

EFFECTIVE COMMUNICATION AMONG JUDGES, UNITED STATES TRUSTEES, AND STANDING TRUSTEES

NCBJ-UST Liaison Committee Task Force

APPROVED BY NCBJ BOARD ON OCTOBER 9, 2014

Federal Rule of Bankruptcy Procedure 9003 prohibits attorneys from having *ex parte* contact with judges concerning matters affecting a particular case or proceeding, but “does not preclude communications with the court to discuss general problems of administration and improvement of the bankruptcy administration, including the operation of the United States Trustee system” by the United States Trustees (“U.S. Trustees”), assistants to, employees, and agents of the U.S. Trustees. Fed. R. Bankr. P. 9003(b). In June 2014, the National Conference of Bankruptcy Judges (“NCBJ”)’s NCBJ-UST Liaison Committee created a task force (the “Task Force”) to explore ways to maximize effective communications between Chapter 12 and 13 trustees, U.S. Trustees and bankruptcy judges within the parameters of Federal Rule of Bankruptcy Procedure 9003 and ethical canons.

The Task Force¹ worked collaboratively to develop an Effective Communications Guide (the “Guide”) that articulates best practices, with the intent it would be shared among the various bankruptcy constituencies to improve Chapter 12 and Chapter 13 case administration. The ultimate goal of the Guide is to enhance case administration through direct communication and productive professional relationships among the judge, U.S. Trustee, and trustee communities, within the ethical parameters of the Rules of Professional Conduct, the Code of Conduct for United States Judges, and Bankruptcy Rule 9003.

THE ETHICAL RULES AND STATUTORY AUTHORITY

The Task Force recognizes that when a judge is asked to meet with a party who appears in his or her court, the judge must comply with the judicial conduct rules, and also that bankruptcy judges will want to ensure that their assessment of when, how, and with whom to communicate about case administration issues fits within the scope of conduct authorized by the controlling ethical guidelines. In this regard, the Model Rules of Professional Conduct and the Code of Conduct for United States Judges are especially crucial. Rule 3.5 of the Model Rules of Professional Conduct provides, in pertinent part:

Rule 3.5 - Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, . . . by means prohibited by law;*
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;*

...

In the Code of Conduct for United States Judges, Canon 1 requires judges

to uphold the integrity and independence of the judiciary

and Canon 2A provides that

[a] judge should ... act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

¹ The members of the Task Force are: Judge Colleen A. Brown, Chair, and Judge Laura S. Taylor, representing the bankruptcy judges, on behalf of the NCBJ; U.S. Trustee and Acting Deputy Director William Neary and U.S. Trustee Nancy Gargula, on behalf of the United States Trustee Program; Jan Sensenich, Chapter 12 and 13 Trustee, on behalf of the Chapter 12 Trustees; Joyce Babin and Marge Burks, Chapter 13 Trustees, on behalf of the Chapter 13 Trustees / National Association of Chapter Thirteen Trustees (“NACTT”).

Additionally, Bankruptcy Rule 9003(a) is essential to the analysis. It prohibits *ex parte* communication, and specifically recognizes the unique role of the U.S. Trustee professionals and their agents in the administration of bankruptcy cases, the corollary need for direct communication with bankruptcy judges. It provides as follows:

Rule 9003 Prohibition of Ex Parte Contacts

- (a) *General Prohibition. Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.*
- (b) *United States Trustee. Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communication with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.*

COMMUNICATION BETWEEN JUDGES AND TRUSTEES - WHY?

The notion that communication about bankruptcy administration is essential is inherent in the final sentence of Rule 9003(b). It makes absolutely clear that the general prohibition against judges talking with parties who appear in bankruptcy matters about cases does not apply when the discussion is about general administrative matters: “*This rule does not preclude communication with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.*”

Many judges and trustees have found that direct and regular communication about procedural and policy matters improves case administration. This increases efficiency, and benefits the courts, trustees, debtors, and creditors, as well as their representatives.

The U.S. Trustee has a unique role in the bankruptcy system as an administrator, regulator, and enforcer. Rule 9003 speaks to the U.S. Trustee’s role as administrator. The Bankruptcy Reform Act of 1978 removed the bankruptcy judge from the responsibilities for day-to-day administration of cases. Debtors, creditors, and third parties with adverse interests to the trustee were concerned that the Court, which previously appointed and supervised the trustee, might not impartially adjudicate their rights as adversaries of that trustee. To address these concerns, judicial and administrative functions within the bankruptcy system were bifurcated with the result that many of the administrative functions formerly performed by the court were placed within the Department of Justice through the creation of the Program. The Program became permanent and was expanded nationwide by the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986. Pub. L. No. 99-554, 100 Stat. 3088 (1986). Section 586 of title 28 sets forth the statutory duties of each U.S. Trustee. Included in the administrative functions assigned to the U.S. Trustee were the appointment and supervision of Chapter 12 and Chapter 13 trustees. 28 U.S.C. § 586(b), (c), (d), (e). Communications with the Court were undoubtedly anticipated as essential

when the U.S. Trustee assumed responsibility for these administrative functions as evidenced by the clear language of Rule 9003.

