Southern District of Florida Bankruptcy Court - Lawyer Advisory Committee (LAC) Meeting Minutes (12-14-2020)

December 14, 2020

4:00pm EST (via Zoom)

Attendees Present:

Chief Judge Laurel M. Isicoff
Judge Robert A. Mark
Judge A. Jay Cristol
Judge Erik P. Kimball
Judge Mindy A. Mora
Judge Scott M. Grossman
Judge Peter D. Russin
Judge Paul G. Hyman
Jeffrey S. Fraser (Committee Chair)
Christopher Andrew Jarvinen (Vice-Chair)
Peter Kelly (Secretary)
Heidi Feinman
Joe Falzone
Michael Hoffman
John Page
Laila Gonzalez
Rilyn Carnahan
Nancy Neidich
Grace Robson
Robert Furr
Ashley Dillman Bruce
Leyza Blanco

Not Present:

Brett Lieberman
Michael Johnson

1. **Welcome/Check-In, and October 7, 2020 meeting minutes**
   Meeting commenced at 4:00PM. The Lawyers Advisory Committee ("LAC") members explained that the minutes of the October 7, 2020 meeting had been circulated and finalized and accepted previously via email. The minutes were approved without objection. All LAC meeting minutes are posted on the LAC website which is linked from the Bankruptcy Court's webpage.

2. **Chapter 7 Dual Contract/Unbundling of Duties**
   Agenda Item(s):
   - ***a.*** *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. At the June 19, 2020 meeting, LAC voted to bring the issue to, and to request guidance from, the Bankruptcy Judges. At the October 7, 2020, the topic was brought up again as the issue continues to gain attention among practitioners.*
   - ***b.*** *Update: LAC agreed to keep this topic on the agenda for discussion with the judges, but no further action at this time.*

   The Judges explained they are considering this topic and deciding whether to provide guidance. It was explained that in most other jurisdictions around the country this item is being addressed through the process of issues arising at a hearing / in an active case, and FLSB Judges present explained they have been hopeful the matter would come up in this way. Members explained that it appears most practitioners do not want to allow the dual contract/unbundling of duties and that many concerns raised relate to implications on competition among practitioners.

Substantive discussion focused on two issues: 1) under what circumstances is the practice/process permitted; and 2) separate topics that arise relating to fees themselves including disclosure and premiums when factoring is involved. Related ethical issues were also discussed, including the concepts of debtor counsel becoming a creditor as of the petition date, sale of receivables to factors / 3rd parties, and nature of fees charged including whether premiums are charged on top of fees for use of factoring agreements. It was also discussed that it is difficult to determine the actual magnitude of the problem if matters are not raised in cases or without further information gathering / research.

Members discussed that Florida Bar Rules are not excused by any of these activities, that attorney enforcement issues are very serious, and that the Office of the United States Trustee is looking at the issue very closely. Additionally, there have been instances of higher fees charged / premium assessed in circumstances of a receivable sale. It was explained that at present the Office of the United States Trustee is not actively seeking out these situations to raise issues in cases, and it was discussed that absent the Office of the United States Trustee bringing the issue to the Judge, there are not many situations where a creditor (or debtor attorney) would bring the matter to the Court. Attendees commented that these are issues of concern in other courts throughout the country, that this practice has been determined a violation of the bar rules in Utah by its state bar, and that a new bill has been proposed by Sen. Warren that would appear to permit fee collection post-petition.

It was suggested that in the absence of a ruling by the Court on a particular case, then a local rule or an administrative order describing the lay of the land to practitioners would be helpful. The Judges explained this topic is on the agenda for their upcoming judicial meeting, and attendees agreed that if the Judges determine an administrative order should be utilized as a mechanism for providing clarification then a subcommittee within the LAC would be beneficial to assist with creating such an order. The Judges indicated they will report back to the LAC after their meeting.

