

Calton
Statement

LANSING, MICHIGAN

JUDY B. CALTON
TELEPHONE (313) 465-7344
FAX (313) 465-7345
E-MAIL jbc@honigman.com

LAW OFFICES
HONIGMAN MILLER SCHWARTZ AND COHN LLP

2290 FIRST NATIONAL BUILDING
660 WOODWARD AVENUE
DETROIT, MICHIGAN 48226-3583
FAX (313) 465-8000

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✓ 01-BK-B

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of U.S. Courts
1 Columbus Circle
Washington, D.C. 20544

Re: *Proposed Amendments to the Federal Rules of Bankruptcy Procedure*

Dear Secretary:

The following comments on the Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1004, 2004, 204, 2015(a)(5), 4004, 9014 and 9027(a)(3), New Proposed Bankruptcy Rule 1004.1 and Proposed Amendments to Official Form 1 (the "Proposed Amendments") are on behalf of the Advisory Committee of the Eastern District of Michigan Bankruptcy Court,¹ the Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan and the Debtor/Creditor Section of the Detroit Metropolitan Bar Association.

Rule 7026

Rule 26 of the Federal Rules of Civil Procedure was amended effective December 1, 2000 to remove the prior authority to exempt cases by local rule from application of Rule 26(a), (d) and/or (f). Only those proceedings listed in Rule 26(a)(1)(E) are exempted; adversary proceedings in bankruptcy cases are not among the exemptions. Rule 26 is made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7026.

Local Bankruptcy Courts should have the flexibility to adopt local rules or issue standing orders exempting adversary proceedings or categories of adversary proceedings from the requirements of Rule 26(a), (d) and (f). We believe allowing local variations in procedures are desirable in view of the variations among districts in the size and nature of type of typical cases and judicial workload. In the Eastern District of Michigan Bankruptcy Court, approximately fifty percent (50%) of the adversary proceedings filed between January 1, 1999 and September 20, 2000 were to object or revoke discharge under 11 U.S.C. §727 or to determine dischargeability under 11 U.S.C. §523. It is common in such proceedings for the debtor to represent himself pro se and for little or no discovery to be taken. Requiring initial disclosures and scheduling conferences in such cases would unduly burden pro se debtors and litigants with limited funds. Also, adversary proceedings in the Eastern District of Michigan Bankruptcy Court often come on for trial within four to six months of the answer to the complaint being

¹ The Advisory Committee is comprised of the leadership of several Michigan-based bar groups concerned with bankruptcy practice. The Advisory Committee meets periodically with the Eastern District of Michigan Bankruptcy Judges on matters of interest to the bankruptcy bench and bar.

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filed. The inherent delays in commencing discovery imposed by Rules 26(a), (d) and (f) would slow down that pace.

Therefore, we suggest that the phrase "unless the court otherwise directs" be added at the beginning of Rule 7026.

Rule 9014

Bankruptcy Rule 9014(d) would require that all testimony of witnesses with respect to disputed facts in contested matters be taken in open court under Federal Rule of Civil Procedure 43(a). Although the Committee Note states that Bankruptcy Rule 9014(d) applies when "the motion cannot be decided without resolving a disputed material issue of fact", the rule itself is phrased more broadly to apply to all "disputed factual issues". Bankruptcy Judges should be allowed to use their discretion to determine whether there is a genuine issue as to any material fact before requiring an evidentiary hearing with live testimony. Further, the courts should have the discretion to take direct testimony by affidavit, allow deposition transcripts and transcripts of testimony from other hearings in the bankruptcy case subject to applicable rules of evidence. Otherwise, scarce judicial resources would be wasted and the costs to litigants increased in holding unnecessary evidentiary hearings.

We suggest that Rule 9014(d) provide that "[t]estimony of witnesses with respect to disputed genuine issues of material fact shall be taken under Rule 43(a), or in the court's discretion Rule 43(e)."

Very truly yours,


Judy B. Calton

JBC:jeb.lmt
Enclosure

cc: Honorable Ray Reynolds Graves
Honorable Steven Rhodes
Honorable Walter Shapero
Honorable Arthur J. Spector
Judith Greenstone Miller
Kay Kress

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JUDY B. CALTON

Ms. Calton counsels banks, finance companies, manufacturers and other business clients in commercial law, corporate reorganization and transactions, and represents her clients' interests in negotiations, disputes and in bankruptcy-related litigation. Ms. Calton is particularly qualified in questions of insolvency, bankruptcy and reorganization. She specializes in representing customers of insolvent corporations in work outs, bankruptcies and related litigation. In other matters, Ms. Calton represented a manufacturer with \$500 million a year in sales as debtor-in-possession, the bank group in one of the largest bankruptcy cases filed in the United States in 1994, successfully obtaining repayment in full of over \$100 million in prepetition indebtedness within a year of the commencement of the case, and represented the Chapter 7 trustee of a corporate debtor in litigation, recovering over \$15 million from insiders and former professionals of the corporation.

Ms. Calton was made a Partner in the firm in 1991 and is admitted to practice before numerous U.S. District Courts and the U.S. Courts of Appeals for the Sixth and Ninth Circuits.

An active member of the State Bar of Michigan, Ms. Calton is Co-Chair of the Debtor/Creditor Rights Committee. She sits on the Business Law Council of the State Bar and the Bankruptcy Advisory Committee for the Eastern District of Michigan. She authored the chapters on statutes of frauds and specific performance in *Michigan Contract Law* (J. Trentacosta, ed. 1998). She has written an article on the jury trial rights of trustees in bankruptcy proceedings (*Michigan Business Law Journal*, Vol.XV, Issue 4, 1993) and coauthored "Defending a Preference Action," which was published in the *Michigan Bar Journal* in July of 1993. While in law school, Ms. Calton coauthored the "1984 Annual Survey of Tort Law," published in the *Wayne Law Review*.

Ms. Calton is recognized as an expert on rules of procedure, testifying before the Judicial Conference Advisory Committee on Bankruptcy Rules, Civil Rules and Evidence Rules, writing commentary on the proposed amendments to the Federal Rules of Bankruptcy Procedure on behalf of the Bankruptcy Advisory Committee for the Eastern District of Michigan and on the local bankruptcy rules for the Eastern District of Michigan on behalf of the Debtor/Creditor Rights Committee. She has conducted business seminars for accountants on bankruptcy valuations and determining which companies would benefit from Chapter 11 bankruptcy protection. She addressed the General Contractors' Association on subcontractor bankruptcies.

Ms. Calton graduated with high honors from Wayne State University Law School, where she was elected to the legal academic honor society, Order of the Coif, was Associate Editor of the *Wayne Law Review*, and was awarded the Ira Spoon Award for her monograph on urban development. She earned her bachelor's degree, which was awarded with high honors in history and pre-law studies, from the University of Illinois at Champaign-Urbana. In the years between college graduation and law school, Ms. Calton was employed by the Internal Revenue Service.



2290 First National Building
660 Woodward Avenue
Detroit, Michigan 48226
Phone: 313 465-7344
Fax: 313 465-7345
jbc@honigman.com

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MILLER
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AND COHN