

U.S. Bankruptcy Court for the Middle District of Pennsylvania
Attorney Advisory Committee
August 13, 2015

Minutes

Attendance:

Bar: Ann Swartz, Anne Fiorenza, Brenda Bishop, Henry Van Eck
Jim Jones, Lisa Rynard, Marie Reilly
Robert Chernicoff, Sam Bufford, Thomas
Capehart, Tracy Updike

Clerk's Office:

Chambers: Judge John Thomas, Judge Mary France

The meeting was convened at 3:10 p.m. and concluded at 4:40 p.m. Introductions were made and Judge Thomas welcomed members of the Committee. There was a brief discussion about Lisa Rynard being the outgoing president of the MDBBA and Donald Hahn as incoming president. A special thank you to Judge Bufford for attending the meeting.

OLD BUSINESS:

1. Revision of 341 notice to require Debtor ID and Social Security card update (Terry Miller).

Review of the previous discussion of the 341 notice form including the language that debtors are required to provide valid photo ID and social security cards at 341 meetings. The new official forms will not allow alterations. However, it was thought that the language was a good addition and it will be added as long as we are allowed to do so. It was stated that the language was added to the form but it might be only temporary if alterations are not permitted.

2. Mortgage Modification Mediation Program update (Tracy Updike and Ann Swartz).

A written report was received from Ann Swartz which was circulated to everyone. Ann Swartz prepared a proposed amendment to the Mortgage Modification Mediation Program Rule 9019-3 to make it more user friendly and encourage more participation. One of the changes was the portion of the rule that the creditor is required to respond to a request for participation in the MMMP. The proposed change will allow the debtor into the program by an order entered even if the creditor has not responded. Also, the proposed amendment includes the choice of using a

portal or not, and having that decision made early in the process. The debtor is to indicate a preference in the initial filing, then the creditor will indicate whether or not it agrees. There are separate rules proposed for using a portal and not using a portal. Parties will need to register to use the portal. There is also a requirement for the creditor to identify one contact person, as well as requiring the creditor to continue the review process while waiting for documents to be produced. If a loan is transferred to a new servicer, the creditor will be required to report a change in servicer, make that change in the portal, and require the new servicer to get all loan documents so as to not delay process. One question was what happens if there's a bump in the road and it was suggested that it would be helpful to have a status conference if there is a stall in the process. The Court would schedule the conference with both parties required to attend and discuss what is going on. This would allow parties and the judge to know what's going on and whether there is a need for a mediator. Judge Thomas noted that program has not been all that active or successful and he would like to see it work, especially in counties with their own mediation program, but there are a lot of counties that do not have their own mediation program. Judge Thomas said he was happy to leave this on the agenda for the next meeting. Jim Jones asked if these proposed changes would eventually go to the Rules Committee. It was stated that it should go to the Rules Committee for review and comment to make sure it fits with current structure and doesn't create problems with any other rules and ultimately come to the judges to approve. Ann Swartz confirmed that there were conference calls among a subcommittee of the Advisory Committee. Ann Swartz asked, as far as the portal that would be used, should we designate one particular portal or do we find a couple others for options and suggested that she thought there should be something designated so there is no confusion. Judge France agreed and that may have to be discussed among judges. Judge Bufford suggested issuing a general order to make changes as needed rather than putting it in the local rules, which gives the Court more flexibility. Ann Swartz expressed a concern over how to deal with a creditor that doesn't respond. Judge Bufford suggested that a complaint could be filed with the Court to compel participation. Mark Moulton suggested an adversary proceeding be brought then the matter be diverted to the program. Tracy Updike stated that she believed the proposed changes could be finalized in the next 30 days. Judges France and Thomas suggested keeping this on the agenda for the November meeting and possibly referring it to the Rules Committee.