There are a number of administrative matters for which the U.S. Trustee provides guidance and oversight relating to the administration of Chapter 12 and Chapter 13 cases by the Chapter 12 and Chapter 13 standing trustees.² These include but are not limited to: designating the standing trustee as the presiding officer at the meeting of creditors (11 U.S.C., § 341, 28 U.S.C. § 586(b)); requiring standing trustees to work with the U.S. Trustee and Clerk of Court to ensure prompt scheduling and noticing of the meetings of creditors within the time frame of Rule 2003; approving standing trustees as providers of personal financial management education courses for debtors pursuant to 11 U.S.C. § 111, in addition to overseeing the performance of their statutory duties as set forth in the Code. Coordinating the calendars for § 341 meetings, debtor personal financial education courses and confirmation hearings among the U.S. Trustee, standing trustees and the Court is but one example of where communication among these parties will improve case administration. It has also proved very effective to include trustees and the U.S. Trustee in discussions of Local Rules or Standing Orders that impact the practices within a District to bring about uniformity, about what services should be included in any “presumed reasonable fee” or “no look fee” a District may adopt for debtors’ counsel, as well as the planning and presentation of attorney training about, for example, new forms, model plans, and case administration.

In addition to the administrative functions of appointing and supervising Chapter 12 and Chapter 13 trustees, the U.S. Trustee also takes actions in bankruptcy cases to promote the integrity and efficiency of the bankruptcy system for the benefit of all stakeholders – debtors, creditors, and the public. The Program monitors the conduct of bankruptcy parties and acts to ensure compliance with applicable laws and procedures. Communications relating to matters in which the U.S. Trustee is taking such supervisory or regulatory actions in bankruptcy cases should not occur with the judges, as these guidelines make clear.

Judges and trustees also have unique and complementary roles in Chapter 12 and 13 case administration. There is no question that disputes in individual cases must be addressed by court hearings and decisions. However, there are many procedural and/or policy decisions that affect large numbers of cases, e.g., procedures for confirmation hearings, routine orders, calendar procedures, and hearing schedules, which are effectively and appropriately addressed through judge – trustee – U.S. Trustee conversations. If Chapter 12/13 case administration is viewed as an integrated system involving judges, trustees, attorneys, debtors, and creditors, it must also be recognized that each of these players has a unique perspective. It is also true that there are many different configurations of meetings that are available for the conversations about Chapter 12/13 procedures, depending on the nature of the topic under consideration. Small meetings, bench – bar meetings, as well as CLE seminars, are all tools through which productive communication may occur. Often, when one participant hears the perspective of another, he or she may become persuaded to do something different, in order to increase efficiency, save money, redirect scarce economic resources, and/or improve service to debtors, creditors, their representatives, and the court. Post-BAPCPA, the roles of bankruptcy judge, U.S. Trustee and trustees are connected and complementary in many facets of case administration. If they are in regular communication, each can learn more about the other participants’ priorities, operating constraints, and long-term vision – and they can do this within the

² See *Handbook for Chapter 12 Trustees*, July 1, 2013, and *Handbook for Chapter 13 Standing Trustees*, October 1, 2012 located on the United States Trustee Program’s website at: <http://www.justice.gov/ust>.

parameters of Bankruptcy Rule 9003(b), as long as all participants comply with the controlling ethical canons.

SUGGESTIONS FOR COMMUNICATION AMONG BANKRUPTCY JUDGES, STANDING TRUSTEES, AND U.S. TRUSTEES

Meetings to discuss administrative matters between judges, the U.S. Trustee, and trustees are encouraged. The first parameter to put in place is that substantive issues pending before the Court must never be discussed at an administrative meeting. All parties must take care to conduct the meeting in a way that does not create even the appearance of impropriety. Transparency is an excellent tool for accomplishing this. Transparency can be created by publicizing the fact that a trustee, group of trustees and/or U.S. Trustee representatives holds regular meetings with the Judge(s).

It is also helpful to be intentional about who attends the administrative meetings, depending upon the topic to be discussed. Some topics might be most appropriately discussed at a meeting of a standing trustee and the judge before whom s/he appears. For other topics, it might be appropriate to include all of the standing trustees and judges of a district. And for yet other topics, it would be most effective and appropriate to invite representatives of the United States Trustee Program. The Judge(s) will need to decide that. In some instances, individual meetings may serve a specific purpose which would be difficult to facilitate in a larger meeting or by written communication. For example, there may be practices that are not “visible” to the debtor/creditor bar that may help or hinder effective administration, e.g., the needs of case trustees to administer cases on a wide scale using specialized software with some limitations, the administrative parameters for court chambers and clerks for CM/ECF, and the needs of the United States Trustee Program to consider policies affecting consistent administration of all chapters or cases, which will be most expeditiously addressed by the court and trustee alone.

