ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 22-23, 1994

Agenda

Introductory Items

1. Approval of minutes of February 1994 meeting.

2. Report on June 1994 meeting of the Committee on Rules of Practice and Procedure.

3. Report on publication of Advisory Committee meeting minutes via "on line" availability on Lexis and Westlaw. [Materials: memorandum from John K. Rabiej dated 3/3/94 and attached Judicial Conference guidelines dated 11/17/93.]

Rules

4. Proposed amendments to Rule 9014 to make certain 1993 amendments to Fed.R.Civ.P. 26, and certain other discovery provisions contained in the civil rules, inapplicable to contested matters. [Materials: Reporter's memorandum dated June 14, 1994, and Civil Rules 26(a) and (f).]

5. Proposed amendments to Rule 8002(c) in response to decision in In re Mouradick, 13 F.3d 326 (9th Cir. 1994), concerning extension of time to file a notice of appeal. [Materials: Reporter's memorandum dated June 17, 1994.]

6. Proposed amendments to Rule 4003(b) concerning extension of time to object to debtor's list of claimed exemptions. [Materials: Reporter's memorandum dated May 23, 1994.]

7. Proposed amendments to Rule 3021 concerning distributions after confirmation of a plan. [Materials: Reporter's memorandum dated June 18, 1994.]

8. Proposed amendments to Rules 3017 and 3018 re: record date for voting purposes. [Materials: Reporter's memorandum dated June 13, 1994.]

9. Proposed amendments to Rule 9011 to conform the rule to the 1993 amendments to Fed.R.Civ.P. 11, on signing of papers and sanctions. [Materials: Reporter's memorandum dated May 25, 1994.]

10. Proposed new Rule 8020 concerning sanctions for filing a frivolous appeal to the district court or bankruptcy appellate panel. [Materials: Reporter's memorandum dated June 10, 1994.]

11. Request of Standing Committee that Advisory Committee consider possible amendment to Rule 9006(f) that would change the additional period allowed when service is made by mail from "three days" to "five days." [Materials: Reporter's memorandum dated 8/12/94.]

12. Subcommittee Reports

Report of the Subcommittee on Technology.

Report of the Subcommittee on Forms.

Report of the Subcommitte on Local Rules.

Report of the Subcommittee on Alternative Dispute Resolution.

Report of the Subcommittee on Style.

Report of the Subcommittee on Long Range Planning.

Report of the Subcommittee on Meeting Sites.

13. Information Items

Report of Judge Restani on the April 1994 meeting of the Civil Rules Committee.

Status list of rules amendments.
Status chart of rules amendments.

Amendments to be published for comment.

14. Next Meeting

The dates and place of the next meeting are:

March 30-31, 1995
Lafayette, LA

ADVISORY COMMITTEE ON BANKRUPTCY RULES

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DRAFT

AGENDA I
New York, New York
September 22-23, 199

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 24 -25, 1994
Sea Island, Georgia

Minutes

The Advisory Committee on Bankruptcy Rules met at The Cloister in Sea Island, Georgia. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge James J. Barta
Bankruptcy Judge James W. Meyers
Professor Charles J. Tabb
Henry J. Sommer, Esquire
Kenneth N. Klee, Esquire
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
Neal Batson, Esquire
Professor Alan N. Resnick, Reporter

The following former members also attended the meeting:

District Judge Joseph L. McGlynn, Jr.
Ralph R. Mabey, Esquire
Herbert P. Minkel, Esquire

The following additional persons also attended all or part of the meeting:

District Judge Thomas S. Ellis, III, member, Committee on Rules of Practice and Procedure, and liaison with this Committee
Bankruptcy Judge Lee M. Jackwig, member, Committee on Automation and Technology
Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure
Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, and Assistant Director, Administrative Office of the U.S. Courts
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U. S. Courts
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court, Eastern District of California
Gordon Bermant, Director, Planning and Technology Division, Federal Judicial Center

Elizabeth C. Wiggins, Research Division, Federal Judicial Center

District Judge Alicemarie H. Stotler, chair, Committee on Rules of Practice and Procedure, was ill and could not attend. Circuit Judge Edward Leavy, former chair of the Advisory Committee, was unable to attend due to an en banc hearing. District Judge Paul A. Magnuson, chair of the Committee on the Administration of the Bankruptcy System, also was unable to attend. William F. Baity, acting director, Executive Office for United States Trustees, U.S. Department of Justice, was unable to attend.

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 to the Committee on Rules of Practice and Procedure.

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

INTRODUCTORY MATTERS

Minutes of the September 1993 Meeting. The Committee approved the minutes of the September 1993 meeting with one change. On page 3, paragraph 3, of the draft, the phrase "bankruptcy rules require" should be changed to "Bankruptcy Rule 8002 will require."

Report on the January 1994 Meeting of the Committee on Rules of Practice and Procedure, ("Standing Committee"). The Reporter reviewed the issue of filing by facsimile transmission ("fax filing"). Fed.R.Civ.P. 5(e) and Fed.R.App.P. 25(a) allow fax filing under Judicial Conference guidelines, and Fed.R.Bankr.P. 7005 incorporates the civil rule for adversary proceedings. The Advisory Committee on Bankruptcy Rules is on record as strongly opposing fax filing, because it is outdated technology and a burden on the clerks. Guidelines for fax filing were proposed in 1993, however, by the Judicial Conference Committee on Court Administration and Case Management. Both the Standing Committee and the Committee on Automation and Technology opposed the draft guidelines, and the Judicial Conference declined to adopt them. The Standing Committee, however, must put forward a substitute proposal at the September 1994 meeting of the Judicial Conference. At its January 1994 meeting, the Standing Committee decided not to allow fax filing on a routine basis and to exempt bankruptcy courts from any requirement to accept fax filings.

Professor Resnick also reported that the Standing Committee had expressed concern about Congress enacting rules changes outside the Rules Enabling Act process, as a provision in S. 540, the

bankruptcy bill currently pending, would do. Amendments to Rule 8002 and 8006 are pending at the Supreme Court and will take effect August 1, 1994, absent congressional action to the contrary. No bankruptcy rules amendments were before the January 1994 Standing Committee meeting, and there was sentiment by Standing Committee members, he said, that advisory committees should exercise restraint in proposing amendments.

With respect to the style revisions to the rules, Professor Resnick reported that Bryan Garner had submitted the proposed draft of the civil rules and the Advisory Committee on Civil Rules is in the process of line-by-line review. The intent is to make only style changes, not substantive ones, he said.

Professor Resnick said that the Judicial Conference has guidelines on access to materials. He said that committee members should be careful about circulating memoranda that do not represent committee positions. Mr. Sommer observed in response that rules committee meetings are open to the public (28 U.S.C. § 2073(c).) and that committee records also are public.

PUBLISHED DRAFT RULES

Published (Preliminary Draft) Amendments to Rules 8018, 9029, and Proposed New Rule 9037. Professor Resnick reviewed the history of these proposals for "common rules" concerning local rules and technical amendments. He described the initiating of the amendments by the Standing Committee, the negotiating of the language with the other advisory committees, and the publication of similar amendments for the appellate, civil, and criminal rules. The last time the proposals were considered by the Advisory Committee was in February 1993, and several changes were introduced after that, which the committee had not had a chance to consider prior to publication of the preliminary draft. Most of these were stylistic or involved minor changes to the committee notes. There were two changes that were substantive, however.

The first was an insert to the amendments to Rules 8018(a)(2) and 9029(a)(2) that would prohibit a court from enforcing any local rule imposing a requirement of form in a way that would cause a party to lose rights if the failure to conform to the requirement was a "negligent failure." Mr. Rosen asked how other "non willful" failures would be treated under the rule and suggested that the appropriate standard ought to be "non willful," rather than negligence. Professor Coquillette said this was a good suggestion and might be adopted if the other advisory committees concur. Judge Robreno said he thought it "revolutionary" to have rules that do not have to be followed, but wondered whether his comment might be too late to have any effect. The Reporter said it was not too late. Judge Meyers

said he thought the concept of repeated noncompliance (as an indicator of willfulness) should be part of the committee note, and the Reporter agreed to suggest it, if it is not already in there. **A motion to approve the amendment to Rule 9029(a) subject to changing the word "negligent" to "non willful" carried by a vote of 10-1.**

The second substantive change is in Rules 8018(b) and 9029(b) and involves the prohibition of sanctions for noncompliance with a local requirement unless the alleged violator had actual notice of the requirement "in the particular case." The Reporter stated that the proposed standard would relieve an attorney of any duty to seek rules out and could spawn additional disputes in a bankruptcy setting, due to the incidence of litigation within a case. Participants in such litigation may not have been active in the earlier stages of a case; they may enter a proceeding months, or even years, after any mass mailing of the judge's rules and likely were not present when such rules may have been stated orally. These conditions, which are typical of bankruptcy litigation, may generate disputes over whether a party had actual notice of a requirement. Although the committee directed that the record reflect its consideration of this issue, no motion was made and no vote taken concerning the addition of "in the particular case" to the rule.

Professor Resnick reviewed the three comment letters the committee had received concerning the published draft. Bankruptcy Judge Fenning's letter cautioned the committee against appearing to support one-judge-only standing orders, so long as they are published, rather than court-wide procedures under local rules applicable to all judges in a district. Judge Barta said he was surprised that no comments had been received about proposed Rule 9037, the technical amendments rule. The committee is on record as opposing this rule, the Reporter said, but the Standing Committee published it anyway. **A motion to reaffirm the committee's opposition to Rule 9037 failed on a tie vote.**

AMENDMENTS RELATED TO CIVIL RULES AMENDMENTS

Rule 9014 and the 1993 Amendments to Fed.R.Civ.P. 26. The Reporter stated that the recent amendments to Rule 26 governing discovery automatically apply in adversary proceedings (through Rule 7026) and in contested matters (through Rule 9014), which are expedited proceedings initiated by motion. Although there does not appear to be any reason to exclude adversary proceedings from the provisions of Rule 26, contested matters could suffer undue delay if the requirements of Rule 26(a)(1)-(4), (mandatory disclosure), and 26(f), (mandatory discovery meeting), are followed. Rule 26 itself permits courts, by local rule or order, to opt out of the mandatory disclosure and meeting requirements.

In the event the committee thought it appropriate to make the mandatory disclosure and meeting requirements inapplicable to contested matters nationally, the Reporter had drafted an amendment to Rule 9014 for this purpose. After discussion, **a motion to defer action and study the operation of discovery deadlines in contested matters overall carried by a 6-0 vote.**

Rule 7004 and the 1993 Amendments to Fed.R.Civ.P. 4. The 1991 amendments to the bankruptcy rules "froze" the Fed.R.Civ.P. 4 (to which reference is made in Rule 7004 and parts of which are incorporated into the bankruptcy rules by Rule 7004) to the version of the rule that was in effect on January 1, 1990. This action was taken because amendments to Rule 4 were pending, but their final form was still uncertain. Rule 4 now has been amended, and it is time to amend Rule 7004 to conform to the new Rule 4. The Reporter had prepared a draft for this purpose. In addition, the Reporter had drafted a new subdivision (f) to cover service and personal jurisdiction over a party who is a non-resident of the United States having contacts with the United States sufficient to justify application of United States law but insufficient contact with any single state to support jurisdiction under a state long-arm statute. The new subdivision tracks a similar new provision in Rule 4. **A motion to adopt the Reporter's draft carried by a vote of 6-2.** The amendments to Rule 4 included creating a new Rule 4.1 to cover "other" process, not a summons or subpoena. These provisions formerly were in a subdivision of Rule 4 that was not incorporated by Rule 7004. The Reporter said he had consulted with Professor Lawrence P. King, a former member and former Reporter to the committee, about the history of not incorporating the subdivision. Professor King had said the subdivision was left out intentionally so that it would not apply to the servicee of motions. Rule 4.1 also contains territorial limits on service that are inconsistent with the nationwide service provisions of Rule 7004. **There was no opposition to the Reporter's recommendation that Rule 4.1 not be incorporated into the bankruptcy rules.**

PROPOSED AMENDMENTS

Rule 1006. Professor Resnick stated that the Judicial Conference in 1992 had prescribed a $30 administrative fee for chapter 7 and chapter 13 cases, payable at filing. As originally prescribed, this fee was not payable in installments as is the filing fee for such cases. In late 1993, however, the Judicial Conference had amended the schedule of fees prescribed under 28 U.S.C. § 1930(b) to permit payment of the $30 fee in installments. Professor Resnick had proposed two drafts to incorporate the administrative fee into the rule on installment payments. **A motion to adopt the shorter draft, amending Rule 1006(a), carried on an 8-3 vote.** The Reporter stated that there also had been a proposal by the president of the National Association of Consumer Bankruptcy

Attorneys to amend Rule 1006(b) to permit installment payments of filing fees to be made to a standing chapter 13 trustee (who would pay the fees to the clerk). The Reporter had drafted an amendment to implement the suggestion, and also had asked the Federal Judicial Center to conduct a survey to evaluate the suggested amendment. Ms. Wiggins reported the results of the survey. Most respondents thought such an amendment unnecessary and that no purpose would be served by mixing court fees and payments intended for creditors, she said. Nine courts permit such arrangements under the existing rule and are satisfied with how their systems work. **A motion to adopt the proposed amendment to Rule 1006(B) failed by a vote of 0-9.**

Rules 1007(c) and 1019. At the September 1993 meeting, the Committee had voted to delete from Rule 1007(c) the reference to "chapter 7," which dated to a time when there were separate schedules for a chapter 7 case and a chapter 13 case. At that meeting, a member of the Committee had suggested that the phrase "superseding case" or "superseded case" should be replaced to avoid giving the erroneous impression that conversion of a case to another chapter creates a new case. The Reporter, accordingly, presented draft amendments to the two rules in which these phrases appear. Rule 1019 also contains the phrase "original petition," which gives the erroneous impression that there is a second petition in a converted case. **There was a consensus that the amendments to Rule 1007(c) should be approved. With respect to Rule 1019, the Committee discussed a number of changes to the draft, but referred the rule back to the Reporter for further study.**

Rule 2002(f)(8). The present rule requires notice to the debtor, all creditors, and indenture trustees of "a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500." The trustee's "final report" is a separate document than the trustee's "final account," and the current practice is to mail only the final report. The final report is filed and mailed prior to distribution of dividends, while the final account is completed after the distribution. The Reporter's memorandum to the committee points out that, once the final report is circulated, there probably is no reason to incur the expense of mailing the final account to all creditors. The United States trustee receives the final account and, as the supervisor of chapter 7 trustees, should review it. The proposed amendment would delete the words "and account" from the rule. **A motion to adopt the proposed amendment carried, 12-0. The Committee rejected a proposal to amend Rule 2002(f)(8) to restrict the mailing of the summary of the trustee's final report to only those creditors who have filed claims.**

Rule 2002(h). This rule authorizes the court to direct that, after the period for filing claims has expired, the court may direct that notices be sent only to creditors who have filed

claims. The Reporter reviewed his memorandum dated January 9, 1994, which detailed various suggestions for amendments, two from deputy clerks of court, several related to deleting references to Rule 3002(c)(6) which the Committee separately had voted to abrogate, and several further amendments suggested by Professor Resnick. **The Committee approved amendments to Rule 2002(h) that would assure the mailing of notices to the debtor, the trustee, and all creditors during any 90-day claims filing period arising from notification by the trustee that newly discovered assets may be available for distribution. The Committee rejected a proposal to amend subdivision (h) to extend the period during which all creditors receive notices until the time has expired for the filing of a claim on behalf of a creditor by the debtor or the trustee. The Committee referred the proposed amendments to Rule 2002(h) and the Committee Note to the style subcommittee with the following instructions: 1) make sure line 12 does not exclude the debtor, the trustee, and the U.S. trustee from receiving notices, 2) make sure that creditors who filed claims late are not excluded from receiving notices, and 3) reorganize the Committee Note to state simply that the rule is being amended "as follows" and list the changes. A motion to approve the proposed amendments as described above, subject to further work by the style subcommittee, carried unanimously.**

Rule 3002. The Reporter briefly reviewed the history of various proposals to amend this rule that have been considered by the Committee and noted that the case law concerning the status of a late-filed proof of claim remains very unsettled. The Committee declines to take a position on the issue. Nevertheless, the language of Rule 3002(a), especially when read together with Rule 3009, leads to the conclusion that an unsecured creditor who misses the deadline for filing claims may not have an "allowed claim" and may not receive any distribution in a chapter 7 case. This conclusion, however, conflicts with the provisions of § 726 of the Code that indicate that a late-filed claim can be an "allowed" claim, at least in some instances, and expressly direct payment of "tardily filed" claims under certain circumstances. To clear up any conflict between the Code and the rules on this issue, the Reporter had drafted amendments that would add a new subdivision (d) to the rule and delete existing subdivision (c)(6) as unnecessary if (d) were added. The proposed subdivision (d) would state that a late claim may be allowed to the extent the creditor would be authorized to receive a distribution by § 726. Mr. Rosen offered alternative language to accomplish the same result. **A motion to approve the amendments as redrafted to incorporate Mr. Rosen's suggestions carried, with none opposed. A motion to approve conforming changes to the proposed Committee Note also carried, with none opposed.**

Rules 3017, 3018, and 3021 and Proposed Amendments Regarding the Record Date for Voting and Distribution. Rule 3017(d) requires that certain documents in a chapter 11 case be mailed to

creditors and equity security holders so that they can vote on the plan. Rule 3018(a) governs the right to vote on a plan. The Reporter explained that both provisions contain language stating that the record date for determining who the equity security holders are is the date the order approving the disclosure statement was entered on the court's docket. The Reporter stated that Mr. Klee had suggested that these rules be amended because using the entry date of the order causes unnecessary delay. The Reporter, accordingly, had drafted alternate amendments to the two rules, one set of amendments would give the court discretion to order that the record date be the date the court announces its approval of the disclosure statement, and the other set would give the court greater flexibility in fixing a record date. **A motion to postpone consideration of these proposals to the next meeting carried, with none opposed.** The proposed amendment to Rule 3021 would permit the plan or order confirming the plan to designate a record date for distribution that is difference than the date on which distribution commences. This change would permit the debtor to ascertain who are the equity security holders entitled to receive distribution prior to commencing actual distribution. **A motion to adopt the Reporter's draft amendment carried, 11-0.**

Rule 8002. The Reporter had drafted an amendment creating a new subdivision (d) of the rule that would deem a prisoner's notice of appeal to have been timely filed if it was deposited in the prison's internal mail system on or before the last day for filing. The proposal would conform Rule 8002 to a 1993 amendment to Fed.R.App.P. 4(c) and would reflect the decision in In re Flanagan, 999 F.2d 753 (3rd Cir. 1993), in which the court of appeals held that a pro se prisoner's notice of appeal from an order of the bankruptcy court is "filed" at the moment of delivery to prison authorities for forwarding to the bankruptcy court. **A motion to take no action carried by a vote of 8-4.**

SUBCOMMITTEE REPORTS

Subcommittee on Technology

At the request of the Subcommittee on Technology, Mr. Bermant led a discussion of "the virtual bankruptcy court." Committee members expressed divergent views concerning the pros and cons of technological developments that could largely replace the courtroom, in which a judge, lawyers, and parties are physically present, with video conferencing equipment and computers operated by a judge, lawyers, and parties who all may be in different locations. Judges and lawyers both stated that people will continue to need and want direct contact with colleagues and adversaries, even if such contact is not absolutely necessary to accomplish their work. On the other

hand, if the individuals do not all have to be physically present at every proceeding, much time and energy can be saved and other efficiencies realized in the utilization of judicial time. For example, a judge could handle a case from another district without having to travel.

Judge Barta, chairman of the subcommittee, reported that the subcommittee had met twice and had drafted two amendments that would authorize courts to accept electronic filings. These are discussed below. Judge Barta stated that the report requested by the Committee on the future of technology and the rules was not yet complete due to the raising at the first subcommittee meeting of several issues that require further inquiry. The philosophy anchoring the report would be that the Advisory Committee should take a leading role in adopting rules to implement changing technology, he said. One result of the Committee's having stepped forward is Rule 9036, which now permits delivery of information from the court by means other than paper; the next step, he said, is to authorize the court to receive documents other than on paper. Judge Barta said he expects the report to be finished in time for the Standing Committee to consider it in connection with any request to publish the proposed electronic filing amendments.

Rule 5005. The subcommittee on technology proposed adding a new subdivision (a)(2) that would authorize a court by local rule to "permit documents to be filed, signed or verified by electronic means" consistent with any technical standards established by the Judicial Conference. **A motion to adopt the proposed amendment carried, with none opposed. On further motions, the Committee approved the deletion of lines 12 - 15 (no intent to permit filing by facsimile transmission) and lines 68 - 71 (no intent to affect any statute requiring a "writing" or "signature") of the proposed Committee Note.**

Rule 8008(a). The subcommittee's proposed amendment to the rule would authorize a district court or bankruptcy appellate panel by local rule to accept electronic filings. **A motion to adopt the amendment carried, with none opposed.**

Subcommittee on Alternative Dispute Resolution

Professor Tabb, chairman of the subcommittee, requested guidance on the need for proposed amendments concerning alternative dispute resolution. The consensus was that, although some districts operate local, voluntary programs, there is not a need for national rules at this time. A need could arise if Congress were to mandate an ADR program for the bankruptcy courts. Accordingly, the subcommittee's work remains investigatory at this time.

Subcommittee on Forms

Mr. Sommer, chairman of the subcommittee, reported that, in addition to considering proposals for amendments that had been referred to it at the September 1993 meeting, the subcommittee would undertake a conversion to "plain English" for forms that go to the public.

Subcommittee on Local Rules

Judge Duplantier, chairman of the subcommittee, reported that the subcommittee had met to discuss the outstanding issues concerning the proposed uniform numbering system for local rules developed by Ms. Channon. The system is based on the national rule numbers and the subcommittee had requested that Ms. Channon add uniform numbers based on the Part VIII rules governing appeals for use by a district court or bankruptcy appellate panel. The subcommittee had approved the proposed numbering system subject to that addition. The subcommittee also had requested Ms. Channon to prepare a new memorandum explaining the system and stating the topics on which rules now exist that had been omitted and the reasons for the omission. The memorandum also would describe the difficulties a district might experience in adapting certain types of rules, such as those titled "Chapter 13 Cases," to the numbering system. Judge Duplantier said that at this point the subcommittee favored some kind of publication and solicitation of comment from the courts and the bar. **A motion to approve the proposed system, circulate it to the judges and clerks for comment, and release it to the "bankruptcy press," carried unanimously.**

"EXCUSABLE NEGLECT"

The Committee discussed briefly whether to undertake a review of the rules for the purpose of restricting the "balancing test" standard announced by the Supreme Court in Pioneer Investment Services v. Brunswick Associates, 113 S.Ct. 1489 (1993). The consensus appeared to be that it is too soon to assess the impact of the Court's decision, and **a motion to table the matter carried by a vote of 6-2.**

FUTURE MEETINGS

The next meeting of the Committee will be September 22-23, 1994, in New York City.

The chairman requested Judge Duplantier to investigate whether the Committee could meet in Lafayette, Louisiana, in mid-to-late March 1995. The Committee also agreed on Portland,

Oregon, as the site for a meeting in August 1995, and on Arizona for a meeting in February or March of 1996.

Respectfully submitted,

Patricia S. Channon

ORAL REPORT

AGENDA IV
New York, New York
September 22-23, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9014, THE 1993 AMENDMENTS TO CIVIL RULE 26, AND APPLICATION OF CERTAIN TIME PERIODS IN THE CIVIL RULES

DATE: June 14, 1994

The amendments to Rule 26(a) of the Federal Rules of Civil Procedure that became effective on December 1, 1993, require disclosure of certain information without awaiting formal discovery requests. In addition, the 1993 amendments to Civil Rule 26(f) require the parties in a litigation to meet to discuss and resolve discovery issues in advance of the formal Rule 16 pretrial conference. A copy of Rule 26(a) and (f), as amended in 1993, is attached. These amendments are applicable in adversary proceedings under Rule 7026.

At the February 1994 meeting, the Advisory Committee discussed the 1993 amendments to Civil Rule 26 in connection with my memorandum of January 3, 1994 (item No. 2 of the agenda materials for the February 1994 meeting). At that time, I recommended that Rule 7026 remain unchanged so that the 1993 amendments to Rule 26 will continue to be applicable to adversary proceedings. Although the 1993 amendments to the Civil Rules are controversial, I am not sure that there is a bankruptcy-related reason for recommending a blanket rule that makes these amendments inapplicable in adversary proceedings. Why should parties be immune from making the initial disclosures or from meeting to resolve discovery disputes in an adversary proceeding?

In addition, making Rule 26 applicable in adversary proceedings does not mean that the 1993 amendments will always apply. It is important to note that the controversial mandatory disclosure provisions of Rule 26(a), as well as the meeting requirement of Rule 26(f), are subject to local opt-out. Rule 26 itself provides that courts, by local rule or order, may render these mandatory disclosure and meeting requirements inapplicable. In fact, a number of districts have opted out of the automatic disclosure requirements already.

For these reasons, I recommend that Rule 7026 not be amended at this time.

Rule 26 is Applicable to Contested Matters

Rule 9014 makes Rule 7026 (and, therefore, Civil Rule 26), applicable in "contested matters." A contested matter is initiated by motion, not a summons and complaint, and is an expedited procedure that could be unduly delayed if the parties have to make initial disclosures mandated by Rule 26(a) and have to meet as required by Rule 26(f). Rule 26(a)(f), as amended, requires that the parties meet at least 14 days before a pretrial conference (pretrial conferences are not held in contested matters). Unless the court orders otherwise or the parties stipulate, Rule 26(a)(1) disclosures must be made within 10 days after the Rule 26(f) meeting of the parties. Rule 26(a)(2) disclosures on expert witnesses must be made, in the absence of a stipulation or court order directing otherwise, at least 90 days before the trial date. Pretrial disclosures under Rule 26(a)(3)

must be made at least 30 days before trial unless the court orders otherwise. These time provisions are inconsistent with the expedited nature of contested matters. For that reason, I recommended at the February meeting that certain aspects of the 1993 amendments to Rule 26 should not be applicable to contested matters. I also presented a draft of proposed amendments to Rule 9014 that would render Rule 26(a)(1)-(4) and Rule 26(f) inapplicable in contested matters unless the court otherwise directs. This draft is attached hereto marked "Draft No. 1."

However, Henry Sommer commented at the February meeting that there are other time periods contained in certain Civil Rules (in addition to Rule 26) that are made applicable to contested matters through Rule 9014's reference to certain other Part VII rules, and that some of these periods may be inappropriately long for contested matters. The consensus of the Committee was to defer consideration of my recommendations regarding Rule 9014 and Civil Rule 26 until the September 1994 meeting, with a request that I review the time periods in all Civil Rules that are made applicable to contested matters by Rule 9014's reference to Part VII rules.

As a result of my review, I observed the following:

(1) Provisions restricting the use of discovery procedures before the time specified in Rule 26(d). Several Civil Rules, as amended in 1993, require a party to obtain leave of court to use certain discovery procedures if the party wants to act "before the time specified in Rule 26(d)." For example, "before the time

specified in Rule 26(d)," a party must obtain leave of court to take a deposition upon oral examination (see Rule 30(a)(2)(C)), to take a deposition upon written questions (see Rule 31(a)(2)(C)), to serve interrogatories (see Rule 33(a)), to serve a request for the production of documents (see Rule 34(b)), and to serve a request for admissions (see Rule 36(a)).

Rule 26(d) provides:

> "(d) TIMING AND SEQUENCE OF DISCOVERY. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of the parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

Therefore, the time specified in Rule 26(d) for seeking the above listed discovery methods without leave of court is the time when the parties have met "as required by subdivision (f)." Rule 26(f) requires the parties to meet to resolve discovery issues at least 14 days before the Rule 16 scheduling conference. As I recommended at the February 1994 meeting, I do not think that Rule 26(f) should apply in contested matters and my draft of the proposed amendments to Rule 9014 so provides. If the parties are not required to have a Rule 26(f) meeting in a contested matter, the provisions in the other Civil Rules that require parties to obtain leave of court to act before "the time specified in Rule 26(d)" should have no effect. That is, parties should be able to take such action without leave of court at any time after commencement of the contested matter. I do not think that any

amendments to Rule 9014 are needed, other than the addition of the provision stating that the parties are not required to meet pursuant to Rule 26(f).

However, for the sake of clarity, I would add the following to the Committee Note to Rule 9014:

> "Because parties are not required to meet pursuant to Rule 26(f), any provision in an applicable rule that requires leave of court or otherwise restricts the use of discovery procedures prior to the time when the parties meet 'as required by subdivision (f)' is not applicable in a contested matter."

(2) Other Time Periods. The following time periods are found in the Civil Rules that are made applicable to contested matters through Rule 9014's reference to Part VII rules:

> (a) Rule 25(a) requires dismissal of an action if a motion to substitute a proper party for a deceased party is not made within 90 days after service of a statement of the fact of the death of the party. Since the motion for substitution is usually made by a representative of the deceased party's estate, and time may be needed for the representative to be appointed and ready to seek substitution, a shorter time period for contested matters may be impractical.
>
> (b) Rule 27(a)(2) requires that an expected adverse party must be served, at least 20 days before the hearing, with a petition seeking to perpetuate testimony by taking a deposition before an action is commenced or pending an appeal. I do not think that this is inappropriate for contested matters.
>
> (c) Rule 30(e) gives a deponent 30 days to review a transcript or recording of a deposition and to sign a statement reciting changes. This time period may be too long for contested matters.
>
> (d) Rule 31(a)(4) provides that a party served with a notice for a deposition upon written questions has 14 days to serve cross questions upon other parties. Within 7 days after being served with cross questions, a party may serve redirect questions. Within 7 days after being served with redirect questions, a party may serve recross questions. Although the total time for developing cross-examination,

redirect, and recross questions are 28 days, this was shortened from a total of 50 days by the 1993 amendments. Moreover, the rule expressly provides that the court may for cause shown enlarge or shorten the time. I do not think that this rule is inappropriate for contested matters, especially given the court's discretion to shorten the time.

(e) Rule 32(d)(3)(C) provides that objections to the form of written questions submitted under Rule 31 are waived unless served within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized. I do not think that this time period is inappropriate for contested matters.

(f) Rules 33(b)(3), 34(b), and 36(a) give a party 30 days to answer or object to interrogatories, to respond to a request for the production of documents or the inspection of land, or to respond to a request for admissions, respectively. Although these 30-day periods may be too long for contested matters, all of these rules expressly provide that the court may shorten the time. The Committee may want to provide that the 30-day periods in these rules shall be automatically shortened to 10 days (or some other period), or may be satisfied with leaving it 30 days subject to the court shortening it. Courts may, if they so desire, shorten these periods by local rule.

(g) Rule 52(b) gives a party 10 days to file a post-judgment motion to amend findings or the judgment. This period seems to be appropriate for contested matters.

(h) Rule 56(a) requires that a claimant wait at least 20 days before filing a motion for summary judgment. This may make sense in adversary proceedings because it gives the defendant time to answer the complaint. However, there is no responsive pleading necessary in a contested matter. Therefore, summary judgment should be available at any time after commencement of the contested matter. Rule 56(c) requires that the motion be served at least 10 days before the hearing. This is longer than the five-day provision for service of motions in Rule 9006(d). The Committee may want to shorten the 10-day period to five days.

(i) Rule 62(a) provides a 10-day stay of proceedings to enforce a judgment. This appears to be appropriate for judgments rendered in contested matters.

Reporter's Recommendations.

I repeat my recommendations presented to the Advisory

Committee in February regarding amendments to Rule 9014 to deal with the 1993 amendments to Civil Rule 26 (these are set forth in the attached draft marked "Draft No. 1").

With respect to time periods contained in other Civil Rules made applicable to contested matters through Rule 9014's reference to Part VII rules, I believe that the only ones that may be inappropriate for contested matters are the 30-day periods contained in Rules 30(e), 33(b)(3), 34(b), and 36(a), the 20-day prohibition on seeking summary judgment, and 10-day period for giving notice prior to the hearing on summary judgment. Since Rule 9014 makes these rules applicable "unless the court otherwise directs," the court may vary these rules including shortening any time periods. In fact, the time periods in Rules 33(b)(3), 34(b) and 36(a) expressly give the court discretion to reduce or enlarge the 30-day periods contained therein. In addition, Rule 9006(c) permits reduction of time periods. In sum, flexibility for the court to change these time periods already exists. One alternative for the Committee, therefore, is to leave Rule 9014 as is and to leave it to the courts to modify these time periods accordingly.

Another alternative -- which may avoid the necessity of parties seeking court orders changing these time periods -- is to continue the court's flexibility while shortening these periods so that they will be more appropriate for contested matters in the absence of a court order or local rule. To achieve this goal, I attach a draft ("Draft No. 2") of proposed amendments to

Rule 9014. This draft includes the same changes I recommended in Draft No. 1 (from the February 1994 meeting), plus several others to deal with other time periods.

In view of the number of Civil Rules mentioned in this memorandum and in my draft of proposed amendments to Rule 9014, I asked the Administrative Office to circulate with the agenda materials booklets containing the Federal Rules of Civil Procedure as amended on December 1, 1993.

Draft No. 1

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, ~~7026,~~ 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. Unless the court otherwise directs, Rule 7026 shall apply except that parties shall not be required to make disclosures under Rule 26(a)(1)-(4) F.R.Civ.P., the information described in Rule 26(a)(1)-(3) F.R.Civ.P. may be obtained by methods of discovery prescribed by Rule 26(a)(5) F.R.Civ.P., and the parties shall not be required to meet pursuant to Rule 26(f) F.R.Civ.P. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are not applicable. The notice shall be

given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

Rule 26(a)(1)-(4) F.R.Civ.P. was amended in 1993 to require parties to disclose certain information without awaiting formal discovery requests. Rule 26(f) F.R.Civ.P. also was amended to require parties to meet to resolve discovery and other issues in advance of the formal pretrial conference. These 1993 amendments to Rule 26(a)(1)-(4) and (f) should not be applicable in most contested matters in view of their expedited nature.

The amendment to this rule renders inapplicable in contested matters the 1993 amendments to Rule 26(a)(1)-(4) F.R.Civ.P. and (f), but provides flexibility by giving the court discretion to order otherwise. In the absence of such a court order, the provisions of Rule 26 F.R.Civ.P. apply except that any information described in Rule 26(a)(1)-(3) may be discovered only through traditional discovery methods and the parties are not required to meet pursuant to Rule 26(f). Because parties are not required to meet pursuant to Rule 26(f), any provision in an applicable rule that requires leave of court or otherwise restricts the use of discovery procedures prior to the time when the parties meet as "required by subdivision (f)" is not applicable in a contested matter.

The court's discretion in ordering appropriate disclosure requirements and discovery methods is broad. It may order that all or some requirements of Rule 26(a)(1)-(4) and (f) shall apply. The rule also continues the current practice of giving the court discretion to direct that Rule 7026, in its entirety, shall not be applicable. By providing this flexibility, courts may tailor appropriate disclosure and discovery methods to the particular needs of the contested matter.

Draft No. 2

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. ~~, and, unless~~ Unless the court otherwise directs, ~~the following rules shall apply:~~ Rules 7021, 7025, ~~7026,~~ 7028-7037, 7041, 7042, 7052, ~~7054-7056~~ 7054, 7055, 7062, 7064, 7069, and 7071 apply except that the 30-day time periods provided in Rules 30(e), 33(b)(3), 34(b), and 36(a) F.R.Civ.P., when applicable to a contested matter, are reduced to ten days. Unless the court otherwise directs, Rule 7026 shall apply except that parties shall not be required to make disclosures under Rule 26(a)(1)-(4) F.R.Civ.P., the information described in Rule 26(a)(1)-(3) F.R.Civ.P. may be obtained by methods of discovery prescribed by Rule 26(a)(5) F.R.Civ.P., and the parties shall not be required to meet pursuant to Rule 26(f) F.R.Civ.P. Unless the court otherwise directs, Rule 7056 shall apply except that a motion for summary judgment may be filed by any party at any time and shall be served at least five days before the time fixed for the hearing. The court

may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

Rule 26(a)(1)-(4) F.R.Civ.P. was amended in 1993 to require parties to disclose certain information without awaiting formal discovery requests. Rule 26(f) F.R.Civ.P. also was amended to require parties to meet to resolve discovery and other issues in advance of the formal pretrial conference. These 1993 amendments to Rule 26(a)(1)-(4) and (f) should not be applicable in most contested matters in view of their expedited nature.

The amendment to this rule renders inapplicable in contested matters the 1993 amendments to Rule 26(a)(1)-(4) F.R.Civ.P. and (f), but provides flexibility by giving the court discretion to order otherwise. In the absence of such a court order, the provisions of Rule 26 F.R.Civ.P. apply except that any information described in Rule 26(a)(1)-(3) may be discovered only through traditional discovery methods and the parties are not required to meet pursuant to Rule 26(f). Because parties are not required to meet pursuant to Rule 26(f), any provision in an applicable rule that requires leave of court or otherwise restricts the use of discovery procedures prior to the time when the parties meet as "required by subdivision (f)" is not applicable in a contested matter.

The court's discretion in ordering appropriate disclosure requirements and discovery methods is broad.

It may order that all or some requirements of Rule 26(a)(1)-(4) and (f) shall apply. The rule also continues the current practice of giving the court discretion to direct that Rule 7026, in its entirety, shall not be applicable. By providing this flexibility, courts may tailor appropriate disclosure and discovery methods to the particular needs of the contested matter.

This rule also is amended to reduce to ten days certain 30-day time periods that are found in Rules 30(e), 33(b)(3), 34(b), and 36(a) F.R.Civ.P. when such rules are applicable to a contested matter. These periods govern the time to review a transcript or recording of a deposition and to sign a statement reciting changes, to answer or object to interrogatories, to respond to a request for the production of documents or the inspection of land, and to respond to a request for admissions. Shortening these periods to ten days is consistent with the expedited nature of contested matters. Flexibility is provided by giving the court discretion to alter these time periods.

Rule 56(a) F.R.Civ.P. prohibits a claimant from moving for summary judgment until 20 days after commencement of the action or after service of a motion for summary judgment by an adverse party. Because a response is not required in a contested matter unless the court orders that an answer be filed, there is no reason to prohibit the claimant from moving for summary judgment early in the proceeding. Accordingly, this rule is amended to permit any party, in the absence of a court order directing otherwise, to move for summary judgment at any time during the contested matter. This rule also conforms to Rule 9006(c) by requiring that a motion for summary judgment be served at least five days before the hearing, rather than 10 days as provided in Rule 56(c) F.R.Civ.P.

and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) INCOMPETENCY. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against the party's representative.

(c) TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE.

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) A public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name; but the court may require the officer's name to be added.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 17, 1961, eff. July 19, 1961; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

V. DEPOSITIONS AND DISCOVERY

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) REQUIRED DISCLOSURES; METHODS TO DISCOVER ADDITIONAL MATTER.

(1) *Initial Disclosures.* Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which

the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) *Pretrial Disclosures.* In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) *Form of Disclosures; Filing.* Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through (3) shall be made in writing, signed, served, and promptly filed with the court.

(5) *Methods to Discover Additional Matter.* Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) MEETING OF PARTIES; PLANNING FOR DISCOVERY. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) SIGNING OF DISCLOSURES, DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

AGENDA V
New York, New York
September 22-23, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 8002(c)

DATE: JUNE 17, 1994

Rule 8002 governs the time for filing a notice of appeal from an order, judgment or decree of the bankruptcy court. Although Rule 8002(a) gives a party only ten days from the entry of the order to file a notice of appeal, that period may be extended under Rule 8002(c) which reads as follows:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

Last year, the Advisory Committee voted to amend this subdivision to clarify that a motion for an extension of time to file a notice of appeal must be "filed"-- rather than "made" -- within the ten day period. Other stylistic changes were made by the style subcommittee so that the following draft was ready to be presented to the Standing Committee with a request for publication:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made by written motion and must be filed before the time for filing a notice of appeal has expired, except that such a motion filed ~~request made~~ no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

However, in view of a recent Ninth Circuit decision, In re Mouradick, 13 F.3d 326 (9th Cir. 1994), Rule 8002(c) will again be on the agenda for the next Advisory Committee meeting so that the Committee could consider whether further amendments to the rule are warranted in light of this decision.

In In re Mouradick, the bankruptcy court issued a final order on August 21st disallowing Anderson's administrative claims against the bankruptcy estates. On September 18th, Anderson filed a motion seeking an extension of time to file notices of appeal. The bankruptcy court granted the motion on November 5th

and gave Anderson until November 8th to file the notice. Anderson filed the notice on November 7th. The BAP dismissed the appeal as untimely filed and the court of appeals affirmed the dismissal.

Since no extension was requested or granted within the original ten-day appeals period, the appellant had to rely on that part of Rule 8002(c) that permits the court to extend the time based on excusable neglect. In particular, under the rule "a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect..." Clearly, Anderson's request was made within this 20-day period so that the motion for an extension was timely. However, the court focused on the first sentence of Rule 8002(c) which provides that "[t]he bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule." Although the motion for an extension in Mouradick was timely and the bankruptcy court did eventually grant the motion, the fact that a notice of appeal was not filed within 20 days after expiration of the ten-day period deprived the appellate court of jurisdiction.

FRAP 4

The court of appeals in Mouradick referred to a 1979 case, Selph v. Council of Los Angeles, 593 F.2d 881 (9th Cir. 1979), that reached a similar conclusion while interpreting the Federal Rules of Appellate Procedure in effect at that time. In that

case, a motion for an extension of time for filing a notice of appeal was filed within the 30-day extension period permitted by FRAP 4(a), but was not granted until after the 30-day period. FRAP 4(a) at that time was similar to Rule 8002(c) in that it provided that "[u]pon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision." The court in Selph held that the appellate court was without jurisdiction because the notice of appeal was not filed within that time.

In another case -- Matter of Orbitec Corp., 520 F.2d 358 (2d Cir. 1975) -- Judge Friendly indicated that an appellant could file a notice of appeal together with the motion for an extension of time so that, if the court later grants the extension, the notice would already have been filed within the 30-day period under FRAP 4(a). The court rejected the appellant's argument that she was prohibited from filing an untimely notice of appeal until the court actually grants the extension. Applying that reasoning to the facts in Mouradick, one could argue that the appellant in that case could have (and should have) preserved his right to appeal by filing the notice of appeal together with the motion for the extension. The court in Orbitec also held that the motion for an extension of time to file a notice of appeal is not, in and of itself, a notice of appeal.

FRAP 4(a) was amended in 1979 to provide that, if a motion

to extend is filed within the permissible 30-day extension period, the extension granted by the court shall not "exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later." FRAP 4(a)(5). The Committee Note to the 1979 amendments explained the reason for this change:

> "A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in In re Orbitek ... The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered."

The Ninth Circuit in Mouradick concluded that "[b]ecause Bankruptcy Rule 8002(c) contains no savings provision like the one found in Rule 4(a)(5), a notice of appeal from a bankruptcy court decision must necessarily be filed within 20 days from the expiration of the time prescribed by Rule 8002. Consequently, the BAP correctly determined Anderson's appeals were untimely, since the bankruptcy court could not extend the time for Anderson to file his notices of appeal until November 8, 1991."

Issue for the Committee

The question for the Committee is whether Rule 8002(c) should be amended in a manner that is similar to the 1979 amendment to FRAP 4(a)(5). That is, if a timely motion for an

extension of time is filed -- but the court grants the motion after the permissible extension period -- should the rule permit the party to file a notice of appeal within 10 days (or some other period) after entry of the order granting the motion to extend? This amendment would prevent the party making a timely motion for an extension from losing the right to appeal only because the court took too long to decide the motion and enter an extension order, or because the party failed to file a notice of appeal when the motion for the extension was filed.

It is important to note, however, that under Rule 8002(c) there are two types of extensions of time for filing a notice of appeal in a bankruptcy case - whereas there is only one type in other cases.

(1) If a party files a motion for an extension within the original time for filing the notice of appeal (i.e., within 10 days after entry of the judgment in most situations), the court may extend the time without finding excusable neglect regardless of the nature of the order being appealed.

(2) However, because certainty of finality is so important with respect to certain kinds of orders, Rule 8002(c) provides that if the motion for an extension is filed within 20 days after the expiration of the original time period, it may be granted only if the court finds "excusable neglect" and the judgment appealed from does not authorize the sale of any property or the obtaining of

credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

It may appear that any amendment to Rule 8002(c) that could result in a long period in which there is uncertainty regarding the finality of the order (caused by the court's delay in deciding a timely motion) would destroy the early finality that it built into the current rule. However, I believe that the current rule, even as interpreted in Mouradick, has the same uncertainty. Today, a party could make a timely motion for an extension of the time to appeal (even if the order is an order confirming a plan, approving a sale of property, or one of the other kinds of orders receiving special treatment under Rule 8002(c)), file a notice of appeal together with the motion, and wait for the court to rule on the motion. Even if the motion is granted six months later, since the party filed the notice of appeal within 20 days after expiration of the prescribed time to appeal, a literal application of Rule 8002(c) leads to the conclusion that the appeal is timely filed.

Alternative Amendments

The alternatives available to the Committee include the following:

(1) Provide for early finality by requiring that the order granting an extension of time be entered within the 20-day period. Perhaps the Committee will decide that the need for

early finality is so important in bankruptcy cases that the result in Mouradick, although harsh, is the right one. If the court delays action on a motion to extend the time, perhaps it makes sense to treat the motion as automatically denied if the court fails to act within the 20-day period.

However, if the Committee wants this result, Rule 8002(c) should be amended to provide that the order extending the time must be entered within the 20-day period -- whether or not a notice of appeal has been filed within the 20-day period. If the Committee prefers this alternative, it should consider the following amendments:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made by written motion and must be filed before the time for filing a notice of appeal has expired, except that such a motion filed ~~request made~~ no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring

of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code. An order extending the time for filing a notice of appeal is void if it is not entered within 20 days from the expiration of the time otherwise prescribed by this rule.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

In the interest of providing greater and earlier certainty regarding the finality of orders, subdivision (c) is amended further to require that a court order extending the time for filing a notice of appeal must be entered no later than 20 days after the expiration of the time to file the notice of appeal otherwise prescribed by this rule.

(2) Protect the appellant who files a timely motion by permitting the filing of a notice of appeal within a specified time after entry of the order extending the time to appeal -- even if the court grants the extension after the 20-day period. This approach, which is consistent with the Appellate Rules, protects the party from the court's delay in ruling on the motion for the extension. In addition, since a timely motion must be filed, any party checking the court records should be able to determine whether the time for appeal might still be extended

because of a timely motion. This approach would eliminate the harshness of the result in Mouradick. If the Committee prefers this approach, the following amendments should be considered:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party ~~for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule~~. A request to extend the time for filing a notice of appeal must be made by written motion and must be filed before the time for filing a notice of appeal has expired, except that such a motion filed ~~request made~~ no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code. An extension of time for filing a notice of appeal must not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or [10] days from the date of entry of the order granting the motion, whichever is later.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if the motion was timely filed and the notice of appeal is filed within a period not exceeding [10] days after entry of the order extending the time. This amendment is designed to overrule In re Mouradick, 13 F.3d 326 (9th Cir. 1994), where the court held that a notice of appeal filed within the 3-day period expressly prescribed by an order granting a timely motion for an extension of time did not confer jurisdiction on the appellate court because the notice of appeal was not filed within the 20-day period specified in subdivision (c).

(3) Protect the appellant who files a timely motion by permitting the filing of a notice of appeal within a specified time after entry of the order (as in alternative (2) above), but require that the court act within a specified time after the timely motion. If the Advisory Committee is concerned that alternative (2) may result in courts taking too long to rule on motions for extensions, and that this delay would conflict with the need for early certainty regarding bankruptcy court orders, there is another alternative. In addition to the amendment proposed in alternative (2) above, the rule could require the court to act on the motion within a certain time after the 20-day period.

For example, if the rule provides that (a) the motion must be filed within the 20-day period, (b) the court must grant the motion within 10 days after the 20-day period expires, and (c) the party must file a notice of appeal not later than 10 days after entry of the court order, this would reduce the harshness of the Mouradick result while also assuring early finality of orders.

If the Committee prefers this approach, it should consider the following amendments:

Rule 8002. Time for Filing Notice of Appeal

* * * *

(c) EXTENSION OF TIME FOR APPEAL. The bankruptcy judge may extend the time for filing the notice of appeal by any party ~~for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule~~. A request to extend the time for filing a notice of appeal must be made by written motion and must be filed before the time for filing a notice of appeal has expired, except that such a motion filed ~~request made~~ no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan,

dismissing a case, or converting the case to a case under another chapter of the Code. An extension of time for filing a notice of appeal must not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or [10] days from the date of entry of the order granting the motion, whichever is later. An order extending the time for filing a notice of appeal is void if it is not entered within 30 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule.

COMMITTEE NOTE

Subdivision (c) is amended to provide that a request for an extension of time to file a notice of appeal must be filed within the applicable time period. This amendment will avoid uncertainty as to whether the mailing of a motion or an oral request in court is sufficient to request an extension of time, and will enable the court and the parties in interest to determine solely from the court records whether a timely request for an extension has been made.

The amendments also give the court discretion to permit a party to file a notice of appeal more than 20 days after expiration of the time to appeal otherwise prescribed, but only if (1) the motion for an extension of time is timely filed, (2) the notice of appeal is filed within a period not exceeding [10] days after entry of the order extending the time, and (3) the order extending the time is entered no later than 30 days after the original time to appeal has expired.

In re James Cy MOURADICK, Debtor.

