

# Meeting Minutes - U.S.B.C. Southern District of Florida Lawyer Advisory Committee (LAC) Meeting with the judges (12-20-2021)

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**December 20, 2021**

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**4:00 PM EST**

(via Zoom)

*The meeting was called to order and commenced at 4:05PM*

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## **Judges Present:**

Chief Judge Isicoff  
Judge Cristol  
Judge Grossman  
Judge Kimball  
Judge Mark  
Judge Mora  
Judge Russin

## **LAC Committee Members Present:**

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

Justin Lefko  
Dana Kaplan  
Eric Sliver  
Greg Grossman

## **Not Present:**

Honorable Judge Grace Robson (No longer a Committee Member pursuant to recent Middle District Judicial appointment)  
Jacqueline Calderin

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

- September 23, 2021 – Meeting Minutes (approved via email).

The Chair called the meeting to order and welcomed the Judges and the Committee Members in attendance. The minutes from the prior September 23, 2021 Committee meeting were previously distributed and approved via email, with no additional comments or requests for changes received. Motions to approve the minutes and to move to the next agenda item were seconded.

### **2. Chapter 13 Subcommittee Report.**

#### *Agenda Items:*

- Current Issue(s):
  - “No-Look” (or “Presumed Reasonable”) attorney fees for secured creditors in Chapter 13.
  - “Monitoring fee” for debtor attorneys in this District, similar to the Middle District of Florida.

- **Update:**
  - The Chapter 13 Subcommittee has examined the possibility of “presumed reasonable” fees for certain, repeatable filings in Chapter 13 cases. The Subcommittee has been working on a draft proposal but has not yet come to consensus on a proposal (or if the objective is one that is even appropriate at this time).
  - Middle District of Florida monitoring fee  
[\[http://www.flmb.uscourts.gov/proguide/documents.asp?ID=288\]](http://www.flmb.uscourts.gov/proguide/documents.asp?ID=288)

The Chair provided an update on this Subcommittee’s recent activity, including efforts and discussion for a potential proposal to deal with secured creditor fees and potential safe harbor / standardization for Chapter 13 cases. The Subcommittee created a form draft proposal through its discussions, but it has not been presented to the full LAC Committee because no mutual agreement on terms has been reached within the Subcommittee.

Attendees discussed issues on this topic including related disputes arising more frequently in Chapter 13 cases of late, a wide variety of fee amounts and arrangements presented by creditors, timing concerns relating to the confirmation process and Federal Bankruptcy Rules for fees noticing, recoverability against collateral property vs. personally against a debtor, loan size and status, other varying factual and case-by-case circumstances.

The Chair explained the different focal points of what the Subcommittee has discussed with respect to the proposal, including current vs. non-current mortgage/loan status, and consideration of adjustment of the timing for filing Rule 3002.1 notice to predate confirmation if creditor benefiting from the presumed reasonable fee). Subcommittee members also raised escrow issues/ projected escrow shortages as additional topics of concern.

The Subcommittee will keep this topic on its agenda, and will work with the Judges’ feedback to try to reach agreed proposal terms. In general, the Judges were receptive to any proposal that helps facilitate administration of Chapter 13 cases, including the general concept of no look/presumed reasonable fee for creditor attorneys in Chapter 13 cases. The Judges indicated they would be willing to consider an agreed-upon proposal if one was submitted to them for review.

The Subcommittee members have also been discussing a possible “monitoring” fee for debtor’s counsel, during the post-confirmation period of a Chapter 13 case. One of the attendees noted that the Middle District has a \$50 per month monitoring fee post-confirmation, in addition to the safe-harbor debtor attorney fee of \$4,500, and some Subcommittee members believe approval of the monitoring fee would reduce need for certain fee applications. As with the topic of presumed reasonable fees, the Judges indicated they would be receptive to review an agreed-upon proposal if presented to them.

A Motion was then made to move to the next Agenda item and was seconded.

