UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA

PROPOSED AMENDMENTS TO LOCAL RULES: PUBLIC COMMENT PERIOD

The Court's Local Rules Advisory Committee has proposed various amendments to the local rules. After a preliminary review and some minor edits, the Judges have directed that the proposals be posted for public comment.

The proposals are attached – with comments from the Committee and the Judges.

Comments to the proposed rule can be made by sending an email to Local_Rules_Comments@insb.uscourts.gov . Deadline for comments is Friday, September 26, 2014.

August 26, 2014

/s/ Kevin P. Dempsey
Clerk

PROPOSED RULES AMENDMENTS –August 2014
[published for public comment]

B-1002-1. FILING REQUIREMENTS TO COMMENCE A VOLUNTARY CASE

*****

(b) Emergency Filing; Minimum Required

*****

(c) Emergency Filing: Dismissal for Failure to Provide Required Documents

Failure to submit the above required items at the time of filing or within seven (7) days thereafter may result in dismissal of the case pursuant to S.D. Ind. B-1017-1(b). Any request for an extension of time to file the other documents required by this rule must comply with Fed.R.Bankr.P. 1007.

(~~c~~d) Filing a Case Non-Electronically

*****

(~~d~~e) Place of Filing

*****

Clerk's Comments

Review of the rules while proposed amendments were being considered by the Judges revealed that two rules have 'hanging paragraphs' which may cause confusion because the subject of the hanging paragraph differs slightly from the list that precedes it. This is the first of the rules. New subparagraph (c) was originally a hanging paragraph at the end of subparagraph (b). Edits are for style only – no substantive change intended.

B-1007-1. LISTS, SCHEDULES AND STATEMENTS; TIME LIMITS

*****

(c) Extensions of Time

(1) Motions Generally

~~Any~~ The first motion for an extension of time to file the initial lists, schedules, statements and other documents required to commence a new case shall be treated by the Court as a request for ~~the maximum allowable extension of time for each applicable chapter~~ an extension of thirty (30) days and the Clerk will provide notice ~~of the opportunity to object~~ except as described in

subparagraphs (2) ~~and (3) below~~. Any subsequent motion for an extension of time shall be served by the Debtor on the trustee, the UST, any examiner, and any committee, and such service shall constitute the notice required by Fed.R.Bankr.P. 1007(c).

(2) Presumption of No Objection

~~Unless the Debtor is a "small business" filing under Chapter 11, as defined by 11 U.S.C. §101(51D),~~ The UST and any trustee appointed in a case, any examiner, and any committee are deemed to have no objection to ~~any original request~~ the first motion for extension of time within which to file schedules or related documents ~~if that request seeks an extension to no more than forty-five (45) days after the date the petition is filed. If the Debtor is a small business filing under Chapter 11, then the UST is deemed to have no objection to any original request for an extension of time within which to file schedules or related documents if that request seeks an extension to no more than thirty (30) days after the date the petition is filed.~~ Given this subparagraph, the Clerk is not required to give any notice of the first motion for extension of time.

*****

Committee Comments

The proposed amendment to the subparagraphs on extensions of time to file initial case documents addresses the question of notice, which is not currently addressed in the local rule. The Committee debated whether the 'free' extension should be 45 days or something shorter. No strong support for 45 days was found in the Code or the Rules, although it is noted that 521(1) uses the 45-day period in determining 'automatic' dismissal for failure to file. Some Committee members feel strongly that 45 days are needed to get the documentation together for some debtors. However, others noted the impact on meetings of creditors, which are often scheduled for less than 45 days after filing, and that the rule does not preclude additional extensions. Review of the rules of other courts revealed that 30 days is much longer than most allow. It was also noted that if the Judges reject the 30-day proposal in favor of a longer extension, the rule will need to address small business Chapter 11 cases separately.

The Committee also debated whether the presumption of no objection in subparagraph (2) should extend to all parties in interest. However, only the parties named are entitled to notice of any extension.

B-1009-1. AMENDMENTS OF VOLUNTARY PETITIONS, LISTS, SCHEDULES, AND STATEMENTS OF FINANCIAL AFFAIRS

*****

(b) Amendments Adding or Changing Status of Creditors: Notice Requirements

(1) If an amendment adds creditors, the Debtor shall also upload creditor information at the time of filing or, if filed non-electronically, shall provide a new CD or diskette pursuant to S.D. Ind. B-1007-1(c).

(2) The Debtor shall give notice to added creditors and provide copies of notices and documents in the case as appropriate, including the notice of the meeting of creditors with full SSN or ITIN, notice of ~~the bar date~~ possible assets, the most recent plan or amended plan, and confirmation hearing notice and shall file a certificate of service that complies with S.D.Ind. B-9013-2. If the Debtor asserts that no notice is required, the Debtor shall file a statement in lieu of notice. A sample form is available on the Court's website.

(3) If a Chapter 11 Debtor amends the creditor schedules and changes the status of a claim not previously listed as contingent, disputed, or unliquidated to a status of contingent, disputed, or unliquidated, or changes the scheduled amount of a claim, the Debtor shall give notice to that creditor of the change in status or amount and of the bar date for filing claims or a deadline for filing claims that is thirty (30) days after the notice, whichever date is later. A sample form is available on the Court's website.

*****

Committee Comments

Proposed new subparagraph (b)(3) attempts to address the problems that arise because the right to amend schedules extends far into the life of the case. In Chapter 11 cases amendment can change a creditor's rights, and trigger the need to file a proof of claim, without notice. (The Committee agreed that in Chapter 11 cases an objection can be filed to a 'claim' that only appears on the schedules because the claim was not shown as disputed, contingent, or unliquidated. This subparagraph does not affect that procedure, but addresses only the situation where the debtor or another entity in the case with the power to file amended schedules does so.) The new subparagraph provides an alternative that gives the creditor better notice as to why an obligation to file a claim arose later in the case despite an original listing on the schedules that did not require filing of a claim. (The amendment to subparagraph (b)(2) merely gives the actual docket description of the item that sets the bar date.)

B-1010-1. INVOLUNTARY CASES: CONSENT TO ORDER FOR RELIEF

At any time after the filing of an involuntary petition and before the adjudication of that petition, the alleged debtor can file a consent to the entry of an order for relief. The consent must be as to relief under the chapter proposed by the involuntary petition. After the filing of such consent, the Court may enter the order for relief without further notice or hearing.

Committee Comments

The Committee felt it would be helpful to remind practitioners that consent to the entry of an order for relief is a proper response, but that consent must be as to relief under the Chapter in which the involuntary case was filed.

B-1010-~~1~~2. INVOLUNTARY PETITIONS COMMENCED BY NON-ATTORNEYS

Committee Comments

The rule is renumbered so that new 1010-1 comes first.

B-2002-1. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, AND UNITED STATES TRUSTEE

*****

(b) Notices Prepared and Distributed by Parties

A notice prepared and distributed by a party shall:

(1) be signed by the party, not the Clerk or the Judge, unless its form has been approved by a courtroom deputy; and ~~Notices in a Chapter 11 case shall be docketed separately.~~

(2) instruct recipients to file pleadings with the Bankruptcy Clerk and provide the correct address of the division of the Bankruptcy Clerk's Office where pleadings should be delivered; and

(3) ~~and . Notices in a Chapter 11 case shall~~ be docketed separately unless included in another pleading.

