

NATIONAL BANKRUPTCY CONFERENCE

A Voluntary Organization Composed of Persons Interested in the
Improvement of the Bankruptcy Code and Its Administration

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Re: Proposed Amendments to Bankruptcy Rules 9014 and 9017, and Proposed Adoption of Rule 7043

Ladies and Gentlemen:

The National Bankruptcy Conference (“NBC”) is a voluntary, non-partisan, not-for-profit organization composed of about 60 of the nation’s leading bankruptcy judges, professors, and practitioners. The NBC has provided advice to Congress regarding bankruptcy legislation for approximately 80 years. We enclose a Fact Sheet providing further information about the NBC.

The National Bankruptcy Conference makes the following proposal to the Advisory Committee on Bankruptcy Rules with respect to remote testimony in bankruptcy cases and proceedings. This recommendation is limited to the issue of remote testimony, and is not intended to address all issues related to conducting hearings either remotely or in hybrid formats.

I. Background

The wide-spread use of video conferencing for evidentiary and other hearings by bankruptcy courts during the COVID-19 pandemic permitted seamless administration of bankruptcy cases during a time when courts were constrained from use of courthouse facilities for hearings. The procedure not only enabled courts a constructive means to hear and determine matters but enabled greater participation by parties affected by the matters. Remote evidentiary hearings conducted over zoom or other video conferencing services became common place; many bankruptcy courts instituted standing orders and published procedures for video hearings. *See, e.g., Third Amended Order Governing the Conduct of Hearings Due To Coronavirus Disease 2019 (COVID-19)* (Bankr. D. Del. May 11, 2020)¹; *Second Amended General Order 20-05 Trials and Evidentiary Hearings During COVID-19 Public Emergency* (Bankr. N.D. Ill. Mar. 15, 2022)²; *see also Zoom Video Hearing Guide for Participants* (Bankr. S.D.N.Y.).³

The successful application of video conferencing during the pandemic has led to serious interest in continuing video conferencing for bankruptcy hearings after the exigent circumstances created by the pandemic subside. If video conference hearings continue for bankruptcy cases, the current Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure may

¹<https://www.deb.uscourts.gov/sites/default/files/news/3rd%20Amended%20Order%20re%20court%20hearings.5.11.2020.pdf>

² <https://www.ilnb.uscourts.gov/sites/default/files/general-ordes/Gen-Ord-20-05-SecondAmended.pdf>

³ https://www.nysb.uscourts.gov/sites/default/files/NYSB_Zoom_Video_Hearing_Guide_for_Participants.pdf

require amendment in order to permit remote testimony in the absence of compelling circumstances. The National Bankruptcy Conference believes the only amendment required is slight and targeted to the appropriate use of video conferencing for remote testimony in contested matters.

Unlike civil litigation, a bankruptcy case does not typically involve one trial at the culmination of discovery that concludes the case. Instead, bankruptcy cases involve many matters requiring evidentiary hearings on expedited consideration and affecting numerous parties. Frequently bankruptcy court evidentiary hearings pertain to financial and administrative details in which credibility of the witness is not in question. Indeed, most contested matters are very short hearings and in these the credibility of witnesses – a key reason advanced in favor of live, in-court testimony – is simply not the central issue.

Remote participation has significant access to justice implications. Bankruptcy cases are constrained by financial insolvency. Access to bankruptcy court hearings is intrinsically intertwined with cost. Remote transmissions of court hearings allow creditors who are often spread out across the country to participate in hearings when live attendance would be cost prohibitive. Remote transmission of court hearings removes a barrier to access for individual debtors who are unable to travel to the federal courthouse because the travel expense, parking expense, childcare needs, lack of job leave, and no public transportation make live attendance not possible. Interestingly, the Federal Judicial Center (FJC) issued a report in 2017 (with a second edition in 2019) on Remote Participation in Bankruptcy Proceedings⁴ concluding,

Because of the potential to save money and other resources, bankruptcy courts should consider using DP [distance participation] technology for conducting proceedings. In some circumstances, using the technology would benefit the court and litigants without sacrificing essential elements of the judicial process.

Elizabeth C. Wiggins, *Remote Participation in Bankruptcy Proceedings*, FED. JUD. CTR., at 41, available at <https://www.fjc.gov/content/326261/remote-participation-bankruptcy-guide>.

