AMERICAN BANKRUPTCY INSTITUTE

2018 Hon. Steven W. Rhodes Consumer Bankruptcy Conference

East Meets West: Understanding Differences in Local Practice

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HAMMER AND NAILS – CONSTRUCTING THE USE OF APPEARANCE COUNSEL IN BANKRUPTCY CASES

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HAMMER AND NAILS – CONSTRUCTING THE USE OF APPEARANCE COUNSEL IN BANKRUPTCY CASES

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For various reasons, lead counsel for a debtor in a bankruptcy case may be unable to participate in certain hearings, the meeting of creditors and/or other matters. In such instances, lead counsel may arrange for an attorney unaffiliated with his or her law firm to appear on behalf of the debtor. Such attorneys are often referred to as "appearance counsel," also known in some districts as *per diem* attorneys, substitute counsel, temporary attorneys, and associate counsel.[1] One court has described appearance counsel as follows:

> "Appearance attorneys" are attorneys who, at the request of the debtors' chosen attorney, appear and attempt to represent debtors at meetings of creditors and hearings on behalf of the debtors' attorney. An appearance attorney is neither a partner nor an associate at the law firm retained by the debtor. Rather, appearance attorneys are solo practitioners who generate income typically by contracting with multiple firms to represent their clients at proceedings at the courthouse. These lawyers are almost never disclosed to the court prior to their appearance, and debtors are often unaware that an appearance attorney will be representing them until they meet the attorney – usually mere minutes before a hearing or a meeting of creditors begins.

In re Bradley, 495 B.R. 747, 757 n.1 (Bankr. S.D. Tex. 2013).

Notwithstanding some valid concerns expressed by courts, the use of appearance counsel can, under the right circumstances, provide much needed flexibility to attorneys, and solo practitioners in particular. It is extremely important, however, for lead counsel and appearance

[1] Several "providers" arrange for appearance counsel in consumer and commercial bankruptcy cases on a national level. Based on a review of these providers' websites, appearance counsel is becoming "big business" in the legal profession.

counsel to comply with the applicable provisions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the local bankruptcy rules and the Michigan Rules of Professional Conduct that govern the use of appearance counsel. Absent careful adherence to these directives, lead counsel and appearance counsel put themselves at risk of fee disgorgement, sanctions, and possibly even disciplinary proceedings.

These materials are intended to briefly discuss some of the requirements that accompany the use of appearance counsel, including disclosure, advanced and informed consent from clients, and fee sharing restrictions.[2]

A. ***Appearance Counsel in General***

A common misconception is that appearance counsel only appears for, and takes actions on behalf of, lead counsel. The role of appearance counsel is not, however, limited to simply appearing at a matter to request an adjournment, standing on a motion, or otherwise "covering" for lead counsel. Rather, even when serving in a limited capacity, appearance counsel has a duty to the client, not lead counsel. *See, e.g.*, *In re D'Arata*, 587 B.R. 819 (Bankr. S.D.N.Y. 2018); *In re Wright*, 290 B.R. 145 (Bankr. C.D. Cal. 2003); *In re Al Sammak*, 2016 WL 3912375 (Bankr. D. Idaho July 12, 2016); *In re Egwu*, 2012 WL 5193958 (Bankr. D. Md. Oct. 19, 2012); *In re Bernhardt*, 2012 WL 646150 (Bankr. D. Colo. Feb. 28, 2012).

Addressing the relationship among the lead attorney, appearance counsel and the debtor, one court emphasized the following:

> Despite [lead counsel's] characterization, [appearance counsel] were not simply agreeing to appear on [lead counsel's behalf]. They

[2] The materials are far from comprehensive. The author expresses no opinion regarding the decisions cited herein. Practitioners are encouraged to review the actual decisions in order to thoroughly understand their issues and holdings. For additional discussion regarding the use of appearance counsel in bankruptcy cases, *see* Hon. Alan Trust and Michael A. Pantzer, *Does Sending or Being an Appearance Attorney Have an 80 Percent Chance of Success?*, Am. Bankr. Inst. J. (July 2017); Neil M. Berman, *Judge, This Is Not My Case . . .*, Norton Bankr. L. Adviser 3 (May 2004); *see also* Darin Day, *New Limited Scope Rules Benefit Underemployed Attorneys and Overburdened Courts*, Mich. Bar. J. (June 2018).

> were appearing, as counsel, *for [the debtor]*. And, they were not just "appearing" – they were *representing* her at a § 341(a) hearing *as [the debtor's] attorney*. . . Even though this arrangement may be for a limited purpose or duration, [appearance counsel] is, for that time and purpose, *the* attorney who is representing [the debtor].

In re Olson, 2016 WL 343341, at *5 (Bankr. D. Idaho June 16, 2016) (emphasis included). Other than the limited scope of the representation, the role of appearance counsel is no different than that of co-counsel.

As discussed in more detail below, when acting as either lead counsel or appearance counsel, communication, disclosure and preparedness are of paramount importance.

B. *Disclosure Obligations Under the Bankruptcy Code and Fed. R. Bankr. P.*

The Bankruptcy Code and the Bankruptcy Rules, both of which require attorneys for debtors to make certain disclosures, do not distinguish between lead counsel and appearance counsel. Instead *all* attorneys must disclose the information required by section 329 and Bankruptcy Rule 2016(b).

1. 11 U.S.C. § 329 – Debtor's Transactions with Attorneys

Section 329(a) provides that:

> any attorney representing a debtor in or in connection with a case shall file a statement of the compensation paid or agreed to be paid for the services rendered or to be rendered by that attorney and the source of the compensation.

11 U.S.C. § 329(a). The language of section 329 is mandatory in all respects. It evinces Congress's intent that bankruptcy courts closely review and monitor compensation arrangements between a debtor and his or her attorney. *Henderson v. Kisseberth (In re Kisseberth)*, 273 F.3d 714, 720 (6th Cir. 2001). In the event that compensation is unreasonable, the court has the authority to cancel the agreement and/or order the attorney to disgorge amounts previously paid. 11 U.S.C. § 329(b).

By its express terms, section 329(a) requires an attorney for a debtor to file a statement of compensation. This requirement applies to any attorney representing the debtor *in* the actual case, including lead counsel and appearance counsel. It also applies to attorneys representing a debtor *in connection with a case*, an extremely broad phrase. *See, e.g.*, *In re Gorski*, 519 B.R. 67 (Bankr. S.D.N.Y. 2014) (debtor's divorce attorney subject to disclosure obligation in debtor's bankruptcy case).

In addition, section 329 requires an attorney to disclose the compensation paid or anticipated to be paid, as well as the source of any such compensation. *See Mapother & Mapother, P.S.C. v. Cooper (In re Downs)*, 103 F.3d 472, 477 (6th Cir. 1996). This requirement is not limited to lead counsel and extends to appearance counsel. Lead counsel and appearance counsel therefore have independent obligations to disclose compensation arrangements. *See, e.g.*, *In re Egwu*, 2012 WL 5193958, at *4 (Bankr. D. Md. Oct. 19, 2012).

2. Fed. R. Bankr. P. 2016(b) – Compensation for Services Rendered and Reimbursement of Expenses

Section 329 is implemented by Bankruptcy Rule 2016(b), which provides that:

> Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 14 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code, including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 14 days after any payment or agreement not previously disclosed.

Fed. R. Bankr. P. 2016(b).

Bankruptcy Rule 2016(b) requires an attorney representing a debtor in any chapter and in any capacity related to the bankruptcy case to file a statement of compensation, even if the attorney is not being compensated for his or her services and regardless of the scope of the representation. *See, e.g.*, *In re Bradley*, 495 B.R. at 789-90; *In re Wright*, 290 B.R. 145, 155 (Bankr. C.D. Cal. 2003). This requirement is strictly enforced. *See Halbert v. Yousif*, 225 B.R. 336, 351 (E.D. Mich. 1998) (attorney must file statement of compensation and cannot rely on other documents filed with court in lieu of such statement); *see also In re Bernhardt*, 2012 WL 646150, at *6 (Bankr. D. Colo. Feb. 28, 2012) (disclosure under Bankruptcy Rule 2016(b) is not an "empty exercise" or one that may be satisfied by filing a form with the same information in every case).[3] Therefore, lead counsel and appearance counsel are each required to file a statement of compensation under Bankruptcy Rule 2016(b). *See, e.g.*, *In re Bradley*, 495 B.R. at 790 (citation omitted). If, for example, lead counsel for a debtor in a chapter 7 case agrees to pay or has paid appearance counsel $X, two statements of compensation should be filed with the court – one by lead counsel and another by appearance counsel, both of which disclose $X as compensation paid by lead counsel to appearance counsel.

