STATES' ASSOCIATION OF BANKRUPTCY ATTORNEYS – SABA

PO Box 262, Albuquerque, NM 87102-0262

February 15, 2011 10-BK-M

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurmond Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendments to Bankruptcy Rule
Establishment of Uniform Rule of National Admission/Local Counsel
for Governmental Units

Creation of National Uniform Chapter 13 Bankruptcy Plan

Dear Mr. McCabe:

The States' Association of Bankruptcy Attorneys ("SABA") respectfully requests that the Rules Committee on Bankruptcy Rules consider drafting two new uniform rules that would greatly assist in the administration of bankruptcy cases, reducing the costs and burden of those cases for the courts, governmental entities and debtors alike.

The first and simple proposed rule is that there should be a uniform rule for national admissions and local counsel requirements for governmental entities. At this time, the rules for allowing government counsel to appear in non-local districts are a crazy quilt of requirements. Most, but not all, districts allow counsel for the United States to appear without special permission. The rules for other governmental entities, though, are greatly varied. Some jurisdictions, such as Delaware, have in recent years removed virtually all restrictions for government counsel. Others, such as the Southern District of New York, treat government counsel like others, but have relatively simple and

expeditious rules for being admitted and do not require local counsel. Other jurisdictions, however, have difficult, time-consuming, and/or expensive processes for admission. In addition, a number of those courts also require that the government attorney must associate a local counsel, regardless of the extent or complexity of the matter in which the government is involved. Inasmuch as we are unaware of any problems that arise with respect to the liberal rules for appearance for U.S. counsel or in the districts where similar privileges are extended to state and local counsel, we respectfully suggest that it would be appropriate to create a global rule for government counsel. Attached is a discussion that sets out in more detail the proposed language and the rationale therefore.

The second request for proposed rulemaking concerns the need for a national uniform Chapter 13 plan. The Supreme Court's decision in *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356 (2006) emphasized the constitutional dimensions of the uniformity requirement in the Bankruptcy Clause. Its more recent decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2009) underscored the critical nature of the confirmation order in Chapter 13 (and the other chapters), while simultaneously directing bankruptcy courts in the strongest terms that they not only could, but *must* ensure that plans met the terms of the Code. In that bankruptcy filings have now reached the same levels as in the days immediately before the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005, it is clear that courts and the parties alike will greatly benefit from "systems engineering" measures that will assist with triage of the flood of cases and paperwork that come to governmental offices.

In that regard, while the Supreme Court's decision in *Espinosa* is, of course, the presently definitive ruling on whether the notice given met minimum constitutional standards, that does not change the fact that the plan at issue there included provisions that Rule 7004 required be brought as adversary proceedings, and that, consequently, was not served in accordance with the heightened notice requirements of Rule 7004. The failure to follow the rules makes it difficult to ensure that mail room staff personnel can recognize and identify the documents that will need to be routed to persons that are able to deal with them appropriately and in a timely fashion. (The short deadlines in bankruptcy cases only exacerbates those concerns). These problems are further increased for governmental entities by the current fiscal crisis that is likely to continue and deepen in the future. That crisis has resulted in reduced staff levels and shortened hours, making it even more difficult for counsel to have time to even glance at the flow of documents, even if each one might appear to be relatively short.

The confluence of these factors makes the present a timely occasion to consider the adoption of a *national uniform* plan in Chapter 13. A number of districts have already adopted or have considered adopting such plans. Such plans are undoubtedly an improvement on a totally *ad hoc* process, and they may aid the court in that particular district and counsel who represent debtors. For creditors and regulators, though, who may be brought into cases across the country the existence of up to 100 or more "uniform" plans is only a marginal improvement over the

current situation. To be truly effective and useful for *all* parties in the case, it is important that a single starting point be utilized.

In regards to the nature of that plan, we would suggest several points. We will provide more comments on specific provisions if rule-making proceeds on this proposal, but these are global suggestions

First, it should be as specific as possible and cover as many likely areas of attention as practicable. Again, the goal should be to have a *single* plan, not a framework for creating separate plans in each district.

Second, it should incorporate and be consistent with as many statutory requirements as possible and should provide that they are *not* modifiable absent affirmative written consent from the non-debtor party. Thus, for instance, it should specify the debts that are automatically excepted from discharge, and should provide that a proceeding to determine whether a debt qualifies for discharge (such as hardship for student loans) cannot be combined with the plan process absent such affirmative consent. The same would apply to efforts to determine the "extent, priority, or validity" of a lien. Similarly, the treatment for domestic support obligations and tax claims should also be referenced, correctly described, and not made subject to modification without affirmative consent. Where the Code is clear and specific, a party should be entitled to that treatment without needing to affirmatively defend its position

Third, where applicable, it should be made clear that the provisions selected for inclusion in the model plan are not necessarily the only ones that might be legal. Rather, they are selected as the ones that are viewed by the Committee as the most practical, cost-effective, least burdensome, or most protective of due process. In other words, this should be a "best practices" plan from which parties should have to choose to deviate and, as discussed below, if they do so, the deviation should be specifically and conspicuously noted.

