

From: Colleen Brown
Sent: 06/25/2008 06:19 PM EDT
To: Laura Swain
Cc: Elizabeth Perris; Elizabeth_Gibson@unc.edu; James Wannamaker; Jeff.Morris@notes.udayton.edu; Scott Myers
Subject: Re: Rules Committee work; Suggestions re Revisions to Forms Project

Dear Laura,

I thank you for agreeing to put the IFP waiver issue on the agenda for the fall meeting of the full committee, and apologize for my delay in responding to your questions regarding the points I raised about fee waiver applications.

Part of the reason for the delay is that I wanted to do more research on the procedure locally and check with the debtor and trustee bars about the question. I am glad I engaged in that process because I learned quite a lot. First, I learned that in Vermont we have implemented a procedure whereby we do not consider the IFP application until all schedules have been filed. We did this because of consistently deficient applications (detailed more below). This procedure has been working very well and I would encourage the committee to consider creating a rule regarding IFP applications that requires schedules to be filed prior to any action on an application. I recognize that this raises the issue of a case pending -- and the stay being in effect -- for 15 days (soon to be 14 days) without the D having paid any filing fee, but I see no alternative unless the rule were to deprive the D seeking a fee waiver of the full time period permitted other debtors to file schedules. I find the schedules essential to my analysis of these applications and have opted to live with the D having a free ride for a couple of weeks. It is not an ideal solution and hope perhaps the wise minds of your committee might find a better compromise.

The second point I would like to bring to the attention of the rules committee is the importance of having good fee waiver orders. The bar in Vermont has asked that any denial of fee waiver applications set forth a finding for the denial, so the attorney can explain it to her client and the bar can understand the criteria the court is applying. I think this is eminently reasonable. Therefore, we have recently modified our local form order that has a free text box in which my findings can be set forth. I specify in the text box whether the denial is due to the D's failure to show the first prong of the test (150% of the poverty limit for this sized family) or the second prong of the test (D unable to pay the fee, even in installments), and point to the information in the schedules and/or application that I am relying on to reach that determination. It is too early to know how well it is working but I expect this may reduce the number of fee waiver applications and improve the quality of the applications filed. We'll see.

Our systems manager, Gary Gfeller, created the form order. It is automated (though, technically, something less than interactive) such that when the Clerk's Office employee is creating it she gets a different form depending on the answers she gives to a series of queries (eg., was application denied? if so, is the D permitted to pay in installments? if so, the system calculates the due dates and amounts, making all payments due within the time frame set forth in the rule). I attach a copy of the form order. If anyone on your committee would like further info about the form order, Gary Gfeller would be happy to answer your questions. It is very handy because since it is generated electronically, it is sure to be mathematically and time frame correct, does not include the installment payments box unless I have both denied the application and authorized installment payments, and concisely explains the basis of any denial in a public document that the bar and trustees can review.

Lastly, let me respond directly to the specific questions you posed (**my replies are in bold**):

Is it that people are not providing the financial information the form requests?
in many instances, the application is incomplete (since if Ds have not yet completed their schedules, they are guessing about the specifics)

Or that the information is divergent from what eventually comes in on the forms, **there are very often inconsistencies between the answers on the application and the info on the schedules, even on basic questions such as number in household**

or that you need the detail that underlies the total figures required by the form, **the details, not included on the application, is often essential, for example, in connection with information pertaining to liens, exemptions, and the overall budget detail**

or something else?

we have had more than one example (indeed we are probably closer to a dozen) where the fee was waived and the industrious ch 7 trustee who was outraged about losing his commission in a case where he perceived the D could pay the fee did some sleuth work and discovered egregious extravagances in the D's budget (*worst case was a woman who had her nails done weekly*) and successfully moved to have the waiver order reconsidered and the waiver revoked

Any further information you can provide as to the nature of the practical problem would be very helpful. **I am advised (and this has been documented in an NABT article of late last year) that the Vt bk court has granted more fee waivers than any other district . . . and it appears (by no coincidence I am sure) that the most aggressive trustee, in terms of seeking reconsideration of fee waivers, practices here. So, there have been many interesting challenges raised here about how far the court must look for assets before determining the D cannot afford to pay the filing fee. There have also been fascinating questions raised around revocation of the waiver: the legal criteria invoked here is that the form specifies that the fee waiver can be revoked if the Court subsequently becomes aware that circumstances at the time of the filing did not warrant the waiver. A general issue this raises is how late in the case can such facts and circumstances effect the revocation of the waiver? Must it be within the time frame for paying the filing fee in installments? or does the revocation of the waiver start the 120 day period running anew?**

That is just the tip of the iceberg, Laura Let me give you a few illustrative examples of the Yankee creativity that has been unleashed in connection with these fee waiver applications:

