ORIGINAL

TRANSCRIPT OF PROCEEDINGS

ADMINISTRATION OFFICE OF

THE UNITED STATES COURTS

PUBLIC HEARING OF THE

BANKRUPTCY RULES COMMITTEE

Pages 1 thru 128

Washington, D.C.
January 28, 1999

MILLER REPORTING COMPANY, INC.
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Washington, D.C. 20002
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Thursday, January 28, 1999

Thurgood Marshall
Federal Judiciary Building
One Columbus Circle, N.E.
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C O N T E N T S

P R O C E E D I N G S

JUDGE DUPLANTIER: I'm Adrian Duplantier. I'm a United States District Judge in New Orleans, the Eastern District of Louisiana. Just from the white hair you can tell I'm a senior judge.

First off, I want to welcome all of you, not only those on the West Coast who are going to be testified through the magic of television but everybody who is here with us today. We appreciate your attendance. We appreciate the efforts you've taken to offer your advice and suggestions concerning these proposed rules changes which we have under consideration. We also want to thank all those who sent us written comments.

I assure all of you that the comments, all of them, written or oral, will be seriously considered by the full committee, which incidentally meets in about six weeks, mid-March. One of the first orders of business there will be to reconsider the work that we've done and the litigation package particularly but all of those rules that were published for comment, to reconsider them in the light of all of the comments.

I'm especially pleased that we have so many members of our committee present today, that they managed to rearrange their schedules to be here, and their presence is an indication, I know you realize, that we do value your

comments.

I'm going to ask all the members of our committee who are here to introduce themselves to you and I'll start with Judge Robreno over here.

JUDGE ROBRENO: I'm Eduardo Robreno. I'm a United States District Judge sitting in Philadelphia in the Eastern District of Pennsylvania.

MR. KOHN: My name is Chris Kohn. I'm with the Civil Division of the Department of Justice. I serve as an ex officio member on behalf of the Attorney General.

JUDGE ROETTGER: I'm Roland Roettger. I'm a judge of the United States District Court for the Southern District of Florida in Ft. Lauderdale.

JUDGE KRESSEL: I'm Bob Kressel. I'm a bankruptcy judge in Minneapolis.

MR. FRANK: I'm Eric Frank. I'm a practitioner with Miller, Frank & Miller in Philadelphia, Pennsylvania.

MR. HELTZEL: I'm Richard Heltzel, clerk of the Bankruptcy Court, California Eastern in Sacramento.

MR. KLEE: I'm Ken Klee. I'm an acting professor at UCLA Law School.

JUDGE SMALL: I'm Tom Small, bankruptcy judge in Raleigh, North Carolina.

JUDGE CRISTOL: A.J. Cristol, Miami, Florida, chief judge, United States Bankruptcy Court, Southern

District of Florida.

MR. RESNICK: I'm Alan Resnick. I'm the reporter to the Advisory Committee. I teach at Hofstra University School of Law and I'm of counsel to the Fried, Frank firm in New York.

JUDGE DUPLANTIER: I haven't done a nose count but I expect that we actually have a majority of the committee here. And I want to tell all of you present and those on the West Coast, as well, that I've been working with the committee now for five and a half years and I can tell you it's an outstanding group of people, in eery respect.

I want to assure you that we have no desire to cut off anybody's comments unnecessarily but I urgently request that all of you try to avoid repetition. Our time, like yours, is limited and there are a number of people who want to speak today. We have a number of written comments, as well, which speak to a lot of the same issues that you're going to address today.

If a previous speaker has made a suggestion or voiced a criticism which you were also planning to tell us about, please just let us know that you concur, without having to restate the matter in any detail. Even if you would do so perhaps in different terms and even though you probably are convinced that you would do it more lucidly for us, try to avoid that, if you will.

We've scheduled the teleconference people at the outset in order to try to avoid repetition, so that all the other speakers who want to talk to us today can hear you speak, but you won't be able to hear them afterwards. Unfortunately, we cannot conduct the entire hearing where we can televise it or however you call that, out to the West Coast. The configuration of the room here just doesn't allow us to do it. So it's just not practical.

The reason we asked all of you who want to testify to be here at the start of the hearing is that same reason, so that you can be made aware of what the early speakers are saying.

I just want to comment specifically that I noted in Judge March's letter that she took note of the fact that we were going to try to avoid repetition but indicated that there would be repetition--I think she called it overlapping themes--which the constituencies wished them to stress.

I would hope that once one of the three of you has stressed one of those overlapping themes, that out of consideration for the speakers who want to follow you, you would avoid that repetition, even though perhaps your constituencies might want you to do it.

This is a fairly bright group of people. We get the point the first time and that's especially true because we've studied the written comments which we've received from

you.

So now I think you all have asked to change your order that you earlier had set. I think Judge Russell, you wanted to speak first and would you please do so now.

STATEMENT OF THE HONORABLE BARRY RUSSELL

LOS ANGELES CHAPTER OF THE FEDERAL BAR ASSOCIATION

JUDGE RUSSELL: Thank you very much and good afternoon, although it's morning here. I want to thank you for giving me the opportunity of appearing before you today. And though I am the senior bankruptcy judge in the Central District of California, I'm here to represent the Los Angeles Chapter of the Federal Bar Association. In 1990 I was the national president of the Federal Bar Association.

It's obvious that the litigation package is the result of your extensive efforts to correct perceived problems with the present bankruptcy rules. Your introduction indicates that the Federal Judicial Center's 1995 survey identified motion practice and litigation as areas of significant dissatisfaction due to a lack of national uniformity and insufficient guidance regarding motion procedures.

Not having seen the SJC survey, I cannot comment on its findings. However, based on my nearly 25 years as a bankruptcy judge and 10 years on the Ninth Circuit Bankruptcy appellate panel, it is my view that the present

rules, in particular rule 9014, work very well.

The proposed amendment to rule 9014 has engendered a great deal of discussion throughout the country. It has highlighted the obvious fact that there are many different ways to regulate motion practice.

But after reading with great interest the various motion practices throughout the country, I'm convinced that there is no one best practice. In discussions with my fellow judges and with many lawyers, I'm convinced that our local rule works very well and that there is no need to amend Rule 9014, yet we would never of imposing our local rule on other districts.

In short, there are many effective ways to, in the words of Rule 1001, "secure the just, speedy and inexpensive determination of every case and proceeding."

I have heard that the lack of uniformity in motion practice creates problems for out-of-district counsel. I have not observed these problems but in any case, association with the local counsel, as is required by many districts, including my own, should resolve the problem.

The vast majority of motions involve matters that are handled by local counsel who are familiar with local legal culture and the present local rules. The proposed Rule 9014 is far too complex and would drastically change well established local practices to the detriment to the

fair and efficient resolution of motions.

If there is a problem with the unavailability of local rules, a possible solution is to require that they be published on a website, which as the AO's website.

I would now like to turn my attention to proposed Rule 9014(j) and the proposed elimination of the application of Rule 42(e) and replacing it with Rule 56(e).

Rule 43(e) has worked very well in both bankruptcy and district courts for many years. It is a well known and accepted method of presenting evidence in an efficient and fair way that provides due process.

There is the assertion that the Advisory Committee believes that the assessment of witness credibility is as important at evidentiary hearings on an administrative motion as it is at a trial in an adversary proceeding. Rule 43(e) provides that the court may direct that the matter be heard wholly or partially in oral testimony or deposition. Where there are serious factual disputes, bankruptcy courts routinely grant requests for live testimony.

Both bankruptcy judges and appellate judges are very familiar with the application of Rule 43(e). If the bankruptcy judge improperly denies such a request for live testimony, appellate courts are well equipped to handle the problem.

Rule 56 (e) is not an acceptable substitute for

Rule 43(e) which, as I said, works very well and is well understood by both judges and counsel.

I would finally like to briefly turn to proposed Rule 9014(e)(3), which permits an individual debtor whose debts are primarily consumer debt to file a motion without filing supporting affidavits. I see no justification for the rule. It may also lead to additional needless litigation as to whether the debtor's debts are primarily consumer debt.

Although I have previously submitted the written report, these are my comments today and I would like to thank you again for allowing me to present our views.

JUDGE DUPLANTIER: Thank you very much, Judge Russell.

Does anybody have any questions of Judge Russell or any comments?

We appreciate your taking part in the hearing, Judge, very much.

Is Judge March going to speak next?

STATEMENT OF THE HONORABLE KATHLEEN P. MARCH

UNITED STATES BANKRUPTCY COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

JUDGE MARCH: Good morning California time and good afternoon your time. I certainly am sure all of us out here on the West Coast want to thank you for letting us

appear by videoconference. For one thing, we would have all had to pay to fly to Washington except for Barry, who'd be funded by the Federal Bar Association.

I want to second Judge Russell's comments, particularly his comment that Federal Rule of Civil Procedure 43(e) should not be abrogated.

Unless Judge Russell and Judge Riblet, who are speaking for constituencies, I'm just speaking for myself. I'm a bankruptcy judge here in the Central District of California. I've been a bankruptcy judge for 10 years. I'd been in practice for 15 years before that. I think my background is a little different from a lot of bankruptcy judges because I was a law clerk to a district judge when I got out of law school. Then I worked for a Wall Street firm in New York. I am barred in New York and California.

I practiced a nonbankruptcy litigation practice. When I was in California I was a federal prosecutor in the Office of the U.S. Attorney here in Los Angeles and then I was in private practice doing business and contingency litigation in the state and federal courts in Los Angeles.

So I'm from a state court and a district court background before I became a bankruptcy judge and I think that gives me kind of a different perspective from a lot of bankruptcy judges who grew up in the bankruptcy background.

I have some themes in speaking to you today. The

first is that by making some simple changes to the present proposed version of bankruptcy Rule 9014, that you can get a good result, probably a result that would improve motion practice instead of getting what I think a lot of people throughout the country are afraid is going to be a bad result--in fact, a worse result--from what we have now if we don't have some further amendments to the rule.

Now, the first thing I want to tell you is that it's been a struggle in bankruptcy courts to get people to use admissible evidence. When I first started on the bench 10 years ago there were a lot of people that really hadn't focussed on the fact that the Federal Rules of Evidence did apply in bankruptcy court. If I had a penny for every time someone had told me, "Well, it's in my memo of P&As; I mean, why do I need a declaration?" I'd have jars and jars of pennies.

But the good news is that bankruptcy practice and bankruptcy court has just come a tremendous difference. Certainly in California all of our four districts and the judges that I know require admissible evidence in motion practice, that motions be supported by the movant, by declarations or affidavits filed with the motion, that oppositions be supported by affidavits or declarations that are filed with the opposition.

And my theme today, one of them is if you don't

have admissible evidence and you're the judge, you're just guessing at what the right answer should be. If you don't have admissible evidence and you get the motion and the opposition, you're just guessing at whether you should grant the motion, even if it's unopposed. In fact, because the Federal Rules of Evidence do apply in bankruptcy court, you can't properly grant a motion that involves factual issues where you have no admissible evidence with the motion, even if there is no opposition.

So if you don't have admissible evidence, you're just guessing. And if you don't have admissible evidence with the motion and the opposition, which would be the case unless we eliminate this consumer debtors don't need declarations or affidavits to support their motions or their oppositions, and you're the judge, you're just going to be guessing as to whether you should grant the motion, guessing as to whether you should hold a hearing.

And, of course, if you are forced to hold a hearing to try and get admissible evidence, then you're going to be wallowing around in a hearing not even knowing what you are looking for because your hearing won't be focussed as to what the issues might be by having affidavits and declaration from the movant, affidavits or declarations from the opposing parties, which you have reviewed in advance to see if there are conflicts on an issue of fact

that is material to the motion.

If you have affidavits or declarations with the motion and with the opposition, then you can see if you had a conflict. You can see if you need to have an evidentiary hearing and your evidentiary hearing will be focussed because you will know what is the conflict. One side says the light is red; one side says the light is green; you need to know what color was the light. That's it. You hold a light hearing and that's what everybody focusses on in their testimony. You have a general idea of what's relevant and what's not.

Without admissible evidence on both sides, paper evidence in the form of affidavits or declarations, you're just guessing as to whether you should grant the motion. You're guessing as to whether you need a hearing. And if you're forced to have a hearing, of course you're wallowing around in a hearing trying to figure out whether there even is an issue that you're looking for, rather than focussing on resolving the issue, the conflict in the paper evidence.

So my first theme is you need evidence or you're just guessing and that the Federal Rules of Evidence do apply in bankruptcy court, so most judges will not grant a motion that is not supported by admissible evidence.

So if a debtor, consumer debtor, brings one but they don't have admissible evidence, I wouldn't grant that

motion. I would be forced to have a live hearing. So we'll have numerous live hearings that we wouldn't otherwise need to have or the more cynical of us would merely say "No evidence; your motion is denied."

That's not a good result, either. It's obviously not what the committee intended. It's obvious the better result is to have evidence on both sides, have hearings only when they are necessary.

Now, that is my biggest theme. When many of us met with the National Conference of Bankruptcy Judges in Dallas Ken Klee and Alan Resnick were nice enough to meet with a group of us and they told us, "Well, don't just whine about it. Propose specific language that will solve the problem that you folks see in the present version."

So 15 minutes isn't enough to go over everything but I do ask that the letter that I sent in on October 27, 1998, which is my written comments, be incorporated as part of my testimony by reference today and be made an official part of the transcript of today's hearing.

In that letter I do, at the heading of the letter that's called "Redraft to avoid requiring unnecessary live hearings," which is number 6 in the letter, there is an actual paragraph indented at the top of the page that is proposed language that would be put in to replace the language that's currently in Bankruptcy Rule 9014(i) about

live hearings.

It would say--of course first you have to say that both sides have to have admissible evidence in the form of affidavits or declarations or also, because we have more than two sides--we can have trustees, debtors, creditors; we can have agencies, such as the U.S. Trustee and agencies such as state and federal governmental entities, so we can have a lot of parties--require all parties to have admissible evidence.

The idea of exempting consumer debtors from having admissible evidence--you know, I've got to say out here we have the "Just Say No to Drugs" campaign. I think this is one where, you know, we should just say no to this idea because there's no justification for favoring consumer debtors over all other categories of parties that appear in bankruptcy court. And respectfully, I suggest that part of that should be left to Congress, which is very actively being partisan on the question of bankruptcy reform.

When we get to working on national rules, the function of national rules does not give one party or another an advantage. It is to try and evenhandedly carry out--have procedures to carry out whatever legislation Congress has passed.

So that's another theme. Just say no to having different rules for consumer debtors from all other parties

in bankruptcy courts.

Now once you've done that, when you have the live hearing, the language I suggest is quoted in my letter. It's that the court shall determine whether the affidavit supporting the motion prima facie supports the granting of the relief requested and, if so, shall determine whether the affidavits supporting the opposition conflict with those submitted by the movant on an issue of fact material to the motion.

If there is a conflict between a moving and opposing affidavits on any issue of fact material to the motion, then the court shall hold an evidentiary hearing to hear live testimony from those declarants.

Now, that language does solve some problems that exist in bankruptcy motion practice today.

Now, I'm happy to say the judges that I know and work with up and down the West Coast require admissible evidence in the form of affidavits or declarations but I do understand that national bankruptcy practitioners, such as Mr. Klee, whom I respect tremendously, have encountered in their travels throughout the country the occasionally bankruptcy court that is still in the dark ages of bankruptcy practice, meaning they're still using the old offer of proof approach to bankruptcy, where everybody talks about in their motions what the evidence would be if they

had some, but they don't have any.

