

Newsletter

Volume XXII, Number 3 Debtor-Creditor Section, Oregon State Bar Fall 2003

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By Gary Scharff

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Gary Scharff

As the year draws to a close, I would like to share thoughts and invitations for involvement in the Section in several areas.

Judicial feedback process.

This spring I received a call from an attorney from the East seeking input on practice points in Oregon and a possible need for local representation. The caller spoke of our local judges with familiarity and respect, and indicated he was a former bankruptcy court judge now in private practice. He obviously loved being a judge and was proud of what he considered a strong career as a prolific jurist from an important jurisdiction, producing numerous opinions on important cases and issues over the years. I sensed he was surprised and perhaps confused that his career on the bench had ended.

I have no idea of the circumstances surrounding his Circuit's decision not to reappoint a judge who appeared to be highly intelligent and a master of bankruptcy law. However, the decision not to reappoint may have resulted in part from the structure of our relationship as judges and attorneys: perhaps this former judge had not heard from lawyers what he needed to hear to help him identify and work on areas of possible weakness. Committed judges undoubtedly face difficulties obtaining clear, realistic and useful feedback on their judicial performance.

Judges at the trial court level do not typically observe one another in practice, and the people who do – the attorneys practicing before them – are disadvantaged in their ability to provide constructive feedback. In our adversary system judges and attorneys may disagree, but the judge always has the final word. The attorney knows s/he will appear before the judge again and may feel limited in the courtroom in pointing out mistakes in the nature of human error. The judge/attorney power difference essential to the rule of law, and ethics rules such as the ban on ex parte contact, overlies the most cordial of professional relationships between attorneys and judges.

The client of course is the unseen participant in the background. Sensible attorneys know they will inevitably lose arguments and disagree with judges in valid conflicts in the interpretation of law and facts. However, if the judge has made a "human" mistake – forgetting or misunderstanding a key item of evidence, inadvertently treating attorney argument as evidence; becoming short-tempered after a long hearing or when a hoped-for compromise is revealed to be unavailable after all – serious harm to clients may result unrelated to the law. A motion to stay or a formal appeal may not be a practical or appropriate remedy. Just as judges constantly warn practitioners that they privately (or not so privately) take note of who their problem attorneys are, so attorneys inevitably develop a sense of the strengths and weaknesses of their judges, and would value the opportunity to provide constructive

feedback. While it is inappropriate to provide feedback on the content of a legal decision, attorneys are sensitive to how aspects of the judicial process unrelated to the law may – at least from the attorney’s standpoint – prevent the attorney from protecting the client’s interests properly.

The point of raising this is not to complain; I, and I believe most attorneys in our Section who appear in bankruptcy court in Oregon, have a high regard for our judges. However, the bench, like the bar, is an institution made up of human beings who grow through constructive feedback, like everyone else. In my view we can only improve the quality of justice in our court system, and the service we provide to our clients and the public, by finding a meaningful way to enable judges to see themselves and their conduct from a different perspective, through the constructive comments of the intelligent professionals who appear before them.

Earlier this year I raised with several of our bankruptcy judges in Oregon the question of whether and how attorneys appearing before them might provide useful feedback. There was widespread support among the judges for this; Judge Perris indicated the Ninth Circuit is looking to facilitate a feedback process. I assume that practitioners appearing frequently before our judges would appreciate the opportunity to provide (at their election and discretion) constructive input while respecting the institutional boundaries between judge and attorney-advocate. At this point I see the key questions to be how to facilitate free and candid communication while preserving anonymity and avoiding ex parte contact, and whether the process of developing feedback should be incorporated into methods already in place or under development elsewhere, including in the Ninth Circuit.

As Section members who practice in the Portland area may be aware, the Judicial Liaison Committee of the Multnomah Bar Association has developed an “MBA Judicial Feedback” procedure, including a carefully-developed form, whereby litigators can provide feedback to state Circuit Court judges in Multnomah County. The MBA’s approach is a model of simplicity, breadth of useful information, and brevity. The form provides on one side of a sheet of paper three points to be addressed by the attorney. First, the type of proceeding is specified – such as jury trial, court trial, settlement conference, or matter resolved prior to trial – as well as the nature of the case (civil, criminal, family law, other) and the outcome (client won, lost, compromised, other).

Second, the form lists 12 features of judicial performance – (1) willingness to ignore irrelevant considerations, such as race, sexual orientation, religion, status of lawyers or parties; (2) judicial demeanor; (3) attentiveness; (4) diligence and punctuality; (5) timeliness of decisions; (6) practical approach; (7) accessibility; (8) neutrality and objectivity regarding legal issues; (9) knowledge and application of law; (10) effective oral and written communication; (11) court-

room and calendar management; and (12) courtesy toward jurors, lawyers, litigants and witnesses. Only two categories of comment are permitted for each factor – NI (needs improvement) and E (very good to excellent).

Finally, there is a space for written comments. To assure anonymity there is no reference to the particular matter on which the attorney appeared. The attorney writes only the name of the judge on the outside of the completed and sealed form and sends it to the MBA Court Liaison Committee, which sends it to the Presiding Judge, who in turn forwards the form unopened to the judge named on the outside of the form. An attorney should use the form only if s/he has appeared personally before the judge on the matter, and had an adversary proceeding before the judge, and (unless the matter was resolved by settlement) a verdict, judgment or final order was entered on the matter. (To see or download a copy of the MBA’s judicial feedback form go to the MBA’s website at www.mbabar.org and on the home page you will find a link to the form and statement of procedures.)

The challenges to judicial practice in state court may differ in important respects from the challenges our judges face in bankruptcy court, where, among other things, timing is often crucial and the equitable dimension of numerous issues requiring adjudication introduces broad areas of discretionary power where the legal standards are unclear or conflicting. Nonetheless, the twelve features of judicial conduct noted in the MBA form represent positive values and, I believe, a useful framework to assist judges as they consider both their own judicial style and how they are perceived by the attorneys who come before them.

The MBA approach of completing a form is only one option for providing feedback. Another method, apparently in use in other jurisdictions, is to find a respected attorney – an experienced “gray hair” type who may be retired or simply not practicing before the court in question – who will volunteer his or her services as a communication channel. This lawyer is trusted to listen carefully to the practitioner and to articulate that attorney’s feedback to the judge. The esteemed status of this intermediary may help the practitioner be both candid and disciplined in offering thoughtful feedback, and should encourage the judge to be attentive and open to the commentary.

I will continue to monitor what the Ninth Circuit considers by way of feedback practices and will explore further with our judges what might be useful to them. It is also appropriate to survey what is being done around the country before undertaking a plan here. I welcome volunteers who would like to join me in this project. For those not inclined to work on the project itself, I invite you to consider the above ideas from the standpoint of your own practice and contact me. (Telephone – 503-493-4353; email – gs@scharfflaw.com.)

Campaign for Equal Justice. The campaign for 2003-04 is now underway, and again we find ourselves as a Section fortunate enough to enjoy a significant fund balance. Please consider whether, like last year, we should donate to this valuable project in 2004. In 2002 the Section voted by a wide majority to make a donation of \$2,500. With the State's unemployment rate still high and the negative economy hitting the lower income brackets - populated by many of our members' clients - especially hard, I believe another \$2,500 donation from the Section is appropriate. The Executive Committee is developing its budget for 2004. Please come to the Annual Meeting prepared to vote on whether a Section contribution should be made in 2004.

Tax policy resource. For those of you interested in the tax policy issues raised in my From the Chair column of this past summer, you may wish to check out the New York Times Magazine of Sunday, September 14, 2003, where in an extended article Paul Krugman explores the development of the antitax movement in this country since the late 1970s. The online link is www.NYTimes.com

New Listserv resource. In the summer edition, I discussed the use of the Section Listserv for communicating questions and comments on various topics of law and practice. Executive Committee member Tom Renn, along with Bar general counsel George Riemer and other Bar personnel, have put together a separate, "opt-in" listserv to allow for wide-ranging give and take among lawyers on the subject of law and practice. The Section Listserv going forward will be limited to official, Section-related communications.

If you have any suggestions or comments concerning areas where the Section may be of better service to you as Section member or to the public, please feel free to contact me (telephone - 503-493-4353; email - gs@scharfflaw.com) or any of the chairs of our various Section committees noted below.

SECTION COMMITTEES AND CHAIRS:

Annual Meeting

Susan Ford - 503-227-1111

Consumer Bankruptcy

Mike Scott - 503-236-0209

Continuing Legal Education

Miles Monson - 503-646-9230

Legislative Action

Gary Blacklidge - 503-295-266

Moot Court Competition

Judge Randall Dunn - 503-326-4175

Newsletter

Deborah Guyol - 503-281-2466

Pro Bono Activities

Valerie Auerbach - 503-228-6044

Saturday Session

Doug Schultz - 541-686-8833

Many thanks to the committee chairs and to all Section members for your contributions as professionals to our legal system and to the public.

Debtor-Creditor Newsletter

The Debtor-Creditor Newsletter is published three times a year by the Debtor-Creditor Section, Oregon State Bar, P.O. Box 1689, Lake Oswego, OR 97035.

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The purpose of this publication is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities.

THE ABC'S OF ECF

By **Charlene Hiss**

Chief Deputy Clerk and ECF Project Manager
U.S. Bankruptcy Court for the District of Oregon

Electronic Case Files (ECF) is the new case management and electronic case file system for the federal courts. It is also sometimes referred to as CM/ECF. The ECF system will allow the court to maintain case documents in electronic form (*e.g.*, by scanning the paper documents), where they may be viewed on the Public Access to Court Electronic Records (PACER) system. It will also allow attorneys and some others to electronically file court documents via the Internet.

