ADVISORY COMMITTEE ON BANKRUPTCY RULES

Minutes of the Meeting of May 13-14, 1988

The Advisory Committee on Bankruptcy Rules met in Chicago, Illinois, on May 13 and May 14, 1988. The following members were present:

District Judge Lloyd D. George, Chairman
Circuit Judge Edith H. Jones
Circuit Judge Edward Leavy
District Judge Franklin T. Dupree
District Judge Thomas A. Wiseman
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Joseph G. Patchan, Esquire
Harry D. Dixon, Jr., Esquire
Ralph R. Mabey, Esquire
Herbert P. Minkel, Esquire
Bernard Shapiro, Esquire
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

Circuit Judge Joseph F. Weis, Jr., Chairman of the Committee on Rules of Practice and Procedure, attended the meeting, as did W. Reece Bader, Esquire, a member of the standing Committee whom Judge Weis has appointed to serve as liaison with the Advisory Committee.

Peter G. McCabe, Assistant Director for Program Management, and Patricia S. Channon, Staff Attorney, attended the meeting from the Administrative Office. Wayne Nelson, Clerk of the Bankruptcy Court for the Northern District of Illinois, and William B. Eldridge, Director of the Research Division of the Federal Judicial Center also attended. Two representatives of the Executive Office for United States Trustees attended: Thomas J. Stanton, Director, and Barbara G. O'Connor, Senior Counsel.

The following summary of matters discussed at the meeting should be read in conjunction with the Reporter's draft revisions, related memoranda of the Reporter and the Executive Office for United States Trustees, and various other memoranda and correspondence, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure.

Votes and other action by the Advisory Committee and assignments by the Chairman appear in bold.

Thanks to Norman H. Nachman

The Chairman announced that the Advisory Committee would recess at noon on May 13 to attend a luncheon in honor of former Advisory Committee member, Norman H. Nachman. Mr. Nachman served on the first Advisory Committee on Bankruptcy Rules from its inception in 1961 until 1973 when the work of replacing the former General Orders in Bankruptcy with procedural rules was completed. When the Advisory Committee was reconstituted following enactment of the Bankruptcy Reform Act of 1978, Mr. Nachman was reappointed and served until November 1987, participating in the drafting of the 1983 rules and their 1987 revision. At the luncheon, Judge George presented to Mr. Nachman a plaque commemorating his more recent service to the Advisory Committee. The plaque read as follows:

Presented to

Norman H. Nachman, Esquire, for his commitment extending over a decade, during which he provided distinguished service as a member of the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. With quiet dignity, he has made a lasting and meaningful contribution to the law and earned the respect and admiration of all who have had the privilege of knowing him as friend and counselor. This token of esteem and recognition is gratefully given by The Advisory Committee on Bankruptcy Rules. May 1988.

Approval of Minutes of January 1988 Meeting

The Advisory Committee approved the minutes of the January 1988 meeting. The Chairman stated his recollection that the Advisory Committee in January had approved a complete schedule for the revisions being undertaken, rather than simply the target effective date of August 1, 1991, reported in those minutes. At the Chairman's request, the complete schedule appears below.

Schedule for Completion of Revised Bankruptcy Rules

July 1989 - Preliminary Draft Complete

Transmit Preliminary Draft to standing Rules Committee, or its chairman, for approval for publication

August 1989 - Transmit Preliminary Draft to Ann Gardner for publication

(Estimated production time, 8 weeks)

October 1989 - Publication of Preliminary Draft for comment

(Six months public comment period required)

Winter 1990 - Receive and evaluate written comments

Public hearings? (Customary, not required)

April 1990 - Close of public comment period

June 1990 - Proposed Revised Rules complete, with transmittal letter and "gap" memorandum describing comments received and action taken on them

July 1990 - Consideration of Proposed Revised Rules by standing Rules Committee

September 1990 - Consideration of Proposed Revisions by Judicial Conference

October 1990 - Transmission of Proposed Revised Rules to Supreme Court

(By) May 1, 1991 - Transmission of Proposed Revised Rules to Congress

August 1, 1991[1] - Revised Rules Become Effective

Rules Committee Liaison, Openness in the Rules Process

Judge Weis announced that he had appointed two members of the Rules Committee to act as liaison with each of the Advisory Committees. He said that, in addition to Reece Bader, he had named Judge Amalya Kearse of the Court of Appeals for the Second Circuit to serve in this capacity with the Advisory Committee on Bankruptcy Rules. The purpose of these appointments is to assist the Rules Committee in understanding the work of the Advisory

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[1] Legislation now pending may change the effective date of new procedural rules from August 1 to December 1 of the year in which the Supreme Court submits them to Congress.

Committees and to promote uniformity and consistency among the several bodies of rules.

Judge Weis said that in the past there had been an attitude of secrecy toward the rules-drafting process, which he attributed to a failure on the part of Committee and Advisory Committee members to distinguish between judicial work and committee work. Judge Weis said he thinks secretiveness here is misplaced. He encouraged all present to talk openly about the Advisory Committee's work and to solicit the views of their colleagues and professional contacts concerning particular rules on which the Advisory Committee is working. The goal of every Advisory Committee, said Judge Weis, should be to obtain the widest possible input concerning its rules.

