ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 13 - 14, 1997

Charleston, South Carolina

Minutes

The following members were present at the meeting:

District Judge Adrian G. Duplantier, Chairman

District Judge Eduardo C. Robreno

District Judge Bernice B. Donald

District Judge Robert W. Gettleman

Bankruptcy Judge Robert J. Kressel

Bankruptcy Judge Donald E. Cordova

Bankruptcy Judge A. Jay Cristol

Bankruptcy Judge A. Thomas Small

Kenneth N. Klee, Esquire

Gerald K. Smith, Esquire

Henry J. Sommer, Esquire

Professor Charles J. Tabb

R. Neal Batson, Esquire

Leonard M. Rosen, Esquire

J. Christopher Kohn, Esquire, United States

Department of Justice

Professor Alan N. Resnick, Reporter

District Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), and Professor Daniel R. Coquillette, Reporter to the Standing Committee, also attended. Alan W. Perry, Esquire, liaison to this Committee from the Standing Committee, was unable to attend due to illness. Brady C. Williamson, Esquire, the chairman of the National Bankruptcy Review Commission, had planned to attend but was unable to do so because of bad weather at his home in Madison, Wisconsin. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System, attended the meeting as a representative of that committee.

The following additional persons attended the meeting: Joseph G. Patchan, Director, Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon and James H. Wannamaker, III, Bankruptcy Judges Division, Administrative Office of the United States Courts ("Administrative Office"); Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins and Robert Niemic, Federal Judicial Center ("FJC"). Brenda K. Argoe, Clerk, United States Bankruptcy Court for the District of South Carolina, attended part of the meeting.

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 Peter G. McCabe, Assistant Director of the Administrative Office and Secretary of 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 guests in attendance and the newly-appointed members and welcomed them to the meeting. **The Committee approved a resolution of commendation and appreciation for the work of its former chairman, Bankruptcy Judge Paul Mannes.**

Mr. Klee suggested that the last paragraph on page 22 of the minutes of the September 1996 meeting be revised to reflect that the amendments discussed there should conform to the language used in the drafts. **The Committee approved the minutes, as revised, on Judge Kressel's motion.**

The Committee discussed the extent to which the minutes should go beyond recording the Committee's formal actions and attempt to capture the Committee's deliberative process. The Reporter and several members indicated that the practice of including highlights from the Committee's discussions has been extremely useful.

The Chairman reported that the next meeting is scheduled for September 11 - 12, 1997, at the Williamsburg Lodge in Williamsburg, Virginia. The chairman suggested that the Spring 1998 meeting be held at the Winrock International Conference Center in Arkansas on March 26 - 27, 1998. **The Committee agreed.** Mr. Heltzel offered to look into the possibility of holding the Fall 1998 meeting at

the Ahwahnee Lodge hotel in Yosemite National Park in September or early October. Because of the difficulty in getting rooms at the hotel, he suggested that a "back-up" site also be selected. **The Committee accepted his suggestions.** The Chairman and Ms. Channon will make preliminary inquiries with Mr. Heltzel's assistance.

The Chairman announced the appointment of the following circuit liaisons:

First Circuit Mr. Klee

Second Circuit Mr. Rosen

Third Circuit Judge Robreno

Fourth Circuit Judge Small

Fifth Circuit Judge Duplantier

Sixth Circuit Judge Donald

Seventh Circuit Judge Gettleman

Eighth Circuit Judge Kressel

Ninth Circuit Mr. Smith

Tenth Circuit Judge Cordova

Eleventh Circuit Judge Cristol

D.C. Circuit Mr. Sommer

Federal Circuit Professor Tabb

The Chairman explained the duties of the liaisons and stated that they should contact the members of the Judicial Conference of the United States from their circuits as necessary to inform them about important or controversial matters.

The Chairman and Professor Resnick reported on the January 1997 meeting of the Standing Committee. Although no action items from this Committee were before the Standing Committee, the Chairman and the Reporter informed the Standing Committee of the status of this Committee's proposed amendments to the Official Bankruptcy Forms ("Official Forms"), the Litigation Subcommittee's work on revising Rules 9013 and 9014, proposed amendments to Rules 2004 and 2014, and proposed amendments to 14 other rules which the Committee approved in substance earlier.

The Reporter stated that Circuit Judge Frank H. Easterbrook has been appointed chairman of the Standing Committee's new Subcommittee on Technology. The Chairman named Judge Cristol and Mr. Heltzel to serve as this Committee's liaisons to the new subcommittee. The Reporter stated that District

Judge Morey L. Sear, the former chairman of this Committee, has been appointed to the Standing Committee.

Action Items

Amendments to Official Bankruptcy Forms. Mr. Sommer, the chairman of the Forms Subcommittee, stated that the subcommittee met in Washington on February 28, 1997, to consider the comments received in response to the publication of the proposed amendments to the Official Forms. Mr. Sommer presented the Reporter's summary of the comments and the Subcommittee's recommendation on each comment and copies of the published amendments marked with additional changes recommended by the Subcommittee. The Committee agreed to consider the proposed amendments and comments utilizing the "consent calendar" format recommended by the Reporter in his memorandum of March 3, 1997.

Form 1, Voluntary Petition. Ms. Channon presented the Subcommittee's additional changes on Form 1 as reformatted by Frederick D. Rogovy, Esquire, of New Hope Software, Inc. Mr. Klee suggested changing the phrase "check any applicable box" in the "Type of Debtor" section on page 1 to "check all boxes that apply", which he stated would be less ambiguous. **The Committee agreed to make the change there and anywhere else on the amended forms where more than one box could be checked. The Committee agreed to correct the citation to 11 U.S.C. § 110 at the bottom of Page 2.** The Committee discussed how to make citations to the Bankruptcy Code on the forms easier for lay people to understand. **The Committee determined not to change the present method of citation.**

The Reporter and Ms. Wiggins discussed the proposal by Professor Karen Gross to divide the lowest statistical categories for number of creditors, estimated assets, and estimated liabilities in order to capture information on very small, individual debtor cases. The professor indicated that those cases might be managed differently or administered outside of the bankruptcy system. The Reporter stated that every few years social scientists and other researchers ask the Committee to add boxes to collect data that would be useful in their research, but that the Committee has always declined because that is not the function of the form. Ms. Channon said the information on estimated assets and liabilities is used by the Administrative Office to determine the appropriate number of judgeships for each district.