3. No Look Fees for extra two years – Ch. 13 CARES ACT plan modification

The Judges explained that the issue has come up in several chapter 13 cases, framed as requests by debtor counsel for approval of additional fees associated with chapter 13 plan term extensions pursuant to the CARES act. Attendees discussed level of discussion / related request exists among practitioners and explained that expiration of CARES Act may likely limit the scope of the issue. Members explained the Chapter 13 Trustee practice has been to bring this request up to the Court when it arises, and to have the Court weigh in on the specifics requested in the circumstances of the case. Requests have been made in cases for a $750 fee plus the $500 no-look fee for a motion to modify plan, to cover the work that continues during the additional 24 months of a plan/case in these circumstances. Generally, attendees supported 2 hours as agreeable for a general time amount for these circumstances, and the issue was framed as whether formal approval is appropriate for a no look fee for the work associated with the additional 24 months. The Judges agreed they will add the topic to their agenda.

4. Court Call/Court Solutions/Zoom Hearing

Agenda Item(s):

- ***a.*** *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).*
- ***b.*** *Update: Sub-committee will discuss updates at meeting*

The Chair provided recap of transition to electronic / virtual processes for hearings (expansion of scope for telephonic hearings, use of Zoom for video hearings, etc.) and explained subcommittee had been formed to facilitate discussion of related issues and to promote efficiency and potential improvements.

Subcommittee members explained that during Chapter 13 Trustee calendars, attorneys are directed to spell their last name with each appearance during Miami case calendars but are not directed to do so in Fort Lauderdale or West Palm Beach case calendars. Cumulatively, the name-spelling requirement adds time to the duration of the calendars which

typically involve hundreds of hearings in each session. Attendees agreed name spelling is necessary for recording/transcript purposes for all matters over which a Judge presides but inquired as to its necessity during Trustee calendars where a Judge is not in attendance. Attendees discussed registration process for calendars (as necessary through virtual attendance platforms) now helps alleviate the prior concerns of attorney identification for transcript purposes. Procedures for processing registration lists presently vary among the Judges, and it was discussed that a new requirement for upload of registrations to the Court may be helpful in the event a transcript is requested. The Judges seated in Miami agreed that attorney name-spelling can be eliminated from the Miami Chapter 13 Trustee calendars going forward.

A proposal was raised to consider utilizing Zoom hearings rather than Court Solutions telephonic for chapter 7 and chapter 11 calendars. The Judges explained they have been looking at this possibility and provided details regarding obstacles and ongoing research. There are some issues with self-calendaring processes for hearings and scheduling in chapter 7 cases and in some chapter 11s. It is important to be able to have the registration link contained within the notice of hearing, however integrating this has been problematic due to limitations on the ability to populate the link into the notice of hearing. Certain courtrooms have been looking into these issues and it was explained thus far the only available workarounds are too problematic with regard to their inability to integrate with the self-calendaring system (it must be shut off) and that it is exceedingly burdensome on court staff because it requires courtroom deputy involvement with every single notice of hearing. Additionally, there are limitations as to what can be put into the website. Judges explained that Court-Solutions is working on a video feature for their system and may be rolled out in early 2021, and that Court-Solutions integrates better with the court's web / internet structure better than Zoom does). Generally, attendees were in agreement that there are a lot of factors at play behind the scenes and complete migration to one platform over another for all hearings is not likely possible at this time. Attendees also discussed the costs & access factors for attendees when considering public access (pro se litigants, public / press observation, etc.).

The Judges have conducted extensive research into these technologies and integration into courtrooms, electronic procedures/website, etc., which will continue. Everything learned / researched will be utilized going forward, as it is very likely the Court will operate using hybridized programs once the present COVID health concerns are under control. They hybridized system was generally described as a courtroom process that would allow some people to attend in person and others to attend via a virtual/remote access platform.

Attendees discussed that it may be worthwhile to compile & maintain a list of best practices for Zoom / remote hearing attendance, such as common-sense items and pet peeves from the Judges. The compiled information could then be posted on the LAC website. Judges referenced the existing basic list of items included in standard orders/notices, and attendees further explained the main court webpage includes the basic info for virtual hearing attendance. Supplementation is possible if it is determined that the existing lists/references need updating.