The statement of compensation required by Bankruptcy Rule 2016(b) must specifically state whether the attorney filing the statement has shared or agreed to share compensation with any other entity (other than a member or associate of the disclosing attorney's firm). It must also explain the details of such arrangement. Neither section 329 nor Bankruptcy Rule 2016(b) provide further instruction as to the level of detail. As a matter of best practices, an attorney filing a

[3] Official Form 3020, which is entitled Disclosure of Compensation of Attorney for Debtor, has been prescribed for use by the Judicial Conference of the United States. *See* Fed. R. Bankr. P. 9009. Certain bankruptcy courts, including the Bankruptcy Court for the Eastern District of Michigan, have modified Official Form 3020. *See id*. (permitting modifications under appropriate circumstances). The form adopted by the Bankruptcy Court for the Eastern District of Michigan is available on its website at www.mieb.uscourts.gov/forms/all-forms.

statement of compensation should consider attaching his or her retention agreement with the debtor, as well as any fee sharing agreement with other attorneys. *See* 11 U.S.C. 528(a) (requiring written contract between debtor and debt relief agency); *see also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 235-39 (2010) (attorneys are debt relief agencies).[4]

The timing of such disclosures is also important. An attorney must file the statement within fourteen days of the order for relief (the petition date in most cases) or such other time as the court instructs. An attorney's disclosure obligations under Bankruptcy Rule 2016(b) do not end upon the filing of the initial disclosure though. An attorney is also required to file a supplemental statement within fourteen days of receiving payment or entering into an agreement for payment that was previously not disclosed. The obligation is continuing in nature, meaning an attorney must timely file a supplemental statement each time he receives payment or enters into a new agreement for compensation. *See In re D'Arata*, 587 B.R. at 822 n.5; *In re Hirsch*, 550 B.R. 126, 135 (Bankr. W.D. Mich. 2015) (citations omitted) (statement of compensation must be filed even after completion or dismissal of case); *In re Bradley*, 495 B.R. at 789 (lead counsel and appearance counsel required to file supplemental statements once lead counsel decides to use appearance counsel).

For further discussion regarding the application of section 329 and Bankruptcy Rule 2016(b) to the use of appearance counsel, see *In re Harwell*, 439 B.R. 455 (Bankr. W.D. Mich. 2010); *In re Al-Sammak*, 2016 WL 3912375 (Bankr. D. Idaho July 12, 2016); *In re Olson*, 2016 WL 3453341 (Bankr. D. Idaho June 16, 2016).

[4] For discussion regarding the unbundling of services in chapter 7, see *In re Slabbink*, 482 B.R. 576 (Bankr. E.D. Mich. 2012); *In re Gourlay*, 483 B.R. 496 (Bankr. E.D. Mich. 2012).

3. Fed. R. Bankr. P. 9010 – Representation and Appearance

An attorney appearing for any party (including the debtor) "in a case" is required to file a notice of appearance. Fed. R. Bankr. P. 9010(b). This requirement applies equally to lead counsel and appearance counsel. Although it is unclear whether Bankruptcy Rule 9010(b) technically requires an attorney to file a notice of appearance if he or she only attends the meeting of creditors, the Michigan Rules of Professional Conduct do. *See infra* at p. 9. Moreover, local rules may require appearance counsel to file a notice of limited appearance. *See infra* at p. 13. In order to ensure compliance with applicable authorities, appearance counsel should file some form of notice of appearance whenever he or she is representing a debtor (or any other party, for that matter).

For additional discussion regarding the need for appearance counsel to file notices of appearance, see *In re Jacobson*, 402 B.R. 359, 364-65 (Bankr. W.D. Wash. 2009).

4. 11 U.S.C. § 504 – Sharing of Compensation

Section 504(a) provides, in pertinent part, that "a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) . . . may not share or agree to share . . . any such compensation or reimbursement with another person; or any compensation or reimbursement received by another person under such sections." 11 U.S.C. § 504(a). Congress enacted section 504(a) to address at least three policy-driven concerns: (i) the potential that an attorney may inflate his or her fee to make up for the portion lost to sharing; (ii) the potential that the attorney may be subject to outside influences of which the court does not have knowledge or control; and (iii) the potential for the *de facto* transfer of judicial power over expenditures and allowances. *In re Egwu*, 2012 WL 5193958, at *4 (Bankr. D. Md. 2012).

Because section 504(a) only applies to attorneys who receive compensation allowed as an administrative expense, it generally does not apply to attorneys for chapter 7 debtors. *See Lamie*

v. United States Trustee, 540 U.S. 526 (2004). An attorney for a chapter 7 debtor may therefore agree to share compensation, whether pre or post-petition, so long as he or she complies with section 329, Bankruptcy Rule 2016(b) and any applicable rules of professional conduct.

The same cannot be said for an attorney, whether the lead attorney or appearance counsel, representing a debtor in a chapter 13 case. Even with the requisite disclosures under section 329 and Bankruptcy Rule 2016(b), section 504 seemingly precludes lead counsel and appearance counsel from sharing fees that are derived from an administrative expense allowed under section 503(b)(2) or (4).[5] At least one court has rejected an attempt to circumvent section 504 by concluding that it is inappropriate to include the fees of appearance counsel in a fee application filed by the lead counsel for a chapter 13 debtor. *In re Egwu*, 2012 WL 5193958, at *4 (Bankr. D. Md. Oct. 19, 2012); *but see In re Wright*, 290 B.R. at 156 (discussing lead counsel applying for fees for services performed by contract attorney). Therefore, as a matter of best practices and to ensure technical compliance with section 504, appearance counsel in a chapter 13 case should consider filing his or her own *short* fee application or, if allowed by the local rules, a stipulation with the chapter 13 trustee. *See* Fed. R. Bankr. P. 2002(a)(6); LBR 2016-1(d) (Bankr. E.D. Mich.) (*ex parte* application for fees less than $1,000 in chapter 13 case with endorsed approval of debtor and trustee).[6]

[5] As the *Egwu* court noted, section 504 applies only to administrative expenses. *In re Egwu*, 2012 WL 5193958, at *4 n.15 (Bankr. D. Md. Oct. 19, 2012). Therefore, any fees paid prepetition are not subject to the prohibition on fee sharing. *Id.* Nonetheless, disclosure obligations remain under section 329, Bankruptcy Rule 2016(b) and applicable rules of professional conduct.

[6] The proposed revisions to the local rules for the Western District of Michigan contain a similar provision.

C. *Michigan Rules of Professional Conduct*

The Michigan Rules of Professional Conduct are equally as important to the use of appearance counsel. They impose additional requirements to ensure that clients, including debtors in bankruptcy cases, have an opportunity to consent to the use of appearance counsel.

1. Mich. R. Prof. Cond. 1.2 – Scope of Representation

Rule 1.2(b) provides, in pertinent part that:

> [a] lawyer licensed to practice in the State of Michigan may limit the scope of a representation, file a limited appearance in a civil action, and act as counsel of record for the limited purpose identified in that appearance, if the limitation is reasonable under the circumstances and the client gives informed consent, preferably confirmed in writing.

Mich. R. Prof. Cond. 1.2(b).

Because Rule 1.2(b) specifically refers to a "limited appearance," it applies to appearance counsel in a bankruptcy case, which is a civil action. Moreover, the rule seems to contemplate that the notice of limited appearance will at least reference the role of appearance counsel and the services he or she is expected to provide.

Rule 1.2(b) clearly allows an attorney to limit the scope of a representation, subject to two conditions. First, any limitation must be pursuant to *an agreement with the client* and documented in writing whenever possible. *Accord* 11 U.S.C. § 528(a). It is not appropriate to attempt to limit the scope of the representation by presenting a client with a form agreement, by filing a notice of appearance, or by filing a statement of compensation without the terms of the engagement and the signature of the client.

Importantly, any agreement to limit the scope of the representation requires that the client give his or her "informed consent" to such limitation. "Informed consent" is defined as "an agreement to a proposed course of conduct after the lawyer has communicated adequate

information and explanation about the material risks of the proposed course of conduct, and reasonably available alternatives to the proposed course of conduct." Mich. R. Prof. Cond. 1.0. As such, an attorney may not limit the scope of his or her representation without first providing the client with sufficient information to understand the limitations of the engagement and the potential consequences thereof. Moreover, the client should be given sufficient time to understand the limitations, meaning that absent exigent circumstances, lead counsel should discuss use of appearance counsel well in advance of any hearing or the meeting of creditors that appearance counsel will attend.

Second, any limitation must be reasonable under the circumstances.[7] An attorney cannot limit the scope of the representation by disclaiming an obligation to represent a client with respect to a fundamental matter. In bankruptcy cases, courts have held that attorneys may not, among other things, limit the scope of their representation so as to exclude their obligation to appear with a debtor at the meeting of creditors. *See, e.g.*, *In re Castorena*, 270 B.R. 504, 524-28 (Bankr. D. Idaho 2001) (citations omitted); *In re Ortiz*, 496 B.R. 144, 150-51 (Bankr. S.D.N.Y. 2013); *see also In re D'Arata*, 587 B.R. at 828 (encouraging parties to report instances where counsel fails to meet obligations to debtor, including by failing to appear at meeting of creditors). In effect, because the meeting of creditors is such a critical event in a bankruptcy case, an attorney is expected to represent the debtor's interests at the meeting and cannot disclaim this obligation.[8]

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[7] As a threshold matter, lead counsel and appearance counsel must each conduct a conflicts search before agreeing to represent the client. *See* Mich. R. Prof. Cond. 1.7. An attorney must obtain the informed consent of the client to proceed with the representation if the conflict is not *per se* disqualifying. *Id*.

