REPORT AND RECOMMENDATIONS OF THE COMMITTEE ON THE INDIVIDUAL DEBTOR FEBRUARY 1, 2006

Background to this Report.

Prior to the 2005 Annual Meeting of the NBC, the individual Debtor Committee decided to consider various issues regarding the forms and rules promulgated to implement BAPCPA by the Advisory Committee on Bankruptcy Rules. The Committee on the Individual Debtor reached a consensus to which there was opposition within the Committee and after review by the Executive Committee, the NBC sent a letter to the Advisory Committee on Bankruptcy Rules consistent with the consensus position of the Individual Debtor Committee. At the Annual Meeting there was a brief discussion of the letter and the response of the Advisory Committee on Bankruptcy Rules. One comment that was made regarding the letter was that it would be more useful for the Advisory Committee on Bankruptcy Rules if the NBC would develop specific and detailed recommendations which would include the actual language that the NBC suggested be included in the Rules and Official Forms. The Committee on the Individual Debtor has endeavored to be responsive to this criticism. The Report and Recommendations that the Committee supports and urges the NBC to adopt are very very detailed. The good news is that the Report is responsive to the suggestions made by the Advisory Committee on Bankruptcy Rules and should be more helpful to them than would have been a more general response; the bad news is that the very detail sought by the Advisory Committee on Bankruptcy Rules makes the Report and Recommendation very technical and perhaps difficult for the members of the NBC to evaluate.

At the request of the chair of the Individual Debtor Committee, a subcommittee consisting of Judge Clark, Judge Lundin, and Henry Sommer analyzed certain of the Proposed Federal Rules of Bankruptcy Procedure ("Interim Rules"), as well as, certain of the newly promulgated forms under BAPCPA. The Memo was distributed to the Committee on the Individual Debtor and the Committee met several times by telephone to determine if there was unanimous agreement on these recommendations. Subsequently, the committee was polled on those issues where there was not unanimous agreement. This Memo contains and explains most of the recommendations made by the sub committee and indicates which are unanimous recommendations, which are consensus recommendations and which are majority recommendations. At the end of the Report is a separate summary of those Recommendations which are unanimous and a separate summary of those Recommendations which are consensus recommendations. A copy of the forms is at http://www.uscourts.gov/bkforms/bankruptcy_forms.html#official for easy reference.

I: ANALYSIS AND RECOMMENDATIONS; INTERIM RULES

A. Interim Rule 1007(c).

As now written, the rule requires that the debtor's certification of receipt of a briefing from an approved nonprofit budget and credit counseling agency ("certificate of briefing") be filed with the petition.[1] By contrast, other documents, such as the debtor's schedules and statement of affairs, are to be filed with the petition *or within 15 days thereafter*.[2] The Rule should permit the certificate of briefing to be filed within 15 days after the filing as well.

The Rule as now written likely sought to give effect to the fact that the certificate of briefing is a new eligibility element. *See* § 109(h). That section, however, does not set a time frame on when the certificate is to be filed. Neither does section 521. *See* § 521(b).[3] Indeed, eligibility is not jurisdictional. *See, e.g., Matter of Phillips*, 844 F.2d 230, 235 n. 2 (5th Cir. 1988). In addition, there are already other documents that *can* be filed up to 15 days after filing, such as the debtor's schedules, even though the content of those filings is *also* relevant to *eligibility* for chapter 13 relief, for example. *See* INTERIM RULE 1007(c); *see also* § 109(e).

A number of courts, as a result of the current requirement that the certificate be filed with the petition, have instituted a variety of non-uniform procedures, ranging from show cause orders to summary dismissals. Under BAPCPA, a dismissal has dramatic consequences. In a second filing done to cure a technical error such as not timely filing the certificate of briefing, the debtor has only a thirty day automatic stay, which can only be extended on stringent terms. *See* § 362(c)(3). Unless necessary to achieve the clear mandate of the statute, a rule should not create an unnecessary trap for the unwary.[4]

---

[1] The pertinent language of 1007 as now promulgated states:

> (c) TIME LIMITS. … The documents required by subdivision (b)(3) [*i.e.*, the certificate of briefing] shall be filed with the petition in a voluntary case. …
>
> INTERIM RULE 1007(c).

[2] The Interim Rule deletes an "or" that is in current National Rule 1007(c). *See* FED.R.BANKR.P. 1007(c). The deletion appears to be a mistake, however. The "or" is needed in order for the sentence to make sense. A document filed within 15 days after the petition cannot be filed "with" the petition, so the sentence without the "or" is nonsensical.

RECOMMENDATION NUMBER 1 THE INTERIM RULE DELETES AN "OR" THAT IS IN CURRENT NATIONAL RULE 1007(C). THE DELETION IS A MISTAKE. THE "OR" IS NEEDED IN ORDER FOR THE SENTENCE TO MAKE SENSE. UNANIMOUS SUPPORT

[3] This section says that "in addition to the requirements under subsection (a), a debtor who is an individual shall with the court - (1) a certificate [of briefing] ..." 11 U.S.C. § 521(b). The requirements of subsection (a) include, *inter alia*, the debtor's schedules and statement of affairs, which can be filed up to 15 days after filing. Note as well that the automatic dismissal provision in section 521(i) is tied to the filing requirements of § 521(a)(1), *not* to the filing requirements of § 521(b). In other words, failing to file the certificate of briefing does *not* result in automatic dismissal of the case.

[4] A few courts are apparently refusing to accept individual bankruptcy petitions for filing when the certificate of briefing is missing. That option should not, as a rule be available however, because it is inconsistent with the policy expressed in the federal rules that discourages clerks from rejecting "defective pleadings." *See, e.g.* FED.R.CIV.P. 5(e); FED.R.BANKR.P.

