ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 18-19, 2003
Stevenson, Washington

Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, and Professor Bruce A. Markell, advisor to the Committee, attended the meeting.

Bankruptcy Judge Dennis Montali, liaison to the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); Peter G. McCabe, secretary of the Committee on Rules of Practice and Procedure (Standing Committee); and Martha L. Davis, Principal Deputy Director, Executive Office for United States Trustees (EOUST), attended. Circuit Judge Anthony J. Scirica, chair of the Standing Committee; Circuit Judge Harris L. Hartz, liaison to the Standing Committee; Professor Daniel Coquillette, reporter of the Standing Committee; and Lawrence A. Friedman, Director, EOUST, were unable to attend.

The following additional persons attended the meeting: James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); James Ishida, Rules Committee Support Office; James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center (FJC).

The following summary of matters discussed at the meeting should be read in

conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed all the members, liaisons, advisers, and guests to the meeting. Judge Zilly welcomed the Committee to Washington state. The Chairman announced the reappointment of Judge Zilly, Judge Klein, and Mr. Shaffer and the designation of Judge Hartz as liaison to the Standing Committee. The Chairman recognized Judge Gettleman, whose term expired with this meeting. The Chairman announced that Patricia Ketchum has retired and Mr. Wannamaker has replaced her as principal support staff for the Committee.

The Chairman praised the invaluable contributions of District Judge Norman C. Roettger, Jr., a member of the Committee, who passed away on July 26, 2003. Judge Roettger, who served on the federal bench for 31 years, had a keen mind and a wealth of knowledge about a wide and varied array of subjects. In addition to his Committee work, Judge Roettger was a great story teller and a wonderful dinner companion. Judge Zilly recalled Judge Roettger's appreciation for the work of the Committee and his contributions. **A motion to approve a memorial resolution recognizing Judge Roettger passed unanimously.**

The Committee approved the minutes of the April 2003 meeting.

The Chairman briefed the Committee on the June 2003 meeting of the Standing Committee. The Standing Committee approved proposed amendments to Rule 9014, technical amendments to Rules 1011 and 2002, and new Official Form 21. The Standing Committee approved the Committee's recommendation to publish proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 for public comment. Comments are due by February 16, 2004, and a public hearing on the comments has been tentatively scheduled for January 30, 2004, in Washington, D.C. District Judge David F. Levi has been designated as the new chair of the Standing Committee, replacing Judge Scirica, and District Judge Lee H. Rosenthal has been designated as the new chair of the Advisory Committee on Civil Rules (Civil Rules Committee), replacing Judge Levi.

The Chairman reported that the Standing Committee discussed interest in possible rules changes relating to mass torts litigation if Congress fails to act on asbestos legislation. Mr. Rabiej stated that no decision has been made on holding a mass torts conference to discuss the situation.

The Chairman reported that the Supreme Court has approved and transmitted to Congress amendments to Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, 2016, and 7007.1. The amendments will take effect on December 1, 2003, unless Congress enacts legislation to reject, modify, or defer them. The Chairman reported that proposed amendments to the Model Local

Rules for Electronic Case Filing have been placed on the consent calendar for the September 2003 meeting of the Judicial Conference.

Judge Montali reported on the June 2003 meeting of the Bankruptcy Administration Committee. Circuit Judge Marjorie O. Rendell has been designated as the new chair of the Bankruptcy Committee. Judge Montali reported that a major issue at the June meeting was whether retired bankruptcy judges and magistrate judges who conduct mediation and arbitration sessions are practicing law, which would disqualify them from receiving cost-of-living increases in their pensions. Responding to concerns that reversing the Administrative Office's current interpretation would have a negative impact on the prospects for a cost-of-living adjustment for active judges, the Bankruptcy Administration Committee agreed to defer consideration of the issue.

After a spirited debate on proposed adjustments in the Miscellaneous Fee Schedule, including doubling the fee for motions for relief from the automatic stay, the Bankruptcy Administration Committee endorsed the changes by a 6-5 vote. The Bankruptcy Administration Committee recommended that the Judicial Conference express concern regarding legislation to provide for the expungement of the record of involuntary bankruptcy cases filed against individuals in bad faith and that the Conference request legislation to permit bankruptcy judges to hold court outside the district in emergencies.

Action Items

Rule 2002(g) — National Creditor Registry. The Bankruptcy Noticing Working Group has previously requested that the Committee consider amending Rule 2002(g) to permit creditors to receive notices on a national or regional basis. In addition, the Working Group asked that the Committee consider amending Rule 2002(g) to permit creditors to register in a single place the address or addresses they wish to be used in all cases and in all districts throughout the bankruptcy system. Section 315 of the Bankruptcy Reform Act of 2003, H.R. 975, as passed by the House of Representatives, includes a similar provision. When the Working Group's proposal was discussed at the last Committee meeting, Committee members expressed skepticism about the software that would be used to match creditor names and addresses in bankruptcy cases with the creditors who sign up to receive notices on a national or regional basis. The software is already used to identify creditors that have signed up to receive electronic notices on a district-by-district basis.