[8] In a strongly worded letter regarding problems associated with use of appearance counsel, one trustee commented as follows with respect to the significance of the meeting of creditors for debtors:

> [Individual debtors] have most often never hired a lawyer. They are overwhelmed by debt. They are in need of help. They nearly all are honest debtors. They are not proud to be filing for bankruptcy. The day they appear for examination by the

2. Mich. R. Prof. Cond. 1.5 – Disclosure of Fee Division

Rule 1.5 of the Michigan Rule of Professional Conduct allows a division of a fee between lawyers who are not in the same firm to divide a fee if (i) the client is advised of, and does not object to, the participation of all the lawyers involved, and (ii) the total fee is reasonable. Mich. R. Prof. Cond. 1.5(e). In other words, the client must be given an opportunity to consider and approve of any fee sharing arrangement between lead counsel and appearance counsel. Although Rule 1.5(e) does not require that the client agree to the fee sharing arrangement in writing, appearance counsel and lead counsel should include such a disclosure in their respective retention agreements as a matter of best practices. *See* Mich. R. Prof. Cond. 1.2(b). The agreements should state the identity of all attorneys sharing in the fee and the amount to be paid to each attorney.

For additional discussion regarding fee disclosure requirements, see *In re Olson*, 2016 WL 3453341, at *7 (Bankr. D. Idaho June 16, 2016); *In re Bernhardt*, 2012 WL 646150, at *5 (Bankr. D. Colo. Feb. 28, 2012).

3. Mich. R. Prof. Cond. 1.1 – Competent Representation

Rule 1.1 establishes the standard for competence of a lawyer with respect to a particular engagement by providing that a lawyer shall not:

> (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;
>
> (b) handle a legal matter without preparation adequate in the circumstances; or
>
> (c) neglect a legal matter entrusted to the lawyer.

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trustee is the lowest day of their lives. If ever there was a day when they need the help of their lawyer, it is the day of their § 341 examination.

In re D'Arata, 587 B.R. at 827.

Mich. R. Prof. Cond. 1.1. While the rule is fairly self-explanatory, it should be noted that it applies equally to lead counsel and appearance counsel. Lead counsel and appearance counsel must be fully prepared and possess the requisite skill and knowledge to provide the services expected by the client.

Importantly, Rule 1.1 provides that an attorney may not neglect a matter entrusted to the attorney. Obviously, Rule 1.1 imposes an obligation on appearance counsel with respect to the limited services he or she is providing. However, an additional burden is placed on lead counsel. Lead counsel must ensure that appearance counsel has been fully briefed, provided with all necessary information, and has coordinated with the client well in advance of any hearing, the meeting of creditors or any other matter. *See* Mich. R. Prof. Cond. 1.4 (requiring attorney to keep client reasonably informed and provide sufficient explanation to permit client to make informed decisions); *see also In re Bradley*, 495 B.R. at 787-88; *In re Olson*, 2016 WL 3453341, at *9 (Bankr. D. Idaho June 16, 2016). As a matter of best practices, lead counsel should participate in a meeting with appearance counsel and the client at least one week before a hearing or the meeting of creditors.

D. ***LBR 9010-1 (Bankr. E.D. Mich.) – Appearances***

The Bankruptcy Court for the Eastern District of Michigan has promulgated a local rule that addresses the use of appearance counsel at hearings and the meeting of creditors.[9] LBR 9010-1 (Bankr. E.D. Mich.). Although the Bankruptcy Court for the Western District of Michigan does not have a similar local rule, attorneys practicing in the Western District of Michigan may wish to refer to the Eastern District of Michigan's rule for guidance.

[9] Other bankruptcy courts have similar local rules. *See, e.g.*, LBR 2090-1(a)(2)-(3) (Bankr. C.D. Cal.); LBR 9010-6 (Bankr. S.D. Cal.); LBR 2017-1(a)-(b) (Bankr. E.D. Cal.); LBR 2090-1(D) (Bankr. S.D. Fla.); LBR 2090-2(a), (e) (Bankr. E.D.N.Y.).

Consistent with Mich. R. Prof. Cond. 1.1, LBR 9010-1 provides that all attorneys appearing before the court are expected to "be fully prepared and knowledgeable of the issues and matters to be addressed." LBR 9010-1(a)(2)(G) (Bankr. E.D. Mich.); *see* Mich. R. Prof. Cond. 1.1(b). Relatedly, any attorney appearing at a hearing or the meeting of creditors "must have sufficient familiarity and knowledge of the case and its prior proceedings as to permit informed discussion and argument." LBR 9010(b) (Bankr. E.D. Mich.). Appearance counsel is therefore expected to represent the interests of the debtor as if he or she was acting as lead counsel. Moreover, it is generally expected that the debtor's attorney "will attend and represent the debtor at the meeting of creditors, any hearing on reaffirmation agreements, and all other hearings within the scope of the representation." *Id*.

Subject to certain requirements, the local rules for the Eastern District of Michigan expressly allow for the use of appearance counsel, including at the meeting of creditors. LBR 9010-1(c) (Bankr. E.D. Mich.). According to the local rules, appearance counsel must file, prior to his or her appearance, a written notice of special appearance and a statement of compensation. *Id*. The statement of compensation filed by appearance counsel for a debtor must be countersigned by the debtor. *See* LBR 9010-1(d) (Bankr. E.D. Mich.). In addition, appearance counsel must provide a copy of a filed notice of special appearance upon request. LBR 9010-1(c) (Bankr. E.D. Mich.).

Finally, consistent with LBR 9010-1(b), appearance counsel "will be accountable for adequately representing the interests of the person or entity on whose behalf the appearance is made." *Id*. In other words, the role of appearance counsel is not to simply appear; it is to represent the interests of the client pursuant to all requirements imposed by the Bankruptcy Code, the

Bankruptcy Rules, the local rules, the Michigan Rules of Professional Conduct and other applicable authorities.

E. ***Practice Pointers***

The use of appearance counsel can be perilous to both lead counsel and appearance counsel if the relationship is not properly structured. As a matter of best practices, attorneys are encouraged to consider the following non-exhaustive actions when implementing an appearance counsel relationship:

- Lead counsel should perform a conflicts search prior to meeting with the client. Appearance counsel, whenever identified, should likewise conduct a conflicts search.
- If the client wishes to retain lead counsel, the parties should enter into a retention agreement.
- If lead counsel anticipates using appearance counsel, the client should be informed of the potential relationship, the identity of appearance counsel, if known, and the fee to be shared. Lead counsel should explain how the relationship among lead counsel, appearance counsel and the client. The agreement should be set forth in writing, ideally as part of the retention agreement.
- Appearance counsel and the client should enter into a separate agreement reflecting the services to be performed, the fees for such services, and the person responsible for payment of such fees.
- Lead counsel and appearance counsel should file notices of appearance in the appropriate form.
- Lead counsel and, when identified, appearance counsel, should each file statements of compensation on the prescribed form in a particular district, and supplemented as necessary, under Bankruptcy Rule 2016(b). Any written agreements should be attached to the statements.
- Lead counsel, appearance counsel and the client should meet at least seven days before a hearing or the meeting of creditors. Lead counsel should provide appearance counsel with the file prior to the meeting with the client.

- After the hearing or meeting of creditors, appearance counsel should inform lead counsel of the results (ideally in a meeting with the client) and not rely on the client to do so.

- Lead counsel and appearance counsel should separately request fees in chapter 13 cases.

EAST MEETS WEST: UNDERSTANDING DIFFERENCES IN LOCAL PRACTICE

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THE GREAT DIVIDE

While there is, was and always will be a significant division in the great state of Michigan not based in ideology or political persuasion but instead on your love of maize and blue or green and white, the divide we talk of today is not that. This divide is based on the artificial boundary roughly dividing the state east and west along interstate 127, that being the division between the two Federal Districts of Michigan, East and West.

This division is evident in the area of bankruptcy practice. While Federal Bankruptcy law controls substantive law regardless of the district or the state in which one practices and while the federal rules of bankruptcy practice control and are not amendable by local rules, there are still substantial differences between the practices in the Eastern and Western Districts of Michigan

To facilitate efficiencies in bankruptcy practice for those representing debtors and creditors in both Districts this session compares and contrasts the most common practices and issues in the Districts.

CHAPTER 13 ISSUES

- **FILING A CHAPTER 13 CASE**

An important note when filing a chapter 13 case in the Western District is that a Declaration Re: Electronic Filing with original signatures of Debtor(s) and Counsel *must be sent via mail* to the Clerk of the Court. Failure to timely do so will result in dismissal of the case.