W. Bartley ANDERSON, Appellant,

v.

James Cy MOURADICK, Appellee.

In re Richard D. KALASHIAN, Debtor.

W. Bartley ANDERSON, Appellant,

v.

Richard D. KALASHIAN, Appellee.

Nos. 92-16082, 92-16086.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 4, 1993.

Decided Jan. 5, 1994.

Creditor appealed from Bankruptcy Court order disallowing administrative claims. The Bankruptcy Appellate Panel, Robert Clive Jones, Chief Judge, Lawrence Ollason and Elizabeth L. Perris, JJ., dismissed for lack of jurisdiction, and appeal was taken. The Court of Appeals, Hatfield, District Judge, sitting by designation, held that notice of appeal filed more than 30 days after entry of order disallowing claims was untimely.

Affirmed.

1. Bankruptcy ⇐3774.1

Untimely filing of notice of appeal deprives appellate court of jurisdiction to review bankruptcy court's order. Fed.Rules Bankr.Proc.Rule 8002, 11 U.S.C.A.

2. Bankruptcy ⇐3775

Notice of appeal filed more than 30 days after entry of order denying administrative claims was untimely, even though bankruptcy court had granted creditor's request for extension of time to appeal; bankruptcy court was not free to extend time for filing notice of appeal beyond 20 days from expiration of basic ten-day period. Fed.Rules Bankr.Proc. Rule 8002(a, c), 11 U.S.C.A.

3. Federal Courts ⇐670

Under "unique circumstances doctrine," appellate court may consider untimely appeal where a court has affirmatively assured party that its appeal will be timely.

See publication Words and Phrases for other judicial constructions and definitions.

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John P. Eleazarian and Jeffrey J. Lodge, Kimble, MacMichael & Upton, Fresno, CA, for appellee-debtor Kalashian.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel.

Before KOZINSKI and O'SCANNLAIN, Circuit Judges; HATFIELD,* District Judge.

HATFIELD, District Judge:

W. Bartley Anderson appeals from the Bankruptcy Appellate Panel's ("BAP") order dismissing his appeals from the bankruptcy court for lack of jurisdiction. The BAP held Anderson's notices of appeal were not filed within the thirty day period provided by Rule 8002(c), Fed.R.Bankr.P. We affirm.

BACKGROUND

On August 21, 1991, the bankruptcy court issued a final order disallowing Anderson's administrative claims against the debtors' bankruptcy estates.[1] On September 18,

* The Honorable Paul G. Hatfield, Chief United States District Judge for the District of Montana, sitting by designation.

1. It is beyond dispute that the bankruptcy court clerk did not send the notice of entry of the bankruptcy court's order as required by Bank.R. 9022(a). Rather, counsel for the creditor's com-

1991, Anderson moved the bankruptcy court, pursuant to Rule 8002(c), to extend the time for filing notices of appeal. The bankruptcy court eventually entered an order on November 5, 1991, granting Anderson until November 8, 1991, within which to file the notices. Anderson filed notices of appeal on November 7, 1991.

On March 27, 1992, the BAP entered a conditional order of dismissal, raising, *sua sponte*, a jurisdictional question concerning the timeliness of the notices of appeal. On May 13, 1992, Anderson filed a motion requesting the BAP afford him relief under the "unique circumstances" doctrine.

On May 19, 1992, the BAP entered a final order dismissing the appeals for lack of jurisdiction. The BAP determined Bankruptcy Rule 8002(c), on its face, limits the period of time a bankruptcy court may extend the deadline for filing a notice of appeal. The order did not address Anderson's requests for relief under the "unique circumstances" doctrine.

DISCUSSION

I

[1] The provisions of Bankruptcy Rule 8002 are jurisdictional; the untimely filing of a notice of appeal deprives the appellate court of jurisdiction to review the bankruptcy court's order. *Matter of Mullis*, 79 B.R. 26, 27 (D.Nev.1987), *citing, In re Souza*, 795 F.2d 855, 857 (9th Cir.1986); *Matter of Ramsey*, 612 F.2d 1220, 1222 (9th Cir.1980). "This rigid enforcement is justified by the "peculiar demands of a bankruptcy proceeding," primarily the need for expedient administration of the Bankruptcy estate aided by certain finality of orders issued by the Court in the course of administration." *In re Nucorp Energy, Inc.*, 812 F.2d 582, 584 (9th Cir.1987), *quoting, Matter of Thomas*, 67 B.R. 61, 62 (Bankr.M.D.Fla.1986).

mittee mailed the notice, which Anderson received on August 29, 1991. It is also undisputed that the notice erroneously reported that the appealable order had been entered on August 19, 1991. Consequently, when Anderson received the notice it appeared, on its face, that the last day to file a notice of appeal was August 29, 1991, rather than August 31, 1991.

Pursuant to Bankruptcy Rule 8002(a),[2] Anderson's notices of appeal were due on or before August 31, 1991—ten days from the date the bankruptcy court denied his administrative claims. However, under Bankruptcy Rule 8002(c), a motion to extend the time for filing a notice of appeal made no more than twenty days after the expiration of the ten day period may be granted upon a showing of excusable neglect. *In re Martinez*, 97 B.R. 578, 579 (9th Cir. BAP 1989), *affirmed by, Martinez v. Peelle Financial Corp.*, 919 F.2d 145 (9th Cir.1990). Bankruptcy Rule 8002(c) provides:

> (c) Extension of time for appeal. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect....

On September 18, 1991, Anderson moved the bankruptcy court, pursuant to Rule 8002(c), to extend the time for filing the notices of appeal due to excusable neglect. Anderson's motion was made within "20 days after the expiration of the time for filing a notice of appeal [August 31, 1991]" and, as a result, was timely filed. The bankruptcy court concluded Anderson had established "excusable neglect" and, on November 5, 1991, extended the time for filing the notices of appeal to November 8, 1991—seventy-nine days after the bankruptcy court's initial order.

[2] Bankruptcy Rule 8002(c), however, limits the period of time a bankruptcy court may extend the deadline for filing a notice of appeal. Rule 8002(c) prohibits an extension

2. Rule 8002(a) provides:

> Ten day period. The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. . .

that exceeds "20 days from the expiration of the time otherwise prescribed by this rule." Rule 8002(c), Fed.R.Bankr.P. The "time otherwise prescribed" by Rule 8002(c) is (1) the ten day period established in Rule 8002(a); or (2) ten days from the date of disposition of certain motions, as set forth in Bankruptcy Rule 8002(b).[3]

[3] Consequently, even though the bankruptcy court granted Anderson's request for an extension, the notices of appeal had to have been filed no later than thirty days after entry of the order denying the administrative claims. *See, In re Martinez, supra,* 97 B.R. at 579, *citing,* Bankruptcy Rule 8002(c). *See also, Martin v. Bay State Milling Co.,* 151 B.R. 154, 156 (N.D.Ill.1993), *citing, Collier on Bankruptcy,* ¶ 8002.07 (15th Ed.) ("[t]he wording of Rule 8002(c) makes it clear that once 30 days have expired from the entry of the order, no appeal may ever be taken, even upon a showing of excusable neglect."). The bankruptcy court's delay in ruling on Anderson's timely motion for an extension does not prompt a different result. The bankruptcy court was not free to extend the time for filing a notice of appeal beyond September 21, 1991—twenty days from the expiration of the ten day period established in Rule 8002(a).

Support for this admittedly harsh result is found in the cases interpreting Fed.R.App.P. 4(a)(5), the analog to Rule 8002(c). This court, in *Selph v. Council of Los Angeles,* 593 F.2d 881 (9th Cir.1979), held the provisions of Rule 4(a), Fed.R.App.P.[4], "are mandatory and jurisdictional" and, consequently, the "district court had no authority to grant an extension of time beyond the provisions of that rule." 593 F.2d at 882 (citations omitted). In *Selph,* a motion for extension of time for filing a notice of appeal was filed within the 30–day extension period permitted by Rule 4(a) but was not granted until after the expiration of the extension period. This court raised, *sua sponte,* the issue of jurisdiction and dismissed the appeal, finding the language of Rule 4(a) was not ambiguous and, as a result, the notice of appeal "should have been filed within 30 days of the entry of judgment or within 60 days of entry of judgment if the court granted an extension of time within the terms of Rule 4(a)." 593 F.2d at 882. The court further rejected the argument that the motion for extension of time be construed as a notice of appeal. 593 F.2d at 883.

Rule 4(a) was amended in 1979 to permit a district court to rule on a timely filed extension request after the extension period has expired. If the extension period has expired, the court is now authorized to grant a ten day extension period from the date the request is granted.

> The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)....
>
> *No such extension shall exceed 30 days past such prescribed time or ten days from the date of entry of the order granting the motion, whichever occurs later.*

Fed.R.App.P. 4(a)(5) (emphasis added).

Rule 4(a)(5), as amended, would abrogate the court's ultimate decision in *Selph.* Nevertheless, the rationale employed by the court remains instructive, given the fact Bankruptcy Rule 8002 is taken directly from Fed.R.App.P. 4. Because Bankruptcy Rule 8002(c) contains no savings provision like the one found in Rule 4(a)(5), a notice of appeal from a bankruptcy court decision must neces-

3. Bankruptcy Rule 8002(b) provides:

> Effect of motion on time for appeal. If a timely motion is filed by any party: (1) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (2) under Rule 9023 to alter or amend the judgment; or (3) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed.

4. Rule 4(a), Fed.R.App.P., provided:

> Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of time otherwise prescribed....

sarily be filed within 20 days from the expiration of the time prescribed by Rule 8002. Consequently, the BAP correctly determined Anderson's appeals were untimely, since the bankruptcy court could not extend the time for Anderson to file his notices of appeal until November 8, 1991.

II

Anderson asserts the BAP erred in failing to afford him relief under the "unique circumstances" doctrine.[5] The Supreme Court articulated the unique circumstances doctrine in three *per curiam* decisions, *see, Wolfsohn v. Hankin*, 376 U.S. 203, 84 S.Ct. 699, 11 L.Ed.2d 636 (1964); *Thompson v. INS*, 375 U.S. 384, 84 S.Ct. 397, 11 L.Ed.2d 404 (1964); *Harris Truck Lines v. Cherry Meat Packers, Inc.*, 371 U.S. 215, 83 S.Ct. 283, 9 L.Ed.2d 261 (1962), and recently revisited it in *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989). *In re Slimick*, 928 F.2d 304, 309 (9th Cir.1990). Under the doctrine of unique circumstances, an appellate court may consider an untimely appeal where "a court has affirmatively assured a party that its appeal will be timely." *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1462 (9th Cir.1992), *quoting, Slimick, supra*, 928 F.2d at 310. *See also, Osterneck, supra*, 489 U.S. at 179, 109 S.Ct. at 993 (unique circumstances exist "only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done").

In the instant action, Anderson contends that had he received a Notice of Entry of Judgment that accurately reported the date of entry of the bankruptcy court's order, his notices of appeal would have been filed within the ten day period of Rule 8002(a). Relying upon this court's decision in *California v. Tahoe Regional Planning Agency*, 766 F.2d 1316 (9th Cir.1985), Anderson asserts he was entitled to rely on the bankruptcy court's incorrect notice. In *Tahoe Regional Planning*, the appellant delayed filing its notice of appeal for thirty-seven days after the district court orally denied its motion for modification of a preliminary injunction, anticipating the court would enter a final written order. This court applied the unique circumstances doctrine and heard the appellant's otherwise untimely appeal. 766 F.2d at 1318.

In the instant action, the notice Anders received apprised him that the ten day period of Bankruptcy Rule 8002(a) had expired. Consequently, there was no affirmative assurance by the bankruptcy court that Anderson's appeal would be timely. Rather, the notice effectively advised Anderson that he would need to seek an extension of time for filing a notice of appeal, pursuant to Rule 8002(c), due to excusable neglect. Accordingly, the unique circumstances doctrine affords Anderson no relief.

CONCLUSION

The BAP correctly determined Anderson's appeals were technically untimely and that no unique circumstances warranted their allowance. Accordingly, the BAP's orders dismissing Anderson's appeals are AFFIRMED.

5. Recent Supreme Court decisions have cast doubt upon the viability of the unique circumstances doctrine. Four Justices rejected the doctrine in a dissent. *See Houston v. Lack*, 487 U.S. 266, 282, 108 S.Ct. 2379, 2388, 101 L.Ed.2d 245 (1988) (Scalia, J., joined by Rehnquist, Ch.J., and O'Connor and Kennedy, JJ., dissenting) ("Our later cases ... effectively repudiate the *Harris Truck Lines* approach, affirming that the timely filing of a notice of appeal is mandatory and jurisdictional"). Other courts have questioned its continuing vitality. *See, e.g., Pinion v. Dow Chemical*, 928 F.2d 1522, 1529 (11th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 438, 116 L.Ed.2d 457 (1991), and cases cited therein; *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1562 (7th Cir.1990). Nevertheless, because the Court refrained from repudiating the doctrine in *Osterneck* and, to date, has not otherwise explicitly overruled it, we are bound by our case law to apply it.

grant an extension of time after expiration of the 30-day period following the conclusion of the meeting of creditors, even if the trustee files a timely motion to extend the time within the 30-day period. The court wrote:

> "The Rules are quite clear on their face, we believe, that a bankruptcy court can extend the period for objections to exemptions only by acting within the original time period.... There simply is no room in the wording for construing Rule 4003(b)... to permit granting an extension of time to file objections outside the original thirty-day time limit. We recognize that this may cause problems for many bankruptcy courts with crowded dockets or when the motion has been filed, as here, on the last day. But that is a matter for the drafters of the bankruptcy rules, who appear to have thought that precise time limitations were important in the situation presented here." 912 F.2d at 1257.

In In re Williams, 124 BR 864 (Bankr., N.D. Fla. 1991), the bankruptcy court expressly rejected the holding in Brayshaw and held that the court may grant the extension of time after the 30-day period expires, provided that the trustee filed the motion seeking the extension within the 30-day period. In reaching this result, the court focused on a similar provision in § 365(d)(4) of the Code that requires the trustee to assume or reject a lease of nonresidential property within 60 days after the order for relief "or within such additional time as the court, for cause, within such 60-day period, fixes." Although § 365(d)(4) also appears to require that the court grant the motion within the specified time period, the court in Williams correctly pointed out that a number of courts have construed that language to permit the court to rule on a motion for an extension after the 60-day period expires, so long as the motion was filed within the

60-day period. See, e.g., In re Southwest Aircraft Services, Inc., 831 F2d 848 (9th. 1987), ("[A] rule that forfeits a party's rights, benefits, privileges or opportunities simply because a court fails to act within a particular time period would be quite extraordinary. We think that Congress would not adopt any such rule without clearly indicating in the legislative history its intention to do so and explaining its reasons."); In re Unit Portions of Del., Inc., 53 BR 83 (Bankr. E.D.N.Y. 1985) ("The scheduling of the hearing was neither the responsibility of, nor in the control of, the debtor. It would be unjust to deny the debtor its request for relief due to the court scheduling of the hearing after the expiration of the 60 day period").

The court in Williams also noted that a majority of circuit courts have held that a former version of Federal Rule of Criminal Procedure 35 -- which explicitly gave district courts 120 days within which to act in order to reduce a sentence -- could be applied so that the court could act on a timely motion within a reasonable time after expiration of the 120 days. See, e.g., U.S. v. Mendoza, 581 F.2d 89, 90 (5th Cir. 1978) ("For any number of reasons it may be impossible or impractical for a judge to act promptly upon a motion for reduction of sentence filed with the court long before the expiration of the 120 day period.").

After considering the case law applying § 365(d)(4) and former F.R.Crim.P. 35, the bankruptcy court in Williams concluded:

> "Likewise, an interpretation that BR 4003(b) requires the bankruptcy court to act before the 30th day after the meeting of creditors would be impractical and could lead to numerous unnecessary filings of motions for extensions of time. Rather than being pressured for a quicker and less thorough examination of the debtors claimed exemptions, trustees will merely file a request for an extension of time the day after the meeting of creditors to avoid the risk of a heavily burdened court not ruling on their otherwise timely filed motions. Accordingly, we find that the court has the jurisdiction to grant the trustee's motion for an extension of time to file objections to exemptions."

124 BR at 866.

The difference of opinion regarding the court's power to grant an extension after expiration of the 30-day period is also reflected in the treatises. Collier on Bankruptcy (15th ed.), at vol. 8, ¶ 4003.04, page 4003-10, reading the rule literally, states that "[t]he time period for filing objections to exemptions may be extended only by the court and only if the extension is granted within the original time period." In contrast, Norton, Bankruptcy Law & Practice 2d, vol. 9, at page 275, states that "[t]he thirty-day deadline specified in subdivision (b) for filing objections to exemptions may be extended by the court provided that a request for further time is filed within the original thirty-day period."

The Advisory Committee should consider whether Rule 4003(b) should:

(1) prohibit the court from extending the 30-day period unless the order extending it is actually granted within the 30-day period,

(2) permit the court to order an extension of time after

expiration of the 30-day period if a motion for an extension is filed within the 30-day period, or

(3) require a timely motion within the 30-day period and also require the court to enter an extension order before the later of (a) the expiration of the 30-day time period or (b) a specified time period after the motion is filed.

The First Alternative

A justification for the strict rule prohibiting the court from granting an extension of time after the initial 30-day period is to further the "fresh start" policy by avoid the delay and uncertainty regarding the property that the debtor may keep. Thirty days after the conclusion of the meeting of creditors is ample time to determine whether an objection should be filed. If a motion for an extension is filed on the 29th day after the meeting of creditors, and the court could delay the hearing and decision on the motion for a substantial period of time (perhaps a month or two), this could leave the individual debtor in the position of not knowing whether certain property (tools of the trade, household goods, an automobile, etc.) will be protected from the bankruptcy process. As the Supreme Court said in Taylor, when referring to Rule 4003(b), "[d]eadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." 112 S.Ct. at 1648.

If the Committee prefers to prohibit the court from granting an extension after expiration of the 30-day period, which is

consistent with the literal language of the rule now and the Tenth Circuit's holding in Brayshaw, I think that an amendment to Rule 4003(b) should not be necessary. However, if the Committee would like to avoid such decisions as the one in the Williams case, the rule could be amended as follows for further clarification:

(b) OBJECTIONS TO CLAIM OF EXEMPTIONS. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list unless a motion for an extension of time is filed and an order granting the extension is entered before the expiration of such time period~~, within such time period, further time is granted by the court~~. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

COMMITTEE NOTE

Subdivision (b) is amended to clarify that a court may not grant an extension of time for filing objections to the list of exemptions after the expiration of the 30-day period following the conclusion of the meeting of creditors or the filing of an amendment to the list, even if a timely motion requesting an extension has been filed. Both the filing of the motion requesting the extension and the entry of the order granting the motion must be completed within the initial time period for filing an objection.

The Second Alternative

The Committee may be persuaded, however, that the rule should not penalize the trustee or creditors merely because the court is unable to act fast enough with respect to a timely motion for an extension of time.

If the Committee prefers to amend the rule to permit the court to grant a timely motion for an extension, even if the order is entered after the initial 30-day period, the following amendment should be considered:

(b) OBJECTIONS TO CLAIM OF EXEMPTIONS. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list unless, on motion filed within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

COMMITTEE NOTE

Subdivision (b) is amended to permit the court to grant an extension of time to object to the list of exemptions after expiration of the 30-day time period for filing objections, provided that a motion for an extension of time is filed within the 30-day period. This amendment is intended to overrule In re Brayshaw, 912 F.2d 1255 (10th Cir. 1990), where the court of appeals held that, after the expiration of the 30-day period for filing objections under Rule 4003(b), a bankruptcy court did not have the power to extend the time for filing objections even though a timely motion

for an extension of time had been filed.

The Third Alternative

A third approach, which is one that I think makes sense, is to amend the rule to permit the court to grant the extension within a specified period after the expiration of the 30-day period, provided that a timely motion has been filed within the 30-day period. Consider the following amendment:

(b) OBJECTIONS TO CLAIM OF EXEMPTIONS. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list unless a motion for further time is filed within such period and, before the expiration of such period or within 10 days after the filing of the motion, whichever is later, an order is entered extending the time for filing objections to the list~~, within such period, further time is granted by the court~~. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

COMMITTEE NOTE

Subdivision (b) is amended to permit the court to grant an extension of time to object to the list of exemptions after expiration of the 30-day time period for filing objections, provided that a motion for an extension of time is filed within the 30-day period and

the order extending the time is entered either within the 30-day period or within 10 days after the filing of the motion.

This amendment is intended to reduce the harshness of the holding in In re Brayshaw, 912 F.2d 1255 (10th Cir. 1990), where the court of appeals held that, after the expiration of the 30-day period for filing objections under Rule 4003(b), a bankruptcy court did not have the power to extend the time for filing objections even though a timely motion for an extension of time had been filed. This amendment will assure the party seeking the extension of time that the court will have at least ten days to act on a motion filed within the 30-day period for filing objections.

AGENDA VII
New York, New York
September 22-23, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 3021

DATE: JUNE 18, 1994

Rule 3021, which governs distributions under a plan, provides as follows:

> "After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to holders of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security interests have not been disallowed and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) and which have been allowed."

At Ken Klee's suggestion, the Advisory Committee voted at its February 1994 meeting to request publication of the following proposed amendment to Rule 3021:

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to holders of stock, bonds, debentures, notes, and other securities of record ~~at the time of commencement of distribution~~ whose claims or equity security interests have not been disallowed and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) and which have been allowed. For the purpose of this subdivision, except as otherwise provided in the plan or the order confirming the plan, holders of securities of record are the holders of record at the time of commencement of distribution.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier than the date on which distributions commence.

However, in preparing the text of the amendment for a report to the Standing Committee, I noticed apparent inconsistencies and other possible problems that may warrant further modifications to the rule. I discussed my observations with Ken Klee who agreed that there are other problems that warrant Committee review. Ken, Judge Mannes, and I were of the view that the proposed amendments to Rule 3021 should not go forward to the Standing Committee, but should be referred back to the Advisory Committee for further discussion at the September 1994 meeting.

If a timely proof of claim is filed, pursuant to section 502 of the Code, the claim is "deemed allowed" unless an objection to the claim is filed. Section 1111(a) provides that a claim is deemed filed (and therefore is allowed in the absence of an objection) if it is scheduled, unless it is scheduled as contingent, disputed, or unliquidated. Rule 3003(c)(2) and (3) provides, in essence, that a creditor or equity security holder whose claim or interest is not scheduled, or is scheduled as disputed, contingent, or unliquidated, shall file a proof of claim or interest within the time set by the court, and that "any creditor who fails to do so shall not be treated as a creditor

with respect to such claim for the purposes of ... distribution." Consistent with these provisions, Rule 3021 correctly provides that a distribution under a confirmed chapter 11, 12 or 13 plan "shall be made to creditors whose claims have been allowed."

In contrast to the provision that distribution is made to creditors whose claims "have been allowed", Rule 3021 also provides that distribution shall be made to "holders of stock ... of record ... whose equity interests have not been disallowed." Apparently, this provision permits distribution to stockholders of record unless an affirmative act is taken to have the interest "disallowed." This seems to create a presumption that stockholders of record have allowed interests, unless the court rules otherwise.

Although one could argue that there is no need for treating stockholders and creditors differently, it does not seem to be creating any problem to create this presumption for stockholders and, in my view, the Rules or Code do not prohibit treating stockholders this way. Again, Rule 3003(c)(2) provides that a creditor who fails to file a timely claim is not treated as a creditor for distribution or voting purposes, but there is no similar provision for interest holders. In sum, I do not perceive any problem with the different treatment for creditors and stockholders under Rule 3021.

However, Rule 3021 also provides that record holders of bonds, debentures, and notes (who are "creditors" -- not equity interest holders) shall receive distributions if their "claims

... have not been disallowed." This seems inconsistent with the first part of the rule. That is, Rule 3021 provides that (1) "creditors" receive a distribution only if their claims "have been allowed," but holders of bonds, debentures and notes (who also are creditors) receive a distribution if their claims "have not been disallowed." Why are "creditors" treated one way, while holders of notes are treated a different way?

There also may be an inconsistency between Rules 3021 and 3003(c)(2). In view of the fact that holders of bonds, debentures, and notes are "creditors," is it inconsistent to provide in Rule 3003 that they "shall not be treated as a creditor" if they are not scheduled and a timely proof of claim has not been filed, but to provide in Rule 3021 that holders of bonds may share in a distribution so long their claims "have not been disallowed." Does that mean that an unscheduled trade creditor who misses the deadline for filing claims is automatically disqualified from receiving a distribution, but an unscheduled note holder who fails to file a timely claim may share in the estate so long as nobody files a motion to disallow the claim?

One more problem: The rule provides for distributions to stockholders and other securities of record whose "equity security interests have not been disallowed." The term "equity security interests" is defined to include limited partners, but not general partners. See section 101(16) of the Code. Of course, a general partner may be entitled to receive a

distribution if the interest has not been disallowed. I would suggest that the broader term "interest" be used instead of "equity security holder."

I want to add, however, that to the best of my knowledge, these "problems" in Rule 3021 that I have observed have not caused any real difficulties in practice. I would not consider these amendments urgent or important. Nonetheless, if Rule 3021 is going to be changed, perhaps all glitches should be corrected at the same time.

If the Committee agrees that these problems exist and are worth correcting, it should consider the following amendments (which include the substance, but not the same language, of the amendments approved at the February meeting as well as others):

Rule 3021. Distribution Under Plan

After confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders ~~of stock, bonds, debentures, notes, and other securities of record at the time of commencement of distribution whose claims or equity security~~ whose interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) ~~and which~~ that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of

commencement of distribution unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This rule is amended to provide flexibility in fixing the record date for the purpose of making distributions to holders of securities of record. In a large case, it may be impractical for the debtor to determine the holders of record with respect to publicly held securities and also to make distributions to those holders at the same time. Under this amendment, the plan or the order confirming the plan may fix a record date for distributions that is earlier than the date on which distributions commence.

This rule also is amended to treat holders of bonds, debentures, notes, and other debt securities the same as any other creditors by providing that they shall receive a distribution only if their claims have been allowed. Finally, the amendments clarify that distributions are to be made to all interest holders -- not only those that are within the definition of "equity security holders" under section 101 of the Code -- whose interests have not been disallowed.

AGENDA VIII
New York, New York
September 22-23, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO BANKRUPTCY RULES 3017 AND 3018 REGARDING THE RECORD DATE FOR VOTING PURPOSES

DATE: JUNE 13, 1994

After a disclosure statement is approved in a chapter 9 or chapter 11 case, Bankruptcy Rule 3017(d) requires that certain documents (the plan, disclosure statement, ballots for voting, etc.) be mailed to creditors and equity security holders so that they have an opportunity to vote on the plan. The last sentence of Rule 3017(d) provides as follows:

> "For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement was entered."

Rule 3018(a), which governs the right to vote on the plan, contains a similar provision:

> "[A]n equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered."

Because of these two sentences, the right of a security holder to receive vote solicitation materials and to vote on a plan depends on whether the entity is a holder of record on the date that the order approving the disclosure statement is entered.

Prior to the February 1994 meeting of the Advisory Committee, Ken Klee suggested that these provisions be amended

because "the date of entry of the order approving the disclosure statement is a date that is fraught with uncertainty in large districts where docketing delays are common." Ken suggests that "the court ought to be entitled to enter an alternative record date such as the date the court orally approves the disclosure statement. This will allow the preparation of lists and prompt solicitations without having to wait for the fortuity of entry of the order."

To assist the Advisory Committee, I included as item #8 in the agenda materials for the February meeting my memorandum dated January 4, 1994, two alternative sets of draft amendments to Rules 3017(d) and 3018(a). These sets of drafts are attached. The first set (Alternative A) amends Rules 3017(d) and 3018(a) to give the court the discretion to order that the date on which the court announces its approval of the disclosure statement, rather than the date of entry of the order, shall be the record date for voting purposes. The second set of drafts (Alternative B), which is favored by Ken, gives the court greater flexibility in fixing the record date. At the February meeting, I expressed my preference for Alternative A because it should cure the problem pointed out by Ken while not giving the courts the power to deviate too much from the date on which the order approving the disclosure statement is entered. In general, I think that the record date for voting purposes should be the latest practicable date before solicitation materials are mailed. In any event, it is important that the amendments regarding the record date be the

same for Rules 3017(d) and 3018(a).

There may be other alternatives for the Committee to consider. For example, the record date for voting purposes could be the date on which the order approving the disclosure statement is signed (rather than "entered" or "announced").

At the February meeting, the Committee discussed these alternatives, but decided to postpone consideration until the next meeting.

Alternative A

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

* * * *

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS AND EQUITY SECURITY HOLDERS. On approval of a disclosure statement, unless the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders, the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee, (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; and (4) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders pursuant to Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or

only a summary of the plan is transmitted, the opinion of the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the expense of the proponent of the plan, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record ~~at~~ on the date the order approving the disclosure statement ~~was~~ is entered or, if the court so directs, on the date on which the court announces [signs] the order approving the disclosure statement.

* * * *

COMMITTEE NOTE

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents under this subdivision. In some districts, there may be a delay between the oral announcement of the bankruptcy judge's order approving the disclosure statement and entry of the order on the court docket. This amendment gives the court the discretion to fix the date on which the judge orally approves the disclosure statement as the record date for the purpose of applying this rule, so that the parties

may expedite preparation of the lists necessary to facilitate the distribution of these documents.

If the court orders the distribution of documents to holders of securities who are holders of record when the judge announces the approval of the disclosure statement, and the holders of such securities are impaired by the plan, the judge also should order that the same record date shall apply for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Alternative A

Rule 3018. Acceptance or Rejection of Plans

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or, if the court so directs, on the date on which the court announces [signs] the order approving the disclosure statement. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. In some districts, there may be a delay between the oral announcement of the bankruptcy judge's order approving the disclosure statement and

entry of the order on the court docket. This amendment gives the court the discretion to fix the date on which the judge orally approves the disclosure statement as the record date for the purpose of voting eligibility, so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the ballots and other documents required to be distributed under Rule 3017(d).

If the court fixes the date on which the judge announces the approval of the disclosure statement as the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed under Rule 3017(d).

Alternative B

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

* * **

(d) TRANSMISSION AND NOTICE TO UNITED STATES TRUSTEE, CREDITORS AND EQUITY SECURITY HOLDERS. On approval of a disclosure statement, unless the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders, the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee, (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; and (4) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders pursuant to Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or only a summary of the plan is transmitted, the opinion of

the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the expense of the proponent of the plan, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record ~~at~~ on the date the order approving the disclosure statement ~~was~~ is entered or such other date as the court for cause fixes.

* * * *

COMMITTEE NOTE

Subdivision (d) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to receive documents under this subdivision. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date so that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents.

If the court fixes a record date under this subdivision with respect to the holders of securities, and the holders are impaired by the plan, the judge also should order that the same record date shall apply for the purpose of determining eligibility for voting pursuant to Rule 3018(a).

Alternative B

Rule 3018. Acceptance or Rejection of Plans

(a) ENTITIES ENTITLED TO ACCEPT OR REJECT PLAN; TIME FOR ACCEPTANCE OR REJECTION. A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered or such other date as the court for cause fixes. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide flexibility in fixing the record date for the purpose of determining the holders of securities who are entitled to vote on the plan. For example, if there may be a delay between the oral announcement of the judge's decision approving the disclosure statement and entry of the order on the court docket, the court may fix the date on which the judge orally approves the disclosure statement as the record date for voting purposes so

that the parties may expedite preparation of the lists necessary to facilitate the distribution of the plan, disclosure statement, ballots, and other related documents in connection with the solicitation of votes.

If the court fixes the record date for voting purposes, the judge also should order that the same record date shall apply for the purpose of distributing the documents required to be distributed under Rule 3017(d).

AGENDA IX
New York, New York
September 22-23, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9011 AND THE 1993 AMENDMENTS TO CIVIL RULE 11

DATE: MAY 25, 1994

Until December 1, 1993, Civil Rule 11 and Bankruptcy Rule 9011(a) were substantially identical. In essence, these rules require the signing of certain papers and the imposition of sanctions for signing frivolous papers. In 1993, however, Civil Rule 11 was changed significantly in several ways.

The most significant and controversial changes to Rule 11 relate to the imposition of sanctions. More specific procedures for the imposition of sanctions, such as notice requirements, are included and the rule has a new "safe harbor" provision that gives the attorney or pro se litigant an opportunity (21 days) to avoid sanctions by withdrawing the offending paper. The amendments also provide that the court has the option of imposing sanctions, in contrast to the older version that made sanctions for violation of the rule mandatory. The amendments also make it less likely that monetary sanctions will be imposed for violations or that, when monetary sanctions are imposed, they will include the payment of the complainant's attorney's fees.

Publication of the proposed amendments to Rule 11 resulted in voluminous and intense public comment that demonstrated a lack of any consensus on whether, or how, the rule should be amended. The 1993 amendments to Rule 11 were so controversial that three Supreme Court Justices dissented from the Court's order

promulgating the amendments. I enclose the relevant part of an opinion by Justice Scalia, joined by Justices Thomas and Souter, expressing objections to the changes. One significant criticism was that the rule will be substantially "weakened."

A general theme that has been expressed and implemented in the past is that the different bodies of federal procedural rules (civil, criminal, bankruptcy, and appellate) should be the same with respect to a particular issue or concept unless there is a good reason for departing from the others. For example, at the request of the Standing Committee, the Advisory Committee on Bankruptcy Rules amended Rule 9011(a) in 1991 for the purpose of conforming it to the precise language of Rule 11 except for certain language that is unique to bankruptcy (for example, Rule 9011 excludes "schedules" from its scope). This desire for uniformity among the various bodies of rules was demonstrated recently with respect to the proposed amendments on local rule numbering and technical amendments.

In view of the 1993 amendments to Rule 11, the Advisory Committee should decide whether Bankruptcy Rule 9011(a) also should be changed so that the two rules will again be substantially the same. Is there a "bankruptcy reason" for not conforming to the new version of Rule 11? Is there a need for a "stronger" sanction rule regarding frivolous papers in bankruptcy courts? If there is no "bankruptcy reason" for keeping Rule 9011(a) as is, should the Advisory Committee refrain from recommending changes to Rule 9011 solely because it disagrees

with the recent amendments to Rule 11? Should the Advisory Committee wait and see how the 1993 Rule 11 amendments work in practice before adopting them in the Bankruptcy Rules? These are questions that will be discussed at the next Advisory Committee meeting.

For the convenience of the Committee, I prepared a draft of proposed amendments to Bankruptcy Rule 9011 that would incorporate the 1993 amendments to Rule 11 (see Exhibit H to this memorandum). Of course, the Committee may decide to recommend that Rule 9011(a) be amended to conform to only some of the recent changes to Rule 11. In any event, it will be necessary for the Advisory Committee to become familiar with the Rule 11 changes.

I enclose for your information:

Exhibit A - Bankruptcy Rule 9011

Exhibit B - Pre-1993 version of Civil Rule 11

Exhibit C - Civil Rule 11 as amended in 1993.

Exhibit D - Civil Rule 11 showing the 1993 changes and containing the Committee Notes.

Exhibit E - A summary of the changes to Rule 11 prepared by the Chair and Reporter of the Advisory Committee on Civil Rules.

Exhibit F - Dissenting opinion by Justice Scalia, joined by Justices Thomas and Souter

Exhibit G - Excerpts from May 1, 1992, letter to the Standing Committee from the Chair of the Civil

Committee summarizing public comments regarding Rule 11.

Exhibit H - My draft of Rule 9011(a) showing amendments to conform to the 1993 amendments to Rule 11 (together with the Committee Note and Reporter's notes explaining certain aspects of the draft).

EXHIBIT A

BANKRUPTCY RULE 9011

Rule 9011. Signing and Verification of Papers

(a) SIGNATURE. Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(b) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(c) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

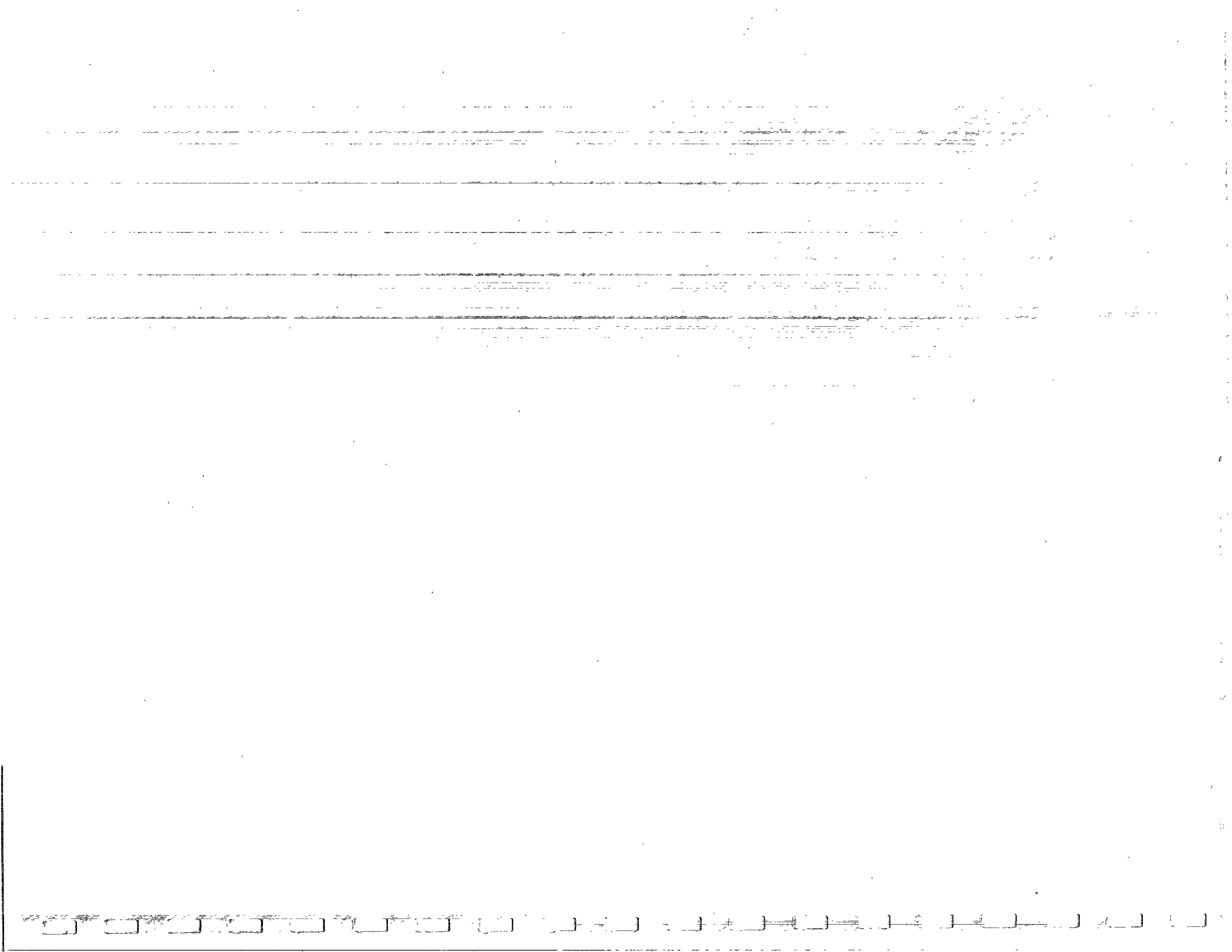

EXHIBIT B

PRE-1993 VERSION OF CIVIL RULE 11

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

EXHIBIT C

CIVIL RULE 11 AS AMENDED IN 1993

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal

contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) **How Initiated.**

(A) **By Motion.** A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate

subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter

repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) **Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

EXHIBIT D

CIVIL RULE 11 SHOWING THE 1993 CHANGES AND COMMITTEE NOTES

which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. ~~Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules~~ A court may, by local rule, permit papers to be filed by facsimile or other electronic means if such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

COMMITTEE NOTES

This is a technical amendment, using the broader language of Rule 25 of the Federal Rules of Appellate Procedure. The district court--and the bankruptcy court by virtue of a cross-reference in Bankruptcy Rule 7005--can, by local rule, permit filing not only by facsimile transmissions but also by other electronic means, subject to standards approved by the Judicial Conference.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper ~~of a party represented by~~

~~an attorney~~ shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address.~~ Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. ~~The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper~~

~~purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other~~ An unsigned paper ~~is not signed, it~~ shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~pleader or movant~~ attorney or party.

(b) Representations to Court. ~~If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.~~ By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or

parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

COMMITTEE NOTES

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, Sanctions and Attorneys' Fees (1987); T. Willging, The Rule 11 Sanctioning Process (1989); American Judicature Society, Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, Report on Rule 11 (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, Sanctions: The Federal Law of Litigation Abuse (1989); J. Solovy, The Federal Law of Sanctions (1991); G. Vairo, Rule 11 Sanctions: Case

Law Perspectives and Preventive Measures (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-

think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"--and hence certifying to the district court under Rule 11--those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has

a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-

heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See Manual for Complex Litigation, Second, § 42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if

a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The sanction should be imposed on the persons--whether attorneys, law firms, or parties--who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion,

it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See Willy v. Coastal Corp., ___ U.S. ___ (1992); Business Guides, Inc. v. Chromatic Communications Enter. Inc., ___ U.S. ___ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the

record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person

responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, i.e., not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11--whether the movant or the target of the motion--reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed

after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what--if any--sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See Chambers v. NASCO, ___ U.S. ___ (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

EXHIBIT E

SUMMARY OF 1993 CHANGES TO CIVIL RULE 11 PREPARED BY THE CHAIR AND REPORTER TO THE ADVISORY COMMITTEE ON CIVIL RULES

new Forms 1A and 1B, which replace the abrogated Form 18-A. The features of waiver include:

- The request for waiver is sent by mail or other reliable means, and includes a prepaid means of compliance. When the plaintiff files a waiver, the action proceeds as if service had been made at the time of filing.
- Waiver does not waive objections to venue or personal jurisdiction.
- Waiver is encouraged by several devices. A defendant who waives service is given additional time to answer; see also Rule 12(a)(1)(B). A defendant in the United States who refuses to waive is liable for the costs of service. A defendant outside the United States who refuses to waive may be liable for the costs of service as costs taxed on conclusion of the litigation.
- Waiver is not available in actions against the United States or its agencies.
- The provisions for service on the United States or its agencies are refined to make it easier to cure failure to serve all required multiple officers, agencies, or corporations.
- The Foreign Sovereign Immunities Act is formally incorporated as the means of serving a foreign state or agency.

Rule 4.1. Service of Other Process

This rule contains the provisions of former Rule 4 governing process other than the summons. Rule 4.1(b) provides for nationwide service of an order of commitment for civil contempt.

Rule 5. Facsimile and Electronic Filing

Rule 5 is amended to authorize filing not only by facsimile transmission but also by other electronic means. Filing must be authorized by local rule, and the local rule must comply with standards established by the Judicial Conference of the United States.

Rule 11. Signing of Pleadings; Representations to Court

The 1983 version of Rule 11 is substantially revised. The scope of the obligations imposed by Rule 11 is expanded in some ways, but the sanctions are scaled back. The most central of the changes noted below are those that make it clear that Rule 11 is violated by persisting in advocating a position that did not initially violate Rule 11 but has come to lack any sufficient

support; that create discretion to deny any sanction for a violation; that create a "safe harbor" by allowing withdrawal or correction of positions that violate Rule 11; and that define the purpose of sanctions as deterrence, subordinating the role of compensating the expenses occasioned by the violation.

Rule 11(b).

- Rule 11(b) sets the standards for all pleadings, written motions, and other papers. But discovery matters are taken outside Rule 11 by Rule 11(d).

- Rule 11 certifications are made by signing, filing, submitting, or later advocating assertion in a paper. Although an allegation has sufficient support when first made, Rule 11 is violated by continuing to assert it after learning that it has no merit. It is not required that the paper be withdrawn or amended. Rule 11 applies to continuing advocacy after removal of positions advanced in papers initially filed in state court.

- It is made clear that Rule 11 applies to each claim, defense, allegation, and legal or factual contention.

- Rule 11(b)(1) continues to forbid presenting a position for any improper purpose.

- The test for arguing for changes of law is changed from "good faith argument" to "nonfrivolous argument." The Note explains that this eliminates any "empty-head pure-heart" justification.

- The test for factual contentions is changed from "well grounded in fact" to "have evidentiary support." Specific provision is made for allegations "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery" if they are specifically identified. Such allegations cannot be pressed if further investigation shows them unfounded.

- A separate provision is made for denials of factual contentions, permitting denial based on reasonable doubts as to the credibility of the only available evidence.

Rule 11(c).

- Rule 11(c) governs sanctions.

- Sanctions are made discretionary.

- A sanction, if imposed, is "limited to what is sufficient to deter repetition." Nonmonetary sanctions are proper; a wide

variety are suggested in the Note. Penalties payable to the court are proper; the Note states that ordinarily monetary sanctions should be paid into court. Compensation for expenses incurred by the moving party also is proper; the Note suggests that compensatory awards should be limited to unusual circumstances.

- A law firm is jointly responsible for violations committed by partners, associates, or employees, absent exceptional circumstances.

- A party who wishes to seek sanctions under Rule 11 must serve a separate motion, but may not file or present the motion unless the challenged paper is not withdrawn or corrected within 21 days after service (the time period may be changed by court order).

- Attorney fees and expenses can be awarded for making or resisting a Rule 11 motion. This provision is intended to reduce the occasions for cross-motions asserting that a Rule 11 motion itself violates Rule 11. Sanctions also may be imposed on an unrepresented party, or on a represented party that is responsible for a violation - except that a represented party may not be sanctioned for frivolous legal arguments.

- The court may initiate Rule 11 sanctions on its own, without the advance notice required for motion by a party. Monetary sanctions can be imposed by this means only if an order to show cause is issued before voluntary settlement or dismissal.

- If sanctions are imposed, the court must describe the conduct that violated the Rule and explain the basis for the sanction imposed.

Rule 12. Time To Answer

Rule 12(a)(1)(B) is added to reflect the additional time to answer allowed if a defendant waives service under new Rule 4(d)(3).

Rule 15. Amended Pleadings

The cross-reference in Rule 15(c)(3) is changed to reflect the designation of former Rule 4(j) as rule 4(m).

Rule 16. Pretrial Conferences

- The time for the scheduling order is extended by using appearance of a defendant or service as the starting point, not the time of filing the complaint. This change is more important than might seem because new Rule 26(f) requires the

EXHIBIT F

DISSENTING OPINION BY JUSTICE SCALIA JOINED BY JUSTICES THOMAS AND SOUTER

SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[April 22, 1993]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom JUSTICE SOUTER joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

I

Rule 11

It is undeniably important to the Rules' goal of "the just, speedy, and inexpensive determination of every action," Fed. Rule Civ. Proc. 1, that frivolous pleadings and motions be deterred. The current Rule 11 achieves that objective by requiring sanctions when its standards are violated (though leaving the court broad discretion as to the manner of sanction), and by allowing compensation for the moving party's expenses and attorney's fees. The proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day "safe harbor" within which, if the party accused

of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all.

To take the last first: In my view, those who file frivolous suits and pleadings should have no "safe harbor." The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty. The proposed revision contradicts what this Court said only three years ago: "Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 398 (1990). The advisory committee itself was formerly of the same view. *Ibid.* (quoting Letter from Chairman, Advisory Committee on Civil Rules).

The proposed Rule also decreases both the likelihood and the severity of punishment for those foolish enough not to seek refuge in the safe harbor after an objection is raised. Proposed subsection (c) makes the issuance of any sanction discretionary, whereas currently it is *required*. Judges, like other human beings, do not like imposing punishment when their duty does not require it, especially upon their own acquaintances and members of their own profession. They do not immediately see, moreover, the system-wide benefits of serious Rule 11 sanctions, though they are intensely aware of the amount of their own time it would take to consider and apply sanctions in the case before them. For these reasons, I think it important to the effectiveness of the scheme that the sanctions remain mandatory.

Finally, the likelihood that frivolousness will even be *challenged* is diminished by the proposed Rule, which restricts the award of compensation to "unusual circum-

stances," with monetary sanctions "ordinarily" to be payable to the court. Advisory Committee Notes to Proposed Rule 11, pp. 53–54. Under Proposed Rule 11(c)(2), a court may order payment for "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" only when that is "warranted for effective deterrence." Since the deterrent effect of a fine is rarely increased by altering the identity of the payee, it takes imagination to conceive of instances in which this provision will ever apply. And the commentary makes it clear that even when compensation is granted it should be granted stingily—only for costs "directly and unavoidably caused by the violation." *Id.*, at 54. As seen from the viewpoint of the victim of an abusive litigator, these revisions convert Rule 11 from a means of obtaining compensation to an invitation to throw good money after bad. The net effect is to decrease the incentive on the part of the person best situated to alert the court to perversion of our civil justice system.

I would not have registered this dissent if there were convincing indication that the current Rule 11 regime is ineffective, or encourages excessive satellite litigation. But there appears to be general agreement, reflected in a recent report of the advisory committee itself, that Rule 11, as written, basically works. According to that report, a Federal Judicial Center survey showed that 80% of district judges believe Rule 11 has had an overall positive effect and should be retained in its present form, 95% believed the Rule had not impeded development of the law, and about 75% said the benefits justify the expenditure of judicial time. See Interim Report on Rule 11, Advisory Committee on Civil Rules, reprinted in G. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, App. I-8–I-10 (2d ed. 1991). True, many lawyers do not like Rule 11. It may cause them financial liability, it may damage their professional reputation in front of important clients, and the cost-of-litigation savings it produces are savings not to lawyers but to litigants. But the overwhelming approval of the Rule by the federal

district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.[1]

II

Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery.* It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohib-

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[1] I do not disagree with the proposal to make law firms liable for an attorney's misconduct under the Rule, see Proposed Rule 11(c), or with the proposal that Rule 11 sanctions be applied when claims in pleadings that at one time were not in violation of the rule are pursued after it is evident that they lack support, see Proposed Rule 11(b); Advisory Committee Notes to Proposed Rule 11, p. 51.

