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Subject Comments on proposed changes to Bankruptcy Rule 4002

Concerning proposed amendments to Bankruptcy Rule 4002.

My experience. I am a consumer bankruptcy attorney whose initial, face-to-face interviews with clients take place only after the clients complete an extensive written questionnaire. I believe that I spend more time with clients in an initial interview than is usual and I am aware that many attorneys do not use a written questionnaire at all.

I usually have a comprehensive knowledge of my clients' assets before the Petition is completed; but the most disorganized clients are probably screened out by the written questionnaire requirement.

I am routinely surprised by the meager records most clients keep and the sheer time required to elicit from them, by patient questioning, the actual legal character of their assets and obligations. They are no different from wealthy in one respect: They do not think like lawyers about their assets and liabilities but view them in terms of their emotional significance. Answering the questions required for a complete bankruptcy Petition is a big job and mistakes are always possible.

On this foundation of experience I believe that most reasonably-organized Debtors will be able to bring with them to the 341 Meeting the items required by Rule 4002(b)(2)(A) & (B), but the utility of the information is limited. Since the most disorganized or traumatized Debtors may not be able to comply at all, I do not believe these new requirements make sense.

Will this information really help monitor bankruptcy cases? The utility of the information is limited by the fact that few bankruptcies are precipitated by simple income insufficiency; or even by problems within the most recent tax year. One of the most common financial situations is that individuals decide to file bankruptcy once they become employed again after an extended period of unemployment or disability. Current income data can be seriously misleading about the Debtor's financial condition for that reason and even the most recent year's tax return doesn't always demonstrate the problem clearly. Note also that, depending on the time of year that the bankruptcy case is filed, the "most recently filed" federal income tax return may be a limited financial snapshot of a time period almost a year in the past.

Other documentation problems.

Note that the attachments of tax returns are not cross referenced with each other as carefully as the pages of a bankruptcy Petition. The clever debtor may fail to copy a damning page or two in a way that the Trustee might not easily uncover. If the Trustee confronts the Debtor about a missing schedule, it will be hard to be sure that the omission was not mere accident.

Concerning subsection (C), note that mutual fund and brokerage accounts for "the time period that includes the date of filing of the Petition" will often not be available by the time of the Meeting of Creditors because they are often provided quarterly, semi-annually or yearly.

The Cost of Implementing the Changes. Case Trustees should rebel at these requirement as they dramatically increase the amount of time required to process no asset cases. As a Debtor attorney I often know how poorly constructed are the Petitions of many Debtors. I would like to see Trustees conduct investigations more frequently but I see no possibility of that unless they are compensated differently. If both case Trustees and the U.S. Trustees feel that these required documents would provide useful data to screen files that need further investigation, I would consent fully to the requirements. My guess, however, is that they do not expect to use them this way. To screen effectively, you need several years' worth of tax returns and a years' worth of credit card billing statements and bank records, and 15 minutes to ask questions after careful review of the documents.

As an alternative, if the profession were organized differently then you could rely on the professionals to elicit this information but the profession is not organized this way. My own ability to make a living while interviewing clients extensively is unusual.

I note a recent proliferation of local rules and statutory interpretations which, combined with reduction of funding for the Bankruptcy Court, leads to decisions made on technical procedural grounds where equitable investigation and balancing are required for a just result. I fear that increasing documentation requirements without more fully funding the Trustees and the Bankruptcy Courts, combined with substantial negative public pressure on debtors' counsel, will lead to increased artificiality and purely bureaucratic paper-shuffling instead of equitable reform.

While this rule will not be difficult for me to comply with, I think it will increase the cumbersomeness of the system for the professionals who have not typically had the luxury of conducting their practice as I do. I believe the papers will be provided by most Debtors but to no useful purpose. I expect that only pro forma investigation will take place thereafter, and Debtors' counsel will not be paid when unexpected assistance is required during the investigation. This is not a good result. The rule change is likely to make justice in the Bankruptcy Courts more capricious.

I hate to think that increasing irrationality of bankruptcy procedures is the only way to obtain equitable reforms. To avoid that unfortunate end, I suggest that, at a minimum, you not implement the changes to this rule unless you dramatically increase the Trustee compensation structure for no-asset cases; INCREASE BANKRUPTCY COURT FUNDING to manage the related paperwork problems and provide a mechanism to compensate Debtor's counsel for unexpected post-Petition investigation defense. (You are probably aware that most bankruptcy fees are paid up-front and on a flat fee basis; if you want your system to work, you will assure Debtor's counsel of fee protection when problems develop on a post-Petition basis based on inadequate pre-Petition disclosure by the Debtors. I more or less accomplish this myself by clever interrogation but my clients tend to be organized and well-intentioned. There is a broader

clientele more typically served by different approaches. I'm not sure how much you can change that.)

Finally remember that frank mental illness is a contributing factor in many bankruptcies. There is only so much accurate paperwork you can expect from people whose spouses, parents, chldren or cohabitants are not fully sane.

Security of Identity Information. As identity theft proliferates, management of the documentation provided to the Trustees becomes critical as well. I do not think you should implement rules like this without specifying the way the materials will be handled by the Trustees. Their burdens in terms of management and storage of paper are definitely going to be increased by the rule. Without clear instructions about when and how to dispose of the paperwork I anticipate that debtors will be more frequently victims of identity theft than they already are. I have noted that debtors appear to experience identity theft a year or so after their case is filed and it's easy to see why. Prior to the last few years, a properly-filled-out Petition, complete with account numbers and social security numbers, was freely available at the public counters of Bankruptcy Court and/or on the internet. The redacted social security numbers and account numbers are better but placing brokerage statements, paystubs, tax returns and bank account information in the hands of over-burdened Trustees for an indefinite time period is a recipe for disaster.

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