So it's the offer of proof idea. It's not in compliance with the Federal Rules of Evidence. It's why they used to call it the burden of persuasion in bankruptcy court, back in the referee days, instead of the burden proof. That was because they didn't have any admissible evidence, so they obviously couldn't have a burden of proof. And we shouldn't be going back to that.

So to the extent that that's still out there in limited pockets, this approach of requiring admissible evidence in the form of affidavits and declarations with a motion, with the opposition, by both sides would solve that problem. That would be an advance.

The other problem that national practitioners have encountered, and again I'm happy to say I never met a bankruptcy judge that did this but apparently occasionally, in limited places, there are bankruptcy judges that do not hold a hearing, a live hearing, when they have the conflicting declarations--one that says the light is red, one that says the light is green.

Well obviously at that point you've got to hold a live hearing or once again you're just guessing what the answer should be. So at that point you can either press a point or hold a live hearing.

So my language that I'm proposing would say the

judge shall hold an evidentiary hearing in that situation. And I think that's what Federal Rule of Civil Procedure 43(e) currently contemplates. That's the way it works in district court. But if we need to reinforce that with bankruptcy judges, you can even put in and to this extent only, Federal Rule of Civil Procedure 43(e) is abrogated, to make absolutely clear that if you got conflicting declarations on an issue of fact material to the motion, you've got to hold a live hearing.

Now--

JUDGE DUPLANTIER: Excuse me a minute but we do have your letter. I want to assure you of that. We've had it from early on, since you wrote it. Every member of the committee has it. So I'd ask if you could sum up now because we're about out of time.

JUDGE MARCH: Okay, thank you.

The language that I'm proposing is not something that I invented. It's merely language that states what the motion practice is in Federal District Court, certainly in the Central District and, I believe, in most places in the United States and it states what the motion practice is in California in state court and when I was in New York, the New York state courts, as well.

So why would we want to make bankruptcy court different from what is the norm in motion practice in state

and federal courts throughout the United States? We wouldn't want to and I think by these changes we can have a rule that improves motion practice rather than one that bankruptcy judges are going to seek to opt out of.

Thank you so much.

JUDGE DUPLANTIER: Thank you, Judge. We appreciate your comments.

Judge March, Ken Klee wants to ask you a question.

MR. KLEE: Judge, is it your view that the--

JUDGE MARCH: Hi, Ken.

MR. KLEE: Hi. Is it your view that the rules, as proposed, should be amended as you have suggested or that the existing rules should remain in place as they are and just left alone?

JUDGE MARCH: I want to answer that question candidly rather than what may be the view that's stated in the cover letter that's written by Judge Mund, the chief bankruptcy judge for the 21 judges in our district. She says please don't change anything and that's what Judge Russell said.

I think a lot of people are saying that because they're so afraid that a bad revision will be worse than what we have and a bad revision would be worse than what we have. But a good revision will be better than what we have because it will solve the problems that you, Ken, and other

national practitioners have encountered.

So I think a good revision would be good. And you know how I'm defining good revision.

JUDGE DUPLANTIER: Judge Kressel?

JUDGE KRESSEL: Kay, it's Bob Kressel.

I was wondering how you think your language on when to hold an evidentiary hearing differs in practice from what is in the proposed rule, which was basically an incorporation of the summary judgement standard. It sounds the same.

JUDGE MARCH: Well, in several ways. The first is that the proposed--I would have a hearing when there's a conflict in the evidence. The problem with the consumer debtor exception is whenever there's a consumer debtor involved, either as the moving party or the opposing party, we won't have evidence on both sides, so we won't know whether we need a live hearing. That's the first problem.

The second problem is that the summary judgment standard, which is no material issue on a fact that's relevant to the motion, I think probably makes it sound to bankruptcy judges like you always have to have a hearing, no matter what because, as you know, motions for summary judgment are very rarely granted.

So I think it's an unnecessarily confusing standard. I think that saying you need to have a live

hearing if you have a conflict in the moving and opposing evidence on an issue relevant to the motion is a much better way to put it without interjecting what is kind of a confusing gloss from summary judgment practice because really, you know, summary judgment practice is where you just have an issue of law. And the vast majority of our motions involve issues of fact, as well as law.

So I think what I'm suggesting is a much more--it's a standard with a lot less baggage and one that's going to be more clear to everybody about when they really need to hold a hearing.

JUDGE DUPLANTIER: Thank you, Judge, very much. We appreciate that.

Can we hear from Judge Riblet now?

STATEMENT OF THE HONORABLE ROBIN L. RIBLET

UNITED STATES BANKRUPTCY COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

JUDGE RIBLET: Good morning, Judge Duplantier and members of the committee. Thank you for hearing us on the West Coast this morning. I'm very appreciative of not having to fly to Washington in our busy schedules.

I'm Robin Riblet, bankruptcy judge from the Central District of California. I'm appearing this morning on behalf of the 21 bankruptcy judges of the Central District.

I get that distinction because I'm the chair of the Rules Committee for our district and was the chair of the ad hoc committee that drafted the letter that we sent, which constitutes our written comments.

Judge March and Judge Russell are also from my district and I echo many of the comments they've made already and will not repeat those points.

The first substantive point I would like to address is the virtual ban on local rules imposed by the committee notes accompanying proposed Bankruptcy Rule 9014. The comments of various of the districts in the Ninth Circuit have been posted on our circuit's bankruptcy website. I have read them and have discovered one common theme to be: please don't take away our local rules.

The comments of the various courts demonstrate that we have different methods of approaching law and motion practice. Our district tends to set most motions for notice hearing. That works real well for us. Other districts prefer a notice and opportunity for hearing approach, setting actual hearings on many matters only when a response is received. That approach works well for them.

There is no one single right or wrong, best approach. We're all very proprietary about our methods and the lawyers who appear before us day in and day out are comfortable with the procedures we employ. The fact that an

out-of-town or, more likely, an out-of-state lawyer wanders in to represent an interest in a high profile Chapter 11 case once in a while does not provide justification for imposing on our 93 districts a single method of practice.

I would hope that all districts have placed their local rules on their court's web page. If they're not Internet-available, they should be. And I would suggest that it would not be inappropriate to specify in the national rules where our local rules should be posted. The Administrative Office website comes to mind as an appropriate posting but perhaps the committee would think some other common location preferable. We have no intention of hiding our rules and have no objections to taking measures to ensure that they're available nationally.

I would next like to address several specific provisions of proposed Rule 9014. Subsection (g) I believe is unworkable for several reasons. That provision states that in the absence of a timely filed response, there will be no hearing on a motion unless the judge, prior to the hearing, notifies the movant and other appropriate entities that a hearing will be held. The lead time provided is five days.

If the judge decides for whatever reason that a hearing should go forward, a burden is placed upon the clerk and/or chambers staff to immediately track down and notify

all appropriate parties at the very last minute. That could prove to be of a tremendous burden. And in an era when the courts are being asked to do more with fewer resources, this provision strikes the judges of my district as a major step backward.

I believe this concern has also been expressed in the comments submitted to the committee by the Ninth Circuit Bankruptcy Clerks Liaison Committee.

Additionally, this provision effectively prevents the bankruptcy judge from considering an untimely but meritorious response. As Chief Judge Mund pointed out in her cover letter to our district's comments, the Central District of California, as well as several other large districts--notably, Arizona, California Eastern, Georgia Northern and New Jersey--each have Chapter 7 pro se filing rates in excess of 30 percent.

As regrettable as it may be, pro se debtors simply do not file responses, especially to motions for relief from the automatic stay. They just show up at our scheduled hearing, sometimes with a legitimate defense to the motion. More often, the creditor and debtor will use the hearing as an opportunity to make a deal and enter into a stipulation regarding adequate protection.

A rule which contemplates the granting of motions automatically without a hearing when no response is timely

filed will result, in our district at least, in many unrepresented debtors losing their homes and automobiles needlessly. The procedure may work well for some districts but it will not work efficiently for us and, I believe, for other courts with high pro se filings.

I would next like to turn to Subsection (c)(1) and (d)(1) of proposed Rule 9014 and urge the committee to set longer lead times for the filing and service of motions. The rule provides that motions and responses be served 20 days and five days prior to the hearing date respectively. We request that the time period specified be increased or that the rule be amended to allow courts to require increased time periods.

Five days is simply insufficient time for many judges to receive a response and adequately consider it. The better part of a day may elapse in the smallest and most efficient of clerk's offices between a response crossing the intake window and findings its way to the judge's or law clerk's in basket. The time lapse may be substantially longer in larger courts with operations located on many different levels of a single building or in multiple buildings.

The five-day response deadline also inhibits the moving party from filing a rebuttal or reply. If replies are to be allowed, please provide adequate time for their

filing and analysis by the courts. If they are not to be allowed, we would ask the committee to state so specifically. We all want to make the right decision as efficiently as possible. If responses and replies are filed and served at the last minute, it will decrease our efficiency.

If we have inadequate opportunity to consider all the issues of law thoroughly before a hearing on a difficult motion, we are far more likely to make a hasty, ill-considered decision, resulting in an increased chance of appeal, or we will continue the hearing so that all legal briefs and relevant law may be thoughtfully and thoroughly considered. In either case, the result is delay in a final resolution, increased expense for the parties, especially in the case of an appeal, and diminished efficiency for the courts.

The bankruptcy judges of the Southern District of California have also raised this issue as a significant problem for them in their comments to the committee. They know that their local rules require 28, 14 and seven days notice of motion, responses and replies respectively. Our district's local rule is very similar.

Echoing the judges of the Southern District, we would not presume to impose our time limits on any other district. The entire question of timeliness should be left

to local decision. However, if the committee is determined to impose a single briefing schedule on us all, my district would vigorously urge you to adopt a schedule more in line with that of our district or Southern California. Please do not deny us the opportunity to make our best decisions on issues of law with due deliberation at the first hearing. We desire to impart justice, not victory by ambush.

Another issue which we believe unworkable or at least extremely burdensome on all is the requirement that litigants submit proposed orders with their motions and responses. The submission of orders prior to a hearing will create extra work for both the clerk's office and chambers staff--processing, tracking and storing them.

It is also an extra expense for counsel to prepare an order which will very likely not be signed. Only one party will prevail at the hearing on the motion and the order which the court ultimately issues very often bears no resemblance to that proffered by either litigant.

If the hearing is to be held, it is far more expeditious for the order to be submitted in the courtroom at the conclusion of the hearing or lodged thereafter. The submission of an order with a motion is appropriate only when it is anticipated that the matter will be determined without hearing. We envision no circumstance in which a responding party should be called upon to submit an order

prior to a favorable determination on the motion.

I would note that both the bankruptcy judges for the Northern District of California and the Ninth Circuit Bankruptcy Clerks Liaison Committee have raised similar concerns in their comments with reference to proposed Rule 9014(b)(2) and (d)(3)(A).

Our districts also believe proposed Rule 2014 governing the employment of professionals to be unworkable as drafted. Subsections (c) and (d) provide that a motion to employ a professional person must be set for hearing on at least 10 days notice and it may be resolved without a hearing if no objection or request for a hearing is filed at least two days before the scheduled hearing date.

Dozens of such motions are filed weekly in each of the courts in our district and probably in every other district, generally with no objection from anybody. Occasionally an objection will be raised by the United States Trustee and very rarely by another party in interest. When objections are raised, we conduct hearings. Requiring that all such motions be calendared for hearing will cause our already-congested calendars to balloon.

Allowing the motions to be resolved without hearing if no objection is filed two days before the scheduled hearing date provides no realistic relief. By the hearing, judges will very often not know whether an

objection has been filed, as it could well take two days for an objection to be docketed and routed to the judge, particularly in large courts where the mailroom or intake window may be far removed from the judge's chambers.

Virtually all motions to employ, at least in my district, will remain on calendar and be heard, resulting in unnecessary hearings and expense to the estate.

Because of the generally noncontroversial nature of the employment of professionals, we suggest that their employment be treated by application, pursuant to proposed Rule 9013. Should an objection be raised by a party in interest, a hearing on the application could easily be scheduled. I would refer the committee members to the comments submitted by California Northern raising a similar criticism to proposed Rule 2014.

My final comment addresses proposed Rule 9013 relating to the use of applications. Although Subsection (c) requires that an application be served on enumerated parties, it provides no means by which the judge may determine if any opposition has been raised prior to signing the order, which the rule also requires to be filed with the application.

We urge the committee to provide more structure to the procedure envisioned. We would suggest that procedure be modified to provide that after service of the application

and the passage of the notice period without any opposition being raised, the applicant be required to file with the court an affidavit as to service and a lack of opposition. Furthermore, the order for the relief requested should accompany that affidavit.

Under this suggested procedure, the judge is presented with the order only when finding it is appropriate. Under the procedure we suggest, we will avoid the otherwise inevitable mistakes of inadvertently signing orders prematurely, as well as the separation of orders from their applications. Again the comments of California Southern are consistent with our own on this issue.

Thank you for your attention, committee members, and that concludes my comments.

JUDGE DUPLANTIER: Thank you, Judge.

Before we sign off our California group with our thanks, I think for the sake of the morale of the committee I might want to read into the record now a letter that Professor Klee received from Chief Judge Tina Brasman of the Southern District of New York. And if you already suspect that this is self-serving, it is.

It says this: "Dear Professor Klee: The Administrative Office of the United States Courts has forwarded to me the preliminary draft of proposed amendments to the Federal Rules of Bankruptcy Procedures. In speaking

with Larry King I learned that you were instrumental in drafting and advocating these reasoned rules.

"I just wanted to thank you for your work in producing such a thoughtful and practical set of proposed rules, which should go a long way toward unifying practice in the bankruptcy courts." And I'm told that this signature here is not a forgery.

Thank you again for joining us today. We appreciate it.

JUDGE RIBLET: Thank you, Judge Duplantier.

JUDGE DUPLANTIER: Okay, we'll take a five-minute recess.

[Recess.]

JUDGE DUPLANTIER: Our next witness is Judge Susan Sonderby of the United States Bankruptcy Court for the Northern District of Illinois. You may proceed, Judge.

STATEMENT OF THE HONORABLE SUSAN PIERSON SONDERBY

UNITED STATES BANKRUPTCY COURT FOR THE

NORTHERN DISTRICT OF ILLINOIS

JUDGE SONDERBY: Thank you, Judge.

Distinguished members of the Advisory Committee on Bankruptcy Rules, my name is Susan Pierson Sonderby and I'm the chief judge for the United States Bankruptcy Court for the Northern District of Illinois.

I want to thank you for the opportunity to be able

to comment on the proposed amendments to the Federal Rules of Bankruptcy Procedure on behalf of the 10 bankruptcy judges in the Northern District of Illinois. I trust that you have reviewed our December 21, 1998 letter, as well as the statement in opposition to the approval of the amendments that has been filed by our court.

What I'd like to do is make a few observations, make a few comments and make a few recommendations to you.

Our court has reviewed the results of the 1995 survey on the Federal Rules of Bankruptcy Procedure that was published by the Federal Judicial Center. We have also reviewed the minutes of your committee meetings that were held in March of 1997, September 1997 and March 1998, as well as some of the comments that have been received by your committee.