LBR 9011: Signatures on Electronically Filed Documents, Declarations Re: Electronic Filing and Statements of Social Security Number (s)

(a) Facsimile Signatures - A signature transmitted by facsimile is deemed to be an original signature for purposes of Fed. R. Bankr. P. 9011.

(b) Mandatory Electronic Filing – ECF Filers must file through CM/ECF all petitions, lists, schedules, statements, amendments, pleadings, affidavits, and other documents containing original signatures or requiring verification under Fed. R. Bankr. P. 1008 or an unsworn declaration as provided in 28 U.S.C. E 1746. (1) Electronic Filing as Signature - Electronic filing of a petition, pleading, motion, proof of claim, or other document by an ECF Filer constitutes the signature of that individual for all purposes, including those under Fed. R. Bankr. P. 9011 and 28 U.S.C. E 1746, and has the same effect as if the individual had affixed that individual's signature on a paper copy of the document being filed. (2) Declaration Re: Electronic Filing - When the petition is filed through CM/ECF, the Filer must also file a separate Declaration Re: Electronic Filing pursuant to ECF Administrative Procedures. (A copy of the Declaration Re: Electronic Filing is appended to these Rules as Exhibit 12.) The Clerk will make a text entry in the electronic docket to reflect that the declaration has been filed. However, the declaration itself will not be available for public viewing.

(c) Statement of Social Security Number(s) - If the debtor has not filed a Declaration Re: Electronic Filing containing the debtor's social security number, then the debtor must conventionally file a completed Official Form B21 (Statement of Social-Security Number(s)) containing the full 9-digit social security number and original signature of each debtor. If the debtor does not have a social security number, the debtor must file Official Form B21 stating that the debtor does not have a social security number. Failure to submit this form within 14 days from the date of the Notice to File Statement of Social Security Number(s) will result in dismissal of the case without further hearing.

- **Required Documents for the First Meeting of Creditors: WESTERN DISTRICT**

Schedule C in a Joint Case. Each individual in a joint case must file a separate Schedule C.

Payroll Orders in Chapter 13 Cases - A payroll order must be entered in every Chapter 13 case unless it would be impractical or the debtor files a motion showing good cause why a payroll order should not be entered.

Practice pointer: in the Western District the clerk will not enter the payroll order without the approval of the chapter 13 Trustee. Therefore submit payroll orders to the chapter 13 Trustee for approval prior to filing and serving.

Pursuant to the local rules of the Western District: The debtor must submit the following documents to the Trustee at least 7 days before the date first set for the meeting of creditors. The Trustee may adjourn the meeting of creditors or file a motion to dismiss if the documents are not provided by the required deadline.

(1) Copies of all payment advices or other evidence of payment received by the debtor from any employer within 60 days of the date of filing. This documentation must be provided to the Trustee instead of being filed with the Court as prescribed by 11 U.S.C. § 521(a)(1)(B)(iv);

(2) Copies of the federal and state income-tax returns, together with all W-2s, for the most recent tax year ending immediately before the commencement of the case, or a debtor's certification explaining why those tax returns are not available. This documentation must be provided to the Trustee instead of being filed with the Court as prescribed by 11 U.S.C. E 521(e)(2);

(3) For each financial account held by the debtor, copies of account statements or transaction histories that reflect the account's activity for the 90 days immediately preceding the commencement of the case;

(4) Copies of all certificates of title issued with respect to personal property owned by the debtor as of the commencement of the case;

(5) Copies of all recorded deeds and mortgages (if any) and the current year's SEV for all real property in which the debtor holds an interest as of the commencement of the case;

(6) The declarations pages of all insurance policies that provide coverage for any real or personal property owned by the debtor as of the commencement of the case;

(7) An account statement showing the current value of all IRAs, 401(k)s, pensions, or similar retirement or investment accounts held by the debtor as of the commencement of the case;

(8) If the debtor has been divorced within the last 10 years, a complete copy of the judgment of divorce and all related agreements; and

(9) If the debtor is required to pay a Domestic Support Obligation, written documentation showing:

(A) the name, address, and telephone number of the Domestic Support Obligation recipient; and

(B) the name, address, and telephone number of any Friend of the Court or similar out-of-state agency; and the case or account number used by the agency in the Domestic Support Obligation matter.

- **Required Documents for the First Meeting of Creditors: EASTERN DISTRICT**

Pursuant to the local rules of the Eastern District: Rule 2003-2 Debtor's Documents at the Meeting of Creditors

(a) In a case under chapter 7, 12 or 13, or in an individual case under chapter 11, to the extent they are in the debtor's possession or are readily available, the debtor must have available at the meeting of creditors, neatly arranged, all of the following:

(1) documents for one year pre-petition to support all entries on schedule I, other than previously provided payment advices and tax returns;
(2) documents for one year pre-petition to support all entries on schedule J, including canceled checks, paid bills or other proof of expenses;
(3) copies of life insurance policies either owned by the debtor or insuring the debtor's life;
(4) keys to non-exempt buildings and vehicles;
(5) divorce judgments and property settlement agreements;
(6) documents establishing the scheduled amounts of joint debts, if the debtor claims an entireties exemption;
(7) the name, address and telephone number of each holder of a domestic support obligation; and
(8) any other specific document requested by the Trustee relating to the schedules or statement of financial affairs, if requested in writing at least seven days before the first meeting of creditors.

(c) In a case under chapter 13, to the extent they are in the debtor's possession or are readily available, the debtor must provide to the Trustee no later than 14 days prior to the meeting of creditors, neatly arranged, all of the following:

(1) tax returns for the last two years pre-petition;
(2) payment advices or other proof of current income for the 60 days pre-petition;
(3) proof of all income for one year pre-petition stated on schedule I, including year to date profit and loss statements if the debtor is self-employed or engaged in business;
(4) if the debtor owns a business, business financial statements and business tax returns for the past three years, and business bank statements for the past six months; and
(5) any other specific document requested in writing by the Trustee relating to the schedules or statement of financial affairs.

Practice pointer: Trustees in both the Eastern and Western Districts have document upload programs. Before emailing any documents to the Trustee, check the Trustee website for the correct document upload procedure.

- **CHAPTER 13 PLANS: A comparison of the model chapter 13 plans and procedures**

Federal Rules of Bankruptcy Procedure (FRBP) 3015 requires all judicial Districts either utilize the form national model plan as provided in the rules or opt out of the national model plan and adopt a model chapter 13 plan specifically for the District. Both the Eastern and Western District of Michigan opted out of the national model plan and took steps, including the required notice to parties with comment periods, to create their own model plans.

Practice pointer: the model plans are <u>not interchangeable</u> between Districts.

- **SIMILARITIES:**

FRBP 3015.1 requires:

The plan include an initial paragraph for the debtor to indicate that the plan does or does not:

(1) contain any nonstandard provision;
(2) limit the amount of a secured claim based on a valuation of the collateral for the claim; or
(3) avoid a security interest or lien;

Practice pointer: When drafting the plans each statement in the initial paragraph must indicate if the proposed plan includes or does not include the specified provision, which is you must "check the box".

Both Districts' plans comply with this requirement.

Practice pointer: While both Districts' plans included these required provisions, the required provisions are not found in the same places in the plans.

Continuing, FRBP 3015.1(d) requires in all locally adopted plans "separate paragraphs for:

(1) Curing any default and maintaining payments on a claim secured by the debtor's principal residence;
(2) Paying a domestic-support obligation;
(3) Paying a claim described in the final paragraph of §1325(a) of the Bankruptcy Code; and
(4) Surrendering property that secures a claim with a request that the stay under §§362(a) and 1301(a) be terminated as to the surrendered collateral"

Again, both Districts' adopted chapter 13 plans comply.

Practice pointer: changes to the model plan, other than insertion of case specific creditor/debtor information, must be accomplished in the non-standard provisions paragraph at the end of the plan. Amendment of provisions in the body of the plan will invalid the plan.

- **DIFFERENCES:**

The first notable difference between the two plans is the Eastern District plan has special provision relating to Bay City, Detroit and Flint treatment of tax refunds. In the Western District, there are no separate provisions for the Northern (Upper Peninsula) and the southern division (Lower Peninsula) nor is there a distinction between the two chapter 13 Trustee's plans.

Practice pointer: When practicing in the Eastern District, make sure to "check the box" that applies to the tax refund situation on pages 2 or 3 for the division in which you are filing (note in each of the boxes, failure to "check the appropriate box" leads to a default provision).

Probably the most notable difference between the two plans is the claims classes. The Eastern District plan (Paragraph III, beginning on page 3) has designation and treatment of classes of claims from One – Nine. This designation and treatment of classes of claims not only identifies the claims but also provides for the plan payment treatment of the claims. Then in the Eastern District plan, in the section V, ADDITIONAL STANDARD PROVISION the section Order of Payment of claims further lays out the Trustee disbursement scheme.