Committee Procedures

Peter McCabe reviewed the procedures for assuring that all members receive materials for the meetings and that the official records are complete. Members should send the original or a copy of all comments, memoranda, documents, or correspondence to James E. Macklin, Jr., the Secretary of the Committee on Rules of Practice and Procedure. Mr. Macklin, who also is the Deputy Director of the Administrative Office, has a full time assistant for duties related to the Rules Committee and the four Advisory Committees.

Every comment or other document is docketed. Advisory Committee comments, memoranda, and other agenda items are duplicated and distributed to all members. If the comment originates from outside the Advisory Committee membership, the comment is acknowledged and forwarded to the appropriate Advisory chairman. After the Advisory Committee has acted upon the comment, the Secretary sends a follow up letter to the author, reporting on the action taken.

Proposed Legislation

Chairman George reported on amendments to the Rules Enabling Act introduced by Representative Kastenmeier and reasonably certain to be enacted. These amendments would require meetings of the Advisory Committees to be open to attendance by the public. The proposed amendments were discussed in February 1988 by the Rules Committee, which concluded that Advisory Committees still would have an obligation to control what happens at their meetings. Thus, while the public would have a right to attend, participation in any meeting would be only at the invitation of

the Advisory Committee. The Chairman will ensure that all members receive a copy of the legislation once it has been enacted.

Proposed Rule 6 - Federal Rules of Appellate Procedure

The Advisory Committee on Rules of Appellate Procedure has drafted a new Rule 6, and a new Form 5, for appeals of bankruptcy cases from district courts and bankruptcy appellate panels to the circuit courts. The Advisory Committee on Rules of Appellate Procedure had forwarded the draft to the Advisory Committee on Bankruptcy Rules with a request that the draft be approved in time for its submission to the Rules Committee in July 1988.

The Reporter recommended that the Advisory Committee approve the draft on condition that the word "bankrupt" in the caption to the proposed form be changed to "debtor," the term used in the Bankruptcy Code and Rules. Jerry Patchan suggested that in line 7 of the proposed rule, the word "should" in the phrase "appeals should be taken in the identical fashion" ought to be changed to "shall," to make the procedure mandatory.

The Committee voted unanimously to approve the proposed new Rule 6, Federal Rules of Appellate Procedure, and the proposed Form 5, on condition that the word "bankrupt" in the caption of the Form be changed to "debtor," and with a suggestion that the Advisory Committee on Appellate Rules may want to consider changing the word "should" in line 7 to "shall," if the intent is to make the procedure mandatory.

Report of Standing Committee Action on Rule 9006(a)

The Chairman reported that he had placed before the February 1988 meeting of the Rules Committee the Advisory Committee's request for accelerated approval of a change to this rule which would reduce from 11 days to seven days the time period from which intermediate Saturdays, Sundays, and legal holidays may be excluded when computing any prescribed time. The change to 11 days was made in 1987 to conform Rule 9006(a) to its civil rule counterpart, Rule 6(a) of the Federal Rules of Civil Procedure. The requested change would restore Rule 9006(a) to its former wording and reestablish certainty of length to the various 10-day periods in bankruptcy practice, particularly the ten days allowed for filing a notice of appeal under Rule 8002(a).

Judge George reported that after a full discussion, the Rules Committee had determined not to accede to the Advisory Committee's request for special procedures to permit the change to Rule 9006(a) by August 1, 1988.

The Reporter noted that several Rules Committee members had said the change to 11 days also was causing problems in the civil and criminal practice, and that Judge Weis had directed all of the Reporters to confer and prepare a joint recommendation for the July 1988 meeting of the Rules Committee. The Reporter said he had talked with the reporters for all of the other Advisory Committees, that the appellate rules had never been changed, that a consensus for reverting to seven days in all of the rules appeared to be forming, but that the Advisory Committee on Rules of Civil Procedure was not scheduled to meet until November 1988. Accordingly, the Reporter said, he did not expect the Rules Committee to act until after November 1988.

Testing of Revised Official Forms 16 and 19

The Chairman reported that the Rules Committee had approved the Advisory Committee's request to test in selected pilot districts revised versions of the Order and Notice of § 341 Meeting, (Official Form 16), and Proof of Claim, (Official Form 19). Patricia Channon reported that the test will begin in the pilot districts on June 1, 1988. She requested Advisory Committee approval of six months as the duration of the test, which approval was given.

Ms. Channon also requested determinations from the Advisory Committee on several questions raised by the pilot courts concerning the Order and Notice of § 341 Meeting in chapter 13 cases.

1. In many districts the Order and Notice of § 341 meeting is sent by a commercial computer service or by the trustee, using the trustee's own computer system. The commercial services and computerized trustees are reluctant to re-program for a form which may not be adopted after the test is concluded. The courts in these districts would like to be excused from testing the revised chapter 13 Order and Notice of § 341 meeting, but would participate in all other parts of the test program.

2. The Order and Notice of § 341 Meeting states that all claims are to be filed with the court and provides space for the court to insert the time and place for the confirmation hearing. One pilot court does not hold formal confirmation hearings and several courts have local rules requiring proofs of claim to be

filed with the chapter 13 trustee. The courts have inquired whether they may alter the form to match local practice or whether local practice must be changed to match the form.

Professor King stated that the forms had been drafted in accordance with the requirements of the Code and Rules. In the context of Form 16, for example, § 1324 of the Code makes a confirmation hearing mandatory, and Rule 5005(a) requires a proof of claim to be filed with the clerk. Alteration of a form in a manner that conflicts with the law cannot be condoned.