It appears to us that the Advisory Committee on Bankruptcy Rules gleaned from the six questions in the Federal Judicial Center survey of bankruptcy judges, lawyers, trustees, clerks and other participants in the bankruptcy system that the respondents wanted uniformity.

I'm going to read to you from the request for comment on the proposed rule that's been circulated. First, "A serious criticism of the bankruptcy rules is that there is a lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these

important substantive disputes."

Reading down, "Although such motions that are unrelated to pending litigation may involve millions of dollars to the litigants, the current rules provide little specificity or uniformity as to the procedures governing them."

Further on, "The result is that practice varies from district to district or from court to court. The Advisory Committee believes that greater specificity and national uniformity, as well as improvements to the current procedures, are desirable for such motions that are unrelated to any pending litigation."

And lastly, "In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief that is unrelated to pending litigation. These amendments should reduce substantially the number of local rules."

And then when I looked at your minutes I found that a member of your committee commented that, and I quote, "The sole finding of the FJC's study was a desire for uniformity." And I took that from your committee meeting minutes, September 1997.

In fact, the only mention of uniformity in the survey appears at Appendix B on page 38 and that is in response to and the last comment regarding question number

3. Reading question number 3, it says, "Are there any matters that should be addressed by the Federal Rules of Bankruptcy Procedure and related forms that currently are not? If yes, please desire below each matter you think ought to be addressed by the rules and related forms and where wherein the current organization and any reorganization you proposed in question 1 of the rules and forms it should be addressed."

The last comment in response to that is, and I quote, "General comments regarding the desirability of uniformity of practice across districts and according parity to rules that augment but do not conflict with the Bankruptcy Code." A general answer to a very specific question.

The survey does not detail how many respondents answered that comment or if, in fact, there was even more than one. Nevertheless it's notable that while the subject of uniformity was mentioned only once in the survey, other subject categories have been listed multiple times.

The summary of the survey explained that, and I'm reading from page vii, "Most of the respondents to the questionnaire indicated that they did not see a need to change the rules and forms, had not experienced problems with the rules and forms or had no opinion on the particular changes being asked."

Also on page 5 under organization of bankruptcy rules and forms, it states, "As Table 2 shows, a relatively small percentage--that is, 16.2 of the respondents--thought the current organization of the Federal Rules and related forms should be revised."

I also note that the overall response rate to the survey was only 23 percent. That amounted to 720 responses and there were only 13 percent that were from private bankruptcy practitioners. Those people are probably the most adversely affected by the proposed amendments.

Further, the concerns expressed were probably skewed toward those who are unhappy with the current rules. The survey itself acknowledged that when it said, "It is possible that those who think the rules are problematic responded at a higher rate than those who find the rules satisfactory. See the Federal Judicial Center survey at page 5."

Plainly the FJC's study does not support the committee's conclusion that uniformity is desirable.

Now let's take a look at a couple of the rules. Because the most important and fundamental changes would be to Rules 9013 and 9014, allow me to apply some facts to those rules.

Number one, a bank or other lender has not received a mortgage payment for over a year. After repeated

efforts to collect, foreclosure proceedings were commenced at a cost to the lender. That procedure took a year and a sale of the property was scheduled. The day of the foreclosure sale the debtor files for Chapter 7 protection.

The property is located in a sparsely populated county where a bankruptcy judge sits only every two weeks. Debtor's counsel indicates that his client knows he has no equity in the property. The bank discovers that the debtor has failed to pay his insurance premiums on the house and the insurance has lapsed. No real estate taxes have been paid for two years. The bank instructs its counsel to move immediately to lift the stay.

Under the proposed amendments to the rules, the bank's counsel needs a couple of weeks to get the required paperwork together, including the affidavits and an appraisal. By the time he sends out the 20-day notice and has to add 12 days more to accommodate the judge's schedule, the creditor is entitled to a preliminary hearing within 30 days and then a subsequent final hearing within an additional 30 days. Even though the debtor admits that there was no equity in it property, the creditor is held at bay for over 106 days after the petition date.

Now I might add that pursuant to the local bankruptcy rules in the Northern District of Illinois, this stay would probably have been lifted on the day of

presentment, which would be seven days after notice had been mailed.

Example number two. A debtor is driving an expensive sports utility vehicle on which he's not maintained insurance or made payments for six months. Shortly after filing for bankruptcy protection, the holder of the lien on the vehicle wants to move to lift the automatic stay. He needs at least a week to get the affidavit and appraisal together and then has to wait 20 days in order to provide the required notice.

Before the date of presentment, the car is totalled. The creditor has lost the value of its lien.

Number three. The elderly owner of a three-flat has a tenant who's paid no rent for two months. He needs the money to pay his utility bills and to maintain the property. He starts proceedings in the state court and finally gets an order for eviction. By now he's not received rent for six months. The tenant files for bankruptcy protection.

The landlord immediately files for relief from the automatic stay on the ground that the debtor no longer has any right in the apartment. He pays a lawyer to prepare the affidavits and waits for the notice period to pass. The tenant files a timely response before the presentment date and the court finds that there is a genuine issue of

material fact.

Under the proposed rules, the court would have to conduct a status conference "for the purpose of expediting the disposition of the proceeding and scheduling the evidentiary hearing." After paying the lawyer and going through the process, including three court appearances, the landlord is unable to pay the utility bills on the property.

Example number four. A large grocery store files for bankruptcy protection. Lenders of perishable products have not been paid. They want assurances of payment or at least the court's blessing to resell their products elsewhere.

The court becomes an emergency court in order to handle the deluge of motions.

The cost of bankruptcy will increase dramatically for both debtors and creditors if the proposed amendments are enacted. Attorneys who represent creditors will have to reevaluate the cost of making garden variety lift-stay motions because the requirements of affidavits and appraisals, flat fee Chapter 7 charges will become obsolete. Hourly rates will have to be charged and the cost of lending will increase. These costs will be passed on to the debtor.

In simple terms, the proposed amendments will defeat the goal of prompt and economical resolution of disputes. They're inconsistent with the basic purpose of

the Federal Rules of Bankruptcy Procedure, which is and I quote, "To serve the just, speedy and inexpensive determination of every case and proceeding," citing, of course, Federal Rule of Bankruptcy Procedure 1001.

Some of our courts' other concerns are spelled out in our letter and our statement.

So what, you ask, do we recommend? We recommend that national standards for bankruptcy motion practice should be established that include requirements of adequate notice and opportunity to be heard and object and the taking of oral testimony or the submission of affidavits on any genuine issue of material fact.

Each district should be required--

JUDGE DUPLANTIER: Can I interrupt for a minute?

JUDGE SONDERBY: You may.

JUDGE DUPLANTIER: Do you think judges ought to decide matters on affidavit when there is a genuine issue of material fact?

JUDGE SONDERBY: No, I do not.

JUDGE DUPLANTIER: I misunderstood that. I didn't mean to interrupt you. Go ahead.

JUDGE SONDERBY: That each district should be required to have local bankruptcy rules that mirror as closely as possible the District Court local rules so that attorneys can move easily between the District Court and the

Bankruptcy Court.

Local rules should be required to be published with the clerk of the court, as well as on the website for each court, and local rules should be numbered to conform with the Federal Rules of Bankruptcy Procedure so that out-of-district lawyers can easily access them.

On behalf of the bankruptcy judges of the Northern District of Illinois, thank you for allowing me to make this presentation to you. And thank you for your careful consideration over our comments and the recommendations that we are making. I'd be happy to answer any questions you might have.

JUDGE DUPLANTIER: Thank you.

Does anybody have any questions of the judge?

JUDGE ROBRENO: I think you suggested perhaps some overarching principles that ought to govern the rules. Would the purpose of that be that in the event a relief was granted in violation of one of those overarching principles, the remedy would lie on an appeal--that is, there had been a violation of the procedure below and therefore the litigant would be left a way of correcting the particular violation?

JUDGE SONDERBY: Assuming that a motion to reconsider was denied, yes.

JUDGE DUPLANTIER: Thank you, Judge.

JUDGE SONDERBY: Thank you very much.

JUDGE DUPLANTIER: I'd ask all of our speakers, and everyone thus far has done it and we appreciate it; try to limit your comments to in the neighborhood of 15 minutes. We do have a lot of folks we want to hear from. Thank you.

Judge Clark.

STATEMENT OF THE HONORABLE LEIF M. CLARK

UNITED STATES BANKRUPTCY COURT FOR THE

WESTERN DISTRICT OF TEXAS

JUDGE CLARK: Members of the committee, I want to thank you for the opportunity to testify at these hearings. I am a United States Bankruptcy Judge for the Western District of Texas. This is a district that includes the cities of San Antonio, Austin, El Paso. All of these are sizable cities. San Antonio is about a million people; Austin is approaching that fast. El Paso is about 600,000 people, the largest city in the United States incidentally without a sitting judge--El Paso.

Also it includes Waco and Midland, both smaller communities. Ours is a geographically large district. It's over 700 miles and one time zone from Waco, Texas to El Paso, Texas. By the time you get to El Paso, you're halfway to California. It's a huge district.

Within this district I'm here on behalf of myself and my colleagues in the Western District of Texas and on behalf of the clerk of our district.

I've been a bankruptcy judge, as I said, for 11 years and I have the privilege of sitting in what I like to think is one of the most efficiently managed and operated bankruptcy court systems in the nation. That is my personal opinion but it is also the conclusion of the Administrative Office of the United States Courts, which has found that the Western District of Texas has been one of two courts recognized for meeting or exceeding the national average in all 17 categories of measurement of case processing year for the last eight years. And we've done it under budget every year.

I share this with you not so much to brag but to confirm that we are, I think, doing something right in the Western District of Texas. We are currently operating at about 60 percent of the staffing level that is justified by our case filings and we've done so for the past two or three years.

Although our filing level justifies a fifth judge, we have not found it necessary to fill that position to date, this despite the fact that we are one of the most geographically dispersed districts in the nation. And we have been able to operate at these levels, I believe, under budget eery year for the past six years because of the procedures that we employ in our district.

Our happy success at case management has been a

true team effort. The judges recognize that we do not operate in a vacuum, that the way we manage our docket can have a direct impact on the ability of the clerk's staff to handle the paper flow efficiently.

As a result, we have adopted case management techniques that are designed to make cases run more efficiently for our constituents and more economically from the standpoint of our clerk's operation.

In the main, that policy translates into not creating any more docketing than is necessary to comply with the statute and the rules and with the legitimate desires of our constituents.

For example, we long ago adopted a rule in our district that in Chapter 11 cases votes on Chapter 11 plans would not be sent to the Clerk of Court and filed one by one. Instead, they would be sent to the plan proponent, who would then be responsible for assembling them and then preparing a statement that summarized the ballots and, under penalties of Rule 11, submitted them in a single document which was then filed with the Clerk of the Court. In a large case this can mean the difference between one docketing even and 2,000 or 3,000 or 4,000 docketing events.

So the filing of the ballot summary is one of those devices that we have used to help save time and money.

An important technique for reducing docketing

events is the use of suspense files. Pleadings may be filed with so-called negative notice, held for a requisite time period and then an order signed at the conclusion of that time period. There are in the usual case only two docketing events: the motion and the resulting order. Only if an objection is filed will a hearing then be set. And in that event, two more docketing events. By not setting a hearing on every motion, we substantially reduce the number of docketing events required to be performed by our case managers.

It is easy to assume that a little bit of extra docketing can't be all that important. The truth is that time is money and in the aggregate, these things add up.

Our Clerk of Court estimates that the average cost per docket entry item, taking into account only the cost of the case manager, is $2.69 per docket entry. If one factors in the support staff, from supervisors to systems managers, the cost averages out to about $5.87 per docket entry. Neither of these numbers includes the costs of furniture, computers, utilities or lease payments, costs which rise when the number of personnel rises.

In fiscal year 1998 our district logged 432,263 docket entries. Of that number, 30,485 were hearing settings. My staff advises that the average docket entry takes six minutes and each case manager averages 50 entries

per day. Adding in paper-handling, faxing and the like can increase the average time each such entry takes.

Additional settings also require additional noticing costs, costs which will either be borne by the courts or imposed on the parties.

In fiscal 1998 our Bankruptcy Noticing Center cost was $123,007.74. If the increased noticing obligations are observed by the courts, we may expect that number to increase by some factor. It's difficult to know by how much.

The proposed bankruptcy rules will, we believe, force us abandon our suspense file system. Instead we will have to docket a hearing setting for every administrative proceeding. Instead of 30,485 hearing settings we may anticipate a tripling or quadrupling or more.

Adding just 60,000 new docketing events, and I think that that is very conservative in terms of the actual new docketing events that would be added by the rules, but just adding 60,000 new docketing events adds an average cost of $161,400 just in case manager time.

The actual cost would be higher because 60,000 events is also 360,000 additional minutes of time. The average time spent on docketing by case managers is 300 minutes per day. That comes to an additional 1,200 worker-days per year to handle the additional workload. three or

four additional employees just for docketing, plus benefits, space, equipment and the like. Increased docketing responsibilities quickly convert to increased expenses.

As I indicated earlier, we are currently operating at 60 percent of our recommended staffing per the current work measurement formula for our caseload. Yet we have been successfully operating at that level for a number of years now thanks to internal procedures that make maximum productive use of our workforce. We cannot impose more work duties without hiring additional staff.

That, in turn, will force the Judicial Conference to ask for more money to operate the court system in the Western District of Texas and many other places throughout the country, as well, for we are not unique.

We should give very, very careful consideration to a change in the rules that threatens to increase the cost of operating the system and we should be confident that the benefits of such a change are so important and so valuable that they more than offset the countervailing costs that they impose. I do not believe the current proposals pass that test.

I'm not here to attempt to address in detail the rules as proposed, as I've already done that in my earlier written response which you have before you. The overall structure of the rules changes, however, would clearly

impose new duties on our case managers to docket hearing settings. They would clearly force our courtroom deputies to surrender control over their docket, making case management much more difficult and much more expensive.

The benefit that these proposals yield in exchange for these costs are ostensibly uniformity in nationwide practice, further clarity in identifying matters that can be disposed of without hearing and without invoking formal litigation rules, and appropriate due process and litigation protections in the event a hearing on a matter is needed.

I heartily endorse these goals. Most dispositive motions are more like trials than they are like ordinary motion practice in District Court. There ought to be uniform national rules governing the handling of such matters with appropriate protections for due process for the litigants.

It is my belief, however, that the goals sought can be obtained without employing the procedures that are recommended here. Though I concur in the importance of achieving these benefits, I believe they can be accomplished without employing what appears to be a fairly cumbersome and expensive procedure.

A simple clarification to the rules that confirms which matters can be handled on a limited or no-notice and no-hearing basis and which matters cannot is certainly

appropriate and it is welcome and I endorse that proposal in the rules. We have a similar local rule in place in the Western District of Texas.

Also a rule that the adversary rules and appropriate protections of objecting parties' interests is appropriate and in order, although I would endorse that proposal with some modifications. These proposals again are entirely consistent with the procedures that we use in the Western District of Texas today and which I understand are in place in many other districts, as well.

I would strongly discourage adopting a rule that de facto requires status hearings in all matters in which an objection has been filed, however, because it introduced unnecessary costs and delay.

