ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Warrenton, Virginia
March 18-19, 1999

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Judge Robert J. Kressel
Professor Kenneth N. Klee
Leonard M. Rosen, Esquire
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February 25, 1999
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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 18 - 19, 1999
Airlie Conference Center
Warrenton, VA

Introductory Items

1. Approval of minutes of October 1998 meeting.

2. Report on the January 1999 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). [Materials: Draft minutes will be available at the Advisory Committee meeting.]

3. Report on the January 1999 meeting of the Committee on the Administration of the Bankruptcy System. (This will be an oral report.)

4. Report on the recent meeting of the Technology Subcommittee of the Standing Committee. (This will be an oral report.)

Action Items

5. Review of comments received concerning Rules 1007(m), 1017(e), 2002(a), 4003(b), 4004(c), and 5003(e) ("Other Amendments") and Official Forms 1 and 7 published August 1998. [Materials: Reporter's Memorandum dated 2/10/99.]

6. Consideration of comments received concerning the "litigation package" of proposed amendments to Rules 9013, 9014, and 25 other rules. [Materials: Reporter's Memorandum, "Public Comments on Litigation Package" dated 2/15/99; Summary of Public Comments on Proposed Amendments; and Professor Morris' Memorandum dated 2/3/99 on the January 28, 1999, public hearing.]

7. Proposed amendments to Rules 2002(g) and 9020. Consideration of whether to forward to Standing Committee with request for publication. [Materials: Reporter's Memorandum dated 2/15/99.]

8. Proposed amendments to Rules 2002(c), 3016, 3017, and 3020 and Official Form 15 relating to injunctions in plans. [Materials: Reporter's Memoranda dated 2/8/99 and 9/2/98; Mr. Kohn's Memorandum dated 10/1/98.]

9. Proposed official form for a reaffirmation agreement with a motion and order approving the agreement. [Materials: Forms Subcommittee Memorandum dated 2/16/99.]

10. Proposed amendments concerning notice to infants or incompetent persons and capacity for infants, incompetent persons, corporations, and other entities to commence a bankruptcy case. [Materials: Reporter's Memorandum dated 2/12/99; Professor Morris' Memorandum dated 2/1/99 ; Reporter's Memorandum dated 9/8/98.]

Information Items

11. Report on legislation enacted concerning Alternative Dispute Resolution (ADR). [Materials: Memorandum dated 2/18/99; Federal Judicial Center Memorandum dated 1/29/99; Judge Small's letter dated 2/5/99.]

12. Report of the Subcommittee on Attorney Conduct, including Rule 2014 Disclosure Requirements. (This will be an oral report.)

13. Progress chart of proposed amendments.

14. Next meeting reminder: **September 27 - 28, 1999**, at Jackson Lake Lodge, Grand Teton National Park. [Please note, these dates are different from those the Advisory Committee was discussing previously. Also note that the meeting will be on a Monday and Tuesday.]

Administrative Matters

15. Discussion of dates and place for March 2000 meeting.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 8 - 9, 1998
Andover, Massachusetts

Draft Minutes

The following members attended the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Eduardo C. Robreno
District Judge Robert W. Gettleman
District Judge Bernice B. Donald
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Professor Kenneth N. Klee
Professor Mary Jo Wiggins
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
R. Neal Batson, Esquire
Eric L. Frank, Esquire
J. Christoper Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

Circuit Judge Anthony J. Scirica, Chairman of the Committee on Rules of Practice and Procedure ("Standing Committee"), A. Wallace Tashima, liaison to this Committee from the Standing Committee, Professor Daniel J. Coquillette, Reporter to the Standing Committee, and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), also attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), and Henry J. Sommer, a former member of this Committee, also attended the meeting.

The following additional persons attended the meeting: Joseph G. Patchan, Esquire, Director of the Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Professor Jeffrey W. Morris, University of Dayton Law School and Consultant to the Committee; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center, ("FJC").

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the

office of the Secretary to the Standing Committee. Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

Introductory Items

The Chairman introduced the new members and welcomed them to the Committee. All present then introduced themselves and made a brief statement about themselves and their length of service with the Committee.

The Committee approved the draft minutes of the March 1998 meeting.

The Chairman reported on the June 1998 meeting of the Standing Committee. He informed the Committee that the package of proposed amendments presented to the Standing Committee for approval had passed, although with an 8 to 4 vote on the group of amendments related to Rule 7062 and the issue of a 10-day stay. The Committee's proposed amendments were approved (on the consent calendar) at the September 1998 meeting of the Judicial Conference and, accordingly, would shortly be transmitted to the Supreme Court. The Standing Committee also had discussed at length the "litigation package," its accompanying preliminary statement, and the proposed amendments to the official forms, and approved a request for publication.

The Chairman reported further that the Department of Justice had stated its intent to oppose the proposed amendment to Rule 7001 that would exempt from the procedures otherwise required to obtain an injunction any injunction contained in a plan of reorganization. The Department withdrew its objection, however, upon reaching an understanding with the Chairman and the Reporter than the Committee would address its concerns through amendments to other rules. The Reporter added that Mr. Kohn had been instrumental in helping reach the agreement. He noted that proposed amendments intended to safeguard against the imposition of such injunctions without appropriate notice to those affected would be discussed later in the meeting.

Attorney Conduct. The Chairman also noted that the Standing Committee is continuing to study the question of whether to propose federal rules to govern attorney conduct and, if so, what type of rules there should be. As part of that effort, the advisory committees had been asked to provide two members each to serve on an Ad Hoc Committee with Chief Justice Veasey and Professor Hazard from the Standing Committee. The Chairman noted that he had selected Mr. Smith and Mr. Batson for this task. Professor Resnick added that both the American Law Institute ("ALI") and the American Bar Association ("ABA") also are working on this issue, and that Chief Justice Veasey is chairing the effort for the ABA. He said the Ad Hoc Committee will try to coordinate its work with that of these outside groups. Professor Resnick also said the FJC has nearly completed work on a questionnaire, requested by the Committee, that will be sent to bankruptcy judges to ascertain whether there are problems in the area of attorney conduct and whether and what kind of rules they think may be needed. Professor Coquillette returned to this subject later in the meeting and said there are plans to hold a meeting of the Ad Hoc Committee

in March 1999. He also noted that two bills on the subject had been introduced in Congress, one limiting the courts to using state standards of attorney conduct, and the other requiring a separate federal standard.

Technology. Continuing the report on the meeting of the Standing Committee, Professor Resnick said that Gene Lafitte, Esquire, the chairman of the Subcommittee on Technology of the Standing Committee, had met with the reporters of all the Advisory Committees to discuss emerging issues during the Standing Committee meeting. Professor Resnick noted also that after the meeting Mr. McCabe had drafted a memorandum outlining the many potential rules issues presented by electronic filing in the federal courts, and said that copies of that memorandum were available for review by the Committee. The Advisory Committee on Bankruptcy Rules historically has taken the lead in proposing rules amendments prompted by technology, including the existing rules on electronic filing and electronic noticing. He added that the "litigation package," which has been published for comment, contains the first proposed provision in the federal rules to authorize service of pleadings by electronic means. The Standing Committee's technology subcommittee will meet again with the advisory committee reporters and the chief judges of the prototype courts for electronic filing during the first quarter of the 1999. Five district courts and five bankruptcy courts currently accept documents filed electronically over the Internet, using a system developed as a prototype by the Administrative Office. Mr. McCabe noted that one district court and one circuit court independently have developed systems for handling files and documents electronically. He said he expected the meeting in early 1999 would examine the electronic filing process step-by-step, looking for rules implications. Among the issues likely to be considered, he said, are how thoroughly electronic filing should be covered by national rules and how much left to local rules, whether a court properly can force a party to file electronically or must keep electronic filing voluntary, how to handle filings by pro se parties, and what to do about service, certificates of service, non-public parts of the case record (especially in criminal cases), and the record on appeal.

Corporate Disclosure. The Reporter said the Standing Committee also had requested input from the Advisory Committee on the issue of corporate disclosure statements concerning all parent companies, subsidiaries, and affiliates. The purpose of the statement is to alert a judge assigned to a case about these related entities and facilitate identification of any disqualifying conflicts a judge might have. Currently, under the federal rules, such a disclosure statement is required only by the Federal Rules of Appellate Procedure. The Reporter said that Rule 26.1, as in effect at the time of the meeting, had been the subject of complaints from corporations on the basis that compliance with the rule is too difficult in a world in which corporate relationships take so many forms and change so rapidly. Accordingly, an amended version of Rule 26.1, more narrowly drafted, is scheduled to take effect December 1, 1998, he said. The Committee on Codes of Conduct had requested all the advisory committees to consider adopting a rule similar to Rule 26.1 for trial level courts. Of course, in bankruptcy cases, he said, there is always a question about who is a "party."

Professor Klee noted that a bankruptcy case is an ongoing proceeding. For example, he

said, a person could buy a claim for the purpose of causing the judge to be disqualified. Judge Duplantier said the same problem can arise in district court, and that it can not be solved with a rule. Judge Kressel said that bankruptcy judges typically preside over proceedings in bankruptcy cases rather than actively over the entire case. Mr. Smith said the perennial question remains whether a lawyer is adverse to the debtor or to a creditor in a case because of having another client who is a creditor, even when there is no dispute between the represented parties. Judge Duplantier said that judges are in a different situation from attorneys, because judges are fungible and have no direct pecuniary interest in the outcome of a case.

Subcommittee Policy. The Chairman said that some members of the Judicial Conference staff recently had indicated their disapproval of subcommittees and reminded committee chairs of the policy that subcommittees are not to hold face-to-face meetings. He said the subcommittees of this Advisory Committee have worked very hard and meet by telephone except occasionally, *e.g.*, when there is a need to draft forms. The Reporter observed that if the pending bankruptcy reform act is enacted, the Advisory Committee will need more subcommittees.

Local Rules. The Reporter reminded the Advisory Committee about the Standing Committee's requests for feedback concerning proposals to change the procedures for adopting local rules. At the March 1998 meeting, the Advisory Committee expressed its opinion that requiring any local rules or amendments to be pre-approved by the circuit council is inadvisable, but that a uniform effective date of December 1 for local rules would be acceptable so long as there were provision for emergency situations such as new legislation or simply a different effective date stated in the amended rule, in appropriate circumstances. The Reporter said the appellate advisory committee had drafted proposed amendments, but was waiting until January 2000 to submit its draft to the Standing Committee. This draft would provide for a December 1 effective date for local rules unless a majority of the judges determined there were an immediate need and that no local rule would be effective until a copy had been received at the Administrative Office. Ms. Channon said her office would be unable to handle the volume of telephone calls that could be expected from attorneys calling to check whether a certain amendment had been received. Mr. McCabe suggested that effectiveness could be tied to when the Administrative Office posts the amended rule on its Internet site pursuant to Judicial Conference regulations. Mr. Frank said the proposal seems to penalize the party when the court may be at fault for not sending a copy of the rule to the Administrative Office. Professor Wiggins said that when she studied local rules of the Ninth Circuit at the request of the circuit council, she found numerous standing orders, which created a tension because the circuit did not want to give a sense of legitimacy to the standing orders. She said she supports the ideas put forth by the Judicial Conference because more consistency nationally is a good idea. Professor Coquillette said that is the goal of the uniform effective date, so that if an appellate rule takes effect December 1, the district court does not use a different effective date for a criminal rule that must work with the appellate one. Mr. Heltzel said the best action the Standing Committee could take would be to encourage each court to establish a webpage with a hyperlink to the Administrative Office's webpage, to post the court's local rules there, and to keep the posted local rules up to date. He noted that such a procedure would make the current rules accessible to

out of town practitioners at all times, obviating the need for a uniform effective date. Mr. Shapiro said that 42 courts now have websites.

Bankruptcy Administration Committee. Judge Hodges noted that Judge Donald had attended the June 1998 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) as a representative of the Advisory Committee. He said the only matter that appears to be under consideration by both committees is the issue of contempt power of bankruptcy judges. He said the Bankruptcy Committee had decided to take no action on the issue, pending the outcome of proposed legislation to grant limited contempt authority to magistrate judges. Judge Donald added that the Bankruptcy Committee is very interested in the work of the Advisory Committee, especially the litigation package, and recognizes that major additional work will face the Advisory Committee if the pending legislation is enacted.

Mass Torts. Judge Scirica described for the Committee the activities of the Mass Torts Working Group. The group included representatives from the rules committees and the committees on federal-state relations, court administration and case management, bankruptcy administration, the magistrate judges system, and from the Judicial Panel on Multi-District Litigation. It was formed as an adjunct to the work of the civil rules committee on class actions. Judge Scirica noted that Professor Resnick had attended two of the group's meetings and said his participation had been extremely helpful to the group. It was noted also that Ralph R. Mabey, Esq., a former member of the Committee also had attended the September meeting of the group. Judge Scirica said the most difficult problem is that of future claims and how the defendant can resolve them. He said the group had spent little time considering bankruptcy solutions to the handling of mass torts until its September session. The group thought the recommendations of the National Bankruptcy Review Commission (NBRC) on handling future claims were very sound, he said, and he hoped the working group would officially support them. He said further that, although the NBRC recommendations have merit, it is unknown whether they would solve the future claims problem in a class action, due to the difficulty of estimating those claims. The working group is due to submit its report in February 1999, he said, but the group may continue, or a follow-on group may be formed to continue studying the problem. Professor Klee asked if there were some way outside of bankruptcy to provide a global settlement of claims for a solvent company. Judge Scirica said this had been discussed without resolution, and that Judge Niemeyer, the chair of the civil rules committee, has asked the group to study whether it would be possible constitutionally to have a non-opt-out class absent bankruptcy.

Action Items

Rule 9020. The Reporter reviewed the history of the Advisory Committee's consideration of possible amendments to Rule 9020, which governs contempt proceedings conducted by a bankruptcy judge. The question which had prompted Judge Small's 1997 suggestion for amendment is whether the current rule is unnecessarily restrictive in light of decisions by at least six circuits recognizing that a bankruptcy court has the power to issue a contempt order. The current rule pre-dates those circuit decisions. At the March 1998 meeting

the Advisory Committee had concluded that the existence of contempt power is a substantive matter and should not be part of any rule. Any rule should address only the procedure for bringing a contempt action before the court, with any questions about the existence of contempt authority left to the decisional law of each circuit. The Advisory Committee took this position while recognizing the danger that abrogation of all or most of the existing rule might be taken by some as an indication that existing contempt power is being withdrawn. The Advisory Committee referred the question to a subcommittee which discussed the matter in two conference calls during the summer. At the first telephone conference, the subcommittee determined to replace the current rule with a simple statement the a request for an order of contempt is made by motion under Rule 9014 and to present a somewhat detailed Committee Note explaining the Advisory Committee's intent. The subcommittee included District Judge Michael J. Melloy, a member of the Bankruptcy Committee, in that conference call. Judge Melloy had said the Bankruptcy Committee had declined to seek a legislative amendment out of concern that doing so would draw attention to the issue and possibly result in a restriction of the authority now being exercised under various circuit court rulings.

Subsequently, Mr. Kohn had circulated a memorandum in which he noted that four circuits have relied to some degree on the language of Rule 9020 and cited the dangers that could ensue from amending the rule. The subcommittee, after discussing the issue again in a second conference call, had reaffirmed its earlier decision to amend the rule, but voted also to include Mr. Kohn's memorandum concerning constitutional support for the bankruptcy court system in the meeting materials for all members to review.

Judge Kressel added that shedding light on the issue may not be a bad step. If there is no power to punish for contempt, he said, the bankruptcy community should find that out. Mr. McCabe noted that the Judicial Conference had approved and the House had passed legislation granting limiting contempt authority to magistrate judges, but that those non-Article III judicial officers need legislation, because the Federal Magistrates Act specifically states that magistrate judges do not have contempt power. Judge Kressel said that both the current rule and the Reporter's original draft are substantive and that he prefers the simpler approach of directing that any proceeding be governed by Rule 9014, leaving the issue of whether authority exists to court decisions. Professor Klee agreed.

The Reporter said the subcommittee's proposed draft, which would simply state that a motion for contempt is governed by Rule 9014, would be accompanied by the Committee Note that would be explicit about the limited purpose of the amendment, which is to guide the procedure and nothing more. He noted that the Committee had been very clear that it wanted to take no position on whether there is contempt power, inherent or otherwise. He referred to the 1987 Committee Note which gives detailed direction concerning the extent of the contempt power, and which he characterized as "very unusual," although perhaps necessary when it was drafted due to the absence at that time of decisions involving bankruptcy judges. Judge Robreno

questioned whether a rule should be, in effect, propped up by its Note. Judge Gettleman said that citing the circuit decisions or announcing in a Note what the case law is does not make substantive law.

Some members said they were troubled by the deletion of Rule 9020(a) and any mention of sua sponte actions for contempt in the presence of a judge. Judge Duplantier responded that the subcommittee thought the existing provision is unnecessary and noted there is no similar provision in the civil rules. Mr. Rosen suggested adding a statement in the Note that deleting subdivision (a) is not intended to take away any power and noting that the civil rules are silent.

A motion to adopt the subcommittee's draft of Rule 9020 carried, 10 to 2. The Reporter was directed to redraft the Committee Note for consideration on the second day of the meeting.

Judge Robreno noted that when the case law is summarized by the Reporter it comes out differently than when it is summarized by Mr. Kohn. The Reporter responded by noting that the decision of the First Circuit cites Rule 9020, but that other circuits, especially those that follow the Supreme Court's decision in Chambers v. Nasco, Inc., 501 U.S. 32 (1991), do not mention or rely on any rule but on Section 105 of the Bankruptcy Code or simply the "inherent power" of a court. He said he thinks the risk is low that any circuit now would say "no rule, no power." Mr. Frank asked whether the rule would have to be re-amended if the cases were to begin to say de novo review is required, and the Reporter said it would not.

Judge Tashima suggested that, in rewriting the note, the third paragraph should become the first, and that the background information in the first paragraph of the draft should follow the description of the purpose of the amendment. There was consensus that the re-drafted note also should address the issue of contempt action by the court sua sponte. A majority preferred not to include Mr. Kohn's hand-written suggested additions to the draft note. **On the second day, the Reporter presented a redrafted Committee Note that was approved by the Committee.**

Rules 2002, 3016, 3017, 3020, and Official Form 15, (Proposed Amendments to the Rules Relating to Injunctions in Plans). The Reporter said that the draft amendments presented to the Committee were worked out between himself and Mr. Kohn following the June 1998 Standing Committee meeting. He directed the Committee's attention to lines 5 and 6 of the proposed amendments to Rule 2002 and explained that the phrase "not otherwise enjoined under the Code" is a reference to statutory injunctions provided by the Code, such as the discharge injunction provided for in § 524(a) of the Code. A similar phrase appears in the proposed amendments to Rules 3016, 3017, and 3020. Briefly, the amendments require the plan proponent to state in specific and conspicuous language (bold, italic, or highlight text) that certain conduct would be enjoined by the plan and notify those affected that they may be subject to an injunction and state the deadline for filing any objections. In addition, the amendments would require that the order confirming the plan contain details of any injunction and identify those affected.

Mr. Kohn said that outside of bankruptcy any injunction granted by a court must be preceded by a summons and complaint, in other words the full adversary procedure, addressed only to the matter to be enjoined. Mr. Batson said the amendments seem unnecessary. There are no similar safeguards for the professional exculpations and releases of liability in plans and he did not think injunctions needed to be highlighted separately from other plan provisions that prohibit certain future conduct. Judge Kressel said he supports the concept, but is concerned about the ambiguities of the phrase "not otherwise enjoined" and what he described as the ambiguous language often found in plans. He said he did not want ambiguous material in an order confirming a plan. Mr. Kohn said Judge Kressel's comments demonstrate the need for the amendments, and that they should cover anything enforceable by contempt. Judge Kressel noted, however, that violations of the automatic stay or the discharge are not contempt, even though a statutory injunction has been violated. In response to a question from Judge Tashima, Professor Klee distinguished contempt of a statute from contempt of a court order. Mr. Rosen said plans sometimes contain provisions that people perceive as unfair. He said notice to those affected should be required under the rules. Judge Cordova said he thinks people should take responsibility for reading the plan. Judge Duplantier, however, observed that a plan may also affect people who are not named or designated in the plan. He suggested that the rule should require a person who wants to benefit from an injunction to provide special notice on the front of the plan, especially when non-parties will be affected, *e.g.*, "EPA: page 220 would enjoin you." **The Chairman said it appeared the Committee was not ready to vote on the matter and appointed a Plan Injunction Subcommittee to study possible amendments and report at the next meeting. He appointed Mr. Rosen as chair of the subcommittee and Judge Roettger, Mr. Kohn, Professor Wiggins, Professor Klee, and Mr. Batson to serve as members.** The Reporter summarized the concerns raised during the discussion: 1) current creditors are receiving the plan, but may not be reading it; 2) there is concern also for those affected who are not creditors, *e.g.*, the SEC and the EPA; 3) should what is done with respect to injunctions be done also for releases of professionals and fiduciaries, to assure due process; and 4) if releases are included, is there a stopping point?

Rule 9011. The Reporter reviewed his memorandum to the Committee. This included a history of the proposed amendment, which was prompted by a recommendation of the National Bankruptcy Review Commission. Professor Resnick also noted that the bankruptcy reform legislation pending in Congress contained a "sense of the Congress" provision that suggested amending the rule in a manner similar to that recommended by the Review Commission. The draft adds language to Rule 9011(b) to make it clear that a debtor's attorney is making representations to the court concerning the debtor's schedules, statements, and lists, even though the attorney does not sign those documents. Professor Resnick said that amending Rule 9011(b) raises a question about why the rule continues, in its subdivision (a), to exempt attorneys from signing these documents.

Mr. Patchan said that making attorneys responsible for the contents of a debtor's schedules and statement of financial affairs could have the effect of establishing petition preparers more firmly and driving attorneys out of the field. Judge Robreno asked why

bankruptcy should be different from civil practice. Mr. Patchan said that if a case involves large amounts, attorneys will investigate, but that debtors in smaller cases often don't really know how much they own or even who some of their creditors are. Mr. Sommer said he thinks the rule as amended December 1, 1997, already covers the schedules and statements and that, when an attorney has a client who cannot provide full and complete information, the attorney simply does the best job in the circumstances. He said he thinks the situation is very similar to that presented by an affidavit to a summary judgment motion. Mr. Klee said he does not believe a consumer lawyer can afford to investigate every debtor's property, that attorneys should not be held responsible for the debtor's schedules. Professor Morris said he thinks the lawyer is responsible anyway, because in signing the petition, the lawyer certifies that the debtor is eligible for the relief. He said courts do not seem to be holding lawyers to exact accuracy, although if they should begin to do so, that would drive lawyers out of the practice. Mr. Batson said the problem is also one for lawyers in commercial cases, as they are not trained to be forensic accountants, and that he opposed the amendment. Judge Kressel said the problem is smaller than the proposed solution. He said it would be fully proper for the Committee to do nothing with the rule. That would not involve acting contrary to the sense of the Congress, he said, but merely declining to follow the recommendations of the National Bankruptcy Review Commission and the Congress. Professor Coquillette said the proposed amendment raised the larger issue of the propriety of a federal rule governing attorney conduct, a subject currently under discussion by the Standing Committee. **A motion to take no action passed unanimously.**

Rule 2003. The Reporter explained that an attorney had recommended that the rule be amended to permit the court to temporarily allow claims for the purpose of voting for a chapter 7 trustee and summarized the history of the rule as stated in his memorandum to the Committee. Professor Klee said the issue is an important one, although it does not arise frequently. He said that although temporary allowance might be inconsistent with the statute, including a sentence stating that the rule does not prevent a court from temporarily allowing a claim would recognize the practical side of bankruptcy cases. Judge Kressel disagreed with the argument for practicality and said he does not want to legislate in the rules. The Committee discussed the differences between Rule 2003, which requires a creditor to have an undisputed claim in order to vote for a trustee, and Rule 3018(a), under which the holder of a disputed claim can vote on a plan. **A motion to amend Rule 2003 to provide that in resolving a disputed election the judge may resolve any disputed claim passed by a vote of 7 to 6.** The Reporter was asked to redraft the proposed rule for reconsideration the next day.

When the Reporter presented the redrafted rule, he said he wanted to clarify for the Committee that the issue in In re San Diego Symphony Orchestra Association, 201 B.R. 978, 980-981 (Bankr. S.D. Cal. 1996), was whether at the time of the election of a trustee there was a bona fide dispute, not whether it would be proper for the court to proceed to finally resolve the claim, thereby eliminating the dispute. He also called the Committee's attention to § 303(b) of the Code, which contains a similar requirement for filing an involuntary petition. If the judge at trial finds there is a bona fide dispute, resolves the dispute and allows the claim, it still was a bona fide disputed claim at the time the petition was filed, he said, and there would appear to be

a question whether a ruling allowing the claim could have a retroactive effect. The law on the subject is unclear, he said, but the proposed amendment would affirmatively say what the statute means. Mr. Smith favored staying neutral and allowing the case law to develop further, and Mr. Batson said there did not appear to be any need to act, as the issue arises only infrequently. Professor Klee said he thinks it is acceptable to interpret the statute. **A motion to take no action passed by a vote of 7 to 3.**

Rules 1007, 2002, and 7004. The Reporter reviewed with the Committee his memorandum on the question of providing notice to infants and incompetents and noted that he had drafted amendments to Rules 1007 and 2002 to accomplish this notice. Mr. Frank said he thought the proposed new subdivision(p) to Rule 2002 was unnecessary in light of the reference in Rule 2002(g) to list of creditors or schedules filed under Rule 1007. Professor Klee said he believes amendments are needed but would also want to have an infant identified as such, because the legal representative of a minor could have a conflict, especially if the representative is the debtor. Judge Gettleman suggested inserting after the word "know" on line 2 of Rule 1007 the phrase "or has reason to know." Mr. Sommer said a bigger problem is the capacity of minors and incompetents to file bankruptcy, as Rule 7017, incorporating Civil Rule 17, only applies in adversary proceedings. Professor Klee suggested moving Rule 7017 to Part 9 of the rules to make it applicable more generally. Professor Resnick observed that such action would open the door for the rules to operate in the substantive area of eligibility for bankruptcy. In addition, the Reporter said, Civil Rule 17 addresses the right to sue and be sued, while courts generally look to state law, for example, to determine who can file a complaint for a corporation. He noted that Rule 7017 would apply to "Administrative Proceedings" under the proposed amendments to Rule 9014 in the "litigation package" and suggested that adding capacity language to Rule 1002 might be considered. **The Chairman ruled that the Committee would take the issue up again at the March meeting after the Reporter had had the opportunity to prepare another draft based on the above discussion.** The scope of the revised proposals will be the capacity to act and the procedure by which action may occur with respect to infants, incompetents, corporations, limited liability companies, limited liability partnerships, and similar entities in such matters as filing a bankruptcy petition and participating in a bankruptcy case. In addition, members said any proposed amendments should point practitioners to their state rules and provide guidance in the event that an infant or incompetent files his or her own proof of claim with that individual's own address, rather than proceeding through a legal representative.

Rule 2002(g). In a separate memorandum dated October 3, 1998, and distributed to the Committee by facsimile transmission on October 5, 1998, the Reporter presented a redraft of proposed amendments to Rule 2002(g) which had been approved in principle by the Committee at the March 1998 meeting. Members suggested several style changes to the draft. Mr. Rosen noted that the draft uses the words "state" and "designate" interchangeably in connection with a mailing address provided by a creditor, indenture trustee, or equity security holder and said the usage should be made consistent. Professor Klee said the word "its" in lines 20 and 27 of the draft should be changed to "a." **There was a motion to adopt the draft with the changes suggested, to which no objection was raised.**

Rules 4003(b) and 1019(2). A bankruptcy judge had recommended amending the rules to provide for a new period for filing an objection to a debtor's claim of exemptions when a case converts from chapter 13 to chapter 7. Judge Small said he does not think chapter 13 debtors file improper exemptions, as had been suggested, but that other reasons exist for amending the rules. One reason is that in chapter 13 a debtor is not protecting property, while in chapter 7 the debtor is doing that. Mr. Sommer added that creditors in a chapter 13 case do not object to exemptions because exemptions are used only for the liquidation test under that chapter. He suggested that permitting a renewed period for exemptions, however, could lead to abuse by creditors in the form of involuntary conversions to chapter 7. Judge Kressel said that §522(l) of the Code provides that if there is no objection to a claimed exemption, the property is exempt; he said providing for a new period to object is a good idea, but suggested it should be done by providing a different time period for objecting in chapter 11, 12, and 13 cases. Professor Klee opposed changing the rule, because a debtor needs to be able to rely on the claimed exemptions early in the case. Over time, he said, property initially exempted may be consumed or sold, which could create problems for a debtor if a new period for objecting to exemptions were provided. Judge Cristol said the suggestion appeared to be related to the decision of the Supreme Court in Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992); he said the problem involves only a few cases, although the amounts at stake in some cases are large. Mr. Rosen said the Committee should not force people to address exemptions in chapters where they are not critical to the outcome on the chance that the case might convert to chapter 7. Mr. Frank suggested that a different deadline might be appropriate in chapter 13, because § 348(f)(2) provides that if a chapter 13 debtor converts to chapter 7 in bad faith the property of the estate includes all property of the estate at the time of the conversion. In chapter 11, by contrast, Professor Klee added, postpetition property does not become part of the estate. **A motion to adopt the suggested amendment failed by a vote of 5 to 8.**

Form for Reaffirmation Agreement and Motion. At the March 1998 meeting the Committee had considered a recommendation of the NBRC that an official form be issued for a motion to approve a reaffirmation agreement. The Committee had referred the matter to the forms subcommittee. Mr. Sommer explained that the subcommittee had developed a draft form that contained or requested the parties to disclose all of the information which the NBRC had specified should be provided to the parties and the court. In addition, the draft distributed to the Committee was intended to meet several additional requirements that had been in the bankruptcy bill passed by the Senate. These additional requirements had not been included in the conference report bill, he said, and could be ignored unless the Committee determined they were beneficial. Mr. Sommer added that the subcommittee had thought it better to have a form agreement with all the critical information and a simpler motion for approval. Mr. Rosen said there should be an official form for reaffirmation agreements. Mr. Patchan agreed that it is important to have a national form for reaffirmations. Judge Small, however, said that the reaffirmation agreement is a contract between two parties and that it is not for the Committee, through a form, to tell the parties what to put in it. Mr. Heltzel said creditors often use unfair leverage to get debtors to sign agreements, and a national form could help curb this practice. Many members made specific suggestions for improvements to the draft. Mr. Sommer agreed to incorporate these in a new

draft for consideration the following day. On reviewing the revised draft on the second day of the meeting, the Committee made further suggestions. Mr. Patchan also offered a group of comment letters provided to him by U.S. trustees. **The Committee continued its referral of the recommendation for an official form for reaffirmations to the forms subcommittee and requested the subcommittee to report again at the March 1999 meeting.**

Public Company Reporting Requirements, the SEC, and the Rules. (Agenda Item 13) After discussion of the written materials, **the consensus was to take no action.**

Rule 2014. The Reporter referred the Committee to his September 4, 1998, memorandum concerning style comments to the published draft of the rule that had been transmitted by Judge James A. Parker, the chairman of the Standing Committee's style subcommittee. The Reporter also handed out another draft of the rule as it would appear with Judge Parker's suggested revisions that would offer the Committee a way to resolve an apparent inconsistency in the published rule between the requirement for a "notice of motion" in one rule and a "notice of hearing" in another. Professor Resnick also said he was unsure whether the rule should require the use of the form. Mr. Sommer said the rule should not mention the form, because mention there could imply that use of the form is not required for other motions. After discussion, **the consensus was to use "notice of motion" throughout.**

Subcommittees

In addition to appointing a Plan Injunction Subcommittee, as discussed above, the Chairman took the following actions concerning subcommittees:

- Dissolved the Subcommittee on Alternative Dispute Resolution
- Appointed Judge Kressel to replace Mr. Sommer as chairman of the Subcommittee on Forms, and appointed Mr. Frank as a member
- Announced that he did not plan to appoint anyone to replace Mr. Sommer on the Subcommittees on Litigation and Government Noticing, as their work is nearing completion.

Next Meeting

The Chairman reminded the Committee that the next meeting will be March 18 -19, 1999, at the Airlie Conference Center, near Warrenton, Virginia. The Committee discussed dates and preferred locations for the fall 1999 meeting and settled tentatively on September 23 - 24, 1999, as the dates. The preferred locations are Jackson Lake Lodge and the Monterey, California, area.

Respectfully submitted,

Patricia S. Channon

The draft minutes of the January 1999 meeting of the Committee on Rules of Practice and Procedure will be available at the meeting.

Items 3 and 4 will be oral reports.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

DATE: FEBRUARY 10, 1999

SUBJECT: MISCELLANEOUS PROPOSED AMENDMENTS TO THE RULES AND OFFICIAL FORMS PUBLISHED FOR COMMENT

Proposed amendments to Bankruptcy Rules 1007, 1017, 2002, 4003, 4004, and 5003, and Official Forms 1 and 7, were published for comment in August 1998. The miscellaneous proposals to these six rules and two forms are unrelated to the "Litigation Package." Although more than 170 letters were received commenting on the Litigation Package, only 17 letters commented on the miscellaneous rule amendments, and eight letters commented on the amendments to the forms.

The purpose of this memorandum is to set forth the proposed amendments to each of these six rules, followed by a summary of comments relating to the particular rule (the 3-digit number following the name of each commentator is the comment number assigned by the Rules Committee Support Office). I also include at the end of this memorandum a summary of the comments on the proposed amendments to the forms. Where appropriate, I have added my own thoughts and recommendations.

If the Advisory Committee decides to go forward with these miscellaneous amendments, they could be presented to the Standing Committee at its June 1999 meeting for final approval.

Rule 1007. Lists, Schedules, and Statements; Time Limits

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(m) Identifying a Governmental Unit. If the debtor lists a governmental unit as a creditor in any list or schedule filed under Rule 1007, the debtor shall identify, if known to the debtor, any department, agency, or instrumentality of the governmental unit through which the debtor is indebted. Failure to comply with this paragraph does not affect the debtor's legal rights.

COMMITTEE NOTE

Governmental units, including federal, state and municipal governments, may have difficulty or may experience delay in identifying the particular department or agency through which a debt is owed. To facilitate earlier and more effective participation by governmental units who are creditors in bankruptcy cases, Rule 1007(m) has been added to require the debtor to identify in the lists and schedules filed under this rule the particular department, agency, or instrumentality of the governmental unit through which the debtor is indebted, if the debtor knows this information. But if the debtor fails to comply with this requirement, such failure does not affect the debtor's legal rights.

SUMMARY OF COMMENTS ON RULE 1007:

1. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Rule 1007(m) is no rule at all. The words "if known" makes the rule precatory. The debtor will always be able to convincingly state that he or she did not know,

so there is no incentive to attempt to identify the government agency, nor is there any sanction for failing to do so. It would be better to have no rule than to have a useless rule.

2. Arthur J. Fried, Gen. Counsel, Social Security Admin. (100):

Opposes the proposed amendments to Rules 1007 and 5003 on government noticing because they provide that a debtor's failure to comply will not affect the validity of the notice if the governmental unit has notice or actual knowledge in time to participate. While this may appear to protect the debtor, in practice it may result in adverse consequences, i.e., failure to give timely notice to the appropriate component of SSA may result in the continued collection of overpayments that normally would be suspended as a result of the automatic stay. Monthly Social Security benefits may be inadvertently withheld. Notice failures also will result in added time and expense to the courts because of contempt proceedings when the stay is violated due to poor notice of the case. Encloses the 2/28/98 memorandum of J. Christopher Kohn submitted to the Advisory Committee and considered at the Committee's March 1998 meeting.

3. Judith R. Starr on behalf of Div. of Enforcement, Securities and Exchange Comm. (114):

Although the Committee should be commended for attempting to deal with the problem of providing notice to government agencies, Rule 1007(m) provides no incentive for compliance. The rule should provide that notice not made in accordance with its provisions shall not be effective.

4. Executive Office for United States Attorneys (115):

There is no penalty for failure to comply with the requirement to identify the governmental agency through which the debt is owed. Failure to effectuate service correctly should mean that the affected creditor does not lose its rights. They suggest a revision so that if the U.S. is prejudiced by non-compliance, it shall extend the time for the government to exercise its rights.

5. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

Supports Rule 1007(m), but it seems counterproductive to tell debtors that willful failure to comply cannot affect their legal rights, particularly since the obligation

to identify the specific unit of government applies only "if known to the debtor."

6. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

Delay action until it is possible to assess likelihood of new legislation, which may deal with these issues. The last sentence of the proposed amendment not only vitiates any impact of the changes, but makes it worse for the government. In most cases now, the government will succeed in arguing that a generalized notice (to "State of X") not sent to the proper agency is no notice at all. This rule would turn that result on its head.

Rule 1017. Dismissal or Conversion of Case; Suspension

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(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an individual debtor's case for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed by the United States trustee before the time has expired, the court for cause extends the time for filing the motion to dismiss. The United States trustee shall set forth in

the motion all matters to be submitted to the court for its consideration at the hearing.

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COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request filed by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under § 707(b), whether the court rules on the request before or after the expiration of the 60-day period.

SUMMARY OF COMMENT ON RULE 1017:

1. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

Does Rule 1017(e)(1) permit the court to extend the time (in parallel with the preambular language of Rule 1017(e))?

[*Reporter*: Rule 1017(e)(2), which is not being amended, imposes a 60-day time limit on the court's own motion to dismiss for substantial abuse, and does not include any provision allowing for the extension of the 60-day period. Rule 9006(b)(3) provides that the court may enlarge the time for taking action under Rule 1017(e) only to the extent stated in that rule. Accordingly, the only permissible extension of time regarding substantial abuse dismissals under Rule 1017(e) is when the U.S. trustee files a timely request for it]

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 at least 20 days' notice by mail of:

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(6) ~~hearings on all applications for compensation or reimbursement of expenses totaling in excess of $500~~ a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000;

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(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed:

(1) in a chapter 11 reorganization case in which the Securities Exchange Commission has filed either a notice of appearance in the case or a written request to receive notices, to the Securities and Exchange Commission at any place the Commission ~~designates~~ has designated in the notice of appearance or the written request ~~, if the Commission has filed either a notice of appearance in the case or a written request to receive notices~~;

(2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.;

(3) in a chapter 11 case, to the District Director of Internal

Revenue for the district in which the case is pending;

(4) if the papers filed in the case disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.,; and

~~(4)~~ (5)if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor ~~became~~ is indebted. ~~; or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C~~. The department, agency, or instrumentality shall be identified in the address of the notice mailed to the United States attorney.

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COMMITTEE NOTE

Paragraph(a)(6) is amended to increase the dollar amount from $500 to $1,000. The amount was last amended in 1987, when it was changed from $100 to $500. The amendment also clarifies that the notice is required only if a particular entity is requesting more than $1,000 as compensation or reimbursement of expenses. If several professionals are requesting compensation or reimbursement, and only one hearing will be held on all applications, notice under paragraph (a)(6) is required only with respect to the entities that have requested more than $1,000. If each applicant requests $1,000 or

less, notice under paragraph (a)(6) is not required even though the aggregate amount of all applications to be considered at the hearing is more than $1,000.

If a particular entity had filed prior applications or had received compensation or reimbursement of expenses at an earlier time in the case, the amounts previously requested or awarded are not considered when determining whether the present application exceeds $1,000 for the purpose of applying this rule.

Subdivision (j) is amended to require that the address of any notice mailed to the United States attorney under Rule 2002(j) identify the particular department, agency or instrumentality through which the debtor is indebted to the United States. This requirement may be satisfied by including in the address either the name or an acronym commonly used to identify the department. For example, this requirement may be satisfied by addressing the notice to "United States Attorney (SBA)" if the debt is owed through the Small Business Administration. If the debtor is indebted to the United States through more than one department, agency or instrumentality, each should be identified in the address.

Other amendments to Rule 2002 are stylistic.

SUMMARY OF COMMENTS ON RULE 2002(a)(6):

1. Peter C. Fessenden, Esq. (Brunswick, Maine) (016):

Suggests that the dollar amount ($500) in Rule 2002(a)(6) be maintained. Also, whether or not the dollar amount is changed, "the rule should be amended to clarify that notice and opportunity for hearing on a fee application is required if the *aggregate total* fee application exceeds the threshold amount." Based on his experience as a chapter 13 trustee for over 18 years, even $500 can be a significant burden on debtors. The bankruptcy judges in Maine take seriously their responsibility to review fee applications; "inefficiency and padding are ferreted out and disallowed. Raising the level of unscrutinized fees to $1,000 may impose an unfair burden on those least able to afford it." Regardless of the dollar amount

used, he comments that the existing and proposed rule is ambiguous -- are notice and hearing escaped if the *particular request* is less than $500/$1,000, or if the *total aggregate* fees to date are less than that amount? Especially in chapter 13, counsel could "fly below radar" simply by spreading out fee requests to receive court approval without any meaningful review. Rule 2002(a)(6) should clarify that notice and opportunity for hearing are waived only if the application indicates that the total aggregate fees do not exceed the dollar limit in the rule. "In all other respects, the Other Amendments are excellent and should be adopted."

[*Reporter*: The ambiguities raised by this comment exist under the current rule, were discussed by the Advisory Committee, and were deliberately clarified in the language of the amendment and in the Committee Note.]

2. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Supports the proposed amendment.

3. Terrence H. Dunn, Clerk (D. Ore.)(099):

Supports the proposed amendment.

SUMMARY OF COMMENTS ON RULE 2002(j):

1. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

The proposed change will require notices to go to the government department or agency. What will happen if a debtor fails to identify the department and the clerk mails notices to all creditors? Is the notice ineffective? That would seem to be belied by case law under the current rules and Code section 523(a)(3). Also, it seems inconsistent with proposed Rule 1007(m) which provides that the debtor's failure to identify the department does not affect the debtor's legal rights. It is better that there be no rule on the topic than to have a rule which creates more questions than it resolves.

2. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

Supports the amendments to Rule 2002(j)(5).

Rule 4003. Exemptions

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(b) ~~OBJECTIONS~~ OBJECTING TO A CLAIM OF EXEMPTIONS. ~~The trustee or any creditor may file objections~~ An objection to the list of property claimed as exempt may be filed by the trustee or a creditor only within 30 days after ~~the conclusion of~~ the meeting of creditors held ~~pursuant to Rule 2003(a)~~ under §341(a) is concluded or within 30 days after ~~the filing of~~ any amendment to the list or supplemental schedules is filed, whichever is later. ~~unless, within such period, further time is granted by the court.~~ The court may, for cause, extend the time for filing objections if, before the time to object expires, the trustee or a creditor files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, ~~and to~~ the person filing the list, and the attorney for ~~such~~ that person.

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request for an extension of time to file objections to the list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day period. The purpose of this amendment is to avoid the harshness of the present rule which has been construed to deprive a bankruptcy court of jurisdiction to grant a timely request for an extension if it has failed to rule on the request within the 30-day period. See *In re Laurain*, 113 F.3d

595(6th Cir. 1997); *In re Stoulig*, 45 F.3d 957 (5th Cir. 1995); *In re Brayshaw*, 912 F.2d 1255 (10th Cir. 1990). The amendment also clarifies that the extension may be granted only for cause.

Other amendments are stylistic.

SUMMARY OF COMMENTS ON RULE 4003(b):

1. Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) (070):

Revise Rule 4003(b) to clarify that an objection to an exemption is governed by Rule 9014. Also, further amend the rule to provide that the time limit for objecting to exemptions does not apply to chapter 11 cases and, in such cases, to permit the court to set a deadline.

[R*eporter:* Judge Tchaikovsky's comments do not relate to the proposed amendments to this rule]

2. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Strongly agrees with the proposed amendments to Rule 4003(b) that will obviate the possibility of harsh results such as created in *In re Laurain*, 113 F.3d 595 (6th Cir. 1997).

3. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

Objects to the discovery schedule in the proposed amendments to Rule 9014 (part of the Litigation Package), which would apply when there is an objection to claimed exemptions under Rule 4003(b). An objector would not be able to obtain discovery if an optional response is never filed by the debtor. If a response is filed 5 days before the hearing, there would be insufficient time to obtain discovery before the hearing (Rule 9014 provides for a 10-day response time to discovery requests). The current Rule 9014 allows discovery immediately.

[*Reporter:* Mr. Herzog's comments are directed at the effects of the proposed

amendments to Rule 9014 on objections to claimed exemptions under Rule 4003(b). These comments do not relate to the proposed amendments to Rule 4003(b)]

4. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

   Supports proposed amendments to Rule 4003(b), which will allow trustees additional time, if warranted, to file objections to claims of exemption. Trustees are sometimes forced to file objections even if they are unsure of the merits in order to meet the 30-day time limit. Some of these are subsequently withdrawn. The amendment will allow trustees more time to determine the merits of an objection before filing it.

5. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

   Points out that the reference to an objection to claimed exemptions being filed by the "trustee or a creditor" is incomplete. Section 552(l) refers to a "party." They suggest a similar change here since the UST sometimes finds it necessary to object to a debtor's claim of exemptions, particularly in chapter 11.

   [*Reporter:* I agree that "creditor or trustee" in Rule 4003 is too limited. It should be changed to "party in interest" because Code section 522(l) provides: "Unless a party in interest objects, the property claimed as exempt on such list is exempt." I think this change could be made without further publication as a change necessary to conform to the statute.]

6. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D.Mich. Bankr. Court (066):

   Supports the proposed amendments to Rule 4003(b), but is concerned that the inclusion of this provision might, by negative implication, be deemed to preclude the court from granting extensions of exclusivity or the time to assume or reject nonresidential leases if the statutory time period expires where a timely filed request for extension is pending. We suggest that similar provisions be placed in other rules with respect to such requests and/or the language permitting enlargement of time in Rule 9006(b) be strengthened.

Rule 4004. Grant or Denial of Discharge

****

(c) GRANT OF DISCHARGE.

(1) 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~~ under Rule 1017(e), the court shall forthwith grant the discharge unless:

(a) the debtor is not an individual,

(b) a complaint objecting to the discharge has been filed,

(c) the debtor has filed a waiver under § 727(a)(10),

(d) a motion to dismiss the case pursuant to Rule 1017(e) is pending,

(e) a motion to extend the time for filing a complaint objecting to discharge is pending, ~~or~~

(f) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending, or

~~(f)~~(g) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. §1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. §1930(b) that is payable to the clerk upon the

commencement of a case under the Code.

****

COMMITTEE NOTE

Subdivision (c) is amended so that a discharge will not be granted while a motion requesting an extension of time to file a motion to dismiss the case under § 707(b)is pending.

SUMMARY OF COMMENTS ON RULE 4004:

1. Hon. Christopher M. Klein (E.D. Cal.) (111):

Can the court extend the time sua sponte? Consider revising the rule to take into account undeserved discharges in cases that are eligible to be dismissed. There has been a problem when the debtor does not attend the meeting of creditors, which the trustee keeps continuing, and ultimately the case gets dismissed for failure to prosecute, but the discharge has been automatically entered under Rule 4004(c). Since section 349 does not provide that dismissal vacates the discharge, there is an opportunity for manipulation in which a debtor gets the benefit of a discharge without giving up nonexempt property to creditors.

[*Reporter's Recommendation:* I suggest that "pursuant to" in Rule 4004(c)(1)(d) be changed to "under" for stylistic consistency. I also suggest that the letters designating paragraphs of Rule 4004(c)(1) be changed to uppercase letters (i.e., Rule 4004(c)(1)(a) should become Rule 4004(c)(1)(A), etc.)].

Rule 5003. Records Kept By the Clerk

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(e) REGISTER OF MAILING ADDRESSES OF FEDERAL AND STATE GOVERNMENTAL UNITS. The United States or the state or territory in which the court is located may file a statement designating its mailing address. The clerk

shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes these mailing addresses, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law.

~~(e)~~ (f) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall ~~also~~ keep ~~such~~ any other books and records ~~as may be~~ required by the Director of the Administrative Office of the United States Courts.

COMMITTEE NOTE

Subdivision (e) is added to provide a source where debtors, their attorneys, and other parties may go to determine whether the United States or the state or territory in which the court is located has filed a statement designating a mailing address for notice purposes. By using the address in the register -- which must be available to the public -- the sender is assured

that the mailing address is proper. But the use of an address that differs from the address included in the register does not invalidate the notice if it is otherwise effective under applicable law.

The register may include a separate mailing address for each department, agency, or instrumentality of the United States or the state or territory. This rule does not require that addresses of municipalities or other local governmental units be included in the register, but the clerk may include them.

Although it is important for the register to be kept current, debtors, their attorneys, and other parties should be able to rely on mailing addresses listed in the register without the need to continuously inquire as to new or amended addresses. Therefore, the clerk must update the register, but only once each year.

To avoid unnecessary cost and burden on the clerk and to keep the register a reasonable length, the clerk is not required to include more than one mailing address for a particular agency, department, or instrumentality of the United States or the state or territory. But if more than one address is included, the clerk is required to include information so that a person using the register could determine when each address should be used. In any event, the inclusion of more than one address for a particular department, agency, or instrumentality, does not impose on a person sending a notice the duty to send it to more than one address.

SUMMARY OF COMMENTS ON RULE 5003:

1. Bankruptcy Judges and Clerk of District of South Carolina (081):

The amendments will require significant administrative time and effort in the clerk's office for a product that is optional. It would be better to permit the court to solicit from all creditors, including credit card companies and governmental units, one address for noticing purposes.

2. Terrence H. Dunn, Clerk (D. Ore.)(099):

Opposes this change, which would require extensive administrative effort in the

clerks' office while stating that a failure to use the address in the register does not invalidate the notice. Expansion of the electronic noticing contract for bankruptcy courts will help eliminate the need for this proposal. The increasing number of pro se debtors will negate the effect of this rule since many are not sophisticated enough to check the register. If this rule is kept, the court should solely maintain these records on its PACER system rather than wasting time and money printing paper copies and mailing.

3. Arthur J. Fried, Gen. Counsel, Social Security Admin. (100):

Opposes proposed amendments for the reasons stated above (see Mr. Fried's comments relating to Rule 1007).

4. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Supports Rule 5003 amendments because they provide certainty as to where to send notices to governmental agencies.

5. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

The concept of a clearinghouse for addresses is appealing, but details raise questions. Since updated only once each year, some addresses will be obsolete. The conclusive presumption of an obsolete address raises concerns especially in an era when the Postal Service seems to be getting less efficient at forwarding mail. If the address contains an error, is the conclusive presumption operative? The burdens on clerks may be greater than anticipated. Given the opportunity for misunderstanding when something does not happen when and as anticipated, this proposal should not be adopted in its present form.

6. Executive Office for United States Attorneys (115):

The register is a good idea, but multiple addresses for agencies are needed so that an agency can have different addresses for offices handling different types of loans. Suggests eliminating the information requirement enabling the user to determine which address is applicable. The failure to use the provided mailing address does not invalidate notice ,so the purpose of this provision is unclear and its effectiveness is uncertain.

7. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

This rule would require extensive administrative effort by clerks' offices without a clear purpose because failure to use the specified address would not invalidate an otherwise valid notice.

8. Peter H. Arkison, Esq. (Bellingham, WA) (132):

The register should be expanded to include local governmental units such as cities and counties.

9. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

Concerned about the limitation that the clerk is not obligated to list more than one address for an agency. The IRS might want to use more than one address in the future (depending on the type of proceeding) as a result of the pending reorganization of the IRS along functional lines. While most clerks will cooperate, the proposed rule would give clerks the right to deny such a request arbitrarily. Proposes language that "the clerk may include more than one mailing address ..." (rather than "the clerk is not required to include more than one ...").

10. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

Delay action until it is possible to assess likelihood of new legislation, which may deal with these issues. The register is a useful concept, but the restrictions on it make it less helpful (even harmful). Opposes excluding other states and municipalities, and limiting it to one address for each agency. Updating only once each year is not sufficient (forwarding addresses are limited in time, certainly less than one year). Since the address is conclusively presumed to be the correct one, if an agency moves and notifies the debtor, the debtor may still send notices to the old address (i.e., room for abuse). It is important that it be accurate (updated) and mandatory (not optional), or it will be of little value. A properly constructed, updated, mandatory register that is on the Internet would be very useful.

COMMENTS ON OFFICIAL FORMS

Form 1. Voluntary Petition

1. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

> Form 1, Exhibit C, will require a debtor to make certain disclosures regarding property that "poses a threat of imminent and identifiable harm to public health or safety." While this is a laudable goal, they suggest that this be revised to require the debtor to identify such property only if a governmental agency has determined or alleges that the property poses such a threat, or which the debtor has admitted might have such characteristics. This should result in the desired disclosures, without requiring debtors to concede liabilities that may otherwise be the subject of dispute.

2. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

> The language of Exhibit C to the Voluntary Petition raises questions. Competent lawyers do not let clients admit that property poses a threat of imminent and identifiable harm to public health or safety except in clear-cut situations. Whether there is such a threat is mostly a matter of opinion and there is often a dispute on that issue. More helpful information might be obtained if the question were to be revised to ask whether anyone or any public entity contends that any of the debtor's property poses such a threat.

3. Sandra Connors, Director, Regional Support Division, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency (128):

> Supports the proposed amendments to Form 1, Exhibit C (Voluntary Petition), which will result in fuller disclosure and improved notice of environmental problems that may need to be considered during the administration of the bankruptcy case. The amendment to Form 1 will help identify threats to public health and safety that need to be addressed promptly.

4. Peter H. Arkison, Esq. (Bellingham, WA) (132):

> Official Form 1 would be more user friendly if the name and address of the attorney for the debtor were shown on the first page. The proposed addition of Exhibit C is a good idea; it would be more useful to trustees if it also indicated

what assets, if any, need immediate attention.

5. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

Form amendments are generally helpful, but suggests that if the debtor files the Exhibit C to Form 1, or answers the environmental questions (no. 25) on the Statement of Financial Affairs, it should be required to serve the petition and those schedules on the relevant environmental agencies. It is helpful that the U.S. Trustee knows of a possibility of imminent harm but that information should also go to the environmental agencies that will have responsibility for dealing with those problems.

Form 7. Statement of Financial Affairs

1. Jay W. Browder, General Manager of Forms, Inc. (001):

(a) Form 7, page 1, para. 2: It is unclear whether a debtor who is not engaged in business is supposed to mark "none" or leave blank the boxes labeled "None" to questions 18-25. In one sentence, it tells them not to answer questions 18-25, and in the next sentence it says to mark the box labeled "none" if the question is not applicable.

(b) Form 7, Question 10: It has one section to it and yet it has a section "a" as though it were supposed to have a section "b"

(c) There are no comments on new questions in Form 7.

2. Thomas J. Yerbich, Esq. (Alaska) (049):

Form 7, new Question 16: Suggests including Alaska in the list of community property states. This year Alaska passed the Community Property Act which allows married couples to elect, by a Community Property Agreement or a Community Property Trust, to treat some or all property as "community property." This is voluntary and the extent to which spouses may elect to convert property to community property will not necessarily be uniform.

[*Reporter:* I confirmed the enactment of the Community Property Act in Alaska (AS 34.77.010 through AS 34.77.995) which became effective on May 23,1998,

and which provides that property of spouses is community property only to the extent provided in a community property agreement or a community property trust.]

3. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

   Supports the proposed amendments to Form 7.

4. Sandra Connors, Director, Regional Support Division, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency (128):

   Supports the proposed amendments to Form 7, Question 25 (Statement of Financial Affairs). These will result in fuller disclosure and improved notice of environmental problems that may need to be considered during the administration of the bankruptcy case.

5. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

   Supports the proposed changes to Form 7.

6. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

   Form amendments are generally helpful, but suggests that if the debtor files the Exhibit C to Form 1, or answers the environmental questions (no. 25) on the Statement of Financial Affairs, it should be required to serve the petition and those schedules on the relevant environmental agencies. It is helpful that the U.S. Trustee knows of a possibility of imminent harm but that information should also go to the environmental agencies that will have responsibility for dealing with those problems.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PUBLIC COMMENTS ON LITIGATION PACKAGE

DATE: FEBRUARY 15, 1999

The Proposed Amendments to the Federal Rules of Bankruptcy Procedure published in August 1998 include (a) the "Litigation Package" consisting of amendments to 27 rules, (b) miscellaneous amendments to six rules, and (c) amendments to two official forms. We received 172 letters in response to the proposed amendments, almost all of which commented on the Litigation Package. Seventeen letters commented on the miscellaneous rule amendments and/or the amendments to the official forms. Fourteen commentators testified at the public hearing held on January 28th in Washington, D.C. The oral testimony focused on the Litigation Package; no testimony was offered with respect to the miscellaneous amendments or official forms.

The commentators represent a wide range of participants in the bankruptcy process. Many of the 172 letters received express the views of more than one person. Sixty-five letters were submitted by, or on behalf of, approximately 150 bankruptcy judges (there are approximately 326 bankruptcy judges nationwide). Letters were submitted on behalf of bar associations or other organizations of lawyers who practice in the bankruptcy field. Letters were written by lawyers who often represent parties in large chapter 11 cases, as well as by those who regularly represent creditors or debtors in small

business or consumer cases. Letters were received from bankruptcy court clerks, chapter 7 and chapter 13 trustees, and United States trustees. The letters also represent a broad geographic mix, including commentators from large cities and those from rural areas throughout the United States. Many letters were long and contained multiple comments relating to a number of rules. Few focused on only one issue.

For your benefit, I summarized each written comment and organized these summaries according to the relevant rule or official form. The first category of my summary includes those comments of general application that relate to all or a substantial part of the Litigation Package. The remaining summaries are arranged on a rule-by-rule basis. These summaries are enclosed in a separate document. A summary of the oral testimony is set forth in the enclosed memorandum from Jeff Morris.

Several commentators (including about ten bankruptcy judges and a few lawyers) have expressed support for the published Litigation Package. But the vast majority of commentators (approximately 160 letters) have expressed opposition. Some were general in their opposition and merely urged the Advisory Committee to abandon this project. Many were more specific in identifying features they oppose. Some have expressed the view that this is a worthwhile effort with a laudable goal, but that further work needs to be done before the package is ready for adoption. Some letters set forth very specific suggestions for revising the package, including recommended language. It is not surprising that many commentators have voiced the same views, objections, and

suggestions.

The purpose of this memorandum is to list issues and comments that have been repeated in many of the letters received. Hopefully, this list will assist the Advisory Committee in its discussion at its March 1999 meeting. I have listed these in question form, starting with the most general to the more specific. By listing these frequently raised issues and comments, I do not mean to minimize the importance of the many constructive comments that were not repeated often, but which deserve careful consideration by the Advisory Committee before it finalizes and forwards to the Standing Committee proposed amendments to any of these rules.

The following list contains 20 frequently raised issues and comments:

1. ***Is there a significant problem that needs to be fixed regarding current procedures that govern contested matters and other motions in the bankruptcy courts?***

   A number of commentators have questioned whether there is a need to "fix" anything. They question the underlying premise that motion practice does not work well and needs to be improved. These commentators believe that motion practice works very well and efficiently, especially in the hundreds of thousands of routine motions handled regularly by local practitioners. One commentator has expressed this objection by calling the Litigation Package a "solution in search of a problem."

2. ***Is it desirable to have national uniformity, rather than local variation, regarding procedural rules for contested matters and litigation (other than adversary proceedings)?***

   Many commentators have expressed the view that national uniformity is not as important as providing courts with flexibility to deal with the special needs, customs, or practices of a particular jurisdiction. Rural districts were vocal in expressing the need for flexibility and emphasizing the reality that in some districts

lawyers and clients are great distances from the courthouse. Many commentators emphasized the differences between busy high-volume consumer bankruptcy districts (such as C.D. Cal.) and other districts with more large chapter 11 cases but fewer routine consumer cases (Delaware, S.D.N.Y). They oppose a detailed and rigid "one-size-fits-all" approach as unworkable and impractical (especially in high-volume districts). They comment that the beauty of the current Rules is that they allow for appropriate local variation.

Several commentators have stressed the importance of uniformity between procedures in bankruptcy courts and procedures in state and other federal courts within a particular district. They argue that it is more important for lawyers to have familiarity and consistency between the various courts in a particular geographic area, than to have procedural uniformity among bankruptcy courts in New York and South Dakota. Otherwise, non-bankruptcy lawyers will be discouraged from practicing in bankruptcy courts.

Many commentators have rejected the notion that national practitioners need uniform rules governing motion practice, observing that (1) technological advances (web sites) will make it easy for national practitioners to obtain local rules, (2) new uniform local rule numbering (now mandatory) makes local rules more user-friendly, and (3) in significant cases, national practitioners retain local counsel who are familiar with local rules and practices.

A number of commentators support national uniformity, but believe that the national rules should be modeled after the local rules of their particular district (and enclose sets of local rules for the Advisory Committee's consideration). Commentators have expressed the view that, even if national uniformity is a worthy goal, the Litigation Package introduces an unwarranted degree of precision and rigidity.

3. ***Will the Litigation Package increase burdens and costs for courts and parties that would outweigh its benefits?***

Several commentators argue that whatever benefits might be achieved by the Litigation Package, they are outweighed by the costs and burdens to courts, clerks, and litigants (more docket entries, more papers filed and handled by clerks, more work for lawyers, etc.). Conducting a cost/benefit analysis before proceeding further with the Litigation Package has been suggested.

4. ***Should the Advisory Committee wait to see if Congress will enact legislation before going forward with substantial revisions to the Rules?***

   A few commentators have expressed opposition to frequent amendments to Rules. They urge the Committee to refrain from tinkering with the Rules so often. They suggest that if Congress enacts comprehensive legislation of the type that almost became law last year, further Rule amendments will be required and, therefore, the Committee should wait to see if bankruptcy legislation becomes likely before going forward with the Litigation Package.

5. ***Is the Litigation Package too complex and cumbersome in that it creates too many categories of procedures?***

   Commentators have opposed the package because it contains too many categories of requests for orders. There are applications, administrative motions, other motions, objections (which sometimes, but not always, commences an administrative proceeding), requests, etc. They argue that the package should be simplified by reducing the number of categories and reducing definitional complexity.

6. ***Is it desirable to separate requests for orders into two categories (applications and administrative proceedings) as manifested in proposed Rules 9013 and 9014?***

   The Litigation Package has two main categories: (1) routine ex parte applications governed by Rule 9013, and (2) contested motions with the procedural safeguards of the type set forth in Rule 9014. This 9013/9014 bifurcation (which is a core feature of the Litigation Package) has been praised by many commentators, but attacked by others. An objection to this bifurcation is that it is too cumbersome to determine which requests are in which category (the lawyer must go through the long list in Rule 9013(a) and the exceptions in Rule 9014(a)). What happens if a lawyer files a motion under one of these rules when it should have been brought under the other? Will this result in additional litigation?

7. ***What should Rule 9014 be called?***

   One of the most frequent and strongest objections to the Litigation Package is the title of Rule 9014 ("administrative proceedings"). This title has been described as

demeaning, misleading, and inaccurate. Alternatives suggested by commentators include, among others: Contested Matters (the current title), Motions, Motion Proceedings, Case Motions, Main Case Motions, Main Case Proceedings, Operational Proceedings, Independent Proceedings [or Motions] Not in the Context of an Adversary Proceeding Under Part VII, Adjunct Proceedings, Auxiliary Proceedings, and Summary Proceedings.

8. ***Should the Rules require that dates for hearings be set before the notice of motion is served?***

Under proposed Rule 9014 (as well as Rule 2014), the notice of motion must include the date of the hearing. This requirement is inconsistent with local procedures in many districts, where hearings are not set unless and until a response or request for a hearing is filed. Since most motions are uncontested, requiring hearing dates to be set for every motion would be inefficient and costly in those districts. Bankruptcy clerks and judges were the most vocal in opposing this aspect of the Litigation Package. It has been suggested that this problem could be solved by removing the requirement that the notice of motion include the hearing date, and by setting the time limit for a response as a specified number of days after service or filing of the motion. Only a few commentators have expressed support for providing a hearing date in the notice of motion.

9. ***Should Rule 9014 require that motions and responses be supported by affidavits?***

Commentators are sharply divided on whether supporting affidavits should be required for motions and responses. They would be required under proposed Rule 9014(b)(3)(A) and (d)(3)(B), unless the party is a consumer debtor. Many judges, especially judges in the Southern District of California, claim that sworn affidavits/declarations are necessary because a motion may not be granted without admissible evidence (even in the absence of an objection or response). But many other judges, such as those in the Central District of Illinois, claim that affidavits/declarations are not necessary at all, at least not until a response is filed. Moreover, they do not want the extra paper filed. Some judges believe that affidavits rarely add to the allegations contained in the motion itself, and refer to Rule 9011 that is applicable to motions. Others argue that this requirement is costly to clients, will increase legal fees, and will increase clerks' costs because they must be docketed and kept by the court.

10. ***Should Rule 9014 require that valuation reports, if available, be filed and served together with motions and responses?***

Commentators have opposed the requirement in Rule 9014(b)(3)(B) and (d)(3)(C) that valuation reports be filed and served in certain situations. Many have construed (or misconstrued) this requirement as meaning that such valuation reports would be considered as admissible evidence to be considered by the judge without the need to authenticate them by affidavit or declaration (the Committee intended that valuation reports be exchanged as a form of discovery). If the provisions on valuation reports remain in the rule, further clarification of this point should be considered. Several commentators have opposed this requirement as unnecessary, expensive for clients, and burdensome to clerks -- especially if there is no opposition to the motion.

11. ***If affidavits and/or valuation reports are required, should consumer debtors be excused from these requirements?***

Commentators have opposed the provisions of Rule 9014 that excuse consumer debtors from the requirement to file supporting affidavits and valuation reports. The exclusion has been criticized as over broad (includes consumers represented by counsel) and too limited (does not include consumer creditors or other small creditors). There should be a level playing field. A few have even suggested that it may be unconstitutional (due process and equal protection). Some have commented that this exclusion actually disadvantages consumers because, without an affidavit, they could not be successful on the motion (especially if the other party supports its position with an affidavit).

12. ***Should Rule 9014 make Civil Rule 43(e) inapplicable at evidentiary hearings?***

The use of affidavits at trials was an issue that was raised by many commentators. Rule 9014(j) would render Civil Rule 43(e) inapplicable when an evidentiary hearing is held. This provision was intended (at least by the Reporter) to require that evidentiary hearings for Rule 9014 motions be conducted in the same manner as trials in adversary proceedings with respect to the necessity for presenting live testimony. It was intended that judges should not be permitted to determine factual disputes based solely on affidavits. Many commentators have criticized the elimination of Civil Rule 43(e) for several reasons. First, it has been argued that judges should have discretion to decide factual disputes based solely on affidavits

where appropriate, especially in small matters where it is too expensive and time-consuming to conduct live witness hearings (such as an objection to a small claim). Second, commentators have read Rule 9014(j) to mean that affidavits may never be used and that live witnesses must appear for direct, as well as cross, examination. These commentators cite appellate decisions that have held that trial judges have discretion to permit affidavits to be used at district court trials so long as witnesses are available for cross-examination, and they assert that the elimination of Rule 43(e) would deprive bankruptcy judges of the same discretion.

13. ***Should the "two-hearing" approach in Rule 9014(i) be retained?***

Commentators have criticized as unnecessary, expensive, and burdensome on the courts and the parties, the provisions that require that the first hearing be limited in most situations to a determination of whether there are genuine triable issues of fact and, if not, the resolution of the motion. If there is a factual issue that needs an evidentiary hearing, the lawyers must return to court again for the evidentiary hearing. This two-hearing approach, which includes an automatic "summary judgment hearing" plus an evidentiary hearing later, is too cumbersome for routine motions in the majority of cases (consumer cases). Commentators have observed that it may work well for large, major disputed matters, but is overkill for most situations. The provision in Rule 9014(i)(1)(B) that permits the court to notify litigants that an evidentiary hearing will be held at the initial hearing was criticized as meaningless because the time between the response and the hearing (5 days) is too short to enable the court to give reasonable notice to the parties.

14. ***Are the time provisions applicable to motions appropriate?***

Rule 9014, as well as Rule 2014 and other rules, contain specific time periods relating to motions. Notice of the motion under Rule 9014 must be filed and served 20 days before the hearing, and a response deadline is five days before the hearing. Different time provisions appear in Rule 2014. Commentators have criticized the time periods in the Litigation Package for various reasons: (1) There are too many different time periods that unnecessarily adds confusion, (2) the 20-day notice requirement for motions is too long and will cause delays in the case (especially for certain types of motions, such as a motion to appoint a chapter 11 trustee), (3) an attempt to reduce a time period will require another motion, and (4) the time periods are too short and will require separate motions to extend.

Criticism of time periods is not limited to Rules 9014 and 2014. A number of

commentators have criticized the different time provisions in Rules 6004 and 6007 (use, sale, lease, or abandonment of property of the estate). Many would prefer greater uniformity among the time periods in the Rules. Some have suggested that local rules, rather than national rules, should set time periods applicable to motions.

A related concern expressed by a few commentators is that the 10-day provision applicable to discovery under Rule 9014(h)(3) is too short. It has been suggested that such a short period for responding to discovery requests will unnecessarily lead to more motions for extensions.

15. ***Will Rule 9014(o) permit courts to "opt out" of the requirements of Rule 9014?***

Although Rule 9014(o) was intended to give the court discretion to alter the procedural requirements for cause in a particular case, a number of commentators have referred to it as an "opt out" provision that will defeat the goal of national uniformity. Some commentators appear to favor this opt out provision, while others refer to it to support their objection to the Litigation Package as not achieving the uniformity goal.

16. ***Is the service list in Rule 9014(c) appropriate?***

Commentators have criticized the list of entities to be served under Rule 9014(c). They suggest that there are too many entities on the list for many routine types of motions. Why is it necessary to serve both the debtor and the debtor's lawyer? The requirement to serve entities with an interest in property was criticized as requiring a movant for relief from the stay to do an unnecessary and expensive title search to identify junior creditors. A frequent comment was that the requirement to serve "any entity entitled to service . . . by these rules" appears to incorporate the notice requirements of Rule 2002(a). That is, the movant would have to serve a complete set of motion papers on all creditors if the movant seeks to dismiss or convert the case (rather than service by the clerk of notice of the hearing). The relationship of Rule 9014(c)(1)(G) and Rule 2002 would have to be better coordinated and clarified. Other commentators have suggested adding other entities to the service list, including any entity that filed a notice of appearance and request for papers.

17. ***Should Rule 9014 require that the movant and respondent file and serve proposed orders?***

Commentators, especially clerks and judges, have opposed the requirement in Rule 9014(b)(2) and (d)(3)(A) that parties file proposed orders. This could result in additional docketing and extra paper being filed. At least one of the two proposed orders will never be signed, but will remain in the court files. This has been criticized as unnecessary and expensive. Other commentators have supported this requirement as helpful to the court.

18. ***Is Rule 2014 (employment of professionals) too cumbersome and inefficient for most cases?***

Rule 2014 also has been the subject of many comments (23 letters). Commentators have suggested that most requests for court approval of the employment of lawyers and other professionals are uncontested and that the service, interim employment orders, and other provisions of Rule 2014 are unnecessary, cumbersome, and expensive for routine cases. The time provisions in Rule 2014, which differ from the analogous time provisions in Rule 9014, also have been criticized. It also has been suggested that requests for approval of employment under Rule 2014 be treated as a Rule 9013 application.

19. ***Is the list of matters included in Rule 9013(a) too limited? Does it contain matters that should not be treated in an ex parte fashion?***

The list of matters covered by Rule 9013(a) has been criticized as confusing. Several commentators have suggested that the list of matters included in Rule 9013(a) is too short and questions whether local rules may add to that list. Others have commented that certain listed matters should be deleted. For example, several commentators believe that a request for an order protecting secret or defamatory matters under Rule 9018 should not be treated ex parte.

20. ***Should the debtor be able to obtain an extension of time to file schedules and statements without notice and opportunity to be heard?***

Several commentators oppose the proposed amendments to Rule 1007(c) because it would allow the court to extend the time to file schedules and statements "with or without notice or hearing." They urge the Committee to treat such requests as Rule 9014 motions.

SUMMARY OF PUBLIC COMMENTS ON PROPOSED AMENDMENTS PUBLISHED IN 1998

Commentators:

001 - Jay W. Browder
002 - Richard Craig Friedman
003 - Jerry A. Weissburg
004 - Hon. Thomas F. Waldron
005 - John Brubaker.
006 - Hon. Stan Bernstein
007 - Hon. Alan Jaroslovsky
008 - Hon. Kathleen P. March
009 - Diane L. Jenson
010 - T. Bentley Leonard
011 - Leon Forman
012 - Richard Levin (2 letters)
013 - Benjamin S. Seigel
014 - Nancy Knupper
015 - Heide Kurtz
016 - Peter C. Fessenden, Esq.
017 - Hon. Frank W. Koger
018 - Hon. Ralph H. Kelley
019 - David M. Reeder, Esq.
020 - Hon. Keith Lundin
021 - Hon. David S. Kennedy
022 - Hon. Rosemary Gambardella (on behalf of bankruptcy judges in D. N.J.)
023 - Stephen J. Snipper, Esq.
024 - Bankr. Judges, Dist. of Colorado (Hon. Charles Matheson)
025 - Eric J. Breithaupt, Esq.
026 - Hon. Michael J. Kaplan
027 - Michael L. Stern, Esq.
028 - Hon. Ernest M. Robles
029 - Hon. Vincent P. Zurzolo
030 - Earl D. Ahlschwede
031 - Hon. Jack Caddell
032 - Raymond J. Rotella, Esq.
033 - Joseph V. Ferguson, Esq.
034 - Joseph M. DuRant, Esq.
035 - Hon. Irvin N. Hoyt
036 - Bradford L. Bolton, Clerk

037 - Hon. James Scott Sledge
038 - Hon. Margaret A. Mahoney (on behalf of herself and Hon. William H. Murphy)
039 - Hon. Stephen C. St. John and Hon. David H. Adams
040 - Edgar M. Rothschild, III, Esq.
041 - James J. Feder, Esq. (Feder & Mills)
042 - Hon. James F. Queenan, Jr.
043 - John W. Mills III, Esq. (Feder & Mills)
044 - Hon. Russell A. Eisenberg
045 - David L. Hammer, Esq.
046 - Leslie A. Cohen, Esq.
047 - Stephen W. Sather, Esq.
048 - Hon. Henley A. Hunter
049 - Thomas J. Yervich, Esq. (2 e-mail communications)
050 - Hon. Polly S. Higdon (includes comments of Oregon Bankruptcy Judges, comments of a committee of the Portland Bar Association, and of a committee of the Lane County Bar Association in Eugene, Ore.)
051 - Kenton D. Kinnaird, Esq.
052 - Jeffrey Marks, Esq.
053 - Dewayne Gooch, Esq.
054 - Carolyn B. Buffington, Esq., Law Clerk
055 - Hon. Robert D. Martin
056 - Hon. Barry Russell (request to testify only)
057 - Mark Bonacquisti
058 - Hon. Barry Russell (on behalf of LA Chapter, Fed. Bar Assn.)
059 - Federal Bar Assn. Bankruptcy Law Section
060 - Bankruptcy Judges of N.D. Illinois (10 Judges)
061 - Judy B. Calton on behalf of Detroit Metropolitan Bar Assn. (request to testify only)
062 - Bankruptcy Judges of C.D. Cal. (21 judges)
063 - Bankr. Law Committee of the Commercial Law Section of the Delaware State Bar Assn.
064 - Hon. Leif M. Clark
065 - Commercial Law League of America (submitted by David P. Goch, Esq.)
066 - Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankruptcy Court
067 - Hon. Mark B. McFeeley
068 - Hon. Jerry A. Brown
069 - [open]
070 - Hon. Leslie Tchaikovsky (on behalf of the nine Bankruptcy Judges of N.D. Cal.)
071 - Hon. Donald MacDonald IV and Hon. Herbert A. Ross
072 - Louis W. Levit, Esq. (request to testify only)
073 - Hon. James S. Starzynski
074 - Hon. Stacey W. Cotton (on behalf of Bankruptcy Judges in the N.D. Ga.)
075 - George W. Stevenson, Esq.
076 - Hon. Steven A. Felsenthal (on behalf of 3 Bankruptcy Judges from the N.D. Tex.)
077 - Los Angeles Bankruptcy Forum (Janet A. Shapiro, President)

078 - Hon. J. Vincent Aug
079 - Hon. John D. Schwartz
080 - Brad Wilson Hissing, Esq.
081 - Bankruptcy Judges and Clerk of District of South Carolina
082 - Hon. Alan H. Shiff (on behalf of the Bankruptcy Judges of the District of Connecticut)
083 - Henry C. Kevane, Esq.
084 - Hon. William A. Clark (on behalf of eight Bankruptcy Judges in the S.D. Ohio)
085 - Hon. Alexander L. Paskay
086 - George W. Ledford, Chapter 13 Trustee
087 - James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee)
088 - Robert A. Goering, Esq.
089 - Hon. Warren W. Bentz
090 - Hon. Gerald D. Fines
091 - Sally S. Neely, Esq.
092 - Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.)
093 - Hon. Terry J. Hatter, Jr.
094 - Hon. Terrence L. Michael
095 - Bankruptcy Judges of the Southern District of California
096 - Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks
097 - Michael L. Molinaro, Esq.
098 - Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York
099 - Terrence H. Dunn, Clerk
100 - Arthur J. Fried, General Counsel of the Social Security Administration
101 - Hon. William Greendyke
102 - Gary J. Gaertner on behalf of the National Assoc. of Chapter 13 Trustees
103 - Hon. David A. Scholl
104 - Dennis J. LeVine, Esq., on behalf of Tamp Bay Bankruptcy Bar Assoc.
105 - Terry Bird, Chair, Los Angeles County Bar Assoc. Federal Courts Committee
106 - Richard B. Herzog, Chair, Rules Committee, Bankruptcy Section, State Bar of Georgia
107 - Hon. Linda B. Riegle on behalf of Ninth Circuit Conference of Chief Bankruptcy Judges
108 - Michael Wm. Zavis, Esq.
109 - Shirley C. Arcuri, Esq., on behalf of Local Rules Adv. Comm., Bankr. Court, M.D. Fla.
110 - Ninth Circuit Bankruptcy Clerks' Liaison Committee
111 - Hon. Christopher M. Klein
112 - Jerry W. Venters, Esq.
113 - Linda W. Simpson, Bankruptcy Administrator
114 - Judith R. Starr on behalf of the Div. of Enforcement of the Securities and Exchange Comm.
115 - Executive Office for United States Attorneys
116 - Gregory S. Clore, Esq.
117 - William J. Barrett, Esq., on behalf of 15 bankruptcy lawyers in Chicago
118 - Daniel A. Zazove, Esq.
119 - Bankruptcy Subsection of the Colorado Bar Association
120 - Thomas M. Mathiowetz, Esq.

121 - William P. Wessler, Pres., Mississippi Bankruptcy Conference, Inc.
122 - Phoenix and Tucson Chapters of the Federal Bar Association
123 - Patrick M. Costello, Esq.
124 - William R. Keleher, Board Chair, on behalf of Board of Directors of the Bankr. Law Section, State Bar of New Mexico
125 - Hon. Arthur N. Votolato
126 - Douglas P. Taber, Esq.
127 - Donald C. Shine, John K. Kneafsey, Daniel P. Dawson, Esq.
128 - Sandra Connors, Director, Regional Support Division, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency
129 - Hon. Stephen S. Mitchell
130 - Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group
131 - Martha L. Davis, General Counsel, Executive Office for United States Trustees
132 - Peter H. Arkinson, Esq.
133 - Hon. Dana L. Rasure
134 - Tammi M. Hellwig, Esq.
135 - Bruce A. Emard, Esq.
136 - Alan Steven Wolf, Esq.
137 - Gary B. Rudolph and Radmila A. Fulton on behalf of San Diego Local Rules Subcomm.
138 - Margaret A. Burks, Chapter 13 Trustee
139 - Michelle M. Stephenson, Esq. (on behalf of 9 law firms practicing as chapter 13 trustees)
140 - Hon. Phillip H. Brandt
141 - Hardin W. Hawes, Clerk
142 - Hon. William V. Altenberger
143 - Steven B. Towbin, Esq.
144 - Hon. Robert E. Grant
145 - Riley C. Walter, Esq.
146 - Hon. E. Stephen Derby and Hon. Duncan W. Keir
147 - Hon. Karen A. Overstreet
148 - Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice
149 - Hon. Burton Perlman
150 - Dean S. Cooper, Assoc. General Counsel, Feddie Mac
151 - Lisa C. Fancher, Esq.
152 - Brenda Porter Helms, Esq.
153 - Terry John Malik, Esq.
154 - Philomena S. Ashdown, Esq.
155 - Karen Cordry, Bankruptcy Counsel, National Assoc. of Attorneys General
156 - Hon. Larry Lessen
157 - Howard J. Weg, Esq.
158 - Catherine Steege, Esq.
159 - Paul J. Gaynor, Esq.
160 - David B. Altman, Esq.
161 - Janet L. Chubb, Esq.