WHEN IS ECF COMING TO THE BANKRUPTCY COURT FOR THE DISTRICT OF OREGON?

The court is preparing for an October or November 2003 launch of the ECF system, possibly with a small pilot group of registered users who will file documents electronically. At the conclusion of the pilot period in early 2004, ECF will be made available to all attorneys. Before they can access ECF, all users will be required to attend training administered by the court or, if they are already using ECF in other districts, demonstrate their knowledge of ECF and their familiarity with the ECF procedures adopted by this court.

WHAT DOES ECF OFFER?

- Ability to file documents with the court 24 hours per day, 7 days per week
- Automatic e-mail notification of case activity
- Reduced paper, photocopy, postage, courier, and document storage costs
- 24-hour Internet access (via PACER) to case information and documents, primarily those filed on and after the date of the court's initial conversion to the ECF system
- Ability to download and print documents from PACER
- Concurrent access to case files and documents by multiple parties
- No waiting in line or unavailable files at the clerk's office

WHAT DO I NEED TO USE ECF?

To view court documents via PACER you need:

- An Internet connection and Netscape Navigator (minimum v. 4.7) or Internet Explorer (minimum v. 5.5).

- A PACER account. To obtain an account (if you don't already have one), contact the PACER Service Center at (800) 676-6856 or visit their website at *pacers.psc.uscourts.gov*. If you already have a PACER account for BANCAP, it will remain active and useful for ECF.

- Adobe Acrobat Reader (can be downloaded at no cost from the Adobe web site).

To electronically file documents with the court, in addition to the items listed for PACER viewing, you need:

- Word processing software (*e.g.*, WordPerfect or Word) to create documents.
- A **full** version of Adobe Acrobat to convert documents to text-based portable document format (pdf). Although newer versions of many word processing software products have this functionality, Adobe Acrobat is preferred because it provides better compression and converts formatting features more reliably.
- Anti-virus software that has "live update" capability with signature update service (*e.g.*, Symantec).
- A scanner for documents not created on your computer (*e.g.*, attachments and exhibits) is also recommended.

To use these products, you will need a computer that is reasonably powerful and Windows compatible. An absolute minimum configuration would be: Intel PIII 500Mhz; 64MB RAM; 10GB hard disk with 500MB free space; 15-inch monitor; CD-ROM; 56K modem and Internet access account with e-mail; and Windows NT, 2000 or XP.

A **preferred** configuration would be: Intel Pentium 4 (2.4 GHz or better) with 533FSB and 512 cache CPU; minimum 128MB DDR SRAM memory (256MB or 512MB is better); 40GB hard drive (80GB is better); graphics adapter with 32MB memory (64MB is better); CD-RW drive (CDRW/DVD combo is better); 17-inch monitor capable of 1280X1024 resolution (tilt portrait feature is preferable); scanner capable of 300dpi (600 dpi is better; flat bed preferred); Windows XP; Microsoft Suite (*e.g.*, Word, Excel); Adobe Acrobat; Anti-Virus software with regular (*e.g.*, weekly) signature update service.

Minimum filers can probably use a 56K modem and a dial up Internet service depending on their facility's telephone system capability to achieve an acceptable baud rate. High volume filers should strongly consider high speed Internet access (*e.g.*, DSL or cable).

Note: If using DSL or other high speed Internet access, such as cable, it is highly recommended that firewall software be installed and activated to prevent hackers from attaining access through the Internet service.

Note: The Court deploys multiple layers of virus protection and updates its virus definitions at least daily.

IS THERE SOFTWARE TO HELP ME PREPARE PETITIONS FOR ELECTRONIC FILING?

Yes, several bankruptcy software vendors have developed products that greatly simplify the process of filing bankruptcy petitions. You may want to check with attorneys who file bankruptcy cases in other ECF courts (*e.g.*, Western District of Washington) about their experience with these products.

HOW DOES ECF WORK?

ECF accepts documents in portable document format (PDF). Documents, other than previously created exhibits that cannot be converted to text-based PDF, must be created in text-based PDF rather than imaged (*i.e.*, scanned) because text documents are much smaller than imaged documents. The PDF text version of a typical document is only 20 percent of the size of its imaged version. Therefore, an imaged document can take five to ten times as long to transfer and uses five to ten times more computer storage.

Text-based PDF is searchable and retains a document's original formatting, so the pages, fonts, etc. are preserved.

HOW DO I FILE A DOCUMENT WITH THE ECF SYSTEM?

- Create the document using word processing software.
- Save the document in text-based PDF format.
- Log onto the court's ECF system, using a court-issued login and password.
- Follow the set of simple prompts to provide information about the case, party and document to be filed.
- Attach the PDF document and submit it to the court for filing (by pressing a submit button).
- Save or print the ECF electronic receipt e-mailed from the court confirming that the document was filed.

ARE THERE FEES?

There are no added fees for filing documents over the Internet using ECF. Existing document filing fees do apply and will be paid by electronic filers using an Internet credit card payment program. This program allows an attorney to file several documents requiring fees and then pay in one transaction. Attorneys may use either a credit card or a debit card with a credit card logo on it, and receive a receipt number for each transaction for use in reconciling their card statement. They may also run a report which displays the detail (*e.g.*, date paid, case number and document filed, receipt number, and amount) for all transactions over a specified period of time.

Electronic access to court data is available through PACER. Attorneys and litigants receive one free copy of documents filed electronically in their cases; additional copies are available for viewing or downloading at seven cents per

page, with a maximum \$2.10 fee for documents of 30 pages or more.

Attorneys may wish to establish a business or personal credit card account specifically for filing fees. The following are suggestions from members of the Washington Western bar on using credit cards for the payment of filing fees:

- Obtain a sufficient credit limit on the card. Communicate with the credit card company about how you will be using the credit card. Most credit card companies are willing to work with you on obtaining a higher limit for this usage.
- Obtain a credit card for which you can track your balance and limit over the Internet.
- For bookkeeping purposes, use the card only for court costs. Since filing fees have to be paid through trust accounts, one check can be cut from the trust account to pay all filing fees for the month.
- Establish the credit card through a bank that you deal with regularly and that provides you with the most advantages.

HOW WILL SIGNATURES BE HANDLED?

The court will issue logins and passwords to all electronic filers. Using your login and password to electronically file a document is deemed to constitute your signature under FRBP 9011.

Electronic filers must obtain all required signatures on all documents which require original signatures (including stipulations and other consent documents), and maintain them for the time period specified in the court's ECF General Order. When electronically filing such documents, the filer must indicate all signatures with /s/ (Name), by which the filer is certifying under penalty of perjury that the named party has signed the original on file. The filer must provide the original document for review upon request of the court or an interested party.

WHAT ABOUT SERVICE?

The Court will serve all notices, orders, judgments, etc. through the Bankruptcy Noticing Center (BNC). Documents mailed by the BNC generally take a minimum of 4 days from the date they are entered into the system to arrive at their destinations.

To obtain documents issued by the court moments after entry via e-mail or fax, you are encouraged to sign up for Electronic Bankruptcy Noticing (EBN). For further information, visit the EBN's website at www.EBNuscourts.com or call 1-877-837-3424. Electronic Bankruptcy Noticing is free, and technical support is provided.

Under ECF, whenever a document is filed electronically, the filing party is automatically sent a Notice of Electronic Filing (NEF) via electronic means at the time of filing. All other parties who are ECF participants also receive the NEF by e-mail for cases in which they are involved, and may

register to receive notice in other cases. The NEF contains a hyperlink which allows the recipient "one free look" at the document filed through PACER, including the ability to print or save it. ECF users may choose to receive individual notification of each filing or a daily summary report, and may also register multiple e-mail addresses for this purpose.

Participation in the ECF system constitutes consent to electronic service and notice of pleadings and papers, except for certain documents (*e.g.*, summons and complaint in an adversary proceeding under FRBP 7004) specified in the court's General Order on Electronic Filing of Case Documents.

WHAT KIND OF TRAINING WILL BE PROVIDED?

The court will offer classes for attorneys and their staff at the court's Portland and Eugene locations. Attorneys must complete the training or demonstrate their knowledge of the court's ECF procedures in order to become registered users of ECF. Prior to this training, attorneys and their staff will be required to familiarize themselves with ECF by going through computer-based training modules which will be posted to this site.

WHEN WILL PROCEDURES BE AVAILABLE?

The Clerk has drafted an ECF General Order and Administrative Procedures and may add a Participants/Style Guide. Each is currently being reviewed by a committee of Court, Bar, and United States Trustee representatives, with a goal of adoption by the Court in October.

In the meantime, in anticipation of ECF, the Court has amended some local rules relating to document preparation. These amendments are set forth in General Order 03-1.

WHO TO CONTACT

For further information, contact Charlene Hiss, ECF Project Manager and Chief Deputy Clerk, at (503) 326-2231 x 171.