Our experience has been that such status hearings are, in the main, a waste of everybody's time. Nothing happens. Nothing happens. The actual trial of the matter is simply deferred for an additional month or longer. A better rule would be to accord the court the discretion to treat the hearing as preliminary where the parties show that that would be in everybody's best interest. In other words, don't adopt a rule to deal with the exception. Give the court the discretion to adjust the rule to deal with the exception.

Concerns about uniformity can, of course, be met

so long as the procedure employed is one that is easily understood, easily implemented and universally mandated. The negative notice procedure that we use for processing a large percentage of our cases I believe can and should be employed on a nationwide basis precisely because it is easily understood, just as easily implemented, at a minimum cost to a state administration and court administration.

Incidentally, in that regard I do endorse the committee's recommendation that proposed forms of order accompany motions. I know that some of my colleagues disagree with that. However, we have been using that procedure for over 15 years in the Western District of Texas and it is one of the reasons that we can operate as efficiently as we do. It does not make work. It saves work and it saves time.

I think the principal concern that might be raised about the negative notice process is the extent to which it does or does not accord parties an adequate opportunity to prepare for a hearing. I submit that in our experience, parties have not been unfairly prejudiced by a rule that, upon objection, the matter is set for hearing. And I hasten to add that in my 11 years experience on the bench, I have treated a hearing as just that--a true evidentiary hearing at which the Federal Rules of Evidence and the Rules of Civil Procedure, as made applicable in

bankruptcy, are applied.

I do not use affidavits in lieu of live testimony. I do not in the main use proffers as a substitute for live testimony. When the subject matter of the hearing is sufficiently complicated that further discovery time needs to be accorded to the parties, and that usually is the exception, not the rule, it is easy enough to continue the matter on the parties' request or to treat the setting as a preliminary setting. Due process rights are zealously protected in our courts.

I believe the rules can successfully achieve their end by restricting or eliminating the use of proffers and affidavits as a substitute for evidence. That rule can easily be incorporated into the negative notice procedure now regularly employed by many, many districts around the country.

In short, I would like to recommend that the committee not proceed down the road charted by these proposed rules, though I strongly agree with the principles that the committee is trying to achieve. Instead, I recommend a much closer examination of rules and procedures already in use in districts which have a demonstrated track record of efficient case management, both from the point of view of the litigants and from the point of view of the efficient operation of the clerk's office.

I submit that litigants have never complained, to my knowledge, in our district that they have in any way been denied their opportunity for their day in court by the rules of practice and procedure that we employ. And I modestly suggest that we just might be doing something right in Western Texas, something that might be worth emulating nationwide.

I'd like to thank you for the opportunity to address the committee and I'll be happy to answer any questions you might have.

JUDGE DUPLANTIER: Thank you, Judge.

Judge Small?

JUDGE SMALL: Judge Clark, you use the negative notice practice and we do, also. Judge March talked about the 30 percent pro se cases and felt like some pro se litigants are losing their rights as a result of--could lose their rights. How do you deal with the pro se cases?

JUDGE CLARK: One of the really sad and difficult things that we have to deal with in judicial systems, it seems, and bankruptcy courts are not unique in this--court systems state and federal, nationwide, face the same problem--is that litigants are often not able to afford counsel and they come into court without the benefit of counsel. And the sad but true statement is that they are not as well served.

The court does not have an obligation to be their lawyer. The court does have an obligation to try to bend over backwards to make sure that they have their day in court.

Generally if a pro se litigant files something, and our experience has been that pro se litigants in fact do respond to motions on negative notice, the key is to make the negative notice clear enough that--we should follow the same rule that Time Magazine follows. Time Magazine writes for the eighth-grader or the sixth-grader. That's how we should write our notices, and that's what we try to do. And we'll treat almost anything as a response--a handwritten letter, a letter sent directly to the court, reconsiderations. There are all kinds of things that can be done.

Now admittedly, the situation in Western Texas is not the same as the situation in Los Angeles. They've got a problem of a whole other order.

MR. KLEE: And in that vein, Judge, because you have urged a national rule with your negative notice procedure, can one size fit all? Can we have a rule that works in urban areas and rural areas?

The reason I ask you is it occurs to me your district is one of the few that has urban areas and rural areas and we've heard that seven days in Chicago, 24 in

L.A., 28 in San Diego--can we have a one size fit all? Is it wise? Does it work? Or should we have local variation?

JUDGE CLARK: It's a tough call. There's much merit to what I believe one of the judges--I believe it was Judge Riblet; I'm not sure--who'd said please don't take away our right to make local rules. I do think that there needs to be the ability to make some adjustments on a local basis for extraordinary needs.

We have had poor luck at the District Court level, as I understand it, with attempting to prescribe single national rules that take away from the district judges the ability to tailor practice to local needs. And I think that we may have to have some flexibility in this area, as well, for the same reason.

JUDGE DUPLANTIER: Thank you, Judge. We appreciate your coming.

Mr. Patton.

STATEMENT OF JAMES L. PATTON, ESQUIRE

DELAWARE STATE BAR ASSOCIATION

MR. PATTON: I want to thank the members of the committee for giving me the opportunity to appear today. I'm the chairman of the Bankruptcy Law Committee of the Commercial Law Section of the Delaware State Bar Association and our committee previously submitted a letter commenting on the preliminary draft of the proposed amendments to the

Federal Rules of Bankruptcy Procedure. I sought an opportunity to appear before the Advisory Committee to emphasize just a couple of additional points.

By way of background about me and my firm, in addition to representing corporate debtors and creditors in many, many cases in the District of Delaware, we have reorganized debtors in a number of other jurisdictions, including the Middle District of Florida, the Eastern District of Louisiana and the District of Minnesota.

While I recognize the need for greater uniformity in the administration of bankruptcy cases, I've found that the application of local rules and the application of the existing bankruptcy rules in the various jurisdictions have been quite workable for my part and in my experience.

At the same time, I've observed other practitioners, particularly those who represent creditors as opposed to debtors and who appear on a more sporadic basis before those courts, having trouble navigating the nuances of the local practice in the jurisdictions where they appear if they are not members of the local bar.

To obtain uniformity, of course, bankruptcy courts must be given less flexibility in the application of the rules. And while the preliminary draft of the proposed amendments does a terrific job of attempting to serve the goals of greater uniformity and a guarantee of a full and

fair hearing, the proposed amendments create at least two pitfalls in my view, one relatively minor and one somewhat more major.

In the minor category is the amendment to Rule 9017 and the new rule 9014(j) which takes away the application of Civil Rule 43(e). My comments are a little different from the others that have been made with respect to that and I won't give you the full flavor of my comments because they're somewhat repetitive, only that I want to emphasize that a distinction needs to be made in the bankruptcy context between the application of Rule 43(e) and a hearing, where there are a broad panoply of facts and issues presented to the court.

For example, in a sale hearing where there is a motion before the court to approve the sale of assets, together with or coupled with a motion to approve the assumption and assignment of leases, the way the rule is currently written, in my interpretation, if there were an objection filed by a landlord to the assumption and assignment of a particular lease, that would turn the matter into an evidentiary hearing if there were a genuine issue of contested fact.

And then arguably if Rule 43(e) were not available, the entire hearing would have to be considered a trial and every issue that was presented to the court would

have to be presented through live testimony.

To the extent that that ambiguity is created by the amendment, I see no reason to allow that to stand. And it should be made clear that only those issues that are identified as contested facts are the ones that are going to be presented through live testimony and with respect to which Rule 43(e) does not apply.

More significantly, we are concerned that by creating a very detailed and somewhat cumbersome set of procedures for matters arising under proposed Rule 9014 and by making Rule 9014 the default set of procedures for all matters coming before the bankruptcy court, the adoption of proposed Rule 9014 will become a self-defeating exercise.

That is, by attempting to impose greater formality and rigidity on the process as applied by bankruptcy courts to resolve what are now called contested matters, the employment of provisions such as proposed Rule 9014(o) will undermine any attempt at increased uniformity. Proposed Rule 9014(o) permits the court to modify all of the procedural requirements of proposed Rule 9014.

Some of the judges with whom I've discussed proposed Rule 9014 suggest that their principal concern is the fear that its application will multiply the number of hearings they must schedule and pleadings they must review, and I think some of the comments today bear that concern

out.

Practitioners, on the other hand, face the prospect of an increased uncertainty in determining when a matter is likely to be resolved and on the part of practitioners, determining when a matter is likely to be resolved is often as important as knowing what the resolution ultimately will be.

Under the proposed Rule 9014 it's contemplated that the final hearing date will not be selected until the status conference is held.

The subcommittee of my committee in Delaware that prepared comments on the rule consisted of approximately 15 lawyers and we were joined by our two bankruptcy judges, Judge Walsh and Judge Walrath. In the course of preparing our formal comments to the proposed amendments, we began discussing how proposed Rule 9014 would be applied in practice if it were actually adopted.

We could think of very few circumstances in which the additional time and formality of a status conference and period of discovery greater than that available under the current rules would provide a meaningful advantage to either party. We did acknowledge, however, that the ability to create delay could be of significant tactical advantage to a respondent to a motion.

Generally it's my view that disputes regarding the

assumption and rejection of contracts, the extension of time to assume or reject contracts, relief from the automatic stay, extensions of the period of exclusivity and the auction and sale of property are all matters that rise and fall on a very limited constellation of facts in most disputes.

Courts and litigants will face the impulse to invoke Rule 9014(o) or Rule 9014(i)(1)(B) at the time a motion is actually filed to ensure that the matter gets resolved at the scheduled hearing, that all parties bring witnesses to that hearing and that any discovery will be completed before the hearing.

Additionally, my experience is that most hearings conducted by bankruptcy courts are of a relatively routine nature and this includes most of the hearings that will fall under proposed Rule 9014. If I'm right, courts and practitioners will find that the proposed Rule 9014 makes many relatively simple matters unnecessarily complex and time-consuming.

And if that happens, I believe that the invocation of the exceptions contained in proposed Rule 9014--that is, the invocation of Rule 9014(o), which permits the court to modify all of the procedural requirements of 9014 and Rule 9014(i)(1)(B), which permits the court to order in advance of the scheduled hearing that it will be an evidentiary

hearing rather than a status conference--will result in an almost habitual disregard for the underlying policy of 9014, which is to provide a fuller opportunity for litigants to take discovery and present their case to the bankruptcy court in matters that warrant such an opportunity.

My suggestion would be to rewrite proposed Rule 9014 in a manner that presumes that any hearing scheduled by the court will be an evidentiary hearing but that upon the filing of a response, the movant or respondents may request that any evidentiary hearing be deferred to a later date. In that way the parties would have an opportunity to prepare for the hearing as an evidentiary hearing and that only if the court, upon consideration of the respondent's request, determined that further discovery or a fuller hearing on disputed facts were required would the matter be turned into a status conference.

To handle the decision in the interim between the filing of a response and the scheduled hearing, the court would have to develop a mechanism or the rules would have to provide for a mechanism for the court to address the respondent's request. Whether that's done by teleconference or on ex parte consideration of the application of the respondent is a matter upon which I have no particular opinion. But I believe a mechanism could be devised that began from the starting point that the originally scheduled

hearing was going to be evidentiary unless the court determined otherwise.

Under the current version of proposed Rule 9014, as I've indicated, I predict that the courts will enter orders at the time motions are filed establishing that the scheduled hearing will be an evidentiary hearing and, in effect, will be prejudging the issue of whether complex factual disputes exist.

In short, the exceptions that are built into Rule 9014 will swallow the rule. In fact, on reflecting on our local rules and the local rules I've seen in other courts, I can imagine a way to fashion the existing procedures in most courts so that the use of Rule 9014(o) would enable the courts to tailor the existing procedure that is being applied right now in their jurisdictions to fit within this rule with very little change, which I think would defeat the underlying purpose of the proposed change to Rule 9014 and, in fact, would undermine the overarching policy of the proposed amendment, which is to create greater formality and uniformity.

The solution, as I said, is to start with the presumption that there's going to be a single hearing, that it will be an evidentiary hearing and that only upon specific application could that presumption be changed.

Thank you for the opportunity to address you all

and I'll be happy to answer any questions.

JUDGE DUPLANTIER: Thank you, Mr. Patton.

Does anybody have any questions?

JUDGE ROBRENO: I have a couple of questions. One, there's been some criticism that in your district there was for some period of time the local rules were not easily available to out-of-town practitioners and that there were certain procedures which were of an informal nature and available only to local counsel.

Would this kind of a proposal correct those matters if, in fact, they existed? How would you suggest that that kind of unfairness be remedied?

MR. PATTON: Well, there are a couple of answers to that. Let me begin at the practical level. There is a set of formal local rules that look like the local rules that most jurisdictions have adopted that are in the process of being approved. They've been drafted and they're now sitting with the District Court and the Bankruptcy Court for approval.

But taking the broader question that you asked in terms of our jurisdiction as it was and other jurisdictions that may be equally informal, I don't think this would solve the problem because what I would do if I were a judge in a jurisdiction that was busy is I would, at the filing of a motion, make a determination whether or not I was going to

invoke one of the exceptions to Rule 9014 and I would have the same secret local practice of routinely imposing or invoking Rule 9014(o), for example, at the filing of every Rule 9014 motion.

The same unwritten procedure could be employed under this rule as under the existing rules. I don't think you can eliminate Rule 9014(o) because there are legitimate occasions when one must have the ability to modify the rule. But as long as Rule 9014(o) exists, the kind of unwritten practice that you're describing will be able to continue to exist. The only way to get around that, I think, is probably through judicial education and applying pressure on courts to adopt formal local rules.

JUDGE DUPLANTIER: Anybody else have any other questions?

Thank you very much, Mr. Patton. We appreciate it.

Judge Whelan.

STATEMENT OF ROGER WHELAN, ESQUIRE

FEDERAL BAR ASSOCIATION

BANKRUPTCY LAW SECTION

MR. WHELAN: Good afternoon. I am Roger Whelan. I am senior counsel with the Washington law firm of Shaw, Pittman, Potts & Trowbridge and practice primarily in it Chapter 11 arena on a national basis. However, I have

served for 12 years as a United States Bankruptcy Judge.

In fact, my career has a judge actually began as a referee in bankruptcy. For those of you who are old enough to recall, those are the individuals with black and white striped shirts who blew whistles and made decisions on a hurried basis.

I am presenting, of course, the position of the Federal Bar Association's National Bankruptcy Section and would point out that by unanimous vote of our executive committee, we have submitted the summary proposals that I have submitted to Mr. McCabe on January 21.

I would also point out that we have two active bankruptcy judges who are presently serving as officers on the executive committee--Judge James Garrity from the Southern District of New York and Judge Jack Smetterer from the Northern District of Illinois.

As pointed out in my paper of January 21, of course, we incorporate and we support in essence the recommendations and comments primarily of Judge Russell, who spoke first to you this afternoon, and, of course, the judges of the Northern District of Illinois, as represented here today in the person of Judge Sonderby.

There are primarily three areas that I would address. One, of course is with reference to 9014 with respect to a new concept; namely, that of administrative

proceedings. Particularly harkening back to my judicial experience as a referee, it kind of reminds me of what we would be using under the old Bankruptcy Act.

I think based on the approach and the concept as I envision it and what I would hope is intended by the Rules Committee, that this might more appropriately be captioned "Contested Motions." Certainly it is my experience and belief, based on my appearance in numerous courts and contacts with both judges and practitioners on both sides of aisle, that we envision under the existing rules that applications in connection with existing Bankruptcy Rule 9014 refers primarily to those uncontested matters that we are accustomed to dealing with, such as applications for appointment of counsel.