RECOMMENDATION NUMBER 2

The original recommendation of the subcommittee was that Rule 1007(c) should be amended to provide that the certificate of briefing may be filed with the petition or within fifteen days of filing. In our first meeting there had been on unanimous agreement and Judge Wedoff proposed that the committee recommend that the Rule be amended to tell courts not to accept individual bankruptcy petitions for filing when the certificate of briefing is missing. This recommendation did not receive unanimous support. On our second call the committee discussed the idea of drafting a Rule that would require the Clerk to provide a notice to those non electronically filing a petition for an individual without a certificate, that a certificate is required; if the filer goes ahead and files the petition anyway, then the Rule would permit the certificate of briefing to be filed within fifteen days after the bankruptcy filing. Although there are many unresolved issues everyone on the call thought this suggestion was worth pursuing.

II. ANALYSIS AND RECOMMENDATIONS: NEWLY PROMULGATED FORMS

A. Form B22C

1. Overview of Form B22C

This form is designed to generate information for the chapter 13 process. Debtors who file for relief under chapter 13 obviously do not have to pass the Means Test. A number of concepts from the Means Test are imported into the chapter 13 confirmation process. In addition, the concept of "current monthly income"("CMI") pervades chapter 13. Section 1325(b)(1)(B) of the Code provides that, in the event that either a chapter 13 trustee or an unsecured creditor raises the issue as an objection to the plan, the plan must devote all of the debtor's disposable income to the payment of unsecured creditors for a minimum period of time.[5] "Disposable income" is now defined in § 1325(b)(2) in terms of CMI, a defined term in the Code,[6] less reasonable expenditures.[7] Amounts reasonably necessary to be expended is in turn defined in § 1325(b)(3) by reference to § 707(b)(2) *if* the debtor's CMI is higher than the median for the debtor, depending on size of household.[8] Finally, the applicable commitment period *(i.e.*, the minimum period of time during which payments must be devoted to paying

---

5005 & Advisory Comm. Note (1993) ("It is not a suitable role for the office of the clerk to refuse to accept for filing papers not conforming to requirements of form imposed by these rule or by local rules or practices").

[5] *See* 11 U.S.C. § 1325(b)(1)(B). The pertinent language reads: "If the trustee or the holder of an allowed unsecured claim object to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan – … (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." *Id*.

[6] *See* 11 U.S.C. § 101(10A).

[7] *See* 11 U.S.C. § 1325(b)(2).

[8] *See* 11 U.S.C. § 1325(b)(3).

unsecured creditors) is computed in § 1325 (b)(4).[9] Form B22C serves to help the debtor calculate CMI, reasonable expenditures, and commitment period.

There are a number of respects in which this Form in its current format can and should be modified to more accurately reflect the language of the statute. Our comments here are set out with line references where appropriate.

We first focus on a significant structural problem regarding Parts II and III and how the current structure does not yield a correct calculation of CMI. Next we focus on problems within individual lines for which our recommended changes do not structurally revise the form.

2. Structural Problem: The Current Form Does Not Accurately Yield CMI.

Part I of the Form is entitled "Report of Income." As accurately self-described, this section does *not* yield CMI. This is primarily because it does not provide any place for a calculation of "any amount regularly paid by an entity other than the debtor … on a regular basis for the household expenses of the debtor or the debtor's dependents …"[10] Pt. II works off of the gross number generated in Pt. I to calculate the Commitment Period for § 1325(b)(4), while Pt. III functions to give the "Disposable Income" number needed for § 1325(b)(3). To get to the correct number in Pt. III, a calculation must be performed to generate CMI (because Disposable Income is defined in the statute in terms of CMI). Interim Rule 1007(b)(3) also requires every debtor to file a "statement of current monthly income," so every debtor completing Form B22C must, at some point generate CMI.

A problem is created with this structure, however. Line 17 of the form, at the end of Pt. II of the form, directs that, if the applicable commitment period generated in Pt. II turns out to be three years rather than five years, then the debtor does not have to complete the remainder of the form. The direction is correct, insofar as it goes, but has an accidental consequence: debtors who are "under the median" never get to calculate CMI. This is contrary to the directive of Rule 1007(b)(3), as well as counter to the express requirements of § 1325(b)(1)(B), because disposable income in that section is *defined* in terms of CMI.[11]

A logical way to cure the problem is to have all debtors go ahead and complete Pt. III anyway. To reduce confusion and to make the form work in the same logical order as the statute, the Pt. II and Pt. III sections should be *flipped,* so that debtors are performing the disposable income calculation *before* they calculate the commitment period. In this way, *all* debtors would

[9] *See* 11 U.S.C. § 1325(b)(4).

[10] *See* 11 U.S.C. § 101(10A)(B). This is the section which defines CMI. Section 101 begins with the phrase: "In this title *the following definitions shall apply*:" The italicized language, significantly, was added by BAPCPA.

[11] Electronic version of Form B22C now being used by many attorneys will literally not *allow* entry of data on the rest of the form if the "below median income" box is checked on Line 17. This is why this problem *must* be fixed.

complete a section that yields CMI, as required by Interim Rule 1007(b)(6).[12] All debtors would then be directed to complete the next section to calculate Commitment Period. In addition, debtors whose CMI is above the applicable median income would directed to complete Pt. IV and following as well.

Flipping Parts II and III helps to cure another problem with the existing form as well. Section 101(10A)(B) of the Code calls for an *addition* to the *debtor's* income to reflect amounts *"paid* by any entity other than the debtor … on a regular basis for the household expenses of the debtor or the debtor's dependents …" The wording of the marital adjustment in current Lines 13 (Part II) and 19 (Part III) of the form, by contrast, both call for a *subtraction* from the gross number generated on Line 11 (the end of Pt. I) of the non-filing spouse's income "that was not *regularly contributed* to the household expenses of you or your dependents." This wording departs from the language of the statute, with legally significant consequences.[13]

By flipping Part II – the Commitment Period and Part III–Disposable Income – the married debtor completing the form can *start* with an accurate CMI calculation, whether the debtor is filing singly or jointly. That number would then be carried over to new Pt. III for purposes of calculating the Commitment Period. Within the Commitment Period box itself, the debtor would first enter the CMI calculated in the previous section. The "Marital Adjustment" line would then be revised to read as follows:

> If you are married, but are not filing jointly with your spouse, AND if you believe that the calculation of the commitment period under § 1325(b)(4) requires inclusion of the income of your spouse, enter the amount of the income listed on line 10, column B that was NOT regularly paid by your spouse for the household expenses of you or your dependents.

