

# AMERICAN BANKRUPTCY INSTITUTE JOURNAL

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## An Introduction to Local Bankruptcy Rules

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This column seeks to provide the less-experienced chapter 11 attorney a basic introduction to local bankruptcy rules. Given the possible breadth of that undertaking, this column has been limited to an overview of a few local rules that we thought might be particularly relevant to a newer chapter 11 attorney. We remind the reader that local rules are inherently local and distinct. Be aware that bankruptcy judges in 98 different federal court districts are certain *not* to be entirely uniform with regard to their practices, procedures and formatting (thus, the same substantive local rule might be numbered differently in different jurisdictions). Accordingly, new practitioners *must* carefully review all the possible applicable rules and standing orders.

### Professionals: Appearing Pro Hac Vice



Douglas E. Deutsch

In most cases, if a client wants to participate in a bankruptcy case, you (or a more senior attorney for which you are working) must file a notice of appearance. This is relatively simple if you are licensed in

the jurisdiction in question. However, and as a general rule,<sup>1</sup> attorneys from outside the jurisdiction must be admitted to the case *pro hac vice* (literally, “for this turn”).

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To be admitted *pro hac vice*, an attorney must often certify or attest to certain facts. For example, in Delaware, a motion for admission *pro hac vice* must be made by a Delaware attorney in good standing and be accompanied

Order for District Court Fund effective Jan. 5, 2005); S.D.N.Y. *Pro Hac Vice* Instructions (Revised January 2009) (requiring payment of \$25 fee to clerk of bankruptcy court).



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Local rules and practice must also be reviewed to determine the boundaries of a permitted *pro hac vice* admission. For example, Southern District of New York practice allows an attorney admitted *pro hac vice* to seemingly take all or almost all actions with respect to

## Building Blocks

by a certification of the attorney to be admitted attesting that said attorney: (1) is eligible for admission to the bankruptcy court; (2) is admitted, practicing and in good standing as a member of the bar of his or her state; (3) submits to the disciplinary jurisdiction of the bankruptcy court for any alleged misconduct that occurs in the preparation or course of the matter for which he or she is to be admitted; and (4) is generally familiar with the court's local rules. See Del. Bankr. L. R. 9010-1(b), Del. Local Form 105. Applicable rules or procedures also frequently require the attorney seeking *pro hac* admission to pay a fee. See, e.g., Del. Bankr. Local Form 105 (requiring payment of annual \$25 fee to clerk of district court as required by and incorporating Standing

a pending case without the assistance of local counsel. See S.D.N.Y. Bankr. L. R. 2090-1 (and comment thereto). In fact, the Southern District of New York requirement that all *pro hac* admitted attorneys have a local address was revoked in 2004 because it was construed as requiring retention of local counsel. In contrast, non-Delaware attorneys may not be admitted *pro hac vice* in Delaware unless associated with Delaware counsel. See Del. Bankr. L. R. 9010-1(c). Delaware counsel—not the attorney admitted *pro hac vice*—is required to be a registered user of CM/ECF (the electronic filing system), is required to file all papers and must attend all proceedings before the court. See Del. Bankr. L. R. 9010-1(c).

### “First Day” Relief

In order to encourage more debtor cases to be filed locally, bankruptcy courts across the country have sought to take certain steps to become more “customer friendly.” This has meant, among other

<sup>1</sup> The exceptions to the general rule are usually few. For example, the Southern District of New York does not require attorneys filing proofs of claim or appearing on behalf of a child support creditor to file *pro hac vice* motions. See S.D.N.Y. Bankr. L. R. 2090-1(f). Additionally, Delaware local rules do not require Delaware counsel to become “associated” (see article for more information) with a *pro hac vice* counsel if the “visiting” attorney is a government attorney or, with some exceptions, the attorney is prosecuting a proof of claim or a response to an objection to a proof of claim. See Del. Bankr. L. R. 9010-1(e)(iii).

things, that many courts have modified local rules to mirror rules applicable to debtors that file in Delaware and the Southern District of New York (frequent venues for larger bankruptcy case filings, in part because many companies are incorporated in these states). Specific “customer friendly” provisions include, for example, Delaware’s often-copied procedural guidelines for obtaining relief with respect to motions or applications filed at the outset of the bankruptcy case where the debtor requests a hearing or the entry of an order on less than five days’ notice. *See* Del. Bankr. L. R. 9013-1(m). These motions and applications are commonly known as “first day motions.”

The Delaware Local Rules require a first-day motion to be confined to matters “of a genuinely emergent nature” that are “required to preserve the assets of the estate and to maintain ongoing business operations.” *See* Del. Bankr. L. R. 9013-1(m)(ii). Although relief can be granted in Delaware on 24 hours (or less) limited notice to the U.S. Trustee, the 20 largest general unsecured creditors and any party directly affected by the motion, debtor and creditor attorneys should note that *any* party can file a motion to reconsider a first-day order within 30 days of its entry except for orders entered with respect to the use of cash collateral of postpetition financing. *See* Del. Bankr. L. R. 9013-1(m)(iii), (v).