It is curious that the proposed rule regarding sanctions for discovery abuses *requires* sanctions, and specifically recommends financial sanctions and compensation to the moving party. See Proposed Rule 37(a)(4)(A), (c)(1). No explanation for the inconsistency is given.

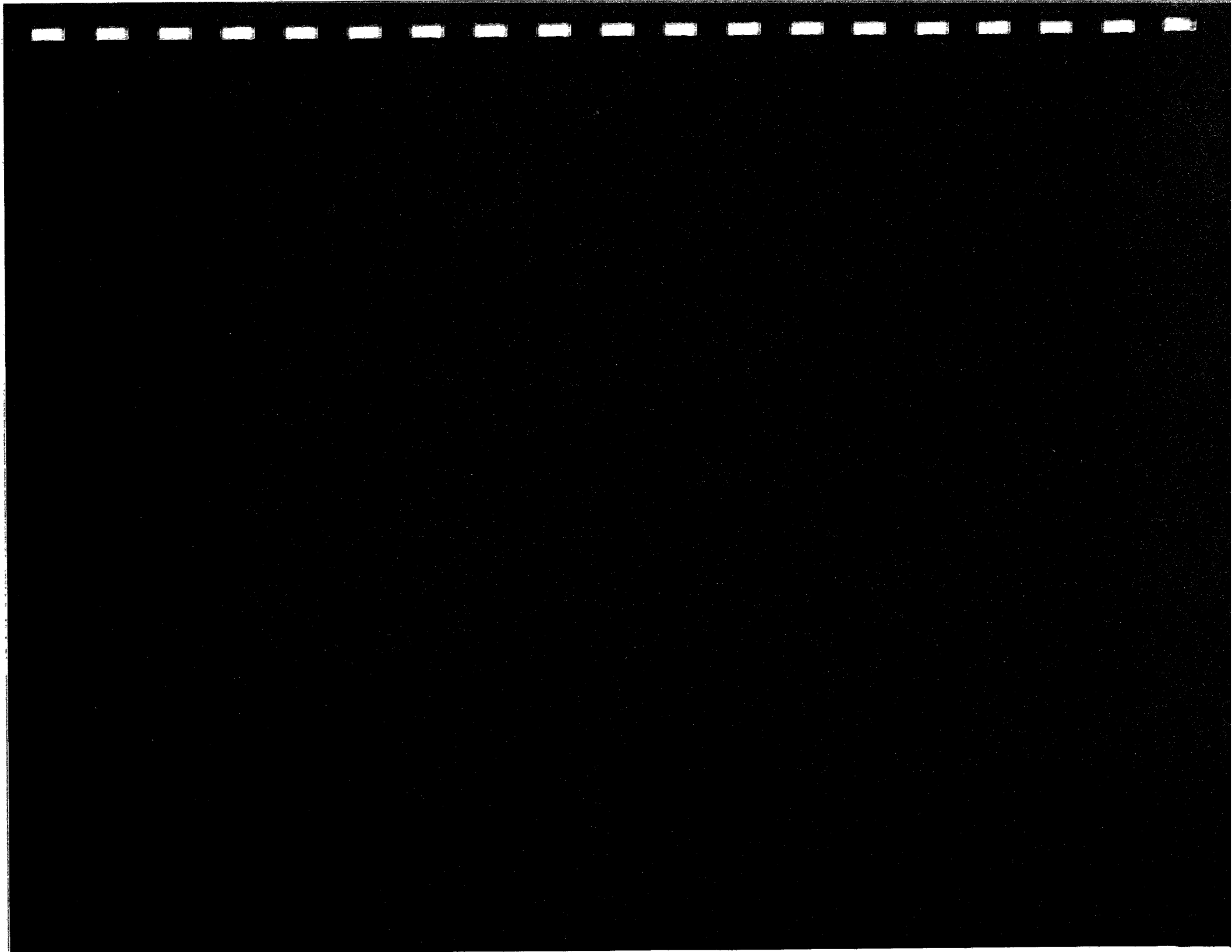


EXHIBIT G

EXCERPTS FROM MAY 1, 1992 LETTER TO THE STANDING COMMITTEE FROM THE CHAIR OF THE CIVIL COMMITTEE

with respect to defendants located outside the United States is disapproved, Rule 4 need not be rejected in its entirety. Rather, one of two approaches could be adopted: (1) eliminate the cost-shifting feature that is the principal objection raised by the British Embassy (by adding a clause in the last sentence of Rule 4(d)(2) that excludes foreign defendants from the cost-shifting sanction), or (2) limit the Rule 4(d) procedure to domestic defendants (by eliminating the reference to subdivision (f) in the first sentence of Rule 4(d) and eliminating subdivision (a)(1)(B) of Rule 12). The Committee Notes and Forms 1A and 1B would also need to be revised to conform to these changes.

Fed. R. Civ. P. 4.1 (Draft published October 1989)

Non-controversial. This rule was returned by the Supreme Court for further review because of its relationship to the proposed amendment of Rule 4. There are no changes needed in language as previously submitted to the Supreme Court.

The Advisory Committee is unanimous in recommending adoption of Rule 4.1, which is essentially unchanged from the language published in October 1989.

Fed. R. Civ. P. 5 (Not previously published)

Non-controversial. This is a technical amendment, using the broader language of recently revised Fed. R. App. P. 25 to make clear that district courts--and, more importantly at the present time, bankruptcy courts--may permit, to the extent authorized by the Judicial Conference, filing not only by facsimile transmission but also by other electronic means.

The Advisory Committee is unanimous in recommending adoption of Rule 5. Although this has not been published as a proposed change to the Fed. R. Civ. P., the Advisory Committee believes that this is a technical amendment as to which public notice and comment should be eliminated under Rule 4d of the governing procedures and so recommends to the Standing Committee.

Fed. R. Civ. P. 11. (Draft published August 1991)

The proposed amendment of Rule 11 is controversial. It has provoked extensive comment from the bench, bar, and public.

It is appropriate to begin with a brief discussion of the special procedures followed by the Advisory Committee with respect to Rule 11. The Committee had received various requests, formal and informal, for further amendment or abrogation of Rule 11, which had been revised in 1983. The Committee was also aware of several studies of the rule undertaken by various individuals, bar associations, and courts. Whether to propose any change--and, if so, what type of change--was, however, far from clear. The Committee started by publishing a notice that solicited comments about the several aspects of the operation of Rule 11 and by requesting that the Federal Judicial Center conduct certain studies and surveys. The Committee then held a public meeting and heard from various judges, attorneys, and academics who were known to have strong views about Rule 11.

There was no consensus about whether--or how--the rule should be amended. Some urged that the 1983 revision be retained with little or no change. Some urged that any amendment was premature and should be deferred until more experience had been gained. Some suggested various changes to deal with specific problems that had arisen. Others urged that it be restored, in essence, to its pre-1983 form or, indeed, be eliminated altogether.

After considering these comments and the FJC studies and survey, the Committee concluded that the widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit. The goal of the 1983 version remains a proper and legitimate one, and its insistence that litigants "stop-and-think" before filing pleadings, motions, and other papers should, in the opinion of the Committee, be retained. Many of the initial difficulties have been resolved through case law over the past nine years. Nevertheless, there was support for the following propositions: (1) Rule 11, in conjunction with other rules, has tended to impact plaintiffs more frequently and severely than defendants; (2) it occasionally has created problems for a party which seeks to assert novel legal contentions or which needs discovery from other persons to determine if the party's belief about the facts can be supported with evidence; (3) it has too rarely been enforced through nonmonetary sanctions, with cost-shifting having become the normative sanction; (4) it provides little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law; and (5) it sometimes has produced unfortunate conflicts between attorney and client, and exacerbated contentious behavior between counsel. In addition, although the great majority of Rule 11 motions have not been granted, the time spent by litigants and the courts in dealing with such motions has not been insignificant.

The Committee then drafted a proposed amendment with the objective of increasing the fairness and effectiveness of the rule as a means to deter presentation and maintenance of frivolous positions, while also reducing the frequency of Rule 11 motions. The proposed amendment was published in August 1991 and has generated many comments, written and oral.

Summarized below are the principal criticisms and suggestions that the Committee has received. Several of these, it may be noted, are embodied in an alternative proposal for amendment of Rule 11 sponsored by Attorney John Frank and others, which has gained significant support from various judges, lawyers, and organizations.

Opposition to this revision as "weakening" the rule. It is correct that, given the "safe harbor" provisions and those affecting the type of sanction to be imposed, the amendment should reduce the number of Rule 11 motions and the severity of some sanctions. The Advisory Committee is unanimous that, to the extent these changes may be viewed as "weakening" the rule, they are nevertheless desirable.

Opposition to any amendment as "premature." While several problem areas encountered under the 1983 version of Rule 11 have been corrected by case law, others remain and cannot be cured by greater experience within the bench and bar. By the time the new amendments can become effective, a period of ten years will have elapsed since the prior revision. The Advisory Committee is unanimous that changes should not be deferred for additional time and study.

Application to discovery documents. Notes to the published draft asked for comments on whether Rule 11 should be made explicitly inapplicable to discovery documents, and indicated that the Advisory Committee would be considering such a change without additional publication. The comments received support this change. The Advisory Committee is unanimous that this change should be made and has done so through the addition of subdivision (d).

Continuing duty to withdraw unsupportable contentions. The published draft abandoned the "signer snapshot" approach of the current rule that imposes obligations solely on the persons signing a paper and measures those obligations solely as of the time the paper is filed. It provided that litigants have a duty not to maintain a contention that, though perhaps initially believed to be meritorious, is no longer supportable in fact or law. Several comments expressed concern that, at least as drafted, the revision might lead to disruptive and wasteful activities based on a mere failure to re-read and amend previously filed pleadings, motions, or briefs. The Advisory Committee believes that this latter criticism is well taken and has made several modifications to the published language of the text and limited the expansion to non-signers to persons who "pursues" a previously filed paper. These changes, coupled with the "safe harbor" provisions, should minimize these concerns.

Duty to conduct pre-filing investigation. Some critics express skepticism regarding the obligation to conduct an appropriate pre-filing investigation in view of the provisions allowing pleading on "information and belief" and affording a "safe harbor" against the filing of Rule 11 motions if unsupportable contentions are withdrawn. The basic requirement for pre-filing investigation is retained in the text of the rule, and, as the Committee Notes make clear, pleading on information and belief must be preceded by an inquiry reasonable under the circumstances. The revision is not a license to join parties, make claims, or present defenses without any factual basis or justification. However, it must be acknowledged that, with these changes, some litigants may be tempted to conduct less of a pre-filing investigation than under the current rule. The Advisory Committee believes that this risk is justified, on balance, by the benefits from the changes.

Pleading "as a whole." Several comments urged that the revision of Rule 11 incorporate the approach adopted in some decisions, permitting sanctions only if, taken "as a whole," the paper violated the standards of the rule. The Advisory Committee continues to believe that the "stop-and-think" obligations apply to all of the allegations and assertions, not just to a majority of them. Nevertheless, the language of the published draft might have inappropriately encouraged an excessive number of Rule 11 motions premised upon a detailed parsing of pleadings and motions. The Advisory Committee has changed the text of subdivision (b) to eliminate the specific reference to a "claim, defense, request, demand, objection, contention, or argument" and has also modified the accompanying Notes to emphasize that Rule 11 motions should not be prepared--or threatened--for minor, inconsequential violations or as a substitute for traditional motions specifically designed to enable parties to challenge the sufficiency of pleadings. These changes, coupled with the opportunity to correct allegations under the "safe harbor" provisions, should eliminate the need for court consideration of Rule 11 motions directed at insignificant aspects of a complaint or answer.

"Mandatory" sanctions. The most frequent criticism has been that the revision leaves in place the current mandate that some sanction be imposed if the court determines that the rule has been violated. The suggestion is that, even if a violation is found, the district court should have discretion not to impose any sanction. Two members of the Advisory Committee prefer this approach, though do not request that this view be expressed as a formal minority view in the Committee Notes. The other members of the Advisory Committee believe that, particularly given the opportunity through the "safe harbor" provisions to withdraw an unsupportable contention before a Rule 11 motion is even filed, some sanction should be imposed if the court is called upon to determine, and does determine, that the rule has been violated. As under the current rule, the court retains discretion as to the particular sanction to be imposed, subject however to the principle that it not be more severe than needed for effective deterrence, and the court's decision whether a violation has occurred is reviewed on appeal for abuse of discretion.

Payment of monetary sanctions to an adversary. Another frequent criticism is that the draft continues to permit a monetary award to be paid to an adversary for damages resulting from a Rule 11 violation, rather than limiting monetary awards to penalties paid into court. The Advisory Committee agrees with the premise that cost-shifting has created the incentive for many unnecessary Rule 11 motions, has too frequently been selected as the sanction, and, indeed, has led to the large awards most often cited by critics of the 1983 rule. Both in the text and the Committee Notes, the published draft contained language that, while continuing to permit cost-shifting awards, explicitly recited the deterrent purpose of Rule 11 sanctions and the potential for non-monetary sanctions. The Advisory Committee remains convinced that there are situations--particularly when unsupportable contentions are filed to harass or intimidate an adversary in some cases involving litigants with greatly disparate financial resources--in which cost-shifting may be needed for effective deterrence. The Committee has, however, made a further change in the text of subdivision (c)(2) to emphasize that cost-shifting awards should be the exception, rather than the norm, for sanctions. As to the expenses incurred in presenting or opposing a Rule 11 motion, the published draft provides the court with discretion to award fees to the prevailing party: this is needed to discourage non-meritorious Rule 11 motions without creating a disincentive to

the presentation of motions that should be filed.

Protection of represented parties (as distinguished from attorneys) from sanctions. The current rule permits the court to impose a sanction upon the person who signed the paper, "a represented party, or both." The published draft would have restricted the imposition of monetary sanctions upon a represented party to situations in which the party was responsible for a violation of Rule 11(b)(1) (papers filed to harass or for other improper purpose). Comments have been mixed: some opposing any such restriction; others opposing any monetary sanctions on represented parties; others suggesting variants on the language in the draft. Upon further reflection and consideration of the comments, the Advisory Committee believes that the prohibition of monetary sanctions against a represented party should be limited to violations of Rule 11(b)(2) (frivolous legal arguments), and has changed the language of subdivision (c)(2)(A) accordingly.

Sanctions against law firms. The published draft contained provisions designed to remove the restrictions of the current rule respecting sanctions upon law firms. See Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint). While many comments supported this change, others opposed it, urging that sanctions be imposed only on the individual attorney found to have violated the rule. The Advisory Committee believes that, consistent with general principles of agency, it is often appropriate for a law firm to be held jointly responsible for violations by its partners, associates, and employees. Given the opportunity under the "safe harbor" provisions to avoid sanctions imposed on a motion, coupled with the changes designed to reduce the frequency of "fee-shifting" sanctions that have produced the largest monetary sanctions, the Committee has added to the published draft in subdivision (c)(1)(A) language clarifying that a law firm should ordinarily be held jointly accountable in such circumstances.

Court-initiated sanctions after case dismissed. Several groups have suggested that the safe harbor provisions, which under the published draft apply only to motions filed by other litigants, should apply also to show cause orders issued at the court's own initiative. The Advisory Committee continues to believe that court-initiated show cause orders--which typically relate to matters that are akin to contempt of court--are properly treated somewhat differently from party-initiated motions. The published draft does, however, contain provisions in subdivision (c)(2)(B) protecting a litigant from monetary sanctions imposed under a show cause order not issued until after the claims made by or against it have been voluntarily dismissed or settled.

Standards for appellate review. Some of the comments have urged that the revision contain language modifying the standard for appellate review announced in Cooter & Gell v. Hartmarx Corp., ___ U.S. ___ (1990). The Advisory Committee concludes that the arguments are not sufficiently compelling to justify a deviation from the principle that ordinarily the rules should not attempt to prescribe standards for appellate review.

The Advisory Committee has carefully considered the various criticisms and suggestions, as well as those comments favoring the published proposal. Ultimately the only disagreement within the Committee related, as noted above, to whether imposition of sanctions should be mandatory or discretionary. The two members who favored the discretionary standard nevertheless believe that proposed amendment is preferable to the current rule, and accordingly the Committee is unanimous in recommending adoption of the proposed amendment of Rule 11. As noted above, several changes have been made to the language of the amendment as published. These changes, however, either are essentially technical and clarifying in nature, or represent less of a modification of the current Rule 11 than had been proposed in the published draft; and the Committee believes that the proposed amendment can and should be forwarded to the Judicial Conference without an additional period for public notice and comment.

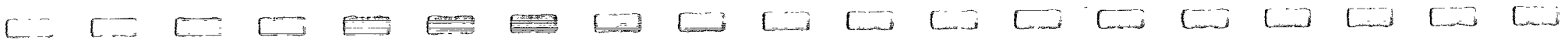


EXHIBIT H

DRAFT OF PROPOSED AMENDMENTS TO BANKRUPTCY RULE 9011 TO CONFORM TO THE 1993 AMENDMENTS TO CIVIL RULE 11

Rule 9011. Signing ~~and~~ of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion and other paper ~~served or filed in a case under the Code on behalf of a party represented by an attorney~~, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. ~~whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number.~~ Each paper shall state the signer's address and telephone number, if any. ~~The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If~~

~~a document is not signed, it~~ An unsigned paper shall be stricken unless ~~it is signed promptly after the~~ omission of the signature is corrected promptly after being called to the attention of the ~~person whose signature is required~~ attorney or party. ~~If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.~~

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, attorney or unrepresented party is certifying that the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, --

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions

have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the

court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or , if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded

against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

~~(b)~~ (e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

~~(c)~~ (f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

COMMITTEE NOTE

This rule is amended to conform to the 1993 changes to F.R.Civ.P. 11. For an explanation of these amendments, see the advisory committee note to the 1993 amendments to F.R.Civ.P. 11.

Reporter's Notes:

(1) I deleted the phrase "served or filed in a case under the Code" in the first sentence of the rule. There is no similar phrase in Rule 11 (pre-1993 or the current version). I did this to conform to Rule 11. I also think it is not necessary to say "in a case under the Code" because Rule 1001 already provides that the Bankruptcy Rules apply to cases under the Code.

(2) In preparing this draft, I did not include the following sentence that has been in Rule 11 (pre- and post-1993) but has not been in Rule 9011: "Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." There are several reasons why I did not include this in the above draft. First, Rule 9011(b) governs verification (Rule 11 has no comparable subdivision). Second, "pleadings" could be construed to include motions in contested matters under Rule 9014 and it is the usual practice to submit affidavits together with motion papers. See Rule 9006(d). I also do not think that this sentence is necessary and I am not aware of any problems caused by the absence of this sentence in Rule 9011. Finally, the last time Rule 9011 was amended to conform to Rule 11 (in 1993), this sentence was not added to Rule 9011.

(3) Rule 11 does not contain the substance of the present Rule 9011(c) regarding copies of signed or verified papers. I would leave this in as a separate subdivision (I renumbered it Rule 9011 (f) in the above draft).

AGENDA X
New York, New York
September 22-23, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: FRIVOLOUS APPEALS

DATE: JUNE 10, 1994

I recommend that the following new Bankruptcy Rule be considered by the Advisory Committee:

Rule 8020. Damages and Costs for Frivolous Appeal

If a district court or bankruptcy appellate panel determines that an appeal from an order, judgment, or decree of a bankruptcy judge is frivolous, it may, after a separately filed motion or notice from the district court or bankruptcy appellate panel and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

COMMITTEE NOTE

This rule is added to clarify that a district court hearing an appeal, or a bankruptcy appellate panel, has the authority to award damages and costs to an appellee if it finds that the appeal is frivolous. By conforming to the language of Rule 38 F.R.App.P., this rule recognizes that the authority to award damages and costs in connection with frivolous appeals is the same for district courts sitting as appellate courts, bankruptcy appellate panels, and courts of appeals.

This rule requires that before the district court or bankruptcy appellate panel may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. This rule is consistent with the 1994 amendments to F.R.App.P. 38 in that it reflects the basic principle enunciated in the Supreme Court's opinion in Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's

brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions,is sufficient. If there is no such motion filed, notice must come from the district court or bankruptcy appellate panel. The form of notice from the court and the opportunity for comment purposely are left to the appellate court's discretion.

Background

Judge James W. Meyers has recommended that a rule similar to Rule 38 of the Federal Rules of Appellate Procedure be added to Part VIII of the Bankruptcy Rules. F.R.App.P. 38, currently titled "Damages for Delay", now provides: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." Rule 38 is being amended this year to expressly provide for notice and opportunity to respond before sanctions are imposed. These amendments were promulgated by the Supreme Court in April to be effective on December 1, 1994.

Judge Meyers also suggests that the Committee Note indicate that the new bankruptcy rule is intended to clarify, rather than change, existing law. Although prevailing case law recognizes that sanctions for frivolous appeals from a bankruptcy court order may be imposed by the district court or BAP, the particular source of the authority to impose these sanctions is not clear. Judge Meyers suggests that adding a rule in Part VIII based on Appellate Rule 38 "will place appellate sanctions by the district court or the BAP on a firmer foundation." I agree.

Possible Sources of Authority to Impose Sanctions

Several possible sources of the authority of a district court or BAP to impose sanctions for frivolous appeals have been relied upon -- or at least suggested -- in appellate decisions:

(1) Bankruptcy Rule 9011

In my opinion, a literal reading of the Bankruptcy Rules leads to the conclusion that Rule 9011 gives the district court or BAP the authority to impose sanctions in connection with frivolous appeals. The rule requires a signature on every "petition, pleading, motion and other paper served or filed in a case under the Code..." It appears to me that this would include appellate briefs. For violation of the rule, "the court" shall impose an appropriate sanction. "Court" is defined in Rule 9001 as "the judicial officer before whom a case or proceeding is pending." If the proceeding is pending before the BAP or district court, that tribunal is the "court." Clearly, a district court is a "court" when it is hearing a noncore matter de novo, or when the reference of a case or proceeding to the bankruptcy court has been withdrawn so that the district judge acts as a trial judge. Rule 9011 does not distinguish between district judges acting as trial judges and district judges acting as appellate judges. In addition, Rule 1001 defines the scope of the Bankruptcy Rules broadly, including "procedure in cases under title 11," without limiting them to any particular court (compare Civil Rule 1 which limits its scope to procedure in the "district court"). The mere presence of Part VIII of the Rules shows that the Bankruptcy

Rules apply to appeals to the district court or BAP, and Rule 9011 is in Part IX which contains "General Provisions."

Nonetheless, my reading of Rule 9011 is irrelevant in view of decisions that have held that it is not applicable to appellate courts. For example, in In re Akros Installations, Inc., 834 F2d 1526, 1531 (9th Cir. 1987), the Ninth Circuit held that the word "court" in Rule 9011 means "bankruptcy court," and that Rule 9011 applies to only the "initial proceedings in bankruptcy court." Therefore, Rule 9011 can not be relied upon as authority for imposing sanctions for frivolous appeals. The Ninth Circuit also held, in In re Vasseli, 5 F.3d 351 (9th Cir. 1993), that it is inappropriate for the appellate court to remand to the bankruptcy court the task of imposing sanctions for a frivolous appeal. It appears, therefore, that bankruptcy courts also may not use Rule 9011 to impose sanctions for a frivolous appeal from a bankruptcy court order.

(2) Civil Rule 11

Although it has been argued in a number of cases that Rule 11 F.R.Civ.P. is a source of authority for a district court to impose sanctions for a frivolous appeal from a bankruptcy court order, most courts have either rejected this argument or have avoided the issue by finding a different source of authority. As the Ninth Circuit held in In re Akros Installations, Inc., 834 F2d 1526 (9th Cir. 1987), bankruptcy proceedings are expressly excluded from the scope of the Civil Rules (see Civil Rule 81(a)(1)). See also, In re Sherk, 918 F2d 1170 (5th Cir. 1990),

and In re Stalter & Co., Inc., 99 BR 327 (E.D. La. 1989), where the courts declined to decide whether Rule 11 applies to bankruptcy appeals to the district court because there are alternative sources of authority to impose sanctions. Finally, the Supreme Court has suggested that Rule 11 was not intended for appeals, but "is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 406 (1990).

In any event, the Civil Rules, including Rule 11, only applies to district court proceedings and, therefore, could not apply to the BAP. See Rule 1.

(3) 28 U.S.C. § 1927

This statute provides as follows:

> **Counsel's Liability for Excessive Costs**
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Several courts have held that this statute may be the basis for imposing sanctions for frivolous appeals to the district court. See In re Sherk, 918 F2d 1170 (5th Cir. 1990); In re Akros Installations, Inc., 834 F2d 1526 (9th Cir. 1987). However, it appears to me that reliance on this statute as authority for a BAP imposing sanctions may be problematic.

Section 1927 authorizes a "court of the United States" to award sanctions, and 28 U.S.C. § 451 defines "court of the United States" to include "... any court created by Act of Congress the judges of which are entitled to hold office during good behavior." Since BAP judges do not enjoy life tenure, it is at least unclear whether this statutory authority could apply to a BAP.

(4) Appellate Rule 38

F.R.App.P. 38 gives the court of appeals the authority to award "just damages and single or double costs to the appellee" if it finds that an appeal is frivolous. However, the Appellate Rules do not apply to district courts (see F.R.App.P. 1 which limits the scope of the rules to appeals to the court of appeals from the district court or BAP) and, therefore, it appears that Rule 38, standing alone, does not support imposition of sanctions by a district court or BAP.

However, in In re Burkhart, 84 B.R. 658 (9th Cir. BAP 1988) (Meyers, J.), the BAP applied Appellate Rule 38 to award sanctions in connection with a frivolous appeal from a bankruptcy court order. The BAP based its decision on a local BAP rule (BAP Rule 13) which provides that the Federal Rules of Appellate Procedure may be applied by the BAP where the Bankruptcy Rules and the BAP local rules are silent. Since the BAP was bound by the Ninth Circuit decision in Akros Installations -- holding that Civil Rule 11 and Bankruptcy Rule 9011 do not apply to frivolous appeals -- the BAP concluded that Appellate Rule 38 could be the

basis for its imposition of sanctions.

In any event, I do not think that district courts may rely on F.R.App.P. 38 as authority for the imposition of sanctions and, although the BAP may rely on Rule 38, it can only do so because of its local rules.

(5) Inherent Authority to Impose Sanctions

The Supreme Court in Roadway Express, Inc. v. Piper, 447 U.S. 752, 756 (1980), held that courts are vested with inherent power to assess attorneys' fees against counsel who willfully abuse judicial processes. After that decision, several courts have held that a district court has inherent authority to impose sanctions for frivolous appeals. See In re Sherk, 918 F2d 1170 (5th Cir. 1990); In re Akros Installations, Inc., 834 F2d 1526 (9th Cir. 1987).

Recommendation

In view of the uncertainty regarding the authority to impose sanctions for frivolous appeals from decisions of the bankruptcy court, especially to the district court, I agree with Judge Meyers that a national rule that clearly provides such authority should be promulgated. The logical place for such a rule is in Part VIII of the Bankruptcy Rules.

In drafting a rule on this subject, I could not think of any reason to depart from the rule that exists for imposing sanctions for frivolous appeals to the court of appeals. If Appellate Rule 38 works effectively for the court of appeals, it should work effectively for the BAP and district courts. The draft I am

recommending conforms to the 1994 amendments to Rule 38 that were promulgated by the Supreme Court to become effective on December 1, 1994.

1994 Amendments to App. Rule 38

Rule 38. Damages and Costs for ~~delay~~ Frivolous Appeals

If a court of appeals ~~shall~~ determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Committee Note

The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

AGENDA XI
New York, New York
September 22-23, 1994

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9006(f)

DATE: AUGUST 12, 1994

Rule 9006(f) provides as follows:

> (f) ADDITIONAL TIME AFTER SERVICE BY MAIL. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

This subdivision of Rule 9006 is substantially the same as Civil Rule 6(e), Appellate Rule 26(c), and Criminal Rule 45(e). At the June 1994 Standing Committee meeting, a member of the Committee suggested that all these rules be amended by changing "three days" to "five days" because of frequent delays in mail delivery. This suggestion was made during a discussion of the use of commercial delivery services as alternatives to the United States Post Office. In response to this suggestion, the Standing Committee asked each of the four advisory committees on procedural rules to consider this suggestion and to report its views at the January 1995 Standing Committee meeting.

To assist the Advisory Committee in its consideration of this suggestion, I offer the following observations and comments:

(1) Rule 9006(f) has been construed narrowly and does not apply to most time periods under the Rules. In judging the impact that the suggested change would have on bankruptcy cases, it may help the Advisory Committee to know how frequently or infrequently this rule is applied.

I have found that Rule 9006(f) has been narrowly construed and is not applicable to most time periods under the Rules -- even when service by mail is used. In general, this provision applies only when (a) a prescribed time period commences upon the service of a paper, (b) service is by mail, and (c) the paper is not process. I found 57 cases that have cited the rule, including 7 court of appeals decisions. In the vast majority of decisions, the courts have rejected arguments that the rule was applicable to particular time periods. See, e.g., In re Robintech, Inc., 863 F.2d 393 (5th Cir. 1989).

Most time periods under the Rules do not run from the date of service of a notice or other paper. For example, Rule 9006(f) does not apply to the time for filing a notice of appeal because the 10-day period prescribed by Rule 8002(a) runs from the entry of judgment (not from the mailing of the notice of entry of judgment). See, e.g., In re B.J. McAdams, Inc., 999 F.2d 1221 (8th Cir. 1993). Similarly, Rule 9006(f) does not apply to the time for filing a complaint to determine the dischargeability of a debt under Rule 4007(c), to the deadline for filing proofs of claim, or to the deadline for filing objections to the debtor's list of exemptions under Rule 4003(b) -- even though notice of these deadlines are given by mail. Rule 9006(f) also does not apply to the time for filing an answer to a complaint in an adversary proceeding (the time prescribed by Rule 7012(a) runs from the issuance of the summons).

In addition, the Rules do not require a response to a motion. See Rule 9014. If a local rule or court order requires the filing of a response to a motion a specified number of days before the hearing date, and the motion is served by mail, Rule 9006(f) would not apply because the prescribed time does not run from the date of service.

I do not mean to suggest that Rule 9006(f) is never used. The time periods prescribed by the Rules that could be extended by three days under Rule 9006(f) include:

(a) The time to file an answer to a counterclaim under Rule 7012 (the deadline is 20 days "after service of the answer").

(b) The time to file a response in opposition to a motion for leave to appeal under Rule 8003(a) (the response must be filed "within 10 days after service of the motion").

(c) The time for an appellee to file a designation of additional items to be included in the record on appeal under Rule 8006.

(d) The time to file appellate briefs (other than the appellant's original brief) under Rule 8009(a).

(e) The time to file objections to a bankruptcy judge's proposed findings of fact and conclusions of law in a non-core proceeding under Rule 9033(b).

Rule 9006(f) also applies to periods prescribed by court order or local rule that run from the service of a notice or other paper. See, e.g., In re Antell, 155 BR 921, 929 (Bankr. E.D.Pa. 1992) (Rule 9006(f) applied where a court order stated that a response to a motion to lift the automatic stay must be served within 15 days after service of the order).

(2) The effects of the suggested amendment on relevant time periods; When 3 + 2 = 7. To fully understand the impact of any change in time periods, it is important to appreciate that the arithmetic used in the Rules is not always the same as the arithmetic we learned in grade school. For example, suppose that a time period that would end on Monday is extended by 3 days pursuant to Rule 9006(f). As a result, the period would end on Thursday (3 days later). However, if 2 days are added to the 3-day rule as is suggested, the period would end on the following Monday (7 days later). The reason for this result is that time periods that end on a weekend or holiday are extended to the next business day under Rule 9006(a). Therefore, the suggested amendment would actually add 4 calendar days to the time period.

Compare a time period that would ordinarily end on Wednesday, but is extended under Rule 9006(f). Under either the present rule (adding 3 days when served by mail) or the suggested amendment (adding 5 days when served by mail), the period would end on the following Monday. Therefore, in this situation the suggested amendment would have no effect.

The following chart sets forth the effects of the present rule and the effects of the suggested amendment according to the day of the week on which the prescribed period ends in the absence of any extension under Rule 9006:

If period ends on:	Under Rule 9006(f) it would extend to:	Suggested change would make it end:
Monday	Thurs. (3 days later)	Monday (7 days later)
Tuesday	Friday (3 days later)	Monday (6 days later)
Wednesday	Monday (5 days later)	Monday (5 days later)
Thursday	Monday (4 days later)	Tuesday (5 days later)
Friday	Monday (3 days later)	Wed. (5 days later)
Saturday*	Tuesday (3 days later)	Thurs. (5 days later)
Sunday*	Wed. (3 days later)	Friday (5 days later)

*A period ending on a weekend would be extended to Monday under Rule 9006(a) in the absence of a further extension under Rule 9006(f).

(3) In general, the Committee should be reluctant to expand time periods because of the expedited nature of bankruptcy cases. The Bankruptcy Rules are designed to expedite bankruptcy cases and proceedings -- for example, the time for filing a notice of appeal in a bankruptcy case is only ten days instead of the 30-day period applicable in other federal cases. Therefore, the Committee should consider whether the suggested change is inconsistent with the expedited nature of bankruptcy cases. One could conclude that the suggested change would not have a material impact on the administration of bankruptcy cases because, as discussed above, Rule 9006(f) is not applicable to most time periods under the Rules. The Committee also may conclude that the protection of parties from prejudice due to mail delays outweigh the desire to expedite bankruptcy cases.

(4) The suggested change could cause problems for lawyers who rely on the current rule. The suggested amendment to Rule 9006(f) brings back disturbing recollections of the 1987 amendment to Rule 9006(a) that changed the manner in which time

periods were calculated. Prior to 1987, intervening weekends and holidays did not count when calculating time periods if the period was "less than 7 days." In 1987, the rule was changed to provide that weekends and holidays did not count if the time was "less than 11 days." Because practitioners were accustomed to the old method of counting days, this change resulted in criticism from members of the bar after the amendment became effective. Lawyers who relied on the finality (non-appealability) of orders (especially chapter 11 confirmation orders) upon the expiration of 10 calendar days after entry of the order, where surprised (sometimes shocked) to learn that the rule was amended so that "10 days" would really mean 14 calendar days because intervening weekends were no longer counted. As a result of that criticism, Rule 9006(a) was amended again only two years later so that 10 days again means 10 calendar days.

Although the 1987 change to Rule 9006(a) had a far greater impact than would the suggested change to Rule 9006(f), the lesson that I remember from that experience is that any change in time periods, or the method of computing time periods, should be approached with caution and an appreciation for the habits of lawyers who have been practicing under the current rules for a long time. It is likely that many, if not most, lawyers will not be aware of the change for a significant period of time. This could be important for those who rely on the absence of a "timely" response or objection by another party -- erroneously and prematurely believing that the time period has expired.

(5) The suggested amendment may result in conflicts with local rules. Another problem that could result from the suggested change to Rule 9006(f) is that the new 5-day extension would be inconsistent with local rules that either duplicate or are modeled after the current 3-day rule. For example, the Local Bankruptcy Rules for the Southern District of New York includes the following rule:

> **Rule 46. Notice of Proposed Order**
>
> (a) **Use**. Whenever "notice and a hearing" are not required by the Code and a hearing has not been held, the form set forth in subdivision (b) of this rule shall be used for the submission of orders to the court.
>
> (b) **Form**. Notice of a proposed order shall be given to the debtor, debtor in possession, trustee, if any, United States trustee and any committee appointed or elected pursuant to the Code in substantially the following form:
>
> [Form Omitted]
>
> (c) **Time**. Three (3) days' notice shall be required for the presentation of an order under this rule. If notice is given by mail, three (3) days shall be added to the prescribed period. [emphasis added]

If Rule 9006(f) is changed so that service by mail adds 5 days to a time period, but this local rule is not changed, the result could be confusion and a possible trap for lawyers. Lawyers would have to know that notice by mail sometimes does not extend the applicable time period at all, sometimes extends it by 3 days, and sometimes extends it by 5 days -- depending on the applicable period. I do not know how many districts have such local rules, but if the S.D.N.Y. has one, it is likely that other districts also have them. It also is highly unlikely that every district that has such a rule will amend its rules in a timely

fashion to conform to the amended Rule 9006(f). Local rules are rarely amended in many districts.

(6) Is the suggested change necessary? In view of the concerns discussed above (i.e., lawyers' reliance on the current 3-day rule, potential conflicts with local rules, and the policy of expediting cases), the Committee should consider whether there is a demonstrated need for the suggested change.

Although I have no doubt that there is plenty of anecdotal evidence of delays in mail delivery, the suggested amendment was not accompanied by any statistics or other empirical evidence indicating that the time of delivery of first-class mail is longer than 3 days in most situations, or that mail delivery is slower today than it was when the 3-day provision in Rule 9006(f) was first adopted in 1983 (the 3-day rule was adopted in the Appellate Rules in 1967, and, I believe, even earlier in the Civil Rules). I also should add that, to the best of my recollection, the Advisory Committee has not received any comments from the bench or bar suggesting that the 3-day provision in Rule 9006(f) is too short.

Perhaps the real issue is whether mail delivery in the United States in late 1997 (when the suggested amendment will become effective if the normal rule amendment process is followed) will warrant a 5-day extension provision in Rule 9006(f).

(6) Should Rule 9006(f) conform to the other bodies of rules in the event that they are changed?

Although the Advisory Committee may decide to recommend to the Standing Committee that the suggested change to Rule 9006(f) not be made at this time, it is possible that other advisory committees will support the suggested amendments to the other bodies of rules. In that event, the Standing Committee may approve the publication of such amendments for public comment. If that occurs, the Standing Committee probably will want the Advisory Committee's views on whether there are reasons why the 3-day rule should continue in bankruptcy cases despite a change to a 5-day rule for other cases. Does the expedited nature of bankruptcy cases justify a non-uniform approach to extensions of time when service is by mail? The Advisory Committee should discuss this question at the meeting in New York.

Reporter's Recommendation

Although at first I did not have any position on the suggested change to Rule 9006(f) -- primarily because I viewed it as having little significance -- after further consideration and the preparation of this memorandum, I now believe that the Advisory Committee should recommend that the suggested change not be made at this time. In view of lawyers' reliance on the 3-day rule and potential conflicts with local rules, and the lack of evidence that mail delivery in late 1997 will warrant this change, on balance I do not think that Rule 9006(f) should be changed.

However, if the other bodies of rules are changed, there may not be a sufficient "bankruptcy reason" for not conforming to those rules. Although there is a strong policy of expediting bankruptcy cases, that policy may not justify departing from the other bodies of rules in view of the limited application of Rule 9006(f).

AGENDA XII
New York, New York
September 22-23, 1994

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

FRANCIS F. SZCZEBAK
CHIEF
BANKRUPTCY JUDGES DIVISION

August 9, 1994

Honorable Alice M. Batchelder
United States Court of Appeals
807 East Washington Street, Suite 200
Medina, Ohio 44256

RE: Local Rules Subcommittee

Dear Judge Batchelder:

As you will recall, the Advisory Committee on Bankruptcy Rules at its February 1994 meeting gave preliminary approval to the subcommittee's recommendations concerning a proposed uniform numbering system for local bankruptcy rules. In addition, the committee determined to seek comment on the proposal, primarily through publishing it in the "bankruptcy press."

Accordingly, I have modified the numbering system as requested, adding a section on appeals for use by district courts and bankruptcy appellate panels. I also have prepared a listing of the topics according to their national rule numbers and revised the memorandum explaining the proposed system.

While revising the memorandum I reviewed several preliminary comment letters that the committee already had received. Two of these letters suggested different systems than the one the committee is proposing. As both suggestions had merit in addition to certain disadvantages, it seemed a good idea to offer future commentators a chance to compare all proposals. I have completed a draft alternate based on one of the suggestions and expect to complete the other before the September 1994 committee meeting in New York. I did not want to put off circulating all of the material, however, so I enclose for your review a package that is almost complete. I will send "Appendix 3" as soon as it is ready.

Unfortunately, Judge Duplantier will not be able to attend the meeting in New York. He has asked me, in his absence, to present the package at the committee meeting. I will be glad to do so and am depending heavily on your comments to help me in that endeavor. I sent an antecedent draft of the enclosed

package to Judge Duplantier a few weeks ago, and what you are receiving incorporates the very valuable comments he made. I hope you can manage to go over the material and provide me with your comments before September 1.

Please either telephone me at (202) 273-1908 or fax your comments to my attention at (202) 273-1917.

Sincerely,

Pat

Patricia S. Channon
Senior Attorney
Bankruptcy Judges Division

Enclosures

cc: Hon. Adrian G. Duplantier (w/enc)

MEMORANDUM TO ACCOMPANY PRELIMINARY DRAFT OF
PROPOSED UNIFORM NUMBERING SYSTEM FOR LOCAL BANKRUPTCY RULES

Introduction and Background

The Committee on Rules of Practice and Procedure ("standing Committee") in 1992 directed the various rules advisory committees to draft amendments requiring local rules to conform to a uniform numbering system prescribed by the Judicial Conference of the United States. Proposed amendments to Federal Rule of Bankruptcy Procedure 9029 establishing such a requirement have been approved and forwarded to the Supreme Court. A copy of Rule 9029, showing the proposed amendments, is attached. Absent affirmative action by the Court or by the Congress to block the amendments, they will take effect August 1, 1995.

In addition to proposing amendments to Rule 9029, the Advisory Committee on Bankruptcy Rules ("Advisory Committee") has developed a preliminary draft of a uniform numbering system for local bankruptcy rules to recommend to the Judicial Conference. That proposed numbering system, set out both numerically by national bankruptcy rules number (Appendix 1) and alphabetically by topic (Appendix 2), is attached.

The goal of the Advisory Committee is to propose for consideration by the Judicial Conference a uniform numbering system that both coordinates with the national rules and works for lawyers and judges in the practical sense. The Advisory Committee seeks comment on the proposal from the bankruptcy community --- bench, bar, trustees, and other interested persons.

Another criterion for the Advisory Committee is that the uniform numbers should be able to run parallel with the existing local rule numbers assigned by the district. Running the double, or parallel, systems would permit each district to retain its familiar numbers, yet the local rules could be indexed and searched in a computer database by making use of the assigned national number. An attorney making reference in court to a local rule could do so as follows: "Your honor, I direct your attention to the court's Local Rule 4, which is Rule 9701 in the uniform numbering system."

The Judicial Conference in 1988 approved for local district court civil rules a uniform numbering system that employs a decimal point after the related national rule number. The Advisory Committee rejected adopting a similar system for local bankruptcy rules on several grounds. The national bankruptcy rules, having four digits, are already very long. Further, a decimal point system becomes awkward when the related national rule already has a decimal point, e.g., Bankruptcy Rule 2007.1 and Fed. R .Civ. P. 23.1, 23.2, and 44.1. The Advisory Committee also was dissatisfied with way the civil rules numbering system

treated local rules that are not related to any national rule, e.g., attorney admission rules. In the civil rules numbering system, these unrelated rules all are attached to Fed. R. Civ. P. 83, which authorizes each court to promulgate local rules on subjects not covered by the national rules.

To develop a system that would meet the Committee's requirements, the Advisory Committee started with an index of local rules topics compiled by the Bankruptcy Judges Division of the Administrative Office. This index was derived empirically from the actual local rules in effect in the bankruptcy courts. Those topics that related to a national rule were identified, and the related rule number noted. This process disclosed several districts that already had keyed their local rule numbers to the national rules. A few of these districts had adopted a practice of using available numbers at the end of the various parts of the rules to assign numbers to local rules which did not have a specific "parent" national rule.

The use of available, unused, numbers within a part of the national rules proved adaptable to a proposed uniform numbering system as well. For example, rules on admission of attorneys would have uniform number 2901, indicating by the first digit a subject matter covered in Part II of the national rules (Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants) and by the use of the number 9 as the second digit that the local rule is not related to any specific rule within Part II.

A Proposed System

The national numbering system uses four digits. The second digit is a zero, which is used as a place holder (e.g., 7087), in case some part of the rules eventually has more than 99 rules. The proposed uniform local rule numbering system replaces this zero with the numerals two (2) through nine (9). Numerals two (2) through six (6) are reserved for local rules that are related to a national rule. Numerals seven (7), eight (8), and nine (9) indicate local rules that are not related to a national rule. The numeral one (1) was passed over because Part VII of the Bankruptcy Rules already extends to Rule 7087. It seemed wise to ensure sufficient expansion room by reserving the numeral one (1) for future use in national rules.

Having a series of numerals available accommodates situations in which several local rules may relate to a single national rule. For example, Rule 9029 governs the prescribing of local bankruptcy rules, and many districts have local rules about local rules. Accordingly, the list of topics and uniform numbers includes both Local Rules - General, 9229, and Local Rules -

General Orders, 9329. Another national rule that generated several local rule numbers is Rule 9011, which has four related topics: Attorneys - Duties, 9211; Pro Se Parties, 9311; Sanctions, 9411; and Signatures, 9511.

The process of assigning numbers to unrelated local rules began with determining which part of the national rules seemed to cover the subject of a particular local rule. The first digit of the uniform number was assigned based on the Part (I - IX) of the rules to which a local rule seemed most closely related. For example, rules relating to attorney admissions and discipline were assigned the numbers "29--" based on the title of Part II which is "Officers and Administration; Notices; Meetings; Examinations; Elections; Attorneys and Accountants." For this topic, Part II was selected rather than Part IX because Rule 9011 addresses only written pleadings. For other rules topics, the choice of part number was more arbitrary. Local rules covering such subjects as the number of copies to be filed and payment of fees, for example, could have been assigned either to Part V, Courts and Clerks, or to Part IX, General Provisions. The proposal assigns payment of fees to Part V and number of copies to Part IX, but switching either topic also could be justified.

Several parts attracted large clusters of unrelated local rules, most notably Parts II, V, and IX. The local rules assigned to these parts were grouped and associated topics all given the same second digit. In Part V, for example, the rules concerning judges or documents issued under their authority all are numbered "59--"; rules concerning clerks and activities under their control are numbered "58--"; and rules concerning scheduling, courthouse decorum, and other activities performed by parties or attorneys are numbered "57--." Further subgroupings are indicated by changing the third digit to "1" or "2," a procedure that can accommodate additional subgroups in the future. In Parts with only a few unrelated rules, the second digits all were numbered "7", and the individual rules were numbered sequentially, ("01," et seq.), as their topics appeared in the alphabetical index list, e.g., "3708."

Two topics relate to national rules that have been abrogated, Rule 5008, Investment of Estate Funds (indexed as "Estate Administration"), and Rule 9015, Jury Trials. The uniform numbering system treats these topics as if the national rule were still in place, i.e., uniform local rule numbers 5208 and 9215.

Preliminary Testing of the System

As a test, the proposed uniform numbering system was applied to two, randomly chosen, sets of local rules --- the Southern District of Texas and the Western District of Kentucky. The districts appeared to be representative, and both had a moderate number of local rules. The Southern District of Texas, is a

large district containing rural areas, small towns and cities, and one very large metropolitan center (Houston). The other, the Western District of Kentucky, is smaller and contains only one medium-sized city (Louisville). One district uses a four-digit numbering system that relates to the national rule numbers, and the other uses consecutive numbers, beginning with the numeral one (1).

The process of assigning uniform numbers to actual local rules proceeded smoothly, for the most part. Problems occurred only when a district grouped together actions or requirements from several different national rules. Organizing under one local rule all the functionally relevant material concerning chapter 13 cases or motion practice makes practical sense, but creates a problem of repeated use of a single uniform number in several rules or subdivisions of rules.

For example, Local Rule 9013 of the Southern District of Texas is titled "Motion requirements". It contains 13 subdivisions [(a) through (m)] which range over the following uniform numbers: Motion Practice, 9313, (four times, not consecutively); Hearings, 9801; Certificate of Service, 9703; Mailing List or Matrix, 1207(a); Notice, 9702; Orders - Proposed, 9713, (twice, not consecutively); and Calendars and Scheduling, 5701. Two of these topics, Mailing List or Matrix and Orders - Proposed, appear also in another rule. The topic of Compensation of Professionals, Uniform Number 2216, appears in three other rules and in three subdivisions of one rule.

In the rules for the Western District of Kentucky, the problem of repetition of a uniform number occurred only in one rule. In Rule No.3, titled "Attorneys," the topic Attorneys - Duties appears non-consecutively, due to interruptions for two other topics, Attorneys - Discipline and Disbarment, and Pro Se Parties.

There are two solutions to this problem. One would be for the district to reorganize its local rules to match the pattern of the Federal Rules of Bankruptcy Procedure. The other would be to adopt the approach used by the Southern District of Texas and assign the uniform number based only on the topic stated in the title to a rule, while ignoring subdivisions that may introduce other functionally relevant topics which are covered by other uniform numbers. Although this method simplifies the assignment of uniform numbers, it inevitably will result in incomplete topical searches.

Further Issues

Neither the local rules index nor the uniform numbering system, as proposed, makes value judgments about specific local rules or rules topics. For example, some districts have local rules concerning investment of estate funds or jury trials, two

subjects no longer treated in the national rules. The rule on investment of estate funds was abrogated because the subject now comes under the authority of the United States trustee and is, accordingly, not one for the judiciary to regulate. The uniform rule number topic has been broadened to "estate administration," but otherwise has been left in place.

