LBR 9019.2(b); LBR 9029.3; LBR 1007.1; LBR 5005.1, Appendix 1 01, Paragraph I.D; and LBR 2090.1(b), respectively.

LBR 1007.1(a)(2), Initial Filings (Formerly S.O. 18-2): Since September 1, 2018, the court has required attorneys to file the Declaration Re: Electronic Filing electronically as a sealed document. The court also issued a revised Declaration Re: Electronic Filing form that contains specific filing instructions.

Practice Tip: Be Certain to Use the CM/ECF Filing Event Listed on the New Declaration Re: Electronic Filing Form. Use only the *Bankruptcy > Other > Declaration Re: Electronic Filing* event. Using the correct event will automatically file the document under seal. Filing the document using any other event in CM/ECF will file the document publicly, disclosing the Social Security Number and requiring you to file a motion to redact (and pay a \$25 filing fee).

Practice Tip: Do Not Share CM/ECF and PACER Credentials With Third-Party Service Providers Who Share Documents. To protect yourself from becoming the “leak” that allowed your clients’ Social Security Numbers or other sensitive information to become public, it is best not to share your CM/ECF filing credentials and PACER account credentials with third-party services (e.g., PACER Pro, DocketBird, CourtDrive, RECAP, etc.). The Judiciary recently informed us that if you share your login credentials, then when we transition to NextGen, it can allow the third-party to download copies of documents that you have rights to access, including sealed documents that you filed. 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. That could compromise the confidentiality of the sealed record and its contents.

LBR 2004.1, Examinations: The text of LBR 2004.1 did not change. The Notice of Rule 2004 Examination form that follows that rule was updated to change the citations from “Interim D. Kan. LBR 2004.1” to “D. Kan. LBR 2004.1.”

LBR 2016.1, Monthly Compensation of Professionals: The local rule previously referred to “attorney” and “professional” in different sections. To clarify that the local rule applies to both attorneys and other professionals, all references to “attorney” have been changed to “professional.”

Practice Tip: Negative Notice is Sufficient for Motions to Retain Professionals. Local Rule 2014.1 also deals with the employment of professionals. Its text is not being amended, but the court recently clarified its interpretation of that rule after consulting

with the Bankruptcy Bench Bar Committee. See Minutes of the Bankruptcy Bench Bar Committee (Aug. 28, 2018), 3, available at <http://www.ksb.uscourts.gov/sites/ksb/files/BBMinutes20180828.pdf>.

LBR 2014.1(b) states that “All retention motions shall be heard on the first hearing date that would allow adequate notice of the retention motion and hearing” This does not mean that a hearing is always required. Negative notice (*i.e.*, notice with an opportunity for hearing if an objection is filed) is sufficient. LBR 2014.1(b) was intended to provide the appropriate date for a hearing if an objection is filed. Because a motion to retain a professional is a Rule 9013 proceeding (rather than a Rule 9014 proceeding), the court has indicated that negative notice is sufficient.

LBR 2090.1(b), Attorneys—Admission to Practice (Formerly S.O. 18-4): On August 20, 2018, the District Court for the District of Kansas amended its *pro hac vice* application procedures to require the application to be submitted per the District Court Clerk's form. The District Court form was contemporaneously modified to eliminate the requirement that a proposed order accompany the motion. The Bankruptcy Court follows a different procedure than the District Court when considering motions to appear *pro hac vice*.

Practice Tip: When Sponsoring Another Attorney to Appear *pro hac vice*, Submit a Draft Order That Grants the Motion. The Bankruptcy Court requires applicants to submit a proposed order granting the motion.

LBR 5075.1, Orders by Bankruptcy Clerk; Review: LBR 5075.1(a)(3) was deleted because the Clerk is now granting a Clerk's extension of time to file an answer by issuing a text-only Notice Approving Request for Entry of Clerk's Extension of Time. Therefore, a party or attorney no longer needs to submit a draft order granting a Clerk's extension of time to file an answer or other responsive pleading.

Practice Tip: A Request for Clerk's Extension May Be Made as a Text-Only Request. The process for requesting a Clerk's extension under LBR 5075.1(a)(1)(A) is now smoother than ever. Attorneys do not need to draft a motion or a proposed order granting the Clerk's extension of time. Attorneys can use this event to generate a text-only request for Clerk's extension:

Adversary > Other > Request for Entry of Clerk's Extension of Time Pursuant to LBR 5075.1(a)

Note: The event still gives you the opportunity to attach a motion, if you wish. However, attaching a document is only optional. If you want to proceed without attaching a document, just click “Next” when prompted for a Filename and click the “OK” button in the popup window that says “Note: You have not selected a document.”