The Debtor-Creditor Newsletter will accept camera-ready display ads

Advertising will be limited to those entities which provide goods and services to section members. Cost and ad sizes are:

Quarter page	\$150
Half page	\$250
Full page	\$450

For information, write: **Deborah S. Guyol**
5161 NE Wistaria Drive, Portland, Oregon 97213

SOME FRIENDLY REMINDERS FROM THE BANKRUPTCY COURT CLERK'S OFFICE

By **Hon. Randall L. Dunn** and
the Intake Staff of the Clerk's Office

The bankruptcy court for the District of Oregon is fortunate to have a very high quality and hard working staff in the clerk's office. Attorneys and the public most often interface with the Intake Department. The Intake staff is one of the best resources for assistance that can be found at the bankruptcy court. To make the best use of their time and minimize problems with filings, avoid the following errors and omissions.

I. EMERGENCY PETITIONS.

For the Intake staff to provide the services you need, they need to know: 1) what the emergency is (foreclosure, repossession, garnishment, etc.); and 2) when the emergency event is scheduled to occur (in 10 minutes, tomorrow, next week). The clerk's staff are aware that emergency deliveries of petitions or pleadings that need immediate attention in terms of case numbers and file stamped copies at 4:25 p.m., just prior to closing, sometimes are unavoidable. Such "emergency" deliveries, attended by immediate expectations for action, should not be made on a regular basis and cannot be accommodated as a matter of course. The clerk's staff do the best they can, often in high-pressure circumstances, but chronic last minute filers cannot expect to make their emergencies the emergencies of the Intake staff on a regular basis.

II. INCOMPLETE PETITIONS.

Day in and day out, the Intake staff see the following, easily correctable problems with bankruptcy petitions that pro se debtors and attorneys seek to file:

1. Debtors' names are not spelled correctly (*e.g.*, Jennifer).
2. Wife's name will have a "Jr." or "Sr." indication, same as husband.
3. The debtor's name on the petition does not match the signature (*e.g.*, Elizabeth may sign as Beth) or is inconsistent (*e.g.*, Elizabeth one time and Beth the next), or the debtor will sign with a generation indicator, such as "Jr.," but not include it in the caption.
4. Social security numbers are incorrect. (We are getting more telephone calls from people who say they never have filed bankruptcy or lived in Oregon, but a bankruptcy case is showing up on their credit report. Verification by the attorney prior to filing would help immensely.)

5. Addresses are missing or incomplete.
6. Boxes on page 1 of the petition are not checked (e.g., venue, estimated creditors, etc.).
7. Information with respect to pending or prior bankruptcy cases on the top of page 2 of the petition is not provided.
8. Required information for Exhibit C is missing.
9. The petition is not signed where required.
10. Petitions are not presented in order, or enough copies are not provided.
11. Petitions are presented with more than the required numbers of copies. (One or two extras are not a problem. Five or six are a bit much!)

III. CHECKS.

1. Checks are unsigned or not made payable for the correct amount(s).
2. Checks for payments to a Trustee are sent to the court, or Trustee payments are sent to the court and made payable to the court, with no explanation as to what the check(s) are for. (We mainly receive such checks from debtors, but most of the debtors making payments other than filing fees are represented. Attorneys should be sure their debtor clients understand what payments they must make and to whom.)

IV. MISCELLANEOUS CONCERNS.

1. Drop-offs at 4:15 p.m. or later with multiple copies that the messenger or office staff want back immediately with time stamps. Use common sense. It is not always convenient or possible to time stamp and hand back copies of multiple documents late in the business day. If multiple time-stamped copies are needed, send them earlier in the afternoon, or expect to pick them up in the morning of the following business day.
2. Cover letters indicating that staff will call back at a particular time for filing time or case number. The Intake staff work on emergency petitions as soon as possible, and provide exemplary service. However, to tell the court when certain actions must or will be taken is unrealistic and irritating. (Some such directives have been received with time deadlines that pass even before the subject documents are delivered!)
3. If an attorney has questions about an Order Returning Documents, please call to discuss such questions so that the clerk's office does not need to return documents over and over again. Such unanswered questions delay processing of the subject documents and create unnecessary work for the clerk's staff.

4. Please do not write in the upper right corners of documents where the court file-stamps documents.
5. Please do not staple documents in the middle or right corners. Such stapling makes it difficult to time-stamp documents. The documents either must be hand-stamped, or taken apart, time-stamped and restapled.
6. A guaranteed way to generate ill will in the clerk's office is to attempt to play one member of the clerk's staff off against another. A person will say that he or she called the phone desk and was told something different from what he or she is hearing at the counter. The Intake staff communicate very well with one another and try to let one another know on a regular basis what is happening with current communications from attorneys and pro se parties. Your reputation for honesty and consideration in your dealings with court staff is important to you and to your clients!
7. Do not call the phone desk and assume that projects can be unloaded on the clerk's staff through such calls. Some callers are upset when informed that requests for copies to be made or matrices run must be made in person at the clerk's office or through a request in writing. (A common response is: "Since when? I've always done it this way." The response of the Intake staff is "Not!")

CONCLUSION

We hope that the foregoing comments and observations are taken constructively. Addressing these issues with appropriate corrective action will ensure that filings with the bankruptcy court clerk's office proceed smoothly, create good will for you and your firms, and reduce stress in your lives.

PROFESSIONALS BENEFIT THE ESTATE: SO WHAT?

By Russ Garrett
Bullivant Houser Bailey

It is not unusual, in a chapter 7 case, for a professional who has not been formally retained to benefit the estate. For example, the debtor files bankruptcy and schedules a personal injury claim. The debtor's personal injury attorney, with or without knowledge of the bankruptcy case, settles the personal injury claim postpetition but does not obtain approval of the court or the trustee. Assuming that the settlement is fair and beneficial, and that the estate will receive the settlement funds, should the professional be paid his administrative expense claim?

In a second scenario, the debtors enter into a purchase and sale or earnest money agreement to sell their home after filing bankruptcy. The prospective sale is not intended to confer any benefit on the bankruptcy estate – in fact, the sale is not disclosed to the trustee. Two days before the scheduled closing, the trustee learns of the sale. The debtors realize they cannot force an abandonment within 48 hours and offer to allow the trustee to take some of the debtors' equity for the benefit of the estate if the trustee will take control of the sale of the property, obtain the necessary orders on shortened time and close the transaction. Assuming the trustee does not simultaneously employ the realtors, are the realtors entitled to be paid their fee as an administrative expense?

In the foregoing examples, both the personal injury attorney and the real estate professional benefited the estate. In each example, the professionals were not employed before performing work, or even before closing the transaction.

EMPLOYMENT AND COMPENSATION REQUIREMENTS

To be compensated as a professional, a person must comply with a number of Bankruptcy Code sections, including §330(a)(1)(A). That section requires compensation to be reasonable subject to §327, meaning that the professional person must first be employed. Under §327, the trustee, with the court's approval, may employ one or more attorneys that do not hold an interest adverse to the bankruptcy estate and that are disinterested. Lawyers may be employed for a specified special purpose under §327(e) if they have already represented the debtor, if employment by the trustee is in the best interest of the estate, and if they do not hold any interest adverse to the debtor or to the estate with respect to the matter for which they are to be employed.

The issues that arise in this area are whether the professional was employed before the work was done (giving rise to a *nunc pro tunc* motion) or whether lawyers can represent the interest of the estate either generally or specifically as outlined above. In a local decision on point, *In re Rice*, 224 BR 464, 470 (Bankr. D Or 1998), the court held that debtor's counsel could not represent the trustee in continuation of the litigation where the dispute over allocation of potential personal injury damages placed the debtor and the trustee "in a direct adversarial position," and where both the debtor and the estate had a "continuing interest in the personal injury claims." See also *In re Mercury*, 280 BR 35 (Bankr SDNY 2002) (lawyers who represented debtors prepetition in their personal injury claim violated their duties to debtor by seeking to represent trustee postpetition).

To receive compensation from the bankruptcy estate, the attorney must make a detailed application to the bankruptcy court outlining the services rendered, the time expended and the expenses incurred, and disclosing, among other things, previous payments received and any agree-

ment for future compensation. FRBP 2016(a). The court must determine whether the services were rendered and the amounts were reasonable. See *Land v. First Nat'l Bank of Alamosa*, 943 F2d 1265, 1266-1267 (10th Cir 1991). See also *Matter of Diamond Mortgage Corp.*, 77 BR 597, 601-602 (Bankr ED Mich 1987) (since the trustee did not ask counsel to perform any services and since the court was unaware that counsel was performing services, the entry of a *nunc pro tunc* order was not justified under the exceptional circumstances rule or any other rule).

NUNC PRO TUNC ORDERS

As illustrated above, trustees often must file motions for nunc pro tunc approval of employment of professionals before the professionals can be paid. Take the case of the real estate agent. If all the work was completed before the employment was sought, should the realtor be employed and paid as an administrative expense claim?

According to *Atkins v. Wain*, 69 F3d 970, 976 (9th Cir 1995), a professional must first satisfy the criteria for employment of §327. If the applicant satisfies §327, then, for an employment order to be entered nunc pro tunc, the applicant must also satisfy the two requirements set forth in *In re THC Fin. Corp.*, 837 F2d 389 (9th Cir. 1988). The *THC Financial* test requires the professional both to satisfactorily explain its failure to obtain pre-employment approval and to demonstrate that its services significantly benefited the estate. Fees are awarded only in exceptional circumstances. The benefit to the bankruptcy estate must be significant. *In re THC Fin. Corp.*, 837 F2d at 392. In considering the justification for failing to obtain prior judicial approval, the court may evaluate the nine factors set forth in *Twinton Properties Partnership*, 27 BR 817, 819-20 (Bankr MD Tenn 1983). All the *Twinton Properties* criteria need not be satisfied, however. *Atkins v. Wain*, 69 F3d at 975.