This language both more accurately tracks the statute (both by using the statute's wording and calling for an addition to CMI), and still gives the debtor the opportunity to make the contention that Line 13 currently offers to married debtors filing singly.[14]

---

[12] Some technical changes would need to be made to the wording of the disposable income section. The first line of the section should be renamed "current monthly income, and should give the debtor a choice: If both spouses are filing, then the first line should be the same as the number entered on Line 11 from Pt. I. If only one spouse is filing, then the debtor should be directed to report the number from Line 10, Column A, plus "any amounts paid by your spouse on a regular basis for the household expenses of you or your dependents." The current marital adjustment line would not be needed if this language is used. The remainder of the box would then read as it now does.

[13] For example, a non-filing spouse who regularly deposits her paycheck into the family's joint checking account might be said to "regularly contribute" to the household expenses, but might not be "paying on a regular basis" for household expenses within the meaning of section 101(10A)(B). The nonfiling spouse's income in a given case might actually be surplusage in some months, but not others. It is "regularly contributed" but not necessarily regularly paid for household expenses. Some courts will no doubt conclude that regular contributions do constitute regular payment, and their interpretations will be appropriately subject to appellate review. There is no appellate review of the language chosen by the form. The form should therefore strive to remain as neutral as possible.

[14] That is, it "adds back" the non-filing spouse's income not already included in the CMI calculation from the previous section, if the debtor believes that, in the case of a married debtor filing singly, § 1325(b)(4)(A)(ii) requires including all of the non-filing spouse's income in order to calculate the commitment period correctly.

Another approach is also possible. Pt. II and Pt. III would be flipped, as recommended above, but the first four lines within the Commitment Period box would remain the same, except to rewrite the marital adjustment line to more closely adhere to the language of the statute. The "marital adjustment" line would then read as follows:

> If you are married but are not filing jointly with your spouse, AND if you contend that calculation of the commitment period under § 1325(b)(4) does NOT require inclusion of the income of your spouse, enter the amount of the income listed in Line 10, Column B that was NOT paid on a regular basis for the household expenses of you or your dependents. Otherwise, enter zero.

RECOMMENDATION NUMBER 3

THE INSTRUCTION IN LINE 17 IS INCORRECT AND SHOULD BE REVISED TO INSTRUCT ALL DEBTORS TO GO AHEAD AND COMPLETE PART III.
UNANIMOUS RECOMMENDATION

RECOMMENDATION NUMBER 4 ***Flip Pt. II and Pt. III.*** Revise the first line of the Disposable Income Box to provide for a calculation of CMI with a choice depending on whether the married debtor is filing singly or jointly (and appropriate instructions consistent with the language of § 101(10A)(B)). Delete the "marital adjustment" line (as unnecessary), and leave the balance of the Disposable Income Box as now written(including the instructions regarding completing the remaining parts of the form).

CONSENSUS RECOMMENDATION

RECOMMENDATION NUMBER 5. New Pt. III will be titled "Calculation of § 1325(b)(4) Commitment Period."

CONSENSUS RECOMMENDATION

RECOMMENDATION NUMBER 6

Marital Adjustment Language
Section 101(10A)(B) calls for an addition to the debtor's income to reflect amounts "paid by any entity other than the debtor … on a regular basis for the household expenses of the debtor or the debtor's dependents. The wording of the marital adjustment in current Lines 13(part II) and 19 (part III) of the form both call for a subtraction for the gross number generated on Line 11(the end of Part I) of the non-filing spouse's income "that was not regularly contributed to the household expenses of you or your depends. This wording departs from the language of the statute with legally significant consequences.

RECOMMENDATION; CHANGE THIS LANGUAGE TO USE THE STATUTORY LANGUAGE:

UNANIMOUS RECOMMENDATION

3. Individual Line Change Recommendations

a. Line 1. Marital/filing status:

i. A third choice of filing status should be offered.

The current Form B22C offers only two choices for filing status: (1) Married, or (2) Unmarried. Form B22A, by contrast, also offers two other third alternatives, "married not filing jointly with declaration of separate households," and "married, not filing jointly." These choices should be available on the chapter 13 Form B22C as well. The instructions with regard to filling out Columns A and B do not need to change, of course (because the spouse's income maybe relevant to computing the applicable Commitment Period, depending on one's read of § 1325(b)(4)(A)(ii)). The information that the debtor is separated, however, will be important to creditors and the chapter 13 trustee when it comes time to evaluate best efforts under § 1325(b)(1)(B) at the first meeting of creditors.

RECOMMENDATION NUMBER 7 Individual line in form B22C

i. a third choice of filing status should be offered.

Add a box for "married, not filing jointly. "

UNANIMOUS RECOMMENDATION

RECOMMENDATION NUMBER 8

ii. Add a box for "Married not filing jointly with declaration of separate households."

A MAJORITY OF THE COMMITTEE SUPPORTS THIS RECOMMENDATION

ii. The instruction language in Line 1 should be revised to reflect the language of the statute.

The instruction language in Line 1 should also be revised to reflect the language of the statute. Section 101(10A), where CMI is defined, adds an additional limitation on income received, however. The statute says that CMI means "the average monthly income from all sources that the debtor receives … *derived* during the six month period ending [the end of the last complete month before the filing]. 11 U.S.C. § 101(10A)(A). The use of the word "derived"

can be important for debtors who, for example, may *receive* a bonus or a commission check or tax refund within the 6 month window, but the monies received are *derived* from an earlier part of the year outside the 6 month window. Form B22C, as written, does not permit the debtor to make this distinction, potentially skewing all the rest of the numbers throughout the form.

