

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

DATE: December 7, 2009

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on October 1-2, 2009, in Boston, Massachusetts, to consider a number of proposed amendments to the Bankruptcy Rules, Official Forms, and Director's Procedural Forms. The draft minutes of that meeting are attached to this report as Appendix A.

The Advisory Committee is not submitting any action items to the Standing Committee at this meeting. It is continuing to work on some rule and form amendments that it anticipates bringing to the Standing Committee in June, along with any rules and forms published for comment in August 2009 that the Advisory Committee approves at its spring meeting.

This report discusses several information items regarding continuing, multi-year projects of the Advisory Committee, as well as actions taken by the Committee during and after the October meeting that do not require action by the Standing Committee. The information items that are discussed are the following:

- revision of the Part VIII (appellate) Bankruptcy Rules;
- the Forms Modernization Project;
- communications regarding time period changes in the Bankruptcy Rules from 15 to 14 days;

- changes to the reaffirmation agreement form and other Director's Procedural Forms;
- creation of an authoritative version of the Bankruptcy Rules;
- consideration of a suggestion to eliminate the prohibition on the use of special masters in bankruptcy cases; and
- changes in the membership of the Advisory Committee.

II. Information Items

A. Revision of the Bankruptcy Appellate Rules

The Advisory Committee has continued its deliberations regarding a possible comprehensive revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules). On September 30, 2009, its Subcommittee on Privacy, Public Access and Appeals held a second special open meeting devoted to this topic. The meeting, held at the Harvard Law School, was attended by invited judges from the First and Eighth Circuits' Bankruptcy Appellate Panels, clerks of court, bankruptcy practitioners, and academics. The chair and reporter of the Standing Committee and the reporter for the Advisory Committee on Appellate Rules also participated. Additional public attendees included trustees, academics, practitioners, and students. Harvard Law School Dean Martha Minow greeted the participants and made remarks at the beginning of the meeting.

The participants discussed the operation of the current bankruptcy appellate rules and provided feedback on a working draft of a revised Part VIII. That draft incorporated changes made in response to comments received at the initial special open meeting held in San Diego in March 2009. Among the changes were the addition of provisions that take account of the use of electronic filing in the federal courts. Strong support was expressed at the Cambridge meeting for the undertaking of a Part VIII revision and for recognition in the rules of the use of electronic filing and anticipated future technologies.

Because of the mutual interest in considering how best to incorporate evolving information technologies into the federal rules, the Advisory Committee will keep the other advisory committees informed of its progress on this project as it goes forward. Likewise, the Committee hopes to benefit from the wisdom and experience of the other committees that have begun to consider these issues.

At its spring 2010 meeting, the Advisory Committee will discuss and vote on the underlying goals that it seeks to achieve in revising the Part VIII rules.

B. Forms Modernization Project

Work has continued by the Advisory Committee's Forms Subcommittee on its multi-year Forms Modernization Project. This undertaking seeks to develop recommendations for making the Official Bankruptcy Forms more user-friendly and less error-prone, and for taking better advantage of modern information technology. The Project has solicited comments from judges, clerks, and other participants in the bankruptcy system, and representatives from a number of groups within the Judiciary have assisted with their specialized expertise.

In April, 2009, the Project hired an expert in forms redesign and began the painstaking process of reformatting and rephrasing the hundreds of questions on the forms. The Forms Subcommittee decided to focus on an initial filing package to be used by individual debtors in bankruptcy. Through the fall of 2009, subgroups conducted nearly weekly teleconferences, revising the petition and the debtor's real and personal property schedules for consideration by the Project working group at its next meeting in January 2010.

The Project continues to solicit feedback from users of the forms (bankruptcy judges, attorneys, court and clerk's office employees, the Executive Office for United States Trustees, and academics) through a series of electronic surveys and other questionnaires, and has also provided to the NextGen CM/ECF Project a list of functional requirements it believes should be included in the future version of CM/ECF.

C. 15- to 14-Day Time Period Changes

Most of the time computation amendments that went into effect on December 1, 2009, lengthen time periods in the rules by a few days, thereby offsetting the effect of counting intermediate weekends and holidays as part of all time periods. There are twelve Bankruptcy Rules, however, that are an exception to the general lengthening in the rules. These twelve rules, which include the deadlines for filing schedules and statements at the start of a bankruptcy case, chapter 13 plans, and appellate briefs, have time periods that were shortened from 15 days to 14 days.

No one raised concerns about possible adverse effects of these changes during the comment period following publication of the proposed time computation amendments. During the fall of 2009, however, Congressional staff members informed the Administrative Office that they had received some expressions of concern from debtors' lawyers about whether sufficient notice had been provided of the shortening of these deadlines by one day. It was suggested that a six-month deferral of the effective date of these twelve time period changes might be appropriate.

Concerned that a deferral might increase, rather than reduce, confusion regarding the bankruptcy rules time computation amendments, the Advisory Committee took the position that for these twelve rules, during a six-month transition period, a filing that would have been timely under the prior rule but was late under the amended rule should be treated as the product of “excusable neglect” under Rule 9006(b)(1). This position was communicated to the courts in a memorandum from the chairs of the Standing Committee and the Bankruptcy Rules Committee.