WHO MAY EMPLOY – EXCEPTIONS

Under *Atkins*, the court must first address the applicant's qualifications under §327. Section 327(a) provides that only the trustee is authorized to employ a professional person. This is supported by FRBP 2014, which states that "an order approving the employment of attorneys . . . or other professionals pursuant to Section 327 . . . of the Code shall be made only on application of the trustee or committee." (Emphasis added). Despite the clear language of §327(a)(e) and FRBP 2014, the court in *Atkins v. Wain* nevertheless allowed an applicant's motion for *nunc pro tunc* employment over the objection of the debtor. 69 F3d at 978. However, in *Atkins*, the debtors-in-possession previously promised the professional that they would employ the professional. In light of those facts, the court allowed the professional to file the motion to employ itself.

Under §327(a) or (e), the trustee may employ a professional person with court approval if the employment is in the best interest of the estate and if the professional holds

no interest adverse to the estate. In essence, the professional must be disinterested. A disinterested person, according to §101(14), is, among other things, a person who is not a creditor. Even employment under §327(e) (employment for specified special purpose) requires that the attorney not hold any interest adverse to the debtor or to the estate with respect to the matter on which attorney is to be employed.

An application to become employed must state the specific facts showing the necessity for employment, the professional services to be rendered, any proposed arrangement for compensation and all of the applicant's connections with the debtor, creditors, and any party in interest. FRBP 2014.

Retroactive appointment of counsel is approved only in extraordinary circumstances. The BAP in *In re Crook*, 79 BR 475 (9th Cir BAP 1987), held that mere negligence does not constitute exceptional circumstances justifying the entry of a retroactive order. *See also In re Arkansas Co.*, 798 F2d 645 (3rd Cir 1986) (inadvertence on the part of counsel is not an extraordinary circumstance). Similarly, one who has been denied fees by the bankruptcy court for failure to become employed may not recover fees in state court on the theory of quantum meruit or otherwise. *In re Shirley*, 134 BR 940, 944 & n.6 (9th Cir BAP 1992). Courts applying the standard recognize that this approach is harsh. *See F/S Airlease II, Inc. v. Simon*, 844 F2d 99, 108 (3rd Cir 1988) (applying a slightly different test than *Atkins*):

In most cases in which *nunc pro tunc* approval has been sought, the applicant has performed services of value. To this extent, there will be some unjust enrichment if compensation is not authorized. Because that is the unavoidable consequence of the statutory requirement of prior approval, we agree with the statement by the court in *In re Mason*, 66 B.R. 297, 307 (Bankr. D. N.J. 1986), that the "fact that the applicant's services were beneficial to the debtor's estate is immaterial to this court's decision regarding *nunc pro tunc* approval."

This merely illustrates the courts' reluctance to grant *nunc pro tunc* orders.

The court in *Atkins* granted the accounting firm applying for *nunc pro tunc* employment its order. The court relied upon the undisputed engagement by the debtors of the accountants postpetition and on an emergency basis. It was also undisputed in *Atkins* that the debtors had promised to seek court authorization for employment of the accountants. Finally, it was undisputed that the postpetition benefit to the estate was substantial, the debtors were solvent, the creditors were paid in full, and the professionals had relied upon the debtors' representations for employment. *Atkins v. Wain*, 69 F3d at 978.

CONCLUSION

With few exceptions, payment to professionals as administrative expense claimants, requires rigid adherence to the rules and timelines. Those representing professionals should be aware of the rules and timelines. Professionals should inquire about the existence of a bankruptcy before settling any claim or closing any transaction.

Finally, lawyers who previously represented the debtor may find themselves caught in a hopeless conflict of interest, particularly in the personal injury area where the claims of the debtor still may be structured, for settlement purposes or otherwise, as exempt, such as loss of past and future earnings. If a conflict is clear, employment and compensation will likely be denied whether or not employment is applied for in advance.

SATURDAY SESSION

By **Richard J. Parker**
Parker Bush & Lane

The annual Saturday Session was held on September 6th at the Sweetbriar Inn. The session was well attended by judges, trustees, and attorneys. The three main topics were attorney conflict scheduling for §341(a) meetings, motions for relief from stay, and electronic filing. There were also brief discussions and comments by the U.S. Trustee and the judges on other topics.

Judge Radcliffe delivered the introduction to the meeting, highlighting the volume of cases the court is experiencing. In the past year, over 25,000 cases were filed, as well as more than 7,000 motions for relief.

For the time being, the Eugene bankruptcy court will remain where it is - its prospective move has been scheduled for some time in 2006. The lease for the Portland bankruptcy court has been renewed for 7 years. (Terry Dunn added later that the Portland Court will get new carpets). Judge Radcliffe also requested that defaults in adversary proceedings include not only the date of the service in the case, but also the issuance date of the summons.

Diane Tebelius was next on the agenda, providing some insights into the operation of the office of the U.S. Trustee. She commented on a recent Montana case in which a law firm was denied its \$1,000,000 fee application and required to disgorge its \$800,000 retainer, due to a decision by the bankruptcy judge that the firm had not adequately disclosed its prepetition representation of a secured creditor. The firm also was found to have obtained an inadequate waiver.

Ms. Tebelius also commented on the continuing emphasis on §707(b), the upcoming change to electronic case filing and the issue of attorney fee unbundling. The office of the U.S. Trustee is very concerned about debtors appearing at §341(a) meetings without counsel.

She also discussed bankruptcy reform legislation, and said her office will be ready if and when it passes. The Eastern District of Washington is a pilot project for debtor audits and so far nearly every petition reviewed has had problems in varying degrees, including unlisted assets and incorrect values. Many of the problems are material, though very few have an effect on the outcome of the case.

The next speaker, Terry Dunn, Clerk of the Court, reported that planning for electronic filing (CMECF) is well underway. He recommended that we all watch the court web page for announcements. (Chapter 13 attorneys should check it now for GO 03-02, relating to attorney fees in chapter 13.) He added that chapter 12 has been restored, that court opinions back to the early 1990's are now on the web page, and that Rose Thrush is working on a compendium of local rules, general orders and the new bankruptcy rules. He also reminded all attorneys about the corporate disclosure requirements.

Perhaps the most important discussion was the changes that will come about as a result of CMECF. As everyone should know, signatures must now be in black ink and may not blur the typed text of the document. There are to be no more documents with text on 2 sides. *See GO 03-01*.

In the future, all notices will come from the bankruptcy noticing center. If you would like to get notices by fax or email rather than postal transmission, you can call 877-837-3424 or sign up at ebnuscourts.com. If you opt for fax or email notices, you will no longer get mailed notices. Rick Yarnall suggested that people who opt for this have two ISPs, since failure to get a notice due to the failure of your ISP will be considered your fault.

The first panel discussion was on attorney scheduling and §341(a) meetings.

Once the first phase of CMECF is in place (about November 7, 2003), you will no longer be able to use LBF 102 to indicate dates unavailable. The §341(a) date you get is the date you get. The office of the U.S. Trustee is taking the position that re-sets can be requested for emergency or compelling circumstances, such as medical reasons, but not for vacations, conflicts with other cases and so on. Judge Alley stated that the courts would review such matters, but probably only for abuse of discretion by the Trustee.

The next comments were by Judge Dunn with respect to the clerks office. The intake desk asks that when you have an emergency, you state the nature of the emergency and when the dreaded event will take place. This will help them when they are confronted with multiple emergency filings. They also notice when the same attorney always has an emergency.

The clerks have been tracking the most common and easily correctible mistakes, including the following: name misspelled; "Jr." on the name of the wife; name and signature inconsistent; wrong Social Security numbers; boxes unchecked; not listing prior bankruptcy filings; unsigned checks; checks that should go to Rick Yarnall being sent to the court; and the number of copies and the order of pages in petitions.

Their pet peeves include the following: staples in the middle of the page or on the right rather than on the left; writing in the file stamp area; cover letters giving the time you will call in to get information; and lawyers unloading their work on the clerk. They also notice when attorneys try to play one clerk off against another – for example: "I was told on the phone that I could do this."

In the second discussion Judge Perris addressed motions for relief. The default rate for these motions is about 2 out of 3. Due to the increased volume of cases and motions, the court is looking for a way to streamline the process. That effort has resulted in new forms currently being tested (forms 720.70 and 720.90). There is a standard Order and a combined motion and response form. There was discussion about possible changes in the forms.

Next, Judge Alley commented on ECF. Training sessions are coming and the bottom line is that there will be a shift in some of the labor from the clerks office to the attorney. When a response to a motion is filed, the attorney will need to link it to the motion (self-docketing). A handout discusses the required equipment. Payment for filing will be by credit card. It is not yet clear if a debit card will work. It is suggested that lawyers dedicate one card for bankruptcy filings only.

Judge Alley added that there is no way to delete or unsend; if you have such a problem, do not try to fix it yourself, but call the court administrator. This advice is not, however, to be considered a license to have the court staff fix all of our problems. We need to have our own information technology people work out the basics for us. Among the subsidiary items are that original signatures will have to be maintained for 10 years and Rule 11 will apply to electronic submissions. In addition, the new Bankruptcy Rules and future procedures contain several items relating to privacy – for example, the petition will no longer show the full social security number. Instead, that number will be submitted separately and not be subject to public access. It will still show on the §341(a) notices mailed to parties in interest. Also, names of children and credit account numbers should not be shown in the petition.