The Technology Subcommittee met on May 19, 2003, in Washington, D.C., and heard from the contractor that operates the Bankruptcy Noticing Center (BNC) for the Judiciary as well as AO staff responsible for the noticing program. The contractor and AO staff explained the operation of the BNC's certified address-verification software, which is comparable to that used by the United States Postal Service. The software determines whether any entities listed on the debtor's schedules have requested electronic notices. If there is not a perfect match between the creditor name and address supplied on the schedules and the names (or synonyms) and addresses

of parties getting electronic notices, the notice is sent by mail to the address on the mailing matrix. The BNC representatives said approximately 1,100 entities use electronic noticing pursuant to 4,500 noticing agreements with the courts.

The Technology Subcommittee concluded (1) that any national creditor registry should only apply to chapter 7 and chapter 13 cases where high volume creditors are more likely to appear, (2) that the current registration system for electronic noticing works well but deleting the requirement for a separate noticing agreement for each district would facilitate operation of a national creditor registry, (3) that any potential problems with the accuracy and expedience on the part of notice providers other than the BNC could be addressed by performance standards set by the Administrative Office, and (4) that Rule 2002 should be amended. Judge Zilly, the chair of the subcommittee, said the only question is the form of the amendment.

The Reporter stated that the proposed legislation would let a creditor sign up for the national creditor registry with any bankruptcy court. He said he followed the proposed legislation in drafting an amendment to Rule 2002(g) because there is no downside once you are satisfied with the accuracy of the system and because creditors take the risk by opting into the system. Mr. Frank stated that he was concerned about the possibility of a notice intended for an unregistered creditor going to a creditor that has registered for the system. The Reporter said the BNC's matching software is very good and that there is only a very, very minor chance of a registered creditor getting a notice intended for an unregistered creditor. Mr. Waldron said there is an infinitesimal chance of two creditors having the same name and address in the same Zip Code.

The Chairman stated that Rule 2002 covers not just notices given by the BNC, but also notices given by the clerk, the chapter 13 trustee, the debtor, and other persons designated by the court to give notices. If they are required to send notices to a creditor's registered address, they need access to the name- and address-matching software. Mr. Frank stated that he does not understand how a debtor would comply if the debtor was required to give notice and if use of the creditor address registry is mandatory, not a safe harbor. Professor Resnick asked how the national registry would function if creditors could register an address to be used by all courts with any court. Mr. Waldron said the clerk would forward the address to the BNC, which would maintain the registry, but that it would be easier for the clerk if creditor addresses were all registered at one place. Judge Swain suggested that an Official Form be prescribed for registering creditor addresses. Professor Resnick stated that requiring creditors to file their preferred address with the court would have the advantage of making it a matter of record. Judge Walker asked what filing would mean in this context and how the clerk would keep and treat the requests.

Professor Markell stated that creditors are always trying to make notices directed to a creditor's local address, such as a store, ineffective. He said it might be best to craft the amendment as a safe harbor until the proposed legislation passes. Judge Torres suggested adding a sentence that the court's failure to send a notice to a registered address does not render invalid an otherwise valid address. Professor Resnick suggested tracking that provision in Rule

5003(e).

Judge Montali said the current presumption is that a notice to an address listed by the debtor actually goes there. The Reporter said the proposed amendment provides that a notice sent to a creditor at its registered address is presumed to be the proper address for the notice. Mr. Adelman said the debtor who puts the correct address on the schedules should not bear the risk that a notice is mishandled. Professor Resnick said the Committee Note should explain the consequences of the debtor scheduling a correct address which is not the creditor's registered address and the notice going to another registered address. The Reporter said a computer error in matching creditor names and addresses would be the same as a postal carrier taking the notice to the wrong house.

Professor Resnick said the registry of government addresses maintained by the clerk under Rule 5003(e) could be a model for the amendment to Rule 2002. Judge Klein stated that the Rule 5003 registry is available to anyone sending notices. He suggested that someone should maintain a registry of creditor addresses which would be the basis of contractual agreements with creditors on noticing. The Reporter stated that the Working Group's proposal was not intended to create a registry as such and that the database of creditor names and synonyms and addresses would be massive and would have to be updated every time a creditor opens a new store. Judge Klein said debtors would use a creditor address registry because they want to get the most accurate addresses. Professor Resnick said the Committee declined to include municipal governments in the Rule 5003 registry because that would have been too many addresses.