RECOMMENDATION NUMBER 9

THE INSTRUCTION SHALL BE MODIFIED AS FOLLOWS TO MATCH THE LANGUAGE OF THE STATUTE:

> "All figures must reflect average monthly income derived during ~~for~~ the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing."
> UNANIMOUS SUPPORT

iii. The second sentence in Line 1 is surplusage and should be deleted.

RECOMMENDATION NUMBER 10

The remainder of the explanatory language[15] is surplusage and is actually misleading, because it does not permit one to account for income received within the six month period, but not actually derived during that period. The word "average" in the phrase "average monthly income" is sufficient instruction. The second sentence of the instruction should therefore be deleted.

CONSENSUS RECOMMENDATION

b. Line 16 & Line 22.[16]

These lines ask the debtor to supply the "median family income for applicable state and household size." They also direct the debtor to a Department of Justice website to obtain this information.

RECOMMENDATION NUMBER 11

i. The Form should allow debtors to choose a smaller than actual household size in order to prevent below-median income filers from being forced out of Chapter 13 entirely.

CONSENSUS RECOMMENDATION

[15] The second sentence states: "If you received different amounts of income during these six months, you must total the amounts received during the six months, divide this total by six, and enter the result on the appropriate line."

[16] Note that these line references are to Form B22C as currently written. The suggestions made here apply to the substance of the lines, regardless of where they may end up, *i.e.*, if Pt. II and Pt. III are flipped, as recommended earlier.

The instruction for current Line 22, (relating to disposable income) should permit the debtor to supply the median income for the applicable household size *or fewer,* to give the debtor the option of yielding a *higher* median family income. While this may seem counterintuitive, a close reading of the provisions of section 1325(b) demonstrates why this option may actually be necessary to permit debtors to propose confirmable plans. The statute says, in § 1325(b)(3), that reasonable expenses for purposes of computing disposable income will be computed using the provisions of § 707(b)(2), subparagraphs (A) and (B), *if* the debtor's CMI is *greater than* the median for a given household size. A debtor may well *prefer* to use the § 707(b)(2) expense allowances, rather than simply Schedule J expenses, because section 707(b)(2) allowances are actually *more generous* in one important respect: Section 707(b)(2)(A)(iii) permits, as a reasonable expense, the costs associated with secured debt on property that a debtor needs, such as a house or a car.[17] The form should at least give the debtor the option of selecting a smaller household size (with its lower median income) to trigger the "greater than" language in § 1325(b)(3).[18] Otherwise, debtors with below-median income may well be forced out of Chapter 13.

RECOMMENDATION NUMBER 12

ii. The Form should direct debtors to the Census Bureau, not the DOJ.

The form should direct the debtor directly to the Census Bureau site rather than the DOJ site. The statute itself defines median family income as that "calculated and reported by the Bureau of Census in the then most recent year." The Form should mirror the statute. The DOJ has no statutory obligation either to maintain this information at its website, or to vouch for its accuracy.

CONSENSUS RECOMMENDATION

[17] In a perfect storm of unintended consequences, it should be noted that the best efforts test of § 1325(b) was revised by BAPCPA to require that all of the debtor's projected disposable income to be received during the commitment period (either three or five years) be applied to make payments to *unsecured creditors* under the plan. The addition of the phrase "unsecured creditors" has a dramatic impact on the best interest test. A plan which applies disposable income as computed by current Schedule J would not, under the best efforts test, be allowed to pay *any money* to secured creditors, because the payments to secured creditors under the plan itself do not show up as "reasonable expenses" on Schedule J! *See* 11 U.S.C. § 1325(b)(2)(B). If the debtor uses the § 707(b)(2) expense allowances, however, the debtor will be permitted to pay secured creditors as one of the expenses deemed reasonably necessary for support of the family. *See* 11 U.S.C. § 707(b)(2)(A)(iii). Only the money left over after doing the § 707(b)(2) deductions (which include paying secured creditors) would be defined as disposable income payable to unsecured creditors in compliance with § 1325(b)(1)(B). Little wonder that some debtors would *prefer,* under BAPCPA, to use the § 707(b)(2) expense calculations rather than the traditional Schedule I and J income and expense calculations. The only way to get to § 707(b)(2) expenses, however, is through the provisions of § 1325(b)(3) – and that means having CMI greater than the "selected" median family income level. Hence the importance of providing this option on the form.

[18] Note that the statute itself seems to contemplate the option being recommended here. Section 1325(b)(3)(B) says "in the case of a debtor in a household of 2, 3, or 4 individuals, the highest mediant family income of the applicable State for a family of the same number *or fewer* individuals." Subparagraph (C) has the same "or fewer" phrase.

c. Line 35

i. The Form may mislead debtors into believing that "pre-school" expenses are not deductible; however, the IRS permits "preschool" expenses to be deducted.

This line is part of Pt. IV, the section in which a debtor calculates deductions allowed under § 707(b)(2). This particular line instructs a debtor to enter amounts actually expended for childcare, then specifically cautions the debtor *not* to include payments made for "children's education." The instruction varies from what the IRS actually permits in terms of childcare – expenses for pre-school. The instruction as now written misleads debtors into thinking that pre-school expenses are not deductible as childcare because pre-school is "education." The instruction should be deleted. [19]

RECOMMENDATION NUMBER 13

THE INSTRUCTION SHOULD READ

ENTER THE AVERAGE MONTHLY AMOUNT THAT YOU ACTUALLY EXPEND ON CHILD CARE (BABY-SITTING, DAY CARE, NURSERY AND PRESCHOOL). DO NOT INCLUDE OTHER EDUCATIONAL EXPENSES.

UNANIMOUS RECOMMENDATION

d. Line 37.

i. The instruction is unnecessarily limiting and will become

The instruction is unnecessarily limiting. It lists as permissible expenses certain kinds of telecommunications items. In so doing, it excludes other services (and also limits the form over time, as technology changes). The instruction is easily modified by the insertion of the phrase "services such as" immediately following the words "expenses that you actually pay."

