"Walter R. Dahl"
<wdahl@DahlLaw.net>
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Please respond to
"Walter R. Dahl"
<wdahl@DahlLaw.net>

To <Rules_Comments@ao.uscourts.gov>
cc <keith_lundin@tnmb.uscourts.gov>
bcc
Subject Proposed New Bankruptcy Rule 4002(b)

04-BK-005

I urge the Committee not to adopt proposed new Bankruptcy Rule 4002(b).

Individual debtors have for many years been required to submit under penalty of perjury detailed information regarding their current income and expenses [Official Forms 6 & 7 - Schedules I & J], and detailed information regarding their depository and investment accounts as of the date of filing of bankruptcy [Schedule B].

In effect, the proposed rule says to all individual debtors: "we don't trust you to be honest with the court", at least with regard to a limited amount of the voluminous initial disclosures required in the petition, the schedules and the statement of financial affairs. If we don't trust all individual debtors to accurately disclose their current income and balances in investment accounts, why not expand Rule 4002(b) to compel these presumptively dishonest individuals to bring to the §341(a) meeting their deeds and current property tax bills for all real property [Schedule A], their title certificates for all motor vehicles [Schedule B], and their current statements for all secured debts [Schedule D]? Or, from another perspective, why is proposed Rule 4002(b) limited to individual debtors? The Committee's apparent presumption that all individual debtors are dishonest is as flawed as the Committee's apparent presumption that all entity debtors are honest. After all, every entity can act only through individuals -- the officers or partners.

In over 22 years of bankruptcy practice, representing both creditors and debtors -- some individuals and some entities -- I have determined that the vast majority of debtors make materially honest disclosures to the court. In my opinion, this results from several factors: first, many debtors, even those facing financial ruin, are honest and good people; second, most debtors engage competent counsel who cherish their bar admission and reputation far more than any transient gain obtainable by suborning perjury; third, most case trustees after a few months on the job, develop the 'sixth sense' which lets them quickly and accurately sniff out fraud; and fourth, the US Trustee, at least in the districts I am familiar with, actively refers suspect cases to the FBI and the US Attorney.

As a party in interest, the case trustee has the unquestioned authority to obtain the documents mandated by proposed Rule 4002(b) and many more documents and information by utilization of Rule 2004. I have never seen a case trustee's application for a Rule 2004 exam denied by a bankruptcy judge. However, in the majority of cases the case trustee simply informally requests the information and documents deemed relevant to answer apparent or suspected discrepancies in the Schedules and Statements, and all but the most incompetent or short-sighted counsel fully comply. As to pro se debtors, I think it unlikely that proposed Rule 4002(b) will change much -- those pro se debtors who are honest and intellectually capable of complying will, just as they do now to the trustee's informal requests, and those dishonest or incapable will face contempt or other sanctions.

I wonder who or what constituency lobbied for proposed Rule 4002(b)? Certainly it was not attorneys for consumer debtors; the additional costs of compliance, and the minefields for inadvertent incomplete compliance, are staggering. I doubt it was standing trustees; the mountain of additional paperwork to review in every case, rather than just in the cases where a debtor is suspected to be dishonest, will tax their ability to timely complete the mandated first meetings of §341(a). And what do the case trustees do with this mountain of paper? I doubt the push for this proposed Rule came from the creditor bar; when I suspect a debtor of dishonesty, I do my own 2004 exam(s) and document productions. In addition, I note the Committee Note [but not the Rule itself] states (or maybe mandates, or maybe just suggests?) that the materials would not be available to any creditor. Can I subsequently obtain such by a Rule 2004 document production directed to the case trustee? I can only conclude that the drafters of proposed Rule

4002(b) had little experience in the real, day to day practice of consumer bankruptcy either as a case trustee, a debtor's attorney, or a creditor's counsel.

I wholeheartedly agree with the more comprehensive (and better written) critique of the Honorable Keith M. Lundin, Bankruptcy Judge for the Middle District of Tennessee, as recently published. Lundin, *Proposed Bankruptcy Rule 4002(b): Trouble Brewing for Debtors and Counsel,* 11 Norton Bankruptcy Law Advisor 4 (November, 2004 West).

Quite clearly, those of us who do practice in the field know of fraud upon the court practiced by dishonest debtors, and sometimes aided by unscrupulous attorneys. I firmly believe that this is the exception, not the rule, but even if it is more pervasive that I believe, proposed Rule 4002(b) is a very expensive and highly incomplete mechanism for ferreting out fraud. If the Committee truly wants to have an effective impact on this problem, develop a mechanism to allow case trustees no-cost access to electronic searching of asset databases, judgments and liens, motor vehicle, vessel and aircraft records, skip-tracing, real property records, UCC filing systems, credit reporting agencies, and the like. The Administrative Office of the US Courts could negotiate fixed price contracts with the various providers of this data and have it all accessed from a single web page with a secure log in available only to case trustees after sufficient training and password issuance by the local US Trustee offices.

Thank you for your measured consideration.

Walter R. Dahl

Dahl & Dahl, Attorneys At Law
2304 N Street
Sacramento CA 95816-5716
Tel: 916 446-8800
Fax: 916 446-1634
Web: www.DahlLaw.net