### **3. Mental Health/Attorney Mentoring.**

#### *Agenda Items:*

- **Issue:** It was requested of the LAC to formulate a Subcommittee, procedure, or other idea(s) to address the concern of mental health and/or attorney well-being in our District. The objective is for the LAC to serve as a resource for the Southern District attorneys that are experiencing difficulties such as mental health, substance abuse, or other conditions that may (and/or has been identified to) have an impact on an attorney’s practice. LAC members have expressed liability concerns connected to *initiating* contact with attorneys with whom they have no prior personal or professional relationship.
- **Update:** A small Subcommittee has been formed (Jeff Fraser, Christopher Jarvinen, Nancy Neidich). With the initial objective of ascertaining how (and if) it would be appropriate for LAC members to initiate contact with attorneys, the Vice Chair (Christopher Jarvinen) thoroughly researched the issue to get us started. In sum, the issue of lawyer well-being has experienced a material increase in interest in recent years. It was mentioned that lawyer assistance programs (“LAPS”) have been developed around the country with the primary purpose of providing confidential services to support lawyers experiencing challenges to his/her well-being. However,

Florida's professional rules of conduct are worded in such a way that unanticipated liability is a possible consequence (for example, the imposition of a "duty" to report an allegedly impaired lawyer to the bar rather than to explore potential mental health options). LAC members Heidi Feinman and Christopher Jarvinen have also presented the group with the idea of a possible CLE/presentation on mental health.

- Possible Next Steps:
  - the LAC could possibly make a recommendation for clarification (or revision) of FL Rule 4-8.3 [Christopher Jarvinen]
  - the LAC could also host, sponsor, or otherwise promote a mental health CLE [Heidi Feinman]

The Vice Chair provided a summary and preview of coming attractions for this topic. He explained the Subcommittee formation and activity, and its general inquiry into the question of: for a member of the bankruptcy community that may have a mental distress issue, what should the bar community and LAC members do? The Vice Chair explained that he reviewed all 50 states and various national organizations on this issue. He noted 1) a material increase in general interest w/in legal community as to mental health within the past 5 years; 2) lawyer advisory programs exist in many states & cities, but focus on someone with a mental health or substance abuse issue going to these programs (which is not the focus of this Subcommittee); and 3) concerns have arisen in discussions surrounding the Florida Rules of Professional Conduct 4-8.3, which is a requirement that bar members report someone troubled not to someone who could help them, but to someone who could take action with respect to their ability to practice law. He also explained the story remains incomplete in that there remains no clear answer as to what Committee and bar members should do when presented with a colleague who is experiencing mental health issues or related troubles. As a result, the Vice Chair indicated that the Subcommittee proposes to develop a white paper for consideration by the LAC and then by the Judges, as to what solution makes sense, and possibly suggest a revision to the Professional Conduct 4-8.3 Rule to add our input. This will be a major focus of the Subcommittee in 2022.

Attendees discussed the high level of concern and importance for this issue amongst the Judges, as well as inquiry into identifying and providing information about programs and committees presently available for assistance. Attendees provided anecdotal experiences for additional context on the importance of this issue. Discussion also included the ramifications of assisting those in need versus some existing programs' focus on troubled individuals' ability to practice law. Attendees expressed appreciation for the LAC's efforts so far and encouraged the LAC to continue the efforts in creating a long-term goal for addressing this issue in the District (and potentially beyond), but also requested that the LAC focus on practical solutions that are presently available, including compiling a database of resources such as hotlines, existing committees, and webinar programs for public presentation.

Subcommittee members explained a program presentation has been observed that was helpful and believe that it can help spread information about these issues. Subcommittee members explained that they believe the process of providing and spreading helpful information has value and helps improve the likelihood that resources are made available to those in need (even though the troubled individuals may not be likely to seek it out or attend programs while in distress).

The Vice Chair volunteered to work with the LAC and Subcommittee during 2022 to put together a program presentation, possibly with promotional assistance through the SDBBA.

A Motion was then made and seconded to move to the next Agenda topic.

#### **4A. Item Addition to Circulated Agenda - End of Year Bench & Bar Conference – Proposed by Chief Judge Isicoff.**

Chief Judge Isicoff explained she has attended an end of year bench and bar conference in the Middle District in the past and it is a great event. From attendance at the conference, she has learned of the student loan mediation program and the mental health program ideas. She would like to have the LAC consider creating this type of program and explore whether there is interest in having this type of thing, and whether the Southern District would like to conduct one. Bench and Bar funds support the program in the Middle District, and she does not believe it would need a large amount of funding.