Contrast this with the Western District plan. Beginning with paragraph III, disbursement (page 2) the Western District plan identifies the claims i.e. (administrative, priority, secured, executory contracts, direct pays unsecured and special unsecured), but specifies the order of Trustee fund disbursement in paragraph IV.H "Trustee Post-confirmation Disbursement priority of Payments". While the Western District plan priority of Trustee payments follows the listing of the claims in the paragraph III for the most part, the default disbursement in IV. H. 1 – 3 is the outline for payments. Of note is the fact the debtor attorney fee will follow disbursement of continuing claim monthly payments, unless otherwise noted.

Practice pointer: While both Districts' plans direct Trustee fund disbursement, the Trustee fund disbursement may be modified by additional provisions in the debtor's plan so indicating.

- **ADDITIONAL STANDARD PROVISION and /or GENERAL PROVISIONS**

Both plans provide for detailed information on miscellaneous provision in the implementation of the debtors' chapter 13 plan.

Both plans outline the debtors' obligations regarding tax refund remittance. For the most part, tax refunds are to be remitted to the Trustee for disbursement to creditors.

Vesting of the estate is found in both plans with the Eastern District's plan default to the estate vesting in the debtor, while the Western District's default is in the estate.

Incurring new debt is provided for in both plans with the Eastern District requiring approval by the Trustee and Court of any debt over $2000.00. In the Western District any debt for a vehicle may be approved by the Trustee only, but any other debt requires Court approval.

Unscheduled claims present problems for Trustee disbursement. Both plans provide in the event of a claim filed by an unscheduled creditor, the Trustee may, without further direction from the debtor or Court, classify and pay the claim and the Trustee deems appropriate.

Future tax returns must be turned over to chapter 13 Trustees pursuant to the terms of both plans.

Non-applicability of FRBP 3002.1 provisions are found in both plans for property surrendered or for which there is relief from stay.

Both plans provide for the payment of attorney fees. The Eastern District default provision disburses attorney fees after monthly payments to specified creditors while the Western District default provision disburses attorney fees after only the monthly payments on continuing debtors.

Liquidation analysis, the Eastern District plan requires a separate document for liquidation analysis, the Western District does not.

Plan calculation, the Eastern District plan requires a separate document for plan calculation, the Western District does not.

Practice pointer: If you are particularly fond of a given provision in one District's plan and want to incorporate that provision in the other District's plan, the provision can be added to the additional/non-standard provisions.

- **CONFIRMATION PROCESSES**
  - **Pre-confirmation hearings**

The Eastern District employs the pre-confirmation hearing sheet that provides the opportunity for the parties to review outstanding chapter 13 plan objections. This form is completed by the debtor's attorney and submitted prior to the confirmation hearing.

There is no such pre-confirmation hearing statement required in the Western District.

Similarly there are no pre-confirmation conferences to resolve confirmation issues in the Western District. Generally, if a confirmation issue is not resolved, the parties will agree to an adjournment which is placed on the record by the Trustee. Appearance of counsel may not be needed at the confirmation hearing date if all parties agree to adjournment. Stipulations to adjourn may be required if the adjournment is conditioned on specific actions. Otherwise, direct contact with the Trustee or Court is generally sufficient without further documentation.

Pre-confirmation conferences are required in the Eastern District as a means to review and resolve confirmation issues. Attendance by the debtor counsel is generally required.

While orders confirming plan are required in both District to mark the successful confirmation of the proposed chapter 13 plan, in the Western District, for the most part, the Court does not utilize a long form OCP. Instead, a text order is entered after the case is confirmed at the confirmation hearing.

In the Eastern District the long form order confirming plan is filed to signify the successful approval of the plan by the Court.

Procedurally, the changes that may be needed in a plan to resolve creditor or Trustee objections differ in each District because of this formatting of the OCPs. In the Eastern District, if the parties agree to terms in the plan that resolve disputes, and no creditors are adversely impacted, those changes may be incorporated in the written order confirming plan which is approved by the parties and submitted to the Court for the Judge's signature.

In the Western District, modification of plan terms resolving objections must be accomplished by filing an amended plan. Notice to creditors is needed only if the plan adversely impacts the creditors. If no adverse impact, the plan may be amended, filed with the Court and the Trustee may recommend confirmation. The text OCP is then entered by the Court. While the Western District does utilize the long form orders as needed, the use of the long form versus the text order is rare.

- **Adjournment of pre-confirmation cases**

In the Eastern District signing up for det13list@yahoogroups.com provides attorneys with updates from the Trustee on the status of plan confirmation. The Trustees send a list of cases that are ready for confirmation and cases that have been adjourned by stipulation prior to the schedules hearing.

In the Western District the Trustees' office is typically in touch with Counsel regarding the status of confirmation prior to the hearing. If the parties agree that more time is needed adjournments in Kalamazoo are done informally based on the stipulation of the parties. In Lansing if an adjournment is requested a stipulation and order with conditions and deadlines must be signed by the parties and filed with the Court prior to the hearing.

In the Eastern District if all parties agree that an adjournment is necessary generally all Trustee's will sign a stipulation and order (with or without conditions) to be filed by Debtor's Counsel with the Court prior to the confirmation hearing. Subsequent adjournments may be granted upon stipulation of the parties depending on the Trustee's office policy and the status of the case. Some of the Judges in the Eastern District have a firm policy that the first adjournment will be for 120 days, but if the case becomes ready to confirm prior to the adjourned date Debtor's Counsel may submit a stipulation and order to reschedule the confirmation hearing with the proposed Order Confirming Plan that resolves all outstanding issues to the Trustee for approval.

- **ATTORNEY FEES**

Allowed attorney fees vary in the Eastern and Western Districts. In the Eastern District the maximum chapter 13 "no look" pre-confirmation attorney fee is $3500.00. In the Western District the chapter 13 "no look" attorney fee is set on a scale based on the debtor attorney's post law school education. In the Western District, if an attorney has no continuing legal education the allowed fee is $2600.00, but with eight hours of relevant legal education in the past 12 months, the allowed fee is $3200.00 and attorneys that are board certified are allowed $3650.00. The Western District also sets the reasonable hourly rate for attorney fees. Please note, nothing prevents and attorney from filing a fee application instead accepting the customary "no look" fees.

Post confirmation attorney fees are allowed in both districts by applications. The important difference is that the Eastern District requires itemization of attorney time and expenses from confirmation forward while the Western District requires itemization of attorney time and expenses from the date of client engagement forward. Also, pursuant to the Western District model plan service of the fee application is limited to creditors filing claims, governmental entities, Trustee, debtor and the United States Trustee. That is, the entire matrix is not required to be served.

- **AMENDING PLANS—pre and post confirmation**

In the Western District pursuant to local bankruptcy rule 3015 (f) Pre-Confirmation Amendments to Plans,

- All pre-confirmation amendments to a plan must be numbered chronologically and entitled "First Pre-Confirmation Plan Amendment . . . , Second Pre-Confirmation Plan Amendment . . .", etc.
The amendment must (1) include only the provisions that differ from the original plan,
and (2) explain how each new or amended provision changes the plan.

The debtor must serve the amendment, together with a notice of the hearing date for confirmation, on the Trustee and any creditors or parties in interest who may be adversely affected; and must file a proof of service with the Clerk.

The debtor may not file a plan amendment that adversely affects the rights of non-objecting creditors **less than 21 days** before the plan is finally confirmed.

Post-Confirmation Amendments to Plans – All amendments to a confirmed plan must filed by the debtor on a "notice and opportunity" basis pursuant to LBR 9013(c).

Post confirmation amendments to a plan must be numbered chronologically and entitled "First Post Confirmation Plan Amendment . . . , Second Post-Confirmation Plan Amendment . . . , etc.

The amendment must (1) include *only the provisions that differ* from the plan as confirmed, and (2) explain how each new or amended provision changes the plan.

The debtor must serve the Trustee and any creditors or parties in interest that may be adversely affected by the amendment with a copy of the amendment and the LBR 9013(c) notice; and must file a proof of service with the Clerk.

- **AMENDING SCHEDULES – pre and post confirmation**

When filing amended Schedules in the Western District keep in mind LBR 1009 requiring that all changes to the amended Schedules must be highlighted in some fashion. This requires Counsel to use color, italics, or bold to specifically indicate every change on the amended Schedules.

LBR 1009: Amendments to Petitions, Lists, Schedules, and Statements (a) General Procedure – When filing an amendment to the petition or a list, schedule, or any statement, the debtor must file the entire amended document and highlight the amendment in some fashion. Unless otherwise ordered by the Court, the debtor must sign every amended document. However, the debtor may attach a single signed verification if several documents are contemporaneously amended. (b) Adding Creditors – If the amendment adds a creditor or creditors, each new creditor's name and address must be uploaded into CM/ECF. The debtor must also promptly serve each newly added creditor with a copy of the Notice of Commencement of Case, Notice of Meeting of Creditors, and Fixing of Deadlines. (c) Service of Amendments - The debtor must serve the amendment on the Trustee and all other entities adversely affected by the amendment, and must promptly file a proof of service showing compliance with Fed. R. Bankr. P. 1009.