In addition, most districts have local rules on attorney admissions, photography in the courthouse, and courtroom decorum. Some, however, hold the view that these subjects should be treated only in local district court rules, which would apply to the bankruptcy court. Examined from the standpoint of this philosophy, these subjects should not appear separately in bankruptcy local rules but only in references to the district court rules.

The Bankruptcy Judges Division's index, on the other hand, was intended merely to record and categorize the existing universe of local rules and thereby facilitate access. This index makes no attempt to evaluate the content of any rule. Similarly, the proposed numbering system provides a number for every rule that exists, without regard to whether any particular rule should exist.

Although the intent is simply to remain neutral, prescribing a numbering system that allows for controversial topics could be viewed as affirmative permission for courts to make rules addressing those topics rather than simply a recognition of existing rules for purposes of indexing and facilitating access. Moreover, a uniform numbering system affords an opportunity to exclude topics believed to be inappropriate by simply not providing uniform numbers for them. Attempting to control the content of local rules, however, might drive some local rules "underground," which is not a desirable outcome.

Section 332(d)(4) of title 28, United States Code, imposes on the judicial council of each circuit a duty to review periodically the local rules prescribed by courts within the circuit. Section 332(d)(4) also confers on the judicial council the authority to abrogate or modify any local rule "found inconsistent" with the national rules. Accordingly, the uniform numbering system, as proposed, would leave to the judicial councils the issue of the inconsistency of any local rule with national rules.

Citation Form and Preliminary Comments

The citation form for a local bankruptcy rule, using the uniform numbers, would be "LR ----." An example, for a local rule describing responsibilities of the clerk of court, would be "LR 5203," (Clerk-General/Authority). In a brief or other

written document in which an indication of the district prescribing the rule were needed, the form of the citation would be "E.D. Va. LR 5203."

The Advisory Committee has received several preliminary comments on its proposal, which may spotlight some problem areas. They are summarized here as a catalyst for eliciting further comment.

One commentator observed that insertion of the numerals 2 through 9 in the place of the second digit of the number will prevent the uniform numbers staying close to their associated rules when sorted numerically in any automated system. For example, in Part I, there are two uniform rule numbers related to national Rule 1014; they are numbers 1214 and 1314. There also are two uniform rule numbers related to national Rule 1015; they are numbers 1215 and 1315. When sorted numerically, however, uniform rule numbers 1314 and 1315 will appear after number 1219, rather than near numbers 1214 and 1215, the numbers with which they should be associated. If the uniform numbers were to be sorted numerically together with the national rule numbers, all of the uniform numbers would appear following all of the national rule numbers, and the topical relationships that form the basis for the uniform numbering system would not be discernible.

Two other commentators suggested that the first task should be to overhaul the existing numbering system for the national bankruptcy rules and possibly conform the numbering system to that of the federal civil rules. Then, the uniform local rule numbers for both district court (civil) and bankruptcy local rules could become a coordinated system. The Advisory Committee considered these suggestions, but rejected them as impractical for three reasons: 1) the length of time that would be required to develop a completely new numbering system for the national rules, 2) the incorporation of most of the civil rules into Part VII and Part IX of the bankruptcy rules, and 3) the large number of bankruptcy rules that govern procedures for estate administration, subjects not treated in the civil rules.

Another suggestion would employ a numbering system consisting primarily of three-digit numbers based on the national rule numbers. Under this system, the zero in the national rule numbers would be deleted. For example, the topic "Employment of Professionals," related to national Rule 2014, would have uniform local rule number 214. The lowest number in the national rules is 1001, which would become 101. Rules not related to any national rule could be assigned numbers from 1 to 99. As each part of the national rules begins with a rule numbered "_001," (1001, 2001, 3001, etc.), a local rule number of "_00," (100, 200, 300, etc.), also would be available for a maximum of nine rules. Unused numbers at the end of each part of the rules probably could not be utilized, because in Part VII the national

rules extends to 7087 (local rule 787 under this system), leaving only 12 potential numbers for expansion within that part. Some drawbacks to such a system are: 1) the potential for confusion with the Federal Rules of Evidence, which are numbered similarly, starting with the number 101, and 2) the wide assortment of topics that would have to be included under numbers 1 through 99 --- from places of holding court and assignment of cases to exhibits and stipulations. For comparison purposes, however, "Alternative 1," which is based on this suggestion, is attached as Appendix 3.

Lastly, another commentator stated that the proposed system is too complicated, especially for the many bankruptcy court litigants who proceed without a lawyer. This commentator suggested using the national rule number followed by a dash and an additional numeral, as in "LR 5003-1." A major drawback of such a system is that it adds an additional digit to numbers that already are quite long. For purposes of comment, however, "Alternative 2" is attached as Appendix 4. It shows the national rule numbers followed by dashes and augmented with additional numbers for "unrelated" topics based on the parts of the rules.

Any uniform numbering system that eventually is prescribed will require bankruptcy lawyers, bankruptcy judges, bankruptcy clerks' offices, and the parties involved in bankruptcy cases to make adjustments. Those who practice in some districts may have to make greater or more difficult adjustments that those in other districts. The Advisory Committee wants, above all, to recommend a practical system that lawyers, judges, clerks, and parties can adopt and use without unnecessary strain. Please review the attached proposal and submit comments in writing by , 1995.

Please address your comments to:

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Attachments: Rule 9029 with proposed amendments
Appendices 1 - 4

Rule 9029. Local Bankruptcy Rules; Procedure When There is No Controlling Law

(a) Local Bankruptcy Rules.

(1) Each district court ~~by action of~~ acting by a majority of ~~the~~ its district judges ~~thereof~~ may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make

and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with -- but not duplicative of -- Acts of Congress and these rules and which do not prohibit or limit the use of the Official Forms. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(2) A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement. ~~In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these rules or those of the district in which the court acts.~~

(b) Procedure When There is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

COMMITTEE NOTE

Subdivision (a). This rule is amended to reflect the requirement that local rules be consistent not only with applicable national rules but also with Acts of Congress. The amendment also states that local rules should not repeat applicable national rules and Acts of Congress.

The amendment also requires that the numbering of local rules conform with any uniform numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform numbering system would make it easier for an increasingly national bar and for litigants to locate a local rule that applies to a particular procedural issue.

Paragraph (2) of subdivision (a) is new. Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For example, a party should not be deprived of a right to a jury trial because its attorney, unaware of -- or forgetting -- a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn -- covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the court's power to enforce local rules that involve more than mere matters of form -- for example, a local rule requiring

that a party demand a jury trial within a specified time period to avoid waiver of the right to a trial by jury.

Subdivision (b). This rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, it permits the court to regulate practice in any manner consistent with federal law, with rules adopted under 28 U.S.C. § 2075, with Official Forms, and with the district's local rules.

This rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for

noncompliance with such an internal directive, unless the alleged violator has been furnished in a particular case with actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

APPENDIX 1

Local Rules Index and Proposed Uniform Local Rule Numbers - Arranged by National Rule Number

PART I

National Rule	Topic	Uniform Number
1002	FILING PAPERS - REQUIREMENTS	1202
1004	PETITION - PARTNERSHIP	1204
1005	PETITION - CAPTION	1305
1005	FILING PAPERS - REQUIREMENTS	1205
1006(b)	FEES - INSTALLMENT PAYMENTS	1206(b)
1007	FILING PAPERS - REQUIREMENTS	1207
1007(a)	MAILING - LIST OR MATRIX	1207(a)
1007(b)	LISTS, SCHEDULES, STATEMENTS	1207(b)
1007(b)(2)	STATEMENT OF INTENTION	1207(b)(2)
1009	AMENDMENTS TO LISTS & SCHEDULES	1209
1010	PETITION-INVOLUNTARY	1210
1014	TRANSFER OF CASES	1214
1014	VENUE - CHANGE OF	1314
1015	JOINT ADMINISTRATION - CONSOLIDATION	1215
1015	RELATED CASES	1315
1017	CONVERSION	1217
1017	DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	1317
1019	CONVERSION	1219

No Related National Rules:	Topic	Uniform Number
[none]	JURISDICTION	1701
[none]	DIVISIONS - BANKRUPTCY COURT	1702
[none]	PLACES OF HOLDING COURT	1703
[none]	ASSIGNMENT OF CASES	1704
[none]	CORPORATIONS	1801

PART II

National Rule	Topic	Uniform Number
2002(a)-(o) (except (j))	NOTICE TO CREDITORS AND OTHER INTERESTED PARTIES	2202(a)-(o)
2002(j)	NOTICE TO U.S. OR FEDERAL AGENCY	2202(j)
2002(j)	U.S. AS CREDITOR OR PARTY	2302(j)
2003	MEETING OF CREDITORS AND EQUITY SECURITY HOLDERS	2203
2007	UNITED STATES TRUSTEE	2207
2004	DEPOSITIONS & EXAMINATIONS	2204
2004	WITNESSES	2304
2010	BONDS/SURETY	2210
2014	EMPLOYMENT OF PROFESSIONALS	2214
2014	APPRAISERS & AUCTIONEERS	6205
2015	TRUSTEES - GENERAL	2315
2015(a)	DIP DUTIES	2315(a)
2015(a)	TRUSTEES - REPORTS & DISPOSITION OF RECORDS	2215(a)
2015(c)	TRUSTEES - CHAPTER 13	2215(c)
2015(d)	DIP DUTIES	2315(d)
2016	COMPENSATION OF PROFESSIONALS	2216
2016	APPRAISERS & AUCTIONEERS	6205
2019	ATTORNEYS - DUTIES	2219
2020	UNITED STATES TRUSTEES	2220

No Related National Rules:	Topic	Uniform Number
[none]	ESTATE ADMINISTRATION	2701
[none]	COMMITTEES - OF CREDITORS, etc.	2710
[none]	NOTICE TO OTHER COURTS	2720
[none]	CHAPTER 9	2809
[none]	CHAPTER 11 - GENERAL	2811
[none]	CHAPTER 12	2812

PART II
cont.,

No Related National Rules:	Topic	Uniform Number
[none]	CHAPTER 13 - GENERAL	2813
[none]	ATTORNEYS - ADMISSION TO PRACTICE	2901
[none]	ATTORNEYS - DISCIPLINE AND DISBARMENT	2902

PART III

National Rule	Topic	Uniform Number
3001-3006, 3008	CLAIMS AND EQUITY SECURITY INTERESTS	3201-3206, 3008
3007	OBJECTIONS TO CLAIMS	3207
3009	DIVIDENDS	3209
3010	DIVIDENDS	3210
3011	UNCLAIMED FUNDS	3211
3012	VALUATION OF COLLATERAL	3212
3015	AMENDMENTS TO PLANS (Ch.13)	3315
3015	CHAPTER 13 CONFIRMATION	3415
3015	CHAPTER 13 - PLAN	3215
3016	CHAPTER 11 - PLAN	3316
3016	DISCLOSURE STATEMENT	3216
3017	DISCLOSURE STATEMENT	3217
3018	ACCEPTANCE OR REJECTION OF PLANS	3318
3018	BALLOTS - VOTING ON PLANS	3218
3019	AMENDMENTS TO PLANS (Ch.11)	3219
3020	CHAPTER 11 - CONFIRMATION	3220
3021	DIVIDENDS (Ch.11)	3221
3022	FINAL REPORT, DECREE	3222

No Related National Rules:	Topic	Uniform Number
[none]	CHAPTER 13 - PAYMENTS OUTSIDE THE PLAN	3713

PART IV

National Rule	Topic	Uniform Number
4001(a)	AUTOMATIC STAY - RELIEF FROM	4201(a)
4001(b)	CASH COLLATERAL	4201(b)
4002	DEBTOR - DUTIES	4202
4002(5)	ADDRESS OF DEBTOR	4202(5)
4003	EXEMPTIONS	4203
4003(d)	LIEN AVOIDANCE	4203(d)
4004	DISCHARGE HEARINGS	4204
4004	OBJECTIONS TO DISCHARGE	4304
4007	DISCHARGEABILITY COMPLAINTS	4207
4008	REAFFIRMATION	4208

No Related National Rule:	Topic	Uniform Number
[none]	INSURANCE	4702

PART V

National Rule	Topic	Uniform Number
5001	COURT ADMINISTRATION	5201
5001(c)	CLERK - OFFICE LOCATION/HOURS	5201(c)
5002	UNITED STATES TRUSTEE	5202
5003	CLERK - GENERAL/AUTHORITY	5203
5003	COURT PAPERS - REMOVAL OF	5303
5003(b)	CLAIMS AND EQUITY SECURITY INTERESTS	5203(b)
[5008] [abrogated 1991]	ESTATE ADMINISTRATION	5208
5009	FINAL REPORT/DECREE	5209
5010	REOPENING CASES	5210
5011	ABSTENTION	5211
5011	WITHDRAWAL OF REFERENCE	5311

PART V
cont.,

No Related National Rules:	Topic	Uniform Number
[none]	CALENDARS AND SCHEDULING	5701
[none]	CONTINUANCE	5702
[none]	COURTROOM DECORUM	5710
[none]	PHOTOGRAPHY, RECORDING DEVICES AND BROADCASTING	5711
[none]	FAXFILING/SERVICE	5720
[none]	CLERK - DELEGATED FUNCTIONS OF	5801
[none]	COURT REPORTING	5810
[none]	TRANSCRIPTS	5811
[none]	FEES - GENERALLY	5820
[none]	FEES - FORM OF PAYMENT	5821
[none]	JUDGES - VISITING AND RECALLED	5900
[none]	SIGNATURES - JUDGES	5901
[none]	SEAL OF COURT	5910

PART VI

National Rule	Topic	Uniform Number
6004	SALE OF ESTATE PROPERTY	6204
6005	APPRAISERS AND AUCTIONEERS	6205
6006	EXECUTORY CONTRACTS	6206
6007	ABANDONMENT	6207
6008	REDEMPTION	6208

No Related National Rules:	Topic	Uniform Number
[none]	TAX RETURNS AND TAX REFUNDS	6701

PART VII

National Rule	Topic	Uniform Number
7001	ADVERSARY PROCEEDINGS	7201
7003	COVER SHEET	7203

PART VII
cont.,

National Rule	Topic	Uniform Number
7004	SERVICE OF PROCESS	7204
7004	SUBPOENAS, SUMMONS	7304
7005(b)	CERTIFICATE OF SERVICE	9703
7005(d)	DISCOVERY - NON-FILING OF MATERIALS	7205(d)
7007(b)	MOTION PRACTICE	7207(b)
7008(a)	CORE - NON-CORE PROCEEDING	7208(a)
7012(b)	CORE - NON-CORE PROCEEDING	7212(b)
7016	PRE-TRIAL PROCEDURES	7216
7024	INTERVENTION	7224
7024(c)	UNCONSTITUTIONALITY, CLAIM OF	7224(c)
7026	DISCOVERY - GENERAL	7226
7027-32	DEPOSITIONS & EXAMINATIONS	7027-32
7040	ASSIGNMENT OF CASES (APs)	7240
7042	JOINT ADMINISTRATION/ CONSOLIDATION (APs)	7242
7052	FINDINGS AND CONCLUSIONS	7252
7054	COSTS - TAXATION/PAYMENT	7254
7055	DEFAULT - FAILURE TO PROSECUTE	7255
7056	SUMMARY JUDGMENT	7256
7065	INJUNCTIONS	7265
7067	REGISTRY FUND	7267
7069	JUDGMENT - PAYMENT OF	7269

[No "unrelated" local rule topics.]

PART VIII

National Rule	Topic	Uniform Number
8001-	APPEALS (See Appendix)	8201-

For District Court/Bankruptcy Appellate Panel uniform local rule numbers, see "Appendix of Uniform Local Rule Numbers for Local Rules Governing Bankruptcy Appeals."

PART IX

National Rule	Topic	Uniform Number
9001	DEFINITIONS	9201
9002	DEFINITIONS	9202
9003	EX PARTE CONTACT	9203
9004	FILING PAPERS - REQUIREMENTS	9204
9004	CAPTION - PAPERS, APs	9304
9006	TIME PERIODS	9206
9007	NOTICE TO CREDITORS AND OTHER PARTIES IN INTEREST	9207
9009	FORMS	9209
9010	ATTORNEYS - DUTIES	9210
9010(c)	POWER OF ATTORNEY	9210(c)
9011	ATTORNEYS - DUTIES	9211
9011	PRO SE PARTIES	9311
9011	SANCTIONS	9411
9011	SIGNATURES	9511
9013	BRIEFS AND MEMORANDA OF LAW	9213
9013	MOTION PRACTICE	9313
[9015] [abrogated 1987]	JURIES - TRIALS	9215
9016	SUBPOENA	9216
9016	WITNESSES	9316
9019(a) & (b)	SETTLEMENTS AND AGREED ORDERS	9219(a) & (b)
9019(c)	ALTERNATIVE DISPUTE RESOLUTION (ADR)	9219(c)
9020	CONTEMPT	9220
9021	JUDGMENTS AND ORDERS	9221
9021	ORDERS - EFFECTIVE DATE	9321
9022	JUDGMENTS AND ORDERS	9222
9027	REMOVAL/REMAND	9227
9029	LOCAL RULES - GENERAL	9229
9029	LOCAL RULES - GENERAL ORDERS	9329
9035	BANKRUPTCY ADMINISTRATORS	9235

PART IX
cont.,

No Related National Rules:	Topic	Uniform Number
[none]	FILING - NUMBER OF COPIES	9701
[none]	FILING - SIZE OF PAPERS	9702
[none]	EXHIBITS	9710
[none]	STIPULATIONS	9711
[none]	ORDERS - PROPOSED	9713
[none]	HEARINGS	9801
[none]	TELEPHONE CONFERENCES	9802
[none]	EMERGENCY ORDERS	9813

APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR LOCAL RULES GOVERNING BANKRUPTCY APPEALS [District Courts and Bankruptcy Appellate Panels (BAPs)]

National Rule	Topic	Uniform Number
8001	Appeal - Notice of	8201
8001(c)	Appeal - Dismissal (Voluntary)	8201(c)
8001(e)	Appeal Consent to Determining by BAP	8201(e)
8002	Appeal - Time for Filing	8202
8003	Appeal - Motion for Leave to	8203
8004	Appeal - Service of Notice	8204
8006	Designation of Record	8206
8007(a)	Appeal - Completion of Record	8207(a)
8007(b)	Appeal - Transmission of Record	8207(b)
8007(b)	Appeal - Docketing of	8307(b)
8007(c)	Appeal - Record for Preliminary Hearing	8207(c)
8008(a)	Appeal - Filing of Papers	8208(a)
8008(b)	Appeal - Service of All Papers Required	8208(b)
8008(c)	Appeal - Manner of Serving	8208(c)
8008(d)	Appeal - Proof of Service of Filed Papers	8208(d)
8009(a)	Appeal - Briefs, Time for Filing	8209(a)
8009(b)	Appeal - Time for Filing Appendix to Brief	8209(b)
8010(a)	Appeal - Form of Briefs	8210(a)
8010(b)	Appeal - Reproduction of Statutes, etc.	8210(b)
8010(c)	Appeal - Length of Briefs	8210(c)
8011(a)	Appeal - Motion, Response, Reply	8211(a)
8011(b)	Appeal - Determination of Procedural Motion	8211(b)
8011(c)	Appeal - Determination of Motion	8211(c)
8011(d)	Appeal - Emergency Motion	8211(d)

National Rule	Topic	Uniform Number
8011(e)	Appeal - Power of Single Judge to Entertain Motions	8211(e)
8012	Appeal - Oral Argument	8212
8013	Appeal - Disposition	8213
8014	Appeal - Costs	8214
8015	Appeal - Motion or Rehearing	8215
8016(a)	Appeal - Entry of Judgment by Clerk of District Court or BAP	8216(a)
8016(b)	Appeal - Notice of Order or Judgment	8216(b)
8016(b)	Appeal - Return of Record	8316(b)
8017(b)	Appeal - Stay Pending Appeal to Court of Appeals	8217(b)
8018	Appeal - Local Rules of District Court or BAP	8218
8019	Appeal - Suspension of Part VIII, Fed.R.Bankr.P.	8219
No Related National Rule:		
[none]	Appeal - Dismissal by Court for Non-Prosecution	8601

SPECIAL BANKRUPTCY APPELLATE PANEL MATTERS
(to which other nation and uniform numbers apply)

9001	Definitions	9201 (Bankr.) L.R.1.1. (Dist.)
9002	Definitions	9202 (Bankr.) L.R.1.1. (Dist.)
[none]	Admission of Attorneys	2901 (Bankr.) L.R.83.5 (Dist.)
[none]	Courtroom Photography, Broadcasting	5711 (Bankr.) L.R.83.4 (Dist.)

APPENDIX 2

Index to the Local Rules of the Bankruptcy Courts and Proposed Uniform Local Rule Numbers - Alphabetical List of Topics

Local Rule Topic	Related National Rule Numbers	Uniform Number
ABANDONMENT	6007	6207
ABSTENTION	5011	5211
ACCEPTANCE OR REJECTION OF PLANS	3018	3318
ADDRESS OF DEBTOR	4002(5)	4202(5)
ADVERSARY PROCEEDINGS	7001 -	7201 -
ALTERNATIVE DISPUTE RESOLUTION	9019(C)	9219(c)
AMENDMENTS TO LISTS AND SCHEDULES	1009	1209
AMENDMENTS TO PLANS	3015; 3019	3315, 3219
APPEALS (See Appendix)	8001 -	8201 -
APPRAISERS AND AUCTIONEERS	2014, 2016, 6005	6205
ASSIGNMENT OF CASES	7040	1704, 7240(APs)
ATTORNEYS - ADMISSION TO PRACTICE		2901
ATTORNEYS - DISCIPLINE AND DISBARMENT		2902
ATTORNEYS - DUTIES	9010, 9011, 2019	9210, 9211, 2219
ATTORNEYS - WITHDRAWALS		2903
AUTOMATIC STAY - RELIEF FROM	4001(a)	4201(a)
AUTOMATIC STAY - VIOLATION OF		4701
BALLOTS - VOTING ON PLANS	3018	3218
BANKRUPTCY ADMINISTRATORS	9035	9235
BONDS/SURETY	2010	2210
BRIEFS AND MEMORANDA OF LAW	9013	9213
CALENDARS AND SCHEDULING		5701
CAPTION - PAPERS, APs (See Filing Papers - Requirements)	9004	9304
CASH COLLATERAL	4001(b)	4201(b)
CERTIFICATE OF SERVICE	7005(b)	9703
CHAPTER 11 - CONFIRMATION	3020	3220
CHAPTER 11 - GENERAL		2811
CHAPTER 11 - PLAN	3016, 3018, 3019	3316
CHAPTER 12		2812
CHAPTER 13 - CONFIRMATION	3015	3415
CHAPTER 13 - GENERAL		2813
CHAPTER 13 - PAYMENTS OUTSIDE THE PLAN		3713
CHAPTER 13 - PLAN	3015	3215
CHAPTER 9		2809
CLAIMS AND EQUITY SECURITY INTERESTS	3001-3008, 5003(b)	3201-3208, 5203(b)

Local Rule Topic	Related National Rule Numbers	Uniform Number
CLASS ACTION	7023	7223
CLERK - DELEGATED FUNCTIONS OF		5801
CLERK - GENERAL/AUTHORITY	5003	5203
CLERK - OFFICE LOCATION/HOURS	5001(c)	5201(c)
CLERK - ORDERS GRANTABLE BY		5802
COMMITTEES - OF CREDITORS, ETC.		2710
COMPENSATION OF PROFESSIONALS	2016	2216
CONTEMPT	9020	9220
CONTINUANCE		5702
CONVERSION	1017, 1019	1217, 1219
COPIES, HOW TO ORDER		5721
CORE - NONCORE PROCEEDINGS	7008(a), 7012(b)	7208(a), 7212(b)
CORPORATIONS		1801
COSTS - TAXATION/PAYMENT	7054	7254
COURT ADMINISTRATION	5001	5201
COURT PAPERS - REMOVAL OF	5003	5303
COURT REPORTING		5810
COURTROOM DECORUM		5710
COVER SHEET	7003	7203
DEBTOR - DUTIES	4002	4202
DEBTOR-IN-POSSESSION-DUTIES	2015(a); 2015(d)	2315(a), 2315(d)
DEFAULT - FAILURE TO PROSECUTE	7055	7255
DEFINITIONS	9001, 9002	9201, 9202
DEPOSITIONS AND EXAMINATIONS	2004, 7027-32	2204, 7227-32
DISCHARGE HEARINGS	4004	4204
DISCHARGEABILITY COMPLAINTS	4007	4207
DISCLOSURE STATEMENT	3016, 3017	3216, 3217
DISCOVERY - GENERAL	7026	7226
DISCOVERY - NON FILING OF MATERIALS	7005(d)	7205(d)
DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	1017	1317
DIVIDENDS	3009, 3010, 3021	3209, 3210, 3221
DIVISIONS - BANKRUPTCY COURT		1702
EMERGENCY ORDERS		9813
EMPLOYMENT OF PROFESSIONALS	2014	2214
ESTATE ADMINISTRATION		2701
EX PARTE CONTACT	9003	9203
EXECUTORY CONTRACTS	6006	6206
EXEMPTIONS	4003	4203
EXHIBITS		9710
FAX FILING/SERVICE		5720

Local Rule Topic	Related National Rule Numbers	Uniform Number
FEES - FORM OF PAYMENT		5821
FEES - GENERALLY		5820
FEES - INSTALLMENT PAYMENTS	1006(b)	1206(b)
FILING - NUMBER OF COPIES		9701
FILING - SIZE OF PAPERS		9702
FILING PAPERS - REQUIREMENTS	1002, 1007, 1005, 9004	1202, 1207, 1205, 9204
FINAL REPORT/DECREE	3022, 5009	3222, 5209
FINDINGS AND CONCLUSIONS	7052	7252
FORMS	9009	9209
HEARINGS		9801
INJUNCTIONS	7065	7265
INSURANCE		4702
INTERVENTION	7024	7224
INVESTMENT OF ESTATE FUNDS		5208
JOINT ADMINISTRATION/CONSOLIDATION	1015, 7042	1215, 7242
JUDGES - VISITING AND RECALLED		5900
JUDGMENTS - PAYMENT OF	7069	7269
JUDGMENTS AND ORDERS	9021, 9022	9221, 9222
JURIES - TRIALS		9215
JURISDICTION		1701
LIEN AVOIDANCE	4003(d)	4203(d)
LISTS, SCHEDULES, AND STATEMENTS	1007(b)	1207(b)
LOCAL RULES - DISTRICT COURT	8018	8218
LOCAL RULES - GENERAL	9029	9229
LOCAL RULES - GENERAL ORDERS	9029	9329
MAILING - LIST OR MATRIX	1007(a)	1207(a)
MEETING OF CREDITORS AND EQUITY SECURITY HOLDERS	2003	2203
MOTION PRACTICE	9013, 7007(b)	9313, 7207(b), 4201(c)
NOTICE TO CREDITORS AND OTHER INTERESTED PARTIES	2002(a)-(o), 9007	2202(a)-(o), 9207, 6204(a)
NOTICE TO OTHER COURTS		2720
NOTICE TO UNITED STATES OR FEDERAL AGENCY	2002(j)	2202(j)
OBJECTIONS TO CLAIMS	3007	3207
OBJECTIONS - TO DISCHARGE	4004	4304
ORDERS - EFFECTIVE DATE	9021	9321
ORDERS - PROPOSED		9713
PETITION - CAPTION	1005	1305
PETITION - INVOLUNTARY	1010	1210
PETITION - PARTNERSHIP	1004	1204

Local Rule Topic	Related National Rule Numbers	Uniform Number
PHOTOGRAPHY, RECORDING DEVICES AND BROADCASTING		5711
PLACES OF HOLDING COURT		1703
POWER OF ATTORNEY	9010(c)	9210(c)
PRE-TRIAL PROCEDURES	7016	7216
PRO SE PARTIES	9011	9311
REAFFIRMATION	4008	4208
REDEMPTION	6008	6208
REGISTRY FUND	7067	7267
RELATED CASES	1015	1315
REMOVAL/REMAND	9027	9227
REOPENING CASES	5010	5210
SALE OF ESTATE PROPERTY	6004	6204
SANCTIONS	9011	9411
SEAL OF COURT		5910
SERVICE OF PROCESS	7004	7204
SETTLEMENTS AND AGREED ORDERS	9019(a) & (b)	9219(a) & (b), 4201(d)
SIGNATURES	9011	9511
SIGNATURES - JUDGES		5901
STATEMENT OF INTENTION	1007(b)(2)	1207(b)(2)
STIPULATIONS		9711
SUBPOENAS/SUMMONS	7004, 9016	7304, 9216
SUMMARY JUDGMENT	7056	7256
TAX RETURNS AND TAX REFUNDS		6701
TELEPHONE CONFERENCES		9802
TIME PERIODS	9006	9206
TRANSCRIPTS		5811
TRANSFER OF CASES	1014	1214
TRUSTEES - CHAPTER 13	2015(c)	2215(c)
TRUSTEES - GENERAL	2015	2315
TRUSTEES - REPORTS AND DISPOSITION OF RECORDS	2015(a)	2215(a)
UNCLAIMED FUNDS	3011	3211
UNCONSTITUTIONALITY, CLAIM OF	7024(c)	7224(c)
UNITED STATES AS A CREDITOR OR PARTY	2002(j)	2302(j)
UNITED STATES TRUSTEE	2020, 5002, 2007	2220, 5202, 2207
VALUATION OF COLLATERAL	3012	3212
VENUE - CHANGE OF	1014	1314
WITHDRAWAL OF REFERENCE	5011	5311
WITNESSES	2004, 9016	2304, 9316

APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR LOCAL RULES GOVERNING BANKRUPTCY APPEALS

[District Courts and Bankruptcy Appellate Panels (BAPs)]

Topic	National Rule No.	Uniform Number
Appeal-Notice of	8001	8201
Appeal-Dismissal (Voluntary)	8001(c)	8201(c)
Appeal-Dismissal by Court for non-Prosecution	none	8601
Appeal-Consent to Determination by BAP	8001(e)	8201(e)
Appeal-Time for Filing	8002	8202
Appeal-Motion for Leave to	8003	8203
Appeal-Service of Notice	8004	8204
Appeal-Designation of Record	8006	8206
Appeal-Completion of Record	8007(a)	8207(a)
Appeal-Transmission of Record	8007(b)	8207(b)
Appeal-Docketing of	8007(b)	8307(b)
Appeal-Record for Preliminary Hearing	8007(c)	8207(c)
Appeal-Filing of Papers	8008(a)	8208(a)
Appeal-Service of All Papers Required	8008(b)	8208(b)
Appeal-Manner of Serving Papers	8008(c)	8208(c)
Appeal-Proof of Service of Filed Papers	8008(d)	8208(d)
Appeal-Briefs, Time for Filing	8009(a)	8209(a)
Appeal-Time for Filing Appendix to Brief	8009(b)	8209(b)
Appeal-Form of Briefs	8010(a)	8201(a)
Appeal-Reproduction of Statutes, etc.	8010(b)	8210(b)

Topic	National Rule No.	Uniform Number
Appeal-Length of Briefs	8010(c)	8210(c)
Appeal-Motion, Response, Reply	8011(a)	8211(a)
Appeal-Determination of Procedural Motion	8011(b)	8211(b)
Appeal-Determination of Motion	8011(c)	8211(c)
Appeal-Emergency Motion	8011(d)	8211(d)
Appeal-Power of Single Judge to Entertain Motions	8011(e)	8211(e)
Appeal-Oral Argument	8012	8212
Appeal-Disposition	8013	8213
Appeal-Costs	8014	8214
Appeal-Motion for Rehearing	8015	8215
Appeal-Entry of Judgment by Clerk of District Court or BAP	8016(a)	8216(a)
Appeal-Notice of Order of Judgement'	8016(b)	8216(b)
Appeal-Return of Record	8016(b)	8316(b)
Appeal-Stay Pending Appeal to Court of Appeals	8017(b)	8217(b)
Appeal-Local Rules of District Court or BAP	8018	8218
Appeal-Suspension of Part VIII, Fed.R.Bankr.P.	8019	8219

SPECIAL BANKRUPTCY APPELLATE PANEL MATTERS
(to which other national and uniform numbers apply)

Definitions	9001, 9002	9201, 9202 (Bankruptcy) L.R.1.1 (Dist.)
Admissions of Attorneys	none	2901 (Bankruptcy) L.R.83.5 (Dist.)
Courtroom Photography, Broadcasting	none	5711 (Bankruptcy) L.R.83.4 (Dist.)

APPENDIX 4

Alternate 2 - Local Rules Index and Proposed Uniform Local Rule Numbers Number

PART I

National Rule	Topic	Uniform Number
1002	FILING PAPERS - REQUIREMENTS	1002-1
1004	PETITION - PARTNERSHIP	1004-1
1005	PETITION - CAPTION	1005-2
1005	FILING PAPERS - REQUIREMENTS	1005-1
1006(b)	FEES - INSTALLMENT PAYMENTS	1006(b)-1
1007	FILING PAPERS - REQUIREMENTS	1007-1
1007(a)	MAILING - LIST OR MATRIX	1007(a)-1
1007(b)	LISTS, SCHEDULES, STATEMENTS	1007(b)-1
1007(b)(2)	STATEMENT OF INTENTION	1207(b)(2)-1
1009	AMENDMENTS TO LISTS & SCHEDULES	1009-1
1010	PETITION-INVOLUNTARY	1010-1
1014	TRANSFER OF CASES	1014-1
1014	VENUE - CHANGE OF	1014-2
1015	JOINT ADMINISTRATION - CONSOLIDATION	1015-1
1015	RELATED CASES	1015-2
1017	CONVERSION	1017-1
1017	DISMISSAL OR SUSPENSION - CASE OR PROCEEDINGS	1017-2
1019	CONVERSION	1019-1

No Related National Rules:	Topic	Uniform Number
[none]	JURISDICTION	1701-1
[none]	DIVISIONS - BANKRUPTCY COURT	1702-1
[none]	PLACES OF HOLDING COURT	1703-1
[none]	ASSIGNMENT OF CASES	1704-1
[none]	CORPORATIONS	1801-1

PART II

National Rule	Topic	Uniform Number
2002(a)-(o) (except (j))	NOTICE TO CREDITORS AND OTHER INTERESTED PARTIES	2002(a)-1 thru 2002(o)-1
2002(j)	NOTICE TO U.S. OR FEDERAL AGENCY	2002(j)-1
2002(j)	U.S. AS CREDITOR OR PARTY	2002(j)-2
2003	MEETING OF CREDITORS AND EQUITY SECURITY HOLDERS	2003-1
2007	UNITED STATES TRUSTEE	2007-1
2004	DEPOSITIONS & EXAMINATIONS	2004-1
2004	WITNESSES	2004-2
2010	BONDS/SURETY	2010-1
2014	EMPLOYMENT OF PROFESSIONALS	2014-1
2014	APPRAISERS & AUCTIONEERS	6005-1
2015	TRUSTEES - GENERAL	2015-2
2015(a)	DIP DUTIES	2015(a)-2
2015(a)	TRUSTEES - REPORTS & DISPOSITION OF RECORDS	2015(a)-1
2015(c)	TRUSTEES - CHAPTER 13	2015(c)-1
2015(d)	DIP DUTIES	2015(d)-1
2016	COMPENSATION OF PROFESSIONALS	2016-1
2016	APPRAISERS & AUCTIONEERS	6005-1
2019	ATTORNEYS - DUTIES	2019-1
2020	UNITED STATES TRUSTEES	2020-1

No Related National Rules:	Topic	Uniform Number
[none]	ESTATE ADMINISTRATION	2701-1
[none]	COMMITTEES - OF CREDITORS, etc.	2710-1
[none]	NOTICE TO OTHER COURTS	2720-1
[none]	CHAPTER 9	2809-1
[none]	CHAPTER 11 - GENERAL	2811-1
[none]	CHAPTER 12	2812-1
[none]	CHAPTER 13 - GENERAL	2813-1
[none]	ATTORNEYS - ADMISSION TO PRACTICE	2901-1
[none]	ATTORNEYS - DISCIPLINE AND DISBARMENT	2902-1

PART III

National Rule	Topic	Uniform Number
3001-3006, 3008	CLAIMS AND EQUITY SECURITY INTERESTS	3001-1 thru 3006-1, 3008-1
3007	OBJECTIONS TO CLAIMS	3007-1
3009	DIVIDENDS	3009-1
3010	DIVIDENDS	3010-1
3011	UNCLAIMED FUNDS	3011-1
3012	VALUATION OF COLLATERAL	3012-1
3015	AMENDMENTS TO PLANS (Ch.13)	3015-2
3015	CHAPTER 13 CONFIRMATION	3015-3
3015	CHAPTER 13 - PLAN	3015-1
3016	CHAPTER 11 - PLAN	3016-2
3016	DISCLOSURE STATEMENT	3016-1
3017	DISCLOSURE STATEMENT	3017-1
3018	ACCEPTANCE OR REJECTION OF PLANS	3018-2
3018	BALLOTS - VOTING ON PLANS	3018-1
3019	AMENDMENTS TO PLANS (Ch.11)	3019-1
3020	CHAPTER 11 - CONFIRMATION	3020-1
3021	DIVIDENDS (Ch.11)	3021-1
3022	FINAL REPORT, DECREE	3022-1

No Related National Rules:	Topic	Uniform Number
[none]	CHAPTER 13 - PAYMENTS OUTSIDE THE PLAN	3713-1

PART IV

National Rule	Topic	Uniform Number
4001(a)	AUTOMATIC STAY - RELIEF FROM	4001(a)-1
4001(b)	CASH COLLATERAL	4001(b)-1
4002	DEBTOR - DUTIES	4002-1
4002(5)	ADDRESS OF DEBTOR	4002(5)-1
4003	EXEMPTIONS	4003-1
4003(d)	LIEN AVOIDANCE	4003(d)-1

PART IV
cont.

National Rule	Topic	Uniform Number
4004	DISCHARGE HEARINGS	4004-1
4004	OBJECTIONS TO DISCHARGE	4004-2
4007	DISCHARGEABILITY COMPLAINTS	4007-1
4008	REAFFIRMATION	4008-1

No Related National Rule:	Topic	Uniform Number
[none]	INSURANCE	4702-1

PART V

National Rule	Topic	Uniform Number
5001	COURT ADMINISTRATION	5001-1
5001(c)	CLERK - OFFICE LOCATION/HOURS	5001(c)-1
5002	UNITED STATES TRUSTEE	5002-1
5003	CLERK - GENERAL/AUTHORITY	5003-1
5003	COURT PAPERS - REMOVAL OF	5003-2
5003(b)	CLAIMS AND EQUITY SECURITY INTERESTS	5003(b)-1
[5008] [abrogated 1991]	ESTATE ADMINISTRATION	5008-1
5009	FINAL REPORT/DECREE	5009-1
5010	REOPENING CASES	5010-1
5011	ABSTENTION	5011-1
5011	WITHDRAWAL OF REFERENCE	5011-2

No Related National Rules:	Topic	Uniform Number
[none]	CALENDARS AND SCHEDULING	5701-1
[none]	CONTINUANCE	5702-1
[none]	COURTROOM DECORUM	5710-1
[none]	PHOTOGRAPHY, RECORDING DEVICES AND BROADCASTING	5711-1
[none]	FAXFILING/SERVICE	5720-1
[none]	CLERK - DELEGATED FUNCTIONS OF	5801-1

PART V
cont.,

No Related National Rules:	Topic	Uniform Number
[none]	COURT REPORTING	5810-1
[none]	TRANSCRIPTS	5811-1
[none]	FEES - GENERALLY	5820-1
[none]	FEES - FORM OF PAYMENT	5821-1
[none]	JUDGES - VISITING AND RECALLED	5900-1
[none]	SIGNATURES - JUDGES	5901-1
[none]	SEAL OF COURT	5910-1

PART VI

National Rule	Topic	Uniform Number
6004	SALE OF ESTATE PROPERTY	6004-1
6005	APPRAISERS AND AUCTIONEERS	6005-1
6006	EXECUTORY CONTRACTS	6006-1
6007	ABANDONMENT	6007-1
6008	REDEMPTION	6008-1

No Related National Rules:	Topic	Uniform Number
[none]	TAX RETURNS AND TAX REFUNDS	6701-1

PART VII

National Rule	Topic	Uniform Number
7001	ADVERSARY PROCEEDINGS	7001-1
7003	COVER SHEET	7003-1
7004	SERVICE OF PROCESS	7004-1
7004	SUBPOENAS, SUMMONS	7004-2
7005(b)	CERTIFICATE OF SERVICE	9703-1
7005(d)	DISCOVERY - NON-FILING OF MATERIALS	7005(d)-1
7007(b)	MOTION PRACTICE	7007(b)-1
7008(a)	CORE - NON-CORE PROCEEDING	7008(a)-1

PART VII
cont.,

National Rule	Topic	Uniform Number
7012(b)	CORE - NON-CORE PROCEEDING	7012(b)-1
7016	PRE-TRIAL PROCEDURES	7016-1
7024	INTERVENTION	7024-1
7024(c)	UNCONSTITUTIONALITY, CLAIM OF	7024(c)-1
7026	DISCOVERY - GENERAL	7026-1
7027-32	DEPOSITIONS & EXAMINATIONS	7027-1 thru 7032-1
7040	ASSIGNMENT OF CASES (APs)	7040-1
7042	JOINT ADMINISTRATION/ CONSOLIDATION (APs)	7042-1
7052	FINDINGS AND CONCLUSIONS	7052-1
7054	COSTS - TAXATION/PAYMENT	7054-1
7055	DEFAULT - FAILURE TO PROSECUTE	7055-1
7056	SUMMARY JUDGMENT	7056-1
7065	INJUNCTIONS	7065-1
7067	REGISTRY FUND	7067-1
7069	JUDGMENT - PAYMENT OF	7069-1

[No "unrelated" local rule topics.]

PART VIII

National Rule	Topic	Uniform Number
8001 ff.	APPEALS (See Appendix)	8001-1 ff.

For District Court/Bankruptcy Appellate Panel uniform local rule numbers, see "Appendix of Uniform Local Rule Numbers for Local Rules Governing Bankruptcy Appeals."

PART IX

National Rule	Topic	Uniform Number
9001	DEFINITIONS	9001-1
9002	DEFINITIONS	9002-1
9003	EX PARTE CONTACT	9003-1
9004	FILING PAPERS - REQUIREMENTS	9004-1

PART IX
cont.,

National Rule	Topic	Uniform Number
9004	CAPTION - PAPERS, APs	9004-2
9006	TIME PERIODS	9006-1
9007	NOTICE TO CREDITORS AND OTHER PARTIES IN INTEREST	9007-1
9009	FORMS	9009-1
9010	ATTORNEYS - DUTIES	9010-1
9010(c)	POWER OF ATTORNEY	9010(c)-1
9011	ATTORNEYS - DUTIES	9011-1
9011	PRO SE PARTIES	9011-2
9011	SANCTIONS	9011-3
9011	SIGNATURES	9011-4
9013	BRIEFS AND MEMORANDA OF LAW	9013-1
9013	MOTION PRACTICE	9013-2
[9015] [abrogated 1987]	JURIES TRIALS	9015-1
9016	SUBPOENA	9016-1
9016	WITNESSES	9016-2
9019(a) & (b)	SETTLEMENTS AND AGREED ORDERS	9019(a)-1 & 9019(b)-1
9019(c)	ALTERNATIVE DISPUTE RESOLUTION (ADR)	9019(c)-1
9020	CONTEMPT	9020-1
9021	JUDGMENTS AND ORDERS	9021-1
9021	ORDERS - EFFECTIVE DATE	9021-2
9022	JUDGMENTS AND ORDERS	9022-1
9027	REMOVAL/REMAND	9027-1
9029	LOCAL RULES - GENERAL	9029-1
9029	LOCAL RULES - GENERAL ORDERS	9029-2
9035	BANKRUPTCY ADMINISTRATORS	9035-1

PART IX
cont.,

No Related National Rules:	Topic	Uniform Number
[none]	FILING - NUMBER OF COPIES	9701-1
[none]	FILING - SIZE OF PAPERS	9702-1
[none]	EXHIBITS	9710-1
[none]	STIPULATIONS	9711-1
[none]	ORDERS - PROPOSED	9713-1
[none]	HEARINGS	9801-1
[none]	TELEPHONE CONFERENCES	9802-1
[none]	EMERGENCY ORDERS	9813-1

APPENDIX OF UNIFORM LOCAL RULE NUMBERS FOR LOCAL RULES GOVERNING BANKRUPTCY APPEALS

[District Courts and Bankruptcy Appellate Panels (BAPs)]

National Rule	Topic	Uniform Number
8001	Appeal - Notice of	8001-1
8001(c)	Appeal - Dismissal (Voluntary)	8001(c)-1
8001(e)	Appeal Consent to Determining by BAP	8001(e)-1
8002	Appeal - Time for Filing	8002-1
8003	Appeal - Motion for Leave to	8003-1
8004	Appeal - Service of Notice	8004-1
8006	Designation of Record	8006-1
8007(a)	Appeal - Completion of Record	8007(a)-1
8007(b)	Appeal - Transmission of Record	8007(b)-1
8007(b)	Appeal - Docketing of	8007(b)-2
8007(c)	Appeal - Record for Preliminary Hearing	8007(c)-1
8008(a)	Appeal - Filing of Papers	8008(a)-1
8008(b)	Appeal - Service of All Papers Required	8008(b)-1
8008(c)	Appeal - Manner of Serving	8008(c)-1
8008(d)	Appeal - Proof of Service of Filed Papers	8008(d)-1
8009(a)	Appeal - Briefs, Time for Filing	8009(a)-1
8009(b)	Appeal - Time for Filing Appendix to Brief	8009(b)-1
8010(a)	Appeal - Form of Briefs	8010(a)-1
8010(b)	Appeal - Reproduction of Statutes, etc.	8010(b)-1
8010(c)	Appeal - Length of Briefs	8010(c)-1
8011(a)	Appeal - Motion, Response, Reply	8011(a)-1
8011(b)	Appeal - Determination of Procedural Motion	8011(b)-1
8011(c)	Appeal - Determination of Motion	8011(c)-1
8011(d)	Appeal - Emergency Motion	8011(d)-1

National Rule	Topic	Uniform Number
8011(e)	Appeal - Power of Single Judge to Entertain Motions	8011(e)-1
8012	Appeal - Oral Argument	8012-1
8013	Appeal - Disposition	8013-1
8014	Appeal - Costs	8014-1
8015	Appeal - Motion or Rehearing	8015-1
8016(a)	Appeal - Entry of Judgment by Clerk of District Court or BAP	8016(a)-1
8016(b)	Appeal - Notice of Order or Judgment	8016(b)-1
8016(b)	Appeal - Return of Record	8016(b)-2
8017(b)	Appeal - Stay Pending Appeal to Court of Appeals	8017(b)-1
8018	Appeal - Local Rules of District Court or BAP	8018-1
8019	Appeal - Suspension of Part VIII, Fed.R.Bankr.P.	8019-1
No Related National Rule:		
[none]	Appeal - Dismissal by Court for Non-Prosecution	8601-1

SPECIAL BANKRUPTCY APPELLATE PANEL MATTERS
(to which other nation and uniform numbers apply)

9001	Definitions	9001-1 (Bankr.) L.R.1.1. (Dist.)
9002	Definitions	9002-1 (Bankr.) L.R.1.1. (Dist.)
[none]	Admission of Attorneys	2901-1 (Bankr.) L.R.83.5 (Dist.)
[none]	Courtroom Photography, Broadcasting	5711-1 (Bankr.) L.R.83.4 (Dist.)

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
ROYBAL BUILDING
255 EAST TEMPLE STREET, SUITE 1682
LOS ANGELES, CALIFORNIA 90012

LISA HILL FENNING
BANKRUPTCY JUDGE

(213) 894-2553
FAX (213) 894-3731

November 24, 1993

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Attention: Peter G. McCabe, Secretary

Dear Committee Members:

This letter is in response to the request for public comment on the proposed amendments to the Federal Rules of Bankruptcy Procedure. I am writing solely in my individual capacity, but my comments are based upon my nearly eight years of experience as chair of the Rules Committee for the U.S. Bankruptcy Court for the Central District of California.

I wish to comment on two aspects of the proposed amendments. First, I support the goal of developing a uniform numbering system for local bankruptcy rules. Such a numbering system should make it much easier for litigants to identify the relevant rules in each jurisdiction. Our court is awaiting guidance from the Advisory Committee on Bankruptcy Rules as to how to renumber our rules.

Before a local rules numbering system is devised, however, I urge that the Advisory Committee on Bankruptcy Rules consider whether the present numbering system for the Federal Rules of Bankruptcy Procedure is logical and consistent. It appears to me that the national rules have evolved over time in a sequence that perhaps no longer reflect a useful structure or order. Once any necessary renumbering of the national rules is completed, then the local rules numbering system could be designed to correlate with the national rules.

Second, as drafted, the proposed amendment creating a FRBP 9029(b) appears to sanction the practice of "local" local rules. It appears from the Committee Comment that the intent of the new subsection was to assure notice of requirements before a litigant could be punished for noncompliance. I support that principle.

In multijudge courts, however, this subsection is likely to encourage proliferation of idiosyncratic requirements for each judge in each district around the country, because it says any judge can make up any rules or procedures that are not inconsistent

orders by consensus of the judges of the district, rather than by proliferation of judge-specific orders or notices. Uniformity aids litigants and simplifies staff training and the administration of clerk's offices. Nothing in this rule is intended to encourage the proliferation of individualized requirements by judges.