Note: If the requested extension meets the requirements of the rule (*e.g.*, it is requested before the deadline expired, it requests 14 days or fewer, it is the first request for extension, etc.), the Clerk’s Office will enter a text-only Notice Approving Request for Entry of Clerk’s Extension of Time.

Related Practice Tip: Serve Text-Only Orders and Text-Only Requests on All Parties Entitled to Notice. When any text-only request or any text-only order is filed, be certain to serve a copy on all parties who are entitled to service. For years, the court has been including a reminder like this with all text-only orders:

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.

This bulky language will be disappearing from existing text-only orders and entries such as a request for Clerk’s extension, a notice approving the Clerk’s extension, and an order continuing a hearing. However, the duty to serve the text-only entry and the duty to file a certificate of service still remains, pursuant to LBR 5005.1, Appendix 1-01, Paragraph IX and LBR 9013.3. Therefore, if there are parties who are entitled to service and they do not receive a Notice of Electronic Filing (NEF) by email, then be sure that you serve them and file a certificate of service. When filing the certificate of service for a particular text-only order, relate it back to the “epo” category in CM/ECF.

LBR 9072.1, Exhibits: The requirements for submitting exhibits for trials and evidentiary hearings have been amended in two key ways.

Practice Tip Re: Submit the Proper Quantity of Exhibit Sets: Three (3) business days before the hearing or trial, parties must submit sets of exhibits marked with exhibit stickers and bound in three-ring binders with each exhibit separated by dividers or tabs corresponding to the number or letter of the exhibit. Parties must provide:

- One (1) set of originals for use by the witnesses
- Two (2) copies to chambers
- One (1) copy to each party participating in the proceeding.

Practice Tip Re: Paginate All Multi-Page Exhibits. To make it easy for everyone to unambiguously identify which page is being referenced in an exhibit, all multi-page exhibits must be either numbered or bates numbered. Bates numbering the entire set of exhibits is permitted, but not required so long as each individual multi-page exhibit is numbered.

Warning: Failure to comply with these new provisions may result in the court excluding an exhibit that is offered.

THE CLERK’S OFFICE CAN HELP KEEP YOU INFORMED

Bankruptcy Court Website

Helpful announcements are routinely posted on the Court’s website in the News section of the landing page: <http://www.ksb.uscourts.gov>.

Bankruptcy Bench Bar Committee Minutes

During the Bankruptcy Bench Bar Committee meetings, the Judges, members of the Committee, and the Clerk’s Office share important updates, discuss emerging issues and practice points, and preview most Local Bankruptcy Rule changes. Meetings are generally held semi-annually in the spring and fall. Meeting minutes are posted after each meeting at <http://www.ksb.uscourts.gov/bankruptcy-bench-bar-committee>.

govDelivery

Essential and time-sensitive announcements are also sent by email to people who signed up using govDelivery. The link to register for govDelivery appears on the home page of the court’s landing page. Registration is free.

We respect your time and do not want to flood your email inboxes, so we are careful to send only the most important announcements by govDelivery, such as alerts about CM/ECF down time and maintenance, new Standing Orders, newly published court opinions, docket schedule changes, and publication of local rule changes for notice and comment. We sent an average of only 15 emails per year over the past two years.

ON THE HORIZON

NextGen

The Bankruptcy Court for the District of Kansas will begin the transition from the current version of CM/ECF to the “NextGen” version in July 2019. We will provide training so that attorney filers and non-attorney limited filers can access NextGen by the time we go live in early 2020.

Electronic Bankruptcy Noticing (EBN), Especially for High Volume Recipients

Anyone can sign up for Electronic Bankruptcy Noticing (EBN) and enjoy its benefits. EBN is a free service that sends bankruptcy notices by email to the recipient rather than sending them by mail. It provides notices to recipients faster and more reliably than mail. EBN also brings additional benefits such as XML (extensible markup language) metadata features. EBN users can read a pdf file and extract case data that is embedded in the pdf document as metadata (such as the case name and number, debtor names and addresses, notice title, and 341 meeting location). The EBN user can either view that metadata or use it to create automated business processing workflows.

Detailed information and sign-up forms are available on the EBN website: <https://bankruptcynotices.uscourts.gov>. A convenient link to the EBN site appears on the landing page of the court's website.

Heads Up: High Volume Recipients Should Look at EBN. If you have a client who receives a high volume of bankruptcy notices by mail, it may be wise to encourage them get ready now and sign up for EBN. The Judiciary is considering a change to Fed. R. Bankr. P. 9036 that would require entities who receive a large number of paper notices by mail (on the order of 100 or more per month) to accept those notices electronically. The rule change, if adopted, would likely take effect in a couple of years. Entities who begin evaluating the benefits and convenience of EBN sooner will have more time to set up a system that derives the maximum benefit from EBN, such as its XML features.