The Administrative Office is conducting a Study on Future Bankruptcy Data Needs. Ms. Channon said Frank Szczebak, the chief of the Bankruptcy Judges Division, has suggested that the question of whether to collect data on very small cases be left to the review of data collection. Ms. Channon said the last time the form was revised the number of boxes and the labels to be used on them were left to the discretion of the Administrative Office. Changing the boxes would require revising the commercial software used to prepare the form, the software used by the clerks to enter case opening data, and the software used by the Administrative Office to compile statistics. The Chairman suggested referring the matter to the Administrative Office. **The Committee agreed to refer the matter.**

Mr. Klee suggested inserting the word "Bankruptcy" in the third line of Exhibit A. The Reporter suggested enclosing the phrase "Including debts listed in 2.c., below" in parentheses, moving it to the right of "Total debts", and making the letter "I" lower case. **The Committee accepted the suggestions.**

Form 3, Application and Order to pay Filing Fee in Installments. Mr. Sommer said it is not entirely clear whether Rule 1006 prohibits petition preparers from being paid prior to the payment of the filing fee. As a result, the last sentence of the Certification and Signature of Non-Attorney Bankruptcy Petition Preparer was drafted to prohibit only future payments before the filing fee is paid. The Reporter said he was concerned that, if the other interpretation of the rule prevailed, petition preparers might collect fees from debtors without telling them that the payments would disqualify them from paying the filing fees in installments. **The Committee declined to change the proposed form.**

Form 8, Individual Debtor's Statement of Intention. Mr. Sommer said the revised form was drafted in an effort to avoid taking a position on interpreting the statute. Judge Donald noted that the word "petitioner" in the certification should be "petition." Mr. Klee stated that the statutory references in section 2.b. should include the phrase "11 U.S.C." **The Committee accepted the corrections.** Professor Tabb suggested changing the phrase "Check any applicable statement." to "Check all statements that apply." The Reporter stated that the change might be substantive. **The Committee declined to make the change.** Judge Small asked whether a fourth statement should be added for debtors who don't intend to claim the property as exempt, redeem it, or reaffirm the debt. Mr. Sommer said doing so would adopt a particular interpretation of the statute. **The Committee declined to make the change.**

Form 9, Notice of Bankruptcy Case, Meeting of Creditors, & Deadlines. Judge Kressel suggested adding the chapter number to the top line of each notice. **The Committee agreed.** The Committee discussed the suggestion by Andrea E. Celli, Esquire, the chapter 13 trustee in Albany, New York, to revise the title to refer to the "Meeting of Creditors and Examination of Debtor." Mr. Sommer said "Meeting of Creditors" is a statutory term and adequate. **The Committee declined to make the change.** Judge Small said several chapter 13 trustees had suggested adding a statement to Form 9I that the chapter 13 trustee does not give legal advice. Mr. Sommer said the change would discourage calls to the trustees, who have a statutory duty to advise, other than on legal matters, and to assist the debtor.

The Committee considered the comments by the Bankruptcy Noticing Users Group and others that the revised meeting of creditors notice would significantly increase the cost of bankruptcy noticing and concluded that the increased costs are outweighed by the benefits of the proposed amendments. The increased cost of mailing a second sheet of paper will be incurred only in asset cases in which the proof of claim form is mailed with the notice. These are predominately chapter 13 cases in which the court could delegate noticing to the standing trustee.

Judge Cristol stated that several clerks had expressed concern about the additional cost of increasing the meeting of creditors notice to two pages in order to include "Explanations," which paraphrase the law, on the back of the form. Mr. Sommer said the form had included explanations for years, and that several clerks had asked for better instructions and information for the parties in plain English. He stated that making this information more complete and easily understandable would result in savings by reducing the number of calls to the clerk's office. Mr. Sommer noted that the Judiciary imposes a $30 administrative fee that must be paid by a debtor commencing a chapter 7 or chapter 13 case. The fee is intended to cover the cost of noticing and is more than sufficient to cover the cost increases resulting from the proposed amendments to the forms. Mr. Heltzel stated that the matter is a policy one which should not be decided on a monetary basis. He said his personal belief is that the change is worth the extra cost.

The Reporter stated that the chapter 11 forms had been revised to incorporate a new description of the discharge. He said the description in Forms 9F and 9F Alt. includes the phrase "except as provided in the plan," which should be added to the description in Forms 9E and 9E Alt. **The Committee agreed to include the phrase.**

Mr. Patchan stated that the chapter 11 forms try to explain the nature of chapter 11 and suggested that the chapter 7 forms should refer to it as the liquidation chapter. Mr. Sommer said the Subcommittee considered the idea but believed it would be misleading in no asset cases in which there is no liquidation. Mr. Klee noted the extra period and misalignment of "p.m.." on Form 9B. **The Committee agreed to correct the two typographical errors**. Mr. Klee stated that page 1 of Form 9I should refer to the "chapter 13 trustee," not the "bankruptcy trustee" to avoid any confusion with a chapter 7 trustee. Judge Kressel said the Bankruptcy Code refers to the "trustee." **The Committee declined to make the change.**

Marcy J.K. Tiffany, the U.S. trustee in the Central District of California, suggested adding the following to the notice: "BANKRUPTCY FRAUD OR ABUSE: Any Questions or information relating to bankruptcy fraud or abuse may be addressed to the United States Trustee at (insert address of relevant region)." Mr. Patchan stated that he was reluctant to recommend the change because of the possibility of unintended consequences. He added that criminal referrals can go directly to the U.S. attorney. **The Committee declined to add the statement.**

Form 10, Proof of Claim. Mr. Sommer said the Subcommittee originally planned only to prepare instructions for the back of the form. As the project progressed, the Subcommittee also made changes to the front of the form. Judge Stotler asked if the changes to the proposed amendment since its publication for comment were based on the comments received or were suggested by members of the Committee. Mr. Sommer said most of the changes were from the comments. The Reporter said the Committee received nine letters on the form and, as a result, the Subcommittee completely rewrote several boxes on the form.