In connection with other contested motions, and here, and why I make specific reference to contested motions, is the fact that I think and certainly it seems to be the finding of the Advisory Committee dealing with these rules, that the existing rules dealing with adversary proceedings commenced by the filing of a complaint seem to be functioning quite well.

That leaves us with contested matters, which have traditionally been addressed by motion. I think for that reason that the utilization of a new term, administrative proceeding, is very likely to cause confusion on the part of

those attorneys in particular who do not practice in the bankruptcy arena.

Secondly, in connection with the so-called abrogation of FRCP 43(e), it certainly, at least initially on a reading and certainly based on the comments today, reflects a concern that abrogation of this rule would reduce the flexibility that bankruptcy judges presently enjoy and that is certainly customary in connection with the existing practice at the District Court level, who frequently rely upon the admonitions of 43(e) to at least judge in the initial stages whether or not there is a factual issue which, in turn, will have to be addressed in an evidentiary hearing.

Certainly after reading these rules through several times in connection with 9014(j), I think it's probably a fair assessment that the concern, and particularly with reference to evidentiary hearing, is that there are some judges in isolated districts that, at an evidentiary hearing, will rely solely on proffer or upon affidavits. This clearly is contrary to the Federal Rules of Evidence and certainly in my view, and I think in the view of all judges, would be ultimately a deprivation of due process with regard to the elements of notice and opportunity for hearing.

But however that may be viewed, I think that at

least the opinion of the members of the committee with their reading of and their terminology with reference to the abrogation of Federal Rule 43(e) would be a mistake, primarily because it would hinder the flexibility that many judges feel is necessary, particularly in dealing with consumer cases. And clearly it is consumer cases now that consume the bulk of time and hearing on the part of our nation's bankruptcy courts.

Secondly, one of the voiced concerns of our committee as set forth in our letter of January 21 is the concern particularly addressed by Judge March and by Judge Russell. That has to do with the elimination of the need on the part of individual consumer debtors to submit affidavits or other documentary evidence in connection with a pending motion.

I think in the long run, that could be a great mistake and I don't think it's in keeping with certainly the judge's oath to treat the rich and poor alike, to give neither an advantage but rather, to address the underlying merits as they are presented.

So to raise or to elevate an individual consumer debtor and eliminate that need, clearly, at least in my view and the view of our committee, puts litigants at a distinct disadvantage. And I think for those reasons it would be a great mistake.

I think also, and I certainly, as do the members of my committee, commend the tremendous work and effort that has gone on by each of your efforts in connection with these rules, clearly the need to achieve uniformity is a desired goal. I think that is particularly true in connection with megaChapter 11 cases. In connection with the overwhelming number of individual consumer debtor cases, these are handled by local counsel.

I very rarely see attorneys from New York traveling to California to represent a debtor in a consumer case and that strikes the chord with reference to the remarks of Judge Russell and Judge March in particular. And that is in keeping with the administration of these type of cases, it is essential that judges, of course abiding by the established rules of due process--opportunity and notice for hearing--that there be a certain degree of flexibility.

The present and proposed rules under 9014 could very well result at least in three separate hearings. I think that is a primary concern of the members of the committee, particularly the judges who serve on our executive committee at the level of the Federal Bar Association and feel again that this would ultimately be a deprivation of due process for many consumers.

We feel then that if there is going to be a need, at least by way of proposing a rule along the lines of the

proposed 9014, that it be made more applicable and geared to the Chapter 11 cases which attract your national practitioners and who have a concern that by local rule, they may in some way be disadvantaged or ambushed by local counsel.

That concludes my remarks. I want to thank you for the attention of the members of this committee for the opportunity for me to appear on behalf of the Federal Bar Association. If any of you have any questions, I hope I can address those.

JUDGE DUPLANTIER: Ken?

MR. KLEE: Judge--I guess once a judge, always a judge.

Based on your experience as a judge and a practitioner, do you think that in the consumer cases a motion that is filed without evidence or affidavit but that is unopposed can be granted by a judge, should be granted by a judge? Should that be something on which there is uniformity or variation?

MR. WHELAN: I think ultimately, Ken, it depends on the discretion of the judge. I think the judges have a feel for those cases and in some cases that certainly the principle is clear: there has to be evidence on which a judge grants a motion. But we all know, as a matter of practice, that there are exceptions and hopefully if an

injustice has been done, it will be brought to the attention of the court, usually by way of a motion for reconsideration.

JUDGE DUPLANTIER: Any other questions?

Thank you very much.

MR. WHELAN: Thank you.

JUDGE DUPLANTIER: Ms. Calton.

STATEMENT OF JUDY B. CALTON, ESQUIRE

DETROIT BAR METROPOLITAN ASSOCIATION

DEBTOR/CREDITOR SECTION

MS. CALTON: Thank you for allowing me to appear today. I'm Judy Calton from the Detroit law firm of Honigman, Miller, Schwartz and Cohn and I'm testifying on behalf of the Detroit Metropolitan Bar Association. I submitted written comments on behalf of the Advisory Committee of the Eastern District of Michigan Bankruptcy Court. That's an umbrella group of the Michigan Bar Association, the Clerk of the Court, the U.S. Trustee, the Chapter 13 Trustee that meets regularly with the Eastern District of Michigan judges.

Before I give any criticism, we'd like to wholeheartedly support the proposed changes to Rule 4003. This is such an excellent change to clarify that the time to object to exemptions will not run while a timely motion to extend is pending.

We'd like to see this rule made more general, for virtually any motion to extend a time, that the time which is the subject of the motion won't run before the hearing can be held. Certain examples, like a motion to extend exclusivity or a motion to extend the time to assume or reject if the hearing isn't held before the time would otherwise run out, that it would be extended until the hearing was held and we wouldn't like a negative implication that because there's this rule on the exemptions, that therefore it isn't extended on these other ones.

On the other hand, we dispute the premise that we need national uniformity in rules for practice. And on a personal note, our firm represents General Motors nationwide and in Canada with respect to its financially troubled suppliers, so that we practice on a national basis and regularly appear in different courts around the country.

And we have not seen any problem with variation in local rules, at least to the extent the local rules are published. The problem that we tend to find is an unpublished practice, which I don't think this proposed rules would address, and that's pretty much will the hearing that is scheduled be a hearing at which evidence will be taken? Should we bring in our witnesses from out of town? And unfortunately, we find quite often when we call and try to talk with the court or the judge's clerk that you're

told, "If you don't know, we're not going to tell you," which does run up the cost quite a bit when you have to troop in your witnesses from out of town, whenever everybody knows "Boy, on Monday afternoons we never take evidence."

As I said, I don't think these rules address it one way or the other and wouldn't correct that.

In addition, we see advantages to allowing variation in the local rules: experimentation--we've had the negative notice in our court and it's worked very well--and the adaptation based on the workload of the courts and the type of cases.

I'd give an example on proposed Rule 2014, which would require a motion and a hearing on retention of professionals. I would say it's far less than 1 percent of the cases where there's any controversy on the retention of professionals and it just wouldn't accord with what's necessary in our local practice to have to hold a hearing.

In conclusion, I'd like to thank you again for allowing us to appear and testify.

JUDGE DUPLANTIER: Thank you, Ms. Calton.

Does anybody have any questions?

Thank you very much.

Ms. Chenetz.

Now before you start, you did hear me read that letter from your chief judge.

MS. CHENETZ: I did and I was unaware of it until today.

JUDGE DUPLANTIER: Aha. Do you wish to change your testimony?

MS. CHENETZ: No.

STATEMENT OF SARA L. CHENETZ, ESQUIRE

COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATION OF THE BAR OF THE CITY OF NEW YORK

MS. CHENETZ: Good afternoon. I'm Sara Chenetz, a member of the New York City law firm of Freeman Forrest & Chenetz LLP. I'm appearing here today on behalf of the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York. And if I may, I'll refer to that committee as the committee.

The committee and I appreciate the invitation to present our comments on the proposed amendments to the Federal Rules of Bankruptcy Procedure. The committee is a standing committee of the association. Its members include experienced bankruptcy lawyers, bankruptcy law professors and representatives of the Office of the United States Trustee and the Clerk of the United States Bankruptcy Court for the Southern District of New York. Many of the committee's members appear regularly in bankruptcy courts throughout the country and represent varied parties in consumer and business cases, Chapter 7, Chapter 11 and

Chapter 13 cases.

On December 23, 1998, the committee submitted a letter to the secretary of the Committee on Rules of Practice and Procedure which expresses the committee's general support for the adoption of the proposed amendments and explains the committee's selective suggestions for their modification.

The committee included with its letter marked versions of the proposed amendments to Rules 2014, 9013 and 9014, indicating the committee has recommended changes. My comments here today will highlight the issues which are addressed in the committee's letter in greater detail. I will also endeavor not to repeat what's been said earlier.

My comments, like the committee's letter, reflect a consensus of the views of the members of the committee, and the views of individual members and their respective firms and institutions may vary.

First is proposed Rule 9013. The intent of this rule appears to be to harmonize practice with respect to nonsubstantive and noncontroversial matters. The committee supports this goal but is concerned that the new rule could be used, whether deliberately or inadvertently, to mask a matter of substance, through limited notice and the entry of orders without hearings.

The committee therefore recommends that the notice

required under proposed Rule 9013(c) be expanded to include, if an unsecured creditors committee has not been appointed, the 20 largest unsecured creditors of the debtor, as well as parties who have filed a notice of appearance.

In addition, the committee suggests that the rule be expanded to cover requests for orders limiting notice or hearing. While the proposed amendments to Rule 9013 require notice of an application filed under the rule, the proposal does not specify the amount or nature of the notice to be provided before a court may rule on such an application.

Therefore, the committee recommends that unless the court determines ex parte relief is warranted, proposed Rule 9013(d) should provide that relief may not be granted without a hearing unless at least three days have passed since the service of the motion and allowing three additional days for mail, in accordance with Rule 9006(f). These suggested changes are designed to give parties in interest an opportunity to object to the use of shortened procedures and the proposed application of Rule 9013, as opposed to Rule 9014, to a particular request for relief.

Parallel to proposed Rule 9013, the committee understands the purpose of proposed Rule 9014 to be to harmonize practice with respect to matters that cannot be considered routinely nonsubstantive and noncontroversial. The committee supports this goal and generally believes the

proposed amendments advance this purpose.

Still, the committee suggests that certain technical and substantive revisions be made to proposed Rule 9014 in the interests of clarity, efficiency and process.

First, the committee recommends including among the parties entitled to notice under Subsection (c)(1) those parties who have filed notices of appearance under Rule 9010(b), examiners appointed under Section 1104 of the Bankruptcy Code and, in those rare cases where it's pertinent, future claims representatives and representatives and committees of retired employees appointed under Section 1114. The omission of such parties appears to have been inadvertent and not intended to further any particular policy or objective.

As with the committee's proposed changes to the amendments to Rule 9013, these suggested changes are not intended to limit a court's authority to enter an order limiting or expanding notice.

Second, the committee recommends that the list of administrative motions for which an evidentiary hearing may be conducted at the initial hearing should be expanded--and here we may have a middle ground to some of the different views that have been expressed earlier today--to include those that are proposed but other ones that often require expedition, such as motions to approve the sale or lease of

property under Section 363(c), for adequate protection under 363(e), to direct the appointment of a trustee under Section 1104(a), to convert or dismiss a case under 1112 and to increase or reduce the exclusive periods under Section 1121(d).

Third, the committee suggests that proposed Rule 9014 be clarified to make clear that the court may grant interim relief in connection with an administrative motion. The notice provisions of the proposed rule appear to contemplate such relief, and I think the committee notes also speak of that, but the authority is not clearly stated.

Further, the committee suggests making uniform the time for hearing, whether or not interim relief has been granted. The proposed rule appears to adopt as a general principle, which the committee supports, that an administrative motion be served at least 20 days before the scheduled hearing. This expands the time in current practice in many districts with respect to certain contested matters and reduces it slightly in some others.

The committee believes that if the list of parties to be served with notice is expanded as we've recommended, parties will have the opportunity to be heard at the interim hearing, where interim relief may be granted, and in such circumstances there should be ordinarily no reason to shorten the 20-day period until the preliminary hearing.

Again courts should retain the authority to short notice for cause shown.

Under existing rules, the notice period for most motions must be expanded by three days if notice is served by mail. The proposed amendments do not purport to change this requirement of Rule 9006(f) but the comments to proposed Rule 9014 suggest at least an intent to supplant Rule 9006 in the context of administrative proceedings. This can be found at page 108 of the committee notes to the rules.

As the 20-day notice period, in most cases if the rule is adopted, will merely set the time for a status conference and strict adherence to this rule is required if the desired uniformity is to be achieved, the committee recommends that the amendment to Rule 9014 explicitly supplant Rule 9006(f) as to motions filed under 9014.

Yet when expeditious service is required, as contemplated under the proposed amendments in Subsection (f), notice of matters requiring evidentiary hearings in lieu of status conferences, service by mail in those cases should be prohibited.

In addition, consideration should be given to explicitly providing that service by facsimile, overnight and hand delivery constitutes valid service. The rules seem to contemplate allowing courts to use electronic filing,

which certainly in the Southern District of New York is working effectively. These other means of service are also accurate and efficient in current times.

The committee does have one strong objection to the proposed changes to Rule 9014. At this point it's probably not a surprise that it concerns Subparagraph (j), which would prohibit the use of affidavits in lieu of live testimony. The use of affidavits for direct testimony permits more efficient preparation for cross and permits courts to assess witness credibility on cross-examination.

JUDGE DUPLANTIER: I'm very curious, if I could just stop you. Do you think matters that involve perhaps considerable sums or even inconsiderable, where there is a genuine issue of material fact involved, that affidavits ought to be admitted in evidence? Do you think that? I'm just curious because people seem to think that goes on in the District Courts and believe me, it does not.

MS. CHENETZ: What I would suggest is appropriate in contested hearings is that affidavits be used in lieu of direct but not cross-exam or rebuttal testimony.

JUDGE DUPLANTIER: Why?

MS. CHENETZ: That an affidavit be submitted on direct, distributed to parties--

JUDGE DUPLANTIER: I don't have to bring my witness in?

MS. CHENETZ: Oh no, you do. You have to bring your witness to be cross-examined.

JUDGE DUPLANTIER: But I have to bring an affidavit for somebody to cross-examine them on?

MS. CHENETZ: No, the procedure that we suggest and I have seen in my personal experience used effectively in a number of districts--New York, Southern District of New York, Middle District of Florida, Central District of California, District of Delaware--

JUDGE DUPLANTIER: You see, 43, which is apparently applied in some bankruptcy courts, would allow motions to be resolved on affidavits.

MS. CHENETZ: What the committee is here suggesting is not to use affidavits exclusively but to merely use affidavits only in lieu of direct testimony and then say, "All right, we've saved an hour and a half on this witness's direct testimony; now put the witness on the witness stand and let parties cross-examine the witness on--

JUDGE DUPLANTIER: I don't want to belabor it.

JUDGE ROBRENO: Is it similar to perhaps the procedure which the Manual of Complex Litigation suggests, which is that you can offer direct testimony by way of affidavit and narrative, provided that the person giving that testimony is there to be cross-examined?

MS. CHENETZ: Yes.

JUDGE ROBRENO: That's what you're suggesting?