Committee members pointed out that this event could be a good option for people who cannot afford the annual SDBBA retreat. Others explained that many consumer attorneys do not attend the SDBBA retreat, and that many of the consumer attorneys would love the end of year bench and bar type of event. Chief Judge Isicoff suggested LAC members investigate the Middle District event to learn what they do for their event. She also explained that typically it is not focused on substantive legal issues but will typically address things like procedure or other similar matters. There was a chair set up in the Middle District for this event; Chief Judge Isicoff explained she will communicate with Judge Delano to try to get her name and provide to our LAC. The LAC is to consider this request.

A Motion was made to move to next agenda item; the Motion was seconded.

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

*Agenda Items:*

- Issue: “Meet the LAC” Zoom conferences allow Southern District of Florida lawyers 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: Business BK/Ch7 “Meet the LAC” Zoom conference occurred August 30, 2021, where LAC members discussed LAC’s role in our District. The lawyers present inquired about the continuation of virtual hearings. We will look to schedule Consumer Meet the LAC in the early months of 2022, and will encourage any new appointed members to join in.

The Chair provided an update regarding the meet the LAC conferences, including that they have generally been well received and that some follow-up conferences have been conducted. The Chair explained that scheduling will continue for these conferences into early 2022.

A Motion to move to the next Agenda item was made and seconded.

#### **5. 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.

The Secretary provided a summary update regarding ongoing pro bono projects and developments during the past year, including efforts to continue with pro se clinics via virtual or remote means during the ongoing pandemic, efforts to develop the virtual version of the courtroom pro se helpdesk program, revisions to the court’s website to promote awareness and information for pro bono matters, and cross-divisional pro bono efforts that have been possible during the pandemic because of remote accessibility reducing or limiting geographical challenges.

#### **6. LAC 2021 Year in Review/Issues of Note:**

*Agenda Items:*

- **Chapter 7 Dual Contract/Unbundling of Duties.**
  - 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/Additional Thoughts (if any): Judge Isicoff entered a very thorough opinion allowing the dual contract process (with conditions). In re: Brown, 631 B.R. 77 (Bankr. S.D. Fla. 2021)
- **Document Production – Rule 2004 Exam:**
  - 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, there did 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 did not, for instance, allow the designation of two different dates (one for production of documents and one for the oral testimony). It was believed/observed that many practitioners resorted 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.

- Update/Additional Thoughts (if any): LF 48 updated on December 1, 2021, consistent with LAC recommendations.
- **Attorney Conduct/Civility.**
  - 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/Additional Thoughts (if any): Attorney Thomas Messana drafted an article on civility and virtual conduct titled "Actually, it's Virtual Respect" which was published in the June 2021 edition of the Courthouse Beacon News and may be accessed at this link (<https://www.flsb.uscourts.gov/publications/newsletter>).
- **Congratulations to Judge Grace Robson**

The Chair provided an update on multiple topics addressed by the LAC Committee during the 2021 year.

Regarding the Chapter 7 dual contract / un-bundling of duties concerns for "no money down" type bankruptcy fee arrangements, the Chair explained that Chief Judge Isicoff's opinion on these cases appears to have provided great clarity on the issue, which had been requested by many practitioners. Chief Judge Isicoff commented on the "no money down" bankruptcy cases to indicate that there still appear to be firms advertising this way even though the ruling she issued (In re: Brown, 631 B.R. 77 (Bankr. S.D.Fla. 2021)) clarifies that firms cannot advance the required filing fee.

An update was provided regarding the Rule 2004 examination form and practitioners' previous efforts to reflect two dates in such notices so that documents can be produced prior to the actual examination date, as well as the corresponding amendment to Local Form 84.

The Chair and the LAC Committee thanked attorney Tom Messana for his excellent article on attorney conduct and civility, which he penned in part at the request of the LAC Committee.

The Chair and the LAC Committee also expressed congratulations to the appointment of Honorable Judge Robson to the bench, who as a result has resigned as a member of the LAC. The Committee thanked her for her tremendous efforts in her previous capacity as a member.

Chief Judge Isicoff thanked everyone for their hard work, which was shared across the group. Several members of the committee who are departing after the 2021 year also expressed their thanks and goodbyes.

Whereupon a Motion was made, seconded, and approved to conclude the meeting, and the meeting concluded at approximately 5:19PM.