(c) Limited Notice in Chapter 7 Cases

In Chapter 7 cases, ninety (90) days after the first date set for the meeting of creditors or, if a report of possible assets has been filed, ninety (90) days after the issuance of the Notice of Possible Assets, all notices required by Fed.R.Bankr.P. 2002(a), except the notice of the final report and of dismissal or denial of discharge, shall be mailed only to the Debtor, the trustee, the UST, creditors who have filed claims and creditors, if any, who are still permitted to file claims by reason of an extension granted under Fed.R.Bankr.P. 3002(c)(1) or (2).

*****

(e) Notice of Final Report with Notice of Applications for Compensation

In Chapter 7 cases in which the amount of net proceeds realized exceeds the amount set forth in Fed.R.Bankr.P. 2002(f)(8), or the amount of any application for compensation exceeds the amount set forth in Fed.R.Bankr.P. 2002(a)(6), the Chapter 7 trustee shall provide notice of the

trustee's final report and of the applications for compensation and reimbursement of expenses. That notice shall include a deadline of twenty-one (21) days from the date of the notice to file an objection to the final report or to any application for compensation and reimbursement of expenses.

(e f) Returned and Undeliverable Mail

*****

Committee Comments

Subparagraph (b) is amended to set the basic standard for notices distributed by the parties. Many subsequent rules allow the filing of combined motions and notices, and CM/ECF events also remind filers of the need for notice. Therefore, Clerk staff felt that the language about separate docketing of notices in Chapter 11 cases is no longer needed.

Subparagraph (c) is amended to correct the omission of the debtor from the list of entities who get notice when it is limited in a Chapter 7 case. (In practice, notices have been issued to debtors – omission from the rule was an oversight.)

New subparagraph (e) captures local actual practice, which sets a deadline for objecting to a final report in some cases, even though no such deadline is found in the national rules. The language closely tracks that of Florida Southern in its local rule.

B-2070-1 MOTIONS FOR TURNOVER: NOTICE

A ~~Chapter 7~~ trustee who files a motion for turnover against the Debtor shall provide the Debtor(s), counsel for the Debtor(s), if any, ~~and~~ the UST, and any committee notice of the motion. That notice shall give twenty-one (21) days from the date of service for the filing of any objection. Along with the motion, the ~~Chapter 7~~ trustee shall file a copy of the notice and a certificate of service that complies with S.D.Ind. B-9013-2. The motion, notice, and certificate of service may be combined into one document. A sample combined motion for turnover, notice, and certificate of service is available on the Court's website.

Committee Comments

The purpose of the rule is to shift responsibility for noticing a motion for turnover onto the filer. The rule is amended to include Chapter 11 trustees in its coverage. The Committee also felt that a sample form would be helpful.

B-3002.1-3 MOTION FOR DETERMINATION OF FINAL CURE AND PAYMENT: HEARING DEEMED WAIVED

If the trustee or Debtor files a motion for determination of final cure and payment pursuant to Fed.R.Bankr.P. 3002.1(h), and the holder of the claim has filed a response that agrees

with the previously filed notice of final cure and payment, or the holder of the claim files a response that concurs in the motion for determination, then the holder of the claim is deemed to have waived further notice and the Court may enter an order on the motion immediately.

Committee Comments

This proposed new rule expedites the issuance of an order on any motion for determination of final cure and payment when the lender has indicated its agreement with the assertion that final cure has been made.

B-4001-1. MOTIONS FOR RELIEF FROM STAY AND MOTIONS TO EXTEND OR IMPOSE THE STAY

(a) Relief from Stay or Co-Debtor Stay

(1) Contents of Motion

*****

(2) Sample Form

A sample form motion is available on the Court's website. The motion may be combined with the notice required by subparagraph (a)(4).

(3) Waiver of 30-day Hearing Requirement

The movant may include in the motion a waiver of the 30-day hearing requirement in 11 U.S.C. §362(e), and shall note that waiver by including in the caption, the statement, "with 30-day waiver." Selection of the waiver option when filing the motion electronically also results in waiver of the 30-day hearing requirement in 11 U.S.C. §362(e). ~~The motion may be combined with the notice required by subparagraph (a)(2).~~

(~~2~~ 4) Notice; Disposition

*****

Clerk's Comments

This proposal comes from the Bankruptcy Clerk and not the Committee (because the issue was identified after the Committee concluded its discussions). This section of the rule pre-dates CM/ECF and has not been updated to capture the waiver that can be made at time of filing.

An outside user filing a motion for relief from stay receives this message:

Due to the large number of case filings and time restraints on scheduling cases, the Court requests your waiver of the requirement that a final hearing be held within 30 days of filing this

Motion for Relief from Stay.

The movant is then asked to select between "Yes" and "No" radio buttons regarding this statement:

Moving party hereby waives the requirement of 11 U.S.C. Sec. 362(e) of the U.S. Bankruptcy Code that a final hearing be held within 30 days of filing a Motion for Relief from Stay.

Occasionally a filer will select the "Yes" radio button even though the pleading does not contain a statement that the 30-day hearing requirement is waived or a mention of that waiver in the caption. The proposed edit would make selection of the "Yes" radio button during filing effective as a waiver.

The proposed edit also eliminates the 'hanging paragraph' at the end of the current version of B-4001-1(a)(1) by creating two new subparagraphs and renumbering others.

B-4001-3. OBTAINING CREDIT IN CHAPTER 13 CASES

*****

(c) Filing Approved Request with the Court

If the Debtor seeks an order from the Court on a request that has been approved by the trustee, the Debtor may file the approved request with the Court and provide an order. If the pleading is filed without documentation showing the trustee's approval, it will be treated as a Motion to Incur Debt filed under subparagraph (d). The trustee's approval can be documented by reference to same within the motion or by attaching a document signed by the trustee.

Committee Comments

The Clerk reports a lack of uniformity among the trustees as to how trustee approval can be noted. The Rule would make both of the current options acceptable.

B-4003-2. LIEN AVOIDANCE MOTIONS PURSUANT TO §522(f)

(a) Requirements~~: All Motions~~

Any Debtor seeking to avoid a lien pursuant to ~~either~~ 11 U.S.C. §§522(f) ~~or 1322(b)~~ shall file a separate written motion as to each alleged lien holder. The motion may be combined with the notice required by subparagraph (d) and the certificate of service that complies with S.D.Ind. B-9013-2. A sample notice, ~~and~~ motion, and certificate of service are available on the Court's website. The motion shall identify:

(1) the value of the subject collateral;

(2) the amount, listed separately, of all mortgages and other liens on the property which the Debtor will not seek to avoid, and a list of the liens on the property which the Debtor will seek to avoid;

(3) ~~if applicable, the amount of the impaired exemption; and~~ the amount of the exemption to which the Debtor would be entitled but for the lien;

(4) the lien to be avoided and its approximate amount; and ~~.~~

(5) if lien avoidance is sought as to real property, the common address and legal description of that property.

(b) Judicial Liens: Additional Requirements

In addition to the information required by subparagraph (a), ~~M~~motions to avoid judicial liens shall also include:

(1) the case number and the Court where the underlying judgment was entered; and

(2) the date of the judgment~~; and~~ .