Local rules across the country also commonly require a debtor to file an affidavit with its bankruptcy petition that might require, for example, a list of the debtor’s premises, a schedule of the legal actions in which the debtor is involved (and details on each litigation) and a list of the debtor’s senior management. *See* S.D.N.Y. Bankr. L. R. 1007-2. Standing orders may also exist that specifically address other first-day/bankruptcy filing matters, such as procedures related to prepackaged bankruptcy cases. *See, e.g.,* S.D.N.Y. Bankr. Gen. Order 201 (“Procedural Guidelines for Prepackaged Chapter 11 Cases”).

### **Professionals: Being Retained and Paid**

By custom and convention, in many jurisdictions, applications to retain professional persons are signed not by the professional seeking to be retained, but instead by the party seeking to retain the professional. *See, e.g.,* Del. Bankr. L. R. 2014-1(a) (*entity* seeking approval of employment of professional person is to file retention motion and

*professional* must file affidavit or verified statement in support of application). As to timing, applications to retain debtors’ professionals often cannot be heard at the first-day hearing but instead must be heard at a later hearing date that would allow sufficient notice as required by Delaware’s other applicable local rules. *See, e.g.,* Del. Bankr. L. R. 2014-1(b).

Local rules, forms and standing orders also commonly provide for detailed procedures related to being paid as debtor or committee counsel. *See, e.g.,* S.D.N.Y. Bankr. L. R. 2016-2; Del. Bankr. L. R. 2016-2. Reviewing the details of these procedures—which are slightly different from jurisdiction to jurisdiction—will be less useful than (1) a review of the rules in the applicable jurisdiction and (2) a review of recently-approved fee applications filed by debtor’s or committee’s counsel (and some related objections) in another case in the applicable jurisdiction. While the specific rules may vary among jurisdictions, they typically are fairly well established. Nothing substitutes for reviewing and understanding the rules, but following well-crafted, time-tested formats can obviate the need to sow new ground in this area.

### **DIP/Cash Collateral**

A full exposition of the rules regarding financing and cash collateral motions—and how each district addresses such issues—could fill several columns. Given our space limitations and recognizing that this is an issue that new practitioners tend to be less involved in, the analysis provided herein is limited to a few highlights. Do not be fooled by our brevity! There is perhaps no issue that requires a more thorough review of the applicable local rules.

Bankruptcy Rule 4001 was amended in 2007 in order to provide interested parties with more fulsome disclosure of the relief requested in financing and cash-collateral motions. The amendments to Bankruptcy Rule 4001 have required bankruptcy courts, in turn, to modify the applicable local rules. In sum and substance, both revised Rule 4001 and revised applicable local rules usually require the movant to fully explain and/or highlight certain provisions of the requested financings. For example, Del. Bankr. L. R. 4001-2 requires financing motions to recite, identify the location of and justify the inclusion of provisions that:

1. grant cross-collateralization (the

securing of prepetition debt by postpetition assets);

2. bind the estate or parties-in-interest with respect to the validity, amount or perfection of prepetition liens and claims without giving

- a. parties-in-interest at least 75 days from the entry of the proposed order and

- b. a creditors’ committee at least 60 days from the date of its formation to investigate such matters;

3. waive the estate’s rights under §506(c) (surcharge of a lender’s collateral);

4. grant to a prepetition secured creditor liens on the debtor’s avoidance actions;

5. allow for the payment of a secured creditor’s prepetition debt;

6. provide for different professional fee carveouts for debtor’s and committee’s professionals; and

7. prime any secured lien without a lienor’s consent.

*See also* S.D.N.Y. Bankr. L. R. 4001-2.

Such provisions are to be highlighted because the court believes them to be “extraordinary” and, thus worthy of specific analysis. Moreover, at least in Delaware, and absent “extraordinary circumstances,” the court is reluctant to approve interim financing orders that include any of these controversial provisions. *See* Del. Bankr. L. R. 4001-2(b). As a result, to the extent such provisions find their way into interim financing orders, they often are effective subject to the entry of a final financing order. *See* Del. Bankr. L. R. 4001-2(c).

### **Withdrawal of the Reference**

Despite the substantive complexity that can bedevil parties seeking to withdraw the reference, the procedural rules in New York and Delaware for pursuing such a course are fairly straightforward. Pursuant to New York’s and Delaware’s local rules, a motion to withdraw the reference of a matter or proceeding is filed—perhaps counterintuitively—with the clerk of the bankruptcy court. *See* S.D.N.Y. Bankr. L. R. 5011-1 and Del. Bankr. L. R. 5011-1. The clerk of the bankruptcy court transmits the motion to the clerk of the district court for disposition by the district court.

### **Sale of Property**

Section 363 of the Bankruptcy Code provides a debtor the statutory

authority to sell estate property, subject to certain limitations, but fails to explain the procedures related to the sale. With §363 sales outside a plan increasingly common, practitioners are well advised to know the rules of the road. That is where Rule 6004 and the related local rules or standing orders come into play.