Judge Walker suggested providing that a creditor could agree with an entity authorized to give notices as to the place and manner of receiving notices. The Reporter said that notice providers could be defined in Rule 9001 and that the provision for creditor agreements with notice providers could be included in Rule 2002. He said confidence in the notice providers would come from their certification by the AO. The Chairman said he had proposed this approach but that the Administrative Office expressed concern about setting technical standards and quality controls for authorized notice providers. Judge McFeeley said the clerk's office should not be excluded because CM/ECF will have the capacity to do this.

The Committee discussed how a deputy clerk mailing copies of a court order or a chapter 13 trustee sending notices would get a creditor's preferred address and how difficult that would be. Judge Klein said the BNC should be given latitude in implementing the proposal. Judge Swain said the amendment should be permissive, not mandatory, and should apply only to notices sent by the court. **The committee approved in principle permitting a creditor to obtain notices at a preferred address. The Chairman asked the Reporter to prepare alternative drafts of the proposed amendment for the next meeting. One draft would follow the subcommittee's recommendation, which would allow a creditor to notify a clerk's office of its preferred address. The other draft would allow a creditor and an approved notice provider to make their own arrangements.** Professor Resnick suggested a third approach based on Rule 9036. **The Committee agreed to consider that as well.**

Rule 9036 — Confirmation of Receipt. Rule 9036 provides that electronic noticing is complete when the sender obtains electronic confirmation that the transmission has been received. The Reporter stated that confidence in the delivery of e-mail has increased greatly since the rule was added in 1993. The Technology Subcommittee met on May 19, 2003, in Washington, D.C., and heard from the contractor that operates the Bankruptcy Noticing Center (BNC) for the Judiciary as well as AO staff responsible for the program. The BNC conducted a test of the top 10 Internet Service Providers (ISPs) and obtained a 99.62 percent success rate for receipt of the messages, provided that the message contained a link to the notice rather than including the notice as an attachment. Because few ISPs offer return receipts, the Reporter stated that the confirmation requirement is arguably obsolete and may hinder the use of electronic noticing if enforced to its letter. The subcommittee recommended deleting the last sentence of Rule 9036, including the confirmation requirement.

Mr. Shaffer questioned why Rule 9014(b) requires that the motion initiating a contested matter be served in the manner provided for the service of a summons and complaint in Rule 7004 and, as a result, cannot be served electronically. He said many attorneys just serve the attorney for the other party electronically if both parties are already in the case and both attorneys are CM/ECF participants. Professor Resnick stated that contested matters are as important as any other litigation and, thus, historically service under Rule 7004 was required for contested matters. Judge Walker suggested that the rule be revised to cover a number of other means of sending notice, including electronic transmission. Judge Klein stated that because Civil Rule 5(b)(2)(D) already applies in adversary proceedings, the amendment to Rule 9036 should be as close as possible to the civil rule to avoid inconsistencies between the two rules. The Reporter stated that Rule 5(b)(2)(D) also applies in contested matters.

Judge Zilly suggested adding a statement that the electronic transmission is complete on transmission. Judge Montali said Rule 9036 should be consistent with Rule 9006(e), which provides that service of notice by mail is complete on mailing. The Committee discussed whether to add to Rule 9036 the provision in Civil Rule 5(b)(3), which is incorporated by Rule 7005, that service by electronic means is not effective if the party making service learns that the attempted service did not reach the intended person. Professor Resnick said requiring that a notice reach the intended "person" is ambiguous. Judge Klein said an attorney who does not open his mail or who is on vacation when notice is given could argue that he or she did not receive the notice. Mr. Shaffer said signing up for electronic noticing is voluntary and that participants assume the risk that their e-mail system may be down. **Judge Walker's motion to strike the last sentence in Rule 9036 and substitute, "Notice by electronic means is complete on transmission." carried with two dissenting votes.**

Restyling Civil Rules. The Civil Rules Committee has initiated a project to restyle the Civil Rules. Restyled versions of Civil Rules 1 through 15 were presented to the Standing Committee in June and approved for publication in August 2004. The Civil Rules Committee is continuing its restyling effort and expects to have another substantial portion of the restyled rules ready for presentation to the Standing Committee next year and, if the Standing Committee

approves, for publication along with the first group of restyled rules.

This Committee discussed whether to begin restyling the Bankruptcy Rules immediately or whether to wait. Professor Resnick stated that this Committee should wait to see what the Civil Rules Committee does and then respond. He said many of the Civil Rules are incorporated verbatim in the Bankruptcy Rules. Because the restyled Civil Rules will not be published until 2004 and because many of the changes are technical ones which do not require publication, Professor Resnick said waiting would, at worst, leave the Bankruptcy Rules only a year or two behind the Civil Rules in restyling. Judge Walker, the liaison to the Civil Rules Committee, said the Style Subcommittee of the Civil Rules Committee is very receptive to comments on the impact of changes in the Civil Rules on the Bankruptcy Rules.