I do not plan to testify at the hearings on the Bankruptcy Rule amendments in March. I ask that this letter be considered in lieu of testimony.

Please give me a call at 213/894-3557 if you have any questions or comments, or if I can be of further assistance.

Very truly yours,

Lisa Hill Fenning
United States Bankruptcy Judge

cc: Hon. Paul Mannes
Professor Alan Resnick

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

Jacob Weinberger United States Courthouse
325 West "F" Street
San Diego, California 92101-6989

LOUISE DE CARL ADLER
BANKRUPTCY JUDGE

Telephone (619) 557-5661
Facsimile (619) 557-5536

May 25, 1994

Hon. Paul Mannes
United States Bankruptcy Court
451 Hungerford Drive
Rockville, Maryland 20850

RE: Local Rules Numbering Project

Dear Paul:

My sincere apologies for my delay in responding to your invitation to comment on the local rules numbering scheme described to me by Judge Meyers. As you know, we have recently moved the entire bankruptcy court to another building and your letter got set aside in one of the boxes.

The subject of local rules numbering is one with which I have some familiarity. I am the chair of the Ninth Circuit Bankruptcy Local Rules Review Committee, having served as the chair since Fall, 1992. Chief Circuit Judge J. Clifford Wallace appointed this committee and a similar committee at the district court level to review local rules for consistency with the national rules of procedure for the respective courts.

One of the first acts of our committee was a strong endorsement of the concept of a uniform numbering system for the bankruptcy local rules. We encountered much of the same resistance that district courts have encountered in the past to a uniform numbering effort. We had some success in our pitch in those districts which were in the process of revising their local rules. At this time, of the 14 bankruptcy court districts of the Ninth Circuit having local rules, 9 now use a local rule numbering system which refers to the corresponding Federal Rule of Bankruptcy Procedure. For example, in my own district, the local rule requirements for a motion for relief from stay are found under BLR 4001-1, *et seq.*

In each district which uses a system of FRBP-based numbering, there is a designation preceding the rule which indicates it is a local rule. For example, Arizona uses "AZ Rule"; the Eastern District of California uses "EDR"; Oregon uses "O.R.". Then the FRBP number is followed by either a hyphen, a period, or parenthsized subparagraphs which spells out the local requirements for implementing the national rule.

The merit of this system is its simplicity. It takes no special insight or knowledge to figure out that a motion for relief from stay under FRBP 4001 must be filed in the district in a manner which meets the requirements of, for example, BLR 4001-1. This is extremely important when one considers the number of *in propria persona* debtors and creditors who appear in the bankruptcy court. More so than any other branch of the federal system, we are a "people's court". Indeed, as financial hardship continues for many people, we are finding not only debtor's approaching the system without counsel but also non-institutional lenders and small residential landlords.

While I strongly support a uniform numbering system, I am gravely concerned about the impact of an arcane system which inserts an unrelated digit in the national rule as a method of identifying the local rule. Absent a course in local rules interpretation, there is no way the uninitiated -- either lay person or lawyer -- would understand the insertion of the number "2" into the rule identifies the rule as local. While the concept might have some merit if only sophisticated lawyers used the bankruptcy system, the possibilities for confusion and attendant hardship on non-lawyer users of the system should cause your committee to reconsider.

I would be happy to speak further with the Committee on Rules of Practice and Procedure if you think it would be of some assistance. Having been "in the trenches" on this issue, I am sympathetic to the resistance you may encounter in proposing a uniform system for numbering local rules. I strongly urge you to minimize it by keeping any proposal for uniform local rules numbering consistent with the national rules and as simple as possible.

Sincerely,

Louise DeCarl Adler

LOUISE DECARL ADLER, Judge
United States Bankruptcy Court

LDA/dah
cc: Peter McCabe, Secretary of the Committee on Rule of Practice and Procedure
Hon. Adrian Duplantier, Chair, Local Rules Subcommittee

OFFICE OF THE CLERK
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
P.O. BOX 1111
LEXINGTON, KENTUCKY 40588-1111

BETTY L. JENNETTE
CLERK

TELEPHONE
(606) 233-2608

April 19, 1994

Mr. Peter McCabe, OJB
Standing Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

RE: Proposed Rules 9029 and 9037

Dear Mr. McCabe:

I reviewed the proposed rules set out in your Memorandum to the Clerks of Bankruptcy Courts dated April 8, 1994 with our Clerk of Court, Betty L. Jennette.

On behalf of the Clerk of the U.S. Bankruptcy Court for the Eastern District of Kentucky, I am writing to you with a few comments.

PROPOSED RULE 9029

Our court has always adhered to the philosophy of not duplicating Federal Codes, Rules and Acts in our local rules. We do not feel that we should have to set out in our local rules what is already set out in the federal statutes. Furthermore, you greatly increase the risk of changing a Federal Code or Rule due to imprecise paraphrasing when you try to include it in the local rules.

In reviewing the local rules of other bankruptcy courts, I think that our court is in the minority. I'm sure that it is very convenient for the attorneys who practice in the bankruptcy court not to have to know anything about the Federal Code or Rules. Also, I'm sure that the courts would receive more uniform documents because an attorney who is too lazy to look up a Federal Code Section or Rule will usually at least check the local rules. (I can get away with criticizing attorneys for laziness because I am an attorney). However, it is probably not in the best interest of their clients for them not to have to learn their way around Chapter 11 of the U.S.C. and the Federal Rules of Bankruptcy Procedure.

Also a peripheral consideration is that in these times of trying in all possible ways to reduce our budgets, the court would be providing at its expense copies of information already available and accessible to attorneys and the public at their own expense.

The only true "service" which providing duplicative information

might provide is that it would make it easier for debtors trying to process a bankruptcy case pro se. Our experience with pro se debtors, however, is that they don't bother to try to follow the local rules.

PROPOSED RULE 9037

This proposed rule seems to be both practical and efficient.

PROPOSED UNIFORM NUMBERING SYSTEM

I believe that a uniform numbering system would be good for all the reasons which are set forth in the Committee Note.

In view of the committee goal to make it easier for a national bar to locate a local rule which applies to a particular procedural issue, we have a suggested numbering system.

In our court, we number our rules when possible to correspond to the Federal Rule number. For example, Federal Rule of Bankruptcy Procedure 2016 sets forth the requirements of Fee Applications. Our local rule No. 216 points out the fact that a Supplemental Fee Application is still a Fee Application that needs to meet the requirements of Federal Rule 2016. Federal Rule of Bankruptcy Procedure 3015 sets out a requirement to file a Chapter 13 Plan. Our local rule No. 315 sets out local form requirements for Chapter 13 plans and rules on who to serve with copies of the plan.

We explain our numbering system in local rule No. 2 so that even a new attorney or a pro se debtor doing a bankruptcy for the first time will know that they can find out more about a particular topic by looking up the corresponding Federal Rule of Bankruptcy Procedure.

Of course, there are always items covered in local rules which do not relate to a Federal Rule of Bankruptcy Procedure. For example, some courts have rules about the age of children allowed in the courtroom. There is still room to handle these kinds of rules with our numbering method. The first Federal Rule of Bankruptcy Procedure is numbered 1001 so the first corresponding local rule number would be 101. Therefore, local rule numbers 1 through 100 would be available for rules which relate to topics not covered at all by the Federal Rules of Bankruptcy Procedure. Also, each part of the Federal Rules of Bankruptcy Procedure begins as follows: Rule 1001, Rule 2001, Rule 3001, etc. Rule numbers 1000, 2000, 3000, etc. don't exist. This frees up space to create local rules number 100, 200, 300, 400, 500, 600, 700, 800 and 900 which seem to go logically with a particular Part of the Federal Rules of Bankruptcy Procedure, but which don't seem to fit well under a specific rule. For example, in our local rules, we wanted to deal

with Agreed Orders for Relief from Stay separately from Motions for Relief from Stay. Since Federal Rule of Bankruptcy Procedure 4001 and local rule No. 401 deal with Motions for Relief from Stay, we put our Agreed Order rule in local rule No. 400.

I am enclosing a copy of our local rules for your review if you wish to study our numbering system. Also, our local rules would be a concrete example of what local rules without duplication are like.

Thank you for your consideration of our comments.

Sincerely,

Grace H. Dupree

Grace H. Dupree, Esq.

ghd
Enclosure

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
ROYBAL BUILDING
255 EAST TEMPLE STREET, SUITE 1580
LOS ANGELES, CALIFORNIA 90012

SAMUEL L. BUFFORD
JUDGE

(213) 894-0892

December 2, 1993

Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20044
Attention: Peter G. McCabe, Secretary

Dear Committee Members:

This letter is in response to the request for public comment on the proposed amendments to the Federal Rules of Bankruptcy Procedure. I am writing solely in my individual capacity, but my comments are based upon my nearly eight years of experience as a member of the Rules Committee for the United States Bankruptcy Court for the Central District of California.

My colleague Judge Lisa Hill Fenning, who is chair of our Local Rules Committee, has sent you a letter dated November 24, 1993. I agree fully with her letter, except that I believe that "local" local rules should be actively discouraged. We have worked very hard in this district to coordinate the procedures of some twenty judges at four different locations in the district. All this has produced a voluminous set of local rules that is well known to the Committee. This set of local rules has largely achieved the purpose of avoiding the adoption of "local" local rules by individual judges in the district. As Judge Fenning points out in her letter, the "local" local rules are one of the most common sources of complaint by the bar. In contrast, the publicity of local practices that is accomplished by the local rules is generally appreciated by the bar.

The numbering of local rules to correspond to the Federal Rules of Bankruptcy Procedure would introduce a needless difficulty for lawyers in finding the appropriate local rule. Only approximately 5% of the 40,000 lawyers in Southern California have any federal court practice. In addition to a different set of evidence rules (the Federal Rules of Evidence), these lawyers must be familiar with four different sets of procedural rules: the Federal Rules of Civil Procedure, the Federal Rules of Bankruptcy Procedure, and local rules for the district court and bankruptcy court. We have attempted to ease this burden as much as possible by adopting both the language and the numbering system of the local district court rules in our bankruptcy court rules. A renumbering of the bankruptcy rules to correspond to the Federal Rules of Bankruptcy Procedure will make it more difficult for non-specialist to find the appropriate local rule.

There are two ways in which this difficulty could be ameliorated. First, if the Federal Rules of Bankruptcy Procedure were renumbered to correspond to the Federal Rules of Civil Procedure, this would make it easier for non-specialists to find the appropriate national bankruptcy rule. Second, if the district courts were required to number their rules to correspond to the Federal Rules of Civil Procedure, then the entire federal practice could be synchronized to make it easy for non-specialists to find the appropriate rule.

I do not plan to testify at the hearings on the bankruptcy rule amendments in March. Please consider this letter in lieu of testimony.

Please give me a call at (213) 894-0992 if you have any questions or comments, or if I can be of further assistance.

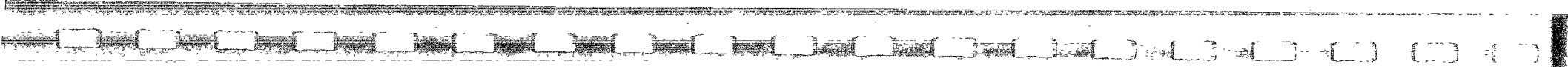
Very truly yours,

SAMUEL L. BUFFORD,
UNITED STATES BANKRUPTCY JUDGE

SLB:gjf

cc: Hon. Paul Mannes
Professor Allen Resnick

bcc: Central District Bankruptcy Judges
Mr. Frank Goodroe
Ms. Yvonne Evans
Mr. David Grube



M E M O R A N D U M

TO: Advisory Committee on Bankruptcy Rules

FROM: Kenneth N. Klee, Esq.

DATE: March 16, 1994

RE: Long-Range Planning

At the recent meeting of the Advisory Committee on Bankruptcy Rules held in Sea Island, Georgia, Chairman Mannes asked me to prepare a memorandum with respect to long-range planning. This memorandum seeks direct input from you with respect to your vision of a long-range plan for the Advisory Committee on Bankruptcy Rules.

Before embarking on a long-range plan, the Long-Range Planning Subcommittee believes it needs guidance from the Advisory Committee with a respect to a number of issues. First, as a matter of philosophy should the Rules be enforceable commands or should they be guidelines that will be enforced loosely. Perhaps different principles should apply to different Rules. For example, as a general proposition, time periods set forth in the Rules are subject to enlargement or reduction. In special cases, however, enlargement or reduction is not permitted. See Fed. R. Bankr. P. 9006(b)(2) and 9006(c)(2). Is it useful or desirable to articulate a general approach with respect to this issue?

Second, it appears to the Long-Range Planning Subcommittee that the existing Rules were adaptations of Rules designed for the Bankruptcy Act. The Rules have developed as a result of incremental and interstitial revision as opposed to a comprehensive overhaul. Is a comprehensive revision necessary or desirable?

Third, the Long-Range Planning Subcommittee believes that it may be useful to reexamine the organization of the Rules. For example, the organization of the Rules does not follow the scheme of the Bankruptcy Code. Definitions appear at the end rather than at the beginning. Is a reorganization of the Rules necessary or desirable? If a reorganization is to be accomplished, should it be done by chapter or by kind of case? Is it appropriate to compare bankruptcy Rules with Rules in other civil or criminal proceedings? In particular, bankruptcy is a collective proceeding consisting of numerous battles. Civil Rules designed for a single lawsuit may not be a useful model to follow. For example, an adversary proceeding may not be the appropriate means of revoking an order of confirmation obtained

through fraud. That seems, however, to be the impact of Rule 7001.

Fourth, the Long-Range Planning Subcommittee questions the feasibility of adopting a long-range plan in a Committee whose membership changes on a regular basis. A comprehensive revision of the Bankruptcy Rules could be a project that will be accomplished over a period of time in excess of eight to ten years. Is it wise to undertake such a mission when it is certain that leadership and direction of the Committee will change during the course of the mission?

Fifth, it is difficult to restructure the procedural practice in bankruptcy cases without considering changes to procedural rules contained in the Bankruptcy Code. Prior to the enactment of the Code, the Rules Committee was given the extraordinary power of altering the statute as to matters of procedure. Probably the Long-Range Planning Committee should not consider its recommendations for changes in the Rules bound by procedural provisions of the Bankruptcy Code. It may be that legislation will be required to fully implement our recommendations, but at least in the planning stage, the statute should not be treated as the final word on procedural matters.

Sixth, should the Long-Range Planning Subcommittee identify defective Rules that should be revised as part of a long-range plan but do not rise to the crisis level necessary to be considered by the Advisory Committee in the short run?

Seventh, what principles should guide the Long-Range Planning Subcommittee in forumulating a long-range plan to recommend to the Advisory Committee?

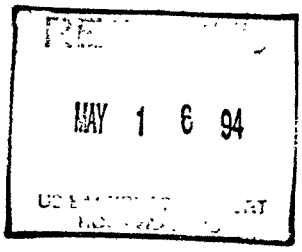
The Long-Range Planning Subcommittee welcomes your views with respect to the foregoing as well as any other matters of long-range planning. I would be most appreciative if you would supply Gerry Smith with a copy of your comments, since he is the other member of the Long-Range Planning Subcommittee.

ORAL REPORTS

AGENDA XIII
New York, New York
September 22-23, 1994

UNITED STATES COURT OF INTERNATIONAL TRADE
ONE FEDERAL PLAZA
NEW YORK, NY 10007

CHAMBERS OF
JANE A. RESTANI
JUDGE



May 12, 1994

Honorable Paul Mannes
United States Bankruptcy Court
for the District of Maryland
451 Hungerford Drive
Rockville, Maryland 20850

Re: Meeting of the Advisory Committee of the Civil Rules
April 28-30, 1994

Dear Judge Mannes:

First, thank you for the new code and rules. This version looks to be very handy.

Second, I thought a short memorandum on what transpired of interest to Bankruptcy might be useful. Here goes.

1. The committee is deferring action on Rule 26(e) concerning the balance between the public's right to know about safety issues and protection of proprietary information in discovery. Congress is very interested, but a rule change is not ready. Rule 77.1 on sealing is in a similar posture.

2. Changes to Rules 50, 52 and 59 will be sent forward to the Standing Committee. The reporter indicates that the standing committee will be alerted to the problem of any reference to Rule 6(a)'s 10 day period without a reference to BR 9006(a)'s 8 day period.

3. As to Rule 43's allowance of non-oral testimony the committee decided to eliminate reference to facsimile and computer transmissions in the note and then decided not to send the rule forward at all.

4. Rule 83 will go forward with the Leonard Rosen substitution of "non-wilful" for "negligent."

5. The Rule 84 changes on technical amendments were killed as ultra vires.

6. Rule 23 on class actions was discussed from the point of view of whether changes are needed to facilitate its use for mass tort litigation, particularly through expansion of the limited fund exception to opt out. The problem is much bigger than Rule 23 and requires a look at the whole issue of how to handle mass torts. This, I believe, will end up as a legislative issue and the committee will probably do only tinkering. But that's just a guess. I have the whole Rule 23 discussion package if anyone wants to review it.

7. Rule 68 on offers of judgment is going to get some more study. The committee seemed interested in having it apply to both plaintiffs and defendants and making it apply to expert fees in all cases. Shifting attorney fees is dead for the moment.

8. For the first time in the history of mankind facsimile filing was not discussed.

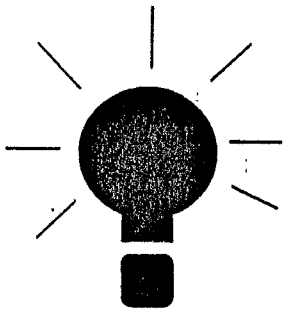
Very truly yours,

Jane

Jane A. Restani
Judge

cc: Professor Alan N. Resnick
Hofstra University School of Law
121 Hofstra University
Hempstead, New York 11550-1090

THE GESTATION OF AN AMENDMENT



1. Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.
2. This period is of indeterminate length.
3. Proposals come from Committee members, the Reporter, judges clerks, or the public, or result from statutory changes, case law developments, or experience.

Proposed amendments may be at different stages of the process. at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

YEAR 1

Advisory Committee approves draft of proposed amendments. (January -May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited. (October)

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). (January-April)

Public comment period closes. (mid-April)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate). (April-May)

Standing Committee reviews final draft; may 1) approve, 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

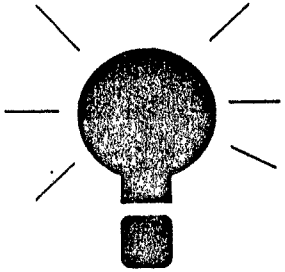
YEAR 3

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress. (March or April) (must be by May 1)

Congress can alter or reject during the next 90 days. If Congress does not act, amendments take effect August 1st.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

THE GESTATION OF AN AMENDMENT



YEAR 1

YEAR 2

YEAR 3

Amendments to Rules 3017, 3018, 3021, 4003(b), 8002(c), 9006(f), 9011, 9014

Proposed New Rule 8020

Amendments to Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, 9006

Amendments to Rules 8002(b) and 8006 took effect 8/1/94

Amendments to Rules 8018 and 9029 (before JCUS meeting 9/20-21)

Amendments to Rules 8018 and 9029 (after JCUS meeting 9/20-21)

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

BANKRUPTCY RULES AMENDMENTS

Status List - August 1994

Amendments Which Took Effect 8/1/94

8002(b)
8006

Proposed Amendments Published for Comment 1993-94 and Approved 6/94 by Standing Committee for Transmittal to Judicial Conference 9/94 and Possible Effective Date of 8/1/95*

(Comment period for these amendments ended 4/15/94. At the June 1994 meeting of the Standing Committee, the Advisory Committee's recommended change in Rule 9029 from "negligent" to "non willful" was approved and adopted for the similar civil, criminal, and appellate amendments. Other advisory committees joined in the Advisory Committee's objections to proposed new Rule 9037 permitting "technical" amendments and it was not approved. If approved by the Judicial Conference (9/94), these amendments will be transmitted to the Supreme Court (10/94) and, if prescribed by the Court, to Congress (4/95).)

8018 (local rules of dist.ct. & BAP re: bankr. appeals)
9029 (uniform numbering; local rules must be published, etc.)

"Class of '96" - Possibly Could Take Effect 8/1/96*

(These were approved for publication and comment by the Standing Committee at its 6/94 meeting.)

1006(a)
1007(c)
1019
2002(a),(c),(f),(h),(i),(k)
2015(b)&(c)
3002
3016
4004
5005(a)
7004
8008(a)
9006(c)

* Pending legislation, if enacted, would change the effective date for bankruptcy rules from August 1 to December 1 of the years indicated.

(Continued)

"Class of '97" - Possibly Could Take Effect 8/1/97*
(These will be discussed at the 9/94 Advisory Committee meeting.)

Amendments:

3017
3018
3021
4003(B)
8002(C)
9006(F)
9011
9014

New Rule:

8020

* Pending legislation, if enacted, would change the effective date for bankruptcy rules from August 1 to December 1 of the years indicated.

PRELIMINARY DRAFT
OF PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the ~~prescribed~~ filing fee except as provided in subdivision (b) of this rule. For the purpose of this rule, "filing fee" means the filing fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) Application for Permission to Pay Filing Fee in Installments. A

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*New matter is underlined; matter to be omitted is lined through.

voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments. The application shall state the proposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) Action on Application. Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable

not later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.

(3) Postponement of Attorney's Fees. The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney or any other person who renders services to the debtor in connection with the case.

COMMITTEE NOTE

The Judicial Conference prescribes miscellaneous fees pursuant to 28 U.S.C. § 1930(b). In 1992, a $30 miscellaneous administrative fee was prescribed for all chapter 7 and chapter 13 cases. The Judicial Conference fee schedule was amended in 1993 to provide that an individual debtor may pay this fee in installments.

Subdivision (a) of this rule is amended to clarify that every petition

must be accompanied by any fee prescribed under 28 U.S.C. 1930(b) that is required to be paid when a petition is filed, as well as the filing fee prescribed by 28 U.S.C. § 1930(a). By defining "filing fee" to include Judicial Conference fees, the procedures set forth in subdivision (b) for paying the filing fee in installments will also apply with respect to any Judicial Conference fee required to be paid at the commencement of the case.

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

(c) TIME LIMITS. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the

statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements ~~previously~~ filed prior to the conversion of a case to another chapter ~~in a pending chapter 7 case~~ shall be deemed filed in ~~a superseding~~ the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may

direct.

COMMITTEE NOTE

Subdivision (c) is amended to provide that schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case, whether or not the case was a chapter 7 case prior to conversion. This amendment is in recognition of the 1991 amendments to the Official Forms that abrogated the Chapter 13 Statement and made the same forms for schedules and statements applicable in all cases.

This subdivision also contains a technical correction. The phrase "superseded case" creates the erroneous impression that conversion of a case results in a new case that is distinct from the original case. The effect of conversion of a case is governed by § 348 of the Code.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or

reconverted to a chapter 7 case:

* * * * *

~~(7) EXTENSION OF TIME TO FILE CLAIMS AGAINST SURPLUS. Any extension of time for the filing of claims against a surplus granted pursuant to Rule 3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (6) of this rule, and notice shall be given as provided in Rule 2002.~~

COMMITTEE NOTE

Subdivision (7) is abrogated to conform to the abrogation of Rule 3002(c)(6) and the addition of Rule 3002(d). If a proof of claim is tardily filed after a case is converted to a chapter 7 case, the claim may be allowed to the extent that the creditor, as the holder of an unsecured claim proof of which is tardily filed, is entitled to receive a distribution under section 726 of the Code.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of (1) the meeting of creditors pursuant to § 341 of the Code; (2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice; (3) the hearing on approval of a compromise or settlement of a controversy other than approval of an

agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent; ~~(4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6);~~ ~~(5)~~ (4) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case, unless the hearing is pursuant to § 707(b) of the Code, or the conversion of the case to another chapter; ~~(6)~~ (5) the time fixed to accept or reject a proposed modification of a plan; ~~(7)~~ (6) hearings on all applications for compensation or reimbursement of expenses totalling in excess of $500; ~~(8)~~ (7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); and

~~(9)~~ (8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

* * * * *

(c) CONTENT OF NOTICE.

* * * * *

(2) Notice of Hearing on Compensation. The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision ~~(a)(7)~~ (a)(6) of this rule shall identify the applicant and the amounts requested.

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of

* * * * *

(8) a summary of the trustee's final report ~~and account~~ in a chapter 7 case if the net proceeds realized exceed $1,500.

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, ~~the court may,~~ after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code or, if a notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), the court may~~,~~ direct that all notices required by subdivision (a) of this rule~~, except clause (4) thereof,~~

be mailed only to the debtor, the trustee, all indenture trustees, creditors ~~whose claims~~ who hold claims for which proofs of claim have been filed, and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule ~~3002(c)(6)~~ 3002(c)(1) or (c)(2).

(i) NOTICES TO COMMITTEES. Copies of all notices required to be mailed under this rule shall be mailed to the committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and ~~(7)~~ (6) of this rule be transmitted to the United States trustee and be mailed only to the committees

elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed pursuant to § 1114 shall receive copies of all notices required by subdivisions (a)(1), ~~(a)(6)~~ (a)(5), (b), (f)(2), and (f)(7), and such other notices as the court may direct.

* * * * *

(k) NOTICES TO UNITED STATES TRUSTEE. Unless the case is a chapter 9 municipality case or unless the United States trustee otherwise requests, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters

described in subdivisions (a)(2), (a)(3), ~~(a)(5)~~ (a)(4), ~~(a)(9)~~ (a)(8), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), and (f)(8) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (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. Nothing in these rules shall require the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U.S.C. § 78aaa et seq.

* * * * *

COMMITTEE NOTE

Paragraph (a)(4) is abrogated to conform to the abrogation of Rule 3002(c)(6). The remaining paragraphs of subdivision (a) are renumbered, and references to these paragraphs contained in other subdivisions of this rule are amended accordingly.

Paragraph (f)(8) is amended so that a summary of the trustee's final account, which is prepared after distribution of property, does not have to be mailed to the debtor, all creditors, and indenture trustees in a chapter 7 case. Parties are sufficiently protected by receiving a summary of the trustee's final report that informs parties of the proposed distribution of property.

Subdivision (h) is amended (1) to provide that an order under this subdivision may not be issued if a notice of no dividend is given under Rule 2002(e) and the time for filing claims has not expired as provided in Rule 3002(c)(5); (2) to clarify that notices required to be mailed by subdivision (a) to parties other than creditors must be mailed to those entities despite an order issued under subdivision (h); (3) to provide that if the court, pursuant to Rule 3002(c)(1) or 3003(c)(2), has granted an extension of time to file a proof of claim, the creditor for whom the extension has been

granted must continue to receive notices despite an order issued under subdivision (h); and (4) to delete references to subdivision (a)(4) and Rule 3002(c)(6), which have been abrogated.

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

* * * * *

(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this

paragraph.

(c) CHAPTER 13 TRUSTEE AND DEBTOR.

(1) Business Cases. In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor within the time fixed by the court.

* * * * *

COMMITTEE NOTE

Under subdivision (a)(1), the trustee in a chapter 7 case and, if the court directs, the trustee or debtor in possession in a chapter 11 case is required to file and transmit to the United States trustee a complete inventory of the debtor's property within 30 days after qualifying as trustee or debtor in possession, unless such an inventory has already been

filed. Subdivisions (b) and (c) are amended to clarify that a debtor in possession and trustee in a chapter 12 case, and a debtor in a chapter 13 case where the debtor is engaged in business, are not required to file and transmit to the United States trustee a complete inventory of the property of the debtor unless the court so directs. If the court so directs, the court also fixes the time limit for filing and transmitting the inventory.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.

* * * * *

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a

proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

* * * * *

~~(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.~~

(d) TARDILY FILED CLAIM IN CHAPTER 7 CASE. Notwithstanding subdivision (a) of this rule, if a creditor files a proof of claim in a chapter 7 case after the expiration of the time for filing the proof of claim prescribed in subdivision (c) of this rule, the creditor, as the holder of an unsecured

claim proof of which is tardily filed, is entitled to receive a distribution to the extent provided under section 726 of the Code.

COMMITTEE NOTE

The abrogation of subdivision (c)(6) and the addition of subdivision (d) are designed to make this rule consistent with § 726 of the Code. Section 726(a)(2)(C) and § 726(a)(3) recognize that in a chapter 7 case a creditor holding a claim that has been tardily filed may be entitled to receive a distribution.

This amendment is not intended to resolve the issue of whether a claim of the kind entitled to priority under § 507 of the Code has the right to priority in distribution under § 726(a)(1) if the proof of claim is tardily filed. Compare, e.g., In re Century Boat Co., 986 F.2d 154 (6th Cir. 1993), with In re Mantz, 151 B.R. 928 (9th Cir. BAP 1993). The resolution of this issue and any other issues regarding priority in distribution are left to the courts as matters of substantive law and statutory interpretation.

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

~~(a) TIME FOR FILING PLAN. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.~~

~~(b)~~ (a) IDENTIFICATION OF PLAN. Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

~~(c)~~ (b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement pursuant to § 1125 or

evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed.

Rule 4004. Grant or Denial of Discharge

* * * * *

(c) GRANT OF DISCHARGE. In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, (3) the debtor has filed a waiver under § 727(a)(10), ~~or~~ (4) a motion to dismiss the case under Rule 1017(e) is pending, (5) a motion to extend the time for filing a complaint objecting to discharge is pending, or (6) the debtor has not paid in full the filing fee prescribed by 28 U.S.C.

§ 1930(a) and any fee prescribed by the Judicial Conference of the United States pursuant to 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code. Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within such period, the court may defer entry of the order to a date certain.

* * * * *

COMMITTEE NOTE

Subsection (c) is amended to delay entry of the order of discharge if a motion under Rule 4004(b) to extend the time for filing a complaint objecting to discharge is pending. This subdivision also is amended to delay entry of the discharge order if the debtor has not paid in full the filing fee and the administrative fee required to be paid upon the commencement of the case. If the debtor is authorized to pay the fees in installments in accordance with Rule 1006, the discharge order will not be entered

until the final installment has been paid.

Rule 5005. Filing and Transmittal of Papers

(a) FILING.

(1) Place of Filing. The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U.S.C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk. The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose

of filing solely because it is not presented in proper form as required by these rules or any local rules or practices.

(2) Filing by Electronic Means. A court by local rule may permit documents to be filed, signed, or verified by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. A document filed by electronic means in accordance with this rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * *

COMMITTEE NOTE

The rule is amended to permit, but not require, courts to adopt local rules that allow filing, signing, or verifying of documents by electronic means. However, such local rules must be consistent with technical standards, if any, promulgated by the Judicial Conference of the United States.

An important benefit to be derived by permitting filing by electronic means is that the extensive volume of paper received and maintained as records in the clerk's office will be reduced substantially. With the receipt of electronic data transmissions by computer, the clerk may maintain records electronically without the need to reproduce them in tangible paper form.

Judicial Conference standards governing the technological aspects of electronic filing will result in uniformity among judicial districts to accommodate an increasingly national bar. By delegating to the Judicial Conference the establishment and future amendment of national standards for electronic filing, the Supreme Court and Congress will be relieved of the burden of reviewing and promulgating detailed rules dealing with complex technological standards. Another reason for leaving to the Judicial Conference the formulation of technological standards for electronic filing is that advances in computer

technology occur often, and changes in the technological standards may have to be implemented more frequently than would be feasible by rule amendment under the Rules Enabling Act process.

It is anticipated that standards established by the Judicial Conference will govern technical specifications for electronic data transmission, such as requirements relating to the formatting of data, speed of transmission, means to transmit copies of supporting documentation, and security of communication procedures. In addition, before procedures for electronic filing are implemented, standards must be established to assure the proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms. These matters will be governed by local rules until system-wide standards are adopted by the Judicial Conference.

Rule 9009 requires that the Official Forms shall be observed and used "with alterations as may be appropriate." Compliance with local rules and any Judicial Conference standards with respect to the formatting or presentation of electronically transmitted data, to the extent that they do not conform to the Official Forms, would be an appropriate alteration within the meaning of Rule 9009.

These rules require that certain documents be in writing. For example, Rule 3001 states that a proof of claim is a "written statement." Similarly, Rule 3007 provides that an objection to a claim "shall be in writing." Pursuant to the new subdivision (a)(2), any requirement under these rules that a paper be written may be satisfied by filing the document by electronic means, notwithstanding the fact that the clerk neither receives nor prints a paper reproduction of the electronic data.

Section 107(a) of the Code provides that a "paper" filed in a case is a public record open to examination by an entity at reasonable times without charge, except as provided in § 107(b). The amendment to subdivision (a)(2) provides that an electronically filed document is to be treated as such a public record.

Although under subdivision (a)(2) electronically filed documents may be treated as written papers or as signed or verified writings, it is important to emphasize that such treatment is only for the purpose of applying these rules. In addition, local rules and Judicial Conference standards regarding verification must satisfy the requirements of 28 U.S.C. § 1746.

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE. Rule ~~4(a), (b), (c)(2)(C)(i), (d), (e) and (g)-(j)~~ 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service pursuant to Rule ~~4(d)~~ 4(e)-(j) F.R.Civ.P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(b) SERVICE BY FIRST CLASS MAIL. In addition to the methods of service authorized by Rule ~~4(c)(2)(C)(i) and (d)~~ 4(e) -(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a

copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to ~~also~~ the Attorney General of the United States at

Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to such officer or agency. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United

States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service under this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as

trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is

also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant

as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another

place designated by the United States trustee in the district where the case under the Code is pending.

(c) SERVICE BY PUBLICATION. If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule ~~4(d) or (i)~~ 4(e)-(j) F.R.Civ.P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail postage prepaid, to the party's last known address and by at least one publication in such manner and form as the court may direct.

(d) NATIONWIDE SERVICE OF PROCESS. The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

~~(e) SERVICE ON DEBTOR AND OTHERS IN FOREIGN COUNTRY. The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F.R.Civ.P.~~

~~(f)~~ (e) SUMMONS: TIME LIMIT FOR SERVICE. If service is made pursuant to

Rule ~~4(d)(1)-(6)~~ 4(e)-(j) F.R.Civ.P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(f) PERSONAL JURISDICTION. If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of

any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

~~(g) EFFECT OF AMENDMENT TO RULE 4 F.R.CIV.P. The subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules shall be the subdivisions of Rule 4 F.R.Civ.P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F.R.Civ.P. subsequent thereto.~~

COMMITTEE NOTE

The purpose of these amendments is to conform the rule to the 1993 revisions of Rule 4 F.R.Civ.P. Rule 7004, as amended, continues to provide for service by first class mail as an alternative to the methods of personal service provided under Rule 4 F.R.Civ.P.

Rule 4(d)(2) F.R.Civ.P. provides a procedure by which the plaintiff may request by first class mail that the defendant waive service of the summons. This procedure is not applicable in adversary proceedings because it is not

necessary in view of the availability of service by mail under Rule 7004(b). However, if a written waiver of service of a summons is made in an adversary proceeding, Rule 4(d)(1) F.R.Civ.P. applies so that the defendant does not thereby waive any objection to the venue or the jurisdiction of the court over the person of the defendant.

Subdivisions (b)(4) and (b)(5) are amended to conform to the 1993 amendments to Rule 4(i)(3) F.R.Civ.P., which protect the plaintiff from the hazard of losing a substantive right because of failure to comply with the requirements of multiple service when the United States or an officer, agency, or corporation of the United States is a defendant. These subdivisions also are amended to require that the summons and complaint be addressed to the civil process clerk at the office of the United States attorney.

Subdivision (e), which has governed service in a foreign country, is abrogated and Rule 4(f) and (h)(2) F.R.Civ.P., as substantially revised in 1993, are made applicable in adversary proceedings.

The new subdivision (f) is consistent with the 1993 amendments to F.R.Civ.P. 4(k)(2). It clarifies that service or filing a waiver of service in accordance with this rule or the applicable subdivisions of F.R.Civ.P. 4 is sufficient to establish personal jurisdiction over the defendant. See

the committee note to the 1993 amendments to Rule 4 F.R.Civ.P.

Subdivision (g) is abrogated. This subdivision was promulgated in 1991 so that anticipated revisions to Rule 4 F.R.Civ.P. would not affect service of process in adversary proceedings until further amendment to Rule 7004.

Rule 8008. Filing and Service

(a) FILING. Papers required or permitted to be filed with the clerk of the district court or the clerk of the bankruptcy appellate panel may be filed by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs shall be deemed filed on the day of mailing. An original and one copy of all papers shall be filed when an appeal is to the district court; an original and three copies shall be filed when an appeal is to a bankruptcy appellate

panel. The district court or bankruptcy appellate panel may require that additional copies be furnished. Rule 5005(a)(2) applies to papers filed with the clerk of the district court or the clerk of the bankruptcy appellate panel if filing by electronic means is authorized by local rule promulgated pursuant to Rule 8018.

* * * * *

COMMITTEE NOTE

This rule is amended to permit, but not require, district courts and, where bankruptcy appellate panels have been authorized, circuit councils to adopt local rules that allow filing of documents by electronic means, subject to the limitations contained in Rule 5005(a)(2). See the committee note to the 199__ amendments to Rule 5005.

Rule 9006. Time

* * * * *

(c) REDUCTION.

* * * * *

(2) Reduction Not Permitted. The court may not reduce the time for taking action under Rules ~~2002(a)(4) and (a)(8)~~ 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

* * * * *

COMMITTEE NOTE

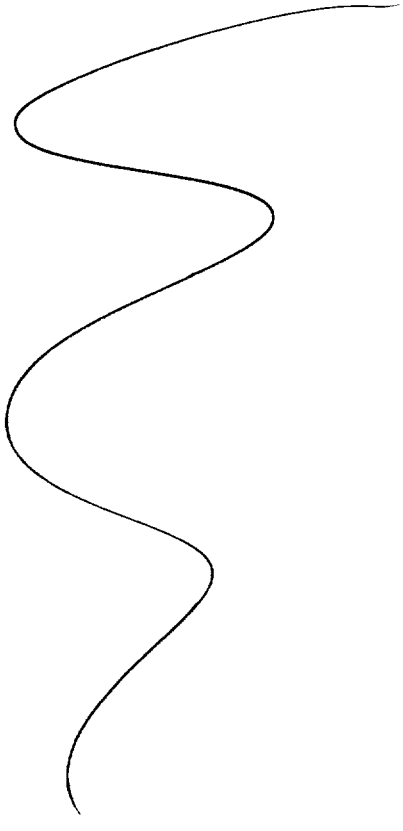
Subdivision (c)(2) is amended to conform to the abrogation of Rule 2002(a)(4) and the renumbering of Rule 2002(a)(8) to Rule 2002(a)(7).

Supplemental

Agenda

Book

Materials



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

August 24, 1994

MEMORANDUM TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Attached are the agenda materials for the September 22-23, 1994, meeting in New York City. Also attached is a pamphlet containing the Federal Rules of Civil Procedure as amended through December 1, 1993. Please bring both the agenda book and the civil rules pamphlet with you to the September meeting.

As a reminder, the meeting will be held in the Hughes Room of the Association of the Bar of the City of New York, 42 West 44th Street. It will start each day at 8:45 a.m.

As you know, Advisory Committee members and former members plan to hold a dinner honoring former Advisory Committee reporter and member Professor Lawrence P. King in recognition of his 26 years of service to the Advisory Committee. The dinner will be held at 7 p.m. on Thursday, September 22, at

Chin Chin Restaurant
216 East 49th Street
(between 2nd & 3rd Avenues)
(212) 888-4555

The all-inclusive price for dinner and gratuities is $65.00 per person. Please send a check in the appropriate amount to member emeritus

Herbert P. Minkel, Jr.
Fried, Frank, Harris, Shriver and Jacobson
One New York Plaza, Suite 2500
New York, New York 10004-1980

Your check will serve as your reservation, so please make sure Mr. Minkel receives it by Friday, September 16. If you have any questions about the dinner, Mr. Minkel's phone number is (212) 820-8035.

Mark D. Shapiro

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

File

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

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JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 9, 1994

MEMORANDUM TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

At Professor Resnick's request, I am attaching additional materials for the September 22-23, 1994 meeting in New York City. Please bring these materials with you to the meeting.

Mark D. Shapiro

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

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

September 9, 1994

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Agenda Item 9 - September 23-24, 1994 Meeting.

Dear John:

Thank you for your letter of August 31, 1994, regarding item No. 9 (B.Rule 9011 and Civil Rule 11) of the agenda for the next meeting of the Advisory Committee on Bankruptcy Rules.

First, I want to thank you for pointing out my error when I wrote that two Supreme Court Justices joined with Justice Scalia in his dissent from the order promulgating the 1993 amendments to Rule 11. As you correctly indicated, although two Justices joined in the dissenting opinion as it relates to discovery provisions, only Justice Thomas joined with Justice Scalia in that part of the dissenting opinion that deals with Rule 11. This is stated clearly in the first paragraph of the dissenting opinion that is included in the agenda materials. Mea culpa.

I also thank you for sending me the excerpt of the remarks of Judge Sam C. Pointer, Jr. to the House Judiciary Committee addressing the points made by the dissenting Justices. It would be useful for the members of the Advisory Committee also to have the benefit of Judge Pointer's remarks prior to the meeting.

Please circulate to the Advisory Committee (and others who received agenda materials) copies of this letter together with copies of Judge Pointer's remarks.

Best personal regards.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

STATEMENT

of

SAM C. POINTER, JR.

CHIEF DISTRICT JUDGE
FOR THE NORTHERN DISTRICT OF ALABAMA
and
CHAIRMAN, ADVISORY COMMITTEE
ON CIVIL RULES

before the

SUBCOMMITTEE ON INTELLECTUAL PROPERTY
AND JUDICIAL ADMINISTRATION

of the

COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

Concerning Recent Amendments to
Federal Rules of Civil Procedure

June 16, 1993

a mere passive failure to withdraw a document would not constitute a Rule 11 violation.

Rule 11, as so amended by the Standing Committee, was approved by the Judicial Conference of the United States and then adopted by the Supreme Court, with two justices (Scalia and Thomas) dissenting.

Issues.

Given the numerous modifications contained in the new rule, I am unsure what concerns may be expressed to Congress regarding Rule 11. I urge the Subcommittee to read the Committee Note accompanying Rule 11 (pp. 180-89), which explains in detail its various provisions.

I assume there will be some who, like Justices Scalia and Thomas, will contend that, although some of the changes may be worthwhile, the amendments may render Rule 11 "toothless" and thereby eliminate "a significant and necessary deterrent to frivolous litigation." Their dissent (pp. 104-07 of House Document 103-74) focuses on three of the changes: the "safe harbor;" making imposition of sanctions discretionary, rather than mandatory; and disfavoring compensation for litigation expenses as a sanction.

Justice Scalia accurately observed that the combination of elements in the new rule should reduce the number of Rule 11 motions presented to the court. Indeed, this is one of the principal aims of the revision, and we believe the FJC studies amply support our conclusion that there has been an excessive and unproductive amount of Rule 11 activity. To be sure, the "safe harbor" will reduce the risks to a litigant for initially including a questionable claim or defense. On the other hand, amended Rule 11 will continue to deter — and, in fact, more effectively and equitably deter — the *pursuit* of frivolous litigation, claims, and defenses. The "safe harbor" provisions, coupled with the proscription against the continued assertion of contentions that can

no longer be justified, should actually result in more frequent abandonments and withdrawals of frivolous contentions than the prior rule. It should be noted that the "safe harbor" applies only to party-initiated motions; these provisions will not prevent court-initiated sanctions, which would be appropriately invoked by the more egregious violations that burden or offend the court.

Whether imposition of sanctions should be discretionary or mandatory is a question that has troubled and divided both the Advisory Committee and the Standing Committee.[3/] Those favoring mandatory sanctions generally express the concern that, if discretionary, sanctions will be imposed less frequently due to judges' natural reluctance to punish those who appear before them. Those favoring discretionary sanctions note that the mandate is largely illusory since the judge has wide discretion in selecting what sanction to impose, and that, indeed, explicit discretion to decline imposition of sanctions is needed in order to deal with the problem of Rule 11 motions that raise technical, insignificant violations. Influenced greatly by the disruption often caused by Rule 11 motions, the Standing Committee concluded that, on balance, a discretionary standard was preferable, and this is the form of the rule approved by the Judicial Conference and adopted by the Supreme Court.

The Scalia dissent correctly notes that the restrictions on monetary sanctions payable directly to movants will decrease the incentive for parties to file Rule 11 motions. This represents a conscious choice by the drafters. Too often, Rule 11 motions have been filed in an effort to circumvent the standards for statutory awards of attorney's fees to prevailing parties or to shortcut the procedures that would apply in traditional malicious prosecution actions. We

---

3. As mentioned in the Scalia dissent, the language of Rule 37, unlike that of Rule 11, continues to treat sanctions for discovery abuses as mandatory. This difference can perhaps best be explained by noting that the mandatory language of Rule 37, which long predated the 1983 revision of Rule 11, produced very few complaints. This in turn may be due to the fact that monetary awards under Rule 37 have typically been limited to expenses resulting from some particular discovery abuse, and not the shifting of the entire cost of litigation to another party.

believe that the principal purpose of Rule 11 should be to deter improper representations to the court which offend the integrity of the judicial process, and that parties should not be encouraged to file Rule 11 motions to obtain some personal benefit. At the same time, however, the amended rule does not discourage parties from preparing Rule 11 motions; service of meritorious Rule 11 motions should result in withdrawal or abandonment of frivolous claims or defenses, and, if court action is needed to accomplish that result, the fees incurred in presenting the motion may be reimbursed.

The most vigorous opposition to the proposals to amend Rule 11 came, however, not from those concerned about possible weakening of the rule, but from those who believed the changes did not go far enough — that Rule 11 should have been either abrogated altogether or restored to a form comparable to the pre-1983 language. We are convinced, however, that, despite its deficiencies and problems, Rule 11, as amended in 1983, has served a prophylactic purpose in calling on litigants to "stop and think" before asserting unsupportable contentions. According to the FJC survey, the great majority of district judges believe that Rule 11 — perhaps more as a result of its in terrorem effect rather than in the actual imposition of sanctions — has been a valuable tool, albeit less effective than some of the other management techniques available to the courts. The Advisory Committee believes that, with appropriate changes, Rule 11 can and will continue to serve an useful role in combating litigation abuses.

The plaintiffs' civil rights bar was especially vocal in asserting that the 1983 version of Rule 11 had been used by defense counsel and some courts to "chill" the development of potentially meritorious, yet untested and novel, claims. We believe their concerns have been adequately addressed and remedied in the amended rule, which includes some changes made by the Advisory Committee and Standing Committee after publication of the original proposal. In

addition to the protection afforded by the "safe harbor" provisions, Rule 11(b) places plaintiffs and defendants on a more equitable footing with respect to their obligations, and Rule 11(c)(2), relating to the type of sanction to be imposed, should avoid the unduly punitive sanctions occasionally imposed. Of particular note is the recognition in Rule 11(b)(3) that sometimes a plaintiff will have a legitimate basis for believing that some claim can be pursued but will need discovery from a defendant or third-parties to obtain factual support for that claim.

One additional matter may draw comment — the so-called "pleading as a whole" concept. Some may argue that a sanction should be imposed only if the pleading, taken as a whole, violates the certification requirements. The Advisory Committee was convinced, however, that the mere fact that some contentions in a complaint, answer, or brief have arguable merit should not absolutely excuse the inclusion and active pursuit of other contentions that were made for improper purposes, without any evidentiary support (existing or potentially obtainable through discovery), or without colorable legal merit. At the same time, the Committee agrees that parsing a document for every statement possibly subject to challenge under Rule 11 should not be encouraged. The proper balance, we believe, is achieved through the "safe harbor," the adoption of a discretionary standard, and the elimination of the incentive for personal gain. Moreover, in the Committee Note we have included an admonition that Rule 11 motions should not be used for minor, inconsequential violations and that, in deciding what sanction — if any — to impose, the court should consider whether the violation infects an entire pleading or only one count or defense.

III. DISCOVERY AND DISCLOSURE; RULES 26-37 AND FORM 35

At the same time the Brookings Institute was reviewing the causes and potential remedies for unnecessary expense and delays in litigation — a study that would ultimately provide the

(Cite as: 1994 WL 498242 (9th Cir.))
NOTICE: THIS OPINION HAS N[illegible] BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPO[illegible]BJECT TO REVISION OR WITHDRAWAL.

Passed out of Bankr. Mg.
Sept BK Ct

In re: Carol Freeman MARSCH[illegible]ppellant,
v.
Carol F. MARSCH[illegible]
In re: CAROL Freeman MARS[illegible]-Appellant,
v.
Carol F. MARSCH[illegible]
Nos. 92-564[illegible]
United States [illegible]
Ninth Ci[illegible]
Argued and Sub[illegible]
Filed Septem[illegible]

Appeals from the Ninth Circuit[illegible]lason and Meyers, Bankruptcy Judges, Presiding

Michael L. Sanford and John P. Caviness, Hill & Sanford, Santa Barbara, California, for the claimant-appellant.

Joseph M. Sholder, Michaelson, Susi & Michaelson, Santa Barbara, California, for the respondent-appellee.

Before: Alex Kozinski and Stephen S. Trott, Circuit Judges, and Spencer Williams, District Judge. [FN*]

FN* The Honorable Spencer Williams, Senior United States District Judge for the Northern District of California, sitting by designation.

PER CURIAM.