I. Current Federal Rules

Two rules currently govern remote testimony in bankruptcy cases. Bankruptcy Rule 9017 incorporates Civil Rule 43, which provides:

In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Fed. R. Bankr. P. 9017; Fed. R. Civ. P. 43(a). Rule 9017 also incorporates Federal Rule of Evidence 611, which grants a court broad discretion over the mode of evidentiary presentations. Rule 611 provides:

Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

⁴ The report provides a comprehensive examination of the use of technology for distance participation in bankruptcy proceedings. The report describes considerations and challenges to widespread use of video technology for bankruptcy proceedings. In addition to Federal Rule of Civil Procedure 43, the report describes the Judicial Conference policy prohibiting private recording or broadcasting of court proceedings for purposes of public dissemination. Pages 8 -9 of the report explain the policy, its application, and procedures courts adopt to comply with the policy.

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

Fed. R. Evid. 611(a). A third rule, Bankruptcy Rule 5001(b), does not directly address the presentation of remote testimony, but it does require that “[a]ll trials and hearings shall be conducted in open court and so far as convenient in a regular court room.” Fed. R. Bankr. P. 5001(b).⁵

Rule 611 and Rule 43 set forth inconsistent standards. Rule 611 gives a court “broad discretion” to manage the “mode and order of examining witnesses,” see *United States v. Bozovich*, 782 F.3d 814, 816 (7th Cir. 2015), while Rule 43(a) requires “good cause in compelling circumstances” to deviate from in-person testimony. The Advisory Committee Notes to Rule 43(a) stress the “importance of presenting live testimony in court” noting that the “very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling.” See Fed. R. Civ. P. 43(a) advisory committee’s note to 1996 amendment. The Advisory Committee Notes state that remote “[t]ransmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial” and stress that remote testimony should be the exception rather than the rule. *Id.* Courts vary in the interpretation of what constitutes “good cause in compelling circumstances.” Compare *Matovski v. Matovski*, No. 06 Civ. 4259(PKC), 2007 WL 1575253, at *3 (S.D.N.Y. May 31, 2007) (refusing to allow remote testimony due to the inconvenience of travel), and *Gulino v. Bd. of Educ.*, No. 96 Civ. 8414(CBM), 2002 WL 32068971, at *1 (S.D.N.Y. Mar. 31, 2003) (same), with *Aoki v. Gilbert*, No. 2:11-cv-02797-TLN-CKD, 2019 WL 1243719, at *2 (E.D. Cal. Mar. 18, 2019) (allowing remote testimony due to inconvenience of travel), and *Dagen v. CFC Grp. Holdings Ltd.*, No. 00 Civ. 5682(CBM), 2003 WL 22533425, at *1 (S.D.N.Y. Nov. 7, 2003) (same).

While courts have relied on the broad discretion granted under Rule 611 to authorize deviations from the requirement that a witness’s direct testimony be taken live in open court, those same decisions still require the witness to appear in person in open court for cross-examination. See *Ball v. Interoceanica Corp.*, 71 F.3d 73, 77 (2d Cir. 1995) (authorizing direct examination by declaration but requiring witness to be present in court from cross-examination); *Adair v. Sunwest Bank (In re Adair)*, 965 F.2d 777, 779-80 (9th Cir. 1992) (same). But see *In re Juarez*, 16-40560, 2017 WL 1169529, at *10 (Bankr. D. Idaho Mar. 28, 2017) (refusing to admit declaration as direct testimony where witness did not appear live for cross-examination).

Given the inconsistencies in the case law and the high standard set forth in Rule 43, once the pandemic subsides, bankruptcy courts may be reluctant to authorize remote testimony even in routine contested matters.

II. Proposal

The following proposal does not amend any Federal Rule of Civil Procedure, but it does amend Federal Rules of Bankruptcy Procedure to provide bankruptcy courts with greater flexibility to authorize remote testimony.

Rule 9017 would be amended to strike the reference to Rule 43:

The Federal Rules of Evidence and Rules ~~43~~, 44 and 44.1 F.R.Civ.P. apply in cases under the Code.