The Advisory Committee indicated by consensus that pilot courts may excuse from the test any chapter 13 trustees who generate § 341 meeting notices on their own computers or who use a commercial computer service. The Advisory Committee disapproved alteration of the prescribed form to accommodate local practices which conflict with the law.

Local Rules Oversight

Judge Weis described the background and goals of the standing Committee's local rules project. The project grew out of Rep. Kastenmeier's concerns about the effect on national practitioners of the proliferation and diversity of local rules. Judge Weis said that, over the years, many courts seemed to believe that the solution to any problem was to "throw a local rule at it." Many such local rules stay in force long beyond their usefulness and serve only, in the words of one commentator, as "a memorial to a dead chief judge." These conditions, said Judge Weis, led to Congressional funding of the study of local district court rules which now is in its final year.

The project collected and analyzed 5000-plus local rules; the number in each district ranges from zero in some districts to hundreds in others. The project found that some local rules conflict directly with national rules or statutes, some are of no use, and some are better than the national rules on the same subject. Judge Weis said the Rules Committee hopes to introduce a uniform numbering system for local district court rules, a step which would help national practitioners especially, and would facilitate inclusion of local rules in the Lexis and Westlaw databases as well.

Judge Weis said that the point of identifying local rules which conflict with national rules is not simply to eradicate conflicting local rules but, rather, to inquire into the effectiveness of the local rule and the district's experience with it. If the local rule appears to be a good one, the Rules

Committee would consider making the local rule the national rule. As an example, Judge Weis mentioned the issue of limiting the number of interrogatories a party may serve. Some local rules impose a limit, although the present national rule does not. The Rules Committee historically has opposed a limit but, based on the successful experience with local rules, now is reconsidering a limit in the national rule.

In general, Judge Weis said, the policy of the Rules Committee is to encourage districts to keep the number of local rules to the fewest possible, but not so few as to cut off the empirical approach to local rule-making. Judge Weis noted that tension exists between this policy and the "no conflicts with national rules" directive in the Rules Enabling Act and expressed concern that a restrictive interpretation of the statute might cut off valuable experimentation.

Judge Weis said he hoped Congress would follow through on its original intent and authorize continuation of the local rules project to cover other bodies of rules, including bankruptcy. Continuation, however, depends on the willingness of Congress to provide further funding and is very uncertain.

Professor King suggested that one way around the funding problem would be to utilize the resources of the Bankruptcy Division, which could work on local bankruptcy rules under the direction of a subcommittee of the Advisory Committee. Judge Weis said he believed such a preliminary effort would be beneficial. Herb Minkel said his firm probably could make two associates available on limited basis to study at least some local rules. Judge Wiseman suggested exploring the possibility of obtaining funding from the National Conference of Bankruptcy Judges. Judge Jones said that the Fifth Circuit is planning to examine the local rules within the circuit, including local bankruptcy rules. Peter McCabe noted that the Administrative Office has a collection of local bankruptcy rules and that the Bankruptcy Division had developed an index of these, which is available to the Advisory Committee as a starting point. Bill Eldridge indicated that the Federal Judicial Center also could help with such a project.

Chairman George appointed Barney Shapiro, Herb Minkel and Larry King to look into possible sources of funding. The Chairman also asked each member to send a copy of the local bankruptcy rules of his or her own district to Peter McCabe for transmission to the other members. Patricia Channon will send a copy of the local rules index to each member of the subcommittee.

Consideration of the Reporter's Draft Revisions to the Rules

The written materials which formed the basis for the discussion are the Reporter's March 15, 1988, memorandum concerning proposed amendments relating to United States trustees and the attached draft rules of even date. The Reporter noted that he had received a responsive memorandum from the Executive Office for United States Trustees dated April 27, 1988, and written comments from two members of the Advisory Comittee, Barney Shapiro and Jerry Patchan. The Reporter indicated that he would refer to these comments during his presentations on the specific rules to which the comments were addressed.

At the Chairman's request, however, the Reporter responded in general terms to one issue raised in the United States trustee's April 27 memorandum, that of supervision by United States trustees of debtors in possession. The Reporter stated that 28 U.S.C. § 586 clearly authorizes the United States trustee to supervise the administration of chapter 11 cases and to monitor a debtor in possession's performance of all statutory duties under the Bankruptcy Code. Professor Resnick observed further that 11 U.S.C. § 307 gives the United States trustee the right to raise and to appear and be heard on any issue in a case and that various provisions of title 11 authorize the United States trustee to take specific actions which may affect debtors in possession. Professor Resnick said that his memorandum and draft were not intended to conflict with these statutory provisions but, rather, to reflect his view that supervision by the United States trustee should not extend to the daily operations of the debtor in possession's business. Tom Stanton stated that, while he agreed generally with this summary of the United States trustee's role in chapter 11 cases, he would assert the United States trustee's authority to become involved in such matters as officers' salaries, in particular cases which might warrant such action.

The Chairman proposed that the Advisory Committee vote separately on the substantive changes to each rule. Upon completion of that process, a style committee, made up of a few members appointed by the Chairman, would go over the entire draft to finalize the words. Then the Advisory Committee would consider the entire draft one last time, for final approval. The Advisory Committee agreed to the this procedure, by consensus.

RULE 1002

The Advisory Committee approved by unanimous vote the revision of Rule 1002 as drafted by the Reporter.