3. MDBBA Rules Committee update (Tracy Updike).

Tracy Updike reported that she had been holding off on submitting any suggested rules changes because of the proposed changes to MMMP Rule, but since MMMP Rule still needs work, she reported the following suggested changes. It was suggested that briefs be required to be labeled and that any motions to dismiss be a separate filing. Also, she noted that there is a typo in form 2016-2(c) referring back to 2016-2(a) in error. Judge France brought up an issue about the Rules Committee. She noted that as it was finally decided that Judge Opel spearheads adoption of rules for the Court but it doesn't make sense for a separate Rules Committee in that it doesn't make sense for the bar to suggest changes, then go to a Committee then to the Court. Robert Chernicoff, suggested that adding a Rule 9013-4 would be helpful in

that often when an answer is filed, affirmative defenses are incorporated into an answer and such a rule would prohibit that. Judge France noted that problems arise when a responsive pleading contains nothing that supports a motion to dismiss but such a request is added to the wherefore clause. She indicated that such a rule, requiring a separate motion, would make sure everything is clear. Judge Thomas stated that he wasn't sure how a pleading would be treated differently if the rule was violated. Judge France indicated that having the rule lets people know what's expected and though some consistently follow the rules while others don't, the rule would at least give guidance to those who seek it.

4. Chapter 13 Breakfast Club update (Lisa Rynard).

Lisa Rynard reported that the MDBBA set up a subcommittee consisting of Ann Swartz and Larry Young. Ann did background research regarding CLEs and there was a survey sent out seeking the Bar's interest in this. The survey consisted of the question: would you be interested in attending a breakfast meeting with attorneys and other law clerks? Of the 47 responses, 80% showed interest. It was estimated that the survey went out to approximately 200 people. She said that the Board meets again next Thursday (August 20, 2015) and she is hoping to get Board to make some decision so that Don Hahn knows what he's walking into when he comes in as president. Judge France suggested that somewhere between 20 to 30 people would be worth the effort. If other people would be willing to put forth the work, worth it to carry forward. Judge Bufford thought it was a fabulous idea and said that something similar was very useful in Los Angeles. Judge France noted that there are some lawyers that have some great practical practice tips and ideas and if there could be sharing of ideas would be a great idea. Judge Thomas noted that the Court is somewhat isolated and does not have much contact with attorneys. He also indicated that other districts sponsor roundtables and that this could possibly continue on to a regional roundtable. Judge Thomas said this would be added to the next agenda for future discussion. Lisa Rynard stated that after the Board meeting, she would contact everyone and inform of the decision.

5. Pro Se Debtor Issues/Self-Help Center update (Terry Miller).

Terry Miller provided a report that Judge Thomas forwarded. Pro se filings have increased and the thought was that perhaps there would be lawyers who would volunteer to meet with pro se filers on a pro bono basis. Lisa Rynard indicated that there weren't a lot of volunteers to liaison with the Court and thought the perhaps the general bar isn't aware of this yet and she would need to get together with Terry Miller and put something on the ListServ to let everyone know this is in the works and maybe solicit volunteers once there is a more specific idea of what the process would be. Terry Miller provided some proposed forms for pro se's to complete. Judge Thomas asked if this is going to reach over into Don Hahn's administration and Lisa Rynard would continue to serve as liaison and would continue with whatever Don Hahn appointed her to continue with. Judge France said Terry Miller indicated if there weren't enough lawyers that

perhaps someone could reach out to the schools for clinical work. Judge France thought that perhaps the initial concept was a meeting with the individuals to review paperwork and such. According to Professor Moringiello, there is a clinic at the University and this program could be added to that clinic. Judge Thomas asked if it would be possible to work out a deal that new lawyers would volunteer time for credit toward attendance at the ABI conference. Lisa Rynard stated that Widener does occasionally file bankruptcies and that the civil law clinic would be included as an also not an alternative. Dauphin County has the incubator program for new lawyers: the bar association helps set up private practice and requires pro bono work in exchange. Lisa Rynard said she will touch base with Terry Miller and report back. Jim Jones asked who would assign the lawyers, and suggested the Clerk's office. Judge Thomas wanted to keep the Court out of that process.

NEW BUSINESS:

1. Request for clarification or informal policy with respect to billing in Chapter 13 proceeding for time related to CourtCall (Lisa Rynard).