162 - Hon. Diane Weiss Sigmund
163 - Hon. Paul B. Snyder
164 - Hon. Bruce Fox
165 - Hon. Jim D. Pappas
166 - Mark E. Leipold, Esq.
167 - Paul T. Gefreh, Esq.
168 - Brad A. Berish, Esq.
169 - Earl C. Buckles, Esq.
170 - Hon. David T. Stosberg
171 - Hon. Tina Brozman
172 - National Assoc. of Independent Insurers

GENERAL COMMENTS APPLICABLE TO ALL OR SEVERAL RULES

1. Hon. Stan Bernstein (Bankr. EDNY) (006):

> "[T]he Committee has focused on a very practical and perplexing set of procedural difficulties raised by the Bankruptcy Code and the Bankruptcy Rules. The Committee's proposed resolution of these issues is exceptionally thoughtful, and if adopted, would surely make management of my daily calendar much easier. Please extend my thanks as a working bankruptcy judge..."

2. Richard Craig Friedman, Office of U.S. Trustee (001):

> One of the virtues of a legal system is uniformity. The rules should be clear enough to follow and fixed for a sufficient time to understand them. Constant tinkering is undesirable and changes should not be made for small improvements. On the whole, these changes are unnecessary and unwelcome. And to move down this path when legislative reform may soon necessitate changes to the rules seems especially premature and wasteful of everyone's time.

3. John S. Brubaker, Chief Deputy Clerk (Kentucky) (005):

> "Great revisions to the Bankruptcy Rules! I like the clear distinction between an application and a motion." He then suggests an amendment to Rule 9014(c) regarding who serves notices. See comments to Rule 9014.

4. T. Bentley Leonard, Esq. (Asheville, N.Car.) (010):

> Changes to motion practice may work well for chapter 11 cases, but will be burdensome and "a general waste of time for the run of the mill consumer chapter 13 or 7." There is no need for elaborate procedures for consumer motions for which there is seldom a response. The present system works well for the typical consumer case.

5. Richard Levin, Esq. (Los Angeles) (012):

> "I heartily endorse the concept that the Advisory Committee attempted to implement in proposed Rules 9013 and 9014 and in the related amendments to the other rules." He has recognized problems under the current rules caused by ambiguity and uncertainty in the distinction between the handling of administrative matters and contested matters, as they are currently defined, and the lack of uniformity throughout the country in what is treated as motion practice but is in fact two-party (or occasionally multi-party) litigation under

the umbrella of a bankruptcy case. He then offered several technical and drafting suggestions in a separate letter, but added: "On the whole, I believe the draft is excellent and provides major advances not only in Rules 9013 and 9014, but throughout.".

6. Peter C. Fessenden, Esq. (Brunswick, Maine) (016):

"The 'Litigation Package' surrounding Rules 9013 and 9014 requires little comment other than enthusiastic support. The changes are wise, well crafted and long overdue." Mr. Fessenden then makes a minor suggestion to change the phrase "proof of service" to "certificate of service" or "evidence of service" in Rules 9013 and 9014. He also commented that the "Other Amendments" (unrelated to the Litigation Package) "are excellent and should be adopted" except for one objection regarding the proposed amendment to Rule 2002(a)(6) (discussed below).

7. Hon. Keith Lundin (Bankr, M.D. Tenn.) (020):

Submitted an editorial he coauthored in opposition to the Litigation Package (published in *Norton's Bankruptcy Law Adviser*). The proposed amendments replace "contested matters" with a "labyrinth of new pleadings and procedures that border on the incomprehensible." Motions will be mutated into multiple new forms: administrative proceedings/administrative motions, ordinary motions, requests, and motions "that morph into something that doesn't have a name in the proposed rules but which is controlled by cross-references to Federal Rules of Civil Procedure in Part VII of the (existing) Rules." There also will be "applications", "responses" (which, he claims, could turn an application into an administrative motion), and "objections" that are treated as a motion in an adversary proceeding (but not always). Some actions are begun by filing a "notice"; a "general notice" differs from an ordinary notice. There also are "pleadings." What you call a piece of paper determines whether and how much notice must be given; who gives notice and to whom it is given; whether affidavits must be attached or are forbidden; how long you have to respond and in what form; whether there will be a hearing; whether witnesses are permitted or prohibited at any hearing; whether you get a status conference, and whether court action is automatic or permissive.

Litigation under the current Rules was patterned on litigation in the district courts, with one form of civil action commenced with a complaint and within which a court order is requested by motion. Vestiges of pre-1983 practice ("applications" and "requests") appear in only a few places now and cause little confusion. "Contested matter" is just another way to describe motion practice outside of an adversary proceeding. But now the proposed amendments is a "giant step backwards" by bringing back "the unique forms and secret handshakes that once (so it was said) characterized the bankruptcy courts." It also is a step backwards because it involves judges in the administration of cases. "In the guise of a 'Status Conference,' the Litigation Package resurrects 'going to see the bankruptcy judge'. The process "will inevitably generate a gigantic black hole of

discretion within which the Status Conference becomes the answer to all questions." There is no reason to expect the Litigation Package to produce uniformity of practice.

Certain words are used sometimes used as words of art and sometimes not, such as "proceeding" (used to mean administrative proceeding or sometimes to mean a request for an order). "Motion" is sometimes used to mean administrative motion, and sometimes not. It sometimes requires a "motion" and other times a "written motion" or authorizes "oral motion", and sometimes incorporates F.R.Civ.P. 7(b)(1) "which usually does but sometimes doesn't require that a motion be in writing." Forms of discovery in civil practice are rearranged with shortened time periods and that usual forms of discovery are abandoned altogether in favor of mandatory disclosures with respect to certain issues (such as valuation reports - "whatever that is").

The Litigation Package confuses the use of affidavits. Citing several decisions, he notes that there is controversy about how and when affidavits may be used as evidence in contested matters and adversary proceedings. He claims that under proposed Rule 9014 affidavits under Rule 43(e) are prohibited in any evidentiary hearing in an administrative proceeding, but they may be used were there is a hearing without testimony to demonstrate whether there are genuine issues of fact. "Rule 9006 (dealing with time computations) refers ambiguously to Affidavits in Administrative Proceedings. Other parts of Proposed Rule 9014 incorporate Part VII that incorporate Civil Rules that bring Affidavits into Administrative Proceedings through the back door."

The Advisory Committee struggled to find a balance between micro-management and the sometimes awkward forms in which contests arise in bankruptcy cases. But this did not produce the simplicity, certainty and uniformity sought by the Advisory Committee. It is confusing and will undo years of progress toward bringing bankruptcy litigation into the mainstream of federal civil practice. He suggests an alternative: when you want an order you file a motion (not an application, request, objection, or notice). In some districts, the movant is responsible for giving notice explaining the relief sought and telling everyone that it will be granted without a hearing unless an objection is filed within a stated period. If not timely response is filed, the motion is granted. "One mailing, one set of papers, one order -- no mess, no fuss." If a response is filed, a few micro-managements are necessary to adjust the time periods for discovery, but otherwise the F.R.Civ.P. are quite adequate for management of the resulting litigation.

8. Hon. David S. Kennedy (Bankr. W.D. Tenn.) (021):

Instead of having "applications" (Rule 9013), "requests" (Rule 1006), and "motions" not made in the context of a Part VII adversary proceeding (Rule 9014), these various "requests for orders" should be combined and called "motions." This approach would make bankruptcy procedure somewhat more akin to the procedures that currently exist in

the district courts and state courts. "Perhaps these bankruptcy procedural distinctions, having semantical but nonsubstantive differences, should be eliminated."

9. Bankr. Judges, D. Colorado (submitted by Chief Judge Matheson) (024):

Most comments relate to Rule 9014 and are discussed where specific comments on Rule 9014 are listed. But three general comments are offered as well: (1) The proposed amendments sacrifice, for the sake of national uniformity, the ability of courts to structure local procedures so as to blend with procedures used in other courts (state and federal) in the same district; (2) The burden on judicial resources and the cost inevitably occasioned by the court and the parties will be increased; and (3) the proposed rules will establish a more complicated, expensive, paper intensive and time consuming method for the disposition of contested proceedings.

10. Hon. Ernest M. Robles (Bankr., C.D. Cal.) (028):

Suggests the Committee review Judge Keith Lundin's "summary of how the proposed changes ... will work to confuse an already confusing maze." He does not think the wholesale changes would improve the bankruptcy system. For practitioners and pro se parties, it would make the system "unreachable." "If the Committee really wants to make significant reforms..., it might consider doing what our local rules committee did. That is, review the local rules for the bankruptcy courts around the country. The Committee will see that many bankruptcy courts have already discovered how the FRBP can be turned into something that streamlines procedure while maintaining the imperative of due process."

11. Hon. Vincent P. Zurzolo (C.D. Cal.) (029):

The need for the proposed amendments is ambiguous because the rationale and sources regarding the confusion and criticism as to current procedures (as revealed by the F.J.C. survey) is unclear and not fully disclosed. To the extent that lack of national uniformity is a rationale for the proposed amendments, no explanation is given as to why national uniformity is paramount for the resolution of what are now known as contested matters. There is a great deal of variety in the size of courts (from single judge courts to C.D. Cal. with 21 bankruptcy judges serving in 5 geographic divisions) and the nature of disputes they regularly handle. In 1997, there were 35,812 motions seeking relief from stay. "It is difficult to imagine the rationale that supports establishing a uniform motion practice procedure for a district such as ours that would be identical to one employed in a single judge or even a three or four judge bankruptcy court *and* that would serve the needs of the courts and the litigants in those courts equally well." The vast majority of Rule 9014-type motions in the C.D. Cal. are brought by local counsel familiar with local rules, and for other lawyers the local rules are available on the court's website. Traditional problems for visiting counsel in learning local rules in a particular court are no longer a serious

problem. He agrees with the bifurcation between Rule 9013 and Rule 9014 matters, and agrees with the name change to Rule 9013. Other comments are discussed below where comments on particular rules are addressed.

12. Earl D. Ahlschwede, Esq. (Grand Island, Nebraska) (030):

He read the editorial in *Norton Bankruptcy Law Advisor* (co-authored by Judge Lundin) and, based on that, he urges the Committee to abandon the proposal and to continue with the current rules.

13. Hon. Jack Caddell (Bankr. N.D. Ala.) (031):

The proposed amendments are "outrageously complicated" and attempts to "fix something that isn't broken." "Have the lawyers complained about the existing Rules or is the Committee guided by other interests groups? Please abort your plans to make these onerous and unnecessary changes. The concept behind the Federal Rules of Civil Procedure is simplicity - a short and plain statement of the cause of action. Your proposed Rules take us back to the days of common law and equity pleading."

14. Raymond J. Rotella, Esq. (Florida) (032):

Against revising rules every year -- it becomes a "pitfall for the weary." The proposed changes to Rule 9014 require changes to almost every other rule, which causes the need to re-educate all bankruptcy lawyers. Suggests abandoning the proposed amendments. He also makes more detailed comments regarding Rule 9014 (see below where Rule 9014 is discussed).

15. Hon. Ralph H. Kelley (Bankr. E.D. Tenn) (018 addendum):

Urges the Committee to read the editorial in *Norton Bankruptcy Law Adviser*, Issuer No. "I believe more time is needed to iron out the problems which were noted in the editorial." [The editorial, which is attached to Judge Kelley's letter, was co-authored by Judge Lundin - see Judge Lundin's comments above]

16. Joseph V. Ferguson, Esq. (Duluth, Minn.) (033):

Opposes the proposed amendments. As a practicing bankruptcy lawyer for 24 years, he believes the current rules pose no problems and any modifications should be made by local rules which reflect customs and practice of the district. The proposed amendments will confuse experienced lawyers and make it virtually impossible for non-bankruptcy practitioners to understand an already complicated field of law.

17. Joseph M. DuRant, Esq. (Newport News, Va.) (034):

Opposes proposed amendments to Rules 9013 and 9014. Questions the necessity for them (the system is not broken); in his district (E.D.Va.) large dockets move rapidly, efficiently, and fairly without the overlay of rules that seem to be a retreat to Code pleading practice and which seem contrary to the progress of federal litigation. The proposals will tie up dockets through additional hearings and proceedings. The stated purpose of national uniformity will not be achieved, particularly with liberal opportunities to fine tune them locally. Although he does not have a great deal of practice outside his district, based on what he sees coming from other districts, practice outside the district is not so different that a rigid uniformity would appear necessary.

18. Hon. Irvin N. Hoyt (Bankr., D. South Dakota) (035):

In favor of non-Litigation Package amendments (they appropriately address gray areas that need clarification), but opposes the Litigation Package for several reasons:

(a) broad changes to the Bankruptcy Code are still on the horizon; should not make major rule changes until legislation passes or is permanently tabled.

(b) several proposals are burdensome - if an attorney must abide by Rule 9011, there is no need to require affidavits with a Rule 9014 motion (this just increases costs and attorney time). Also, the requirement of a preliminary hearing to determine whether an evidentiary hearing is needed unnecessarily clogs a calendar and presupposes that pleadings are incomplete or misleading. Courts should be permitted to hold preliminary hearings in their discretion.

(c) The proposed amendments are inconsistent with local procedures needed to accommodate his large, one-judge district. Rule 9014(d)(1) requires a response at least 5 days before the hearing. They do not even set a hearing date until a response is filed (the movant's notice gives a deadline for an objection). This eliminates wasteful scheduling and unscheduling uncontested matters. Attorneys can notice a motion without getting a hearing date in advance. When the hearing is scheduled, the clerk better knows how much time is needed for the hearing and who will be involved. If warranted, the hearing could be scheduled in a different division. Our scheduling is thus more efficient. We used to operate on an "objections to be filed five days before hearing" rule but have found our new method works much better. There are no benefits to the scheduling practice under the proposed amendments.

(d) The Committee's challenge is to come up with a set of rules that fosters uniformity, but that recognizes that the practice in the District of S. Dakota is much different than in the S.D.N.Y., especially in business reorganization cases. Most business cases in S. Dakota are to reorganize a farm or ranch. The bankruptcy bar there is small (less than 100 attorneys) - they have one judge, one

attorney in the U.S. Trustee's office they share with N.Dakota, one chapter 13 trustee, 5 chapter 7 trustees, two chapter 12 trustees. Each of the 4 courts in the district are over 150 miles apart. Telephonic hearings are common and often necessary due to travel costs, bad weather, etc. National uniformity must yield, when appropriate, to the different nature of a rural district.

19. Hon. James Scott Sledge (Bankr. N.D. Ala.) (037):

Supports the proposed amendments as needed and well crafted. They will clarify many of the present conflicts and eliminate the many local attempts to establish efficient systems. Proposed Rules 9013 and 9014 will require adjustments, but provide a standard for us all to apply. But he offers one additional change: although he follows the Code's requirement that a confirmation hearing always be held in a chapter 13 case (even without any objections), he has observed that most other courts ignore that requirement and hold hearings only when their is an objection. He suggests the Code be changed to require a hearing only if there is an objection.

20. Hon. Margaret A. Mahoney (on behalf of herself and Hon. William S. Shulman (Bankr. S.D. Ala.) (038):

In favor of the proposed amendments for several reasons: First, practice will become more uniform nationwide. Although judges have become comfortable with local practices, that is not a reason to oppose more uniformity. There are more national law firms and more companies that have eliminated some of their local counsel and consolidated legal work in a few firms. More uniformity will allow for higher qualify of work from these firms and companies and will lower the cost of legal services. "There has been a view that bankruptcy is an area of the law which necessitates local counsel to avoid pitfalls in local practice and unwritten local rules. These [proposed] rules will help eliminate the perception of parochialism." Although there are provisions of the proposed amendments that they would have drafted differently to better suit their current practice, "every district could say the same thing." Each district has different local rules with different demands on practitioners; each district's rules worked very well but were not perfect. "We believe the amendments are comprehensive and complete and accomplish some very significant goals." Second, the amendments will lower the workload in many clerks' offices because:

(1) lawyers will be able to "self schedule" hearing dates for motions without the aid of a court employee (perhaps there would be a website with dates for hearings or a calendar available to anyone who wants to file a motion). Usually the setting of hearing dates requires a telephone call or correspondence between the movant and the clerk's office.

(2) the motion and hearing could be docketed at one time in one entry if the

hearing date is included in the motion. Many courts now send a separate notice of hearing to the movant or to all affected parties; both the motion and the notice of hearing are docketed separately.

(3) the movant serves the motion and gives notice of the hearing to the affected parties. At present, the clerk prepares and sends notice of hearing in many courts.

(4) orders will be prepared by attorneys, not the court.

21. Hon. Stephen C. St. John and Hon. David H. Adams (Bankr. E.D.Va.) (039):

Oppose and offer suggestions with respect to several specific aspects of proposed rule amendments (discussed below with respect to Rules 9014, 2007, 3007, 3012, 3015). "Other proposed amendments appear to be satisfactory and we particularly applaud the changes concerning service of motions to insure due process and modification of discovery rules to fit a bankruptcy motion context." But are very concerned that Rule 9014 will radically and adversely affect the adjudication of motions and of confirmation of chapter 13 plans and will substantially delay dockets without any accompanying benefits.

22. Edgar M. Rothschild, III, Esq. (Nashville, Tenn.) (040):

The proposed changes are "wrong, confusing and misguided." Resist the temptation to tinker with the current rules that work very well.

23. David L. Hammer, Esq. (Dubuque, Iowa) (045):

Mr. Hammer's comments are applicable to proposed amendments to all bodies of rules (Civil, Evidence, and Bankruptcy). An area of some inequity, at least to attorneys practicing in more than one federal court, is the use of local rules. If we have uniform national rules, and there is no room for variant local rules. If the sense of the Rules is significant, then the Rule should obtain in all Federal Courts, and if they are not, they should obtain in none. In any event, the multiplicity of local court rules would suggest that the Federal Rules of Practice and Procedure should comprehend the subjects which are matters of local rules."

24. Hon. James F. Queenan, Jr. (Bankr. D. Mass.) (042):

Offers suggestions regarding Rules 9013 and 9014 (discussed below where comments on those rules are summarized). But notes that there is one important topic the proposed amendments do not address: overbidding at private sales. To enhance the bidding process there should be substantial notice to potential overbidders, and he prefers sealed bids rather than voice bids at the auction in the courtroom. He encloses his local rule on

overbidding.

25. Hon. Russell A. Eisenberg (Bankr. E.D. Wisconsin) (044):

Having national uniform procedures and preventing balkanization of our courts are laudatory goals and the Committee is on the right track, but there is more work to be done. The proposed procedures probably are manageable (provided there is extensive clarification and we can sort out the terminology and esoteric procedures), but the proposed changes are a "big step backward." The proposed procedures are too complex, difficult to understand, and cumbersome, and will result in fewer lawyers appearing in bankruptcy courts. The proposals will make life particularly burdensome for pro se litigants. Terminology should be uniform throughout the Code, Rules and Forms. Form 20A is a basic form (Notice of Motion or Objection). Adding "application" as a term will require close scrutiny of Official Forms and Rules. The number of references to other rules makes him think of the Internal Revenue Code "which is easy to understand notwithstanding all of its references provided that one knows before checking the IRC what the IRC says and means."

26. Hon. Henley A. Hunter (Bankr. W.D. La.) (048):

Suggests the Committee read the editorial in *Norton's Bankruptcy Advisor* (written and submitted as a comment by Judge Keith Lundin), and quotes the article expressing the view that the Litigation Package will confuse litigation, make litigation mysterious and secretive, and will undo progress toward bringing bankruptcy litigation into the mainstream of federal civil practice. The package is an overkill reaction to the perceived problem of variation in local rules. The uniform numbering system should eliminate much confusion regarding local rules. He acknowledges that motion practice in bankruptcy differs from motion practice in district courts, but that bankruptcy practitioners rarely appear in district court, and district court practitioners rarely appear in bankruptcy court. "I also agree with the premise that a bankruptcy case does not involve litigation as that term is generally viewed in the legal community. If, however, the purpose of these amendments is to make proceedings in the bankruptcy courts and the district courts more similar, or to simply reduce the number of local rules, I cannot see that the myriad of new and often confusing terminology used in the amendments will improve this situation." Most bankruptcy practitioners understand the concept of a "contested matter" (even though they may in fact be uncontested), and he does not favor eliminating that term.

27. Thomas J. Yerbich, Esq. (Anchorage, Alaska) (049 addendum):

Litigation package is unnecessarily complex and confusing, and will increase costs to both the parties and the judicial system (it would increase the volume of paper filed, the number of judicial hearings in some districts, and the number of documents to be

prepared). Suggests all uncontested matters be treated the same, and all contested matters should be treated the same (under the Rules, required procedural safeguards for contested motions differ based on the nature of relief requested -- a motion to obtain postpetition financing differs from a motion to dismiss a case, which differs from an objection to a claim). Appears to object to having 9013 and 9014 proceedings differ ("What difference does it make if a matter is seldom or frequently contested?... It is more logical to streamline the system for all uncontested matters)." Questions whether national uniformity and reduction in local rules is necessary or desirable. Local rules governing motion practice differs markedly, which can make it difficult for non-local attorneys, but each district faces distinctly different conditions, and local rules address these differences. Local procedures (scheduling hearings only after a response) work well and would have to be changed if the Rules 9013 and 9014 are amended. "Rules of practice and procedure having national application should provide a broad uniform framework within which the federal judiciary functions, ...[but] must be sufficiently flexible to permit each district to adopt rules tailored to the particular circumstances and peculiarities of each district. [The proposals] constitute an ill-advised micro-management of judicial procedure, effectively placing each of the districts in a procedural strait-jacket." See below for his specific comments on Rule 9014.

26. Hon. Polly S. Higdon (on behalf of Oregon Bankr. Judges) (050):

The changes are a "very bad idea" with no sufficiently identified or justified purpose. The use of local rules to facilitate the court's business should be encouraged, rather than prohibited.

27. Lane County Bar Assoc. Bankr. Subcomm (Eugene, Ore.) (50):

Recent increases in volume of bankruptcy cases and the ability of bankruptcy courts to efficiently process this increasing caseload suggests the current flexibility of the Rules has allowed courts to promulgate local rules that maximize their own efficiency. Without a compelling analysis of the potential benefits of standardization, the benefits achieved with flexibility should not be discarded.

28. Kenton D. Kinnaird, Esq. (Colorado Springs, Colorado) (051):

(a) The proposed amendments will increase costs for low income individuals. He charges a low flat fee to handle consumer cases and will no longer be able to do so. This will make it harder for low income debtors to find lawyers and to go into bankruptcy for needed financial relief. They will be forced to go to paralegals who will not be able to handle the added complexities. This also will benefit creditors.

(b) We should maintain the status quo until we find out what Congress and the President are going to do about changing the Bankruptcy Code.

(c) The time frames between motions and responses are too short, which decreases settlement time and increases the likelihood of a hearing, which also increases costs.

(d) The rule changes will eliminate the flexibility allowed under Code section 102 ("after notice and a hearing" rule of construction).

29. Hon. Robert D. Martin (Bankr., D. Wis.) (055):

Suggests abandoning the Litigation Package as a sincere but misguided effort to provide greater uniformity in the practice of bankruptcy law (which he assumes will primarily benefit national practitioners). The amendments will introduce unnecessary rigidity, counterintuitive definitions, and a ridiculous level of precision and complexity. The costs will be intolerably high. Bankruptcy practice will be the sole province of specialists because words which have meanings in other procedural contexts would have different meanings in other procedural contexts. Although variations exist in bankruptcy practice from one district to another, and the system is less than ideal, the cure cannot possibly lie in greater complexity and rigidity introduced in a system already criticized for being excessively technical and expensive to administer.

30. Mark Bonacquisti (Plantation, Florida) (057):

Opposes the Litigation Package. Although the current system has its faults, they are usually fixed at the local level and usually with great simplicity. The Litigation Package is completely at odds with the spirit and purpose of the Federal Rules of Civil Procedure.

31. Federal Bar Assn. Bankruptcy Law Section (059):

The proposals to amend Rules 9013 and 9014 will burden small cases (such as by eliminating the court's ability to rely on affidavits under Rule 43(e) in Rule 9014 proceedings) and will discourage non-specialists from practicing bankruptcy law (new terminology). Issues involving larger chapter 11 cases and failure to publish local rules can be dealt with in other ways (establish national standards for motion practice, such as taking oral testimony on any genuine issues of fact, require publication of local rules and certification that they comply with national standards).

32. Bankruptcy Judges of N.D. Illinois (10 Judges) (060):

The proposals would create national uniformity at the expense of burdening hundreds of thousands of routine matters affecting only local lawyers who now practice comfortably under established local procedures. The proposals to amend Rules 9013 and 9014 will burden small cases (such as by eliminating the court's ability to rely on affidavits under Rule 43(e) in Rule 9014 proceedings, requiring affidavits and valuation reports, etc.). Time periods in Rule 9014 are too long (20 days notice of motion) for routine motions.

The amendments will discourage non-specialists from practicing bankruptcy law (new terminology). Issues involving larger chapter 11 cases and failure to publish local rules can be dealt with in other ways (establish national standards for motion practice, such as taking oral testimony on any genuine issues of fact, require publication of local rules and certification that they comply with national standards).

33. Bankruptcy Judges of C.D. Cal. (21 Judges) (062):

Opposes proposed amendments. They will create unnecessary confusion, extra work at all levels of the court, and more detriment than benefit. By local rule, out of state lawyers must engage local counsel in order to appear. Local rules are available on web site. Suggests publication of local rules on A.O. web site as a condition to punishing a lawyer for noncompliance. That is a better solution to the national practitioner's problem than requiring all courts to fit a cookie cutter mold even though courts face different problems. Specific comments are below under Rules 9013 and 9014.

34. Hon. Leif M. Clark (Bankr., W.D. Tex) (064):

Favors uniformity and agrees that the current rules need more specificity, but disagrees with the mechanisms that have been proposed. Other techniques should be considered. There will be many unintended consequences of the proposed procedures.

35. Hon. Mark B. McFeeley (Bankr., D. N.M.) (067):

Opposes the Litigation Package as unworkable and costly. For example, Rule 9014's requirements to file and serve on the listed parties supporting affidavits, and to file proposed orders is onerous and wasteful. Local rules developed over time consistent with the national rules is the better way to proceed.

36. Hon. Jerry A. Brown (Bankr. E.D. La.) (068):

Opposes the Litigation Package as a step backwards. Agrees with the *Norton Bankruptcy Law Advisor* editorial (see Judge Lunden's comments above - #020). They are confusing and unnecessary.

37. Hon. Donald MacDonald IV and Hon. Herbert A. Ross (Bankr., D. Alaska) (071):

Opposes amendments to Rules 9013 and 9014. The existing rules should not be amended. Concurs with the many judges throughout the Ninth Circuit that have criticized the proposed amendments and with the comments of Thomas J. Yerbich, Esq. (#049).

38. Hon. James S. Starzynski (Bankr. D. N.M.) (073):

The Committee has done a commendable job in proposing a series of changes that are almost all helpful and which will continue the process of steadily improving the practice of bankruptcy law and administering cases, but he is deeply concerned about the unhelpful changes that Rule 9014 would impose on the procedures now followed in that district. Opposes proposed amendments to Rules 9013 and 9014. See specific comments relating to Rule 9014.

39. Hon. Steven A. Felsenthal (on behalf of 3 Bankruptcy Judges from the N.D. Tex.) (076):

Rationale for Litigation Package is lack of national uniformity and insufficient guidance regarding procedures. Last year we engaged in time-consuming local rule renumbering process, which should alleviate frustration with locating local rules. The committee should defer considering substantial changes to the rules until the effect of the renumbering can be ascertained. The proposed use of new terms does not cure confusion resulting from present terminology used. Perhaps terminology should be motions in the bankruptcy case, motions in an adversary proceeding, and claims. See specific comments on Rules 9013 and 9014.

40. Hon. J. Vincent Aug (Bankr., S.D. Ohio) (078):

The present Rules 9013 and 9014 work well and the present system discourages wasteful motion practice. The new proposals do not simplify procedure and will only encourage more local rules hoping to fine tune the process. The committee has focused its efforts in the wrong place.

41. Hon. John D. Schwartz (Bankr., N.D. Ill.) (079):

Opposes the Litigation Package. Local procedures (some in effect for 50 years and carefully developed and improved) have worked very well (described in detail in the letter) and would be "turned on its head" by the Litigation Package. The proposals are complicated and would return bankruptcy practice to only experienced bankruptcy practitioners. They do not secure the "just, speedy, and inexpensive" determination of proceedings.

42. Bankruptcy Judges and Clerk of District of South Carolina (081):

While some standardization of motion practice may be desirable, each court must be able to develop local rules to manage and facilitate its work. This should be encouraged, rather than discouraged. Distant practitioners should not have problems because local rules are available on web sites and through national publishers.

43. Hon. Alan H. Shiff (on behalf of the Bankruptcy Judges of the District of Connecticut) (082):

Unanimously supports the proposed amendments to Rules 9013 and 9014.

44. Hon. Alexander L. Paskay (on behalf of the Bankruptcy Judges of the M.D. Fla.) (085):

Opposes Litigation Package. The problems sought to be addressed by the amendments is not present in that district. Flexibility for courts to meet local needs is important. Lawyers are not confused over terminology. Encloses local rules and explains local procedures that work well. See specific comments on Rule 9014.

45. Robert A. Goering, Esq. (Cincinnati, Ohio) (088):

Opposes the proposed amendments. The present system of having motions in one form is preferable to having different kinds of motions or notices or objections.

46. Hon. Warren W. Bentz (Bankr., W.D. Pa.) (089):

Commends the Committee for this major effort and offers several suggests for revisions. In several rules (Rules 2014, 6004, 90066007, 9014), it is assumed that a hearing date will be scheduled, but the rules do not give guidance as to how the movant gets a hearing date (does the movant telephone the clerk, will the court offer available dates, etc.?). A uniform procedure for obtaining a hearing date would be helpful to the practitioner. Other comments relating to specific rules are listed below.

47. Hon. Gerald D. Fines (Bankr., C.D. Ill.) (090):

The disadvantages outweigh the advantages of these proposals. The changes will increase administrative burdens on the clerks and judges.

48. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Wholeheartedly endorses the effort to rationalize the rules relating to litigation and practice outside of adversary proceedings and concurs with the direction that the Committee took. Supports in general the amendments to Rules 9013 and 9014 and the use of plain English. Submits several specific criticisms to assist the Committee to "clean up" some points (see below regarding comments on specific rules). As general comment, criticizes the hodgepodge of deadlines and method for counting days (lists the numerous time periods, from one day to 60 days, in the current rules, and different ways to count the days, and encloses portions of Judge Rhodes' article on this problem). Suggests fewer time periods in multiples of 7 (7-14-21-28, etc.) as is used in Michigan state courts. As a justification for the Litigation Package, national uniformity is stated, but he believes that should not be an important justification since most practice is local (the present balance between federal and local rules is appropriate).

49. Hon Terrence L. Michael (Bankr. N.D. Okla.) (094):

Litigation Package appears to be designed for large cases in large metropolitan areas and to facilitate national large firm practice, which are not the focus in Oklahoma. Many of the amendments will be cumbersome to the court and will not result in any improvement in the quality or service to attorneys or the public.

50. Bankruptcy Judges of S.D. Cal. (095):

The proposed amendments undo the efficient practice in place in the district. It is unclear what effects they will have on the electronic filing program. Specific comments on Rules 9013 and 9014 are summarized below.

51. Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks (096):

Opposes proposals which increase the burden on courts, increasing the number of hearings, and sacrificing local custom and practice for a small minority of practitioners.

52. Michael L. Molinaro, Esq. (Chicago, Ill.) (097):

The present system is straight forward and workable. Even if there is general dissatisfaction with motion practice (which does not apply to him), the Litigation Package will only exacerbate the problem by establishing a more confusing procedure. The amendments are overly complex and cumbersome and will make practice more difficult.

53. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

Strongly endorses the objective of promoting uniformity and believes the Litigation Package furthers that objective. But that objective may be undermined by attempting to establish notice and hearing procedures on the basis of concept of relief sought (which may be open to varying interpretation), rather than on the basis of specified relief. It may be inevitable that some period of uncertainty must be experienced before courts and practitioners implement the rules on a reasonably consistent basis. Specific comments relating to, and black-lined versions of, proposed Rules 2014, 9013 and 9014 are discussed below.

54. Gary J. Gaertner on behalf of the National Assoc. of Chapter 13 Trustees (102):

Opposes Litigation Package. Many courts have refined their local rules to establish outstanding mechanisms to streamline certain motion practices and reduce time and costs. These are especially important to Chapter 13 trustees because of the high volume of motions they file. Eliminating these local rules is not a laudable goal. Prefers that the Advisory Committee study existing local rules to include aspects of the best ones, or to

establish general guidelines governing motion practice to provide uniformity to important aspects of the practice such as form, content and service, yet permit courts to establish other procedures tailored to the character and number of motions filed in that district. The Litigation Package goes too far in limiting flexibility of the bankruptcy court to manage its cases in an efficient manner. Opposes the requirement that affidavits be filed for every motion (adds significant burdens to Chapter 13 trustees and is unnecessary in the absence of an objection). The amendments would produce less clarity (difficult to know what motions are governed by which rule). There are too many categories of motions. Asks what would happen if a party files a Rule 9014 motions when the relief is governed by Rule 9013 (Will it now be governed by Rule 9014?).

55. Hon. David A. Scholl (Bankr., E.D. Pa.) (103):

The goal of uniformity and providing a comprehensive procedural approach is worthwhile (the shortcomings of the national rules requires his court to engage in considerable energy to fill these gaps with local rules). But, the proposed amendments appear to address problems in a manner suitable only to large chapter 11 cases. They make procedures more complex rather than simpler for most cases. Would favor uniform simple procedures for providing clear notice of what is at issue and how the parties must proceed. He commends the proposed amendments as a "starting point," but they need significant revision before they are promulgated. Offers specific comments on Rules 9014, 2004, and 2014 (see comments below).

56. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

Agrees there is confusion over procedures to be used in motion practice and that the lack of national uniformity is a legitimate concern, but the draft is a "step in the wrong direction." The draft is needlessly complex, will be unfamiliar to lawyers accustomed to practice under the Federal Civil Rules and state court practice. Revise the draft to conform as much as possible to the Civil Rules. They should clearly provide that there are only two contexts for action by the court: adversary proceedings and contested matters. The proposed rules lack uniformity regarding the level of preparation needed for a hearing (use of the word "may" throughout the rules gives the court discretion on the type of hearing that will be held). Affidavits should always be required, particularly in consumer cases, and should be admissible to establish a *prima facie* right to relief. More specific comments are discussed below.

57. Hon. Linda B. Riegle on behalf of Ninth Circuit Conference of Chief Bankr. Judges (107):

Opposes Litigation Package. They "perform radical surgery when only an aspirin is required." They are unnecessary, create administrative burdens on the court, do not recognize the diverse caseloads carried by the districts, and will not result in the speedy, economical and efficient administration of justice. The concern of national practitioners

has been overemphasized. Their local rules are consistent in numbering and substance with the federal rules, and are available electronically.

58. Michael Wm. Zavis, Esq. (Chicago, Ill.) (108):

Opposes Litigation Package. The introduction indicates that motion practice and litigation are areas of significant dissatisfaction, but that has not been his experience. The present system is straight forward workable (particularly in N.D. Ill.). The amendments would introduce more confusing, complex, and cumbersome procedures. Disagrees with 20-day notice time in Rule 9014 (in his district, motions can be scheduled on a more prompt basis while still providing adequate notice). The 20-day provision will slow down the bankruptcy process.

59. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Although uniformity is a laudable goal, the Litigation Package fails to take into account the need for specific procedures to respond to local differences in the many districts due to caseload, number of unrepresented debtors, and other factors. The amendments address problems that do not exist in M.D. Fla. A copy of their local rules is enclosed with the comment letter and the Advisory Committee is urged to review them and to consider them, where appropriate, for adoption. Several proposed amendments (2014, 3006(a), 3007, 9014) would require that a hearing be scheduled on all motions/objections; the negative notice procedures under their local rules is preferable. Specific comments on several rules are offered (see below).

60. Ninth Circuit Bankruptcy Clerks' Liaison Committee (110):

Opposes Litigation Package as creating administrative burdens on courts without any commensurate benefits. The need for the amendments is unclear and, to the extent they are based on lack or ready access to local rules, the majority of Ninth Circuit bankruptcy courts post local rules on the Internet. If uniformity is the goal, they fail to account for the geographic, litigant, and practice diversity of the various bankruptcy courts to which local rules are a practical response. Offers specific comments on Rule 9014 (see below).

61. Hon. Christopher M. Klein (E.D. Cal.) (111):

While the Litigation Package contains a number of meritorious proposals and reflects a considerable amount of work and thought, many of the changes seem unnecessary, unwise, counterproductive, and inconsistent with the "just, speedy, and inexpensive determination of every case and proceeding" contemplated by Rule 1001. He worries that the proposed changes would toss the proverbial baby out with the bath water. Less intrusive alternatives should be considered. Regarding uniformity, he does not accept the proposition that local variations should or can be reined in to the degree proposed. Local

cultures vary. There are nonuniform local procedures that are troubling, but his experience reviewing all local rules in the Ninth Circuit as a member of the Judicial Council Committee persuaded him that most local variations worthy of condemnation arise from unwritten practices and from local rules that are inconsistent with the Code and national Rules. The remedy is to police existing rules and for aggrieved parties to appeal from such procedures (which is not being done which may be evidence that the rules are not fundamentally broken). Regarding Rule 9006(d) and the 5-day time applicable to motions under the current rules, he suggests changing that to 10 days for contested matters, rather than the proposed amendments to Rule 9014. See specific comments regarding Rule 9014.

62. Jerry W. Venters, Esq. (Jefferson City, Missouri) (112):

Opposes the Litigation Package (except supports most proposed changes that are not included in or affected by the proposed amendments to Rules 9013 or 9014). The amendments to Rules 9013 and 9014 are confusing and contain many procedural hurdles and traps. The desire for uniformity is laudable, but establishing a labyrinth of confusing rules is not the best solution. The vast majority of lawyers practice only in their home district and are not national practitioners.

63. Judith R. Starr on behalf of Div. of Enforcement, Securities and Exchange Comm. (114):

Supports the goal of national uniformity for handling contested matters, but the proposed amendments to Rules 9013 and 9014 do not accomplish this goal in a fair and efficient manner. The two-tier system whereby matters are categorically designated as either noncontroversial and subject to summary process under Rule 9013, or controversial and subject to Rule 9014, errs on the side of too little procedural protections for some matters and too much for other matters. Opposes lack of effective notice under Rule 9013, and burdensome requirement for evidentiary hearings for all disputed factual issues under Rule 9014. The 9013/9014 dichotomy is arbitrary. Applying Rule 9014 to motions to extend the time to object to an exemption and the issue of prejudice by the extension is raised, the court may have to hold two hearings, including an evidentiary hearing, on factual issues relating to prejudice. Opposes deleting Civil Rule 43(e). A more workable approach would be to establish one procedural framework (rather than two: 9013 and 9014) and to continue application of Rule 43(e).

64. Daniel A. Zazove, Esq. (Chicago, Ill.) (118):

Opposes the Litigation Package. There are 3 major flaws: (a) they create a huge ambiguity as to the types of matters to be brought under Rules 9013 and 9014; (b) the 20-day period in Rule 9014 is too long (waiting 20 days is unthinkable for most motions); and (c) some requirements (such as the need to file a written response before the initial hearing) are unrealistic.

65. Bankruptcy Subsection of the Colorado Bar Association (119):

Questions the need for uniformity (most courts require involvement of local counsel for *pro hac vice* representation). Proposed Rules 9013 and 9014 cannot be reconciled with the demands between practices in different districts (compare S.D. N.Y. with Colorado). Uniformity is important for substantive issues, but not procedural matters. Local courts are best suited to supervise the efficient disposition of motions and other matters with procedures tailored to their district's demographic, geographic, and financial needs. The best approach is for the national rules to set broad, basic parameters consistent with due process. After much study and review of various procedures around the country, the Colorado local rules were adopted under which hearings are the exception, rather than the rule.

66. Thomas M. Mathiowetz, Esq. (Englewood, Colorado) (120):

Opposes the Litigation Package. It will make motion practice more costly to parties, confusing, and less efficient for courts. Do not remove discretion of bankruptcy judges to supervise the handling of certain procedural matters in an efficient way. Due to many exceptions and complexity, the Litigation Package provides less, not more, guidance to practitioners. Suggests as an alternative proposal simpler motion practice similar to the model that works well now in Colorado.

67. William P. Wessler, Pres., Mississippi Bankruptcy Conference, Inc. (121):

The Board of the Mississippi Bankruptcy Conference, Inc., believes that the proposed amendments should be deferred at this point of time because it appears that there will be dramatic changes to the Bankruptcy Code within the next year. Making rule changes now will exacerbate the problem of broad legislative changes that will complicate bankruptcy cases. In addition, it seems inevitable that the Rules would have to once again be reviewed and revised in the near future to conform to legislative changes.

68. Phoenix and Tucson Chapters of the Federal Bar Association (122):

Commends the Committee for its efforts in proposing amendments with the important goal of nationalizing certain standards and streamlining bankruptcy procedures. Specific suggests are made with respect to certain rules (discussed below).

69. William R. Keleher, Board Chair, on behalf of Board of Directors of the Bankr. Law Section, State Bar of New Mexico (124):

They recognize that these changes are probably proposed to remedy specific problems which may have arisen in other jurisdictions, but such problems do not exist in New Mexico. Consequently, some of the changes will needlessly increase the time spent by

judges and clerks on routine matters and will drive up expenses for creditors and debtors. In the hope that such costs can be avoided, they offer several specific suggestions for changing Rules 9013 and 9014 in the next draft of the proposed rules. These suggestions are discussed below.

70. Hon. Arthur N. Votolato (D. R.I.) (125):

The proposed rules are a giant leap backward and do little to improve bankruptcy procedure for litigants or the courts. Most clerks' offices function very efficiently as is. The proposed amendments are the antithesis of the apparent goal of making bankruptcy practice more uniform and user friendly. They establish new filing, scheduling, noticing and hearing requirements, and create procedures that are burdensome, confusing, and time consuming. Specific comments are discussed below.

71. Donald C. Shine, John K. Kneafsey, Daniel P. Dawson, Esq. (Chicago, IL) (127):

Opposes the Litigation Package as a step in the wrong direction. They depart too much from the Federal Rules of Civil Procedure and the simplicity and commonality of the 1983 version of the Bankruptcy Rules. The proposed rules will needlessly complicate and delay processes which are now ably handled by judges. The most troublesome amendments deal with the form and service of motions.

72. Hon. Stephen S. Mitchell (Bankr., E.D. Va.) (129):

Supports national standardization to replace the patchwork of local rules that are often a trap for out-of-district litigants. Applauds the effort to distinguish among motions within adversary proceedings and contested matters, motions concerning relatively routine matters of estate administration, and motions that affect substantive rights, and to ensure a reasonable level of due process. See comments on Rule 9014 below.

73. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

The Litigation Package is confusing, unnecessarily time consuming, will place at tremendous administrative burden on the courts and litigants, and will eliminate many time-tested management techniques. They appear to accommodate a small group of national practitioners and are unnecessary due to the availability of local rules on the Internet.

74. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

Supports move to establish standard motions practice in the national rules,. which should diminish the need for local rules and promote more consistent national practices. But there is also a careful balance to be struck to avoid increasing unnecessarily the delays

and costs of proceedings. Overall, the specter of multiple hearings is one that most concerns us. In this regard, it would be useful to know if there is a court that is not following procedures similar to the proposed rules so their impact could be evaluated. If not, it might be useful to launch such a pilot. See comments on specific rules below.

75. Hon. Dana L. Rasure (D. Okla.) (133):

The Litigation Package would significantly increase the burden on judicial resources in the 2-judge district in Oklahoma and unnecessarily complicate practice for most practitioners. Agrees with the concerns expressed by Chief Judge Charles E. Matheson on behalf of the Bankruptcy Judges for the District of Colorado (see Comment Letter #.024).

76. Hon. E. Stephen Derby and Hon. Duncan W. Keir (Bankr., D. Md.) (146):

Rules 9013 and 9014 should be withdrawn and abandoned or substantially revised because they will have a negative impact on the court. Detailed comments are discussed below.

77. Gary B. Rudolph and Radmila A. Fulton on behalf of San Diego Local Rules Subcomm. (137):

Opposes changes. Will create an inordinate amount of unnecessary court time and undue expense. Will tie up court time with unnecessary ministerial matters. Their local rules are working well and do not require any changes.

78. Margaret A. Burks, Chapter 13 Trustee (Cincinnati, Ohio) (138):

Opposes the proposed amendments as cumbersome and confusing. Agrees with editorial in *Norton Bankruptcy Law Advisor* (see #020).

79. Michelle M. Stephenson, Esq. (on behalf of 9 law firms practicing as chapter 13 trustees in E.D. Mich) (139):

Opposes amendments as confusing and burdensome. Will increase costs. Disputes the premise that uniformity is necessary. This will benefit a minority of national practitioners but will result in detriment to most individual districts. Prefers their local rules (which they enclose with the comment letter).

80. Hardin W. Hawes, Clerk (Bankr., C.D. Ill.) (141):

Opposes the proposed amendments. They will result in the court losing control of its calendar and will add complexity to the procedures in C.D. Ill. The proposals attempt to

fix things that are not broken.

81. Hon. William V. Altenberger (Bankr., C.D. Ill.) (142):

Disagrees with the desirability of uniform national rules on these matters (what works in one court might not work in another). They will add complexity to the procedures used in his district now, and the raise the issue of who controls the docket (the judge or the parties). The time periods in the proposed amendments are not realistic (not enough time to prepare for many matters).

82. Steven B. Towbin, Esq. (Chicago, Ill.) (143):

Opposes the amendments. Agrees with the comments of 15 bankruptcy lawyers from Chicago (see #117).

83. Brenda Porter Helms, Esq. (Wheaton, Ill.) (152):

Opposes Litigation Package as unnecessary, overly burdensome, and costly. She adopts the views of the Chicago lawyers expressed in their letter (see Comment #117).

84. Terry John Malik, Esq. (Chicago, Ill.) (153):

Supports the Litigation Package. He is a national practitioner (senior partner of the bankruptcy department of a national firm). There is a desperate need for uniformity of procedure regardless of geographic location of the court. The proposals will assure that less time of the court and lawyers is wasted on frivolous motions, motions not founded on any substantive provision of the Code, and procedural short cuts to the disadvantage of those that abide by the rules. The proposals "make sense" and he urges adoption.

85. Philomena S. Ashdown, Esq. (Cincinnati, Ohio) (154):

Opposes the Litigation Package. The present motions practice is simple and comprehensible, even to a pro se litigant. The proposed rules will introduce multiple levels of new pleadings and unnecessary hearings amounting to a waste of judicial time and increased expense to parties.

86. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

Urges the Committee to defer further action on the Rules until it is possible to gauge whether a bankruptcy bill will pass in 1999. Proposed legislation is likely to impact on the Rules and it makes little sense to revise Rules now if they are likely to be superseded by statutory changes. For example, proposed amendments to Rule 1007 will make it

easier (without notice) to obtain an extension of time to file schedules, whereas proposed Code amendments would require automatic dismissal of the case after a certain period of time if schedules are not filed. These are diametrically opposed to each other in approach to this issue. Numerous other examples can be found. Also, the Litigation Package does not achieve the laudable goal of clarifying the treatment of the myriad of motions and disputed issues that may arise in a bankruptcy case.

The package leaves unresolved issues with respect to applications, and imposes an excessively bureaucratic and burdensome process for Rule 9014 matters. A more appropriate solution would be to provide a single method by which all matters are filed, a time for oppositions and disputes to be registered is set, and then the means for dealing with disputed issues of fact and law. They do not appear to favor the 9013/9014 dichotomy (one cannot divide up in advance the matters that will be controversial, and those that will not).

87. Hon. Larry Lessen (Bankr. C.D. Ill.) (156):

The Litigation Package is an unnecessary attempt to micro-manage a judge's docket. The trend to national uniformity is misguided; better to have flexibility. Rules 9013 and 9014 are confusing and incomprehensible. Nothing needs to be fixed; courts are current and cases are being processed and closed in an expedited manner.

88. Janet L. Chubb, Esq. (Nevada) (161):

Opposes Litigation Package. See specific comments on Rule 9014 below.

89. Hon. Diane Weiss Sigmund (Bankr. E.D. Pa.) (162):

Opposes the Litigation Package. The proposed rules would create a plethora of new labels and would make bankruptcy motion practice different than motion practice in district courts.

90. Hon. Paul B. Snyder (Bankr. W.D. Wash.) (163):

Eliminate use of the terms "application," "administrative motion," "contested matter," and "objection," and call a request for an order a "motion" (unless it is a complaint or a petition). Place all notice requirements in one rule (Rule 2002). Opposes any rule that purports to control when a judge will take live testimony. Remove the impediment to the judge's use of affidavits and declarations (Rule 9014(j).

91. Hon Bruce Fox (Bankr. E.D. Pa.) (164):

Opposes Rules 9013 and 9014 as far too complex. The time and expense of complying

would outweigh any benefit. It would make it more difficult for non-bankruptcy lawyers to appear.

92. Hon. Jim D. Pappas (Bankr. D. Idaho) (165):

The Litigation Package is "a solution in search of a problem." They are unnecessary, complicated and unwise. We have experienced little difficulty in operating under the present rules. The most profound impact will not be in the large cases, but in the small consumer cases where complicated rules translate into increased legal costs.

93. Mark E. Leipold, Esq. (Chicago) (166):

Opposes the Litigation Package as unnecessary and as benefiting only national practitioners to the detriment of well-established, efficient and fair rules currently employed in Chicago. Adopts the views expressed in the letter submitted by other Chicago attorneys (see comment letter #117).

94. Paul T. Gefreh, Esq. (Colorado Springs, Colorado) (167):

Opposes the changes to Rules 9013 and 9014. They eliminate the benefits and efficiencies of the local rules in his district. The consumer exceptions are a meaningless attempt to save costs for consumers, because these costs will be passed on to consumers by business owners. It is the consumer who will pay the increased costs of the new procedures. The changes to "notice pleading" in the Civil Rules would be eliminated by these onerous changes for the sake of uniformity.

95. Brad A. Berish, Esq. (Chicago) (168):

Adopts the views expressed in the letter submitted by other Chicago attorneys opposing the proposed amendments (see comment letter #117).

96. Earl C. Buckles, Esq. (Memphis, Tenn.) (169):

Opposes the Litigation Package. Enclosed an editorial from the *Bankruptcy News* published by the Memphis Bar Association in opposition to the Litigation Package.

97. Hon. David T. Stosberg (Bankr. W.D. Ky.) (170):

Opposes the Litigation Package. It is a waste of time and a useless exercise because uniform national rules will not displace local cultures and customs. "The changes might humor a few national practitioners, but it will not alleviate their supposed problem." In the age of computers and websites, national practitioners can quickly access information about local rules.

98. Hon. Tina L. Brozman (Bankr. S.D.N.Y.) (171) (read into record at public hearing):

> The Litigation Package is a "thoughtful, and practical, set of proposed rules which should go a long way toward unifying practice in the bankruptcy courts."

99. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankr. Court (066):

> Disputes the premise that there should be national uniformity in procedures governing the resolution of requests for court orders and litigated disputes outside of adversary proceedings. The problem is one of unpublished local rules, not local rules dealing with local variation. One advantage of local variation is to encourage experimentation and initiative.

100. National Association of Independent Insurers (172):

> Supports the proposed changes.

Rule 1006

1. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

   No mechanism is in place in Rule 1006(b)(3) to alert the trustee that a balance for fees due to the Court remains outstanding.

2. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

   A bankruptcy petition preparer should not receive preferential treatment over attorneys regarding pre-petition monies. This court has found it very effective to require that all filing fees be paid prior to the payment of any attorney or bankruptcy petition preparer whether those monies are paid pre-petition or post-petition.

3. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

   Instead of providing for a "request" to pay the filing fee in installments, the rule should provide for a "motion" which may be granted with or without notice and a hearing.

4. Executive Office for United States Attorneys (115):

   Regarding the requirement in Rule 1006(b)(3) that the filing fee must be paid before a debtor or chapter 13 trustee may pay an attorney, petition preparer, or other person who renders services in connection with the case, chapter 12 trustees (who disburse money in much the same way as a chapter 13 trustee) should be included.

5. Phoenix and Tucson Chapters of the Federal Bar Association (122):

   The proposed amendment favors petition preparers by excluding them from Rule 1006(b)(1). They suggest adding reference to bankruptcy petition preparers or any other person to the last sentence of Rule 1006(b)(1).

6. Hon. Arthur N. Votolato (D. R.I.) (125):

   Opposes the proposed amendment because all professionals should be treated the same: either allow prepetition payment for attorneys and petition preparers, or disallow as to both.

7. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

   Opposes allowing a debtor to pay a fee to a petition preparer and not to an attorney pre-petition. Treat all professionals alike -- either allow payment to both attorneys and petition preparers, or prohibit it for both.

8. Peter H. Arkison, Esq. (Bellingham, WA) (132):

> The change does not address what happens when a clerk accepts the petition on an installment fee basis where the debtor paid an attorney or petition preparer. As a trustee, I have reviewed numerous cases where this has happened and there is no effective and efficient way to reverse the filing.

Rule 1007

1. Richard Craig Friedman, Office of U.S. Trustee (001):

   Opposes the change that would permit an extension of time to file schedules without notice to either the US trustee or the case trustee, because debtors often request an extension beyond the date of the 341 meeting. The UST routinely objects to such extensions because a 341 meeting without schedules is not meaningful and have to be continued. The proposal should at least state that no extension shall be granted to a date that is after the date fixed for the 341 meeting except on motion for cause shown and on notice to the UST and any interim trustee serving in the case.

2. Commercial Law League of America (065):

   Opposes granting an extension of time to file schedules and statements without notice; notice and opportunity for objection should be provided to creditors.

3. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

   Instead of providing for a "request" for an extension of time to file schedules, the rule should provide for a "motion" which may be granted with or without notice and a hearing. Also, the rule does not provide for a limitation on the time for extension and does not allow an opportunity for parties who may be prejudiced by an extension to be heard. This may cause problems in chapter 7 and chapter 13 cases where section 341 meetings are scheduled in anticipation of schedules and statements being available for examination.

4. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

   The requirement to show "cause" to extend the time to file schedules has been omitted without comment. This requirement is helpful in minimizing the number of occasions in which extensions are requested. Suggests that "cause" be kept in the rule.

5. Executive Office for United States Attorneys (115):

   Objects to extending the time for filing schedules where there has been no notice or hearing. This is especially problematic in chapter 13 cases, where creditors (such as the IRS) cannot prepare proofs of claim without schedules (valuation of assets necessary to determine the amount of a secured claim). Also, extending the time without notice and hearing hampers the trustee's ability to file a motion to dismiss for substantial abuse under Code section 707(b) or a creditor's ability to file a non-dischargeability complaint.

6. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

Objects to the elimination of the notice requirement and the "for cause shown" provision regarding a request to extend the time to file schedules. The UST should be given notice and an opportunity to oppose the request. This change also could impact on the UST's responsibility to convene and preside at meetings under section 341. The existing rule is preferred but, if changed, they recommend that Rule 1007(c) be further amended to require that any extension request recite the date of the section 341 meeting and whether the date has been noticed before filing the extension request. If the 341 meeting has been noticed, no extension shall be granted beyond the date 5 business days before the scheduled 341 meeting date without notice and a hearing.

Rule 1014

1. Hon. Michael J. Kaplan (Bankr., W.D.N.Y.) (026):

Does not comment on the proposed amendments to the rule, but suggests that Rule 1014(b) (as it now reads and as amended) cannot be reconciled with 28 U.S.C. 1334(e) (which gives the district court in which a case is pending exclusive jurisdiction over all property of the estate and the debtor). The rule provides that if a case is filed in one court by a debtor, and a case is filed in another district by an "affiliate", the court in which the first case was filed determines which court shall preside over both cases. If the Committee believes the rule and statute could be reconciled, he suggests that Rule 1014(b) be amended to make it clear that if a bona fide dispute exists over whether the other debtor is an "affiliate", then the rule not apply and the question of whether the two cases should be in the same district shall be left to 28 U.S.C. 1412. He enclosed two decisions he rendered relating to this issue.

2.. Peter H. Arkison, Esq. (Bellingham, WA) (132):

The rule and 28 USC section 1408 do not adequately address the issue of where a debtor should file a petition (proper venue) if the debtor lived outside the U.S. for the greater part of the last 180 days.

Rule 1017

1. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

   The amendment to Rule 1017(f)(2) will either be ignored by the court or strictly enforced to the detriment of parties and increased court administrative overhead.

2. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

   Pleadings seeking dismissal of a case should require notice and opportunity for a hearing by interested parties so as to avoid persons utilizing the courts as revolving doors, filing and dismissing cases without any creditor participation.

3. Executive Office for United States Attorneys (115):

   Rule 1017(e) should be changed to permit the U.S. trustee to file a section 707(b) dismissal motion within 60 days after the section 341 meeting is "concluded", rather than 60 days after the first date set for the meeting. Information provided at the meeting may be needed to make the motion. Regarding (e)(2), they are concerned that the provision is too limited in terms of recipients of service when the court acts on its own motion. Creditors should get notice so that they can provide information about conduct or acts that might support dismissal. Regarding Rule 1017(f), which provides that Rule 9014 does not apply to dismissal or conversion on the court's own motion, it is not specified which rule governs (by implication, it is Rule 9013, but it is not specified). Also, Rule 1017(f)(3) is silent as to which rule governs conversions from chapters 12 or 13 to chapter 7.

4. Peter H. Arkison, Esq. (Bellingham, WA) (132):

   There are conflicting interests that arise when a debtor is subject of a Section 707(b) motion. The UST is seeking to have the case converted to chapter 13, but the case trustee wants to liquidate the assets for creditors . The Rule needs to be adjusted to accommodate the proposed actions of the case trustee.

5. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

   Opposes a limited time period for filing a substantial abuse motion. If the debtor can obtain extra time to file schedules easily, why should a trustee be forced to seek an extension of the deadline for a section 707(b) motion "for cause?" Also, time periods should run from date meeting was actually held (and concluded). There is no provision requiring service on other parties. Why not have this action proceed under Rule 9014?

Rule 2001

1. Bankr. Law Committee, Commercial Law Section of the Delaware State Bar Assn. (063):

   Motion to appoint a trustee in an involuntary case should be required to be in writing, unless the court grants leave for it to be made orally (they propose specific language for Rule 2001(a)).

2. Commercial Law League of America (065):

   Opposes the amendment which does not require notice to creditors of an alleged chapter 7 involuntary debtor than an interim trustee is being appointed. Creditors should be afforded notice and opportunity to assist in the selection of an interim trustee. The notice requirements of Rule 9014(c) would not be sufficient for this purpose.

3. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

   In the final sentence of Rule 2001(a), clarify that an entity that joins under Code section 303(c) is also included.

4. Peter H. Arkison, Esq. (Bellingham, WA) (132):

   Rule 2001(a) needs a provision that allows the court sua sponte to initiate the proceedings for the appointment of an interim trustee.

5. Hon. Robert E. Grant (Bankr. N.D. Ind.) (144):

   Rule 2001(a) should not be restricted to involuntary petitions under chapter 7. While rare, the rule should continue to recognize that involuntary relief may be sought under chapter 11 and that, as with cases under chapter 7, the appointment of a trustee prior to an order for relief may be appropriate.

Rule 2004

1. Hon. Leif M. Clark (Bankr., W.D. Tex) (064):

   Recommends permitting parties to notice Rule 2004 examinations (similar to Rule 30 deposition notice) without the need to obtain an order. It would save court time and permit parties to move for a protective order.

2. Commercial Law League of America (065):

   Supports the proposed amendments and believes it will make interdistrict law practice more efficient.

3. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

   "While proposed changes should be welcome in most districts, our local rules still provide a better procedure."

4. Hon. Warren W. Bentz (Bankr., W.D. Pa.) (089):

   Rule 2004 discovery should proceed without a court order. It should be left to the objecting party to obtain a protective order. Delete Rule 9013(a)(10) which makes this an application for a court order.

5. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

   Opposes changing "motion" to "application."

6. Hon. David A. Scholl (Bankr., E.D. Pa.) (103):

   A brief prior notice to a party subject to a Rule 2004 examination should be required (suggests 3-day notice as under the local rules in his district).

7. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

   Supports the proposed amendments to Rule 2004(c) allowing attorneys to issue subpoenas for an examination in the district where the case is pending or where the examination will be conducted.

Rule 2014

1. Richard Craig Friedman, Office of U.S. Trustee (001):

   Proposed change is worse than the present rule. There is no basis for 10-day notice on retention applications, or for serving the 20 largest creditors (it adds to costs and delay, especially in chapter 7 cases, with no discernable benefit). Interim employment orders are not desirable. Professionals who are later not found to be disinterested or who are disqualified will have an order they can use to obtain fees for services they should not have been authorized to perform. "Any professional whose application might be subject to dispute will routinely seek an interim order and then litigate their entitlement to fees." At least provide that any professional whose application is denied shall not be entitled to any fees based on having obtained an interim order.

2. Richard Levin, Esq. (Los Angeles, Cal.) (012):

   Suggests that the word "authorizing" be changed to "approving" in Rule 2014(a) because Code sections 327, 1103, and 1114 permit a court to approve, but not to authorize, employment of a professional person.

3. Hon. Stephen C. St. John and Hon. David H. Adams (Bankr. E.D.Va.) (039):

   (1) The rule appears to require docketing of a hearing on every retention application whether or not an objection is filed. This is burdensome on the clerk; the court should be permitted to schedule a hearing in the event of an objection to employment is filed.

   (2) Rule 2014(f) should be clarified to permit a partner, member or associate of a firm to act provided such counsel is admitted as a member of the bar of a given court. "In our district we have previously experienced concerns because an out-of-state firm will position an attorney admitted in our jurisdiction but have non-admitted counsel sign all pleadings to evade our rule requirement of a local counsel. The ambiguity of this subsection should be clarified to insure our long-standing local rule requirements may not be evaded under the auspices of this proposed Rule."

4. Bankruptcy Judges of C.D. Cal. (21 Judges) (062):

   Rule 2014(c) and (d) require 10 days notice and that court can resolve it without a hearing if no response at least 2 days before the hearing. Objections are rare and requiring scheduling for hearing in all cases will cause already congested calendars to balloon. By the hearing, judges will rarely know whether a response has been filed (it takes time for docketing and routing to the judge) so that many unnecessary hearings will be held. Prefers treating these under Rule 9013 as applications. Also, the proposed amendments delete the list of parties who are considered professionals (the current rule has the list);

suggests the list be restored to reduce confusion as to whom the rule applies.

5. Hon. Leif M. Clark (Bankr., W.D. Tex.) (064):

Agrees Rule 2014 proceedings should be by motion practice, but opposes pre-setting hearing dates (for same reasons stated with respect to Rule 9014), especially with only a 10-day notice provision. It would be simpler to allow relief on the pleadings and afford parties an opportunity to object after the fact. That is how it works in W.D. Tex. With a minimum of bureaucracy.

6. Commercial Law League of America (065):

These are rarely contested and should be Rule 9013 applications. An order approving employment should be deemed effective as of the filing of the application as is provided in the local rules in E.D. Mich. (enclosed with the comment letter). The rule would encourage requests for interim employment orders. Also, the service list should include the trustee, any committee, the 20 largest creditors, and any other entity the court may direct. The notice also should be provided to the debtor. The time to file objections is insufficient (prefers 15 days notice before the hearing date and objections 2 days before the hearing). The "all connections" requirement for disclosure is too broad and vague; additional guidance is needed.

7. Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) (070):

Requirement that notice be served on a committee or the 20 largest unsecured creditors should be limited to chapter 11 cases. Opposes requirement that all applications be set for hearing and then taken off calendar if no objection is filed (inefficient).

8. Bankruptcy Judges and Clerk of District of South Carolina (081):

Opposes a rule that requires a hearing and delays the court's consideration of these applications. Opposes requirement that a hearing be set for all motions to approve employment (causes more work). Two days before the hearing date is too short a time to accommodate the routing of any objection and preparation for a hearing.

9. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

In Rule 2014(a), provide that "trustee" includes debtor in possession in chapter 13 case (as well as in a chapter 11 case). Chapter 13 debtors file motions to employ attorneys in negligent actions or appraisers and brokers. To require the trustee to do it would impose an administrative burden on the trustee. The new language in Rule 2014(d) is helpful, but a slight discrepancy is noted. It only requires that a request for a hearing be filed at least 2 days before the hearing, while a local rule in the district requires filing and service of

objections at least 5 days before the hearing.

10. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Change Rule 2014(a) to substitute the word "approving" for "authorizing" (to conform to Code section 327(a)).

11. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

Supports the proposed requirement for a motion on notice with an opportunity for a hearing to obtain a Rule 2014 order. The entry of retention orders without notice has occasionally precluded parties from a meaningful opportunity to raise good faith issues. Agrees with interim employment provision, but does not agree that shorter time periods should apply when interim employment is authorized. The same time periods should apply to the final hearing, regardless of interim employment. The rule should clearly state that a professional employed on an interim basis under the Rule, but whose employment is not approved at the final hearing, has the right to request compensation for the period employed. Also clarify that employment may be approved retroactive to the date the professional commenced work (some courts do that now, but some do not). Opposes requirement that the professional disclose any interest "adverse" to the estate (requires determination as to what that means), and prefers that the movant state to the best of its knowledge that the professional is "disinterested." Supports the goal of supplemental disclosure, but the proposed rule is vague and does not address concerns of courts and the U.S. trustee. They propose that a professional firm be required to update its original disclosures once every 120 days, and any individual who has actual knowledge of a matter that should be disclosed would be required to do so promptly (they prefer "prompt" rather than the 15-day rule). A black-lined draft showing specific revisions recommended is enclosed with their letter.

12. Hon. David A. Scholl (Bankr., E.D. Pa.) (103):

The appointment of a professional person should not be governed by Rule 9014. Hearings can be scheduled in these few instances where necessary or warranted.

13. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

Rule 2014(b)(3) requires clarification as to what constitutes a "connection." Are firms required to search every creditor without regard to materiality, determine whether any spouse of a member of a law firm works for a creditor (or their accountant or attorney) without regard to whether the creditor's claim is material, or determine whether any attorney holds an equity interest in any creditor without regard to whether the claim is material?

14. Hon. Christopher M. Klein (E.D. Cal.) (111):

In Rule 2014(b)(1), the statement that the person is eligible to be employed under the Code is a legal conclusion, not a fact. In Rule 2014(e), clarify the effect of an interim employment order that purports to specify compensation terms on the limitation in section 328(a) restricting the court's power to change compensation terms. One possibility is to provide that an interim order may not fix a basis of compensation for purposes of section 328(a).

15. Executive Office for United States Attorneys (115):

Revise Rule 2014(a)(1) to require disclosure of *any* personal or professional services for which employment is sought. Revise the 14-day period for interim employment orders under Rule 2014(e) so that the court may change the time in which it must hold the final hearing. They also suggest that there be clarification of the rate at which paralegals, associates, and other staff can be billed.

16. Gregory S. Clore, Esq. (San Francisco, CA) (116):

It is unclear whether Rule 2014 is governed by Rule 9014. Also clarify that a motion under Rule 2014 must be filed (in addition to being served and transmitted). Questions whether the provisions on interim employment orders are appropriate because they create a more costly and cumbersome two-step process for the employment of professionals. Under the amendments, more first-day motions and orders will be required; the current application process with nunc pro tunc employment orders is more efficient than the interim order process under proposed Rule 2014.

17. Phoenix and Tucson Chapters of the Federal Bar Association (122):

Agrees with goals of decreasing the burden on the debtor when attempting to employ counsel and improving efficiencies relating to employment of professionals. But the proposed rule complicates the process by contemplating that a hearing must always be set. They suggest specific language that contemplates setting a hearing only if there is an objection, and a proposed interim order to accompany the motion. Also, change the time period from 14 to 15 days to add consistency to time frames throughout the rules.

18. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

Delete as redundant the disclosure requirement in proposed Rule 2014(b)(4). Code section 329 only applies to debtor's attorneys and Rule 2016(b) already requires debtors' attorneys to file these disclosures regardless of whether they seek employment in the case. If this is kept in, clarify that it is in addition to, and not in lieu of , the Rule 2016(b) disclosure. Also 2014(b)(4) should be revised to add "for the debtor" after "attorney."

Regarding Rule 2014(e), they question dual procedures for regular employment orders and interim employment orders (5 v. 10 days notice, etc.). The obvious incentive is to ask for interim relief all the time. Suggests eliminating after the first sentence of 2014(e) so that there is only one procedure; or establish a 5-day notice on all 2014 motions and eliminate the interim order provision altogether. Also raises the question of whether interim employment is entitled to compensation if not finally employed. Supports as an "excellent move" Rule 2014(g) (supplemental statements), but suggests clarification that it applies whether the professional has been retained or if the motion for retention is still pending. Any supplemental statement should disclose why the information was not previously disclosed (suggests specific language to achieve this - see page 4 of letter).

19. Peter H. Arkison, Esq. (Bellingham, WA) (132):

These changes will create an administrative nightmare for the routine chapter 7 case, which often has a realtor appointed to sell real estate, an attorney to do legal work related to the sale, and accountant to prepare the tax returns. The employment of these people should be by application under new Rule 9013. It also will create numerous problems in chapter 11 cases where the "first day orders" need substantial legal work and the emergency hearings are held on shortened notice concerning use of cash collateral, etc. Since the Ninth Circuit dimly views *nunc pro tunc* orders, there is the potential for substantial work being done without compensation. Although interim orders try to address this problem, a better solution would be to authorize the employment with the creditors and other parties having the right to object to the employment. Finally, there appears to apter 11 case). Chapter 13 debtors file motions to employ attorneys in negligent actions or appraisers and brokers. To require the trustee to do it would impose an administrative burden on the trustee. The new language in Rule 2014(d) is helpful, but a slight discrepancy is noted. It only requires that a request for a hearing be filed at least 2 days before the hearing, while a local rule in the district requires filing and service of objections at least 5 days before the hearing.

20. Gary B. Rudolph and Radmila A. Fulton on behalf of San Diego Local Rules Subcomm. (137):

These matters should be dealt with as ex parte motions (9013) rather than as motions under Rule 9014. There are timing problems in that the 10-day notice of hearing and 2-day objection deadline do not allow for adequate court preparation. Also opposes the need to set hearing dates for all motions in advance.

21. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

What does the phrase "unless the case is a chapter 9 case" in Rule 2014(c) except from the coverage of the Rule? Does it mean that the motion need not be served on the U.S.

Trustee, or that 10 days hearing need not be provided, or that no such motion may be filed? The antecedent of this "unless" clause is ambiguous.

22. Hon. Paul B. Snyder (Bankr. W.D. Wash.) (163):

Opposes the amendments because they will add unnecessary burdens of administrative cost and time. The local procedures work well.

23. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankr. Court (066):

Employment of professionals are rarely contested. Better to treat as an application under Rule 9013. The proposed rule would encourage interim orders.

Rule 2016

1. Richard Craig Friedman, Office of U.S. Trustee (001):

   We are missing an opportunity to incorporate by reference the US Trustee's Guidelines on Fee Applications (under 28 USC 586). At a minimum, since amendments to Rule 2016 come after the promulgation of the guidelines, the rule should state that nothing in the rule shall be read to excuse compliance with the guidelines.

2. Leon S. Forman, Esq. (Philadelphia) (011):

   Opposes subdivision (g) in that, if no response to a fee request is filed, the court may deny or grant it for a reduced amount without a hearing. If this happens, the burden is thrust on counsel to request reconsideration. Due process and fundamental fairness would require the court to give counsel an opportunity to be heard on the court's proposed ruling before it is made final by a formal order. Sometimes an aspect of the fee application can be easily explained at a hearing. This may be especially important for the record if an appeal is taken. Also, the reference to section 102(1) in Rule 2016(g) is unclear; does it mean that the court must hold a hearing to give an opportunity to be heard before making an order in the above situation? Perhaps language could be added providing that an order disallowing the fee request or reducing the amount shall not be made without an opportunity to be heard.

3. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

   Changes are positive, but time period for responses differs from applicable time period in local rule (which would have to be changed).

4. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

   The meaning of Rule 2016(a)(2) is unclear and should be reworded. What practice is it intended to cover?

5. Hon Terrence L. Michael (Bankr. N.D. Okla.) (094):

   The amendments assume that courts are or should hold hearings on the appointment of counsel in every case. That will serve no purpose and will add congestion to the court's docket.

6. Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks (096):

   Rule 2016 strips the court of the authority to make a determination whether a motion or application needs a hearing. Less efficient and more cumbersome.

7. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

Supports treating Rule 2016 requests for compensation a motion governed by Rule 9014. They note that Rule 2016(a)(1)(C) refers only to attorneys and accountants, while the remainder of the rule addresses all professionals. Recommends clarification that all professionals be included in this rule.

8. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Supports the amendment to Rule 2016(a)(2) providing for equal treatment of fee applications filed by counsel for debtors, trustees, and creditors.

9. Hon. Christopher M. Klein (E.D. Cal.) (111):

This rule assumes counsel will work only on the basis of time and expenses. Counsel are increasingly agreeing to work for fixed fees, contingent fees, or hybrids as permitted under section 328(a). One advantage is that counsel paid on such a basis is not required to keep hourly records or sometimes even records of expenses. In such circumstances, it would not seem necessary to require the motion to account for time and expenses as would be required by Rule 2016(a)(1). The rule should be revised to accommodate the possibility of alternative bases of compensation.

10. Gregory S. Clore, Esq. (San Francisco, CA) (116):

Rule 2016 should provide that a motion under that rule must be *filed* (in addition to being served).

11. Hon. Arthur N. Votolato (D. R.I.) (125):

Opposes advanced scheduling of hearings for all motions (Rule 2016 motions will be governed by Rule 9014 which requires pre-scheduling of hearings for all motions).

12. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

The motion for compensation should include a reference to the UST guidelines for fee applications.

13. Peter H. Arkison, Esq. (Bellingham, WA) (132):

There should be a reasonable relationship between the amount of fees requested and the extent of the motion required. The proposed rule could require more time to prepare a fee application to pay an accountant $500 for preparing a tax return than the value of the

work performed. Similarly, an auctioneer or realtor is often paid on a commission basis and they should not be required to detail the time that they have spent in selling the property.

14. Hon. Phillip H. Brandt (Bankr., W.D. Wash.) (140):

Clarify whether the entire motion and supporting papers must be served on all creditors entitled to notice under Rule 2002(a)(7), or just the notice of motion (note that Rule 2016(a) provides that 9014 is applicable, which refers to 9014(c)). It should not require that and the rule should be clarified to provide that entitlement to notice does not equal entitlement to service of the entire motion.

Rule 3001

1. Commercial Law League of America (065):

   Opposes shortening notice time for disputes regarding transferred claims (from 30 days to 20 days) by reason of application of Rule 9014. The current provision for 30 days should be maintained in conjunction with any amendments to Rule 9014.

2. Patrick M. Costello, Esq. (Palo Alto, CA) (123):

   Rule 3001(e)(5) will make an objection to the transfer of a claim asserted by a transferor a proceeding governed by Rule 9014. Rule 9014 requires notice to be served on many parties. This is inappropriate for Rule 3001(e)(5) objections because these are supposed to be 2-party disputes. The debtor, trustee, and others listed in Rule 9014(c) do not have standing to be heard on the validity of the transfer and giving them notice may appear to be giving them standing. Also, by making this a 9014 dispute, it adds at least 20 days to the process (in addition to the initial 20-day notice under Rule 3001), so that it is at least 40 days before an initial hearing may be held. Finally, since the objection is treated as a motion, it suggests that the alleged transferor has the burden of proof (the transferee should have such burden). Recommends that the motion only be served on the alleged transferor, treat the notice of evidence of the transfer given to the alleged transferor as the motion (this resolves the burden of proof and delay problems). Also, it should be clarified that a motion to determine the proper person to vote is one against both the transferor and transferee so that they both should be treated as entities entitled to service under Rule 9014(c).

Rule 3006

1. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

   Something is wrong with the syntax of this rule. The second sentence of subdivision (a) contradicts the first.

2. Executive Office for United States Attorneys (115):

   Clarify or reconsider the provision in Rule 3006(a) stating that a creditor cannot withdraw a claim after an objection is filed, the creditor voted on the plan, or otherwise has participating significantly in the case. It would seem always beneficial for invalid or questionable claims to be withdrawn.

Rule 3007

1. Hon. Stephen C. St. John and Hon. David H. Adams (Bankr. E.D.Va.) (039):

   In their district, after extensive work by the bench and bar and public comment, they adopted a local rule for chapter 13 cases that combines the confirmation hearing with hearings on claim objections and on valuation of property. A copy of the local rule is enclosed with their letter. This permits the fair and efficient adjudication of these issues at one time thereby preventing a multiplicity of postconfirmation hearings on claims and valuation that could require postconfirmation plan modification or dismissal. Incorporating Rule 9014 requirements will prevent their new procedures by its 2-hearing requirement. Also, the Rule 9014 requirement for supporting affidavits in the context of claim objection is very burdensome and does not contribute to the resolution of the objection. These same comments are made regarding Rule 3012 below.

2. Commercial Law League of America (065):

   Supports 30 day period for both Rule 3001(e) motions and Rule 3007 objections.

3. Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) (070):

   Suggests the 30-day notice period be deleted and that claims objections be subject to the same 20-day notice period required under Rule 9014. Also objects to setting all claims objections for a hearing as an initial matter. That will clutter up court calendars and require additional staff (most are granted by default).

4. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

   Revise the rule to require the same notice period (20 days) as other notices to promote consistency among rules.

5. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

   The rule should specify the procedure for transforming an objection to claim into an adversary proceeding when Rule 7001 relief is requested. If (as stated in the Committee Note) a complaint must be filed and served, the mechanism should be specified in the rule. What if the Rule 7001 relief issue crops up in subsequent pleadings rather than in the initial objection?

6. Thomas M. Mathiowetz, Esq. (Englewood, Colorado) (120):

   Suggests that the 20-day provision for motions under Rule 9014 (applicable to motions relating to transfers of claims under Rule 3001(e)) should apply to Rule 3007 objections

to claims. Change the 30-day period in Rule 3007 to 20 days.

7. Patrick M. Costello, Esq. (Palo Alto, CA) (123):

Treating a claim objection as a Rule 9014 proceeding raises two problems. First, service must conform to Rule 7004, which has no provision for service on the entity and address in the proof of claim. The current practice of serving to the address in the proof of claim should be kept. Specify in Rule 3007 that, notwithstanding Rule 7004 as incorporated into Rule 9014, service on the entity and at the address in the proof of claim constitutes effective service. Also specify that treatment of the claim objection as a motion under Rule 9014 does not alter or shift the burden of going forward with the evidence or the burden of proof.

8. Hon. Robert E. Grant (Bankr., N.D. Ind.) (144):

Rule 3007(b) should be more explicit (along the lines of the language in the committee note) that filing an adversary proceeding is required if one wants to both object to a creditor's proof of claim and obtain affirmative relief. As it is currently worded, the rule seems to suggest that an adversary proceeding may not actually be required but that an objection to claim which seeks additional relief is somehow treated as though it were one.

9. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

The area of objections to claims should be one of the first places to start in overhauling bankruptcy litigation. The current rule is inadequate on how and when claims objections should be filed, and courts invent procedures anew with each case. Creditors can be subjected to multiple objections with no time limits, or omnibus objections to all claims (leaving to creditors the need to determine how to respond). There may be no requirement that the debtor provide any factual basis for its objection. This is particularly troublesome in light of statutory proposals to impose the debtor's attorneys fees on creditors whose claims are reduced.

Rule 3012

1. Hon. Stephen C. St. John and Hon. David H. Adams (Bankr. E.D.Va.) (039):

   In their district, after extensive work by the bench and bar and public comment, they adopted a local rule for chapter 13 cases that combines the confirmation hearing with hearings on claim objections and on valuation of property. A copy of the local rule is enclosed with their letter. This permits the fair and efficient adjudication of these issues at one time thereby preventing a multiplicity of postconfirmation hearings on claims and valuation that could require postconfirmation plan modification or dismissal. Incorporating Rule 9014 requirements will prevent their new procedures by its 2-hearing requirement. Also, the Rule 9014 requirement for supporting affidavits in the context of valuation disputes is burdensome and does not contribute to the resolution of the dispute. These same comments are made regarding Rule 3012 below.