Judge Zilly stated that Civil Rule 5 refers to electronic filings and service by electronic means if authorized by a local rule, but that many bankruptcy courts use general orders to authorize electronic filing and service. Professor Resnick stated that the Standing Committee prefers local rules, even if the rule refers to a general order. Mr. McCabe said the preferred practice was that the court authorize electronic filing and service in a local rule and then put the details in a general order or administrative procedure.

Mr. Rabiej said Civil Rules 1 through 37 and Rule 45 are to be published and that it would be difficult for each committee member to review the whole package. He suggested that the Chairman assign portions of the restyled rules for review. **The Chairman stated that, when restyled rules are approved by the Standing Committee, they will be sent to all committee members. Any member wishing to discuss any restyled rule should inform the Chairman and the restyled rule will be added to the agenda for the spring 2004 meeting.**

Rule 5001(b) — Court Locations. The courts have been preparing plans to ensure their continued operation in the event of emergencies. Mr. Wannamaker stated that, in the course of the emergency planning, it became clear that some courts would be best served by conducting matters in another district. Under the existing statute and Rule 5001(b), there is a serious question as to whether a bankruptcy judge could hold court in the next most available court location. This led to a proposal before the Judicial Conference to seek an amendment to 28 U.S.C. § 152(d), which would permit bankruptcy judges to hold court outside of the district if emergency conditions are present and no location for holding court is reasonably available within the district. In addition, it has been suggested that Rule 5001(b) be amended.

Mr. Shaffer suggested moving the phrase, "Except as provided in 28 U.S.C. § 152(d)," from the beginning of the second sentence to after the word "but" in line 7 in the draft amendment prepared by the Reporter. **There was no objection.** Judge Montali said it sometimes is difficult to say just where the court is. For instance, the judge may conduct a hearing by teleconference from a hotel room while the parties and counsel are other locations. Mr. McCabe stated that judges conduct trials from remote locations by videoconference. **At the suggestion of Mr. Rabiej, the Committee approved the proposed amendment in principle but deferred further action. If legislation is passed authorizing bankruptcy judges to hold**

court out of district, the Chairman stated that the Committee would consider the request by e-mail ballot.

Rule 7004(b)(3). Judge Robert J. Kressel has urged the Committee to consider revising Rule 7004(b)(3) to clarify the requirement for service of a summons and complaint on a corporation. Judge Kressel observed that the rule is unclear as to whether it requires the name of an individual who is an officer or appropriate agent on the envelope or whether an envelope generically addressed to "any officer, or managing or general agent of XYZ, Inc." also is effective.

The Reporter stated that Judge Kressel's observation about the ambiguity of the rule is borne out in the case law. The Reporter presented two draft amendments to remove any perceived ambiguity. The first directed that the summons and complaint be served on a specific individual and the second was intended to clarify that under the current rule, generic service is acceptable. Professor Resnick and Judge Swain challenged whether the second draft amendment, which changed "an officer" to "any officer" clarifies the matter. Professor Resnick suggested inserting "by name or office." Mr. Frank stated that the Committee should not increase the burden on the party serving the summons and complaint and that mail addressed to the president or chief executive officer of a corporation should get to that person.

Judge Zilly and Judge Klein stated that they are reluctant to deviate from the parallel with the language of Civil Rule 4(h). Judge Klein said the district judges didn't seem to have a problem with that language in Rule 4(h). The Reporter stated that the bankruptcy rule permits service by first class mail while the civil rule requires delivering the documents to the person named. Judge Walker stated that young attorneys may serve the summons and complaint according to what they think is required by the rule. He said the Committee could be criticized if it knows that the existing rule is ambiguous, but doesn't fix it. Judge Montali and Judge Swain suggested setting out the address to be used in the rule. Judge Small stated that the Committee should decide whether to clarify the rule or to leave it as is. **With three members dissenting, the Committee decided that the rule was better left alone.**

Rule 3007 — Service of Objections to Claims. Judge Kressel has asked the Committee to consider amending Rule 3007 to clarify the service obligations of parties who object to claims. He suggested that these objections be treated as contested matters with service accomplished under Rule 7004 as provided in Rule 9014. The Reporter stated that Rule 9013 recognizes two forms of requests for orders — motions and applications. Mr. Frank agreed that there is some ambiguity in the rules about whether objections to claims are something separate from motions and applications. Because the claimant has already initiated the matter by filing the claim, Mr. Frank said service under Rule 7005 would be more appropriate than service under Rule 7004. Judge Klein stated that the claim is consent to the court's jurisdiction and that, because the objection to the claim is the equivalent of the answer to a complaint, service should be under Rule 7005.