~~(3) list the common address of any real property affected by the lien~~.

(c) Nonpossessory, Nonpurchase Money Security Interests in Household Goods: Additional Requirements

In addition to the information required by subparagraph (a), ~~M~~motions to avoid a nonpossessory, nonpurchase money security interest in household goods under 11 U.S.C. §522(f)(1)(B) ~~must, in addition to the requirements in paragraph (a)~~ shall also:

(1) specifically identify the household goods that are subject to the security interest sought to be avoided, referring to the definition of "household goods" provided in 11 U.S.C. §522(f)(4); and

(2) state the date the debt that the lien secures was incurred.

(d) Service and Notice

The Debtor shall serve the motion and notice thereof on the lien holder, in accordance with Fed.R.Bankr.P. 9014(b) and 7004. The notice shall allow at least twenty-one (21) days from the date of service to file objections.

(e) Filing and Certificate of Service

Along with the motion, the Debtor shall file with the Court a copy of the notice and a certificate

of service that complies with S.D.Ind. B-9013-2.

(f) Orders

An order avoiding a lien on real estate shall include both the common address and a legal description of that real estate.

Committee Comments

During the Committee's deliberations, the Judges advised of their intent to require that actions to strip mortgages in Chapter 13 cases be pursued by adversary proceeding instead of motion. Therefore, the Committee removed the references to §1322(b) and restructured the rule to limit its application to §522(f) motions.

The Committee also reordered the required elements of a lien avoidance motion (this change is not reflected by redline or strikeout) to start with the value of the property and have the lien and its amount mentioned only after information about other liens and the debtor's exemption. The Committee has also rephrased the requirement of providing the amount of the allegedly impaired exemption, for clarity. Other changes are stylistic.

B-4003-3. STRIPPING MORTGAGES IN CHAPTER 13 CASES

Any Debtor seeking to strip a mortgage in a Chapter 13 case shall file a separate adversary proceeding as to each lien holder. In addition to any other required allegations, the complaint shall identify:

(a) the mortgage to be avoided and its approximate amount;

(b) the other mortgages and liens on the property which the Debtor asserts have higher priority than the mortgage to be avoided, and the amount – listed separately – of those mortgages and liens;

(c) the value of the property; and

(d) the common address and legal description of the property.

A proposed judgment tendered by the Debtor shall include both the common address and the legal description of the property.

Committee Comments

The Committee proposes this rule to capture the Judges' desired change in procedure from motions stripping unsecured mortgages to adversary proceedings. Since some of these adversary

proceedings may be resolved by default judgment, the Committee felt it was important for the Court to have sufficient information presented in the complaint to ensure that stripping is appropriate. It has also been noted that if this rule is adopted the Court's Rights and Responsibilities document, specifically the list of duties covered by the 'no look' fee, will need to be edited.

The Committee opted not to refer to any section of the Bankruptcy Code, since the concept of lien stripping in Chapter 13 cases comes primarily from case law. The Committee also opted to place the rule here, next to the rule on lien avoidances under §522(f), rather than in the 7000 series of local rules concerning adversary proceedings, because mortgage stripping used to be covered by B-4003-2. (No national uniform number for the subject matter exists.)

The Committee decided not to provide in the Rule for a sample form, since adversary proceedings have more requirements as to form and content than do motions. A form can be added at a later time if experience suggests it would be helpful.

B-5011-1. WITHDRAWAL OF REFERENCE

(a) Form of Request; Place of Filing

A motion for withdrawal of ~~reference in whole or part~~ a case or proceeding shall be filed ~~by motion~~ in the Bankruptcy Court. In addition, all such motions shall clearly and conspicuously state that "relief is sought from a U.S. District Judge."

(b) Recommendation by Bankruptcy Court

The Bankruptcy Court, on its own motion, may recommend to the District Court that a case or proceeding be withdrawn under 28 U.S.C. §157(d). Any such recommendation must be served on the parties to the case or proceeding and forwarded to the Clerk of the District Court for assignment to and resolution by a District Judge.

(~~b~~ c) Stay

The filing of a motion to withdraw the reference or the Bankruptcy Court's recommendation to withdraw the reference does not stay the proceedings in the Bankruptcy Court. Fed.R.Bankr.P. 8005 governs requests for a stay pending decision on withdrawal of reference.

(~~c~~ d) Designation of Record

The moving party shall serve and file, together with the motion to withdraw the reference, a designation of those portions of the record believed to be necessary or pertinent to the District Court's consideration of the motion. Within fourteen (14) days after service of such designation of record, any other party may serve and file a designation of additional portions of the record. All designated documents shall be identified by document number as noted on the docket. If the record designated by any party includes a transcript of any proceeding, that party shall file a

written request for the transcript and include with the request the fee for preparation of the transcript.

(~~d~~ e) Responses to Motions to Withdraw Reference; Reply

Opposing parties shall file with the Clerk, and serve all parties to the matter, their written responses to the motion within fourteen (14) days after being served a copy of the motion. The moving party may serve and file a reply within fourteen (14) days after service of a response.

(~~e~~ f) Transmittal of Record to District Court

When the record is complete, the Clerk of the Bankruptcy Court shall transmit to the Clerk of the District Court the motion and the portions of the record designated. After the opening of the docket in the District Court, documents pertaining to the matter under review by the District Court shall be filed with the Clerk of the District Court.

Committee Comments

Subparagraph (a) is amended for greater clarity, and now closely parallels the first subparagraph in Fed.R.Bankr.P. 5011. A new subparagraph (b) sets the procedure for the Bankruptcy Court to recommend withdrawal of the reference. This procedure may be important in situations where the Court's power to rule becomes problematic.

[NOTE: The Committee is proposing to replace the current rule on motions to sell, B-6004-1, with a new set of rules on sales, B-6004-1 through B-6004-5. Given the extensive revisions proposed, providing a redline/strikeout version of B-6004-1 would not be helpful. The Court will recognize that many of the procedures and requirements of B-6004-1 have been preserved in the new set of rules.]

B-6004-1. SALE OF ASSETS OUTSIDE THE ORDINARY COURSE PURSUANT TO 11 U.S.C. §363: GENERALLY

(a) Applicability of Local Rule

This rule applies to any motion to approve the sale of assets, outside the ordinary course of business, pursuant to 11 U.S.C. §363 (the "Motion to Sell"), including motions filed by a trustee or a Debtor.

(b) Employment and Compensation of Professionals

Except as otherwise permitted by Local Rules B-6004-2 and 6004-3, the movant shall file a separate application to employ, and a separate application to compensate, any broker, auctioneer, or other professional to be retained to assist with any sale. The retention of liquidators, auctioneers, and appraisers is also governed by Local Rule B-6005-1. No payment

shall be made to any professional before the Court has entered an order approving compensation and reimbursement of expenses.

(c) Procedure; Contents of Motion; Notice

Unless otherwise ordered, any motion to sell shall follow the procedures outlined in and provide the information required by Local Rules B-6004-2 through B-6004-5, depending on the type of sale.