All facets of CMECF should be in place by mid-January 2004. Welcome to the 21st Century.

NINTH CIRCUIT CASE NOTES

By **Karl E. Hausafus**

Preston Gates & Ellis, LLP

PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER § 105(a)

In re Dyer, 322 F3d 1178 (9th Cir 2003)

Debtor's father-in-law helped Debtor and wife purchase a home by providing \$143,000 for the down payment and later paying off their \$100,000 mortgage. Father required an executed and notarized demand note and trust deed but did not record the trust deed. Debtor later divorced and filed for bankruptcy and Father subsequently, but without knowledge of the filing, recorded the trust deed. Trustee demanded that father reconvey the deed, father refused, and trustee brought an adversary proceeding for violation of the automatic stay. Bankruptcy court awarded trustee \$151,439 as, in the alternative, sanctions, attorneys' fees or punitive damages, and an additional \$50,000 in punitive damages. Father appealed and district court reversed on the grounds that portions of the trustee's fees were incurred in litigating issues unrelated to the automatic stay violation, and that punitive damages were not available. Trustee appealed.

The Ninth Circuit agreed that the Bankruptcy Court exceeded its authority in awarding punitive damages. While §362(h) provides for punitive damages to an individual harmed by a willful violation of the automatic stay, the parties agreed that a trustee is not an "individual" under the Code. The court therefore analyzed the award under §105(a). It confirmed that an award of civil sanctions may be made under §105(a), so long as it is limited to compensatory damages, attorney fees and the offending creditor's compliance. However, in a matter of first impression, the court concluded that punitive damages are not available under §105(a). A punitive award is, in essence, a **criminal** contempt sanction, as it is intended neither to coerce compliance nor to compensate for actual damages. Due process requires that certain procedural protections accompany such an award – procedures that a bankruptcy court is ill-equipped to provide, such as a jury trial. Therefore, aside from "relatively mild non-compensatory fines" (the definition of which the court left for another day), punitive damages are outside the power of §105(a). The court further held that such a punitive award cannot be upheld under the bankruptcy court's inherent sanction authority for the same due process reasons.

STUDENT LOAN CREDITORS CAN HAVE HALF THEIR CAKE AND EAT IT TOO

In re Saxman, 325 F3d 1168 (9th Cir 2003)

Debtor sought to discharge his student loans on the basis of undue hardship under §523(a)(8). Bankruptcy court found that repayment would cause undue hardship and therefore discharged the entire \$83,927 loan. On appeal, the district court vacated the opinion and remanded for proceedings consistent with *In re Myrvang*, 232 F3d 1116 (9th Cir 2000), which the district court interpreted as permitting a partial discharge. Debtor appealed.

In an issue of first impression, the Ninth Circuit held that bankruptcy courts may exercise their equitable authority under §105(a) to partially discharge student loans. The court found that, following *Myrvang*, it is generally recognized that an all-or-nothing approach to dischargeability of student loans contravenes Congress's intent in granting bankruptcy courts the equitable authority to enforce provisions of the Code. However, in order to grant such partial discharge, the substantive requirements for undue hardship, as set forth in *In re Brunner*, 831 F2d 395 (2nd Cir 1987), must be met as to that portion of the debt.

CAN'T SUE THE UST

In re Balsler, 327 F3d 903 (9th Cir 2003)

Involuntary petitions were filed against three debtors, and the cases were administratively consolidated. Debtors consented to the appointment of an examiner, who was selected by the United States Trustee. Two creditors contacted the UST to complain about the examiner's conduct and asset sale, but the UST determined the examiner committed no fraud or wrongdoing. Creditors later filed an adversary proceeding against the UST alleging breach of his statutory duty to supervise the administration of the debtors' estate. The district court dismissed the complaint on the basis of sovereign and judicial immunity.

The Ninth Circuit affirmed, holding that an action against a UST, acting in his or her official capacity, is considered an action against the United States and the UST is therefore entitled to sovereign immunity. The court also held, in an issue of apparent first impression, that quasi-judicial immunity covers the conduct undertaken by USTs in the course of their employment. The court noted that USTs have historically assumed judicial functions of the bankruptcy courts and that many of their duties are part of the judicial function. The court therefore held that USTs have quasi-judicial immunity for actions undertaken in the course of their employment.

CREDITOR GETS WINDFALL, BUT NOT SUBROGATION

In re Bevan, 327 F3d 994 (9th Cir 2003)

Creditor obtained relief from the automatic stay to foreclose its trust deed on Debtor's real property and purchased that property at the foreclosure sale.

Although the foreclosure eliminated an IRS lien upon the property, Creditor settled with the IRS in order to eliminate IRS's right of redemption. Creditor later filed a notice transferring the IRS claim into Creditor's name on the basis of equitable subrogation. Debtor objected but the bankruptcy court allowed the claim. The district court affirmed.

The Ninth Circuit reversed. Equitable subrogation is not appropriate where the Creditor purchases property at foreclosure sale and pays off a lien creditor with redemption rights in order to preserve a windfall from the bargain purchase price. In making such a payment, the Creditor is acting as a volunteer and is not seeking to preserve its interest. The court held that allowing subrogation would therefore be inequitable.

HE SHOULD HAVE BOUGHT THE EXTENDED HOME WARRANTY – §549(A) DOES NOT CREATE AN EXCEPTION TO THE STAY

40235 Washington St Corp v. Lusardi,
329 F3d 1076 (9th Cir 2003)

Debtor company incorporated eight days prior to purchasing real property that was scheduled to be sold at county tax auction, then filed chapter 11. Although informed of the bankruptcy, the County went ahead with foreclosure sale and Lusardi, unaware of the filing, was the winning bidder. While the bankruptcy court later dismissed the chapter 11, debtor remained in possession of the property and Lusardi sued in state and federal court for declaratory relief and to quiet title. Debtor asserted that Lusardi never obtained title because of the automatic stay. Lusardi claimed that §549(c) provides an exception to the automatic stay and that he was entitled to reimbursement under California state tax law. District court agreed that §549(c) provides an exception, but held that Lusardi didn't meet the requirements for the exception, and therefore granted declaratory relief in debtor's favor.

The Ninth Circuit held that §549(c) **does not** create an exception to the automatic stay. Section 549 concerns the ability of a trustee to avoid postpetition transfers of property, and subsection (c) protects bona fide purchasers who had no knowledge of the bankruptcy case and who meet certain other requirements. Section 549 concerns avoidance actions by the trustee, not postpetition transfers that are already void under the automatic stay. The purpose of §549 is to provide a just resolution when the debtor itself initiates an unauthorized postpetition transfer of property. The court noted that neither its own decisions assuming the existence of the exception, nor cases in other circuits holding that the

exception exists, considered the textual, structural and policy arguments, and that the clear weight of judicial reasoning supported its contrary view. Furthermore, while California tax law required a reimbursement prior to voiding a deed, the court held that law is preempted by the Code.

CORPORATE OFFICER NOT A "FIDUCIARY" FOR § 523(A)(4) PURPOSES

In re Cantrell, 329 F.3d 1119 (9th Cir 2003)

In a case decided under California law, the Ninth Circuit held that a corporate officer is not a "fiduciary" within the meaning of §523(a)(4)'s discharge exception for fraud or defalcation in a fiduciary capacity. For purposes of §523(a)(4), a fiduciary relationship arises from an express or technical trust imposed before and without reference to the wrongdoing that caused the debt. While federal law governs the definition of "fiduciary," state law determines whether the requisite trust relationship exists. Under California law, although officers and directors are imbued with the fiduciary duties of an agent and with certain duties of a trustee, they are not trustees with respect to corporate assets. Therefore, the corporate officer was not a fiduciary in relation to those assets for purposes of §523(a)(4).

DON'T FILE A PROOF OF CLAIM IF YOU WANT EVER TO ASSERT SOVEREIGN IMMUNITY

In re Harleston, 331 F3d 699 (9th Cir 2003)

Debtors filed chapter 13 and California Board of Equalization filed fully secured proof of claim. Debtors objected to the claim and the bankruptcy court set an evidentiary hearing to determine its secured status. The case was converted to chapter 7, the hearing was struck for want of prosecution, and the debtors received a discharge. When the Board later brought collection proceedings, the debtors sought a declaratory judgment that the debt had been discharged and the Board moved for judgment on the pleadings, asserting Eleventh Amendment immunity. The bankruptcy court denied the motion and the BAP affirmed, concluding that the Board had waived sovereign immunity by filing its proof of claim. The Board appealed.

The Ninth Circuit noted the Supreme Court has held that a state, by filing a proof of claim, waives its sovereign immunity with respect to adjudication of that claim. *Gardner v New Jersey*, 329 US 565, 67 S Ct 467 (1947). The Ninth Circuit later extended the scope of this waiver to include a waiver of immunity with respect to adjudication of any estate claims that arise from the same transaction or occurrence as the state's claim. Here the debtors' declaratory action arose from the same transaction or occurrence as the state's claim. The Board therefore waived immunity by filing its proof of claim.