*1 Before a state court could enter a restitution judgment against Carol Marsch ("debtor' ') in favor of her ex-husband, John Marsch, she filed a Chapter 11 petition. The bankruptcy court found that debtor, who was not in business, filed the petition to prevent entry of the judgment and avoid posting an appeal bond, even though debtor had sufficient assets to pay the judgment or post the bond. Consequently, the bankruptcy court dismissed the petition, holding that "[i]t is not the purpose of the bankruptcy code to allow a debtor to file Chapter 11 bankruptcy to avoid the posting of an appeal bond where the debtor has the clear ability to satisfy the judgment in full from nonbusiness assets.' ' Thus, the bankruptcy court characterized the petition as a "bad faith' ' filing and imposed sanctions pursuant to Bankruptcy Rule 9011. The Bankruptcy Appellate Panel ("BAP' ') reversed both the dismissal for "bad faith' ' and the award of sanctions. We have jurisdiction pursuant to 28 U.S.C. s 158(b), and we reverse.

I

In 1989, debtor obtained a judgment against John Marsch in state court. Pursuant to that judgment, John Marsch transferred certain shares of stock to debtor. In 1991, the state appellate court reversed the trial court's judgment and remanded the case for

Guaranteed Retirement, Inc., 112 B.R. 263, 270 (Bankr. N.D. Ill.), aff'd, 119 B.R. 149 (N.D. Ill. 1990). "The existence of good faith depends on an amalgam of factors and not upon a specific fact.' ' In re Arnold, 806 F.2d 937, 939 (9th Cir. 1986). The test is whether a debtor is attempting to unreasonably deter and harass creditors or attempting to effect a speedy, efficient reorganization on a feasible basis. Id.

The term "good faith' ' is somewhat misleading. Though it suggests that the debtor's subjective intent is determinative, this is not the case. Instead, the "good faith' ' filing requirement encompasses several, distinct equitable limitations that courts have placed on Chapter 11 filings. See N.R. Guaranteed, 112 B.R. at 271-72. Courts have implied such limitations to deter filings that seek to achieve objectives outside the legitimate scope of the bankruptcy laws. See Furness v. Lilienfield, 35 B.R. 1006, 1011 (D. Md. 1983); Lawrence Ponoroff & F. Stephen Knippenberg, The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy, 85 Nw. U. L. Rev. 919, 946-47 (1991). Pursuant to 11 U.S.C. s 1112(b), courts have dismissed cases filed for a variety of tactical reasons unrelated to reorganization. While the case law refers to these dismissals as dismissals for "bad faith' ' filing, it is probably more accurate in light of the precise language of section 1112(b) to call them dismissals "for cause.' '

One limitation some courts have implied under section 1112(b) involves Chapter 11 cases filed to stay a state court judgment against the debtor pending appeal. In those cases, courts have expressed concern that the petition is merely a "litigating tactic' ' designed to "act as a substitute for a supersedeas bond' ' required under state law to stay the judgment. In re Wally Findlay Galleries (New York), Inc., 36 B.R. 849, 851 (Bankr. S.D.N.Y. 1984).

*3 Several bankruptcy courts have held that a debtor may use a Chapter 11 petition to avoid posting an appeal bond if satisfaction of the judgment would severely disrupt the debtor's business. A petition filed for this purpose doesn't comport with the objectives of the bankruptcy laws, however, if the debtor can satisfy the judgment with nonbusiness assets. See, e.g., In re Sparklet Devices, Inc., 154 B.R. 544, 548-49 (Bankr. E.D. Mo. 1993); In re Harvey, 101 B.R. 250, 252 (Bankr. D. Nev. 1989); In re Holm, 75 B.R. 86, 87 (Bankr. N.D. Cal. 1987).

We need not decide whether bankruptcy laws can be used to skirt state court procedural rules in this manner. The bankruptcy court found that the debtor's Chapter 11 petition was filed solely to delay collection of the restitution judgment and to avoid posting an appeal bond. Even assuming a Chapter 11 petition may be used for this purpose when enforcement of a judgment would cause severe business disruption, a question we leave open, this would not help the debtor here. The bankruptcy court found that the debtor had the financial means to pay the judgment. Moreover, because she wasn't involved in a business venture, the judgment didn't pose any danger of disrupting business interests. These factual findings are clearly supported by the record; the bankruptcy court thus correctly held that the debtor's

the language (which is similar) to policy considerations (which may be different). In deciding whether to follow Townsend 's lead, then, we must ask whether the policy considerations that prompted the court there to depart from the clear language of FRCP 11 apply with equal force in the bankruptcy context. We conclude they do not While bankruptcy proceedings serve important purposes, they seldom carry the broad policy implications of many federal lawsuits, such as those seeking enforcement of environmental or antitrust laws. At the same time, experience has shown that bankruptcy proceedings are subject to a degree of manipulation and abuse not typical of civil litigation. [FN2]

These differences between bankruptcy proceedings and ordinary civil litigation militate against wholesale adoption of Townsend 's reasoning in interpreting Bankruptcy Rule 9011. Nonetheless, we accept Townsend 's basic teaching, which is that frivolousness and improper purpose are not wholly independent considerations but "will often overlap.' ' 929 F.2d at 1362. We thus adopt an interpretation of Bankruptcy Rule 9011 that differs somewhat from Townsend 's interpretation of FRCP 11, but one we believe is more faithful to Rule 9011's language and more consistent with the realities of bankruptcy practice. We conclude that bankruptcy courts must consider both frivolousness and improper purpose on a sliding scale, where the more compelling the showing as to one element, the less decisive need be the showing as to the other. [FN3]

Applying this standard to the case before us, we conclude that the bankruptcy court did not abuse its discretion by imposing sanctions. With respect to frivolousness, we cannot conclude that debtor's petition was completely without legal foundation. Neither this court nor a court in respondent's district has decided whether debtors who have sufficient nonbusiness assets to pay a judgment may nevertheless use a Chapter 11 petition to avoid posting an appeal bond. As a result, debtor ostensibly asserted "a good faith argument for the extension, modification, or reversal of existing law.' ' Bankr. R. 9011; see Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 471-72 (9th Cir. 1990). The overwhelming weight of authority in districts where the issue has been decided, however, flatly contradicts the position asserted by the debtor. See, e.g., In re Sparklet Devices, Inc., 154 B.R. 544, 548-49 (Bankr. E.D. Mo. 1993); In re Harvey, 101 B.R. 250, 252 (Bankr. D. Nev. 1989); In re Holm, 75 B.R. 86, 87 (Bankr. N.D. Cal. 1987). And the two cases providing some support for her position involved debtors who were unable to post an appeal bond-clearly not the situation here. See In re Ford, 74 B.R. 934, 938 (Bankr. S.D. Ala. 1987); In re Corey, 46 B.R. 31, 32-33 (Bankr. D. Haw. 1984). While debtor's petition can't be characterized as wholly frivolous, it was certainly of dubious legal merit.

*5 Turning to Bankruptcy Rule 9011's second element, the record clearly reveals that debtor's petition was filed for an improper purpose. As noted earlier, see pp. 11106-07 supra, the bankruptcy court found that the petition was filed solely to delay collection of the judgment and avoid posting an appeal bond, even though debtor had the ability to satisfy the judgment with nonbusiness assets. Debtor's action was

A complaint or petition is frivolous if, after reasonable inquiry, a debtor "could not form a reasonable belief that the petition is well grounded in fact and warranted by existing law or a good faith argument for the modification or reversal of existing law.' ' Rainbow Magazine, 136 B.R. 545, 551 (Bankr. 9th Cir. 1992). Here, the bankruptcy court sanctioned the debtor because it concluded that case law in the Ninth Circuit clearly established that the debtor's case was filed in "bad faith.' ' [FN1] Although a number of bankruptcy courts had held that using bankruptcy law to appeal a judgment without posting an appeal bond constituted a "bad faith' ' filing, and although we now hold that the bankruptcy court's assessment of the viability of the petition was correct, no court of appeals or BAP decision had yet addressed the issue at the time the petition was filed. Even the bankruptcy courts in this circuit did not all agree on the proper approach. Compare In re Karum Group, Inc., 66 B.R. 436, 437-38 (Bankr. W.D. Wash. 1986) with In re Corey, 46 B.R. 31, 33 (Bankr. D. Haw. 1984). 11 U.S.C. s 1112(b) doesn't explicitly require that petitions be filed in good faith, much less address whether a petition may be filed in order to avoid posting an appeal bond. Under these circumstances, I agree with the experienced members of the BAP: the debtor could reasonably have believed that the petition was warranted by law or a good faith argument for the modification or reversal of existing law. Cf. Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (even though BAP had already adversely decided the issue, the BAP decision's "binding effect is so uncertain that it cannot be the basis for sanctioning a party for seeking a contrary result in a district where the underlying issue has never been resolved' '). Thus, I am unable to conclude that at the time of filing debtor's petition was frivolous, even though we now hold that it was filed for a purpose inconsistent with congressional intent. Therefore, I believe we are constrained to hold, as the BAP did, that the bankruptcy court abused its discretion in sanctioning the debtor. Accordingly, I would affirm the BAP's reversal of the sanctions. [FN2]

*7 I do not mean to suggest that lack of authority on point always precludes sanctions. However, when courts are construing equitable limitations not explicitly delineated in the Bankruptcy Code, courts should be wary of imposing sanctions when the law is not well-developed.

FN1. The 11 U.S.C. s 305(a)(1) issue is not before us on appeal. Under section 305(c), an order dismissing a case pursuant to section 305(a) is not reviewable by the courts of appeals.

FN2. For example, abuse of bankruptcy proceedings by renters became so widespread in the Central District of California that "[i]n 1991, J. Clifford Wallace, Chief Judge of the Ninth Circuit Court of Appeals, established an Ad Hoc Committee on Unlawful Detainer and Bankruptcy Mills to look into possible solutions to the practice of abusive filings to prevent eviction.' ' Judge Geraldine Mund, Updated Report of Unlawful Detainer Task Force 1 (1992). The committee found that bankruptcy "mills' ' are a substantial cause of the abuse: They churn out large numbers of petitions (which result in an automatic

file

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 1, 1994

MEMORANDUM TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

At Judge Mannes' request, I am attaching additional agenda materials for the September 22-23, 1994 meeting in New York City.

Mark D. Shapiro

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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CRIMINAL RULES

RALPH K. WINTER, JR.
EVIDENCE RULES

August 29, 1994

TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES:

I enclose two recent court of appeals decisions in chapter 7 cases holding that the IRS is entitled to priority treatment despite the fact that its proof of claim was tardily filed. In re Pacific Atlantic Trading Co., No. 92-16973 (9th Cir. 8/18/94), and In re Vecchio, 20 F3d 555 (2d Cir. 1994).

You may recall that the proposed amendments to Rule 3002 that will be published soon do not address the issue regarding priority treatment of tardily filed tax claims. The committee note accompanying the proposed amendment clarifies that this issue is left to the courts for resolution based on statutory interpretation of the Bankruptcy Code. A copy of the proposed amendments to Rule 3002 and the committee note can be found at the end of the recently distributed agenda book for the September meeting.

The reason for circulating these decisions is because the reasoning of the courts goes well beyond chapter 7 cases and the treatment of priority tax claims -- it also could apply to general unsecured claims in cases in other chapters. In essence, these courts have held that Rule 3002 does not imposes timeliness of a proof of claim as a condition to allowance of a claim. The courts also rely on the fact that section 502(b) of the Code (which is applicable in all cases and to all claims) does not list tardiness as a basis for disallowing a claim. The Second Circuit is more explicit, clearly indicating that it is inappropriate for the Rules to make timely filing of a proof of claim a condition to allowance.

The reasoning of these courts is consistent with the decision in In re Hausladen, 146 BR 557 (Bankr. D.Minn 1992) (late filed claim in chapter 13 case must be allowed) which the Advisory Committee had discussed on several occasions during the past two years. Because most courts had rejected the Hausladen reasoning and had held that it is appropriate for the Rules to

require a timely proof of claim as a condition to allowance (except in chapter 7 cases), the Committee decided last year to leave Rule 3002 as is, except to provide that the holder of a tardily filed claim may receive a distribution in a chapter 7 case to the extent provided in section 726 of the Code. Many members of the Committee also thought that the Hausladen reasoning was wrong. In any event, I indicated that I will continue to monitor judicial developments on this issue.

The reason for circulating these decisions is to keep you informed of these developments. I am not recommending any action at this time. I would not be surprised if other court of appeals decisions -- perhaps with different results -- are rendered on his issue in the near future. Last year, the Tenth Circuit (without discussing Hausladen) strictly enforced Rule 3002 by holding that the bankruptcy court erred when it permitted a creditor in a chapter 12 case to file a late proof of claim. Jones v. Arross, 9 F3d 79 (10th Cir. 1993).

Most recent lower court decisions reject the reasoning of Hausladen to the extent that it interprets sections 501 and 502 as precluding any rule that requires the timely filing of a proof of claim as a condition to the allowance of the claim in cases that are not in chapter 7. Most recently, in Gullatt v. U.S., 1994 U.S.Dist. LEXIS 9496 (M.D. Tenn. 7/7/94), the district court rejected the reasoning in Hausladen, upheld the validity of Rule 3002, and disallowed a tardily filed claim in a chapter 13 case. A copy of Gullatt is enclosed.

Although this issue is not on the agenda for the September meeting, I will briefly bring the Committee up to date at that time.

I look forward to seeing you in New York.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

Citation | Rank(R) | Database | Mode
--- B.R. ---- | R 1 OF 1 | ALLFEDS | Page
(CITE AS: 1994 WL 371077 (M.D.TENN.))

In re Connie L. and Sandra K. GULLATT, Debtors.
Connie L. and Sandra K. GULLATT, Appellants,
v.
UNITED STATES of America, Appellee.
No. 3:94-0229.
United States District Court,
M.D. Tennessee,
Nashville Division.
July 7, 1994.

Michael James Passino, Passino & Minton, Nashville, TN, for appellants.
Richard Fox Clippard, Office of the U.S. Atty., Nashville, TN, for appellee.

MEMORANDUM

WISEMAN, District Judge.

*1 This is an appeal from the bankruptcy court's ruling that a creditor's tardily filed CLAIM is allowable in a Chapter 13 bankruptcy case, 164 B.R. 279. This court reverses the bankruptcy court and holds that the tardily filed CLAIMS of Chapter 13 creditors are not allowable.

I.

Connie and Sandra GULLATT filed for Chapter 13 bankruptcy on February 11, 1993. Pursuant to Rule 3002 of the Federal Rules of Bankruptcy Procedure, creditors' proofs of CLAIMS were due before June 16, 1993. Despite receiving proper notice of the bankruptcy, the Veterans Administration failed to apply for the time extension available to government entities through Rule 3002(c)(1). The Administration did not file its $13,966.95 CLAIM until August 16, 1993, three months late. The Veterans Administration's explanation for its tardiness was that they lack adequate manpower to move for additional time every time they receive a bankruptcy notice. Ruling on the trustee's objection to the filing of this late CLAIM, the bankruptcy court held that late filing does not require disallowance.

Judge Keith Lundin agreed with a prior opinion of Chief Judge George Paine of this district, and both cited with approval the reasoning and holding of In re Hausladen, 146 B.R. 557, 558-59 (Bankr.D.Minn.1992) (en banc). Finding Bankruptcy Rule 3002 to be inconsistent with the Bankruptcy Code, they found the Rule to be "not effective."

II.

A.

[1] Rule 3002(a) states that an unsecured creditor "must file a proof of CLAIM or interest in accordance with this rule for the CLAIM or interest to be allowed." (emphasis added). The Rule then states in subsection (c) that such proof "shall be filed within 90 days after the first date set for the meeting of the creditors." (emphasis added). The language of Rule 3002 is unambiguous and this court must apply the "ordinary, contemporary, common meaning" of this language, See Pioneer Inv. Services v. Brunswick Associates, --- U.S. ----, ----, 113 S.Ct. 1489, 1495, 123 L.Ed.2d 74 (1993), unless there is an irreconcilable conflict with the enabling legislation or the Constitution.

The Hausladen court disagrees with this Court's reading of the plain language of Rule 3002, asserting that the Rule does not "explicitly say but

impl[ies] that filing within the prescribed period is a prerequisite to allowance." 146 B.R. at 559. Hausladen "explains" that this and other courts' "erroneous reading [of the Rule] arose when the drafters of the new Rule 3002 hastefully copied the substance of old Rule 302 without paying any attention to the major change in the underlying statute." Id. Contrary to Hausladen 's characterization of the Advisory Rules Committee consideration of this Rule as hasty, the Federal Rules of Bankruptcy Procedure were scrutinized by the Committee "line by line, word for word as the rules proceeded through several drafts." Letter from Judge Ruggero J. Aldisert, Chairman of the Advisory Committee on Bankruptcy Rules transmitting the Rules to Judge Edward T. Gignoux, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (Aug. 9, 1982) (reprinted in Appendix 1 Collier on Bankruptcy, p. 1276 (Lawrence P. King ed., 15th ed. 1994)). This scrutiny included the input of judges, lawyers, law professors, and governmental agencies from across the country. Id. The Rules were finally recommended by the Judicial Conference of the United States and transmitted to Congress with the express approval of the United States Supreme Court. After three months time in which Congress could act to change the Rules if they saw fit, the Bankruptcy Rules took effect on August 1, 1983. Following the enactment of Pub.L. 98-353, on July 10, 1984, wherein Congress responded to the decision of Northern Pipeline, the Advisory Committee on the Bankruptcy Rules minutely re-examined the Rules to conform them to the new jurisdictional scheme. Again public hearings were held at various places across the country, the Rules as amended were submitted to the Rules and Practice Committee of the Judicial Conference, the Supreme Court, and to the Congress. No changes were made and the Revised Rules took effect August 1, 1987.

B.

*2 The "major change in the underlying statute" to which Hausladen refers is the relocation from the Bankruptcy Code to the Bankruptcy Rules of the provision disallowing tardy CLAIMS. Under the old Bankruptcy Act, s 57n disallowed late filed CLAIMS. Under the new Bankruptcy Code, ss 501 and 502 do not specifically bar allowance of creditors' late filed CLAIMS; instead, late CLAIMS are disallowed through the procedural mechanism of Rule 3002. In re Zimmerman, 156 B.R. 192, 197 (Bankr.W.D.Mich.1993) (en banc).

Hausladen's conclusion that ss 501 and 502 "explicitly" require courts to allow late CLAIMS, 146 B.R. at 560, is based upon the following reasoning. Section 502 provides:

Allowance of CLAIMS or interests.

(a) A CLAIM or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects.

(b) ... if such objection to a CLAIM is made, the court, after notice and a hearing ... shall allow such CLAIM ... except to the extent that--[eight exceptions which do not include late filing.]

Because late filing is not listed as an exception under s 502(b), Hausladen concludes that late filed CLAIMS must be allowed. Id. at 599-60.

[2] What this analysis ignores is that proper filing of a CLAIM under s 501 is a condition precedent to consideration under s 502. Zimmerman, 156 B.R. at 195. Section 502(a) refers to a CLAIM "proof of which is filed under section 501"; section 502(b) instructs a court to "allow such CLAIM" if it does not come within one of the listed exceptions. If a CLAIM is not properly

filed under s 501, a court need not examine the exceptions set out in s 502(b). Section 501 states inter alia that a creditor may file a proof of CLAIM, and that if the creditor fails to timely file, proof of CLAIM may be filed by other specified parties. Sections 501 and 502 are therefore consistent with Rule 3002's disallowance of late filed CLAIMS. This court agrees with Zimmerman 's conclusion that Rule 3002 is a procedural complement to ss 501 and 502, rather than Hausladen 's conclusion that Rule 3002 is a conflicting substantive requirement. Zimmerman, 156 B.R. at 197; see also In re Messics 159 B.R. 803 (Bankr.N.D.Ohio 1993) (siding with Zimmerman over Hausladen); In re Parr, 165 B.R. 677, 681-83 (Bankr.N.D.Ala.) (siding with Zimmerman over Hausladen and also citing a number of other recent supporting decisions); 8 Collier on Bankruptcy P 3002.02[1] (Lawrence P. King ed., 15th ed. 1994) ("Rule 3002 complements ss 501 and 502 of the Code"). Contra Hausladen, 146 B.R. at 557 ("section 502 and Rule 3002 are not complementary but independent").

C.

Contrary to Hausladen 's reading of the legislative history, this Court finds no indication that the removal from the Code to the Rules of the provision disallowing tardy CLAIMS signalled a major change in bankruptcy law. Under the previous Bankruptcy Act, s 57(n) specifically disallowed late filed CLAIMS. Former Bankruptcy Rule 302(e) set the time limit for filing Chapter 7 and Chapter 13 CLAIMS at 6 months. See Advisory Committee Notes following Rule 3002(c). The Advisory Committee Notes following Rule 3002(c) make clear that the new Rule 3002(c) was simply adapted from former Rule 302(e), with the minor change in the length of time provided for filing.

*3 As explained in In re Bailey, 151 B.R. 28 (Bankr.N.D.N.Y.1993), the absence of specific statutory disallowance of tardy CLAIMS did not signal a change from the previous law barring tardy CLAIMS. Rather, the legislative history of s 501 shows that specific procedural details under the Code were intentionally left for the Federal Rules of Bankruptcy Procedure: "The Rules ... will set the time limits, the form, and the procedure for filing, which will determine whether CLAIMS are timely or tardily filed." Id. at 31, citing H.R.Rep. No. 595 95th Cong., 1st Sess. 351 (1977), reprinted in 1978 U.S.Code Cong. & Admin.News 5963, 6307; see also Historical and Revision Notes following 11 U.S.C. s 501. Further legislative history states that in modernizing the bankruptcy law, "nearly all procedural matters [formerly incorporated in the provisions of the Act] have been removed and left to the Rules of Bankruptcy Procedure." Bailey 151 B.R. at 32, (citing H.R.Rep. No. 595, 95th Cong., 1st Sess. 449 (1977), reprinted in 1978 U.S.Code Cong. & Admin.News 5963, 6405).

[3] What the legislative history does not say is even more impressive than what it does. There is no indication in the legislative history that the drafters of the new Code and the new Rules intended to effect a major change in bankruptcy law by allowing late filed CLAIMS under Chapter 13. The Supreme Court has indicated its reluctance "to accept arguments that would interpret the [new bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in legislative history." In re Messics, 159 B.R. at 809 (quoting Dewsnup v. Timm --- U.S. ----, ----, 112 S.Ct. 773, 779, 116 L.Ed.2d 903 (1992)). The Messics court indeed saw the

change proposed by Hausladen to be a "major change" in policy:

It is difficult to see how [Chapter 13] reorganization plans could be devised without bar dates on CLAIMS allowance. The amount a chapter 13 debtor can devote to a plan is a function not only of his projected available income, but also of the type and number of CLAIMS against him.... Without a bar date, the debtor could not realistically anticipate receiving a discharge despite years of conscienscious payment of available income.

Moreover, creditors could not count on dividends that might have been bargained for in formulating a plan.

Id. at 809. Similarly, Zimmerman stressed that,

A bar date is necessary so that a reorganization plan may more easily be formulated. Furthermore, a plan can only be administered after all CLAIMS against the estate have been filed.... Calculations involving plan distributions would be extremely difficult even if late CLAIMS were paid less than other CLAIMS because late CLAIMS would still be taking something away from the timely filed CLAIMS. The debtor and all timely filing creditors benefit from the CLAIMS bar date because the case can be administered much more efficiently. On the other hand, no injustice results by barring late CLAIMS of unsecured creditors who have timely notice of the bar date.

*4 Zimmerman, 156 B.R. at 199. No court has pointed to any legislative history indicating that Congress intended to change the old rule of disallowing the tardily filed CLAIMS of Chapter 13 creditors.

D.

Judge Lundin argues that interpreting Rule 3002 to bar late filed CLAIMS under Chapter 13 would be inconsistent with a number of Code provisions. Relying in part upon previous opinions, and presenting a number of novel arguments, Judge Lundin asserts that this Court's interpretation would be inconsistent with 11 U.S.C. ss 726, 1325, 501(b) and (c), and 506(d)(2). To the contrary, this Court concludes that these sections are consistent with the proposition that late filed creditor CLAIMS are generally disallowed.

1.

The clearest potential conflict is between Rule 3002 and 11 U.S.C. s 726. Sections 726(a)(2)(C) and (a)(3) refer to "allowed" CLAIMS which are "tardily filed." This language implies that a tardily filed CLAIM may be allowed in some circumstances. Although ss 726(a)(2)(C) and (a)(3) specify the circumstances in which such CLAIMS are allowed, some courts, including Hausladen and two bankruptcy judges of this district, have read s 726 to bring into question the general principle that tardy CLAIMS are not allowed.

First it should be noted that the legislative history indicates that s 726 "is the general distribution section for liquidation [Chapter 7] cases." Notes of the Committee of the Judiciary, Senate Report No. 95-989. Since this is a Chapter 13 case, s 726 does not apply. Courts that have relied upon s 726 in interpreting ss 501 and 502, and Rule 3002 cite s 726 only as an indication that "allowed CLAIMS" are not limited to timely filed CLAIMS. This Court does not, however, read s 726 to indicate that the general rule barring late filed CLAIMS has been abandoned.

[4] The primary purpose of s 726(a)(2)(C) is to determine the priority of CLAIMS filed late because the creditor did not receive adequate notice. The due process clause and general principles of equity insure that a CLAIM will not be disallowed for tardiness if the creditor did not receive adequate

notice. See United States v. Cardinal Mine Supply, 916 F.2d 1087, 1089, 1090-92 (6th Cir.1990). Thus, s 726(a)(2)(C) merely recognizes an existing exception to the timely filing requirement, and specifies the priority of CLAIMS filed late due to inadequate notice.

Similarly, the history of s 726(a)(3) indicates that it merely codifies an equitable exception to the general rule that late filed CLAIMS shall be barred; it does not indicate that the general rule has been abandoned. The allowance under the new Code of tardily filed CLAIMS under s 726(a)(3) does not represent a significant change in congressional intent concerning allowance of tardily filed CLAIMS. See 4 Collier on Bankruptcy P 726.02[3], at 726-9 (Lawrence P. King ed., 15th ed. 1994). Under the old Bankruptcy Act, s 57n's bar date was very strict, and many courts in the first part of this century used their equitable powers to mitigate its harsh effects. See generally 3 Collier on Bankruptcy, P 57.27 (James W. Moore & Lawrence P. King, eds., 14th ed. 1977). Courts did not, for example, hold the government to the bar date. Id. at P 57.01[2.14] & P 57.30. Some courts also felt it inequitable to allow a "surplus" in the bankruptcy estate to be returned to the bankrupt debtor if there were late filing creditors on record. Id. at P 57.33.

*5 Responding to these equitable concerns, Congress in 1938 provided the government the option of filing for a time extension, id. at P 57.01[2.14] & P 57.26[3], and allowed any surplus remaining in the bankruptcy estate after payment to timely filing creditors to be paid to tardily filing creditors rather than returned to the debtor. Id. at P 57.33. Thus, congressional intent in 1938 was clear:

> In allowing for an extension of time to file government tax CLAIMS, and in allowing the belated filing of proofs in cases where there is a surplus after all the other creditors have been paid in full, the Act unmistakably implies that under no circumstances other than those specifically referred to in the statute may a court admit a CLAIM to untimely proof, but that it is under a duty to disallow it, with no power to substitute equitable considerations for the manifest intent of Congress.

Id. at P 57.27[2].

The Act of 1938 disallowed all late CLAIMS except in the two specifically mentioned circumstances. Those two circumstances are still recognized in the law today. Rule 3002(C)(1) is consistent with Congress' 1938 intent to allow government to file for a time extension. And section 726(a)(3) is consistent with Congress' 1938 intent that surplus property should be distributed to timely CLAIM filers ahead of tardy CLAIM filers, and to tardy CLAIM filers ahead of the debtor. Section 726(a)(3) does not, therefore, represent any significant change from prior law, 4 Collier on Bankruptcy P 726.02[3], at 726-9 (15th ed. 1994), and is not evidence of any change in congressional intent. Section 726(a)(3) codifies an exception to the bar date now contained in Rule 3002, and does not call into question the general rule that late filed creditor CLAIMS are disallowed.

2.

Judge Lundin also argues that this Court's interpretation of Rule 3002 is inconsistent with 11 U.S.C. s 1325. Section 1325 states that the value of property distributed under a Chapter 13 plan "on account of each allowed unsecured CLAIM" must be at least as much as would be paid on "such CLAIM" under a Chapter 7 distribution. Under Chapter 7, a late filer may have

distribution rights to surplus property under s 726(a)(3). [FN1] Allowing a late filer to recover under Chapter 7 but not under Chapter 13 would, the argument goes, violate s 1325.

[5] The answer to this argument is that the meaning of "allowed CLAIM" is somewhat different under Chapter 7 and Chapter 13. Section 726(a)(3) creates an exception to the rule that late filed CLAIMS are disallowed. The s 726(a)(3) exception for late filed CLAIMS to surplus property does not apply in the Chapter 13 context because the concept of "surplus property" does not apply to Chapter 13 plans.

Section 1325 is concerned with Chapter 13 distribution plans, and the phrase "allowed unsecured CLAIM" refers to a CLAIM allowed under Chapter 13. The phrase "such CLAIM" likewise refers to CLAIMS that are allowed under Chapter 13. Section 1325 requires a court first to examine whether a given CLAIM is allowed under Chapter 13, and then to compare what the creditor will receive on that CLAIM under the distribution plan with what the creditor would receive on that CLAIM under a Chapter 7 distribution. Late filed CLAIMS are not allowed under Chapter 13, so they need not be compared with late filed CLAIMS under Chapter 7.

*6 Further, s 1325 only makes sense if one assumes that tardy CLAIMS that are allowed under s 726(a)(3) are not allowed under s 1325 and Chapter 13. Section 1325 asks courts to compare what a creditor will receive under the proposed reorganization plan with what the creditor would receive under Chapter 7. When examining timely filed CLAIMS this is easily done--the Court looks at what a creditor is going to receive under the plan and compares it to what the creditor would have received if the debtor's present assets were disbursed under Chapter 7. Judge Lundin's interpretation would, however, require courts to compare what late filers would receive under a proposed distribution plan with what they would receive under Chapter 7.

This comparison is impossible to make, because there is no way to predict how much a late filer would recover under Chapter 7 without knowing how many late filers there will be and how much they will CLAIM. In a situation in which payment of all timely CLAIMS would leave a surplus under Chapter 7, late filers would divide the surplus. The only way to insure that late filers would not receive more under Chapter 7 than under a given Chapter 13 distribution plan would be to provide in the plan that all untimely CLAIMS are to be paid in full. This is because it is always possible that a single late filer would file under a Chapter 7 distribution and that there would be enough surplus funds to fully satisfy the CLAIM.

When there would be no surplus after a Chapter 7 distribution, disallowing late filed CLAIMS under a Chapter 13 plan would not violate s 1325. As shown above, when there would be a surplus under a Chapter 7 distribution, a Chapter 13 plan would have to provide that all late filed CLAIMS shall be paid in full. Under these circumstances, there is little incentive to file a CLAIM on time; and of course it is unfair to those creditors who do file on time if they receive less than full payment. This difficulty is only one of many that would face courts, creditors, and debtors attempting to devise Chapter 13 reorganization plans without benefit of a firm bar date. See Messics, 159 B.R. at 809; Zimmerman, 156 B.R. at 199;

3.

Judge Lundin also argues that "[s]ections 501(b) and (c) have vitality only if

untimely filed CLAIMS are allowable." Sections 501(b) and (c) permit the debtor, the trustee, or a co-debtor to file a proof of CLAIM on behalf of the creditor if the creditor "does not timely file a proof of such creditor's CLAIM." Judge Lundin argues that the power to file a proof of CLAIM when the creditor has failed to timely file is meaningless if untimely CLAIMS are disallowed under Rule 3002.

This argument fails to recognize that Rule 3002(a) sets out exceptions to the general rule that a creditor's failure to timely file results in disallowance. Two of these exceptions relate directly to filings under ss 501(b) and (c). Rule 3002(a) states that a creditor must file a proof of CLAIM in accordance with the rule for the CLAIM to be allowed, "except as provided in Rules 1019(3), 3003, 3004, and 3005." Rule 3004 relates to s 501(c), and provides that if a creditor fails to timely file the debtor or trustee may file in the creditor's name "within 30 days after the expiration of the time for filing CLAIMS prescribed by Rule 3002(c) or 3003(c)." Rule 3005 relates to s 501(b), and provides that if a creditor does not timely file a co-debtor may file a proof of CLAIM in the creditor's name "within 30 days after the expiration of the time for filing CLAIMS prescribed by Rule 3002(c) or 3003(c)." Rule 3002 does not, therefore, require a court to disallow CLAIMS filed under ss 501(b) and (c) if those CLAIMS are filed within the time provided by Rules 3004 and 3005.

4.

*7 Judge Lundin also argues that 11 U.S.C. s 506(d) does not make sense if late filed CLAIMS are disallowed. Section 506 provides in relevant part:

To the extent that a lien secures a CLAIM against the debtor that is not an allowed secured CLAIM, such lien is void, unless--

...

(2) such CLAIM is not an allowed secured CLAIM due only to the failure of any entity to file a proof of such CLAIM under section 501 of this title.

Judge Lundin argues that if failure to file is an exception to the voiding power of s 506(d), but untimely filing is not, then a lien holder with no filed proof of CLAIM is better off than a lien holder with a late filed proof of CLAIM.

This argument is unpersuasive because it applies equally to any CLAIM that would be disallowed for any reason. Any lienholder whose lien secures a CLAIM that would be disallowed is better off (with respect to the lien) not filing a CLAIM. If this is an absurd result, it is equally absurd regardless of the basis upon which an unfiled CLAIM would be disallowed if filed. [FN2]

III.

For the forgoing reasons, the Court holds that in Chapter 13 cases Rule 3002 requires courts to disallow late filed CLAIMS. Accordingly, the judgment of the bankruptcy court is REVERSED and the case is REMANDED with instructions that an order be entered disallowing the late filed CLAIM of the Veterans' Administration.

FN1. Creditors who file late due to inadequate notice have a valid CLAIM under Chapter 7 or Chapter 13. See Cardinal Mine Supply, 916 F.2d at 1089 ("Due process and equitable concerns require that when a creditor does not have notice or actual knowledge of a bankruptcy, the creditor must be permitted to file tardily when the creditor does so promptly after learning

of the bankruptcy.") The allowance of late filed CLAIMS under s 726(a)(2)(3) does not, therefore, even arguably conflict with Rule 3002 in the context of a s 1325 determination.

FN2. The result is not absurd if the primary purpose of s 506(d) is to provide lienholders notice and a hearing before a lien is voided. See 3 Collier on Bankruptcy, P 506.07, at 506-69 to 506-71 (15th ed. 1994).

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: PACIFIC ATLANTIC TRADING CO. *Debtor.* UNITED STATES OF AMERICA, *Claimant-Appellant,* v. ROBERT F. TOWERS, *Trustee-Appellee.*	No. 92-16973 D.C. No. CV-92-01743-FMS OPINION

Appeal from the United States District Court
for the Northern District of California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
March 18, 1994—San Francisco, California

Filed August 18, 1994

Before: J. Clifford Wallace, Chief Judge, Cecil F. Poole and William C. Canby, Jr., Circuit Judges

Opinion by Chief Judge Wallace

SUMMARY

Bankruptcy/Priorities/Tax

The court of appeals reversed a district court judgment. The court held that the Internal Revenue Service's (IRS's) claim

for federal taxes was "allowed" under the Bankruptcy Code and retained its right to first distribution, regardless of when it was filed.

An involuntary petition under Chapter 7 of the Bankruptcy Code was filed against Pacific-Atlantic Trading Co. The Internal Revenue Service (IRS) received notice of the bar date. IRS records indicated no unpaid tax liabilities of Pacific, but did show Pacific had not filed any tax returns or made any installment payments of estimated taxes for 1985 through 1989.

In February 1991, the IRS filed a proof of claim for federal corporate income taxes, penalties, and interest for the tax periods 1985 through 1988. Appellee Robert F. Towers, the bankruptcy trustee, objected to the IRS's claim, contending the claim was filed after the bar date. The bankruptcy court agreed and entered summary judgment disallowing the IRS's claim in its entirety. The district court affirmed, holding that the IRS's claim was not entitled to first priority status under 11 U.S.C. § 726(a)(1). The district court, however, remanded for the bankruptcy court to enter an order granting the IRS's claim for third priority status under § 726(a)(3).

The government appealed, contending that a claim for tax liabilities retains its priority status under § 507(a)(7) and its position in the order of distribution under § 726(a)(1) regardless of when proof of the claim is filed. The IRS conceded that it failed to file a timely proof of claim as required by Bankruptcy Rule of Procedure 3002(c). It argued, however, that § 726(a)(1) draws no distinction between timely and tardy priority claims, and thus its failure to comply with Rule 3002(c) had no effect on its claim's entitlement to first priority distribution.

[1] Section 507(a)(7) gives priority status to governmental units' "allowed" unsecured claims, such as claims for federal corporate income taxes. **[2]** The Bankruptcy Code's plain lan-

guage demonstrates that the Code "allows" the claim in this case, regardless of when proof of the claim is filed. Section 501 imposes no time limit or other qualification on the filing of a claim, and does not incorporate Rule 3002(c). [3] Moreover, § 502(b) enumerates categories of claims which are disallowed, and none of the categories refer to tardy claims.

[4] Section 726(a) establishes the order of distribution for claims entitled to priority status under § 507. [5] Congress intended priority claims to receive first distribution regardless of whether proof of the claim was filed timely or late.

COUNSEL

Gary D. Gray, Tax Division, United States Department of Justice, Washington, D.C., for the claimant-appellant.

Dennis D. Davis, Goldberg, Stinnett & MacDonald, San Francisco, California, for the trustee-appellee.

OPINION

WALLACE, Chief Judge:

The government appeals from a district court judgment in favor of the bankruptcy trustee and against the Internal Revenue Service (IRS). The government contends that a claim for tax liabilities retains its priority status under 11 U.S.C. § 507(a)(7) and its position in the order of distribution under section 726(a)(1) regardless of when proof of the claim is filed. The district court had jurisdiction pursuant to 28 U.S.C. § 158(a). We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 158(d). We reverse.

I

An involuntary petition under Chapter 7 of the Bankruptcy Code was filed against Pacific-Atlantic Trading Co. (Pacific

Atlantic) on September 15, 1988. The IRS received notice of the bar date. IRS records indicated no unpaid tax liabilities of Pacific Atlantic but did show Pacific Atlantic had not filed any tax returns or made any installment payments of estimated taxes for 1985 through 1989.

The IRS opened a file for Pacific Atlantic on August 10, 1989, and correctly noted in the file the August 11, 1989, bar date. The IRS, however, did not examine Pacific Atlantic's potential tax liabilities until September 1990. On February 8, 1991, the IRS filed a proof of claim for federal corporate income taxes, penalties, and interest for the tax periods 1985 through 1988.

The trustee objected to the IRS's claim, contending the claim was filed after the bar date. The bankruptcy court agreed and entered summary judgment disallowing the IRS's claim in its entirety. The government appealed to the district court which affirmed, holding that the IRS's claim was not entitled to first priority status under 11 U.S.C. § 726(a)(1). The district court, however, remanded for the bankruptcy court to enter an order granting the IRS's claim third priority status under section 726(a)(3).

The IRS disputes the district court's construction of the Bankruptcy Code. The IRS concedes, as it must, that it had notice of the bankruptcy proceeding and potential tax liabilities of Pacific Atlantic yet failed to file a timely proof of claim as required by Bankruptcy Rule of Procedure 3002(c). The IRS contends that its claim is entitled to priority status under the Bankruptcy Code even if it fails to comply with Rule 3002(c). The IRS contends section 726(a)(1) draws no distinction between timely and tardy priority claims and thus its failure to comply with Rule 3002(c) has no effect on its claim's entitlement to first priority distribution.

II

We review a district court's interpretation of the Bankruptcy Code de novo. *Acequia, Inc. v. Clinton (In re Acequia),*

787 F.2d 1352, 1357 (9th Cir. 1986). Interpretation of a statute must begin with the statute's language. *United States v. Ron Pair Enterps.*; 489 U.S. 235, 241 (1989). We consider the language of the statute to be conclusive of its meaning except in the most extraordinary circumstances. *Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *Perroton v. Gray (In re Perroton)*, 958 F.2d 889, 893 (9th Cir. 1992).

[1] Section 507(a) provides for eight categories of priority status for claims. At issue here is subsection 7 which gives priority status to "*allowed* unsecured claims of governmental units," such as claims for federal corporate income taxes. 11 U.S.C. § 507(a)(7) (emphasis added). Whether a claim is "allowed" depends on compliance with sections 501 and 502. Section 502(a) provides: "A claim or interest, proof of which is filed under section 501 of this title, is *deemed allowed*, unless a party in interest . . . objects." (Emphasis added.) Section 501(a) simply states, "[a] creditor . . . may file a proof of claim . . . ." Section 502(b) "disallows" seven categories of claims, none of which include tardy claims.

Rule 3002 purportedly implements section 501. Rule 3002(a) provides that an unsecured creditor "must file a proof of claim . . . in accordance with this rule for the claim or interest to be allowed, ..." Rule 3002(c) establishes time limits for filing a proof of claim. The IRS admits it failed to comply with the time limits set forth in Rule 3002(c).

The district court stated that section 501, which provides that "[a] creditor . . . may file a proof of claim," incorporates Rule 3002(c)'s time limit on filing a proof of claim. As a consequence, the district court held that a claim must comply with Rule 3002(c) in order to be "allowed" under section 502. Because the IRS failed to comply with Rule 3002(c), the district court reasoned the IRS's claim was not an "allowed" claim and thus did not qualify for priority status under section 507(a)(7), which only provides priority status to "allowed" unsecured claims.

Title 28 U.S.C. § 2075, which implements the Bankruptcy Rules, provides that "[s]uch rules shall not abridge, enlarge or modify any substantive right." As a result, any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code. *Cisneros v. United States (In re Cisneros)*, 994 F.2d 1462, 1465 (9th Cir. 1993). Thus, if the IRS's claim is "allowed" according to the Code, Rule 3002(c) cannot "disallow" it.

[2] We conclude that the plain language of sections 501 and 502 demonstrates that the Code "allows" this claim regardless of when proof of the claim is filed. Section 502's use of conclusory language in stating a claim "is deemed allowed" if filed in accordance with section 501 requires us to conclude that a claim is allowed as long as the requirements of section 501 are met. Section 501 only provides that a claim "may be filed" and imposes no time limit or other qualification on the filing of a claim. We disagree with the district court's conclusion that section 501 incorporates Rule 3002(c). While Rule 3002(c) mandates a claim be filed within 90 days, section 501 imposes no such requirement. Thus, to construe section 501 as incorporating Rule 3002(c) would create a result at odds with the plain language of the Code.

[3] An examination of section 502(b) further supports our conclusion that this claim should be allowed under the Code regardless of when it is filed. That section enumerates categories of claims which are disallowed. None of the categories refer to tardy claims. Section 502(b)'s omission of tardy claims from its recitation of disallowed claims suggests that Congress did not intend for the time in which claims are filed to affect its status as "allowed" or "disallowed." *Cf. In re Gerwer*, 898 F.2d 730, 732 (9th Cir. 1990) ("The express enumeration indicates that other exceptions should not be implied.").

A review of the former Bankruptcy Act confirms our judgment that this claim is "allowed" under the Code regardless

of when proof of a claim was filed. Section 57(n), 11 U.S.C. § 93(n), provided:

> . . . all claims provable under this Act, *including all claims of the United States* . . . shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors, shall not be allowed . . . .

(Emphasis added.) Under section 57(n), a bankruptcy court had no discretion to allow untimely claims such as this to be filed. *In re Pigott,* 684 F.2d 239, 242 (3d Cir. 1982). The Bankruptcy Reform Act of 1978 repealed section 57(n). *Vertientes, Ltd. v. Internor Trade, Inc. (In re Vertientes),* 845 F.2d 57, 59 (3d Cir. 1988). The deliberate omission of the provision disallowing untimely claims, combined with section 501's silence on the effect of an untimely filing of a claim, confirms Congress intended untimely claims such as this to be allowed under the Code. *See Stewart v. Ragland,* 934 F.2d 1033, 1037 n.6 (9th Cir. 1991) (*Stewart*).

Rule 3002(c)'s time limits simply demark whether a claim is timely or late for purposes of distribution under section 726. *In re Corporation de Servicios Medico-Hospitalarios de Fajarado, Inc.,* 149 B.R. 746, 750 (Bankr. D. P.R. 1993); *In re Rago,* 149 B.R. 882, 885 (Bankr. N.D. Ill. 1992); *In re Hausladen,* 146 B.R. 557, 560 (Bankr. D. Minn. 1992). Rule 3002(c) does not disallow a late claim. It simply divides claims into two categories: timely and late.

III

We now turn to the question of the effect of a failure to comply with Rule 3002(c)'s time limitations on a priority claim's order of distribution under section 726(a). The IRS's claim for federal taxes would ordinarily be entitled to first distribution under section 726(a)(1). The IRS contends its claim

retains the right to first distribution even though proof of the claim was filed after the bar date.

[4] Section 726(a) establishes the order of distribution for claims entitled to priority status under section 507:

> Except as provided in section 510 of this title, property of the estate shall be distributed —
>
> (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;
>
> (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is —
>
> (A) timely filed under section 501(a) of this title;
>
> (B) timely filed under section 501(b) or 501(c) of this title; or
>
> (C) tardily filed under section 501(a) of this title, if —
>
> (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and
>
> (ii) proof of such claim is filed in time to permit payment of such claim;
>
> (3) third, in payment of any allowed unsecured claim proof of which is tardily filed

> under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

[5] Thus, sections 726(a)(1), 726(a)(2), and 726(a)(3) treat late-filed claims differently. Section 726(a)(1) makes no distinction between late and timely claims. Section 726(a)(2) provides second distribution to tardy claims only if the creditor did not have notice or actual knowledge of the case. Section 726(a)(3) affords third distribution to late claims in which the creditor did know about the case. The contrast in the three subsections' treatment of late and timely claims indicates Congress intended priority claims to receive first distribution regardless of whether proof of the claim was filed timely or late. Congress's explicit distinction between late and timely claims in sections 726(a)(2) and 726(a)(3) indicates Congress knew how to distinguish late and timely claims when it wished. Therefore, Congress's failure to draw a similar distinction between late and timely priority claims in section 726(a)(1) demonstrates that timeliness of a priority claim does not affect its entitlement to first distribution. *See Bell v. Internal Revenue Service,* 928 F.2d 901, 903 (9th Cir. 1991) ("Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another."); *cf. Stewart,* 934 F.2d at 1041 ("When certain statutory provisions contain a requirement and others do not, we should assume that the legislature intended both the inclusion and the exclusion of the requirement.").

The Second Circuit has recently come to the same conclusion that we reach. *In re Vecchio,* 20 F.3d 555 (2d Cir. 1994). The Sixth Circuit earlier took a similar view in *United States v. Cardinal Mine Supply,* 916 F.2d 1087, 1091 (6th Cir. 1990). The Sixth Circuit subsequently limited this position and held that only priority creditors who file a proof of claim prior to the distribution from and closure of the estate may receive priority treatment. *In re Century Boat Co.,* 986 F.2d 154, 158 (6th Cir. 1993). The Second Circuit, on the other

hand, recognized that its reasoning permitted priority treatment even for creditors who filed their claims after distribution; it suggested that the district court could ameliorate this result in appropriate cases by exercise of its discretion over the entry of disgorgement orders, or over equitable subordination. *Vecchio,* 20 F.3d at 560. The issue is not before us, however, and we do not decide with which Circuit's view we agree.

Finally, the trustee incorrectly argues that our decision in *Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.),* 920 F.2d 1428, 1430 (9th Cir. 1990), compels a different result. There, we addressed the necessity of the timely filing of a proof of a claim on the right to distribution under section 726(a)(2) and 726(a)(3). Zidell knew of the bankruptcy proceeding but failed to file a timely proof of claim. We upheld the district court's refusal to distribute his claim under section 726(a)(2) because this section expressly excluded late-filed claims when the creditor knew of the bankruptcy proceeding. *Id.* at 1433. We did not address distribution of priority claims under section 726(a)(1) or the possibility of a conflict between the Code and Rule 3002(c).

REVERSED.

In re Edward G. VECCHIO and Carol A. Vecchio, also known as Carol Reed, Debtors.

UNITED STATES of America, Appellant,

v.

Edward G. VECCHIO and Carol A. Vecchio, a/k/a Carol Reed, Appellees.

No. 1756, Docket 93–5003.

United States Court of Appeals, Second Circuit.

Argued Aug. 11, 1993.

Decided April 5, 1994.

Chapter 7 trustee moved to expunge Internal Revenue Service's (IRS) late-filed priority claim for employment taxes. The Bankruptcy Court determined that late-filed priority claims should be treated as nonpriority claims, 132 B.R. 239. On appeal, the United States District Court for the Eastern District of New York, Leonard D. Wexler, J., affirmed, 147 B.R. 303, and IRS appealed. The Court of Appeals, Walker, Circuit Judge, held that: (1) priority claims in Chapter 7 case need not be timely filed to be allowed, and (2) claim disallowed as untimely would have to be expunged, rather than subordinated.

Reversed and remanded.

[148]

1. Bankruptcy ⇐2897.1

Priority claims in Chapter 7 case need not be timely filed to be allowed. Bankr. Code, 11 U.S.C.A. § 726(a)(1); Fed.Rules Bankr.Proc.Rule 3002, 11 U.S.C.A.