Committee Comments

The Committee proposes to replace B-6004-1 with this rule that provides the general requirements for the process of selling estate property pursuant to §363 and, with the separate rules that follow, setting specific procedures depending on the type of sale. In unique situations, pursuant to subparagraph (c) the Court can approve a different procedure.

B-6004-2. PRIVATE SALE

(a) "Private Sale" Defined

For the purpose of this rule, a "private sale" is defined as a sale to a specific entity on terms that are fixed at the time the motion to sell is filed, with no consideration of competing bids contemplated.

(b) Contents of Motion: All Chapters

Any Motion to Sell by private sale shall identify:

(1) the property to be sold;

(2) the prospective purchaser ("Prospective Purchaser");

(3) the sales price and an estimate of the net proceeds to be received by the estate (including a deduction for any exemption);

(4) a brief summary of all material contingencies to the sale, together with a copy of the agreement, if available;

(5) a description of the manner in which the property was marketed for sale, and a description of any other offer to purchase;

(6) a description of any known relationship between the Prospective Purchaser and its insiders and the Debtor and its insiders or the trustee;

(7) a statement setting forth any relationship or connection the trustee or the Debtor (including its insiders) will have with the Prospective Purchaser or its insiders after the consummation of the sale, assuming it is approved; and

(8) a disclosure if the property to be sold contains personally identifiable information and, if so, the measures that will be taken to comply with 11 U.S.C. §363(b)(1).

(c) Contents of Motion: Additional Requirements in Chapter 11 Cases

Any Motion to Sell by private sale in a Chapter 11 case that proposes the sale of all or substantially all of the Debtor's assets shall include, in addition to the requirements in subparagraph (b), the following:

(1) if schedules have not been filed by the Debtor, a summary of the Debtor's debt structure, including the amount of the Debtor's secured debt, priority claims, and general unsecured claims; and

(2) If a creditors' committee, or its equivalent, existed pre-petition, the identity of the members of the committee and the companies with which they are affiliated and the identity of any counsel.

(d) Notice

(1) Distribution; Contents; Certificate of Service Generally.

Unless otherwise ordered by the Court, the movant shall distribute notice of any hearing or of any deadline to object to a Motion to Sell, as determined by subparagraphs (2) and (3) below. The notice shall contain all of the information required by subparagraph (b) and (c) of this rule. The movant shall file a certificate of service that complies with S.D.Ind. B-9013-2. The motion, notice, and certificate of service may be combined into one document. A sample combined motion to sell, notice, and certificate of service is available on the Court's website.

(2) Chapter 7, 12, and 13 Cases

Unless the Court by separate order shortens the notice period, in a Chapter 7, Chapter 12, or Chapter 13 case, the movant shall distribute notice that provides twenty-one (21) days after the date of service for objections to be filed.

(3) Chapter 11 Case

In a Chapter 11 case, the movant shall contact the courtroom deputy to obtain direction as to whether the Court desires a notice with opportunity to object to the motion or a notice of the hearing date. The movant shall distribute the notice and file a certificate of service.

(e) Report of Sale

After a private sale has been completed, the movant shall file a report of sale pursuant to Fed.R.Bankr.P. 6004(f)(1).

Committee Comments

This rule provides guidance on private sales – which are sales to a specific entity for a set price with no bidding contemplated.

Judges' Edits to Committee's Proposal

The Committee proposed to keep in place the current rule's requirement that post-sale relationships between the seller and the buyer be disclosed for Chapter 11 cases. The Judges determined that the existence of any post-sale connection between the seller (the trustee or the debtor) should be disclosed in every chapter – not just as to sales in Chapter 11 cases.

B-6004-3. PRIVATE SALE BY AGENT

(a) "Private Sale by Agent" Defined

A "private sale by agent" is defined as the sale by the trustee or Debtor of estate property other than real estate using an agent that is in the business of selling such property in a 'commercially reasonable manner' that would satisfy Indiana Code §26-1-9.1-610. At the time approval of the sale is sought, the trustee or Debtor has not identified the purchaser or the exact purchase price.

(b) Contents of Motion

Any Motion to Sell by private sale using an agent shall identify:

(1) the property to be sold;

(2) information to support the determination that the agent is in the business of selling similar property in a commercially reasonable manner;

(3) the amount of any exemption claimed in the property; and

(4) a disclosure if the property to be sold contains personally identifiable information and, if so, the measures that will be taken to comply with 11 U.S.C. §363(b)(1).

(c) Combining Retention and Compensation of Agent with Motion

The trustee or Debtor may combine a request to retain and to compensate the agent with the motion to sell. Any such request shall provide the information required by Fed.R.Bankr.P. 2014, describe how compensation will be determined, and estimate the fees to be paid.

(d) Notice

Unless the Court by separate order shortens the notice period, the movant shall distribute notice that provides twenty-one (21) days after the date of service for objections to be filed. The notice shall include a description of the property to be sold; the name of and contact information for the agent; the proposed terms of compensation for the agent, if proposed retention has not been noticed separately; and the location of the property prior to sale. The movant shall also file a certificate of service that complies with S.D.Ind. B-9013-2. The motion, notice, and certificate of service may be combined into one document. A sample combined motion to sell, notice, and certificate of service is available on the Court's website.

(e) Report of Sale

After a private sale by agent has been completed, the movant shall file a report of sale pursuant to Fed.R.Bankr.P. 6004(f)(1).

Committee Comments

The concept of a "private sale by agent" already exists under the local rules but is now broken out into its own rule. This rule applies only to the sale of personal property by a trustee. Given the nature of these sales and the relatively small value of the property involved, the Committee is recommending a streamlined procedure for the retention and compensation of agents assisting with the sale.

B-6004-4. SALE BY AUCTION

(a) "Sale by Auction" Defined

A "sale by auction" is any sale by public auction, with no previously identified initial bidder.

(b) Contents of Motion

Any Motion to Sell by auction shall identify:

(1) the property to be sold;

(2) the name of and contact information for the entity conducting the auction;

(3) the date, time and place of the sale, if known, or instructions on how that information can be obtained;

(4) any bid procedures proposed for the sale, even if those bid procedures were previously disclosed in an application to employ an auctioneer; and

(5) a disclosure if the property to be sold contains personally identifiable information and, if so, the measures that will be taken to comply with 11 U.S.C. §363(b)(1).

(c) Notice

Unless the Court by separate order shortens the notice period, the movant shall distribute notice that provides twenty-one (21) days after the date of service for objections to be filed. The notice shall provide the information required by subparagraph (b) of this rule. The movant shall also file a certificate of service that complies with S.D.Ind. B-9013-2. The motion, notice, and certificate of service may be combined into one document. A sample combined motion to sell, notice, and certificate of service is available on the Court's website.

(d) Report of Sale

Unless otherwise ordered by the Court, after an auction the auctioneer or the party that filed the application to employ the auctioneer shall file the report pursuant to Fed.R.Bankr.P. 6004(f)(1).

Committee Comments

This proposed rule sets out the procedure for a 'straight' auction – with no prospective purchaser identified. The rule contemplates either retention of an auctioneer to handle the sale or sale with the trustee or Debtor serving in that capacity. Because an auctioneer may not have the ability to file documents electronically, the report of sale can be filed by the party that filed the application to employ.

