

# USBC Southern District of Florida Lawyer Advisory Committee (LAC) Meeting Minutes (5-26-2021)

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May 26, 2021

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12:30 PM EST

(via Zoom)

*The meeting commenced at 12:35PM*

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## **Committee Members Present:**

Jeffrey S. Fraser (Committee Chair)  
Christopher Andrew Jarvinen (Vice-Chair)  
Peter Kelly (Secretary)  
Heidi Feinman  
John Page  
Laila Gonzalez  
Rilyn Carnahan  
Nancy Neidich  
Grace Robson

Justin Lefko  
Dana Kaplan  
Eric Sliver  
Greg Grossman  
Jacqueline Calderin

## **Not Present:**

Michael Hoffman

### **1. Welcome/Check-In.**

- February 10, 2021 – Meeting Minutes Approval

Chair welcomed members and provided opportunity for initial comments. The circulated minutes for the February 10, 2021 meeting were discussed and no changes were proposed. A motion to approve the minutes as circulated was made and seconded, and the minutes for the February 10, 2021 meeting were approved by the LAC.

### **2. Chapter 7 Dual Contract/Unbundling of Duties.**

#### *Agenda Items:*

- Issue Recap: *Whether the Bankruptcy Court should give bankruptcy law practitioners guidance as to the Bankruptcy Court's position with respect to "no-money-down" bankruptcies.*
- Update: *Two separate motions by the US Trustee have been filed in front of Judge Isicoff (BK Case No. 20-23354-LMI and BK Case No. 20-18268-LMI). Both cases are still pending a final ruling.*

Chair explained that this issue remains active, with two related motions presently pending before Judge Isicoff. Each motion purportedly involves different law firms who have engaged in some form of the unbundling / zero initial fee practice, but both motions basically address the same argument/concerns. It is anticipated that rulings will be coming out in the near future, but there is no known deadline. It is likely the issue remains a topic of discussion among the Bankruptcy Judges. When a ruling or rulings become available, the LAC will try to circulate them to the committee members. Members indicated that the unbundling/no fees practice continues to be advertised in the marketplace and is believed to be an ongoing practice of some firms.

### 3. Attorney Conduct/Civility.

*Agenda Items:*

- *Issue: it has been brought to the LAC's attention that there have been instances of attorney incivility during telephonic proceedings (specifically 341 meetings).*
- *Update: Attorney Thomas Messana drafted an article on civility and virtual conduct titled "Actually, it's Virtual Respect".*

Chair and members provided an update that the prior agenda topic of incivility prompted a request from the LAC to attorney Tom Messana to draft a Beacon News article to promote civility and support active thought among attorneys regarding civility and interacting with each other. Members explained this topic is especially poignant in the virtual world in which we all have been operating due to the pandemic. Members commented about the great article attorney Messana prepared, which was circulated to members as a pre-view before publishing. It is anticipated that the article should be published in the next Beacon News article (likely within the next coming weeks). For any members who like the article, they were welcomed and encouraged to thank attorney Messana for his work and effort in preparing the important article.

### 4. Court Call/Court Solutions/Zoom Hearing.

*Agenda Items:*

- *Issue Recap: As a result of COVID-19, our District (as well as most regions in the country) has been forced to adjust court procedures and hearing options. The LAC agreed that a sub-committee should be formed to discuss options for expanding virtual hearings and other procedures/strategies to promote efficiency (depending on hearing calendar type).*
- *Update: Judge Kimball will begin utilizing Zoom for all hearings. This is purported to be for hearings in all case chapters for Judge Kimball (including Chapter 13 Consent Calendars, starting in May 2021), which will implicate the Court's self-scheduling system within CM/ECF. It was also discussed that the bankruptcy court system is likely to continue with use & development of virtual hearing processes for the foreseeable future.*

Chair explained this is a pandemic-related issue and remains an agenda item for ongoing discussion of what we are and can be doing to improve efficiency and virtual practice. An update was provided that we have concluded our first Southern District Chapter 13 calendar proceeding entirely via zoom, which participating members all agreed was very successful. It was estimated that approximately 100 attorneys attended the Zoom ch13 calendar, and no major technical issues were observed. Members also commented that it was very personable / enjoyable to see practitioners via the video platform.