MS. CHENETZ: Exactly.

JUDGE ROBRENO: Not that there be two contesting affidavits and somehow you would divine which one is correct, but that you would try to short-cut the direct examination, perhaps on valuation issues?

MS. CHENETZ: Exactly.

JUDGE DUPLANTIER: I just want to say there's no way you can get that out of Rule 43, which you complain that we're abrogating. In any rate, I don't want to belabor it.

MR. RESNICK: If I can follow-up, you're advocating the same rules or the same use of an affidavit that you could use at a trial at an adversary proceeding or at a trial in a District Court action?

MS. CHENETZ: Correct.

MR. RESNICK: No more, no less than what you could do at trial?

MS. CHENETZ: Correct. And I would suggest in those bankruptcy proceedings--

MR. RESNICK: I would just suggest that that's what the proposal is.

JUDGE DUPLANTIER: Precisely.

MR. RESNICK: That's exactly what it is because 43(e)--

JUDGE ROBRENO: That's what it's intended to be.

MR. RESNICK: It is. All it says is 43(e) does not apply. 43(e) applies to motions. 43(a) governs trials. And the intention is and the rule just treats it the same way at trial.

So the same use of an affidavit at trial could be used in a 9014 evidentiary hearing. I don't want to belabor it. I'm sorry.

MS. CHENETZ: I'll move on to a rule that actually has not been the subject of much discussion today, which is Rule 2014. The committee supports the adoption of the requirement in Rule 2014 that requests for orders retaining professionals be made by motion, on notice, with an opportunity for hearing. The entry of retention orders without notice, on occasion, has precluded parties in interest from having meaningful opportunities to raise good faith disputes about the merits of a proposed retention. However, the committee believes certain clarifications regarding the notice requirements are needed.

As proposed Rule 2014 appears to recognize, it is critical for both the professional and client that there be an opportunity for a professional to be retained and compensated on an interim basis. However, the committee does not agree that the notice and hearing period with respect to professional retention should be shortened where interim retention is approved.

As with proposed Rule 9014, the committee recommends that the notice requirements for a motion to retain a professional be the same regardless of whether interim retention has been authorized.

The committee also believes that professionals who are retained on an interim basis should have the right to seek the allowance of fees and reimbursement of expenses that accrue during the interim period, even if the application for employment is ultimately denied. The right to file an application for the allowance of such fees and expenses is implicit in the proposed amendments to Rule 2014.

Nonetheless, to eliminate any uncertainty in this area, the committee recommends that the amended rules unequivocally indicate that such requests may be made.

The committee also recommends that the rule make clear that courts may authorize retention of a professional retroactively to the date the professional commenced work. Compared with current practice, if proposed Rule 2014 is adopted, professionals are more likely to begin work before their retention is approved and to do so for longer periods of time. As such, the need for retroactive retention orders will increase.

In the important area of qualifications for professional employment, the committee is concerned that the

proposed new requirement that the movant disclose any interest adverse to the estate would require the movant to determine what "adverse" means. The committee suggests instead the movant continue to be required to state that to the best of its knowledge that the proposed professional is disinterested. This will eliminate imposing on the movant the task of determining what "adversity" means, a standard that courts sometimes have had difficulty defining in this context.

Finally as to proposed Rule 2014, the committee supports the goal of supplemental disclosure but believes that the proposed rule is vague and does not sufficiently address the concerns that have been expressed recently.

In order to address these concerns, the committee proposes that there be a new periodic disclosure requirement applicable to professional firms and an obligation of prompt supplemental disclosure applicable to individuals. The committee proposes that a professional firm be required to update its original verified statement at least once every 120 days and additionally, any individual who has actual knowledge of a matter that should be disclosed be required to do so promptly.

The committee considered utilizing a 15-day rule here for individual disclosures but believes the requirement of prompt disclosure is more flexible and is likely to

result in most disclosures occurring with 15 days.

JUDGE DUPLANTIER: In consideration of other speakers, I would ask if you can conclude. Maybe we could take your comments on 2016 and amendment to the voluntary petition--

MS. CHENETZ: Certainly. I'll try to reduce those.

As to 2016, the committee understands the primary purpose of that rule--to make clear that the requests for allowance of compensation are motions governed by proposed Rule 9014. The committee supports this change because these applications are sometimes the subject of vigorous dispute and as such, as treated as motions.

We would recommend one clarification here, which is that the Subsection (a)(1)(C) refers only to attorneys and accountants, while the rest of the rule seems to and should apply to all professionals and that all professionals be in the purview of that section.

Finally, the committee has one comment to the proposed changes to the official forms and that's to Exhibit C of the voluntary petition form. This would require a debtor to state whether the debtor owns or possesses property which, to the best of the debtor's knowledge, "poses a threat of imminent and identifiable harm to public health or safety," and describe such property.

While identifying such sites is a laudable goal, this language seems to require a debtor to identify and concede potential significant liabilities. Instead we suggest that the debtor be required to state if such allegations have been made by others without having to admit that its property has such characteristics.

I thank you for your time, attention and consideration.

JUDGE DUPLANTIER: Thank you very much. We appreciate it.

We'll take a five-minute break now.

[Recess.]

JUDGE DUPLANTIER: One thing we can do before Pat comes back is the two of you can introduce yourselves to us and say what you're here representing.

STATEMENTS OF JAY L. WELFORD, ESQUIRE AND

JUDITH GREENSTONE-MILLER, ESQUIRE

COMMERCIAL LAW LEAGUE OF AMERICA

MR. WELFORD: All right. My name is Jay Welford. I'm a partner with the Detroit law firm of Jaffe, Raitt, Heuer and Weiss.

MS. GREENSTONE-MILLER: My name is Judith Greenstone-Miller. I'm a member of Clark, Hill PLC and work in its Birmingham office--Birmingham, Michigan office.

MR. WELFORD: And we are here today on behalf of

the Commercial Law League of America and its Bankruptcy and Insolvency Section. For those who don't know, the Commercial Law League was formed in 1895. It's the nation's oldest organization of attorneys and experts in credit and finance, actively engaged in the fields of commercial law, bankruptcy and reorganization.

Our membership exceeds 4,600. The League has long been associated with the representation of creditor interests while, at the same time, seeking the fair, equitable and efficient administration of the bankruptcy laws.

The Bankruptcy and Insolvency Section itself is comprised of over 1,600 bankruptcy professionals--lawyers, judges--who represent really all aspects of the bankruptcy process--debtors, creditors, trustees and the like.

As you know, the League has analyzed the proposed rules. We have submitted written comments to you and we would like to summarize our position just briefly here today.

JUDGE DUPLANTIER: Very well. Go ahead. Pat is here.

MR. WELFORD: With respect to proposed Rule 1007, this proposal is to allow a debtor to obtain an extension of time to file schedules or statements of financial affairs essentially without notice or an opportunity for objection

by creditors.

What we have found in our practice is that it's becoming more the exception rather than the rule that the 341 meeting is held before the schedules and statement of financial affairs are actually of record and we face ourselves with the prospect of either having to attend a second 341 or taking a 2004 exam.

So we believe that creditors should be aware if an extension is being sought with respect to the time period for filing the schedules or statement of financial affairs. Otherwise we believe the U.S. Trustee may not monitor the situation closely enough and we will have the same situation we have currently.

With respect to Rule 2001, we believe that the rule does not, when you read it in conjunction with proposed Rule 9014, provide for required notice to creditors of an alleged debtor with respect to the motion for the appointment of an interim trustee. We believe that to the extent there is a creditor list that's available, every potential creditor should be made aware of the motion for the appointment of an interim trustee so they can participate in that hearing and participate in the election ultimately of that trustee.

With respect to the retention of professionals, we believe that the proposed rule is more of a race to the

courthouse at a time when you don't need one. There is a procedure in the Eastern District of Michigan, which may not be ideal but we think it works very well. That is that an application for employment is filed and it is subject to our normal notice and opportunity for hearing period, which is 15 days. The order authorizing employment, once it is entered, will authorize employment retroactive to the date of filing of the application for employment.

There is obviously some nun pro tunc effect to that order but I believe even under the proposal under 9014, there would be some nun pro tunc effect, as well.

The advantage to this is that the creditors have the full 15-day period, or whatever the rule would provide, if there is going to be an objection to the retention of counsel, to organize themselves enough and to figure out why counsel should not be retained.

On the other hand, if counsel is in need for an expedited determination because they believe they may be disqualified, in our district there's a procedure where you can ask for an expedited hearing with respect to your retention. That is more the exception rather than the rule. So we would prefer to see a system more along the lines of what we have in our district because most of these are uncontested but creditors should have time to accumulate their thoughts and their information.

If the rule remains as it is, we believe that it should not be governed by 9014. It probably should be governed by 9013 because most applications for retention are not subject to litigation.

3001(e)(5) provides a transferor or transferee of a claim less notice with respect to a challenge to that transfer than they would have with respect to an objection to the claim itself, which is currently 30 days. We don't know whether this shortening was intentional or an oversight. We think that whatever the rule is, the claims objection period and the period with respect to the transfer of a claim and challenge to that should be uniform.

With respect to Rule 3007, we didn't know whether it was intentional or not but as a result of the rule, when read with 9014, the period of time with respect to an objection to claim for the claimant to respond is no longer 30 days but it probably will turn out to be about 25 days because the motion has to be served 30 days prior to the hearing and then the response is due five days prior.

So again I don't know if it's oversight or intentional that you're shortening the time period but it could turn out to be shorter than 30 days.

With respect to Rule 3020 governing objection to confirmation, the rule omitted notice to other parties that the court might designate and the comment says that that was

in there because there was confusion and creditors might not know who to serve.

We believe that the service list with respect to an objection to confirmation should be as broad as possible. We believe that most creditors have available to them the service list with respect to the plan itself and we don't see any reason why all creditors shouldn't be apprised of an objection to a confirmation if there is one.

With respect to 4001 and its interplay with 9014, we had a limited objection as it relates to cash collateral hearings. Most of you know that cash collateral litigation is on a very expedited basis. Sometimes we get notice on an afternoon that we have to be in court the next day if we're representing a creditor.

We don't believe that it's feasible to get our client together and get an opposing affidavit prepared within that very short time frame. We would not want to be precluded from presenting factual testimony at the time of the cash collateral hearing or emergency financing hearing simply because we have not provided an affidavit creating an issue of fact.

I also believe as a practical matter, when you get to those types of hearings, the facts that you are relying on as the creditor is really an impeachment of the debtor's projections or information which the debtor has supplied, so

the type of affidavit testimony you would get would be nothing more than your banker's opinion that the projections are inconsistent with what they believe the true set of facts to be.

I believe in a perfect world that I like 9014, I don't mind the affidavit process, but I don't believe in an expedited context like cash collateral the affidavit should be a prerequisite. Otherwise the court would make a finding there's no issue of material fact.

Finally, with respect to 6004(b), which governs the use, sale and lease of property, I don't know if it's a drafting error but many times in that rule the word "shall" has been replaced with the word "may." With respect to the filing and service of objections it says a creditor may file and serve an objection within so many days.

If there is no mandate as to when an objection is to be served, then we don't know how an objection could ever be deemed timely or untimely. I don't know why that change was made but we think the word "shall" should remain, rather than the permissive "may."

I'll now turn it over to Judy to talk about 9013 and 14.

MS. GREENSTONE-MILLER: I'd like to make some general comments about 9013 and 9014 first. We recognize that problems exist with regard to bankruptcy practice from

district to district insofar as knowing the local rules, the local practice and the hidden rules of the court. And you want to have a fair playing field so that all the parties have the opportunity to fully participate in the proceedings and they can't adequately do that if they're blind-sided by the local practices.

What works in one district, however, does not necessarily work in another district and variation from district to district in terms of local practice is not per se bad. It allows experimentation of other options that may work better. The practice, in terms of some of the small business cases, for instance, with having the disclosure statement conditionally approved and then approved at the confirmation hearing became not a rule per se but by experimentation.

Although we recognize that a lot of time also has been incurred to create these new proposed rules, the major flaw appears to be, from the comments that we've seen and also read, a lack of clarity and a lack of simplicity.

The procedural rules should not be so complex and confusing that they overshadow the substantive issues and we would therefore make the following comments and recommendations with regard to the two, what are referred to as the primary litigation package rules.

Rule 9013 governs procedures which are called

applications and relate to enumerated matters which in most instances, according to the commentary, are nonsubstantive and noncontroversial. However, a number of the matters set forth in the enumerated list are substantive and should not be subject to the application process but rather, subject to a motion practice.

For instance, a motion to dismiss or convert a case is always controversial. A motion to appoint a trustee or an examiner is usually controversial and substantive, and therefore they should subject to the contested motion procedure.

Placing such matters within the scope of 9013 also causes a notice problem. Normally you want all creditors and parties in interest to receive notice of those motions, whereas the noticing procedure set forth in Rule 9013 does not require such notice on a creditor unless the creditor has filed an appearance and request for papers, even though the impact of the request is likely to impact them in the proceeding if the relief is granted.

A number of matters, on the other hand, do not fall within the scope of the application process but nevertheless are usually noncontroversial and nonsubstantive in nature; for example, motions to reject unexpired leases and executory contracts, motions to approve compromises and settlements. These are rarely contested and routinely

granted and therefore it would probably be better put within the scope of 9013.

The purpose of the changes, according to the comments, was to enable the parties to obtain court orders in a relatively short period of time, to increase uniformity nationally and reduce the necessity for local rules. However, as I indicated previously, having local rules from our perspective is not bad per se but also presents a problem when the rules as revised are not sufficiently clear to advise the parties of the applicable procedures, thereby having the procedural issues dwarf the substantive issues.

There's no time period set out within 9013 that delineates when a response or objection to an application must be filed so that it is deemed timely. Also we suggest that the noticing procedure set forth in Federal Rule of Bankruptcy Procedure 2002 be incorporated into the rule.

How hearings are handled if a response to an application is filed also doesn't appear to be sufficiently dealt with within the rule. If a hearing is scheduled, what type of hearing is it? An initial hearing at which no affidavits or live testimony can be used? An evidentiary hearing? Is there to be a status conference as part of it? Does the filing of the objection convert the application to a contested motion? Needless to say, the myriad of questions highlights the need to provide greater

specificity, clarity and simplicity of the process.

The rule, like the old procedures, requires service of the application, like a summons commencing an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7004. We believe that it's unduly burdensome and inefficient, particularly in the case of corporate entities where you have to locate the resident agent, and therefore recommend that the service requirement be changed to allow service at the business address reflected in the bankruptcy schedules unless otherwise directed by the debtor or the creditor to the contrary.

With respect to 9014, which governs contested matters now known as administration motions, I note that Judge Spector from the United States Bankruptcy Court for the Eastern District of Michigan filed some comments. They were attached to the comments of the Detroit Metropolitan Bar Association, the Debtor/Creditor Section, and he was concerned that the name administrative motion might be abbreviated to AP and then therefore be confused with adversary proceeding.

Maybe since we're calling the pleading under 9013 an application that simply calling it a motion under 9014 would create less confusion.

If it does not fall within the provisions of 9013 or 9014 by its expressed terms, it's not clear unless

otherwise expressly provided elsewhere, what procedure governs the process. The affidavit requirement as part of the motion and the response seems unreasonable and burdensome and particularly, as Jay already indicated, in motions seeking expedited relief, are difficult at best to obtain.