The revision adds a new subdivision (b) to the rule which affirmatively requires the clerk to "transmit" to the United States trustee a copy of every petition filed. The discussion focussed on the use and meaning of the word "transmit." The Advisory Committee expressed concern that its intent be clear. The United States trustee is to receive a copy of the filed petition. Therefore, the rule imposes the duty on the clerk. The actual means of transmission is a matter between the United States trustee and the clerk; it may be by pickup by the United States trustee from the trustee's box in the clerk's office, or by the clerk mailing the document to the United States trustee, or by electronic transmission.

There is no intent that the clerk should make the copy, however. The prescribing of the number of copies to be provided to the clerk by the petitioner was deleted from the rules in 1987, as a matter best left to local rules.

RULE 9022

The Advisory Committee considered the proposals concerning this rule at this point because approval of the revisions to it would eliminate the need to provide specifically in several other rules for the transmitting of copies to the United States trustee.

The Advisory Committee approved unanimously the Reporter's proposed revisions to Rule 9022(a) and (b), subject to their modification to require the clerk to transmit to the United States trustee a copy of the judgment or order, rather than notice of entry.

RULE 1006

The consensus of the Advisory Committee was that no changes to Rule 1006 are needed.

The bases for not making any change were: 1) having approved the revision to Rule 9022 to require transmission of a copy of every order or judgment to the United States trustee, no specific direction is needed in Rule 1006; and 2) the unlikelihood of anyone's construing the "filing fee" mentioned in the rule as

including or referring to the chapter 11 quarterly fee payable to the United States trustee, which also is denominated as a filing fee in 28 U.S.C. § 1930(a).

RULE 1007

1007(a)(1), (a)(2), and 1007(d). **The Advisory Committee voted unanimously against including in these rules the revisions proposed by the Reporter. The Committee Note will state that language of Rule X-1002(b) authorizing the United States trustee to require unspecified additional information has not been carried over because the [new, revised] Official Form prescribes uniform national requirements on this subject.**

The discussion reflected the concern of both the Advisory Committee and the Executive Office for United States Trustees that any requirement of additional information concerning creditors be uniform throughout the country. The Advisory Committee considers the Official Form to be the appropriate place in which to prescribe such information. Tom Stanton stated that the experience built during the pilot program should enable the Executive Office to advise the drafters of the new forms concerning the additional information needed for appointing creditors committees. The Advisory Committee Note was determined to be the proper vehicle for explaining the decision to delete from the rules the specific authority to require additional information now contained in Rule X-1002(b) in favor of prescribing uniform disclosures in the Official Form.

The Executive Office for United States trustees will provide the Administrative Office with a list of information that should be required in the List of Creditors Holding 20 Largest Unsecured Claims (Official Form No. 9).

1007(a)(4) and 1007(c). **The Advisory Committee approved unanimously the revisions proposed by the Reporter.**

1007(l). **The Advisory Committee voted unanimously to delete the two final sentences of the Reporter's draft of this new subdivision of the rule.**

Concerning the first deleted sentence, the Reporter said he was changing his recommendation as a result of the comments received from the Executive Office for United States Trustees. As revised, the Reporter's draft would have required the clerk to transmit forthwith to the United States trustee the list of equity security holders filed by the debtor pursuant to Rule 1007(a)(3). This would have been accomplished by inserting "(a)(3)" into the first sentence and deleting the second sentence.

Several members pointed out that imposing such a requirement would burden both the clerk and the United States trustee with handling bulky documents, while serving no useful purpose. For any publicly owned corporation, these lists are voluminous and become outdated quickly as a result of continuing trading activity. Although, the United States trustee has the authority to convene a meeting of equity holders, Tom Stanton agreed that this rarely occurs. If the United States trustee were to perceive a need for such a meeting, a current list (provided by the debtor) would be needed. The Reporter stated that the proposed addition of a subsection (d) to Rule 2015, requiring debtors in possession to cooperate with and furnish information to the United States trustee, would provide the United States trustee with ample authority to obtain a list from the debtor.

The consensus of the Advisory Committee was that the Note to this rule should state that if the United States trustee requires a list of the debtor's equity security holders, the trustee can request one under (new) Rule 2015(d).

Concerning the second deleted sentence, which was determined to be unnecessary in light of the revision to Rule 9022 approved earlier, Tom Stanton expressed concern about possible negative inferences from not carrying over all specific directives now contained in the X-Rules. He said he did not want these actions by the Advisory Committee to be construed as diminishing the authority now exercised by United States trustees under the X-Rules.

The Advisory Committee agreed to include in its transmittal letter to the Rules Committee some legislative history on this point. The transmittal letter will state that, although not all of the X-Rules have been preserved, there is no intent to curtail the authority granted to the United States trustee by Congress. The transmittal letter will explain that the X-Rules were experimental, that experience has shown some provisions to be unnecessary, and that some provisions have been superseded by statutory amendments.

RULE 1009

The Reporter's draft adds a new subsection (c), requiring the clerk to transmit to the United States trustee any amendments to a petition, lists, schedules, or statements filed by a debtor. At the suggestion of Tom Stanton, the Reporter also proposed to insert in the second sentence of the Note, after the phrase "take appropriate steps," the words <u>to monitor the trustee's efforts</u>.

The Advisory Committee approved these changes by unanimous vote.

RULE 1014

The Advisory Committee voted unanimously to delete from the proposed revisions to subsections (a)(1) and (a)(2) of the rule the phrase "except in a chapter 9 municipality case," and directed the Reporter to revise the Note accordingly.