Regarding virtual hearing platforms / remote hearing attendance generally, members also explained that the benefits and efficiencies we have realized by using virtual hearings would be great to retain even after the courts re-open to in-person hearings. Some Bankruptcy Judges have commented that after the courtrooms reopen to allow in-person attendance again, they will likely also allow for some sort of hybrid setup. Members discussed that this could involve courtrooms are opened for in person hearings but with the additional option to attend remotely via virtual means (possibly zoom), facilitated through camera infrastructure located in the courtrooms. Additionally, members commented that 341 meetings are expected to continue to operate via telephone conference for the foreseeable future. Comments were also raised that some attorneys seem to forget that the proceedings are court, and that it is important to remember that formal dress / attire is still required. Guidelines were prepared to remind attorneys of this but they may not all adhere properly to these rules. Members agreed that if possible, it will be helpful to seek further guidance from the courts about in-person reopening details before we conduct the open / meet the LAC meetings, as this will likely be a topic of common interest among practitioners. Chair will attempt to get further detail from the Bankruptcy Judges before conducting the open / meet the LAC meetings.

## 5. Local Rule or Administrative Order suggestions (agenda item identified from Greg Grossman):

### *Agenda Items:*

- *Issue #1 – Document Productions under Rule 2004 & Rule 7030: LAC member Greg Grossman identified whether it may be worth discussing the procedures of document productions for Rule 2004 Examinations and Rule 30 non-party depositions in our District in terms of timing and free-standing document requests. As to timing, right now there does not appear to be a method to require an examinee or a deponent who is not a party (where Rule 7034 could be used to obtain documents in advance of deposition) to produce documents prior to the deposition (as having documents available in advance for review would make the deposition more cost-efficient, useful and productive). The local rules, local forms, and forms of subpoenas do not, for instance, allow the designation of two different dates (one for production of documents and one for the oral testimony). Grossman believes that many practitioners resort to workarounds including non-uniform notices of Rule 2004 examinations to achieve such results. As to free-standing document requests, where there is an adversary or contested matter, the current rules seem perfectly adequate to handle the needs (Rule 7034 can be used to get documents from a party and Rule 45 and the current form of subpoena permits checking a box asking only for documents from a non-party). However, when a party in interest in the main case seeks documents but not testimony a Rule 2004 Examination notice is an ill-fit in terms of the forms. For example, a Rule 2004 Examination that seeks documents but not testimony from a debtor should be available in an easy process.*
- *Issue #2 – Contingency Fee Arrangements: Rule 4-1.5(f) of the Florida Bar Rules and Regulations [“Contingent Fees”] pertaining to contingency fees requires a writing, signed by the lawyer and client, stating the method by which the fee is calculated, and indicate whether costs are included or not. Grossman suggested that it appears as if contingency or hybrid fee agreements in our District are common (e.g. in preference litigation by trustee’s counsel or D&O lawsuits) and are being approved without compliance with 4-1.5(f) relying instead solely upon a motion or application filed under Section 328 and the order thereon. Grossman notes that our local rules require compliance with the Rules Regulating the Florida Bar.*

Issue #1 was explained as an issue with the local forms and local rules relating to examinations and document discovery (Rule 2004 & 7030/7034), with the general desire by attorneys propounding discovery to acquire documents before examining a party under oath being at conflict with the local form documents and local rule indicating the local forms are not to be altered. It was discussed that the common practice appears to be alteration / modification of the local form to accommodate multiple dates for the discovery process (i.e. documents by x timing prior to y examination/depo date), which technically attorneys are not supposed to do pursuant to local rules. Rather than having everybody to alter the forms in complicit agreement that this is needed, it was proposed that should just change the local form (and possibly rules?) so that parties are permitted to alter the form / fill in custom areas, or have the form adjusted to simply allow for things like multiple dates / distinction between deadlines for document production vs. examination date. Members discussed that local rules committee is closed for the season and may not be reopening soon, but changing the local form may be possible without a local rule adjustment. Grace Robson and Christopher Jarvinen also noted their interest in this issue. As a result, Greg Grossman, Grace Robson and Christopher Jarvinen will prepare a proposed local form change. It also appears likely the local rule may also need a minor adjustment but that change may not be possible until a later time, and it is a possibility that language could be included on the form to alleviate the issue. The LAC will attempt to put this issue on the agenda with the Bankruptcy Judges for implementation of the changes.

Issue #2 was explained as involving contingency fee structures where no underlying formal written agreement / documentation exists and only a Section 328 Motion and Order were used to approve the retention. (An example would be a Chapter 7 Trustee retaining counsel). Greg Grossman explained that he added this topic to the agenda because he was curious if this was the standard practice, so that there are not necessarily separate retention letters/agreements put in place between trustee and counsel, etc., or if there generally are underlying retention agreements. Members explained that yes use of the Section 328 Motion and Order as the only documentation is fairly common practice, and often arises from repeat retention relationships (i.e. same trustee retaining same firm), and also that it references the Florida Bar requirements. Members discussed the considerations of which party signs off on the 328 Motion (signed by the Trustee as applicant, or signed by counsel for the Trustee). Issues can arise based on the typical requirements under Florida law for the necessary elements of contingency relationships / representation, such as settlement of a preference action involving as consideration the release of a claim against

the estate (leading to the question of which way does the settlement/release work with respect to the contingency—does it work for or against the fee?). With the issue identified, Greg Grossman proposed that the local rules may need adjustment (i.e. to potentially require actual written retention agreements), in order to protect participants and the general concept of what they are seeking to do with retention on a contingency basis. It was discussed that this ultimately may be as simple as including language in the Local Rules comments area, simply to remind practitioners to comply with Fla Bar rules regarding contingency arrangements. Chair requested that members brainstorm ideas on it (Grace Robson volunteered to evaluate this issue with Greg Grossman) to further possible proposals and discussion about adjustments.