Proposal was discussed that a standing list of approved participants may be helpful for every hearing. Judges explained hearing attendees should be able to get approval for attendance fairly easily through the respective hearing platforms/procedures, and that the prior no need to seek court pre-approval for remote attendance is generally no longer necessary (except as described for certain situations on the Judges' individual webpage info, etc.)

5. Attorney Conduct/Civility

Agenda Item(s):

a. *<u>Issue</u>: it has been brought to the LAC's attention that there have been instances of attorney incivility during telephonic proceedings (specifically 341 meetings). This item is on the agenda for general discussion on attorney decorum, expectations, and ideas or strategies (if any) to address such conduct as it relates to all bankruptcy hearings.*

Attendees discussed a recent request submitted by a practitioner (Chapter 7 Trustee) to the LAC, for inquiry into incivility of an attorney during section 341 meeting proceedings. Attendees discussed the roll of the LAC with respect

to these types of inquiries generally. Judges explained that typically the United States Trustee addresses section 341 meeting matters, rather than the Court, so the specific circumstances at hand raised recently to the LAC should be addressed by the Office of the United States Trustee. It was also discussed by the Judges that if they observe improper behavior by attorneys during hearings/proceedings over which they preside, they anticipate that they will address such issues directly. Judges also referenced that a committee/organization exists within the U.S. District Court, Southern District of Florida that is tasked with addressing this type of attorney misbehavior / incivility.

It was discussed that situations arise where the matter / behavior may go well beyond the section 341 meeting setting, and LAC members sought guidance regarding addressing the expectations and role of the LAC with respect to this type of inquiry by practitioners. Clarification was provided with respect to the mission of the LAC, dealing with concerns or complaints raised by practitioners about individual attorney behavioral issues / incivility is not be something the LAC should be burdened with. For the circumstances described regarding the specific practitioner inquiry presently raised to the LAC, it should be directed to the Southern District's committee program. Attendees also indicated that with respect to Trustee / section 341 meeting situations, mechanisms are available for the Office of the United States Trustee to bring these matters to the Court within the respective case(s). The Judges will determine if there is something more formal to be created to address these types of issues, but made it clear it is not a core LAC function.

6. Wet Signatures/Verification (Admin Order 2020-13 and L.R. 9011-1)

Agenda Item(s):

a. *Issue:*

i. *Practitioners have raised concerns to members of the LAC regarding the requirements for wet signatures and have indicated discussion/consideration may be helpful. Local Rule 9011-1 states that the filer must obtain the original wet ink document within 14 days from filing party's receipt of a copy or digitally scanned document containing the wet ink signature. Admin Order 2020-13 states that if filer uses digital software, and the software provides signature authentication, then filer must maintain copy of the digitally signed document in case file. If a signature is obtained via a commercial digital software (i.e., DocuSign or something similar) will maintaining the digital signature (alone without a wet ink document) suffice with the signature requirement for our district?*

ii. *If the filer fails to obtain the wet ink signature after 14 days, what does that do the effectiveness of the document filed with a copy or scanned wet ink signature?*

iii. *"Personally verify" – in the context of a telephonic 341 meeting, when a debtor attorney is asked if they have personally verified certain documents of the debtor (i.e., social security card, license, etc.), what exactly does this entail? Does counsel have to personally meet with the client, or can counsel view (and verify the documents) virtually or via email?*

The Chair explained the general concerns presented by practitioners relating to wet signatures and related local rule and Administrative Order requirements. The topic of wet signatures was discussed extensively during the local rules committee work. The Chair explained that the Local Rules group could not get comfortable with the digital signature software alone, so created a hybrid feature of moving slightly away from wet ink signatures but still requiring that there be some reliability retained with the signature provided to Debtor's counsel. If after 14 days someone cannot verify their client has given authority, then the situation can end up before the Court (typically this occurs with pro se filers when they do not provide the substantiating documentation necessary). However, in a situation where there is representation who does not acquire the actual physical document, it is likely not something that will become known by way of standard procedures. Consultation was conducted by the Court with the US Trustee when preparing this local rule, and the US Trustee expressed strong concerned with bankruptcy fraud and was very supportive in requiring wet ink signatures be acquired / retained as part of the process.

