

Best Practices
Non Individual/Business
Adversary Proceedings

I. COMMUNICATE WITH OPPOSING COUNSEL EARLY IN THE PROCESS

II. JURISDICTION CHALLENGES

A. Subject matter jurisdiction

1. 28 U.S.C. § 157(b)(1) states that bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11. . . and may enter appropriate orders and judgments. Section 157(b)(2) provides a non-exhaustive list of core proceedings.
2. However, in *Stern v. Marshall*, the SCOTUS held that a bankruptcy court, because it is a non-Article III court, lacked authority under Article III of the United States Constitution to enter a final judgment on a state law compulsory counterclaim that is not resolved in the process of ruling on a creditor's proof of claim. This was despite Congress granting statutory authority under 28 U.S.C. § 157(b)(2).

B. Personal jurisdiction

1. For a bankruptcy court to exercise personal jurisdiction over a defendant, the plaintiff must demonstrate that the defendant has sufficient minimum contacts with the United States such that requiring the defendant to appear before the bankruptcy court would comport with the traditional notions of fair play and substantial justice.
2. General jurisdiction: exists where a party's contacts with a forum are substantial, continuous and systematic.
3. Specific jurisdiction: exists when a party's contacts with a forum are not "substantial, continuous and systematic," but the party has engaged in activities within the forum that give rise to, or are related to, the Plaintiff's claim.

III. SERVICE OF PROCESS

A. Rule 7004 - Adopts most of Rule 4 of the Federal Rules

1. Nationwide 1st class mail service
2. U.S./Agencies Service- Rule 7004(b)(4)
 - a) Attorney General
 - b) U.S. Attorney for District
 - c) Agency
 - d) Best practice: postage is cheap compared to additional time. If you are uncertain as to the specific agency address or department within that agency which needs to be served, send to all that you can find

3. Debtor Service
 - a) Residence in petition/or as changed-
 - b) Debtor's counsel
4. Insured Depository and Institution
 - a) Certified mail, addressed to "Officer".
 - b) <https://research.fdic.gov/bankfind/> find out if institution is an Insured Depository Institution
 - c) Best Practice: serve by certified and regular mail if there is any doubt.
5. Service upon corporation
 - a) Address fist class mail to "officer or managing agent."
 - b) Best practice: use due diligence to discover the name of an officer and serve that individual. If you are uncertain of the individual's name or afraid that you don't have the name of a current officer, serve upon "officer or managing agent" as an alternative. See *In re Saucier*, 366 B.R. 780, 784-85 (Bankr. N.D. Ohio 2007)
6. SUBSEQUENT PAPERS
 - a) Serve counsel and any unrepresented parties
 - b) Service of motions: comply with local rule 9013-1 and 9013-3.
7. Certificate of service requirements: Local Rule 9013-3:
 - a) A certificate of service shall be appended to and served with any document tendered for filing which is required to be served (excepting any document required to be served together with a summons). The certificate of service shall be signed and shall:
 - o Identify, with specificity, the document served;
 - o State the date and method of service;
 - o Identify, by name and address, each entity served; and
 - o Contain or refer to an accompanying notice as required by LBR 9013-1(a).
 - b) Parties in default need not be served
 - c) Best practice: serve both the application for entry of default and motion and order for entry of default judgment be served on all parties

IV. CONTROL OF ATTORNEY-CLIENT PRIVILEGE

- A. Explaining it to clients

1. The attorney-client privilege protects the confidentiality of communications between an attorney and the client made for the purpose of securing legal advice.
 2. Any individual, entity, or government body that seeks the advice of an attorney and establishes an attorney-client relationship will be considered a client that has the right to assert privilege over its communications with his/its attorney(s).
- B. Control of attorney-client privilege
1. It is well established that the attorney-client privilege is held and controlled by the client and not the attorney. Therefore, while the attorney-client privilege is most often asserted by the attorney on behalf of the client, ultimately it is the client, and not legal counsel, who may choose to assert the privilege or waive its protections.
 2. The actor whose duties most closely resemble those of management should control the privilege within bankruptcy.
 - a) Therefore, in the typical corporate Chapter 11 bankruptcy proceeding, and in the absence of a bankruptcy trustee, the debtor in possession controls the corporation's attorney-client privilege.
 - b) Where a trustee, including a liquidation trustee, is appointed in a bankruptcy proceeding, the attorney-client privilege can be expected to pass to that individual, provided that he or she has been vested with control over the debtor's bankruptcy estate or the particular claims to which the privilege applies.

V. KNOW THE APPLICABLE RULES.

- A. Fed. Bankr. R. 5005. Filing and Transmittal of Papers:
1. Filing.
 - a) Place of filing. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.
 - b) Filing by electronic means. A court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code [11 USCS § 107].
 2. Transmittal to the United States trustee.