SANCTIONS FOLLOW BAD FAITH FILING

In re Silberkraus, 336 F3d 864 (9th Cir 2003)

Lessee of commercial real property exercised option to purchase the property. Lessor failed to close the sale and lessee sued for specific performance. Lessor filed chapter 11 and bankruptcy court granted lessee relief to pursue litigation to judgment. The bankruptcy court held that the proposed plan impermissibly gerrymandered the claims of lessee and debtor's real estate agent (entitled to receive commission upon exercise of option) into a class separate from other general unsecured creditors. When debtor missed the deadline for filing an amended plan, lessee and agent moved for sanctions. The debtor conceded that reorganization was impossible over the objections of lessee and agent, and the court converted the case to chapter 7. After determining that there was sufficient equity in the real property to pay most, if not all, of the claims the court imposed sanctions on the debtor for filing bankruptcy for an improper purpose. The debtor appealed the award and the district court and Ninth Circuit affirmed.

Debtor argued a number of procedural issues, all of which the court rejected. The court also held that, on a motion for sanctions, a court must consider both frivolousness and improper purpose on a sliding scale: the more compelling the showing as to one element, the less decisive need be the showing for the other. After determining that a court may infer the purpose of a filing from the consequences of a pleading or motion, the court held that an improper purpose and frivolous filing existed based upon the facts that the case was filed two days before a trial was to be scheduled and that reorganization was impossible over the objections of the lessee and agent.

WOMBATS 2004

WOMBATS – Women Bankruptcy Attorneys – announces its 2004 schedule of brown-bag lunch meetings. Speakers have been confirmed for the first two meetings. Watch for announcements for the remaining meetings.

January 29, 2004

Brad Tellam on the disciplinary process in Oregon – what to do if a complaint is filed against you

April 1, 2004

Diane Tebelius, US Trustee for this region, and Peter Jarvis will discuss *In re Jore*, a Montana case on disclosure of conflicts of interest in applications for appointment in bankruptcy cases

- May 27, 2004
- September 23, 2004
- December 2, 2004

All meetings are held in the 8th floor conference room of the US Bankruptcy Court in Portland, from 11:45 to 1:15. Please contact Laura Walker, lwalker@chbh.com, with questions, comments, or ideas for speakers and topics, or to be added to the WOMBATS email list.

NINTH CIRCUIT BAP CASE NOTES

By **Matthew A. Arbaugh**

Farleigh, Wada & Witt, PC

BALANCING OF EQUITIES IS PROPER TEST FOR DETERMINING WHETHER TO ANNUL THE STAY

In re Fjeldsted, 293 BR 12 (9th Cir BAP 2003)

The BAP reviewed a bankruptcy court ruling related to the purchase of property at a foreclosure sale after a bankruptcy filing. The sale had been postponed two hours due to the debtor's bankruptcy filing. The eventual purchasers of the property missed the announcement and were informed of the postponement but not the reason. The sale went on despite the filing and the property was purchased by individuals with no knowledge of the bankruptcy. The debtor attempted to set aside the sale as a violation the automatic stay. The bankruptcy court retroactively annulled the stay and allowed the sale.

The BAP found the purchaser was a bona fide purchaser but that status alone was neither an exception to the stay nor cause to annul the stay. After reviewing the existing law on the issue, the BAP announced the test for determining when cause exists to annul the automatic stay: the BAP adopted a "balancing of the equities" test, and rejected the idea that a stay could be retroactively annulled only under "extraordinary" or "extreme" circumstances. The court then set forth a nonexclusive list of factors for courts to consider, including the debtor's filing history, the costs of annulment (both monetary and otherwise), and the creditor's behavior after learning of the bankruptcy. The court remanded the case for application of the correct test to determine whether to annul the stay.

KNOW YOUR STATE LAW ON RENEWING STATE COURT JUDGMENTS AFTER DEBTOR'S BANKRUPTCY

In re Smith, 293 BR 220 (9th Cir BAP 2003)

Judgment creditors had their debt held nondischargeable. The creditors then sought a declaration that they had timely renewed their state court judgment in line with §524 and §108. The bankruptcy court granted the creditors relief under §108(c)(2); the BAP reversed and remanded for determination of whether renewal was timely under §108(c)(1).

Section 108(c) determines the time period for judgments to be renewed. The judgment creditor must also examine state law because §108(c) incorporates state law. The BAP held that a judgment must be renewed within the time set by state law or within thirty days after notice of termination

of the automatic stay, whichever is later. In this case, the state law provided longer for renewal, but that time did not extend to the end of the discharge proceeding so the renewal was not timely. The creditors also failed to file the renewal in accordance with the state law's deadlines. This decision makes it imperative that judgment creditors be aware of the state law on renewing judgments. They cannot count the time for renewal starting from the date of the discharge judgment.

CREDITORS CAN USE PROOF OF CLAIM TO ASSERT THE RIGHT TO ATTORNEY FEES

In re Atwood, 293 BR 227 (9th Cir BAP 2003)

In a chapter 13 bankruptcy, an oversecured creditor asserted its right to attorney fees by filing a proof of claim that included attorney fees. The debtors objected, claiming that notice should have been given to the debtors and all creditors through an application under FRBP 2016. The bankruptcy court found the proof of claim sufficient and allowed the creditor's attorney fees.

The BAP affirmed in part and reversed in part. The BAP first concluded that FRBP 2016 could be read broadly enough to include secured creditors' attorney fees and that the creditor here was entitled to recover some fees. The BAP agreed with the analysis of a bankruptcy court in Alabama that the right to attorney fees could be established either through a fee application in compliance with §503 and FRBP 2016 or through a timely filed proof of claim specifically claiming the fees. Thus creditors can seek attorney fees without filing a notice to all creditors. Finally, the BAP reversed the allowance of the attorney fees here because the creditor had not sufficiently established the amount sought was reasonable.

CHAPTER 11 DEBTORS CANNOT OBJECT TO CLAIMS THROUGH PLAN PROVISIONS

In re Dynamic Brokers, Inc.,
293 BR 489 (9th Cir BAP 2003)

The chapter 11 debtor listed a secured claim on its schedules without designating it as disputed, contingent, or unliquidated. Early versions of the plan proposed payment in full, but the fourth amended plan provided for less than full payment. During confirmation hearings, the creditor filed an untimely proof of claim. The creditor also orally objected to confirmation at the hearing, but the bankruptcy court did not entertain the objection and agreed with the debtor that the plan could be used to modify treatment of claims. The plan was confirmed and the objection to the claim sustained.

The BAP reversed the ruling and held that the debtor could object to a claim only through the process set forth in the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. It was improper to attempt to object to claims

by modifying their treatment in provisions of the chapter 11 plan. The claim should have been deemed allowed because no legitimate objection was filed. The court also held that even if the late-filed proof of claim was disallowed, it did not affect the claim because on disallowance, the "deemed allowed claim" (based on the schedules) would again be valid. The BAP remanded the confirmation order based on its holdings.

PENALTY WAGES ENTITLED TO ADMINISTRATIVE PRIORITY

In re Metro Fulfillment, Inc.,
294 BR 306 (9th Cir BAP 2003)

Two employees of the debtor quit their jobs postpetition and were not paid all that was owed to them at the time. They moved for payment of administrative claims based on their wages and the penalty wages owed them under California law. The bankruptcy court denied the motions and the employees appealed.

The BAP reversed. Under §959 the penalty wages were a result of the debtor-in-possession's failure to comply with state laws in its postpetition operations. The BAP distinguished *In re Palau Corp.*, 18 F3d 746 (9th Cir 1994), in which penalty wages were disallowed, because that case involved claims that arose prepetition. "Actual and necessary" should be read to include costs ordinarily incurred in operating a business. Any penalties assessed because a trustee or debtor-in-possession failed to comply with the laws of the state in administering the estate should be afforded administrative priority as arising out of postpetition conduct.

COMPUTERS CAN ACT "WILLFULLY"!

In re Champion, 294 BR 313 (9th Cir BAP 2003)

A debt collector initiated garnishment proceedings against the debtor postpetition. The debtor filed an adversary proceeding to recover damages for violation of the stay. The debt collector's defense was that its computer failed to identify the debtor in its records and mistakenly started garnishment proceedings; thus violation of the stay was not willful. The bankruptcy court rejected this argument.

The BAP agreed. To be willful, an act only has to be intentional and taken after the creditor was aware of the stay. The BAP next addressed the creditor's defense of "mistake of fact," or confusion resulting from the debtor's use of different names: Mike P. Champion versus Michael P. Champion. The BAP noted that the creditor had at one point identified that the two names were the same person. Ultimately, the BAP said, a computer error is no different than an error by a clerical employee; the employer is responsible in either case.

ONLY DEBTOR CAN GET DAMAGES FOR BAD-FAITH INVOLUNTARY PETITIONS

In re Mike Hammer Productions, Inc.,
294 BR 752 (9th Cir BAP 2003)

One creditor instituted an involuntary bankruptcy case. At the time, other creditors were engaged in litigation against the petitioning creditor, the debtor, and others. The bankruptcy court dismissed the petition and awarded damages to the nonpetitioning creditors.

On appeal, the BAP reviewed the language of §303(i)(2), which allows damages to be awarded against petitioners who file involuntary petitions in bad faith, to determine whether third parties could be awarded damages. The BAP found the statute to be ambiguous and thus reviewed its legislative history. Based on the statute's reference to the debtor, and the potential for its abuse by creditors, the BAP concluded that Congress did not intend to allow nondebtors to receive damages for bad faith involuntary filings. The BAP was concerned some creditors would contest petitions and use the potential for damages as leverage against petitioning creditors. The BAP reversed the bankruptcy court's award of damages to third parties under §303(i)(2).