The Reporter presented a draft amendment requiring that an objection to a claim be made

by a written motion. Professor Resnick opposed the change in terminology because, he stated, everybody knows these objections as objections to claims. He stated that requiring service under Rule 7005 would allow the objections to be served electronically. **Professor Resnick's motion not to make the change recommended by Judge Kressel carried without dissent.**

Rule 3007(b) provides that when an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding. Judge Klein stated that there is confusion in the courts on whether a separate adversary proceeding must be filed after the objection to claim. The Committee discussed the nature of the affirmative relief under Rule 3007 and how a clarification of the reference to an adversary proceeding in Rule 3007(b) should be worded. **The Committee agreed that a clarification is needed and that the Reporter draft a proposal for consideration at the spring meeting.**

Rule 5005(c). Judge Kressel has suggested that Rule 5005(c) be amended to add the clerk of the bankruptcy appellate panel (BAP) to the list of persons who are authorized, when they receive improperly filed or transmitted papers, to send the papers on to the proper person. The Reporter suggested also adding district judges to the second part of the rule.

The Committee discussed whether the rule should be revised to include papers erroneously filed in other districts and whether the reference to deeming erroneously delivered papers to have been filed is limited to the persons listed in the rule. Judge Walker said the discussion of hypothetical errors makes it clear that the last sentence refers only to the listed people. Judge Swain stated that adding other districts would enable parties to consider bundling their claims for the entire country and filing them in a single district. **The Committee agreed without dissent to add the clerk of the BAP and district court judges to the list of persons who are authorized to forward erroneously filed or transmitted papers to the proper person.**

Rule 9001(9) — Definition of Associate. Robert M. Barnes, a San Diego, California attorney, has requested an amendment to Rule 9001(9) to include accountants who are employed by accounting firms within the definition of "regular associates." The Reporter stated that the definition of "firm" in Rule 9001(6), which includes both law firms and accounting firms, is not parallel with the definition of "regular associate," which just includes attorneys. The Reporter presented a draft amendment to include attorneys regularly employed by, associated with, or of counsel to an individual attorney or firm, and accountants regularly employed by an individual accountant or firm. Judge Montali suggesting specifying law firms and accounting firms. Judge Swain stated that multidisciplinary practice could create more problems.

The Reporter stated that the change could focus attention on the rule and prompt other groups to ask to be included in the rule. The Reporter said that while there may be some ambiguity in the rule, the courts appear to be handling it and redrafting the rule may create more problems than it would solve. The Committee discussed the application of the rule to accountants employed by law firms and attorneys employed by accounting firms. Judge Walker stated that an application for employment could cover the issue. **Judge Swain's motion to**

make no change in the rule carried without dissent.

Rule 9014 — Electronic Service. Mr. Waldron stated that several electronic filers in his court have complained that they are required to serve the motion initiating a contested matter in the manner provided for the service of a summons and complaint in Rule 7004. He said the attorneys question why service by mail of a paper copy of the motion is needed when the attorney for the party has already received a Notice of Electronic Filing through the CM/ECF system. Mr. Waldron presented draft amendments to Rule 9014 which would permit electronic service of the motion initiating a contested matter under Rule 7005 unless the debtor is the party against whom relief is sought. **The Chairman referred the proposal to the Technology Subcommittee.**

Rule 4003(c) — Burden of Proof. At the March 2002 meeting, the Committee considered whether to amend Rule 4003(c) to reverse the burden of proof from the objecting party to the party who would have that burden under applicable nonbankruptcy law. Judge Barry Russell had raised the issue with the Committee, noting that the allocation of the burden of proof under Rule 4003(c) is arguably inconsistent with the Supreme Court's decision in Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15 (2000). At the time, the Committee determined that it would take no action on the issue until the case law developed further. The Reporter stated that a number of courts have identified the issue but none of them have held that Raleigh renders Rule 4003(c) ineffective. **After a brief discussion, the Committee agreed to take no action at this time but to continue monitoring developments in the case law.**

Suggestions by the Director of the EOUST Concerning Rules 2003, 4002, 2016, and 7001 and Schedule I, and New Official Form. The amendments submitted by Mr. Friedman, Director of the EOUST, fall into three categories. The first category involves the debtor's obligation to provide complete and accurate information to the trustee and United States trustee; the second category concerns the debtor's attorney's obligation to disclose compensation received or promised in connection with the bankruptcy case for the year prior to commencement of the case. The third category relates to the entry of an order denying a discharge under section 727(a)(8) or (9) of the Bankruptcy Code. Ms. Davis presented the proposed amendments. She stated that the amendments would make the bankruptcy process more efficient and effective for the 1.2 million debtors who file chapter 7 each year, many of whom receive a discharge and are out of the system within 90 days of filing.

• Schedule I. Ms. Davis stated that a non-filing spouse's income can be material to making substantial abuse determinations under section 707(b) of the Bankruptcy Code and evaluating the household expenses set out on Schedule J. She said that requiring chapter 7 debtors to disclose their non-filing spouses' income on Schedule I would save time and work for the United States trustees. Schedule I already requires disclosure of the non-filing spouse's income in chapter 12 and chapter 13 cases.

