

Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1004, 2004, 2014, 2015(a)(5), 4004, 9014 and 9027(a)(3), New Proposed Bankruptcy Rule 1004.1, and Proposed Amendments to Official Form 1 (Informational)

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Introduction

The United States Judicial Conference Advisory Committee on Bankruptcy Rules has issued proposed amendments to the Federal Rules of Bankruptcy Procedure 1004, 2004, 2014, 2015, 4004, 9014, and 9027 and Official Form 1. There also is a new proposed Rule 1004.1

The United States Judicial Conference Standing Committee on Rules of Practice and Procedure has circulated to the bench, bar, and public proposed amendments to the foregoing Rules and Form. The Standing Committee seeks substantive and stylistic public comments by the deadline date of February 15, 2001. There are numerous ways for interested persons to comment. For example,

- one can write to the Secretary of the Standing Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, Washington, D.C. 20544;
 - one can send comments electronically via the Internet to www.uscourts.gov;
- or
- one can attend a public hearing to be held in Washington, D.C. on January 26, 2001. Anyone desiring to testify at the public hearing must contact the Secretary of the Standing Committee at the address referred to above at least 30 days prior to the public hearing on January 26, 2001. All comments are made part of the official record and are made available to the public.

After the public comment period has expired, the Advisory Committee will determine whether to submit one or more of the proposed amendments to the Standing Committee on Rules of Practice and Procedure. If later approved by the Standing Committee, the proposed amendments will be sent to the Judicial Conference of the United States and, eventually, to the United States Supreme Court for treatment under the Rules Enabling Act, 28 U.S.C. § 2075.

Summary of Proposed Amendments

A summary of the proposed amendments to these Rules follows:

- (a) **FED. R. BANKR. P. 1004** is amended to clarify that the rule implements section 303(b)(3)(A) of the Bankruptcy Code and is not intended to establish any substantive standard for the commencement of a voluntary case by a partnership.
- (b) **FED. R. BANKR. P. 1004.1** is added to set out the manner in which a case is commenced on behalf of an infant or an incompetent person. This proposed Rule is derived from Rule 17(c) F.R. Civ. P.

More specifically, Rule 1004.1 is entitled *Petition for an Infant or Incompetent Person* and provides, in its entirety, as follows:

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

The Advisory Committee Note accompanying this Rule provides as follows:

This rule is derived from Rule 17(c) F.R. Civ. P. It does not address the commencement of a case filed on behalf of a missing person. *See, e.g., In re King*, 234 B.R. 515 (Bankr. D.N.M. 1999).

- (c) **FED. R. BANKR. P. 2004** is amended to clarify that an examination ordered under this rule may be held outside of the district in which the case is pending. The court where the examination will be held issues the subpoena, and it is served in the manner provided in Rule 45 F.R. Civ. P., made applicable by FED. R. BANKR. P. 9016. Moreover, the rule makes clear that an attorney authorized to practice either in the court in which the case is pending or in the court for the district in which the examination will be held may issue and sign the subpoena on behalf of the court for the district in which the examination will be held.
- (d) **FED. R. BANKR. P. 2014** is rewritten to make it conform more closely to the applicable disclosure provisions of the Bankruptcy Code. This Rule also includes stylistic changes and sets out service requirements for the application.

The Advisory Committee Note accompanying this Rule provides, in its entirety, as follows:

The rule has been rewritten to make stylistic changes and to make it conform more closely to the applicable provisions of the Code. The rule directs professionals seeking court approval of their employment to disclose all information relevant to determining whether the person is “disinterested” as defined in § 101 of the Code. The rule requires the professional to undertake a reasonable inquiry under the circumstances to identify any facts relevant to that determination.

The rule also sets out the service requirements for the application for the approval of employment. There is no provision requiring a hearing on the application. In most cases, an order approving the employment will be entered without a hearing. The court may set a hearing sua sponte or on request or may vacate an order issued under the rule upon motion of an interested party.

The rule does not address the standards that courts should apply in ruling on an application for employment of a professional.

- (e) **FED. R. BANKR. P. 2015(a)(5)** is amended to conform to 28 U.S.C. § 1930(a)(6) which was amended in 1996.
- (f) **FED. R. BANKR. P. 4004(c)** is amended to provide that the filing of a motion under section 707(a) of the Bankruptcy Code to dismiss a case postpones the entry of the discharge. Currently, only motions brought under section 707(b) postpone entry of the discharge.
- (g) **FED. R. BANKR. P. 9014** is amended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, to the list of Rules applicable in contested matters. It is also amended to permit service of papers, other than the initial motion, under Rule 5(b) F.R. CIV. P. subdivision (d) is added to clarify that in any matter presenting a disputed material issue of fact, an evidentiary hearing must be held at which the testimony of witnesses is taken under Rule 43 (a) F. R. CIV. P. Subdivision (e) is amended to address problems of local variation in procedures for the appearance of witnesses by requiring that the court provide a mechanism to enable attorneys to know whether the presence of a witness is necessary at any particular hearing. This proposed amendment significantly affects trial practices and will no doubt be somewhat controversial. (Remember and compare the earlier “litigation package” that was heavily criticized by the bench and bar.)

The Advisory Committee Note accompanying this Rule provides, in its entirety, as follows:

The list of Part VII rules that are applicable in a contested matter is extended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, and capacity. The discovery rules made applicable in adversary proceedings apply in contested matters unless the court directs otherwise.

Subdivision (b) is amended to permit parties to serve papers, other than the original motion, in the manner provided in Rule 5(b) FED. R. CIV. P. When the court requires

a response to the motion, this amendment will permit service of the response in the same manner as an answer is served in an adversary proceeding.

Subdivision (d) is added to clarify that if the motion cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held at which testimony of witnesses is taken in the same manner as testimony is taken at a trial in an adversary proceeding or at a trial in a district court civil case. Rule 43(a), rather than Rule 43(e), FED. R. CIV. P. would govern the evidentiary hearing on the factual dispute. Under Rule 9017, the Federal Rules of Evidence also apply in a contested matter.

Subdivision (e). Local procedures for hearings and other court appearances in a contested matter vary from district to district. In some bankruptcy courts, an evidentiary hearing at which witnesses may testify usually is held at the first court appearance in the contested matter. In other courts, it is customary for the court to delay the evidentiary hearing on disputed factual issues until some time after the initial hearing date. In order to avoid unnecessary expense and inconvenience, it is important for attorneys to know whether they should bring witnesses to a court appearance. The purpose of the final sentence of this rule is to require that the court provide a mechanism that will enable attorneys to know at a reasonable time before a scheduled hearing whether it will be necessary for witnesses to appear in court on that particular date.

- (h) **FED. R. BANKR. P. 9027(a)(3)** is amended to clarify that the time limits for filing a notice of removal of a claim or cause of action apply to any claim or cause of action initiated after the commencement of a bankruptcy case, whether the bankruptcy case is still pending or has been suspended, dismissed, or closed.
- (i) **Official Form 1** is the form of a voluntary petition, and it is amended to require the debtor to disclose ownership or possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety.

Dated: October 25, 2000