The rule also requires the court in all instances to set a hearing, even though the matter may not be actually contested, in order to trigger the time for filing a response to the motion. The impact potentially is to clog the court with hearing dates that are never going to take place. The better procedure is what we currently have, which is notice and opportunity for a hearing pursuant to local Bankruptcy Rule 9014-1 of the Eastern District of Michigan.

Moreover, many motions are routinely granted without any basis because there is no obligation to respond to the motion. The court can always decline to enter an order, however, under such circumstances and nevertheless on its own initiative require the parties to attend a hearing.

Although the service on the parties again has always been pursuant to 7004, my comments made with respect to 9013 would be the same with respect to 9014, to have it be the address that's in the schedule. That's the address at which they've been doing business together. It's known.

There's no reason to require service on resident agents.

Discovery problems are also occasioned by Rule 9014. The movant under the rules cannot commence discovery until the respondent responds or commences discovery. This seems unfair. Moreover, the time period for responding to discovery is shortened from 30 days to 10 days. The 10-day period seems too short, particularly for preparation for what is likely to be a hotly contested evidentiary hearing and is likely to result in numerous requests for extensions, which again will further clog the court's docket.

Although it's envisioned that the status conference will be held at the time of the initial hearing or immediately thereafter, there's no requirement in the rule with respect to the timing for the status conference or how the court notifies the parties. The rule provides that on request of the parties the court, on its own initiative and upon reasonable notice, can schedule an evidentiary hearing to be held on the date of the scheduled initial hearing date. Again Judge Spector raised concerns regarding allowing the parties to direct without the court's involvement whether or not the initial hearing should be changed into an evidentiary hearing.

The parties do need to be sufficiently apprised in advance of the initial hearing of whether it's going to be turned into an evidentiary hearing and whether they need to

bring witnesses.

A number of the subsections of 9014 except out individual debtors, primarily with consumer debts, from the requirements of the rule; for instance, the filing of the affidavit, the providing of evaluation report or the providing of an order with the response of leading. Although the affidavit again made be burdensome--we believe it may be burdensome for all parties--there doesn't seem to be the same justification for not requiring a debtor who has an appraisal of a piece of property at issue not to be compelled to produce it or to set forth in an order what it is they think should be granted as a result of the contested matter.

Lastly, the rules allow the court to modify the rules. The permit such modification does, in effect, however, what the Rules Committee has sought to negative; that is the creation of special rules for each court. The better approach from the Commercial Law League's standpoint is to have standard rules that are uniform or retain the current practice and allow each court to operate under its local rules and to maintain a more simplified approach that's easy for everybody to understand without having to determine what type of proceeding it is and what type of hearing there will be afterwards.

Thank you very much for the opportunity to address

you and we'd be happy to respond to any questions or concerns you have.

JUDGE DUPLANTIER: Thank you very much.

Does anybody have any questions? Ken?

MR. KLEE: On page 10 of your written statement you say "Motions lacking supporting evidence are routinely granted when the nonmoving party fails to file a response or if the response indicates no dispute as to any material facts."

Earlier we heard testimony that in many districts there are pro se debtors. Do you believe it's appropriate for the rules to permit judges to grant motions filed without any supporting evidence just because there has been no filed response?

MS. GREENSTONE-MILLER: Probably.

MR. WELFORD: What we find in our district is two of our judges will not make any further inquiry and two of our judges will. Notwithstanding the nonexistence of a countervailing response, they will hold a hearing if they find something that they don't like.

MS. GREENSTONE-MILLER: In other words, if it doesn't pass the smell test when they look at it, they won't have any second thoughts about convening the parties on their own initiative in court to determine whether or not the relief requested, although a response hasn't been filed,

is justified under the circumstances.

MR. KLEE: Do you believe that variation should be left to each judge on a case by case basis and a judge by judge basis?

MS. GREENSTONE-MILLER: Yes.

JUDGE DUPLANTIER: You can't be serious. Are you?

MS. GREENSTONE-MILLER: (Nods.)

JUDGE DUPLANTIER: Really? That's only because you want to go home and practice before those judges. That must be the reason.

MR. WELFORD: No, none of them are here today.

JUDGE DUPLANTIER: But, you see, we're recording this. Anyway, thank you. We appreciate it.

Mr. LeVine.

STATEMENT OF DENNIS J. LeVINE, ESQUIRE

TAMPA BAY BANKRUPTCY BAR ASSOCIATION

MR. LeVINE: Thank you. Good afternoon. My name is Dennis LeVine and I'm the current president of the Tampa Bay Bankruptcy Bar Association. Our association has 240 members and we practice in the Tampa and Ft. Myers Divisions of the Middle District of Florida. Alexander L. Paskay is our chief bankruptcy judge and he is here to testify also today. Thank you for the opportunity to speak with y'all today.

Our association and its board of directors have

reviewed the proposed amendments to the Federal Rules of Bankruptcy Procedure and I want to add that the Bankruptcy UCC Committee of the Florida Bar met last week and also discussed the proposed amendments to the bankruptcy rules and that committee, which has over 200 members, has authorized me to represent that they share the views that I'm going to express today.

The members of our association run the gamut in practice. They represent debtors, creditors, trustees. They include solo practitioners and members of large firms. They work on routine cases. They work on complex cases. Some of the members, like myself, handle a large volume of cases. Many of our members, including myself, practice in all three of the districts in Florida--the Northern, Middle and Southern.

So the diversity that we see in the bankruptcy practice in bankruptcy courts is clear. We believe that the bankruptcy rules need to recognize the significant diversity among our districts.

For example, in the Middle District of Florida in the Tampa and Ft. Myers Division for the second year in a row we're going to exceed 20,000 cases being filed. Generally it's a very broad district. I know that Judge Clark talked about his district and our district is not as broad but many attorneys have to drive 50 or 60 miles to go

to a hearing.

Our review of the proposed changes to the bankruptcy rules has raised some significant concerns regarding potential scheduling problems, unnecessary affidavits and unnecessary hearings and we believe that there are unintended consequences of some of the proposed changes in the rules that likely will cause more harm than good.

As I'm sure the committee recognizes, the vast majority of bankruptcy cases today are consumer cases and that is the primary focus in my particular practice. And as Judge Sonderby said earlier in talking about examples, four examples of cases that these rules might create problems in, I would submit that those are the typical kinds of cases that most bankruptcy judges see.

Most of the contested matters in consumer cases fall into four categories: motions for relief from stay, motions to value collateral, objections to claims and objections to exemptions. In Chapter 7 cases, motions for relief from stay and objections to claims generally are resolved in our districts under local rules by negative notice procedure. And as a result, in these matters there's almost never the need for a hearing, let alone an evidentiary hearing.

For example, hearings are not set in stay

litigation in Chapter 7 cases unless the trustee files a response and asks for a hearing, except there is one court in our district that does hold hearings routinely on Chapter 7 motion to lift stay matters and most of the practitioners and trustees view these hearings as unproductive for all parties.

And I will add that those hearings are not preliminary hearings; they are final evidentiary hearings and I'm always at a loss as to why, if I represent a bank and they have a mortgage on someone's house, that I have to bring somebody from the lender and the house is exempt or the car, there's no equity in it, that I have to bring an actual person to a Chapter 7 motion to lift stay hearing where the trustee really doesn't care about the result of the hearing.

I also want to point out that the bankruptcy bar of our district is very tight-knit and we maintain a high level of congeniality. And from what I've heard from my discussions with lawyers around the country, I believe that's the case in other districts, as well.

As a result, most contested matters that we see are resolved by counsel prior to any hearing. And with these remarks in mind, I want to address some specific concerns regarding certain amendments to the rules.

With regard to scheduling first, the proposed

amendments to Rule 9014 would significantly change and I believe would detrimentally impact the court's current scheduling system. In our district the court sets hearings upon receipt and review of all motions and objections.

However, as I stated, under our local rules and, I'll add, the local rules of the Southern District and the local rules of the Northern District of Florida, a number of routine motions and objections are not automatically set for hearing. Instead of a preliminary notice setting forth the hearing being sent out, a notice is sent out giving interested parties the opportunity to file a response and setting forth a specific deadline within which to file a response.

This procedure is simple and straightforward. In the event a response is not timely filed, the court then considers the motion on the papers that have been filed. If a response is filed, a hearing is set. When a hearing is set, that hearing notice typically says whether it is an evidentiary hearing or a preliminary hearing, so there is no confusion as to what kind of hearing you're going to show up at.

Under the proposed amendments, the negative notice procedure could not be used for administrative motions under Rule 9014. This, we believe, would result in a significantly greater number of motions being set for

hearing unnecessarily.

Another scheduling problem that we see with regard to the proposed changes in the rules is the requirement that attorneys obtain hearing dates prior to filing every motion. We've thought about this and this would, in our view, create significant difficulties, primarily in the clerk's office, on the judge's staff and also with the staff of attorneys like myself.

Additional court personnel would be needed to coordinate the scheduling of hearings. And I cannot imagine how our judges' calendar clerks would handle the deluge of phone calls from attorneys requesting hearing dates and times, and the rule seemingly requires that you have to obtain that hearing date and time for every motion that was filed, notwithstanding the fact that in a lot of different matters, 95 percent of the things are resolved; they're not contested.

The staff in an attorney's office would also have additional responsibility to set these hearings.

There is a procedure that is remotely like this and it's used in the Southern District. When a motion is filed with a negative notice provision and a response is filed by the opposing party, the rules require that the movant submit a notice of hearing form with a blank date to the clerk's office. The clerk fills in that date, sends it

back to the movant's attorney, who then serves all the parties.

That's the only thing I've seen close to lawyers being involved in the scheduling. We don't schedule the hearings. The clerk's office and the judges' calendar clerks do and I think that that's where it needs to stay.

The requirement in the proposed rules to serve a notice of hearing with each administrative motion we believe would not promote efficiency or provide any perceive additional benefit to litigants.

We believe there's also other unintended consequences regarding scheduling. These would be that hearings--and we've heard from other folks before, so I won't belabor the point, but hearings would be set on every motion. And from my experience, most motions are resolved without the necessity for a contested hearing.

There is a procedure for cancellation of hearings but this cancellation would only become known five days before the scheduled hearing. Obviously somebody on the court's staff is going to have to find folks and say the hearing's been cancelled. Hopefully that message doesn't get lost in my jumble of messages on my desk.

In addition to that, significant blocks of time are going to be set aside, both on the court's calendar and on practitioners' calendars, for hearings that have been

set. And you're not going to know--well, I've got two days of hearing set two weeks from now and somebody calls you up and they want to come in and meet with you or you want to schedule a deposition; you have two hours blocked on a morning and you think that all those hearings are going to be canceled but you don't know and you can't schedule time on that until you find out if those hearings have been cancelled.

I think most judges would be in the same position. They don't want to have dead time on their calendars. It's an anathema to most judges. They want to fill it up with live things that are happening. So I think that that is a particular problem for both the courts and for practitioners.

The affidavit requirement, if I can speak to that for a moment, appears unnecessary in many instances. The court sets almost all motions and objections for a preliminary hearing and the vast majority of these motions and objections are resolved or unopposed. Creditors and trustees will incur additional time for preparation of affidavits, which often will prove to be unnecessary.

I could see objections to exemptions or objections to claims. Trustees would have difficulty--and I represent several trustees--putting together the affidavit information that would be required. And in many cases the objection to

the claim itself is self-evident if you just look at the claim itself. So I think the increased cost to parties is something that is unwarranted and unnecessary.

The requirement for submitting proposed orders--I want to speak to that for a moment. While I believe the requirement is laudable and I've had the opportunity to practice a little bit in Judge Clark's division and have found out the hard way that when you file a motion without filing a proposed order, they send the motion back and say, "Please send it back with a proposed order," that's the only court I've had the experience with that.

And the way I frankly see it is you would be submitting pieces of paper to the court, one by the movant that says, "I win," one by the respondent that says, "I win; movant loses," and the order that's going to come out of that hearing is unlikely to say that precisely. It's going to say one side wins and one side loses but there's going to be, I have found, other situations; for example, motions to lift the stay.

Typically in Chapter 13 cases, for example, adequate protection is granted in almost all those cases, the stay isn't lifted and the terms of the adequate protection are pounded out by the court and the parties in court.

So we see the requirement to submit orders with

each motion not to be in the best interest of the efficient administration of the courts. There are some local rules in the Southern District, for example, that require that you bring an order to a hearing when there is a hearing. That makes a little bit more sense because by the time you've gotten down to the hearing, the case has probably been resolved.

I want to talk finally about the lack of flexibility, and that's a large concern that we see. As you know, bankruptcy cases run the gamut from simple cases, routine cases in Chapter 7 to complex Chapter 11 reorganizations and there's a tremendous diversity not only in bankruptcy practice but bankruptcy districts.

We believe the bankruptcy rules must have flexibility to meet the demands of the diversity in bankruptcy cases. We also believe districts should be given the flexibility to allow their local rules to reflect the diversity in their jurisdictions.

The courts in our districts, working together with the bar, are constantly looking to streamline their procedures. In fact, in 1998 the Bankruptcy UCC Committee established a judicial liaison committee made up of bar leaders and bankruptcy judges. This committee has already held two meetings and the bankruptcy judges and attorneys who worked on this committee have been making significant

progress to streamline problems with the bankruptcy procedures in the Florida districts.

The proposed amendments to 9014 would specifically preclude varying procedures by local rule. We have urged the Rules Committee in our written response and also the written response from our local Federal Rules Committee and they also submitted a written response, to consider some of the negative notice procedures that are utilized in the Middle District's rules and in the Southern District's rules, which I'm sure Judge Cristol is very familiar with.

Under those procedures, where no objection is filed the court rules on the motion and the objection without a hearing. And, of course, the court has the ultimate determination of whether on the papers--they may say the papers, while they're not opposed, are junk and I'm not going to grant the relief that you're seeking.

As a result, most contested matters from our experience are resolved with full notice but without the necessity of a hearing. Costs are thus kept down because there are no scheduled hearings unless an objection is filed. This system works and it works well. I would urge the committee to please allow our courts to continue to have the flexibility to operate their heavy caseloads efficiently.

In conclusion, we believe that the current

versions of the rules work very well in our districts and shouldn't be modified. We also are concerned about some of the unintended consequences of the amendments which have been discussed by other speakers before me today.

We are strongly opposed to any amendment to the rules that would preclude bankruptcy courts from varying procedures by local rule. Therefore our association is opposed to those specific provisions that are in the proposed amendments to the rules.

I appreciate the opportunity to speak to you all this afternoon. Thank you and I'll entertain any questions.

JUDGE DUPLANTIER: Thank you.

JUDGE ROBRENO: I'm curious about your statement, which seems to be maybe more sweeping than we have previously heard, that you believe that by local rule you could deviate from any procedure under the rules? I mean is that to be taken literally, so that the rules, in a sense, the national rules are guidance that ultimately the local court would either choose to adopt or disregard?

MR. LeVINE: I don't think it's that sweeping a statement. It was my sense in looking at the proposed amendments that it went too far in the other direction by basically tying the hands of judges in local districts to set local rules. There are--

JUDGE ROBRENO: Right now the law is that the

local rules, in fact, must be consistent with the national rules.

MR. LeVINE: That's correct.

JUDGE ROBRENO: Now you're not suggesting that that would not be the operative principle here?

MR. LeVINE: No, not at all.