It may also be helpful for a judge to provide direct feedback to a trustee about his or her operational approach to certain types of matters in order to improve case administration, and that can be delivered more effectively in a small one-on-one meeting. A judge or trustee may also want to meet alone in order to share the early concept of an idea for an administrative change before the change is distributed for public comment and/or implementation, to explore if both think it worthy of further consideration. If they agree it may have merit, then they can decide how and when to share it with others in the bankruptcy community, so all constituents who will be affected by it have an opportunity for input before it takes a final shape.

Under Rule 9003, and the ethical canons, it is permissible for a judge, the U.S. Trustee and trustee(s) within a district to meet as long as only administrative issues are discussed. In order to be sure that all parties are comfortable with the topics to be discussed – and can have time to prepare in advance – the Task Force recommends that meetings be scheduled, and the person initiating the meeting circulates a proposed agenda, in advance. If a court opts not to meet with just a trustee, utilizing an advisory council or other group to discuss case administrative matters may be an effective vehicle for obtaining input from all constituents, e.g., debtor bar, creditor bar, standing trustees, U.S. Trustees, and the court, and therefore that is also encouraged.

COMMUNICATION CONSIDERATIONS AND PITFALLS TO AVOID IN COMMUNICATIONS AMONG JUDGES, TRUSTEES, AND U.S. TRUSTEES

The overarching objective in the administrative meeting is two-fold: to improve case administration and avoid the appearance of impropriety. To do this requires that all participants focus on both the opportunities for improving effective case administration and the confines of the Rules of Professional Conduct, the Canons of the Code of Conduct for United States Judges, and Bankruptcy Rule 9003, at all times. The following list is provided to help trustee and U.S. Trustee participants to achieve that dual objective:

- Be careful not to engage in communications or make comments that lead to the perception that the trustee or U.S. Trustee enjoys special access or influence because of the communication or his/her role as a standing trustee/U.S. Trustee.
- Be careful not to reference pending cases or issues that are before the court during direct communications with a bankruptcy judge.
- Avoid making statements that imply, or leave the perception, that the issue before the court in a particular case was previously discussed privately with the judge.
- Remember that perceptions are often based on what is observed, what is said, or what is not said. Be mindful of where your interactions occur, when your interactions occur, with whom your interactions occur, and the words you use to avoid even an appearance of impropriety or an inference the judge may lack impartiality.
- Limit discussion during administrative meetings to only matters that involve case administration, improvement of bankruptcy administration, or trustee operational matters, such as, staffing matters that directly impact the administration of Chapter 12 and Chapter 13 bankruptcy cases, United States Trustee Program Chapter 12 and Chapter 13 Handbook and policy changes that impact case administration, and administrative challenges of, and potential assistance to, *pro se* Chapter 12 and Chapter 13 debtors.
- Avoid the appearance of engaging in any communication that is or could be perceived as an *ex parte* communication, i.e., about a specific case or open matter.
- Be transparent that meetings with the bankruptcy judge(s) are held to discuss matters related to case administration, and share the outcome of the meetings with the bar, to the extent it will have an impact on the bar or bankruptcy practice generally in that court.
- Schedule meetings in advance, prepare an agenda if it will facilitate the purpose of the meeting, share the agenda with all who will attend the meeting, and stick to the agenda (so no one is caught by surprise or faced with a topic that might raise some ethical concern).

- Consider utilizing an advisory council or other group as a sounding board to discuss case administration matters which includes all bankruptcy constituents, e.g. debtor bar, creditor bar, standing trustees, U.S. Trustee, and the Court, either in lieu of the smaller meetings or as a next step after such meetings.
- Participate in activities of the bar association, bankruptcy section, or other organized groups of attorneys who practice bankruptcy law, but scrupulously avoid discussing pending cases or issues during conversations there when any bankruptcy judge is present.
- In a multi-judge district, take into account whether, given the agenda, it would be appropriate to include all judges.
- Bear in mind that administrative meetings are not intended to short-cut processes already in place for addressing changes to local rules or procedures; for example, if a change that is agreed upon at an administrative meeting would typically require a 30-day notice and comment period, that should still happen.
- Be cognizant of, and do not run afoul of, the mandates the ethical rules, the applicable Codes of Conduct, and Rule 9003 impose on all parties.

SUGGESTIONS FOR LEVELS OF INCLUSIVENESS	
<i>PARTICIPANTS</i>	<i>NATURE OF ADMINISTRATIVE TOPICS</i>
Judge and Standing Trustee	Discrete issues re specific Judge/Trustee processes
All Judges and Standing Trustees in a District	Preliminary discussions of issues in common to procedures within a District, with subsequent notice to the U.S. Trustee
Judges, Trustees and U.S. Trustee	Preliminary discussion of issues in common to local procedures in a district which directly impact Trustee/U.S. Trustee policy or responsibilities
Judges, Trustees, U.S. Trustee and Bar Representatives	Issues which could possibly have a broad impact on practice within a District
Open Bench-Bar Meeting	Issues which are likely to have a broad impact on practice within a District
CLE Seminar	Changes which will impact on practice within a District