Fourth, the plan should cover both substantive and procedural issues. For instance, it should specify not only what payments are to be made and when, but also how to deal with the perennial procedural conflict between plan terms that specify claim amounts and treatments and timely filed claims that contradict those plan terms. While many courts treat the plan as controlling, others have procedure to automatically reconcile claims after the bar date and modify the plan accordingly. We would support the latter approach which appears to be quite workable in light of the lengthy term of most plans, but, in any case, the issue should be resolved on a uniform basis so parties know their obligations.

Fifth, once the specific provisions are determined in the plan, the rule should provide that

the plan must note – on the first page – that the plan has changes from the model plan, note the specific paragraphs affected and, preferably, briefly describe the specific changes being made. It should further explicitly provide that, any changes that are *not* so referenced are invalid and do not bind any other party to the proceedings. The goal is to ensure that parties can have a clear and unequivocal understanding on first glance as to whether they need to review the plan or not. If the model plan incorporates statutory requirements and the party is satisfied with that treatment, the first page should tell the attorney – and more importantly, the mail room clerk – that no further action is necessary. If it does make changes, the clerk knows that such plans do need immediate attention by the attorney.

SABA strongly supports the development of a plan that meets these principles and would be willing to participate in any sort of review and writing process that is used to arrive at such a plan. While the process will undoubtedly take time, the net result will likely provide a greatly improved system for all parties, including debtors who will not have to pay counsel to invent the wheel anew with each successive case.

Very truly yours,

James C. Jacobsen
President, SABA

JCJ/amh
Attachment

National Admissions/Local Counsel Proposals

- **National admission recognizes the unique pressures that bankruptcy filings impose on other parties and should be treated like other national litigation.**

  - Unlike in other federal cases, debtors are allowed to force plaintiffs, who might not otherwise be subject to suit in the debtor's locale to leave their local jurisdiction and appear in the debtor's choice of forum. (This fact is aggravated by the liberal venue rules which allow a case to be filed in a location which has little connection to the everyday place of the debtor's affairs.) Thus, non-debtor lawyers are not seeking to enter jurisdictions where they are not admitted; instead they have been forced into that foreign court by the debtor, at which point they may be forced to comply with burdensome procedures and additional costs merely to continue to exercise their existing rights and retain their current counsel.

  - Cases assigned to the Judicial Panel on Multidistrict Litigation pose many similar issues to bankruptcy cases in this regard: there, too, for convenience, parties can be forced to litigate in a distant forum, which has no necessary connection with any of the issues, facts, or parties, in their particular case. In that situation, the Rules for such litigation recognize the burden this places on the parties and deals with it in exactly the fashion we have argued for. Rule 1.4 provides:

  > *Every member in good standing of the Bar of any district court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. Any attorney of record ... may continue to represent his or her client in any district court of the United States to which such action is transferred. Parties to any action transferred under Section 1407 are not required to obtain local counsel in the district to which such action is transferred.*

  If this is appropriate in multidistrict litigation, it is equally so in bankruptcy? This is particularly true when bankruptcy is a uniquely *national* subject area as to which the Constitution requires that Congress enact *uniform* laws.

  - The need to obtain admission to the local court and/or hire local counsel is particularly burdensome in light of the speed at which bankruptcy moves. "First day" orders routinely decide matters of great significance. An out-of-state party is severely hampered if it must first be admitted and obtain local counsel before it can even appear. When bankruptcy matters often proceed on expedited schedules, and statute of limitations are compressed to a few months, procedural barriers which might be manageable in other contexts can become major problems.

- **These issues are of particularly great concern to governmental entities.** They

have less ability to control where their debtors may live or hold their collateral than those who are voluntary creditors, or who do not act as regulators. Thus, states and localities often have to appear throughout the country and, unlike the federal government which has offices and staff nationwide, normally have no one working in the vicinity of where the case is being heard. Yet, despite that national presence of the federal government, most court rules in fact offer automatic admission to federal government employees – but not to employees of state and local governments. The burden of seeking admission in the distant jurisdiction is exacerbated by the lack of uniform rules on this topic.

In addition, government fiscal policies make it difficult or impossible for appearance fees to be authorized within the very short time periods in bankruptcy cases. As a result, government counsel often pay these fees out of their own pocket to ensure that the government will be able to appear at all! Congress has already authorized national admission for domestic support creditors -- the Attorneys General strongly urge that they should be given no less consideration when they must appear in a case on behalf of their citizens.