SECTION 303(i) PREEMPTS STATE TORT LAW REMEDIES RELATED TO BAD FAITH FILINGS

In re Miles, 294 BR 756 (9th Cir BAP 2003)

This case also involved an involuntary petition dismissed for bad faith. After the dismissal, the debtor's wife and child sued in state court seeking damages on tort theories. The defendants removed the cases to bankruptcy court, and the plaintiffs sought a remand to state court for lack of federal jurisdiction. The bankruptcy court held that federal law preempts state tort law and dismissed the complaints on the grounds that third parties cannot recover damages for bad faith involuntary petitions.

The BAP affirmed. Preemption is a question of congressional intent, which can be "inferred from a scheme of federal regulation that is . . . sufficiently comprehensive to warrant an inference that Congress has 'left no room' for state regulation." The Ninth Circuit has held that state laws on malicious prosecution are preempted when the claims stem from a bankruptcy. The remedial scheme in §303(i) is comprehensive and covers all appropriate remedies. Based on these findings and the concern for uniformity and maintaining the federal scheme in bankruptcy matters, the BAP held that bankruptcy law preempts state tort remedies in actions to recover for bad faith filings. Consistent with *Mike Hammer, supra*, the wife and daughter, as nondebtor third parties, could not recover damages based on the bad faith filing against the husband.

EMOTIONAL DISTRESS DAMAGES MAY BE AWARDED FOR WILLFUL VIOLATION OF THE AUTOMATIC STAY

In re Stinson, 295 BR 109 (9th Cir BAP 2003)

This was a dispute over the damages awarded to a debtor based on a creditor's willful violation of the stay. The bankruptcy court awarded the debtor attorney's fees based on the creditor's failure to adequately dispute this award. The court also awarded emotional distress and punitive damages.

The BAP affirmed or vacated many aspects of the lower court's ruling based on the specific facts of the case. The issue of awarding emotional distress damages was a novel one for the BAP, however. The BAP held that emotional distress damages should be allowed for violations of the automatic stay, to enable the stay to fully protect the legal interests of the debtor. The BAP also held that to recover emotional distress damages, the debtor must show both "significant economic loss" and emotional injury caused by the loss. This issue was remanded for application of the appropriate standard.

CREDITOR'S ATTORNEY FEE AWARD FOR ACTION BEGUN PREPETITION BUT CONTINUING POSTPETITION WAS DISCHARGED IN FULL IN DEBTOR'S BANKRUPTCY

In re Ybarra, 295 BR 609 (9th Cir BAP 2003)

A creditor in prolonged state court litigation with the debtor obtained a judgment that included a provision for nearly one half a million dollars in attorney fees. Before the litigation ended, the debtor filed for bankruptcy, and ultimately received a discharge. The creditor moved for leave to collect its judgment. The bankruptcy court held that the fees attributable to the post-petition period were not discharged, and the debtor appealed.

The BAP focused on whether the fees were a prepetition claim. Judge Perris reviewed Ninth Circuit law and concluded that, while conflicting, it requires the court to examine when the action was commenced. If the action was commenced prepetition, the attorney fees are discharged in the debtor's bankruptcy. Here, the only action taken postpetition was the revival of the state court action, which was not considered to be a new action. Therefore the attorney fees were discharged. Judge Klein concurred in a lengthy opinion, taking an alternative approach to harmonizing the disparate Courts of Appeals opinions. Judge Baum dissented, arguing that the fees should not be discharged because they arose postpetition.

STATUTORY CAP ON TERMINATION DAMAGES IS NOT REDUCED BY PAYMENTS MADE PRIOR TO BANKRUPTCY FILING

In re Condor Systems, Inc.,
296 BR 5 (9th Cir BAP 2003)

Creditors were the former CEO and CFO of the debtor corporation, terminated prepetition and given sizable severance packages. They received some severance money prepetition, and filed claims for the large amounts still owed them. The debtor objected and the creditors attempted to amend their claims. The court disallowed the amendments and sustained the objection, holding that payments received prepetition reduced the statutory cap on termination damages available to former employees of bankrupt debtors under §502(b)(7).

After examining the "precise language" of the statute, the BAP reversed and remanded. Under the statute, the claim is the total amount owed under relevant nonbankruptcy law, and the cap is the portion of the claim which can be paid by the bankruptcy estate. The cap has no bearing on the debtor's total liability to the claimant. The statute provides a mechanical test for computation of the cap, and this computation is not reduced by prepetition payments. The cap also is not reduced by payments from a third-party source - here, a letter of credit guaranteeing the payments due to the former employees. The BAP reiterated its focus on the language of the statute, noting that if Congress intended for these payments to affect the cap it could have included statutory language to that effect.

LOCAL BANKRUPTCY COURT CASE NOTE

By **Karl E. Hausafus**

Preston Gates & Ellis, LLP

THE DOG ATE MY OBJECTION – CONFIRMATION ORDERS NOT SUBJECT TO FRCP 60(B)

In re Robinson, 293 BR 59 (Bankr. D. Or. 2002)

Chapter 13 plan contained provision that her student loan would be discharged for undue hardship under §523(a)(8). Creditor received notice, but it had transferred the loan to an assignee, which did not receive notice in time to timely object to the plan. The plan was confirmed and the assignee filed an adversary proceeding seeking to revoke the confirmation order on the basis of excusable neglect under FRCP 60. Judge Radcliffe ruled for the debtor.

Section 1330(a) provides that a confirmation order under §1325 may be revoked within 180 days after entry upon request of a party in interest "if such order was procured by fraud." Assignee asserted that FRCP 60(b), applicable through FRBP 9024, provides additional grounds for revocation - mistake, inadvertence and excusable neglect. The court rejected this argument. Section 1330(a) is more than a limitations period; it provides the complete substantive basis for revocation of chapter 13 confirmation orders. While FRCP 60(b) provides a rule applicable to orders in general, the court held that §1330(a) must be construed as Congress's acknowledgment that confirmation orders are different than other orders. Any other result would harm the finality normally accorded confirmation orders and specifically provided for by Congress in §1327(a).

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- ✎ A discussion of the issues likely to be confronted in the next legislative session

STATE COURT CASE NOTES

By Heather Harriman

Greene & Markley PC

**NO UTPA CLAIM UNLESS LOSS IS AS A
RESULT OF THE MISDEED**

Gemignani v. Pete, 187 Or App 584, 71 P3d 87 (2003)

Gemignanis and Goldings (Buyers) alleged that defendant violated the Unfair Trade Practices Act by selling real estate that did not have the qualities that defendant represented the real estate would have. Buyers also claimed breach of contract and argued for piercing the corporate veil.

Buyers entered into contracts with defendant's corporation for the purchase of lots of land, where defendant's corporation was to build buyers' houses. Buyers paid significant amounts of cash toward their purchases. Defendant's corporation, acting through defendant, obtained lines of credit from a bank and secured those lines of credit with trust deeds on buyers' respective properties. Upon final payment of the purchase price, defendant provided buyers with warranty deeds stating that the properties were free of liens and encumbrances. Defendant did not inform buyers of the trust deeds on their properties. After receipt of their warranty deed, the Gemignanis paid the property taxes on their piece of property. The Goldings did not pay any other sums relative to their property after receipt of their warranty deed. The bank foreclosed the trust deeds on the buyers' properties.

The court held that the Gemignanis held a viable claim under the UTPA because their payment of taxes was an ascertainable loss as a result of defendant's delivery of their warranty deed. The Goldings, however, suffered no such loss because any loss they did incur was not "as a result" of defendant's violation of the UTPA (delivery of a warranty deed when, in fact, the property was encumbered by the trust deed).

The court further held that defendant should be liable for his corporation's breach of the contract because defendant engaged in "improper conduct" at a time when the corporation was insolvent or undercapitalized. The improper conduct sufficient to pierce the veil was "obligating the corporation to repay loans that it could not possibly pay because of its undercapitalization or insolvency, loans that were secured by plaintiffs' property."

**ATTEMPTS TO EVADE SERVICE MAY
DEMONSTRATE LACK OF GOOD FAITH**

Stonebrook Hillsboro, LLC v. Flavel, 187 Or App 641, 69 P3d 807 (2003)

In this forcible entry and detainer action, plaintiff attempted to serve defendants, brother and sister who were tenants at plaintiff's hotel, with notices of plain-

tiff's intention to terminate the tenancy. On at least two occasions, plaintiff attempted to hand deliver the notices but the defendants evaded plaintiff. Plaintiff ultimately delivered the notices by sliding them under defendants' doors and knocking on the doors. The evidence established that defendants were in their rooms at the time that plaintiff slipped the notices under the doors.

Plaintiff ultimately obtained a judgment of restitution of the premises and defendants sought to set aside the judgment based upon plaintiff's failure to personally serve defendants with notice. The court held that because defendants acknowledged having received the notices and were in their rooms at the time plaintiff slipped the notices under their doors, defendants could not argue that they were entitled to face-to-face delivery or some other form of delivery. Defendants had failed to act in good faith and could not complain that the notices were defective.