After the Committee discussed setoffs, the Subcommittee proposed revising Box 5, Secured Claim, by adding the phrase "(including a right of setoff)" and the definition of a secured claim on the back of the form by adding "(has a right of setoff)". The Subcommittee also recommended adding the sentence "If all or part of your claim is secured or entitled to priority, also complete Item 5. or 6., below." to box 4. **The Committee agreed to the changes.**

Form 14, Ballot for Accepting or Rejecting a Plan. The Committee did not make any changes to the proposed amendments.

Form 17, Notice of Appeal Under 28 U.S.C. § 158(a) or (b) from a Judgment, Order, or Decree of a Bankruptcy Court. Judge Kressel stated that the form tells the appellant how to elect to have the appeal heard by the district court. He said the form should not give advice to one party but not the other. In response, the Subcommittee prepared alternative drafts of a sentence to be added to the final paragraph. **The Committee chose the following language:** "Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court." Mr. Klee stated that the title of the form and second line of the text should refer to the "bankruptcy judge," not the "bankruptcy court," in order to be consistent with the statute. The Reporter said the change would be consistent with Rule 8001.

The Committee agreed to make the change.

Form 18, Discharge of Debtor. Judge Cristol said printing the explanation of the discharge on the back of the form will increase mailing costs. The Committee discussed whether the phrase "or will decide" should be set off by commas in subdivision "g" on the back of the form. **The Committee decided not to use commas in the subdivision.**

Form 20A, Notice of Motion or Objection; Form 20B, Notice of Objection to Claim. Judge Kressel suggested deleting the phrase "The Committee anticipates that" from the beginning of the second paragraph of the Committee Note. **The Committee agreed to delete the phrase.** Mr. Heltzel said that the notices should state that "Responses must be filed as formal legal pleadings." Mr. Sommer said he was not sure that the Bankruptcy Rules have such a requirement. Mr. Klee said the two forms are inconsistent in the use of the words "lawyer" and "attorney." Mr. Sommer suggested using the word "attorney" throughout the two forms. **The Committee accepted Mr. Sommer's suggestion.** Judge Cristol stated that the notices should state that the original response, not a copy, should be filed with the court. In order to do that, the Subcommittee redrafted three paragraphs of each form. **The Committee approved the revised draft.**

The Committee approved the forms package, as revised, without objection and directed that it be submitted to the Standing Committee for approval at its June meeting.

Effective Date. Ms. Channon reported that she had surveyed private vendors and judicial personnel about the time needed to update their computer software in order to implement the proposed changes in the Official Forms. She said representatives of the private vendors, NIBS, BANCAP, and the Administrative Office's Statistics Division indicated that they could make the changes within 90 days. The only dissenter was the project manager for the Bankruptcy Noticing Center (BNC). Because the BNC contractor customizes notices for each court, the project manager said that, although some or most courts could be ready by January 1, 1998, March 1, 1998, would be a more realistic implementation date.

The Subcommittee recommended an effective date of January 1, 1998, if the amended Official Bankruptcy Forms are approved by the Judicial Conference at its September meeting. The Committee discussed the desirability of an overlap period during which both the old and new forms could be used. The Chairman suggested that the Committee recommend that the amended forms be effective for all purposes on March 1, 1998, and that they could be used on a permissive basis as soon as they are approved by the Judicial Conference. **The Committee accepted his proposal.**

Litigation Subcommittee. Mr. Klee stated that the Litigation Subcommittee began its work as a result of the FJC's survey of the bench and bar concerning the Bankruptcy Rules. He said the survey found that the rules generally function well but that changes were needed in a few areas, including litigation. He said the Part VII rules work well in adversary proceedings, but that the application of the rules is very fuzzy in contested matters. Mr. Klee said the litigation world may be divided into three parts: adversary proceedings governed by the Part VII rules; administrative proceedings under Rule 9014; and administrative motions, which the Subcommittee proposes calling "applications," under Rule 9013. Additionally, motions within adversary proceedings and motions within motions are a separate matter.

Rule 7001. The Litigation Subcommittee recommended one change in the Part VII rules -- amending Rule 7001(7) to permit injunctive relief in a plan or order confirming a plan. Mr. Klee said it is a common practice to include an injunction in a chapter 11 plan or confirmation order despite the requirement in Rule 7001 that equitable relief be obtained by filing an adversary proceeding.

Mr. Sommer said the Committee Note should state that the amendment is not intended to broaden the substantive law. **The Committee agreed to include a statement in the Committee Note that the amendment is limited to circumstances in which an injunction is permitted by substantive law.** The Reporter stated that a party could be "blind-sided" if an injunction were included in the confirmation order without adequate notice in the plan. Mr. Rosen moved to approve the proposed amendment after inserting the word "for" after "provided," deleting the bracketed language "or an order confirming a plan," and revising the Committee Note. **The motion carried without dissent.**

Rule 1007. The Litigation Subcommittee recommended that requests to extend the time to file schedules and statements be left to local discretion rather than being subject to either Rule 9013 or Rule 9014, as revised. The Committee discussed whether to require notice to the trustee and the U.S. trustee. The Reporter said current practice permits extensions to be granted informally, often in open court without notice. Mr. Sommer said requiring notice would avoid the waste of time when the U.S. trustee files a motion to dismiss for failure to file schedules and statements which is moot because the court has extended the time. Other committee members said the U.S. trustee is unlikely to file the motion to dismiss on the first day after the original deadline. **A motion to approve the proposed amendment carried without dissent.** The Reporter stated that the proposed amendment to Rule 7001 could go to the Standing Committee for consideration at its June meeting but that the proposed amendment to Rule 1007 is dependent on the revision of Rule 9013 and should be submitted along with that amendment. **The Committee agreed.**

Mr. Patchan asked that approval of the proposed amendment to Rule 1007 be reconsidered. He suggested that an extension without notice or a hearing be limited to the initial extension or to a limited time. He cited recent testimony concerning "dead on arrival" chapter 11 cases in which delay is the debtor's chief goal. Judge Robreno stated that the testimony was directed to extension of the exclusivity period. **A motion to reconsider failed on a 4-4 vote.**