RULE 1015

The Advisory Committee agreed by consensus that there is no need to amend this rule, as the previously adopted change to Rule 9022 will assure that the United States trustee receives a copy of any order concerning joint administration.

RULE 1017

1017(a). There was no opposition to the Reporter's proposed revisions to subsection (a), which were made in the interest of clarity and accuracy of references.

The Reporter noted that Tom Stanton had requested a change in the final sentence of subsection (a), which permits the court to order the debtor "or other entity" to file the list of creditors if the debtor has failed to do so. A problem arises because the definition of the word "entity" includes a governmental unit, and the sentence thus could be construed as authorizing the court to require the United States trustee to file the list. Suggested solutions were to change the word "entity" to "person" or to add "except the United States trustee" at the end of the sentence. Barbara O'Connor explained that substitution of the word "person" would make the United States trustee susceptible to the duty when serving as the trustee in the case, a circumstance in which the United States trustee ceases to be a "governmental unit." The Advisory Committee determined to take no action on this request.

1017(b)(1). The Advisory Committee voted unanimously against any change to subsection (b)(1). This vote is consistent with the Advisory Committee's earlier action on Rule 1006.

1017(d). The Advisory Committee voted unanimously to approve the Reporter's draft revisions to Rule 1017(d).

Judge Mannes raised for consideration the apparent conflict between Rule 1017(d), which directs conversion of a chapter 13 case without court order upon the filing by the debtor of a notice under § 1307(a), and Rule 1019(2), which still refers only to "the order converting the case." The Advisory Committee agreed that Rule 1019(2) should be changed to recognize also conversions by notice pursuant to § 1307(a).

The Advisory Committee voted unanimously to add to Rule 1017(d) a final sentence, as follows: "The clerk shall forthwith transmit a copy of such notice to the United States trustee." The United States trustee, as the supervisor of the chapter 13 trustee, can take care of notifying the superseded trustee.

Professor King suggested that the Advisory Committee consider drafting an additional rule requiring the debtor to provide the clerk with extra copies of any documents which must be transmitted by the clerk to the United States trustee. Others suggested that such provisions could be left to local rule-making.

Judge Weis, however, said he would "caution you about relying on local rules too much." He said that the Judiciary has been criticized by Congress for the lack of uniformity in local civil rules and that there is a "great purge of local rules coming" in the near future as a result of the local rules project of the standing Committee on Rules of Practice and Procedure. He said his advice to the Advisory Committee would be: "Given a choice, make the point in a national rule."

The Reporter directed the attention of the Advisory Committee to a further controversy, a matter upon which he was not recommending any revision of the current rule. This is the issue of the procedure for implementing the United States trustee's new authority under 11 U.S.C. §§ 707(a)(3), 1112(e), 1307(c)(9) and 1112(b)(10) to move for dismissal if the debtor fails to timely file the lists, schedules and statements required by 11 U.S.C. § 521(1) or pay any chapter 11 quarterly fee. In a December 1987 memorandum to the Advisory Committee, Tom Stanton had argued for Rule 9013 treatment of these motions as being in the nature of automatic dismissals and, in the case of failure to pay the quarterly fee, had asserted that an application (rather than a motion) should be permitted. The Advisory Committee's former reporter, Walter Taggart, had agreed in an October 1987 memorandum that Rule 9013 treatment would be appropriate.

The Reporter disagreed. He said such motions properly should be treated as contested matters under Rule 9014, as the Rule presently provides, for the reasons stated on pages 11 and

12 of his March 15, 1988 memorandum. Briefly, those reasons were the statutory grant of discretion to the court in ruling on the motions, the rights of the debtor and creditors to oppose the motions, the possibility of bona fide disputes over the sufficiency of filed documents or amounts paid, and the authority of the court to grant extensions of time for filing.

Mr. Stanton reiterated his position, adding that the amount due is seldom in dispute, that the only issue normally is failure to pay, and that the more streamlined application procedure should be available. Professor King responded that the policy of the Advisory Committee always has been to keep applications to a minimum and that a motion is the appropriate procedure for any matter which either is known to be disputed or which has the potential to generate a dispute.

By unanimous vote, the Advisory Committee upheld the Reporter's recommendation to retain unchanged the provisions of Rule 1017(d) requiring that motions to convert or dismiss be treated as contested matters, unless specifically excepted in the rule.

1017(e). The Reporter explained that the additions he was recommending were intended to afford the debtor due process in any proceeding to dismiss a case for substantial abuse under 11 U.S.C. § 707(b).

There was discussion concerning whether the notice [of the filing of the motion under § 707(b)] or the motion itself should be the means by which the debtor is advised of the basis for the allegation of substantial abuse.

Professor King made a motion that the word "motion" be substituted for the word "notice" in line 6 of page 11 of the Reporter's draft, which carried by a vote of 10 to 2. The question of whether the court can file a motion is left for resolution by the style committee.

Professor Resnick said he had included a time limit for filing the motion, 60 days from the first date set for the meeting of creditors, primarily because granting of the motion has the same effect as a successfully prosecuted objection to discharge, and the action, therefore, should be subject to the same time limit. Moreover, he said, the decisions to date all have relied upon information readily ascertainable from the schedules - fraudulently conveying assets immediately prior to filing and filing of chapter 7 by a debtor who has the ability to fund a chapter 13 plan being the most common fact patterns.