- a) The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending.
 - b) The entity, other than the clerk, transmitting a paper to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the paper and stating the date on which it was transmitted to the United States trustee.
 - c) Nothing in these rules shall require the clerk to transmit any paper to the United States trustee if the United States trustee requests in writing that the paper not be transmitted.
3. Error in filing or transmittal. A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

B. Local Bankruptcy Rule 5005-1

1. Form. Except as otherwise ordered by the Court, all documents presented for filing or lodging in paper format either by mail or over the counter:
- a) Shall be printed, typewritten, or hand printed in ink on 8½ × 11 inch white paper. The Clerk may accept different sized documents, such as computer printouts.
 - b) Shall be prepared on only one side of the document. No duplex or double-sided printing will be accepted.
 - c) Shall not be pre-punched.
2. Facsimile Transmissions. The Clerk shall not accept for filing any facsimile transmission unless ordered by the Court.
3. Signatures. Signatures on the petition, pleadings, motions, and other documents submitted to the Court, either by conventional means or by electronic means established by the Court, shall include the attorney's typewritten name, firm affiliation, if any, address, telephone number, facsimile number, e-mail address, and Bar Registration Number. The signature of an attorney on any document filed by electronic means shall be indicated as "s/name."

Last Revised: May 16, 2011

C. Fed. Bankr. R. 9013. Motions: Form and Service

1. A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:
 - a) the trustee or debtor in possession and on those entities specified by these rules;
or
 - b) the entities the court directs if these rules do not require service or specify the entities to be served.

D. Local Bankruptcy Rule 9013-1

1. Certificate of Service and Notice. A motion or application tendered for filing shall be accompanied by (1) a certificate of service in accordance with LBR 9013-3 and (2) a notice to all persons entitled to notice that any objection must be filed within 14 days, or such other time as specified by applicable Federal Rule of Bankruptcy Procedure or statute or as the Court may order, from the date of service as set forth on the certificate of service, if the relief sought is opposed, and that the Court is authorized to grant the relief requested without further notice unless a timely objection is filed.
2. Response. Unless otherwise ordered by the Court, a response memorandum must be filed if the relief sought by a motion or application is opposed. The response shall specifically designate the motion or application to which it responds and, subject to Fed. R. Bankr. P. 9006(f), shall be filed within 14 days from the date of service as set forth on the certificate of service attached to the motion or application. The response shall state with particularity the reasons that the motion or application is opposed.
3. Reply. Subject to Fed. R. Bankr. P. 9006(f), a reply may be filed within 7 days after the date of service shown on the certificate of service of the response. No additional briefing will be considered except upon leave of Court for good cause shown.
4. Effect of No Response. Failure to file a response on a timely basis may be cause for the Court to grant the motion or application as filed without further notice to the extent such action would not conflict with any Federal Rule of Bankruptcy or Civil Procedure.
5. No Oral Arguments on Motions. Motions and applications shall be decided without oral argument unless otherwise provided in these rules or a hearing is scheduled by the Court.

Last Revised: May 16, 2011

E. Local Bankruptcy Rule 9013-2

1. Page Limitation. No motion or response thereto, including written argument and cited authorities, shall exceed 20 pages in length, exclusive of appendices, unless the party has first sought and obtained leave of Court. Font size, including footnotes, shall be at least 12 point. Where such leave is granted, a table of contents containing a summary of all points raised shall be included with the brief or memorandum.
2. Supporting Evidence. If a motion, opposition brief, or reply brief requires the consideration of facts not appearing of record, a party shall serve and file copies of all documentary evidence and photographs that it intends to rely upon in addition to the affidavits required or permitted by the Federal Rules of Bankruptcy Procedure. In those

instances where a party deems it necessary, or the Federal Rules of Bankruptcy Procedure otherwise require that evidence, by way of deposition, be submitted with and/or incorporated into a motion, only those pages of the deposition which contain the pertinent testimony shall be attached to the motion. The party shall not file the entire deposition in support of the motion, as long as certain pages or portions thereof will suffice to establish the party's position.

3. Citations of Statutes and Regulations. All motions and briefs containing references to statutes or regulations shall cite the United States Code or the Code of Federal Regulations, or have attached thereto a copy of the statute or regulation.
4. Unreported Opinions. If an unreported opinion or an opinion available only through an electronic retrieval process is cited, a copy of the opinion shall be attached to the brief or memorandum, and such attachment shall be an exception to the 20 page limitation in (a) above.
5. Compliance. Failure to comply with any of the requirements of this Rule may be grounds for striking the motion or brief.

Last Revised: May 16, 2011

F. Local Bankruptcy Rule 9013-3

1. A certificate of service shall be appended to and served with any document tendered for filing which is required to be served (excepting any document required to be served together with a summons). The certificate of service shall be signed and shall:
 - a) Identify, with specificity, the document served;
 - b) State the date and method of service;
 - c) Identify, by name and address, each entity served; and
 - d) Contain or refer to an accompanying notice as required by LBR 9013-1(a).