RECOMMENDATION NUMBER 14

SUBSTITUTE THE FOLLOWING LANGUAGE

"ENTER THE AVERAGE MONTHLY AMOUNT THAT YOU ACTUALLY PAY FOR TELECOMMUNICATION SERVICES OTHER THAN YOUR BASIC HOME TELEPHONE SERVICE – SUCH AS CELL PHONES, PAGERS, CALL WAITING, CALLER I.D. , SPECIAL LONG DISTANCE, OR INTERNET SERVICE – TO THE EXTENT

[19] This point reiterates a theme of this analysis: It is not appropriate for the Judicial Conference of the United States to interpret a new law with its forms, which are not subject to appellate review. Disputes over the meaning of statutory terms should be left to case law development. The forms, whenever possible, should be neutral.

NECESSARY FOR YOUR HEALTH AND WELFARE OR THAT OF YOUR DEPENDENTS. DO NOT INCLUDE ANY AMOUNT PREVIOUSLY DEDUCTED. "

UNANIMOUS RECOMMENDATION

e. Line 39.

i. The instruction is narrower than the IRS actually allows.

RECOMMENDATION 15

The instruction here is narrower than the IRS rules from which it is derived. The regulations actually permit monies expended, not only for the debtor, but also for the debtor's spouse, whether or not he or she is a dependent or a co-debtor. The Committee recommends the following instruction be substituted.

"List the average monthly amounts that you actually pay for reasonably necessary health insurance, disability insurance, and health savings account expenses for yourself, your spouse, or your dependents."

UNANIMOUS RECOMMENDATION

f. Line 48.

i. The instruction is narrower than the statute actually allows.

This line contains a faulty instruction as well. As written, it states that, if a secured debt from Line 47 is "in default," then the debtor "may deduct 1/60th of the amount you must pay the creditor *as a result of the default* (the 'cure amount') in order to maintain possession of the property." The statutory language from which this instruction is drawn is not so limited. Section 707(b)(2)(A)(iii)(II) permits, in addition to scheduled payments as contractually due, *"any additional payments* to secured creditors *necessary for the debtor,* in filing a [chapter 13] plan, *to maintain possession of* [the property in question]." 11 U.S.C. § 707(b)(2)(A)(iii)(II). This language is broad enough to encompass a broad variety of charges debtors are likely to be called on to pay the lender, from additional attorney's fees incurred in filing a proof of claim, to adequate protection payments under § 1326(a)(1)(C), and beyond. Many of these charges may not *necessarily* be "as a result of a default" by the debtor.[20]

RECOMMENDATION NUMBER 16

SUBSTITUTE THE FOLLOWING LANGUAGE

[20] That is, unless the form's drafters thought that *every* debtor is in default just because they filed bankruptcy. Of course if that is the case, then why have an instruction that suggests that some charges might be "as a result of a default" while some might not be? Better to have no instruction at all, as is suggested here.

"IF ANY OF THE DEBTORS LISTED [IN THE RELEVANT SECURED DEBT LINE] ARE SECURED BY PROPERTY THAT IS NECESSARY FOR YOUR SUPPORT OR THE SUPPORT OF YOUR DEPENDENTS, YOU MAY INCLUDE IN THE IN YOUR DEDUCTION 1/60TH OF ANY AMOUNT (THE 'CURE AMOUNT') THAT YOU MUST PAY THE CREDITOR IN ADDITION TO THE PAYMENTS LISTED IN [THE RELEVANT SECURED DEBT LINE], IN ORDER TO MAINTAIN PAYMENTS LISTED IN [THE RELEVANT SECURED DEBT LINE], IN ORDER TO MAINTAIN POSSESSION OF THE PROPERTY. THE CURE AMOUNT WOULD INCLUDE ANY SUMS IN DEFAULT THAT WOULD HAVE TO BE PAID IN ORDER TO AVOID REPOSSESSION OR FORECLOSURE. LIST ANY SUCH AMOUNTS IN THE FOLLOWING CHART AND ENTER THE TOTAL. IF NECESSARY, LIST ADDITIONAL ENTRIES ON A SEPARATE PAGE."

UNANIMOUS RECOMMENDATION

B. Form B22A.

This is the Form for use by debtors filing for chapter 7 relief. This form does not need to yield information about "disposable income" or "commitment period," both concepts unique to chapter 13. However, it *is* used to trigger the opportunity to object to the filing as "in bad faith" under section 707(b) by requiring certain debtors whose incomes exceed the median to fill out the means test, to determine whether they could complete a chapter 13 plan in a certain minimal amount.

RECOMMENDATIONS 17 AND 18

B. Form 22A including 1. Presumption of Abuse and 707(b)(6) and 2. Line by Line Modifications.

CONSENSUS RECOMMENDATIONS

There is one major recommendation to be made with regard to Form B22A, having to do with the presumption box on the first page, and the portions of the form that instruct the debtor whether to check the box indicating that a presumption has arisen. In addition, recommendations with regard to a number of the line entries on Form B22A will track similar recommendations made on Form B22C, because the information sought is essentially the same (though the line references are different).

1. Presumption of Abuse and § 707(b)(6)

The Form has a box at the top of the page, calling for the debtor to check off whether "the presumption arises" or "the presumption does not arise." If the debtor checks the first box, that alerts the clerk of court to send a notice to all creditors and parties in interest, under Interim Rules 2002 and 5008, that a presumption of abuse has arisen under § 707(b). That in turn invites those noticed to file motions seeking dismissal of the case on substantial abuse grounds. *See* 707(b)(1).