Judge Jones, however, said that substantial abuse may not be discovered until later in the case, especially abuse by debtors who "sandbag" the court by having the meeting postponed, often until the time for filing discharge-related actions against them has run. Judge Leavy expressed concern about tying the hands of a judge who may not see the case until the time has expired.

Professor King said that § 707(b) applies only to chapter 7 consumer debtors and that there should be a time after which such persons are assured they can stay in chapter 7, no longer threatened with having to choose between converting to chapter 13 or suffering dismissal. For that reason, Professor King said he favored a shorter time limit, especially now that the United States trustee can make the motion.

Ralph Mabey raised the point that first meeting can be set for any date between 20 and 40 days after the petition is filed, even 60 days afterwards in some districts. Thus some creditors have a longer time than others in which to discover grounds for filing discharge-related complaints, a problem which is compounded if the meeting - the creditors' chief opportunity for making such discoveries - does not take place. This seemed to him illogical and possibly detrimental, not being tied to any predictable event. The limit suggested by the Reporter, he said, appeared to have been chosen primarily to be consistent with Rule 4004(a) governing the filing of objections to discharge. But the premises on which Rule 4004(a) is based do not serve well when the meeting does not occur on schedule. He favored running the time from the filing of the petition or from when the meeting actually is held. [Professor King noted that it was the bankruptcy judges who originally suggested the first date set for the § 341 as being the appropriate trigger for the running of the 60-day time periods.]

Barbara O'Connor said that the only opportunity the United States trustee has for verifying the contents of the debtor's schedules is the creditors meeting. Often debtors fail to provide mitigating information, e.g. inadvertently leaving out a mortgage or an unusually large number of dependents, she said, even though the schedules afford the opportunity. She supported running the time from the debtor's actual appearance at the meeting.

Professor King gave a history of § 707(b). He explained that the provision was born of a compromise between demands by the consumer credit industry that chapter 13 be made mandatory for consumer debtors and the opposition of many in Congress to that concept. The result was an unworkable provision which has been made somewhat more workable now that the United States trustee can make the motion.

Professor Resnick described the "mischief" that could result if no time limit were imposed, especially under the cases which construe "substantial abuse" as simply an ability to fund a chapter 13 plan. Even an honest debtor would be vulnerable to post-discharge and post-liquidation dismissal (and probably loss of the benefit of a previously granted discharge) if the court or the United States trustee were to conclude at some late date that the debtor could have funded a chapter 13 plan. The Reporter added that a fraudulent or dishonest debtor's discharge can be revoked under § 727(d), if grounds later are discovered.

Judge Leavy made a motion to delete from the proposal the 60-day time limit. The motion was defeated by a vote of 7 to 6. The Chairman stated that while he supports a time limit, he favors one predicated upon a different beginning point.

Ralph Mabey made a motion to amend the proposed draft to require any motion to dismiss under § 707(b) to be made "not later than 30 days after the debtor first appears for examination at the meeting of creditors held pursuant to § 341(a)...." He subsequently accepted an amendment enlarging the time to 60 days. The motion, as amended, carried by a vote of 6 to 5.

In support of the motion, Mr. Mabey stated that it is illogical base the period on the time initially set for a meeting that may not occur, especially when the significant milestone is the actual opportunity to examine the debtor. Choosing this date, he said, would also encourage debtors to appear and start the time running. He said he selected the debtor's first appearance rather than the conclusion of the meeting because the availability of adjournments could promote abuses.

Chairman George observed that for the practical purpose of giving notice of the time limit, the first date set for the meeting works well; the clerk cannot predict whether the meeting will occur on schedule. Notwithstanding the inconvenience to the clerk in tracking the expiration of the time, however, the actual examination of the debtor is critical to the issues, he said, and the administrative burden must be borne.

Judge Mannes suggested that the Rules governing the time for filing § 707(b) motions, objections to discharge, § 523(c) complaints and objections to exemptions all be uniform. Chairman George noted that § 707(b) motions involve only two entities- the court and the United States trustee - whereas the other three are creditors' actions. Most creditors do not attend § 341 meetings and would not know when the debtor appeared. Thus the initial date set for the meeting, as the rules now provide, probably should continue to be used for starting the time running

for these actions. The Chairman directed the Reporter to study the issue of uniformity prior to the Advisory Committee's consideration of Rules 4003, 4004, and 4007.

Herb Minkel requested that the style committee consider adding the words or Conversion to the caption of Rule 1017.

RULE 1018

At the suggestion of Jerry Patchan, the Chairman deferred consideration of Rule 1018 until the Advisory Committee considers the Reporter's proposed new Rule 7005.1. The only change proposed to Rule 1018 is the addition of a reference to [proposed] Rule 7005.1.

RULE 1019

1019(2). Based on the action taken previously on Rule 1017(d), this subsection was thought no longer necessary. The Advisory Committee voted unanimously to delete Rule 1019(a)(2).

1019(6). By consensus, the Advisory Committee approved the Reporter's draft adding the United States trustee to the rule.

RULE 2001

The Advisory Committee voted unanimously to include in the Advisory Committee Note the following sentence: "This rule does not apply to the exercise by the court of its sua sponte powers pursuant to § 105(a)."