2. Peter H. Arkison, Esq. (Bellingham, WA) (132):

   Code sections 502 and 506 does not specify whether the valuation of property must take place before or after the sale of the property or how it is to be determined. What about costs of the sale, who determines whether the sale is commercially reasonable. The only time this would come into play is if there would be a distribution to unsecured creditors, something that is often not known when the secured creditor initiates its efforts to foreclose.

3. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

   How does this relate to Rule 7001 which provides that the extent, priority, and validity of a lien must be determined in an adversary proceeding? The valuation of a lien is the primary step in determining the "extent" of the lien. These two provisions appear to be contradictory.

Rule 3013

1. Richard Levin, Esq. (Los Angeles) (012):

   Suggests that Rule 3013 track statutory language of Code sections 1122, 1123(a), 1222(b), and 1322(b) more closely by stating that "the court may determine whether the classification of claims and interests proposed under ... is proper for purposes of the plan and its acceptance." The Code does not give the court authority to determine classes, but permits the court to determine if a proposed classification is proper.

2. Bankr. Law Committee, Commercial Law Section of the Delaware State Bar Assn. (063):

   Motions to determine classes is governed by Rule 9014. Add to the end of Rule 3013: "unless it is filed in conjunction with an objection to plan confirmation, in which case the motion will be treated as an objection to confirmation pursuant to Rule 3015(f) or Rule 3020(b)." This will avoid procedural inconsistency when an objection to confirmation is joined with a motion to determine classes.

3. Commercial Law League of America (065):

   Opposes amendments that permits a determination of classes without the necessity of a hearing. Classification is too important to be resolved without a hearing, and the burdens imposed under Rule 9014 (which applies to these motions) are too stringent for determining classification issues.

Rule 3015

1. Richard Levin, Esq. (Los Angeles) (012):

> Rule 2002 requires 25 days notice of the confirmation hearing and the objections deadline, which suggests that the court could set the date so that an objection could be filed on the date of the hearing. Proposed Rule 3015(f) reinforces this timing problem and does not seem to require advance notice required for this proceeding under proposed Rule 9014. "Is that really what is intended?" [Reporter: Rule 3015(f) is excluded from Rule 9014 under Rule 9014(a)]

2. Hon. Stephen C. St. John and Hon. David H. Adams (Bankr. E.D.Va.) (039):

> (a) Rule 3015(f) is unclear as to whether a time limit for filing objections to confirmation may be established. They have a local rule establishing a time limit and need to maintain this procedure to permit the successful operation of their chapter 13 confirmation process, which combines the confirmation hearing with hearings on claims objections and valuation disputes. (See their comments regarding Rules 3007 and 3012 above).
>
> (b) Rule 3015 contemplates a confirmation hearing in every chapter 13 case, but they have a local rule under which confirmation hearings are held only if an objection is filed. If no objection is filed, a confirmation order is entered without a hearing. This procedure has been upheld on appeal and greatly facilitates our confirmation process while still providing due process. The adoption of Rule 3015 likely would require them to schedule and conduct an estimated 7,000 hearings each year which are not needed under their local rule. Holding confirmation hearings when there is no objection is burdensome.

3. Commercial Law League of America (065):

> Recommends revising Rule 3015(f) further to harmonize it with corresponding provision in Rule 3020(b)(1) (objections to confirmation of a chapter 11 plan). As in Rule 3020(b)(1), Rule 3015(f) should provide that objections to confirmation should be filed within the time fixed by the court *and* before a plan is confirmed.

4.Bankruptcy Judges and Clerk of District of South Carolina (081):

> It is best to establish a deadline to object to confirmation before the hearing to give the trustee and parties an opportunity to resolve it before the hearing. Also, it is essential that valuation and lien avoidance motions be handled as a part of the plan confirmation process. For that reason, chapter 13 cases should be exempted from Rule 9014's effect on valuation and lien avoidance motions.

5. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

Rule 3015(f) says an objection must be filed before confirmation, but does not say how long before. Suggests that an objection be due 5 days before the final confirmation hearing. Rule 3015(g) will require that a hearing be scheduled for all plan modifications. Since there are myriad modified plans filed in chapter 13 cases, this would be exceptionally time consuming and burdensome.

6. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

An objection to confirmation should be governed by Rule 9014 rather than treated as a "nonsubstantive" and "noncontroversial" matter.

7. Executive Office for United States Attorneys (115):

Objections to confirmation should be served on all creditors or at least those who would be affected by the objections, and on the U.S. trustee. This provision (Rule 3015(f)) does not address the problem of judges confirming plans prior to the government's 180-day deadline to file a proof of claim, and then refusing to reopen the case.

8. Hon. Robert E. Grant (Bankr., N.D. Ind.) (144):

Revise the rule so that an objection to confirmation must be filed by some date certain (rather than before the plan is confirmed). This will solve the problem of objections filed after the confirmation hearing but before the confirmation order is entered, and the problem of objections filed while the parties are disposing of objections filed before the scheduled confirmation hearing. Where post-confirmation modifications are concerned, the motion should also identify the proponent, the reason for the proposed modification and all entities affected thereby.

9. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

Suggests there should be some sort of time limit for filing a confirmation objection.

Rule 3019

1. Commercial Law League of America (065):

   A hearing should be required, rather than just a motion, to provide creditors with an opportunity to assert allegations as to how claims and interests are in fact adversely affected by a proposed plan modification.

2. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankr. Court (066):

   Opposes the proposed change. At present, Rule 3019 permits a modification to an accepted plan to be deemed accepted if, upon limited notice, the court finds that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any security holder who has not accepted the modification in writing. Often that notice requirement can be satisfied by the presence of the affected parties at the confirmation hearing. Amended Rule 3019 would require the filing of a Rule 9014 motion to obtain the same finding. The time delay and expense in filing a motion is unnecessary for most modifications, which are usually the result of negotiations with creditors.

Rule 3020

1. Commercial Law League of America (065):

   Notice should be provided to the listed parties, but also to any creditor or party in interest requesting such notice.

2. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

   An objection to confirmation should be governed by Rule 9014 rather than treated as a "nonsubstantive" and "noncontroversial" matter.

3. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

   The revision would make contested confirmations procedurally sui generis by eliminating them from Rule 9014. This raises a host of issues regarding one of the most important proceedings in a case. For example, must the court make findings of fact and conclusions of law? More guidance is needed.

Rule 4001

1. Bankr. Judges, D. Colorado (letter by Chief Judge Matheson) (024):

   Opposes the proposed amendments to Rule 9014 (see discussion where Rule 9014 comments are listed). If the proposed amendments to Rule 9014 do not go forward, then the proposed amendments to Rule 4001 also should not be adopted. "If the Committee favorably considers the noticing approach under Colorado's Local Rule 202, it may also wish to consider the procedure utilized in Colorado for stay relief motions under Local Rule 401 (a copy of which is enclosed with the judges' letter).

2. Hon. Leif M. Clark (Bankr., W.D. Tex) (064):

   Recommends using procedures used in W.D. Tex. for relief from stay motions. Hearings are set in all cases (final hearings, not preliminary). Virtually all are resolved at the hearing.

3. Commercial Law League of America (065):

   Concerned that parties will not be able to comply with stringent requirements of Rule 9014 early in the case. These issues (stays, postpetition financing, use of cash collateral) often arise in emergency basis within hours after commencement of the case. Suggests affidavits not be required for these emergency motions for interim relief (amend Rule 9014(d) and (f) accordingly. As a technical matter, suggests clarifying Rule 4001(d)(1)(E) to clarify that the party consenting to a senior or equal lien is the party who has the senior lien (this concept is in the current version of Rule 4001(d)(1)(E) but has been deleted.

4. Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks (096):

   Rule 4001 is confusing and contradictory in its terms. It allows the court to determine that a matter may be decided without a hearing, but in order to file the motion a moving party must comply with Rule 9014 and file a notice of hearing with the motion, thus eliminating the opportunity for the court to make the determination. Also, it adds procedural requirements that slows down the process of justice in a bankruptcy proceeding.

5. Hon. Arthur N. Votolato (Bankr. D. R.I.) (125):

   Rule 4001(d) is confusing and puts the court and litigants in a "catch-22" situation. Paragraph (d)(1) provides that "except as provided in Rule 4001(d)(3), Rule 9014 governs a motion for approval of an agreement..." Rule 4001(d)(3) states that the court may direct that the procedures prescribed in Rule 4001(d)(1) and (2) do not apply, and

that an agreement of the kind listed in (d)(1) may be approved without further notice, if the court determines that a motion made under Rule 4001(a), (b), or (c) was sufficient to afford reasonable notice of the material provisions of the agreement and an opportunity to be heard. Simply stated, how will the court determine that Rule 9014 does not apply if the court does not see the papers until after the hearing is scheduled? The movant, in the meantime, must obtain a hearing date and file appropriate affidavits before knowing whether the provisions of Rule 9014 apply.

6. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

The proposed language creates a catch-22. How does one determine that Rule 9014 does not apply if you have to have filed all the 9014 documents including the notice of hearing before the court can make the determination?

Rule 6004

1. Commercial Law League of America (065):

   Proposed Rule 6004(b) has replaced "shall" with "may" for filing and service of objections. The rule refers to a "timely objection." If there is no mandate for when an objection is to be served and filed, how can an objection be timely or not timely? Suggests restoring the current "shall."

2. Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) (070):

   The amendment to Rule 6004(b) states that a hearing date shall be included in the objection (if not included in the notice of sale). Since more than one party may object, this procedure creates the possibility of several hearings being scheduled. Recommends that if one or more objections are received, the party proposing the action must schedule and notice the hearing.

3. Hon. Warren W. Bentz (Bankr., W.D. Pa.) (089):

   Delete Rule 6004(a) and (b) and treat all sales the same as sales free and clear of liens (except leave Rule 6004(d) in place for sales under $2,500). All sales should require a court order with a hearing open to higher offers. Also, all holders of liens which the movant proposes to divest should be named as respondents and that the lien be reasonably identified.

4. Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks (096):

   Rule 6004 and 6007 are difficult to understand. It requires the court or clerk to determine the type of motion filed to determine what hearing and scheduling procedures need to be followed. The deadlines for objections differ within the rule depending on the type of motion filed (5 days or 15 days). Tracking these deadlines with the most sophisticated automation system would be an administrative headache of major proportions.

5. Executive Office for United States Attorneys (115):

   Rule 6004(b) treats the notice as the equivalent of a motion, but notices can be skeletal and will not contain the type and extent of information that the debtor must present to meet its burden under section 363. Creditors will be forced to file objections to obtain full disclosure. Also, they prefer the use of "shall" rather than "may' regarding the filing and service of an objection to a proposed use or sale of property at least 5 days before the date for the proposed action.

6. Thomas M. Mathiowetz, Esq. (Englewood, Colorado) (120):

Rule 6004 is inconsistent in its requirements for the setting of a hearing date for any objections to a proposed use, sale, or lease of property. This will lead to confusion and does not provide sufficient guidance to consumer bankruptcy lawyers.

7. Phoenix and Tucson Chapters of the Federal Bar Association (122):

Offers specific stylistic changes to Rule 6004(d) to conform to similar language in other rules relating to service (referring to service of notice, rather than mailing of notice).

8. Hon. Arthur N. Votolato (Bankr. D. R.I.) (125):

Rules 6004 and 6007 are extremely cumbersome and will create a scheduling nightmare. Each type of matter has a different procedure in terms of when and whether it is noticed for hearing, how it is treated, and whether only part or all of Rule 9014 applies. Objection deadlines differ even in the same rule. (5 days v. 15 days to object to proposed sales in Rule 6004(b) and (d)). Rules 6004 and 6007 lack consistency in the treatment of notices (in Rule 6004, the notice is treated as a motion if an objection is filed; in Rule 6007 it is the objection that is treated as the motion).

9. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

This rule would be very laborious and require extremely complicated scheduling. Each type of matter has a different procedure. The clerk would have to monitor all such pleadings to track which ones have hearing notices included since some may appear in the motion and others in the objection. Similar to comments of Judge Votolato (see above - comment #125).

Rule 6007

1. Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks (096):

   Rule 6004 and 6007 are difficult to understand. See comment regarding Rule 6004 above.

2. Thomas M. Mathiowetz, Esq. (Englewood, Colorado) (120):

   Under Rule 6007, if a party objects to a proposed abandonment or disposition of property, the objection is treated as a Rule 9014 motion (the objecting party is the movant). Compare Rule 6004 in which the objecting party is not the moving party. "This is probably the most confusing part of the proposed changes." The objecting or responding party should never be considered the moving party. There is also inconsistency and lack of guidance regarding notice of the hearing date (compare Rule 6004 and 6007).

3. Phoenix and Tucson Chapters of the Federal Bar Association (122):

   Offers specific stylistic changes to Rule 6007(a) to conform to similar language in other rules relating to service (referring to service of notice, rather than mailing of notice).

4. Hon. Arthur N. Votolato (Bankr. D. R.I.) (125):

   Rules 6004 and 6007 are extremely cumbersome and will create a scheduling nightmare. Each type of matter has a different procedure in terms of when and whether it is noticed for hearing, how it is treated, and whether only part or all of Rule 9014 applies. Objection deadlines differ. Rules 6004 and 6007 lack consistency in the treatment of notices (in Rule 6004, the notice is treated as a motion if an objection is filed; in Rule 6007 it is the objection that is treated as the motion).

5. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

   This rule would be very laborious and require extremely complicated scheduling. See comments regarding Rule 6004.

Rule 9006

1. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

   Opposes using so many different time periods in the rules, and suggests all time periods in multiples of 7 days (see summary of his comments above relating to all rules). As a stylistic matter, the word "five" should not be spelled out in letters; in all other rules it is written as "5".

2. Executive Office for United States Attorneys (115):

   The time for filing motions in adversary proceedings or administrative proceedings should be the same as provided for in the Federal Rules of Civil Procedure for purposes of uniformity.

Rule 9013

1. Hon. Kathleen P. March (Bankr. C.D. Cal.) (008):

   Suggests deleting Rule 9013(a)(5) because a motion for a chapter 11 trustee or examiner is usually opposed and, therefore, should be governed by Rule 9014. [Reporter: Judge March reads Rule 9013(a)(5) to apply to a request for an order directing the appointment of a trustee/examiner, rather than to only the approval of an appointment under section 1104(d)].

2. Richard Levin, Esq. (Los Angeles, Cal.) (012):

   Some judges require that, when an application is filed for an order limiting notice in a chapter 11 case to those who request special notice, the application must be served on all creditors and equity interest holders. "Is [Rule 9013(a)(7)] intended to limit that practice or to endorse it? Some clarification would be useful as to that issue as well as generally to applications for orders regulating notice in a case."

3. Peter C. Fessenden, Esq. (Brunswick, Maine) (016):

   Has one "minor suggestion" on Rule 9013. The phrase "proof of service" in Rule 9013(b)(2) "overstates its purpose" because "proof" is a conclusion to be made by the court. The phrase "evidence of service" or "certificate of service" should be used. "To the extent that the rules may wish to have a certificate of service be verified or made under the pains or penalties of perjury, amen; it is still only evidence of service." He makes the same comment regarding Rule 9014(b)(2).

4. Hon. Frank W. Koger (Bankr. W.D. Missouri) (017):

   "I realize the need for uniformity and it would seem to me that Rule 9013 ... has substantial merit and I really don't have any serious problems with it," although it will require a change in the procedures used in his district.

5. Hon. David S. Kennedy (Bankr. W.D. Tenn.) (021):

   Suggests that Rule 9013(a)(5) refer to Rule 2007.1(b) instead of Rule 2007.1.

6. Bankr. Judges, D. Colorado (letter by Chief Judge Matheson) (024):

   Regarding the applicability of Rule 9013, it suffers from the same "definitional complexity" as proposed Rule 9014. Rule 9014 should apply to all matters in which the Code or Rules require an order "after notice and a hearing." Rule 9013 should apply to any motion that is not subject to the requirement that it be considered "after notice and a

hearing." Rule 9013 also suffers from the same service problems imposed by Rule 9014 (see discussion below regarding Rule 9014), both as to the motion and the order. "Why, for example, must a request to examine a third party under Rule 2004 be served on the debtor and his/her attorney?"

7. Hon. Vincent P. Zurzolo (Bankr.C.D. Cal.) (029):

Agrees with bifurcation of Rule 9013 and 9014 matters, and the name change to Rule 9013. But thinks Rule 9013 should include a provision clarifying that the application must be accompanied by admissible evidence in the form of a declaration or affidavit establishing the factual predicate for the relief sought, if facts must be proven in order to grant the relief requested.

8. Hon. James F. Queenan, Jr. (Bankr. D. Mass.) (042):

Suggests two changes to the published draft (shown on copy of the published draft of Rule 9013 with his handwritten markings enclosed with his letter): (a) Rule 9013(a)(3) should be changed to add a reference to Code § 1208(a) (regarding conversion of a case); and (b) Rule 9013(a)(5) should be changed to read "approval of the prior appointment of an examiner or trustee in a chapter 11 case ~~under § 1104~~ and in accordance with Rule 2007.1" . This change is designed to clarify that it applies to the approval of the appointed person, rather than the request for an order to appoint an examiner or trustee.

9. Hon. Polly S. Higdon (on behalf of Oregon Bankr. Judges) (050):

(a) Agrees with principle that ex parte matters be distinguished from contested matters under Rule 9014, but unnecessary confusion will result from changing these matters from "motions" to "applications" (while technically correct, it will alter years of previous practice and courts will continue to process motions described in Rule 9013 whatever the title on the document).

(b)The rule lacks an effective means for review or vacation of orders signed. Suggests a waiting period between service of the application and presentment to the court. The rule should spell out what the opposing party's remedy is (ie, state that BR 9024 shall apply, or provide an opportunity for the court to vacate the order or call for a hearing at its discretion thereby maintaining a less stringent standard for relief than may be available under BR 9024).

(c) Rule 9013(a)(2) should be clarified to limit its scope to joint administration and not to substantive consolidation.

(d) Rule 9013(a)(10), which extends ex parte treatment to Rule 2004 examinations, should be enlarged to include, as a prerequisite to the application, that the movant must

certify that he or she has conferred with the party to be examined, or allow local rules to so provide. The local rules in Oregon have such a prerequisite.

10. Lane County Bar Assoc. Bankr. Subcommittee (050):

Rule 9013 does not set out procedures for objecting for its resolution. One solution would be to specify that an objection to a Rule 9013 application would be considered a Rule 9014 motion. Objections to proofs of claim are similarly treated elsewhere in the proposed changes.

11. Carolyn B. Buffington, Esq., (Clerk, S.D. Ohio; Cincinnati) (054):

It is unclear how Rule 9013 will impact on Official Form 20A (Notice of Motion or Objection).

12. Los Angeles Chapter, Federal Bar Assn. (058):

Rule 9013(a)(5) (application for approval of trustee/examiner appointment) is an unnecessary change. Should be a contested matter because an evidentiary hearing is often required.

13. Bankruptcy Judges of C.D. Cal. (21 Judges) (062):

Opposes Rule 9013(a)(14) (treating protective orders as applications); gives insufficient weight to the public policy in making papers open to the public. Rule 9013(a)(5) should be clarified to make it clear that it applies only to naming the trustee or examiner, but does not apply to whether any trustee or examiner should be appointed at all. Rule 9013(c) should be revised to provide that after service and passage of the notice period, without opposition being raised, the applicant file with the court an affidavit of service and lack of opposition, and that a proposed order be presented with it.

14. Bankr. Law Committee, Commercial Law Section of the Delaware State Bar Assn. (063):

(a) Change (a)(5) to read: "approval of an elected trustee, an appointed trustee or an appointed examiner under Section 1104 and in accordance with Rule 2007.1" to clarify that it does not include a motion seeking an order for the appointment.

(b) Suggests adding three additional matters to Rule 9013(a): closing a case under Rule 3022; setting the time within which proofs of claim or interest must be filed under Rule 3003(c)(3); and "orders governed by and requested under local court rules, where local rules authorize the use of Rule 9013."

(c) Revise Rule 9013(b) so that the application must be in writing or orally at a status

conference or hearing at which all parties entitled to notice of the application are present "and consent. Absent the parties' consent, the court may grant leave to hear the oral application at such status conference or hearing, or on such further notice as ordered by the court."

(d) Revise Rule 9013(c) to list the parties to be served, including service on parties who have entered an appearance in the case or their counsel (proposes specific statutory language).

15. Hon. Leif M. Clark (Bankr., W.D. Tex) (064):

Requests for protective orders (Rule 9013(a)(14) should not be included in the list (sealing records should require notice and opportunity to be heard). Also, questions why applications are served on parties who have no opportunity to respond. If they object, what is their remedy?

16. Commercial Law League of America (065):

Opposes the proposed amendments to Rule 9013. The distinctions between applications and motions is unnecessary and confusing. Also, rejection of executory contracts and leases should be Rule 9013 proceedings because they are rarely contested and are granted routinely. The appointment of a trustee should be a Rule 9014 proceeding (usually contested). Service in the manner provided in Rule 9014(c) for applications is inefficient. The address for creditors in the schedules is usually the business address, not a registered agent for the creditor. If no committee is appointed, the applicant must research the agent for service of each of the 20 largest creditors. Service should be permitted on the addresses used in the schedules, or if the creditor has filed a notice of appearance and/or request for service, consistent with the notice or request. Amended Rule 9013 also should state the time period in which objections or request for hearing must be filed.

17. Hon. Steven A. Felsenthal (on behalf of 3 Bankruptcy Judges from the N.D. Tex.) (076):

Listing by rule motions that may be decided without a response should aid the practitioner, but he questions several of the items listed. He rarely enters joint administration orders or motions to appoint a trustee or an examiner without a hearing, and enters Rule 2004 examination orders without a hearing only if the deponent agrees to the examination. Local rules will vary these, but the uniform numbering system should make it easy to locate the applicable local rule.

18. Los Angeles Bankruptcy Forum (Janet A. Shapiro, President) (077):

Adopts the comments of Hon. Kathleen P. March (C.D. Cal.) (#008) (see above).

19. Bankruptcy Judges and Clerk of District of South Carolina (081):

Agrees with effort to identify matters considered ex parte, but nomenclature is confusing. Rule 9013 anticipates post-order objections. It seems that Rule 9024 as the sole remedy would be burdensome. Rule 9013 should permit the court to automatically vacate prior orders or schedule a hearing on the original application if it deems that the objection has merit. The rule should clarify that the court may set a hearing if it so desires. Opposes requirement for filing proposed orders as unnecessary and inefficient.

20. Henry C. Kevane, Esq. (San Francisco, CA) (083):

Opposes Rule 9013(a)(14) (permits ex parte protective orders). Recommends imposing a deadline for disposition by the court. Requiring service on "any other entity required by federal law or these rules" creates ambiguity (are service requirements under Rule 2002 incorporated in this rule?). Would it be appropriate to include in Rule 9013 a uniform practice for the assignment of related cases to the same judge.

21. Hon. William A. Clark (on behalf of eight Bankruptcy Judges in the S.D. Ohio) (084):

Opposes proposed amendments to Rules 9013 and 9014. They will have an adverse impact upon all participants in the bankruptcy community.

22. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

The proposed amendments are welcome.

23. Hon. Warren W. Bentz (Bankr. W.D. Pa.) (089):

Delete Rule 9013(a)(5) (construes it to apply to a motion for the appointment of a trustee which ousts the debtor's officers), and Rule 9013(a)(10) (Rule 2004 examinations should not require prior court orders). Add to (b) that the application must "(3) state that a response is not required, and the court may order relief without a hearing." Add to Rule 9013(e) that if a hearing is fixed, that no testimony will be taken, etc. (track the language of Rule 9014(i)(1)(A) so that it conforms to status conference/hearing procedures for Rule 9014 proceedings.

24. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

Concerned that the new Rule 9013 could be used to deliberately or inadvertently mask a matter of substance. Therefore, recommends that notice under Rule 9013(c) be expanded to include the 20 largest creditors if no committee of unsecured creditors has been appointed (as in Rule 9014(c)), as well as all creditors that filed notices of appearance

(unless the court orders otherwise). Also suggests that the rule be expanded to cover requests for orders limiting notice, or seeking approval of certification that relief may be granted without notice or hearing under Code section 102. Unless the court determines that *ex parte* relief is warranted, Rule 9013(d) should be revised to provide that relief cannot be granted without a hearing until at least 3 days have passed since service of the application. That would enable parties to object to the use of shortened procedures and to file a response. A black-lined draft of recommended changes to the published draft is enclosed.

25. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

Opposes changing these matters from motions to applications (while perhaps technically correct). Will cause confusion. Courts will either strictly enforce the rule and therefore dismiss matters that unwitting parties file under the wrong rule (Rule 9013 v. Rule 9014), or will simply process a document no matter what the title. Increases the need for court resources.

26. Dennis J. LeVine, Esq., on behalf of Tamp Bay Bankruptcy Bar Assoc. (104):

Opposes proposed Rule 9013. The current version works well in that district and should not be modified.

27. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

The concept of "applications" is another unnecessary bankruptcy procedural peculiarity that should be subsumed in traditional motion practice. The substance of the proposed rule makes sense in that it permits certain matters to be expedited and heard *ex parte*. Could this rule be expanded by local rule? Opposes Rule 9013(a)(13) because a better procedure for conditional approval of a disclosure statement is to provide advance negative notice so that a party can object to head off material delays from inadequate disclosure statements that are conditionally approved. Notice of contempt under Rule 9020(b) and 9013(a)(9), and a request to protect secret matters (Rule 9013(a)(14)), should only be upon full notice and actual hearing. Also, Rule 9013 should provide that the motion state with particularity the relief sought and the grounds for the relief, be accompanied by proof of service and a proposed order, state that a response is not required, and that the court may order the relief requested without a hearing or further notice [if no response is filed/whether or not a response is filed].

28. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Supports allowing applications on simple matters to be noticed to main parties and heard ex parte without the need for a hearing. Most of the identified matters covered by Rule 9013 are already handled ex parte in M.D. Fla.

29. Executive Office for United States Attorneys (115):

Suggests that the amendment in Rule 9013(c) be changed to provide that the movant serve applications on all parties, not just those listed.

30. Bankruptcy Subsection of the Colorado Bar Association (119):

Does not object to concept of Rule 9013 for non-substantive matters, but the rule is riddled with exceptions and is confusing and complicated. The "relating to" language could sweep in requests for relief which are more substantive without notice and a hearing. Rule 9013(c) should also require notice on any attorney employed by a trustee or committee; service on affected parties and their counsel of record should be required.

31. Thomas M. Mathiowetz, Esq. (Englewood, Colorado) (120):

It is confusing and difficult to determine when a request to enlarge time is a Rule 9013 application or a Rule 9014 motion.

32. Phoenix and Tucson Chapters of the Federal Bar Association (122):

To ensure that Rule 9013 is not construed to eliminate evidentiary or proof requirements under other rules or the Code, Rule 9013(b)(1) should be revised to insert "legal and evidentiary" before "grounds for relief." They generally support the concept of Rule 9013, but it should clearly state that the list in Rule 9013(a)(1)-(14) is an exclusive list. Also, clarify Rule 9013(a)(5) so that it will not be taken to include a request for the appointment of a trustee or examiner. They also suggest that Rules 4004(a) and 4007(c) be deleted from Rule 9013(a)(6) (these require the movant to show cause). They suggest specific stylistic changes (Rule 9013(c) should track Rule 9014(c)(1)(G). Finally, they suggest a new subparagraph (f) to clarify that the burden of proof remains with the applicant in the event of a challenge to the order (specific language is suggested).

33. William R. Keleher, Board Chair, on behalf of Board of Directors of the Bankr. Law Section, State Bar of New Mexico (124):

The proposed rule does not address how a party opposing the relief requested seeks to set aside the order entered without prior notice. It does not state whether the order remains in effect pending the motion to set it aside. In order to avoid that potentially unfair result (in view of the ex parte nature of the order), they suggest that the rule provide that enforcement of such orders be held in abeyance if a motion to set aside an order entered under Rule 9013 is filed within a specified time after entry of the order.

34. Hon. Arthur N. Votolato (Bankr. D. R.I.) (125):

Opposes inclusion in the matters governed by Rule 9013(a) requests to appoint a chapter 11 trustee ((a)(5)), and a notice under Rule 9020(b) ((a)(9)). Proposed Rule 9013(d) should be renamed to delete the phrase "No Response Required" in the title because there is never a response is never "required" (even under revised Rule 9014). Also, how is the court to know whether a response is filed and when to act on the application (will local rules still be permitted that require the court to allow 10 or 20 days for responses before granting the relief?).

35. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

Same comments as those of Judge Votolato (see comment letter #125 above).

36. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

Delete Rule 9013(a)(13) (conditional approval of disclosure statements), and amend Rule 3017.1 to include an abbreviated procedure affording parties in interest a limited opportunity to object while allowing the court to approve it without a hearing in the absence of an objection. Delete Rule 9013(a)(14) (secret, confidential, scandalous or defamatory matters) because these are often contested and at least conform Rule 9018 to strike the phrase "[o]n motion or on its own initiative, with or without notice," to eliminate procedural confusion.

37. Peter H. Arkison, Esq. (Bellingham, WA) (132):

The proposed change takes away the concept of the ex parte order because notice must be given to certain parties. This will create a substantial increase in the work that will go into the small case. It means that each case will have at least $5,000 in administrative costs. It will increase fees paid to chapter 7 consumer debtors' lawyers as they will not have to read more papers.

38. Hon. E. Stephen Derby and Hon. Duncan W. Keir (Bankr. D. Md.) (146):

Opposes the amendments and offers the following comments in particular:
9013(a)(1) - Inclusion of Section 1325(c) in this rule implies that an application will be required in each case for a wage order, which will create additional paper work in the clerk's office and for the Chapter 13 trustee in that district where the current practice is to enter a wage order for every confirmed chapter 13 plan (unless other payment arrangements are made).
9013(a)(5) - Cross reference to Rule 2007.1 does not work because 2007.1(a) refers to Rule 9014. Also, clarify and limit to approval of the appointment of an elected trustee since they do not approve trustees appointed by the U.S. Trustee.
9013(a)(8) - Since Rule 2002(i) requires notice to committees, this proposal appears to require only an application to limit service of notices. The effect is to exclude parties in

interest who are to be deprived of future notices from receiving notices that they are being so deprived. This can be unfair and offers the potential for confusion.
9013(a)(9) - Making 9020(b) (which is already subject to procedures in that rule) also subject to Rule 9013 is redundant surplusage and invites confusion and inconsistent requirements.
9013(a)(10) - Rule 9013(c) appears to exclude third parties who are sought to be examined under Rule 2004 from receiving copies of the application. To avoid unfairness and lack of notice to third parties, our present practice is to require mail service of motions for Rule 2004 examinations on the subject third parties.
9013(a)(12) - Rule 9013(c) seems to exclude from service third parties who might be adversely affected by reopening the case (ie, creditors to be added to schedules). This introduces unfairness. Also, Rule 9018 continues to require a motion. It is not being amended, so the proposal introduces inconsistency.
9013(c) - requiring service of an application on parties to a bankruptcy case to satisfy formal requirements of service of process for a summons is overkill.

39. Hon. Burton Perlman (Bankr. S.D. Ohio) (149):

Supports comments on Rules 9013 and 9014 by Hon. William A. Clark (comment letter #084). Present Rules 9013 and 9014 are simply and brilliantly conceived and work well.

40. Gary B. Rudolph and Radmila A. Fulton on behalf of San Diego Local Rules Subcomm. (137):

Rule 9013 fails to specify documentation required. It is unclear as to whether the list of matters covered is exclusive or can be expanded. They believe more items should fall within the ex parte procedure. They prefer the Local Rules in S.D. Cal. better.

41. Hon. Phillip H. Brandt (Bankr., W.D. Wash.) (140):

Something like the procedure in Rule 2014(c) and (d) should be required, together with a notice form tracking that proposed in Rule 9014(c)(3). The application should include a proposed order attached as an exhibit to preclude separate docketing (same for Rule 9014(b)(2)). Rule 9013(a)(4) should also include dismissals under sections 707(a) and 1112. Delete 9013(a)(5). Rule 9013(a)(7) should also include motions in chapter 7 cases. Proposed Rule 9013(e) should be revised to allow the court to require the movant or prevailing party to serve notice of entry of the order (or clerk's budget must go up).

42. Hon. Robert E. Grant (Bankr. N.D. Ind.) (144):

Issues relating to Rule 9020(b) contempt are far too significant to be dealt with under Rule 9013.

43. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

No instruction or deadlines are given for objections (gives scant evidence that objections will even be entertained). It is inappropriate to include matters that may be contested ((a)(5), (7), (8), and (9)). Service requirements are unclear (interplay between Rules 2002 and 9013). It would be better to require notice to be served on any party requesting notice of all actions in the case. Suggests a review of Rule 2002 as part of the Litigation Package.

44. Hon. Paul B. Snyder (Bankr. W.D. Wash.) (163):

Rule 9013 should be eliminated, along with the distinction between an application and a motion. Motions practice should be generalized and condensed into Rule 9014, with all notice requirements in Rule 2002. Opposes including Rule 9013(a)(5) and (10) in the scope of the rule. Rule 9013(e) requiring the clerk to serve the order is unnecessary and extravagant.

45. Hon Bruce Fox (Bankr. E.D. Pa.) (164):

Opposes the amendments. Exclude from its scope requests to dismiss or convert a case, to reopen a case, or to place a pleading under seal (these matters are frequently contested).

46. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankr. Court (066):

Include in Rule 9013(a) rejection of an executory contract or lease and approval of compromises and settlements (they are almost never contested). Rule 9013(c) requires service in accordance with Rule 7004 -- this would be unduly burdensome and inefficient. Use the business address in the schedules, rather than one of a registered agent. The movant would need to research the proper agent. Also, Rule 9013 should state the time period in which objections or requests for a hearing must be filed.

Rule 9014

1. Richard Craig Friedman, Office of U.S. Trustee (001):

   (a) The rule would require that the UST would have to serve a motion to dismiss or convert on all creditors. Currently, the clerk gives this notice under Rule 2002 (the amendments make it unclear as to who has to provide the notice). There is no basis for shifting this noticing burden from the clerk to the Executive Branch. Some work needs to be done to reconcile Rule 2002 with Rule 9014 on this issue.

   (b) Motions for the appointment of an examiner or chapter 11 trustee often cannot wait 20 days. The provision for interim relief does not cure the additional noticing requirements because it is neither economical nor efficient to have an interim examiner or trustee (and there is no statutory basis for an interim examiner or trustee).

   (c) Changing terminology to "administrative proceeding" from "contested matter" is hardly clarifying and will be confusing. There is no compelling reason to change it.

2. Jerry A. Weissburg, Esq. (003):

   (a) Represents employee benefit plans. Rule 9014 would be burdensome on employee benefit plans because while ""DIPs gamble with trust fund assets, simultaneously doing their employees out of collectively-bargained benefits", trust funds will be subject to discovery, status conferences and evidentiary hearings. The added steps in Rule 9014 will delay the granting of orders compelling payment of administrative expenses. It would increase expenses above attorney time devoted now to the process of preparing and filing motion papers, scrutinizing responses and appearing at the hearing.

   (b) Rule 9014(o) would not help to do away with discovery and potential live testimony (versus declarations only) since "cause" is not defined. He expects to see appellate decisions on what "cause" means in Rule 9014(o), other than economic hardship of discovery, status conferences, lengthy hearings due to live testimony, etc., to which all parties will be subjected to.

   (c) Service is also onerous as it requires service on committees and "the multitude requesting special notice in the process of resolving a two-party dispute." He now serves the US Trustee, counsel for a committee (not members), and, if the list is small, other creditors as well. He interprets the rule to require notice to all creditors and envisions spending a "fortune" in postage serving hundreds of creditors in large cases. He raises the issue (which would have to be litigated) of whether these extra attorney and postage expenses are part of mandatory ERISA remedies? He also states that these extra expenses must be incurred again when seeking contempt or conversion when the debtor does not comply with a court order to pay an administrative expense. "What perchance

are the drafters' sentiments as to other administrative trade creditors, and employees with administrative wage claims, who lack attorney fee provisions by contract or statute and who will be forced to endure the extra steps foisted upon them by the revised motion rule.?"

(d) If new burdens are not eliminated altogether, at least add exemptions and/or define "cause" in Rule 9014(o) for relief from the discovery, live testimony, service, and status conference procedures to include but not be limited to the debtor's administrative delinquency and/or insolvency."

3. Hon. Thomas F. Waldron (Bankr. S.D. Ohio) (004):

Objects to the title of Rule 9014 ("Administrative Proceeding"). It fails to convey the exclusively judicial proceedings (witnesses, evidence, etc.) which may involve millions of dollars. While not asserting that these are the "best choices available," he suggests calling Rule 9013 "Application Proceedings" and Rule 9014 "Motion Proceedings."

4. John S. Brubaker, Chief Deputy Clerk (Kentucky) (005):

Asks whether Rule 9014 should require the movant to serve the notice of hearing for any motion that is covered by Rule 2002(a). Otherwise, there may be 2 hearing notices required (one by the movant and one by the clerk). One possible solution would be to add "unless the court otherwise directs" to Rule 9014(c)(1) so that each court could designate by local rule or order who would serve the notice. He also asks whether Rule 9014(c)(1)(G) would ever require the movant to serve the hearing notice on all creditors. The phrase would be clarified by saying that the movant shall serve all entities "entitled to service of the motion by federal law or these rules" or "entitled to service of the motion and notice by federal law or these rules."

5. Hon. Alan Jaroslovsky (Bankr. N.D. Cal.) (007):

Suggests clarification to Rule 9014(j). The Committee Note states that "witnesses must testify orally in open court ... [T]he court may not resolve these factual issues based on affidavits." But he notes that the Ninth Circuit allows trial testimony by affidavit so long as the witness is available in court to be cross-examined [citing In re Adair, 965 F.2d 777, 779 (9th Cir. 1992); In re Gergely, 110 F.3d 1448, 1452 (9th Cir. 1997)]. "This procedure works very effectively in a variety of bankruptcy disputes and ought to be preserved." Suggests the following language:

> "(j) TESTIMONY OF WITNESSES. Testimony in an administrative motion shall be taken in the same manner as testimony in an adversary proceeding."

6. Hon. Kathleen P. March (Bankr.C.D. Cal.) (008):

(a) "The revised Rule 9014 could be both workable and beneficial" of changed as she suggests, but as proposed it is not fair or workable. The high volume districts would be most adversely affected by the proposed draft if not fixed.

(b) Suggests deleting the provision in Rule 9014(b)(3) and (d)(3) that exempts consumer debtors from the need to file affidavits and valuation reports. There is no statutory basis for treating consumers differently - it goes beyond the rulemaking authority and "might be held unconstitutional" as a violation of equal protection or due process. If the desire is to help unsophisticated consumers, the exemption is also over broad (it includes consumers represented by counsel). Also, sometimes individual creditors are unsophisticated and this exemption should apply to them (it only applies to consumer debtors, not creditors). All movants should be required to file affidavits. Also, this provision actually hurts consumers because they will not be able to establish a triable issue of fact without affidavits. Under the Federal Rules of Evidence, a motion cannot be properly granted where it involves factual issues and the relevant facts are not proven by admissible evidence (i.e., affidavits). As in district court, many motions must be denied, even where unopposed, because the movant fails to prove prima facie that the movant is entitled to the relief sought on the facts and on the law." The same problem exists for responses without affidavits.

(c) Rule 9014(b)(3)(B) should be changed to say "valuation report authenticated by affidavit/declaration..." She would not consider a valuation report that was not authenticated by affidavit or declaration because the Federal Rules of Evidence apply in bankruptcy court.

(d) Suggests redrafting Rule 9014(i) as follows:

> "...if a timely response to an administrative motion is filed, the court shall hold a hearing. At that hearing, the court shall determine whether the affidavits supporting the motion prima facie support the granting of the relief requested in the motion, and if so, shall determine whether the affidavits supporting the opposition conflict with those submitted by movant on any issue of fact material to the motion. If there is a conflict between the moving and opposing affidavits on any issue of fact material to the motion, then the court shall hold an evidentiary hearing to hear live testimony from those declarants. Unless the court has directed before the initial hearing on the motion that parties shall bring their affiants to the initial hearing, any evidentiary hearing shall be set by the court for a date subsequent to the initial hearing. In setting such subsequent evidentiary hearing, the court shall give the parties reasonable notice of said subsequent hearing, so that the parties can bring their witnesses for the subsequent hearing."

(e) Do not abrogate Civil Rule 43(e) for Rule 9014 motions. Judges should be able to

determine a motion based on affidavits, unless the judge determines that live witness testimony is necessary. But she seems to support a rule that requires live testimony if the affidavits conflict on factual issues. She would support adding "to the extent stated herein, FRCP 43(e) is modified/abrogated, to require live evidentiary hearing where the moving and opposing affidavits conflict on a fact material to the motion." She then suggests that Rule 43(e) not be abrogated for motions (make it uniform with motion practice in district court).

7. Diane L. Jensen, Esq. (Fort Myers, Fla.) (009):

(a) Objects to the "cumbersome process" under proposed Rule 9014. The need to file additional documents (affidavits and responses) will greatly increase the costs of administering small bankruptcy estates. She is particularly concerned about the need to file affidavits when objecting to exemptions and objecting to claims "since a lot of pleadings filed by a trustee are based on information and belief at the beginning of a case."

(b) In M.D. Fla., when certain motions are filed the court automatically orders a response and if none is filed the matter may be considered without further hearing. If a response is filed, a hearing is set and at that time "it can easily be determined whether or not the matter should be treated as a pretrial and set for final evidentiary hearing or, in the alternative, can be easily resolved without the need for cumbersome discovery or additional paperwork. The procedure works smoothly and with a minimum of cost to all parties. I would urge the Rules Committee to look at a similar proceeding in other jurisdictions." If a court is not willing to follow this procedure, at least continue enabling courts to pass local rules to streamline procedures.

8. T. Bentley Leonard, Esq. (Asheville, N.Car.) (010):

Changes to motion practice may work well for chapter 11 cases, but will be burdensome and "a general waste of time for the run of the mill consumer chapter 13 or 7." There is no need for elaborate procedures for consumer motions for which there is seldom a response. The present system works well for the typical consumer case.

9. Leon S. Forman, Esq. (Philadelphia) (011):

Suggests reconsideration of Rule 9014(j). The prohibition against the use of affidavits relating to a material fact may be too restrictive. There may be situations in which the requirement of witnesses in the courtroom or by deposition might be unduly expensive and burdensome in a matter not involving large sums. Giving the court discretion to decide the issue on affidavits in unusual circumstances and with proper safeguards might be workable and cost efficient.

10. Richard Levin, Esq. (Los Angeles, Cal.) (012):

(a) Rule 9014(b) requires that the motion be "entitled administrative motion." This would cause practitioners to label every Rule 9014 motion as simply "Administrative Motion" without further explanation as to the substance of the motion. "If you intend that the motion itself have those words in the title of the paper, you might clarify this provision by adding language to the proposed Rule that requires in addition the substance of the relief sought. If you just intend this as a definitional term for use throughout the Rules, you may wish to use a different word than 'entitled.'"

(b) Rule 9014(c)(1) requires service of the motion at least 20 days before the hearing date. In the C.D. Cal., they had unfavorable experience with time periods defined as a certain number of days before a hearing date because it is unclear whether Rule 9006(a) and the weekend rule applies to days that are counted backwards. For example, if a hearing were scheduled under proposed Rule 9014 on Friday November 20, would papers served 19 days before on Monday, November 1 be timely, or would papers have to be filed on or before Friday October 30. A clarifying note stating whether the weekend rule applies would be helpful. This comment also applies to Rule 9014(d) regarding response time.

(c) Rule 9014(c)(1)(B) and (C) require service on both the debtor and the debtor's attorney. "Where the debtor is represented by counsel, isn't service on the attorney adequate?"

(d) The comment above regarding the weekend rule applies to Rule 9014(d) also. In addition, the 5-day period, although reasonable when considered in relation to the 20 day requirement under Rule 9014(c), does not give much time for a reply by the moving party. "Was that intentional?"

(e) Rule 9014(d)(2) requires service of a response no later than when it is filed. "Should service be required no later than when a response is due? I'm not sure there is a substantial difference, but there may be room for argument."

(f) If the court orders a hearing under Rule 9014(g) despite the absence of a response, "[h]ave you given any thought to the mechanics of how the court will notify the movant that a hearing will be held?" Acknowledging that courts may not want the mechanics dictated too much by the rules, Mr. Levin asks: "Shouldn't there be sufficiently advance notice to allow the movant to prepare?"

(g) Rule 9014(i)(1)(B) provides that the court "may" order an evidentiary hearing at which witnesses may testify on the scheduled hearing date. Mr. Levin commented: "If the evidentiary hearing is optional, then you might not achieve one of the purposes of this Rule [as stated in the Introduction], 'When there is a genuine issue of material fact, this

provision would require that witnesses appear and testify, rather than give testimony by affidavit.'"

(h) Rule 9014(o) seems to give the courts the ability to override Rule 9014 by local rule.

11. Benjamin S. Seigel, Esq. (Los Angeles) (013):

"I adopt the comments previously made to you by the Honorable Kathleen P. March ... regarding the proposed amendments to Rule 9014."

12. Nancy Knupper, Esq. (Los Angeles) (014):

"I fully adopt Judge March's position on this matter."

13. Heide Kurtz, Chapter 7 Trustee (Los Angeles) (015):

Ms. Kurtz is a bankruptcy trustee with 3,000 cases in 1997 and 2,500 in 1998 in the Central District of California. She reviews at least 12 relief from stay motions each week pertaining to real property. The proposed changes to Rule 9014(d)(3) would exempt consumers from supporting their opposition with affidavits and valuation reports. "Without this information on hand, how can I take a position on the relief from stay motion?" She "concurs with Judge Kathleen P. March's ... recommendation to redraft Rule 9014 to (1) require everyone to support their motion/opposition to motion with affidavits/declarations/admissible 'PAPER' evidence, and (2) limit the need for a live witness evidentiary hearing to the situation where there is a conflict between the affidavits/declarations/'PAPER' evidence supporting the motion and the affidavits/declarations/'PAPER' evidence supporting the opposition to the motion."

14. Peter C. Fessenden, Esq. (Brunswick, Maine) (016):

Has one "minor suggestion" on Rule 9014. The phrase "proof of service" in Rule 9014(b)(2) "overstates its purpose" because "proof" is a conclusion to be made by the court. The phrase "evidence of service" or "certificate of service" should be used. "To the extent that the rules may wish to have a certificate of service be verified or made under the pains or penalties of perjury, amen; it is still only evidence of service." He makes the same comment regarding Rule 9013.

15. Hon. Frank W. Koger (Bankr. W.D. Missouri) (017):

Concerned that the rule requires motions and responses to be accompanied by affidavits and valuation reports (if available). "If we are going to have a preliminary hearing which is just a status conference it seems to me that the need for affidavits would be subsequent to that rather than at that time." In addition, it is unlikely that a debtor served with a

motion to lift the automatic stay could even get an appraisal within the 15 days before the response is due. "In other words I think what we're doing is loading too much on the front end which is simply going to lead to a lot more paperwork and thicker files in bankruptcy courts." He suggests reconsideration of whether affidavits are actually needed before the status conference. Also, many motions default without a response or there is a response agreeing with the motion. "In view of this I just think the affidavits are overkill... I hate to see too much paperwork on the front end."

16. Hon. Ralph H. Kelley (Bankr. E.D. Tenn.) (018):

The title to Rule 9014 ("Administrative Proceedings") seems to "run up a red flag for bankruptcy judges. We are always fearful of our judicial duties being confused with administrative proceedings. If the proceedings involve the administration of a bankruptcy case why can it not be referred to as a 'case proceeding'?"

17. David M. Reeder, Esq. (Los Angeles) (019):

An evidentiary hearing would take place in every consumer case when there is a disputed issue of material fact. This "would unacceptably clog the courts, would exponentially increase the amount of time devoted to reaching a decision in relatively small matters, would increase litigation costs tremendously, and would lower the level of justice dispensed by the bankruptcy courts." This would create a "small claims" atmosphere "totally unbecoming of and inappropriate in a Federal Court." It also would create a two-tiered system of justice where litigants in non-consumer" cases would have to abide by the Rules of Evidence whereas litigants in consumer cases "would be free to burden the court with irrelevant, unsupported, and inappropriate materials free from the constraint of the Federal Rules of Evidence." In addition, the abrogation of F.R.Civ.P. 43(e) would "similarly adversely impact bankruptcy practice by requiring a *live* evidentiary hearing in every contested matter." "Finally, I fully support the position of Kathleen P. March, United States Bankruptcy Judge, set out in her letter of October 28, 1998."

19. Hon. David S. Kennedy (Bankr. W.D. Tenn) (021):

The title ("Administrative Proceedings") is possibly confusing and misleading, especially to the uninformed, who may erroneously assume that a disposition of such a motion would be made by an administrator, a non-judicial officer, or an administrative law judge. Judge Kennedy suggests several alternatives for the title:

- Main Case Proceedings
- Operational Proceedings
- Independent Proceedings Not in the Context of an Adversary Proceeding Under Part VII
- Independent Motions Not Made in the Context of an Adversary Proceeding

Under Part VII
- Adjunct Proceedings
- Adjunct Proceedings Not in the Context of an Adversary Proceeding under Part VII
- Auxiliary Proceedings
- Auxiliary Proceedings Not in the Context of an Adversary Proceeding Under Part VII

Proposed Rule 9014(b) might then provide that a motion governed by this rule shall be entitled "Rule 9014 Motion", "Main Case Motion", "Operational Motion", "Independent Motion", Adjunct Motion", or Auxiliary Motion."

20. Hon. Rosemary Gambardella (on behalf of all bankruptcy judges in D. N.J) (022):

Opposes proposed Rule 9014(j) and Rule 9017 which would provide that Civil Rule 43(e) no longer applies at an evidentiary hearing on an administrative motion. Relying on Rule 43(e), they adjudicate most motions of this type (which is most of the court's calendar) on the basis of affidavits. Dispositions on affidavits are less time-consuming. The proposed change "will add enormous delays to the time required to dispose of such motions" and will add great expense and inconvenience to parties and other affiants who would be required to spend hours waiting in crowded courtrooms. And these changes will "drastically alter adjudication of disputes in bankruptcy courts" at a time when bankruptcy filings have increased 43% in the last five years nationally with little or no increase in the number of judges "and at a time when Congress has been urging us to work more efficiently."

The proposed change in Rule 9014(j) also exceeds its stated goal (the assessment of witness credibility is mentioned in the committee note). But the judges claim that the change is not limited to determinations of fact involving witness credibility. For example, if there is a dispute as to whether a payment had been made (which is a genuine issue of material fact), an affidavit with a copy of the canceled check showing payment would no longer suffice; witnesses for both sides would have to testify "although the adjudication of the dispute will not turn on witness credibility." "Hundreds of other examples of factual disputes which do not turn on witness credibility could be offered Many motions in bankruptcy court do not turn on the credibility of witnesses." In addition, "there are sometimes cases when affidavits and other evidence make it apparent that a given witness's proposed testimony is obviously not credible." The proposed change would eliminate the discretion bankruptcy judges have had for decades to make decisions that oral testimony will not be necessary in particular cases.

20. Stephen J. Snipper, Esq. (Los Angeles) (023):

Enclosing a copy of a letter from Bankruptcy Judge Kathleen P. March (C.D. Cal.) urging

lawyers to write in opposition to the proposed amendments to Rule 9014, Mr. Snipper stated that "the offices of [his law firm] adopt this position and request that you reconsider" the proposed amendments.

21. Bankr. Judges, D. Colorado (letter by Chief Judge Matheson) (024):

(a) Agreeing that it is time to amend Rule 9014 and that "an attempt at national uniformity is laudable," the proposed amendments are unworkable and impose unnecessary costs and inconvenience. They will have a disruptive effect on local counsel who are accustomed to local procedures that may mirror established procedures in other local state and federal courts, in order to cater to the perceived needs of a few national practitioners who appear in only a small fraction of the bankruptcy cases. They suggest as a better alternative their Local Rule 202 (enclosed with their letter) which is more expeditious and efficient, and which enabled the clerk to reduce its staff for financial savings for the court. Local Rule 202 was adopted after a lengthy re-examination of their previous procedures and extensive study of systems used in other districts.

(b) Defining the Scope of Rule 9014: The proposed rule defines the scope broadly with numerous exceptions, and requires amendment to many other rules to state that Rule 9014 applies. It would be simpler and more effective to state that Rule 9014 applies to all matters specified in the Code or Rules to be heard "after notice and a hearing" (or similar phrase), with 3 exceptions (adversary proceedings, disclosure statement hearings, and plan confirmation hearings).

(c) Scheduling the Hearing: The judges strongly object to the requirement that the notice of motion specify the hearing date. Under Local Rule 202, a hearing date is specified only after a response or request for a hearing is filed (a party files a "certificate of contested matter and request for a hearing"). If unopposed, a hearing is not scheduled at all. Although a number of districts do it the way is would be done under the proposed amendments (those are the same districts where the judges complain or boast of hearing several hundred matters in a day), the Colorado judges think it is wasteful of judicial resources and onerous on the parties. The proposed amendments would require each judge to set aside a regular motions day -- a full day would probably have to be dedicated. The court would have no control over motions and no way to balance the workload. The judge may have hundreds of matters one week and none the next. Counsel must arrive early and, perhaps, stay late to be able to appear on one matter. They would have to reinstate a burdensome and time consuming procedure they abandoned when they adopted Local Rule 202: a calendar "tickle" for every Rule 9014 motion (which is a "nightmare" in a large reorganization case). Letting the movant schedule the hearing places an unfair disadvantage on the respondent. And in their district, because of distances involved, they allow non-evidentiary hearings by telephone. If attorneys are setting hearings on a blanket motions calendar, the ability to do telephonic hearings is greatly restricted because of an inability to schedule the telephone calls at a certain time.

The features of Local Rule 202 (which does not purport to define the parties to be served, nor the documents to be served) should be considered.

(d) Affidavits and Valuation Reports: Opposes the requirement to have affidavits. Requiring affidavits "takes us back to the days of Code pleading" before the Federal Rules of Civil Procedure. It adds unnecessary bulk, practical impediments to counsel and parties to arrange for signing and transmission of affidavits, and disadvantages the respondent because of the more limited time schedule. "The complaint and answer in adversary proceedings serve the same purposes as the motion and response in contested matters, but there is no requirement that pleadings in adversaries must be supported by affidavit." Rule 9011 is sufficient in that it requires counsel and pro se parties to investigate and to allege only facts that "have evidentiary support or, if specifically identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery ..." Also opposes the provision on valuation reports. First, they are hearsay documents that ought not be offered or received in evidence (see *National Canada Corp. v. Dikeou*, 868 P.2d 1131 (Colo. App. 1993)). Second, it creates bulk. Obtaining valuation reports is a "legitimate function of the discovery process and should not be imposed as part of the pleading process."

(e) Service Requirements would be burdensome, wasteful, expensive, and unnecessary. They fail to take into account that there are 3 types of contested matters, each of which involves separate considerations for service:

> (A) those seeking relief against the estate and not against any particular party, such as for allowance of administrative expenses or attorneys fees;
>
> (B) those affecting only the interests of a particular party but not the interests of the estate, such as motions to redeem property under section 722, motions to avoid liens under section 522(f), and motions to use cash collateral;
>
> (C) those affecting both the estate and a particular party, such as motions to sell property free and clear of a particular lien.

Service of the notice of motion is sufficient to alert non-affected parties, while service of the notice and all motion papers should be required for those parties directly affected. Rule 9014 requires service of documents on "any committee." When the committee has counsel it should be sufficient to serve committee counsel, rather than requiring service on each member of the committee.

22. Eric J. Breithaupt, Esq. (Birmingham, Alabama) (025):

While the idea behind the proposed amendments makes sense, some amendments are not

practical (especially regarding relief from stay proceedings in consumer cases):

(a) Under 362(e), a motion for relief from stay must be heard within 30 days after the motion is filed. Under Rule 9014, it will have to be served at least 20 days before the hearing date. Even if the clerk could docket it "on the same day as the pleading was filed," the court would only have a 10-day window in which to hold a hearing. As a practical matter, clerks are unable to process a motion immediately upon its filing. "Typically, the docketing and scheduling of a motion for a hearing will take anywhere from 3 - 5 days." That leaves the court with less than 5 days for a hearing before the 30-day period expires. Compliance with Rule 9014 would be a "nightmare" for the court especially given the high volume of consumer stay relief motions.

(b) A problem with the proposed amendments is that Rule 9014(j) would abrogate Civil Rule 43(e), which permits the presentation of a motion by affidavit. In the typical consumer stay relief proceeding, the finance company has no representative close to the courthouse. The presentation of evidence by affidavit with respect to the presence of a security interest, valuation, authentication of the contract, and status of payments, "are matters which lend themselves to establishment by affidavit." If the debtor is able to force the presentation of live testimony in all such motions, there is potential for abuse and large back log for trials. "In a truly contested matter, the presentation of testimony ... through live witnesses is certainly preferable. Suggestion is to continue the use of affidavits, but require the non-moving party to tender a counter-affidavit as would be the case in summary judgment practice. The presentation of a counter-affidavit that reflects an actual dispute as to material issues of fact would then place all of the parties and the Court on notice that the matter would require a trial on the merits."

23. Hon. Michael J. Kaplan (Bankr. W.D.N.Y.) (026):

Opposes the title of Rule 9014. "Administrative Proceedings" is not respectful to the persons affected by the kinds of "profoundly substantive issues" governed by Rule 9014. Since a whole generation of bankruptcy lawyers have grown up without having to address the nuances of the old distinction between "summary proceedings" and "plenary matters", he suggests that Rule 9014 be titled "summary proceedings" if it is decided that "contested matters" not be used. "Summary proceedings" is the most descriptive label for an adjudicative process that does not have the formality of a proceeding commenced by summons and complaint, but that may implicate extended hearings. If that title is too provocative, he suggests that Rule 9014 be called "non-plenary matters."

24. Michael L. Stern, Esq. (Los Angeles) (027):

Proposed Rule 9014 "does not make good sense." In California, in federal district courts, bankruptcy courts, and state courts, motions are ruled upon based on factual affidavits and memoranda of fact and law, not on oral presentations in court. Most judges rely on

written records submitted in advance and provide tentative rules before oral argument. This process is fair and efficient, and it is unusual that oral testimony is required to resolve factual issues. He requests that Rule 9014 be redrafted to restrict factual submissions to affidavits, unless testimony is requested by the court to resolve conflicts.

25. Hon. Vincent P. Zurzolo (Bankr. C.D. Cal.) (029):

(a) Disagrees with title to Rule 9014 because it implies a matter that is non-adjudicative in nature. Suggests the rule be called "motions made in the bankruptcy case and not in an adversary proceeding," or the short-hand reference "Case Motions."

(b) Against the provisions relieving consumers of the burden of submitting affidavits. Discriminating between movants who are consumer debtors and other moving parties is wrong. Although most consumer debtors lack financial resources, federal judges must apply the law evenly to both rich and poor, and it is inappropriate to place or remove a burden on a litigant based on economic status. Consumers will be harmed by the amendments by not clarifying that the consumer movant also must support his/her position with admissible evidence.

(c) If the Committee wants to make access to the court easier for the consumer who could not afford an attorney, a better remedy would be to prepare form declarations and affidavits that would be available for common motions that consumers could easily access in the clerk's office or on the court's website. Judge Zurzolo attached copies of local forms (optional) for notice of motion, motion, declaration, and response relating to a motion for relief from the stay (unlawful detainer) for his district. The response indicates that supporting papers signed under penalty of perjury are required and includes places to check that a declaration in support of the response is attached

(d) Agrees with the proposed amendment that would allow interim relief to be ordered if appropriate; with the proposed modification of discovery in Rule 9014 proceedings; and with the proposal that the court may rule on the motion without a hearing if a timely response is not filed (but suggests it would be more efficient and less burdensome on the court if the movant is excused from appearing at a hearing on an uncontested motion only if the movant is given notice that the court does not require his or her appearance).

(e) Strongest objections are to the remaining provisions of Rule 9014 that would not permit a local rule providing that Rule 9014 motions would be decided at the first hearing based on affidavits or declarations in the ordinary course. The vast majority of disputes on issues of fact in such motions do not turn on credibility of witnesses; rather, they turn on issues of fact that can be decided by comparing and contrasting affidavit/declaration testimony, especially in light of evidentiary objections that may be made. Two examples are disputes over the valuation of property and the payment history of consumer debtors with regard to chapter 13 plans. These do not usually turn on whether a party is telling the

truth, but on comparison and contrast as to particulars of the valuation of property or history of payments made and received. Almost always, he can make these determinations without the necessity of oral testimony. If oral testimony is needed, it is easy to order a hearing at a later time after consulting with parties to give them an opportunity to conduct discovery after the first hearing.

(f) The proposed amendments would handcuff courts in drafting local rules with regard to how to conduct hearings. This would not benefit parties or attorneys, but would create a danger of oppositions being filed only for the purpose of delaying the resolution of the motion which could otherwise be resolved at the first hearing. He strongly urges deletion of the provision that renders Civil Rule 43 inapplicable in Rule 9014 motions. This could cause a problem in the resolution of tens of thousands of motions in his district.

(f) Rule 9014 would make resolution of motions slow, expensive and would rob judges of the ability to exercise discretion that they are supposed to use in tailoring procedures to the particular needs of the parties and the dispute before them.

26. Raymond J. Rotella, Esq. (Florida) (032) (Nov. 30):

Rule 9014 amendments are confusing. The proposal changes motion practice that existed for 21 years; he has not seen confusion among lawyers in determining when a matter is a contested matter. He views contested matters as understandable because of cross-references to rules in Part VII applicable to adversary proceedings and contested matters. Proposed Rule 9014 slows down the process that was meant to be quick; creates more paperwork in clerks' offices; and causes more confusion for lawyers. It is more expensive for clients because of increased paperwork (including affidavits). Because responses are due 5 days before the hearing, with time for mailing, an attorney may not know he needs a witness until a day or two before the hearing. Also, discovery is bogged down until only after a response is filed, even though you would probably know who your adversary is at the time you filed the motion.

27. Hon. Irvin N. Hoyt (Bankr., D. South Dakota) (035):

(a) Since an attorney must abide by Rule 9011, there is no need to require affidavits with a Rule 9014 motion (this just increases costs and attorney time).

(b) The requirement of a preliminary hearing to determine whether an evidentiary hearing is needed unnecessarily clogs a calendar and presupposes that pleadings are incomplete or misleading. Courts should be permitted to hold preliminary hearings in their discretion.

(c) The proposed amendments are inconsistent with local procedures needed to accommodate his large, one-judge district. Rule 9014(d)(1) requires a response at least 5 days before the hearing. They do not even set a hearing date until a response is filed (the

movant's notice gives a deadline for an objection). This eliminates wasteful scheduling and unscheduling uncontested matters. Attorneys can notice a motion without getting a hearing date in advance. When the hearing is scheduled, the clerk better knows how much time is needed for the hearing and who will be involved. If warranted, the hearing could be scheduled in a different division. Our scheduling is thus more efficient. We used to operate on an "objections to be filed five days before hearing" rule but have found our new method works much better.

28. Bradford L. Bolton, Clerk (D. Colorado) (036):

Opposes Rule 9014 because it would require his district to significantly modify their motion procedures to discontinue two innovative practices implemented in 1993 that have resulted in very substantial savings in the clerk's office: (a) the court would have to set every motion for hearing instead of only those hearings actually requested by a party (this would have required the clerk scheduling 12,000 motions in 1997 rather than 579 it actually scheduled), and (b) the clerk's office would have to create and maintain work files for all pending motions, thereby shifting the burden from the parties to the clerk to monitor the prosecution of motions. As a result, the clerk's office must absorb the burden of 23,000 related calendaring and docketing entries, and over 98,000 work file maintenance actions -- requiring in his district additional staff of 6 new deputy clerks at an annual cost of $200,000.In Colorado, local rules strictly apply the "after notice and hearing" provision in section 102(1) -- uncontested motions do not require scheduling of a hearing unless there is an objection and one or more interested parties have notified the court that the matter is at issue and a hearing is required. Mr. Bolton attached an exhibit comparing clerk's office work activity under proposed Rule 9014 and Local Rules.

29. Hon. Stephen C. St. John and Hon. David H. Adams (Bankr. E.D.Va.) (039):

In general, Rule 9014 as proposed would result in substantial delay in the administration of justice in their district (especially requiring two hearings in virtually every contested matter), would impose an unnecessary hardship on parties in their court system, and departs from their current procedures to manage their substantial caseload; would cause great dislocation to their court. The overall effect of Rule 9014 would be to substantially retard the fair and efficient consideration of our judicial business. Specific comments include:

(a) Oppose titles of Rule 9014. Suggests Rule 9013 be designated application proceedings and Rule 9014 be designated as motion proceedings (as suggested by Judge Waldron).

(b) Favors the way Rule 9014 positively addresses due process concerns in service of motions and aptly modifies discovery rules to fit our rapid time frames inherent in bankruptcy cases.

(c) A defect is the lack of any capacity to shorten the 20-day period in Rule 9014(1)(c). They find no provision granting authority to shorten it when extraordinary circumstances so warrant (such as sale of asset situations). The interim relief provisions in Rule 9014(f) does not adequately address this need in many circumstances.

(d) The requirement in Rule 9014(b) that the motion be supported by one or more affidavits is extremely onerous and adds substantial expense to participate in our system. Exempting only individual consumer debtors from that requirement discriminates against many small consumer creditors (who often act pro se). And if affidavits are required, the rule should clarify the procedural outcome of failing to so comply (automatic dismissal, etc.). These same comments apply to Rule 9014(d)(3) regarding responses.

(e) Rule 9014(f) on interim relief is problematic in that it invites contest in every proceeding in which interim relief is sought by requiring the parties to take "reasonable steps to provide all parties with the most expeditious service and notice ...feasible." Often when expeditious relief is requested, the court will direct the means of notice (which does not appear to be permitted by Rule 9014). "In addition, the last sentence of [Rule 9014(f)]'s reference to grants of interim relief when Rule 4001(b)(2) or Rule 4001(c)(2) appears to refer to non-existent rules which are not reproduced in the preliminary draft of the proposed amendments."

(f) The requirement in Rule 9014(g) that written responses be filed in all such motions creates an unnecessary burden on many small creditors and on consumer debtors.

(g) Rule 9014(i) would materially delay the administration of justice in their district by requiring two hearings. Rule 9014(f) mandates what is in effect a mini-summary judgment hearing in all motions. This will not assist the court in disposing of its motions and will create a burden and delay in their docket. Also, Rule 9014(i)(1)(B) (allowing the court to hold the evidentiary hearing on the first scheduled date) is useless because of the requirement that reasonable notice that an evidentiary hearing will be held must be given. Since the response deadline is only 5 days before the hearing, the ability of the court to give reasonable notice that an evidentiary hearing will be held is virtually non-existent. The two-hearing requirement will create massive delays in that district. "It is easier and more efficient to permit us the flexibility to utilize such a procedure selectively in the small minority of contested motions where such procedures are beneficial rather than bog down our entire motions docket for no useful purpose."

(h) Rule 9014(j)(3) permits single hearings in relief from stay, cash collateral, and obtaining credit motions, but there is no provision for hearing these matters on less than 20 days, which is often necessary. Also, regarding relief from stay motions, it appears in conflict with the provisions for relief with or without a hearing as is necessary to prevent irreparable damage under section 362(f) of the Code.

30. James J. Feder, Esq. (Los Angeles, California) (041):

Joins in the comments of Judge Kathleen P. March in objecting to the proposed amendments to Rule 9014. She has identified a number of difficulties that would be encountered if these amendments are promulgated. They would create additional inconsistencies in practice rather than promote uniformity. The identical letter was sent by John W. Mills III of his firm (see below).

31. Hon. James F. Queenan, Jr. (Bankr. D. Mass.) (042):

Generally in favor of proposed Rule 9014. The new rule will change his court's practice (and he suspects the practice in most courts) in that his court does not schedule a hearing on a motion (except a private sale motion to encourage overbids) unless and until an opposition is filed within 12 days. A hearing is set after an objection is filed (for about 2 weeks later). He requires the movant to serve notice of the hearing, but because of problems of service, the Bankruptcy Noticing Center will soon be doing the noticing. A benefit of the new rule is that it will avoid the need for double service (notice of motion and then notice of the hearing). Unless the court has an open motion session (which he dislikes), the new rule would require the movant to telephone the court for a hearing date before filing the motion. This involves a phone call to the court for every motion, adding a burden on the court. But it has the benefit of permitting the movant's attorney (perhaps in cooperation with the opponent) to fit the hearing into his or her schedule. And, of course, one mailing is simpler and less expensive than two. "I therefore regard the proposed change as an improvement over our current practice. And I appreciate the advantage that uniformity of procedure has over a hodge podge of different practices and local rules."

A few specific suggestions for improvement are offered (most of these are shown in handwritten comments on a draft of Rule 9014 enclosed with his letter):
(a) change the title of Rule 9014 to "Main Case Proceeding" and substitute "main case motion" wherever the draft now says "administrative motion."
(b) add a new paragraph to Rule 9014(d) to provide that: "The response shall state the respondent's defenses and shall admit or deny each of the averments contained in the motion. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an averment, the respondent shall so state and this has the effect of a denial." This would impose on the respondent requirements similar to those imposed on an answer to a complaint.
(c) Avoid confusion over the nature of an initial hearing on relief from the automatic stay by stating that the hearing is a combined preliminary and final hearing unless at the hearing the court schedules a second hearing. In particular, the judge would add a new paragraph to Rule 9014(i): (3) *Preliminary and Final Hearing Consolidated on Relief from Stay*. A preliminary hearing on a motion for relief from the automatic stay is a consolidated preliminary and final nonevidentiary hearing unless at the hearing the court

schedules a final evidentiary hearing or nonevidentiary hearing."
(d) Modify Rule 9014(b)(2) to read: "be accompanied by proof of service of the motion and notice of the hearing thereon, and by a proposed order for the relief requested..." This is for clarification.
(e) delete the requirements for an affidavit in support of a motion or response (Rule 9014(b)(3)(A) and (d)(3)(B); delete Rule 9014(e) which provides that an affidavit comply with FRCP 56(e)); delete the requirement that the respondent include a proposed order (Rule 9014(d)(3)(A)); and delete provisions excusing consumers from the requirement to submit valuation reports (Rule 9014(b) and (d)).

32. John W. Mills III, Esq. (Los Angeles, California) (043):

Joins in the comments of Judge Kathleen P. March. Mr. Mills' letter is the identical letter sent by James J. Feder of his firm (see above).

33. Leslie A. Cohen, Esq. (Los Angeles, California) (046):

Writes on behalf of herself and members of her firm in support of a letter sent to the Committee by Judge Kathleen P. March. The proposed amendments to Rule 9014 are unacceptable as drafted and should be revised as outlined by Judge March.

34. Stephen W. Sather, Esq. (Austin, Texas) (047):

Opposes the proposed amendments to Rule 9014. Motion practice in W.D. Texas "works just fine." With a heavy case load, judges in that district crafted procedures that streamlined proceedings while insuring due process. The proposed amendments would increase expenses to litigants and the clerk's office. There may be a problem with national uniformity, but rule amendments should recognize the high volume of motion practice in bankruptcy courts. Requiring affidavits is not helpful and increases costs significantly. If motions could by tried on affidavits they might be helpful, but Rule 9014 prohibits the use of testimony by affidavit. Requiring responses within a set number of days before the hearing is not practical because movants must obtain a hearing date before filing the motion. His district tried that and it was a "disaster." Attorneys consistently put down wrong hearing dates, requiring clerks to re-notice matters. This procedure requires more work for clerks and creates uncertainty. Prefers a rule requiring a response within 20 days after the motion is served, which creates a fixed point of reference. Most districts use some form of 20 day negative notice. This is analogous to a summons served with a complaint in an adversary proceeding. It has the advantage of being definite and familiar. The requirement for bifurcated hearings is unnecessary and burdensome. Prefers the system in his district (Austin Division) in which a matter is set (only after a response is filed) for a "paper docket call." At the docket call, parties turn in an announcement stating whether the motion is still contested and stating the amount of time to try the matter and any scheduling conflicts. These announcements are turned into

the Courtroom Deputy, who then sets matters for a fixed hearing date in consultation with the court. The advantage is that attorneys are not required to spend vast amounts of time sitting in Court waiting for their cases to be called only to announce that a settlement has been reached or to obtain a fixed setting to return on another day. Requiring an evidentiary hearing on every contested motion is unnecessary. Also, many courts allow testimony by proffer, providing that the witness is in the courtroom and available for cross-examination. If the judge believes the credibility of the witness is an issued, the court has discretion to order that he or she testify directly.

An effective motion practice system should recognize that there are the following types of matters that arise in bankruptcy cases: routine administrative matters (i.e., motions to shorten time or an application to employ a professional); motions requiring emergency consideration (in his district, a separate motion for expedited hearing is required which allows the court to insure relief on a timely basis with adequate notice); matters that always require a hearing (i.e., plan confirmation and disclosure statement hearings for which negative notice is not appropriate); lift stay motions that must be on a fast track because of the 30-day Code requirement (in his district, these are filed with 10 day negative notice and must be served with affidavits; a timely request is required for permission to offer oral evidence at the hearing or else it is decided solely on affidavits); most other matters susceptible to being resolved on a procedure involving 20 days negative notice, a docket call and a fixed hearing (which should not rule out stipulated facts or testimony by proffer).

35. Thomas J. Yerbich, Esq. (Anchorage, Alaska) (49):

(a) Opposes requirement that affidavits must be filed in support of every motion or response. The motion serves essentially the same function as a complaint and need only set forth the facts upon which the relief is based. The response either admits or denies. "Affidavits add nothing at this stage of the process." Requiring affidavits to support every fact necessary to grant the relief or counter any potential defenses generates more documents to process.

(b) Why schedule a hearing in all matters before it is determined whether a hearing is required (ie, a response is filed). "This requirement will tend to wreak havoc with calendar control. Courts will 'over book' hearing times to allow for 'no shows' (matters to which no response is filed)." It is inefficient, and frustrating to counsel and parties, to sit in a courtroom for an hour or more waiting to have a 5- or 10-minute matter heard. Also, 15-minute gaps between hearings is not a wise use of scarce judicial resources. In Alaska, a hearing is not scheduled until after a response is served.

(c) Rule 9014(b)(2) and (d)(3)(A) - Requiring proposed orders with the motion or response seldom serves a worthwhile purpose. It is another document that must be filed, docketed, and stored. At least one of them will not be used. Submission of a proposed

order should not occur until a matter is ripe (after response time has elapsed, or after the hearing if the matter is contested).

(d) Rule 9014(b)(3)(A) and (d)(3)(B) - If affidavits serve a useful function, what is the rationale for excepting consumer debtors from this requirement? Inclusion of this exception underscores the lack of any substantial function of affidavits.

(e) Rule 9014(b)(3)(B) and (d)(3)(C) - Unless and until valuation is placed in issue by a response, including a valuation report (which could be lengthy) increases the size of the court file. A better alternative is to require the parties to exchange valuation reports a specified time after the response is filed, but only if the response puts the value at issue. Valuation reports should be exhibits at the hearing, not attached to a pleading.

(f) Rule 9014(d)(1) - The time to respond to a motion should be measured from the date the notice is given, not the hearing date. Also, a response filed 5 days before the hearing in many cases provides insufficient time for the parties to resolve any issues or, in the case of the movant, to adequately prepare to meet the objections. Not scheduling the hearing until the pleadings are compete allows the parties to resolve differences and engage in any necessary discovery.

(g) Rule 9014(h) (discovery) - Opposes the provisions on discovery. First, it is contrary to the policy underlying Civil Rule 26(a) (to expedite and simplify discovery): How Rule 9014 proceedings will be expedited or simplified by eliminating Rule 26(a) (mandatory disclosures) and substituting traditional discovery methods "defies logical explanation." Second, if the movant cannot initiate discovery until after a response is filed, a response is not due until 5 days before the hearing, and parties have 10 days to respond to discovery requests, how can discovery benefit the movant? Third, since numerous matters in bankruptcy are not directed to a particular party, is a party a "respondent" entitled to initiate discovery before the party has filed a response? In Alaska, the local rules incorporate the automatic disclosure requirements of Rule 26(a) as to certain matters (relief from stay motions, sales of property) placed at issue by the motion and response. If a matter involves substantial or complex discovery, the hearing date may be scheduled to accommodate that.

(h) Rule 9014(i)(1) - Questions whether an initial non-evidentiary hearing (effectively the same as a summary judgment motion) is necessary. If the purpose is to determine genuine triable issues of fact from the affidavits, why the need for the hearing at all? "A non-evidentiary hearing adds nothing: the affidavits either establish genuine issues of material fact or they do not." The part that provides that the hearing will be an evidentiary hearing if "reasonable notice" is given is unworkable: How is the court to provide such reasonable notice when the response is not due until 5 days before the scheduled hearing.

(i) Rule 9014(i)((1)(A) (status conference) - Using the initial hearing as a status

conference is the sole rational reason for having it, but a status conference is unnecessary in many motions. "At the time the parties request a hearing in the first instance, the court can be informed whether the hearing is to be a status conference or an evidentiary hearing."

(j) Rule 9014(j) - He is concerned that making Rule 43(e) inapplicable would eliminate the use of anything but live testimony at the evidentiary hearing. "Presumably this would preclude the court from using any affidavit submitted in support of or response to an administrative motion at the evidentiary hearing. As long as the opposite party has an opportunity to cross-examination or does not object to the use of affidavit testimony, what useful function is served by abandoning Rule 43(e)?" In Alaska, evidence may be in the form of affidavits or live testimony depending on the nature of the proceeding and the extent of the dispute (if by affidavit, unless the opposing party waives it, the affiant must be made available for cross-examination).

36. Hon. Polly S. Higdon (on behalf of Oregon Bankr. Judges) (050):

(a) Current practice in Oregon and many other districts is to set matters for hearing only after an objection to the motion or a request for a hearing after an objection to claim is filed. The proposed rule requires that every matter be set for a hearing when the motion is made. This will increase administrative and judicial time and the need for more court personnel. Scheduling hearings will require estimates of time for hearings; if time is too optimistic hearings will have to be rescheduled or delayed. The problem is greatest in districts with large geographic areas where telephone hearings are used.

(b) Two hearings will be required in every contested matter (a summary judgement-type hearing and an evidentiary hearing). In many situations, the court will not be in a position to make a decision based on affidavits, especially when one party is a consumer and files a response without an affidavit. It also is their experience that unrepresented parties sometimes show up at the hearing even though no response is filed. "The rule must be absolutely clear that courts may provide by local rule that no hearing will be held if a response is not filed within the time allowed. Courts should be further empowered to enter default orders unless the court determines that an exception should be made in a particular case." Suggests each court maintain its ability to manage cases as it sees fit, including the notice and hearing approach giving parties at least 20 days to object to a motion (which will remain the procedure in some rules such as Rules 6004(a),(b) and (d) for proposed use, sale or lease of property, and 6007(a) regarding abandoning or disposing of property).

(c) Opposes exclusion of consumers from requirement to file affidavits and valuation reports. It is inconsistent with due process, incorrectly assumes consumers are less able to comply, consumers often have lawyers when small creditors do not. If the waiver applies for consumers, it should also apply to the other party so as to provide fair treatment of all.

(d) Judges should have discretion in allowing or limiting the use of affidavits and declarations, whether at a preliminary or final hearing, so long as due process rights are preserved.

(e) The perceived need for uniformity is to offer a benefit to national practitioners who occasionally visits another district. We are asked to provide a less efficient, poorer product, to hundreds of local attorneys and thousands of local citizens to provide a slight benefit to a few. Inconvenience is slight due to PACER, web sites and availability of local rules from the courts. Recent implementation of uniform numbering systems also helps.

37. Special Bar Committee of Portland, Ore. (050):

(a) Expresses concern that, under a Fifth Circuit decision holding that the performance of administrative functions is not the practice of law for purposes of Rule 9010, new title of Rule 9013 and 9014 could permit parties to appear through non-lawyer agents.

(b) Current motion practice works well in Portland and the Advisory Committee has not presented a convincing argument that a national uniform set of rules is either beneficial or necessary. The proposed amendments address court docket management practices (unlike the Civil Rules which leave these matters to local rulemaking). Asks whether there is a need for national docket management. Asks who is complaining (lawyers, judges, trustees, creditors, etc.). Questions whether lack of national uniformity has caused problems. Also, national uniformity will not eliminate the need for local rules.