The Judges characterized the topic generally as something that falls within the context of basic professional responsibility. The requirement / issue relating to "Personally Verify" requirements was deemed to be a trustee issue (rather than Judge issue) and was not discussed. Judges referenced that during the COVID pandemic the court has

allowed for certain use of digital signature verification software (via Administrative Order). However, this was explained as only temporary, and once things return to non-pandemic status then procedures and requirements will default back to the default local rule (and physical wet signatures will be required).

7. Chapter 13 Sub-Committee Report

Agenda Item:

- ***a.*** *"No-Look" (or "Presumed Reasonable") Attorney Fees for Secured Creditors in Chapter 13*
- ***b.*** *Motions to Modify/Modified Plan Attorney Fees*
- ***c.*** *Chapter 13 Hearings/Calendars (ideas to refine process during COVID)*
- ***d.*** *Possible updates to Local Chapter 13 Plan form (last revision, 2017)*

The Chair provided an update regarding subcommittee discussions generally, with explanation that certain agenda items had already been addressed in earlier discussion. Regarding no-look / safe harbor fees for secured creditors in chapter 13 cases, it was explained that the Middle District of Florida Bankruptcy Court is addressing issue in detail and we may benefit by monitoring the process there. The attendees briefly discussed considerations for refining chapter 13 calendar procedures, including considering possible benefits of considering a change to Zoom. The Judges explained it is generally possible to utilize a repeating/recurring Zoom room link, however, it greatly complicates the registration link—only the most recent registration list overrides all other prior registrations that utilized that same room—so that the idea of utilizing the attendee registration as reference for parties in attendance at hearings is challenging. The consumer/chapter 13 subcommittee agreed it will continue with its discussions of ongoing agenda items.

8. Reaffirmation Agreements

Agenda Item(s):

- *a. Issue: In Chapter 7 cases, reaffirmation agreements are often finalized very close to a debtor's discharge (and in many cases after the discharge). At December meeting, the LAC discussed the concerns raised regarding reaffirmation agreements (and approval of the same) at/near/after discharge. Can the group discuss the best procedural way to accommodate these agreements post-discharge?*
- *b. Update: The LAC suggested that this issue may be best addressed through the local rules, and agreed to raise the topic and suggestions to the next Local Rules Committee*

The Chair explained that practitioners are looking for guidance regarding procedures for bringing reaffirmations after discharge has been entered. The Judges generally agreed there is no such thing as vacating a discharge for this purpose. The Judges commented that if parties made the agreement before the discharge, then that may be approved by the court even if it is executed after entry of the discharge (and likely it is good practice to make this representation in the motion). If a reaffirmation agreement is outstanding and entry of discharge is approaching, it was suggested that a motion be filed to delay the discharge. It was also discussed that a Local rule exists to compel a creditor to execute a reaffirmation if they are delaying the agreement. However, if the discharge is entered there is no mechanism for the Judges to vacate a discharge in this context. For further reference, it was mentioned that Judge Williamson has a great opinion on the word "made" in section 524. Rule 4002 / 4008 describe the tools for addressing this, and counsel needs to be mindful of this. The Judges made it very clear that they do not want to see motions to vacate discharge because this type of motion is problematic. As the LAC had previously determined to bring this issue up to the Local Rules Committee, it will plan to include the feedback of the Judges on this issue as it may impact how or whether a local rule change is appropriate.

After completing discussion of Agenda items a motion to adjourn the meeting was approved, whereupon the meeting was concluded at approximately 5:48PM.