The Form, in Pt. II and Pt. III, calls for calculation of monthly income to see whether the debtor qualifies for the "safe harbor" from the Means Test, provided in section 707(b)(7). That section says that, if a debtor's CMI "and the debtor's spouse combined" is below the applicable median, then no one can seek dismissal for substantial abuse.[21]

The problem with the Form is that it makes no provision for the *limited* harbor of § 707(b)(6). That section of the statute says that, if a *debtor's* CMI, *without reference to the debtor's spouse's income,* is below the median, then *only the judge or the UST can bring a substantial abuse motion.* Creditors in that circumstance are *not allowed* to bring such a motion. In the case of a married debtor whose spouse does not file, it is entirely possible that a debtor's income, combined with that of the nonfiling spouse, might *exceed* the median (*i.e.,* no safe harbor under § 707(b)(7)), but the debtor's CMI alone would be *under* the median *(i.e.,* limited safe harbor under § 707(b)(6)). Yet, in that circumstance, the debtor would still have to check the box "presumption arises," and notice would go out to all creditors and parties in interest, inviting motions to dismiss for substantial abuse.[22]

The Form should provide a "third alternative" in the box at the upper right hand corner of the first page of the Form. It could read "The presumption arises (UST & Court only)." To generate the correct response, a few modifications should be made to the body of the Form. Pt. II should be re-titled "Calculation of Monthly Income." A new line should be added, immediately following Line 12, entitled "Marital adjustment." The instruction for the marital adjustment now found in Line 17 should be repeated here.[23] Another line would then be added, entitled "Total Current Monthly Income for § 707(b)(6)." New Line 13 would be subtracted from Line 12 to yield new Line 14.

In Pt. III, a new line would follow present Line 13, entitled "Annualized Current Monthly Income for § 707(b)(6)." The instruction would be to multiply the result yielded at the end of Pt. I by 12 and enter the number. That would yield the number, for married debtors filing singly, called for in § 707(b)(6).

Current Line 15 would then be re-named "Application of Sections 707(b)(6) and 707(b)(7)." *Three* boxes would be supplied, with one box referring to the Annualized Current Monthly Income for § 707(b)(6) generated immediately before. The box would say, "The amount on Line [*x*] is less than or equal to the amount on [current] Line 14" (with *x* being the line number for Annualized Current Monthly Income for § 707(b)(6)). The instruction would be for the debtor to check the "third alternative" box on the front of the form. It would also instruct the debtor to complete the remaining parts of the form.

---

[21] The structure is designed to excuse below-median debtors from having to "pass" the Means Test. The wording of the statute, referring to the CMI of the debtor and the debtor's spouse combined, is similar to the language found in the Commitment Period calculation in § 1325(b)(4), discussed *supra.*

[22] This imposes an unnecessary additional litigation burden on the debtor, and also requires the clerk of court to send out notices to all creditors even in circumstances in which notice would only need to go to the UST.

[23] The wording of this instruction should be revised consistent with the analysis of Form B22C *supra*.

In this way, the Form would accurately direct the clerk of court to send notice to all creditors only when there is *neither* a safe harbor *nor* a limited harbor. The clerk would give notice only to the UST (and the court) when the limited harbor provisions of § 707(b)(6) applied. The form would thus more accurately serve the needs of the participants in the process, and save the clerk of court some unnecessary noticing costs.

2. Line by Line Modifications.

The line by line modifications recommended in the earlier part of this memo relating to Form B22C apply as well to Form B22A, where the same language is used. What follows is a chart to track the line references discussed *supra* with regard to Form B22C, that would also apply to Form B22A.

Form B22C	Form B22A
Line 1 (instructional wording)	Line 2 (instructional wording)
Line 16 (reference to DOJ site)	Line 14 (same)
Line 13 & 19 (wording of "marital adjustment")	Line 17 (same)
Line 35 (deduction for child care expenses)	Line 30 (same)
Line 37 (telecommunication expenses)	Line 32 (same)
Line 39 (health insurance expenses)	Line 34 (same)

CONSENSUS RECOMMENDATIONS OF THE COMMITTEE THAT EACH OF THESE RECOMMENDATIONS BE MADE

RECOMMENDATION NUMBER 19

Allow deduction for other categories of "Other necessary expenses."

This was contained in the original letter of the NBC sent September 27, 2005.

THE CONSENSUS RECOMMENDATION IS THAT THIS RECOMMENDATION BE REPEATED IN THIS SET OF RECOMMENDATIONS.

RECOMMENDATION NUMBER 20
Allow debtor to argue non debtor spouse's income not included in 707 (b)(7).

THE CONSENSUS RECOMMENDATION IS THAT THIS RECOMMENDATION BE REPEATED IN THIS SET OF RECOMMENDATIONS.

RECOMMENDATION NUMBER 20

Using language of statute for excess home energy deduction;

THE COMMITTEE RECOMMENDS THE FOLLOWING LANGUAGE

"Enter the average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. You must provide your case trustee with documentation demonstrating that the additional amount claimed is reasonable and necessary."

UNANIMOUS RECOMMENDATION

RECOMMENDATION 22

The Form should allow an adjustment for income not actually received by the debtor in chapter 13 (e.g. grandparents paying kids tuition.);

CONSENSUS RECOMMENDATION

RECOMMENDATION NUMBER 23.

The form should treat transportation the same way the forms treat housing expenses – allowing extra line like Form 22C line 26.

CONSENSUS RECOMMENDATION

THIS MARKS THE END OF THE ACTUAL REPORT. THERE FOLLOW FOR YOUR CONVENIENCE FIRST A LISTING OF THOSE RECOMMENDATIONS WHICH THE COMMITTEE ADOPTED UNANIMOUSLY AND SECOND A LISTING OF THOSE RECOMMENDATION WHICH THE COMMITTEE ADOPTED BY CONSENSUS.

Summary of Unanimous Recommendations

The Committee is unanimous with regard to the following issues and recommends that the NBC make these recommendation to the Advisory Committee on Bankruptcy Rules

Recommendation Number 1 Interim Rule 1007(c).
(Footnote 2 Page 2 of the Report)

The Interim Rule deletes an "or" that is in current National Rule 1007(c). The deletion is a mistake. The "or" is needed in order for the sentence to make sense.

Recommendation Number 3
Form B22C Line 17 (Page 6 of the Report)

The instruction in Line 17 is incorrect and should be revised to instruct all debtors to go ahead And complete Part III.