2. Bankruptcy ⇐2897.1

Bankruptcy Rule governing proof of claim filing is inconsistent with bankruptcy code and cannot stand to extent that it suggests that late-filed claim must be disallowed. Bankr.Code, 11 U.S.C.A. §§ 501, 502, 726; Fed.Rules Bankr.Proc.Rule 3002, 11 U.S.C.A.

3. Bankruptcy ⇐2967.1

Even if late-filed priority claim in Chapter 7 case had to be disallowed, it would have to be completely expunged, rather than subordinated to lower tier of distribution. Bankr.Code, 11 U.S.C.A. § 726(a)(1); Fed. Rules Bankr.Proc.Rule 3002, 11 U.S.C.A.

4. Bankruptcy ⇐2967.1, 3442.1

Bankruptcy court has discretion over whether to enter disgorgement order or equitably subordinate late priority claim filed after disbursement of bankruptcy estate, where other creditors would have to return funds to pay priority creditor. Bankr.Code, 11 U.S.C.A. §§ 510(c), 726(a); Fed.Rules Bankr.Proc.Rule 3002, 11 U.S.C.A.

Gary D. Gray, Attorney, Tax Div., Dept. of Justice, Washington, DC (Michael L. Paup, Acting Asst. Atty. General, Washington, DC; Gary R. Allen, Janice B. Geier, Attys., Tax Div., Dept. of Justice, Washington, DC; Mary Jo White, U.S. Atty. for the Eastern District of New York, of counsel), for appellant.

Robert L. Pryor, Mineola, NY (Lynn Welter Sherman, Pryor & Mandelup, Mineola, NY, of counsel), for appellees.

Before: WINTER, MINER, and WALKER, Circuit Judges.

WALKER, Circuit Judge:

The United States of America appeals from a judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, *Judge*) affirming

the decision of the bankruptcy court which held that priority claims under 11 U.S.C. § 726(a)(1) lose their priority status if they are tardily filed. We reverse the judgment of the district court and remand for further proceedings.

BACKGROUND

On September 28, 1988, Edward and Carol Vecchio ("debtors") filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. They listed in their schedule of debts two obligations owed to the Internal Revenue Service ("IRS"): one for $792 owed on their 1986 personal income taxes and the other for $25,000 owed as withholding tax due from New Market Manufacturing, Inc. ("New Market"). The debtors were 70% shareholders of New Market, which had filed an earlier Chapter 7 bankruptcy petition in February of 1988.

The Clerk of the United States Bankruptcy Court for the Eastern District of New York sent a notice of the filing to all creditors but instructed them that it was unnecessary to file a claim because there were insufficient assets for distribution. On November 22, 1989, the Clerk sent all creditors a notice that payment of a dividend might be possible because assets had been discovered. The notice fixed February 20, 1990 as the deadline for filing proofs of claim.

On January 31, 1990, the IRS filed a proof of claim for income taxes for the years 1984 and 1986, totalling $2,203.43. On April 25, 1990 and May 15, 1990, the IRS filed amended claims reasserting the individual taxes due and asserting for the first time a $17,256.51 claim for withholding and FICA taxes owed by New Market in 1987. The claim for withholding and FICA taxes was assessed against debtors individually under 26 U.S.C. § 6672 which attaches personal liability to persons who willfully fail to collect, or truthfully account for and pay over a corporation's withholding and unemployment taxes. The IRS filed its amended claims as unsecured priority claims under 11 U.S.C. § 507(a)(7)(C).

The bankruptcy trustee moved in the bankruptcy court to expunge the IRS claim for withholding and FICA taxes as untimely. The IRS responded that a priority claim, which is paid as part of the first-tier of distribution of an estate under 11 U.S.C. § 726(a)(1), does not have to be timely filed in order to retain its priority status. The bankruptcy court refused to afford the IRS's claim priority status under § 726(a)(1) because it was filed late. However, instead of expunging the claim, the court reclassified it as a non-priority claim that would receive third-tier distribution pursuant to § 726(a)(3). The district court affirmed the bankruptcy court's decision, *see United States v. Vecchio*, 147 B.R. 303 (E.D.N.Y. 1992), and this appeal followed.

DISCUSSION

This appeal turns primarily on our interpretation of § 726(a) of the Bankruptcy Code which spells out the order in which the assets of a Chapter 7 bankruptcy estate are distributed to unsecured creditors. It states in relevant part:

> (a) Except as provided in section 510 of this title [which governs the subordination of claims], property of the estate shall be distributed—
>
> (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;
>
> (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—
>
> (A) timely filed under section 501(a) of this title;
>
> (B) timely filed under section 501(b) or 501(c) of this title; or
>
> (C) tardily filed under section 501(a) of this title, if—
>
> (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and
>
> (ii) proof of such claim is filed in time to permit payment of such claim;
>
> (3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title,

other than a claim of the kind specified in paragraph (2)(C) of this subsection; (4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim; (5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

This statutory scheme thus provides for ordered distribution to tiers of claims in the following manner: first, priority claims; second, unsecured claims that were either timely filed or tardily filed where the creditor did not have proper notice of the bankruptcy but was able to file in time to permit payment; third, tardily filed unsecured claims where the creditor did have proper notice or did not have proper notice but failed to file in time to permit payment; fourth, claims in the nature of fines, penalties, and forfeitures relating to punitive damages; and fifth, claims for appropriate interest. Any remaining assets revert to the debtor.

[1] Claims in the first tier are the priority claims found in § 507 of the Bankruptcy Code. The IRS argues that its claim for withholding and FICA taxes falls under § 507(a)(7)(C), which refers to "a tax required to be collected or withheld and for which the debtor is liable in whatever capacity," and should therefore receive first-tier distribution pursuant to § 726(a)(1). The trustee does not dispute the priority status of an IRS claim for withholding and FICA taxes under § 507 or that the claim asserted by the IRS in this case falls within that category. Rather, the trustee argues that because the claim was untimely, it should be subordinated to the third tier and treated as an unsecured claim that was tardily filed after the creditor received proper notice of the bankruptcy.

We believe that the trustee's argument is at odds with the plain language of § 726(a). Section 726(a)(1) accords priority status to claims specified in § 507 without regard to the timeliness of their filing. In sharp contrast, subsections (a)(2) and (a)(3) of § 726 categorize non-priority unsecured claims into those that are timely filed, those that are tardily filed where the creditor did not have proper notice of the bankruptcy, and those that are tardily filed where the creditor received proper notice of the bankruptcy. Thus, Congress plainly knew how to distinguish between timely and tardily filed claims, yet did not make that distinction for claims filed under § 507. The absence of a timeliness distinction in § 726(a)(1) strongly suggests that this subsection encompasses all priority claims whenever filed.

Legislative history mirrors this reading of § 726(a). Explaining how this statute orders distribution of an estate, the House and Senate Reports both state as follows:

> First, property is distributed among priority claimants, as determined by section 507, and in the order prescribed in section 507. Second, distribution is to general unsecured creditors. This class excludes priority creditors and the two classes of subordinated creditors specified below. The provision is written to permit distribution to creditors that tardily file claims if their tardiness was due to lack of notice or knowledge of the case. Though it is in the interest of the estate to encourage timely filing, when tardy filing is not the result of a failure to act by the creditor, the normal subordination penalty should not apply. Third distribution is to general unsecured creditors who tardily file.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 383 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6339; S.Rep. No. 989, 95th Cong., 2d Sess. 97 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5883. Although this history does not specifically address whether § 726(a)(1) claims retain their priority status even if untimely filed, it draws no distinction between priority claims that are timely or tardily filed while doing so with regard to general unsecured claims. Moreover, it explicitly states that priority claims filed under § 507 are "ex-

clude[d]" from the second tier of distribution. Finally, it describes third-tier claims as those belonging to "general unsecured creditors," a class which, by definition, does not include either secured creditors or priority creditors. This history thus bolsters our conclusion that § 726(a)(1) grants priority claims first-tier distribution regardless of when they were filed.

The trustee asserts that the IRS's claim cannot fit within the first tier because it was untimely filed. But if not in the first tier, where does it belong? The claim is specifically foreclosed from the second tier because subsection (a)(2) expressly excludes "a claim of a kind specified in paragraph (1)." The legislative history confirms that the second tier "excludes priority creditors." H.R.Rep. No. 595, at 383; S.Rep. No. 989, at 97, 1978 U.S.C.C.A.N. at 5883, 6339.

Recognizing this limitation, the trustee is forced to argue that the IRS's claim should be paid out in the third tier because a tardy priority claim is not excluded from subsection (a)(3)'s description of "any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection." However, this same logic of including whatever is not specifically excluded would also require us to include in the third tier late-filed claims for fines, penalties, forfeitures, punitive damages, and the like. Such penalty claims normally fall within the fourth tier, under subsection (a)(4). Application of this logic would thus lead to the absurd result that late-filed penalty claims would be paid under subsection (a)(3) before timely filed penalty claims paid under subsection (a)(4).

The trustee's interpretation would lead to another anomalous result where priority claims are filed late because the priority creditors lacked notice of the bankruptcy. The trustee would relegate such claims to the third tier regardless of whether they were filed in time to permit payment. However, the statute provides that general unsecured claims that are filed late because the claimants lacked notice are paid out in the second tier as long as the claimant files in time to permit payment. The outcome of the trustee's incongruous scheme is that general unsecured claims would be paid ahead of similarly situated priority claims.

The trustee argues that in order to achieve priority status, a claim must be "allowed," and to be allowed, it must be timely filed. He points to § 507(a), which uses the term "allowed" when identifying subcategories of priority claims, and to Rule 3002 of the Federal Rules of Bankruptcy Procedure, which appears to provide that claims must be timely filed in order to be allowed. Rule 3002 states in part (a) that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim of interest to be allowed" and in part (c) that "[i]n a chapter 7 liquidation ... a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code." The trustee asserts that when read together, these two parts of Rule 3002 impose upon the IRS an obligation to file its proof of claim in a timely manner, and that the rule should be strictly construed as a statute of limitations. The trustee maintains that if priority claims are not subject to bar dates, the administration of a debtor's estate will be upset because trustees will be unable to determine with certainty the number and amount of priority claims. This argument persuaded both the bankruptcy and district courts to strip the IRS's untimely filed § 507 claim of its priority status under § 726(a)(1).

However, this argument based upon the Bankruptcy Rules ignores the above-referenced provisions of the current Bankruptcy Code that provide that claims can be both allowed and tardily filed, and do not distinguish priority claims by the timeliness of their filing. Nowhere does the trustee account for the language in subsections (a)(2) and (a)(3) of § 726 which expressly refers to "allowed" claims that are "tardily filed" and, indeed, orders their payment. Plainly, the scheme set forth in § 726(a) imposes no threshold requirement of timely filing for a claim to be "allowed" and thus eligible for payment. The trustee's argument also ignores the fact that in § 502 of the Bankruptcy Code, the section expressly governing the

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disallowance of claims, eight specified grounds for disallowance are set forth and untimeliness is not among them. Moreover, § 501 of the Bankruptcy Code addresses the conditions for the filing of proofs of claim without imposing a timeliness requirement.

[2] Therefore, to the extent Rule 3002 suggests that a late filed claim must be disallowed, it is inconsistent with the text of §§ 726, 502, and 501. Rule 3002 was derived from the former Rule 302, applicable under the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. Section 57(n) of the former Bankruptcy Act specifically disallowed claims not filed within six months after the first meeting of creditors, *see* 11 U.S.C. § 93(n) (1976), and Rule 302(a) accommodated this statutory requirement by providing that a claim had to be filed within the six-month period in order to be allowed. The current Bankruptcy Code contains no provision comparable to former § 57(n) disallowing late claims. With its statutory underpinning removed and because it now contravenes § 726(a) and other Code provisions, a rule of procedure that disallows claims for untimeliness cannot stand. *See In re Gullatt,* 164 B.R. 279, (Bankr.M.D.Tenn.1994); *In re Hausladen,* 146 B.R. 557, 559–61 (Bankr.D.Minn.1992) (both discussing tensions between Rule 3002 and the Bankruptcy Code).

[3] While we do not accept the trustee's argument based on Bankruptcy Rule 3002, we note that even if we did, it would not lead to the result reached by the bankruptcy and district courts. A claim that is disallowed under Rule 3002 would have to be completely expunged, not simply subordinated. The courts' subordination of the IRS's "disallowed" claim to the third tier of distribution is also inconsistent with subsection (a)(3)'s identification of claims to be paid under its proviso as "allowed" claims. Neither the trustee nor the lower courts explain how their concept of allowance can be applied to exclude as "disallowed" a claim from subsection (a)(1) but reinclude it as an "allowed" claim under subsection (a)(3).

We disagree as well with bankruptcy courts in other jurisdictions that have subordinated priority claims to the third tier of distribution based on the tardiness of their filing. *See IRS v. Ulrich (In re Mantz),* 151 B.R. 928, 930–31 (9th Cir. BAP 1993); *In re Elec. Management, Inc.,* 133 B.R. 90, 92 (Bankr.N.D.Ohio 1991); *In re Mayville Feed & Grain, Inc.,* 123 B.R. 245, 246–47 (Bankr. E.D.Mich.1991). These courts have also read a timeliness requirement into § 726(a)(1) despite the absence of such language in that provision or in others in the Code, and have failed to address the inconsistencies that arise as a result of their narrow reading of § 726(a)(1) to exclude late filed priority claims, their broad reading of § 726(a)(3) to include late filed priority claims, and their construction of Rule 3002 to permit subordination and not disallowance of such claims.

Our reasoning is consistent with the construction of § 726(a) set forth by the Sixth Circuit in *United States v. Cardinal Mine Supply, Inc.,* 916 F.2d 1087 (6th Cir.1990). That case presented a situation where the IRS filed a tardy claim because it did not receive notice of its need to file. In analyzing whether the claim should be subordinated, the court observed that:

> The language of section 726 does not itself bar tardily filed priority claims. Subsection (a)(1) merely provides that the order of distribution of priority claims will be the order specified in section 507. This subsection makes no distinction between tardily filed and timely filed priority claims or between tardily filed claims where the priority creditor had notice or had no notice.... There are valid reasons for permitting all tardily filed priority claims to be paid whether or not the creditor had notice.... Congress has chosen to place certain taxes in the privileged category. Congress has expressed itself that these claims are to be paid first. Since their priority is set in the statute, it is reasonable that that priority is more important than whether they were tardily filed either because they had received no notice of the bankruptcy or for some other reason.

916 F.2d at 1091. The court concluded, based in part on its interpretation and in part on due process and equity concerns, that the IRS's claim retained its first priority status under § 726(a)(1). Although the Sixth Circuit has subsequently read *Cardinal Mine* as

a case dealing only with priority creditors who lacked notice, *see IRS v. Century Boat Co. (In re Century Boat Co.)*, 986 F.2d 154, 158 (6th Cir.1993), the force of its interpretation of § 726(a) applies to priority creditors with notice as well. *See also In re Rago*, 149 B.R. 882, 886 (Bankr.N.D.Ill.1992); *In re Horner*, [1991–92 Transfer Binder] Bankr. L.Rep. (CCH) ¶ 74,324, at 77,445, 1991 WL 353297 (Bankr.N.D.Cal. Sept. 21, 1991); *In re MacLochlan*, 134 B.R. 2, 3–4 (Bankr. N.D.Ohio 1991).

[4] We accept, as did the court in *In re Rago*, that our straightforward reading of § 726(a) results in no penalty for priority creditors who, with notice of the bankruptcy, fail to file their claims within prescribed deadlines. *See In re Rago*, 149 B.R. at 888–89. To be sure, the logic of our reading of § 726(a) leads to the conclusion that first priority payment could be accorded even to claims filed after the distribution of the estate's assets. However, we believe that bankruptcy courts can adequately address these concerns through the careful exercise of their discretion over the entry of disgorgement orders. For example, if a priority claim is filed after disbursement of an estate and other creditors would have to return funds in order to pay the priority creditor, the bankruptcy court has discretion over whether to enter a disgorgement order. In such a case, the bankruptcy court could weigh the benefits and burdens of such an order and reach a just result. In addition, bankruptcy courts have authority to subordinate a late filed priority claim under principles of equitable subordination. *See id.* at 889–90; 11 U.S.C. § 510(c).

In this case, the bankruptcy court did not consider whether a disgorgement order was necessary or whether principles of equitable subordination should be applied. We will therefore remand this case to allow the bankruptcy court to consider these issues.

CONCLUSION

Because § 726(a)(1) makes no distinctions regarding the timeliness of priority claims, the courts below erred in reclassifying the IRS's first-tier priority claims under § 726(a)(1) as third-tier claims under § 726(a)(3) on the basis that they were not timely filed. We therefore reverse the judgment of the district court. Congress, of course, may wish to consider whether late filing of all or some priority claims in bankruptcy should be penalized. Such legislation, however, is not part of the judicial function. We remand this case to the bankruptcy court to consider whether the IRS claims should be equitably subordinated and for other proceedings consistent with this opinion.

L. RALPH MECHAM
DIRECTOR

CLARENCE A. LEE, JR.
ASSOCIATE DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

JOHN K. RABIEJ
CHIEF, RULES COMMITTEE
SUPPORT OFFICE

September 7, 1994

MEMORANDUM TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

At Gerald Smith's request, I am attaching additional materials for the September 22-23, 1994 meeting in New York City. Please bring these materials with you to the meeting.

Mark D. Shapiro

Attachments

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

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MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules

FROM: Gerald K. Smith

DATE: September 2, 1994

RE: September 1994 Committee Meeting - New York, NY

==========

1. Agenda Item No. 4: 1993 Amendments to Rules Concerning Discovery and Related Matters.

This was Agenda Item No. 2 of the February 24-25, 1994 meeting. The Reporter then observed that "although these amendments to the Civil Rules are controversial, I am not sure that there is a bankruptcy-related reason for recommending a blanket rule that makes these amendments inapplicable in adversary proceedings. . . . It is important to note that the controversial mandatory disclosure provisions of Rule 26(a), as well as the meeting requirement of Rule 26(f), are subject to local opt-out." Nonetheless, the Reporter suggested that Rule 9014 be amended to make the mandatory disclosure and meeting requirements of Rule 26 inapplicable to contested matters. His rationale was that "a contested matter is initiated by motion, not a summons and complaint, and is an expedited procedure that could be unduly delayed if the parties had to make initial disclosures mandated by Rule 26(a) and had to meet as required by Rule 26(f)." The Reporter's memorandum of June 14, 1994, Agenda Item No. 4 for the September meeting, again recommends that Rule 7026 not be amended, but that Rule 26(a)(1)-(4) and Rule 26(f) be made inapplicable to contested matters unless the court otherwise directs.

My own preference would be for the disclosure and meeting requirements to apply, absent an order as to the contested matter. As the Reporter correctly observed, these provisions are subject to local opt-out. Most of the litigation in a bankruptcy case consists of contested matters, not adversary proceedings. Many contested matters are complex, time consuming and lengthy. For example, motions to dismiss, appoint trustees, lift stays and confirmation hearings are often determinative of the outcome of the reorganization. They can be complex, lengthy and involve numerous witnesses and exhibits. It does not

make sense to me to impose disclosure and meeting requirements on an adversary proceeding seeking to recover a preference or the amount owed on a promissory note, while not doing so in complicated and time consuming contested matters.

Clearly there must be some alteration of the 1993 amendments to accommodate contested matters. For example, Bankruptcy Rule 9014 does not make Bankruptcy Rule 7016 applicable to contested matters. Therefore, at a minimum, as to contested matters, Rule 26(f) must be altered by deleting the reference to Rule 16(b). And since there may not be a scheduling conference or a scheduling order, the requirement of a meeting at least 14 days prior thereto is inappropriate. Nonetheless, I believe that, whether the proceeding is simple or complex, expedited or delayed, the meeting of counsel and the requirement of disclosures should apply unless the court orders otherwise. If these are sound in civil litigation, and I believe they are, they are sound as to the bulk of bankruptcy litigation, *i.e.*, contested matters. What we need are modifications that will preserve the benefits, but tailor them to the particular needs of contested matters. Futhermore, if the national rules do not deal with this, there will be a great deal of time and energy spent at the local level. There has already been considerable effort devoted to local rules, something we should discourage, but it is hard to discourage local rule making where the national rules create a void.

There are several ways to restructure the meeting and disclosure rules to fit contested matters. Two alternative approaches are outlined in **Appendix 1**.

2. Agenda Item No. 5: Bankruptcy Rule 8002(c).

I believe we should consider an amendment to Rule 8002(c)(1), which "carves out" those judgments "carved out" under Rule 8002(c)(2).

3. Agenda Item No. 9, Bankruptcy Rule 9011.

I support the Reporter's draft of a revised Bankruptcy Rule 9011. Since my partner John P. Frank has been in the forefront of the effort to revise Federal Rule 11, I asked him for his comments. They are attached as **Appendix 2**.

4. Other Matters.

A. Revision of Motion Practice.

I think that it is time to revisit motion practice in bankruptcy cases under the Rules. I agree with the comments of Judge Rhodes in *Eight Statutory Causes of Delay and Expenses in Chapter 11 Bankruptcy Cases*, 67 Am. Bankr. L.J. 287, 318-321 (1993), a copy of which is attached as **Appendix 3**. This may, however, be a matter for the Long Range Planning Committee to consider.

B. Disclosures Applicable to the Retention of Professionals.

The recent problems of Weil, Gotshal & Manges in the Leslie Fay Chapter 11 case cause me to again bring to the attention of the Committee the work of the Professional Ethics Subcommittee of the Business Bankruptcy Committee of the Business Section of the ABA. The early efforts of the Committee were devoted to the propriety of the disinterestedness requirement as to counsel for a debtor-in-possession and ways to improve the existing bankruptcy rules as far as the procedures and disclosures that apply to applications for employment of professionals. A copy of the work product, recent newspaper articles and the excerpts from Weil Gotshal's memorandum in support of its disclosures are attached as **Appendix 4**.

It is not only Weil Gotshal that has difficulty as to required disclosures; it is a myriad of far less knowledgeable practitioners. I believe there is a serious problem with the adequacy of disclosure. It may be that the work product of the Professional Ethics Subcommittee is not the way to proceed, but it is at least a starting point.

APPENDIX 1

APPENDIX 1

Alternative 1.

A simple approach would be to require that the moving party furnish in the moving papers the information required by Rule 26(a)(1)(A), (2)(A) and (B), (3)(A), (B) and (C). The requirement of Rule 26(a)(3), that the disclosures be made at least 30 days before trial, would have to be deleted and Rule 26(a)(4) would have to be altered to require that the disclosures of the moving party be made in the motion and those of the responding party be made in the response, unless otherwise ordered by the court. As far as the meeting requirement, this could be within five days after the response deadline, but in no event later than one day before the hearing, unless otherwise ordered by the court, and Rule 26(f) would have to be modified accordingly. With that change, Rule 26(d) would seem to work. However, if the meeting requirement is not made applicable to contested matters, then I believe we need an amendment to Rule 26(d) rather than an amendment to the Committee Note. That amendment could be the deletion of the first sentence thereof. I see no reason to leave an inapplicable sentence in the Rule, especially since we must make other modifications to Rule 26.

Since Bankruptcy Rule 9014 provides that "no response is required under this rule unless the court orders an answer to a motion," the disclosure and meeting requirements could be evaded by not filing a response, appearing at the hearing and participating through argument and the presentation of evidence. It is unlikely, but not impossible. Of course, in an important matter, counsel could request that the court require an answer thereby triggering the disclosure and meeting requirements of the one objecting.

Alternative 2.

Another way to handle the disclosure and meeting requirement would be to trigger their applicability by a request by one who has or may object to the relief requested. This would require an amendment of Rule 26(a)(1) to provide that the disclosures "shall be made to a party requesting the disclosures within _____ days after the request." The use of the term 'other parties' in Rules 26(a)(2) and (3) would have to be reviewed and perhaps modified. As to the one requesting disclosures, the rule should require similar disclosures within a certain time after receiving the moving parties disclosures.

I believe it makes sense to try and craft a disclosure and meeting rule applicable to contested matters, subject to contrary court order. One reason is that there will be a plethora of local rules dealing with these matters otherwise. I assume that the Reporter's intent by the amendment proposed in Draft No. 1 of Rule 9014, was to preclude a local rule dealing with the discovery and meeting requirements, and instead require an order as to each contested matter. If that is not so, then there will be many, many local rules dealing with this subject. But in any event, there will be standing orders and ad hoc orders covering the subject in a variety of ways.

APPENDIX 2

LEWIS AND ROCA LAWYERS

Memorandum August 31, 1994

To	From	Phoenix
Gerald K. Smith	John P. Frank	

Re: **Civil Rule 11 and Bankruptcy Rule 9011**

I. Background.

Rule 11 was substantially amended in 1983. Bankruptcy Rule 9011 was then adjusted to accord with Civil Rule 11. Effective December 1, 1993, Civil Rule 11 was materially altered. "Because Rule 9011, the bankruptcy rule equivalent to Rule 11, has not yet been amended to parallel the 1993 amended Rule 11, courts likely will continue to look to pre-1993 Rule 11 cases and cases under the current rule that address issues that were not affected by the rule change. See In re International Oriental Rug Ctr., Inc., 1994 Bankr. LEXIS 417 at *12-13 (Bankr. N.D. Ill. 1994); In re Leigh, 1994 Bankr. LEXIS 139 at *22 Bankr. N.D. Ill. 1994) ("older case law on the former version of Rule 11 is still applicable")." Solovy, et al., Sanctions Under Federal Rule of Civil Procedure 11, 2 (June, 1994). The question now pending is whether Bankruptcy Rule 9011 should be brought into accord with new Civil Rule 11.

II. Support for Change.

There was an outcry against the operation of Rule 11 from many quarters. The principal group calling for revision was the "Bench-Bar Committee," some of the members of which were Judge Leon Higginbotham of the Third Circuit, Judge Patrick Higginbotham of the Fifth Circuit (now chairman of the Civil Rules Committee), Judge Mary Schroeder of the Ninth Circuit, Professor George Cochran of the University of Mississippi, Francis Fox of Boston, then chairman of the American College of Trial Lawyers Procedure Committee, Hugh Jones, formerly of the New York Court of Appeals and then chairman of the relevant committee for the bar of the State of New York, Jerold Solovy and Laura Kaster of Jenner & Block, authors of the principal ongoing works on Rule 11) and Bill Wagner of Tampa, former president of ATLA, and various former chairmen of the ABA Litigation Section. This group was joined by a large number of others representing state bars, national bars and the academic profession. The general thrust of the criticism was that Rule 11 was operating in a harsh and unpredictable fashion, that it was severely wanting in due process, and that it was materially contributing to the rising incivility of the bar; see the Seventh Circuit Court of Appeals bar report on that general topic.

The various official committees developed their own Rule 11, which is by no means of the Bench-Bar proposal. It was supported unanimously by the Civil Rules Committee and by the Standing Committee, although some Standing Committee members thought that more drastic revision was needed. It was forwarded to Congress by the Supreme Court, with Justices Scalia and Thomas dissenting on this point. In hearings before both the House and Senate Judiciary Committees, the only opposing witness was the Aetna Insurance Company.

The House hearings are not at hand, but I have the Senate hearings of July 28, 1993, when the primary bar concern with the disclosure provisions of Rule 26(a) of the 1993 Rules of Civil Procedure. In that context, and from the record of S. Hrg. 103-608 (July 28, 1993) Serial No. J-103-24, I give you this synopsis. The chairman of the Civil Rules Committee was Judge Sam Pointer, who said, "The 1983 version of Rule 11 provoked more calls for change than any other rule in the history of the Federal Rules of Civil Procedure," p. 3. He added that they had labored hard on this point and that he felt that the amendment "that has been approved by the Supreme Court strikes a fair and equitable balance between competing interests. We believe that it will actually reduce the number of Rule 11 motions brought before courts, but at the very same time actually increase the utility of Rule 11 in reducing the pursuit of frivolous claims and defenses . . . ," pp. 3-4. Judge William Schwarzer, head of the Federal Judicial Center, appeared in support of all of the amendments, including Rule 11, p. 21, though his primary attention went to the disclosure rule. Assistant Attorney General Frank W. Hunger for the Civil Division expressed "strong support" for, among other things, Rule 11, p. 29. President J. Michael McWilliams, President of the American Bar Association, recommended approval of all of the amendments, which would include Rule 11, except for the disclosure rule, p. 54. Associate Attorney General Webster Hubbell advised the Committee that, "With respect to Rule 11, we reaffirm our support for the revised Rule and urge that it be allowed to go into effect," p. 80. In addition to the appearances, there were a few letters taking one side or another.

The change was upheld by Congress.

III. Key Changes.

1. If the relevant conditions existed, sanctions under old 11 were mandatory. Now they are permissive. The switch from "shall" to "may," when related to others, has great importance.

2. The erasure of fee shifting as a prime object of Rule 11 is the most important change in the rule. The rule is now very explicit that sanctions should be for deterrence only and, though unhappily the Committee left this to the note rather than the text, it is now express that fee shifting is not to be the norm and that payment into court is to be the dominant method of enforcing any sanction. This takes the romance out of the application for many persons and should greatly reduce the incentive to incivility among lawyers which has been one of the worst features of the rule. A lawyer will no longer be guilty of a possible claim of malpractice or disloyalty to his client if he does not apply for Rule 11 sanctions because in any normal case they are not going to benefit his client anyway.

The standard is set forth by Justice O'Connor in Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990), that the prime goal of Rule 11 should be deterrence, not punishment. It adopted the proposal which had come principally from the American College of Trial Lawyers that any sanction should ordinarily be paid into court and not to opposing counsel so as to eliminate the "first you try your case and then you try the other lawyer" aspects of the 1983 Rule 11.

3. The express requirements of notice, response, and findings should eliminate the world of casual sanctions. There should be fewer sanctions when the judge can no longer magisterially toss a thunderbolt but must actually give a reasoned account of what is being done.

IV. Detail of Changes.

The major changes as shown in chart form are attached.

V. Appraisal of Changes.

The changes do not go as far as the bulk of the bar which expressed itself had desired, but the new rule is an improvement. The provisions that sanctions can be applied for every separate claim, contention or argument rather than by taking the pleading as a whole may prove burdensome; but the Committee has limited that atomized approach by directing the court to consider whether the error "infected the entire pleading." We will have to live to learn what that means. The earlier rule applied only to writings and this rule is expanded to cover "later advocating" positions which have become untenable. This is to say, if in the course of discovery one learns that some earlier allegation is clearly not true, one cannot, without hazard, press it in an argument. The possibility that counsel can protect himself by making allegations "on information and belief" is helpful, but unfortunate in the respect that a particular form of words must be used.

On the other hand, the conversion of the rule into a "permissive" sanction; the safe harbor device permitting corrections; the clear requirements of due process before penalties can be assessed; and above all, the provision that payments should be made to the court and that the whole rule should operate for deterrence rather than on a punitive basis, should be helpful.

The plain truth is that for better or for worse the powers that be have given us this rule. Those who were critics of the old rule, of which this writer was one of the principals, must now gracefully acquiesce and give the new world ten years to play itself out.

VI. The 9011 Proposal.

Mr. Resnick's proposed adaptation of Bankruptcy Rule 9011 is excellent and if the Bankruptcy Conference is inclined to go with the new rule, this is a good way to do it. It would be well to have a brief note stressing the deterrence purpose of the rule and the pay into court provision of the federal note.

J.P.F.

JPF:cc
Enclosure

RULE 11 CHANGES

1983-93	Bench-Bar Concerns	1994 Rule
Good faith pleadings on law and fact.	None.	No change.
Rule applicable only to writing taken as a whole.	Should apply only "as a whole."	Sanctions allowed for every separate claim, contention or argument; but court should consider whether error "infected the entire pleading."
Rule applies only to writings.	No change desired.	Sanctions allowed for "later advocating" position which has become untenable.
No express provision for allegation which cannot be firm without discovery.	Mistake to require particular form of words for this situation.	Requires that such allegations be expressly alleged as tentative and denied "on information and belief."
Judge "shall" sanction where any sanction is warranted.	Should be permissive "may."	"May."
Person sanctioned - signer.	Should be firm to protect juniors.	"In most cases, the signer," but can be firm; and under 11(C)(1)(A) firm is jointly liable.
No withdrawal of writing permitted.	If withdrawal permitted, should not require new pleading.	21-day withdrawal or "safe harbor" provision; can be informal, without new pleading.
No express requirement, but cases suggest notice, hearings, and findings.	Should be express notice, hearings, findings.	Notice, response, express description of conduct and reason for sanction required.
Rule commonly used to shift attorney fees.	Payments should be to court.	Monetary sanction "should ordinarily" be to court; limited to deterrence.
Applies to discovery when signed.	Should not apply to discovery.	Discovery excluded.

APPENDIX 3

The American BANKRUPTCY LAW JOURNAL

A Quarterly Journal of the National Conference of Bankruptcy Judges

ARTICLES

VOLUME 67

SUMMER, 1993

and to what extent they need disclosure. In any event, an empirical study of this issue is certainly justified at this time.[219]

VIII. THE PROCEDURES SET FORTH IN THE CODE AND THE RULES FOR REQUESTING RELIEF ARE UNNECESSARILY COMPLEX

The purpose of litigation procedure is to focus attention on resolving the parties' dispute, rather than on the process for resolving it.[220] As the means for requesting relief from the court, litigation procedure ought to be simple, straightforward, and consistent.

There appears to be general agreement that the Federal Rules of Civil Procedure meet this test. One noted authority has concluded, "[t]he federal rules have successfully satisfied every test of a good procedural system. The rules are so flexible, simple, clear, efficient, and successful . . . ."[221] Indeed, Federal Rule of Civil Procedure 1 provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[222]

In bankruptcy the procedural rules have this same lofty goal. The Supreme Court has stated that the chief purpose of the bankruptcy laws is the "expeditious and economical administration" of bankruptcy cases.[223] The modern statement of this concept is found in Bankruptcy Rule 1001, which provides: "[t]hese rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding."[224] Unfortunately, as demonstrated below, it is highly questionable whether the Federal Rules of Bankruptcy Procedure are as successful.

Any system of procedure must address a number of issues, including:

-What should the request be called?
-Should there be service of the request itself or merely a notice of the request?
-Who should receive this service?
-Is a written response required?

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[219]*See* Teresa A. Sullivan et al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 LAW & CONTEMP. PROBS. 195 (1987).

[220]"The federal rules are designed to discourage battles over mere form and to sweep away needless procedural controversies that either delay a trial on the merits or deny a party his day in court because of technical deficiencies." 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1029, at 118 (1987) (footnote omitted). *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966).

[221]4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1008, at 46-47 (1987).

[222]FED. R. CIV. P. 1. *See also* Foman v. Davis, 371 U.S. 178, 181 (1962); General Mill Supply Co. v. S.C.A. Servs., Inc., 697 F.2d 704, 711 (6th Cir. 1982). *See generally* Hon. Jack B. Weinstein, *The Ghost of Process Past. The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOKLYN L. REV. 1, 2-3 (1988).

[223]Katchen v. Landy, 382 U.S. 323, 328 (1966); Bailey v. Glover, 88 U.S. (21 Wall.) 342, 346-47 (1874); *Ex parte* Christy, 44 U.S. (3 How.) 292, 312-14, 320-22 (1845).

[224]FED. R. BANKR. P. 1001. *See* 8 COLLIER, *supra* note 21, ¶¶ 1001.1 to 1001.3.

-How much time is allowed for such a written response?
-Is a hearing required?
-How much notice time is required for the hearing?
-Is a hearing required if no response is filed?

A simple system would establish the same procedure for each type of request for relief. A somewhat more complex system would establish a distinct and complete procedural rule for each distinct type of request.

Unfortunately, the collection of directives and requirements found in the Bankruptcy Code and the Bankruptcy Rules represents neither type of procedural system. Rather, it is a complex hybrid structure, characterized by the following:

Certain provisions apply to all procedures. For example, Bankruptcy Code § 102(1) applies throughout the Bankruptcy Code and the Bankruptcy Rules.[225] It provides that the phrase "after notice and a hearing" or a similar phrase means after such notice and an opportunity for a hearing as is appropriate, and authorizes an act (e.g., the entry of an order) without an actual hearing if there was no timely request for a hearing.[226] Similarly, Bankruptcy Rule 9006(d) appears to apply throughout the rules. This rule requires at least five days' notice before a hearing unless another rule or a court order provides otherwise.[227]

Other provisions have a limited application to a few specified procedures. For example, Bankruptcy Rule 9014 is explicitly incorporated into some, but not all, relief-specific rules.[228] This rule requires only "reasonable notice and opportunity for hearing," and states that no response is required unless the court orders an answer.[229] Likewise, Bankruptcy Rule 2002 sets forth the service and notice requirements for certain identified relief-specific requests, as well as the disclosure statement and confirmation.[230]

Each specific request for relief has its own rule with its own peculiar variations of procedure. One important variable in the Bankruptcy Rules is whether there is an explicit requirement for a written response and an explicit grant of authority to the court to resolve the request without a hearing if no objection is filed.[231] A second important variable in the Bankruptcy Rules is the length of time that the parties are allowed to respond, either in writing or at a hearing, to different requests for relief.

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[225] *See* FED R. BANKR. P. 9001.

[226] 11 U.S.C.A. § 102(1) (West 1993)

[227] FED. R. BANKR. P. 9006(d)

[228] See *infra* note 231.

[229] FED. R. BANKR. P. 9014.

[230] FED. R. BANKR. P 2002.

[231] Such explicit provisions are found in FED R. BANKR P 3020(b), 4001(d), 6004(b), 6007(a). The Bankruptcy Rules that have no such provisions, or that leave the requirement of a response to the judge's discretion, include FED R. BANKR. P. 1007(c), 2004(a), 3012, 3013, 4001(a), 4001(b), 4001(c), 6006, 6007(b), 9019(a). *See generally* FED. R. BANKR. P 9014, discussed *supra* note 228.

The Bankruptcy Rules set forth the following time periods:[232]

Five days - Rules 6004(b) and 9006(d)
Fifteen days - Rules 4001(b), (c), and (d), and 6007(a)
Twenty days - Rule 2002(a)
Twenty five days - Rules 2002(b) and 3017(a)
Thirty days - Rule 3007

Rules 9013 and 9014 do not state any specific time.

The result is a system of procedure with several significant problems:

(1) *Reference to more than one relief-specific provision may be necessary to determine the proper procedure.* For example, for the procedure applicable to a motion for relief from the stay, reference must be made to both Bankruptcy Code § 362(e) and Bankruptcy Rule 4001(a). Similarly, the procedures applicable to a motion for authorization to use cash collateral are found in both Bankruptcy Code § 363(c)(3) and Bankruptcy Rule 4001(b). The procedure upon the filing of a disclosure statement is set forth in Bankruptcy Rule 2002(b) and then is restated in Bankruptcy Rule 3017(a), without any apparent need or purpose. For the procedure for plan confirmation after approval of the disclosure statement, reference must be made to both Bankruptcy Rule 2002(b) and Bankruptcy Rule 3021(b)(2).

(2) *The answers in the general rules and in the relief-specific rules may conflict.* Regarding the disclosure statement, Bankruptcy Rule 3017(a) states, "the court shall hold a hearing." This apparently conflicts with § 102(1) of the Bankruptcy Code.[233] Bankruptcy Rule 3020(b)(2) currently also has language appearing to require a hearing.[234]

(3) *Too often no answer can be found.* Several Bankruptcy Rules provide little or no direction regarding such matters as service, notice, objections, or a hearing.[235]

(4) *One issue is just plain silly.* The issue of what to call the request—an adversary proceeding complaint, a motion, an application, a request, or an objection—is technically alive and well under the Bankruptcy Rules. Bankruptcy Rule 7001 identifies the specific requests for relief that must be filed as "adversary proceedings." The term "application" is used in Bankruptcy Rules 2007(b), 2014(a) and 2016(a). Other requests for relief are simply called "motions," as, for example, in Bankruptcy Rule 9014. The distinction between a motion and an application is suggested in Bankruptcy Rule 9013, which states: "[a] request for an order, except when an

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[232]However, the determination of the applicable time periods cannot be made by reference to these rules alone, because under FED. R. BANKR. P. 9006(f), an additional three days is added upon service by mail.

[233]The efficacy of this requirement is therefore disputed. *See infra*, note 242 and accompanying text; 5 COLLIER, *supra* note 21, ¶ 1125.03[4], at 1125-32 to 34.

[234]The 1993 amendments to Bankruptcy Rules 6006 and 6007, effective August 1, 1993, deleted the explicit requirement of a hearing. Thus, in the absence of a request for a hearing, none is now required. PROPOSED FED. R. BANKR. P. 6006, 6007 advisory committee's notes.

[235]*See, e.g.*, FED. R. BANKR. P. 1007(c), 2004(a), 2007(a), 2007(b), 2014(a), 2016(a), 3012, 3013.

application is authorized by these rules, shall be by written motion, unless made during a hearing."[236] Although this suggests that the difference between an application and a motion was intentional and not accidental, it is not clear what that intent was. As a result, applications are often called motions, and vice versa, and the intended distinction is simply lost.[237]

Therefore, it is fair to conclude that the procedural requirements in bankruptcy are complex, confusing, and incomplete.[238] It is simply not possible to discern any rational basis for all of this. One commentator stated the problem more diplomatically:

> Conceptual precision is not a necessary requirement of a functioning legal system; it may not even be desirable. But the examination of imprecision may be instructive. It may help us to better cope with the realities of the legal system we have to live with. And it may help identify issues on which the system has failed or refused to commit itself. It may also help us identify an agenda of unfinished business.[239]

The complexity of these provisions leads to delay and expense in three distinct ways. First, it can take attorneys, court personnel, and judges significant time and effort just to determine the proper procedures for each of the numerous types of requests for relief.[240] Second, significant litigation can result when it is alleged that

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[236]FED R. BANKR. P 9013.

[237]The confusion regarding nomenclature extends even to the most authoritative levels. One court of appeals recently stated that when a trustee's proposal to settle a dispute is uncontested, an "administrative proceeding" is warranted. Kowal v. Malkemus (*In re* Thompson), 965 F.2d 1136, 1140 n.5 (1st Cir. 1992). It is not clear what an "administrative proceeding" is, and in any event there is no basis for this characterization in the rules.

According to one court, an administrative claim for postpetition taxes is made in a "request for payment" rather than in a proof of claim. *In re* Mansfield Tire & Rubber Co., 73 B.R. 735 (Bankr. N.D. Ohio 1987).

See generally HON. WILLIAM L. NORTON, JR. & WILLIAM L. NORTON, III, NORTON QUICK REFERENCE PAMPHLET, BANKRUPTCY CODE AND RULES 207-9 (1993), John D. Ayer, *The Forms of Action in Bankruptcy Practice An Exposition and a Critique*, 1985 ANN. SURV. BANKR. L. 307, Hon. William L. Norton, Jr., *Bankruptcy Terminology and Proceedings Procedure*, 1984 ANN. SURV. BANKR. L. 1.

[238]*See* HON. WILLIAM L. NORTON, JR. & WILLIAM L NORTON, III, NORTON QUICK REFERENCE PAMPHLET, BANKRUPTCY CODE AND RULES 207-9 (1993); DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 17 (1992); Ronald M. Martin & Terence Fagan, *A Guide to Bankruptcy Procedure Under the New Rules*, 89 COM. L.J. 17 (1984) ("The purpose of this article is . . . to help guide the practitioner through the maze of litigation and appeals embodied in the new rules.").

[239]John D Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, 1985 ANN. SURV. BANKR. L. 307, 336-37 (footnotes omitted).

[240]In an effort to address the difficulties described in this part, most bankruptcy courts have promulgated local rules, as permitted by FED R. BANKR. P. 9029. While such local rules may be effective in providing guidance on procedural matters in any given district, they also substantially undermine the important goal of national uniformity in bankruptcy procedure. Peter J Antoszyk & William E. Connors, *An Overview of Local Rulemaking in Bankruptcy Court*, AM. BANKR. INST J., May 1993, at 31. That problem has in turn led to an effort to create a Model Uniform Local Bankrtupcy Rule. *See* Hon. James J. Barta, *A Model Uniform Local Bankruptcy Rule*, AM. BANKR. INST. J., Feb. 1993, at 14.

there was insufficient compliance with the proper process.[241] Sometimes, the result of that litigation is that the process must be abandoned or started over. Third, and perhaps most significantly, many bankruptcy judges conduct hear-ings on most or all requests for relief, despite the explicit language of Bankruptcy Code § 102(1) and certain specific Bankruptcy Rules, because the rules make continuing references to hearings.

The solution to this problem is painful but clear. The Bankruptcy Rules need a thorough review and revision for the purpose of clarification and simplification. In this process, the initial question must be whether to establish a structure in which each type of request for relief has its own procedural rule or a structure in which there is one rule of procedure uniformly applicable to all requests. Focusing on one structure or the other is absolutely necessary in order to eliminate the substantial problems created by the present hybrid structure. Then, care must be taken to assure that each of the procedural questions faced when any given request is filed is actually addressed in the rules. Finally, to promote the best use of scarce judicial resources, the rules should establish an explicit and uniform procedure which requires a written response to any request for relief, and which then authorizes the judge to enter an order resolving any request for relief to which no written objection is filed.[242]

The effort suggested here is of great magnitude, but it is also of great importance. Clarifying and simplifying the Federal Rules of Bankruptcy Procedure holds great potential for significantly reducing delay and expense in chapter 11 bankruptcy cases.

CONCLUSION

The causes of delay and expense in chapter 11 bankruptcy cases are numerous. The statutory causes are significant. Presently, the parties in interest bear an unnecessary burden of expense and delay due to such problems as issues left open in the Bankruptcy Code, duplicate litigation, unnecessary requirements, lack of case management, and awkward and complex jurisdiction and procedure. Each of these problems can and should be addressed. The result would be a substantial benefit to all concerned.

This article has focused on the problems with the present system, and has briefly discussed certain solutions to those problems. It may well be that the problem of expense and delay in chapter 11 cases can also be addressed by creating an alternative

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[241] *See, e.g.*, Wedgewood Inv. Fund, Ltd. v. Wedgewood Realty Group (*In re* Wedgewood Realty Group, Ltd.), 878 F 2d 693 (3d Cir. 1989); Grundy Nat'l Bank v. Looney (*In re* Looney), 823 F.2d 788 (4th Cir.) *cert. denied*, 484 U.S. 977 (1987); River Hills Assocs., Ltd. v. River Hills Apartments Fund (*In re* River Hills Apartments Fund), 813 F.2d 702 (5th Cir. 1987); Mutual Benefit Life Ins. Co. v. Stanley Station Assoc., L.P. (*In re* Mutual Benefit Life Ins Co. in Rehabilitation), 140 B.R. 806 (D. Kan 1992).

[242] *See, e.g*, E.D. MICH. BANKR. R. 2 08

structure for reorganization. Indeed, the current proposal in the Bankruptcy Amendments Act of 1993 for a new chapter 10 is such a structure.[243]

In any event, the case for establishing a bankruptcy review commission is clear, and its agenda is substantial.

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[243]Bankruptcy Amendments Act of 1993, S. 540, 103d Cong., 1st Sess. § 201. If enacted, chapter 10 would be tried as a three year experiment in eight districts. Businesses with a maximum total debt of $2.5 million would be eligible. A plan would have to be filed within 90 days of the petition, and the confirmation hearing must be concluded within 45 days of the filing. The plan would pay unsecured creditors from future disposable income, and is confirmable under standards very similar to those applicable in chapter 13 cases.

APPENDIX 4

AMERICAN BAR ASSOCIATION
SECTION OF BUSINESS LAW
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports the enactment of legislation that would amend Title 11 of the United States Code as follows:

1. Amend 11 U.S.C. § 327(a) to read as follows:*

> "(a) Except as otherwise provided in this section, the trustee or debtor in possession, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons [that do not hold or represent an interest adverse to the estate, and that are disinterested persons,] to represent or assist in carrying out the trustee's or debtor in possession's duties under this title[.], if such professional person does not hold or represent an interest materially adverse to the estate and, in the case of an attorney, if such attorney's employment does not violate

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* Words and punctuation added to current text are underlined. Words and punctuation in brackets appear in current text and are deleted in proposed text.

nonbankruptcy standards of professional responsibility generally applicable in the district where the case is pending. An attorney employed by the trustee must also be disinterested."

2. Amend 11 U.S.C. § 1107 by deleting the (a) from subsection (a) and deleting subsection (b) in its entirety. [The deleted § 1107(b) currently reads "(b) Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case."]

BE IT FURTHER RESOLVED, that the American Bar Association supports and recommends that the Advisory Committee on Bankruptcy Rules propose amendments to Bankruptcy Rules 2014 and 2016 (and the addition of an attorney declaration form to the Official Bankruptcy Forms), which provide for more detailed disclosure of potentially conflicting interests and similar information, and which provide that if such data has been filed in good faith a subsequent termination of the attorney's employment will not disqualify that attorney from receiving compensation under applicable standards. The text of the proposed additions: Rule 2014(c), (d), (e) and (f), Rule 2016(c), and the Attorney Declaration Form, is appended to the Report.

EXECUTIVE SUMMARY

1. Summary of the Recommendation.

A. The resolution proposes a change in the Bankruptcy Code to distinguish between counsel engaged to represent the trustee in a bankruptcy case and counsel engaged to represent the debtor in possession. [In most instances, the Bankruptcy Code uses the term "trustee" to mean both a trustee in the traditional sense and the debtor in possession, unless the context makes clear that a different reading is required.] The proposed text would make clear that a counsel for a trustee (which trustee must himself be a "disinterested person" as defined in Bankruptcy Code § 101(13)) must likewise be a "disinterested person", while the attorney for a debtor in possession (who is clearly not required to be a "disinterested person") is likewise not required to be a "disinterested person".