B-6004-5. SALE WITH PROSPECTIVE PURCHASER IDENTIFIED BUT BIDS CONSIDERED

(a) "Sale with Prospective Purchaser Identified but Bids Considered" Defined

A "sale with prospective purchaser identified but bids considered" is also known as a "sale with a stalking horse bidder," and is a proposed sale to a specific entity for a set price, with competitive bids to be considered.

(b) Contents of Motion to Sell With Bid Procedures

Any Motion to Sell to a prospective purchaser but with bids considered shall identify or include:

(1) the property to be sold;

(2) the prospective purchaser ("Prospective Purchaser");

(3) the sales price and an estimate of the net proceeds to be received by the estate (including a deduction for any exemption);

(4) a brief summary of all material contingencies to the sale, together with a copy of the agreement, if available;

(5) the executory contracts and leases proposed to be assumed or rejected as part of the sale, if any;

(6) a description of the manner in which the property was marketed for sale, and a description of any other offer to purchase;

(7) a description of any known relationship between the Prospective Purchaser and its insiders and the Debtor and its insiders or the trustee;

(8) a statement setting forth any relationship or connection the trustee or the Debtor (including its insiders) will have with the Prospective Purchaser after the consummation of the sale, assuming it is approved;

(9) if a topping fee or break-up fee is proposed to be paid to the Prospective Purchaser if another bidder prevails at the sale, a statement of the conditions under which the topping fee or break-up fee would be payable and the factual basis on which the seller determined the provision was reasonable;

(10) the identities of any other entity that expressed to the movant an interest in the purchase of all or a material portion of the assets to be sold within ninety (90) days prior to the filing of the sale motion, the offers made by them (if any), and the nature of the offer;

(11) any bid procedures proposed for the sale;

(12) a disclosure if the property to be sold contains personally identifiable information and, if so, the measures that will be taken to comply with 11 U.S.C. §363(b)(1); and

(13) if the case is pending under Chapter 11, and proposes the sale of all or substantially all of the Debtor's assets, the following:

(A) If schedules have not been filed by the Debtor, a summary of the Debtor's debt structure, including the amount of the Debtor's secured debt, priority claims, and general unsecured claims; and

(B) If a creditors' committee, or its equivalent, existed pre-petition, the identity of the members of the committee and the companies with which they are affiliated and the identity of any counsel.

(c) Notice of Motion to Sell and to Approve Bid Procedures

After obtaining direction from the Court as to the contents of the notice, the movant shall distribute notice of the motion to sell and of the proposed bid procedures. If a notice of the opportunity to object is directed, unless the Court by separate order has shortened the notice period, that notice shall provide twenty-one (21) days after the date of service for objections to be filed. The notice shall provide the information required by subparagraph (b) of this rule. The

movant shall also file a certificate of service that complies with S.D.Ind. B-9013-2. The motion, notice, and certificate of service may be combined into one document. A sample combined motion to sell and to approve bid procedures, notice, and certificate of service is available on the Court's website.

(d) Notice of Approval of Bid Procedures and of Sale Process

If the Court enters an order approving the bid procedures and setting the sale process, then the movant shall distribute notice of that order. The notice shall include the bid procedures; the date, time, and place where bids will be considered; and the date, time, and place of the hearing to approve the sale. The movant shall also file a certificate of service that complies with S.D.Ind. B-9013-2. A sample combined notice and certificate of service is available on the Court's website.

(e) Order Approving Sale

(1) Sale to Prospective Purchaser

If the Prospective Purchaser prevails at the sale, then the Court shall enter an order approving that sale.

(2) Sale to Different Entity: No Change in Terms Except Price

If a sale pursuant to this rule results in a sale to a party other than the identified Prospective Purchaser, with no change in terms other than the purchase price, then at the hearing on approval of the sale the movant shall identify the successful purchaser and the change in price, and shall make any request for approval of a topping or break-up fee if one was disclosed in the motion to sell. The Court shall enter an order approving that sale.

(3) Sale to Different Entity with Change in Terms

If a sale pursuant to this rule results in a sale to a party other than the identified Prospective Purchaser, and the terms of that sale other than price have changed, including but not limited to the proposed assumption or rejection of leases and contracts, then the movant shall identify the successful purchaser and the change in terms and shall make any request for approval of a topping or break-up fee if one was disclosed in the motion to sell. The Court shall consider whether the change in terms requires additional notice to parties who may be affected by those changes. If no additional notice is required, the Court shall enter an order approving the sale. If additional notice is required, the Court shall enter the order approving the sale only after such additional notice period.

Committee Comments

Through this rule, the Committee proposes to streamline the process of conducting a sale with a 'stalking horse' bidder. The current procedure requires separate presentation and approval of bid

procedures. This rule more closely resembles actual practice [See, for example, *In re Cereplast, Inc.*, 14-90200-BHL-7] and also generally follows the *Guidelines for the Conduct of Asset Sales* of the Southern District of New York: "When an auction is contemplated, the debtor should file a single motion seeking the entry of two orders to be considered at two separate hearings. The first order will approve procedures for the sale process… and the second order will approve the sale to the successful bidder at the auction." Those *Guidelines* can be found at: http://www.nysb.uscourts.gov/sites/default/files/6004-1-j-Guidelines.pdf .

Judges' Edits to Committee's Proposal

The Judges determined that the existence of any post-sale connection between the seller (the trustee or the debtor) should be disclosed in every chapter – not just as to sales in Chapter 11 cases. The Judges declined the Committee's proposal to excuse the filing of a report of sale in some circumstances, as that report of sale is the best notice to other interested parties that the sale has actually closed.

B-6006-1. ASSUMPTION, REJECTION, OR ASSIGNMENT OF EXECUTORY CONTRACTS OR UNEXPIRED LEASES: NOTICE

(a) Assumption, Rejection, or Assignment

A party seeking to assume, reject or assign an executory contract or unexpired lease shall give notice of the motion. Notice shall be given to the parties identified in Fed.R.Bankr.P. 6006(c) as well as to any sublessee. The notice shall allow at least fourteen (14) days from the date of service to file objections. Along with the motion, the moving party shall file a copy of the notice and a certificate of service that complies with S.D.Ind. B-9013-2. The motion, notice, and certificate of service may be combined into one document. A sample combined motion for assumption or rejection or assignment, notice, and certificate of service is available on the Court's website.

(b) Compelling Assumption or Rejection

A party seeking to compel the trustee or the Debtor to assume or reject an executory contract or lease shall give notice of the motion. Notice shall be given to the Debtor, any trustee, counsel of record, the United States Trustee, any other party to the contract or lease, and any sublessee identified on the Debtor's schedules. The notice shall give at least fourteen (14) days from the date of service to file objections. Along with the motion, the moving party shall file a copy of the notice and certificate of service that complies with S.D.Ind. B-9013-2. The motion, notice, and certificate of service may be combined into one document. A sample combined motion to compel assumption or rejection, notice, and certificate of service is available on the Court's website.

Committee Comments

This rule is new. The rule shifts noticing responsibility for motions concerning assumption or rejection of leases and executory contracts onto the filing party.