Mr. Frank asked whether a husband and wife who are separated would be considered as part of the same household. The Reporter stated that Schedule J permits them to schedule their

expenses separately. Several speakers asked whether domestic partners and roommates would be required to disclose their income and whether their income is relevant to section 707(b) determinations. Professor Resnick said requiring 1.2 million chapter 7 debtors to provide more information outweighs concerns about a small number of section 707(b) cases and that the change could be viewed as taking a position on the substantive question of whether a non-filing spouse's income is included in the section 707(b) determination. Professor Markell and Judge McFeeley stated that a non-filing spouse effectively gets a discharge in a community property state, which is another reason for making the change. **Judge McFeeley's motion to add non-filing spouses of chapter 7 debtors to Schedule I carried without dissent.**

• Rule 7001. Ms. Davis stated that removing objections to the debtor's discharge under sections 727(a)(8) and (9) of the Code from Rule 7001 and permitting the objections to be made by motion would save time for the United States trustee and the court. Because most section 727(a)(8) and (9) objections are uncontested and the debtors are simply ineligible for discharge, she said some courts handle them by show cause orders or motions to dismiss. The Committee discussed whether previous discharges within six years should be added to the list of automatic bars to discharge under Rule 4004(c) and whether the debtor would get a discharge under the current rule if the United States trustee missed the deadline for filing an objection based on a previous discharge.

Judge Montali stated that objections to discharge for previous discharge are a complete waste of time. Professor Resnick stated that the discharge is so important that it should not be denied automatically. Several committee members questioned whether permitting these objections to discharges to be filed as motions would save time and resources, especially if the United States trustee could move for default against the debtor. Professor Wiggins stated that there is a distinction between objections under section 727(a)(8) and objections under section 727(a)(9). Ms. Davis agreed that objections under section 727(a)(9) for previous discharges in chapter 12 or chapter 13 present more factual issues. **The Chairman deferred the proposal to the next meeting.**

• Rule 2016(b) and New Official Form. The proposed amendments to Rule 2016(b) would require that the debtor's attorney disclose the details of the legal services to be provided, whether the attorney has taken any interest in property from the debtor, and whether the attorney has received any payments from the debtor within a year prior to the filing, regardless of whether the fees were in connection with or in contemplation of the bankruptcy filing. Ms. Davis stated that the proposed changes in attorney fee disclosures are intended to address two problems — debtors who have no idea of the details of their attorney's fee disclosure (or of the extent of the legal services to be provided) when fees are disputed later in the case and attorneys who bundle non-bankruptcy services with the bankruptcy filing, arguably in order to avoid disclosing the full extent of their fees under the existing rule. Judge Klein said it is possible to argue that the bundled prepetition services were in anticipation of bankruptcy and must be disclosed under the current rule.

Professor Resnick stated that the rule is to implement section 329 of the Bankruptcy

Code, which only requires the disclosure of fees in contemplation of or in connection with the bankruptcy case. The Reporter stated that the proposal raises questions of substantive law and goes beyond what can be fixed by changing the form. Professor Resnick questioned adopting a rule aimed at unethical lawyers when the rule goes well beyond the statute. Questioned about whether the proposal could require the disclosure of confidential or sensitive matters such as potential criminal matters or consideration of divorce, Ms. Davis said the disclosure form could be filed under seal. Judge Zilly stated that disclosing the payments for unrelated services would go beyond the statute but would not be privileged, but that disclosing the nature of the services may be a different matter. He said disclosing the fees would at least trigger a further inquiry by the United States trustee. Judge Gettleman said if the information is privileged, the attorney can assert the privilege and request redaction.

The Committee discussed the practice of unbundling services in which an attorney may agree only to prepare the petition and schedules and represent the debtor at the meeting of creditors. Professor Markell said some bankruptcy courts permit unbundling and others do not, but that the details of the legal services to be provided is a matter of disclosure. Judge Klein described the situation in which an attorney will not represent the debtor on a motion for relief from the automatic stay without additional payment. As a result, he said his court uses a district court rule to require attorneys to represent the debtor for the entire case except for adversary proceedings.

Mr. Frank questioned why the debtor should have to sign another piece of paper when it is the attorney's disclosure, not the debtor's. The Reporter stated that the debtor would sign the disclosure so that the attorney would not lie. Mr. Adelman said disclosure is good for the attorney and may provide a "safe harbor." Judge Walker said the change could be made in the Statement of Financial Affairs, which is signed by the debtor. **The Committee agreed to require the disclosure of all payments by the debtor within a year prior to the filing, either in the attorney fee disclosure or in the debtor's Statement of Financial Affairs. The Chairman asked the Reporter to circulate alternative drafts within a month.** Professor Resnick asked whether the change should be limited to chapter 7 and chapter 13 cases since Rule 2014 already applies in chapter 11 cases. Ms. Davis agreed that consumer cases are the focus of the proposal but stated that section 329 applies across the board.