- **OBJECTIONS TO PROOFS OF CLAIMS**

In the Eastern District a hearing is noticed in the objection, but if a response is not timely filed counsel may file a Certificate of non-response and the objection may be granted prior to the hearing. In the Western District a hearing is not scheduled unless a response to the objection is filed.

EASTERN DISTRICT - Rule 3007-1 Objection to a Claim

(a) Procedure. An objection to claim must be filed with a completed form "Notice of Hearing on Objection to Claim," available on the Court's website, and a certificate of service. The date and time for the hearing stated on the notice of hearing must be obtained from the schedule of available hearing dates for claims objections on the Court's website. The date of the hearing must be at least 30 days after the date of service of the hearing notice. The notice of hearing must state that if the creditor does not file a response by seven days before the date set for the hearing on the objection, the Court may cancel the hearing and enter an order sustaining the objection.

(b) Deadline for Response. The deadline for a creditor whose proof of claim is subject to an objection to file a response to the objection is seven days before the date set for the hearing on the objection.

(c) No Response. If a response is not timely filed, the objecting party may file a certificate to that effect and submit a proposed order sustaining the objection. If the Court decides to proceed with the scheduled hearing, the Court will notify the objecting party. (d) Initial Hearing. Unless the Court orders otherwise, the initial hearing on an objection to claim will not be an evidentiary hearing. If the Court determines that an evidentiary hearing is necessary, the Court will schedule a separate evidentiary hearing.

WESTERN DISTRICT - LBR 9013: Motion Practice

(a) Scope – This Rule applies to relief requested pursuant to Fed. R. Bankr. P. 9013 and 9014 regardless of how the request is made.

(b) Ex Parte Relief – If the requested ex parte relief may be granted without a hearing and without prior notice, the movant may file the motion and proposed order with a request that the order be signed.

(c) Notice with Opportunity to Object - A party seeking relief with notice and an opportunity to object must follow the procedures set forth in this subsection unless the Code, the Federal Rules of Bankruptcy Procedure, or these Rules provide otherwise, or the Court otherwise directs.

(1) Documents Filed with Motion - The following documents must be filed with any motion under subparagraph (c):

(A) A notice to the debtor and all other parties upon whom service is required that states that the party served has 14 days (21 days for matters under Fed. R. Bankr. P. 2002(a) and 2016; and 30 days for objections to claims) from the date of service to file and serve a response or request for a hearing or both. In either event, the response must include the specific reasons for objecting or for requesting a hearing;

(B) A copy of the proposed order; and

(C) Unless otherwise excepted by these Rules, a proof of service indicating the parties served and the date and manner of service.

(2) No Response Filed - The Court may grant relief without a hearing if no timely response or request for hearing is filed. The movant may file with the Court no earlier than 21 days from the date of service of the notice (28 days for matters under Fed. R. Bankr. P. 2002(a) and 2016, and 35 days for objections to claims) a certification stating that no timely response or request for hearing has been filed. On receipt of the certification, the Court may sign the proposed order, require the moving party to prepare a new proposed order, draft and enter its own order, or schedule a hearing.

(3) Response Filed - If a timely response or request for hearing is filed or if the Court has directed that a hearing be held, the Clerk will schedule a hearing on the motion and prepare a notice of hearing for the movant to serve on all required parties.

(4) ***When "Notice and Opportunity" Procedures May Not be Used*** *– Except as provided in subparagraph (d), the procedures set forth in this Rule may not be used for plan confirmation hearings, disclosure statement approval hearings, dismissal or conversion hearings, or hardship discharge hearings.*

- **MOTIONS TO EXTEND THE AUTOMATIC STAY**

While the Eastern District requires a hearing to be held, a hearing in the Western District is only held if the Motion is filed timely and an objection is also timely filed.

EASTERN DISTRICT - Rule 4001-4 Additional Procedures to Extend Stay and to Order Stay to Take Effect

(a) Motion to Extend the Stay. The deadline to file and serve a motion to extend the stay under § 362(c)(3)(B) and to file a certificate of service is *seven days after the* petition is filed. When such a motion is filed, the Court will schedule a hearing with a notice to all parties in interest. If the movant has not received a notice of hearing within seven days after filing the motion, the movant may contact the judge's Courtroom deputy clerk to obtain a hearing date within the time limit established by law. Any party in interest may be heard at the hearing. Written objections are permitted but not required.

(b) Motion to Order the Stay to Take Effect. A motion to order the stay to take effect under § 362(c)(4)(B) may be accompanied by an ex parte motion for an expedited hearing. Otherwise, the Court will schedule a hearing in due course. In either event, the Court will cause a notice of the hearing to be served on all parties in interest. If the movant has not filed a motion for an expedited hearing and has not received a notice of hearing within seven days after filing the motion, the movant may contact the judge's Courtroom clerk to obtain a hearing date. Any party in interest may be heard at the hearing. Written objections are permitted but not required.

(c) Objection Under § 362(l)(3)(A). When an objection under § 362(l)(3)(A) is filed, the Court will schedule a hearing with notice to all parties in interest. If the objecting party has not received a notice of hearing within three Business Days after filing the objection, the objecting party must contact the judge's Courtroom

deputy clerk to obtain a hearing date; otherwise, the requirement to hold a hearing within 10 days under § 362(l)(3)(A) is waived.

(d) Objection Under § 362(m)(2)(B). When an objection under § 362(m)(2)(B) is filed, the Court will schedule a hearing with notice to all parties in interest. If the debtor has not received a notice of hearing within three Business Days after filing the objection, the debtor must contact the judge's Courtroom deputy clerk to obtain a hearing date; otherwise, the debtor's objection is deemed waived and the 15 day period of § 362(m)(1) will continue to run.

(e) Order Regarding the Existence of the Stay. A party seeking relief under either § 362(c)(4)(A)(ii), § 362(j) or § 521(a)(6) must file a motion under Local Rule 9014-1. The motion must be titled, "Motion for an Order Confirming That No Stay Is in Effect," or "Motion for an Order Confirming That the Stay Has Been Terminated." The moving party must serve the debtor and the Trustee and file a certificate of service. The motion may be accompanied by an ex parte motion for an expedited hearing.

WESTERN DISTRICT - LBR 4001-5: Motions to Extend Stay Unless the Court orders otherwise, the debtor or a party in interest may request a E 362(c)(3) extension of the automatic stay by filing a motion with notice and opportunity to object pursuant to LBR 9013. However, any such motion must be filed *within 7 days of the filing* of the petition.

Practice pointer: In both districts, be very aware of the time limits for filing the motion to extend stay under this section. There is no remedy from the failure to file timely. However, please note, the relief from stay in this section is as to the debtor and not as to the property of the estate.

In conclusion, for the best outcome in practicing in both the Eastern and Western District, even though the districts are in the same state, even though on bankruptcy code controls over all, even though the relief sought by debtors in filing bankruptcy is the same, when practicing intra-district, assume the procedures are different in all ways and research the court rules and decisions accordingly.

11 U.S.C. 365(p)—Assuming Leases in Chapter 7

- Do You Need a Reaffirmation Agreement? It depends.

Western District	Eastern District
Need more than a Lease Assumption, possibly a Reaffirmation Agreement	Lease Assumption Agreement, no Reaffirmation Agreements allowed. The reaffirmation requirements of §524(c) do not apply to leases assumed in Chapter 7 cases pursuant to § 365(p).

- Western District

In *Thompson v. Credit Union Financial Group (In re: Thompson)*, 453 B.R. 823 (W.D. Mich. 2011), the lessor and the debtor signed a lease assumption agreement. Prior to the expiration of the lease and the entry of the discharge, the debtor surrendered the vehicle. After the entry of the discharge, the lessor filed a lawsuit in the State Court to collect the debt and the lessor obtained a Default Judgment against the debtor. The debtor reopened the bankruptcy case and filed a Motion for Contempt asserting the lessor violated the discharge injunction by collecting on the lease debt that was not reaffirmed according to §524(c). The Bankruptcy Court denied the debtor's motion and ruled that a §524 reaffirmation agreement was not required to assume a lease pursuant to §365(p) and that the assumed lease became a post-petition liability that was not subject to discharge. The Debtor then appealed the ruling to the United States District Court for the Western District of Michigan.

The District Court reversed the Bankruptcy Court. The court noted "[a]uthority is limited, but multiple courts have held … that a debt assumed under 365(p) falls within the scope of the discharge injunction unless there has been a court approval of the assumption, under 524(c) or otherwise." The District Court cited the following cases:

- *In re Eader*, 426 B.R. 164, 166 (Bankr. Md. 2010) (concluding that "although [s]ection 365(p)(2) permits an individual debtor in a Chapter 7 case to assume a lease of personal property and that such assumption does not require any approval by the bankruptcy court, the personal obligation of the debtor under the assumed agreement is subject to the discharge provided by [s]ection 524(a) unless the debtor reaffirms the indebtedness under the lease in compliance with [s]ection 524(c) *et seq*.");

- *In re Creighton*, 427 B.R. 24, 28 (Bankr. Mass. 2007) ("It would thus appear that an assumption agreement negotiated and entered into under § 365(p)(2), when not otherwise excepted from discharge by § 523(a), is an agreement to which § 524(c) pertains; it is a species of reaffirmation agreement.").