## **6. Pro-Bono Update (Peter Kelly).**

*Agenda Items:*

- Issue: Peter Kelly to provide an update on pro-bono projects currently underway with the District's pro-bono committee.

Peter Kelly provided update regarding the pro se helpdesk program and current efforts to offer the program through virtual courtroom platforms. He also updated the members regarding recent activity with law school clinics and cross-cooperation / collaboration on pro bono efforts across geographical regions that has been possible due to the pandemic / virtual practice over the past year. Members discussed the ability to allocate available resources from one region to need for resources in another, which generally has not been possible previously, due to geographic restrictions. Examples have included placing pro bono clients in Miami with volunteer attorneys located in Palm Beach, and Palm Beach and Broward cases placed with volunteer mentor attorneys and students in law school clinics based in Miami. Other members commented regarding further ability to utilize the virtual platforms for assistance, and also raised the topic of lack of access as a challenge to pro bono clients who don't have computers/necessary technology, or cannot drive, etc. It is possible that the use of Zoom via phone may assist with giving greater access to more potential pro bono clients. It was discussed that 341 meetings are also an issue and challenges exist for Trustees conducting them via phone; it may be the case that 341's may migrate to Zoom platform as well. It was commented that 341 meetings take more time via virtual proceedings when compared to in-person meetings, especially with pro se debtors, but they are more efficient than in-person in other ways (no need to drive/commute, etc.). Members are encouraged to brainstorm additional ideas and contact Peter Kelly and Grace Robson with suggestions or if interested in volunteer opportunities.

## **7. Meet the LAC Zoom Conferences.**

*Agenda Items:*

- Issue: Last year, the LAC conducted "Meet the LAC" Zoom conferences so that Southern District of Florida lawyers had the opportunity to meet our members, and for us to notify them that LAC is here to act as a conduit between the lawyers and the bankruptcy judges in South Florida.
- Update: "Meet the LAC" Zoom conference dates have been proposed for the middle/end of June and the Doodle Poll(s) have been provided to the members.

Chair explained that the Doodle poll for possible Meet the LAC meeting dates is still active. Chair had been looking at dates of June 10 and June 14, 2021 as respective dates for business- & consumer-focused meetings, however he will look at dates further out on the calendar to allow for marketing/promotional time and also to accommodate more participants. Members discussed possible late August or September dates as many people are planning summer travel. Chair will circulate a new crop of dates for approval.

## **8. Chapter 13 Sub-Committee Report.**

*Agenda Items:*

- Current Issues:
  - "No-Look" (or "Presumed Reasonable") attorney fees for secured creditors in Chapter 13.
  - Local Form 48 (Debtor's Response to Rule 3002.1 Notice).
- Update: The Chapter 13 sub-committee met in April to discuss pending issues, and it was determined that (for now) our group will not present a "No-Look" secured creditor attorney fee proposal to the Bankruptcy Judges in

*our District, and the issue may be revisited in the future (perhaps when the Middle District of Florida finalizes a guideline, which may be imminent). As it relates to Local Form 48 (Debtor's Response to Rule 3002.1 Notice), an updated form has been submitted to the Bankruptcy Judges (making it clear that a separate objection must be filed if that option is selected). The updated form has been approved and should be uploaded to the court's website shortly.*

Chair provided an update on the ongoing consumer Subcommittee discussions. Regarding the no look / safe harbor ch13 attorney fees, the discussion reached a point of conclusion in that there will not be a formal proposal submitted to the Bankruptcy Judges at this time. However, the issue/topic will remain open for further discussion within the Subcommittee. Members explained that Judge Mora & Judge Kimball may be presenting their own set of rules/guidelines. As the Courts may deal with the creditor atty fees issues more frequently in actual case disputes, the Subcommittee will remain on the lookout for applicable orders/rulings on the topic which may present opportunity to expand on universal rules proposals. Chair also explained that the Local Form 48 was successfully adjusted as had been previously discussed/proposed.

A motion was then made to adjourn meeting which was approved and seconded, whereupon the meeting concluded at 1:49PM EST.