A new Rule 7043 incorporating Rule 43 would be added to the Part VII rules governing adversary proceedings:

⁵ The rule amendments herein do not affect the requirement that proceedings be conducted in open court in a regular courtroom.

Rule 7043—Taking Testimony
Rule 43 F.R.Civ.P. applies in adversary proceedings.

These two amendments would continue to make Rule 43(a)'s "good cause in compelling circumstances" standard applicable to adversary proceedings while eliminating that heightened standard for contested matters governed by Rule 9014. Because adversary proceedings are analogous to civil litigation, the National Bankruptcy Conference recommends that the current Rule 43 standard for remote testimony continue to apply to adversary proceedings.

To address the taking of testimony in contested matters, the National Bankruptcy Conference recommends that Rule 9014(d) be amended as follows:

(d) Testimony of witnesses; evidence, interpreters. Rule 43(d)⁶ F.R.Civ.P. applies in contested matters. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. When a contested matter relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

By removing the "compelling circumstances" requirement, this proposal would give bankruptcy courts more discretion in contested matters to authorize remote testimony. Because the proposed rule retains the presumption of live testimony, a litigant is free to object to a request for remote testimony in any circumstances.

For these reasons, the National Bankruptcy Conference recommends the proposed rule amendments. Please contact us if the National Bankruptcy Conference can be of further assistance.

Sincerely,



Douglas G. Baird, Chair
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⁶ Fed. R. Civ. P. 43(b) is redundant in bankruptcy cases in light of Rule 9012(b). To avoid this redundancy, the Advisory Committee may consider whether proposed Rule 7043 adopt only Fed. R. Civ. P. 43(a), (c), and (d). Nevertheless, that redundancy exists under the current Rule 9017 and is outside the purpose of this recommendation.

NATIONAL BANKRUPTCY CONFERENCE

A non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

History. The National Bankruptcy Conference (NBC) was formed from a nucleus of the nation's leading bankruptcy scholars and practitioners, who gathered informally in the 1930's at the request of Congress to assist in the drafting of major Depression-era bankruptcy law amendments, ultimately resulting in the Chandler Act of 1938. The NBC was formalized in the 1940's and has been a resource to Congress on every significant piece of bankruptcy legislation since that time. Members of the NBC formed the core of the Commission on the Bankruptcy Laws of the United States, which in 1973 proposed the overhaul of our bankruptcy laws that led to enactment of the Bankruptcy Code in 1978, and were heavily involved in the work of the National Bankruptcy Review Commission (NBRC), whose 1997 report initiated the process that led to significant amendments to the Bankruptcy Code in 2005. Most recently, the Conference played a leading role in developing the Small Business Reorganization Act of 2019, Pub. L. 116-54.

Current Members. Membership in the NBC is by invitation only. Among the NBC's 60 active members are leading bankruptcy scholars at major law schools, as well as current and former judges from eleven different judicial districts and practitioners from leading law firms throughout the country who have been involved in most of the major corporate reorganization cases of the last three decades. The NBC includes leading consumer bankruptcy experts and experts on commercial, employment, pension, mass tort, and tax-related bankruptcy issues. It also includes former members of the congressional staff who participated in drafting the Bankruptcy Code as originally passed in 1978 and former members and staff of the NBRC. The current members of the NBC and their affiliations are set forth on the second page of this fact sheet.

Policy Positions. The Conference regularly takes substantive positions on issues implicating bankruptcy law and policy. It does not, however, take positions on behalf of any organization or interest group. Instead, the NBC seeks to reach a consensus of its members - who represent a broad spectrum of political and economic perspectives - based on their knowledge and experience as practitioners, judges, and scholars. The Conference's positions are considered in light of the stated goals of our bankruptcy system: debtor rehabilitation, equal treatment of similarly situated creditors, preservation of jobs, prevention of fraud and abuse, and economical insolvency administration. Conferees are always mindful of their mutual pledge to "leave their clients at the door" when they participate in the deliberations of the Conference.

Technical and Advisory Services to Congress. To facilitate the work of Congress, the NBC offers members of Congress, Congressional Committees and their staffs the services of its Conferees as non-partisan technical advisors. These services are offered without regard to any substantive positions the NBC may take on matters of bankruptcy law and policy.

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