Recommendation Number 6 Form B22 C Line13(PartII) and Line 19 (Part III)
(Page 6 of the Report)

Marital Adjustment Language
Section 101(10A)(B) calls for an addition to the debtor's income to reflect amounts "paid by any entity other than the debtor … on a regular basis for the household expenses of the debtor or the debtor's dependents. The wording of the marital adjustment in current Lines 13(part II) and 19 (part III) of the form both call for a subtraction for the gross number generated on Line 11(the end of Part I) of the non-filing spouse's income "that was not regularly contributed to the household expenses of you or your depends. This wording departs from the language of the statute with legally significant consequences.

Recommendation: Change the language to use the statutory language.

Recommendation Number 7 Form B22C Alternatives for filing status
(Page 7 of the Report)

i. a third choice of filing status should be offered.

Add a box for "married, not filing jointly. "

Recommendation Number 9 Form B22C Line 1
age 8 of the Report)
The instruction shall be modified as follows to match the language of the statute as follows:

"All figures must reflect average monthly income <u>derived during</u> ~~for~~ the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing."

Recommendation Number 13 Form B22C Line 35
Page 10 of the Report)

"Enter the average monthly amount that you actually expend on child care (baby-sitting, daycare, nursery and preschool.) Do Not include other educational expenses."

Recommendation Number 14 Form B33C Line 37
(Page 10 of the Report)

"Enter the average monthly amount that you actually pay for telecommunication services other than your basic home telephone service – such as cell phone, pagers, call waiting, caller

i.d., special long distance, or internet service – to the extent necessary for your health and welfare or that of your dependents. Do Not include any amount previously deducted."

Recommendation Number 15 Form B22C Line 39
(Page 11 of the Report)

The instruction here is narrower than the IRS rules from which it is derived. The regulations actually permit monies expended, not only for the debtor, but also for the debtor's spouse, whether or not he or she is a dependent or a co-debtor. The Committee recommends the following instruction be substituted.

"List the average monthly amounts that you actually pay for reasonably necessary health insurance, disability insurance, and health savings account expenses for yourself, your spouse, or your dependents."

Recommendation Number 16 Form B22C Line 48
(Page 11 of the Report)

Substitute the following language

"If any of the debtors listed [in the relevant secured debt line] are secured by property that is necessary for your support or the support of your dependents, you may include in your deduction 1/60th of any amount (the "Cure Amount") that you must pay the secured creditor in addition to the payments listed [in the relevant secured debt line], in order to maintain possession of the property. The Cure Amount would include any sums in default that would have to be paid in order to avoid repossession or foreclosure. List any such amounts in the following chart and enter the total. If necessary, list additional entries on a separate page."

Recommendation Number 21; Using language of the statute for the excess home Energy deduction.

The Committee recommends the following language.

```
"Enter the average monthly amount, in excess of the allowance specified by
IRS Local Standards for Housing and Utilities, that you actually expend for
home energy costs.  You must provide your case trustee with documentation
demonstrating that the additional amount claimed is reasonable and
necessary."
```

RECOMMENDATION NUMBER 4 ***Flip Pt. II and Pt. III. New Pt. II will be re-titled "Calculation of Current Monthly Income and § 1325(b)(3) Disposable Income."***
(Page 6 of the Report)

Summary of Consensus Recommendations

The Committee has reached consensus with regard to the following issues and recommends that the NBC make these recommendations to the Advisory Committee on Bankruptcy Rules.

Recommendation Number 4 Form B22C
(Page 6 of Report)

Flip Part II and Part III.

Revise the first line of the Disposable Income Box to provide for a calculation of CMI with a choice depending on whether the married debtor is filing singly or jointly (and appropriate instructions consistent with the language of § 101(10A)(B)). Delete the "marital adjustment" line (as unnecessary), and leave the balance of the Disposable Income Box as now written(including the instructions regarding completing the remaining parts of the form).

Recommendation Number 5 Form B22C
(Page 6 of the Report)

New Part III will be titled "Calculation of § 1325(b)(4) Commitment Period." (Page 6 of the Report)

Recommendation Number 10 Form B22C Line 1
(Page 8 of the Report)

The remainder of the explanatory language is surplusage and is actually misleading, because it does not permit one to account for income received within the six month period, but not actually derived during that period. The word "average" in the phrase "average monthly income" is sufficient instruction. The second sentence of the instruction should therefore be deleted.

Recommendation Number 11 Lines 16 and 22
(Page 8 of the Report)

The Form should allow debtors to choose a smaller than actual household size in order to prevent below-median filers from being forced of out Chapter 13 entirely.

Recommendation Number 12 Form B22C
(Page 9 of the Report)

The form should direct the debtor directly to the Census Bureau site rather than the DOJ

site. The statute itself defines median family income as that "calculated and reported by the Bureau of Census in the then most recent year." The Form should mirror the statute. The DOJ has no statutory obligation either to maintain this information at its website, or to vouch for its accuracy.

Recommendations 17 and 18 Changes in Form B22A
(Pages 12 -14 of the Report)

Form B22A is the Form for use by debtors filing for chapter 7 relief. This form does not need to yield information about "disposable income" or "commitment period," both concepts unique to chapter 13. However, it *is* used to trigger the opportunity to object to the filing as "in bad faith" under section 707(b) by requiring certain debtors whose incomes exceed the median to fill out the means test, to determine whether they could complete a chapter 13 plan in a certain minimal amount.

There is one major recommendation to be made with regard to Form B22A, having to do with the presumption box on the first page, and the portions of the form that instruct the debtor whether to check the box indicating that a presumption has arisen. In addition, recommendations with regard to a number of the line entries on Form B22A will track similar recommendations made on Form B22C, because the information sought is essentially the same (though the line references are different).