Last Revised: May 16, 2011

VI. REVIEW PLEADINGS AND ORDER IN CASE

A. Case Management Orders

1. Court dates
 - a) Check judicial posting on website to see if new or updated standing orders or memoranda regarding Adversary procedures have been posted.
 - b) Failure to comply with the Court's pretrial order could result in sanctions, including dismissal of your case. In re McDowell, 163 B.R. 509, 512 (Bankr. N.D. Ohio 1994)
2. Discovery dates:
 - a) Plan ahead. A Court may not be inclined to grant a discovery extension if, for example, you wait until the week before the deadline to attempt scheduling a deposition.

3. Reservation of authority for filing of dispositive motions
 4. Reminder of efforts to be undertaken before motion practice
 5. Suggestion of communication with and civility toward opposing counsel. See *In re Mann*, 220 B.R. 351 (Bankr. N.D. Ohio 1998)
- B. Trial Orders
1. Witness/Exhibit lists
 2. Findings of fact/Conclusions of law
 3. Briefs
- C. Exhibits - Local Rule 9070 deals with exhibits:
1. Binder/Index/Mark with numbers if plaintiff/letters if defendant
 - a) Multi page exhibits must be numbered
 2. Best practice: Place in binder in anticipated order with tabs marking each exhibit. This helps the court follow your case and is useful for your witnesses.
- D. Review of pleadings
1. Must know what claim is and what disputed allegations exist/affirmative defenses.
 - a) This will help you form your discovery plan and the time needed to complete it.
 2. Check during case
 - a) Sometimes claim may take different direction
 - b) Amend as necessary and as promptly as possible
- E. Appeal - Rule 8001; 8002
1. Timely filing of appeal - 14 days unless extended
 2. Any other failure does not affect validity of appeal. The only critical error is not filing your notice of appeal.
 3. Certain motions will extend the time for filing an appeal: (1) a motion to amend or make additional findings of fact, (2) motion to alter or amend judgment, (3) motion for a new trial, (4) motion for relief from judgment.. FRBP 8002(b).
 - a) A notice of appeal filed before the resolution of any of the Rule 8002(b) motions will not be effective to appeal that motion. A notice, or amended notice of appeal must be filed with 14 days of the order disposing of the motion of a type list in FRBP 8002(b) in order to appeal that ruling.
 4. Best practice: Unless you are frequently appealing decisions, read rules on appeal each time an appeal is contemplated. Missing a deadline to appeal makes for an easy malpractice action. If your client is unsure and the deadline is approaching, prepare the notice of appeal. The document is easy to prepare and it will be ready in case there is a last minute decision to file.

VII. AUTOMATIC REFERRAL AND WITHDRAWAL OF REFERENCE

- A. The Bankruptcy Amendments and Federal Judgeship Act of 1984 vested the district courts with original jurisdiction over all cases arising under Title 11 of the Bankruptcy Code. Pursuant to 28 U.S.C. § 157, a district court may provide that cases under Title 11, proceedings under Title 11, and proceedings related to a case under Title 11 shall be referred to the bankruptcy judges for that district.
- B. 28 U.S.C. §157(d) provides that “[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section on its own motion or on timely motion of any party for cause shown.”
- C. Rule 5011(a) of the Federal Rules of Bankruptcy Procedure provides that, “[a] motion for withdrawal of a case or proceeding shall be heard by a district judge.”
- D. In most Districts, the motion to withdraw reference is filed with the bankruptcy court and then transferred to the District Court for determination

VIII. LITIGATION HOLDS

- A. Identifying Contents of/Procedures for Hold
 - 1. Understand Client’s Document Retention Policies
 - a) How/where are documents maintained (electronic and paper);
 - o Types of Documents: email, presentations, spreadsheets, databases, calendar appointments, paper files, notes, pictures, videos, data logs, etc.
 - ☐ Office locations: servers, laptops, desktops;
 - ☐ Mobile devices: phones, tablets; and
 - ☐ Home access: remote access.
 - b) When are documents destroyed?
 - c) Are back-ups maintained?
 - d) How difficult/costly is recovery from back-up source?
 - e) Who has Responsibility Over Documents?
 - o IT Department Controls;
 - o Manager Access.
 - 2. Identify Sources of Documents.
 - 3. Identify Types of Documents to Preserve.
- B. Consequences of Failing to Hold
 - 1. Adverse Inferences
 - 2. Monetary Sanctions

IX. SETTLEMENT ANALYSIS

- A. Know deadline for claims
- B. Know amount and nature of claims filed
- C. Avoidance actions
 - 1. Know change in claims pool which will potentially result if transfer is avoided
 - 2. Unsecured claim arising from avoided transfer can be filed 30 days after judgment becomes final - Rule 3002(c)(3)
- D. Best practice: communicate frequently with your client. Make sure your client has reasonable expectations regarding the range of potential settlement options.