RULE 2002

2002(a). The Reporter explained that this rule is structured to provide notice of certain events to all creditors. There appeared to be no need, however, to notify all creditors of a hearing to consider dismissal under the restricted terms of § 707(b). Accordingly, an exception has been inserted in (a)(5), allowing the court to determine who should receive notice [in addition to the debtor, who is provided for in Rule 1017(e)]. Discussion focussed on whether creditors have a right to participate which would be impaired by depriving them of notice. Harry Dixon and Jerry Patchan supported requiring that notice be sent unless the court directs otherwise, so that the rule would

be amended to limit notice but not eliminate it. The Reporter noted that Rule 1017(e) covers notice and leaves the extent of any noticing beyond the debtor to the discretion of the court.

A motion to adopt the Reporter's draft carried, with two opposed. Judge Leavy expressed continuing concern about a negative inference being derived from the elimination of a notice requirement in this rule. It was the consensus that the Advisory Committee Note to the rule effectively could overcome any potential negative inference by directing attention to Rule 1017(e). Pursuant to further motion, unanimously carried, the final sentence of the proposed Advisory Committee Note will be deleted and replaced with the following: "Such hearings are governed by Rule 1017(e)."

Jerry Patchan recommended that the style committee consider, in (a)(5), transposing the words "dismissal" and "conversion" so that the exception clearly would relate only to dismissals.

Ralph Mabey questioned the omission from (a)(5) of a motion to convert a chapter 13 case made under § 1307(c). The Chairman directed the Reporter to research this omission and prepare a recommendation for the next meeting.

2002(f). Pursuant to unanimous vote, subsection (4) will be deleted, and "or conversion" will be inserted after "dismissal" in subsection (2).

2002(i). Pursuant to a suggestion by the Reporter not contained in the draft, the Advisory Committee approved unanimously the insertion of the words "transmitted to the United States trustee and" immediately prior to "mailed only to the committees" in the second sentence.

2002(k). This is a new subdivision. The Reporter will correct the references to subsection (f) of the rule in accordance with previously approved changes to subsection (f).

This proposed rule deals specifically with notices to be provided to the United States trustee and is derived from the current Rule X-1008. The Reporter recalled the discussion at the January 1988 meeting concerning the propriety of the exemption from noticing of fee applications under $500 in Rule 2002(a)(7). He noted that he had provided the members with a memorandum justifying the exemption on the basis of the definition of notice in § 102, legislative history, and the expansion of the United States trustee system. He said requiring that notice of all fee applications be provided to the United States trustee, as proposed subsection (k) does, should ensure that the interests of all parties are protected.

By unanimous vote, the Advisory Committee struck from the proposed new subsection the words "or mail" and "or mailed." Professor King expressed concern that the proposed subsection did not specify any time for providing the notices. The Reporter suggested that this could be cured by inserting in the second sentence the words "in subdivisions (a) or (b) of this rule" after the word "prescribed," and dropping the rest of the sentence, which would be unnecessary. The Advisory Committee adopted this suggestion by unanimous vote.

Several members objected to the phrase "sufficient time to permit the United States trustee to participate" in the final sentence. In particular, there was concern about whether a subjective standard, based upon the United States trustee's workload or convenience, would or could be applied to determine what was "sufficient" time. Professor King said he believed the phrase was unnecessary, as the concept of notice already includes providing a meaningful opportunity to participate. The Advisory Committee voted unanimously to delete from the third (final) sentence the reference to sufficient time.

The second and third sentences, as revised, would read as follows:

> Notices to the United States trustee shall be transmitted within the time prescribed in subdivisions (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court.

RULE 2003

2003(a). The Advisory Committee approved the Reporter's draft of this rule by unanimous vote.

2003(b)(1). The Advisory Committee voted unanimously to strike the phrase "or a designee" from the rule. The Advisory Committee Note will disclose the reason for deleting the final sentence. Professor King explained that the sentence originally was included because the judge, who would set the trustee's bond, is not permitted to attend the creditors meeting. The sentence was intended to provide creditors with a means of advising the court concerning any information relevant to the amount of the bond which had been adduced during the examination of the debtor. Now that the bond is set by the United States trustee, who is present at the meeting, the sentence was thought unnecessary. Nothing prevents any creditor from making recommendations to the United States trustee concerning any matter in a case.

2003(b)(2). The Advisory Committee unanimously adopted the Reporter's modified recommendations concerning this rule. The first sentence will begin, "If the United States trustee convenes a meeting...." The phrase "or a designee" also was deleted. As a matter of style, it was noted that the final "United States trustee" could be dropped.

2003(b)(3). The Reporter explained that he was recommending deletion of the second sentence because he also is recommending that Rule 2009(e) be abrogated. The reason for abrogating Rule 2009(e) is that it may infringe on the authority of the United States trustee to appoint trustees; it is not applicable in United States trustee districts under the X rules.

Professor King questioned deletion of that portion of the sentence dealing with the right of a partnership creditor to file a proof of claim evidencing a right to vote for a separate trustee in an individual partner's case, even though the trustee of the partnership otherwise preempts the rights of partnership creditors to participate in an individual partner's case [§ 723(c)]. The Reporter responded that Rule 2009(e) only applies when there is joint administration. Since there can be separate trustees even in jointly administered estates, however, the Reporter said he could not understand treating the situations differently.

The Advisory Committee voted unanimously to strike the second sentence and directed the Reporter to draft a new subsection covering the right of partnership creditors to vote for a trustee in an individual partner's case.