Rule 1006. The Litigation Subcommittee recommended that requests to pay the filing fee in installments also be excepted from the requirements of Rules 9013 and 9014, as revised. Mr. Sommer stated that the rule should not require a hearing on approval of the request, although that is done in some courts. In her comments on the proposed amendment of Form 3, Chief Bankruptcy Judge Geraldine Mund had suggested that Rule 1006 be amended to bar the debtor from paying a bankruptcy petition preparer, and then requesting to pay the filing fee in installments. The Reporter stated that changes to Rule 1006 should be considered along with the revision of Rules 9013 and 9014. **The Committee agreed to defer the matter.**

Rule 9013. Mr. Klee said the Litigation Subcommittee recommended amending Rule 9013 to provide a routine, perfunctory process for obtaining court approval, without advance notice, of certain types of orders which are likely to be nonsubstantive and noncontroversial. A request for such an order would be called an "application." Mr. Klee briefly reviewed the 14 matters set out in Rule 9013(a).

Judge Robreno asked if a party that receives notice of the entry of a Rule 9013 order could contest the order. The Reporter stated that the amendment was intended to provide for "quasi ex parte" orders that could be entered immediately and challenged later. The judge asked whether this point should be addressed in the Committee Note. The Reporter said that, when he drafted the Committee Note, he was reluctant to include more than a general statement that the entry of such an order does not preclude a party from seeking appropriate relief. The Chairman stated that the note should state that the order could be challenged after the fact. **The Reporter agreed to draft such a statement.** Judge Cordova asked about the meaning of the word "notice" as used in lines 46 and 54. The Reporter said it meant that a copy of the application, the papers filed with it, and the proposed order must be served. **The Committee agreed to substitute "service" for "notice" in the two lines.**

Judge Cordova asked why the Subcommittee called a request for an order under Rule 9013 an "application." Mr. Klee said the term "ex parte" carries bad connotations in bankruptcy and calling the requests "motions" could lead to confusion with motions filed within an application, contested matter, or adversary proceeding. Judge Kressel said he liked bringing back the term "application" because it has connotations for attorneys and implies a simplified process. Judge Robreno asked if the term "application" is used in the Bankruptcy Rules in other contexts. The Reporter stated that certain rules provide for an application, such as an application for compensation, an application to pay the filing fee in installments, and an application for service on an insured depository institution by first class mail.

Judge Robreno asked whether the list of applications in Rule 9013 is exclusive. Mr. Klee stated that the rule only covers the applications listed. The Reporter said the proposed amendment to Rule 9014 would cover all other requests for an order except motions in an adversary proceeding and the specific "carve outs" in Rules 9013 and 9014. Professor Tabb expressed concern that the "default" rule is Rule 9014, which is more complicated than Rule 9013. He said Rule 9013 might eventually include as many as 62 exceptions to Rule 9014. The Reporter said he had tried to list all of the matters to be governed by Rule 9014 and had gotten to almost 100 matters before he quit. Mr. Klee said the Subcommittee decided to err on the side of more notice and a more formal process by making Rule 9014 the "default" rule.

Mr. Sommer said the more uniform procedure set out in Rule 9013 is a good idea and that Rule 9014 is probably the best that could be done in devising a national, uniform motion practice for other types of proceedings. It would be better, however, he said, to leave these proceedings to local rules. Mr. Smith said he thought Rule 9014 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. Judge Robreno asked if it would be possible to approve the proposed amendment to Rule 9013 and allow other proceedings to be governed by the existing rules. The Reporter said deleting existing Rule 9013 would leave no provision for the motions it governs. Mr. Klee said the Committee could keep existing Rules 9013 and 9014 and do a new rule for applications. Judge Donald said the Committee should try for a national rule before falling back on local rules. Mr. Klee asked for a show of hands on the general approach of adversary proceedings for lawsuits, Rule 9013 for applications or ex parte motions, and Rule 9014 for more elaborate motion proceedings, with certain "carve outs." **By a vote of 9-4, the Committee favored this approach.**

Mr. Klee reviewed the subdivisions of Rule 9013(a). There were no objections to subdivisions (a)(1), (a)(2), (a)(5), (a)(9), (a)(10), (a)(12), and (a)(14). Mr. Klee said subdivision (a)(3) includes only conversions under 11 U.S.C. §§ 706(a) and 1112(a) because they are not automatic, as are conversions under 11 U.S.C. §§ 1208(a) and 1307(a). The Committee discussed whether dismissals by the debtor under 11

U.S.C. §§ 1208(b) and 1307(b) should be moved to Rule 9014. The Reporter said the draft tries to avoid taking a position on whether a debtor in chapter 12 or chapter 13 has an absolute right to dismiss. **The Committee voted 8-4 to leave the provision in Rule 9013.** Judge Cristol stated, with respect to subdivision (a)(6), that the statute requires that notice of a Rule 7004(h)(2) motion for service by first class mail must be served by certified mail. **The Committee agreed to delete subdivision (a)(6).** The Committee discussed whether court approval of the election of a chapter 11 trustee should be governed by Rule 9013(a)(7), with parties disputing the election having to seek relief after entry of the order. It was stated that disputed elections are likely to be extremely unusual. **The Committee agreed to leave the provision in Rule 9013.**

Professor Tabb asked the basis for selecting the eight types of matters excluded from subdivision (a)(8). Mr. Klee said they could be high profile, controversial matters. The Reporter said the subdivision does not mirror Rule 9006(b)(3) because the two provisions are based on different concepts. The Reporter agreed to draft a separate provision for setting the time to file claims under Rule 3003(c). **The Committee agreed to add a provision to Rule 9013(a) for limiting notice under Rule 2002(i).** Subdivision (a)(11) depends on the revision of Rule 2004. Mr. Heltzel asked whether subdivision (a)(13) would require notice of the routine, sua sponte closing of a chapter 7 or chapter 13 case. The Chairman said the provision was not intended to apply unless a party files a request for closing or the entry of a final decree. **The Committee agreed to delete subdivision (a)(13).**

The Committee agreed to delete the phrase "under § 105(d)" from line 37 and refer subdivision (b) to the Style Subcommittee. The Committee agreed to change the word "served" to "made" on line 54. Mr. Sommer moved to delete the provision for electronic service in lines 55 - 59. Mr. Heltzel said he generally favored the concept of electronic service, but that it should be done across the board. Mr. Klee said providing for electronic service in Rules 9013 and 9014 would be across the board. **The motion failed on a vote of 6-7.** There were no further comments on subdivisions (a), (b), (c), and (d).

Mr. Heltzel said that Rule 9013(e) would create a whole new category of work for the clerk of court in serving Rule 9013 orders. Mr. Klee said service of the order is important because the predicate for the proposed rule is that parties can seek relief from a Rule 9013 order after its entry. The Reporter suggested revising Rule 9013(e) to require service by the applicant and to delete the reference to Rule 9022. **A motion to do so carried with three dissenting votes**. Judge Cristol moved to approve the Subcommittee's proposed amendments to Rule 9013, as revised. **The motion carried without objection.**

Rule 9014. The Reporter said the draft of Rule 9014 provides for "administrative motions" because so many other rules refer to "motions." Judge Robreno said the draft rule is an attempt to micromanage thousands of cases in dozens of jurisdictions. He suggested setting out general principles in a national rule and letting local rules supply the specifics. Judge Cristol said the 25-day notice of the preliminary hearing required by Rule 9014(c) would be unrealistic in many circumstances. Professor Tabb said the best thing about the proposed rule is its uniformity. The Reporter stated that, viewed as motion practice, Rule 9014 looks like a national rule micromanaging local practice. Viewed as administrative proceedings, a category of litigation closer to adversary proceedings and civil litigation in the district court, however, he said, Rule 9014 does no more micromanaging than the adversary proceeding rules or the Civil Rules. For instance, an objection to a $1 million claim is an administrative proceeding under Rule 9014.

Mr. Kohn said the 10-day period for discovery in subdivision (i)(C) provides an unrealistic time for discovery on a disputed $1 million claim. Instead, he said, the rule should provide a 30-day period for discovery which could be shortened. The Chairman said the rule was drafted for routine matters and that the attorneys in a $1 million case could ask for more time. Several Committee members questioned the determination required by subdivision (j)(1) of whether there is a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a matter of law. Mr. Rosen questioned whether the status conference should be held earlier to avoid wasted effort. Judge Kressel said so many of these matters go by default or stipulation that preparation for an early status conference would outweigh any savings.

Several Committee members said they liked the basic idea of the proposed rule but questioned whether the two-step process in subdivision (h) could be simplified by making the initial hearing an evidentiary one. Mr. Smith moved to permit the court to order an evidentiary hearing on its motion or on the motion of a party with notice to the parties. **The motion carried with three dissenting votes.** The Reporter is to draft the new language. Judge Cordova questioned the title of the rule, "Administrative Proceedings." The Reporter said the rule would create a new class of litigation which is a hybrid between motion practice and a civil action. **The Committee agreed to retain the title.** Professor Tabb moved to strike subdivision (b)(1) and insert "be in writing and" at the end of line 22. **The motion carried. The Committee also agreed to strike the references to oral motions in subdivisions (b)(3), (b)(4), (b)(5), and (c)(1).**

The Committee discussed the provision for relief from procedural requirements in subdivision (o). The Chairman said the court is restricted to waiving the requirements in a particular case, rather than opting out of the rule across the board. **With one dissenting vote, the Committee agreed to retain the provision.** Mr. Heltzel said the court files should not be cluttered with proposed orders. Judge Kressel said requiring the movant to prepare a proposed order makes the movant focus on exactly what relief is wanted. The Chairman said it also lets the respondent know what will happen if there is no response. **The Committee declined to change the provision.**

The Committee discussed whether there should be an exception to the list of supporting documents in subdivision (b)(5) for consent motions. The Reporter said the list of possible respondents in subdivision (c)(1) is long enough that the movant is unlikely to have consents from all of them before filing. Judge Cordova moved to delete line 39. Judge Kressel said requiring a memorandum of law forces the movant to inform himself. The Reporter said line 27 requires that the movant state with particularity the grounds for the relief sought. **The motion to delete carried on a vote of 9-2. The Committee also agreed to delete the requirement for a memorandum of law in line 111.**

Judge Cristol moved to strike subdivision (c)(1)(B). Several Committee members expressed concern that the provision would require a burdensome title search. **The motion carried with one dissenting vote.** Professor Tabb asked whether the Reporter would review other rules to identify provisions which are redundant or inconsistent. The Reporter stated that he plans to review all of the rules. **The Committee agreed to substitute "any" for "the" at the end of line 82.** The Committee discussed whether the 25-day notice period in subdivision (c)(1) should be folded into other rules. The Reporter stated that, unlike Rule 9013 notices, Rule 2002 notices are notices to all parties.

Mr. Smith asked whether obtaining expedited relief concerning a truckload of fresh fish would come

under reduced notice in subdivision (f) or relief from procedural requirements in subdivision (o)? The Reporter said it would normally fall under subdivision (f), but that (o) could be used if needed. Mr. Sommer said the fish might require interim relief under subdivision (g), and that it might be better to incorporate the standard for granting a temporary restraining order instead of using the proposed language. In response to a question about the two-day notice period for motions to reduce time, Mr. Batson said it was included in subdivision (f) in order to prevent one of the parties from being "blind-sided."

After considering other business Friday morning, the Committee resumed its discussion of the reduction of time under Rule 9014(f). The Reporter said the requirement for a separate motion and two days notice of the hearing were included to counter fears of attorney abuse in the reduction of time. Mr. Smith said the subdivision represents micromanaging. He moved to strike the rest of the subdivision after the word "Rule" on line 138. The Reporter said the entire subdivision could be deleted, leaving the reduction of time in administrative proceedings to be governed by Rule 9006(c). Mr. Smith agreed to the change. **The motion carried without dissent.**

Judge Gettleman moved to strike the existing language of subdivision (e) and substitute a provision that an affidavit shall conform to the requirements of Rule 56, Fed. R. Civ. P. **The motion carried with one dissent.** Mr. Sommer moved to strike the phrase "in a pretrial order" in line 194. **The Committee agreed to the change.** Mr. Sommer said the 10-day discovery period in subdivision (I)(1)(C) may not be necessary because the first hearing isn't an evidentiary hearing if discovery is ongoing. Judge Gettleman suggested requiring automatic disclosures but not a Rule 26(f), Fed. R. Civ. P. meeting. The Chairman said some of this is covered by the attachments required at the time of filing. Mr. Sommer said the subcommittee believes truncated discovery is sufficient because the vast majority of these expedited matters are settled.

Judge Cristol moved to include the bracketed language on lines 222 - 227. The Reporter suggested striking the words "appear and" on line 226 so that the courts could conduct these conferences by telephone. Mr. Heltzel said his court has a local rule which states that the word "appear" includes appearing by telephone. Judge Kressel suggested leaving the matter to the courts. **The Committee approved Judge Cristol's motion.** Professor Tabb suggested that subdivision (j)(2) incorporate the provisions of Rule 16(c), Fed. R. Civ. P. rather than listing what may be done at a status conference. The Reporter said the list was included in order to avoid incorporating the provision for referring matters to a magistrate judge. **The Reporter agreed to review whether other exclusions are needed and whether there could be a cross-reference to Rule 16(c).**

The Reporter said there is a special provision in subdivision (j)(3) for relief from the automatic stay because the court must hold at least a preliminary hearing within 30 days. Judge Kressel suggested deleting motions for relief from the automatic stay from subdivision (j)(3). Judge Small favored including stay motions in the subdivision and telling the parties that the court will take testimony at the first hearing. In response to a question by Judge Cristol about the continuation of the stay conditioned on payments by the debtor, the Reporter said the rule does not provide for conditional relief because the statute requires a finding on whether the debtor has a reasonable likelihood of prevailing at the final hearing, not on whether the debtor can pay.

Professor Tabb moved to include the bracketed references to stay motions, to delete the word "shall" in

line 244, and to include the word "may" in line 244. **The Committee approved the motion.** It was moved to delete the word "trial" in lines 206, 242, and 243 and to substitute the word "hearing" in lines 242 and 243 as more appropriate for an administrative proceeding. **The Committee approved the motion.** Mr. Sommer moved to delete line 242 and the first three words of line 243. **The Committee approved the motion.**

Judge Robreno asked about the provision in subdivision (k) that Rule 43(e), Fed. R. Civ. P., which permits testimony by affidavit in motion proceedings, does not apply in administrative proceedings under proposed Rule 9014. The Reporter said Rule 43(e) applies only to motions and that administrative proceedings should be decided on the trial rule, which requires witnesses to testify in open court, not the motion rule. Mr. Sommer said the exclusion may be overly broad because it could apply to motions within administrative proceedings. The Reporter suggested limiting the exclusion to evidentiary hearings. **The Committee deferred the matter to the Reporter, who is to draft limiting language.** Professor Tabb stated that Rule 9022 requires service of notice of the entry of an order while subdivision (l) requires service of a copy of the order. **The Committee agreed that subdivision (l) should track the language of Rule 9022.** Mr. Heltzel suggested providing that the notice may be served by such other person as the court may direct. **The Committee accepted the Reporter's suggestion to defer the matter to a future meeting.**

The Reporter stated that subdivision (m) is redundant of Rule 9034 but instructive. Judge Kressel moved to strike subdivision (m) and the related portion of the Committee Note. **The motion carried with two dissents.** Mr. Patchan stated that some of these proceedings are quite significant and that the Committee Note should refer to the requirement in Rule 9034 for transmission to the U.S. trustee. **The Committee agreed to include the reference in the Committee Note.** Professor Tabb and Mr. Sommer asked the Reporter to review the application of particular Part VII rules to administrative proceedings in subdivision (n). Mr. Kohn stated that the reference to the necessity for expeditious relief in line 267 was too narrow. **The Committee agreed to delete line 267.**

Judge Donald moved to approve the proposed amendments to Rule 9014, as revised, in principle, and to refer the draft to the Reporter for further refinement. In light of the sentiment for going forward and the great deal of work by the Subcommittee, Judge Robreno stated that it gave him great pause to stand on the other side. As an alternative, he suggested striking subdivision (b) and providing that no relief shall be granted under the rule unless the party against whom relief is sought has received notice, had an opportunity to take discovery and present evidence, and has been afforded an opportunity to cross-examine witnesses. Several Committee members said they favored publishing the proposed amendment for comment but questioned whether national uniformity in motion practice is better than existing local rules. **The motion to approve the proposed amendments carried without dissent.**

Style Subcommittee. The Reporter presented the report of the Style Subcommittee which reviewed proposed amendments to 14 rules approved at the September 1995, March 1996, and September 1996 meetings, subject to review by the Subcommittee. The Subcommittee recommended a number of "global changes" including the use of the word "under" instead of "pursuant to," the phrase "no later than" instead of "not later than," the words "after" and "before" in place of "following" and "prior to." In addition, the phrase "of the Code" is used only the first time a Bankruptcy Code section appears in a rule. The Style Subcommittee revised each new 10-day stay provision with respect to certain court orders so that it stays the relevant court order, rather than the particular conduct of a party.

The Reporter suggested striking the phrase "a contested matter" on page 7 so that the Committee Note would apply regardless of how Rule 9014 is titled. **The Committee agreed to make the change.** Judge Kressel said substituting the word "is" for "shall be" on line 2 of Rule 3020, line 7 of Rule 4001, line 4 of Rule 6004, and line 4 of Rule 6006 would make the meaning clearer. **The Committee agreed to make the change.** Mr. Sommer asked why the proposed amendment to Rule 1017(b)(1) refers only to dismissals of chapter 7 and chapter 13 cases. **The Committee agreed to strike the phrase "under § 707(a)(2) or § 1307(c)(2)" on lines 18 - 19.**

The Committee approved the proposed stylistic changes, as revised. The Reporter said the proposed amendments will be presented to the Standing Committee at its June 1997 meeting with a request for publication.

Service of Process in a Foreign Country. The Reporter stated that amendments to Civil Rule 4 and Bankruptcy Rule 7004 in recent years had inadvertently extended to service in a foreign country, by cross references, the requirement for service of a summons in an adversary proceeding within 10 days of its issuance. The Reporter proposed amending Rule 7004(e) to provide that the 10-day limit does not apply if the summons is served in a foreign country. **The Committee approved the proposed amendment and agreed to include it in the package of amendments to be presented to the Standing Committee in June 1997.**

Adjustment of Dollar Amounts. Mr. Sommer stated that it might be desirable to provide for the automatic adjustment of the dollar amounts in the Bankruptcy Rules for inflation. In particular, he said, the $500 figure in Rule 2002(a)(6) should be increased to $1,000 because attorney fees are almost always higher than $500. The Committee discussed whether the $500 threshold applies to a single fee application, the aggregate of all fee applications in a particular case by a professional, or all of the fee applications in the case on for hearing at the same time. **The Committee agreed to defer the matter to the September meeting.**

Notice to Governmental Agencies. At its meeting in March 1995, the Committee considered proposals submitted by Mr. Kohn relating to problems that the federal government has been experiencing with notices in bankruptcy cases, and also discussed proposed amendments to Rule 6007 designed to give the Environmental Protection Agency notice of a contemplated abandonment of property. Although the Committee expressed concerns, it did not adopt any of the proposals at the March 1995 meeting. Instead, the chairman, Judge Paul Mannes, asked Mr. Kohn to prepare a revised proposal for the Committee to consider. In response, at the March 1997 meeting, Mr. Kohn submitted six proposals, and the Reporter drafted an alternative suggestion for amending Rules 1007, 2002, and 5003. In addition, David B. Foltz, Jr., a Houston attorney, proposed a new Official Bankruptcy Form entitled "Environmental Statement" and several rules amendments on disclosure and notice to governmental units relating to environmental matters.

Mr. Kohn said his first proposal is intended to address two problems: identifying the specific government agency with a claim and, if the agency has identified a specific address for notices, using that address for mailing notices. He said his proposal, which included amendments to Rules 1007, 2002, and 5003, would benefit both the government and the debtor by avoiding disruptive last-minute claims or no government claim at all. The Reporter stated that the proposal had been expanded from the federal government to all governments, state federal, and foreign, since the 1995 meeting. Mr. Kohn said he saw no problem with extending the use of the registry to be maintained by the clerk under the proposed amendment of Rule

5003 to large, institutional creditors.

The Committee discussed whether the debtor's failure to use a governmental agency's address in the registry would make the debt nondischargeable. The Reporter stated that the debtor is already responsible for giving the government reasonable notice, but that it might be easier for the government to argue that the debt should be nondischargeable if the debtor failed to use the address in the registry.

Mr. Sommer said he was most concerned about pro se debtors who owe taxes. He said the schedules should be revised to include an instruction to use the addresses filed in the clerk's office for government claims. The Reporter said such a change could be coordinated with the rules amendments. Judge Kressel stated that the Reporter's draft amendment to Rule 2002(g) would require the clerk to use the registry address even if the debtor uses the wrong address in the matrix. Mr. Heltzel said its impracticable for the clerk to review the list of creditors in every case and check state, federal, and local governmental agency addresses against the addresses in the registry. Mr. Kohn said he believed page 4 of his proposal imposed the duty to use the registry only on the debtor. The Reporter said he could revise his draft to make the use of the registry address mandatory only for the debtor and only if known to the debtor.

The Committee discussed whether computer screening could be used to correct the addresses for governmental agencies. Mr. Heltzel said his office uses a screening process for electronic notice to the Internal Revenue Service. He stated that the process is practicable for a few creditors with a limited number of possible addresses but that his office couldn't screen dozens of addresses for hundreds of state, federal, and local agencies and possible spellings of their names. He said his district covers 38 counties and that the debtor could have claims by governmental agencies in other states, too.

Professor Tabb stated that he was concerned that private creditors would insist on the same treatment as the government. The Committee discussed whether the public interest in collecting government revenue and the debtor's personal, contractual relationship with nongovernmental creditors are sufficient grounds for distinguishing between notice to governmental and nongovernmental entities.

The Chairman suggested referring the matter to a subcommittee chaired by Judge Small and including Judge Cristol, Mr. Kohn, Mr. Sommer, Mr. Heltzel, and Professor Tabb. Several Committee members said the subcommittee should explore notice to both governmental and private entities. Mr. Smith stated that the subcommittee should address the substantive issue of the debtor's discharge. The Reporter said the proposal might be modified to require the debtor to identify governmental agency creditors, to direct the establishment of a registry to be maintained by the clerk, and to state that the debtor should use the addresses in the registry. If the debtor doesn't use the registry, he said, the adequacy of the notice would depend on the common law. **The Committee agreed to refer the matter to the subcommittee, which is to report back at the September meeting.**

Rule 2004. The Reporter stated an FJC study disclosed that the bankruptcy bench is divided between judges who consider Rule 2004 motions ex parte and those who consider such motions on notice. The matter has been discussed at previous Committee meetings and was referred to the Rule 2004 Subcommittee, which recommended requiring notice and a hearing before a Rule 2004 motion is granted.

Judge Cordova said the proposed amendment gives the subject of the examination two opportunities to object: once before entry of the order and once after the entry. Mr. Kohn suggested the hybrid approach utilized in the Northern District of Iowa in which a Rule 2004 order can be entered ex parte if the parties agree in advance on the scope of the examination. Mr. Batson said the parties are unlikely to come to such an agreement in New York or Atlanta. Judge Small said the orders could be entered on an ex parte basis if there is sufficient time to object before the examination. He said it is pointless to go through the advance notice process when there will be no objections to 99 percent of the motions. Judge Kressel said he opposes ex parte orders generally, even if they tend to be noncontroversial.

Judge Robreno said Rule 2004 examinations are intended to be fishing expeditions and that vesting a party with that type of power without a hearing raises questions. Judge Cristol said advance notice would require thousands of additional docket entries in his district. Mr. Patchan said there have been abuses of the Rule 2004 process in some places, including attempts to use the examinations in adversary proceedings. Mr. Heltzel said he has heard more and more allegations of credit card companies using abusive tactics to harass pro se debtors. The Committee discussed whether there should be special protections for pro se debtors or for third parties ordered to undergo an examination.

The Committee agreed to send the matter back to the Rule 2004 Subcommittee. The Committee also agreed not go forward with the separate amendment to Rule 2004(c) approved in 1995 so that the two amendments could be submitted to the Standing Committee with a request for publication at the same time.

Rule 2014. The Reporter said the proposed revision of Rule 2014 was prepared in response to concerns about the disclosure requirements for employing professionals and because the current rule may have become unworkable as both bankruptcy cases and law firms have gotten bigger. He said the draft attempts to clarify the disclosure requirements and to add procedures for the motion practice. The Reporter stated that the draft subdivision (b)(3) is taken from the Bankruptcy Code's definition of "disinterestedness" but, in some circumstances, may require less disclosure than the current Rule 2014. Judge Cordova stated that any rule must comply with the statute. Mr. Smith said the rule could go beyond the statute.

Mr. Smith said the rule should require that the attorney disclose anything that affects the quality of representation requested. The Reporter noted that the Committee has been asked in the past for a "safe harbor" for disclosure. Instead, he said, the proposed amendment provides for interim employment orders. Professor Tabb asked what standard would be applied in considering interim employment motions. The Reporter said the proposed rule does not specify the standard but that the judge would have the information in the motion for permanent employment and the professional's verified statement.

Judge Stotler asked why the rule referred to employment by a trustee or committee while the Committee Note referred to employment by a trustee, debtor in possession, or committee. The Reporter stated that throughout the Bankruptcy Rules the word "trustee" includes debtors in possession as well as trustees. The Chairman suggested that the time for filing a supplemental statement under subdivision (f) be shortened to five days. Judge Cordova suggested referring the proposed amendment back to the Rule 2014 Subcommittee with general approval of the procedural aspects of the draft. **The Committee agreed to the referral.**

Subcommittee and Liaison Reports

Alternative Dispute Resolution Subcommittee. Professor Tabb said the Alternative Dispute Resolution (ADR) Subcommittee recommended requesting that the FJC conduct a national survey of the use of ADR in bankruptcy cases. He said the survey could identify good ideas in local rules for new national rules and any particular problems such as, perhaps, ex parte contacts or breaches of confidentiality that should be addressed by the rules. Mr. Niemic said the survey would include all bankruptcy judges, a sample of attorneys, and attorney mediators in the courts which have ADR programs.

Mr. Niemic said 24 bankruptcy courts have formal ADR procedures established by local rules, general orders, or other means and that all of these courts have mediation programs. Nine of the 24 courts also utilize other ADR procedures. He also discussed ADR initiatives by groups within the American Bar Association and the American Bankruptcy Institute. **The Committee agreed to request that the FJC proceed with the survey.**

Subcommittee on Technology. Judge Cristol said proposed technical standards for electronic filing have been circulated for comment. He said February 14, 1997, was the deadline for comments but that he has not yet seen the comments. Ms. Channon said she had hoped to have copies of the executive summary of a draft report on the Electronic Case Files (ECF) Project for the Committee, but that they were not available in time for the meeting. She said she would make sure that any interested member of the Committee would receive a copy.

Mr. Sommer suggested that the Technology Subcommittee consider electronic service before the Committee's next meeting. The Reporter asked if there was any reason for this Committee's Technology Subcommittee to refrain from studying electronic service and the ECF paper because the Standing Committee's Subcommittee on Technology is considering the same matters. Judge Stotler said she encouraged every member of the Committee to consider the paper because the more people considering these issues the better. **The Committee agreed that the Technology Subcommittee should study electronic service.**

Subcommittee on Local Rules. The Chairman said he intends to leave the chair and membership of the subcommittee vacant. Ms. Channon said she receives about three calls a week about uniform local rule numbers, and that the renumbering appears to be progressing well.

Subcommittee on Forms. Ms. Channon said the revised Bankruptcy Forms Manual will include, for the first time, the Official Bankruptcy Forms and instructions for their use. The manual also will include Director's Forms and updated instructions from the 1988 version of the publication. She said Committee members are welcome to read the draft manual and comment on it. Professor Tabb expressed the Committee's gratitude to Mr. Sommer and Ms. Channon for their yeoman's work on revising the Official Forms.

Subcommittee on Rule 2014 Disclosure Requirements. Mr. Smith stated that he hoped that this Committee will try to draft rules on the conduct of attorneys in bankruptcy cases or at least begin to focus on the issues. He said the threshold issue is whether the Committee has authority to propose rules on

matters such as when an attorney is qualified to represent the debtor, trustee, creditors' committee, or equity security holders' committee; when an attorney can represent multiple parties in bankruptcy; and how to apply state rules that would disqualify an attorney.

The Chairman asked whether any of the advisory committees has ever undertaken to write what amounts to a code of conduct for attorneys. Professor Coquillette said there have been some national rules and a number of local rules. He stated that it is appropriate for this Committee to undertake such a project. Mr. Sommer asked what the Standing Committee is doing in this area. Professor Coquillette said it may draft a model local rule or pick narrow areas and promulgate national rules. He said it would be helpful to have a model bankruptcy rule to consider and to have this Committee's thoughts on whether a rule for the district courts should be extended to the bankruptcy and appellate courts. **The Chairman asked the Subcommittee to expand its work to include consideration of Mr. Smith's suggestions.**

Professor Coquillette requested that the chairman establish a mechanism for the Standing Committee's Subcommittee on Attorney Conduct to communicate with this Committee. **The Chairman appointed Mr. Smith as a liaison.**

Liaison to Advisory Committee on Civil Rules. The Chairman stated that he will serve as this Committee's liaison with the Advisory Committee on Civil Rules in the future, but that Judge Robreno will represent this Committee at the Civil Committee's next meeting.

Respectfully submitted,

James H. Wannamaker, III

Bankruptcy Judges Division