(c) Apparently no cost-benefit analysis has been made by the proponents of the change. They believe the proposed changes will cause the price of bankruptcy practice to rise dramatically (especially in consumer cases). In Oregon, most contested matters are commenced by the use of forms (which will be eliminated in the push for national uniformity). Parties will be required to commission appraisals not knowing if the matter will be opposed, and a mandatory summary judgment hearing must be held before an evidentiary hearing. This will burden the small, local creditor with limited resources, as opposed to national creditors with appraisers, experts, and accountants.

(d) Motions in Oregon are scheduled for hearing only if opposed; the proposed amendments will require scheduling for a hearing upon filing the motion. This necessitates court personnel to docket matters that may never be heard. Where this system is used, it requires needless hours waiting for hearings. In W.D. Wash., more than 200 matters are routinely scheduled for the 1:00 p.m. Vancouver docket - many times a matter will not be heard until 5:00. In Oregon, matters are heard within an hour of the scheduled time (which is better for small creditors paying lawyers on an hourly basis).

38. Jeffrey Marks, Esq. (Cincinnati, Ohio) (052):

The amendments would have an adverse impact. There would be a significant burden placed on courts and parties as a result of requiring a hearing or status conference on every motion. Requiring affidavits to accompany motions is unduly burdensome; affidavits are rarely justified if motion is unopposed. Exclusion for consumers is questioned; other parties are in need of cost-cutting also. The benefit of national uniformity will be outweighed by negative effects on local practice that works well. In view of Rule 9014(o), most courts will adapt Rule 9014 to suit their local practice anyway, which will defeat national uniformity.

39. Dewayne Gooch, Esq. (Colorado Springs, Colorado) (053):

Understands need for national uniformity, but "as I understand the new Rule 9014, it will *require* a hearing on all matters" covered by the rule, supporting affidavits, and service on *all* parties in interest. This will significantly add costs that will be passed to clients. He prefers continuing practice under local rule that does not require these things.

40. Carolyn B. Buffington, Esq., (Clerk, S.D. Ohio; Cincinnati) (054):

(a) Understands the need for national uniformity, but believes the proposed changes may result in "micro-management to an impractical degree."

(b) Because Rule 9014 lists the matters to which it does not apply, it is difficult to decipher which matters will be covered. It is unclear what procedures govern motions that are expressly outside the scope of Rule 9014.

(c) Pre-set hearing dates will be required; it will be difficult for limited court personnel to respond to all telephonic requests for hearing dates. It will be inefficient to pre-set hearings for specific times. The court will inevitably resort to a "hearing day" when attorneys will have to wait until the motion is called (increasing legal fees). Setting hearings for all motions is wasteful since many are uncontested.

(d) Two hearings will be required when one will do. In that court, if an attorney wants a status conference, he or she asks for it, or the motion is continued. But that is rare.

(e) Requiring supporting affidavits will result in redundant pleadings as the affidavit will merely parrot the language of the motion; it increases attorneys fees and creates more work for court personnel docketing the motion.

(f) The proposal eliminating testimony by affidavit is too rigid. In some instances, because of constraints of time or money, an affidavit is the only way to present certain evidence. To eliminate affidavits would cause a hardship for parties.

41. Los Angeles Chapter, Federal Bar Assn. (058):

Opposes title to Rule 9014, exception for consumers regarding need to file affidavits, filing valuation reports unsupported by an affidavit or declaration, response time (5 days is too short - prefers 14 days before the hearing with opportunity for a reply up to 5 days before the hearing as provided by C.D. Cal. local rule), and elimination or Civil Rule 43(e).

42. Bankruptcy Judges of C.D. Cal. (21 Judges) (062):

(a) Many ideas behind the revisions are good, but several will lead to increased costs and congestion in court calendars. Opposes excusing consumers from affidavit and valuation report requirements.

(b) Redraft Rule 9014(g) so that a hearing, once set, will be held unless the court notifies the movant and other parties that a hearing is not necessary, even if no response is filed. Providing that a hearing will be held as a default when no response is filed will permit the judge to address inadequate motions at the initial hearing without the need to reschedule, to consider untimely responses when justice requires it, and allow pro se debtors who often do not file responses to appear in court and be heard or settle the matter. As it reads now, proposed Rule 9014(g) would require the court to notify the parties if a hearing will be held despite lack of response.

(c) Require live witness hearings only where affidavits are in conflict on a factual issue. Also, eliminate Rule 9014(i)(3) (contemplates testimony at initial hearing on stay relief motions) because it is unnecessary and impractical to require live testimony at the initial hearing.

(d) Redraft Rule 9014 to set longer deadlines for service and filing motions. Requiring responses only 5 days before the hearing is problematic and inadequate. Judges will not be prepared before the hearing. Prefers, if uniform time periods are established (which they oppose), 25 and 10 day periods in Rule 9014. The rule should address replies to responses (unless forbidden, they will be filed and the rules should address them). Other time periods set in other rules (6004, 6007) are also too short. The 5 and 1-day periods in Rule 9006(d) are also too short (its local rules extend them).

(e) Requiring parties to submit proposed orders is wasteful.

(f) Valuation reports should be supported by affidavit; otherwise they are inadmissible.

(g) A strict reading of Rule 9014(j) (abrogating Rule 43(e)) would require live testimony hearings whenever affidavits are filed by both parties. Suggests Rule 43(e) not be abrogated, although live testimony should be taken at evidentiary hearings where there is a genuine triable issue of fact.

(h) Opposes title to Rule 9014. Prefers calling Rule 9014 motions "motions."

43. Bankr. Law Committee, Commercial Law Section of the Delaware State Bar Assn. (063):

(a) The proposed procedures are too cumbersome (multiple hearings, more papers to be filed, etc.). Prefers less rigid procedures; require parties to meet and confer 3 days before the hearing.

(b) Rule 9014(c)(1) should be changed to permit the court to alter the 20-day notice requirement for cause (add: "or as otherwise ordered by the court upon cause shown" before "at least 20 days before the hearing...").

(c) Rule 9014(c)(1) and (2) should be modified (offers specific language) to ensure service on counsel who entered an appearance and authorizing the court to expand or limit the service list. Also, would change Rule 9014(c)(2) to permit the court to order the manner of service (offers specific language).

(d) Rule 9014(d)(1) should clarify that Rule 9006(a) (not counting weekends and holidays for less-than-8-day periods) does not apply to the 5 day period for responses.

(e) Rule 9014(d)(2): add to the end: "or in such other manner as the court may otherwise approve." This will clarify that objections need not be served as provided in Rule 7004 if the court so orders.

(f) Rule 9014(g) should be changed to read: "If no response is timely filed (as evidenced by a certification of receipt of no objection by the moving party), the court may...." This will reduce the court's work.

(g) Rule 9014(h)(3) should be revised to add "or as agreed to by the parties" so that the parties can agree to change the 10-day time limits applicable to discovery. The 10-day time period does not work well with the 20 and 5 day time limits under Rule 9014.

(h) Rule 9014(i)(3) should be revised to apply to relief from the stay "for cause" under Code section 362(d)(1), as well as for relief from the stay of acts against property of the estate under section 362(d)(2) (offers specific language).

(i) Rule 9014(j) should be clarified to permit the court to retain its discretion to permit portions of evidence in the case of a contested administrative motion to be presented in the form of an affidavit. Also would delete the proposed exception in Rule 9017.

44. Hon. Leif M. Clark (Bankr., W.D. Tex) (064):

Opposes requirement to set a hearing date before a response is filed (will increase number

of hearings set by more than 100 fold; increases telephone calls to clerk. etc.); the need to waive off a scheduled hearing in the absence of a response is problematic. Requiring non-evidentiary hearings before an evidentiary one is a waste of time. Opposes view that witnesses not be brought to the initial hearing (it is better to require witnesses at the initial hearing -- avoids delay). The impact of the proposed amendments would be catastrophic in consumer cases (it will slow down the process). He supports the elimination of Rule 43(e) (live witnesses should be required), but questions the need for affidavits to support every motion and response. Opposes the status conference provision as introducing another hearing (a third hearing: the initial hearing, the status conference, and the evidentiary hearing). The types of matters that are Rule 9014 proceedings will not tolerate these delays (buyers of assets will go away, evils will happen pending appointment of a chapter 11 trustee, etc.). Opposes provisions on valuation reports (encourages rules prepared outside the boundaries of ethical standards established by appraiser professional organizations).

45. Commercial Law League of America (065):

Opposes the proposed amendments which complicate (rather than simplify) the process. Agrees with the editorial in *Norton Bankruptcy Law Advisor* and includes local rules from ED Mich. as successful motion practice. If proposed amendments to Rule 9014 are made, excluding Rule 3015(f) proceedings is a concern (since service and discovery provisions of Rule 9014 are incorporated into Rule 3015(f), it would be better to just say Rule 3015(f) is included in Rule 9014 scope). Opposes requirements for supporting affidavits, limiting the use of affidavits at the evidentiary hearing, and any exception for consumer debtors. Rule 9014(c)(1)(D) should be clarified to indicate whether "trustee" means case trustee or US Trustee. Should correct Rule 9014(c)(1)(E) to include creditors on the Rule 1007(e) list in a chapter 9 case (since there is no provision for the formation of committees in a chapter 9 case). Opposes shortening the time for discovery responses in every instance as Rule 9014(h)(3) would require, and the provision that allows respondents to file discovery requests before response time expires, while the movant may not yet know which discovery it will require. Confusion is caused by provision that motions within an administrative proceeding are not governed by Rule 9014 and one must refer to Civil Rule 7(b)(1) and Rule 9006(d) regarding such motions. The provision in Rule 9014(i)(1)(B) that permits the court to order an evidentiary hearing (rather than a status conference) on "reasonable notice" should be deleted and a 10-day time period should be inserted therein.

46. Hon. Jerry A. Brown (Bankr. E.D. La.) (068):

Opposes amendments and prefers E.D.La. local practice (including "motion days") which he describes in detail. Local rules conform to district court practice in that district. Opposes two hearing procedures. Opposes title to Rule 9014 and prefers keeping "contested matters." Adopts as his own the *Norton Bankruptcy Law Advisor* editorial (see

Judge Lundin's comments - #020).

47. Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) (070):

Opposes the title to Rule 9014 as distasteful to bankruptcy judges for historical reasons (prefers "Main Case Motion"). Opposes the requirement to set hearing dates for all motions before an objection or request for a hearing is made. This creates case management and calendar concerns.

Opposes Rule 9014(j), which makes Civil Rule 43(e) inapplicable. Could be read to require live testimony even for unopposed motions, and when there is no factual dispute. Also, valuable court time can be saved by using affidavits at trial with the declarant present and available for cross-examination. Recommends that Rule 9014(j) be revised to provide that Rule 43(e) applies except that (a) the court may not resolve material factual disputes without hearing the testimony of pertinent witnesses, and (b) the court may order the direct testimony be presented by affidavit as long as the affiant is available in court to be cross-examined.

48. Hon. James S. Starzynski (Bankr. D. N.M.) (073):

Recommends abandoning the proposed amendments to Rule 9014 (and Rule 9013). Motion practice works well in the District of New Mexico and proposed Rule 9014 is unnecessary to make it work better. The rule will make obtaining relief more difficult, time-consuming and expensive for all the parties. Opposes requiring affidavits and proposed orders, and pre-setting hearing dates for all motions (this will slow the process and require more imprecise calendars). Although the drafters recognize there will be situations where procedures should be abrogated or revised for a particular case (Rule 9014(o)), they do not permit the abrogation by local rule or general order. This will require extra steps and considerable effort if the rules do not work well in any significant number of cases. He is puzzled about what generated this proposed rule change; terminology has not been a problem in that district. If rule is being changed to accomodate national practitioners, it should not be. Districts differ in demographics, local economics, types of filings, etc. and various districts have developed different workable solutions to procedural problems facing them.

49. Hon. Stacey W. Cotton (on behalf of Bankruptcy Judge in the N.D. Ga.) (074):

Opposes title to Rule 9014. If changed, suggests "Case Motions" or "Main Case Motions."

50. George W. Stevenson, Esq. (Standing Chapter 13 Trustee, W.D. Tenn.) (075):

Recommends changing title of Rule 9014 to something more appropriate (such as "Main

Case Proceeding"). Eliminate additional document requirements (affidavits, proposed orders, written responses) and status conferences which would have a devastating impact on many parties in consumer cases. Suggests an impact study of districts which have a large percentage of consumer cases (especially chapter 13 cases).

51. Hon. Steven A. Felsenthal (on behalf of 3 Bankruptcy Judges from the N.D. Tex.) (076):

Opposes title to Rule 9014, the requirement for filing supporting affidavits and valuation statements before a response is filed (increases costs), the Rule 9014(i) two-step hearing process (more often than not will be unnecessary; parties should expect that the scheduled hearing will be the dispositive hearing), pre-setting hearing dates for all motions (inefficient; the committee should submit a budget impact of this proposal and refer it to the Judicial Resources Committee for inclusion in the work of its pending bankruptcy court clerks work measurement formulas study). Proposed Rule 9014 will eliminate the efficiencies of local procedures under the Local Rules of N.D. Tex (copy enclosed with comment letter). The elimination of Rule 43(e) by Rule 9014(j) for motions appears to unduly restrict the court's legitimate use of the Federal Rules of Civil Procedure.

52. Los Angeles Bankruptcy Forum (Janet A. Shapiro, President) (077):

Adopts the comments of Hon. Kathleen P. March (C.D. Cal.) (#008) (see above).

53. Brad Wilson Hissing, Esq. (Orlando, FL) (080):

The requirements for supporting affidavits, if mandated at all, should be imposed on all parties and consumer debtors should not be excluded.

54.Bankruptcy Judges and Clerk of District of South Carolina (081):

Questions the value of affidavits in routine matters and the fairness of exempting consumers. They have forms for some types of motions and affidavits are unnecessary. Opposes two-hearing system. The effect of the rule will be to double scheduling and other activity. Also, they require local counsel for out-of-state lawyers. They now have the 20-day and 5-day periods as local rules and agree with the requirement of service of proposed orders. Proposes national rules imposing these time periods, but do not seek control over all details. Each court must maintain reasonable autonomy in managing cases.

55. Henry C. Kevane, Esq. (San Francisco) (083):

Opposes the title (prefers "Motion for an Order") and prefers grouping the matters in (a)(2) relating to involuntary and ancillary proceedings (Rules 1010, 1011, 1013, and 1018) into subsection (a)(1) with a descriptive introduction. Rule 9014(a)(4) is

ambiguous. Opposes singling out valuation reports as a specific form of evidence to be provided (all relevant evidence should be required). Could a notice be combined with a motion to comply with Rule 9014(c)? Rule 9014(c)(1) could be construed to require service of the proof of service (should each party served receive a copy of the service list?). Opposes Rule 9014(g) in that it requires service on any other party entitled to service under federal law or these rules -- is this intended to include Rule 2002 notice lists? Responding parties should not be required to file and serve proposed orders. Concerned that the proposal for interim relief under Rule 9014(f) could be misconstrued to suggest interim relief is authorized in all varieties of motions, not just where exigencies are normally thought to exist. May interim orders permit rejection of a contract or a sale of assets? Opposes the elimination of Civil Rule 43(e).

56. Hon. William A. Clark (on behalf of eight Bankruptcy Judges in the S.D. Ohio) (084):

Opposes proposed amendments to Rules 9013 and 9014. They will have an adverse impact upon all participants in the bankruptcy community. Especially opposes requirement to set hearing dates before a response is filed, and objects to the title of Rule 9014.

57. Hon. Alexander L. Paskay (on behalf of the Bankruptcy Judges of the M.D. Fla.) (085):

Opposes proposed amendments. They would severely undermine their ability to process and determine contested matters efficiently and expeditiously. The problems sought to be addressed by the amendments is not present in that district. Flexibility for courts to meet local needs is important. Lawyers are not confused over terminology. Encloses local rules and explains local procedures that work well. Opposes need to schedule hearings before response is filed (increases costs and labor needs). Opposes requirement to file supporting affidavits for all motions. Opposes Rule 9014(o) especially, and suggests it be revised to permit courts to modify procedures in local rules or general orders as may be necessary to enhance efficiency and economy in accordance with local conditions and circumstances.

58. George W. Ledford, Chapter 13 Trustee (S.D. Ohio) (086):

Opposes proposed amendments. They lack an understanding of chapter 13 administration, the voluminous amount of additional paper that will have to be filed in chapter 13 cases, and the impact on the court, clerk, debtors, and others. Most motions in chapter 13 cases are only between the debtor and the trustee and there should be no elaborate procedures required as contemplated by Rule 9014. Opposes requirement that both parties submit proposed orders. Rule 9014(i) provisions for status conference/hearings on all motions when a response is filed is an enormous imposition on the court, debtors, and their attorneys.

59. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

Unclear why consumer debtors do not file valuation reports. Time period for filing responses (5 days before the hearing) is different than response time under local rule (7 days). Proposed amendments in Rule 9014(i)(3) are welcome (the court may wish to have a separate motion day for preliminary hearings on stay relief and cash collateral motions).

60. Hon. Warren W. Bentz (Bankr. W.D. Pa.) (089):

Commends the Committee on this major effort, but offers specific suggestions for revising the proposals. Do not require supporting affidavits for motions or responses (provides 9 reasons for this comment, including that district courts do not require affidavits with initial pleadings). If affidavits are required, do not treat consumers differently than others. Agrees with the requirement for live testimony hearings if an evidentiary hearing becomes necessary ("The undersigned would respectfully disagree with those judges who perceive the Draft Rule 9014 as having an overbroad 'live hearing' requirement"). The elimination of Civil Rule 43(e) is not necessary, but not harmful. A subcaption to the motion should show that it is the movant versus the respondent (insert in Rule 9014(l) that the motion caption shall conform substantially to Rule 7010 and Official Form 16C or 16D, modified to show that it relates to the movant and respondent rather than plaintiff and defendant). The rule should provide for an order by default. Also, the language in the Committee Note saying that the rule may not be abrogated by local rule or general order should be set forth in the rule itself and the rule should state that local rules and general orders in conflict are suspended.

61. Sally S. Neely, Esq. (Los Angeles) (091):

While uniform rules are theoretically desirable, it is not prudent given significant differences among districts. The national rules should leave procedural rules regarding these motions to local rules, but should establish minimum procedural safeguards which can be amplified (not abrogated) by local rule. The federal rules should require that local rules be written and explicit. The national rules should state only what differences are permissible for consumer debtors and leave to local rules whether to adopt any of those differences. Rule 43(e) should not be abrogated and judges should be able to require that direct testimony be by affidavit if cross-examination is permitted; the rule should make clear that, if there are material disputed facts, they must be determined after live testimony. Also, replies should be permitted if allowed by local rule.

62. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

In general, supports these amendments, but offers criticism to assist in cleaning up some points that detract from the quality of the product. Opposes the title "administrative proceedings." Regarding special treatment of consumer debtors and referring to Judge March's comments (#008), he disagrees that a court cannot grant or deny a motion without having admissible evidence (affidavits), but agrees that the rules should be

uniformly applied to all (consumers should not be treated differently - the judge should be trusted to make exceptions when appropriate). Appraisals and other documentary evidence attached to motions must be authenticated to be admissible. While trial-by-declaration is not done in his district, he cannot see why it can not be allowed if the court wants it. Rule 9014(i) should not permit the parties by consent to turn a status conference into a trial unless the court concurs first (courts will lose control over docketing). Confused by Rule 9014(i)(3) which provides that for a few types of motions the first hearing will be the trial (if parties may consent or the court can order it anyway, why is necessary to put Rule 9014(i)(3) in?).

63. Hon. Terry J. Hatter, Jr. (District Judge, C.D. Cal.) (093):

Opposes the provision that allows consumers to file motions without affidavits or any other evidence and the provision on status conferences (time consuming and expensive to have hearings only to determine if there are issues of fact). The rule should require all parties to file affidavits and declarations which would allow the court to dispose of most motions at the initial hearing. As in district court, live witness hearings should only be required where the affidavits conflict on a material issue of fact. Opposes deletion of Rule 43(e) for motions. Allowing valuation reports to be filed without an affidavit from the appraiser is hearsay under the Evidence Rules. The five-day response time for motions is too short for the court and parties to prepare for the hearing. The amendments will lead to lack of uniformity between bankruptcy and district court practice, which is especially troubling since bankruptcy cases may be handled in district court.

64. Hon Terrence L. Michael (Bankr. N.D. Okla.) (094):

Opposes the requirement that a hearing be scheduled in every matter and opposes the title to Rule 9014.

65. Bankruptcy Judges of S.D. Cal. (095):

The amendments will increase court congestion by creating phantom motion calendars and increasing expense to litigants. Opposes scheduling hearings for all motions (they schedule hearings only if a response is filed and the opponent must obtain the hearing date). The 5-day response time is too short for the court to determine if it is opposed and to prepare to rule, and deprives the court of a reply memorandum (local rule provides 14 days after service of the motion for a response and a reply is due 7 days after service of the opposition or 3 days before the hearing date). Time limits should be left to local rules. Opposes exception for consumer debtors regarding affidavits and valuation reports, and questions why valuation reports need not be tested for admissibility under Evidence Rules 701, 702, and 901. Also, questions why affidavits must comply with Civil Rule 56(e), but that they are not usable in subsequent evidentiary hearings under Rule 9014(j). Reads the elimination of Civil Rule 43(e) to deprive the court of the ability to use

depositions for direct testimony subject to cross-examination (cites *In re Adair*, 965 F.2d 777). Proposed Rule 9014(f)-(j) attempts to solve what may be an educational problem by a procedural rule; that genuine issues of fact may not be tried without testimony. Finally, large mega-cases attracting national practitioners have become a memory (chapter 11 cases are only 0.004 % of their cases) and national uniformity should not be a goal especially when local rules responsive to local conditions have been adopted with consultation with the local bar.

66. Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks (096):

Rule 9014 (and Rule 9013) require scheduling hearings unnecessarily and will increase costs and delay cases. In these times of more efficient case processing measures and improving automation systems, these changes are a step backwards for parties and the courts.

67. Michael L. Molinaro, Esq. (Chicago) (097):

Opposes Litigation Package as complex, confusing, and cumbersome. Opposes 20-day notice period as too long. It will slow down the bankruptcy process.

68. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

First, expand the service list to include examiners, future claims representatives, representatives and committees of retirees appointed under Code section 1114, parties that have filed a notice of appearance under Rule 9010(b), and any other entities designated by the court. Second, expand the list of motions for which an evidentiary hearing is held at the initial hearing in lieu of a status conference to other kinds of motions that ordinarily require expedition (if the movant "reasonably anticipates that the first hearing will involve the taking of evidence", such as motions to approve the sale or lease of property, for adequate protection under section 363(e), to direct the appointment of a trustee under section 1104(a), to convert or dismiss a chapter 11 case, and to increase or reduce the exclusivity period under section 1121). They object to Rule 9014(j) which renders Rule 43(e) inapplicable (affidavits are commonly used for direct testimony subject to cross-examination). Clarify that the court may grant interim relief in connection with a Rule 9014 motion. Recommends making uniform the time for a hearing, whether or not interim relief has been granted, and clarify that time is not expanded for service by mail (specifically supplant Rule 9006(f)). Would prohibit service by mail where interim relief is sought or expedited evidentiary hearing will be held. See black-lined draft enclosed with the comment showing recommended revisions to the published draft.

69. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

Opposes the proposed rule. Opposes requirement to pre-set hearing dates (inefficient). Strongly urges that courts be allowed to maintain their present ability to manage cases as they see fit. The rule should not treat consumers differently regarding affidavits and valuation reports. Opposes title to Rule 9014 (initials "AP" is now used as a code for adversary proceedings in court files). The proposed rule will increase court administrative and judicial time and the number of personnel required.

70. Hon. William Greendyke (Bankr., S.D. Tex.) (101):

Opposes the requirement that a hearing be scheduled for every Rule 9014 motion, and opposes the requirement that a hearing be held when an objection is filed. In his district, most motions are submitted without objection. Even when an objection is filed, the court often rules without the need for a hearing. The amendments will increase clerical time.

71. Hon. David A. Scholl (Bankr., E.D. Pa.) (103):

Opposes requirement for affidavits and valuation reports for every motion (too costly, burdensome, and will cause unfair prejudice to unrepresented movants). Opposes multiple-step hearing process (would prefer one hearing rather than a separate initial hearing/status conference). Opposes restriction on using affidavits at the hearing (courts should have option to utilize affidavits as opposed to live testimony). The proposed amendments appear to effect improvement in the procedures only as to motions in large chapter 11 cases.

72. Dennis J. LeVine, Esq., on behalf of Tampa Bay Bankruptcy Bar Assoc. (104):

Opposes proposed Rule 9014 (the current version works well in that district and should not be changed). Although uniformity is a worthy goal in general, significant diversity among the districts in the volume and travel time between courts justifies local variation in motion practice. Opposes requirement that affidavits be filed with every motion (unnecessary and costly), need to schedule a hearing for every motion, and unnecessary hearings.

73. Terry Bird, Chair, Los Angeles County Bar Assoc. Federal Courts Committee (105):

Opposes provisions exempting consumers from requirements for filing affidavits and valuation reports. Suggests that live testimony be required only to resolve genuine issues of material fact raised by conflicting declarations, and therefore it is necessary for all parties (including consumers) to file affidavits/declarations. Rule 9014(j) (rendering Civil Rule 43(e) inapplicable) is ambiguous (could be read to mean that live testimony is required even if affidavits do not conflict on any material fact), and should be revised to read: "Rule 43(e) F.R.Civ.P. applies to an evidentiary hearing on an administrative motion. However, the court shall take live testimony whenever there is a genuine issue of

material fact raised by conflicting declarations."

74. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

Opposes title change (prefers "Contested Matters"). There is no need to refer to Code sections 301-303 in Rule 9014(a) (because these are covered in Rules 1010-1013 and these are referenced in Rule 9014(a)(2)). The matters covered by proposed Rule 9013 should be incorporated into Rule 9014(a)(2). Valuation reports must be attached to the motion or response only if prepared at the time, which promotes gamesmanship; prefers tracking the expert disclosure provisions of the Civil Rules so that either an advance report will be required to support any expert testimony, or a mandatory disclosure of expert testimony is made if there is no report (and if filing of a valuation report is deferred, then any such report must be filed and served at least 5 days before the hearing). Suggests Rule 9014(d)(1) and (g) be revised to *require* a response (not to make it optional) because, if optional, the respondent could deprive the movant of the right to discovery pursuant to Rule 90149(h)(4) by not filing a response. Rule 9014(g) should require entry of the order (mandatory), not "may" enter an order (courts cannot spend the time reviewing unchallenged motions). Suggests revising (h)(3) and (4) so that it allows discovery servable and returnable either (a) when the respondent's discovery is answerable if served prior to filing a response, or (b) 10 days after the date a response is due (the traditional 30 days). The discovery schedule in the (h)(3) and (4) is not workable. Opposes the 2-hearing approach in Rule 9014(i). Concerned that every movant will request that the initial hearing be an evidentiary hearing (as permitted by court order under Rule 9014(i)(B) (which will produce more court rulings). In Rule 9014(i)(3), change "against property of the estate" to read "against the debtor or property of the estate." Rule 9014(o) will produce many more requests for relief to revise procedures; prefers a rule similar to Rule 8019 which allows rules to be suspended in exigent circumstances (which is almost never invoked).

75. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Opposes requirements that an affidavit accompany each motion (unnecessary), that proposed orders be filed with motions (increases paperwork), that hearings be scheduled for every motion (much less efficient), that status conferences and a final hearing be held where a response is filed (mandatory status conferences will be unnecessary in many instances).

76. Ninth Circuit Bankruptcy Clerks' Liaison Committee (110):

Opposes the filing of multiple alternative proposed orders (requires court resources to track and route proposed orders that will be discarded or ignored). Opposes need to schedule hearings on all motions. Although some courts schedule matters for a hearing (such as relief from stay motions), others do not. These differences are based on local

factors such as caseload volumes, number of pro se debtors. Depriving courts of these decisions based on local factors is inefficient. Many courts have developed efficient procedures for setting hearings and sending notice of tentative court rulings. These local practices will not be permitted under the amended rules and will be replaced by a sequence of emergency notices to be sent by the court (see Rule 9024(g) which allows the court to hold a hearing when no response is filed, but only if the court gives the parties notice). This will increase the burden on the clerks' office. They also oppose the title to Rule 9014 (will create confusion and is unnecessary).

77. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

Opposes Rule 9014 as too complex (functions as a barrier to entry to bankruptcy practice; a labyrinth of 53 subparagraphs consuming 224 lines of text and containing traps for the unwary), the nomenclature is too confusing, the abolition of Civil Rule 43(e) is unwise, and the importation of "genuine issue as to any material fact" and related summary judgment concepts will materially increase actual litigation, expense and judicial workload (borrowing summary judgment standards will introduce into motion practice difficult issues that have plagued the district courts for decades). He would not expect the rule to lead to greater national uniformity; the rule is so intricate that it may have the unintended consequence of precipitating local expedients, while driving them back underground to the detriment of all who abhor secret unwritten local rules. Opposes the title change ("contested matter" is well understood and is better left untouched). Rule 43(e), which gives judges flexibility, should be retained for contested matters (once it appears that oral testimony will be appropriate to resolve a factual issue, most judges will accommodate the need). Perhaps permit a party to demand an evidentiary hearing with evidence to be taken under Civil Rule 43(a), coupled with an attorneys' fee provision to deter mischief. .

Favors Rule 9014(h) which shortens time periods for discovery. Notes that Rule 9014(g) takes sides on an unsettled issue by stating that the court may order relief without a hearing if no response is filed. "Many judges decline to sign orders on that basis and, instead, require that it be demonstrated that the movant is entitled to the requested relief as a matter of law and fact."

78. Linda W. Simpson, Bankruptcy Administrator (W.D.N.C.) (113):

Concerned about the increased number of pleadings and hearings/conferences that will be required. This will cause delays and increased costs to litigants and the courts.

79. Executive Office for United States Attorneys (115):

Opposes changing the title of Rule 9014 and the new requirement that proposed orders be filed (local rules in C.D. Cal. forbid submission of draft orders as they are a burden on the

clerk's office). Rule 9014(b)(3) should be revised to delete the consumer exception (which allows consumer debtors to rely on creditors' investigation). Creditors should not have to pay for the debtor's case. Also, the amendment confuses the Rule 9011 issue since, if no evidence is required to be presented by the consumer, such a case could never be found to be frivolous. They suggest that "supporting affidavits" in Rule 9014(b)(3) be changed to "admissible evidence" so that the rule is not limited to affidavits. Revise Rule 9014(d)(2) and (k) to require service of oppositions and orders only on the moving party and those entitled to a response by the Code or Rules (but not to all those who received the motion, which could be hundreds or people), or no more than those in Rule 9014(c)(1)(A)-(F). Parties wanting copies can request the movant to include the party's name on papers. Opposes reduction in discovery time periods in Rule 9014(h)(3). Rule 9014(h)(4), which provides that discovery may not commence until a response is filed, should clarify that courts can opt out of this rule.

80. William J. Barrett, Esq., on behalf of 15 bankruptcy lawyers in Chicago (117):

The stated goal of national uniformity is overstated and overlooks other concerns. In Chicago, the Local Bankruptcy Rules conform to the District Court Rules. The need for procedural uniformity within a district is more important than uniformity among different districts. They disagree with the view that the current rules provide insufficient procedural guidance. The proposed amendments assume that most matters will be contested, which is a faulty premise. Opposes the requirement that affidavits be filed to support every motion (creates delay and costs). Relief in most situations should be available without an affidavit and in less than 20 days. To shorten the 20-day period (which is too long), a separate motion must be filed (resulting in multiple motions). The new Rule 9014 will materially alter the administration of bankruptcy cases in the their district. They urge that Rule 9014 not be adopted. If adopted, courts should be permitted to opt out entirely or the judge should be able to order that affidavits and notice requirements of Rule 9014 do not apply.

81. Bankruptcy Subsection of the Colorado Bar Association (119):

Colorado lawyers who practiced in other districts with rules similar to the proposed Rule 9014 have found them unwieldy, costly, and time consuming. They have "motion days" which are little more than "cattle calls" where counsel wait for hours. The large geographic size of Colorado would exacerbate the problems caused by Rule 9014. Under the proposed Rules, there is insufficient time for discovery, and discovery when none is necessary would be encouraged (in Colorado, there is no discovery by any party until a response is filed). Requirements for affidavits accomplishes little because the rule prohibits the determination of motions by affidavit. They object to the requirement that the motion papers (including affidavits and valuation reports) must be served on all creditors (rather than just sending a one-page notice of motion). They are especially concerned about additional costs that will result from Rule 9014 (additional papers, travel

time and expenses due to more hearings, etc.).

82. Thomas M. Mathiowetz, Esq. (Englewood, Colorado) (120):

This rule is confusing. Under Rule 9014(a), a lawyer must check at least 18 different Code sections or Rules to determine if the rule applies. Opposes the requirement that the motion and response must be served on all creditors, with affidavits and other papers (increases expense). The exception for consumer debtors regarding affidavits actually disadvantages consumers because without an affidavit it may be difficult to show the existence of a genuine triable issue of fact, and creditors may obtain relief as a matter of law. The rule would not allow telephonic status conferences, which will cause more expense for parties.

The discovery time is reduced to 10 days, and the Committee Note indicates that the 3-day mail rule does not apply because the period is not triggered by service of the notice. The basis for this statement is unclear to me. For example, the time to respond to interrogatories is 10 days, but from what date? If served by mail, it appears the 3-day mail rule in Rule 9006(f) would apply because the time is triggered by service of a paper (the interrogatories). If it is intended that the 3-day mail rule not apply, the rule should so state.

83. Phoenix and Tucson Chapters of the Federal Bar Association (122):

To ensure that Rule 9014 is not construed to eliminate evidentiary or proof requirements under other rules or the Code, Rule 9014(b)(1) should be revised to insert "legal and evidentiary" before "grounds for relief." They disagree with different treatment of consumers, and disagrees with the requirement to file affidavits (delete Rule 9014(b)(3)(B) and (d)(4)(B) in their entirety). Rule 9014(e) should be revised to include "A motion or response may be supported by affidavit." They suggest the 10-day discovery periods in Rule 9014(h) be changed to 15-day periods (10 days is too short and will result in more motions to extend the time). In Rule 9014(h)(4), they suggest using "movant or proponent" and "respondent or objector" terminology to cover situations where the relevant party is neither a movant or respondent. Suggests that Rule 9014(j) be amended to provide that affidavits may be used for direct testimony so long as the witness is available for cross-examination (specific language is offered) either live or by deposition. They cite two cases that show that affidavits can be used at trial if witnesses are available for cross-examination. Rule 9014(i)(3) should be revised to delete "any act against property of the estate."

84. William R. Keleher, Board Chair, on behalf of Board of Directors of the Bankr. Law Section, State Bar of New Mexico (124):

Opposes the requirement for filing affidavits (unnecessary; increases costs; jurisdictions that need them may require them by local rule). Regarding valuation reports, clarifying language should be added to state that it is not necessary to delay filing a Rule 9014 motion while awaiting a valuation report (even if valuation is expected to be an issue). Opposes the requirement for setting a hearing date for all motions (adds unnecessary complexity and work to the existing procedures in New Mexico, where hearings are scheduled only if there is an objection). Regarding the 10-day periods for discovery, these are too short for most parties to respond to discovery requests (it will require many motions for extensions). Leave current discovery time periods in place (subject to the rare motion to shorten the period).

85. Hon. Arthur N. Votolato (Bankr. D. R.I.) (125):

Local rules will still be needed to establish response times for matters listed in Rule 9014(a) as not governed by Rule 9014. This will cause more confusion because there will be many more/different response times. Eliminate requirements for both parties to file proposed orders. The exceptions for consumer debtors is unfair and unsupported. Opposes requirement that affidavits be filed with every motion and response, and the requirement that hearings be scheduled for every motion. The provision in (g) that allows the court to enter an order without a hearing if a response is not filed within 5 days before the hearing is unworkable - 5 days is not enough time to notify parties that the hearing is cancelled, etc.

86. Douglas P. Taber, Esq. (Chicago) (126):

These changes are unnecessary and undesirable. National uniformity in motion practice is not needed or practical. Rejects the premise that the existing rules are inadequate. The changes will be burdensome in small cases and will increase legal expenses. The local rules in N.D. Ill. work very well. The proposed amendments assume that most matters are contested. Affidavit requirements are onerous; 20-day notice period is too long and will cause delay.

87. Hon. Stephen S. Mitchell (Bankr. E.D. Va.) (129):

Applauds the effort to distinguish among motions within adversary proceedings and contested matters, motions concerning relatively routine matters of estate administration, and motions that affect substantive rights, and to ensure a reasonable level of due process. Supports uniform 20-day notice period, requirement of a written response, and requirement for live testimony at an evidentiary hearing. Supports national standardization to replace the patchwork of local rules that are often a trap for out-of-district litigants. He supports the 2-hearing approach in Rule 9014, and likes the provisions in Rule 9014 regarding valuation reports. That said, he objects to the title of Rule 9014 (suggests "adjudicative proceeding" or keep "contested matters"), and also

objects to the provision that the motion be designated as such (prefers "motion for sale free and clear of liens", etc). He also thinks that the requirements for affidavits be dropped, but not because they are burdensome. Rather, he thinks affidavits are usually conclusory, the attorney's words rather than that of the witness, and too often leave out information the judge wants to know.

88. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

Opposes requirement that a hearing be scheduled for all motions (will result in a major and unnecessary restructuring of the way many courts manage their hearing calendar). The rule will require major changes in automated systems and will impact negatively on bankruptcy case processing measures and the bankruptcy judgeship formula. Opposes requirement for affidavits. (will cause increased administrative expense).

89. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

The reason to exempt consumer debtors from affidavit and valuation report requirements is unclear and they do not believe special treatment should be necessary for consumer debtors especially if represented by counsel. Concerned that Rule 9014 does not leave room for expeditious relief before 20 days has expired which may be necessary (ie, motion to appoint chapter 11 trustee). The provisions on interim relief are not sufficient for that purpose. The general content of Rule 9014(n) ("Transmission to United States Trustee") should be incorporated under Rule 9014(c)(1) where all the other parties to be served are named (so that service on the UST is not overlooked. It is also consistent with the way services is outlined in Rule 9013

90. Peter H. Arkison, Esq. (Bellingham, WA) (132):

This rule may work well in chapter 11 cases, but will create an unnecessary monster in the typical chapter 7, 12, or 13 case. If a chapter 13 debtor needs a 3-month moratorium of plan payments because of temporary unemployment, the attorney fees and notice requirements will probably result in the failure of the plan. Somewhere between Rules 9013 and 9014 there is a need for a quick, simple procedure that allows for the entry of orders which will not have a major impact upon the case but that are necessary for its successful administration.

91. Tammi M. Hellwig, Esq. (on behalf of Bankruptcy Section of his law firm, which has offices in N.Car., Georgia, and D.C.) (134):

While an attempt at uniformity makes sense, Rule 9014 is too complicated to permit those practicing to follow the same procedure because there are just too many varying procedures depending on the document label. Due to so many "labels", it will be difficult to determine which category applies to a particular document. Also, the use of affidavits

may be appropriate and efficient in some circumstances and should not be completely barred for an evidentiary hearing.

92. Bruce A. Emard, Esq. (Sacramento, CA) (135):

Favors the proposed rule as an improvement regarding affidavits and witnesses, but only if Rule 9014(i) is construed to mean that, at the status conference, the judge has discretion to determine an appropriate procedure to resolve factual questions either by affidavit only, or by affidavit with cross-examination by live testimony, or some other procedure fitting to the situation in view of the amount at stake, the complexity of the matter, and the sophistication of the parties and their counsel. If live witnesses are needed at every evidentiary hearing on factual issues, it will become more expensive and time consuming and he would oppose it. Regarding Rule 9014(i)(3) (relief from stay), there is an ambiguity because it appears to permit witnesses to testify at a preliminary hearing on a motion for relief from the stay. If a party is permitted to simply show up with a witness at the preliminary hearing on a stay motion, then unnecessary uncertainty and expense will ensue.

93. Alan Steven Wolf, Esq. (Newport Beach, CA) (136):

The writer's firm represents approximately one-half of the top 50 mortgage banking institutions in the country and have been involved in over 25, 000 motions for relief from the stay in California and Nevada. He opposes elimination of Civil Rule 43(e). It is not unusual for a judge to have 50 or more hearings on relief from stay every day and it is important that they be able to determine these based on declarations. Requiring live witnesses would be inefficient. Opposes exemption for consumer debtors from requirements to submit admissible evidence. Also opposes requirement to give notice under Rule 9014(c)(1)(F) to "any entity that has a lien or other interest in property ..."This will change Ninth Circuit case law by imposing a notice requirement regarding non-debtor parties. The Circuit has made it clear that the automatic stay is for the protection of the debtor and not for the protection of junior lienholders (In re Brooks, 79 BR 479, 481 (Bankr. 9th Cir. 1987)). While property interest holders other than the debtor may have a right to notice in a Chapter 11 case, there is no such right in Chapter 7 or 13. Finally, "[w]hile there is an opt out provision (proposed Rule 9014(o)), here in California the opt out would have to be made the rule instead of the exception, to do otherwise would cause the courts to grind to a halt."

94. Hon. E. Stephen Derby and Hon. Duncan W. Keir (Bankr. D. Md.) (146):

Requests that proposal be withdrawn and abandoned, or substantially revised. Opposes the title (demeaning, confusing). The basic problem is that proposed Rule 9014 will create more hearings and paperwork, and will reduce the court's control over its hearing docket. Opposes requirement to set hearing dates in advance of the motion (unworkable).

Motions for preliminary interim use of cash collateral and other emergency motions are not excluded from the 20-day hearing notice. Opposes the 2-hearing provision where the court is required to hold a hearing to determine if there is a reason to hold a hearing (waste of time; no available hearing time for such a mandatory hearing likely to have value in only one percent of the motions). Rule 9014(n) and 9034 are redundant. The inclusion of relief from stay motions in Rule 9014(i)(3) will negate the more simplified default procedure that they are proposing under local rule. The time to respond to a motion under Rule 9014(d)(1) is too short; if motion is served by mail, and allowing 3 days for mail (Rule 9006(f)), there is only 9 days (including weekends) for a respondent to prepare an answer. Also, opposes Rule 9014(b)(3)(A) requirement for an affidavit where the motion involves only legal issues (better to eliminate the paperwork).

95. Hon. Karen A. Overstreet (Bankr., W.D. Wash.) (147):

Opposes Rule 9014 and supports flexibility in determining whether she will hear evidence on a motion. For the most part, she is unable to hear evidence on her motions calendar because of high volume. It would be irresponsible to listen to testimony in a case while up to 30 lawyers are milling around, charging clients while waiting for their cases to be heard. It should be clarified in Rule 9014(i) that the judge will determine whether live testimony may be presented, rather than just the agreement of the parties. Rule 9014(i)(3) creates an unnecessary rule for stay relief and financing matters, and leaves unanswered the question of who decides whether and how live testimony will be taken at the preliminary hearing. Local rule provides that no live testimony is taken then. Otherwise, counsel will be underprepared or overprepared at the preliminary hearing. To the extent that Rule 9014(o) would prohibit the local rule, it should be rejected. Also opposes Rule 9014(j) (elimination of Civil Rule 43(e)) because it prohibits a judge from taking any testimony by way of affidavit. She advocates that judges should have discretion to take testimony by affidavit when appropriate and to have cross-examination of live testimony when credibility is an issue. "Each case is different. Judges must have discretion to fashion rules for evidentiary hearings that make sense and keep the costs down.

96. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

Opposes special treatment for consumer debtors under Rule 9014(b)(3) and (d)(3) (undesirable, raises equal protection concerns, disruptive to the courts, and raises costs for other parties). Opposes Rule 9014(j) (elimination of Civil Rule 43(e)) because, while courts occasionally decide motions based on affidavits when live testimony should have been taken, the proposed amendment will overload the courts with unnecessary testimonial hearings. In our view, the current procedure works reasonably well. Opposes shortening of discovery time periods to 10-days (troublesome for government agencies, especially when there is an objection to a tax claim; at least have an exception for discovery responses by governmental units or for responses in proceedings contesting a

claim). Finally, it would be helpful for the Committee Note to cross-reference to Rule 3007 or to otherwise indicate that the time limit for a hearing on an objection to claim is 30 days (rather than 20 days).

97. Hon. Burton Perlman (Bankr. S.D. Ohio) (149):

Supports comments on Rule 9014 submitted by Hon. William A. Clark (comment letter #084). Present Rule 9014 is simply and brilliantly conceived and works well. In his district, they apply the same procedures for Rule 9014 contested matters and for motions that arise in adversary proceedings, and that works well (no need to separate as proposed). The proposed rules are more complicated and include a mandatory requirement for a hearing which would be an unnecessary burden on the bench and bar.

98. Dean S. Cooper, Assoc. General Counsel, Feddie Mac (150):

Freddie Mac is the holder of thousands of mortgages on residential real estate. It opposes Rule 9014(d)(3)'s exemption for consumer debtors from the requirement to file affidavits and valuation reports when responding to a motion. It is unwarranted and will lead to unnecessary evidentiary hearings, costs, and delay. The court would have to hold an evidentiary hearing whenever the consumer debtor says "I oppose the motion." This would lead to abuse by consumer debtors. The existing procedures work well in this regard and should not be changed.

99. Gary B. Rudolph and Radmila A. Fulton on behalf of San Diego Local Rules Subcomm. (137):

If a party plans to use live testimony, the party should provide some notice of that in the moving papers or opposition. Rule 9014(n) should not limit service of papers to matters required by Rule 9034. Rule 9014(o) opens the door to a barrage of requests for amendments in particular cases. Opposes requirement that hearing dates be set in advance. The 5-day response time provides the court with little hearing preparation time. The lack of a response is problematic.

100. Hon. Phillip H. Brandt (Bankr., W.D. Wash.) (140):

Opposes title (prefers "Motions"). Make clear that motions leads to an order, not a judgment (which should be reserved for adversary proceedings). In 9014(b)(2), make the proposed order an exhibit so that it is not docketed separately. Instead of using "affidavit", use "affidavit or declaration" wherever it appears. In Rule 9014(b)(3), require an affidavit or declaration establishing the foundation for admitting the valuation report. Either provide for, or outlaw, responses. If provided for, the time schedule should be 25/10/5 for motion, response, reply. (or 30/14/5 because of Rule 9006(a)). Clarify that Rule 9014(c)(1)(G) does not entitle all creditors to the entire set of motion papers where

they are entitled to notice of the hearing. If consumers do not file affidavits, they will always lose at the "summary judgment" hearing under Rule 9014(i) (a perverse result). Opposes requirement for live testimony (elimination of Rule 43(e)), particularly when small amounts are involved (i.e., objection to a $500 claim). The prohibition in the last sentence of the committee note against abrogating Rule 9014 by local rule should be put in the text of the rule.

101. Hon. Robert E. Grant (Bankr., N.D. Ind.) (144):

Opposes Rule 9014 amendments. One must read at least 3 statutes and 16 other rules just to determine whether Rule 9014 applies to the matter at hand. Will cause unnecessary litigation over procedural matters, and will promote the perception that bankruptcy practice is an arcane area. Too much micro management. Opposes need to schedule hearings for every motion in advance. The one-size-fits-all-approach does not work. Also, perhaps treat some of these issues (ie, discovery) in a separate stand-alone rule.

102. Riley C. Walter, Esq. (Fresno, CA) (145):

Opposes Rule 9014. These changes are unnecessary and would bog down courts. Questions why is it good policy to hold live witness evidentiary hearings on motions where such testimony is not necessary. The rule will increases expenses to parties. It seems incongruous that the committee would consider a rule change that dramatically favors consumer debtors at a time when other parts of the public are seeking to reduce the number of consumer bankruptcy cases.

103. Lisa C. Fancher, Esq. (Austin, Texas) (151):

Opposes proposed amendments to Rule 9014. They are unnecessary and will increase costs and delay for her clients and for the court without any corresponding benefit. In particular, opposes requirement to file affidavits and valuation reports with a motion, and to set a hearing date before the notice of motion is served. Opposes abrogation of Rule 43(e) and opposes Rule 9014(o) which provides that Rule 9014 may not be abrogated by local rule.

104. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

It is unfair for the Rules to require a creditor to file a Rule 9014 motion for an extension of time, while allowing a debtor to obtain an extension (i.e., to file schedules) without notice. Opposes requirement for a Rule 9014 motion to extend the time to file an appeal (should be dealt with in Rule 9013). The requirement to file an affidavit for every motion is unwarranted and burdensome (require only if a response creates material factual issue). Opposes categorical prohibition against the use of affidavits at an evidentiary hearing (at

least allow for direct testimony as in the Microsoft case). Service provisions are unclear (especially interplay with Rule 2002; should provide notice to all parties that filed requests for all notices). Opposes requirement for initial hearing or status conference whenever a response is filed (hold only if parties disagree on whether there is a material issue of fact). Opposes requirement to set a hearing date for all motions (better to set one only if response comes in showing factual disputes).

105. Hon. Larry Lessen (Bankr. C.D. Ill.) (156):

Rule 9014 is confusing and incomprehensible. Consumer provisions probably raise constitutional issues. Many judges "including myself will apply the opt out provision under 9014(o) on every administrative motion they hear." He agrees with the editorial in the *Norton Bankruptcy Law Advisor.*

106. Howard J. Weg, Esq. (Los Angeles) (157):

Opposes Rule 9014 as unworkable, unnecessary and inappropriate. There is no reason to exempt consumers from the affidavit requirements or to force bankruptcy judges to hear live testimony in motion proceedings.

107. Catherine Steege, Esq. (Chicago) (158):

Adopts the comments submitted by certain members of the Chicago Bar Association opposing Rule 9014 amendments (see comment letter #117). At a minimum, an "opt out" should be added to allow judges the discretion to modify the Rule as necessary to accommodate local practice.

108. Paul J. Gaynor, Esq. (Chicago) (159):

Adopts the comments submitted by certain members of the Chicago Bar Association opposing Rule 9014 amendments (see comment letter #117). At a minimum, an "opt out" should be added to allow judges the discretion to modify the Rule as necessary to accommodate local practice.

109. David B. Altman, Esq. (Chicago) (160):

Adopts the comments submitted by certain members of the Chicago Bar Association opposing Rule 9014 amendments (see comment letter #117). It requires additional documents that will increase expenses for those that have to pay legal bills.

110. Janet L. Chubb, Esq. (Nevada) (161):

Opposes proposed amendments. The administrative proceedings concept is ill conceived

(in 1978 judges were taken out of the administration of the estate). There is no need to create a separate category of motions. Just figuring out what to call a motion will be time-consuming, expensive and confusing. Opposes the elimination of Rule 43(e); judges should have discretion to determine when live testimony is necessary. "We'll all become like Delaware, where nothing but live testimony is acceptable and the cost of trying any issue becomes so exorbitantly high that it's not worth it." Opposes requirement to file proposed orders (unnecessary and expensive). Opposes requirement to serve notice of the motion on all persons who may have liens or other interests in the subject property (will cause every stay relief motion regarding real property to be based on a title report or similarly researched document; and is not necessary because a stay relief motion is to get out of the bankruptcy case and state law will protect lienors). The phrase "if the lien or interest may be affected" is ambiguous (does it include a motion to dismiss or convert the case? Does this mean that a foreclosure is invalid if a lien creditor was not notified?). Also opposes the two-hearing requirement (leave it to the judge's discretion).

111. Hon. Paul B. Snyder (Bankr. W.D. Wash.) (163):

Title should be "motions." Providing valuation reports is a good change, but opposes exemption for consumers regarding affidavits, and opposes the requirement to serve notice on any party with a lien or other interest (will require title reports; better to require notice only to lienholders listed in the schedules). Opposes the 2-hearing approach in Rule 9014(i). Opposes Rule 9014(j) (which eliminates Rule 43(e)). Opposes the requirement for the clerk to serve notice of orders under Rule 9014(k) (unnecessary and extravagant). Delete Rule 9014(m). Favors Rule 9014(o) and says that Rule 9014 is so detailed and restrictive that local courts will exercise their discretion to "opt out."

112. Hon Bruce Fox (Bankr. E.D. Pa.) (164):

Opposes the amendments as too complex and costly to implement. It is not necessary to require an answer to a motion (filing an answer is the norm in every other court). Rule 9014 should expressly state whether or not the service by mail provisions of Rule 9006(f) apply.

113. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankr. Court (066):

The requirement to file affidavits is unduly burdensome and costly. Motions lacking supporting evidence are routinely granted when no response is filed. There is no reason to prohibit the use of affidavits at evidentiary hearings if the court deems the use appropriate. Rule 9014(i) must include a role for the court in scheduling an evidentiary hearing.

Rule 9017

See comments on Rule 9014(j) above (making Civil Rule 43(e) inapplicable so that live testimony will be required on issues of fact at evidentiary hearings).

Rule 9021

1. Hon. Phillip H. Brandt (Bankr. W.D. Wash.) (140):

> Rule 9021 should be changed, in the second sentence, to read: "Every judgment entered in an adversary proceeding *or dispositive order* in an administrative proceeding [or motion, or other nomenclature used] shall be set forth on a separate document."

Rule 9034

1. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

   In Rule 9034(f), the term "application" for compensation should be changed to "motion" for compensation to conform to the new terminology in Rule 2016.

2. Gregory S. Clore, Esq. (San Francisco, CA) (116):

   In Rule 9034(f), the term "application" for compensation" should be changed to "motion" for compensation to conform to the new terminology in Rule 2016.

3. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

   Appreciates the 3 new categories being added, but they are too narrow. It makes sense to condense related topics because the list is getting too long. For example, (h) and (i) could be collapsed to read "the appointment , election or removal of a trustee or examiner in a case under this title." Rule 9034(j) should be recast as "the formation of a creditors committee" (parties may seek to have a committee appointed as well as disbanded). Objects to the language proposed which is limited to "a review of the appointment" of the committee because several courts are of the view that they have no authority to review the UST's appointment and this language could suggest otherwise. .

COMMENTS ON "MISCELLANEOUS AMENDMENTS" (NOT THE LITIGATION PACKAGE)

Rule 1007(m):

1. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

> Rule 1007(m) is no rule at all. The words "if known" makes the rule precatory. The debtor will always be able to convincingly state that he or she did not know, so there is no incentive to attempt to identify the government agency, nor is there any sanction for failing to do so. Better no rule than a useless rule.

2. Arthur J. Fried, General Counsel, Social Security Administration (100):

> Opposes the proposed amendments to Rules 1007 and 5003 on government noticing, because they provide that a debtor's failure to comply will not affect the validity of the notice if the governmental unit has notice or actual knowledge in time to participate. While this may appear to protect the debtor, in practice it may result in adverse consequences, i.e., failure to give timely notice to the appropriate component of SSA may result in the continued collection of overpayments that normally would be suspended as a result of the automatic stay. Monthly Social Security benefits may be inadvertently withheld. Notice failures also will result in added time and expense to the courts because of contempt proceedings when the stay is violated due to poor notice of the case. Encloses the 2/28/98 memorandum of J. Christopher Kohn submitted to the Advisory Committee and considered at the Committee's March 1998 meeting.

3. Judith R. Starr on behalf of Div. of Enforcement, Securities and Exchange Comm. (114):

> Although the Committee should be commended for attempting to deal with the problem of providing notice to government agencies, Rule 1007(m) provides no incentive for compliance. The rule should provide that notice not made in accordance with its provisions shall not be effective.

4. Executive Office for United States Attorneys (115):

> There is no penalty for failure to comply with the requirement to identify the governmental agency through which the debt is owed. Failure to effectuate service correctly should mean that the affected creditor does not lose its rights. They suggest a revision so that if the U.S. is prejudiced by non-compliance, it shall extend the time for the government to exercise its rights.

5. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

Supports Rule 1007(m), but it seems counterproductive to tell debtors that willful failure to comply cannot affect their legal rights, particularly since the obligation to identify the specific unit of government applies only "if know to the debtor."

6. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

Delay action until it is possible to assess likelihood of new legislation, which may deal with these issues. The last sentence of the proposed amendment not only vitiates any impact of the changes, but makes it worse for the government. In most cases now, the government will succeed in arguing that a generalized notice (to "State of X") that is not sent to the proper agency is no notice at all. This rule would turn that result on its head.

Rule 1017(e):

1. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

Does Rule 1017(e)(1) permit the court to extend the time (in parallel with the preambular language of Rule 1017(e))?

Rule 2002(a)(6):

1. Peter C. Fessenden, Esq. (Brunswick, Maine) (016):

Suggests that the dollar amount ($500) in Rule 2002(a)(6) should be maintained. Also, whether or not the dollar amount is changed, "the rule should be amended to clarify that notice and opportunity for hearing on a fee application is required if the *aggregate total* fee application exceeds the threshold amount." Based on his experience as a chapter 13 trustee for over 18 years, even $500 can be a significant burden on debtors. The bankruptcy judges in Maine take seriously their responsibility to review fee applications; "inefficiency and padding are ferreted out and disallowed. Raising the level of unscrutinized fees to $1,000 may impose an unfair burden on those least able to afford it." Regardless of the dollar amount used, he comments that the existing and proposed rule is ambiguous -- are notice and hearing escaped if the *particular request* is less than $500/$1,000, or if the *total aggregate* fees to date are less than that amount? Especially in chapter 13, counsel could "fly below radar" simply by spreading out fee requests to receive court approval without any meaningful review. Rule 2002(a)(6) should clarify that notice and opportunity for hearing are waived only if the application indicates that the total aggregate fees do not exceed the dollar limit in the rule. "In all other respects, the Other Amendments are excellent and should be adopted."

2. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Supports the proposed amendment.

3. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

Supports the proposed amendment.

Rule 2002(j):

1. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

The proposed change will require notices to go to the government department or agency. What will happen if a debtor fails to identify the department and the clerk mails notices to all creditors? Is the notice ineffective? That would seem to be belied by case law under the current rules and Code section 523(a)(3). Also, it seems inconsistent with proposed Rule 1007(m) which provides that the debtor's failure to identify the department does not affect the debtor's legal rights. It is better that there be no rule on the topic than to have a rule which creates more questions than it resolves.

2. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

Supports the amendments to Rule 2002(j)(5).

Rule 4003(b):

1. Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) (070):

Revise Rule 4003(b) to clarify that an objection to an exemption is governed by Rule 9014. Also, further amend the rule to provide that the time limit for objecting to exemptions does not apply to chapter 11 cases and, in such cases, to permit the court to set a deadline.

2 Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Strongly agrees with the proposed amendments to Rule 4003(b) that will obviate the possibility of harsh results such as created in *In re Laurain*, 113 F.3d 595 (6th Cir. 1997).

3. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

Objects to the discovery schedule in Rule 9014, which would apply when there is an

objection to claimed exemptions under Rule 4003(b). An objector would not be able to obtain discovery if an optional response is never filed by the debtor. If a response is filed 5 days before the hearing, there would be insufficient time to obtain discovery before the hearing (Rule 9014 provides for a 10-day response time to discovery requests). The current Rule 9014 allows discovery immediately.

4. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Supports proposed amendments to Rule 4003(b), which will allow trustees additional time, if warranted, to file objections to claims of exemption. Trustees are sometimes forced to file objections even if they are unsure of the merits in order to meet the 30-day time limit. Some of these are subsequently withdrawn. The amendment will allow trustees more time to determine the merits of an objection before filing it.

5. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

Points out that the reference to an objection to claimed exemptions being filed by the "trustee or a creditor" is incomplete. Section 552(l) refers to a "party." They suggest a similar change here since the UST sometimes finds it necessary to object to a debtor's claim of exemptions, particularly in chapter 11.

6. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankr. Court (066):

Supports the proposed amendments to Rule 4003(b), but is concerned that the inclusion of this provision might, by negative implication, be deemed to preclude the court from granting extensions of exclusivity or the time to assume or reject nonresidential leases if the statutory time period expires where a timely filed request for extension is pending. We suggest that similar provisions be placed in the rules with respect to such requests and/or the language permitting enlargement of time in Rule 9006(b) be strengthened.

Rule 4004(c):

1. Hon. Christopher M. Klein (E.D. Cal.) (111):

Can the court extend the time sua sponte? Consider revising the rule to take into account undeserved discharges in cases that are eligible to be dismissed. There has been a problem when the debtor does not attend the meeting of creditors, which the trustee keeps continuing, and ultimately gets dismissed for failure to prosecute, but the discharge has been automatically entered under Rule 4004(c). Since section 349 does not provide that dismissal vacates the discharge, there is an opportunity for cynical manipulation in which a debtor gets the benefit of a discharge without giving up nonexempt property to creditors.

Rule 5003:

1.Bankruptcy Judges and Clerk of District of South Carolina (081):

The amendments will require significant administrative time and effort in the clerk's office for a product that is optional. It would be better to permit the court to solicit from all creditors, including credit card companies and governmental units, one address for noticing purposes.

2. Terrence H. Dunn, Clerk of the Bankruptcy Court (D. Ore.) (099):

Opposes this change, which would require extensive administrative effort in the clerks' office while stating that a failure to use the address in the register does not invalidate the notice. Expansion of the electronic noticing contract for bankruptcy courts will help eliminate the need for this proposal. The increasing number of pro se debtors will negate the effect of this rule since many are not sophisticated enough to check the register. If this rule is kept, the court should solely maintain these records on its PACER system rather than wasting time and money printing paper copies and mailing.

3. Arthur J. Fried, General Counsel, Social Security Administration (100):

Opposes proposed amendments for the reasons stated above (see Mr. Fried's comments relating to Rule 1007).

4 Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Supports Rule 5003 amendments because they provide certainty as to where to send notices to governmental agencies.

5. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

The concept of a clearinghouse for addresses is appealing, but details raise questions. Since updated only once each year, some addresses will be obsolete. The conclusive presumption of an obsolete address raises concerns especially in an era when the Postal Service seems to be getting less efficient at forwarding mail. If the address contains an error, is the conclusive presumption operative? The burdens on clerks may be greater than anticipated. Given the opportunity for misunderstanding when something does not happen when and as anticipated, this proposal should not be adopted in its present form.

6. Executive Office for United States Attorneys (115):

The register is a good idea, but multiple addresses for agencies are needed so that an agency can have different addresses for offices handling different types of loans. Suggests eliminating the information requirement enabling the user to determine which address is applicable. The failure to use the provided mailing address does not invalidate notice ,so the purpose of this provision is unclear and its effectiveness is uncertain.

7. Barry K. Lander, Clerk, on behalf of the Bankruptcy Clerks' Advisory Group (130):

   This rule would require extensive administrative effort by clerks' offices without a clear purpose because failure to use the specified address would not invalidate an otherwise valid notice.

8. Peter H. Arkison, Esq. (Bellingham, WA) (132):

   The register should be expanded to include local governmental units such as cities and counties.

9. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

   Concerned about the limitation that the clerk is not obligated to list more than one address for an agency. The IRS might want to use more than one address in the future (depending on the type of proceeding) as a result of the pending reorganization of the IRS along functional lines. While most clerks will cooperate, the proposed rule would give clerks the right to deny such a request arbitrarily. Proposes language that "the clerk may include more than one mailing address ..." (rather than "the clerk is not required to include more than one ...").

10. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

    Delay action until it is possible to assess likelihood of new legislation, which may deal with these issues. The register is a useful concept, but the restrictions on it make it less helpful (even harmful). Opposes excluding other states and municipalities, and limiting it to one address for each agency. Updating only once each year is not sufficient (forwarding addresses are limited in time, certainly less than one year). Since the address is conclusively presumed to be the correct one, if an agency moves and notifies the debtor, the debtor may still send notices to the old address (ie, room for abuse). It is important that it be accurate (updated) and mandatory (not optional), or it will be of little value. A properly constructed, updated, mandatory register that is on the Internet would be very useful.

COMMENTS ON OFFICIAL FORMS

1. Jay W. Browder, General Manager of Forms, Inc. (001):

   (a) Form 7, page 1, para. 2: It is unclear whether a debtor who is not engaged in business is supposed to mark "none" or leave blank the boxes labeled "None" in questions 18-25. In one sentence, it tells them not to answer questions 18-25, and in the next sentence it says to mark the box labeled "none" if the question is not applicable.

   (b) Form 7, Question 10: It has one section to it and yet it has a section "a" as though it were supposed to have a section "b"

   (c) There are no comments on new questions in Form 7.

2. Thomas J. Yerbich, Esq. (Alaska) (049):

   Form 7, new Question 16: Suggests including Alaska in the list of community property states. This year Alaska passed the Community Property Act which allows married couples to elect, by a Community Property Agreement or a Community Property Trust, to treat some or all property as "community property." This is voluntary and the extent to which spouses may elect to convert property to community property will not necessarily be uniform.

3. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

   Supports the proposed amendments to the Official Forms, except for the new Exhibit C to Form 1 (voluntary petition). Form 1, Exhibit C, will require a debtor to make certain disclosures regarding property that "poses a threat of imminent and identifiable harm to public health or safety." While this is a laudable goal, they suggest that this be revised to require the debtor to identify such property only if a governmental agency has determined or alleges that the property poses such a threat, or which the debtor has admitted might have such characteristics. This should result in the desired disclosures, without requiring debtors to concede liabilities that may otherwise be the subject of dispute.

4. Hon. Christopher M. Klein (Bankr. E.D. Cal.) (111):

   The language of Exhibit "C" to the Voluntary Petition raises questions. Competent lawyers do not let clients admit that property poses a threat of imminent and identifiable harm to public health or safety except in clear-cut situations. Whether there is such a threat is mostly a matter of opinion and there is often a dispute on that issue. More helpful information might be obtained if the question were to be revised to ask whether anyone or any public entity contends that any of the debtor's property poses such a threat.

5. Sandra Connors, Director, Regional Support Division, Office of Site Remediation Enforcement, U.S. Environmental Protection Agency (128):

   Supports the proposed amendments to Form 1, Exhibit C (Voluntary Petition), and Form 7, Question 25 (Statement of Financial Affairs). These will result in fuller disclosure and improved notice of environmental problems that may need to be considered during the administration of the bankruptcy case. The amendment to Form 1 will help identify threats to public health and safety that need to be addressed promptly.

6. Peter H. Arkison, Esq. (Bellingham, WA) (132):

   Official Form 1 would be more user friendly if the name and address of the attorney for the debtor were shown on the first page. The proposed addition of Exhibit C is a good idea; it would be more useful to trustees if it also indicated what assets, if any, need immediate attention.

7. Stephen J. Csontos, Sr. Legislative Counsel, Tax Division, U.S. Dept. of Justice (148):

   Supports the proposed changes to Form 7 (Statement of Financial Affairs).

8. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

   Form amendments are generally helpful, but suggests that if the debtor files the Exhibit C to Form 1, or answers the environmental questions (no. 25) on the Statement of Financial Affairs, it should be required to serve the petition and those schedules on the relevant environmental agencies. It is helpful that the U.S. Trustee knows of a possibility of imminent harm but that information should also go to the environmental agencies that will have responsibility for dealing with those problems.

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules

FROM: Jeff Morris

DATE: February 3, 1999

RE: Public Hearing on Proposed Amendments

This report describes the oral testimony presented at the public hearing on the Proposed Amendments to the Bankruptcy Rules held at the Federal Judicial Center in Washington on January 28, 1999. Attached to the report is the list of witnesses who appeared at the hearing with a cross-reference to the written commentary they had previously submitted to the Committee. Also attached are copies of the commentaries supplied by several of the speakers in support of their oral testimony.

The hearing commenced at 1 p.m., and the first three witnesses presented their testimony via video conference. The first speaker was the Honorable Barry Russell, United States Bankruptcy Judge for the Central District of California. Judge Russell's appearance was on behalf of the Los Angeles Chapter of the Federal Bar Association. Judge Russell asserted that the litigation package offered by the Committee was unnecessary because the existing rules work well. He suggested that some variety in motion practice throughout the United States is not inappropriate. He indicated that the local rules in Los Angeles work well, but he would not propose to export those rules to other districts. He did assert that local rules should be made public and that association of local counsel along with publication of local rules should resolve any unfairness, whether perceived or real, felt by out-of-town counsel. Judge Russell also spoke in opposition to proposed Rule 9014(j) which excludes Civil Rule 43(e) from evidentiary hearings on administrative motions. Finally, he asserted that the exclusion of consumer debtors from the list of parties who are required to submit affidavits under proposed Rule 9014(b)(3) was ill advised.

The Honorable Kathleen March, also of the Central District of California, spoke second. She asserted as well that Civil Rule 43(e) should not be abrogated in bankruptcy proceedings. She argued that bankruptcy judges need to be resolving matters on the basis of admissible evidence, and she asserted that some of the proposals would reduce the likelihood that admissible evidence would be available to the court. She reiterated her written commentary in which she offered a substitute Rule 9014(i). Thereafter, Judge March joined with Judge Russell by noting that consumers should not be exempt from the requirement that they submit affidavits in support of valuation assertions. She argued strenuously that judges ought not to be guessing as to the results they reach, but rather should base their decisions on admissible evidence. In response to a question from Professor Klee, Judge March indicated that she would prefer adoption of amendments to the rules, as adjusted by the changes she would suggest, rather than to leave the rules as they are. In response to a question from Judge Small, Judge March asserted that her proposals differ from the Committee's in that

consumer debtors would be required to support their valuation claims with appropriate affidavits and that the standard for reaching decisions in the Committee's proposals was more in the nature of a summary judgment evaluation which she believed would lead to too many hearings because relief would rarely be granted.

The final speaker by video conference was the Honorable Robin Riblet, also a bankruptcy judge in the Central District of California. Judge Riblet was appearing on behalf of the 21 bankruptcy judges from that district. She serves as the Chair of the Rules Committee for the district. Judge Riblet took issue with the Committee's proposals which she viewed as an attempt to virtually ban local rules. In her view, local rules operate properly in most places to assure that the process runs smoothly. To prevent surprise regarding local rules, Judge Riblet suggested that requirements be put in place for the publication of all local rules on the website of the Administrative Office of the United States Courts or in some similar location. She also noted that proposed Rule 9014(g) would create problems in her district. In her view, insufficient time was permitted under the proposed rule to notify the appropriate parties of the cancellation of hearings. The volume of cases and filings in her district could lead to insufficient time for judges to make carefully reasoned decisions as well as to be fully prepared for hearings that would be held under the rules as proposed. She notes especially the difficulty presented in pro se cases. Frequently, unrepresented debtors appear at hearings without having filed any responses to the pleadings filed by creditors. Notwithstanding their failure to respond in a timely fashion, they sometimes have good reasons to oppose the relief being sought against them. In those instances, Judge Riblet indicated that she and other judges listen carefully to the pro se debtors in an effort to ensure that a just result is reached. If strict time deadlines are adhered to, however, those debtors would be prevented from presenting their positions to the courts. She suggested as well that longer lead times are necessary under proposed Rule 9014(c)(1) and (d)(1). Once again, she asserted that simply moving the papers throughout the courthouse takes several days in extremely busy districts. This would make it difficult, if not impossible, for the judges to have a full file to review in a timely fashion prior to hearings. She suggested that if the system were to remain as proposed, that the deadlines be 28 days prior to the hearing for motions, 14 days prior to the hearing for responses, and 7 days prior to the hearing for any replies. Judge Riblet also suggested that the provisions for the submission of proposed orders will cause additional confusion and expense. She asserted that both sides would be incurring the cost of preparing these orders, although the final order might not look anything like either of the proposed orders. As regards Rule 2014, she suggested that the proposal was unworkable. She indicated that the judges of her district were opposed to requiring that motions for the appointment of counsel be set for hearing. She indicated that dozens of these applications are filed weekly, and generally they are approved without objection. Finally, she suggested that under proposed Rule 9013(c) that applicants be required to file affidavits stating that they have properly served the application on the necessary parties, as well as stating that no opposition has been received to the application.

The next speaker was the Honorable Susan Pierson Sonderby, who spoke on behalf of the bankruptcy judges for the Northern District of Illinois. Judge Sonderby's comments followed generally the discussion contained in her written statement submitted for the hearing. She

challenged the Committee's evaluation of the survey conducted by the Federal Judicial Center, as well as the survey itself. She asserted that the finding of widespread dissatisfaction with the bankruptcy rules was erroneous. Judge Sonderby also offered several hypothetical situations to test the efficacy of the proposed amendments to the rules. In each instance, Judge Sonderby suggested that the proposed rules would extend the time it takes to complete matters and would increase the costs to all participants in the process. She suggested instead that the Committee establish adequate standards of notice and set out the means to accept affidavits and live testimony in an effort to provide the courts with sufficient evidence on which to base decisions. She suggested the publication of local rules, as well as redoubled efforts to make local rules consistent with district court rules.

The next speaker was the Honorable Leif Clark from the Bankruptcy Court for the Western District of Texas. Judge Clark, appearing on behalf of all of the bankruptcy judges of his district, suggested that many of the proposed amendments to the rules would be counterproductive in his district. He cited the peculiar characteristics of his district as being geographically among the most widespread, as well as containing several urban areas. He indicated that the district has been extraordinarily successful in managing its case load, notwithstanding understaffing both in the clerk's office and on the court itself. He set out a number of ways in which the local practices in that court enhance the efficiency of the process. Among the things he was most emphatic about were efforts in his district to limit the number of docket entries required in cases. As an example, he noted that completed ballots on Chapter 11 plans are sent to the plan proponent rather than to the clerk. The plan proponent then files a single notice setting out the tabulation of the ballots. This enables the clerk to make a single docket entry rather than a separate docket entry for each ballot that is received. Along those lines, he also touted the "negative notice" system which permits courts to enter orders without the necessity of a hearing on a number of matters. My recording of his numbers may be slightly off, but Judge Clark indicated that with 480,000 docket entries in his district last year, there were only 30,480 hearings set. He stated that requiring hearings to be set, as would be the case under the proposed amendments, would increase dramatically the number of docket entries required. He estimated the number of those docket entries and, with the help of the court clerk, determined that each docket entry requires approximately 6 minutes of work. That costs approximately $2.80 per docket entry. Ultimately, he estimates that the change in the rules would require the addition of 2-3 people to the clerk's office. Consequently, he strongly advocated the adoption of the negative notice system. In response to a question from Judge Small, Judge Clark noted that they have very limited experience in his district with pro se litigants who may be particularly disadvantaged by such a system. He also noted, however, that any notices that are sent out should be governed by the "Time Magazine" rule. That is, the notices should be readable to a person at a sixth or eighth grade reading level. In response to a question from Professor Klee, Judge Clark recognized the value of a national, uniform system, but suggested that some flexibility should remain to account for local differences.

The next speaker was Mr. James Patton, who appeared on behalf of the Delaware State Bar Association. Mr. Patton indicated that the difficulties presented by nuances in local rules exist more for representatives of creditors than for representatives of debtors in his experience. The first

objection he noted with regard to the proposed amendments to the Bankruptcy Rules was in the removal of Civil Rule 43(e). He suggested that affidavits are particularly helpful in resolving a large number of relatively uncontested matters within a proceeding. He suggested that the need for live testimony be limited to truly contested facts within those proceedings. Mr. Patton also asserted that proposed Rule 9014 would lead to a multiplication of unnecessary hearings. Additionally, the more formal process established by proposed Rule 9014 would lead to strategic behavior by parties seeking to delay the process. In turn, this could lead to an excessive use of Rule 9014(o) as courts seek to "opt-out" of the rule as frequently as possible. He noted that this would diminish the uniformity of practice rather than enhance it as is stated as a goal for the amendments. He suggested as well that all hearings be evidentiary hearings unless after responses are filed the court determines that a status conference would be more appropriate. This commentary was included as well in pages 4-5 of his written comments. In response to a question from Judge Robreno, Mr. Patton indicated that the proposed rules would not resolve the problem of "secret" local practices. He suggested again that Rule 9014(o) would continue to permit that type of local practice to flourish.

The Honorable Roger Whelan appeared on behalf of the Federal Bar Association. He noted first that the title "Administrative Proceeding" was both confusing and inappropriate. He also joined in the view that Civil Rule 43(e) should continue to be available in bankruptcy proceedings. He likewise echoed the view that consumer debtors should be required to file valuation affidavits in the same manner as any other party. As regards uniformity, Judge Whelan suggested that it was particularly appropriate in the "mega case", but that the local bar handles the vast bulk of the remaining cases. Thus, the problems presented by unfamiliarity with local practices are not presented in the vast bulk of matters in the bankruptcy courts. Consequently, he would suggest that if uniformity is the touchstone, that it be limited to larger Chapter 11 cases. In response to a question from Professor Klee, Judge Whelan indicated that the judge should have relatively unlimited discretion to decide motions which are unopposed and in regard to which no evidence has been presented.

Ms. Judy B. Calton appeared on behalf of the Detroit Metropolitan Bar Association. She began her remarks by supporting the Committee's efforts in regards to an amendment to Bankruptcy Rule 4003. That amendment would permit the court to extend the time for objections to exemptions if a request for the extension is made before the expiration of the objection period. The only concern Ms. Calton expressed was as to whether there would be a negative implication from the absence of such a provision in similar rules. She suggested further that the rules need not be entirely universal. She asserted that the problem is not with local rules, but rather, with "unpublished" local rules that are unavailable to attorneys from out of the area. She suggested that even with the proposed amendments being adopted, that problem could continue to exist. She suggested further that the negative notice system works well and should be continued. Finally, Ms. Calton questioned the changes proposed for Bankruptcy Rule 2014 since less than 1% of cases present any need for a hearing on the appointment of counsel.

Ms. Sara L. Chenetz next spoke on behalf of the Association of the Bar of the City of New York. In general, she noted that her group supported the proposals. Her comments generally

followed very closely the submission of that group at #98-BK-098. Because her testimony was so closely aligned with the written submission, I would direct your attention to that submission.

Ms. Judith Greenstone-Miller and Mr. Jay Welford presented the position of the Commercial Law League of America. Mr. Welford began the presentation by addressing a variety of issues which were set out in greater detail in their written submission at 98-BK-065. He brought particular attention to their written comments on proposed Rules 1007, 2001, 2014, and 4001, all as more fully set out in their written submission. Ms. Greenstone-Miller then addressed the Commercial Law League's position regarding the changes to Rules 9013 and 9014. She suggested first that local rules should be allowed to operate because they permit experimentation within the bankruptcy practice to identify the most efficient means to administer the system. She suggested as well that applications to dismiss or convert cases, as well as to appoint trustees and examiners should be excluded from the current proposal in Rule 9013. She suggested that motions to assume or reject executory contracts and motions to approve settlements should be governed by Rule 9013 as well. (My notes are a little unclear at this point, she may have been suggesting that those items be covered by Rule 9014.)

Mr. Dennis J. LeVine presented testimony on behalf of the Tampa Bay Bankruptcy Bar Association. Mr. LeVine urged the Committee to recognize the diversity that exists within districts. He noted geographical concerns similar to those mentioned by Judge Clark when discussing the western district of Texas. Mr. LeVine also noted that the vast majority of cases are consumer cases in which a limited type of issue was presented. He identified motions for stay relief, objections to exemptions, and objections to claims as the typical fare for bankruptcy courts. Given that these matters generally involve limited amounts of money, he urged the Committee to do what it could to maintain simplicity. He strongly supported the negative notice system, and he identified additional problems that would be presented by requirements that hearings be set and then cancelled. In particular, he suggested that attorneys, as well as courts, would have to hold their calendars open and could not schedule conflicting matters because of the possibility that hearings would be held as scheduled. That would be true even though the vast bulk of those hearings would never be held. He suggested that this result would be unfortunate. He urged that the current system largely be left alone so that maximum flexibility is available. He was somewhat unclear on the requirement that proposed orders be attached to motions. Initially, he indicated an objection to that process. Ultimately, he agreed with the suggestion by Judge Small that those orders are particularly important in the negative notice situation. Parties would then know what order would be entered in the absence of their objection. Mr. LeVine also indicated that in his view a response to a negative notice request that simply states that the opposing party wants a hearing is enough to require that a hearing be held.

The next speaker was Mr. Steven Weingold, an Assistant Attorney General for the State of Maryland. He was appearing on behalf of the Association of State Attorneys General. He identified three matters in particular that are of concern to his constituency. First, he argued that the limitations on notice as set out in proposed Rule 9013(c) were too restrictive. Similarly, he urged the Committee to consider including more significant consequences to the failure of a debtor to properly identify a governmental unit as set out in proposed Rule 1007(m). Finally, he suggested that

motions for relief from the stay should not require supporting affidavits for governmental units. Mr. Weingold posed the hypothetical of a governmental unit seeking to enforce its police and regulatory powers. While their actions are excepted from the operation of the automatic stay under § 362(b)(4), he indicated that some state court judges require an order of the bankruptcy court authorizing the commencement or continuation of those actions in the state proceeding. Requiring affidavits, in his view, would slow the process down and thereby unnecessarily restrict the state's enforcement of its police and regulatory powers.

The final oral testimony was offered by the Honorable Alexander Paskay. Judge Paskay's testimony was offered on behalf of the bankruptcy judges for the Middle District of Florida. He urged the Committee to consider that most bankruptcy cases are both small and local. They are not "mega cases" that require national or uniform solutions. He took exception to the three bases upon which he understands the amendments were offered. Those are: a lack of uniformity in the rules; a lack of clarity in the rules; and confusion as to what is a "contested" matter. Judge Paskay asserted that any lawyer who cannot discern the meaning of "contested" matters should not be practicing in the bankruptcy court. He also suggested that local rules are readily available and that if some courts refuse to make them available, then other sanctions are appropriate rather than amendment of the rules. Judge Paskay also asserted that there should be no distinction between motions and applications as is included in the proposed amendments. He would suggest calling everything a motion and retaining flexibility as regards the rules generally. In particular, he testified that Rule 9014 should not be altered from its current form. He views it as working well in the typical cases presented in the bankruptcy courts. Judge Paskay also asked that the Committee consider amending the rules to provide a new opportunity to object to a debtor's claim of exemption whenever a case is converted to Chapter 7.

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
WITNESS LIST
WASHINGTON, D.C.
JANUARY 28, 1999

	PREVIOUSLY SUBMITTED TESTIMONY
Honorable Kathleen P. March United States Bankruptcy Court for the Central District of California	98-BK-008
Honorable Barry Russell Los Angeles Chapter of the Federal Bar Association	98-BK-058
Honorable Susan Pierson Sonderby United States Bankruptcy Court for the Northern District of Illinois	98-BK-060
Honorable Robin L. Riblet United States Bankruptcy Court for the Central District of California	98-BK-062
Honorable Leif M. Clark United States Bankruptcy Court for the Western District of Texas	98-BK-064
James L. Patton, Esquire Delaware State Bar Association	98-BK-063
Roger Whelan, Esquire Federal Bar Association Bankruptcy Law Section	98-BK-059
Judy B. Calton, Esquire Detroit Bar Metropolitan Association Detroit/Creditor Section	98-BK-066
Judith Greenstone-Miller, Esquire Jay L. Welford, Esquire Commercial Law League of America	98-BK-065

Sara L. Chenetz, Esquire Committee on Bankruptcy and Corporate Reorganization of the Bar of the City of New York	98-BK-098
Dennis J. LeVine, Esquire Tampa Bay Bankruptcy Bar Association	98-BK-104
Honorable Alexander L. Paskay Chief Judge, U.S. Bankruptcy Court for the Middle District of Florida	98-BK-085
Steven Weingold Assistant Attorney General for the State of Maryland	98-BK-155

STATEMENT IN OPPOSITION TO THE APPROVAL OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE DATED AUGUST 1998.

The Judges of the Bankruptcy Court in the Northern District of Illinois are opposed to the approval of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure dated August 1998 ("Proposed Amendments") for the reasons set forth in our letter dated December 21, 1998. We submit this additional statement in connection with the oral testimony of Chief Judge Susan Pierson Sonderby.

After submitting our December letter, we reviewed with great care the results of the "Survey on the Federal Rules of Bankruptcy Procedure" published by the Federal Judicial Center in 1996 ("FJC Survey"), the minutes of the Advisory Committee on Bankruptcy Rules (the "Committee") meetings held in March 1997, September 1997 and March 1998 and some of the comments received by the Committee. This material substantially strengthens the position we have taken in opposition to the Proposed Amendments. It makes it clear that the Proposed Amendments are based upon flawed and limited data and do not reflect the needs of the majority of bankruptcy judges, practitioners and parties who avail themselves of the bankruptcy courts throughout the country on a daily basis.

The Purpose of the Proposed Amendments

The announced purpose of amendments proposed to Rules 9013 and 9014 is to promote uniformity in bankruptcy motion practice throughout the United States. The need for

uniformity appears to have been gleaned from the FJC Survey.[1] An examination of the FJC Survey, however, reveals that it does not support the Committee's assumption that a need for national uniformity requires micromanagement of local practice.

The Survey questionnaire was sent to bankruptcy judges, chief district judges, a sample of other district judges, chief circuit judges, a sample of other circuit judges, clerks of bankruptcy courts, bankruptcy administrators, Chapter 13 trustees, a sample of Chapter 7 trustees, bankruptcy practitioners in federal government offices, deans of law schools and a sample of private bankruptcy practitioners. It contained six questions, each of which required a simple response of "yes", "no" or "no opinion." Significantly, the overall response rate was only 23%, which was 720 responses.[2] Also significant was the mere 13% response rate among private bankruptcy practitioners, who are perhaps the most adversely affected by the Proposed Amendments.

Not only was the response rate to the Survey low, but the concerns expressed were probably skewed toward those who are unhappy with the current rules. The Survey itself acknowledges that "it is possible that those who think the rules are problematic responded at a higher rate than those who find the rules satisfactory." FJC Survey at page 5.

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[1] See Introduction to Request for Comment on Proposed Amendments to the Federal Rules of Practice and Procedure (in which the Committee explains that the Proposed Amendments are a response to the results of the FJC Survey).

[2] In contrast, about 166 comments were submitted to the Committee in response to the Proposed Amendments, and many of those were from groups, such as bar committees, associations and our court (which consists of ten judges). Since some effort was required in preparing comments, as compared to responding to the survey, those 166 comments should be entitled to considerable weight.

In fact, the Survey's summary proclaimed that "[m]ost of the respondents to the questionnaire indicated that they did not see a need to change the rules and forms, had not experienced problems with the rules and forms, or had no opinion on the particular changes being asked about." FJC Survey at page vii. As opposed to that general satisfaction with the current rules, the response to the Proposed Amendments demonstrates a clear dissatisfaction with the Committee's attempts to change those rules.

Finally, there is only one place in the Survey[3] that indicates that uniformity of practice across districts is desirable, yet the supposed need for national uniformity is an argument that prevailed repeatedly during the Committee meetings when the members discussed the Proposed Amendments.

The Burden on Small Cases, Local Practitioners and High Volume Courts

We understand that there is special concern among a few practitioners about procedures in major Chapter 11 cases that involve attorneys and parties from around the nation. Unfortunately, however, the Amendments as proposed would affect all bankruptcy cases, including local Chapter 11 cases, the most routine "no-asset" individual Chapter 7 liquidation and wage earner Chapter 13 payment plan cases. Judges in our district and others[4] have

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[3]Appendix B to the Survey contains subject categories of comments made by the Survey respondents. The Survey does not provide the number of comments that were received on a particular subject. Nevertheless, it is notable that the subject of uniformity was mentioned only once in the Survey, while other subject categories are listed multiple times.

[4]*See, e.g.*, comment submitted by practitioner Joseph M. DuRant of Newport News, Virginia ("... in my District, the Eastern District of Virginia, large dockets now move very rapidly, efficiently, and, I believe, fairly and justly ..."); comment submitted by Judge Ernest M Robles of Los Angeles, California ("... many bankruptcy courts have already discovered how the FRBP can be turned into something that streamlines procedure while maintaining the imperative

worked hard to assure that parties to bankruptcy cases and their attorneys have prompt access to the court so they can obtain relief on motions quickly and efficiently, always consistent with other parties' rights to be heard. Motions here may be presented on seven days' mailed notice, two days upon delivered notice. If a motion is unopposed, or if at the time of initial presentation the judge determines that no meritorious defense is available or has been articulated, the motion can be granted immediately by default and an order entered. Indeed, about 90% of the approximately 53,000 motions filed in our bankruptcy court each year are processed in this way. The Proposed Amendments would enormously complicate and delay this routine motion practice.

We were interested to discover that this concern about complicating motion practice, which was expressed in our comment and many of the other comments submitted to the Committee, was discussed at the Committee meetings. For example, Judge Duplantier argued that "routine matters ... should not be unduly burdened with requirements that are needed only in a big case." (Minutes of the Committee meeting, September 1997). Judge Robreno similarly opined that "the draft seemed to be legislating for the extraordinary, while he prefers an approach that states basic principles for all, leaving the court to give directions in major matters." He even proposed a draft of Rule 9013 that would have left the details to local rule. (*Id.*) The response to Judge Robreno's draft was a chorus of support for uniformity, including the statement by one member that "the sole finding of the FJC Study was a desire for uniformity" (*id.*) – an assertion

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of due process."); comment submitted by the Commercial Law League of America and its Bankruptcy and Insolvency Section (in which the motion and hearing procedure embodied in the Local Bankruptcy Rules of the Eastern District of Michigan is lauded for its efficiency).

for which we can find no support in the published Survey.

The concern about uniformity was well expressed by attorney Gerald Smith, who stated that "he thought Rule 9014 [as proposed] is a great start to giving some sense of uniformity to bankruptcy practice nationally in place of the 4,000 pages of local bankruptcy rules printed by one publisher." (Minutes of the Committee meeting, March 1997). We can certainly understand the overwhelming task presented to national practitioners as they make their way from one court to another. The number of national practitioners that we see, however, is minuscule compared to the vast majority of local lawyers and *pro se* litigants. Furthermore, the proliferation of web sites for courts around the country makes local rules and even individual judges' practices more accessible than ever. The Committee might also note that the renumbering of local rules to fit in with the Bankruptcy Rules will also make it easier for national practitioners to find exactly the local rules they need on any matter.

The Committee's job is to balance the interests of everyone involved and the evidence and arguments lean overwhelmingly against the Committee's attempt to micromanage courts all over the country. This is a national Committee with a national perspective, but we ask that the Committee remember that our local rules work for us, California's work for them and New York's work for them. There is simply no support for the assumption that uniformity will provide better justice. What micromanaging will accomplish is to force courts and lawyers to work around the Federal Rules of Bankruptcy Procedure. For example, we will be forced to function on a predominantly emergency basis if attorneys who are used to getting motions heard in seven days can only get access more quickly than twenty days by characterizing their motions as emergencies.

Uniformity also fails to consider the significant differences between urban and rural districts. Our Judges sit in outlying counties as infrequently as once a month. A secured creditor who has to make a routine motion on twenty days' notice and then wait additional time for the judge to be sitting will be losing a lot of money in that time. The comment submitted by Thomas J. Yerbich, the Chair of the Local Bankruptcy Rules Committee of the District of Alaska stated what should be obvious - "each district faces distinctly different conditions, *i.e.*, number and type of cases, number of judges, demographics, geography, size and experience of the bar ... The conditions in the district within which I currently practice (Alaska) differ from those in which I practiced several years ago (Central California). Local rules address those differences."

Moreover, complicating local practice can only make justice more expensive. One of the creditors' counsel whom we see frequently in our Court commented that she will be forced to reevaluate how she charges her clients if she has to hire an appraiser and prepare affidavits every time she files a motion for the turnover of a car worth a few thousand dollars. Clients who have waited fifteen or twenty or more months to be paid on a mortgage will be forced to wait even longer to foreclose on property even in Chapter 7 cases where the debtor admits that he has no equity. The costs of doing business will go up. These are costs of the proposed uniformity.

Plainly, these Proposed Amendments would defeat the goal of prompt and economical resolution of disputes. In this way, they are inconsistent with the basic purpose of the Federal Rules of Bankruptcy Procedure – "to serve the just, speedy, and inexpensive determination of every case and proceeding." Fed. R Civ. P. 1001. That is an important goal in any court, but particularly in bankruptcy courts where time is usually of the essence. Proposals that would cause unnecessary delay and expense should for that reason alone be rejected.

The Return of "Bankruptcy Rings"

Beyond causing increased expense and delays in most cases, the Proposed Amendments would harm the nature of bankruptcy practice generally. An expressed Congressional purpose for adopting the current Bankruptcy Code was to open the practice of bankruptcy law to all attorneys. Prior to the Code, it had been generally perceived that bankruptcy was the special province of a handful of specialists who had unique knowledge of the law and familiarity with the arcane procedures of bankruptcy practice. Codification of bankruptcy law was an attempt to make the substantive law more accessible.[5]

We sought local procedures in our District consistent with that objective. In enacting local rules for our Court, the District Court accepted our request for rules that are as similar as practicable to those of the District Court itself, so that any lawyer competent to practice in that Court could also practice comfortably before us. The Proposed Amendments would defeat all those efforts and encourage a return to the days of the "bankruptcy rings" of specialists familiar with procedures not followed before the district judges.

The harm the Proposed Amendments would do by imposing requirements and

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[5]"I think what we're doing is creating or trying to create new courts of rather general jurisdiction for general practitioners and get rid of the bankruptcy rings which we have heard so much about, and that's the specialized business that has such a questionable reputation now that we want to overcome. And that's a large part of the motivation behind the work of the Commission in recommending these changes and the motivation behind the members of this subcommittee in trying to augment and enhance the role of bankruptcy which, as Mr. Levine has indicated, takes on larger proportions all the time and affects so many hundreds of thousands of Americans every year and so many billions of dollars in assets." Rep. Robert McCrory (Ill.) A&P Legislative History, Hearings on H.R. 8200, *46-47, 95th Cong., 1st Sess., P.L. 95-598, (December 12, 1977 - December 14, 1977).

nomenclature generally unknown in the district courts was summed up by Judge Robert Martin: "Bankruptcy practice which is already somewhat arcane would become the sole province of specialists because words which have meanings in other procedural contexts would have completely different and unanticipated meanings in bankruptcy and procedures would become the stumbling block for any general practitioner approaching the bankruptcy court. A competent lawyer ought to be able to go into any court under the federal system without having to learn a new definition for motion, objection, response, administrative motion, application and request."

Our Recommendation

It may be that not every district in the country has published local bankruptcy rules that are clear and readily accessible to the bar and the public and that establish fair procedures. But these narrow issues can be narrowly addressed without the many serious adverse consequences that would result from adoption of the Proposed Amendments. In lieu of the Proposed Amendments, we propose the following:

- that national standards for bankruptcy motion practice be established such as adequate notice, an opportunity to object and be heard, and the taking of oral testimony on any genuine issue of material fact;
- that local rules be required to be written and published both with the court clerk and on a central web site that will have all local rules;
- that local bankruptcy rules be required to mirror as closely as possible the district court local rules;
- that the district court be required, in adopting local bankruptcy rules, to certify that they comply with those national standards as to content and publication; and

- that in the absence of such certified local rules, defined procedures of the national rules will apply.

In sum, the Survey that gave rise to the Committee's proposals and the responses to those proposals show that the national rules are not in need of more radical revisions than we have suggested. The evidence supports our view that local bankruptcy rules should be required to move parties and their counsel justly and efficiently through the courts and that local bankruptcy rules should be required to mirror as closely as possible the district court rules so that attorneys can practice before both courts within a district with ease.

Thank you for considering our views and for giving Judge Sonderby the opportunity to testify at the January 28, 1999 hearing.

Respectfully submitted,

Honorable Susan Pierson Sonderby, C.J.
Honorable John D. Schwartz
Honorable Jack B. Schmetterer
Honorable Robert E. Ginsberg
Honorable Eugene R. Wedoff
Honorable Erwin I. Katz
Honorable Ronald Barliant
Honorable John H. Squires
Honorable Joan Humphrey Lefkow
Honorable Manuel Barbosa

January 21, 1999

98-BK-098
1/28/99
Hearing Statement

STATEMENT ON BEHALF OF THE COMMITTEE ON BANKRUPTCY & CORPORATE REORGANIZATION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

BEFORE THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

January 28, 1999

Statement of Sara L. Chenetz, Esq.
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Introduction

I am Sara Chenetz, a member of the New York City law firm of Freeman Forrest & Chenetz LLP. I am appearing here today on behalf of the Committee on Bankruptcy & Corporate Reorganization of the Association of the Bar of the City of New York (the "Committee" and "Association"). The Committee and I appreciate the invitation to present our comments on the proposed amendments to the Federal Rules of Bankruptcy Procedure.

The Committee is a standing committee of the Association. Its members include experienced bankruptcy lawyers, bankruptcy law professors, and representatives of the Offices of the United States Trustee and the Clerk of the United States Bankruptcy Court for the Southern District of New York. Many of the Committee's members appear regularly in Bankruptcy Courts throughout the country and represent varied parties in consumer and business cases, chapter 7, chapter 11 and chapter 13 cases.

On December 23, 1998, the Committee submitted a letter to the Secretary of the Committee on Rules of Practice and Procedure which expresses the Committee's general support for the adoption of the proposed amendments and explains the Committee's selective suggestions for their modification. The Committee included with its letter marked versions of the proposed amendments to Rules 2014, 9013 and 9014, indicating the Committee's recommended changes. My comments here today will highlight the issues which are addressed in the Committee's letter in greater detail. My comments, like the Committee's letter, reflect a consensus of the views of the members of the Committee, and the views of

individual members and their respective firms and institutions may vary.

Proposed Rules 9013

The intent of P.R. 9013 appears to be to harmonize practice with respect to non-substantive and non-controversial matters. The Committee supports this goal, but is concerned that the new rule could be used, whether deliberately or inadvertently, to mask a matter of substance, through limited notice and the entry of orders without hearings. The Committee therefore recommends that the notice required under P.R. 9013(c) be expanded to include, if an unsecured creditors committee has not been appointed, the twenty largest unsecured creditors of the debtor, as well as all parties who have filed a notice of appearance under Fed. R. Bankr. P. ("Rule") 9010(b).

In addition, the Committee suggests this rule be expanded to cover requests for orders limiting notice or hearing. While the proposed amendments to Rule 9013 require notice of an application filed under the rule, the proposal does not specify the amount or nature of the notice to be provided before a court may rule on such an application. Therefore, the Committee recommends that, unless the court determines *ex parte* relief is warranted, P.R. 9013(d) should provide that relief may not be granted without a hearing until at least three days have passed and three additional days for mail service in accordance with Rule 9006(f). These suggested changes are designed to give parties in interest an opportunity to object to the use of shortened procedures and the application of P.R. 9013, as opposed to Rule 9014, to a particular request for relief.

Proposed Rule 9014

Parallel to P.R. 9013, the Committee understands the purpose of P.R. 9014 to be to harmonize practice with respect to matters that cannot be considered routinely non-substantive and non-controversial. The Committee supports this goal, and generally believes the proposed amendments advance this purpose.

Still, the Committee suggests certain technical and substantive revisions be made to P.R. 9014 in the interests of clarity, efficiency and process. First, the Committee recommends including among the parties entitled to notice under P.R. 9014(c)(1), those parties who have filed notices of appearance under Rule 9010(b), examiners appointed under section 1104, future claims representatives, and representatives and committees of retired employees appointed under section 1114. The omission of such parties appears to have been inadvertent and not intended to further any particular policy or objective. As with the Committee's proposed changes to the amendments to Rule 9013, these suggested changes are not intended to limit a court's authority to enter an order expanding or limiting notice.

Second, the Committee recommends that the list of administrative motions for which an evidentiary hearing may be conducted at the initial hearing should be expanded to include those requests for relief that ordinarily require expedition and which, under current practice, are typically the subject of accelerated evidentiary hearings, such as motions to

approve the sale or lease of property under section 363(c), for adequate protection under section 363(e), to direct the appointment of a trustee under section 1104(a), to convert or dismiss a case under section 1112(b), and to increase or reduce the exclusive periods under section 1121(d).

Third, the Committee suggests P.R. 9014 be clarified to make clear that the court may grant interim relief in connection with an administrative motion. The notice provisions of the proposed rule appear to contemplate such relief, but this authority is not clearly stated.

Further, the Committee suggests making uniform the time for hearing, whether or not interim relief has been granted. The proposed rule appears to adopt as a general principle, which the Committee supports, that an administrative motion be served at least twenty days before the scheduled hearing. This expands the time in current practice, in many districts, with respect to certain contested matters. The Committee believes that if the list of parties to be served with notice is expanded, as recommended, parties will have the opportunity to be heard when interim relief is granted, and in such circumstances there should ordinarily be no reason to shorten the twenty-day period until the preliminary hearing. Again, courts should retain the authority to shorten such notice for cause shown.

Under existing rules, the notice period for most motions must be expanded by three days if notice is served by mail. The proposed amendments do not purport to change this requirement of Rule 9006(f), but the comments to P.R. 9014 suggest at least an intent to supplant Rule 9006(f) in the context of administrative proceedings. Committee Note at 108. As the twenty-day notice period will in most cases merely set the time for a status conference, and strict adherence to the twenty-day rule is required if the desired uniformity is to be achieved, the Committee recommends that the amendment to Rule 9014 explicitly supplant Rule 9006(f). However, the Committee believes the "expeditious service" admonition of P.R. 9014(f) for all matters anticipated to require evidentiary hearings in lieu of status conferences should continue, and suggests that service by mail in such cases be prohibited. In addition, consideration should be given to explicitly providing that service by facsimile, overnight or hand delivery constitutes valid service.

The Committee does have one strong objection to the proposed changes to Rule 9014, and that concerns subparagraph (j), which would prohibit the use of affidavit evidence in lieu of live testimony. This procedure is relied upon frequently by bankruptcy courts and practitioners to reduce the length of hearings, and concomitantly to save administrative expense. The use of affidavits for direct testimony permits more efficient preparation for cross-examination, and permits the court to assess witness credibility on cross-examination. Additionally, the use of affidavits in lieu of live testimony is explicitly subject to the court's discretion. The Committee does not discern any compelling reason to remove such discretion from the court.

Proposed Rule 2014

The Committee supports the adoption of the requirement that requests for orders retaining professionals be made by motion, on notice, with an opportunity for hearing. The entry of retention orders without notice, on occasion, has precluded parties in interest from having meaningful opportunities to raise good faith disputes about the merits of a proposed retention. However, the Committee believes certain clarifications regarding the notice requirements are needed.

As P.R. 2014 appears to recognize, it is critical for both the professional and client that there be an opportunity for a professional to be retained and compensated on an interim basis. However, the Committee does not agree that the notice and hearing period with respect to professional retention should be shortened where interim retention is approved. As with P.R. 9014, the Committee recommends that the notice requirements for a motion to retain a professional be the same, regardless of whether interim retention has been authorized.

The Committee also believes that professionals who are retained on an interim basis should have the right to seek the allowance of fees and reimbursement of expenses that accrue during the interim period, even if the application for employment is ultimately denied. The right to file an application for the allowance of such fees and expenses is implicit in the proposed amendments to Rule 2014. Nonetheless, to eliminate any uncertainty in this area, the Committee recommends that the amended rules unequivocally indicate that such requests may be made. The Committee also recommends that the rule make clear that courts may authorize the retention of a professional retroactively to the date the professional commenced work. Compared with current practice, if P.R. 2014 is adopted, professionals are more likely to begin work before their retention is approved and to do so for longer periods of time. As such, the need for retroactive retention orders will increase.

In the important area of qualifications for professional employment, the Committee is concerned that the proposed new requirement that the movant disclose any interest "adverse" to the estate would require the movant to determine what "adverse" means. The Committee suggests the existing requirement that the movant state to the best of the movant's knowledge that the proposed professional is "disinterested" be maintained. This will eliminate imposing upon the movant the task of determining "adversity," a standard that courts have had difficulty defining in this context.

Finally as to P.R. 2014, the Committee supports the goal of supplemental disclosure, but believes that the proposed rule is vague, and does not sufficiently address the concerns that have been expressed recently. In order to address these concerns, the Committee proposes that there be a new periodic disclosure requirement applicable to professional firms, and an obligation of prompt supplemental disclosure applicable to individuals. The Committee proposes that a professional firm be required to update its original verified statement at least once every 120 days, and additionally any individual who has actual knowledge of a matter that should be disclosed be required to do so promptly.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS APPROVED BY THE ADVISORY COMMITTEE AT ITS OCTOBER 1998 MEETING

DATE: FEBRUARY 15, 1999

At its October 1998 meeting, the Advisory Committee approved proposed amendments to Rule 2002(g)(notices)and Rule 9020 (contempt). The Committee should vote on whether these proposed amendments should be submitted to the Standing Committee at its June 1999 meeting with a request for publication.

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

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~~(g) ADDRESSES OF NOTICES. A notice required to be mailed under this rule to a creditor, equity security holder, or indenture trustee shall be addressed as such entity or an authorized agent may direct in a filed request; otherwise, to the address shown in the list of creditors or the schedule, whichever is filed later. If a different address is stated in a proof of claim duly filed, that address shall be used unless a notice of no dividend has been given.~~

(g) ADDRESSING NOTICES.

(1) Notices required to be mailed under this rule to a creditor, indenture trustee, or equity security

holder shall be addressed as such entity or an authorized agent directs in a request filed in the particular case. If the entity files more than one request designating a mailing address, the notice shall be addressed as directed in the last request filed. For the purposes of this subdivision --

(A) a proof of claim duly filed by a creditor or indenture trustee which designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a subsequent notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest duly filed by an equity security holder which designates a mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request

designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

COMMITTEE NOTE

Subdivision (g) has been revised to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a mailing address, the last paper filed determines the proper address. The amendments also clarify that a request designating a mailing address is effective only with respect to a particular case.

Under subdivision (g), a duly filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A duly filed proof of interest is considered a request designating a mailing address of an equity security holder.

The other amendments are stylistic.

Rule 9020 Contempt Proceedings

Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.

~~(a) CONTEMPT COMMITTED IN PRESENCE OF BANKRUPTCY JUDGE. Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.~~

~~(b) OTHER CONTEMPT. Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.~~

~~(c) SERVICE AND EFFECTIVE DATE OF ORDER; REVIEW. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.~~

~~(d) RIGHT TO JURY TRIAL. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.~~

COMMITTEE NOTE

The amendments to this rule provide that a motion made by the United States trustee or a party in interest for an order of contempt is governed by the procedural requirements of Rule 9014. This rule, as amended, does not address orders of contempt issued sua sponte. Neither the Bankruptcy Rules or the Federal Rules of Civil Procedure provide procedures for sua sponte contempt orders.

Whether the court is acting on motion under this rule or is acting sua sponte, these amendments are not intended to extend, limit, or otherwise affect either the contemp powers of a bankruptcy judge or the role of the district judge regarding contempt orders. Issues relating to contempt powers of bankruptcy judges are substantive and are left to statutory and judicial development, rather than procedural rules.

This rule, as amended in 1987, delayed for ten days from service the effectiveness of a bankruptcy judge's order of contempt and rendered the order subject to de novo review by the district court. These limitations on contempt orders were added to the rule in response to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which provides that bankruptcy judges are judicial officers of the district court, but does not specifically mention contempt powers. See 28 U.S.C. § 151. As explained in the committee note to the 1987 amendments to this rule, no decisions of the courts of appeals existed concerning the authority of a bankruptcy judge to punish for either civil or criminal contempt under the 1984 Act and, therefore, the rule as amended in 1987 "recognizes that bankruptcy judges may not have the power to punish for contempt." Committee Note to 1987 Amendments to Rule 9020.

Since 1987, several courts of appeal have held that bankruptcy judges have the power to issue civil contempt orders. See, e.g., Matter of Terribone Fuel and Lube, Inc., 108 F.3d 609 (5th Cir. 1997); In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996). Several courts have distinguished between a bankruptcy judge's civil contempt

powers and criminal contempt powers. See, e.g., Matter of Terribone Fuel and Lube, Inc., 108 F.3d at 613, n. 1 ("[a]lthough we find that bankruptcy judges can find a party in civil contempt, we must point out that bankruptcy courts lack the power to hold persons in criminal contempt."). For other decisions regarding criminal contempt powers, see, e.g., In re Ragar, 3 F.3d 1174 (8th Cir. 1993); In re Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990). To the extent that Rule 9020, as amended in 1987, delayed the effectiveness of civil contempt orders and required de novo review by the district court, the rule may have been unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt.

Subdivision (d), which provides that the rule shall not be construed to impair the right to trial by jury, is deleted as unnecessary and is not intended to deprive any party of the right to a jury trial when it otherwise exists.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: REPORT OF THE SUBCOMMITTEE ON RULE AMENDMENTS RELATING TO INJUNCTIONS IN PLANS

DATE: February 8, 1999

At the October 1998 meeting of the Advisory Committee, I presented proposals to amend Bankruptcy Rules 2002(c), 3016, 3017, 3020, and Official Form 15 for the purpose of improving procedural protection for entities affected by injunctions included in a plan. My proposals were contained in my memorandum dated September 2, 1998. Chris Kohn also submitted his memorandum dated October 1, 1998, in support of the proposals. I enclose copies of both of these memoranda, which include the background of, and reasons for, the proposals.

After discussing these proposals in October, this matter was referred for further consideration to a new subcommittee chaired by Leonard Rosen. The subcommittee met by telephone conference on January 20th, discussed the proposals, and approved the drafts of the proposed amendments contained in my September 2nd memorandum. However, the Subcommittee believes that the following questions should be discussed by the full Committee when it considers these proposals in March.

(1) In Rule 3020, should the language "and not by reference to the plan or other document" be deleted. This language derives from Civil Rule 65(d) and would require the

confirmation order to repeat all injunctive language that is contained in the plan, rather than permit the order to refer to the plan by reference.

(2) Should the proposed amendments be broadened to cover more than injunctions? The Subcommittee believes that it would be difficult to define the scope of these rules if it is broadened. One possibility is to include any release of rights against an entity other than a debtor.

If the Committee wants to increase the scope of these rules to cover third party releases, the following language should be considered (these drafts are the same as those included in my September 2nd memorandum, except for the addition of the release language):

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

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(c) *Content of Notice.*

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(3) *Notice of Hearing on Confirmation When Plan Provides for an Injunction or Third Party Release*. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, or a release of rights an entity other than the debtor has or may have

against another entity other than the debtor, the notices required under Rule 2002(b)(2) shall:

(A) include in conspicuous language (bold, italic, or highlighted text) a statement that the plan proposes the injunction or release;

(B) briefly describe the nature of the injunction or release; and

(C) identify the entities that would be subject to the injunction or adversely affected by the release.

COMMITTEE NOTE

Subdivision (c)(3) is added to assure that parties receiving notice of a hearing to consider confirmation of a plan under subdivision (b) receive adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by operation of the Code, and of any release of rights an entity other than the debtor has or may have against another entity other than the debtor.

This new requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 2002(c)(3) would not apply because that conduct would be enjoined under § 524(a)(2) upon the debtor's discharge. But if a plan provides that creditors will be enjoined from asserting claims against persons who are not debtors in the case, the notice of the confirmation hearing must include the information required under Rule 2002(c)(3) because that conduct would not be enjoined by operation of the Code. See §

524(e).

The requirement that the notice identify the entities that would be subject to the injunction or the release requires only reasonable identification under the circumstances. If the entities cannot be identified by name, the notice may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the notice to identify the entities as "all creditors of the debtor" and for the notice to be published in a manner that satisfies due process requirements.

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief or for the release of nondebtor entities. The validity and effect of any injunction or release provided for in a plan are substantive law matters that are beyond the scope of these rules.

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

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(c) *Injunction or Third Party Release Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code, or a release of rights an entity other than the debtor has or may have against another entity other than the debtor, the plan and disclosure statement shall:

(1) describe in specific and conspicuous language (bold, italic, or highlighted text) the act or acts enjoined or the rights released, and

(2) identify the entities that would be subject to the injunction or adversely affected by the release.

COMMITTEE NOTE

Subdivision (c) is added to assure that entities whose conduct would be enjoined under a plan, or whose rights against nondebtor entities would be released, receive adequate notice of the proposed injunction or release.

This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 3016(c) would not apply because that conduct would be enjoined nonetheless under § 524(a)(2). But if a plan provides that creditors will be permanently enjoined from asserting claims against persons who are not debtors in the case, the plan and disclosure statement must highlight the injunctive language and comply with the requirements of Rule 3016(c). See § 524(e).

The requirement that the plan and disclosure statement identify the entities that would be subject to the injunction or adversely affected by the release requires reasonable identification under the circumstances. If the entities cannot be identified by name, the plan and disclosure statement may describe them by class or category. For example, it may be sufficient for the subjects of the injunction to be identified as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief or for a release. The validity and effect of any injunction or release provided for in a plan are substantive law matters that are beyond the scope of these rules.

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

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1 (f) *Notice and Transmission of Documents to Entities*

Subject to an Injunction or Third Party Release Under a Plan. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, or a release of rights an entity other than the debtor has or may have against another entity other than the debtor, and an entity that would be subject to the injunction or adversely affected by the release is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:

(1) at least 25 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and

(2) to the extent feasible, a copy of the plan and disclosure statement.

COMMITTEE NOTE

Subdivision (f) is added to assure that entities whose conduct would be enjoined or whose rights against nondebtor entities would be released under a plan, rather than by operation of the Code, and who will not receive the documents listed in subdivision (d) because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction or release.

This rule recognizes the need for adequate notice to subjects of an injunction or release, but that reasonable flexibility under the circumstances may be required. If a known and identifiable entity would be subject to the injunction or release, and the notice, plan, and disclosure statement could be mailed to that

entity, the court should require that they be mailed at the same time that the plan, disclosure statement and related documents are mailed to creditors under Rule 3017(d). If mailing notices and other documents are not feasible because the entities are described in the plan and disclosure statement by class or category because they cannot be identified individually by name and address, the court may require that notice under Rule 3017(f)(1) be published.

This rule does not address any substantive law issues relating to the validity or effect of any injunction or release of rights against nondebtor entities provided under a plan, or any due process or other constitutional issues relating to notice. These issues are beyond the scope of these rules and are left for judicial determination.

Rule 3020. Deposit; Confirmation of Plan in a Chapter Municipality or a Chapter 11 Reorganization Case

****

(c) ORDER OF CONFIRMATION.

(1) The order of confirmation shall conform to the appropriate Official Form ~~and~~ . If the plan provides for an injunction against conduct not otherwise enjoined under the Code, or a release of rights an entity other than the debtor has or may have against another entity other than the debtor, the order of confirmation shall (1) describe in reasonable detail and not by reference to the plan or other document, the act or acts to be enjoined or the rights released; (2) be specific in its terms regarding the injunction or release; and (3) identify the entities subject to the injunction or adversely affected by the release.

(2) notice of entry ~~thereof~~ of the order of confirmation shall be mailed promptly ~~as provided in Rule 2002(f)~~ to the debtor, the trustee, creditors, equity security holders, ~~and~~ other parties in interest, and, if known, to any identified entity that is subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code, or whose rights against an entity other than the debtor is released under the plan.

(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code, or an entity whose rights against a nondebtor entity are released under a plan. This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code.

The requirement that the order of confirmation identify the entities subject to the injunction or adversely affected by the release requires only reasonable identification under the circumstances. If the entities cannot be identified by name, the order may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the order to identify the entities as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may

provide for injunctive relief or a release of rights against nondebtor entities. The validity and effect of any injunction or release provided for in a plan are substantive law matters that are beyond the scope of these rules.

Amendment to official Form 15 (Order Confirming Plan)

[insert after last paragraph of the form)

[if appropriate, include statement required under Rule 3020(c)(1) regarding an injunction or release provided for in the plan]

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO THE RULES RELATING TO INJUNCTIONS IN A PLAN

DATE: September 2, 1998

In June 1998, the Advisory Committee presented to the Standing Committee for its final approval a proposed amendment to Rule 7001 on adversary proceedings. The proposed amendment to Rule 7001 would recognize that an adversary proceeding is not necessary if a plan provides for injunctive or other equitable relief. The Standing Committee approved the proposed amendment for presentation to the Judicial Conference in September.

At the Advisory Committee meeting in March, Chris Kohn and other Department of Justice officials expressed opposition to the proposed amendment to Rule 7001 because of their concern that it would not provide adequate procedural protections for those whose conduct would be enjoined under a plan. Shortly before the Standing Committee considered the proposed amendment in June, the Department withdrew its opposition to the proposed amendment. However, the withdrawal of its opposition was with the understanding that it would bring to the Advisory Committee for its consideration proposed amendments to other rules designed to protect the rights of persons who would be the subject of plan injunctions.

Accordingly, Chris Kohn and I have been discussing possible

amendments to the Rules designed to provide such procedural protections. Chris faxed me drafts of possible amendments, and I responded with comments and alternative drafts, with a view toward formulating drafts that would assist the Advisory Committee in discussing proposed amendments.

The following proposed amendments are presented to the Advisory Committee for its consideration at the October meeting.

PROPOSED AMENDMENTS REGARDING PLAN INJUNCTIONS

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

* * * *

(c) *Content of Notice.*

* * * *

(3) *Notice of Hearing on Confirmation When Plan Provides for an Injunction*. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notices required under Rule 2002(b)(2) shall:

(A) include in conspicuous language (bold, italic, or highlighted text) a statement that the plan proposes an injunction;

(B) briefly describe the nature of the injunction; and

(C) identify the entities that would be subject to the injunction.

COMMITTEE NOTE

Subdivision (c)(3) is added to assure that parties receiving notice of a hearing to consider confirmation of a plan under subdivision (b) receive adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by operation of the Code.

This new requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 2002(c)(3) would not apply because that conduct would be enjoined under § 524(a)(2) upon the debtor's discharge. But if a plan provides that creditors will be enjoined from asserting claims against persons who are not debtors in the case, the notice of the confirmation hearing must include the information required under Rule 2002(c)(3) because that conduct would not be enjoined by operation of the Code. See § 524(e).

The requirement that the notice identify the entities that would be subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the notice may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the notice to identify the entities as "all creditors of the debtor" and for the notice to be published in a manner that satisfies due process requirements.

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

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(c) *Injunction Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall state in specific and conspicuous language (bold, italic, or

highlighted text) the act or acts to be enjoined and identify the entities that would be subject to the injunction.

COMMITTEE NOTE

Subdivision (c) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, receive adequate notice of the proposed injunction.

This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 3016(c) would not apply because that conduct would be enjoined nonetheless under § 524(a)(2). But if a plan provides that creditors will be permanently enjoined from asserting claims against persons who are not debtors in the case, the plan and disclosure statement must highlight the injunctive language and comply with the requirements of Rule 3016(c). See § 524(e).

The requirement that the plan and disclosure statement identify the entities that would be subject to the injunction requires reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the plan and disclosure statement may describe them by class or category. For example, it may be sufficient for the subjects of the injunction to be identified as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

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

****

(f) *Notice and Transmission of Documents to Entities Subject to an Injunction Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code and an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:

(1) at least 25 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and

(2) to the extent feasible, a copy of the plan and disclosure statement.

COMMITTEE NOTE

Subdivision (f) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, and who will not receive the documents listed in subdivision (d) because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction.

This rule recognizes the need for adequate notice to subjects of an injunction, but that reasonable flexibility under the circumstances may be required. If a known and identifiable entity would be subject to the injunction, and the notice, plan, and disclosure

statement could be mailed to that entity, the court should require that they be mailed at the same time that the plan, disclosure statement and related documents are mailed to creditors under Rule 3017(d). If mailing notices and other documents are not feasible because the entities subject to the injunction are described in the plan and disclosure statement by class or category because they cannot be identified individually by name and address, the court may require that notice under Rule 3017(f)(1) be published.

This rule do not address any substantive law issues relating to the validity or effect of any injunction provided under a plan, or any due process or other constitutional issues relating to notice. These issues are beyond the scope of these rules and are left for judicial determination.

Rule 3020. Deposit; Confirmation of Plan in a Chapter Municipality or a Chapter 11 Reorganization Case

****

(c) ORDER OF CONFIRMATION.

(1) The order of confirmation shall conform to the appropriate Official Form ~~and~~ . If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail and not by reference to the plan or other document, the act or ~~acts to be~~ enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.

(2) notice of entry ~~thereof~~ of the order of confirmation shall be mailed promptly ~~as provided in Rule 2002(f)~~ to the debtor, the trustee, creditors,

equity security holders, ~~and~~ other parties in interest, and, if known, to any identified entity subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code.

(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code. This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code.

The requirement that the order of confirmation identify the entities subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the order may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the order to identify the entities as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Amendment to official Form 15 (Order Confirming Plan)

[*insert after last paragraph of the form)*

[if appropriate, include statement required under Rule 3020(c)(1) regarding an injunction provided for in the plan]

9

TAB 10
10/98 MEETING

U.S. Department of Justice

Civil Division

Commercial Litigation Branch

J. Christopher Kohn
Director

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October 1, 1998

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules

FROM: J. Christopher Kohn

RE: Proposed Amendment to the Rules Relating to Plan Injunctions (Item # 10 in the Agenda Book)

At its March 1998 meeting, the Committee voted to amend Rule 7001 to provide that an injunction contained in a plan, unlike any other injunction in a bankruptcy case, need not be sought through an adversary proceeding. In doing so, it recognized the practical difficulties of imposing the procedural formalities of an adversary proceeding on the plan confirmation process. The amendment, however, creates a procedural vacuum which our proposal seeks to address by assuring due process in a streamlined fashion when an injunction is sought in a plan.

Injunctions can be sought in a bankruptcy case either through an independent proceeding or as part of a plan of reorganization. When found in plans, they can take several forms. The most common may be an injunction that permanently restrains creditors from pursuing non-debtors such as officers, directors, employees,

affiliates, professionals and others for their acts or omissions related to or on behalf of the corporate debtor.[1/] Another type enjoins separate actions against persons who may be liable for the debtor's obligations (such as insurance companies in a mass tort case[2/] or partners of a bankrupt partnership), typically after the third parties have made contributions to the debtor's reorganization. Narrower, more specific injunctions are also occasionally sought, as in the case of efforts to enjoin regulatory activity by a governmental unit.

[1/]The propriety of using plan injunctions to release third parties is an unsettled area of the law. Critics contend that such injunctions, *inter alia*, violate the limitations on discharges contained in section 524(e) of the Code ("Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."); exceed the court's broad injunctive powers under section 105(a) of the Code; are beyond the jurisdiction of bankruptcy courts altogether or, alternatively, can only be entered as non-core matters subject to *de novo* review in the district court; violate principles of creditor equality (to the extent that creditors both with and without non-debtor recourse are classified together); and improperly bestow benefits of the Bankruptcy Code (i.e., a partial discharge) on third parties who have not subjected themselves to the rigors of the bankruptcy process. See generally Ralph Brubaker, "Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations," 1997 U. Ill. L. Rev. 959 (1997)(in FNa1, the author gratefully acknowledges one Charles Tabb for encouragement, and for inspiration in the article's title, which is patterned after the good professor's article, "A Critical Reappraisal of Cross-Collateralization in Bankruptcy"). Other parties, and some courts, have rejected these criticisms. See footnote 5, infra. The proposed rule change is not intended to address these substantive disputes. Their existence, however, demonstrates the breadth of issues that may be implicated and the need for adequate notice and appropriate judicial scrutiny.

[2/]See section 524(g) and (h) providing special provisions for discharges and injunctions in asbestos cases.

The Committee's decision to except plan injunctions from Rule 7001 recognized the practical difficulties of requiring an adversary proceeding as part of the confirmation process. They begin at the very outset: who are the appropriate parties? Is the plaintiff the debtor or the plan proponent or, in the case of a third party release, is it the third party who would benefit from the injunction? Must all interested parties sought to be bound by the plan injunction be named as defendants? Would a class action be required? Once the parties are identified, service of a summons and a copy of the complaint on all defendants (potentially millions of creditors and interest holders) and formal answers would be required. Full discovery by and of all parties could be taken. These formal procedural aspects could prove unwieldy and expensive and do not necessarily "fit" when a plan injunction is sought.

But these procedural anomalies do not mean that the force and effect of an injunction in a plan is any less than one ordered in a separate adversary proceeding. A plan injunction is equivalent to and enforced in the same manner as a judgment. It finally adjudicates the rights of the parties subject to its provisions. It has *res judicata* and collateral estoppel effects. See Stoll v. Gottlieb, 305 U.S. 165, 171-72 (1938); Trulia v. Barton, 107 F.3d 685, 691 (9th Cir. 1997). What's more, the remedy remains an extraordinary one, imbued with the authority of the issuing court and can be enforced, not by ordinary remedies, but by civil or even criminal contempt. Cf. In re Spirco, Inc., 201 B.R. 744, 754 (Bankr. W.D. Pa. 1996). Thus, although it may be embedded in a

plan, it has all the attributes of any other injunction which would otherwise require the procedural safeguards of an adversary proceeding.

In some ways, indeed, the plan injunction can be more insidious and extraordinary than a non-plan injunction. For example, in the non-plan context, a separate complaint is served with a summons; it is thus calculated to garner the focused attention of the specifically identified defendant. In the plan context, the injunctive relief can be "buried" in hundreds of pages of prose which may not even pertain to the entity being enjoined.[3/] In considering the non-plan request, the court concentrates on the legal rights of the specific parties. With a plan injunction, the principal focus often is upon the necessity of the injunction to the overall success of the plan -- an element that may have little

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[3/]In Heron, Burchette, Ruckert & Rothwell, 148 B.R. 660 (Bankr. D.D.C. 1992), an injunction prohibiting creditor actions against partners who contributed to the bankrupt partnership's reorganization was included in the proposed plan. In conjunction with the confirmation process, the court required an adversary proceeding in strict conformance with Rule 7001. In doing so, it observed:

> Here each creditor was served with a summons and complaint specifically apprising them of the injunctive relief sought. They were not simply served with a plan dealing with the disposition of the debtor's estate, a subject to which they might not care to devote sufficient attention to realize that an injunction was sought.

Id. at 690.

to do with the injunction's specific effect on its target.[4/] In contrast to a release and injunction contained in a class action settlement (to which a plan of reorganization might be roughly compared), the dissenting members of the class have no opportunity to "opt out" of the plan, at least in many jurisdictions.[5/] When review of a plan injunction is sought, the appeal encompasses the entire plan confirmation order, not simply the embedded injunction. If a stay pending appeal is sought, the equities which must be balanced relate to the entire plan, not just those of the narrow injunction. If a bond is required, it is calculated based upon the effect of the appeal on the entire plan's consummation -- not just

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[4/]See, e.g., SEC v. Drexel Burnham Lambert Group, Inc., 130 B.R. 910, 928 (S.D.N.Y. 1991)("Providing releases to and injunctions concerning non-Debtors is permissible where a material benefit results to the Debtors' estates and advances consummation of a Plan."), aff'd, 960 F.2d 285 (2d Cir. 1992).

[5/]The legitimacy of using a plan of reorganization to release third parties has divided the courts of appeals into three camps: "pro-release," "release with consent," and "no release." See generally Peter E. Meltzer, "Getting Out of Jail Free: Can the Bankruptcy Plan Process Be Used to Release Nondebtor Parties?," 71 Am. Bankr. L.J. 1 (Winter 1997). The first group, which encompasses the Second, Fourth and D.C. Circuits, holds that third-party releases are sometimes permissible and may form the basis for a valid permanent injunction binding on all parties, regardless of whether or not all affected creditors consent to the provision. See, e.g., SEC v. Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir. 1992); In re A.H. Robins, 880 F.2d 694 (4th Cir. 1986), cert. denied, 493 U.S. 959 (1989); In re AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir. 1989). The second, "release with consent" camp, permits such releases only by those creditors who vote for the plan and specifically consent to them. See, e.g., In re Specialty Equip. Co., Inc., 3 F.3d 1043 (7th Cir. 1993). Assuring adequate notice -- an object of our proposal -- will help to assure informed consent in this category. The last group, the "no release" camp, comprised of the Fifth and Ninth Circuits, prohibits third party plan releases altogether. See, e.g., In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995); In re Zale Corp., 62 F.3d 746 (5th Cir. 1995).

the impact of delay on the isolated injunction. Furthermore, if the plan is substantially consummated, the right to appeal may be lost entirely. Thus, while the plan injunction's relief may be similar to that which otherwise would be sought in an adversary proceeding, the practical consequences surrounding its entry and review can be far more severe.

What rights the target of an injunction will enjoy may turn simply on the nature of the relief and the stage of the case. For example, a debtor might file against the EPA, concurrent with a motion under section 363 of the Code for authority to sell real property, an adversary proceeding seeking injunctive relief regarding the purchaser's successor liability for environmental costs. The government agency would be served with a summons and complaint and would defend the action, enjoying all the procedural protections provided by Part VII of the bankruptcy rules. If, however, the sale was effected as part of a plan, no adversary proceeding would be required. The government agency, which may not have previously even participated in the case, might receive the disclosure statement and the plan "out of the blue" and have to assume the task of discovering its interest in this otherwise unknown case. Such grossly disparate treatment is not warranted.

Our proposal seeks to address the practical difficulties identified at the outset of this memo while insuring, in as streamlined a fashion as possible, due process and appropriate judicial scrutiny. We propose four changes when an injunction against conduct not otherwise enjoined under the Code is sought in

a plan:

* The plan and disclosure statement would conspicuously state the acts to be enjoined and identify the entities that would be affected.

* If an entity that would be subject to the injunction is not a creditor or equity security holder, the court would prescribe procedures for affording that party adequate notice.

* The notice of the hearing on confirmation would provide conspicuous notice that a plan injunction is sought, briefly describe its contents and identify the entities that are its targets.

* In confirming a plan, the court would be required to make findings prescribed by Rule 65(d) for injunctions generally, i.e., providing a description of the acts being enjoined, a specific statement of the terms of the injunction, and an identification of the entities subject to the injunction.

We believe these proposals would impose minimal burdens on the confirmation process while assuring all parties due process which at least approximates that to which they would be entitled if the identical relief were sought outside a plan.

Thank you for your consideration.

MEMORANDUM

DATE: February 16, 1999

FROM: Forms Subcommittee

RE: Form for Reaffirmation Agreement

TO: Advisory Committee on Bankruptcy Rules

The final report of the National Bankruptcy Review Commission (NBRC), issued in October 1997, contained a recommendation that there be an official form for a debtor's motion to approve a reaffirmation agreement. The Advisory Committee, at its March 1998 meeting, provisionally agreed that the recommendation had merit, and the chairman referred the matter to the Forms Subcommittee.

The subcommittee drafted a form during the summer of 1998. The NBRC had recommended creating a form motion and specified certain information that should be provided to the court, but the subcommittee determined early in its deliberations that the information provided to the court should be in the actual agreement rather than in a motion to approve the agreement. The motion, then, would be brief and simply ask the court to approve the agreement. The subcommittee presented a proposed form agreement, motion, and order to the Advisory Committee at the October 1998 meeting, and after discussion and comment by various members, the chairman recommitted the proposed form to the subcommittee, which has continued to refine the draft. Copies of the subcommittee's revised proposal and the NBRC recommendation are attached.

There are two matters for the Advisory Committee to consider. One is the form itself and any related amendments to the rules that may be advisable if the proposed form is approved. The second is when the form could be issued and whether special effort should be made to avoid unnecessary delay.

The subcommittee's proposed form contains a detailed agreement, a motion to be filed if the debtor was not represented by an attorney during the negotiating of the agreement, and an order approving the agreement. One threshold issue for the Advisory Committee is whether to include the form motion in the proposal in light of the proposed amendments to Rules 9013 and 9014. If the motion remains part of the form and the proposed amendments or similar ones become effective, the motion to approve a reaffirmation agreement would be governed by Rule 9014 (because it is not mentioned in Rule 9013 or otherwise excepted from Rule 9014). The

procedures under Rule 9014, however, are inappropriate for a motion to approve a reaffirmation agreement. Treatment as an application under Rule 9013 also may not be appropriate, as only the immediate parties are affected and no notice to others would appear to be necessary.

Rule 4008 addresses a motion to approve a reaffirmation agreement, but merely states that any such motion by the debtor may be filed either before or at the reaffirmation hearing. The Advisory Committee could add a motion to approve a reaffirmation agreement under Rule 4008 to the list of matters excepted from the provisions of Rule 9014 and leave the procedure as it is under Rule 4008. If the Advisory Committee chooses that approach, it might also want to consider amending Rule 4008 to delete the option to file a motion at any hearing, in order to ensure that a hearing will be scheduled and that the rule and form are in conformity. A copy of Rule 4008 is attached for reference.

If the Advisory Committee chooses this approach, Rule 4008 could be amended by deleting the final sentence and substituting the following one:

> "If the debtor was not represented by an attorney in negotiating the reaffirmation agreement, the reaffirmation agreement filed with the court must be accompanied by a motion for approval of the agreement."

If the Advisory Committee approves the subcommittee's draft as a proposed official form, there also is a question of timing to consider with respect to a projected effective date. There has been demand for a form reaffirmation agreement from both the bench and the bar. Judges, especially, complain that parties continue to try to use the 1988 Director's form of reaffirmation agreement, which was published in the Bankruptcy Forms Manual and never has been updated. In addition, both the NBRC final report and the bankruptcy bill introduced in the Senate during the last Congress contained provisions concerning reaffirmation agreements. Although there is no requirement to publish proposed official bankruptcy forms for comment, the Advisory Committee traditionally has done so.

There is a high probability, however, that this year the Advisory Committee will not forward to the Standing Committee any rules amendments for which it will request publication. If the proposed form must await the compiling of a full package of proposed rules amendments before it can be published, the form will be delayed at least another year-and-a-half. There appear to be at least two possible means to avoid unnecessary delay.

The Advisory Committee could request publication of the proposed form in 1999 regardless of whether there are any rules amendments to be published. If the proposed form were to be published this fall, a final draft could be presented to the September 2000 session of the Judicial Conference and become effective upon approval by that body.

Alternatively, the Advisory Committee could authorize the Administrative Office to issue

the form immediately as a Director's form, publish it as a proposed official form later when proposed rules amendments also are published, receive comments, make any appropriate modifications in light of the comments, submit the final proposed form to the Judicial Conference, and, upon approval as a new official form by the Conference, withdraw the Director's form. This procedure could create a situation in which both the Director's form and the official form would continue to circulate for some period, but, unless the post-publication revisions were substantial, the use of both versions probably would not cause significant problems.

Attachments

Form B21

FORM 21. REAFFIRMATION AGREEMENT

UNITED STATES BANKRUPTCY COURT

_____DISTRICT OF _____

Debtor's Name	Bankruptcy Case No.
	Chapter
Creditor's Name and Address	

Instructions: 1) Attach a copy of all court judgments, security agreements, and evidence of their perfection.
2) File all the documents by mailing them or delivering them to the Clerk of Bankruptcy Court.
3) If the debtor was not represented by an attorney in negotiating this agreement, the agreement must be accompanied by a motion for its approval. (See Form 21M.)

☐ Check box if motion to approve reaffirmation agreement is attached.

NOTICE TO DEBTOR:

This agreement gives up the protection of your bankruptcy discharge for this debt.

As a result of this agreement, the creditor may be able to take your property or wages if you do not pay the agreed amounts. The creditor may also act to collect the debt in other ways.

You may rescind (cancel) this agreement at any time before the bankruptcy court enters a discharge order or within 60 days after this agreement is filed with the court, whichever is later, by sending a letter to the creditor at the above address saying that the agreement is canceled or by telling the creditor in some other lawful way.

You are not required to enter into this agreement by any law. It is not required by the Bankruptcy Code, by any other law, or by any contract (except a reaffirmation agreement made in accordance with Bankruptcy Code § 524(c)).

You are allowed to pay this debt without signing this agreement. If you do not sign this agreement and are later unwilling or unable to pay the full amount, the creditor will not be able to collect it from you. The creditor also will not be allowed to take your property to pay the debt unless the creditor has a lien on that property.

If the creditor has a lien on your personal property, you have a right to redeem the property and eliminate the lien by making a single payment to the creditor equal to the current value of the property, as agreed by the parties or determined by the court.

This agreement is not valid or binding unless it is filed with the bankruptcy court. If you were not represented by an attorney during the negotiation of this reaffirmation agreement, the agreement cannot be enforced by the creditor unless 1) you have attended a reaffirmation hearing in the bankruptcy court, and 2) the agreement has been approved by the bankruptcy court. (Court approval is not required if this is a consumer debt and the creditor has a mortgage or other lien on your real estate.)

REAFFIRMATION AGREEMENT

The debtor and creditor named above agree to reaffirm the debt described in this agreement as follows.

THE DEBT

Total Amount of Debt When Case was Filed $_____

Total Amount of Debt Reaffirmed $ _____

Above total includes the following:

Interest Accrued to Date of Agreement $_____
Attorney Fees $_____
Late Fees $_____
Other Expenses or Costs Relating to the Collection of this Debt (Describe) $_____

Annual Percentage Rate (APR) _____ %

Amount of Monthly Payment $ _____

Date Payments Start _____

Total Number of Payments to be made _____

Total of Payments if paid according to schedule _____

Date Any Lien Is to Be Released if paid according to schedule _____

The debtor agrees that any and all remedies available to the creditor under the security agreement remain available.

All additional Terms Agreed to by the Parties (if any):

_____

_____

Payments on this debt [were][were not] in default on the date on which this bankruptcy case was filed.

This agreement differs from the original agreement with the creditor as follows:

_____

_____

CREDITOR'S STATEMENT CONCERNING AGREEMENT AND SECURITY/COLLATERAL (IF ANY)

Description of Collateral. If applicable, list manufacturer, year and model. _____

_____

Value $ _____

Basis or Source for Valuation _____

Current Location and Use of Collateral _____

Expected Future Use of Collateral _____

Check Applicable Boxes:

☐ Any lien described herein is valid and perfected.

☐ This agreement is part of a settlement of a dispute regarding the dischargeability of this debt under section 523 of the Bankruptcy Code (11 U.S.C. § 523) or any other dispute. The nature of dispute is _____.

DEBTOR'S STATEMENT OF EFFECT OF AGREEMENT ON DEBTOR'S FINANCES

My Monthly Income (take home pay plus any other income received) is $ _____.

My current monthly expenses total $ _____, not including any payment due under this agreement or any debt to be discharged in this bankruptcy case.

I believe this agreement [will][will not] impose an undue hardship on me or my dependents.

DEBTOR'S STATEMENT CONCERNING DECISION TO REAFFIRM

I agreed to reaffirm this debt because _____

_____

I believe this agreement is in my best interest because _____

_____

I [considered][did not consider] redeeming the collateral under section 722 of the Bankruptcy Code (11 U.S.C. § 722). I chose not to redeem because _____

_____

I [was][was not] represented by an attorney during negotiations on this agreement.

CERTIFICATION OF ATTACHMENTS

Any documents which created and perfected the security interest or lien [are][are not] attached. [*If documents are not attached*: The documents which created and perfected the security interest or lien are not attached because

_____

_____.]

SIGNATURES

_____
(Signature of Debtor)

Date_____

_____
(Signature of Joint Debtor)

Date_____

_____
(Name of Creditor)

_____
(Signature of Creditor Representative)

Date _____

CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY)

I hereby certify that 1) this agreement represents a fully informed and voluntary agreement by the debtor(s); 2) this agreement does not impose a hardship on the debtor or any dependent of the debtor; and 3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

_____ _____
(Signature of Debtor's Attorney, if any) Date

FORM 21M. MOTION FOR APPROVAL OF REAFFIRMATION AGREEMENT

UNITED STATES BANKRUPTCY COURT

_____DISTRICT OF _____

In re_____, Case No._____
Debtor

Chapter _____

MOTION FOR APPROVAL OF REAFFIRMATION AGREEMENT

The debtor named above and _____, a creditor of the debtor, have made an agreement reaffirming the debtor's debt to the creditor. The agreement is dated _____ and [has][has not] been filed with the court [*if previously filed,* on _____(Date)].

The court [has][has not] granted a discharge to the debtor.

The debtor [was] [was not] represented by an attorney during the negotiating of this agreement.

The debt reaffirmed in the agreement [is][is not] an unsecured debt.

The debtor states that the debtor voluntarily entered into the reaffirmation agreement.

The debtor believes that the reaffirmation agreement is in the best interest of the debtor and represents to the court that the agreement does not impose an undue hardship on the debtor or the debtor's dependents.

I *[We]* ask the court to approve the reaffirmation agreement.

Date_____ _____
(Signature of Debtor)

Date_____ _____
(Signature of Joint Debtor)

*Date*_____ _____
(Signature of Attorney for Debtor

*Date*_____ _____
(Signature of Creditor or Attorney for Creditor)

Form 21O

FORM 21O. ORDER APPROVING REAFFIRMATION AGREEMENT

UNITED STATES BANKRUPTCY COURT

_____DISTRICT OF _____

In re_____, Debtor

Case No._____

Chapter _____

ORDER APPROVING REAFFIRMATION AGREEMENT

The court approves/disapproves the agreement between the debtor and_____ (Name of Creditor).

BY THE COURT

Date _____

_____
United States Bankruptcy Judge

1.3.1 11 U.S.C. § 524(c) should be amended to provide that a reaffirmation agreement is permitted, with court approval, only if the amount of the debt that the debtor seeks to reaffirm does not exceed the allowed secured claim, the lien is not avoidable under the provisions of title 11, no attorney fees, costs, or expenses have been added to the principal amount of the debt to be reaffirmed, the motion for approval of the agreement is accompanied by underlying contractual documents and all related security agreements or liens, together with evidence of their perfection, the debtor has provided all information requested in the motion for approval of the agreement, and the agreement conforms with all other requirements of subsection (c).

Section 524(d) should be amended to delineate the circumstances under which a hearing is not required as a prerequisite to a court approving an agreement of the kind specified in section 524(c): a hearing will not be required when the debtor was represented by counsel in negotiations on the agreement and the debtor's attorney has signed the affidavit as provided in section 524(c), and a party in interest has not requested a judicial valuation of the collateral that is the subject of the agreement. If one or more of the foregoing requirements is not met, or in the court's discretion, the court shall conduct a hearing to determine whether an agreement that meets all of the requirements of subsection (c) should be approved. Court approval of an agreement signifies that the court has determined that the agreement is in the best interest of the debtor and the debtor's dependents and does not impose undue hardship on the debtor and the debtor's dependents in light of the debtor's income and expenses.

The Commission recommends that the Advisory Committee on Bankruptcy Rules of the Judicial Conference prescribe a form motion for approval of reaffirmation agreements that contains information enabling the court and the parties to determine the propriety of the agreement. Approval of the motion would not entail a separate order of the court.

1.3.2 An additional subsection should be added to section 524 to provide that the court shall grant judgment in favor of an individual who has received a discharge under section 727, 1141, 1228, or 1328 of this title for costs and attorneys fees, plus treble damages, from a creditor who threatens, files suit, or otherwise seeks to collect any debt that was discharged in bankruptcy and was not the subject of an agreement in accordance with subsections (c) and (d) of section 524.

Rule 4008.

DISCHARGE AND REAFFIRMATION HEARING

Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.

Bankruptcy Code Reference: § 524

Advisory Committee Note

Section 524(d) of the Code requires the court to hold a hearing to inform an individual debtor concerning the granting or denial of discharge and the law applicable to reaffirmation agreements.

The notice of the § 524(d) hearing may be combined with the notice of the meeting of creditors or entered as a separate order.

The expression "not more than" contained in the first sentence of the rule is for the explicit purpose of requiring the hearing to occur within that time period and cannot be extended.

Advisory Committee Note—1991 Amendment

This rule is changed to conform to § 524(d) of the Code as amended in 1984. A hearing under § 524(d) is not mandatory unless the debtor desires to enter into a reaffirmation agreement.

Bankruptcy Code—Comment

This rule implements § 524(d) of the Code.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: NOTICE TO INFANT OR INCOMPETENT PERSON

DATE: FEBRUARY 12, 1999

In response to Ken Klee's suggestion that the Rules be amended to improve noticing requirements as they apply to infants and incompetent persons, at the October 1998 meeting of the Advisory Committee I presented proposed amendments to Rule 1007 (requiring a debtor to include on the list of creditors and schedules the name and address of the legal representative of a known infant or incompetent person), and Rule 2002 (requiring that notices be mailed to such representative). These proposals were contained in my memorandum dated September 8, 1998 (copy enclosed).

As I pointed out in my memorandum, Rule 7004(b)(2) adequately governs service of process on infants and incompetent persons in an adversary proceeding. Rule 7004(b)(2) also applies in contested matters. Therefore, if there is a gap in the rules regarding notice to infants and incompetent persons, that gap is in Rule 2002 which governs notices to creditors and other parties. The proposed amendments included in my September 8th memorandum were designed to fill in that gap.

At the October meeting, Committee members made several suggestions for improving my proposed drafts. I was asked to

consider my drafts further in light of those helpful comments, and to present revised drafts at the March 1999 meeting. The most significant comment, shared by several committee members, was that the proposals should also address the capacity of an infant or incompetent person, as well as corporations and other entities, to file a bankruptcy petition and to participate in the case.

With respect to the capacity to file a bankruptcy petition, Prof. Jeffrey Morris has prepared a memorandum discussing the capacity of infants, incompetent persons, and corporations to file a bankruptcy petition. Jeff's memorandum includes drafts of possible amendments to Rule 1004 or, alternatively, new Rules 1004.1 and 1004.2. The memorandum is enclosed.

With respect to the capacity of infants, incompetent persons, corporations, and other entities to sue or be sued in a case, Civil Rule 17 governs these issues. Civil Rule 17 is applicable in adversary proceedings through Bankruptcy Rule 7017. Although current Rule 9014 does not make Rule 7017 applicable in contested matters (unless the court orders that it be applicable), the proposed amendments to Rule 9014 published as part of the Litigation Package would expressly make Rule 7017 applicable in Rule 9014 motions.

Rule 3001(b) provides that a creditor or the creditor's authorized agent may execute a proof of claim. Presumably, an

infant or incompetent person can file a proof of claim through a legal representative, which is an agent.

Notices to Infants and Incompetent Persons

Returning to proposed amendments designed to improve the sending of notices to infants and incompetent persons, I offer the following revised draft of Rule 1007 (this draft is the same as the one presented in October except for the bracketed language):

Rule 1007. Lists, Schedules and Statements; Time Limits

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(n) *Infants and Incompetent Persons.* If the debtor knows [or has reason to know] that a person listed on the list of creditors or schedules is an infant or incompetent person, the debtor also shall list thereon the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (n) is added to enable the person required to mail notices under Rule 2002 to mail them to the appropriate guardian or other representative when the debtor knows [or has reason to know] that a creditor or other person listed is an infant or incompetent person.

The proper mailing address of the representative is determined in accordance with Rule 7004(2)(b), which requires mailing to the person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

I also presented in October the following draft of proposed Rule 2002(p):

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

****

(p) *Notice to an Infant or Incompetent Person.* If a list or schedule filed under Rule 1007 includes the name and address of a representative of an infant or incompetent person, notices to the infant or incompetent person under this rule shall be mailed in the manner provided for service of a summons and complaint under Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (p) is added to require that notices to an infant or incompetent person under this rule are mailed to the appropriate guardian or other legal representative in the manner provided for service of a summons and complaint under Rule 7004(b)(2).

The clerk or another person required to mail notices will be aided by the addition of Rule 1007(n). If the debtor knows that a person listed is an infant or incompetent person, the debtor is required to list the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

Committee members raised two issues regarding this draft. First, is it necessary in view of Rule 2002(g) which requires that notice be sent to the creditors listed on the schedules. Second, what happens when the schedules list an infant as a creditor and also lists the name and address of the infant's legal representative, as required by proposed Rule 1007(n)(above), and the infant then files a proof of claim in his or her own name? Where do subsequent notices go?

In response to these questions, I drafted a proposed amendment to Rule 2002(g) to be considered as an alternative to the draft of Rule 2002(p) presented at the last meeting. As you may recall, the Committee decided to completely rewrite Rule 2002(g) at the last meeting to clarify it. The following draft is based on language of Rule 2002(g), as amended at the October meeting, and shows with underlines a new Rule 2002(g)(3):

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

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(g) ADDRESSING NOTICES.

(1) Notices required to be mailed under this rule to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent directs in a request filed in the particular case. If the entity files more than

one request designating a mailing address, the notice shall be addressed as directed in the last request filed. For the purposes of this subdivision --

(A) a proof of claim duly filed by a creditor or indenture trustee which designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a subsequent notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest duly filed by an equity security holder which designates a mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security

holders.

(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, notices under this rule shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (g) has been revised to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a mailing address, the last paper filed determines the proper address. The amendments also clarify that a request designating a mailing address is effective only with respect to a particular case.

Under subdivision (g), a duly filed proof of claim is considered a request designating a mailing address if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5). A duly filed proof of interest is considered a request designating a mailing address of an equity security holder.

Subdivision (g)(3) is added to assure that notices to an infant or incompetent person under this rule are mailed to the appropriate guardian or other legal representative. Under Rule 1007(n), if the debtor knows [or

has reason to knowl that a creditor is an infant or incompetent person, the debtor is required to include in the list and schedule of creditors the name and address of the person upon whom process would be served in an adversary proceeding in accordance with Rule 7004(b)(2). If the infant or incompetent person, or another person, files a request or proof of claim designating a different name and mailing address, the notices would have to be mailed to both names and addressed until the court resolved the issue as to the proper mailing address.

The other amendments are stylistic.

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules

FROM: Jeff Morris

DATE: February 1, 1999

RE: Commencement of Cases by Infants, Incompetent Persons, and Corporations

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Bankruptcy Code §§ 301, 302, 303, and 304 set out the manner of the commencement of bankruptcy cases. Part I of the Bankruptcy Rules provides additional guidance as to the commencement of the cases. Finally, eligibility for relief both generally and as to specific chapters, is governed by § 109 of the Code. Conspicuously absent from the Rules and Code sections, however, is any guidance regarding the capacity of infants, incompetent persons, or corporations to commence cases. Because they present more common issues, this memorandum will consider infants and incompetent persons separate from the discussion of corporations and similar entities.

Infants and Incompetent Persons

The Bankruptcy Rules contain two references to incompetent persons. Rule 1016 provides generally that a pending bankruptcy case of a debtor who becomes incompetent is treated identically to the case in which the debtor dies. Bankruptcy Rule 7017 incorporates Rule 17 of the Federal Rules of Civil Procedure for adversary proceedings only. Under that rule, infants and incompetent persons may proceed by an appointed representative, and in the absence of any representative, the infant or incompetent person may proceed by next friend or guardian ad litem. In fact, the Rule directs the court to appoint a guardian ad litem for unrepresented infants and incompetent persons. Neither Rule 1017 nor 7017, however, apply to the commencement of cases.

There has not been a large number of cases presenting the issue of capacity of infants and incompetent persons to commence bankruptcy cases. Nevertheless, in those few cases in which the issue has been presented, the courts generally have found that these persons have capacity to obtain voluntary bankruptcy relief. The courts have reached this conclusion either by incorporating applicable state law or by finding authorization in the Bankruptcy Rules.

In *Wieczorek v. Woldt (In re Kjellsen),* 53 F.3d 944 (8th Cir. 1995), the Court of Appeals affirmed the dismissal of a bankruptcy case initiated by an individual acting under a durable power of attorney from an incompetent person. The motion to dismiss the case, however, was brought by the duly appointed guardian of the debtor. The court held that under the applicable state law, the guardian had exclusive control over the debtor's property, and the action by the person holding a power of attorney was insufficient to authorize a bankruptcy filing on behalf of that debtor. The court made brief reference to Bankruptcy Rule 7017 and noted that that rule would prohibit the filing

of a suit by a debtor's next friend if a representative had already been appointed. The court did not rely on that provision, however, to conclude that the guardian had authority to act on the debtor's behalf.

The court in *In re Murray*, 199 B.R. 165 (Bankr. M.D. Tenn. 1996), resolved the issue employing a different analysis. In *Murray*, the debtor was seven years old at the time the petition was filed. The petition was signed by the debtor's mother as her next friend. The court reviewed § 109 and concluded that the infant debtor was eligible for relief. The court then focused on whether the debtor had the "capacity" to commence the case. Referring to Civil Rule 17 and supporting authorities, the court noted that "capacity is a procedural question typically controlled by court rules." 199 B.R. at 169. The court then reviewed Bankruptcy Rule 7017 and concluded that it did not provide direct authority for the debtor's mother to commence the case on behalf of the infant. The court did note the irony, however, that if an involuntary petition had been filed against the infant, that the court would be directed by Rule 7017 to appoint the debtor's mother as next friend to act on behalf of the alleged debtor. The court ultimately concluded that it was appropriate to incorporate Federal Rule 17 to permit the debtor's mother to act as her next friend to commence the case. The court reached this conclusion be relying upon Bankruptcy Rule 9029(b) which permits the judge to "regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district." (A copy of *Murray* is attached.)

Regardless of the route taken, the courts have nearly unanimously found that both infants and incompetent persons are eligible for bankruptcy relief. A contrary finding arguably would be inconsistent with § 109 of the Code. The *Murray* and *Kjellsen* cases, however, demonstrate two different means by which capacity can be found. In *Murray*, the authority is said to reside in the power of the bankruptcy court to regulate practice before it. *Kjellsen*, on the other hand, directs attention to the applicable state law to determine the proper party to bring the action.

In many ways, the commencement of the bankruptcy case is different from the commencement of a civil action. The bankruptcy proceeding likely will result in the adjustment or discharge of obligations owed by the debtor. Civil actions and adversary proceedings within bankruptcy cases, however, resolve disputes or establish rights. In that sense, the commencement of a bankruptcy case is more analogous to the capacity to enter into a contract than it is the capacity to commence a civil action. For that reason, it would seem more appropriate to rely on the applicable state law to resolve whether a particular debtor has capacity to commence a bankruptcy proceeding.

There could be some concern that leaving these matters to state law could result in some infants and incompetent persons being denied access to the bankruptcy courts when it is necessary for them. Indeed, some courts have suggested that denial of access to bankruptcy for these persons on a voluntary basis would be unconstitutional since they are subject to involuntary bankruptcy relief. *In re Zawisza,* 73 B. R. 929 (Bankr. E.D. Pa. 1987). Restrictions on access to bankruptcy relief should not be too difficult to overcome. Generally, the commencement of an action by an infant or incompetent person does confer jurisdiction on a court. It simply presents a procedural

irregularity that is subject to being cured without dismissal of the action. *See, e.g., Canterbury v. Pennsylvania Railroad Co.,* 158 Ohio St. 68, 107 N.E.2d 115 (1952); *Perdrix Machinery Sales, Inc. v. Papp,* 116 Ohio App. 291, 188 N.E.2d 80 (1962).

While capacity to sue is in this sense a procedural matter, it does not necessarily follow that it should be governed by the Bankruptcy Rules. Adopting a rule that would establish a guardian, guardian ad litem, or next friend as the proper party to commence a case on behalf of an infant or an incompetent person could create additional confusion. That would be particularly so when persons in conflicting positions seek to commence a case on behalf of an infant or incompetent person. In that event, it is likely that the court would have to refer back to state law in any event to determine which party has the power to pursue the matter.

The absence of specific directive in the Rules for the commencement of cases by infants and incompetent persons has not led the courts to conclude that bankruptcy relief is unavailable for these persons. Nevertheless, if concern exists that lack of guidance from the Rules might operate to prevent some who need relief from being able to obtain it, the Rules could be amended to add a provision similar to Bankruptcy Rule 7017. Ideally, the new rule would be placed in the Part I along with the Partnership Petition Rule (1004), and any rule that might be added to address corporate petitions could be included in the same location within the Rules. The new rule could provide as follows:

Rule 1004.1

PETITION FOR INFANT OR INCOMPETENT PERSON

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, a next friend or guardian *ad litem* may file a voluntary petition on behalf of the infant or incompetent person. The court shall appoint a guardian *ad litem* for an infant or

incompetent person or shall make such other order as it deems necessary for the protection of the infant or incompetent person.

COMMITTEE NOTE

This rule is derived from Rule 17(c) F.R. Civ. P. and sets out the manner in which cases are commenced on behalf of infants and incompetent persons. Nothing in this rule is intended to create specific authority for any particular representative. Applicable nonbankruptcy law will govern the scope of the powers of those representatives. The rule fills the gap in the Rules as noted in *In re Murray*, 199 B.R. 165 (Bankr. M.D. Tenn. 1996).

Corporations

Corporations are "persons" [§ 101(41)], and they are eligible for relief under Chapters 7, 11, and 12 of the Bankruptcy Code. As with infants and incompetent persons, however, there is no direction either in the Code or the Rules as to the manner by which corporate bankruptcy proceedings are commenced. Official Form 1 includes a statement that a particular individual is authorized to file a petition on behalf of a corporation. Similarly, Official Form 2 includes a declaration under penalty of perjury that a particular individual has reviewed the documents being filed and that they contain accurate information. Neither of these statements, however, provide any indication as to what person or persons is authorized or empowered to file a bankruptcy petition on behalf of the corporation.

In *Price v. Gurney*, 324 U.S. 100 (1945), the Supreme Court held that the determination of whether a bankruptcy petition was properly filed on behalf of a corporation is made under local law. Specifically, the court held that if "those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, [the court] has no alternative but to dismiss the petition." 324 U.S. at 106. The courts have continued to follow *Price v. Gurney* in cases decided under the Bankruptcy Code. *See, e.g., Keenihan v. Heritage Press, Inc.*, 19 F.3d 1255 (8th Cir. 1994); *Phillips v. First City, Texas-Tyler, N.A.*, 966 F.2d 926 (5th Cir. 1992); *Dean v. Protho Express, Inc. (In re Protho Express, Inc.)*, 130 B.R. 517 (Bankr. M.D. Tenn. 1991); *In re Quarter Moon Livestock Co.*, 116 B.R. 775 (Bankr. D. Idaho 1990). Typically, the power or authority to file a voluntary petition in bankruptcy is vested in the board of directors of the corporation. **1 Cox, Hazen & O'Neal, CORPORATIONS** at 9.19 (1999). State statutory corporation law usually grants power to the board in general terms and is silent on the issue of the authority of the board of directors, officers, or shareholders to commence bankruptcy proceedings. *See, e.g.*, Del. Code Ann.,

tit. 8, § 141 (Supp.1998)("business affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors...."); N.Y. Bus. Corp. Law § 701 (McKinney 1986); Model Business Corp. Act § 8.01(b); ALI Principles of Corp.Governance § 3.02(b)(6). The bankruptcy court in Idaho considered those arguments in *In re Quarter Moon Livestock Co.*, 116 B.R. 775, 780-81 (Bankr. D. Idaho 1990), and concluded that under the Model Business Corporation Act, as enacted in Idaho, the board of directors was empowered to file a voluntary petition on behalf of the corporation. This power, however, can be limited either by the by-laws or articles of incorporation for the entity.

A number of bankruptcy courts have proceeded under the assumption that the board of directors is the entity with the authority to commence a bankruptcy proceeding on behalf of the corporation. Local rules in the following districts all call for the submission of an appropriate resolution of the board of directors setting out the authority of the officer or agent to commence the proceeding and act on behalf of the corporation: C.D. Cal. Local Rule 1002-1(7)(b)(iii); D. Del. General Order #8(6); M.D. La. Local Rule 201(c); D.Minn. Local Forum 1008-1; S.D. N.Y. Local Rule 1074-1(a); D. Nev. Local Rule 1002(c); and D.R.I. Local Rule 1002-1(f)(1). While these local rules tend to require the filing of a resolution of the board of directors authorizing the filing of a petition, it is likely that the courts would find that a corporate resolution or other official corporate document authorizing a particular entity or officer to file a petition on behalf of the corporation would be sufficient along with the appropriate individual's signature to commence a bankruptcy proceeding on behalf of that corporation. To the extent that these local rules are read to require a resolution of the board of directors when the applicable state law would require some other authority exist for the filing of a bankruptcy proceeding, those rules would seem to conflict with the Supreme Court's decision in *Price v. Gurney* and those other decisions recognizing that state law establishes the authority for a corporation to act.

Some concern could be expressed that states could change their corporation laws to require super majority or even 100% consent by shareholders to the commencement of a bankruptcy case. Other barriers could be enacted to limit a corporation's ability to commence bankruptcy proceedings voluntarily. Any attempt to bar a corporation from obtaining bankruptcy relief is presumably void as against public policy. *See, e.g., In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983)(court notes that it is well settled that "an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy"). There should be no distinction drawn between an individual debtor and a corporate debtor as regards the availability of relief. The mechanics for seeking that relief, however, arguably rest properly with the corporation law itself. Shareholders certainly would have access to the information setting out the authority of one group or another to commence a bankruptcy proceeding for the corporation. It is questionable whether the bankruptcy rules should override that substantive allocation of corporate power. Furthermore, any restrictions that might be placed on the identification of the entity or entities authorized to file a bankruptcy proceeding on behalf of the corporation would have no impact on creditors who might initiate an involuntary case against a corporation. Consequently, it seems prudent to continue the absence of any specific directive in the bankruptcy rules for the manner by which a corporation may commence a voluntary bankruptcy proceeding.

The same standards should govern the commencement of voluntary cases by Limited Liability Companies, Limited Liability Partnerships, and the like. These forms of business entities are established by state law, and the scope of their powers derives from that law. Moreover, the states may create additional types of business entities, and the Bankruptcy Rules would have to be amended each time to reflect those changes if a rule specific to these forms of business were adopted. As with corporations, it seems prudent to leave the issue of the authority to commence cases to the applicable state law.

If the Committee believes that the Bankruptcy Rules should address the topic and provide a specific method for the commencement of corporate cases, then I would suggest the following rule:

RULE 1004.2
CORPORATION PETITION

A voluntary petition filed by a corporation shall be signed by an agent of the corporation and accompanied by a copy of the resolution of the board of directors, minutes of the corporate meeting, or other evidence of the agent's authority to file the petition on behalf of the corporation.

COMMITTEE NOTE

This rule requires that any person filing a bankruptcy petition on behalf of a corporation sign the petition and submit with it a copy of the appropriate document establishing the authority of the signatory to file the petition on behalf of the corporation. This rule does not create authority on behalf of any particular agent or group to file a petition on behalf of a corporation. Those issues are determined by reference to applicable nonbankruptcy law. *See Price v. Gurney*, 324 U.S. 100 (1945).

If interest exists in adding such a rule to the Bankruptcy Rules, it might also be possible to include it as a part of existing Rule 1004. The rule could be renamed Corporate or Partnership Petition, and the foregoing suggestion on corporate bankruptcies could be added as subdivision (c) of existing Bankruptcy Rule 1004. The Rule would appear as follows:

RULE 1004
PARTNERSHIP OR CORPORATION PETITION

* * * * *

(c) CORPORATION PETITION. A voluntary petition filed by a corporation shall be signed by an agent of the corporation and accompanied by a copy of the resolution of the board of directors, minutes of the corporate meeting, or other evidence of the agent's authority to file the petition on behalf of the corporation.

COMMITTEE NOTE

Subdivision (c) is added to this rule to require that any person filing a bankruptcy petition on behalf of a corporation sign the petition and submit with it a copy of the appropriate document establishing the authority of the signatory to file the petition on behalf of the corporation. This rule does not create authority on behalf of an particular agent or group to file a petition on behalf of a corporation. Those issues are determined by reference to applicable nonbankruptcy law. *See Price v. Gurney*, 324 U.S. 100 (1945).

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: NOTICES TO INFANT OR INCOMPETENT PERSON

DATE: SEPTEMBER 8, 1998

Bankruptcy Rule 7004 governs service of a summons and complaint in an adversary proceeding. Rule 7004(b) provides as follows:

> (b) *Service by First Class Mail.* Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:
>
> ****
>
> (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 a defendant in the courts of general jurisdiction of that state. The summons and complaint in that 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.

Under Rule 9014, a motion in a contested matter "shall be served in the manner provided for service of a summons and complaint by Rule 7004..." Therefore, a motion against an infant or incompetent person, if served by mail, must be mailed in the manner provided in Rule 7004(b)2).

Rule 2002 requires that the clerk, or some other person as the court may direct, mail various notices to creditors and other

parties. Notices under Rule 2002 include, among others, notice of the meeting of creditors, notice of the time for filing a proof of claim, notice of the time for voting on a plan, notice of a plan confirmation hearing, and notice of the time for objecting to the debtor's discharge. Rule 2002 does not contain any provision governing the mailing of notices to an infant or incompetent person. Rule 7004(b)(2) is not applicable to Rule 2002 notices.

Ken Klee has suggested that the Rules be amended to require that Rule 2002 notices mailed to an infant or incompetent person be mailed to the legal guardian, parent, or other person who, under state law, would be required to receive service. In essence, the substance of Rule 7004(b)(2) should apply to Rule 2002 notices. Ken asked me to draft and present to the Advisory Committee proposed amendments that would achieve that result.

It is important to note that in most cases the clerk sends the Rule 2002 notices. Of course, there is no way for the clerk to know whether a listed creditor or other person entitled to receive a Rule 2002 notice is an infant or incompetent person. The schedules do not require the identification of creditors or others who are infants or incompetent persons. Therefore, to facilitate the proper mailing of notices consistent with the substance of Rule 7004(b)(2), the clerk would have to be informed of infant or incompetent person status. The best way to inform

the clerk is to require the debtor to identify such persons when listed in schedules or creditor lists.

I offer the following proposed amendments to Rules 1007 and 2002 for the Committee's consideration at the October 1998 meeting:

Rule 1007. Lists, Schedules and Statements; Time Limits

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(n) *Infants and Incompetent Persons.* If the debtor knows that a person listed on the list of creditors or schedules is an infant or incompetent person, the debtor also shall list thereon the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (n) is added to enable the person required to mail notices under Rule 2002 to mail them to the appropriate guardian or other representative when the debtor knows that a creditor or other person listed is an infant or incompetent person.

The proper mailing address of the representative is determined in accordance with Rule 7004(2)(b), which requires mailing to the person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

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

****

(p) *Notice to an Infant or Incompetent Person.* If a list or schedule filed under Rule 1007 includes the name and address of a representative of an infant or incompetent person, notices to the infant or incompetent person under this rule shall be mailed in the manner provided for service of a summons and complaint under Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (p) is added to require that notices to an infant or incompetent person under this rule are mailed to the appropriate guardian or other legal representative in the manner provided for service of a summons and complaint under Rule 7004(b)(2).

The clerk or another person required to mail notices will be aided by the addition of Rule 1007(n). If the debtor knows that a person listed is an infant or incompetent person, the debtor is required to list the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

MEMORANDUM

DATE: February 18, 1999

FROM: Patricia S. Channon

RE: Alternative Dispute Resolution Act of 1998

TO Advisory Committee on Bankruptcy Rules

In October 1998, the President signed the above-referenced Act, which places certain responsibilities on the district courts regarding alternative dispute resolution (ADR) "in all civil actions, including adversary proceedings in bankruptcy." The Act, which is codified at 28 U.S.C. §§ 651-658, replaces arbitration programs that were authorized for a limited period in 20 district courts with permanent legislation that provides for a wide array of ADR procedures in all district courts. A copy of the Act is attached.

The Act requires the district courts by local rule to make available to parties in civil actions at least one form of ADR. The Act expressly includes adversary proceedings in bankruptcy among the civil actions to which this requirement applies. No requirements are placed on the bankruptcy courts, however, and the Administrative Office has taken the position that the inclusion in the statute of adversary proceedings in bankruptcy means that the Act applies only to those adversary proceedings being handled by a district court under a withdrawal of reference. I have attached a Federal Judicial Center memorandum which, in its penultimate paragraph, states this interpretation.

On February 4, 1999, the Federal Judicial Television Network broadcast a discussion of the Act in which the opinion was repeated that the Act does not require bankruptcy courts to institute ADR programs. Any bankruptcy court can establish an ADR program voluntarily, as many bankruptcy courts already have.

Judge Small has raised for the Advisory Committee's consideration, however, a concern about the notice requirements of Rule 9019 in connection with a settlement that may be reached under an ADR procedure in a district court or court of appeals. A copy of Judge Small's letter dated February 5, 1999, is attached.

Attachments

One Hundred Fifth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-seventh day of January, one thousand nine hundred and ninety-eight

An Act

To amend title 28, United States Code, with respect to the use of alternative dispute resolution processes in United States district courts, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Alternative Dispute Resolution Act of 1998".

SEC. 2. FINDINGS AND DECLARATION OF POLICY.

Congress finds that—

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

SEC. 3. ALTERNATIVE DISPUTE RESOLUTION PROCESSES TO BE AUTHORIZED IN ALL DISTRICT COURTS.

Section 651 of title 28, United States Code, is amended to read as follows:

"§ 651. Authorization of alternative dispute resolution

"(a) DEFINITION.—For purposes of this chapter, an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration as provided in sections 654 through 658.

"(b) AUTHORITY.—Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.

"(c) EXISTING ALTERNATIVE DISPUTE RESOLUTION PROGRAMS.—In those courts where an alternative dispute resolution program is in place on the date of the enactment of the Alternative Dispute Resolution Act of 1998, the court shall examine the effectiveness of that program and adopt such improvements to the program as are consistent with the provisions and purposes of this chapter.

"(d) ADMINISTRATION OF ALTERNATIVE DISPUTE RESOLUTION PROGRAMS.—Each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.

"(e) TITLE 9 NOT AFFECTED.—This chapter shall not affect title 9, United States Code.

"(f) PROGRAM SUPPORT.—The Federal Judicial Center and the Administrative Office of the United States Courts are authorized to assist the district courts in the establishment and improvement of alternative dispute resolution programs by identifying particular practices employed in successful programs and providing additional assistance as needed and appropriate.".

SEC. 4. JURISDICTION.

Section 652 of title 28, United States Code, is amended to read as follows:

"§ 652. Jurisdiction

"(a) CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION IN APPROPRIATE CASES.—Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, minitrial, and arbitration as authorized in sections 654 through 658. Any district court that elects to require the use of alternative dispute resolution in certain cases may do so only with respect to mediation, early neutral evaluation, and, if the parties consent, arbitration.

"(b) ACTIONS EXEMPTED FROM CONSIDERATION OF ALTERNATIVE DISPUTE RESOLUTION.—Each district court may exempt from the requirements of this section specific cases or categories of cases in which use of alternative dispute resolution would not be appropriate. In defining these exemptions, each district court shall consult

with members of the bar, including the United States Attorney for that district.

"(c) AUTHORITY OF THE ATTORNEY GENERAL.—Nothing in this section shall alter or conflict with the authority of the Attorney General to conduct litigation on behalf of the United States, with the authority of any Federal agency authorized to conduct litigation in the United States courts, or with any delegation of litigation authority by the Attorney General.

"(d) CONFIDENTIALITY PROVISIONS.—Until such time as rules are adopted under chapter 131 of this title providing for the confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.".

SEC. 5. MEDIATORS AND NEUTRAL EVALUATORS.

Section 653 of title 28, United States Code, is amended to read as follows:

"§ 653. Neutrals

"(a) PANEL OF NEUTRALS.—Each district court that authorizes the use of alternative dispute resolution processes shall adopt appropriate processes for making neutrals available for use by the parties for each category of process offered. Each district court shall promulgate its own procedures and criteria for the selection of neutrals on its panels.

"(b) QUALIFICATIONS AND TRAINING.—Each person serving as a neutral in an alternative dispute resolution process should be qualified and trained to serve as a neutral in the appropriate alternative dispute resolution process. For this purpose, the district court may use, among others, magistrate judges who have been trained to serve as neutrals in alternative dispute resolution processes, professional neutrals from the private sector, and persons who have been trained to serve as neutrals in alternative dispute resolution processes. Until such time as rules are adopted under chapter 131 of this title relating to the disqualification of neutrals, each district court shall issue rules under section 2071(a) relating to the disqualification of neutrals (including, where appropriate, disqualification under section 455 of this title, other applicable law, and professional responsibility standards).".

SEC. 6. ACTIONS REFERRED TO ARBITRATION.

Section 654 of title 28, United States Code, is amended to read as follows:

"§ 654. Arbitration

"(a) REFERRAL OF ACTIONS TO ARBITRATION.—Notwithstanding any provision of law to the contrary and except as provided in subsections (a), (b), and (c) of section 652 and subsection (d) of this section, a district court may allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it when the parties consent, except that referral to arbitration may not be made where—

"(1) the action is based on an alleged violation of a right secured by the Constitution of the United States;

"(2) jurisdiction is based in whole or in part on section 1343 of this title; or

"(3) the relief sought consists of money damages in an amount greater than $150,000.

"(b) SAFEGUARDS IN CONSENT CASES.—Until such time as rules are adopted under chapter 131 of this title relating to procedures described in this subsection, the district court shall, by local rule adopted under section 2071(a), establish procedures to ensure that any civil action in which arbitration by consent is allowed under subsection (a)—

"(1) consent to arbitration is freely and knowingly obtained; and

"(2) no party or attorney is prejudiced for refusing to participate in arbitration.

"(c) PRESUMPTIONS.—For purposes of subsection (a)(3), a district court may presume damages are not in excess of $150,000 unless counsel certifies that damages exceed such amount.

"(d) EXISTING PROGRAMS.—Nothing in this chapter is deemed to affect any program in which arbitration is conducted pursuant to section title IX of the Judicial Improvements and Access to Justice Act (Public Law 100–702), as amended by section 1 of Public Law 105–53.".

SEC. 7. ARBITRATORS.

Section 655 of title 28, United States Code, is amended to read as follows:

"§ 655. Arbitrators

"(a) POWERS OF ARBITRATORS.—An arbitrator to whom an action is referred under section 654 shall have the power, within the judicial district of the district court which referred the action to arbitration—

"(1) to conduct arbitration hearings;

"(2) to administer oaths and affirmations; and

"(3) to make awards.

"(b) STANDARDS FOR CERTIFICATION.—Each district court that authorizes arbitration shall establish standards for the certification of arbitrators and shall certify arbitrators to perform services in accordance with such standards and this chapter. The standards shall include provisions requiring that any arbitrator—

"(1) shall take the oath or affirmation described in section 453; and

"(2) shall be subject to the disqualification rules under section 455.

"(c) IMMUNITY.—All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.".

SEC. 8. SUBPOENAS.

Section 656 of title 28, United States Code, is amended to read as follows:

"§ 656. Subpoenas

"Rule 45 of the Federal Rules of Civil Procedure (relating to subpoenas) applies to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing under this chapter.".

SEC. 9. ARBITRATION AWARD AND JUDGMENT.

Section 657 of title 28, United States Code, is amended to read as follows:

"§ 657. Arbitration award and judgment

"(a) FILING AND EFFECT OF ARBITRATION AWARD.—An arbitration award made by an arbitrator under this chapter, along with proof of service of such award on the other party by the prevailing party or by the plaintiff, shall be filed promptly after the arbitration hearing is concluded with the clerk of the district court that referred the case to arbitration. Such award shall be entered as the judgment of the court after the time has expired for requesting a trial de novo. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

"(b) SEALING OF ARBITRATION AWARD.—The district court shall provide, by local rule adopted under section 2071(a), that the contents of any arbitration award made under this chapter shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated.

"(c) TRIAL DE NOVO OF ARBITRATION AWARDS.—

"(1) TIME FOR FILING DEMAND.—Within 30 days after the filing of an arbitration award with a district court under subsection (a), any party may file a written demand for a trial de novo in the district court.

"(2) ACTION RESTORED TO COURT DOCKET.—Upon a demand for a trial de novo, the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration.

"(3) EXCLUSION OF EVIDENCE OF ARBITRATION.—The court shall not admit at the trial de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless—

"(A) the evidence would otherwise be admissible in the court under the Federal Rules of Evidence; or

"(B) the parties have otherwise stipulated.".

SEC. 10. COMPENSATION OF ARBITRATORS AND NEUTRALS.

Section 658 of title 28, United States Code, is amended to read as follows:

"§ 658. Compensation of arbitrators and neutrals

"(a) COMPENSATION.—The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter.

"(b) TRANSPORTATION ALLOWANCES.—Under regulations prescribed by the Director of the Administrative Office of the United States Courts, a district court may reimburse arbitrators and other neutrals for actual transportation expenses necessarily incurred in the performance of duties under this chapter.".

SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out chapter 44 of title 28, United States Code, as amended by this Act.

SEC. 12. CONFORMING AMENDMENTS.

(a) LIMITATION ON MONEY DAMAGES.—Section 901 of the Judicial Improvements and Access to Justice Act (28 U.S.C. 652 note), is amended by striking subsection (c).

(b) OTHER CONFORMING AMENDMENTS.—(1) The chapter heading for chapter 44 of title 28, United States Code, is amended to read as follows:

"CHAPTER 44—ALTERNATIVE DISPUTE RESOLUTION".

(2) The table of contents for chapter 44 of title 28, United States Code, is amended to read as follows:

"Sec.
"651. Authorization of alternative dispute resolution.
"652. Jurisdiction.
"653. Neutrals.
"654. Arbitration.
"655. Arbitrators.
"656. Subpoenas.
"657. Arbitration award and judgment.
"658. Compensation of arbitrators and neutrals.".

(3) The item relating to chapter 44 in the table of chapters for Part III of title 28, United States Code, is amended to read as follows:

"44. Alternative Dispute Resolution ..... 651".

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

RYA W. ZOBEL
DIRECTOR

TEL.: 202-502-4162
FAX: 202-502-4099

January 29, 1999

TO: Chief Judges, United States District Courts
Chief Judges, United States Bankruptcy Courts
Clerks of District and Bankruptcy Courts
District and Bankruptcy Court ADR Administrators

SUBJECT: Alternative Dispute Resolution Act of 1998

In October 1998, the President signed the Alternative Dispute Resolution Act of 1998, which places certain responsibilities on the district courts regarding ADR in civil actions. The Act also authorizes the Center and AO to assist the courts in establishing and improving their dispute resolution programs. I write to let you know some steps the Center is taking to help you comply with the statute and to send you the enclosed list of resources, which may be helpful to courts that wish to design, revise, or evaluate an ADR program.

Assistance from the Center

As I have written previously (January 14), the Center will present a discussion of the Act on February 4 at 12:00 EST over the Federal Judicial Television Network. The Center is also planning to provide a forum at the chief district judges' meeting in May, where participants will be able to discuss the Act's requirements and the courts' experiences in implementing ADR programs. We are working as well on a workshop for court ADR administrators, where they can talk about their responsibilities and exchange ideas. And we will use other judge and staff meetings as appropriate for discussion of the Act.

For courts that decide to design a new ADR program or evaluate and redesign an existing one, a number of resources are readily available. Enclosed is a list of publications, videos, and other materials courts have found helpful in developing, using, and assessing court-connected ADR programs. Many of these materials can be obtained from the Center. We also can provide examples of local rules adopted by courts with ADR programs.

If your court will be designing a new ADR program, I encourage you to contact courts that have been managing such programs. They can provide both information and guidance based on their experience in such matters as writing local ADR rules, selecting appropriate cases, and setting up and training panels of neutrals. A number of courts now have ADR administrators, who are also very knowledgeable. To learn which courts have established ADR programs and

which have ADR administrators, consult the first document on the enclosed resource list, which you can obtain from the Center's Information Services Office (fax requests to 202-502-4077).

Here at the Center we are aware of the great variety of approaches to ADR already taken by the courts. Recognizing that some have embraced ADR while others have serious reservations about it, our goal is to help those seeking assistance in complying with the Act as well as any court that wishes to learn more about ADR programs generally. To that end, I will be pleased to hear your specific requests or suggestions regarding Center assistance and will continue, as well, to consult with the Administrative Office and relevant Judicial Conference committees. For help from Center staff, you may call Donna Stienstra (district courts) or Bob Niemic (bankruptcy courts) at 202-502-4070.

The Act's Requirements

District chief judges received a summary of the Act in a November 9, 1998 memorandum from AO Director Mecham. As Mr. Mecham noted, the Act imposes some basic requirements on the courts, but it also retains a high degree of discretion and flexibility for individual courts, including the threshold decision of how extensive the court's ADR program should be.

Because some courts have expressed uncertainty about the scope of the Act, I would like to pass on to you the following information provided by the Administrative Office. First, the Act imposes no requirements on the bankruptcy courts and establishes requirements for district courts only. Second, it is the position of the Conference that courts have inherent authority to conduct all forms of ADR, other than mandatory arbitration, and that the Act's requirement to authorize the use of ADR simply makes the courts' authority explicit.

* * * * * *

You will notice that I am sending this memorandum to a relatively small subset of judges. Since I do not know which judges in your court have been assigned responsibility for ADR developments, I request that you forward this memorandum—and the list of resources in particular—to them.

With my regards,

Rya W. Zobel

cc: Clarence A. Lee, Jr., Associate Director, Administrative Office

United States Bankruptcy Court
Eastern District of North Carolina

A. Thomas Small
Chief Judge
919-856-4603

Post Office Drawer 2747
Room 220
Century Station
300 Fayetteville Street Mall
Raleigh, North Carolina 27602

February 5, 1999

The Honorable Adrian G. Duplantier
United States District Court
Eastern District of Louisiana
C-205 U.S. Courthouse
500 Camp Street
New Orleans, LA 70130-3363

Dear Adrian:

After our public hearing on January 28, I mentioned that the Alternative Dispute Resolution Act of 1998 may require the adoption of a new bankruptcy rule. I have just learned that it is the position of the Administrative Office that the Act only applies to district courts and that the reference to "adversary proceedings in bankruptcy" in 28 U.S.C. § 654(a) refers only to adversary proceedings where the reference has been withdrawn.

I initially thought that a new rule might be necessary to provide a mechanism for consenting to arbitration under 28 U.S.C. § 654(a), but in view of the Administrative Office's interpretation of the Act, the rule would be more appropriately placed in the Federal Rules of Civil Procedure.

However, the possibility that adversary proceedings affecting the estate may be resolved by ADR in courts other than the bankruptcy court raises another question. Rule 9019 provides that the court may approve a compromise or settlement after notice to creditors. I am not sure that it is clear that a mediated settlement of an adversary proceeding in district court (whether as a result of an appeal to the district court or a withdrawal of the reference by the district court) is subject to notice to all creditors and approval by the court. I have the same question with respect to mediated settlements in the court of appeals. Furthermore, if the court must approve a settlement under Rule 9019, which court does the approving? I assume that it should be the bankruptcy court unless the reference has been withdrawn.

It may be that a new rule, or a clarification of Rule 9019 is required.

Very truly yours,

A. Thomas Small

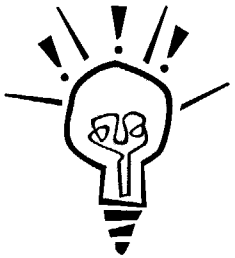
ATS:lw

cc: Professor Alan N. Resnick
Patricia S. Channon

Item 12 will be an oral report.

13

THE GESTATION OF AN AMENDMENT



YEAR 1

YEAR 2

YEAR 3

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.

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.

(August)

Advisory Committee reviews written comments and holds hearing(s). Public comment period closes.

(January - March)

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).

(March -April)

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)

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress.

(March or April)

(must be by May 1)

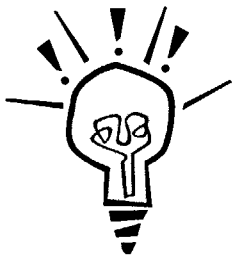
Congress can alter or reject during the next seven months. If Congress does not act, amendments take effect December 1.

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.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

3/99

THE GESTATION OF AN AMENDMENT



YEAR 1

Rules 2002(c), 3016, 3017, and 3020 and Official Form 15 (injunctions in plans)

Rules 1004, 1007, 2002 and proposed new Rules 1004.1 and 1004.2 (notice to infants, etc. and capacity to file)

Proposed Official Form 21 (reaffirmation agreement)

Rule 9019 (ADR)

Rule 2002(g)

Rule 9020

YEAR 2

"Litigation Package," Rules 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 9006, 9013, 9014, 9017, 9021, and 9034

"Other Amendments," Rules 1007, 1017, 2002, 4003, 4004, and 5003

Official Forms 1 and 7

YEAR 3

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

3/99

14-15

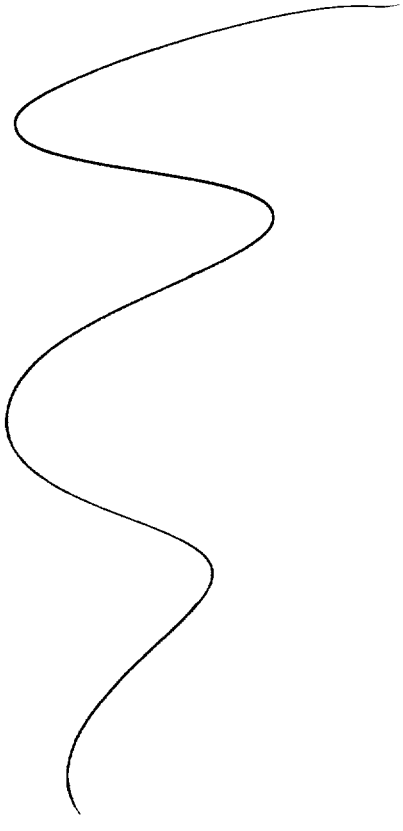
Items 14 and 15 will be oral.

Supplemental

Agenda

Book

Materials



Standards Governing Attorney Conduct in the Bankruptcy Courts

Report to the Judicial Conference
Advisory Committee on Bankruptcy Rules

Marie Leary

With the advice and assistance of
Bob Niemic & Melissa Deckman

Federal Judicial Center
March 1999

Contents

Appendices

Summary

The Judicial Conference Committee on Rules of Practice and Procedure in conjunction with the Advisory Committee on Bankruptcy Rules requested the Federal Judicial Center to conduct a study of attorney conduct issues in the bankruptcy courts. In December 1998, the Center sent 317 questionnaires to all chief bankruptcy judges (including bankruptcy judges in districts with only one bankruptcy judge) and to all other bankruptcy judges.*

1. Sources of Standards Governing Attorney Conduct

a. Source of Standards and the Impact of Changing District Court Rules

(1) Forty-seven (61%) of the 77 responding chief bankruptcy judges said that their courts follow the local rules of attorney conduct of their respective federal district courts. Most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct (only 7% of bankruptcy courts indicated that they do). Thus, proposed changes or uniformity in district court attorney conduct rules could carry over to most of the bankruptcy courts, even if the proposed changes are not directly aimed at or applied to the bankruptcy courts. Nine percent of chief judge respondents indicated that their courts have a local bankruptcy rule that adopts standards other than those in the district court's local rules, and 12% said they have no local district or bankruptcy rule governing attorney conduct.

b. Bankruptcy Courts' Use of Standards Other than Those in Local Rules

(1) Of the 53 responding chief bankruptcy judges in districts with some form of attorney conduct standards, 60% (32) said they never use attorney conduct standards other than the Bankruptcy Code, the Federal Rules of Bankruptcy Practice, or the formal standards referred to in their local bankruptcy rules or district court rules; 40% (21) indicated they did.

(2) When bankruptcy courts look outside their local rules and outside the Bankruptcy Code and Federal Rules of Bankruptcy Procedure for guidance, most turn to state ethics rules.

2. Type and Frequency of Attorney Conduct Issues in Bankruptcy

a. Looking at responses to questions posed to all responding bankruptcy judges (chief and non-chief), the majority of responding judges reported the occurrence one or more times within the past two years of the five following types of attorney conduct issues: (1) 11 U.S.C. § 327 or § 1103 governing representation of an adverse interest or conflicts of interest (80% of 249 respondents); (2) other rules

* We received responses to 251 of the 317 questionnaires mailed to all bankruptcy judges (excluding recalled bankruptcy judges) (an overall response rate of 79%).

regarding conflicts of interest (70% of 249 respondents); (3) disclosure standards regarding employment of attorneys (71% of 247 respondents); (4) rules regarding attorneys' fees (62% of 244 respondents); and (5) candor towards a tribunal (57% of 248 responding judges).

b. The majority of responding judges indicated that each of the five following types of attorney conduct issues had never arisen in the past two years. They are worth noting, however, since the numbers of judges reporting one or more incidences were not insignificant: (1) truthfulness in statements to others (45% of 247 respondents); (2) lawyer as a witness (37%); (3) communication with represented person (30%); (4) confidentiality (19%); and (5) safekeeping of client property (27%).

c. Other findings include:
   - Only a very small group of attorney conduct issues arise in bankruptcy courts with notable frequency.
   - Responding bankruptcy judges were confronted with attorney conduct issues involving statutory or bankruptcy-related standards more often than other types of standards.
   - The other types of attorney conduct issues prevalent in bankruptcy courts, which may also arise in district court practice, often involve different concerns in the context of bankruptcy court practice due to the unique characteristics of such practice. These issues include conflict of interest issues analogous to those covered by ABA Model Rules 1.7 through 1.11, attorneys' fees, and candor towards a tribunal.
   - Thus, one can conclude from questionnaire responses that, if a set of core national attorney conduct rules are drafted for use in district courts and are carried over to bankruptcy courts without taking into consideration the separate types of attorney conduct issues bankruptcy courts must decide upon, bankruptcy courts will still look elsewhere for guidance on these issues.

3. Adequacy of Standards Governing Attorney Conduct

a. The majority of bankruptcy judges (75%) were satisfied with the statutory standards that they use to resolve attorney conduct issues.

b. The majority of bankruptcy judges (88%) were satisfied with the non-statutory standards that they use to resolve attorney conduct issues.

c. The majority of bankruptcy judges (88%) did not find any problematic inconsistencies between their district's statutory and non-statutory attorney conduct standards.

d. The majority of bankruptcy judges (72%) said they had never encountered attorney conduct issues that arose only in bankruptcy courts that were not covered adequately by existing statutory or non-statutory standards.

4. Adequacy of Disclosure Standards Regarding Employment of Attorneys

a. Among 250 responding bankruptcy judges, 62% said they had experienced problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases; 38% said they never experienced such problems.

b. Among the 153 responding bankruptcy judges who said they had experienced such problems, 75% said that none of these problems were caused by inadequate requirements for disclosure in Bankruptcy Rule 2014; 26% said the problems were so caused.

5. National Uniform Attorney Conduct Standards in Bankruptcy Courts

a. Among 248 responding bankruptcy judges, 52% stated that attorney conduct in bankruptcy courts should be governed by uniform standards; 27% said there should not be uniform standards, while 21% answered they "can't say."

b. Assuming uniform standards are adopted by all district and bankruptcy courts, among the 248 responding bankruptcy judges, 52% stated that the standards applied in bankruptcy courts should be the same as those applied in district courts, 28% said they should not be, while 20% said they "can't say."

6. Specific Suggestions For National Uniform Attorney Conduct Standards in Bankruptcy Courts

a. For each of nine specified types of attorney conduct, the majority (ranging from 60% to 64%) of responding judges said there should be a national uniform standard in the bankruptcy courts, and the majority (ranging from 58% to 97%) of respondents who said there should be such a national uniform standard also said the standard should be the same in bankruptcy and district courts. The nine specified types are: confidentiality of information, general rule on conflicts of interest, conflict of interest concerning prohibited transactions, conflict of interest concerning former client, rule on imputed disqualification, rule on candor towards the tribunal, rule on lawyer as witness, rule on truthfulness in statements to others, and rule on communications with person represented by counsel.

b. The majority of judges who indicated that the national uniform standard should be the same for all bankruptcy and district courts said the national uniform standard should be based on the corresponding ABA Model Rule.

c. Among 198 responding bankruptcy judges, 84% said that no additional attorney conduct issues other than those already mentioned in the questionnaire should be drafted as national uniform rules for use in all bankruptcy courts.

I. Introduction[1]

The Judicial Conference's Committee on Rules of Practice and Procedure [the Standing Committee] is studying the current nonuniformity in rules governing the professional conduct of attorneys practicing in the federal district courts. To coordinate this study, the Standing Committee has formed a Special Committee on Rules Governing Attorney Conduct consisting of members from each of the rules advisory committees in addition to representatives from other relevant groups. This Special Committee will meet in the spring and fall of 1999 and representatives from the advisory committees will make recommendations back to their respective advisory committees.

As part of the Standing Committee's efforts in this area, in June 1997, the Federal Judicial Center gave the Standing Committee a report describing (1) the experiences of federal district courts with local rules that govern attorney conduct, and (2) procedures used by the courts to address alleged misconduct [hereinafter the FJC District Court Study].[2] Bankruptcy courts were not included in that study.

The Standing Committee currently has several specific proposals before it to address the current nonuniformity in rules governing attorney conduct in the district courts. One proposal is to adopt a general default provision that requires all district courts to adopt the attorney conduct rules currently in place in the state wherein the district is located. The other proposal is to combine this default provision with a set of "core" national rules. These national rules would apply to specific core areas where problems frequently arise in federal district courts, leaving all other areas to be governed by state standards.

Bankruptcy courts are different from the district courts in the attorney conduct area in that attorneys who practice in bankruptcy courts are subject to a complex statutory system, which includes bankruptcy-specific conflict of interest criteria and other standards directly governing attorney conduct. The Standing Committee has already given attorney conduct in the bankruptcy context some attention through a study report issued in June 1997.[3] That study [hereinafter Study of Bankruptcy Cases], which examined reported bankruptcy opinions involving rules of attorney conduct, demonstrated that the proposals being considered by the Standing Committee for the federal district courts raise many additional issues for bankruptcy courts.

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[1] Special acknowledgments are made to Donna Stienstra, Joe Cecil, Carol Witcher, Bonita Anderson, Yvette Jeter, Aletha Janifer, and Edwin McNair for their assistance with this study.

[2] Marie Leary, Standards of Attorney Conduct and Disciplinary Procedures: A Study of the Federal District Courts 335 (Federal Judicial Center 1997), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of the Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts 1997) [hereinafter the FJC District Court Study].

[3] Daniel R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct 293 (1997), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts 1997) [hereinafter Study of Bankruptcy Cases].

The Standing Committee has asked the Advisory Committee on Bankruptcy Rules [the Advisory Committee] to consider whether bankruptcy courts should be exempt from the attorney conduct proposals the Standing Committee is considering, whether the "core" rules being considered for district courts should make special allowances for the unique conditions of bankruptcy practice, or whether specific and different "core" rules of attorney conduct are required for bankruptcy courts.

To supplement the 1997 Study of Bankruptcy Cases, in June 1998 the Standing Committee asked that the Federal Judicial Center coordinate with the Advisory Committee and conduct a study of attorney conduct issues in the bankruptcy courts. The Advisory Committee at its October 1998 meeting asked its subcommittee on attorney conduct to oversee the study. The following report describes this study.

The information in this report is based on responses to questionnaires that were developed by the Center with the assistance of the Advisory Committee. Two versions of the questionnaire were distributed. Version one (see Appendix A) was sent to all chief bankruptcy judges and all bankruptcy judges in districts with only one bankruptcy judge.[4] The total number of judges in this group was 90. This questionnaire asked the chief judges to answer questions about the formal and informal sources of attorney conduct standards in their bankruptcy court, the adequacy of those standards, the type and frequency of attorney conduct issues that have arisen in their court, and the need for national uniform attorney conduct rules for bankruptcy courts. We received responses to 77 out of the 90 questionnaires mailed to chief judges (an 86% response rate).

Version two of the questionnaire (see Appendix B), which was sent to all other bankruptcy judges, was identical to version one except that it did not include the questions on the formal and informal sources of attorney conduct standards. The total number of judges in this second group was 227. We received responses to 174 of these questionnaires (a 77% response rate).[5]

II. Sources of Standards Governing Attorney Conduct in Bankruptcy Courts (Questionnaire for Chief Bankruptcy Judges)

A. Sources of Standards and the Impact of Changing District Court Rules

Version one of the questionnaire asked chief bankruptcy judges to verify or correct information about the formal sources of attorney conduct standards in their bankruptcy court, and to answer questions about any informal standards used.[6] One goal

[4] Throughout this report, unless indicated otherwise, reference to "chief bankruptcy judges" includes chief bankruptcy judges and bankruptcy judges who preside in districts with only one bankruptcy judge.
[5] We received at least one questionnaire from each bankruptcy court except for the Southern District of West Virginia, Southern District of Illinois, Western District of Arkansas, Eastern District of Oklahoma, District of Wyoming, District of the Virgin Islands, and the District of Guam.
[6] *See* Section A of the Chief Judge Questionnaire, located in Appendix A of this report.

of this series of questions was to determine how closely bankruptcy courts follow the rules of attorney conduct used by their corresponding district courts. This would help gauge how widespread the impact of any changes in federal district court rules would be on the bankruptcy courts.[7]

The chief judge questionnaire included a table that showed the local rule in each district and bankruptcy court.[8] For each district court, the table in the questionnaire identified any local rule on standards of attorney conduct published as of April 28, 1997. For each bankruptcy court, the table showed whether the court has a local bankruptcy rule on standards of attorney conduct and, if so, the source of the standards adopted in the rule as far as we could determine them.[9] We asked each chief judge to review and comment on the accuracy of the information in the questionnaire for their court.

For each source of attorney conduct standard identified in the questionnaire,[10] Table 1 below shows the number of chief bankruptcy judges who indicated that their court used that source. Some chief bankruptcy judges identified more than one source. Seventy-seven chief bankruptcy judges responded.

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[7] The 1997 Study of Bankruptcy Cases concluded that 73% (69) of the bankruptcy courts had adopted the local rules of attorney conduct of their respective district courts. *See* Study of Bankruptcy Cases, *supra* note 3, at 299-301. However, this conclusion may oversimplify the status of these 69 courts. For example, where the local rules of the bankruptcy court were silent on attorney conduct, the Study of Bankruptcy Cases assumed that the rules of the district court applied (32 bankruptcy courts) and, where the bankruptcy court adopted the local district court rules generally, the Study of Bankruptcy Cases assumed that this implicitly included any district court local rules on attorney conduct (18 bankruptcy courts). *Id.* at 299 & n.3, 300. Thus, of the 69 bankruptcy courts that the Study of Bankruptcy Cases had concluded had adopted the district court's local rules of attorney conduct, 50 (32 + 18) have local rules with no specific statement to that effect.

[8] *See* Appendix 1 of the Chief Judge Questionnaire, located in Appendix A of this report.

[9] We derived our information from the sources of standards identified in the Study of Bankruptcy Cases. *See* Study of Bankruptcy Cases, *supra* note 3, at Appendix III of that report. We then updated this information to the best extent we could.

[10] *See* Section A, Question 1 of the Chief Judge Questionnaire, located in Appendix A.

Table 1
Sources of Attorney Conduct Standards in the Bankruptcy Courts
(N=77)*

Number of Chief Bankruptcy Judges Who Indicated that Their Court Used the Given Source (% of chief bankruptcy judge respondents)	Sources of Attorney Conduct Standards
20 (26%)	**Source A**—Adopts District Court's Local Rules in General**: My bankruptcy court has a local bankruptcy rule that adopts the local rules of the district court in general; our local bankruptcy rule makes no specific mention of any district court provision concerning attorney conduct and professional responsibility.
29 (38%)	**Source B***—Adopts District Court's Rules of Attorney Conduct Specifically:** My bankruptcy court has a local bankruptcy rule that specifically states that the bankruptcy court has adopted the district court's rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase.
5 (7%)	**Source C—Developed Its Own Attorney Conduct Standards:** My bankruptcy court has developed its own attorney conduct standards and has incorporated them into a local bankruptcy rule or adopted them by general order.
7 (9%)	**Source D—Adopts Other Standards**: My bankruptcy court has a local bankruptcy rule that adopts other standards to govern attorney conduct such as the ABA Model Rules of Professional Conduct or Model Code of Professional Responsibility; these standards are other than those in the district court local rules.
9 (12%)	**Source E—Has No Local District or Bankruptcy Rule**: My bankruptcy court has no local district or bankruptcy rule, general order, promulgated guideline, standing order, or other written court-wide standard that governs attorney conduct.
13 (17%)	**Source F—None of the Above**: None of the above describes the situation in my bankruptcy court.

*Some judges identified more than one source.
**Note that of the 20 who identified Source A, one judge indicated that Source C standards are also used in his or her bankruptcy court.
***Note that of the 29 who identified Source B, two judges indicated that they also use Source C standards and three judges indicated that they also use Source D standards.

Of the 20 chief bankruptcy judges who indicated that their bankruptcy court has a local bankruptcy rule that adopts the local rules of the district court in general (Source A in Table 1), 18 (90%) indicated that they actually follow or have adopted the district court's attorney conduct standards.[11] In addition, 29 chief bankruptcy judges indicated that they adopt the district court's rules of attorney conduct specifically (Source B in Table 1). Therefore, we can conclude that 47 (18 + 29) of the 77 responding bankruptcy courts (61%) have adopted or follow the local rules of attorney conduct of their respective district courts. If we add to these 47 courts the nine courts that indicated that they have no local district or bankruptcy rule or other written court-wide standard that governs attorney conduct (Source E in Table 1), and if we adopt the assumption of the Study of Bankruptcy Cases that the rules of the federal district court apply where the local rules of the bankruptcy court are silent on the issue of attorney conduct,[12] then it would follow that 56 (73%) of the 77 responding bankruptcy courts follow the local rules of attorney conduct of their respective district courts.

The table reinforces the conclusion of the Study of Bankruptcy Cases that most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct[13]—only 7% of bankruptcy courts indicated so in their

[11] *See* Section A, Question 2 of the Chief Bankruptcy Judge Questionnaire, located in Appendix A of this report.
[12] *See* discussion *supra* note 7.
[13] *See* Study of Bankruptcy Cases, *supra* note 3, at 299.

responses to our questionnaire (Source C in Table 1). Given these findings, proposed changes in district court rules could carry over to most of the bankruptcy courts, even if the proposed changes are not directly aimed at or applied to the bankruptcy courts.[14]

The 1997 FJC District Court Study found that: "Eighty-nine federal districts (95% of all districts) have a local rule informing attorneys practicing before the districts' courts which professional standards of conduct they are required to abide by . . . . The local rules of 68 districts (76% of federal districts with attorney conduct rules) incorporate the relevant standards of the state in which the district is located."[15] Thus, since the majority of bankruptcy courts follow their district court's local rules on attorney conduct, and the majority of district courts with local rules governing attorney conduct incorporate the relevant state standards of the district wherein they are located, if the Standing Committee decides to recommend that district courts adopt the standards of the state wherein they are located, and this rule is made applicable to the bankruptcy courts, this will not mean a change from current practice for many bankruptcy courts.

However, as pointed out by previous studies, there are many differences between the states' attorney conduct rules.[16] For example, the majority of states that have adopted some form of the ABA Model Rules have changed key sections.[17] Thus, if district courts are uniformly required to adopt state standards of attorney conduct, requiring all bankruptcy courts to follow their district court's local rule on attorney conduct would make the source of standards uniform across bankruptcy courts, but it will not produce uniformity in the practical application of the standards.

B. Bankruptcy Courts' Use of Standards Other than Those in Local Rules

Although our results show that the majority of bankruptcy courts adopt the attorney conduct rules of the district court, several qualifications must be noted. First, some courts have multiple sources of authority. Of the 20 chief bankruptcy judges who identified Source A (adopts district court's local rules in general), one indicated Source C standards are also used in his or her bankruptcy court. Out of the 29 chief bankruptcy judges who indicated Source B standards (adopts district court's rules of attorney conduct specifically), two indicated that they also use Source C standards and three others indicated that they also use Source D standards. Second, in applying attorney conduct rules bankruptcy judges look for guidance to sources other than those listed in their local rules, such as the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the American Bar Association Model Rules and Model Code, and the common law of bankruptcy.[18]

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[14] *Id.* at 307.

[15] *See* FJC District Court Study, *supra* note 2, at 337 (Summary).

[16] *See, e.g.*, Daniel R. Coquillette, Report on Local Rules Regulating Attorney Conduct in the Federal Courts 4 (1995), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of the Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts 1997).

[17] *Id.*

[18] *See* Study of Bankruptcy Cases, *supra* note 3, at 301-06.

These qualifications make it more difficult to determine which attorney conduct standards the bankruptcy courts actually use and more difficult to predict the effect of carrying over uniform rules from the district court.

To gain a sense of how widespread the practice of turning to outside sources is, we asked chief bankruptcy judges from districts with some form of attorney conduct standards (those who identified at least one of the Sources A through D in Table 1) to state whether their bankruptcy court (or the judges in their bankruptcy court) ever used standards or sets of standards other than the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the formal standards referred to in their local bankruptcy rules or district court rules. Of the 53 chief bankruptcy judges who responded to this question, 60% or 32 said their court never used other standards, while 40% or 21 indicated they did.[19]

Compare this to the 1997 FJC District Court Study of local rules governing attorney conduct in which we asked district judges: "Are attorneys practicing in your district prevented from relying on the explicit language of your local rule because your district has 'incorporated' external standards into your local rules or utilized external standards not apparent in the rules themselves to interpret the standards?"[20] Out of the 71 districts responding to this inquiry, only seven (10%) reported that attorneys practicing in their district could not rely solely on the explicit language of their local rules because their court used external standards to interpret the district's attorney conduct rules.[21]

In order to determine what the other standards were that bankruptcy courts turn to, we asked these 21 chief bankruptcy judges who indicated they used outside standards not in their local bankruptcy rules to describe them.[22] The other standards they reported using included: state ethics rules (8 chief judges); state bar ethics rules (6 chief judges); ABA Model Rules of Professional Conduct (3 chief judges); case law on attorney responsibility (2 chief judges); treatises on attorney responsibility (1 chief judge); ABA Code of Professional Responsibility (1 chief judge); ABA Canon of Professional Ethics (1 chief judge); state code provisions (1 chief judge); and advisory opinions of state ethics committee and opinions of state bar disciplinary counsel (1 chief judge).

The diversity of sources used is illustrated further by the following responses. Twenty-two (29%) of responding chief bankruptcy judges indicated that (1) their bankruptcy court had no local district or bankruptcy rule, general order or other written court-wide standard that governs attorney conduct (Source E in Table 1 above), or (2)

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[19] *See* Section A, Question 3 in Chief Bankruptcy Judge Questionnaire, located in Appendix A of this report.

[20] *See* FJC District Court Study, *supra* note 2, at 348.

[21] *Id.* & Table A-7 in the appendix. Two of the seven districts reported that their district looks to ABA models (either the Model Rules of Professional Conduct or the Model Code of Professional Responsibility) to "interpret" local rules and resolve ambiguities, even though their district had not expressly incorporated ABA models into its local rules. Four of the seven districts reported "other" situations and problems caused by their use of external standards.

[22] *See* Section A, Question 3 in Chief Bankruptcy Judge Questionnaire, located in Appendix A of this report.

that none of the possible choices given in the questionnaire described the situation in their bankruptcy court (Source F in Table 1 above). We asked these judges to state what standards or set of standards other than the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure their bankruptcy court (or the judges in their bankruptcy court) apply to resolve attorney conduct issues.[23] The standards reported by the 22 responding judges included: state ethics rules (8 chief judges); state bar ethics rules (3 chief judges); district court local rules (3 chief judges); state statutory law (1 chief judge); state case law (1 chief judge); bankruptcy court case law (1 chief judge); ABA standards (2 chief judges).

These responses indicate that when bankruptcy courts look outside of their local rules and outside the Bankruptcy Code and Federal Rules of Bankruptcy Procedure for guidance in resolving an attorney conduct issue or when bankruptcy courts with no written rules or guidelines resolve an attorney conduct issue, most turn to state ethics rules.

III. Type and Frequency of Attorney Conduct Issues in Bankruptcy (Questionnaire for All Bankruptcy Judges)

A. Frequency of Ten Specific Types of Attorney Conduct Issues

We asked all bankruptcy judges to identify the frequency with which ten types of attorney conduct issues have arisen before them during the past two years. We specifically requested the judges to include instances in which the conduct resulted in (1) actual findings that a breach of conduct had occurred and (2) where either a party alleged unethical conduct or the judges perceived that unethical conduct had occurred but no allegation was made. We asked only for estimates, and did not require reference to specific case files or reported case law.[24] Table 2, which combines responses for chief and all other bankruptcy judges,[25] shows the number of judges who indicate a specified frequency for the type of attorney conduct listed. The chief judges answered only for themselves and not for their courts.

[23] *See* Section A, Question 4 in the Chief Judge Questionnaire, located in Appendix A of this report.
[24] *See* Section B, Question 5 of Chief Bankruptcy Judge Questionnaire, or the identical Question 1 of the Bankruptcy Judge Questionnaire, located in Appendixes A and B respectively of this report.
[25] We noticed no discernable differences between the frequencies reported by chief bankruptcy judges and non-chief bankruptcy judges. Thus, we report the combined frequencies in Table 2.

Table 2
Frequency of Actual or Perceived Breaches of Specific Attorney Conduct Issues
(N=number shown in Column 2)

Attorney Conduct Issues[26]	Number of Bankruptcy Judge Respondents	Number of Respondents Identifying Frequency With Which Attorney Conduct Issue Has Arisen in Past Two Years (% of respondents to given question*)				
		Never	Once	Two to Five Times	Six to Ten Times	More than Ten times
1. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of a standard, such as ABA Model Rules 1.7 through 1.11, governing disqualification for conflict of interest.	249	75 (30%)	44 (18%)	112 (45%)	12 (5%)	6 (2%)
2. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of 11 U.S.C. § 327 or § 1103, governing representation of an adverse interest or conflicts of interest. *Please include matters that meet the criteria of this Issue # 2 even if the matters have also been included in Issue # 1 above.*	249	51 (21%)	40 (16%)	129 (52%)	22 (9%)	7 (3%)
3. Required Disclosures: the conduct violated or allegedly violated disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.	247	72 (29%)	62 (25%)	85 (34%)	25 (10%)	3 (1%)
4. Safekeeping of Client Property: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.15.	245	179 (73%)	37 (15%)	27 (11%)	1 (0.4%)	1 (0.4%)
5. Attorneys' Fees: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.5.	244	93 (38%)	40 (16%)	65 (27%)	24 (10%)	22 (9%)
6. Lawyer as a Witness: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.7.	245	155 (63%)	50 (20%)	36 (15%)	1 (0.4%)	3 (1%)
7. Confidentiality: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.6.	246	200 (81%)	32 (13%)	14 (6%)	0	0
8. Communication With Represented Persons: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.2.	246	172 (70%)	42 (17%)	30 (12%)	2 (1%)	0
9. Candor Towards a Tribunal: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.3.	248	107 (43%)	55 (22%)	61 (25%)	14 (6%)	11 (4%)
10. Truthfulness in Statements to Others: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.1.	247	137 (56%)	44 (18%)	49 (20%)	8 (3%)	9 (4%)

*Note that if percentages do not add to 100% across the rows, it is due to rounding.

[26] The questionnaires included an appendix with the full text of all ABA Model Rules, national Bankruptcy Rules, and statutes cited in the questionnaires. (See Appendix 2 of the Chief Bankruptcy Judge Questionnaire, or the identical Appendix 1 of the Bankruptcy Judge Questionnaire, located in Appendixes A and B respectively of this report.)

As shown in Table 2, a majority of the bankruptcy judges reported that five out of the ten listed types of attorney conduct issues have occurred one or more times within the past two years. Conflict of interest issues occurred at the highest rate for the responding bankruptcy judges. Out of the 249 responding judges, 80% or 198 reported one or more incidences of disqualification (or a disqualification motion) based on 11 U.S.C. § 327 or § 1103 (which govern representation of an adverse interest or conflicts of interest). *See* Row #2 in Table 2. Nearly 70% or 174 respondents reported one or more incidences of disqualification (or a disqualification motion) on the basis of a standard analogous to ABA Model Rules 1.7 through 1.11. *See* Row #1 in Table 2.

Issues concerning conduct violating or allegedly violating the disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 and 2016 occurred at a rate of just over 70% (that is, 175 of the 247 respondents reported one or more incidences of the issue). *See* Row #3 in Table 2. One or more incidences of issues involving standards analogous to ABA Model Rule 1.5 (rules regarding attorneys' fees) were reported by 62% (or 151 of the 244 judges responding to that part of the question). *See* Row #5 of Table 2. And one or more incidences of issues relating to standards analogous to ABA Model Rule 3.3 (candor towards a tribunal) were reported by 57% (or 141 of the 248 responding judges). *See* Row #9 of Table 2.

The majority of responding judges indicated that each of the five remaining types of attorney conduct issues had never arisen in the past two years. These are worth noting, however, since the numbers of judges reporting one or more incidences were not insignificant. Nearly half (45%) reported one or more incidences of issues involving standards analogous to ABA Model Rule 4.1 (truthfulness in statements to others). *See* Row #10 of Table 2. Over a third (37%) reported one or more incidences of issues involving standards analogous to ABA Model Rule 3.7 (lawyer as a witness). *See* Row #6 of Table 2. And nearly a third (30%) reported one or more incidences of issues involving standards analogous to ABA Model Rule 4.2 (communication with represented person). *See* Row #8 of Table 2.

Issues relating to standards analogous to ABA Model Rules 1.6 (confidentiality) and 1.15 (safekeeping of client property) rarely arose. A small number of bankruptcy judges (19% and 27%, respectively) indicated that the issues had arisen one or more times within the past two years. *See* Rows #7 and 4 of Table 2.

B. Frequency of "Other" Types of Attorney Conduct

In addition to requesting information on the frequency of the ten attorney conduct issues shown in Table 2, we provided a catchall "other" category in which we invited bankruptcy judges to describe any violations or alleged violations of any other standards, whether or not they were covered by the ABA Model Rules, and to identify the frequency with which each such attorney conduct issue had arisen before them in the past two years.[27] Table 3 summarizes these responses.

[27] *See* Section B, Question 5k of the Chief Bankruptcy Judge Questionnaire, or the identical Question 1k of the Bankruptcy Judge Questionnaire, located in Appendixes A and B respectively of this report.

Table 3
Frequency of Actual or Perceived Breaches of "Other" Attorney Conduct Issues
(N is as shown in Column 2)

"Other" Attorney Conduct Issues Listed by Bankruptcy Judges	Number of Bankruptcy Judge Respondents	Number of Respondents Identifying Frequency With Which "Other" Attorney Conduct Issue Has Arisen in Past Two Years				
		Never	Once	Two to Five Times	Six to Ten Times	More than Ten times
1. Failure to adequately, diligently and competently prepare and represent a client. (ABA Model Rule 1.1)	13	0	0	2	3	7
2. Failure to appear for a scheduled hearing.	4	0	0	1	0	3
3. Client assertion that attorney failed to properly communicate with the client.	4	0	0	2	1	1
4. Violation of Bankruptcy Rule 9011.	3	0	0	2	0	1
5. Abandoning a client in an adversary proceeding.	2	0	1	0	0	1
6. Multiple proceedings 28 U.S.C. § 1927.	2	0	1	1	0	0
7. Violation of standards for petition preparers.	1	0	0	0	0	1
8. Padding time records to increase fees.	1	0	0	0	0	1
9. Charging an hourly rate for an appearance attorney who has paid a flat fee.	1	0	0	0	0	1
10. Failure to comply with orders regarding repayment of money.	1	0	0	0	0	1
11. Taking filing fees and not filing a case.	1	0	0	0	0	1
12. Failure to comply with discovery rules, resulting in legal disputes.	1	0	0	0	0	1
13. Failure to timely serve or ever serve papers on opposing counsel.	1	0	0	0	0	1
14. Indifference to rule of officer of court.	1	0	0	0	0	1
15. Failure to defend client based on low fee arrangement.	1	0	0	0	0	1
16. Failure to bring a meritorious claim (ABA Model Rule 3.1).	1	0	0	0	1	0
17. Termination of representation (ABA Model Rule 1.16).	1	0	0	1	0	0
18. Unauthorized practice of law.	1	0	0	1	0	0
19. Failure of debtor's counsel to appear at a hearing in violation of a local bankruptcy rule.	1	0	0	1	0	0
20. Attorney taking fee outside of bankruptcy court's approval.	1	0	0	1	0	0
21. Failure to obtain client's approval of settlement terms.	1	0	0	1	0	0
22. Violation of lawyers' creed (obligation to be reasonable and work things out).	1	0	0	1	0	0
23. Client asserting that attorney had failed to properly attend the case.	1	0	0	1	0	0
24. Inappropriate description of opposing counsel; sexual bias.	1	0	1	0	0	0

Our findings suggest that only a very small group of attorney conduct issues arise in bankruptcy courts with notable frequency. These findings are consistent with the Study of Bankruptcy Cases, which found that almost all bankruptcy opinions involving attorney conduct involve a small core group of rules, thus not involving the majority of the ABA Model Rules of Professional Conduct.[28] The Study of Bankruptcy Cases compared its findings to the results of a similar study of district court and court of appeals cases involving local rules of attorney conduct.[29] Although both studies found that almost all district court cases also involve a small core group of attorney conduct rules, some rules were found to be more or less prevalent in the bankruptcy courts than in district courts.[30] For example, with the exception of conflict of interest rules, which were found to have consistently high frequencies of occurrence in both district and bankruptcy courts, communications with represented parties and lawyer as witness were found to be significantly less prevalent in bankruptcy courts than in district courts and courts of appeal. And cases involving attorneys' fees and safekeeping of client property were significantly more prevalent in bankruptcy courts than in district courts and courts of appeals.[31]

In the instant study, our findings show that bankruptcy courts are faced with certain attorney conduct issues not relevant to district court practice. Table 2 shows that the responding bankruptcy judges were confronted with attorney conduct issues involving statutory or bankruptcy-related standards more often than other types of standards. Compare Rows 2 and 3 to Rows 4 through 10 of Table 2. Further, the other types of attorney conduct issues prevalent in bankruptcy courts (conflict of interest issues analogous to those covered by ABA Model Rules 1.7 through 1.11, attorneys' fees, and candor towards a tribunal) which may also arise in district court practice, often involve different concerns in the context of bankruptcy court practice due to the unique characteristics of such practice.[32]

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[28] *See* Study of Bankruptcy Cases, *supra* note 3, at 298-99. The 1997 Study of Bankruptcy Cases examined 93 opinions of bankruptcy cases reported from January 1, 1990 to March 23, 1996 that involved local rules of attorney conduct. The study categorized each case by the specific ethical rule involved. The study showed that 53% (49 of the 93 cases) of the reported bankruptcy cases involved ABA Model Rules 1.7 through 1.11 (conflict of interest) or standards analogous to those rules. An additional 13% (12 of the 93 cases) involved ABA Model Rule 1.15 (safekeeping of client property) or analogous standards. The third largest category with 9% or 8 cases involved attorneys' fees (ABA Model Rule 1.5). And 4% (4 of the 93 cases) involved ABA Model Rule 3.7 (lawyer as a witness) or analogous standards. The remaining cases involved miscellaneous rules. *Id.* at 296-98.

[29] *Id.* at 298-99, citing Daniel R. Coquillette, Report on Local Rules Regulating Attorney Conduct in the Federal Courts (1995), *reprinted in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of the Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts September 1997).

[30] *Id.* at 298-99.

[31] *Id.*

[32] *See* Study of Bankruptcy Cases, *supra* note 3, at 301-306.

IV. Adequacy of Standards Governing Attorney Conduct

The 1997 Study of Bankruptcy Cases found that the bankruptcy system presents unique ethical issues because, although most bankruptcy courts follow the local rules of the federal district court of their district, in practice bankruptcy courts have developed standards of attorney conduct that are very different from federal district court practice.[33] This stems from the fact that the Bankruptcy Code and the Bankruptcy Rules have their own provisions relating to attorney conduct. For example, 11 U.S.C. § 327 of the Bankruptcy Code is a statutorily prescribed ethical rule governing conflict of interests for attorneys and other professional persons employed in the bankruptcy context. This is further complicated by the fact that application of § 327 among the bankruptcy courts is not uniform.[34] In addition, there are many disagreements and policy disputes concerning the proper relationship between the Bankruptcy Code provisions, particularly § 327, and the local rules governing attorney conduct in the bankruptcy courts.[35] For example, bankruptcy cases that apply § 327 also frequently involve the conflict of interest rules of the ABA Model Rules of Professional Responsibility, which has been incorporated in some form by the majority of state attorney conduct rules. The majority of district courts adopt these state rules.[36]

In order to gain a sense of whether bankruptcy judges are satisfied with the statutory and non-statutory standards they use to resolve attorney conduct issues, we asked all bankruptcy judges a series of questions concerning the adequacy of these standards. We found that the majority of responding bankruptcy judges were satisfied with the statutory and non-statutory standards, did not find any problematic inconsistencies between their district's statutory and non-statutory standards, and had never encountered attorney conduct issues that arose only in bankruptcy courts that were not covered adequately by existing statutory or non-statutory standards.

A. Statutory Standards

First, we asked the judges if the "statutory standards," which we defined as those in the Bankruptcy Code and national Bankruptcy Rules, are adequate.[37] Among the 248 responding bankruptcy judges, 75% (186) said the statutory standards are adequate, and 25% (62) answered they are not. We asked those bankruptcy judges who believed the statutory standards are not adequate to describe why they believed so. The recurring themes among those bankruptcy judges included complaints that:

(1) The statutory standards are not broad or specific enough to cover attorney conduct issues that actually arise in the bankruptcy courts, thus forcing bankruptcy judges to turn to other standards to supplement them.

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[33] *Id.*

[34] *Id.* at 303-06.

[35] *Id.* at 306.

[36] *See* discussion *infra* p. 8.

[37] *See* Section B, Question 6a in Chief Bankruptcy Judge Questionnaire, or the identical Question 2a in the Bankruptcy Judges Questionnaire, located in Appendices A and B respectively of this report.

(2) The statutory standards do not address whether bankruptcy judges have authority to suspend attorneys from practicing before a bankruptcy court.
(3) The statutory standards governing conflicts of interest are not specific enough to provide guidance (e.g., the vagueness of the disinterestedness standard under 11 U.S. C. § 327(a)) and they are too strict to allow for flexibility in application.
(4) The disclosure rules are too lax and subject to manipulation.

Appendix C of this report contains a more detailed summary of representative respondent comments.

B. Non-Statutory Standards

Next, we asked all bankruptcy judges whether they believed the "non-statutory" standards, which we defined as standards other than those in the Bankruptcy Code and national Bankruptcy Rules, are adequate.[38] Only 12% or 29 of the 245 responding bankruptcy judges indicated that the non-statutory standards used in their court are not adequate, while 88% or 216 answered that their non-statutory standards are adequate. We asked respondents who believed that their non-statutory standards are not adequate to describe why and what other source they would turn to to resolve attorney conduct issues, such as state ethics codes or model rules or codes. The recurring themes were that:

(1) The non-statutory standards, especially those dealing with conflicts of interest, do not address issues unique to bankruptcy, such as fiduciary duties, the existence of multiple parties, and "potential" conflicts.
(2) The non-statutory standards are not readily available to or known by practitioners since they are located in the district court local rules.
(3) The non-statutory standards do not grant bankruptcy courts authority to conduct formal disciplinary proceedings for attorney misconduct that occurs in the bankruptcy court. Further, reliance upon state bar grievance procedures or the district court to conduct investigations delays the process and risks incorrect judgements due to insufficient understanding of bankruptcy issues.

Appendix D of this report contains a more detailed, representative listing of the comments we received.

C. Conflict Between Statutory and Non-Statutory Standards

We asked all bankruptcy judges whether they had found any problematic inconsistencies between their district's statutory and non-statutory attorney conduct standards.[39] Among the 241 responding bankruptcy judges, 88% or 213 reported no problematic inconsistencies, while 12% or 28 respondents said there are such inconsistencies. We asked the bankruptcy judges who found inconsistencies to describe them and the problems they present. The main problem identified was the difficulty judges have applying the non-statutory conflict of interest provisions within the bankruptcy context. For example, judges reported they frequently encounter

[38] *See* Section B, Question 6b in Chief Bankruptcy Judge Questionnaire, or the identical Question 2b in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.
[39] *See* Section B, Question 6c in the Chief Bankruptcy Judge Questionnaire, or the identical Question 2c in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

inconsistencies between the disinterestedness standard of 11 U.S.C. § 327(a) and the provisions for multiple representation in the ABA Model Rules and Code. These inconsistencies are problematic because the ABA models do not contemplate a debtor-client who is a fiduciary with respect to parties with adverse interests (creditors and others in bankruptcy). Other bankruptcy judges complained that the statutory rules are ambiguous or often too vague. And others said the inconsistencies allow attorneys to look to state law standards that are loosely enforced. Appendix E of this report contains a more detailed summary of the comments.

D. Bankruptcy-Specific Attorney Conduct Issues Not Adequately Addressed

The final question regarding adequacy of standards was whether the respondents had ever encountered attorney conduct issues that arose only in bankruptcy courts and were not covered adequately or at all by existing statutory or non-statutory conduct standards.[40] Among the 240 responding bankruptcy judges, 72% or 172 stated that they had never encountered such issues, while 28% or 68 said they had. We asked the latter group to describe these issues. Their comments focused on general conflict of interest issues, disclosure requirements, and problems with the definition of disinterestedness. In addition, once again several bankruptcy judges mentioned the absence of guidance on whether they have the power to discipline attorneys by, for example, barring them from practicing before the bankruptcy court. Appendix F of this report contains a more detailed summary of the comments.

V. Adequacy of Disclosure Standards Regarding Employment of Attorneys

Another controversial attorney conduct issue that may not be adequately addressed by existing state rules or by the ABA Model Rules is Federal Rule of Bankruptcy Procedure 2014, which requires an attorney or other professional person to disclose certain information to the court before they can be employed by the estate. We asked all bankruptcy judges whether they had ever experienced any problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases.[41] Among the 250 responding bankruptcy judges, 62% or 156 said they had experienced problems, while 38% or 94 said they had not.

Then we asked the judges who said they had experienced problems whether they were caused by inadequate requirements for disclosure in Bankruptcy Rule 2014.[42] Among the 153 responding bankruptcy judges, 75% or 114 said that none of these

[40] *See* Section B, Question 6d in the Chief Bankruptcy Judge Questionnaire, or the identical Question 2d in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.
[41] *See* Section B, Question 7a on the Chief Bankruptcy Judge Questionnaire, or the identical Question 3a of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.
[42] *See* Section B, Question 7b on the Chief Bankruptcy Judge Questionnaire, or the identical Question 3b of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

problems were caused by such inadequacies, while 26% or 39 said the problems were so caused.

Finally, we asked the judges who indicated a causal relationship to provide suggestions for amending Rule 2014 to improve the adequacy of disclosure.[43] Thirty-nine bankruptcy judges suggested improvements including recommendations that Bankruptcy Rule 2014:

(1) require more detail in consumer cases to disclose fees paid in prior cases where debtors are multiple filers, especially in chapter 13 cases;
(2) apply to chapter 13 cases;
(3) provide more specific examples of entities falling into the category of "parties in interest" and specific examples of what is meant by "all of the person's connections";
(4) require the fee agreement to be attached to the employment application;
(5) require specific details of client representations by all members of a firm, with a requirement of disqualification by the court if not done or if details indicate a conflict of interest;
(6) require that attorneys disclose the source of funds for a retainer and future payment.

In addition, several judges explained that the problem lies not with Rule 2014 but with the willingness of attorneys who practice in bankruptcy courts to follow the rule and the courts' strictness in enforcing the rule. In many districts there are supplements to Rule 2014 in the form of guidelines or local rules.[44] Appendix G summarizes in more detail representative comments from respondents.

VI. National Uniform Attorney Conduct Standards in Bankruptcy Courts

In the instant study, we found that a little over half of responding bankruptcy judges were in favor of uniform attorney conduct standards and in favor of the same standards for both bankruptcy and district courts.[45] More specifically, of the 248 responding bankruptcy judges, 52% or 130 stated that attorney conduct in bankruptcy

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[43] *See* Section B, Question 7c on the Chief Bankruptcy Judge Questionnaire, or the identical Question 3c of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

[44] *See, e.g.*, D. Massachusetts Local Bankruptcy Rule 2014-1, Application to Employ Professional Persons; N.D. Ind. Local Bankruptcy Rule B-214, Employment of Professionals by Debtor-in-Possession; C.D. Cal., Notice of Amended Standards to be Employed in the Review of Applications for Authorization of Employment of Professionals (Revised Form 8/98); C.D. Cal. Local Bankruptcy Rule 2014-1, Employment of Debtor and Professional Persons; United States Trustee, C.D. Cal., Guide to Applications for Employment of Professionals and Treatment of Retainers (Revised May 1994).

[45] These findings can be compared to the 1997 FJC District Court Study on attorney conduct rules in the district courts in which we asked district judges "Should all federal district courts have the same rules governing the professional conduct of attorneys?" Out of the 79 responding districts, 67% or 53 respondents did not support a national rule; 30% or 24 respondents said they would be in favor of a national rule; and two had no opinion. *See* FJC District Court Study, *supra* note 2, at 351.

courts should be governed by uniform standards, and 27% or 67 said there should not be uniform standards, while 21% or 51 answered they "can't say."[46]

We also asked all bankruptcy judges whether the standards applied in bankruptcy courts should be the same as those applied in district courts, assuming uniform standards were adopted by all district and bankruptcy courts.[47] Fifty-two percent or 128 of the 248 responding bankruptcy judges said the standards should be the same, and 28% or 70 said they should not be, while 20% or 50 said they "can't say."

We asked all bankruptcy judges to explain why they believed such standards should be the same or different in the bankruptcy and district courts.[48] For the most part, bankruptcy judges in favor of the same uniform standards for bankruptcy and district courts stated that attorneys should not have to worry about or learn two sets of standards given that bankruptcy courts are statutorily units of the district court, and counsel are members of the bar of the district court not the bankruptcy court. Further, many respondents said uniformity would ensure efficient operation of both courts and would ensure that the federal courts have a simple set of unified standards for all districts, making it easily and readily determinable what the expectations are, regardless of the federal court in which an attorney practices. Different rules will only lead to greater noncompliance due to confusion and oversight, they suggested.

On the other hand, bankruptcy judges who do not support uniformity in standards for bankruptcy and district courts stated that because there are so many important issues that are unique to bankruptcy cases (e.g., fiduciary obligations owed by the trustee and debtor-in-possession to all parties; disclosure obligations; and conflict of interest issues dealing with disinterestedness complicated by the multitude of interests present in bankruptcy cases), a uniform district court standard may cause confusion in bankruptcy cases. These judges said uniformity is not desirable because the sheer volume of cases in bankruptcy courts suggests that some conduct standards could be relaxed for certain issues, whereas the fiduciary responsibilities in bankruptcy may require more stringent standards with a broader scope for other issues.

Appendix H of this report contains a representative summary of the responses discussed in the last two paragraphs.

VII. Specific Suggestions for National Uniform Attorney Conduct Standards in Bankruptcy Courts

The Standing Committee is considering a proposal to adopt a set of "core" national rules that would apply to specific types of attorney conduct identified as

[46] *See* Section B, Question 8a on the Chief Bankruptcy Judge Questionnaire, or the identical Question 4a of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.
[47] *See* Section B, Question 8b on the Chief Bankruptcy Judge Questionnaire, or the identical Question 4b of the Bankruptcy Judge Questionnaire, located in Appendices A and B of this report.
[48] *Id.*

problematic in the district court, leaving all other areas to be governed by the attorney conduct rules of the state wherein the district is located. To address this proposal, the final section of the questionnaire sought input from all bankruptcy judges on the adoption of uniform standards for nine types of attorney conduct, some of which are being considered as core national rules to be applied uniformly in all district courts.[49] The questionnaire respondents were instructed to assume for this series of questions that the national uniform standards would be identical or substantially similar to the provisions of the ABA Model Rules of Professional Conduct that currently address the nine types of conduct identified in the questionnaire.[50]

A. Should There Be National Uniform Rules for Bankruptcy Courts on Certain Topics? Should the Rules Be the Same For Bankruptcy and District Courts?

For each of the nine types of attorney conduct listed (see Column 1 in Table 4 below), we first asked all bankruptcy judges whether bankruptcy courts should have a national uniform standard governing that type of conduct, be it the corresponding ABA Model Rule on the subject or some other standard. (See Column 2 in Table 4 below.)[51] Then we asked all bankruptcy judges who said there should be a national uniform standard whether the national uniform standard should be the same for bankruptcy and district courts (See Column 3 in Table 4).[52] Table 4 below shows the responses we received to these inquiries.

[49] *See* Section B, Question 9 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.
[50] The text of all cited Model Rules was provided in an appendix to the questionnaires. *See* Appendix 2 of the Chief Bankruptcy Judge Questionnaire, or the identical Appendix 1 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.
[51] *See* Section B, Question 9, Column 3 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 3 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.
[52] *See* Section B, Question 9, Column 4 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 4 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

Table 4
Suggested Uniform Attorney Conduct Standards in Bankruptcy Court
N = number of respondents shown in Columns 2 and 3)[53]

Column 1 **Subject of Suggested Uniform Standard**	Column 2 **Should bankruptcy courts have a national uniform standard on the subject in Column 1, whether it be similar to the ABA Model Rule listed in Column 1 or some other standard on the subject?**	Column 3 **If you feel there should be a uniform standard for bankruptcy courts on the subject in Column 1, should the national uniform standard be the same for bankruptcy and district courts?**
1. Confidentiality of Information (Based on Model Rule 1.6)	Total Number of Bankruptcy Judges Responding = 236 NO 92 (39%) YES 144 (61%)	Total Number of Bankruptcy Judges Responding = 138 NO 22 (16%) YES 116 (84%)
2. General Rule on Conflicts of Interest (Based on Model Rule 1.7)	Total Number of Bankruptcy Judges Responding = 235 NO 85 (36%) YES 150 (64%)	Total Number of Bankruptcy Judges Responding = 139 NO 59 (42%) YES 80 (58%)
3. Conflicts of Interest Concerning Prohibited Transactions (Based on Model Rule 1.8)	Total Number of Bankruptcy Judges Responding = 233 NO 88 (38%) YES 145 (64%)	Total Number of Bankruptcy Judges Responding =136 NO 25 (18%) YES 111 (82%)
4. Conflict of Interest Concerning Former Client (Based on Model Rule 1.9)	Total Number of Bankruptcy Judges Responding = 232 NO 90 (39%) YES 142 (61%)	Total Number of Bankruptcy Judges Responding =131 NO 30 (23%) YES 101 (77%)
5. Rule on Imputed Disqualification (Based on Model Rule 1.10)	Total Number of Bankruptcy Judges Responding =232 NO 95 (41%) YES 137 (60%)	Total Number of Bankruptcy Judges Responding = 127 NO 25 (20%) YES 102 (80%)
6. Rule on Candor Towards a Tribunal (Based on Model Rule 3.3)	Total Number of Bankruptcy Judges Responding = 235 NO 84 (36%) YES 151 (64%)	Total Number of Bankruptcy Judges Responding =141 NO 7 (5%) YES 134 (95%)
7. Rule on Lawyers As Witness (Based on Model Rule 3.7)	Total Number of Bankruptcy Judges Responding = 235 NO 89 (38%) YES 146 (62%)	Total Number of Bankruptcy Judges Responding =138 NO 11 (8%) YES 127 (92%)
8. Rule on Truthfulness in Statements to Others (Based on Model Rule 4.1)	Total Number of Bankruptcy Judges Responding = 235 NO 85 (36%) YES 150 (64%)	Total Number of Bankruptcy Judges Responding =141 NO 5 (4%) YES 136 (97%)
9. Rule on Communications with Person Represented by Counsel (Based on Model Rule 4.2)	Total Number of Bankruptcy Judges Responding = 234 NO 89 (38%) YES 145 (62%)	Total Number of Bankruptcy Judges Responding =139 NO 9 (7%) YES 130 (94%)

Table 4 shows that for each type of attorney conduct listed, the majority (ranging from 60% to 64%) of responding judges said there should be a national uniform standard in the

[53] The discrepancy between the number of respondents answering "YES" in Column 2 and the "total number of bankruptcy judges responding" in Column 3 is attributed to the respondents who failed to indicate a response in Column 3.

bankruptcy courts. In addition, for each type of attorney conduct, the majority (ranging from 58% to 97%) of respondents who said there should be national uniform standards in bankruptcy courts also said the standard should be the same in bankruptcy and district courts.

B. How Should Uniform Bankruptcy Rules Be Different From Uniform District Court Rules?

Next, we asked those bankruptcy judges who did not believe the standard should be the same to explain how the national uniform standard for bankruptcy courts should differ from that for district courts.[54] A brief summary of their comments is provided below for each of the nine types of attorney conduct. Appendix I gives a more detailed summary of the comments.

1. **Confidentiality of Information.** The bankruptcy court uniform rule on confidentiality of information should: (a) permit broader disclosure (i.e., determine that fewer disclosures are protected by confidentiality restrictions); (b) account for the fact that bankruptcy cases deal with *evolving* factual matters, as opposed to *past* factual matters, and thus conflicts may arise post-petition in bankruptcy cases more frequently than post-filing in district cases; (c) include a provision allowing a creditors' committee to share, when necessary, information it has obtained; and (d) permit disclosure of confidential information not only to prevent death or serious bodily harm, but also to disclose crime or fraud threatening substantial financial loss.

2. **General Rule on Conflicts of Interest.** The bankruptcy court uniform rule on general conflicts of interest should: (a) be different because of the large number of interested parties with shifting interests involved in some bankruptcy cases and the increased likelihood of a conflict arising; (b) be different because of the fiduciary obligations owed by certain persons in bankruptcy cases to a broad range of parties; (c) require attorneys appointed by the court to disclose all potential conflicts of interest, and require attorneys to seek court approval when representing the debtor or estate (even if the client consents to the conflict); (d) include Title 11's additional requirements of disinterestedness and bankruptcy rule requirements of complete disclosure; and (e) require consents and disclosures to be in writing.

3. **Conflict of Interest Concerning Prohibited Transactions.** The bankruptcy court uniform rule on conflicts of interest concerning prohibited transactions should: (a) take into account that certain counsel in bankruptcy (e.g., attorneys for debtors-in-possession), creditors' and other official committees, and trustees owe fiduciary obligations to a broad range of parties and require heightened scrutiny generally not applicable in district court; (b) be more restrictive (i.e., cover more) than the applicable standard in district courts; (c) prohibit a debtor's attorney from having any business relationship with his client, including an absolute prohibition against buying

[54] *See* Section B, Question 9, Column 5 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 5 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

property of the estate; and (d) address issues problematic in bankruptcy such as where lawyers take security interests, mortgage judgments, etc., to secure the payment of fees.

4. **Conflict of Interest Concerning Former Client.** The bankruptcy court uniform rule on conflicts of interest concerning a former client should: (a) provide bankruptcy judges with discretion to resolve conflict issues because of the broad range in the size and complexity of bankruptcy cases; (b) be made consistent with § 327(c) and (e) of the Bankruptcy Code, permitting an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor; and (c) require more disclosure in the area of potential conflicts of interest and ongoing disclosure to deal with firm mergers, where conflicts develop during a case.

5. **Rule on Imputed Disqualification.** The uniform rule on imputed disqualification for bankruptcy courts should: (a) provide bankruptcy judges with discretion in resolving conflict issues because of the difference in size and complexity of bankruptcy cases; (b) address the provisions of the Bankruptcy Code (§327(c) and (e)) that permit an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor; (c) adequately address lateral moves between firms and the transactional representation of business clients: and (d) address the problems bankruptcy courts have with ABA Rule 1.10(c) regarding waiver of conflict.

6. **Rule on Candor Towards the Tribunal.** The bankruptcy court uniform rule on candor towards the tribunal should: (a) not be based on ABA Model Rule 3.3(a)(3) because it puts lawyers in conflict with their duty to their own client; and (b) define whether debtors' counsel have a duty to disclose information to creditors if that information is necessary to address preferential transfer, hidden agendas, etc.

7. **Rule on Lawyer As Witness.** The bankruptcy court uniform rule on the lawyer as a witness should: (a) provide a clear rule prohibiting attorney submission when bankruptcy courts use Federal Rule of Civil Procedure 43 (taking of witness testimony) and Federal Rule of Civil Procedure 56 (summary judgment) to decide matters; and (b) address the situation not addressed by ABA Model Rule 3.7 where the attorney for a debtor may become a post-petition transaction witness (if the attorney is a sole practitioner or in a small firm, it is not practical to withdraw, especially in small consumer cases).

8. **Rule on Truthfulness in Statements to Others.** The bankruptcy court uniform rule on truthfulness in statements to others should: (a) address parameters of settlement offers in the bankruptcy context; (b) address the inadequacies of ABA Model Rule 4.1(b) in determining what conduct is "fraudulent" in bankruptcy cases (confidentiality should be waived if a Model Rule 4.1 circumstance arises in bankruptcy); and (c) be broadened because ABA Model Rule 1.6 is not broad enough in bankruptcy cases.

9. **Rule on Communications with Person Represented by Counsel.** The bankruptcy court uniform rule on communications with a person represented by counsel should: (a) allow for situations where an attorney who is a trustee and who also acts as counsel for the trustee may (when acting as the trustee) communicate with a debtor who is represented by counsel; (b) be flexible enough in consumer cases to allow communication where a debtor's attorney signs on for a limited fee and a limited purpose; and (c) include provisions of Bankruptcy Rule 7004 requiring service of pleadings on the consumer debtor as well as debtor's counsel to assure the consumer debtor is apprised of matters in the case.

C. Should National Uniform Bankruptcy and District Court Rules Be Based on the ABA Model Rules?

For each of the nine types of attorney conduct, we asked bankruptcy judges who stated that the national uniform standard should be the same for all bankruptcy and district courts whether the national uniform standard should be based on the corresponding ABA Model Rule for that type of conduct or on a different standard.[55] And if different, we asked the judges to explain how the national uniform standard should differ from the ABA Model Rules.[56] A brief summary of their comments is provided below for each of the nine types of attorney conduct. The majority of bankruptcy judges said the national uniform standard should be based on the corresponding ABA Model Rule.[57] A minority of judges in each category described a different standard. Appendix J provides a more detailed summary of the comments. For the following nine types of conduct, according to respondents, any national uniform standard that is applied to both bankruptcy and district courts should be based on the corresponding ABA Model Rule or:

1. **Confidentiality of Information:** a different standard—the corresponding ABA Model Rule, except that there should be some flexibility to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

2. **General Rule on Conflicts of Interest:** (a) a different standard—the ABA Model Rule except it should be modified for a relaxed disinterestedness standard under §

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[55] *See* Section B, Question 9, Column 5 on the Chief Bankruptcy Judge Questionnaire, or the identical Question 5, Column 5 of the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report

[56] *Id.*

[57] The percentage of judges who indicated that the national uniform standard should be based on the corresponding ABA Model Rule were as follows for each category of attorney conduct:

- confidentiality of information (68%);
- general rule of conflicts of interest (68%);
- conflict of interest concerning prohibited transactions (69%);
- conflict of interest concerning former client (67%);
- rule on imputed disqualification (67%);
- rule on candor towards the tribunal (63%);
- rule on lawyer as witness (62%);
- rule on truthfulness in statements to others (63%);
- rule on communication with a person represented by counsel (62%).

327 so that lawyers who are owed fees by their clients may represent them in bankruptcy proceedings; (b) a different standard—the ABA Model Rule combined with a requirement of full disclosure (disinterestedness standard should be abandoned in favor of the ABA Model Rule) which gives judges a flexible tool to deal with conflict of interest issues.

3. **Conflict of Interest Concerning Prohibited Transactions:** (a) a different standard—the ABA Model Rule but modified for bankruptcy cases where a trustee is a plaintiff in a multi-party proceeding; (b) a different standard—the ABA Model Rule supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

4. **Conflict of Interest Concerning Former Client:** (a) a different standard—the ABA standard modified to include a provision to deal with the problem of large firms and national firms that represent large creditors and debtors; (b) a different standard—the ABA standard modified for conflict issues problematic to bankruptcy courts, such as where a trustee is a plaintiff in a multi-party proceeding.

5. **Rule on Imputed Disqualification:** a different standard—the ABA Model Rules modified for conflict issues problematic to bankruptcy courts, to reflect the reality of bankruptcy practice such as where a trustee is a plaintiff in a multi-party proceeding.

6. **Rule on Candor Towards the Tribunal:** a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

7. **Rule on Lawyer as Witness:** a different standard—the ABA standard except as to applications for attorneys' fees.

8. **Rule on Truthfulness in Statements to Others:** a different standard—the ABA standard modified for "truthfulness in statements to others" issues problematic to bankruptcy courts.

9. **Rule on Communication with a Person Represented by Counsel.** (a) a different standard—the ABA standard with clarification of "who" is represented by counsel; (b) a different standard—the ABA standard but modified for issues concerning "communications with persons represented by counsel" that are problematic to bankruptcy courts such as the inclusion of communications with creditors of the same class.

D. Should a National Uniform Standard on Any Other Attorney Conduct Issue Be Drafted for Use in Bankruptcy Courts?

The final question asked all bankruptcy judges whether a national uniform standard on any other attorney conduct issue should be drafted for use in all bankruptcy

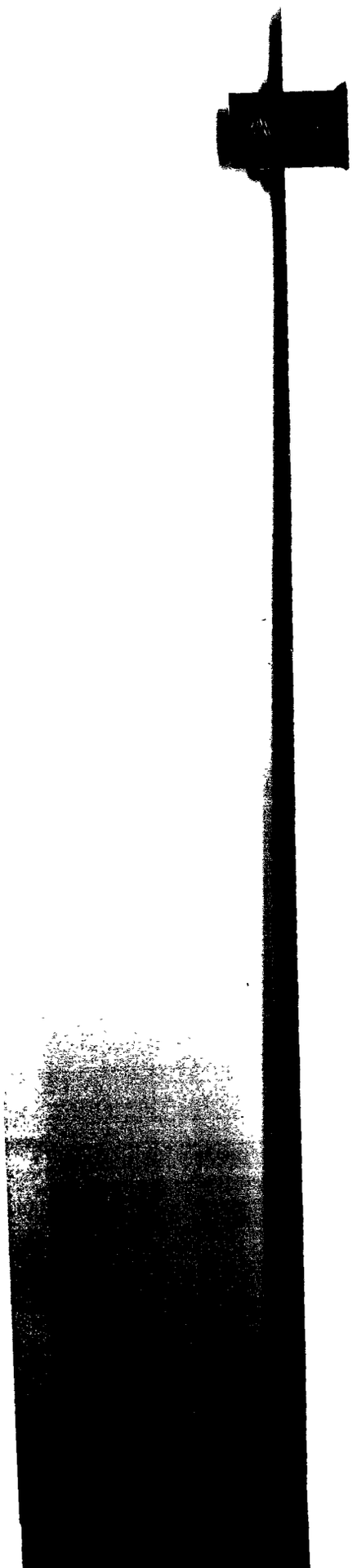
courts.[58] Among the 198 responding bankruptcy judges, 84% or 166 said that no additional attorney conduct issues should be covered by national uniform rules, while 16% or 32 bankruptcy judges said additional issues should be covered. Subjects mentioned by several judges as good candidates for uniform rules included: competency of the practicing attorney before the bankruptcy court; civility to the court, witnesses, and other attorneys; modifications of ABA Model Rules to the bankruptcy context; authority to suspend, disbar, or discipline attorneys by the bankruptcy courts; fiduciary duties; disclosure issues; and bankruptcy-specific conflict of interest issues. Appendix K provides a more detailed summary of their comments.

VIII. GENERAL COMMENTS

The questionnaire included a "General Comments" section in which we asked all bankruptcy judges to add any comments that might help the Standing Committee understand the current issues and problems facing bankruptcy courts with regard to attorney conduct. Ninety-one judges chose to give comments here (36% of all respondents). These comments fell into three general categories: comments in favor of uniform standards; comments opposed to uniform standards; and comments containing mixed and miscellaneous views. In addition, many judges expressed a preference for allowing their bankruptcy court to continue to apply the state ethics rules, supplemented by the statutory bankruptcy standards. Many responding bankruptcy judges in favor of uniform national standards stated that it was important to create uniformity of standards to assist attorneys from one section of the country practicing in bankruptcy courts in other sections. Arguments rejecting uniform national attorney conduct rules for bankruptcy courts comprised the bulk of the general comments. These comments were not in proportion to responses to other questions in the survey.[59] Many responding bankruptcy judges stated that attorneys who practice in state courts should not face differing standards when they appear before bankruptcy courts. Further, many expressed support for permitting local courts to develop additional or stricter standards of conduct, as well as addressing problems of unique, local concern. Appendix L of this report contains a more detailed summary of these comments arranged by category of comment.

[58] See Section B, Question 9j in the Chief Bankruptcy Judge Questionnaire, or the identical Question 5j in the Bankruptcy Judge Questionnaire, located in Appendices A and B respectively of this report.

[59] Responses to the other questions, for example, showed that 52% of responding bankruptcy judges were in favor of uniform standards for bankruptcy and district courts. *See* discussion of national uniformity, *infra* Section VI.



Appendix A

Standards Governing Attorney Conduct in the Bankruptcy Courts

Questionnaire for Chief Judges of United States Bankruptcy Courts

Purpose and Instructions

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) is studying whether nonuniformity in attorney conduct standards across districts has any negative or positive effects. The Standing Committee has asked the Federal Judicial Center to conduct a study of attorney conduct issues in the bankruptcy courts. This questionnaire, developed with the assistance of the Judicial Conference's Advisory Committee on Bankruptcy Rules, asks about the formal and informal sources of attorney conduct standards in your bankruptcy court, the adequacy of those standards, the type and frequency of attorney conduct issues that have arisen in your court, and the need for national uniform attorney conduct rules for bankruptcy courts. A questionnaire identical to Section B of this questionnaire has been sent to all bankruptcy judges. A similar study has already been completed for district courts.

If you need more space to answer any question, please use the "General Comments" section on pages 9 through 11 of the questionnaire. Please give the number of the question you are answering.

Presentation of Responses

Individual respondents will not be identified in the report prepared for the Advisory Committee, but districts may be identified in the report's description of standards and procedures. Only research staff at the Center will have access to the completed questionnaires.

Returning the Questionnaire

The Center is to provide the results of this study to the Advisory Committee on Bankruptcy Rules prior to the Committee's March 1999 meeting. We ask that you please return the completed questionnaire in the enclosed envelope or fax your response by **January 15, 1999** to:

Marie Leary
Research Division
The Federal Judicial Center
One Columbus Circle, NE
Washington, DC 20002-8003
(202) 273-4021 (fax)

Questions

If you have any questions, please call Marie Leary or Bob Niemic at (202) 273-4070.

Section A. Sources of Standards Governing Attorney Conduct in Bankruptcy Courts

The table in the enclosed Appendix 1 shows the status of local rules governing attorney conduct in each federal district court and bankruptcy court. For each district court, the table identifies any local rule on standards of attorney conduct published as of April 28, 1997. For each bankruptcy court, the table shows whether the court has a local bankruptcy rule on standards of attorney conduct and, if so, the source of the standards adopted in the rule as far as we could determine them.

Please locate your district in the table and refer to the information provided there as you answer Question 1 below. After you answer Question 1, please go to the box at the bottom of this page, find the instruction that applies to you, and proceed to the specified question as directed. If you have any problems with the questionnaire, please call Marie Leary at (202) 273-4070 for assistance.

1. To let us know whether the information in Appendix 1 is correct, which of the following best describes the current situation in your bankruptcy court regarding standards governing attorney conduct?

*Check **all** of the following that apply to your bankruptcy court:*

a. ❑$_1$ My bankruptcy court has a local bankruptcy rule that adopts the local rules of the district court in general; our local bankruptcy rule makes no specific mention of any district court provision concerning attorney conduct and professional responsibility.

b. ❑$_2$ My bankruptcy court has a local bankruptcy rule that specifically states that the bankruptcy court has adopted the district court's rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase.

c. ❑$_3$ My bankruptcy court has developed its own attorney conduct standards and has incorporated them into a local bankruptcy rule or adopted them by general order.

d. ❑$_4$ My bankruptcy court has a local bankruptcy rule that adopts other standards to govern attorney conduct such as the ABA Model Rules of Professional Conduct or Model Code of Professional Responsibility; these standards are other than those in the district court local rules.

e. ❑$_5$ My bankruptcy court has no local district or bankruptcy rule, general order, promulgated guideline, standing order, or other written court-wide standard that governs attorney conduct.

f. ❑$_6$ None of the above describes the situation in my bankruptcy court.

If you checked	**a only or a with any other combination—>**	**Go to question 2.**
If you checked	**b only or b with any other combination—>**	**Go to question 3.**
If you checked	**c only—>**	**Go to question 3.**
If you checked	**d only—>**	**Go to question 3.**
If you checked	**c and d—>**	**Go to question 3.**
If you checked	**e or f—>**	**Go to question 4.**

2. If your court has adopted the district court's rules generally, is it correct to assume that your bankruptcy court also follows or has adopted the district court's attorney conduct standards (if any)?

❑$_1$ No
❑$_2$ Yes

3. To resolve attorney conduct issues, does your bankruptcy court (or do the judges in your bankruptcy court) ever use standards or sets of standards other than the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, the formal standards referred to in the local bankruptcy rules, or the district court rules?

❑$_1$ No—> **Go to Section B on next page.**
❑$_2$ Yes

If **YES**, please describe these standards and the frequency with which they are used. **Then go to Section B on next page.**

4. When issues of attorney conduct arise, what standards or set of standards other than the Bankruptcy Code and Federal Rules of Bankruptcy Procedure does your bankruptcy court (or do the judges in your bankruptcy court) apply to resolve the issues? **After responding, go to Section B on next page.**

Section B. Standards Governing Attorney Conduct in the Bankruptcy Courts

Please answer the following questions as they pertain to proceedings before you as an individual judge (i.e., do not answer them as a representative of your bankruptcy court as a whole).

5. **Type and Frequency of Attorney Conduct Issues in Bankruptcy.** Please identify below (by placing a check in the appropriate column) the frequency with which the following attorney conduct issues have arisen before you **during the past two years**. Please include in your count both (1) actual findings that a breach of conduct occurred and (2) instances where either a party raised allegations of unethical conduct or you perceived that unethical conduct had occurred but no allegation was made. There is no need to refer to specific case files or reported case law. Your estimate is sufficient. The full text of all ABA Model Rules, national Bankruptcy Rules, and statutes cited below are in the enclosed Appendix 2.

	Frequency With Which Attorney Conduct Issue Has Arisen in the Past Two Years				
Attorney Conduct Issues	**Never**	**Once**	**Two to five times**	**Six to ten times**	**More than ten times**
5a. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of a standard, such as ABA Model Rules 1.7 through 1.11, governing disqualification for conflict of interest.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5b. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of 11 U.S.C. § 327 or § 1103, governing representation of an adverse interest or conflicts of interest. *Please include matters that meet the criteria of this question 5b even if the matters have also been included in question 5a above.*	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5c. Required Disclosures: the conduct violated or allegedly violated disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5d. Safekeeping of Client Property: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.15.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5e. Attorneys' Fees: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.5.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5

Attorney Conduct Issues	Frequency With Which Attorney Conduct Issue Has Arisen in the Past Two Years				
	Never	Once	Two to five times	Six to ten times	More than ten times
5f. Lawyer as a Witness: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.7.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5g. Confidentiality: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.6.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5h. Communication with represented persons: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.2.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5i. Candor Towards a Tribunal: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.3.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5j. Truthfulness in Statements to Others: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.1.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
5k. Other: This question allows you to describe any violations or allegations of violations of any other standards (whether or not covered by the ABA Model Rules). Please describe below the subject of the standard(s) involved and again identify (by placing a check in the appropriate column) the frequency with which each attorney conduct issue has arisen before you during the **past two years**. If more space is needed, please use the "General Comments" section on pages 9 through 11.					
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5

6. Adequacy of Standards Governing Attorney Conduct

6a. Do you think the "**statutory**" standards (i.e., those in the Bankruptcy Code and national Bankruptcy Rules) for resolving bankruptcy-related issues of attorney conduct are adequate?

❑$_1$ No.
❑$_2$ Yes.

If **NO**, please describe why these standards are inadequate:

6b. Do you think the **non-statutory** standards (i.e., standards other than those in the Bankruptcy Code and national Bankruptcy Rules) your district uses to resolve bankruptcy-related issues of attorney conduct are adequate?

❑$_1$ No.
❑$_2$ Yes.

If **NO**, please describe why these standards are inadequate and what other sources you would turn to to resolve attorney conduct issues (e.g., state ethics codes, model rules or codes):

6c. Are there any inconsistencies that you have found problematic between the statutory and non-statutory attorney conduct standards as defined in Questions 6a and 6b above?

❑$_1$ No.
❑$_2$ Yes.

If **YES**, please describe the inconsistency(ies) and the problem(s) they present:

6d. Are there attorney conduct issues that arise **only** in bankruptcy courts and are not covered or adequately covered by existing statutory or non-statutory attorney conduct standards used by your court?

❑$_1$ No.
❑$_2$ Yes.

If **YES**, please describe those issues:

7. Adequacy of Disclosure Standards Regarding Employment of Attorneys

7a. Have you experienced any problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases?

❑$_1$ No—>**Go to question 8.**
❑$_2$ Yes—>**Go to question 7b.**

7b. Were any of the problems caused by inadequate requirements for disclosure in Bankruptcy Rule 2014?

❑$_1$ No—>**Go to question 8.**
❑$_2$ Yes—>**Go to question 7c.**

7c. If you have any suggestions for amending Bankruptcy Rule 2014 to improve the adequacy of disclosure, please give them here:

8. National Uniform Attorney Conduct Standards in Bankruptcy Courts

The Standing Committee has been considering whether uniform standards of attorney conduct should be adopted for the district and bankruptcy courts. The following questions seek your input on this issue.

8a. Should attorney conduct in all bankruptcy courts be governed by uniform standards?

❑$_1$ No
❑$_2$ Yes
❑$_3$ Can't say

8b. Assuming uniform standards are adopted, should the standards applied in bankruptcy courts be the same as those applied in district courts?

❑$_1$ No
❑$_2$ Yes
❑$_3$ Can't say

Please explain why you think the standards should be the same or different in the bankruptcy and district courts:

9. Suggested Uniform Standards. Please answer the following more specific questions about attorney conduct standards that ---> standards. For purposes of this inquiry, assume the national uniform standards would be identical or substantially similar to the---> For each subject in Column 1, answer no or yes to the question in column 3 and then proceed according to the instructions given.

Column 1 **Subject of Suggested Uniform Standard**	**Column 2** **ABA Model Rule**	**Column 3** **Should bankruptcy courts have a national uniform standard on the subject in Column 1, whether it be the ABA Model Rule listed in Column 2 or some other standard on the subject?**	**Column 4** **Should a national uniform standard on the subject in Column 1 be the same for bankruptcy and district courts?**
9a. Confidentiality of Information	Rule 1.6	❑$_1$ No—> Go to question 9b. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9b. General Rule on Conflicts of Interest	Rule 1.7	❑$_1$ No—> Go to question 9c. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9c. Conflict of Interest Concerning Prohibited Transactions	Rule 1.8	❑$_1$ No—> Go to question 9d. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9d. Conflict of Interest Concerning Former Client	Rule 1.9	❑$_1$ No—> Go to question 9e. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9e. Rule on Imputed Disqualification	Rule 1.10	❑$_1$ No—> Go to question 9f. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9f. Rule on Candor Towards the Tribunal	Rule 3.3	❑$_1$ No—> Go to question 9g. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9g. Rule on Lawyer as Witness	Rule 3.7	❑$_1$ No—> Go to question 9h. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9h. Rule on Truthfulness In Statements to Others	Rule 4.1	❑$_1$ No—> Go to question 9i. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
9i. Rule on Communications with Person Represented by Counsel.	Rule 4.2	❑$_1$ No—> Go to 9j on page 9. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.

might be adopted on a national basis. Column 1 lists nine types of attorney conduct that could be governed by national uniform ABA Model Rules of Professional Conduct listed in column 2 (see the enclosed Appendix 2 for the text of the ABA Model Rules). Make sure to explain in Column 5 your response given in Column 4. Feel free to use pages 9 through 11 if you need more space.

Column 5
•If you answered "No" in Column 4, explain how the bankruptcy standard on the subject in Column 1 should differ from any national uniform standard drafted for use in district courts. **•If you answered "Yes" in Column 4, state whether the national uniform standard should be based on the ABA Model Rule in Column 2 or on a different standard. If different, explain how the national uniform standard should differ from the ABA Model Rule.**

9j. Other Standards. Should a national uniform standard on any other attorney conduct issue be drafted for use in all bankruptcy courts?

❑$_1$ No
❑$_2$ Yes

If **YES**, please describe the standard:

General Comments

Please use the space below to add any comments you think would help the Standing Committee understand the current issues and problems facing bankruptcy courts with regard to attorney conduct.

THANK YOU VERY MUCH FOR YOUR COOPERATION!

Questionnaire for Chief Judges of United States Bankruptcy Courts on Standards Governing Attorney Conduct in the Bankruptcy Courts

Appendix 1

Rules Governing Attorney Conduct in the Federal District Courts and Bankruptcy Courts

Circuit	District	Local Rule Regulating Attorney Conduct District Courts[1]	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts[2]
1	Mass.	Local Rule 83.6(4)	No Local Bankruptcy Rule
1	Me.	Local Rule 83.3	No Local Bankruptcy Rule[3]
1	N.H.	Local Rule 83.5 (DR-1 and DR-5)	No Local Bankruptcy Rule
1	P.R.	Local Rule 211.4(b) (renumbered as Rule 83.5 but effective date unknown at present)	Local Bankruptcy Rule: adopted District Court's Rule(s)
1	R.I.	Local Rule 4(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)[4]
2	Conn.	Local Civil Rule 3(a)	No Local Bankruptcy Rule
2	N.Y.-E	Local Civil Rule 1.5(b)(5)	No Local Bankruptcy Rule
2	N.Y.-N	Local Rule 83.4(j)	No Local Bankruptcy Rule
2	N.Y.-S	Local Civil Rule 1.5(b)(5)	No Local Bankruptcy Rule
2	N.Y.-W	Local Civil Rule 83.3(c)	Local Bankruptcy Rule: local rule does not state standard to be applied.
2	Vt.	Local Civil Rule 83.2(d)(4)	No Local Bankruptcy Rule
3	Del.	Local Rule 83.6(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
3	N.J.	Local Civil Rules 103.1(a) & 104.1(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
3	Pa.-E	Local Civil Rule 83.6, Rule IV	Local Bankruptcy Rule: local rule does not state standard to be applied.
3	Pa.-M	Local Rule 83.23 & Appendix D: Code of Professional Conduct	Local Bankruptcy Rule: local rule does not state standard to be applied.
3	Pa.-W	Local Civil Rule 83.6.1	Local Bankruptcy Rule: adopted District Court's Rule(s)
3	V.I.	Local Civil Rules 83.2(a)(1) & (b)(4)	No Local Bankruptcy Rule
4	Md.	Local Rule 704	Local Bankruptcy Rule 42(k): Counsel are "encouraged to be familiar" with the "Discovery Guidelines of the Maryland State Bar."
4	N.C.-E	Local Rule 2.10	No Local Bankruptcy Rule

[1] The identification and categorization of each district's local rule is based upon the published local rule in effect on April 28, 1997. See Marie Leary, Standards of Attorney Conduct and Disciplinary Procedures: A Study of the Federal District Courts (Federal Judicial Center June 1997) *in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts September 1997).

[2] The sources of standards governing attorney conduct adopted by bankruptcy court local rules are from Daniel R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct, App. III (May 11, 1997) *in* Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (Administrative Office of the United States Courts September 1997).

[3] Where a Bankruptcy Court is listed as having "No Local Bankruptcy Rule," the court has no promulgated local bankruptcy rule addressing standards of attorney conduct.

[4] Where a Bankruptcy Court is listed as having "Local Bankruptcy Rule: adopted District Court's Rule(s)," this includes two types of local bankruptcy rules: (1) local bankruptcy rules that adopt the local rules of the district court in general making no reference to provisions concerning attorney conduct and professional responsibility, and (2) local bankruptcy rules that specifically state that they have adopted the district court's rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase.

Circuit	District	Local Rule Regulating Attorney Conduct District Courts[1]	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts[2]
4	N.C.-M	Local Rule 505	No Local Bankruptcy Rule
4	N.C.-W	General Local Rule 1 & Guidelines for Resolving Scheduling Conflicts Order	No Local Bankruptcy Rule
4	S.C.	Local Rule 83.I.09	Local Bankruptcy Rule: adopts SC Code of Prof. Resp.
4	Va.-E	Local Rule 83.1 & Appendix B: Federal Rules of Disciplinary Enforcement, Rule IV	Local Bankruptcy Rule 105(I): adopts Canons of Prof. Ethics of the ABA & the Va. State Bar
4	Va.W	Local Rules for W.D. Va., Federal Rules of Disciplinary Enforcement, Disciplinary Rule 4	No Local Bankruptcy Rule
4	W.Va.-N	Local Rule of General Practice 3.01	Local Bankruptcy Rule: adopted District Court's Rule(s)
4	W.Va.-S	Local Rule of General Practice 3.01	No Local Bankruptcy Rule
5	La.-E	Local Rule 83.2.4E	No Local Bankruptcy Rule
5	La.-M	Local Rule 20.04M	Local Bankruptcy Rule: adopts rules of Professional Conduct of LA State Bar Assoc.
5	La.-W	Local Rule 20.04W	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Miss.-N	Local Rule 21	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Miss.-S	Local Rule 21	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Tex.-E	Local Rule AT-2(a)	No Local Bankruptcy Rule
5	Tex -N	Local Rule 83.8(e), Local Criminal Rule 57.8(e).	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Tex.-S	Local Rule 1(L) & Appendix A, Rule 1	Local Bankruptcy Rule: adopted District Court's Rule(s)
5	Tex.-W	Local Rule AT-4 & Appendix M: Texas Lawyer Creed	Local Bankruptcy Rule: adopted District Court's Rule(s) and references "litigation standard" announced in local case and states that it applies.
6	Ky.-E	Local Rule 83.3(c) & Local Criminal Rule 57.3(c)	No Local Bankruptcy Rule
6	Ky.-W	Local Rule 83.3(c) & Local Criminal Rule 57.3(c)	Local Bankruptcy Rule 3(b)(2)(E): adopts Standards of Professional Conduct adopted by Ky. Supreme Court
6	Mich.-E	Local Rule 83.22(d) & Civility Plan (includes Civility Principles based on the 7th Circuit model)	Local Bankruptcy Rule: adopted District Court's Rule(s)
6	Mich.-W	Local Rules 17 & 21(a)	Local Bankruptcy Rule: authorizes discipline of attorneys but does not state standard to be applied.
6	Ohio-N	Local Civil Rule 83.5(b) & Local Criminal Rule 57.5(b)	Local Bankruptcy Rule· adopted District Court's Rule(s)
6	Ohio-S	Local Rule 83.4(f) referencing Appendix of Court Orders, Order 81-1, Rule IV	Local Bankruptcy Rule 4: adopts Code of Prof. Resp. adopted by Ohio S.Ct.
6	Tenn.-E	Local Rules 83.6 & 83.7	Local Bankruptcy Rule 2(c): adopts Code of Prof. Conduct adopted by Supreme Court of Tenn.
6	Tenn.-M	Local Rule 1(e)(4)	Local Bankruptcy Rule: adopted District Court's Rule(s) and has Local Bankruptcy Rule: asserts jurisdiction to enforce standards of conduct.

Circuit	District	Local Rule Regulating Attorney Conduct District Courts[1]	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts[2]
6	Tenn.-W	Local Rule 83.1(e) & Guidelines for Professional Responsibility and Courtesy and Conduct of Memphis Bar Association adopted by the W.D. Tenn. (on file with clerk)	Local Bankruptcy Rule: refers to ABA Code and District Court rules as they relate to attorney conduct.
7	Ill.-C	Local Rule 83.6(D)	No Local Bankruptcy Rule
7	Ill.-N[5]	Local General Rule 3.52 incorporating Rules of Professional Conduct for the N.D. Ill., General Order of 10/29/91 with respect to adoption of the N.D. Ill. Rules & Seventh Circuit Standards of Professional Conduct	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Ill.-S	Local Rule 29(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Ind.-N	Local Rule 83.5(f) & Seventh Circuit Standards of Professional Conduct	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Ind.-S	Local Rule 83.5(f), Rule IV of Rules of Disciplinary Enforcement & Seventh Circuit Standards of Professional Conduct	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Wis.-E	Local Rule 2.05(a)	Local Bankruptcy Rule: adopted District Court's Rule(s)
7	Wis.-W	No Local Bankruptcy Rule	No Local Bankruptcy Rule
8	Ark.-E	Local Rules for E. & W.D. Ark., Appendix: Model Federal Rules of Disciplinary Enforcement, Rule IV	Local Bankruptcy Rule: adopted Uniform Federal Rules of Disciplinary Enforcement.
8	Ark.-W	Local Rules for E. & W.D. Ark., Appendix: Model Federal Rules of Disciplinary Enforcement, Rule IV	Local Bankruptcy Rule: adopted Uniform Federal Rules of Disciplinary Enforcement.
8	Iowa-N	No Local Bankruptcy Rule	Local Bankruptcy Rule: modified standards
8	Iowa-S	No Local Bankruptcy Rule	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	Minn.	Local Rule 83.6(d)	No Local Bankruptcy Rule
8	Mo.-E	Local Rule 12.02 & Rules of Disciplinary Enforcement, Rule IV	No Local Bankruptcy Rule
8	Mo.-W	Local Rule 83.6	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	Neb.	Local Rule 83.5(d)	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	N.D.	No Local Bankruptcy Rule	Local Bankruptcy Rule: adopted District Court's Rule(s)
8	S.D.	No Local Bankruptcy Rule	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Alaska	Local Rule 83.1(h)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Ariz.	Local Rule 1.6(d) & Standards for Professional Conduct adopted by D. Ariz.	Local Bankruptcy Rule 9011: refers to ethics rules adopted by the state of Arizona.
9	Cal.-C	Local Civil Rule 2.5	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Cal.-E	Local General Rule 180(e)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Cal.-N	Local Civil Rule 11-3(a)	Local Bankruptcy Rule: incorporated into District Court Rules
9	Cal.-S	Local Rule 83.5i	No Local Bankruptcy Rule

[5] The approach adopted by the N.D. Ill.'s local rule does not fit into any of the three approaches in the table because the N.D. Ill. has adopted a standard of conduct unique to their district that does not follow state standards nor any ABA Model.

Circuit	District	Local Rule Regulating Attorney Conduct District Courts[1]	Local Rule and Source of Standards Governing Attorney Conduct Bankruptcy Courts[2]
9	Guam	Local General Rule 22.3(b)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Haw.	Local Rule 110-3	No Local Bankruptcy Rule
9	Idaho	Local Rule 83.5(a)	Local Bankruptcy Rule 9010(g): adopted Rules of Professional Conduct adopted by S.Ct. of Idaho.
9	Mont.	Local General Rule 110-3(a)	Local Bankruptcy Rule: adopted District Court's Rule(s)
9	Nev.	Local Rule IA 10-7(a)	No separate bankruptcy rules; only bankruptcy specific rules in District Court's rules.
9	N.M.I.	Local Rule 1.5	No Local Bankruptcy Rule
9	Or.	Local Civil Rule 110-3	No Local Bankruptcy Rule
9	Wash.-E	Local Rule 83.3(a)(2)	No Local Bankruptcy Rule
9	Wash.-W	Local General Rule 2(e)	Local Bankruptcy Rule: adopted District Court's Rule(s)
10	Colo.	Local Rule 83.6	No Local Bankruptcy Rule
10	Kan.	Local Rule 83.6.1	Local Bankruptcy Rule: adopted District Court's Rule(s)
10	N.M.	Local Rule 83.9	No Local Bankruptcy Rule
10	Okla.-E	Local Rule 83.3K	No Local Bankruptcy Rule
10	Okla.-N	Local Rule 83.2	No Local Bankruptcy Rule
10	Okla.-W	Local Rule 83.6(b)	Local Bankruptcy Rule: adopted District Court's Rule(s)
10	Utah	Local Rule 103-1(h)	
10	Wyo.	Local Rule 83.12.7	No Local Bankruptcy Rule
11	Ala.-M	Local Rule 1(a)(4) (renumbered and amended to Local Rule 83.1(f) but no effective date known at present)	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Ala.-N	Local Civil Rule 83.1(f)	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Ala.-S	Local Rule 1(A)(4) (renumbered and amended to Local Rule 83.5(f); effective 6/1/97)	Local Bankruptcy Rule: adopted ABA Rules and State Rules
11	Fla.-M	Local Rule 2.04(c)	Local Bankruptcy Rule: adopted ABA Rules and State Rules
11	Fla.-N	Local General Rule 11.1(G)(1) & Addendum: Customary and Traditional Conduct and Decorum in the US District Court	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Fla.-S	Local General Rule 11.1(C) & Rules Governing Attorney Discipline, Rule IV	Local Bankruptcy Rule: Attorney must read and remain familiar with Florida Bar's Rules of Prof. Conduct. No explicit statement on whether these rules apply or govern.
11	Ga.-M	Local Rule 13.1	No Local Bankruptcy Rule
11	Ga.-N	Local Rule 83.1C	Local Bankruptcy Rule: adopted District Court's Rule(s)
11	Ga.-S	Local Rule 83.5(d)	Local Bankruptcy Rule 505(d): adopts "Current Canons of Professional Ethics of the ABA".
DC	D.C.	Local Rule 706	Local Bankruptcy Rule: adopted District Court's Rule(s)

Questionnaire for Chief Judges of United States Bankruptcy Courts on Standards Governing Attorney Conduct in the Bankruptcy Courts

Appendix 2

AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.5 FEES

(a) **A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:**
(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of a matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:
(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:
(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
(2) the client is advised of and does not object to the participation of all the lawyers involved; and
(3) the total fee is reasonable.

Rule 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
(2) to establish a claim or defense on behalf of the lawyer in a controversy between

the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client and knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
  (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
  (3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part of information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
  (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  (1) the client consents after consultation;
  (2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and
  (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is

represented by the other lawyer exempt upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter;
unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Rule 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the firm, unless:
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Rule 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake

or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
  (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
  (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:
  (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
  (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Rule 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer' own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Rule 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:
  (1) make a false statement of material fact or law to a tribunal;
  (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding,

and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material act to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

UNITED STATES CODE

11 USC § 101

§ 101. Definitions.

In this title— . . . .

(14) "disinterested person" means person that—
(A) is not a creditor, an equity security holder, or an insider;
(B) is not and was not an investment banker for any outstanding security of the debtor;
(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 USC § 327

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the trustee, 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 the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional

persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

11 USC § 328

§ 328. Limitation on compensation of professional persons.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 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.

11 USC § 329

§ 329. Debtor's transactions with attorneys.

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, If such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

11 USC § 1103

§ 1103. Powers and duties of committees.

(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

(b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

(c) A committee appointed under section 1102 of this title may—

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

(d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

RULE 2014. Employment of Professional Persons.

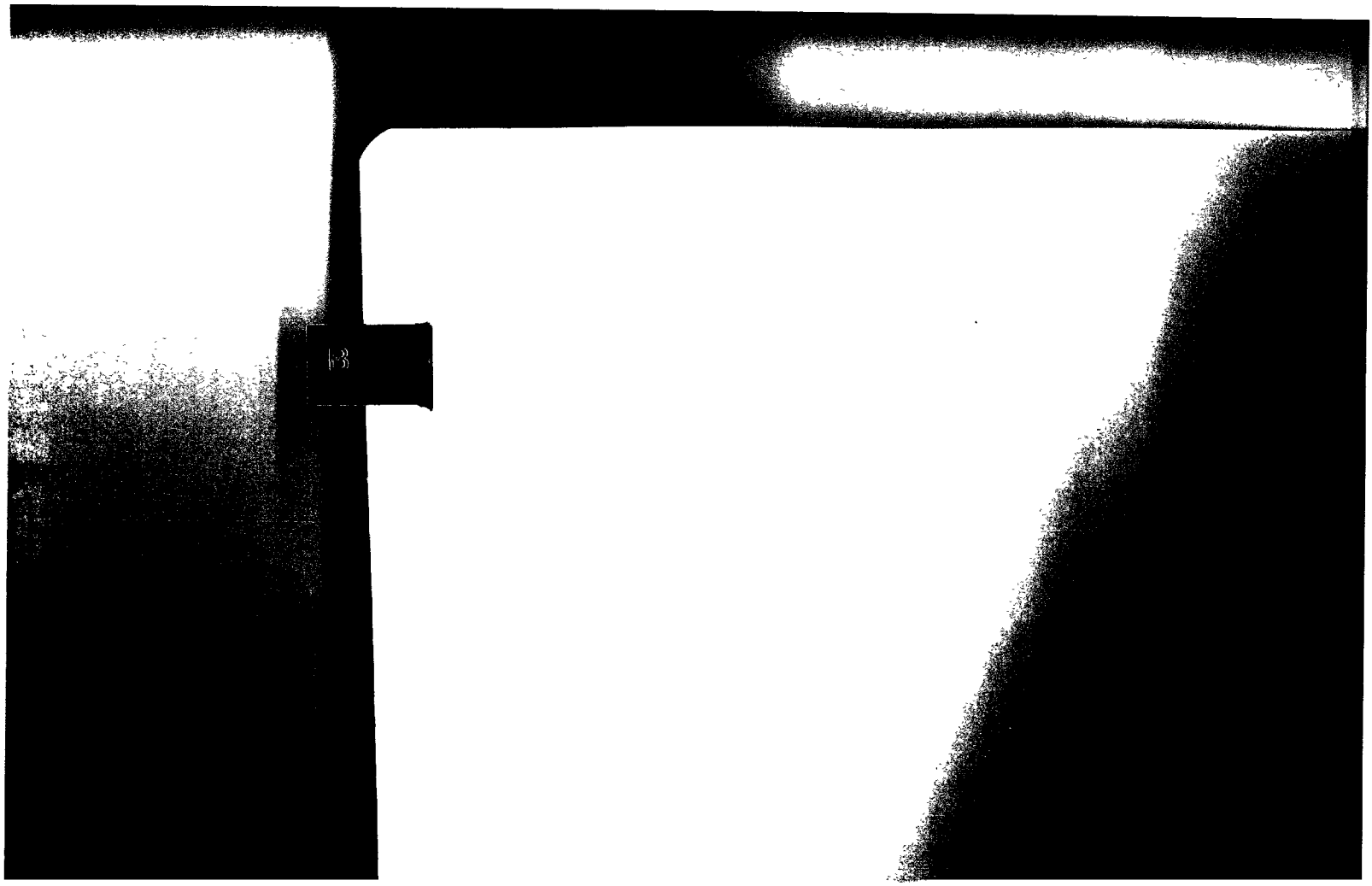
(a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, 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. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's 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.

(b) Services Rendered by Member or Associate of Firm of Attorneys or Accountants. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses.

(a) Application for Compensation or Reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee with 15 days after any payment or agreement not previously disclosed.



Appendix B

Standards Governing Attorney Conduct in the Bankruptcy Courts

Questionnaire for Judges of United States Bankruptcy Courts

Purpose and Instructions

The Judicial Conference Committee on Rules of Practice and Procedure (the Standing Committee) is studying whether nonuniformity in attorney conduct standards across districts has any negative or positive effects. The Standing Committee has asked the Federal Judicial Center to conduct a study of attorney conduct issues in the bankruptcy courts. This questionnaire, developed with the assistance of the Judicial Conference's Advisory Committee on Bankruptcy Rules, asks about the adequacy of the formal and informal sources of attorney conduct standards in your bankruptcy court, the type and frequency of attorney conduct issues that have arisen in your court, and the need for national uniform attorney conduct rules for bankruptcy courts. This questionnaire has been sent to all bankruptcy judges; a similar questionnaire was sent to all chief bankruptcy judges. A similar study has already been completed for district courts.

If you need more space to answer any question, please use the "General Comments" section on page 8 of the questionnaire. Please give the number of the question you are answering. Attach additional sheets if necessary.

Presentation of Responses

Individual respondents will not be identified in the report prepared for the Advisory Committee, but districts may be identified in the report's description of standards and procedures. Only research staff at the Center will have access to the completed questionnaires.

Returning the Questionnaire

The Center is to provide the results of this study to the Advisory Committee on Bankruptcy Rules prior to the Committee's March 1999 meeting. We ask that you please return the completed questionnaire in the enclosed envelope or fax your response by **January 15, 1999** to:

Marie Leary
Research Division
The Federal Judicial Center
One Columbus Circle, NE
Washington, DC 20002-8003
(202) 273-4021 (fax)

Questions

If you have any questions, please call Marie Leary or Bob Niemic at (202) 273-4070.

Please answer the following questions as they pertain to proceedings before you as an individual judge (i.e., do not answer them as a representative of your bankruptcy court as a whole).

1. **Type and Frequency of Attorney Conduct Issues in Bankruptcy.** Please identify below (by placing a check in the appropriate column) the frequency with which the following attorney conduct issues have arisen before you **during the past two years**. Please include in your count both (1) actual findings that a breach of conduct occurred and (2) instances where either a party raised allegations of unethical conduct or you perceived that unethical conduct had occurred but no allegation was made. There is no need to refer to specific case files or reported case law. Your estimate is sufficient. The full text of all ABA Model Rules, national Bankruptcy Rules, and statutes cited below are in the enclosed Appendix .

	Frequency With Which Attorney Conduct Issue Has Arisen in the Past Two Years				
Attorney Conduct Issues	**Never**	**Once**	**Two to five times**	**Six to ten times**	**More than ten times**
1a. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of a standard, such as ABA Model Rules 1.7 through 1.11, governing disqualification for conflict of interest.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1b. Conflict of Interest: the conduct was such that the attorney was disqualified or was the subject of a disqualification motion on the basis of 11 U.S.C. § 327 or § 1103, governing representation of an adverse interest or conflicts of interest. *Please include matters that meet the criteria of this question 1b even if the matters have also been included in question 1a above.*	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1c. Required Disclosures: the conduct violated or allegedly violated disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1d. Safekeeping of Client Property: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.15.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1e. Attorneys' Fees: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.5.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5

Attorney Conduct Issues	Frequency With Which Attorney Conduct Issue Has Arisen in the Past Two Years				
	Never	Once	Two to five times	Six to ten times	More than ten times
1f. Lawyer as a Witness: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.7.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1g. Confidentiality: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 1.6.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1h. Communication with represented persons: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.2.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1i. Candor Towards a Tribunal: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 3.3.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1j. Truthfulness in Statements to Others: the conduct violated or allegedly violated standards analogous to those in ABA Model Rule 4.1.	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
1k. Other: This question allows you to describe any violations or allegations of violations of any other standards (whether or not covered by the ABA Model Rules). Please describe below the subject of the standard(s) involved and again identify (by placing a check in the appropriate column) the frequency with which each attorney conduct issue has arisen before you during the **past two years**. If more space is needed, please use the "General Comments" section on page 8.					
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5
_____ _____	[ ]1	[ ]2	[ ]3	[ ]4	[ ]5

2. Adequacy of Standards Governing Attorney Conduct

2a. Do you think the "**statutory**" standards (i.e., those in the Bankruptcy Code and national Bankruptcy Rules) for resolving bankruptcy-related issues of attorney conduct are adequate?

❑$_1$ No.
❑$_2$ Yes.

If **NO**, please describe why these standards are inadequate:

2b. Do you think the **non-statutory** standards (i.e., standards other than those in the Bankruptcy Code and national Bankruptcy Rules) your district uses to resolve bankruptcy-related issues of attorney conduct are adequate?

❑$_1$ No.
❑$_2$ Yes.

If **NO**, please describe why these standards are inadequate and what other sources you would turn to to resolve attorney conduct issues (e.g., state ethics codes, model rules or codes):

2c. Are there any inconsistencies that you have found problematic between the statutory and non-statutory attorney conduct standards as defined in Questions 2a and 2b above?

❑$_1$ No.
❑$_2$ Yes.

If **YES**, please describe the inconsistency(ies) and the problem(s) they present:

2d. Are there attorney conduct issues that arise **only** in bankruptcy courts and are not covered or adequately covered by existing statutory or non-statutory attorney conduct standards used by your court?

❑$_1$ No.
❑$_2$ Yes.

If **YES**, please describe those issues:

3. Adequacy of Disclosure Standards Regarding Employment of Attorneys

3a. Have you experienced any problems with the adequacy of disclosure by attorneys seeking employment in bankruptcy cases?

❑$_1$ No—>**Go to question 4.**
❑$_2$ Yes—>**Go to question 3b.**

3b. Were any of the problems caused by inadequate requirements for disclosure in Bankruptcy Rule 2014?

❑$_1$ No—>**Go to question 4.**
❑$_2$ Yes—>**Go to question 3c.**

3c. If you have any suggestions for amending Bankruptcy Rule 2014 to improve the adequacy of disclosure, please give them here:

4. National Uniform Attorney Conduct Standards in Bankruptcy Courts

The Standing Committee has been considering whether uniform standards of attorney conduct should be adopted for the district and bankruptcy courts. The following questions seek your input on this issue.

4a. Should attorney conduct in all bankruptcy courts be governed by uniform standards?

❑$_1$ No
❑$_2$ Yes
❑$_3$ Can't say

4b. Assuming uniform standards are adopted, should the standards applied in bankruptcy courts be the same as those applied in district courts?

❑$_1$ No
❑$_2$ Yes
❑$_3$ Can't say

Please explain why you think the standards should be the same or different in the bankruptcy and district courts:

5. Suggested Uniform Standards. Please answer the following more specific questions about attorney conduct standards that —> standards. For purposes of this inquiry, assume the national uniform standards would be identical or substantially similar to the—> For each subject in Column 1, answer no or yes to the question in column 3 and then proceed according to the instructions given.

Column 1 **Subject of Suggested Uniform Standard**	**Column 2** **ABA Model Rule**	**Column 3** **Should bankruptcy courts have a national uniform standard on the subject in Column 1, whether it be the ABA Model Rule listed in Column 2 or some other standard on the subject?**	**Column 4** **Should a national uniform standard on the subject in Column 1 be the same for bankruptcy and district courts?**
5a. Confidentiality of Information	Rule 1.6	❑$_1$ No—> Go to question 5b. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5b. General Rule on Conflicts of Interest	Rule 1.7	❑$_1$ No—> Go to question 5c. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5c. Conflict of Interest Concerning Prohibited Transactions	Rule 1.8	❑$_1$ No—> Go to question 5d. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5d. Conflict of Interest Concerning Former Client	Rule 1.9	❑$_1$ No—> Go to question 5e. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5e. Rule on Imputed Disqualification	Rule 1.10	❑$_1$ No—> Go to question 5f. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5f. Rule on Candor Towards the Tribunal	Rule 3.3	❑$_1$ No—> Go to question 5g. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5g. Rule on Lawyer as Witness	Rule 3.7	❑$_1$ No—> Go to question 5h. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5h. Rule on Truthfulness In Statements to Others	Rule 4.1	❑$_1$ No—> Go to question 5i. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.
5i. Rule on Communications with Person Represented by Counsel.	Rule 4.2	❑$_1$ No—> Go to 5j on page 8. ❑$_2$ Yes—> Go to Column 4.	❑$_1$ No—> Go to Column 5. ❑$_2$ Yes—> Go to Column 5.

might be adopted on a national basis. Column 1 lists nine types of attorney conduct that could be governed by national uniform ABA Model Rules of Professional Conduct listed in column 2 (see the enclosed Appendix for the text of the ABA Model Rules). Make sure to explain in Column 5 your response given in Column 4. Feel free to use page 8 if you need more space.

Column 5
•**If you answered "No" in Column 4, explain how the bankruptcy standard on the subject in Column 1 should differ from any national uniform standard drafted for use in district courts.** •**If you answered "Yes" in Column 4, state whether the national uniform standard should be based on the ABA Model Rule in Column 2 or on a different standard. If different, explain how the national uniform standard should differ from the ABA Model Rule.**

5j. Other standards. Should a national uniform standard on any other attorney conduct issue be drafted for use in all bankruptcy courts?

❑$_1$ No
❑$_2$ Yes

If **YES**, please describe the standard:

General Comments

Please use the space below to add any comments you think would help the Standing Committee understand the current issues and problems facing bankruptcy courts with regard to attorney conduct.

THANK YOU VERY MUCH FOR YOUR COOPERATION!

Questionnaire for Chief Judges of United States Bankruptcy Courts on Standards Governing Attorney Conduct in the Bankruptcy Courts

Appendix

AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.5 FEES

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of a matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Rule 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between

the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Rule 1.7 CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.8 CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client and knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
  (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
  (3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part of information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
  (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
  (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  (1) the client consents after consultation;
  (2) there is no interference with the lawyer's independence of professional judgement or with the client-lawyer relationship; and
  (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is

represented by the other lawyer exempt upon consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

Rule 1.9 CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter;
unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Rule 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the firm, unless:
(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Rule 1.11 SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may

undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:
  (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
  (2) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:
  (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
  (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Rule 1.15 SAFEKEEPING PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer' own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third persons entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

Rule 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:
  (1) make a false statement of material fact or law to a tribunal;
  (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding,

and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material act to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

UNITED STATES CODE

11 USC § 101

§ 101. Definitions.

In this title— . . . .

(14) "disinterested person" means person that—
(A) is not a creditor, an equity security holder, or an insider;
(B) is not and was not an investment banker for any outstanding security of the debtor;
(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 USC § 327

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the trustee, 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 the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional

persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

11 USC § 328

§ 328. Limitation on compensation of professional persons.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 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.

11 USC § 329

§ 329. Debtor's transactions with attorneys.

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, If such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

11 USC § 1103

§ 1103. Powers and duties of committees.

(a) At a scheduled meeting of a committee appointed under section 1102 of this title, at which a majority of the members of such committee are present, and with the court's approval, such committee may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents, to represent or perform services for such committee.

(b) An attorney or accountant employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

(c) A committee appointed under section 1102 of this title may—

(1) consult with the trustee or debtor in possession concerning the administration of the case;

(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;

(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections of a plan;

(4) request the appointment of a trustee or examiner under section 1104 of this title; and

(5) perform such other services as are in the interest of those represented.

(d) As soon as practicable after the appointment of a committee under section 1102 of this title, the trustee shall meet with such committee to transact such business as may be necessary and proper.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

RULE 2014. Employment of Professional Persons.

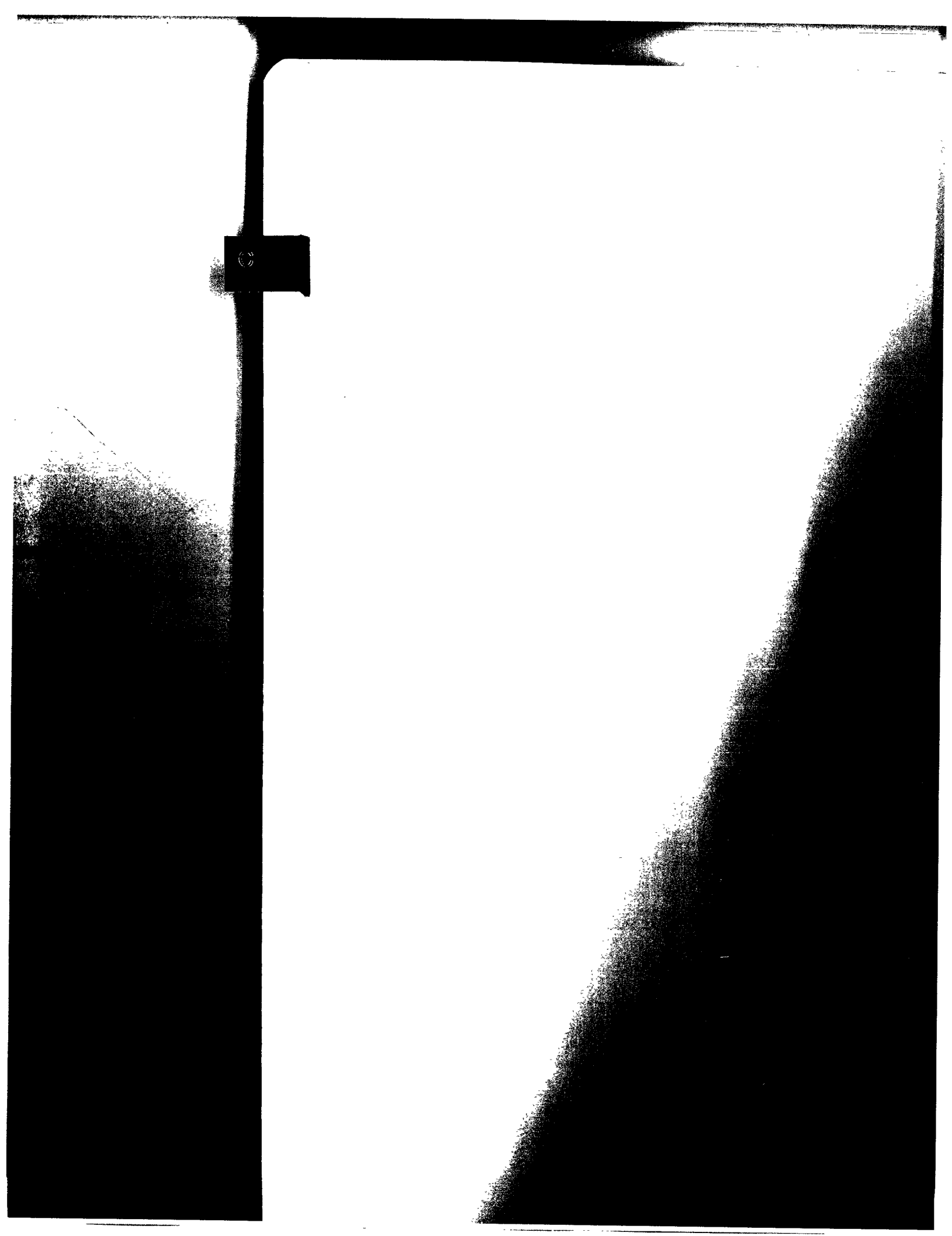
(a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, 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. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's 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.

(b) Services Rendered by Member or Associate of Firm of Attorneys or Accountants. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses.

(a) Application for Compensation or Reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee with 15 days after any payment or agreement not previously disclosed.



Appendix C

Comments Indicating Statutory Standards for Resolving Bankruptcy-Related Issues of Attorney Conduct Were Not Adequate

- The statutory attorney conduct standards for conflicts of interest are not adequate because:
  (1) The statutory standards are not articulated in a specific or detailed enough manner to provide the necessary guidance to attorneys, usually causing more problems than they solve (especially the disinterestedness standard under § 327(a)). The vagueness of § 327(a) requires the court to make difficult decisions concerning whether conflicts are such as to disqualify a professional. (Summary of comments from 7 bankruptcy judges.)
  (2) The statutory standards are too strict (specifically the definition of disinterested persons under 11 U.S.C. § 327(a)) and do not provide enough flexibility or allow for judicial discretion in their application. (Summary of comments from 6 bankruptcy judges.)
  (3) The statutory standards should be clarified as to related corporate debtors. Representation of multiple, related entities ordinarily should be allowed if all were operated as an integrated group with one decision-maker. There needs to be a better definition of the conflict rule pertaining to the debtor and the principal of a debtor entity represented by the same attorney. (Summary of comments from 3 bankruptcy judges.)
  (4) The multi-party nature of bankruptcy, and the fact that bankruptcy cases often involve a multitude of separate legal transactions unlike a single civil action or criminal case, often makes it difficult to tell when a conflict or potential conflict is likely because the potential for conflict or overreaching is constantly shifting and is often obscure or obscured. Also, it is unrealistic to require disclosure of all conflicts to the parties-in-interest because there can be so many of them. (Summary of comments from 2 bankruptcy judges.)
  (5) The disinterestedness concept in the Code does not work in reality because it is incomplete. For example, the remoteness of conflicts that may exist across a large firm are not addressed, nor are problems arising in closely held corporations. Further, it is not clear what duty an attorney for a chapter 11 debtor-in-possession has when he or she is acting in her own interest other than the interest of the bankruptcy estate.
  (6) The statutory standards should be clearer on issues of multiple representation: that is, an attorney representing two related debtors; an attorney representing a debtor corporation or a debtor subsidiary corporation; or debtor partner and debtor partnership.
  (7) The statutory standards should be clearer on issues arising from representation of a pre-bankruptcy debtor and a debtor-in-possession.

- The statutory standards do not cover a broad enough range of attorney conduct issues, forcing judges to turn to other standards to supplement them such as the ABA Model Rules and state supreme court rules. The statutory standards mostly address conflict

issues affecting only attorneys paid by the estate (trustees' and creditors' committees' attorneys and chapters 7 and 13 debtors' attorneys), leaving many other issues such as those listed in this questionnaire unaddressed. The statutory standards are not specific enough in most situations because they do not address all aspects of attorney conduct toward the court, clients, or other parties in interest. For example, the statutory standards fail to set forth adequate criteria for the limitation of the scope of representation of chapters 7 and 13 debtors. (Summary of comments from 16 bankruptcy judges).

- The statutory standards govern the attorneys' conduct but provide little guidance for dealing with that conduct—such as whether bankruptcy judges have authority to suspend attorneys from practicing before a bankruptcy court. Sua sponte contempt powers should be expanded because referral of attorney misconduct to the U.S. trustee, U.S. Attorney, or state bar association often results in no action and no report back to the court. Also, there is a wide divergence of enforcement among bankruptcy districts, causing attorneys to expect lax enforcement in certain districts. The "honor system" does not work. There needs to be a policing and enforcement mechanism other than denial of fees once a conflict becomes known. Sanctions and contempt should be clearly authorized. (Summary of comments from 7 bankruptcy judges.)

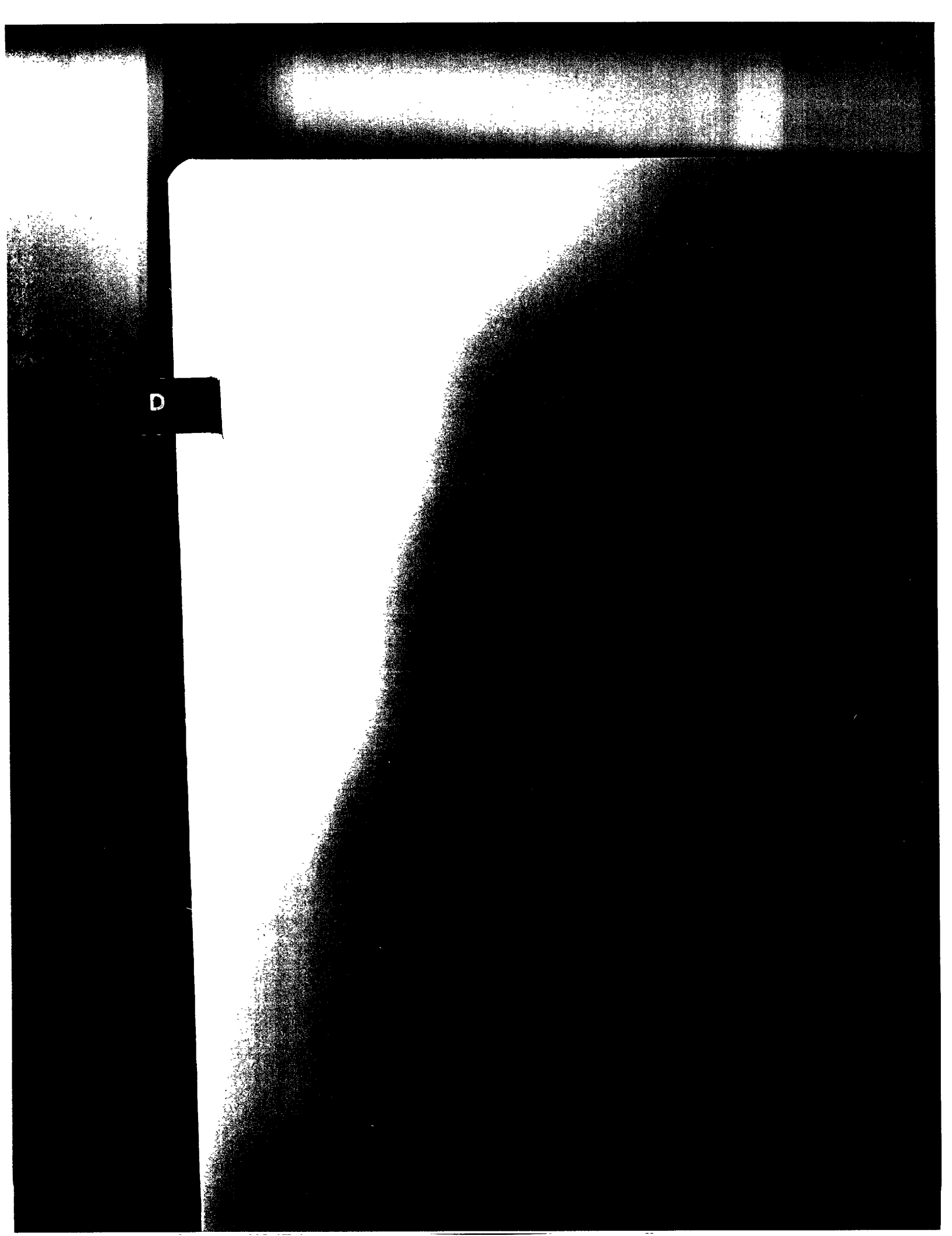
- The statutory disclosure standards are too lax and used perfunctorily by too many major firms. They can be interpreted by the lawyer required to make the disclosure in ways that lead to opposite conclusions about whether disqualification is required. (Summary of comments reported by 2 bankruptcy judges.)

- The Code and Rules are not adequate because they do not cover compensating an attorney who submits an employment application in good faith, immediately performs services, and is then disqualified in a "close call." Should the attorney be able to recover for services that benefit the estate during this "gap" period?

- The Code and Rules are not adequate because they fail to recognize the "realities" connected with attorney representation of consumer debtors. These clients simply cannot pay a lawyer a fee adequate to allow for competent representation.

- Section 1927 of Title 28 should be amended to permit clear use by bankruptcy and magistrate judges.

- The statutory standards should be applicable to all professionals in a case, including those representing parties other than the trustee/debtor in possession.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Appendix D

Comments Indicating Non-Statutory Standards for Resolving Bankruptcy-Related Issues of Attorney Conduct Were Not Adequate

- The non-statutory standards that are employed (e.g., state ethics codes and model rules) are not adequate because they are not geared to issues unique to bankruptcy such as the fiduciary duties bankruptcy imposes, the disclosures bankruptcy mandates and issues of dual representation. (Summary of responses from 3 bankruptcy judges).

- Unlike the state courts, bankruptcy courts do not conduct investigations and must rely on the state bar grievance committee to take action on bankruptcy complaints and their decisions are far too lax. (Summary of responses from 3 bankruptcy judges).

- The non-statutory standards are not readily available to or known by practitioners (since they are located in the local district court rules.) Education as to the existence and content of the non-statutory rules is needed. (Summary of responses from 2 bankruptcy judges).

- The non-statutory standards are not applied uniformly and they lack clarity.

- The bankruptcy court in each district should have authority to conduct formal disciplinary proceedings for attorney misconduct that occurs in the bankruptcy court, instead of the current situation where the district court does so which delays the process. In addition, the district court may have insufficient understanding of issues of bankruptcy procedure to make correct judgements. Bankruptcy courts should be permitted to disbar or suspend attorneys that practice in bankruptcy court.

- The state's code of professional conduct is inadequate because it is applied in one-on-one situations despite the fact that bankruptcy requires consideration of multiple parties and relative interests that are not comprehensively addressed in the non-statutory standards.

- The non-statutory standards dealing with conflicts are unclear when applied to prior representation in an unrelated matter of creditors who are peripheral to the case. The standards do not adequately define a "potential" conflict that is non-disqualifying, or how and when disclosure should be given when the situation has "ripened" to an actual conflict. And non-statutory conflicts standards do not identify what remedy is appropriate when a major chapter 11 is at the plan confirmation stage and counsel for the debtor-in-possession develops a conflict.

- The non-statutory standards are inadequate because they are too cumbersome to prevent an attorney with multiple infractions from continuing to represent entities in bankruptcy court. An individual judge should be able to issue an order preventing ongoing violations and representation, subject to immediate review.

Appendix D

- The non-statutory standards are inadequate because: (1) an attorney working for the bankruptcy estate has fiduciary duties to the estate that an attorney outside of bankruptcy does not have; (2) the California Code of Professional Responsibility and the ABA ethics rules on potential conflict and actual conflict have never worked well either in or outside of the bankruptcy context.

Appendix E

Comments Reporting Problematic Inconsistencies between Statutory and Non-Statutory Attorney Conduct Standards

- The inconsistencies between the disinterestedness standard of 11 U.S.C. § 327(a) and the provisions for multiple representations in the ABA Model Rule and Code are frequently encountered and problematic because:
  (1) § 327 broadly disqualifies without regard to the degree of disinterestedness (i.e., small unpaid fee) and does not permit knowing, intelligent waivers of conflicts as do state rules (such as DR 5-105) under which it is possible to represent two parties that have a potential or actual conflict as long as an appropriate client waiver is obtained.
  (2) The disinterestedness requirement works a hardship on small business debtors and is often impractical.
  (3) A professional person owed pre-petition debt automatically fails the disinterestedness test under the statute but not under any application of attorney conduct rules.
  (4) Multiple-member law firms and accounting firms represent parties who are adverse in some cases and justify this by describing the matters as not "related" when in reality these firms are friendly with both sides.
  (5) An attorney should not be disqualified from representing a debtor simply because the attorney is owed fees for pre-petition representation.
  (Summary of comments from 10 bankruptcy judges.)

- The inconsistencies between statutory and non-statutory attorney conduct standards are problematic because attorneys look to state law which is loosely enforced. The conflict of interest standards under the ABA and state rules of conduct are sometimes not very useful when attempting to apply them within the bankruptcy context because the conflicts arising in bankruptcy cases can be more numerous and complex. (Summary of comments from 3 bankruptcy judges).

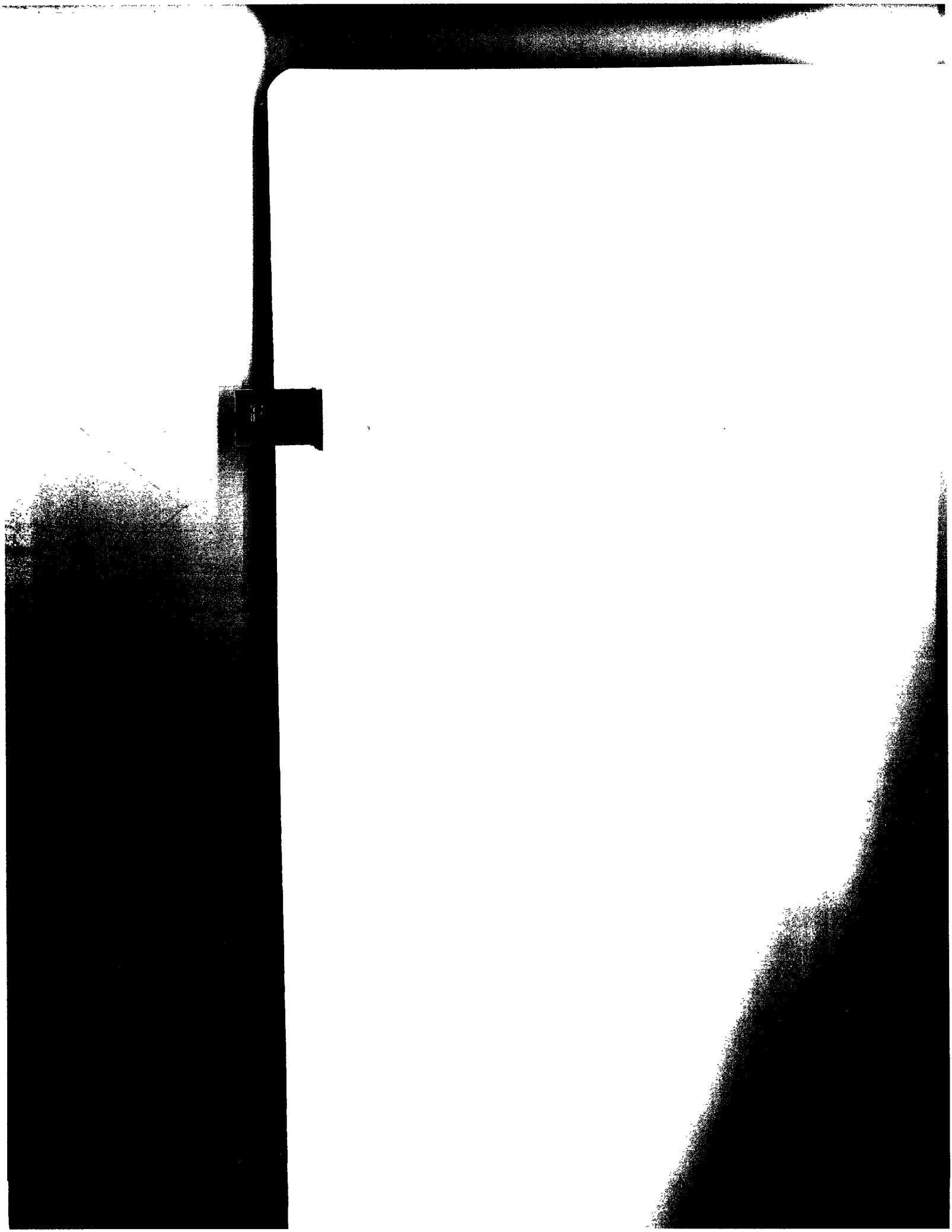
- The inconsistencies are problematic because trustee employment of the trustee and the trustee's law firm is statutorily permissible but presents conduct problems. (Summary of comments from 2 bankruptcy judges.)

- The inconsistencies are problematic because the ABA model ethics principles do not contemplate that the client (debtor) is a fiduciary toward parties with adverse interests (creditors), and the statutory rules are ambiguous or often too vague. (Summary of comments from 2 bankruptcy judges.)

- The inconsistencies are problematic because of the difficulties created by the blur between situations presenting an "actual" conflict versus a non-disqualifying "potential" conflict. Notwithstanding the Code, I find either an actual, or a perception of, a conflict of interest when a trustee also practices in cases under the same chapter for other clients.

Appendix E

- The inconsistencies regarding confidentiality can present difficulties because the trustee can waive the attorney client privilege for corporate debtors while it is less clear whether the corporate debtor or an individual debtor can do so.



Appendix F

Comments Reporting Bankruptcy-Specific Attorney Conduct Issues Not Covered by Rules

- An issue that arises only in bankruptcy courts and is not adequately covered by existing attorney conduct standards is conflict of interest issues:
  (1) The conflict of interest standards under the ABA and state rules of conduct are sometimes not very useful when attempting to apply them within the bankruptcy context because the conflicts arising in bankruptcy cases can be more numerous and complex (for example, potential conflicts due to the vast number of creditors affected.).
  (2) It is unrealistic to require disclosure of all connections to the parties in interest because there can be so many of them.
  (3) The Bankruptcy Code and Rules do not provide enough flexibility or allow for judicial discretion in their application. Strict enforcement and application of the Bankruptcy Code and Rules is often impracticable.
  (4) The disinterestedness requirement of 11 U.S.C. § 327(a) needs to be defined more precisely and not applied so strictly, especially in a smaller community.
  (5) The conflict issue that results from an attorney representing a client pre-bankruptcy and then seeking to represent the debtor or debtor-in-possession is not adequately addressed.
  (6) Conflict issues relating to fee disclosures are not adequately covered by existing standards.
  (Summary of responses from 16 bankruptcy judges.)

- An issue that is not covered by our attorney conduct standards is the absence of guidance on whether the bankruptcy judge has the power to discipline attorneys by, for example, barring them from practicing before the bankruptcy court. I often feel frustrated by the lack of mechanisms available to me to protect the debtor from his or her attorney's incompetence in bankruptcy court representation. I have had many cases where clients were ill-advised to file or to reaffirm debts or where lawyers ignored deadlines, or did not communicate with clients. Bankruptcy Rule 2090 should specifically provide that bankruptcy judges have the authority to impose sanctions against lawyers and parties. (Summary of responses from 5 bankruptcy judges.)

- A bankruptcy case triggers considerations of many competing and countervailing interests unlike traditional two-party lawsuits. For example, creditors' committees may employ professionals who are confronted with special provisions under 11 U.S.C. § 1103(b) when multidisciplinary issues are involved.

- Other areas/issues unique to bankruptcy courts and not adequately covered by existing standards include:
  (1) conduct violating or allegedly violating disclosure requirements of 11 U.S.C. § 329(a) or Bankruptcy Rules 2014 or 2016.
  (2) whether one counsel can represent affiliated corporations in chapter 11s.

Appendix F

(3) the tension between an attorney's need for advance payment in bankruptcy and the prohibitions against an attorney receiving payment in advance for post-petition work.
(4) an attorney's refusal to represent a debtor client where the client is sued by a creditor to prevent dischargeability of particular debts.
(5) A Chapter 11 attorney for a debtor-in-possession has an inherent conflict between representing the reorganization needs of the debtor and requiring the debtor-in-possession to be a fiduciary.
(6) Trustees who employ their own firms as counsel have a problem in determining what is "trustee work" and included in their statutory fees and what they can be separately compensated for.
(7) Attorneys who own paralegal mill operations.
(8) Attorneys who seeks to "limit" responsibilities to a consumer debtor client, i.e., preparing the schedules and statement of affairs but not appearing as attorney of record.
(9) Conflict in representing a corporation and its principals, especially in closely-held corporations. The distinction is problematic because the owner provides the authority for the attorney who represents the debtor-in-possession.
(10) Bankruptcy attorneys who abuse the system by filing multiple bankruptcies for debtors that are not warranted under the law or facts.
(11) Attorneys who do a poor job of advising debtors and seeing that schedules and other documents are accurate.

- Many attorneys for debtors do not understand or recognize their fiduciary duties. The Bankruptcy Rules should clarify that a trustee or debtor in possession is a fiduciary to the estate but the lawyer for the estate is not the fiduciary. The lawyer is an officer of the court and has ethical duties to the client, who is the fiduciary. Recognition of an attorney's duty of candor to the tribunal often places an attorney between a rock and a hard place. Another fiduciary relationship not understood is the fiduciary relationship of the attorney in Chapter 11 to the creditors. (Summary of responses from 11 bankruptcy judges.)

- Individual Chapter 7 debtors may be represented by counsel when they file a petition. However, that counsel "frequently" has not been retained to file motions to lift the stay, to make objections to claims or exemptions or for adversary proceedings involving dischargeability. Unless at least mail communication is made directly to the debtor by the moving party, the debtor may not learn of these matters timely. Thus, communication needs to be tailored so they go to both attorneys and the debtor until represented status is clarified.

- Allowing Chapters 7 and 13 trustees to represent debtors in bankruptcy court encourages the "you-do-a-favor for me today and I'll do the same for you tomorrow" syndrome. "Trustee shopping" is common. More trustees are needed. Further, trustees should be prohibited from retaining themselves (or their law firms) as counsel to trustee. Double billing and duplicative services are encouraged by this risky practice.

Appendix F

- Requests for withdrawal of counsel by counsel for debtors, particularly when representing individuals unable to retain new counsel due to financial constraints. With insolvent debtors, by definition and in fact, they do not have the resources to pay for adversary proceedings in which they may have a meritorious defense. (Summary of responses from 2 bankruptcy judges.)

- It is essential that multiple representations be permitted for cost reasons even where there are potential conflicts.

- Some conflicts that cannot be waived in bankruptcy courts, but they may be waivable in non-bankruptcy matters.

- Our district recognizes "limited appearances" for debtors' attorneys in Chapter 7's and 13's. This creates a problem because other attorneys in these cases do not readily know when they can communicate directly with parties.

- There needs to be clarity on issues arising from representation of pre-bankruptcy debtor and debtor-in-possession. Also, there needs to be clarity on issues arising from representation by the same debtor's counsel of related debtors (parent and subsidiaries, etc.) and when that representation may become a conflict. (Summary of responses from 5 bankruptcy judges.)

- Fee splitting is allowed in some states, but strictly prohibited in the bankruptcy context. Practitioners must be educated and/or the standard be made uniform.

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Appendix G

Comments on Inadequate Disclosure Requirements of Bankruptcy Rule 2014

- Bankruptcy Rule 2014 requires more detail in consumer cases to disclose fees paid in prior cases where debtors are multiple filers. This is especially necessary in chapter 13 cases. The multiple filings are frequently driven by attorney's fees. Also, Rule 2014 does not apply to Chapter 13 cases, but it should.

- Bankruptcy Rule 2014 should include a much clearer requirement to show prior experience in representing debtors in small chapter 11 cases, and to show the level of success in confirming plans or negotiating structured dismissals within the prior 3 to 5 years.

- Bankruptcy Rule 2014 should require an affidavit by the person who made (or should have made) the conflicts check as to exactly what effort was made and require disclosure of every representation within a prior period (perhaps 2 years before the bankruptcy filing date), and the nature, beginning and end dates of every entity that is or becomes a creditor or equity holder in the debtor-in-possession. The Rule should require regular amendments as "new" conflicts arise. Model Rule 1.7(a)(1) should be totally abrogated in bankruptcy in favor of full disclosure.

- Bankruptcy Rule 2014 should provide more specific examples of entities falling into the category of "parties in interest" so as to allow less wiggle room.

- Bankruptcy Rule 2014's provision "all of the person's connections" is arguably vague. I would suggest some specific examples that would not limit the scope of this language but rather would demonstrate the expansive intent behind this limitation to representation. It would help eliminate the many excuses we get in this area.

- Bankruptcy Rule 2014 could provide for more strict enforcement in chapter 11's. (Summary of responses of 2 bankruptcy judges.)

- Bankruptcy Rule 2014 should require that the fee agreement be attached to the application.

- Bankruptcy Rule 2014 should specifically require details of client representations by all members of a firm, with a requirement of action of disqualification by the court if not done or if details indicate a conflict of interest.

- Bankruptcy Rule 2014 should include a provision that the attorney disclose the source of funds for a retainer and future payment.

- We have supplemented the disclosure requirements of Rule 2014 with a local bankruptcy court rule.

Appendix G

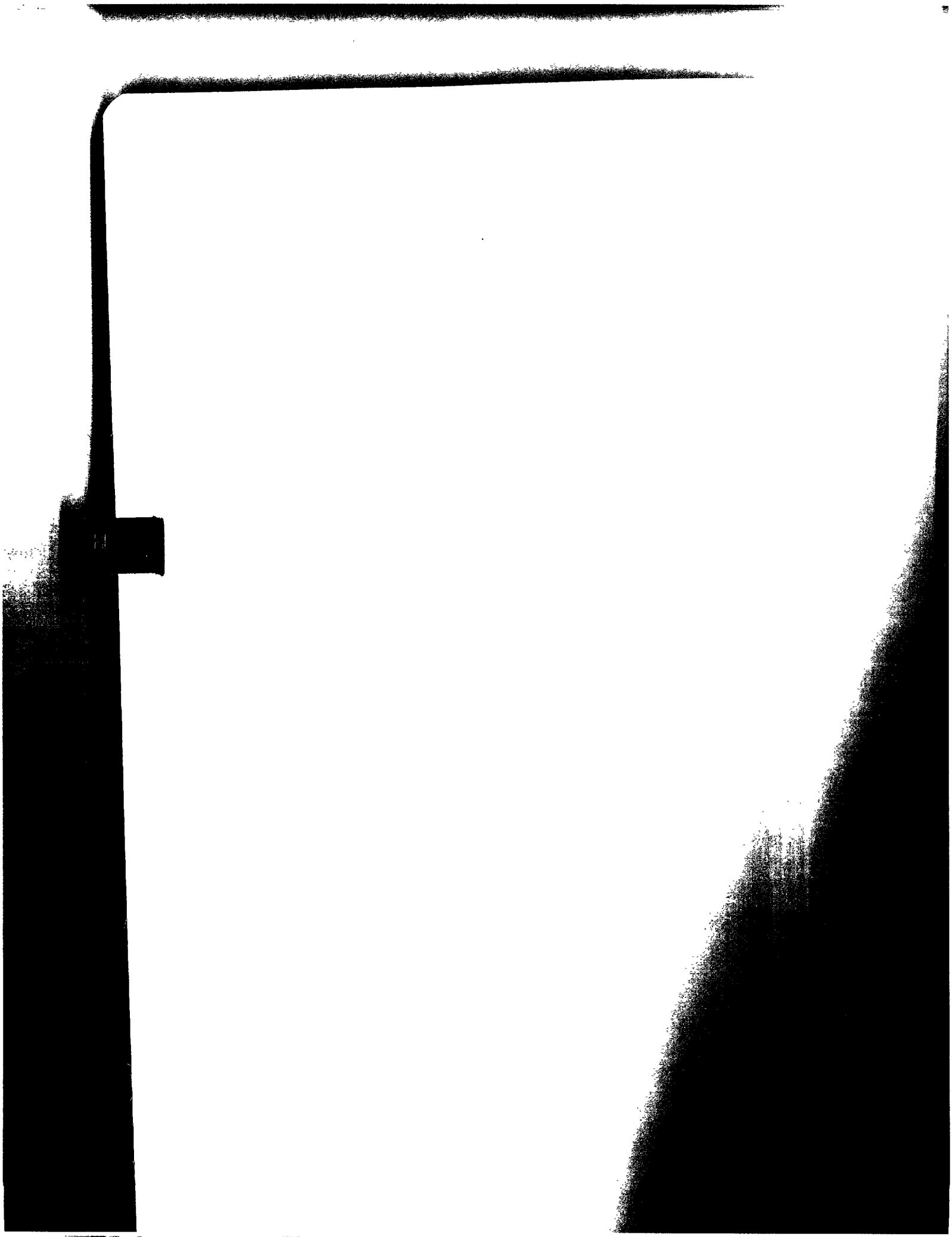
- Often the question of inadequate disclosure results from the applicant's failure to fully consider all the possible ramifications or subtleties associated with the requirements of being "disinterested" and/or holding no "materially adverse interest." In this district, we have tried to minimize this problem through a local rule which supplements the disclosure requirements of Rule 2014.

- Bankruptcy Rule 2014 or local rules should require more than just a conclusory statement. There should be some requirement to describe the steps or procedures undertaken to determine whether a conflict may exist.

- Bankruptcy Rule 2014 should require disclosure of all payments made by the debtor to the attorney within one year prior to filing, as well as a description of any retainer paid.

- We have addressed the inadequacies by specific disclosure required by my standards, my court's local rules and U.S. trustee guidelines.

- Three bankruptcy judges indicated that the problems they've experienced with Rule 2014 stem from attorneys' failure to follow the provisions of the Rule.



Appendix H

Comments in Support of (and Opposed to) the Same Uniform Standards for Bankruptcy and District Courts

The standards should be the same for bankruptcy courts as those applied to district courts:

- Because uniformity of all federal courts with respect to conduct is desirable to ensure efficient operation of both courts. Bankruptcy courts, by statute, are units of the district court, and jurisdiction for bankruptcy courts is referred from district courts. See 28 U.S.C. § 1334. Bankruptcy court judges constitute units of the district court. See 28 U.S.C. § 151. Since the district court is where the attorney is authorized to practice (i.e., counsel are members of the bar of the district court, not the bankruptcy court), attorneys should not have to worry about or learn two sets of standards. Attorneys who practice mostly in the district court should not be trapped when making an appearance in the bankruptcy court, nor should a non-specialist be deterred from representing clients in bankruptcy cases by the creation of specialized rules for bankruptcy. The bankruptcy court has no separate admission and should not have. Public expectations of conduct should not depend on the specialty of the practitioner. We should hold attorneys to the highest standards of competence and ethical conduct no matter what court they are in. The federal courts should have a simple set of unified standards for all units, making it easily and readily determinable what expectations are, regardless of what federal court or where a practitioner is. The more layers of rules which attorneys must follow, the greater the noncompliance due to confusion and oversight. While there are some things peculiar to bankruptcy such as Rule 2014, creditor committee employment, limits on options to waive problems, to name a few, such differences can be handled by footnote references in the uniform rules. (Summary of comments reported by 50 bankruptcy judges.)

- Provided that the district court standards are as stringent as the bankruptcy court standards. I would not like to see relaxation of standards, especially in the conflicts or disclosure areas. In addition, the "related entity" disputes, which are more common in bankruptcy, must be recognized. My perception is the district courts do not enforce or police this conflicts area as strictly as bankruptcy courts do. (Summary of comments reported by 2 bankruptcy judges.)

- But some bankruptcy specific supplementation would likely be necessary/desirable such as acknowledgement of bankruptcy court standards, including disclosures (under Bankruptcy Rules 2014 and 2016), the role of attorneys for debtors, and disinterestedness. (Summary of comments reported by 7 bankruptcy judges.)

- Although the standards of disclosure may be different in a bankruptcy context, there is no reason for the standards of conduct to be different.

- Because state standards presently apply in both bankruptcy and district courts and are adequate.

- Although uniform standards should be the same, how they are applied should differ because this is where bankruptcy practitioners could use some guidance.

The standards should *not* be the same for bankruptcy courts as those applied to district courts:

- Because the usual two-party civil actions do not involve as many "parties" (as the thousands of creditors that may be involved in a bankruptcy action), disclosure obligations, and fiduciary obligations. The multitude of interests in bankruptcy produce different issues, especially conflict of interest issues dealing with disinterestedness, which are more numerous and complex in bankruptcy cases. For example, issues dealing with past representation of a creditor or other party interest and whether that is a conflict of interest or appearance of impropriety are unique to bankruptcy courts. The multitude of separate legal "transactions" that may be involved in a bankruptcy case cause the potential for conflict, overreaching, etc., to be constantly shifting and often obscure or obscured. Because parties in interest enter and exit bankruptcy proceedings during a case, the bankruptcy standards should recognize related hardships that may arise. Waiver is not a practical solution when all creditors are potentially affected. It is essential that multiple representations be permitted for cost reasons even where there are potential conflicts. Moreover, district judges are usually not aware of what is required of lawyers in no-asset chapter 7, chapter 13, or small business chapter 11 cases. (Summary of comments reported by 38 bankruptcy judges.)

- Because the fiduciary obligations owed by trustee and debtor-in-possession counsel to all parties in consumer cases are unique to bankruptcy and a uniform district court standard may confuse the bankruptcy standard. Model Rule 1.8 is problematic in bankruptcy where lawyers take security interests, mortgage judgements, etc. to secure payment of fees. Attorney fee issues must be analyzed in terms of all interested parties (creditors/debtor/trustee) rather than just plaintiff and defendant as in the district court. (Summary of comments reported by 12 bankruptcy judges.)

- Because the sheer volume of cases in the bankruptcy courts suggests that some conduct standards should be relaxed; whereas the fiduciary responsibilities may require more stringent standards with a broader scope. Higher conflicts standards in bankruptcy help ensure disclosure of debtor's situation which is critical to the course of the case and fairness to all parties. On the other hand, the number of parties involved in an insolvency case are enormous while in district court the number of parties are limited; to prevent an attorney from representing a party in the bankruptcy court because of what might be a conflict in the district court would be disruptive and serve no purpose. (Summary of comments reported by 8 bankruptcy judges.)

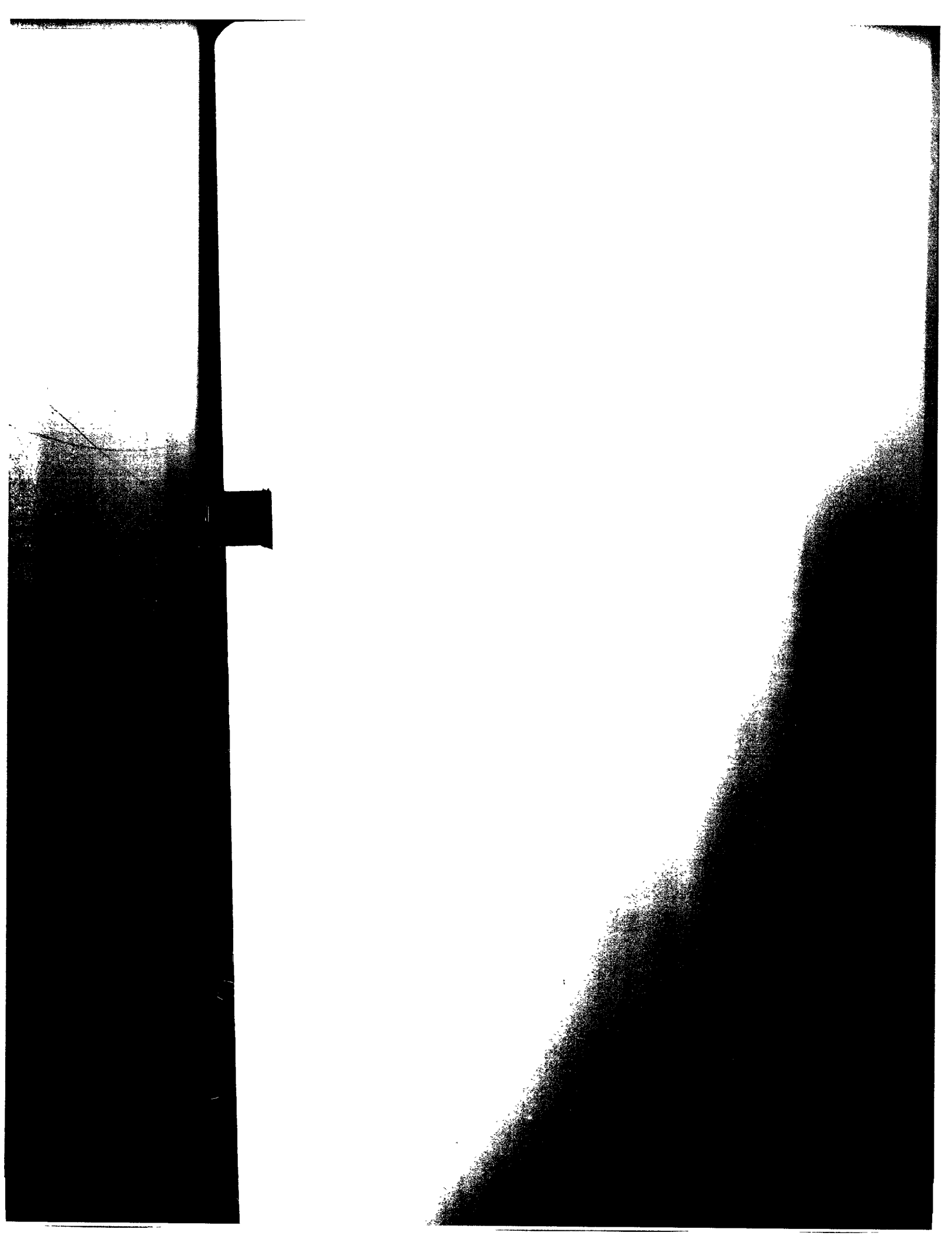
Appendix H

Because the Bankruptcy Code, Rules and case law are more stringent ethically than general federal statutes or case law due to the abuses in the bankruptcy system when the Chandler Act (former bankruptcy act) was in effect. The district courts generally follow the ethical rules of the state supreme courts in the district in which the court is located. Given this historical perspective, it is unlikely that the standards will be uniform between the bankruptcy and district courts.

Because the bankruptcy code and rules themselves, such as Bankruptcy Rule 2014 or 2016, make adoption of uniform rules impractical. (Summary of responses reported by 3 bankruptcy judges.)

Because in bankruptcy the attorney represents the debtor and, if the debtor is a corporation, the principal needs separate counsel because sometimes the interest of the debtor and the principal will not be identical. It may be difficult to determine which communications are confidential in discussions between the principal and debtor.

- In bankruptcy courts there should be separate admission to practice, a separate measure of competence, and a sanction procedure.



Appendix I

Comments Explaining How a National Uniform Standard for Bankruptcy Courts on Selected Attorney Conduct Issues Should Differ From That Applied to District Courts

1. **Confidentiality of Information.** The uniform rule on confidentiality of information for bankruptcy courts should:

- permit broader disclosure (i.e., determine that fewer disclosures are confidential) in order to deal with the issue of a debtor-in-possession as fiduciary and the resulting fiduciary obligations imposed on the attorney in bankruptcy cases; as well as required disclosures in employment applications or in fee applications. For example, a bankruptcy attorney must disclose connections with other parties and the nature of the work performed. (Summary of comments reported by 9 bankruptcy judges.)

- include a provision allowing a creditors' committee to, at times, share information it has obtained. There are too many "parties" in bankruptcy cases to permit the same rules on confidentiality as in civil cases in the district courts.

- contain a much clearer requirement to show prior experiences in representing debtors in small chapter 11 cases and the level of success in confirming plans or negotiating structured dismissals within the prior three to five years.

- account for the fact that bankruptcy cases deal with evolving factual matters as opposed to district courts that deal with past factual matters and thus adverse interests may arise post-petition in bankruptcy cases.

- be expanded to permit disclosure necessary to prevent perjury/false statements in court documents, including bankruptcy schedules and statements.

- permit a debtor's attorney to report to the bankruptcy court when he has reason to believe his client is using the protection or umbrella of the bankruptcy court to further an illegal or improper course of conduct. Thus, disclosure of confidential information should be permitted not only to prevent death or serious bodily harm, but also to disclose crime or fraud threatening substantial financial loss.

- more narrowly draw the ability to reveal confidential information in the context of a lawyer/client dispute.

- allow for release of information to the trustee when a case is converted to chapter 7.

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2. **General Rule on Conflicts of Interest.** The uniform rule on general conflicts of interest for bankruptcy courts should:

   - be different because of the large number of interested parties with shifting interests involved in some bankruptcy cases and the increased likelihood of a conflict arising (client's consent feature may not work well) and because of the fiduciary obligations owed by certain counsel in bankruptcy cases (debtor's counsel) to all parties (e.g., to maximize value for creditors). (Summary of comments reported by 14 bankruptcy judges.)

   - provide bankruptcy judges with discretion in resolving conflict issues because of the difference in the size and complexity of bankruptcy cases.

   - require attorneys appointed by the court to disclose all potential conflicts of interest, and possibly require attorneys to seek court approval when representing the debtor or estate (even if the client consents to the conflict). (Summary of comments reported by 4 bankruptcy judges.)

   - provide a higher standard in bankruptcy cases because bankruptcy is an in rem procedure with no client to give consent in many cases. (Summary of comments reported by 2 bankruptcy judges).

   - be more restrictive than the national uniform standard in district courts because bankruptcy conflicts must receive different scrutiny than general litigation or representation. (Summary of comments reported by 3 bankruptcy judges.)

   - not disqualify professionals with pre-petition debts.

   - permit multiple representation with the court's approval. (Summary of comments reported by 2 bankruptcy judges.)

   - be different from the rule for district courts because the concept of disinterestedness does not coincide with the model rules for general conflicts of interest. For example, an attorney owed money by the client can't represent the client as a debtor even if the client consents. Under the Bankruptcy Code an attorney's "reasonable belief" as to disinterestedness is not enough. (Summary of comments reported by 5 bankruptcy judges.)

   - be broadened in bankruptcy to require disqualification whenever a lawyer holds or obtains a judgment, lien, etc., against the represented debtor-in-possession, trustee or any member of a committee. Model Rule 1.7(a)(1) should be abrogated in bankruptcy.

   - include Title 11's additional requirements of disinterestedness and rule requirements of complete disclosure.

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- be based on 11 U.S.C. § 327 and provide for circumstances articulated in 11 U.S.C. §327(d) because § 327 is much stricter than the ABA rules.

- prohibit waivers in bankruptcy court.

- require consent in writing, disclosures in writing, and consultation with a third party is urged.

- take into consideration representation at initial stages of bankruptcy (i.e., § 341 meetings) and should have flexibility concerning potential conflicts.

3. **Conflict of Interest Concerning Prohibited Transactions.** The uniform rule on conflicts of interest concerning prohibited transactions for bankruptcy courts should:

   - take into account that certain counsel in bankruptcy (attorneys for debtors-in-possession), creditors and other official committees, and trustees owe fiduciary obligations to all parties and require heightened scrutiny generally not applicable in district court. In bankruptcy, defendant conflicts of interest arise in more ways than the model rule suggests (parties being impacted in the bankruptcy context is far greater than the traditional two party dispute concept in the district court). Bankruptcy matters have many parties, some of whom have conflicting interests and some of whom have coincident interests. (Summary of comments reported by 7 bankruptcy judges.)

   - be more restrictive than the national uniform standard for conflicts of interest concerning prohibited transactions in district courts; the definition of what may be prohibited must be broader in bankruptcy cases. For example, ABA Model Rule 1.8(f) allows third party (non-client) compensation upon a client's informed consent. In bankruptcy, there is an additional requirement of disclosure. (Summary of comments reported by 6 bankruptcy judges.)

   - prohibit a debtor's attorney from having any business relationship with his client, including an absolute prohibition against buying property of estates. (Summary of comments reported by 2 bankruptcy judges.)

   - address issues problematic in bankruptcy such as where lawyers take security interests, mortgage judgments, etc., to secure the payment of fees.

   - be based on 11 U.S.C. § 327 which is much stricter than the ABA rules. The ABA standard as adapted by the particular state or the state's ethics rules should be used to support the analysis.

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4. **Conflict of Interest Concerning Former Client.** The uniform rule on conflicts of interest concerning a former client for bankruptcy courts should:

   - provide bankruptcy judges with discretion to resolve conflict issues because of the difference in size and complexity of bankruptcy cases.

   - be made consistent with § 327(c) and (e) of the Bankruptcy Code, permitting an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor.

   - require an attorney to satisfy the bankruptcy court that the attorney is disinterested for bankruptcy code purposes.

   - require more disclosure in the area of potential conflicts of interest and ongoing disclosure to deal with firm mergers, if the attorney represents the debtor or estate, etc., where conflicts develop during a case. (Summary of comments reported by 4 bankruptcy judges.)

   - address the fact that many more parties are impacted in the bankruptcy context. Informed consent by the client alone is insufficient in the bankruptcy context. (Summary of comments reported by 3 bankruptcy judges.)

   - include Title 11's additional requirements of disinterestedness and rule requirements of complete disclosure. Client consent (ABA Model Rule 1.9(a)(b)) is not alone sufficient as to estate professionals in bankruptcy.

   - be based on 11 U.S.C. §327 which is much stricter than the ABA Rules. The ABA standard as adopted by the particular state or its ethics rules should be used to support the analysis.

   - address the bankruptcy specific situation that sometimes occurs in large creditor cases where the petitioning creditors attorney involuntarily becomes the trustee's attorney, and the creditor's attorney becomes special counsel to the trustee.

   - set out specific guidelines for debtor representation (i.e., principal v. debtor and conversion).

5. **Rule on Imputed Disqualification.** The uniform rule on imputed disqualification for bankruptcy courts should:

   - provide bankruptcy judges with discretion in resolving conflict issues because of the difference in size and complexity of bankruptcy cases.

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- address the provisions of the Bankruptcy Code (§327(c) and (e)) that permit an attorney to represent the debtor even though the attorney formerly represented a creditor of the debtor.

- address the fact that attorneys in bankruptcy have fiduciary obligations to many parties, and that there are many mini-transactions particularly dealing with secured lenders. (Summary of comments reported by 2 bankruptcy judges.)

- adequately address lateral moves between firms and the transactional representation of business clients. Larger firms or boutique firms rarely represent business clients on a broad range of matters. A corporation may use 10 or more firms in the same state for intellectual property, environmental, securities, commercial litigation, ERISA, corporate finance, patent prosecution, and bankruptcy matters. This "reality" is not tracked by the conflicts rules, which presuppose a general business representation of a business entity by a single firm.

- require a firm to satisfy the bankruptcy court that it is disinterested for bankruptcy code purposes. (Summary of comments reported by 2 bankruptcy judges.)

- require on-going disclosure to deal with firm mergers, etc., where conflicts develop during a case.

- recognize and impose appropriate safeguard provisions against bankruptcy courts allowance of a "Chinese wall" for firms that may do some work for one of the debtor's creditors as well as the debtor. (Summary of comments reported by 2 bankruptcy judges.)

- not automatically disqualify an attorney from representing a client just because a lawyer is owed fees.

- address the problems bankruptcy courts have with ABA Rule 1.10(c) regarding waiver of conflict.

- be based on 11 U.S.C. § 327 which is much stricter than the ABA Rules. The ABA standard as adopted by the particular state or its ethics rules should be used to support the analysis.

- provide for more disclosure and stricter disclosure rules.

- recognize that bankruptcy courts have to take into account the interests of all parties rather than just the client. Informed consent by the client alone is insufficient. Waiver of conflict by the affected client does not resolve all possible concerns by the parties in interest.

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6. **Rule on Candor Towards the Tribunal.** The uniform rule on candor towards the tribunal for bankruptcy courts should:

   - require candor toward a tribunal and affirmative disclosure of any fraud being perpetrated on the tribunal even over a client confidence (and not merely withdraw from the case).

   - not be based on ABA Rule 3.3(a)(3) because it puts lawyers in conflict with their duty to their own client.

   - address a lawyer's further responsibilities when representing debtors.

   - define whether debtors' counsel has a duty to disclose information to creditors if that information is necessary to address preferential transfer, hidden agendas, etc.

7. **Rule on Lawyer As Witness.** The uniform rule on the lawyer as a witness for bankruptcy courts should:

   - provide for the situation in bankruptcy courts where matters in the main bankruptcy case require an attorney to testify as a witness which differs from the situation where an attorney would be a witness in litigation in the district court. (Summary of comments reported by 2 bankruptcy judges.)

   - provide a clear rule prohibiting attorney submission when bankruptcy courts use Federal Rule of Civil Procedure 43 and Federal Rule of Civil Procedure 56 declarations to decide matters.

   - provide leeway for the trustee/attorney/witness. (Summary of comments reported by 2 bankruptcy judges.)

   - address the situation not addressed by ABA Model Rule 3.7 where the attorney for a debtor may become a post-petition transaction witness. If the attorney is a sole practitioner or in a small firm, it is not practical to withdraw especially in small consumer cases.

8. **Rule on Truthfulness in Statements to Others.** The uniform rule on truthfulness in statements to others for bankruptcy courts should:

   - address parameters of settlement offers in the bankruptcy context.

   - address the inadequacies of ABA Model Rule 4.1(b) in determining what conduct is "fraudulent" in bankruptcy cases. Confidentiality should be waived if a 4.1(b) circumstance arises in bankruptcy.

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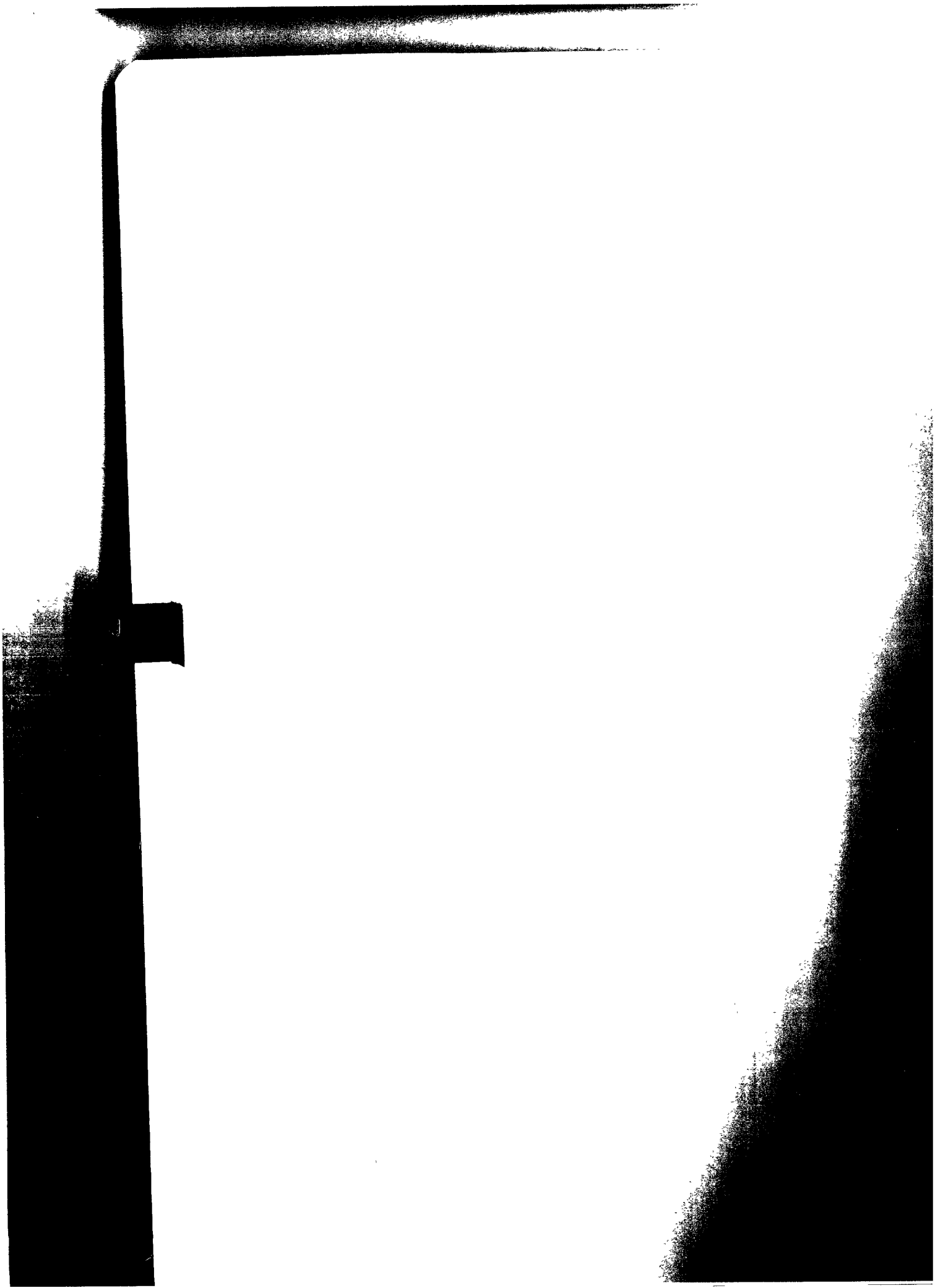
- be broadened because ABA Model Rule 1.6 is not broad enough in bankruptcy cases.

Rule on Communications with Person Represented by Counsel. The uniform rule on communications with a person represented by counsel for bankruptcy courts should:

- allow for situations where an attorney who is a trustee and who also acts as counsel for the trustee may (when acting a the trustee) communicate with a debtor who is represented by counsel.

- be flexible enough in consumer cases to allow communication where the debtor's attorney signs on for a limited fee and a limited purpose (Summary of comments reported by 2 bankruptcy judges.)

- include provisions of Bankruptcy Rule 7004 requiring service of pleadings on the consumer debtor as well as debtor's counsel to assure consumer debtor is apprised of matters in the case.



Appendix J

Comments on Whether the National Uniform Standard for Bankruptcy and District Courts Should Be Based on the Corresponding ABA Model Rule for the Specified Type of Conduct or on a Different Standard

1. **Confidentiality of Information.** The national uniform standard on confidentiality of information applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 79 bankruptcy judges.)

   - a different standard—the corresponding ABA Model Rule except there should be some flexibility to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

2. **General Rule on Conflicts of Interest.** The national uniform standard on the general rule on conflicts of interest applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 54 bankruptcy judges.)

   - a different standard—the ABA Model Rule except it should be modified for relaxed disinterestedness under § 327 so that lawyers who are owed fees by their clients may represent them in bankruptcy proceedings.

   - a different standard—the ABA Model Rule except it should be modified for bankruptcy where necessary, such as where a trustee is plaintiff in a multi-party proceeding. (Summary of responses reported by 2 bankruptcy judges.)

   - a different standard—the ABA Model Rule combined with a requirement of full disclosure (disinterestedness standard should be abandoned in favor of the ABA Model Rule) which gives judges a flexible tool to deal with conflict of interest issues.

   - a different standard—the ABA Model Rule, supplemented with specific language on the limits of representing both a corporation and its principal.

   - a different standard—the ABA Model Rule supplemented with a prohibition against trustees hiring themselves as attorneys and practicing law under the same chapter.

   - a different standard—the ABA Model Rule as long as the disinterestedness person provisions of the case still apply.

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3. **Conflict of Interest Concerning Prohibited Transactions.** The national uniform standard on conflicts of interest concerning prohibited transactions applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 77 bankruptcy judges.)

   - a different standard—the ABA Model Rule but modified for relaxed disinterestedness under § 327 so that lawyers who are owed fees by their clients may represent them in bankruptcy proceedings.

   - a different standard—the ABA Model Rule but modified for bankruptcy cases where a trustee is a plaintiff in a multi-party proceeding.

   - a different standard—the ABA Model Rule supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

   - a different standard—the ABA Model Rule but modified for issues unique to bankruptcy.

   - a different standard—the ABA Model Rule supplemented by disinterestedness person provisions of the Bankruptcy Code.

4. **Conflict of Interest Concerning Former Client.** The national uniform standard on conflicts of interest concerning a former client applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 68 bankruptcy judges.)

   - a different standard—the ABA standard modified to include a provision to deal with the problem of large firms and national firms that represent large creditors and debtors.

   - a different standard—the ABA standard modified for conflict issues problematic to bankruptcy courts, such as where a trustee is a plaintiff in a multi-party proceeding.

   - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

   - a different standard—the ABA standard supplemented by the disinterestedness provisions of the Bankruptcy Code.

- a different standard—the ABA standard except that there should be a standard of materiality and not just a per se rule.

5. **Rule on Imputed Disqualification.** The national uniform standard on imputed disqualification applied to both bankruptcy and district courts should:

   - be based on the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 68 bankruptcy judges.)

   - a different standard—the ABA Model Rules modified for conflict issues problematic to bankruptcy courts, to reflect the reality of bankruptcy practice, such as where a trustee is a plaintiff in a multi-party proceeding. (Summary of comments reported by 5 bankruptcy judges.)

   - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

   - a different standard—the ABA standard except that there should be a standard of materiality and not just a per se rule.

6. **Rule on Candor Towards the Tribunal.** The national uniform standard on candor towards the tribunal applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 84 bankruptcy judges.)

   - a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

   - a different standard—the ABA standard except that ABA Model Rule 3.3(d) may not apply in a criminal proceeding.

   - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

   - a different standard—the ABA standard modified for candor issues problematic to bankruptcy courts.

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7. **Rule on Lawyer as Witness.** The national uniform standard on lawyer as a witness applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 79 bankruptcy judges.)

   - a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

   - a different standard—the ABA standard except as to applications for attorneys' fees.

   - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

   - a different standard—the ABA standard modified for lawyer as witness issues problematic to bankruptcy courts.

8. **Rule on Truthfulness in Statements to Others.** The national uniform standard on truthfulness in statements to others applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 85 bankruptcy judges.)

   - a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.

   - a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

   - a different standard—the ABA standard modified for truthfulness in statements to others issues problematic to bankruptcy courts.

9. **Rule on Communication with a Person Represented by Counsel.** The national uniform standard on communications with persons represented by counsel applied to both bankruptcy and district courts should be based on:

   - the corresponding ABA Model Rule for that type of conduct. (Summary of comments reported by 81 bankruptcy judges.)

   - a different standard—the ABA standard with clarification of "who" is represented by counsel.

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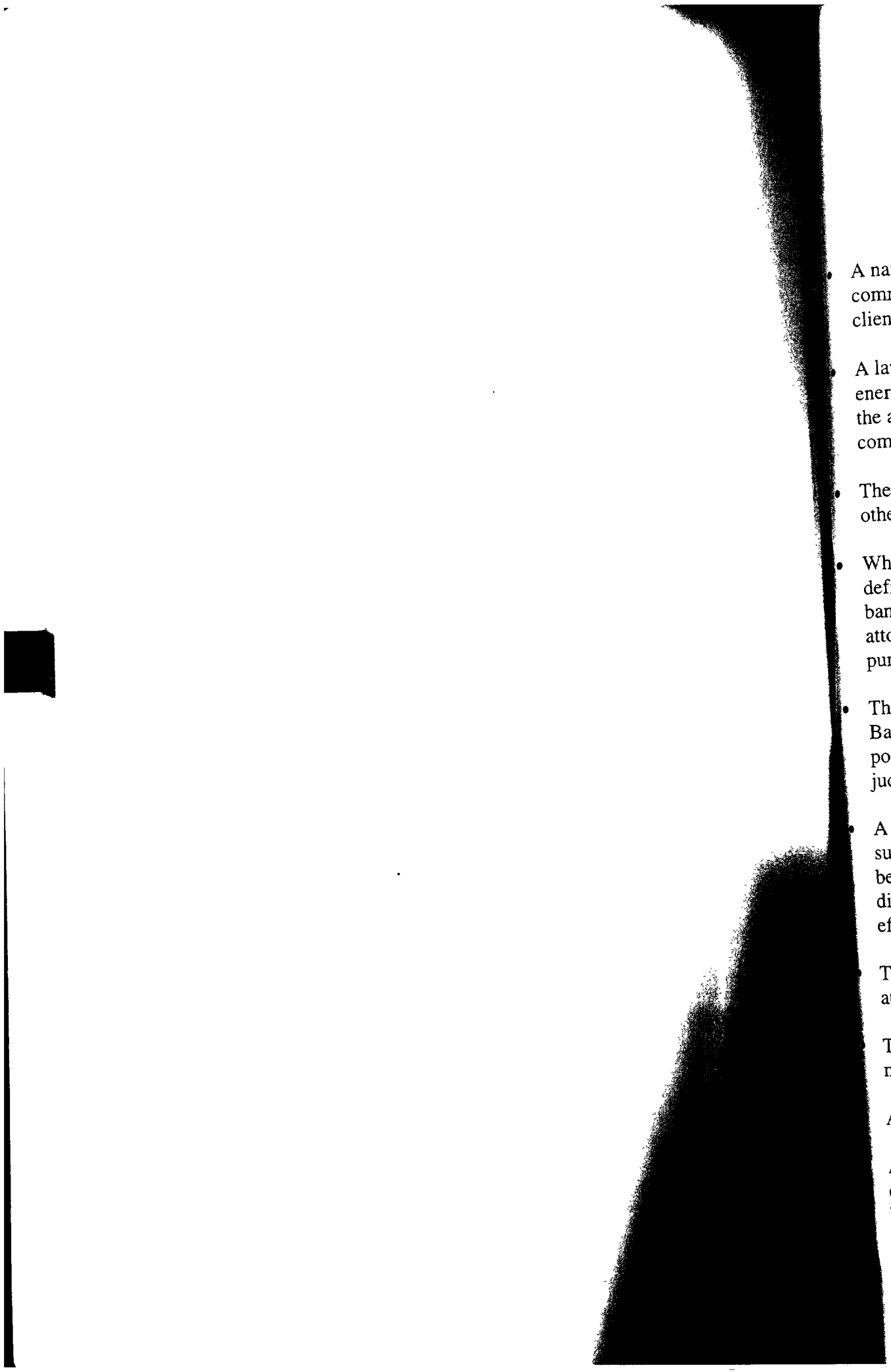
- a different standard—the ABA standard but modified for issues concerning communications with persons represented by counsel issues problematic to bankruptcy courts such as the inclusion of communications with creditors of the same class.

- a different standard—the ABA standard supplemented with the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure.

- a different standard—the ABA standard but applied with flexibility so as to include state rules of conduct where they are stricter, so local attorneys are not held to higher conduct standards than out-of-state attorneys.



Appendix K

Comments from Judges Who Indicated That National Uniform Standards on Other Attorney Conduct Issues Should Be Drafted for Use in All Bankruptcy Courts

- A national civility rule that directs lawyers to refrain from making disparaging comments based on race, gender or sexual orientation about opposing counsel or clients.

- A lawyer must not undertake representation where she lacks the necessary skill, energy and devotion to the task, including familiarity with local rules of practice for the applicable bankruptcy court, the Bankruptcy Code and Rules. (Summary of comments reported by 3 bankruptcy judges.)

- There should be a national uniform rule mandating civility to the court, witnesses and other attorneys. (Summary of comments reported by 3 bankruptcy judges.)

- While not specifically attorney conduct, some national rule should be drafted to define the duties that are included in the "representation" of a debtor in a chapter 7 bankruptcy case. Too often chapter 7 debtors are literally abandoned by their attorneys where they become defendants in adversary proceedings commenced pursuant to 11 U.S.C. § 523 and 727.

- There should be a national uniform rule based on the ABA standards as molded to the Bankruptcy Code and Rules (especially with amplification to reflect a debtor-in-possession's duties to creditors). (Summary of comments reported by 2 bankruptcy judges.)

- A national uniform rule should provide bankruptcy courts with explicit authority to suspend, disbar or discipline attorneys who fail to comply with court orders or become disabled or otherwise unable to practice, until more formal state or federal disciplinary procedures can take place. The district court process is too slow to be effective. (Summary of comments reported by 3 bankruptcy judges.)

- There should be a national uniform rule addressing the fiduciary relationship of attorneys to creditors in chapter 11 cases.

- There should be a national uniform rule establishing the standard for what attorneys must minimally do before filing a bankruptcy case.

- A national uniform rule should provide a better definition of "disinterested".

- A national uniform rule should make Bankruptcy Rule 9011 more specific as to the extent a lawyer is expected to go to review schedules and statements filed by or on behalf of the debtor.

Appendix K

- A national uniform rule should require an affidavit by the person who made (or should have made) the conflicts check as to exactly what effort was made and require disclosure of every representation within a prior period (perhaps 2 years before the bankruptcy filing date), and the nature (including beginning and end dates) of every entity that is or becomes a creditor or equity holder in the debtor-in-possession. The rules should require regular amendments as "new" conflicts arise. Model Rule 1.7(a)(1) should be totally abrogated in bankruptcy in favor of full disclosure.

- A national uniform rule should specify that Bankruptcy Rule 2016(a) and (b) applies to all persons, including bankruptcy petition preparers, and add that violations when discovered must be brought to the court by the U.S. trustee for the court to impose appropriate sanctions.

- There should be a national uniform rule only as to conflicts of interest.

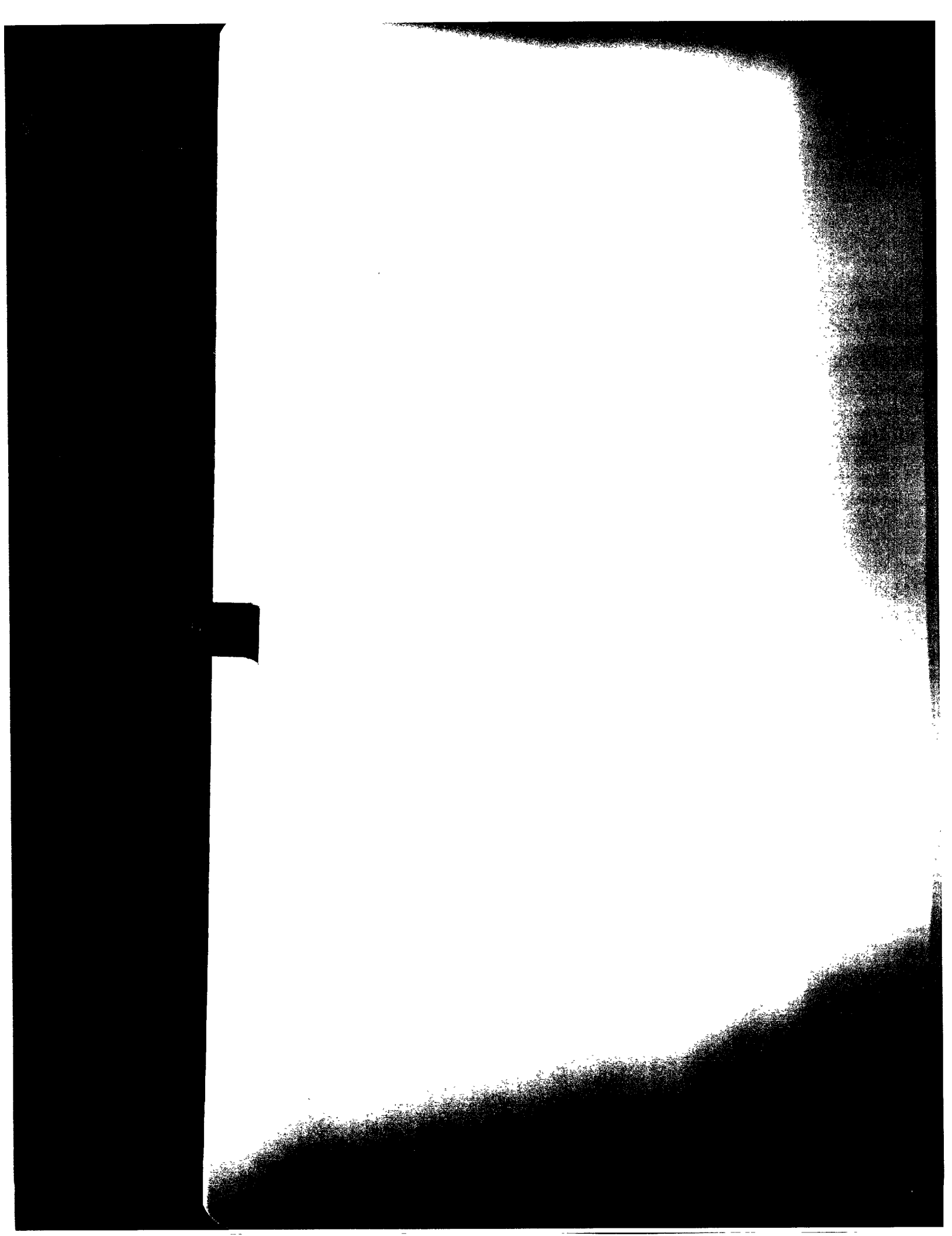
- There should be a uniform national rule controlling subornation of perjury by treating preparation of bankruptcy schedules to be unprotected by the attorney/client privilege.

- There should be a uniform rule prohibiting trustees from hiring themselves as attorneys and disallowing trustees from practicing law under the same chapter.

- There should be a uniform rule requiring passage of a test for admission to the bankruptcy court and a required number of annual CLE hours.

- Any national uniform standard will have to take into account the "trust law" overlay that uniquely exists in the bankruptcy context.

- There should be a national uniform rule establishing standards for trustee representation by his or her own law firm.



Appendix L

General Comments

I. In Favor of National Uniform Standards

- While attorney misconduct is infrequent, proposed national uniform rules are desirable to familiarize attorneys with disciplinary rules effective in all bankruptcy courts. In addition, proposed national uniform standards are advisable because of the ease with which attorneys from one section of the country practice in bankruptcy courts in other sections.

- I believe the standards for bankruptcy practice, district court practice, and state court practice should be the same, meaning no separate standards for bankruptcy courts other than those in the bankruptcy code and rules (e.g., Section 327 and Rule 2014(a)). As to section 327(a) (need for court appointment) and Rule 2014, I believe these requirements serve a useful purpose and should be retained, but separate rules for handling of retainer money and the issues in question 9 (suggested uniform standards) would not be a good idea.

- It is my opinion that an emerging trend and ultimate goal should be to attempt to model and coordinate, to the extent possible, bankruptcy practice with that of the United States district courts and state courts. Many excellent attorneys are reluctant to practice before the bankruptcy courts based on actual or perceived peculiarities of bankruptcy practice. In reality, bankruptcy, it has been said, is not a specialty, but is generic.

- It would be a grave mistake to impose standards in bankruptcy that would differ from those adopted by the district courts. We should continue to recognize the bankruptcy court as a unit within the district court and attorneys appearing before either should adhere to the same standards. I see no problems or need for any change.

II. Opposed to National Uniform Standards

- I sincerely question the necessity of "nationalization." Sure, attorneys who practice only (or principally) in bankruptcy courts would like a national, unvarying standard. However, most of the attorneys I see are also very active in state court. Why should they face varying standards? Incorporation of state rules of conduct, with some variation for bankruptcy works just fine.

- Assuming the purpose of national rules is to aid out-of-state counsel who appear in a local court, I am generally opposed to national uniform standards. They appear to be a solution without a perceived problem. (1) Judges generally do not sanction attorneys for unethical conduct without prior notice of what the standards are the judge expects to be upheld. (2) The standards are commonly written, whether in statutory or non-statutory form. (3) Attorneys are expected to be familiar with the rules of the court in

which they appear. (4) In addition, many courts require affiliation with local counsel to assure practice by out-of-state counsel complies with any local requirements. (5) Many states' codes of conduct are similar and the state courts and committees have publicized case law and advisory opinions interpreting those codes. (6) Many judges refer to the national ABA Model Rules for guidance. Attorneys should already be familiar with these rules. (7) Bankruptcy Rule 9011 addresses many abuses. This national rule has been interpreted by publicized case law. For all of these reasons, I see no need for uniform rules.

- The current issues and problems facing bankruptcy courts are the same that faced them 11 years ago, namely, attorneys who fail to disclose conflicts or fail to perform services in accordance with rules of professional responsibility. Efforts to "nationalize" these rules based on a district court model will only confuse the issues and result in disaster, much like the current proposed revisions to the Federal Rules of Bankruptcy Procedure. There seems to be a desire to have the district court practitioners rush to bankruptcy court. This is to be accomplished by a "cram down" of new rules on the bankruptcy courts. This is a fallacy. If we build it, they will not come.

- If there is a problem it is not with the existing standards and rules, which I feel should be left alone.

- I see no need for any national standards. Lawyer discipline is traditionally a state matter. We simply do not need another set of standards. However, if standards are adopted (for whatever reason) I think the same standards should apply in all federal courts.

- I oppose uniform standards period. Stay out of it. If it is a problem in our district, let the judge address it on a case-by-case basis.

- My experience has been that when rules are "nationalized" it tends to cause delay and increase expense for this court. I fear that national rules regarding attorney conduct would lower the level of conduct that we now have in this court.

- I do not think it reasonable to assume that a national, uniform standard of attorney conduct could be developed that could be fairly and evenly applied to lawyers practicing in Idaho and Los Angeles, and to attorneys practicing in chapter 11 mega-cases and to those practicing in consumer chapter 7 cases. Attorney conduct standards, by necessity, should be developed by the local bar association and local bankruptcy courts. Our biggest challenges are in cases where there are too many lawyers (large chapter 11s) and in cases where fees are too low (consumer chapter 7s) where there is intense competition for clients. While there may be instances where minimum standards of conduct could be developed, local courts should also be allowed to develop additional or stricter standards of conduct to address problems of unique, local concern.

Appendix L

- I think that the standards adopted at the state level should apply in bankruptcy courts, and in district courts. Why require a separate set of standards? For example, our state standards track the ABA standards. Where local conditions require a different rule, the local district and bankruptcy courts can modify by a local rule. The proliferation of "standards" is designed to confuse and is not necessary. A little room for the "working of the joints" is in order.

- If there are differences between the Rules of Professional Conduct (as adopted by the [state] Court of Appeals made applicable to our bankruptcy court by . . . Local Rule . . .) and some hypothetical national standard, I would vote in favor of following the [state] Rule instead of the national standard. Attorneys practicing in [this jurisdiction] ought not be required to conform their conduct to two conflicting standards. Potentially the two different standards might on rare occasion give rise to an attorney's not being able to be in compliance with both standards at the same time. For example, a rigorous standard for disclosures to a court under a hypothetical national rule might conflict with an attorney's duty to guard a client's confidences under the state rule.

- Attorney conduct issues should be handled on a local level. Adopting a national uniform standard would take away the rights and responsibilities of individual judges to do their jobs.

- The ABA Model Rules are sufficient. We do not need any more rules

- I do not believe that another general set of standards governing attorney conduct would be helpful. Every jurisdiction already has state ethical rules, and a single federal standard does not guaranty uniformity among districts. In terms of bankruptcy, a mechanism should exist regarding waiver of conflicts upon notice and with court approval. Debtors in possession should be able to hire their prepetition accountants even if they owe the accountants a debt. The alternative, new accountants, can be expensive. Moreover, with so few major accounting firms remaining, it is difficult to find disinterested accountants in larger cases. These comments are not limited to accountants. There are circumstances where an actual conflict may nonetheless be technical and the alternatives too costly.

- Lawyers already have enough rules and canons to follow. More rules would only cause more disputes involving more time and money. We don't need more rules. Leave well enough alone.

- The problem lies in differences among state law requirements. Unless all state codes of professional responsibility become uniform, federal court nationalized requirements would only lead to conflicting responsibilities.

Appendix L

- Other than an occasional allegation that an attorney's fee request is excessive, or an occasional display of conduct by an attorney which might be classified as somewhat lacking in civility, this court has not experienced any "problems" with regard to attorney conduct. With respect to attorney civility, I believe that local rules, such as our district's local rule on attorney conduct, is sufficient.

- Attorney conduct is often a product of local legal culture or lack thereof. Attorneys who work together frequently and trust each other tend to have fewer conduct problems, or the consequence is immediate. National standards aid attorneys who practice in more than one jurisdiction, but are unnecessary and have no benefit to the vast numbers of attorneys who practice in a single district and state. Local ties and tradition are more helpful for such attorneys.

- In this and other areas, I believe the rules of conduct are best left to the individual states. I see no need for a national, uniform rule in these areas.

- On reflection, the Canons of Ethics and Standard of Conduct applicable to [our state's] lawyers are sufficient to maintain an ethical environment in the U.S. Bankruptcy Court for the district. Almost all lawyers who practice in our court are members of the [state] Bar. I see no need for a separate national standard. If the ethical rules differ significantly from one state or jurisdiction to another, tell me what the differences are before asking me if we need a national standard.

- [Our state] has state rules that cover the same areas as the ABA model rules. There are differences. For example, ABA Rule 3.7 generally prohibits an attorney from being called as a witness. The [state] rule is less restrictive. I do not understand how national standards will interface with state standards.

- Attorneys are used to the state rules of professional conduct on these issues and the body of case law interpreting those rules. Those rules are adequate to deal with professional conduct in bankruptcy court.

- It seems difficult to craft a set of conflicts rules that will work in all types of cases, without considering the amounts in issue. Absolute disqualification rules which may work (and be necessary) in large corporate cases will create special problems in consumer debtor cases. Technically, a married couple filing a consumer chapter 7 is two cases with separate estates, even if they are not both liable on all the debts. The potential for conflict can be large. And if the debtors end up getting divorced, the conflict gets worse.

- I oppose uniform standards period. Stay out of it. If it is a problem in our district let the judge address it on a case-by-case basis.

- The problem in dealing with attorney conduct issues is not only the unique character of bankruptcy issues, but also questions of context. In my view it is possible to set

general guidelines for disclosure and to rely on the disciplinary standards already in place in each district. However, setting uniformity between districts or between the district and bankruptcy court assumes that the issues arise in the same way or in similar context. They often do not, and the setting of a uniform standard might restrict the ability of bankruptcy courts to control attorney conduct rather than promote it.

- National standards sometimes lower the bar of conduct of counsel. They are subject to change due to focused lobbying pressure by attorney associations. I strongly urge that such a motion be rejected.

- I believe attorney conduct standards are best left in the first instance to the governing state bar and then to the local federal courts to adopt those standards to the needs of the local courts and bar. "National" and "uniform" are not better in this area, in my view.

- ABA standards and state bar standards are quite adequate to govern attorney conduct. We do not need another set of standards applicable only in bankruptcy courts and United States district courts.

- I am not of the view that uniform federal rules of ethics are necessary or appropriate.

- No uniform requirements can take into account local differences of ethics, behaviors, or expected behaviors.

- National standards are "pie in the sky" because local culture tends to govern. And my experience indicates that the rules in place are adequate for the task.

- First, I am unalterably opposed to this trend toward uniform national rules and standards to cover every situation that comes before the court. Second, I feel that I have a good sense of what are legally, ethically and morally proper standards of conduct for an attorney appearing in my court. If there is a problem, it is handled, quietly, quickly and efficiently without having to refer to a national standard. I have had a few problems and they never occurred a second time.

- I do not believe national standards applicable to the bankruptcy court are necessary or appropriate. Judges can and probably should be stricter in sanctioning attorney misconduct, but another layer of rules does not seem necessary.

- I do not believe we need national standards. In [a state], we have thorough rules of professional conduct, which work quite well in the bankruptcy context. I am of the view that if it is not broken, don't fix it. I'm not aware that if is broken here in the bankruptcy courts.

- District court procedure would be difficult to apply in bankruptcy cases and proceedings. I would not change existing procedure.

Appendix L

- Keeping in mind that I have only been a judge for a few months (but a bankruptcy attorney for years before that), I believe the Rules of Professional Conduct in [our state] (and, I assume, other states) combined with the Bankruptcy Code and Rules and any local rules are more than enough. Adding an overlay of national standards would create an unnecessary layer of regulation and potential confusion

- I am generally opposed to a national standard. Each state has adopted a code of professional responsibility or similar canon of ethics. If the national standard conflicted with that prescribed by the state supreme court, which would the attorney follow? I am not in the attorney discipline business. In [our state], the Board of Professional Responsibility is set up to handle complaints and does so in an effective and efficient manner.

III. Mixed and Miscellaneous Views

- I think we must also be mindful of the role of state bar organizations who generally govern attorney conduct. I do not know whether the state bars' codes of conduct differ in any significant way from the ABA Model Rules. If they do, it would seem unwise to set one standard for attorneys practicing in the federal courts and another for those practicing in the state courts where those federal courts are located.

- I am not opposed to a national standard. I am opposed to a standard that differs, nationally or locally, from that of the district court.

- There needs to be debate in this area. For example, bankruptcy court opinions are all over the place on whether one counsel can represent affiliated corporations in chapter 11s.

- Standards should be kept straightforward and simple.

- Adopting a national standard for attorney conduct in the bankruptcy courts would only cause unwanted problems. Attorneys are members of state and local bars which have their own rules. Requiring attorneys to abide by two sets of rules only complicates matters. If uniform rules are adopted, they should be the ABA Model Rules with no changes. Attorney conduct problems are the same in all courts: there are no special problems in bankruptcy courts that do not occur in state and district courts. Thus, the rules should be the same in all courts; and the closer those rules are to common sense, the better. The issues and problems past, current, and future, with regard to attorney conduct were, are and will be the same in all courts. Some will ignore the rules, some will not need rules, and most will be confused by the rules.

- Because of the complicated nature of the process of settling standards for judging human conduct, it was very difficult answering some questions without appearing to be inconsistent with the answers to other questions. This may suggest that there are so

many different circumstances here, that it will be impossible to craft an identical set of standards for bankruptcy and district courts. Whatever decision is made, the national uniform standard in the bankruptcy courts should be flexible to account for regional customs.

There are no special "bankruptcy-related" issues with regard to attorney conduct. Accordingly, uniformity should be a touchstone of any rulemaking.

I do not believe any problems are caused by inadequate requirements for disclosure in Bankruptcy Rule 2014. It would help to add "irrespective of whether the applicant or person to be employed perceives any such connection to represent a conflict of interest" because attorneys think they are the decision maker as to whether a conflict exists. They need to better understand that they are to make a full disclosure and the court decides if a conflict exists.

There are very few conduct issues arising in my district, or the other districts where I've served.

The issues of attorney discipline needs to be addressed: (1) What if sanctions are inappropriate (i.e., both sides at fault so neither side should be rewarded or it would be a windfall to the other side or the court is the "party" who has been wronged)? (2) Since attorneys are admitted to the district court, what authority does the bankruptcy court have to "disbar" them?

I believe leaving it up to the individual bankruptcy court works well. There is no reason for a national uniform standard to be adopted. If it is determined that a national standard must be adopted, it would be the same as the district court standard and based on the ABA Model Rules.

- Conflict issues in bankruptcy cases frequently tend to be different and more complex than those arising in district courts due to the frequent involvement of multiple parties in bankruptcy cases. It is fairly common for situations to arise where attorneys become disabled or otherwise cease practice or making appearances for clients and where attorneys fail to adhere to court orders mandating repayment of funds. I believe bankruptcy courts should be able to act swiftly to discipline attorneys in these areas with sanctions, including suspension. It is not clear that this power exists or how it should be exercised apart from the district court.

- I believe that both the district courts and the bankruptcy courts should adopt the Code of Professional Conduct which is applicable in the state in which those courts are located. Although I do not believe that any problems were caused by inadequate requirements for disclosure in Bankruptcy Rule 2014, it might be helpful if the rule contained some explanation of the meaning of "connections" as used in Rule 2014 without attempting to have an all-inclusive definition.

Appendix L

- Codes of ethics and codes of conduct dealing with honesty and the appearances of honesty should be broadly drafted and universal. Codes of civility, dealing with professionalism, respect for the system and each other, should be drafted in much greater detail. Many lawyers think ethics and civility are about the same issues; they are not. Many lawyers think ethics rules are inherently more important than civility; they are not.

- One problem is the use by judges of their personal perceptions of "fairness" in ruling on fees. This can result in "penny ante" moralism rather than effecting any constructive change in attorney behavior. Certainly "padding" the book is inappropriate but it is purely arbitrary to deny or characterize as padding all intraoffice conferences, for example. I think that there is an over-fixation on looking at time records with a fine-tooth comb and failing to evaluate the fee applications in the context of the monetary size of the estate. Even if every time entry is justified, fees should have a reasonable relationship to the size of the estate and be reduced if they don't.

- The rules on disclosure and "connection" with any attorney, accountant, or professional person by the debtor's counsel in a chapter 11 case for each creditor is a rule that defies practical application. This disclosure is impractical when applied to a partner in a firm of 200 lawyers, 1000 creditors, or a big-6 accounting firm engaged by the debtor and another firm engaged by the creditors' committee. The rule on "imputed disqualification" is hopelessly snarled, especially when attorneys make lateral moves among firms. Detailed description of time entries in the fee applications routinely result in either unintelligible coded entries or breaches of confidentiality. We desperately need a rule on minimum scope of engagements in chapters 7 and 13 cases. Ultimately, we need admission to a bankruptcy bar to reflect specialization.

- There should not be a uniform national standard. If there is a uniform national standard, it should be the ABA Model Rules on all subjects noted. State supreme courts regulate the legal profession. Our state's rules apply in our state's federal courts. We do not have a problem with rules, although we occasionally have a problem with a lawyer adhering to the rules. When that happens, we deal with that. The practice of law should not be federalized with separate rules in federal courts and in each state court.

- The status quo, albeit riddled with conundrums, is preferable to more rules that merely add to the risk of confusion. If there are to be federal court standards, there should be no difference between bankruptcy and district courts.

- By and large, in this district there are not big problems in this whole area, especially among the bulk of practitioners. Code provisions on conflicts of interest, and maybe on the disinterestedness standard, should be relaxed somewhat to allow some discretion on part of the bankruptcy court.

Appendix L

The biggest problem I have and hear about relates to attorney competence rather than conduct issues. [ABA Model] Rules 1.5(a)(1), (4) and (7) allow some action by the court but are limited and someone has to raise the issue.

Most problems stem from a lack of adequate or appropriate communications which results in assumptions that give rise to disputes which could be resolved without rancor or court intervention.

There seem to be no good reasons why the standards of conduct an attorney is expected to adhere to should differ. Nonetheless, the standards of conduct (to the extent they are not dictated by statute or the applicable rules of procedure) should properly be determined by the court which is charged with supervising admission to the bar. Since the bankruptcy court is part of (a unit of) the district court (28 U.S.C. Section 151), the standards of conduct promulgated by the various district courts govern the bankruptcy courts in those districts. Any difference should be a function of either statutes or the Federal Rules of Bankruptcy Procedures, not some separate standard or model that would apply only to bankruptcy matters.

This [district] has a very useful general order which can be used to prevent an attorney from practicing anywhere in the district.

I think we need to opt for uniformity of standards in each state at the expense of national uniformity. Thus, the same standards should be applied to, [a state's] lawyers, for example, whether they appear in state or federal court. As a matter of comity, federal courts should apply state rules and standards unless there is a real odd ball local state law or an identifiable need for national uniformity.

There is no national uniform standard for district courts. If there were, I'd want bankruptcy courts to follow it. As matters are, I think bankruptcy courts should follow local rules on attorney conduct.

The heavy volume of cases and large numbers of attorneys who appear in bankruptcy courts make the review and resolution of attorney conduct issues difficult. In addition, the large number of interested parties with varying interests lends to many conflict issues.

Disputes regarding alleged conflict of interest revolves (usually) around the "disinterestedness" standard. The standard serves no useful purpose on its own and should be eliminated. In its place, the usual conflict rules should apply.

The rub is in the drafting. The National Bankruptcy Review Commission found it relatively easy to conceptualize the issues, and very difficult to articulate standards and methods for resolving the issues. Nonbankruptcy groups and scholars have had similar experiences. Nevertheless, somebody should pick up the inquiry and suggestions left by the Commission and continue to try to identify problem areas and

to study possible drafting solutions to those problems. It is entirely possible that an identification of standards applicable in nonbankruptcy areas will emerge from the identification of solutions in the bankruptcy areas. Alternatively, the creation of standards to be used in connection with the peculiar problems facing attorneys involved in bankruptcy cases and proceedings will become clearer as the same or similar issues are illuminated by work in areas seemingly beyond the bankruptcy context.

- I would abolish the disinterestedness limitation in the Bankruptcy Code and Rules in so far as it relates to the appointment of professionals. I think it often results in unnecessary, costly and arbitrary disqualifications. Generally applicable ethical rules, including conflict of interest rules, are adequate in bankruptcy proceedings.

Form B21

FORM 21. REAFFIRMATION AGREEMENT

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

Debtor's Name	Bankruptcy Case No.
	Chapter
Creditor's Name and Address	

Instructions: 1) Attach a copy of all court judgments, security agreements, and evidence of their perfection.
2) File all the documents by mailing them or delivering them to the Clerk of Bankruptcy Court.
~~3) If the debtor was not represented by an attorney in negotiating this agreement, the agreement must be accompanied by a motion for its approval. (See Form 21M.)~~

☐ ~~Check box if motion to approve reaffirmation agreement is attached.~~

NOTICE TO DEBTOR:

This agreement gives up the protection of your bankruptcy discharge for this debt.

As a result of this agreement, the creditor may be able to take your property or wages if you do not pay the agreed amounts. The creditor may also act to collect the debt in other ways.

You may rescind (cancel) this agreement at any time before the bankruptcy court enters a discharge order or within 60 days after this agreement is filed with the court, whichever is later, by sending a letter to the creditor at the above address saying that the agreement is canceled or by telling the creditor in some other lawful way.

You are not required to enter into this agreement by any law. It is not required by the Bankruptcy Code, by any other law, or by any contract (except a reaffirmation agreement made in accordance with Bankruptcy Code § 524(c)).

You are allowed to pay this debt without signing this agreement. If you do not sign this agreement and are later unwilling or unable to pay the full amount, the creditor will not be able to collect it from you. The creditor also will not be allowed to take your property to pay the debt unless the creditor has a lien on that property.

If the creditor has a lien on your personal property, you have a right to redeem the property and eliminate the lien by making a single payment to the creditor equal to the current value of the property, as agreed by the parties or determined by the court.

(2) by adding at the end the following:

"(b) In addition to the requirements under subsection (a), an individual debtor shall file with the court—

"(1) a certificate from the credit counseling service that provided the debtor services under section 109(h); and

"(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the credit counseling service referred to in paragraph (1).".

(e) GENERAL PROVISIONS.—

(1) IN GENERAL.—Chapter 1 of title 11, United States Code, is amended by adding at the end the following:

"§ 111. Credit counseling services; financial management instructional courses

"(a) The clerk of each district shall maintain a list of credit counseling services that provide 1 or more programs described in section 109(h) and a list of instructional courses concerning personal financial management that have been approved by—

"(1) the United States trustee; or

"(2) the bankruptcy administrator for the district.".

(2) CLERICAL AMENDMENT.—The table of sections for chapter 1 of title 11, United States Code, is amended by adding at the end the following:

"111. Credit counseling services; financial management instructional courses.".

(f) LIMITATION.—Section 362 of title 11, United States Code, is amended by adding at the end the following:

"(i) If a case commenced under chapter 7, 11, or 13 of this title is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.".

TITLE II—ENHANCED CONSUMER PROTECTION

Subtitle A—Penalties for Abusive Creditor Practices

SEC. 201. PROMOTION OF ALTERNATIVE DISPUTE RESOLUTION.

(a) REDUCTION OF CLAIM.—Section 502 of title 11, United States Code, is amended by adding at the end the following:

"(k)(1) The court, on the motion of the debtor and after a hearing, may reduce a claim filed under this section based in whole on unsecured consumer debts by not more than 20 percent of the claim, if—

"(A) the claim was filed by a creditor who unreasonably refused to negotiate a reasonable alternative repayment schedule proposed by an approved credit counseling agency acting on behalf of the debtor;

"(B) the offer of the debtor under subparagraph (A)—

"(i) was made at least 60 days before the filing of the petition; and

"(ii) provided for payment of at least 60 percent of the amount of the debt over a period not to exceed the repayment period of the loan, or a reasonable extension thereof; and

"(C) no part of the debt under the alternative repayment schedule is nondischargeable.

"(2) The debtor shall have the burden of proving, by clear and convincing evidence, that—

"(A) the creditor unreasonably refused to consider the debtor's proposal; and

"(B) the proposed alternative repayment schedule was made in the 60-day period specified in paragraph (1)(B)(i).".

(b) LIMITATION ON AVOIDABILITY.—Section 547 of title 11, United States Code, is amended by adding at the end the following:

"(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment plan between the debtor and any creditor of the debtor created by an approved credit counseling agency.".

SEC. 202. EFFECT OF DISCHARGE.

Section 524 of title 11, United States Code, is amended by adding at the end the following:

"(i) The willful failure of a creditor to credit payments received under a plan confirmed under this title (including a plan of reorganization confirmed under chapter 11 of this title) in the manner required by the plan (including crediting the amounts required under the plan) shall constitute a violation of an injunction under subsection (a)(2).".

SEC. 203. VIOLATIONS OF THE AUTOMATIC STAY.

Section 362(a) of title 11, United States Code, is amended—

(1) in paragraph (7), by striking "and" at the end;

(2) in paragraph (8), by striking the period at the end and inserting "; and"; and

(3) by adding at the end the following:

"(9) any communication (other than a recitation of the creditor's legal rights) threatening a debtor (for the purpose of coercing an agreement for the reaffirmation of debt), at any time after the commencement and before the granting of a discharge in a case under this title, of an intention to—

"(A) file a motion to—

"(i) determine the dischargeability of a debt; or

"(ii) under section 707(b), to dismiss or convert a case; or

"(B) repossess collateral from the debtor to which the stay applies.".

SEC. 204. DISCOURAGING ABUSE OF REAFFIRMATION PRACTICES.

(a) IN GENERAL.—Section 524 of title 11, United States Code, as amended by section 202 of this Act, is amended—

(1) in subsection (c)—

(A) in paragraph (2)—

(i) in subparagraph (A), by striking "and" at the end;

(ii) in subparagraph (B), by inserting "and" at the end; and

(iii) by adding at the end the following:

"(C)(i) the consideration for such agreement is based on a wholly unsecured consumer debt; and

"(ii) such agreement contains a clear and conspicuous statement that advises the debtor that—

"(I) the debtor is entitled to a hearing before the court at which—

"(aa) the debtor shall appear in person; and

"(bb) the court shall decide whether the agreement constitutes an undue hardship, is not in the debtor's best interest, or is not the result of a threat by the creditor to take an action that, at the time of the threat, that the creditor may not legally take or does not intend to take; and

"(II) if the debtor is represented by counsel, the debtor may waive the debtor's right to a hearing under subclause (I) by signing a statement—

"(aa) waiving the hearing;

"(bb) stating that the debtor is represented by counsel; and

"(cc) identifying the counsel."; and

(B) in paragraph (6)(A)—

(i) in clause (i), by striking "and" at the end;

(ii) in clause (ii), by striking the period and inserting "and"; and

(iii) by adding at the end the following:

"(iii) not an agreement that the debtor entered into as a result of a threat by the creditor to take an action that, at the time of the threat, the creditor could not legally take or did not intend to take."; and

(2) in subsection (d), in the third sentence, by inserting after "during the course of negotiating an agreement" the following: "(or if the consideration by such agreement is based on a wholly secured consumer debt, and the debtor has not waived the right to a hearing under subsection (c)(2)(C))".

(b) LAW ENFORCEMENT.—

(1) IN GENERAL.—Chapter 9 of title 18, United States Code, is amended by adding at the end the following:

"§ 158. Designation of United States attorneys and agents of the Federal Bureau of Investigation to address abusive reaffirmations of debt

"(a) IN GENERAL.—The Attorney General of the United States shall designate the individuals described in subsection (b) to have primary responsibility in carrying out enforcement activities in addressing violations of section 152 or 157 relating to abusive reaffirmations of debt.

"(b) UNITED STATES DISTRICT ATTORNEYS AND AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION—The individuals referred to in subsection (a) are

"(1) a United States attorney for each judicial district of the United States; and

"(2) an agent of the Federal Bureau of Investigation (within the meaning of section 3107) for each field office of the Federal Bureau of Investigation.

"(c) BANKRUPTCY INVESTIGATIONS.—Each United States attorney designated under this section shall have primary responsibility for carrying out the duties of a United States attorney under section 3057.".

(2) CLERICAL AMENDMENT.—The analysis for chapter 9 of title 18, United States Code, is amended by adding at the end the following:

"158. Designation of United States attorneys and agents of the Federal Bureau of Investigation to address abusive reaffirmations of debt.".

(c) EXCEPTIONS TO DISCHARGE.—Section 523 of title 11, United States Code, is amended by adding at the end the following:

"(f) Nothing in this section or in any other provision of this title shall preempt any State law relating to unfair trade practices that imposes restrictions on creditor conduct that would give rise to liability—

"(1) under this section; or

"(2) under section 524, for failure to comply with applicable requirements for seeking a reaffirmation of debt.

"(g) ACTIONS BY STATES.—The attorney general of a State, or an official or agency designated by a State—

"(1) may bring an action on behalf of its residents to recover damages on their behalf under subsection (d) or section 524(c); and

"(2) may bring an action in a State court to enforce a State criminal law that is similar to section 152 or 157 of title 18.".

Subtitle B—Priority Child Support

SEC. 211. PRIORITIES FOR CLAIMS FOR DOMESTIC SUPPORT OBLIGATIONS.

Section 507(a) of title 11, United States Code, is amended—

(1) by striking paragraph (7);

(2) by redesignating paragraphs (1) through (6) as paragraphs (2) through (7), respectively;

(3) in paragraph (2), as redesignated, by striking "First" and inserting "Second";

(4) in paragraph (3), as redesignated, by striking "Second" and inserting "Third";

(5) in paragraph (4), as redesignated, by striking "Third" and inserting "Fourth";

(6) in paragraph (5), as redesignated, by striking "Fourth" and inserting "Fifth";

(7) in paragraph (6), as redesignated, by striking "Fifth" and inserting "Sixth";

(8) in paragraph (7), as redesignated, by striking "Sixth" and inserting "Seventh"; and

(9) by inserting before paragraph (2), as redesignated, the following:

Electronic Service: Civil Rules 5(b), 77(d)

The Standing Committee Subcommittee on Technology has explored electronic service. This proposal to amend Civil Rule 5(b) grows out of Technology Subcommittee discussions. The proposal has been informally reviewed by the Advisory Committees for , with the thought that . It would be possible to recommend this proposal for publication in August if . These notes provide a brief summary of the background experience with electronic filing under Civil Rule 5(d) and a proposal that restyles present Rule 5(b) and adds a provision for electronic service.

Experience with Electronic Case Filing is gradually accumulating in the wake of the 1996 Rule 5(e) amendment authorizing local rules that permit papers to be filed, signed, or verified by electronic means. The basis of experience is in some ways narrow. Only a few courts are involved, including four district courts participating in a prototype program. The complaint is initially filed by traditional means; only when the case is later selected for electronic filing does the clerk "back-file" the complaint in the electronic record. Cases are individually selected for electronic filing, and consent of the parties is required. These limits suggest caution in seeking to extrapolate lessons for more general application. Nonetheless, the experience of those who engage in electronic filing is just what might be hoped: it is faster, more reliable, and less expensive. Still greater benefits can flow from electronic service. The benefits are likely to be greatest for small offices and for districts that are geographically broad. There is growing pressure to authorize development of electronic service. The lead has been taken by the Bankruptcy Rules Committee. Proposed amendments to Bankruptcy Rule 9013(c), published for comment in August, 1998, deal with "Application for an order." It provides that: "Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." A similar provision is included in the proposed amendments to Bankruptcy Rule 9014.

The first choice to be made, once the concept of electronic service is embraced, is how far to push it. For the moment, it seems safest to allow electronic service only with the consent of the person to be served. This limitation need not be a severe restraint. If the advantages of electronic service are as substantial as the enthusiasts believe, consent is apt to be given by an increasing number of parties and attorneys. The time to abandon the consent requirement will come as modern technology is developed still further and adopted more universally. Detailed provisions for implementing the consent requirement could be incorporated in the national rule. Among the questions that have been suggested are whether advance consent is required, whether consent can be sought in the process of making electronic service, whether failure to object to electronic service implies consent, and so on. The attached draft, however, does not include provisions for these questions. It has seemed better to avoid the risk of fossilizing specific details that would be difficult to adjust through the Enabling Act process. The draft Note suggests that local rules might address these questions.

A second choice is whether to authorize electronic service for the summons and complaint under Rule 4 and "other process" under Rule 4.1. Experience with electronic filing provides very little guidance for these situations. The Technology Subcommittee has agreed that the first step should be limited to service of papers that do not qualify as "process." Rule 5 is to be the sole focus in the Civil Rules, with comparable provisions in the Appellate and Criminal Rules. Bankruptcy Rules may be developed in more adventurous ways. Bankruptcy practice is not easily divided between "process" and other papers, and it has traditionally moved ahead of the other

rules in developing the benefits of advancing technology.

The task of excluding service under Rules 4 and 4.1 from Rule 5(b) is not quite as easy as it may seem. Exposition of the drafting issues is best supported by setting out the full text of present subdivisions 5(a) and 5(b).

Rule 5(a) provides:

> **(a) Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.
>
> In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

Rule 5(b) is set out with superscripts designating the parts of the new draft that incorporate the present provisions:

> **(b) Same: How Made.** [5(b)(1)] Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. [5(b)(2)] Service upon the attorney or upon a party shall be made by [5(b)(2)(A)] delivering a copy to the attorney or party [5(b)(2)(B)] or by mailing it to the attorney or party at the attorney's or party's last known address or, [5(b)(2)(C)] if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: [5(b)(2)(A)(i)] handing it to the attorney or to the party; or[5(b)(2)(A)(ii)] leaving it at the attorney's or party's office with a clerk or other in person in charge thereof; or, if there is no one in charge, leaving it at a conspicuous place therein; or, [5(b)(2)(A)(iii)] if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. [5(b)(2)(B)] Service by mail is complete upon mailing.

Rule 5(a) begins by excepting service "as otherwise provided by these rules." Separate service provisions appear in at least Rule 45(b) (subpoenas); 71A(d)(3) (notice in condemnation

proceeding); and 77(d) (notice by the clerk of the entry of an order or judgment). There may be other exceptions as well. Despite the formidable catch-all "every written notice * * * and similar paper" category at the end, at least one court has held that a trial brief is not included in the Rule 5(a) categories, see 4A C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d, § 1143 p. 415. The puzzle of Rule 5(a) is important not in its own terms, however, but only as a challenge for drafting Rule 5(b).

Rule 5(b) does not now indicate whether it covers all service, only service of items covered by Rule 5(a), or some intermediate category. If it is limited to Rule 5(a), it is only by the catch-line ("Same: How Made") that we know it. The puzzle is aggravated by the first sentence, which refers only to service on an attorney, but is sweeping: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney * * * ." That language should cover, at the least, the clerk's service of notice of an order or judgment under Rule 77(d). It has been held, however, that Rule 45(b) requires service of a subpoena on the party, not the party's lawyer, see 9A Wright & Miller, § 2454, p. 24. This minor inconsistency should be addressed. More important, it is difficult to believe that Rule 5(b) supersedes the service provisions of Rules 4 and 4.1 whenever a party is represented by an attorney before the action is commenced, when an order of civil commitment is served, or the like. Rule 71A(d)(3), further, requires service in accord with Rule 4, and if — as seems probable — Rules 4 and 4.1 are impliedly excluded from the Rule 5(b) provision for serving an attorney, Rule 71A(d)(3) also should be excluded. These problems should be addressed in revising Rule 5(b), if only to define clearly the new provision for electronic service.

These problems with the first sentence of Rule 5(b) flow into the next sentence, which tells how service is made upon the attorney or a party. This sentence does not expressly invoke the first sentence reference to any service required by these rules. This is the point where it is necessary to draft in terms that clearly exclude service under Rules 4, 4.1, 45(b), and 71A(d)(3). (It is proposed below that Rule 77(d) be amended to incorporate revised Rule 5(b), so that the clerk can make service of orders and judgments by electronic means.)

The draft that follows addresses these questions by limiting the "service on the attorney" provision to service under Rules 5(a) and 77(d). This drafting deserves further study. The general service provisions are limited to Rule 5(a) service; the Rule 77(d) proposal simply incorporates Rule 5(b).

Although the immediate impetus arises from the desire to extend electronic filing to electronic service, it has seemed best to allow other means of service as well. Proposed Rule 5(b)(2)(D) includes any means consented to by the person served.

Electronic service raises questions that parallel the present Rule 5(b) provision that "[s]ervice by mail is complete upon mailing." The Technology Subcommittee concluded that it is better to follow this analogy for electronic service. Administrative Office staff active with electronic case filing believe that the best word to use is "transmit" or "transmission." Difficulties arise because the lack of a universal electronic mail system leaves it impossible, at times, to

provide an electronic confirmation that the message has been delivered. There also was concern that a person anxious to avoid service might close down its machinery, so as to obtain a de facto extension of time if service were made effective on receipt. A different drafting difficulty arises from the choice to include nonelectronic means of service. It is somewhat awkward to think of transmitting an envelope to an express service. The draft resolves this problem by making service complete on delivering the paper to the agency designated to make delivery. This language may be clear, but it is not aesthetically pleasing. The draft also includes an illustration of the alternative choice to make email service effective only on receipt.

The choice to make service effective on transmission or delivering the paper to the agency designated to make delivery raises the Rule 6(e) question of additional time. Even electronic means of communication may fail to achieve instantaneous communication. And even an instantly delivered facsimile or email message may arrive on a Saturday, Sunday, or other time when the recipient is not keeping watch. The Technology Subcommittee concluded that it is better to expand Rule 6(e) to allow an additional three days whenever service is made by means other than physical delivery. The draft incorporates this decision; alternatives are sketched with the draft.

A final question is whether responsibility for serving papers filed with the court should continue to fall on the parties. The next generation of filing software may enable courts to effect automatic service on all parties of any paper filed with the court. At least for cases in which all parties have consented to electronic service, it seems desirable to authorize experiments with service by the court. The final sentence of proposed Rule 5(d) would do this; authorization by local rule is required as a means of protecting unwilling courts against litigant requests.

Draft Rule 5(b)

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Rule 5(a) service is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion [then] residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by [electronic or any other means]{any other means, including electronic means,}[1] consented to by the person served. Service by electronic means is complete on [transmission]{receipt by the person served}[2]; service by other consented means is complete when the person

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[1] Two votes have been expressed on the alternative choices. Professor Capra prefers "other means, including electronic means, consented to" because it defeats any argument that consent is not required for electronic means. Gene Lafitte, Chair of the Technology Subcommittee, prefers "electronic or any other means consented to."

[2] The first draft made service complete on receipt. This approach eliminates any need to provide extra time to act in response, see Rule 6(e). It also puts the risk of transmission on the party who wishes to rely on electronic service. It leaves the party effecting service in some uncertainty, since present technical advice is that it is not always possible to ensure delivery of an electronic "receipt" across different electronic mail delivery services. The consensus at the technology subcommittee meeting favored completion on dispatch by the party making electronic service. Technical advisers in the Administrative Office suggested "transmission" as the best single word to convey this idea.

making service delivers the copy to the agency designated to make delivery. If authorized by local rule, the court may make service [on behalf of a party][3] under this subparagraph (D).

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the former provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Paragraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Paragraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. It is anticipated that the benefits of electronic service will become so apparent that in time consent will readily be given by parties and attorneys. Local rules may be adopted to describe the means of consent, including provisions that enable lawyers and parties who regularly engage in litigation to file general consents for all actions. Paragraph (D) also authorizes service by nonelectronic means such as commercial carriers. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in Paragraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, Paragraph (D) authorizes adoption of local rules providing for service by the court. Electronic case filing systems will include the capacity to make service by the court's transmission of all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, knowing that the court will automatically serve the filed paper on all other parties. Because service is under Paragraph (D), consent must be obtained from the persons served.

The expansion of authorized means of service is supported by the amendment of Rule 6(e). The additional three days for acting after service by mail are allowed for service by mail, by leaving a copy with the clerk of the court, or by electronic or other means.

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[3] This phrase, or some equivalent phrase, might be inserted to indicate that the court is acting in place of the party that is required to make service. It does not seem to interfere with the incorporation of Rule 5(b) as proposed for Rule 77(d).

Rule 6(c)

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Alternative 1

Do not change Rule 6(e). Electronic service is the speediest means available. Federal Express and other means also are likely to be speedier than the mails. Service by any of these means requires consent of the party to be served; consent should be given only if the party is prepared to monitor the addresses permitted for service.

Alternative 2

If additional time is provided for everything but "personal service" under Rule 5(b)(2)(A), there is an unreasoned distinction. Eliminate Rule 6(e), rather than add 3 days to every response-time period in the rules.

Alternative 3

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail or by a means permitted only with the consent of the party served, 3 days shall be added to the prescribed period.

This alternative was suggested by Alan N. Resnick as language that could be adopted by Bankruptcy Rule 9006(f). The Bankruptcy Rules do not adopt Civil Rule 6(e), and cannot effectively incorporate Civil Rule 5(b) by cross-reference. The proposed language could be adopted verbatim in Bankruptcy Rule 9006(f), effecting a clear parallel between the two sets of rules.

Rule 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party * * *. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers.

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice. As with Rule 5(b), local rules may establish detailed procedures for giving consent.

Add-on: Electronic Request to Waive Rule 4 Service

Rule 4(d) requires that a request to waive service of process be made in writing. We may want to think about allowing the request to be made by electronic means. This change would be a first and very limited stop on the road to service of summons and complaint by electronic means. The Technology Subcommittee did not think it necessary to address this question in conjunction with electronic service. Two difficulties are apparent: providing assurance of actual receipt, and providing a clear means of response. A simple but probably inadequate approach would revise Rule 4(d)(2) by making a few additions:

* * * The notice and request

(A) shall be in writing or electronic form and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment of law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail, electronic means, or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D, E, F): Unchanged; and

(G) shall, if made in writing, provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing. * * *