A principal purpose is to allow attorneys who have previously represented the debtor to continue to represent that debtor, and to make clear that the obligation of loyalty and similar obligations of that attorney are primarily to the debtor. Several bankruptcy judges and a small segment of the Bankruptcy Bar believe that a new attorney for the debtor is or should be required whenever a bankruptcy petition is filed, and some judges have even suggested that the primary loyalty of that debtor should be to the "estate" (or even to the court), rather than to the "debtor".

B. The second part of the resolution would add disclosure requirements to the relatively limited disclosures required currently by Bankruptcy Rule 2014 [which deals with applications for employment of professionals], would add an Attorney Declaration Form as an Official Bankruptcy Form to serve as a sort of check-list setting forth the types of disclosure that are or may be of significance to the court in determining whether to appoint counsel, and sets forth an addition to Bankruptcy Rule 2016 [which deals with compensation for services rendered and reimbursement of expenses] to provide that if an attorney who has made a good faith disclosure of the required information subsequently has his employment terminated, that the subsequent termination does not mandate a disqualification from receiving compensation or reimbursement of expenses.

There have been instances where attorneys have been appointed by Bankruptcy courts and have served as counsel to the debtor in possession for extended periods of time, and, upon reexamination perhaps a year or two later, the Bankruptcy Court had determined that such attorney was not a "disinterested person" and that the attorney's requested fees would therefore be denied. In certain instances the loss of fees ran into six figures, and the lack of "disinterestedness" was known to all parties and would have been known to the Bankruptcy Judge if the Bankruptcy Judge had read or focused upon the attorney's application to be engaged. The proposal is designed to avoid or minimize the problem in the future.

2. Summary of the Supporting Report.

The purpose of the Bankruptcy Code modifications would be to assure that an attorney with historic ties to a debtor is not automatically disqualified as bankruptcy counsel for that debtor. The proposal for changes in the Bankruptcy Rules and Forms is to facilitate full disclosure of connections between proposed debtor's counsel and the debtor, and to provide that attorneys not be disqualified from receiving compensation if such connections were adequately disclosed.

The report traces the history of the "disinterested" requirement, noting that the requirement seems to have been applied to the attorney for a debtor in possession by a "glitch," to wit: that the Bankruptcy Code adopted the format of utilizing the term "trustee" to mean both a classic court-appointed "trustee," as well as the debtor in possession (i.e., a debtor where no trustee has been appointed).

The report then goes on to show that the ABA Model Rules of Professional Conduct emphasize, perhaps more than did the prior Model Code, that an attorney's obligation is to abide by the client's decisions and generally to follow instructions given by the client or its designated officers, obligations which are inconsistent with the dissenting position that the duty of an attorney for a debtor in possession may run primarily to the bankruptcy estate or some other abstraction. A dissenting view from a bankruptcy judge is that it is useful to have new counsel who is a bankruptcy specialist and who is divorced from any loyalty to past management or business.

REPORT

The proposed Bankruptcy Code Amendments are designed to assure that an attorney with historic ties to a debtor is not automatically disqualified as bankruptcy counsel for that debtor. Certain bankruptcy judges have suggested that the attorney for a debtor in possession should have considerable independence from the management of that debtor, and some decisions have denied compensation because the attorney was not a person "disinterested" in the client. That result is inconsistent with provisions of the Model Rules of Professional Conduct which require a lawyer to abide by the client's decisions, and, in the corporate context, which hold that the lawyer represents the entity under instructions issued by its officers and board of directors, unless they seek to violate legal obligations. The attorney is not to be "disinterested" in the client; he must be guided by the client's objectives.

The recommendations suggest a modest change to bring the Bankruptcy Code into line with what is believed to have been the drafter's intention. The proposed rule changes and the new bankruptcy form would expand disclosure requirements to present potential conflicts and similar issues to the bankruptcy judge approving the appointment of counsel at the time the application for approval is presented, and provides that if the engagement of that attorney is subsequently terminated, material fairly disclosed to the court should not be a basis for withholding compensation.

A major change in reorganization practice brought about by the Bankruptcy Reform Act of 1978 was to continue existing management, or allow the debtor to continue in possession, in Chapter 11 reorganization cases, absent a showing of incompetence, fraud or the like.[1] Under the prior Bankruptcy Act, an independent trustee was required in nearly all Chapter X reorganization cases (one of several predecessor reorganization procedures), since an independent trustee had to be appointed if the indebtedness was $250,000 or more.[2] The trustee in a Chapter X case had to be independent or disinterested. Under Bankruptcy Act § 158 a person was not disinterested if:

• Although the Report is submitted by the Chair of the Business Bankruptcy Committee, its scholarship is the work of Gerald K. Smith, Phoenix, Arizona, Chair of the Subcommittee on Professional Ethics in Bankruptcy Cases.

[1] Bankruptcy Code § 1103.

[2] Bankruptcy Act § 156.

> (1) he is a creditor or stockholder of the debtor; or
>
> (2) he is or was an underwriter of any of the outstanding securities of the debtor or within five years prior to the date of the filing of the petition was the underwriter of any securities of the debtor; or
>
> (3) he is, or was within two years prior to the date of the filing of the petition, a director, officer, or employee of the debtor or any such underwriter, or an attorney for the debtor or such underwriter; or
>
> (4) it appears that he has, by reason of any other direct or indirect relationship to, connection with, or interest in the debtor or such underwriter, or for any reason an interest materially adverse to the interests of any class of creditors or stockholders.

The disinterested trustee could only employ a disinterested attorney.[3] However, neither the Bankruptcy Act nor the Bankruptcy Rules required that counsel for the debtor, in those cases where the debtor was left in possession, had to be disinterested. Additionally, neither Chapter XI nor the Chapter XI Rules (Chapter was another of the several predecessor reorganization procedures), required that counsel for the debtor in possession had to be disinterested. The Chapter XI Rules provided that the Bankruptcy Rules controlled as to the employment of attorneys for a debtor in possession in Chapter XI cases.[4] The Bankruptcy Rules did not require that counsel be disinterested, but only precluded appointment if counsel represented an interest adverse to the estate "in the matters upon which he is to be engaged ...."[5] Thus, when a debtor was continued in possession either in Chapter XI or Chapter X, counsel for the debtor did not have to be disinterested.

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[3] Bankruptcy Act § 157; there was an exception in that an attorney could be employed for a specific purpose.

[4] Chapter XI Rule 11-22.

[5] Bankruptcy Rule 215(a). This Rule allowed employment of an attorney who had been employed by the bankrupt, if in the best interest of the estate. An attorney was not disqualified as a result of employment by a general creditor in the case.

The draftsmen of the Chandler Act Amendments used a drafting convention in Chapters X and XI. Rather than providing separate rules for trustee and debtor in possession, Chapters X and XI provided that the debtor in possession was given the powers of a trustee.[6] In Chapter X the debtor in possession was "vested with all the rights, ... subject to all the duties, and exercise[d] all the powers of a trustee ..."[7] Chapter XI provided that the debtor in possession had the title and could "exercise all the powers of a trustee ..."[8]

The significant change in law and practice that came about in 1978 with the enactment of the present Bankruptcy Code was that existing management continued in most cases. Debtor in possession became a defined term under Chapter 11, but still signified the absence of an independent trustee.[9] The Commission on the Bankruptcy Laws of the United States[10] had

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[6] 8 Collier on Bankruptcy, ¶ 6.32, at 928-30(14th ed. 1974).

[7] Bankruptcy Act § 188: "A debtor continued in possession of its property shall have all the title, be vested with all the rights, be subject to all the duties, and exercise all the powers of a trustee appointed under this chapter, subject, however, at all times to the control of the judge and to such limitations, restrictions, terms and conditions as the judge may from time to time prescribe."

[8] 8 Collier on Bankruptcy, supra note 7. Bankruptcy Act § 342 provided: "Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act, subject, however, at all times to the control of the court and to such limitations, restrictions, terms, and conditions as the court may from time to time prescribe."

[9] Bankruptcy Code § 1101(1) provides: "'debtor in possession' means debtor except when a person that has qualified under § 322 of this Title is serving as trustee in the case."

[10] Report of the Commission on the Bankruptcy Laws of the United States, 93rd Cong., 1st Sess., H.Doc. No. 93-137, Part II, § 7-109, p. 209 (1973) (hereafter "Commission Report"): "An attorney or accountant employed by a trustee shall be disinterested unless the administrator, when it is in the best interest of the estate, authorizes the employment for a special purpose of an attorney or an accountant who has been employed by the debtor but who represents or holds no interest adverse to the debtor or the estate in the matters on which he is engaged."

recommended that the use of an independent trustee be discretionary; if a trustee were appointed, however, both the trustee and counsel for the trustee had to be disinterested. The Commission did not recommend any change if the debtor continued in possession; in that event counsel need not be disinterested. The Commission also recommended that the "debtor shall have all the rights and exercise all the powers of the trustee" until a trustee is appointed.[11] Thus, existing practice as to counsel for the debtor in possession was to continue.[12] Thus, while the Commission recommended changes in reorganization practice it did not require that counsel for a debtor in possession be disinterested. That appeared to continue to be so, even though significant changes occurred in what eventually became the Bankruptcy Code.[13] The Commission's proposed section regulating the employment of counsel in reorganizations was later consolidated in the Bankruptcy Reform Act of 1978 with provisions regulating employment of professional persons in Chapter Three, a general chapter dealing with case administration, which was applicable to all cases, both reorganization and liquidation.[14] Section 327 required that counsel for the trustee be disinterested, in both liquidation and reorganization cases, but it did not expressly so provide as to the debtor in possession.[15]

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[11] Commission Report § 7-201(b), at 234.

[12] In cases other than reorganization cases, the Commission recommended a continuance of the Bankruptcy Act and Bankruptcy Rule procedures as far as the employment of counsel for the trustee, that is, the attorney could not have an interest adverse to that of the estate in the matters on which he is to be engaged, but previous employment by a creditor was not necessarily disqualifying. Commission Report § 4-309(c).

[13] The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598.

[14] 11 U.S.C. § 327.

[15] Bankruptcy Code § 327(a): "Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants,

(Footnote continued on next page.)

Nowhere in the Code or the legislative history is it provided that counsel for a debtor in possession must be disinterested.[16] But somewhere along the way a drafting problem arose. The Senate staff added to the section dealing with the rights, powers and duties of a debtor in possession a provision, innocuous in and of itself, which provided that "[n]otwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

In the final debates on the legislation, the Senate staff prevailed as to the new provision and there was also inserted "a technical amendment contained in the Senate amendment indicating that an attorney for the debtor in possession is not disqualified for compensation for services and reimbursement of expenses simply because of prior representation of the debtor."[18] This was accomplished by inserting a cross reference in § 328(c) to § 1107(b).[19] The Joint Legislative

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(Footnote continued from previous page.)
appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title." (Emphasis added) This section is applicable to all cases. 11 U.S.C. § 103(a).

[16] See H.R. Report No. 95-595,95th Cong. 1st Sess. (1977) and S. Report No. 95-989, 95th Cong. 2nd Sess. (1978).

[17] S.2266, 95th Cong. 2d Sess. § 1107(b), p. 516 (1978). The House Bill did not contain § 1107(b). H.R. 8200, 95th Cong. 1st Sess. § 1107, p. 492 (1977).

[18] Joint Legislative Statement, 124 Cong. Rec. S17,408 (daily ed. October 6, 1978).

[19] Except as provided in Section 327(c), 327(e) or 1107(b) of this title, the Court may deny allowances compensation for the services and reimbursement of expenses of a professional person employed under § 327 or 1103 of this title if, at any time during such professional person's employment under § 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed." (Emphasis added).

Statement did not state or even imply that counsel for the debtor in possession must be disinterested. Nor did the Joint Legislative Statement discuss the reason for the inclusion from the Senate Bill of what became § 1107(b), which provided that a person was not disqualified to represent a debtor in possession "solely because of such person's employment, by or representation of the debtor before the commencement of the case."[20]

Until the inclusion of the provision from the Senate Bill, there was no possible inference that counsel for the debtor in possession must be disinterested. It can be inferred, however, from § 1107(b) that Congress intended to bring the employment of counsel for the debtor in possession under § 327. Nonetheless, in light of the prior practice, a more plausible interpretation is that the amendments were intended to negate the possibility that prefiling counsel for the debtor might be considered to have a materially adverse interest and thus be disqualified from acting as counsel for the debtor in possession. But as a result of the draftsmen carving out one exception, it can be inferred that the disinterestedness requirement otherwise applies. But such interpretation ignores the status of the law prior to October 1, 1979, the effective date of the Bankruptcy Code, and the absence of any express statutory provision overruling the prior law. There is also a lack of any legislative history suggesting a disinterestedness requirement for counsel for the debtor in possession. Surely such a dramatic change would not have been done in such a delicate way. It would have been controversial and widely discussed. A canon of construction often invoked by the Supreme Court of the United States is that the rules that were established under the Bankruptcy Act continue unless explicitly repealed or modified.[21] That is not the situation as to § 1107(b). Even the legislative history is silent. Nonetheless, the Bankruptcy Bench assumes that counsel for a debtor in possession must be disinterested.

The result has been a substantial restriction on the right to choose counsel. The effect has been to cause attorneys with historic ties to a debtor to be automatically disqualified (in some jurisdictions) as bankruptcy counsel for that debtor.

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20 Joint Legislative Statement, supra note 20, at S17,419: "The House amendment adopts Section 1107(b) of the Senate amendment which clarifies a point not covered by the House bill."

21 Kelly v. Robinson, 107 S.Ct. 353,359-60(1986); Midlantic Nat'l Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494,501(1986).

The Committee believes that traditional legal ethics, as well as the Constitution, emphasize the right of a person to select counsel and the correlative lawyer's obligation to respond to the lawful desires of the client. A number of bankruptcy courts have utilized the Bankruptcy Code "disinterestedness" standard to impose a different set of duties upon the lawyer ironically, not upon the debtor itself -- and often to punish the debtor's counsel who were perceived as acting too vigorously for the debtor, rather than "for the estate."

While "disinterestedness" is an appropriate standard when dealing with the "trustee" -- a person who himself must be "disinterested" -- its use in respect of counsel for the debtor has resulted in the disqualification of debtor's counsel in a number of cases. Most bankruptcy judges effectively ignored the "disinterestedness" provision when dealing with prebankruptcy counsel for the debtor. Generally speaking, a disclosure to the Court at the time of engagement that a prebankruptcy fee remained unpaid -- thus rendering the law firm a creditor of the debtor -- or that the law firm represented shareholders or corporations affiliated with the debtor, was not automatically disqualifying. Obviously, if a party in interest presented reasons for disqualification such considerations came before the bankruptcy judge for evaluation and decision.

During recent years, however, several courts have determined that "a violation of the disinterestedness rule" required disqualification of the debtor's counsel. In some cases, the court did not make that disqualification determination until long after the law firm had been appointed by the same court and had put thousands of dollars of time and costs into the case. In some instances, the courts have determined that the initial appointment was void ab initio, and no fee was allowable for the services.

As a matter of principle, the Ethics Task Force, The Business Bankruptcy Committee and The Business Law Section believe that the applicable professional ethics standards, and indeed the Constitutional mandate respecting selection of counsel, impels revision of the "disinterestedness" requirement as applied to counsel for the debtor. Further, fairness dictates that if full disclosure of a potential "conflict" is made to a court (and, of course, to the client) at the time of appointment, that the attorney not be punished later for acting in the appointed capacity.

The difficulty with the disinterestedness standard being applied to counsel for the debtor in possession is not that it is silly but that it causes substantial problems. It does not fill the vacuum left by the abandonment of an independent trustee and the idea that it might is misleading.

The disinterestedness standard often disqualifies counsel most knowledgeable and best equipped to handle the reorganization. It does this by focusing on historical identity with the debtor, which should not be disqualifying in and of itself. The relevant test should be whether any of the historical connections with the debtor creates a materially adverse interest. The fact that the lawyer or a partner of the lawyer may be a creditor, stockholder, director or officer should not be the end of the inquiry; the issue is whether it creates a problem. Whether the debtor is represented by the historical lawyer or a new lawyer, the lawyer must still take direction from those in control, and is therefore not disinterested.

The obligation of counsel for the non-disinterested debtor in possession to follow the direction of his own client, ahead of the interests of others, is underscored by the ABA Model Rules of Professional Conduct. Model Rules 1.2(a) and 1.4(b), for example, require a lawyer to abide by the client's decisions concerning the objectives of representation, and explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation. There was no counterpart to these rules in the 1969 Code of Professional Responsibility.

ABA Model Rule 1.13, again with no counterpart in the Model Code, provides that a lawyer represents an entity through its duly authorized constituents. The lawyer is to follow their instructions, unless they seek to violate a legal obligation to the organization or violate a law imputed to the organization which results in substantial injury to the organization -- not to others. Even then, the lawyer may not simply follow the dictates of others or his own beliefs as to the best interests of all. If he cannot persuade the highest authority in the organization to comply with the organization's clear legal duties, and he believes the violation will substantially injure the organization, his only option is to resign. Model Rule 1.13(c). The notion that the debtor in possession's attorney must be disinterested, so that he can act in the best interest of the estate and all its constituents and report on a disinterested basis to the judge, is contrary to fundamental precepts of the Model Rules.

The second resolution seeks an amendment to the present Bankruptcy Rules, which are inadequate. No guidance is given as to the nature of the required disclosures or the test to be applied. Counsel are disqualified and required to forfeit fees earned in representing debtors in possession, because they were unaware of the caselaw that has developed on disinterestedness and the scope of disclosure involved in evaluating disinterestedness. The test may be beyond the scope of the

rules, but the disclosures are not, and the Ethics Committee has developed some helpful suggestions for the Advisory Committee on the Rules of Bankruptcy Procedure. The second resolution recommends adoption of the suggestions.

The source of the difficulty, however, is the ambiguity of the Code and the decisions of the courts requiring that counsel for the debtor postpetition be disinterested. Recognizing the illogic of this requirement, as well as its mischief, the Business Law Section has recommended the first resolution, that the Code be amended to provide that counsel for the debtor in possession need not be disinterested, but must not hold or represent an interest materially adverse to the estate, and the employment must not violate standards of professional responsibility. This change is a return to the rule, concurred in by Chairman Douglas, in the final version of Chapter X, and is what was intended by the draftsmen of the Bankruptcy Reform Act of 1978.

One member of the Business Bankruptcy Committee, Bankruptcy Judge Samuel L. Bufford of the Central District of California, dissented from the report and recommendations. Judge Bufford believes that Congress intended to provide that a new counsel is required to represent a debtor in bankruptcy proceedings. He argues that since the old management of a debtor in bankruptcy must understand that certain fiduciary duties are required of that management in Chapter 11, a new counsel can better serve to effect that goal.

Judge Bufford further argues that bankruptcy law is sufficiently complex so that only a specialist should advise a Chapter 11 corporate debtor, and that the debtor needs guidance from counsel who has no commitment to the pre-bankruptcy debtor or to the "business as usual" prior to the filing of the bankruptcy case.

The Business Bankruptcy Committee and the Section on Business Law were cognizant and respectful of Judge Bufford's position. The Committee overwhelmingly disagreed with his position, and the Section on Business Law unanimously supported the Committee's recommendations.

Respectfully submitted,

Nathan B. Feinstein
Chair, Business Bankruptcy
Committee
Section of Business Law

August 1991

PROPOSED AMENDMENT TO BANKRUPTCY RULE 2014

(c) **Attorney Declaration.** The attorney declaration required by subsection (a) of this rule shall disclose all connections of the attorney or his firm with the debtor, creditors, or any other parties in interest, whether or not such connections would constitute a basis for disqualification, including whether the attorney, the attorney's firm or any other attorney in the firm:

1. represented the debtor within one year of the petition filing, including a description of the services, and dates performed and paid;

2. is a creditor of the debtor, including by reason of unpaid fees for prepetition services, and the amount, security held, and other particulars of any such claim;

3. holds any direct or indirect equity interest in the debtor, including stock, stock warrants, a partnership interest in a debtor partnership or right to acquire such an interest;

4. is or has served as an officer, director or employee of the debtor within two years before the petition filing;

5. is in control of the debtor or is a relative of a general partner, director, officer or person in control of the debtor;

6. is a general or limited partner of a partnership in which the debtor is also a general or limited partner;

7. is or has served as an officer, director, or employee of a financial advisor which has been engaged by the debtor in connection with the offer, sale, or issuance of a security of the debtor within two years before the filing of the petition;

8. has represented a financial advisor of the debtor in connection with the offer, sale, or issuance of a security of the debtor within three years before the filing of the petition;

9. presently represents a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner, lessor, lessee, party to an executory contract of the debtor, or person otherwise adverse or potentially adverse to the debtor or the estate, on any matter whether such representation is related or unrelated to the debtor or the estate, describing or attaching any waivers of conflicts obtained from such clients;

10. previously represented a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner,

lessor, lessee, party to an executory contract, or person who is otherwise adverse or potentially adverse to the debtor or the estate, on any matter substantially related to the bankruptcy case, describing or attaching any waivers of conflicts obtained from such former clients;

11. represents an affiliate or insider of the debtor, describing the affiliate's or insider's relationship with the debtor, including intercompany claims, asset transfers, overlapping creditors, creditor guaranties and subordination agreements, jointly-owned assets, shared officers, directors or owners;

12. has been paid fees prepetition or holds a security interest, guarantee or other assurance of compensation for services performed and to be performed in the case, with an explanation of the source, amount, and terms of any such arrangement;

13. has any agreement or understanding with anyone else for sharing compensation for services rendered in or in connection with the case, describing the particulars of any arrangement other than those within the attorney's own firm;

14. has any other connection with the debtor, creditors, United States Trustee or any employee of that office, or any other parties in interest; and

15. has any other interest, direct or indirect, which may be affected by the proposed representation.

(d) **Initial Employment.** The court shall evaluate the disclosures pursuant to subsection (c), which may or may not be indicia of disqualification. It may approve employment of counsel for a debtor in possession or trustee on an interim basis, without notice and a hearing.

(e) **Continued Employment.** The court may authorize continued employment by counsel for a debtor in possession or trustee after notice and a hearing. The attorney shall serve on the committee of unsecured creditors, if appointed, any other committees appointed in the case, the creditors on the list required by rule 1007(d), the United States trustee, any trustee appointed in the case, and such other parties in interests as the court may direct:

(1) the application to approve employment;

(2) the attorney declaration;

(3) the initial employment order; and

(4) either a notice of a hearing on further employment, or a notice of a date by which objections to further employment shall be filed and served on interim counsel, as the court directs.

Any hearing on continued employment shall be set not less than 20 days after notice of the hearing is served, and shall take place within 45 days of the application

filing. Any bar date for objections to further employment shall be set not less than 20 days after service of the notice, and shall provide that the court will set a hearing to consider any timely objections.

(f) **Supplemental Attorney Declaration.** A supplemental attorney declaration shall be filed within 15 days after the occurrence of any event, or the discovery of any fact, which is subject to disclosure pursuant to subsections (a) and (c) of this rule. Such supplemental verified statement shall be served on the parties listed in subsection (e) and such other parties in interest as the court may direct.

PROPOSED AMENDMENT TO BANKRUPTCY RULE 2016

(c) If an attorney's employment is terminated, the court shall nevertheless determine compensation for services and reimbursement of expenses from the estate under otherwise applicable standards, provided the attorney declaration accompanying the application for employment and any supplemental attorney declaration were filed by the attorney with the good faith belief, formed after inquiry appropriate to the circumstances of the case, that he disclosed all material facts and met all requirements for representation of the debtor in possession or trustee. Termination of the attorney's employment does not mean an attorney declaration was not filed in good faith.

PROPOSED ATTORNEY DECLARATION FORM

[CAPTION AS IN FORM NO. 1]

[Attorney], a partner in [firm], submits the following statement in compliance with 11 U.S.C. § § 328(a) and 329(a) and Bankruptcy Rules 2014 and 2016.

1. [Firm] represented the debtor during the past year in [describe generally]. In connection with that representation, [describe when services were rendered and when payment was received].

2. [Firm] holds a retainer balance of $_____ in connection with the prior representation/or is owed $_____ for these prepetition services, and holds a guarantee by _____, who is related to the debtor as _____, or holds a security interest in _____ which is owned by _____, obtained on _____.

3. No attorney in [firm] holds a direct or indirect equity interest in the debtor [including stock, stock warrants, a partnership interest in a debtor partnership] or has a right to acquire such an interest, except _____.

4. No attorney in the firm is or has served as an officer, director or employee of the debtor within two years before the petition filing, except _____.

5. No attorney in the firm is in control of the debtor or is a relative of a general partner, director, officer or person in control of the debtor, except _____.

6. No attorney in the firm is a general or limited partner of a partnership in which the debtor is also a general or limited partner, except _____.

7. No attorney in the firm is or has served as an officer, director, or employee of a financial advisor which has been engaged by the debtor in connection with the offer, sale, or issuance of a security of the debtor within two years before the filing of the petition, except _____.

8. No attorney in the firm has represented a financial advisor of the debtor in connection with the offer, sale, or issuance of a security of the debtor within three years before the filing of the petition, except _____.

9. No attorney in the firm presently represents a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner, lessor, lessee, party to an executory contract of the debtor, or person otherwise adverse or potentially adverse to the debtor or estate, on any matter, whether such representation is related or

unrelated to the debtor or the estate, except _____ [describe or attach any waivers of conflicts obtained from such clients].

10. No attorney in the firm has previously represented a creditor, holder of 5 percent or more of any equity securities of a debtor having 300 or more equity security holders, equity security holder of any other debtor, general partner, lessor, lessee, party to an executory contract, or person who is otherwise adverse or potentially adverse to the debtor or the estate, on any matter substantially related to the bankruptcy case, except _____ [describe or attach any waivers of conflicts obtained from such former clients].

11. No attorney in the firm represents an insider of the debtor or the debtor's parent, subsidiary, or other affiliate, except _____ [if any such representation, describe that client's relationship with the debtor, including intercompany claims, asset transfers, overlapping creditors, creditor guaranties and subordination agreements, jointly-owned assets, shared officers, directors or owners].

12. No attorney in the firm has been paid fees prepetition or holds a security interest, guarantee or other assurance of compensation for services performed and to be performed in the case, except _____

[explain the source, amount, and terms of any such arrangement].

13. There is no agreement of any nature, other than the partnership agreement of [firm] as to the sharing of any compensation to be paid to [firm], except _____.

14. No attorney in the firm has any other connection with the debtor, creditors, United States Trustee or any employee of that office, or any other parties in interest, except _____.

15. No attorney in the firm has any other interest, direct or indirect, which may be affected by the proposed representation, except _____.

[Where appropriate, the attorney may state the nature and scope of the inquiry upon which the declaration statements are made. Any pertinent information which counsel believes will satisfy any concerns of disqualification also may be included.]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on [date].

_____
Signature

8/26/94

Weil Gotshal Criticized Over Disclosure

By Frances A. McMorris
And Teri Agins
Staff Reporters of The Wall Street Journal

An independent report scrutinizing the work of Weil, Gotshal & Manges in the Leslie Fay Cos. bankruptcy case criticized the law firm for failing to make proper disclosures of its work for other clients, resulting in the "appearance of impropriety."

The report, unsealed yesterday by U.S. Bankruptcy Court Judge Tina Brozman in New York, found that Weil Gotshal had no actual conflict of interest in the case. But the report said the law firm's business relationships with some of Leslie Fay's outside directors and audit committee members caused the appearance of potential conflict, and that Weil Gotshal should have disclosed those relationships earlier.

The report recommended that the court award Weil Gotshal — which has one of the nation's most influential bankruptcy-law practices — lower fees for its future work for Leslie Fay. New York attorney Charles Stillman said that "an appropriate sanction here is partial disallowance of future fees . . . more Draconian measures such as disqualification or disgorgement of past fees are not appropriate."

Mr. Stillman was appointed by the court to review a 1993 internal investigation conducted by Weil Gotshal. The law firm was retained by Leslie Fay's outside directors after an internal accounting scandal pushed the apparel company into bankruptcy proceedings in April 1993. Weil Gotshal's own investigation of the scandal led to the firing of two top executives at the company and the reversal of about $62 million in earnings over three years.

Weil Gotshal, in a statement, said it "strongly believes that the examiner's conclusions are unfounded." The law firm said the examiner had misapplied the legal standards for evaluating such possible conflicts among clients.

In his report, Mr. Stillman said: "Although the conflict here arises from the appearance of impropriety rather than from actual conduct harming Leslie Fay, . . . [I believe] that appearance, coupled with the failure to disclose the underlying facts, is harm which warrants sanctions."

Last week, the Bankruptcy Court unsealed a separate review by Mr. Stillman of the investigation that Weil Gotshal conducted. Mr. Stillman concluded that Weil Gotshal's efforts in the inquiry "appear to have been thorough and comprehensive." The report didn't refute Weil Gotshal's findings, which placed the blame of the scandal on two former Leslie Fay financial officers and the company's accounting firm, BDO Seidman.

After Weil Gotshal was retained to handle the case, creditors began raising questions about potential conflicts of interest that hadn't been disclosed.

Weil Gotshal has insisted that it fully complied with the disclosure requirements. But the creditors have maintained that Weil Gotshal bent the strict disclosure standards of bankruptcy law, which are more stringent than the disciplinary rules for lawyers in other cases. The creditors allege that the law firm only disclosed its ties to the audit committee members after it was pressured to do so.

The Stillman report released yesterday faulted Weil Gotshal for not disclosing, in a court filing at the time the firm was retained, the identities of the two audit committee members and their affiliations with Bear Stearns & Co. and Odyssey Partners L.P. The Weil Gotshal filing, an affidavit by attorney Alan B. Miller, also didn't state that Weil Gotshal represented Bear Stearns and Odyssey and had "significant professional relationships with them," Mr. Stillman's report said.

In court papers, Weil Gotshal stated that it "consistently discharged its duty of loyalty" to Leslie Fay, just as the bankruptcy disclosure rules are meant to ensure. The law firm had said the creditors were trying to expand the scope of the bankruptcy disclosure requirements.

The creditors, in their court filings, have raised questions about Weil Gotshal's representation of five outside directors of Leslie Fay. The law firm represented some of the directors as individuals in a class-action shareholder lawsuit and government investigations stemming from the Leslie Fay scandal. The creditors also questioned the law firm's previous relationships with Bear Stearns and Odyssey.

The creditors also said that when Odyssey sold its Leslie Fay holdings in 1991, four of the 11 members of Leslie Fay's board had ties to either Odyssey or Bear Stearns: Michael Tarnopol, a director and executive vice president of Bear Stearns, and Steven Friedman, Jack Nash and Lester Pollack, all three executives at Odyssey. A fifth board member, Ira J. Hechler, was previously a senior official of Odyssey's predecessor company.

After the sale, Messrs. Tarnopol and Friedman "continued to serve as members of Leslie Fay's board of directors and with Hechler, constituted three of the four members of the audit committee at the time of Weil Gotshal's retention," the creditors said in court documents.

Mr. Stillman wrote that Weil Gotshal also should have disclosed its role in an unusual step taken by Leslie Fay to draft a lawsuit against one of its directors, Mr. Hechler, a year ago. The suit, which was never filed, would have accused Mr. Hechler of breaching his fiduciary duties in an attempt to acquire Sassco, Leslie Fay's largest division, by using confidential information, Mr. Stillman wrote.

The report said Mr. Hechler denied the allegations at the time and later dropped his plans to acquire Sassco. Mr. Hechler couldn't be reached to comment.

Although Weil Gotshal didn't initially disclose those relationships, it did so in a second court filing in October 1993. The affidavit also indicated that Mr. Friedman, a general partner in Odyssey, had been counseled by Weil Gotshal on personal estate-planning matters and on a Securities and Exchange Commission matter involving Leslie Fay. The law firm also disclosed that it served as Odyssey's outside counsel and "may have advised Odyssey" on the 1991 sale of Leslie Fay stock.

Bankruptcy-law specialists agreed with the creditors and Mr. Stillman that Weil Gotshal should have disclosed more about its potential conflicts from the start.

"Does it look like the kind of information that should have been disclosed? Absolutely," said Elizabeth Warren, bankruptcy-law professor at the University of Pennsylvania Law School.

A company that files for bankruptcy-court protection "doesn't simply represent itself; it also represents all the creditors," Prof. Warren said. Because the interests of the company and the creditors must be weighed, "parties cannot waive conflict like they normally could in a regular case," she said. "It is the court's decision. It isn't up to the attorney to play a game of catch me if you can."

Prof. Warren said, "The question isn't whether Weil adequately or zealously represented Leslie Fay or saved the debtor money. Both of those things may be true but it doesn't change the obligation [to disclose] going in."

Marc Beilinson, a Los Angeles bankruptcy lawyer who specializes in representing debtors, said, "Clearly, to the extent that the debtor had potential causes of action against members of its board, Bear Stearns or Odyssey—at the very least in connection to its application to be employed — the law firm should have fully disclosed each of its prior representations."

* * *

N.Y. TIMES
8/26/94

Leslie Fay's Law Firm Is Rebuked

By LAURENCE ZUCKERMAN

A court-appointed examiner has rebuked one of the country's largest and richest law firms, asserting that it had numerous potential conflicts of interest in its handling of the bankruptcy case of the Leslie Fay Companies and did not properly disclose them as required by law.

But the examiner, Charles A. Stillman, stopped short of recommending that the law firm, Weil, Gotshal & Manges, be forced to return more than $10 million in fees earned so far from its work for Leslie Fay in the Chapter 11 bankruptcy case and be barred from continuing to represent the company.

Board Members Represented

The issue arose because the law firm also represented a committee of Leslie Fay's board that was set up to investigate an accounting scandal that ultimately forced the company into bankruptcy last year. And it represented several prominent independent members of the board in other matters.

The judge presiding over the bankruptcy case, Tina L. Brozman of the Federal Bankruptcy Court in Manhattan, must now decide what action, if any, should be taken against the firm.

"The examiner concludes, based on all the facts presented, that Weil Gotshal was not disinterested in this matter, and did not make proper disclosure as mandated by the bankruptcy code and related provisions," wrote Mr. Stillman, who is a partner in the New York law firm of Stillman, Friedman & Shaw.

Weil, Gotshal said in a statement that it "strongly believes that the

Continued on Page D2

Law Firm Rebuked Over Leslie Fay Case

Continued From First Business Page

examiner's conclusions are unfounded" and that the firm was completely impartial.

In an interview, Dennis J. Block, the partner who has been responsible for the firm's work on the Leslie Fay case, said: "The finding is beyond illogical. It's silly. I think Mr. Stillman spent $800,000 doing his investigation and felt compelled to say something."

Weil, Gotshal blocked the release of the report after it was presented to Judge Brozman. But yesterday, after The New York Times, Bloomberg Business News and Dow Jones & Company, the publisher of The Wall Street Journal, appealed to the judge to unseal the document, officials at Weil, Gotshal agreed that the report should be released.

The statement issued by the firm, however, made it sound like unsealing the report had been a victory for Weil, Gotshal. "We were anxious to have the facts come out," Mr. Block said.

The potentially conflicting clients cited in the report included Michael L. Tarnopol, a senior executive at the Wall Street firm of Bear, Stearns & Company, and Steven M. Friedman, a general partner in Odyssey Partners L.P., a large money management firm on Wall Street. Both men were Leslie Fay directors and their firms were important Weil, Gotshal clients, according to the report.

Mr. Stillman asserted that Weil, Gotshal did not disclose these and other potential conflicts to the bankruptcy court when it applied to represent Leslie Fay in the case.

But he also said that Weil, Gotshal's actions had not harmed any of the parties involved and that the firm had "acted in the best interests" of its clients throughout the proceeding.

Mr. Stillman acknowledged that Judge Brozman had the right to dismiss Weil, Gotshal as Leslie Fay's counsel and order it to return the fees that it had collected. But in a recommendation to the judge, he wrote that such punishment was not warranted. Instead, he suggested that the firm should lose a portion of its future fees from the case.

"Disqualifying Weil, Gotshal now would adversely affect the administration of the Chapter 11 proceedings and seriously delay, or perhaps significantly frustrate, the debtors' reorganization process," he wrote.

Adviser Agrees

Wilbur L. Ross Jr., senior managing director of Rothschild Inc., the financial advisers to Leslie Fay's stockholders, agreed. "We think it would be a very wrong thing to eliminate them from the case at this point," he said. "We, therefore, very much support the examiner's conclusion that there is no reason to knock them out of the proceeding."

But a lawyer involved in the case who spoke on condition of anonymity argued that Mr. Stillman had neglected to acknowledge a relevant piece of case law that left no doubt that Weil, Gotshal should be dismissed as Leslie Fay's counsel and be forced to return the fees it had collected to date.

The case in question centered on the 1931 bankruptcy of H. L. Stratton Inc. and held that failure to make proper disclosure at the outset of a bankruptcy case would result in the mandatory denial of compensation to those lawyers. Instead, Mr. Stillman's report cites a Utah case that leaves it up to the judge's discretion whether to force the lawyers to return the fees.

"He could not avoid finding that they were not candid with the court and has found that they are not disinterested," the lawyer in the case said. But the lawyer said Mr. Stillman ignored the binding rule in the Second Circuit, which is the Federal jurisdiction in which the bankruptcy case is being heard.

"If the Second Circuit says that you must resign and give back your fees, you don't go to a court in Utah and say you have discretion," the lawyer added.

Mr. Stillman said in an interview that he was aware of the Stratton precedent, but he declined to say why he did not include it in his report. "All I can tell you is that the report is what the report is," he said. "Those are the legal conclusions that I came to."

Weil, Gotshal had gross revenue of $318 million last year, making it the the fourth-largest law firm in the country and the eighth largest in terms of profits per partner, according to rankings compiled by The American Lawyer magazine.

FILED UNDER SEAL
PURSUANT TO COURT ORDER

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
THE LESLIE FAY COMPANIES, INC., et al.,	:	Chapter 11 Case No. 93 B 41724 (TLB)
Debtors.	:	(Jointly Administered)
	:	

WEIL, GOTSHAL & MANGES' RESPONSE TO REPORT OF EXAMINER CHARLES A. STILLMAN CONCERNING "DISINTERESTEDNESS ISSUES" INVOLVING WEIL, GOTSHAL & MANGES

Dated: New York, New York
July 5, 1994

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clients -- members of the Audit Committee -- against its other clients -- the Debtors. The Examiner is simply wrong: Weil, Gotshal's only clients were the Debtors. Weil, Gotshal represented the Audit Committee in its capacity as the official entity designated by the Board of Directors of Leslie Fay to act on behalf of the Company. Weil, Gotshal did not represent the members of the Audit Committee individually.[19] Indeed, as the Examiner found, Weil, Gotshal did not advise the Audit Committee members nor did the firm assist with or prepare the proofs of claim. Accordingly, Weil, Gotshal would not have been in a position of representing two clients. (Even if that was the case, section 327(c) does not disqualify counsel solely because it represents a debtor and a creditor. In re Envirodyne Indus., Inc., 150 B.R. at 1015 ("[t]he issues of disinterestedness . . . and adverse interest do not arise solely because [counsel] maintains an ongoing relationship with a creditor of the estates"); BH & P, Inc., 103 B.R. at 562 ("something more than the mere fact of dual representation must be demonstrated" under § 327(c)).

D. Weil, Gotshal's Compliance With The Disclosure Requirements Of Bankruptcy Rule 2014(a) Does Not Merit Sanctions

The Examiner's conclusion that Weil, Gotshal should be sanctioned for its allegedly inadequate disclosure of client relationships is unwarranted. According

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19. Weil, Gotshal's representation of Messrs. Destino, Hechler and Tarnopol in the shareholder suits was for a very limited purpose. Weil, Gotshal is no longer representing them in those actions. See TWI Int'l, Inc. v. Vanguard Oil and Serv. Co., 162 B.R. 672 (S.D.N.Y. 1994) (counsel for debtor permitted to withdraw from representation of debtor's principal to avoid potential conflict of interest).

to the Examiner, Weil, Gotshal supposedly failed to disclose its relationships with the Audit Committee, Bear Stearns, Odyssey and BDO Seidman.

Bankruptcy Rule 2014(a) provides that prospective counsel seeking to be employed in a bankruptcy case must disclose to the court all connections with the debtor, creditors or any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee. See In re Arlan's Dep't Stores, Inc., 615 F.2d 925, 933 (2d Cir. 1979); In re Rusty Jones, Inc., 134 B.R. 321, 345 (Bankr. N.D. Ill. 1991). Rule 2014(a) does not require counsel to disclose its representation of clients which have no relationship to a debtor's chapter 11 case. id.

Although the term "party in interest" is not expressly defined in section 101 of the Bankruptcy Code, section 1109 provides specific examples of parties in interest.[20] None of these examples encompasses an existing client with no other connection to the chapter 11 case. Additionally, although the courts do not appear to have considered the question of what constitutes a "party in interest" in the context of Bankruptcy Rule 2014(a), they have considered the question in relation to sections of the Bankruptcy Code. In In re American Motor Club, Inc., 149 B.R. 317, 321

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20. Section 1109(b) provides:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this Chapter.

(Bankr. E.D.N.Y. 1993) the court stated that "a determination whether an entity qualifies as a party in interest [under Section 362 of the Code] should be made within the specific reorganization process context for which the determination is sought." On the facts before it, the court found that the equity security holders had a significant interest in the recovery of the debtor's assets and they were therefore parties in interest under the Code. See also In re Johns-Manville Corp., 31 B.R. 965, 971 (S.D.N.Y. 1983) (insurer of debtor was a party in interest under the Bankruptcy Code because a judgment against the debtor would render the insurer a creditor of the debtor); Sanders Confectionery Products, Inc. v. Heller Fin., Inc., 973 F.2d 474, 481 (6th Cir. 1992), cert. denied, 113 S.Ct. 1046 (1993) (shareholder of parent of debtor who was not also an equity security holder of the debtor or a creditor of the debtor was not a party in interest in the bankruptcy case).

In determining whether an entity is a "party in interest," the courts consider whether the entity is "affected by the reorganization." In re River Bend-Oxford Assocs., 114 B.R. 111, 114 (Bankr. D. Md. 1990); In re Ionosphere Clubs, Inc., 101 B.R. 844, 849 (Bankr. S.D.N.Y. 1992) ("if a party is not affected by the reorganization process it should not be considered a party in interest"). In In re Comcoach Corp., 698 F.2d 571 (2d Cir. 1983), for example, the court looked to the purpose of the Bankruptcy Code -- to provide a forum for settling disputes between the debtor and creditors -- before concluding that a mortgagee bank was not a party in

interest in the bankruptcy cases of the tenant of the mortgaged property because the debtor had no obligation to the bank. id. at 573.

In concluding that Weil, Gotshal violated Bankruptcy Rule 2014(a) by not disclosing its relationships with Bear Stearns, Odyssey, the Audit Committee members and BDO Seidman, the Examiner assumed, without any analysis, that these persons were Debtors, creditors or some other category of parties in interest. Had he appropriately considered the question, the Examiner would have been required to conclude that Bankruptcy Rule 2014(a) does not require the disclosure of the Bear Stearns and Odyssey relationships. First, neither Bear Stearns nor Odyssey is a shareholder or creditor of the estates. Moreover, they are not "parties in interest" as that term has been interpreted by applicable case law. Bear Stearns and Odyssey Partners have no interests or obligations in the chapter 11 cases, have filed no proofs of claim and will not be affected by any reorganization plan. The only possible basis for suggesting that either entity is a party in interest in the chapter 11 cases is if the Debtors have a claim against them in connection with the 1991 secondary public offering of the Odyssey-Friedman Leslie Fay stock in which Bear Stearns was the underwriter. As previously discussed, it is difficult to fathom what possible claims could reasonably be asserted by the Debtors against Bear Stearns or Odyssey.[21]

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21. See notes 6 and 15 at 18 and 42.

Indeed, as the Examiner has concluded, there is absolutely no legal or factual basis for such a claim.

Representation of Audit Committee members in their filings of proofs of contingent claims would appear to be subject to Bankruptcy Rule 2014(a). However, the Examiner acknowledged that Weil, Gotshal did not undertake such representation. His conclusion, therefore, that Weil, Gotshal violated Bankruptcy Rule 2014(a) by failing to disclose its representation of the Audit Committee is simply wrong. The Audit Committee members were not Weil, Gotshal clients for purposes of asserting their indemnity claims against the Company. Weil, Gotshal's original disclosure nonetheless clearly described the nature of the firm's representation of the Audit Committee in connection with the investigation into the accounting irregularities, the governmental investigations, and the shareholder litigations. (Order Pursuant to Section 327(a) of the Bankruptcy Code Authorizing Employment of Weil, Gotshal & Manges as Attorneys for Debtors; Application For Entry of An Order Pursuant to Section 327(a) of the Bankruptcy Code Authorizing the Employment of Weil, Gotshal & Manges as Attorneys for the Debtors) No objection was raised to Weil, Gotshal's representation of the Debtors, notwithstanding this disclosure.

Representation of BDO Seidman, the auditors for the Company, would appear to be subject to Bankruptcy Rule 2014(a). Weil, Gotshal's discrete and minor representation of BDO, in the context in which that representation might be subject to

the Rule, however, fell within Weil, Gotshal's general disclosure regarding representation of potential parties in interest in unrelated matters. To the extent more specific disclosure was required, Weil Gotshal's omission to disclose that it represented BDO Seidman "in two discrete, relatively small matters" (WGM Report at 37) which were unrelated to Leslie Fay and which have been inactive for some time, was clearly inadvertent. Weil Gotshal respectfully asserts that such an immaterial omission would not merit the imposition of sanctions.

Section 328(c) of the Bankruptcy Code grants discretionary authority to the courts to deny compensation for services to those who have failed to meet the requirements of section 327(a) and Bankruptcy Rule 2014. In re EWC, Inc., 138 B.R. 276, 281-82 (Bankr. W.D. Okla. 1992). Although the courts may impose sanctions for nondisclosure even when no conflict exists, as a court of equity, the court has the ability to determine whether "the need for attorney discipline is outweighed by the equities of the case." In re Roberts, 75 B.R. at 412. Where the equities outweigh the need for attorney discipline, as in this case, "the law does not require the denial of fees and costs." Id. See also In re GHR Energy Corp., 60 B.R. 52, 68 (Bankr. S.D. Tex. 1985) (fees awarded where there was no actual injury or prejudice to the estates). In many cases, even where the court did find a conflict of interest, it declined to impose sanctions. In re Watson Seafood & Poultry Co., 40 B.R. 436, 440 (Bankr. E.D.N.C. 1984) (even where there is a conflict of interest

there is no "mandatory requirement that reorganization courts woodenly must deny compensation . . . regardless of facts") (citing New York, N.H. & H.R. v. Iannotti, 567 F.2d 166, 175 (2d Cir.), cert. denied, 434 U.S. 833 (1977)); In re Georgetown of Kettering, Ltd., 28 B.R. 120, 129 (Bankr. S.D. Ohio), aff'd in part and remanded in part, 34 B.R. 368 (D.C. Ohio 1983)(as a matter of superintendency of estates administration, [denial of compensation] must be the rule only if for the protection of estates administration or the benefitted estate creditors").

In this instance, it would be inequitable to impose sanctions of any kind. The Examiner has concluded that no actual conflict arose out of Weil Gotshal's relationship with BDO Seidman and that the estates have not been prejudiced by such relationship.[22] Weil Gotshal represented BDO Seidman in two minor matters unrelated to the chapter 11 cases or to Leslie Fay; both matters have been inactive for some time. Further, Weil Gotshal's omission to specifically disclose the relationship

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22. The Examiner also notes Weil, Gotshal's relationship with BDO Seidman in connection with his analysis relating to his conclusion that the firm violated section 327(a) of the Bankruptcy Code. Although the Examiner's analysis does not appear to give significant weight to Weil, Gotshal's relationship with BDO, he does state in a footnote that he "cannot conclude that it was an immaterial adverse interest." (WGM Report at 114 n.33) Significantly, the Examiner does not conclude that the BDO relationship constitutes a material adverse interest.

In our view, given the "discrete, relatively small" nature of the matters, which were unrelated to Leslie Fay, on which Weil, Gotshal represented BDO Seidman, and the Examiner's conclusion that the representation caused no harm to the estates, this relationship does not constitute a material adverse interest under section 327(a) of the Bankruptcy Code.

at the outset was inadvertent and the relationship was particularized in a supplemental filing.

Moreover, although Weil, Gotshal contests that there was ever a reasonable appearance of a conflict, it would be particularly inequitable to order sanctions now after any purported perception of "potential" for conflict has been eliminated as a result of the Examiner's extensive and independent investigation. Accordingly, the Court should base its decision on the circumstances as they now exist, and not on some hypothetical set of facts.

E. There Is No Basis For A Reduction In Compensation

Section 328(c) of the Bankruptcy Code permits the Court to deny compensation if a professional person employed under section 327(a) is not a "disinterested person" or "represents or holds an interest adverse to the interest of the estates." 11 U.S.C. § 328(c). Beginning with Berner v. Equitable Office Bldg. Corp., 175 F.2d 218 (2d Cir. 1949), courts have held that compensation should be diminished in proportion to the harm done by conflicting representations. See, e.g., In re Chicago & W.T. Ry., 230 F.2d 364 (7th Cir. 1956), cert. denied sub nom. Elward v. Friedman, 351 U.S. 943 (1956); Securities and Exch. Comm'n v. Cogan, 201 F.2d 78, 85 (9th Cir. 1951); Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 921 (2d Cir.), cert. denied, 340 U.S. 831 (1950).