**PURCHASER OF VENDEE'S INTEREST IN LAND
SALE CONTRACT HAS STANDING TO SET ASIDE
JUDGMENT OF FORECLOSURE**

Estate of Hutchins v. Fargo,
188 Or App 462, 72 P3d 638 (2003)

Mills, vendee of Fargo's interest in real property, sought to set aside a judgment of foreclosure against Fargo and the property. Hutchins held the vendor's interest against Fargo. Hutchins had no actual or constructive notice of Fargo's transfer to Mills because Mills failed to record his deed for eight years. Hutchins, through his personal representative, sued Fargo to foreclose his interest in the property against Fargo, the record owner of the property. Unable to serve Fargo personally, Hutchins obtained court approval to serve by publication. Fargo did not appear. Hutchins obtained a judgment of foreclosure. Nearly seven years after entry of the judgment, Mills sought to set aside the judgment as void by reason of improper service. The court held that Mills had standing to contest the validity of service upon Fargo because Mills' legal rights were directly affected by a determination of the validity of the judgment of foreclosure.

**PRIORITY UNDER STATUTE REQUIRING BOND
FOR MORTGAGE BANKERS/BROKERS**

American Bankers Ins. Co. v. State of Oregon,
188 Or App 606, 72 P3d 666 (2003)

Many parties brought claims against a bond posted for Mortgage One's brokerage license. A dispute among claimants to the bond followed. The Grafts, private lenders alleging misrepresentations by a Mortgage One broker, asserted claims against the bond for losses suffered when their mortgagors defaulted. Two companies asserted claims against the bond for losses incurred by Mortgage One's failure to pay for credit reports and real estate appraisals.

The court considered the language of ORS 59.925 (which requires the bond of any mortgage broker or mortgage banker) and determined it was ambiguous about the person(s) protected. The court then explored the legislative history and held that the statute was enacted to "protect consumers who paid money for certain fees in advance when the brokers failed to pay for or did not provide the services." The court concluded that the bonding statute was not intended to protect either the Grafts – because they were private lenders (the statute would protect the mortgagors) – or the two companies – which had asserted claims against the bond because they were parties providing services to a mortgage broker.

EVEN THOUGH NO FORMAL AGREEMENT EXECUTED, TERM SHEET IS ENFORCEABLE

Hughes v. Misar, 189 Or App 258, __ P3d __ (2003)

Plaintiffs and defendants entered into settlement negotiations during litigation and executed a term sheet memorializing the essentials of their agreement. The parties intended to enter into a more formal agreement, but were unable to agree on language. The court concluded that the parties' failure to express their agreement more formally did not affect the immediately binding nature of the agreement. Further, where the parties did not expressly state that the agreement was not binding until finalization of the formal agreement, the term sheet constituted the parties' agreement.

Plaintiffs had cross-appealed for attorney fees. The court ruled that although the attorney fee clause was not part of the term sheet, it was nonetheless part of the agreement because it was present in all drafts of the formal agreement and defendants never objected to it. Therefore plaintiffs were entitled to attorney fees for their successful enforcement of the settlement agreement. Plaintiffs were not, however, entitled to fees related to the continuing negotiations over the details of the formal agreement.

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CONSUMER BANKRUPTCY COMMITTEE

**By Michelle Bertolino and
Matthew A. Arbaugh**

Farleigh, Wada & Witt, P.C.

JULY 24, 2003 MEETING

The subcommittee appointed to review proposed changes for supplemental fee applications reported some findings and concerns. The basic issues are how supplemental attorney fees are paid through the plan and whether creditors are given proper notice of these fees. The subcommittee assumed there is a due process problem with the way supplemental fee applications are currently handled, considered ways to fix the problem, and identified three categories of cases.

1. New cases. The debtor's attorney can explain in the plan how supplemental attorney fees will be paid. For instance, if attorney fees will be paid before secured creditors in paragraph 2(b)(2), then a provision can also be included that any supplemental fee application will be paid in a similar manner, which would delay payments to creditors.

2. Plans already filed. A general order will issue addressing these cases.

3. Fees that have been paid under the current plan. There was discussion about whether it is necessary to figure out exactly who had been paid prior to 2(b) creditors who were not given proper notice, and to decide whether disgorgement of such fees by the attorney was necessary. The subcommittee is still considering this issue.

There was also discussion of whether it would be helpful to have supplemental fee applications in chapter 13 cases follow the procedure used in chapter 11 cases, where service of supplemental fee applications is limited to a list of creditors who have specifically asked to receive such notice. The subcommittee will also address this issue.

Jack Fisher said the Trustee would begin to object to supplemental fee applications if they affect feasibility.

The issue of whether the Trustee needs to review stipulated orders for relief from stay and sign off on them was discussed. The bankruptcy court has circulated a proposed form of order for relief that explicitly provides for the trustee's signature. There was debate about whether the trustee's signature was legally necessary or an administrative burden. Regardless of legal necessity, the consensus was that the standard practice should continue to be sending the order to the trustee for signature.

Jerry Pederson, counsel for Karla Forsythe's office in Vancouver, Washington, spoke about news and events arising out of the Vancouver Bankruptcy Round Table Meeting.

1. The "no look" fee for attorneys has been increased from \$1,300 to \$1,800 in chapter 13 cases. The same rules for applying for supplemental fees are still in effect.

2. Jerry confirmed that mortgage payments will not be forced through the chapter 13 plan as rumored.

3. Jerry reminded everyone that electronic notice is not sufficient in contested matters and that the parties must serve hard copies of the notice and objection to all the parties in the case.

A Young Lawyers Group tour of the Eugene Bankruptcy Court will be conducted some time in November. If anyone knows of someone who would like to be added to the young lawyers group, please e-mail Scott Hutchinson at scott@hutchinson-law.com. You may email questions to Scott or call him at (503) 231-9333.

Judge Dunn reported that the electronic filing system should be up and running in some form by November 7, 2003. At that time, participation is encouraged but not mandatory.

SEPTEMBER 18, 2003 MEETING

Everyone should be aware of the new language to be included in the plan at 2(b)(2) regarding payment of supplemental attorney fees. This language is mandated by the G.O. XXX.

There was a lengthy discussion of the bankruptcy court's conversion to Electronic Case Management and Electronic Case Filing (CM/ECF) and what that means for practitioners. This is more fully discussed in the special article on this issue printed in this newsletter; information also appears in Rich Parker's report on the Saturday Session.

Jason Wilson-Aguilar raised concerns about obtaining a co-debtor relief from stay. It was decided the best way to achieve this is through two separate motions for relief and one order. The order should have signatures from both parties if they agree; if not, the codebtor's lack of response must be noted in the order. Judge Perris noted the order granting relief should not include language granting relief from the co-debtor stay unless a motion was filed requesting that relief.

Motion for Relief fees will be raised to \$150—the amount for filing a Complaint.

Judge Perris raised the issue of student loan discharges and noted that the Department of Education is "developing a kinder, gentler, more customer friendly" approach to dealing with student loan debtors. We discussed the prospect of holding an educational seminar on the issue once the government formalizes its new approach.

The IRS now has an automated proof of claim program in development and will provide further information to practitioners as it develops. Chapter 7 asset cases will be dealt with out of the Portland office, rather than Hawaii.

The Chapter 13 Trustee raised concerns of the continual

degrading of timely responses to the trustee's request for documents, which delays confirmation and irritates judges. There was discussion of implementing the "Rocket Docket" used in Eugene. The consensus was that there should be some way to speed up the process. One suggestion was requiring the trustee to explain to the court the specific reason why an adjournment of the confirmation hearing was needed and why the documents were not produced as requested.

Several practitioners, Judge Perris and Jeffrey Werstler of the IRS, raised the issues of the increase in tax return problems and the filing of tax returns in chapter 13 cases. Practitioners and judges agree that getting outstanding tax returns prepared and filed, and tax objections resolved, continues to require significant work and time for all parties involved. Stubborn non-filers continue to be a problem. Some voiced a concern that the bankruptcy court seems to be too patient with non-filers.

Judge Perris responded that there was no concerted or explicit effort to be more lenient with non-filers, but that the court needs to find a balance between dismissal of cases and the policy of getting the problem filers back into the tax system.

Todd Trierweiler voiced his concern that it often takes weeks to retrieve tax transcripts from the IRS, which causes substantial delays in the tax analysis for practitioners. Jeff Werstler implored anyone with the same problem to contact him directly; he would be happy to follow up on the issue. Mr. Werstler can be reached at (503)-326-3292.

Susan Egnor of the Oregon Department of Justice informed the group that the Oregon Department of Revenue will no longer agree to section 1305 claims for postpetition tax liability, because the department cannot collect postpetition penalties and interest.

Ms. Egnor also expressed her concern over the Chapter 13 Trustee's policy of objecting to department claims as "disallowed" in full when relief from stay is granted on real property against which the department has a secured claim. Ms. Egnor agrees that the status of the State's claim may change when the collateral it is secured by is foreclosed on, but she does not think it is reasonable for the Trustee to assume that the debt goes away entirely. Rather, she thinks the law supports that the debt/claim is transformed from secured debt/claim into either a priority or nonpriority unsecured debt/claim. Ms. Egnor believes that there should be a better, more cooperative way to deal with this situation. Mr. Godare of the Chapter 13 Trustee's office agreed. Mr. Godare indicated that the department and the Trustee's office can get together to try to come to a better, more efficient, and cooperative solution to this problem in chapter 13 cases.

The Consumer Bankruptcy Sub-Committee usually meets every other month on the third Thursday of the month at 4:30 p.m. in the 8th Floor conference room at the U.S. Bankruptcy Court in Portland. The next meeting will be November 18, 2003. All bankruptcy practitioners are encouraged to attend. Please contact Mike Scott at 503/236-0209 to add topics to the agenda or for further information.

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