• Rules 2003 and 4002. Ms. Davis stated that the trustee has a statutory duty to investigate the financial affairs of the debtor and the debtor is under a statutory obligation to surrender books and records relating to property of the estate. She said the proposal to require the debtor to bring certain core documents to the meeting of creditors may impose a burden on the debtor but that she believes the documents would have been assembled by debtor and the debtor's attorney to prepare the schedules and statement of financial affairs. Ms. Davis stated that, if the debtor can't produce the documents, the debtor could file a statement explaining why not. She said the proposal was based on similar local rules.

Mr. Frank stated that the proposal would be a dramatic change in bankruptcy practice. He said the production of key backup documents in every case would raise the expense of filing

bankruptcy substantially. The debtor is already under oath at the meeting of creditors and subject to further inquiry and production of documents. He said the United States trustee assumes the production will produce a significant number of objections to discharge and additional distributions to creditors but that, ultimately, it is a value judgment and matter of costs vs. benefits. Mr. Frank suggested that the proposal is so controversial that it should be referred to a subcommittee, which could solicit additional comments and report back to the full Committee.

Judge Zilly said the debtor should bring the crucial documents to the meeting of creditors, rather than the trustee having to continue the meeting for their production. Judge Torres asked why it would be onerous to produce the listed documents at the meeting. He said the documents appear to be relevant and the trustee would have to review them at some time. Judge Walker said a more practical, focused proposal is needed. He said the production should be treated as an objection to discovery documents, with the debtor required to produce only what the trustee is going to consider carefully. Judge Walker asked whether the debtor would be required to bring copies of the documents or the originals, which would be reviewed by the trustee during the meeting. One Committee member asked whether the trustee might image the documents at the meeting and return them to the debtor.

Professor Markell said the debtor already supplies the information in summary form on the schedules and statement of financial affairs. The trustee reviews the schedules and statements before the meeting of creditors and the meeting itself is very routine in most cases. He said the trustee inquires further when needed and continues the meeting in those cases. Professor Markell said the proposal would alter the cost of filing bankruptcy for consumer debtors and their attorneys. By analogy, he said, despite the existence of tax fraud, taxpayers have to file only limited information on their tax returns.

Judge Torres asked about the possibility of the United States trustee requesting documents before the meeting of creditors if the documents appear to be needed on the basis of a review of the schedules and statements. Professor Markell and Mr. Frank said informal discovery of this sort goes on now in many districts. Professor Wiggins said a targeted list of what is absolutely necessary would help the Committee make a cost-benefit analysis. Judge Gettleman asked whether, if the trustees are already doing their job, bringing lots of papers to the meeting would change things. Mr. Adelman stated that the proposal raises a privacy issue because the debtor's Social Security number is on some of the listed documents, including tax returns, which could be viewed by a number of people. He said, however, that some of the listed documents stand out because their production would expedite the case and uncover issues. Professor Morris said all of the listed documents could be the basis of an objection to discharge if the debtor failed to produce them at the trustee's request. Professor Resnick stated that the proposal is an extreme one based on the assumption that the debtor is dishonest.

The Committee accepted Judge Klein's motion to refer the proposal to the Subcommittee on Consumer Issues. The Chairman stated that the subcommittee could

meet in Washington, D.C., on January 30, 2004, and invite a focus group similar to the one convened on the privacy amendments to provide input from different viewpoints. Judge Zilly asked the EOUST to be more specific in light of the Committee's discussion. Mr. Shaffer asked about the requirement in the proposed amendment to Rule 4002 that, if the debtor used an incorrect Social Security number, the debtor must take steps to correct the bankruptcy court record and notify credit reporting agencies. Ms. Davis said one reason for the provision is to provide a road map for debtors and their attorneys so that they can furnish more accurate information.

Information Items

Uniform Rules. Rule 9029 states that local rules must conform to any uniform numbering system prescribed by the Judicial Conference. The Conference has directed that courts adopt a numbering system for local rules that corresponds with the relevant federal rules. (JCUS - SEP 88, p. 103; JCUS - MAR 96, p. 34). As the bankruptcy courts have begun accepting electronic filings over the Internet, the courts have been reviewing their local rules to determine how the rules should be revised to reflect the new electronic environment. Mr. McCabe stated that the Office of Judges Programs has received a number of requests for copies of the Uniform Numbering System for Local Bankruptcy Court Rules or for information on the system. The Uniform Numbering System was issued by the Committee in 1996 and revised slightly in April 2003. Earlier this year, copies of the Uniform Numbering System were distributed to all bankruptcy judges and posted on the JNET.