The District Court did not specifically require a §524 reaffirmation agreement, but it does require more than the filing of a lease assumption agreement. The court stated, "if the parties desire to enter into a 365(p) assumption post-discharge, when a reaffirmation under 524(c) is ordinarily not possible, the parties could petition for entry of a nunc pro tunc order, could move for judicial approval under 365(a)…or could seek to have the matter reopened in a way that would permit appropriate relief. Section 524(c) need not be an exclusive route to a discharge avoiding assumption of liability under 365(p)."

- Eastern District

    - *Williams v. Ford Motor Credit Company LLC*, 2016 U.S. Dist. LEXIS 62404 (E.D. Mich.): "[t]his Court agrees with those courts that have enforced lease assumption agreements under Section 365(p) even without reaffirmation under Section 524(c). Section 365(p) specifically addresses lease assumption agreements and does not expressly require that the underlying debt be reaffirmed under Section 524(c). Requiring such reaffirmation would be adding a step that Congress chose not to include; would strip Section 365(p) of its independent significance; and would create anomalous results. For all of these reasons, the Court concludes that a lease assumption agreement that complies with Section 365(p) is enforceable following discharge even if the debt that is the subject of the agreement was not reaffirmed under Section 524(c). Thus, in this appeal, the Agreement is valid even without reaffirmation under Section 524(c) *if* it complies with Section 365(p)"

    - *In re Starline Jackson*, Case No. 06-44335 (Bankr. E.D. Mich. 2006)(J. Shefferly). The Bankruptcy Court found that a lease assumed under §365(p) does not require a reaffirmation agreement. §365(p) does not specifically mention any of the rights and disclosures required for a §524 reaffirmation agreement. The court also reviewed other provisions of the Bankruptcy Code to determine whether §365(p) incorporated §524. Specifically, the court noted that §362(h)(1)(A), addressing the effect of the failure of a Chapter 7 debtor to timely file a statement of intention, clearly differentiates the act of reaffirming a debt under §524(c) and assuming an unexpired lease under §365(p). Therefore, the court reasoned, reaffirming a pre-petition debt is a wholly separate act from assuming a lease.

    - *In re Gundy*, Case No. 07-57777 (Bankr. E.D. Mich. 2008)(J. Tucker). The court ruled that a §524 Reaffirmation Agreement was not required and that a lease assumption agreement does not need to be filed with the court.

    - *In re Abdemur*, Case No. 17-16875, (Bankr. S.D. Fla., June of 2018) Most recent bankruptcy court to address this issue, held (1) assumption of a lease under subsection 365(p) does not require, indeed does not even contemplate, court approval; 2 (2) the reaffirmation procedures of section 524 do not apply to a lease assumption under subsection 365(p);

Reaffirmation Agreements

- Presumption of Undue Hardship—Expenses exceed income as shown in Part D, Statement in Support of Reaffirmation Agreement—11 U.S.C. 254(m) requires the Court to review the presumption. Is a motion required?

Western District	Eastern District
No motion is needed, simply file the Reaff	Local Bankruptcy Rule (LBR) 4008-1 Reaffirmation Agreements and the Presumption of Undue Hardship (a) Reaffirmation with Attorney Certification. If the debtor's attorney certifies that a reaffirmation agreement does not impose an undue hardship on the debtor, neither a motion nor court action is required. The court may in its discretion schedule a hearing regarding any reaffirmation agreement, even if the debtor's attorney certifies that the reaffirmation agreement does not impose an undue hardship on the debtor.
Court will set hearing, if necessary	The Court may set a hearing or may approve/refuse to disapprove the reaffirmation agreement without hearing. Motions are routinely filed and the court may or may not schedule a hearing. Motions are filed with a proposed order and without Notice/Opportunity.
	Guideline 9 (part of LBRs) Responsibilities of

	Debtor's Counsel Relating to a Reaffirmation Agreement As a matter of fulfilling the obligations of counsel for a debtor in a Chapter 7 case, counsel may not exclude from representation services relating to a reaffirmation agreement.

- How to delay the entry of the discharge to allow a reaffirmation agreement to be filed:

Western District	Eastern District
LBR 4004-1: Delayed Discharge (a) A debtor may request, via an official court form, that the Court defer granting a discharge for 30 days after entry of the order approving the request or until a date certain. (b) Clerk's Authority to Grant or Deny - The Clerk may grant or deny the motion. (c) Any party in interest can object within 21 days.	File a Motion to Delay the entry of the Discharge per LBR 9014 and obtain Order, signed by Judge.
See *In re Wilson*, Case No. 16-04363 (Bankr. W.D. Mich. 2017) in which **Judge Dales** held the Debtor may only seek two deferrals pursuant to 4004(c)(2)—does not necessarily apply to the other Judges	

- Remember…Discharge is not the only timing issue. Don't forget Bankruptcy Rule 4008
    - Rule 4008(a) requires reaffirmation agreements to be filed not later than 60 days after the first date set for the 341 hearing, although the rule allows the Court to, "at any time and in its discretion" enlarge the time to file a reaffirmation agreement.
    - Most Judges will enlarge the time to file the reaffirmation agreement at any time as long as the discharge has not been issued. However, **Judge Tucker** (Eastern District) requires the parties to seek the extension of time prior to the time period expiring, even if the discharge has not yet been entered.

Adequate Protection Payments in Chapter 13

- How to Obtain:

Western District	Eastern District
May be proposed in Chapter 13 Plan—not required. LBR 3016: Pre-Confirmation Lease and Adequate Protection Payments requires (1) the name, address, account number, and payment amount for each creditor (2) a claim to be filed; and (3) provide that the trustee may only pay that portion of an allowed, secured claim that comes due after the order for relief. (b) Trustee's Duties - As long as the information required by subparagraph (a) has been provided, the trustee may begin making lease or adequate protection payments within 28 days after a proof of claim is properly filed,	For Personal Property only—LBR 4001-5 Pre-Confirmation Payments in a Chapter 13 Case (a) Payment by the Trustee. (1) Without a court order, the trustee **must** disburse pre-confirmation payments under § 1326(a)(1) to a creditor holding a purchase money security interest in personal property and to a lessor of personal property if: (A) funds are available; (B) the creditor has, by the 14th day of the month prior to the trustee's next regularly scheduled disbursement, filed a proof of claim with adequate proof of a security interest attached setting forth the amount of the debtor's contractual monthly payment obligation; (C) either the plan proposes that the claim will be paid

subject to the availability of funds. Motion filed pursuant to LBR 9013 and 4001-3	by the trustee **or the debtor was not current in the debtor's contractual monthly payment obligation when the petition was filed;** (D) the plan proposes that the debtor will retain possession of the secured or leased property; and (E) a stay is in effect as to the secured or leased property. Motion filed pursuant to LBR 9014-1 or possibly Stipulation

- Amount:

Western District	Eastern District
No specific amount	LBR 4001-5(3) Amount of Disbursement. Unless the court orders otherwise for good cause shown under § 1326(a)(3), the disbursements must be 30% of the debtor's contractual monthly payment obligation to each secured creditor and 100% of the lease payment. Debtor or Creditor can file Motion to decrease or increase the amount. LBR4001-5(b) If claim is paid direct, it's 100% of the monthly payment. **Important—If the plan proposes to pay the claim directly, but the POC is filed with an arrearage, the Trustee will automatically start disbursing adequate protection.** 4001-5(c) Amended Proof of Claim. Within 28 days after confirmation, a creditor receiving any pre-confirmation payments must file an amended proof of claim clearly showing the application of the pre-confirmation payments—No creditors do this and no one seems to care.