To reduce the likelihood of untimely filings and the need for extensions, the memorandum also suggested that bankruptcy courts continue their efforts to publicize the time-computation changes and, in particular, that the courts post a conspicuous notice that specifically identifies the rules for which time periods are reduced by one day. It suggested that the notice be posted on court websites, in the clerks’ offices, and on the initial screen displayed on the CM/ECF system for persons filing electronically.

Director's Form B201, Notice to Consumer Debtor(s) under § 342(b) of the Bankruptcy Code, was also amended to include warnings about the deadlines that have been shortened.

D. Changes to the Reaffirmation Agreement Form and Other Director’s Procedural Forms

The Administrative Office, with the Advisory Committee’s assistance, has issued a new set of forms that may be used when a debtor seeks to reaffirm a pre-bankruptcy debt. Form B240A (called the “Reaffirmation Documents,” a package of five form documents, including the agreement itself, the statutory disclosures and other documents), Form B240B (“Motion for Approval of Reaffirmation Agreement”), and Form B240C (“Order on Reaffirmation Agreement”) have been substantially revised to make the reaffirmation form easier to complete and, as a result, to reduce errors. The forms also are intended to be easier for the court to review. The revision was prompted, in part, by comments received from numerous bankruptcy judges in connection with the Forms Modernization Project. Among other changes, the statutorily required components of the reaffirmation documents were rearranged so that the most significant information appears at the beginning of the reaffirmation document form, and the language was simplified to make it easier for debtors and creditors to understand what information is being sought.

Because many bankruptcy courts require the use of the existing versions of the reaffirmation agreement, motion, and order forms, both the old and new versions of the reaffirmation forms have been posted on the Judiciary's website for a six-month transitional period beginning December 1, 2009.

The Advisory Committee also reviewed three new Director’s Procedural Forms, which

were issued by the Administrative Office with an effective date of December 1, 2009. The new forms are:

- Form B250F, Summons in a Chapter 15 Case Seeking Recognition of a Foreign Nonmain Proceeding,
- Form 18RI, Discharge of Individual Debtor in a Chapter 11 Case, and
- Form B261C, Judgment in an Adversary Proceeding.

The five existing forms used as bankruptcy summonses, Director's Forms B250A, B250B, B250C, B250D, and B250E, were amended to conform the Certificates of Service on the forms more closely to the service of process provisions of Bankruptcy Rule 7004. The Advisory Committee assisted in the development and review of these amended forms.

Finally, six Director's Forms and the Instructions for those forms were revised to reflect the December 1, 2009, time computation amendments.

E. Authoritative Version of the Bankruptcy Rules

For a number of historical reasons, there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Office of the Law Revision Counsel of the House of Representatives, which prepares and publishes the other federal rules of practice, procedure, and evidence, has never compiled and published the Bankruptcy Rules. The bench, bar, and public have adapted to this anomaly by consulting bankruptcy rules published by commercial and nonprofit organizations. Although this has been a workable solution, the absence of an official version of the Bankruptcy Rules is not ideal and has created problems over the years.

Last year, at the request of the Advisory Committee, the Rules Committee Support Office tackled the job of creating an authoritative version of the Federal Rules of Bankruptcy Procedure. After months of intense effort, an authoritative version of the Bankruptcy Rules was created. This was accomplished by painstakingly comparing five versions of the bankruptcy rules using the electronic comparison tools in Word and WordPerfect. Whenever a discrepancy in the rules being compared was discovered, the official source documents were checked – either the orders of the Supreme Court or Congressional legislation – to resolve the discrepancy. Each step in the process was verified and documented. The rules also underwent a stringent editorial, proofreading, and legal review process.

Most of the work was done by, and credit goes to, the interns who were involved in the project: Katie Mize (lead intern), Heather Williams, and Danielle White. The interns worked under the expert supervision of James Ishida.

The final review is nearly complete. Upon completion of the review process, the rules will be transmitted to the Office of the Law Revision Counsel with a request that they be

published as the official version of the Federal Rules of Bankruptcy Procedure.

F. Consideration of Suggested Elimination of Prohibition on the Appointment of Special Masters in Bankruptcy Cases

Bankruptcy Rule 9031 makes Civil Rule 53 inapplicable in bankruptcy cases, thus precluding the appointment of special masters by bankruptcy or district judges exercising bankruptcy jurisdiction. The Advisory Committee received suggestions from two bankruptcy judges that Rule 9031 be amended or deleted so that special masters could be appointed when needed in complex chapter 11 cases and other bankruptcy matters.

On at least three occasions since the 1983 adoption of Rule 9031, the Advisory Committee has considered extensively, and rejected, suggestions that the rule's prohibition on the use of special masters be eliminated. In view of the recent attention to the rule, the absence of information indicating any change in relevant circumstances, and the absence of evidence that special masters have been needed in bankruptcy cases, the Committee adhered to its earlier decisions.

G. Changes in the Membership of the Advisory Committee

District Judge Karen K. Caldwell of the Eastern District of Kentucky is the newest member of the Advisory Committee. Judge Caldwell and two additional appointees to be named in the near future will replace Court of Appeals Judge R. Guy Cole, Jr., of the Sixth Circuit, District Judge Richard A. Schell of the Eastern District of Texas, and Bankruptcy Judge Jeffery P. Hopkins of the Southern District of Ohio. Judges Cole and Schell completed two terms on the Committee. Judge Hopkins accepted a transfer to the Committee on the Judicial Branch.

Attachment: Draft of Minutes of the Advisory Committee Meeting of October 1-2, 2009