1. Presumption of Abuse and § 707(b)(6)

The Form has a box at the top of the page, calling for the debtor to check off whether "the presumption arises" or "the presumption does not arise." If the debtor checks the first box, that alerts the clerk of court to send a notice to all creditors and parties in interest, under Interim Rules 2002 and 5008, that a presumption of abuse has arisen under § 707(b). That in turn invites those noticed to file motions seeking dismissal of the case on substantial abuse grounds. *See* 707(b)(1).

The Form, in Pt. II and Pt. III, calls for calculation of monthly income to see whether the debtor qualifies for the "safe harbor" from the Means Test, provided in section 707(b)(7). That section says that, if a debtor's CMI "and the debtor's spouse combined" is below the applicable median, then no one can seek dismissal for substantial abuse.[24]

The problem with the Form is that it makes no provision for the *limited* harbor of § 707(b)(6). That section of the statute says that, if a *debtor's* CMI, *without reference to the debtor's spouse's income,* is below the median, then *only the judge or the UST can bring a substantial abuse motion.* Creditors in that circumstance are *not allowed* to bring such a motion. In the case of a married debtor whose spouse does not file, it is entirely possible that a debtor's

[24] The structure is designed to excuse below-median debtors from having to "pass" the Means Test. The wording of the statute, referring to the CMI of the debtor and the debtor's spouse combined, is similar to the language found in the Commitment Period calculation in § 1325(b)(4), discussed *supra*.

income, combined with that of the nonfiling spouse, might *exceed* the median (*i.e.*, no safe harbor under § 707(b)(7)), but the debtor's CMI alone would be *under* the median *(i.e.*, limited safe harbor under § 707(b)(6)). Yet, in that circumstance, the debtor would still have to check the box "presumption arises," and notice would go out to all creditors and parties in interest, inviting motions to dismiss for substantial abuse.[25]

The Form should provide a "third alternative" in the box at the upper right hand corner of the first page of the Form. It could read "The presumption arises (UST & Court only)." To generate the correct response, a few modifications should be made to the body of the Form. Pt. II should be re-titled "Calculation of Monthly Income." A new line should be added, immediately following Line 12, entitled "Marital adjustment." The instruction for the marital adjustment now found in Line 17 should be repeated here.[26] Another line would then be added, entitled "Total Current Monthly Income for § 707(b)(6)." New Line 13 would be subtracted from Line 12 to yield new Line 14.

In Pt. III, a new line would follow present Line 13, entitled "Annualized Current Monthly Income for § 707(b)(6)." The instruction would be to multiply the result yielded at the end of Pt. I by 12 and enter the number. That would yield the number, for married debtors filing singly, called for in § 707(b)(6).

Current Line 15 would then be re-named "Application of Sections 707(b)(6) and 707(b)(7)." *Three* boxes would be supplied, with one box referring to the Annualized Current Monthly Income for § 707(b)(6) generated immediately before. The box would say, "The amount on Line [*x*] is less than or equal to the amount on [current] Line 14" (with *x* being the line number for Annualized Current Monthly Income for § 707(b)(6)). The instruction would be for the debtor to check the "third alternative" box on the front of the form. It would also instruct the debtor to complete the remaining parts of the form.

In this way, the Form would accurately direct the clerk of court to send notice to all creditors only when there is *neither* a safe harbor *nor* a limited harbor. The clerk would give notice only to the UST (and the court) when the limited harbor provisions of § 707(b)(6) applied. The form would thus more accurately serve the needs of the participants in the process, and save the clerk of court some unnecessary noticing costs.

2. Line by Line Modifications.

The line by line modifications recommended in the earlier part of this memo relating to Form B22C apply as well to Form B22A, where the same language is used. What follows is a chart to track the line references discussed *supra* with regard to Form B22C, that would also apply to Form B22A.

[25] This imposes an unnecessary additional litigation burden on the debtor, and also requires the clerk of court to send out notices to all creditors even in circumstances in which notice would only need to go to the UST.

[26] The wording of this instruction should be revised consistent with the analysis of Form B22C *supra*.

Form B22C	Form B22A
Line 1 (instructional wording)	Line 2 (instructional wording)
Line 16 (reference to DOJ site)	Line 14 (same)
Line 13 & 19 (wording of "marital	Line 17 (same)
Line 35 (deduction for child care expenses)	Line 30 (same)
Line 37 (telecommunication expenses)	Line 32 (same)
Line 39 (health insurance expenses)	Line 34 (same)

Recommendation Number 19

Allow deduction for other categories of "Other Necessary Expenses."

This recommendation was contained in the letter sent by the NBC on September 27, 2005 and the Committee recommends that the recommendation be repeated in the next letter sent by the NBC.

Recommendation 20

Allow the debtor to argue that non debtor spouse's income is not included in Section 707(b)(7). This recommendation was contained in the letter sent by the NBC on September 27, 2005 and the Committee recommends that the recommendation be repeated in the next letter sent by the NBC.

Recommendation Number 22
The Form should allow an adjustment for income not actually received by the debtors in chapter 13. (e.g. grandparents paying tuition of grandchildren.)

Two other Recommendations

(Recommendation Number 2; Rule 1007
(Page 3 of the Report)

The original recommendation of the subcommittee was that Rule 1007(c) should be amended to provide that the certificate of briefing may be filed with the petition or within fifteen days of filing. In our previous meeting there had been no unanimous agreement and Judge Wedoff proposed that the committee recommend that the Rule be amended to tell courts not to accept individual bankruptcy petitions for filing when the certificate of briefing is missing. That recommendation was not unanimously approved.

On our second call the committee discussed the idea of drafting a Rule that would require the Clerk to provide a Notice to those non electronically filing a petition without a certificate, that a certificate is required; if the filer goes ahead and files the Petition anyway then the Rule would permit the certificate of briefing to be filed with fifteen days after the filing. This Rule would have to take into account those districts that permit electronic filing only. Although there are many unresolved issues the people on the call thought this issue was worth pursuing.

Recommendation Number 8 Form B22C Line 1 Marital/filing status
(Page 7 of the Report)

Add a box for "Married not filing jointly with declaration of separate households."

A Majority of the Committee supports this recommendation.