- Directly Paid Claims

Western District	Eastern District
No local rule; however, local practice is to allow direct pays if debtor is current. Trustee Foley requires payments are current annually. There is case law developing that supports a dismissal and/or denial of discharge for the failure of the debtor to be current on direct payments.	LBR 3070-1 Claims to be Paid by the Chapter 13 Trustee. In a chapter 13 case, all claims must be paid by and through the chapter 13 trustee unless the debtor's plan establishes cause for remitting payments on a claim directly to the creditor. Any timely objection to such a plan provision will be heard at the confirmation hearing. -E.D. Courts interpret cause to mean the account is current

- Motion for Relief from Stay

Western District	Eastern District
LBR 4001-1: Motions for Relief from the Automatic Stay (a) Scope – This Rule governs all motions made pursuant to for relief from the automatic stay. (b) Use of "Notice and Opportunity" Procedures – A creditor may request relief from the automatic stay by filing a motion with notice and opportunity to object pursuant to LBR 9013(c). However, nothing in this subparagraph prohibits a party from seeking relief from stay using other motion procedures permitted by LBR 9013. A secured party seeking relief from the automatic stay by motion with notice and opportunity to object must attach to its motion documentary proof that any lien it asserts has been perfected in accordance with applicable law. (b)(2) If Notice and Opportunity are used and a response is filed, the court will schedule a Final hearing. (c) If the Motion is filed without Notice and Opportunity, the court may schedule the motion for a preliminary hearing.	Rule 4001-1 Motion for Relief from the Stay or Stipulation to Approve Agreement for Relief from the Stay (a) Parties to be Served. A party seeking relief from the stay must file a motion under Local Rule 9014-1, or a stipulation providing for entry of an order approving an agreement regarding relief from the stay. A motion seeking relief from the stay must be served upon the parties required to be served under F.R.Bankr.P. 4001, the debtor, any trustee, any other parties asserting an interest in the property that is the subject of the motion, and on any other party who has requested notice, and file a certificate of service. (b) Contents of the Motion. The motion under must identify the property, state the names and purported interests of all parties that are known or discoverable upon a reasonable investigation to claim an interest in the property, state the amount of the outstanding indebtedness, and state the fair market value of the property. The motion must have attached a legible and complete copy of any relevant agreements and documents establishing perfection, including notes, assignments of instruments, mortgages and UCC-1 financing statements. (c) The Preliminary Hearing. Unless the court notifies the parties in or contemporaneously with the notice of the preliminary hearing, the preliminary hearing will not be an evidentiary hearing and the court will determine whether to schedule a final hearing based on the parties' papers and arguments. At the preliminary hearing, the court may decide issues of law or define the factual or legal issues to be determined at the final hearing and may issue appropriate scheduling orders. The parties may request or the court may order that the preliminary hearing be treated as the final hearing.
It's important to read the Notice of Hearing as some notices require the moving party to serve the Notice of Hearing.	Court will serve the Notice of Hearing.

- Motion Procedure Generally

Western District	Eastern District
LBR 9013: Motion Practice (a) Scope – This Rule applies to relief requested pursuant to Fed. R. Bankr. P. 9013 and 9014 regardless of how the request is made. (b) Ex Parte Relief – If the requested ex parte relief may be granted without a hearing and without prior notice, the movant may file the	Rule 9014-1 Motion Procedure Generally (a) Motion Required. Unless permitted otherwise by applicable rule, a party seeking relief must file a motion. This rule also applies to a fee application under Local Rule 2016-1(a) or (b). For purposes of this rule, an objection to a claim of exemption will be deemed to be a motion.

motion and proposed order with a request that the order be signed. (c) Notice with Opportunity to Object - A party seeking relief with notice and an opportunity to object must follow the procedures set forth in this subsection unless the Code, the Federal Rules of Bankruptcy Procedure, or these Rules provide otherwise, or the Court otherwise directs. (1) Documents Filed with Motion - The following documents must be filed with any motion under subparagraph (c): (A) A notice to the debtor and all other parties upon whom service is required that states that the party served has 14 days (21 days for matters under Fed. R. Bankr. P. 2002(a) and 2016; and 30 days for objections to claims) from the date of service to file and serve a response or request for a hearing or both. In either event, the response must include the specific reasons for objecting or for requesting a hearing; (B) A copy of the proposed order; and (C) Unless otherwise excepted by these Rules, a proof of service indicating the parties served and the date and manner of service. (4) When "Notice and Opportunity" Procedures May Not be Used – Except as provided in subparagraph (d), the procedures set forth in this Rule may not be used for plan confirmation hearings, disclosure statement approval hearings, dismissal or conversion hearings, or hardship discharge hearings. (f) Combined Motions Prohibited - Except as otherwise provided in these Rules, every request for an order from the Court must be filed in a separate motion. However, requests for alternative relief may be contained in one motion. (g) Request for Emergency Hearing - An "emergency" is a matter that requires a hearing in less than 7 days, and that involves an injury which outweighs procedural concerns. If a motion requires an emergency hearing, a separate motion for the emergency hearing must be filed. The motion for emergency hearing must contain the following: (1) sufficient information for the Court to schedule an emergency hearing (e.g., why relief is	(c) Attachments. The moving party must attach the following to the motion: (1) a copy of the proposed order, labeled as Exhibit 1; (2) a completed form "Notice of Motion and Opportunity to Object," available on the court's website, labeled as Exhibit 2, stating that: the deadline to file an objection to the motion is within 14 days (21 days for matters covered by F.R.Bankr.P. 2002(a)) after service; objections must comply with F.R.Civ.P. 8(b), (c) and (e); and if an objection is not timely filed, the court may grant the motion without a hearing; (3) a brief, when required under subpart (f), labeled as Exhibit 3; (4) a certificate of service showing service on those parties entitled to service under ECF Procedure 12(b), labeled as Exhibit 4; (5) affidavits, labeled as Exhibit 5; and (6) documentary exhibits, labeled as Exhibit 6. **(h) Statement of Concurrence Sought. In an adversary proceeding, or in a bankruptcy case unless it is unduly burdensome, the motion must affirmatively state that concurrence of opposing counsel in the relief sought has been requested on a specified date and that the concurrence was denied.** (i) Discovery Motions. With respect to a matter relating to discovery to which F.R.Bankr.P. 7026 through 7037 apply, counsel for each of the parties must meet and confer in advance of the hearing in a good faith effort to narrow the areas of disagreement. The conference must be held a sufficient time in advance of the hearing so as to enable the parties to narrow the areas of disagreement to the greatest extent possible. It is the responsibility of counsel for the movant to arrange for the conference and, in the absence of an agreement to the contrary, the conference must be held in the office of the attorney nearest to the court in which the motion is pending. (j) Withdrawal of a Motion. After a response has been filed, a motion may be withdrawn only upon stipulation of the moving and responding parties or a court order. (k) Evidentiary hearings. Unless the court orders otherwise, the initial hearing on a contested matter will not be an evidentiary hearing. need be served.

needed immediately and why affected parties will not be prejudiced if a hearing is held with only limited notice); (2) a certificate of service; and (3) a proposed order scheduling the hearing, with blank spaces for the date, time, and location of the hearing and for the manner and deadline for giving notice of the hearing. The moving party must telephone the presiding Judge's chambers to promptly advise the Court staff that a request for an emergency hearing has been filed. Nothing in this Rule precludes the Court from utilizing different procedures for scheduling emergency hearings. (h) Request for Expedited Hearing - If a motion requires a hearing on shortened notice but is not an emergency, a motion to shorten notice or to schedule an expedited hearing must be filed in accordance with Fed. R. Bankr. P. 9006(c). The request for expedited hearing must be accompanied by a proposed order.	

- Deadline to Respond to Motions/Certificates of No Response

Western District	Eastern District
9013(c)(2) No Response Filed - The Court may grant relief without a hearing if no timely response or request for hearing is filed. The movant may file with the Court no earlier than 21 days from the date of service of the notice (28 days for matters under Fed. R. Bankr. P. 2002(a) and 2016, and 35 days for objections to claims) a certification stating that no timely response or request for hearing has been filed. On receipt of the certification, the Court may sign the proposed order, require the moving party to prepare a new proposed order, draft and enter its own order, or schedule a hearing.	LBR 9014-1(b) Deadline for Response. Except as otherwise ordered by the court or applicable rule, the deadline to respond to any motion is 14 days after service (21 days after service for matters covered by F.R.Bankr.P. 2002(a)). LBR 9014-1(d) No Timely Response. If a response is not timely filed, the movant may file a certification of no response so stating, attaching thereto a copy of the original certificate of service, and may submit the proposed order. The movant may file a certification of no response only after the deadline for response has passed, including the addition of days to the deadline in order to comply with F.R.Bankr.P. 9006(a) and (f). The court may enter the submitted proposed order without a hearing. If the court decides not to enter the proposed order, the court will schedule a hearing with notice to the movant and the other parties that are entitled to notice, unless the court determines that a hearing is unnecessary to resolve the motion.

- Objections to Trustee's Notice Plan Completion (Notice of Final Cure)

Western District	Eastern District
If a creditor files a response disagreeing pursuant to Fed.R.Bank.P 3002.1, a hearing will only be set if a party in interest objects to the creditor's response the Trustee or Debtor file a Motion for Determination of Final Cure	Once a response disagreeing is filed, the court will set a hearing.

- Statements of Corporate Ownership

Western District	Eastern District
In Adversary Proceedings per Fed.R.Bank.P. 7007.1	Rule 9013-3 Corporate Ownership Statement in a Contested Matter A corporation that is a party to a contested matter must file, contemporaneous with the filing of its first paper in such contested matter, a statement of corporate ownership that contains the information required by F.R.Bankr.P. 7007.1 for a corporation that is a party to an adversary proceeding. The corporate ownership statement must be filed as a separate paper, not as an attachment to another paper.
	If you don't file one, your pleading may be stricken by the Court. Contested matters include but are not limited to motions, objections, etc., not just adversary cases.