

02-BK-E



UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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Thomas J. Yerbich
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February 22, 2002

Hon. A. Thomas Small, Chair
Advisory Committee, Bankruptcy Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
One Columbus Circle N.E.
Washington, D.C. 20554-0002

Re: Rule 26 Disclosures in Contested Matters

Dear Judge Small:

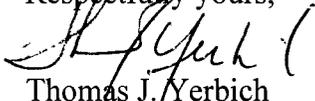
I have encountered another anomaly in Rule 9014. Rule 9014 incorporates Rule 7026, which in turn, incorporates Rule 26, Federal Rules of Civil Procedure. Prior to December 2000, Rule 26 permitted a "local rule option" with respect to the disclosures required by Rule 26(a), including the timing. The December 1, 2000 amendments to Rule 26 eliminated the "local rule option" but continues the authority of the court to modify the requirements on a case-specific basis. As literally written, because of the timing and triggering events, it is impossible to apply Rule 26(a), (e), and (f) in most, if not all, contested matters, and districts lack authority to modify the requirements of those provisions by local rule. [Rule 7016 does not apply in contested matters, therefore there is no pretrial or scheduling conference, which, unless otherwise ordered by the court, is the triggering event that starts the clock on the Rule 26(f) meeting (21 days before a scheduling conference) and the initial disclosures (14 days after the 26(f) meeting).]

Prior to December 2000, as permitted by Rule 26, this district adopted specific provisions regarding mandatory disclosures in certain contested matters, *e.g.*, relief from stay under Rule 4001, sale of estate property under Rule 6004, and assumption of contracts under Rule 6006. To make initial disclosures work in the context of those proceedings, it was necessary to make substantial changes to the timing, triggering events, and materials to be disclosed. These local rules are now inconsistent with the Federal Rules of Bankruptcy Procedure, thereby violating Rule 9029 and of questionable validity. Without the authority to modify the provisions of Rule 26, as a practical matter, unless the court enters an order in each case (a somewhat cumbersome process), a bankruptcy court can not compel parties to make initial disclosures (compliance therewith may be strictly a voluntary matter).

Hon. A. Thomas Small
February 22, 2002
Page 2

To remedy this situation, it is suggested that consideration be given to amending Rule 9104 by substituting for "7026" the following language "7026 subject to modification of the provisions of Rule 26(a) and (e), F.R.Civ.P. by local rule." For those districts, as this district, that wish to use the provisions of 26(a) in contested matters, they may, otherwise that subsection would seldom, if ever, come into play in contested matters. In those situations where a planning meeting may be necessary it would probably come after a status conference with the court and the matter would be part of the status conference order. The primary thrust is to permit adaptation of 26(a) to those contested matters in which it has substantial utility. Because of the timing, Rule 26(e), like 26(f), probably would have limited applicability in contested matters but giving local districts the option of amending it to make it fit would certainly not be inappropriate.

Respectfully yours,


Thomas J. Yerbich
Court Rules Attorney

cy: Hon. James K. Singleton, Jr., Chief District Judge, Alaska
Hon. Donald MacDonald IV, Chief Bankruptcy Judge, Alaska

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May 24, 2002

Thomas J. Yerbich
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222 West Seventh Avenue, Stop 4
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Dear Mr. Yerbich:

Thank you for your letter to Judge Small, suggesting an amendment to Bankruptcy Rule 9014. Your February 22, 2002, letter arrived at my office on May 1. The Advisory Committee on Bankruptcy Rules has approved an amendment to Rule 9014 which addresses the concerns expressed in your letter. The Advisory Committee will request permission from the Committee on Rules of Practice and Procedure ("Standing Committee") to publish the proposed amendment for public comment at the Standing Committee's June 10-11, 2002, meeting. The Standing Committee's actions on the proposed amendment will thereafter be posted on the Administrative Office website at www.uscourts.gov/rules.

We very much welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe