ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of October 8 - 9, 1998

Andover, Massachusetts

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