The States believe that by analogy to the rules for Multidistrict Litigation it would make sense to provide a simple, uniform admission policy for all counsel and have drafted their proposal below in that fashion. However, if the Rules Drafters do not wish to go that far initially, they would ask that it be provided for governmental entities in any event.

- **A national admission policy without relief from local counsel rules provides little meaningful relief for governmental entities. Conversely, such a rule serves no meaningful purpose for the court.**

    - Hiring such counsel can be extremely burdensome and expensive. Strict bidding and billing requirements for contracts by government agencies make it difficult to obtain counsel on an expedited basis. Thus, unless assistance can be obtained from a sister Attorney General's office, the government is unlikely to be able to participate in the opening phases of the case. This is even more true in the current fiscal crisis facing virtually every state. It is difficult for states to be able to even retain their attorneys on staff, much less send them out of state for appearances. Adding on the additional burden of paying for a second, unneeded local counsel is likely to preclude governments from being able to participate at all.

    - Abolishing *requirements* for local counsel does not mean they will never be used. Prudence dictates that states *will* normally work with the local Attorney General's office, or, if a case is involved and will require extended time before the foreign court, the State may well choose to hire a local counsel. But mandating such involvement, to the point of requiring that local counsel sign all pleadings and appear at all hearings as a number

of districts require, is very costly if applied to private counsel. Or if the local Attorney General Office is willing to assist, being forced to provide that level of service, is highly burdensome, disruptive of the work of the local office, and likely to dissuade them from being willing to assist.

- Moreover, because of bankruptcy's unique jurisdictional provisions, local counsel may often have no knowledge of the relevant issues. Even if a case is pending in Tennessee, what expertise will local counsel in that jurisdiction likely have with respect to issues of New York state tax law, for instance, that the New York state attorney assigned to the case will not have? Requiring such a duplicate presence serves no one's interests.

- There is reason in this era of electronic noticing, fax machines, emails, and conference calls, that local counsel are necessary to ensure that notice can be provided quickly or that the court may take emergency actions. Most local counsel are not closely involved with the case and would not be able to effectively substitute for the primary counsel if a substantive issue arises. Nor is there any guarantee that a counsel in the area will not have scheduling conflicts just as could be the case with respect to out-of-state counsel. In any event, it should be left to the good judgment of the party and its counsel as to whether, in an involved case, they wish to associate a local counsel. If necessary, parties will undoubtedly take this step of their own accord, if they do not believe it is necessary, they should not be second-guessed.

- **Relief from these rules is particularly appropriate for government counsel.**

  - Governmental counsel have no pecuniary interest in appearing out-of-state or obtaining additional work there. They are forced into those foreign courts by the debtor's choice, not their own. Thus, there is no likelihood that they will attempt to use these rules as a way of increasing their own practice or to avoid the control of the courts. To whatever extent such concerns dictate the structure of local rules applicable to private counsel, they do not apply to governmental counsel.

DRAFT RULE

The most likely place to add this is to Rule 9010:

Rule 9010(d). Admission to Practice and Local Counsel Requirements

(d) Any attorney who is admitted to practice before any bankruptcy court of the United States and is a member in good standing in all jurisdictions in which he or she is a member of the bar shall be entitled to practice in one or more cases in any bankruptcy court of the United States upon the following conditions:

(1) On or before the first time the attorney appears in court or files a pleading, he or she files with the clerk of the court a Certificate of Admissibility in a form to be prescribed by the Director of the Administrative Office for the United States Court, signed under penalty of perjury, which attests to his or her compliance with the requirements of this paragraph and his or her understanding that he or she has read and is subject to all local rules of the court;

(2) The Certificate of Admissibility shall further provide that the attorney understands and agrees that appearance in the bankruptcy court will subject the attorney to the disciplinary authority of the court to the same extent as if the attorney had been admitted on a motion *pro hac vice;* and

(3) Notwithstanding the foregoing, nothing herein will preclude a bankruptcy court from requiring that counsel who reside, have an office in, or appear regularly and substantially in multiple cases within the bankruptcy district be admitted to the local bar before being allowed to practice in the bankruptcy court.

(e) Any attorney who is admitted to the bankruptcy court under these provisions shall also be entitled to appear in the district court under the same conditions in appeals of any decisions rendered by the bankruptcy court, or in matters withdrawn from the bankruptcy court, by filing an updated Certificate of Admissibility with or before his or her first such appearance or filing of a pleading in the district court.

(f) Any attorney regularly employed by a governmental unit shall not be subject to any local counsel requirements prescribed in local rules of the bankruptcy or district courts when appearing on behalf of that governmental unit in the circumstances described in paragraphs (d) and (e).