B-7026-1. DISCOVERY DISCLOSURES AND CONFERENCES

~~Unless otherwise ordered by the Court,~~ Fed.R.Civ.P. 26(a), concerning ~~initial~~ disclosures, and 26(f), concerning discovery conferences, do not apply ~~in adversary~~ ~~proceedings~~ unless otherwise ordered by the Court.

Committee Comments

The Committee proposes restructuring the rule slightly to make clear that it covers all parts of Fed.R.Civ.P. 26(a) and to eliminate the impression that the rule only applies in adversary proceedings.

B-7055-1. DEFAULT

*****

(b) Motions for Default Judgment

Notwithstanding Fed.R.Bankr.P. 7055(b)(1), a party seeking a default judgment shall present a motion to the Judge, rather than to the Clerk, and shall also tender a proposed judgment. If the claim to which no response was made is for a "sum certain," then the motion shall be accompanied by an affidavit showing the principal amount due and owing, not exceeding the amount sought in the claim, plus interest, if any computed by the movant, with credit for all payments received to date clearly set forth, and costs, if any, pursuant to 28 U.S.C. §1920. If the amount of the claim is not readily ascertainable or if the amount requested in the motion exceeds the amount stated in the claim, the Court may conduct a hearing on the motion for default judgment.

*****

Committee Comments

The rule is amended to remind those seeking a default judgment to tender a form of judgment with their motion.

B-7056-1. SUMMARY JUDGMENT PROCEDURE

(a) Movant's Obligations

A party seeking summary judgment must file and serve a supporting brief and any evidence (that is not already in the record) that the party relies on to support the motion. Unless otherwise

ordered by the Court, the supporting brief shall be no more than thirty-five (35) pages. The brief must include a section labeled "Statement of Material Facts Not in Dispute" containing the facts:

(1) that are potentially determinative of the motion; and

(2) as to which the movant contends there is no genuine issue.

(b) Non-Movant's Obligations

A party opposing a summary judgment motion must, within twenty-eight (28) days after the movant serves the motion, file and serve a response brief and any evidence (that is not already in the record) that the party relies on to oppose the motion. Unless otherwise ordered by the Court, the response brief shall be no more than thirty-five (35) pages. The response must include a section labeled "Statement of Material Facts in Dispute" that identifies the potentially determinative facts and factual disputes that the party contends demonstrate a dispute of fact precluding summary judgment.

(c) Reply

The movant may file and serve a reply brief within fourteen (14) days after a response is served. Unless otherwise ordered by the Court, the reply brief shall be no more than twenty (20) pages.

(d) Surreply

A party opposing a summary judgment motion may file a surreply brief only if the movant cites new evidence in the reply or objects to the admissibility of the evidence cited in the response. The surreply must be filed and served within seven (7) days after the movant serves the reply and must be limited to the new evidence and objections.

*****

Committee Comments

The rule is amended to add page limits. These page limits match those set by the District Court in its Local Rule 7-1.

B-7069-1. EXECUTION/ENFORCEMENT OF JUDGMENTS

(a) Availability of Enforcement Remedies

A trustee or Debtor who seeks to enforce a judgment in an adversary proceeding or an order of turnover for the benefit of the bankruptcy estate may pursue collection in the Bankruptcy Court. The order of turnover must be for a sum certain or direct turnover of specific tangible property.

(b) Applicability of District Court Rules

S.D.Ind. L.R. 69-1 (Execution), S.D.Ind. L.R. 69-2 ~~(Discovery in Aid of Judgment or Execution)~~ (Interrogatories to Garnishees), and S.D.Ind. L.R. 69-3 (Final Orders in Wage Garnishment) apply to adversary proceedings and to orders directing a Debtor to turn over property. Answers to Interrogatories should not be filed with the Court but should be sent to the trustee or Debtor only.

Committee Comments

The rule is amended to clarify that an order of turnover is not subject to execution or enforcement unless it has a specific dollar amount or identifies the tangible property as to which turnover was ordered. In addition, District changed the title of one of its local rules.

~~B-8002-1. CAPTION PAGE FOR APPEAL~~

~~The party filing the notice of appeal shall also provide the Clerk with the caption for the appeal, showing all the parties to the appeal and their roles.~~

Committee Comments

Both the district and bankruptcy clerk's offices want a sample caption page for the appeal, and have usually obtained same from the appellant. However, the requirement of providing that caption isn't spelled out anywhere. This local rule attempts to fill that void. The bankruptcy clerk is changing the way the Notice of Appeal event works so that the electronic filer will be able to fill in a caption page as part of the filing process. However, a pro se party filing an appeal won't have access to that – hence the continuing need for a rule. The rule does not address the caption if a cross-appeal is filed, naming other parties. Given the impending changes to the bankruptcy appeals process effective 12/1/14, the District Court will need to address any caption issues after the initial filing.

Judges' Edits to Committee Proposal

Review of the revised national rules for bankruptcy appeals reveals that Fed.R.Bankr.P. 8003 will include a requirement that the notice of appeal form substantially comply with a new national form, 17A, which includes the information the Clerk seeks through this proposed local rule. Therefore, if adopted the proposed local rule would soon be redundant. The Judges withdrew it from the set distributed for public comment.

B-9006-2. PRESUMPTIVE OBJECTION PERIOD IN CHAPTER 11 CASES

In a Chapter 11 case, when the Court opts to set an objection period on a motion or application rather than a set a hearing, if no other time period is set by the Federal Rules of Bankruptcy Procedure or these local rules, the time period for objection shall be twenty-one (21) days. The Court on its own or on the motion of a party, filed pursuant to L.R. B-9006-1, may shorten the

time period for objection.

Committee Comments

This proposed rule seeks to advise parties of the default notice period used by the Court.

B-9010-1. APPEARANCES

*****

(c) Withdrawal of Appearance in a Bankruptcy Case

(1) Successor Counsel Has Not Appeared

(A) Counsel for a Debtor desiring to withdraw his/her appearance in any case shall file a motion requesting leave to do so. Such motion shall fix a date for such withdrawal and shall include satisfactory evidence of either a written request to withdraw by counsel's client or a written notice regarding the withdrawal from counsel to counsel's client at least seven (7) days in advance of the withdrawal date and shall provide the Court with the client's last known telephone number.

(B) Counsel for a creditor or other non-debtor party who no longer has any issue pending in the case may file a notice of withdrawal. If counsel is involved in a pending issue, then counsel shall file a motion requesting leave to do so, complying with the requirements for such motions in the preceding subparagraph.

(2) Successor Counsel Has Appeared

No advance notice to client is required if an appearance by co-counsel, who will remain in the case, or if an appearance by successor counsel, is filed prior to or concurrently with a motion to withdraw. However, the attorney being replaced must file a motion to withdraw ~~or a notice of withdrawal~~, pursuant to subparagraph (c)(1), before that attorney will be removed as a counsel of record in the case unless a substitution of appearance is filed by new counsel.

*****

Committee Comments

The Clerk advises that previous edits to Rule 9010-1 on appearances have created some confusion about when it is proper to use a notice of withdrawal: only when a non-debtor party has no further interest in the matter, or also when counsel is withdrawing generally but the party has new counsel (or continuing representation by another attorney)? For clarity, the rule would be edited to allow filing of notice of withdrawal only if the non-debtor party does not wish to participate in the case any further. In all other situations, a motion to withdraw would be required.