Fortunately, from a procedural perspective, local rules and standing orders often provide clear guidelines on what can and cannot be done, and what must be disclosed in the context of a §363 sale. Some requirements are obvious; some are not. The general purpose of the local bankruptcy rules or procedures is to ensure a fair and open process that, consistent therewith, provides all parties with equal (or close to equal) access to information. To that end, a number of jurisdictions require the movant to highlight certain provisions. These disclosures often include, but are not limited to, the following:

- creating an auction that precludes the debtor from soliciting competing bids or otherwise limits the shopping of the property to be sold, *see* Del. Bankr. L. R. 6004-1(b)(iv)(D) and S.D.N.Y. M-331 at p. 5;
- providing agreements with management as part of the sale, *see* Del. Bankr. L. R. 6004-1(b)(iv)(G) and S.D.N.Y. M-331 at p. 9;
- noting that the proposed sale of assets is to an insider, *see* Del. Bankr. L. R. 6004-1(b)(iv)(B) and S.D.N.Y. Bankr. Gen. Order M-331 (“M-331”) at p. 9;
- enabling the estate to release sale proceeds to any party after closing absent further order of the court, or provide for a definitive allocation of sale proceeds between or among various sellers or collateral, *see* Del. Bankr. L. R. 6004-1(b)(iv)(H) and S.D.N.Y. M-331 at p. 10;
- impacting the debtor’s ability to retain or have access to its books and records (if the contemplated sale includes substantially all the debtor’s assets), *see* Del. Bankr. L. R. 6004-1(b)(iv)(J) and S.D.N.Y. M-331 at p. 10;
- including the debtor’s avoidance actions in the sale, *see* Del. Bankr. L. R. 6004-1(b)(iv)(K) and S.D.N.Y. M-331 at p. 10;
- limiting/defining successor liability of the proposed purchaser, *see* Del. Bankr. L. R. 6004-1(b)(iv)(L) and S.D.N.Y. M-331 at p. 10;

- ordering the sale free and clear of any leasehold or possessory interests in property, *see* Del. Bankr. L. R. 6004-1(b)(iv)(M) and S.D.N.Y. M-331 at p. 11; and

- seek relief from the 10-day stay contained in Bankruptcy Rule 6004(h), *see* Del. Bankr. L. R. 6004-1(b)(iv)(O) and S.D.N.Y. M-331 at p. 11.

In a similar vein, sales procedure motions must highlight certain other hot-button issues. For example, bid protections afforded to “stalking horse” or initial bidders also must be identified and disclosed (*see, e.g.*, Del. Bankr. L. R. 6004-1(c)(i)(C)(1)-(4) (requiring disclosure of break-up fees, topping fees, expense reimbursement and bidding increments)).

### **Deadlines**

Yet another topic that could yield a separate column for new attorneys is bankruptcy court deadlines. Generally, and among other rules, we would suggest that you fully review Bankruptcy Rule 9006 before moving forward. Rule 9006 explains how time should be computed.<sup>2</sup> Be certain to note that additional time is required if service is to be completed by mailing. *See* Rule 9006(e). Bankruptcy Rule 2002 is then a good next source and sets forth many of the specific notice periods that must be provided, depending on the relief sought.

A young lawyer must now consider the hearing/return date. In the Southern District of New York, this requires that you contact the appropriate bankruptcy judge’s chambers. *See* S.D.N.Y. Bankr. L. R. 5070. Once you obtain the hearing/return date, you must still determine the applicable objection deadline. In Delaware, however, most cases have monthly (or sometimes twice monthly) “omnibus hearing dates” at which the court will hear motions timely filed under the other applicable local rules. *See* Del. Bankr. L. R. 2002-1(a).

Both the Southern District of New York and Delaware bankruptcy courts have established a standard objection deadline. *See* S.D.N.Y. Bankr. L. R. 9006-1 (objection deadline, in most instances, is three days prior to hearing day) and Del. Bankr. L. R. 9006-1 (objection deadline, in most instances, is five days prior to hearing date). Movants and respondents should be aware of

<sup>2</sup> In a nutshell, an attorney should ignore the day of the act and count the appropriate number of days unless the last day ends on a federal holiday or a weekend, in which case the last day is determined to be the first following nonholiday, nonweekend day. *See* Rule 9006.

this or any other applicable objection deadline established by local rules. (Be certain that the court has not entered an order modifying the standard protocol.)

Understanding these local rules is particularly important because movants will often file a moving paper that is given with greater notice than is required—for instance, 20 days’ notice instead of the required 10 days in the Southern District of New York—and then simply note an objection deadline that provides the movant more time to respond to an objection than the movant is otherwise entitled to (thus, 10 days before the hearing rather than three or five days). If this makes a difference to you or your client, a call to the other side pointing to the local rule often will clarify any misunderstanding that may exist. You should be entitled to file your objection according to the local rules.

### **Conclusion**

While this column highlights some rules with which a young lawyer should become familiar, the most important lesson that should be gleaned is that a young lawyer must check all potentially applicable local rules before filing any court paper. This review should become as systematic and regular as shephardizing a cited case before submission of the brief. ■

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