JUDGE ROBRENO: So whatever deviation you would have, it would be consistent with national rules.

MR. LeVINE: Absolutely. That goes, for example, when you look in the rules talking about notice and a hearing, and a lot of the routine matters that we handle, they're handled without a hearing. I think there's been interpretation of that provision of the rules to say notice and an opportunity to be heard.

JUDGE SMALL: I've got two questions about your negative notice practice. The first is what kind of response is required to get a hearing? Do you have to address the allegations of the motion?

MR. LeVINE: I believe that you don't have to specifically address them, that--

JUDGE SMALL: So "I want a hearing" is sufficient enough to get you a hearing?

MR. LeVINE: Yes. I would say that that is not set forth in the local rules. That's something that may vary from judge to judge. But my experience is that any

time a response is filed to something that is sent out with negative notice, it is set for hearing.

JUDGE SMALL: Would it be helpful to have a rule that required a response to address the allegations?

MR. LeVINE: Well, that would perhaps inject too much subjectivity into whether you're addressing the allegation or not.

Are you suggesting that the judge would then make the call based upon looking at the motion and the responses as to whether he thought there was a necessity for a hearing?

JUDGE SMALL: No, I'm just suggesting that you have a situation where the movant knows what the issues are when the movant comes to court.

My other question is you said you'd be opposed to submitting proposed orders, but wouldn't a proposed order actually help your situation on a negative noticing situation where you have the order before the judge immediately? Don't you get the relief quicker that way?

MR. LeVINE: I would say that you're correct. If you're going to have a negative notice, allow a negative notice provision, then I think that submitting an order with that motion would be appropriate.

I can tell you that as a regular practice in Chapter 7 motion to lift stay matters, and there are a lot

of those obviously filed in the bankruptcy courts, that we routinely--most practitioners I know submit an order granting that motion with the motion.

So I think that it's hard to say that you put one rule that says we submit an order with every motion and some motions it's going to work almost all the time and some motions it's going to hardly ever work, but that's where you would be. So I don't know if you're better off one way or the other.

MR. KLEE: Do you have your motions for relief from stay without affidavits?

MR. LeVINE: No. The clerk's office, I think by local rule, requires that an affidavit be filed with a motion for relief from stay. I've often thought that--I don't know what the affidavit has to say but it has to be an affidavit which proves up that you have a security interest and you have--that the loan is in default and that kind of information.

JUDGE DUPLANTIER: Anything else?

Thank you very much, Mr. LeVine.

Mr. Wengel.

STATEMENT OF STEVEN SAKAMOTO-WENGEL, ESQUIRE

BANKRUPTCY AND TAXATION WORKING GROUP

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

MR. SAKAMOTO-WENGEL: Good afternoon. Thank you.

I'm Steve Sakamoto-Wengel. I'm an assistant attorney general with the Consumer Protection Division in the Maryland Attorney General's Office. I'm here this afternoon on behalf of the Bankruptcy and Taxation Working Group of the National Association of Attorneys General and also on behalf of the Maryland Attorney General's Office and other states.

Written comments were submitted by the National Association on behalf of--it was only four states but that wasn't due to lack of support from the other states. It was due to the fact that the comments were being filed over the holiday period and being able to coordinate getting sign-ons from other states was difficult. It's not due to opposition to those comments.

Like most of my colleagues, my practice is not primarily in bankruptcy but we do have to end up in bankruptcy court from time to time when one of the defendants we're pursuing files there.

Our primary concern is that by creating two classes of motions, the proposed rule changes do not allow the bankruptcy court to maintain the current flexibility that it has to treat matters that 9013 would determine to be noncontroversial as controversial and vice versa.

For example, one of the proposed applications would be limiting notice. We, especially in the consumer

area, may have a company filing bankruptcy with hundreds or thousands of consumer victims. We'd be dealing with the issue of what kind of notice would have to be provided to those consumer victims by the debtor, which in our case is a controversial motion and the fact that notice can be limited before we are even aware that such an application to limit notice has been filed is something that we would not be happy about.

On the other hand, under 9014, especially for states with limited resources to devote to bankruptcy cases, on something that might be routine, such as a lift stay motion in one of our cases, to proceed with the enforcement of a governmental enforcement action, which the Bankruptcy Code provides is basically exempt from the automatic stay anyway, but there are a number of state court judges that would not allow you to proceed with it unless you get an order from a bankruptcy judge confirming that, and we will routinely file a motion with the bankruptcy court just asking them to confirm that our enforcement action is, in fact, exempt from the automatic stay so we can then show it to the state court judge and proceed with the action.

The requirement that we obtain affidavits and go through a series of hearings before we could obtain such an order would not only add additional procedural hurdles but would possibly delay our being able to stop what is a

deceptive practice, harming consumers in the various states, and result in additional consumers being harmed in the interim.

Additionally, we do strongly support the proposal that would require a debtor to identify the particular state agency that is a creditor in the schedules. That would be the proposed change to Rule 1007(m). However, we do have concerns about the fact that the rule expressly provides that there are basically no consequences for failing to do so.

I know that we often get notices just addressed to the State of Maryland and trying to figure out which particular agency of the State of Maryland is the creditor is not an easy task. We would hope that there would be some type of consequence for the failure to do so, such as the presumption that notice was not, in fact, received by the state agency involved.

The rest of the comments were submitted in writing and I would be happy to answer any questions that members of the committee might have.

JUDGE DUPLANTIER: Does anybody have any questions?

Thank you very much. We appreciate it.

Judge Paskay is going to be the clean-up hitter.

JUDGE CRISTOL: Are we going to have simultaneous

translation from Hungarian to English?

STATEMENT OF THE HONORABLE ALEXANDER L. PASKAY

CHIEF JUDGE, U.S. BANKRUPTCY COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

JUDGE PASKAY: Good afternoon. As you note immediately, I speak with an accept but fortunately I brought my staff interpreter, Judge Jay Cristol from Miami, who will assist you to translate what I try to tell you in 15 minutes, a short time in your plenary session.

JUDGE DUPLANTIER: People from New Orleans wouldn't notice that you had an accent.

JUDGE PASKAY: Thank you, Judge. I appreciate your comment. You refer to me as a clean-up hitter but nobody referred to me yet as you left the best for the last.

In any event I am chief bankruptcy judge of the Middle District of Florida and I'm a full-time bankruptcy judge since--appointed by not President Cleveland but something like that. I'm sitting on the bench since July 1, '63 and I will complete 36 years this coming July as a full-time bankruptcy judge.

I had the pleasure to serve on the Rules Committee, post-code, from 1980 to 1984, appointed by Chief Justice Burger who, in 1984, sent me a letter saying "Dear Mr. Paskay, you are fired." It was a very uplifting experience but anyway, I enjoyed working on the committee.

The first version was our input was creative and that's what you want to tear apart now and that's the reason I'm here, to defend our position--not really, but make comments on behalf of all the bankruptcy judges of the Middle District of Florida, with whom I was successful to achieve consensus, which is almost as difficult a task as achieving peace in the Middle East. In any event, they all agreed for a change, so I speak on their behalf.

Our approach for the whole problem was, and I voice our vocal opposition to my dear friend Alan in Dallas concerning these proposed amendments because I felt a basic flaw to the approach because based on the premise and a proposition that nine out of ten cases in the United States are megaChapter 11 cases in which the major players are major law firms from the large metropolitan areas, like Ken from Los Angeles, who travel all around the place, and New York people and so forth.

You all know that is not the case because the reverse is true. Nine out of ten cases are run-of-the-mill Chapter 7 consumer cases or 13s. So therefore to create a monstrous procedure which might be fitting to maybe a megaChapter 11 case is just as difficult a task as going to a custom tailor and telling him, "I want you to create a suit which will fit Wilt Chamberlain and Tiny Tim." It just cannot be done. So with these plenary remarks, I would like

to tell you as we see this problem.

I understood that what triggered the idea of this major reform movement to change 9013 and 9014 was the perceived lack of national uniformity in contested matters in motion practice; second, the perception that the current rules lack sufficient guidance; and third, the perceived confusion over certain terminology when most contested matters are not, in fact, contested and that many applications are contested. We disagree with all these premises for the following reasons.

It was voiced that attorneys who are not practicing in the forum are blind-sided and trapped by local rules, obviously because the local rules must be written in Chinese and locked up in some vault, inaccessible to anybody, and that's not the case. If you come to my court--not mine, but I happen to sit there--the first thing I would do is get the local rules. They're attempted to be written in plain English, so you understand what it's all about. So nobody's trapped in anything.

Second, the suggestion was welcome to put them on the website and under the current requirements, they are available and must be filed with the AO and also with the circuit. So they are not some secret hidden document which is unavailable to a foreign lawyer. They're available.

And the second one is that when I was on the Rules

Committee I fought tooth and nail to abolish the distinction between motion and application labels because I don't know in any of the districts--nobody pays attention to it and they use the terms interchangeably constantly. And I don't see what is magic about application or magic about motion.

Second, if any attorney does not know what contested matter is, I don't believe they should practice law. I mean it's quite obvious. So why is that so difficult to understand what is a contested matter? Some matters might be filed which is facially innocuous that it might create an objection and then become a contested matter.

Now, 9013 is attacked by you all and you want to change it. As now written, 9013 merely sets forth how do you request relief in a bankruptcy court? It tells you any request for relief shall be by motion unless the term "application" is used or if the matter involves adversary proceeding governed by Part 7 of the rules. It says how to be served.

I agree with the suggestion if made with the service that 7004 rigid service; that is, incorporation on the resident agent--I don't believe that's practical, but option should be given either serve on the resident agent or the mailing address that the debtor received the billings or the statements, which is most likely the local office or

regional office but not the headquarters someplace in--God knows where they are at.

So I would suggest to you all that 9013 abolish the distinction between motion and application and number one, inject more flexibility in the service of the motion, which is to permit an option either to serve the resident agent or to serve the local office where the billings come from, the address that's stated on the debtor's schedules.

Concerning 9014, I don't believe who does not understand the term "contested matters"? Maybe there's some that don't. So they have to be changed, you all suggest, to administrative motions. I don't have the foggiest notion what that means but maybe I'm not used to highfalutin technical labels here.

What I submit to you is as follows. The current Rule 9014 has to be viewed as it plays out in the street. Let's face it. What kind of motions are filed in an individual consumer Chapter 7 case? Motion for relief from stay, motion to invalidate a lien under 522(f)(1) and (f)(2), and basically that is by way of motions.

The only other contested matters are objections to exemptions, which is still going to be an objection and not motion to object--objection to allowance of a claim, and that is by the trustee.

Now I have to stop here and tell you something

which I deplore and I'm sorry that you all didn't pay attention to it or consider it in your proposed amendments, which in my view would be very, very helpful.

1019 deals with the conversion of a 13 or an 11 to a 7. It provides new time limits to do certain things when a case is converted from a 13 to an 11. It provides a new time frame under 3002 to file claims, to file complaints on dischargability on the 533(c) and file objection to discharge. It does not provide any new time frame for objecting to the individual debtor's exemptions.

Under the Taylor case if there's no objection filed originally in the case, it is deemed to be automatically allowed, even though the debtor as a matter of law is not entitled to the objection at all under any theory.

Why is that? I don't know why the Eleventh Circuit ruled in Taylor that way or the Supreme Court did in the same fashion. I don't know the reason for it. But why would a creditor hire a lawyer and file an objection to the claim of exemption in 13 when 13 does not call for liquidation and the question of exemption is really academic, except possibly in the context that the plan is proposed to consider whether or not the plan is in the best interest of creditors.

In the 11, individual 11, it would be absolutely

asinine in my view to hire a lawyer to object to exemptions. You don't know if the plan is ever going to be filed or what. He might provide--God forbid--100 cents on a dollar to their claim. Why bother with the exemptions?

Yet when it's converted, now you're foreclosed to challenge a claim of exemption which is facially not allowable and not supported by law. And I think that's a big missing item in Rule 1019.

Go back to our pet project here, 9014. In a 7, as outlined by Mr. LeVine, the motions are motions for relief from stay. That involves basically one and one thing only, generally speaking, that the creditor files a motion for relief from stay seeking to enforce a right against a property. In nine out of ten cases a property claimed and allowed as exempt is no longer property of the estate. So to the extent the automatic stay gains a protection vis-a-vis property is not applicable. It's not applicable.

To the extent it's still property of the estate, then the trustee's a party of interest and the trustee, of course, technically has a right to oppose that motion for relief from the stay.

I concede there might be times when there is equity in a property--there turns out to be never one but let's say--and therefore it creates an issue. So the procedure is in our district, for instance, to lift the stay

you have to, under the code, you have to have a hearing within 30 days, mandated.

So we issue an order directing a response. If a response raises an issue, then there's going to be a hearing on it. Otherwise the motion is granted. And the response states merely, "I don't like what you're doing, Where is my money?" or "Don't bother me." These are not responses which create an issue.

However, Judge Duplantier's concern that without proof we grant relief, the motion must document the right to relief. Is there a lien interest? They have to have an affidavit as to the default of the obligation and establish that at least prima facie the creditor has a valid, enforceable interest against the property, such as copy of the mortgage and a note or a security agreement and a UCC-1 item. And that creates a prima facie valid enforceable lien and the response is silent, then lift it, even if there is a trustee involved. If there is an issue then, of course, comes a big problem which some people don't know how to deal with.

Automatic stay litigation was never designed, never designed to litigate substantive issues. It merely puts into issue if there are genuine issues of fact and law legally, what court shall determine it--a bankruptcy court or some other court. But there's no time on the code time

frame to conduct a full-scale trial on a motion for relief from the stay because you can have a discovery process, 30 days responses, depositions, what have you. You cannot do it.

Why? Because there must be a primary hearing in 30 days; there must be a final hearing in 30 more days and a judge must decide it within 30 days. All right?

So I don't believe that it's a violation of the due process to require a response and if facially the movant establishes a prima facie valid case for getting the relief, no response, get it. If the response raises a genuine issue, then we set it down for primary hearing and then I find it. And even--time is up, Jay? No?

JUDGE CRISTOL: I guess the judge will allow you to finish your sentence.

JUDGE DUPLANTIER: Go ahead and conclude, Judge.

JUDGE PASKAY: I conclude.

In 11 stay litigation, which is the most common thing, we have a primary hearing and I ask three questions. Are you offering a recommendation? That's the first question. Second, what is it? Third, if you do not, what is the factual legal justification not to offer any? And usually nine out of ten cases you get an answer: Yes, we had a deal. I'm going to make payments, what have you. And everybody's happy as a bug in a rug.

You don't shuffle affidavits and have a status hearing and have, for instance, what I read in your amendments, you grant a motion for summary judgement even nobody ever filed a motion. I never heard of such a thing. Under your proposal it says there is no factual dispute, nobody asks for it but the judge is going to grant a summary judgment. You don't call it summary judgment but rule as a matter of law.

Thanks for listening to me. I hope that you understood one-half what I said. If not, talk to Jay and he's going to translate it.

JUDGE DUPLANTIER: Thank you, Judge.

Any questions?

Thank you, Judge.

I want to thank all of you for coming, those of you who gave us your comments especially and those of you who came to observe.

We're going to have a session of that portion of the committee that's present, so I'd ask if you'd let us have the room. Thanks again, all of you, for coming.

[Whereupon, at 4:20 p.m., the meeting was adjourned.]

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