B-9013-3. FIRST DAY MOTIONS IN CHAPTER 11 CASES

****

(b) Procedure Prior to Filing

Prior to filing, the Debtor shall ~~endeavor~~ attempt to confer with and provide copies of any First Day Motion to the UST. Counsel shall include in any First Day Motion, or in a separate pleading, a statement of efforts made to meet with the UST and affected parties prior to filing when possible. The Debtor shall also contact the ~~Court's senior~~ courtroom deputy for the Chief Judge to advise that a case with First Day Motions will be filed.

****

(f) List of Included Motions

The following shall be treated by the Court as First Day Motions if filed with the petition or within two (2) days thereafter:

(1) motion for joint administration;

(2) motion for use of cash collateral (interim hearing only) (see S.D.Ind. B-4001-2);

(3) motion for post-petition financing (interim hearing only) (see S.D.Ind. B-4001-2);

(4) motion to pay pre-petition employee wage claims (to the limit provided by 11 U.S.C. § 507);

(5) motion to limit notice generally;

(6) motion to provide adequate assurance to utilities;
(7) motion to pay pre-petition trust fund taxes;

(8) motion to honor pre-petition obligations to customers (to the limit provided by 11 U.S.C. § 507);

(9) motion to vary UST financial requirements, such as motion to authorize maintenance of existing bank accounts, existing business forms, cash management system, investment procedures, etc.;

(10) motion for authority to pay pre-petition claims of alleged critical vendors;

(11) motion to reject leases and contracts; ~~and~~

(12) motion to not appoint a creditors' committee pursuant to 11 U.S.C. § 1102(a)(3)~~.~~; and

(13) a Prepackaged Scheduling Motion (see S.D.Ind. B-2081-2).

Committee Comments

The list of 'first day' motions is amended to include a Prepackaged Scheduling Motion, as added by the proposed amendment to S.D.Ind. B-2081-2. The Committee also swapped out the word 'endeavor' for 'attempt.' It was clarified that the reference to making contact with the courtroom deputy for the Chief Judge is only for purposes of ensuring that a Judge is available to handle first day matters – and does not concern the eventual assignment of the case to a Judge.

B-9016-1. SUBPOENAS

If a subpoena to produce or permit is to be served upon a nonparty, a copy of the proposed subpoena must be served on all other parties at least seven (7) days prior to service of the subpoena on the nonparty, unless the parties agree to a different time frame or the case management plan provides otherwise. Provided, however, that if such subpoena relates to a matter set for hearing within such seven (7) day period or arises out of a bona fide emergency, such subpoena may be served upon a nonparty one (1) day after a notice and copy of the subpoena is served on each party.

Committee Comments

This proposed rule mirrors recently adopted District Court Rule 45-1.

[NOTE: The Committee is proposing to overhaul the current rule on alternative dispute resolution, B-9019-2, so completely that providing a redline/strikeout version would have been time-consuming and not particularly helpful. The entire proposed new rule follows.]

B-9019-2. ALTERNATIVE DISPUTE RESOLUTION

(a) Scope of the Rule

The alternative dispute resolution method governed by this rule is mediation. This rule does not preclude the parties from agreeing to the use of any other reasonable method of alternative dispute resolution. However, any use of arbitration by the parties will be governed by 28 U.S.C. §§654-647.

(b) Applicability of the Rule

This rule applies to all contested matters and adversary proceedings pending before a Bankruptcy Judge of this District.

(c) Referral to Mediation: Process

(1) Motion to Refer to Mediation

Any party may file a motion to refer a matter to mediation ("Motion to Refer to Mediation"). If a party's Motion to Refer to Mediation certifies that all parties to the matter consent to mediation and have been served with the motion, and the Court finds the motion to be appropriate under the circumstances, the Court may enter an order referring the matter to mediation without further notice or hearing. If a motion does not so certify, the motion shall be set for hearing. The Bankruptcy Judge may decide not to grant a motion to refer a particular matter to mediation if the Court determines that the motion was filed to delay the case or proceeding or if the matter involved is not likely to be resolved by mediation, given the issue or the parties involved.

(2) Court's Referral to Mediation

(A) Court's Notice of Status Conference to Discuss Mediation

The Court may refer a matter to mediation on its own by setting a status conference to consider the referral. At the status conference, the parties can oppose the referral or indicate consent. After the hearing, the Court may enter an order referring the matter to mediation.

(B) Court's Proposal During Other Scheduled Hearing or Status Conference

The Court may propose referral to mediation at any other hearing or status conference. The parties can oppose referral, indicate consent, or request a separate status conference on the proposal. The Court may enter an order referring the matter to mediation or may set a status conference for a later date.

(d) Jurisdiction and Pendency of Matter: Deadlines and Discovery

At all times during the course of mediation, the matter remains under the jurisdiction of the Judge to whom the matter is assigned. Referral to mediation does not abate or suspend the matter. As to discovery matters, absent court order or the agreement of the parties, no scheduled dates shall be deferred or delayed. Whenever possible, parties are encouraged to limit discovery to the development of information needed to facilitate mediation.

(e) Selection of the Mediator

(1) Selection by Agreement

Any person may be selected to serve as a mediator. Parties are encouraged to consider those appearing on the Court's list of mediators maintained by the Clerk. If a proposed mediator has been agreed upon by the parties, then within fifteen (15) days after the order referring the matter to mediation, the parties shall file a Notice of Selection of Mediator. The notice shall designate the name of the proposed mediator.

(2) Selection of Candidates by the Court

If the parties cannot agree on a mediator within fourteen (14) days after entry of the order referring the matter to mediation, or if the parties elect to request the Court to name a panel for their consideration before expiration of the fourteen (14)-day period, a party to the mediation shall file a Motion to Select a Panel of Mediator Candidates. The fourteen (14)-day selection period may be extended upon motion of either party to the matter. The Court will issue a Notice of Designation of Mediator Candidates which designates three (3) potential mediators. Each side, alternately, shall strike the name of one (1) mediator. The side initiating the controversy will strike first, and shall do so no later than three (3) days after the filing of the Notice of Designation of Mediator Candidates. The parties shall complete the striking process within seven (7) days of the Court's designation and shall file a Notice of Selection of Mediator with the Court. During the striking process, the parties can agree on a mediator other than one named on the panel of candidates. If a party fails to strike from the list when required to do so, then the first name on the list that has not previously been stricken is deemed stricken by the party with the duty to strike. The other party then exercises its right to strike or, if only one name remains, files the Notice of Selection of Mediator.

(3) Qualification and Immunity

A mediator becomes qualified upon the filing of the affidavit required by subparagraph (e)(5). To the extent permitted under applicable law, a qualified mediator shall have immunity in the same manner and to the same extent as would a duly appointed Judge.

(4) Disqualification

Any person selected to serve as a mediator shall disqualify himself or herself from the matter if impartiality might reasonably be questioned. A mediator is also subject to the disqualification rules found in 28 U.S.C. §455. A party that reasonably believes the mediator should be disqualified may file a Request for Disqualification of Mediator.

