

# Memo

**To:** Commercial Law and Bankruptcy Section of the ISB  
**From:** Sheila R. Schwager, Chair of the Bankruptcy Local Rules Committee  
**CC:** LRC  
**Date:** 12/27/2012  
**Re:** Proposed Changes to Local Bankruptcy Rules Regarding 1) Deadlines to Object; and 2) Witness and Evidence Disclosures

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Dear Section Members,

This Memorandum sets forth certain issues that the Local Rules Committee (“**LRC**”) has been struggling with in regard to whether it would be helpful or harmful to require set deadlines for objections to Motions that are set for hearing and otherwise not addressed in the Local or Federal Bankruptcy Rules (“**Certain Motions**”); and whether to require further detail in evidentiary disclosures.

Several Section Members have reached out to the LRC and requested that the LRC look into modifying the Local Rules to require set objection deadlines to those Certain Motions and require more detailed evidentiary disclosures, so that all parties understand the disputed issues and are ready to proceed with the requisite evidentiary materials necessary to address those disputed issues at the time of hearing. Several other Section Members have responded that the informal nature in which many matters are resolved is cost efficient and different rules will create undue delay and hearings over procedures rather than the substantive issues. Essentially, “If it ain’t broke, don’t fix it.”

Due to the fact that the Commercial Law and Bankruptcy Section of the ISB generally works together in a professional and timely manner in their respective efforts to zealously represent their various client interests, the LRC is hesitant to change the rules, in the fear that it may have unintended consequences.

Thus, this memorandum requests the Section Members to think through these issues in each of their respective practices and note when a rule requiring more than what is required today for objection deadlines and/or evidentiary disclosures, would have facilitated or impeded the matter.

The LRC would greatly appreciate it if you could forward any questions, comments, suggestions, ideas, and/or specific proposed rule changes, as they arise, to Sheila R. Schwager, [srs@hteh.com](mailto:srs@hteh.com), along with your contact information, for any follow up questions by the Committee. If all comments could be provided by July 1, 2013, it would be greatly appreciated. The LRC can then address this issue in a more informed manner next year.

In that regard, below is a summary of the current relevant Local Rules and potential issues:

### **LBR 2002.2(c)**

LBR 2002.2(c), currently provides:

**Objection.** If the notice provides for the filing of an objection, a party objecting to an act or the entry of an order shall file with the clerk and serve on the moving party, a written objection within the time set forth in the notice. The objection shall state, with specificity, the grounds therefor.

Note that under this current rule, when the negative notice procedure is not used, and there is no other applicable Federal Bankruptcy Rule or Local Bankruptcy Rule setting forth an objection deadline, LBR 2002.2(c), can be utilized to provide for an objection deadline. The Moving Party simply refers to LBR 2002.2(c) and sets forth a reasonable time period for all written objections to be filed with the court.

Some questions arise as to whether and what consists of a reasonable objection deadline and what happens if someone appears at the hearing and makes an oral objection. Further, what occurs if the objection does not set forth the specific grounds, as required by the local rules? Lastly, as the parties can set their own deadlines, the lack of uniformity may lead to confusion.

In any event, there is a mechanism in place under the current rule to at least provide for an objection deadline that does not appear to be utilized on a frequent basis. Is this current rule sufficient?

### **LBR 9014.1**

**Witness Testimony at Hearings On Contested Matters.** This rule currently states:

**If a party intends to present evidence through witnesses at a hearing on a contested matter, such party shall so indicate on the initial or responsive pleadings or, alternatively, shall so indicate in a separate notice filed with the court and served on opposing parties not later than seven (7) days prior to such hearing.**

Note that although it is often the practice of the Section Members to identify the witnesses by names and to list the specific exhibits, the local rule only requires the filing to state the intention to present evidence through witness. In other words, the notice only has to alert the other side that the party intends to present evidence, not any specific information regarding the evidence. Further, there is no specific requirement under this rule for the exchange of exhibits prior to the hearing. This rule also does not appear to contemplate when the receiving party of the disclosure is to also indicate his or her intent to present evidence in light of the filing parties' stated intention, which may have been filed on the eve of 7 days prior to the hearing.

Presumably because it assists all parties to get to the issues at hand in the most efficient manner, it is the practice and professionalism of many Section Members to not only identify the known witnesses, but also the exhibits and to also timely exchange those exhibits. This practice, if it consists without a rule, arguably provides parties with the flexibility to introduce witnesses or exhibits not specifically disclosed, which may be necessary due to the expedited fashion that most issues come before the court. The problem with requiring certain deadlines and disclosures, is it takes out the flexibility and potential efficiencies of the current practice. Nevertheless, the other issue to consider is that without such required disclosures, parties may attend a hearing without the requisite parties and evidence because the issues have not been made clear. This could create unintended consequences or "sand bagging," or delays in continued hearings.