- if the D has not yet filed a tax return but in the past has regularly received a sizable refund, should the court take that into account? and if so, how soon must the refund be due in order to be considered available at the time of filing? can the court direct the D to file by April 15 and prohibit him from obtaining an extension?
- what about if the D has filed an AP to recover damages from a 3rd party, part of which would be exempt, can the court direct that the filing fee waiver is contingent upon the outcome of that AP? and direct the D to pay the filing fee when she recovers, even if it is many months, or years, after the order for relief?
- the statute says that a fee waiver cannot be denied just b/c the D paid a fee to an atty, but is some amount of an atty fee is too much? can a D who has no assets and meets the 150% criteria get a fee waiver if she has paid an atty \$1200? what about if a family member paid the \$1200?
- does it matter if that family member who paid the attorney fee also pays the D's mortgage each month? can the court direct that party to pay the filing fee? (*I don't think so!!*)

This may be more than you want to know, but thought you should get the full flavor of the question~

I hope I have answered your questions and adequately articulated the issues I would like to see the Rules Committee consider.

Please feel free to give me a call if you would like to talk further about this.

Thanks to you and your committee for all the great work you do to improve the practice in our bankruptcy courts.

Cheers!
Colleen

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**Laura T
Swain/NYSD/02/USCOURTS
(Dist Judge)**

06/12/2008 04:29 PM

To
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cc
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Wannamaker/DCA/AO/USCOURTS, Scott
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Subject
Re: Rules Committee work; Suggestions re
Revisions to Forms Project

Dear Colleen,

Thank you for your thoughtful feedback. I plan to put the IFP waiver issue on the full committee agenda for our upcoming fall meeting (in anticipation of referring the issue to our Forms subcommittee if the full committee agrees that's the appropriate course), but would appreciate some additional information from you as to why the current Official Form 3B is inadequate. The form was intended to elicit the relevant information that would come in on Schedules I, J, A & B, and to encourage early filing of those forms. Is it that people are not providing the financial information the form requests? Or that the information is divergent from what eventually comes in on the forms, or that you need the detail that underlies the total figures required by the form, or something else? Any further information you can provide as to the nature of the practical problem would be very helpful.

The drafting issue is very much on the radar screen of the Forms Modernization project, and I appreciate your reiterating and expanding on the comments at the Chief Judges' conference.

I'll look forward to hearing from you at your convenience.

Yours,

Laura

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**Colleen
Brown/VTB/02/USCOURTS**

06/10/2008 11:35 AM

To
Laura Swain, elizabeth_perris@orb.uscourts.gov
cc

Subject
Rules Committee work; Suggestions re Revisions
to Forms Project

Hello Laura and Liz,

I am writing to follow up on the discussion we had in DC last week at the Chief Bk Judges' Workshop, when the two of you, on behalf of the rules committee, asked for feedback re bankruptcy forms.

If you need something more formal, I will be happy to do that (though I won't get to it for a couple of weeks).

First, I would like to ask the committee to review -- and consider expanding -- the form application for waiver of filing fee. Given the timing of bankruptcy cases and the short window of time for paying a filing fee in installments, it often seems we are trying to rule on these waiver requests without prior to the due date of the schedules, and hence with precious little detail re the debtor's financial circumstances. I would urge the committee to consider either requiring persons who seek a fee waiver to file schedules with the fee waiver application or requiring more detailed financial info on the fee waiver application form, so courts can make an informed decision as to whether the debtor "cannot afford to pay the filing fee in installments".

Second, I would urge the forms revision committee to take seriously the point made by Steve Rhodes re the errors in many schedules being due to debtors misunderstanding the forms (and perhaps reflecting that the forms may not be drafted as well as they might be for the audience filling them out), specifically in the context of the "abuse prevention" goal of BAPCPA. As chair of the NCBJ-UST Liaison committee I have spoken regularly with the EOUST Exec Director Clifford White about whether the "material misstatements" the UST audits uncover truly demonstrate an intent by debtors to abuse the bankruptcy system -- either on a micro or macro level. I am persuaded that if the forms were drafted in a way that made them more easily understood, there would be two very important results: (1) debtors would have fewer "errors" on their schedules and (2) the incidence of material misstatements would be a more reliable indicator of the extent of abuse of the bankruptcy system. These outcomes would be of great value to all constituencies and give Congress better data to work from when formulating bankruptcy policy.

I appreciate how complex and difficult the work of the rules committee is and do not mean in any way to criticize the quality of the rules and forms you have created. You do amazing work! Rather, I want to suggest that we are at a point in time when there remains a great deal of speculation and disagreement as to the level of *intentional* material misstatements in debtor schedules and the value of the UST audits. I believe the critical work you are undertaking to revise the forms could be just what is needed to improve the value of the UST audits and reduce the number of misstatements on debtor schedules.

I would be happy to discuss my comments with you, at your convenience -- and provide more detail if you so desire.

Warm regards,
Colleen

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