E-Government Act. Section 205(c)(3) of the E-Government Act of 2002, Pub. L. 107-347, requires that the Supreme Court prescribe rules to protect privacy and security concerns relating to the electronic filing of documents and the public availability of documents filed electronically. Mr. Rabiej said that the statute mandates that the new rules provide that a party filing a redacted document also may file an unredacted copy of the document under seal. At the request of the Judiciary, legislation has been introduced deleting the provision for dual filing. Mr. Rabiej said the Standing Committee has appointed a subcommittee to consider the rules required by the Act. He said changes may be needed in the bankruptcy rules, the civil rules, and the criminal rules.

Amendments to §§ 107 and 342(c) of the Bankruptcy Code. The Judiciary has requested revision of sections 107 and 342(c) of the Bankruptcy Code. The amendment to section 107 would authorize the court to redact "personal identifiers" in order to protect any person from identity theft or other harm. In addition, the revision would expand the scope of information a court could protect from "scandalous or defamatory matter" to "information that could cause undue annoyance, embarrassment, oppression or risk of injury to person or property." The amendment to section 342(c) would provide that a debtor include only the last four digits of his or her Social Security account number on notices the debtor provides to creditors.

Changes in the Claims Process. The CM/ECF Working Group's claims processing

subcommittee is preparing recommendations to modify the proof of claim form and the process for filing claims in order to facilitate electronic filing and to accommodate the trade in buying claims. Judge McFeeley, the liaison to the subcommittee, said the proposed amendments are not yet ready to be submitted to this Committee. He said the revised form would be more suitable for filing claims as a datastream to the courts which are prepared to accept it.

If a claim is transferred after the proof of claim is filed, Rule 3001(e) requires that the clerk notify the alleged transferor by mail. Mr. Waldron said many claims buyers obtain notice waivers from the sellers although there are questions about the effectiveness of the waivers and his court does not allow them. He said processing the transfer of claims constitutes the largest increase in the clerk's office's workload in many districts. Professor Resnick said if there is fraud in the transfer, there also could be fraud in the waiver. Professor Markell said there is a legitimate business in buying consumer claims in bulk, even discharged chapter 7 claims. The Chairman stated that there is less concern about fraud when legitimate entities buy claims in chapter 13 but Judge McFeeley said it is difficult to write a rule that just applies to "legitimate" companies.

Professor Resnick stated that the 1991 amendments to the rule deleted disclosure of the compensation for the transfer and narrowed the provision to the disclosure of possible bogus transfers. The Reporter stated that the nature of the creditors involved has changed since 1991, when the transfer of chapter 11 claims was at issue. Professor Resnick said a cost-benefit analysis may be appropriate because the perception is that more sophisticated buyers are purchasing claims from vendors who should know what they are doing.

Implementation of the CM/ECF System. Mr. Wannamaker reported that implementation of the Case Management/Electronic Case Files (CM/ECF) system in the bankruptcy courts is continuing. Fifty-nine bankruptcy courts are live on the system and another twenty-nine courts and the District of Guam are in the process of implementing CM/ECF.

FJC Study of Mandatory Disclosure under Civil Rule 26. Mr. Niemic discussed the proposed study by the FJC of whether certain types of adversary proceedings should be exempted by rule from the mandatory disclosure provisions of Rule 7026 and Civil Rule 26. The study is intended to determine whether certain types of adversary proceedings are resolved before due dates for Rule 26 disclosures. Mr. Niemic said the study could include whether attorneys are making the disclosures or stipulating that they will not make them, whether judges are exempting attorneys from the disclosure requirements, whether the judges think mandatory disclosure makes sense in adversary proceedings, and whether the courts are doing anything to increase compliance with the rule.

Mr. Niemic asked whether the Committee wanted a study based on a survey of the bankruptcy judges and, if so, whether the survey should be of a sample of the judges or of all bankruptcy judges. The Chairman suggested an email survey of all bankruptcy judges. He said the survey would remind the judges of the mandatory disclosure requirements in the rule. Judge Klein said the response rate might be lower with an email survey but that it could show the

extent of support for the conventional wisdom that the mandatory disclosure is unnecessary. **The Chairman asked Mr. Niemic to go forward with the survey with the help of Judge Klein and another committee member to be designated later.**

Administrative Matters

The Committee's next scheduled meeting will be at the Ritz-Carlton Hotel, Amelia Island, FL, on March 25-26, 2004. The Committee discussed several locations as possible sites of the fall 2004 meeting, including Seattle, Monterey, Chicago, Santa Fe, Sundance, and Las Vegas. The Subcommittee on Consumer Issues will meet in Washington, D.C., on January 30, 2004. Trustees and debtors' attorneys will be invited to participate in the January 30 meeting.

Respectfully submitted,

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