(5) Affidavit

A person proposed for selection as a mediator shall prepare an affidavit disclosing any connections with the parties or counsel involved with the controversy which in any way could affect the neutrality or partiality of the mediator and setting forth any other reason which could result in disqualification under section (e)(2) of this rule. The affidavit shall summarize the anticipated rate of compensation and terms of payment of the proposed mediator. The affidavit shall be filed no later than seven (7) days after the notice specified in subparagraph (e)(1) and (2). The time period for filing the affidavit can be extended upon motion of any party to the matter.

(6) Replacement of Mediator

If at any time the mediator is disqualified or opts not to continue to serve, the parties may agree upon another mediator and file the appropriate notice, or they may request that the Court

designate a panel of candidates pursuant to subparagraph (e)(2).

(f) Compensation

Unless otherwise agreed by the parties or ordered by the Court, the compensation and costs of the mediation shall be borne equally by the parties to the mediation. If one of the parties is a trustee or debtor-in-possession, the amount of compensation to be paid by that party shall be treated as an administrative expense and paid by the estate.

(g) The Mediation

(1) Control of the Mediation

The mediator shall control all procedural aspects of the mediation, including but not limited to:

(A) setting dates, times, and places for conducting sessions of the mediation;

(B) requiring the submission of confidential statements;

(C) requiring the attendance of representatives of each party with sufficient authority to negotiate and settle all disputed issues and amounts;

(D) designing and conducting the mediation sessions; and

(E) establishing a deadline for the parties to act upon a settlement proposal.

(2) Termination of the Mediation by Mediator

The mediator may terminate the mediation whenever the mediator believes that continuation of the process would harm or prejudice one or more of the parties; whenever the ability or willingness of any party to participate meaningfully in the mediation is so lacking that a reasonable agreement is unlikely; or whenever the mediator determines that continuing the mediation process would be futile.

(3) Termination of the Mediation by a Party

Parties are required to appear for mediation and to participate in good faith. However, parties are not compelled to reach an agreement. Either party may withdraw from the mediation if the party determines that continuing the mediation would be futile.

(4) Conclusion of the Mediation

(A) If the mediation results in a full settlement of the contested matter or adversary proceeding, the mediator or the party who requested the mediation shall within seven (7) days of the conclusion of the mediation file a Report of Mediation so advising the Court. Within a reasonable time thereafter, the parties shall submit to the Court an agreed order or judgment or

motion for approval of compromise or settlement and provide such notice as is required by the Federal Rules of Bankruptcy Procedure or as the Court may direct. If mediation results in a partial settlement, such that a motion to compromise and settle is not required, the parties shall file a notice of submission of any appropriate stipulation.

(B) If the mediation is terminated or does not result in a settlement, and the mediator, after appropriate consultation with the parties and their counsel, is reasonably satisfied that no further mediation effort is feasible at that time, then the mediator or the party who initiated the mediation shall file a Report of Mediation with the Court, serving all parties to the controversy, that states only that the mediation was concluded without a settlement.

(5) Release of Mediator

Upon the filing of the report under subparagraph (g)(4), the mediation shall be deemed concluded and the mediator shall be relieved of all further duties or responsibilities.

(h) Confidentiality

(1) Protection of Information Disclosed at Mediation

Any written or oral communication made during the course of any process or proceeding covered under this rule is confidential unless otherwise agreed by the parties. The unauthorized disclosure of confidential communication by any person may result in the imposition of sanctions pursuant to subparagraph (i). In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions, mediation, or other alternative dispute resolution procedure shall apply. Information otherwise discoverable or admissible in evidence, however, does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in mediation.

(2) No Discovery from Mediator

The mediator shall not be compelled to disclose to the Court or to any person outside the mediation conference any of the records, reports, summaries, notes, communications, or other documents received or made by a mediator while serving in such capacity. The mediator shall not testify or be compelled to testify in regard to the mediation in connection with any arbitral, judicial, or other proceeding. The mediator shall not be a necessary party in any proceeding relating to the mediation.

(3) Protection of Proprietary Information

The parties, the mediator, and all mediation participants shall protect proprietary information during and after the mediation.

(4) Preservation of Privileges

The disclosure by a party of privileged information to the mediator or to another party during the mediation process does not waive or otherwise adversely affect the privileged nature of the information.

(i) Sanctions

Upon motion by any party, the Court may impose sanctions against any person who fails to comply with this rule.

Committee Comments

The Committee proposes the complete overhaul of this rule, and given that overhaul found it too burdensome – and not particularly helpful – to offer a 'strikeout' version of the existing rule for comparison. The ADR rule, which really applies only to mediation, has not been reviewed in detail since it first came into the local rules many years ago. This proposed revision results from comparison of the current rule to the ADR rules adopted by the District Court and from recent attempts to follow the procedure as it currently exists. Some of the significant proposed changes are as follows:

- Elimination of the Court's ability to reject the mediator selected by the parties. The concept of Court approval of the selected mediator has its roots in concerns that the Court would be anxious about use of what was then a novel concept. Given the wide acceptance of mediation and the availability of numerous qualified mediators, practitioners on the Committee feel that the Court need not be in the business of second-guessing the selection agreed upon by the parties.
- Retention of the Court's ability to reject a certain matter from mediation even if sought by one or more parties. Rather than attempt to list the matters that are not appropriate for mediation, the rule leaves discretion with the Judge, who can decide based on the particular facts and circumstances of the matter involved.
- Simplification of the process by eliminating a separate procedure when parties have both agreed to mediation and to the mediator before anything is filed. The process starts with a Motion to Refer or the Court's Notice of Intent to Refer. Then if an order is entered referring the matter to mediation, the parties either file a Notice of Selection of Mediator – if they have agreed - or a Motion to Select Panel of Mediator Candidates – if they have not agreed or if they merely want some suggestions from the Judge.
- Preservation of the right of the parties to select the mediator. Practitioners on the Committee felt strongly that parties should have a chance to choose a mediator first, because the Court may be unaware of conflicts known to the parties, or of a proposed mediator's scheduling problems. The proposal expands the right by letting the parties agree to a mediator even after the Court has designated a panel from which to choose.
- Reference to, but no required use of, the list of mediators retained by the Clerk. That list is open to any volunteers, and their credentials and experience have not been reviewed by the Court. Furthermore, those volunteers are not dispersed

throughout the District. Therefore, the Committee felt it would be inappropriate to limit selection to that list.

- Attempted specification of the ECF events that should be used at any stage (although some of these events may need to be created).
- Distinguishing mediators from professionals subject to the employment and fee application process. This distinction means that compensation is agreed upon by the parties and not subject to Court review even if one of the parties is a trustee or debtor-in-possession.
- Retention of the 'affidavit' requirement – the District Court does not have this requirement but, given the nature of bankruptcy cases, the Committee felt that the affidavit would provide some assurance to parties that the mediator did not in fact have any disqualifying interest. The affidavit also places into the record the mediator's anticipated compensation.
- Addition of appropriate topics from the District Court's ADR rules and reorganization of the rule's content for more logical flow.

Judges' Edits to Committee Proposal

The Committee did not propose in subparagraph (e)(2) any process when a party fails to strike proposed mediators from the list. The Judges wanted to ensure that the mediation process does not bog down because of a party's failure to strike a mediator, and added the language that produces 'automatic striking' if a party fails to act.