Lisa Rynard reported that she received correspondence from a member of the bar and was asked that it be brought to the Committee. The person who wrote to her was looking for clarification as to what time is acceptable to bill while utilizing CourtCall. He noted that if there was travel involved, an attorney could charge half time for travel, but when using CourtCall, it is difficult to do other work and felt that by using CourtCall, the firm was losing revenue and looking for clarification of an acceptable charge for time. Robert Chernicoff indicated that when sitting in court, you can't bill for time. Judge Thomas stated that he doesn't have a problem with billing for one doing other work, deducting the time and billing other clients for that work. However, if one is working only on that case, then bill only for that appearance. CourtCall was meant to reduce costs to client so he doesn't know why it's an issue. Judge France indicated that she is not allowing attorneys to charge for full time of CourtCall on fee applications. She allows for a small amount of extra time, but not for full time. She doesn't think it's reasonable to charge for the entire time on phone, but that this issue needs to be addressed with the Judge that's handling your fee application. Judge Thomas suggested setting hearings and requiring lawyers to justify their applications. Judge Bufford stated that in Los Angeles, all fees were fixed fees. Occasionally, in a complicated cases there would be additional fees that could be charged, within limits, and obviously, Chapter 11s are different. Judge France stated that was attempted to be encouraged, but attorney choose lodestar and those have to be reviewed.

2. The Court invites the Committee's input on the following matter: Up for review by our bankruptcy bench is L.B.R. 2016-2(h) in light of the Supreme Court's decision in *Harris v. Viegelahn*, 135 S.Ct. 1829.

L.B.R. 2016-2(h) states:

(h) ***Payment of Fees in Certain Dismissed or Converted Cases.*** In dismissed or converted cases where funds are to be refunded to the debtor(s) by the trustee, counsel may request by motion, within fourteen (14) days of the order converting or dismissing the case, payment of any outstanding attorneys' fees. If a motion is not filed timely, the trustee may disburse the funds to the debtor(s). The motion must be served on the debtor, the chapter 13 trustee, the U.S. Trustee and, if applicable, on any party entitled to share in the funds held by the trustee. Counsel may apply for payment of attorneys' fees only from funds received on or before the date of the entry of the order of dismissal/conversion that otherwise would be refunded to the debtor(s). All orders dismissing chapter 13 cases will provide that the court will retain jurisdiction to rule on timely requests for payment of compensation.

Judge Thomas wanted to alert the Bar that this has been added to the topics for the next Judges' meeting as to whether we delete certain areas of the rule in light of *Harris*. He indicated that the way has handled such motions thus far is that if a debtor assigned fees to the attorney prior to conversion or dismissal, Judge Thomas requires the attorney to get a post-conversion or dismissal assignment and warns the attorney of a possible violation of stay. Judge France said that it was understood that the decision was not decided thinking about whether an attorney will get paid. The issue decided was does it go to the debtor or unsecured creditors. The Supreme Court's decision was on converted cases, and there's a problem with the rule as it stands. Judge Bufford indicated that the Ninth Circuit developed a practice where the attorney for the debtor could make a fee application and, if granted, a local rule provided for the Chapter 13 trustee to pay the attorney then pay the rest to debtor. Judge France stated that under *Harris*, the trustee has no authority to make disbursement to anyone else. Jim Jones clarified that if a case is dismissed or converted pre-confirmation, all monies go to the debtor except administrative expenses and if a fee application is an administrative expense, then fees would be paid to the attorney. Judge France noted that we may not be able to come up with a satisfactory alternative. Judge Thomas stated that the Judges will do what needs to be done with the local rules but will leave it open to the Rules Committee to suggest an alternative that complies with *Harris*. Judge France also indicated that there are a lot of judges that have similar procedures and they are all trying to figure out how to make their local rules work and ultimately what a district or circuit court would say. Mark Moulton did want to note that the benefit to having certain things in a rule is that a debtor will find an answer on the internet by finding a rule rather than reading a case and trying to interpret and understand it. Judge Thomas ended by saying that this may be a case of deleting certain provisions and that the issue can't be answered today but wanted to alert the Bar to it.

Request for Compensation Local Form: There is a question whether this form needs to be filed in every case or are there some exceptions such as a pre-paid legal plan paying attorney's fees rather than through a Chapter 13 plan. Judge France stated that this is something that all three judges should discuss based on 2016-2(g). Jim Jones also asked if a plan can be confirmed without the form and if there are exceptions, what are they? Judge France explained that the reason for the form was to provide the Chapter 13 trustee with something so that he would know how to make disbursements from the plan. If the attorney's fees don't affect feasibility and not being paid through the plan, the form is not required. Judge Thomas recommended that the concerns over the form be framed in the form of correspondence to the three judges and it can be added to the judge's meeting. He also suggested it would be helpful to provide examples.

MEETING DATES FOR 2015:

The next meeting is scheduled for November 12, 2015, at 3:00 p.m. If there are conflicts for several committee members, please contact Chambers and a new meeting date will be selected.