The Reporter also recommended that the last sentence be changed to substitute the "United States trustee" for the "court" and adding a final clause as follows: "subject to a resolution by the court pursuant to subdivision (d) of this Rule." The Reporter also would add to the Advisory Committee Note an explanation and a direction to the United States trustee to tabulate and report the results of each alternative presented by the disputed election. Members King, Shapiro, Mabey and Leavy expressed concern about the United States trustee exercising the judicial function of allowing a claim, especially since a motion to resolve the dispute also is required. Creditors may be surprised when the failure of a creditor to make such a motion results in the interim trustee continuing as trustee, pursuant to subdivision (d).

Judge Jones suggested amending the caption to subsection (d) to indicate that disputed elections are covered there.

By consensus, the Advisory Committee remanded this issue to the Reporter for reworking along the lines of the instructions for reporting disputed elections now located in the Advisory Committee Note. This subdivision is to be considered as a special item of business at the next meeting, with particular emphasis on any aspect of the proposal which would confer a measure of judicial power on an administrator.

2003(c). Several objections to the Reporter's draft were raised, in particular with respect to the proposal restricting production of transcripts to "the court reporter" and the imposing of official Judicial Conference rates. Barbara O'Connor objected to the requirement to file the original tape with the clerk. She said that parties or attorneys most often only want to listen to the tape, an undertaking which may be disruptive to the clerk's office. Moreover, the United States trustee presently keeps the record at or near the § 341 meeting site; a requirement to file the tapes with the clerk may cause major inconvenience and dissatisfaction in areas where great distances separate the United States trustee's office from the court.

The Reporter stated that his proposal took shape from expressions at the January meeting which indicated a consensus that the § 341 record be part of the official record of the case, but that it appeared from the discussion that the members had revised their view. Judge Leavy said the draft rule seemed to "exalt" the § 341 meeting record beyond that of any other extra-judicial proceeding, while neglecting important details of accountability for the producing and keeping of a record. Professor King expressed concern about access to the records, as the United States trustee is not under the same statutory duty to provide this as the clerk is. Barbara O'Connor said the policy of some United States trustees concerning meetings in chapter 7 cases is to erase and reuse the tapes after 90 days, a period which the Chairman considered far too short if no copy were on permanent file with the clerk.

Ralph Mabey made a motion that the second sentence of the rule provide that the United States trustee shall make a record of the § 341 meeting, preserve the record until one year after the case is closed, and provide certified duplicates or transcripts of the record at the expense of the requesting party. The motion carried with one vote opposed and one member abstaining.

By consensus the Advisory Committee agreed to delete the final sentence of the Reporter's proposed draft, on the basis that the Rules of Evidence provide adequately for admitting the record of the § 341 meeting into evidence.

Pursuant to a motion by Ralph Mabey, later withdrawn, the Advisory Committee discussed whether it is necessary for the presiding officer to prepare and file with the clerk minutes of the meeting. Professor King made a motion that the first sentence of this subdivision be replaced with one that requires the United States trustee to inform the clerk of the occurrence of the § 341 meeting and the examination of the debtor, which information will be placed by the clerk in the docket of that date. The motion carried by a vote of 9 to 3.

Judge Leavy said he wanted to explain his negative vote. Allowing the docket entry to be based on a notation in a daily report from a source outside the court would lend a "folkloric" aspect to the court's docket compromising its integrity, he said. In Judge Leavy's view, a docket entry is proper only when supported by an actual document in the file. Judge Jones said she was not troubled by the absence of a document and cited the numerous docket entries indicating the occurrence of pre-trial conferences. "There's no document, but nobody disputes they were held," she said. Professor King quoted from Bankruptcy Rule 5003 which directs the clerk to enter on the bankruptcy docket, not only every order or judgment, but also every "activity" in the case. The concept of a docket in a bankruptcy case appears to be somewhat broader than it may be in a civil case or an appeal, he said, and the meeting of creditors unquestionably is an "activity" of the type contemplated in Rule 5003 as being suitable for docketing.

2003(f). The Advisory Committee voted unanimously to approve the Reporter's draft with two modifications, so that the subdivision will read as follows:

> (f) SPECIAL MEETINGS. The United States trustee may call a special meeting of creditors on request of a party in interest or on the United States trustee's own initiative.

2003(g). The Advisory Committee unanimously approved the Reporter's draft subject to the deletion of the phrase "or designee" from the second sentence.

RULE 2006

2006(e). The Advisory Committee unanimously approved the Reporter's draft as amended to change the reference to Rule 2003 to a reference to § 341(a) of the Code.

The use of the word "file" was referred to the style committee.

2006(f). No amendment is necessary because of adoption earlier of the amendment to Rule 9022. The final sentence of the Reporter's draft is to be stricken.

RULE 2007

The Reporter observed that this rule did not apply in pilot districts. He said he had decided to preserve it based on the discussion at the January meeting indicating a strong preference for retaining judicial review of the appointment of committees.

2007(a) and (b). The Advisory Committee approved the Reporter's draft with the deletion, in (b)(2) of the phrase "with the court." The vote was 8 to 1.

The use of the word "filed" was referred to the style committee.

2007(c). The Advisory Committee approved unanimously the Reporter's draft.

Adjournment and Next Meeting

The Chairman adjourned the meeting at 11:50 a.m., May 14, 1988.

The next meeting of the Advisory Committee will be held July 7 and 8, 1988, at the Breckenridge Public Affairs Center of Bowdoin College, in York, Maine.

Respectfully submitted,

Patricia S. Channon

Patricia S. Channon
Attorney
Division of Bankruptcy