ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 27 -28, 1999
Jackson Lake Lodge, Moran Junction WY

Minutes

The following members attended the meeting:

District Judge Adrian G. Duplantier, Chairman
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
Eric L. Frank, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Eduardo C. Robreno, Leonard M. Rosen, Esquire, and R. Neal Batson, Esquire, were unable to attend the meeting. Circuit Judge A. Wallace Tashima, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), Bankruptcy Judge Frank W. Koger, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy 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 James D. Walker, Jr., and Howard L. Adelman, Esquire, appointed to the Committee for terms beginning October 1, 1999, 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, Consultant to the Committee; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center ("FJC"). In addition, David M. Poitras, Esquire, a member of the American Bar Association's General Practice, Solo and Small Firm Section, 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 the Secretary to the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Committee approved the minutes of the March 1999 meeting.

The Chairman welcomed Judge Walker and Mr. Adelman, newly appointed members, the guests present, and noted with thanks the service of the members whose terms were expiring: Judge Robreno, Judge Small, Mr.Smith, and Mr.Batson. He also informed the Committee that Professor Resnick, the Committee's Reporter, would be retiring as Reporter and joining the Committee as a member. He announced that Professor Morris, a

consultant to the Committee for the past year, would be the new Reporter.

The Chairman and Professor Resnick reported on the actions taken at the June 1999 meeting of the Standing Committee. The proposed amendments submitted by the Committee were approved for transmittal to the Judicial Conference. The draft amendments which the Committee requested permission to publish for comment also were approved for that purpose. Amendments to Rule 5 of the Federal Rules of Civil Procedure (Civil Rules) to permit service of papers after the initial complaint by electronic means, which the Committee had discussed at the March 1999 meeting, also were approved for publication. If adopted, they would permit similar electronic service in adversary proceedings. There was a division of opinion among the advisory committees over whether to afford parties who receive service electronically the additional three days for response currently available when service is made by mail. Accordingly, the proposed amendments to Civil Rule 6(a) and Bankruptcy Rule 9006, as published, are not consistent.

The Standing Committee also approved and forwarded to the Judicial Conference proposed amendments to the Civil Rules on discovery. Under the proposed amendments, a mandatory disclosure requirement narrower than the scope of the present Rule 26(a) would become the national rule, although a court could order otherwise in a particular case. The current provision allowing a district to opt out of mandatory disclosure by local rule would be deleted. The Reporter noted that Rule 9014 makes Rule 26 applicable in contested matters unless the court orders otherwise and suggested that the Committee may want to address Rule 9014 in connection with this issue. The amendments to the Civil Rules were approved by the Judicial Conference in mid-September, with the exception of a proposed amendment to Rule 26(b)(2) which would have allowed "burdensome" discovery at the expense of the requesting party.

Judge Kressel said the Committee should consider promptly the matter of mandatory disclosure, both as an amendment to Rule 9014 and in adversary proceedings, because of the time issues that pervade bankruptcy cases. Professor Resnick noted that Bankruptcy Judge Louise DeCarl Adler had written a letter stating that mandatory disclosure should not apply in adversary proceedings involving less than a certain dollar amount.

The Chairman reported that the Standing Committee had approved a resolution of appreciation for Professor Resnick and his extraordinary contributions to the rules and the work of the rules committees over his 12 years as Reporter. Judge Duplantier presented Professor Resnick with an illuminated rendering of the resolution. Professor Resnick expressed thanks for the opportunity to work with four chairmen of the Committee and with the more than 40 Committee members during his service as Reporter. He said he also was grateful to the chairs and members of the Standing Committee, to its Reporter, Professor Coquillette, and to the reporters for the other advisory committees whom he had gotten to know. He also thanked the Administrative Office staff for their support and congratulated Professor Morris on having accepted a rewarding post.

The Chairman said the Standing Committee had asked the various advisory committees to study the issue of judicial conflicts of interest and divestiture/recusal requirements, a subject which had received extensive press coverage over the prior year. He said that public interest groups had paid to obtain the financial disclosure statements of many district judges. Rule 26.1 of the Federal Rules of Appellate Procedure (Appellate Rules) requires any nongovernmental corporate party to an appeal to list all its parent corporations and any publicly held company that owns ten percent or more of the party's stock. The Standing Committee had asked the advisory committees to consider specifically whether a similar rule should be in all the federal rules, he said. Professor Resnick said the reporters already are scheduled to meet at the January 2000 Standing Committee meeting to prepare a common draft.

Professor Klee said the difficulty in bankruptcy will be similar to that in a civil class action: too many parties all making disclosures that must be checked. Judge Duplantier said that is part of judging, and the judge must read them all. Professor Resnick said that the bankruptcy rule probably could limit the duty to disclose to parties involved in adversary proceedings and contested matters. The proof of claim form could be modified to require the disclosures, but this approach might not be effective, as judges normally do not see the proofs of claim. Judge Cordova said the filing of a proof of claim generally is too broad a test, that conflict-checking

should await the filing of an objection to a claim. Professor Klee said Rule 3001 also should be amended to require a claims purchaser to disclose its corporate parents, because claims purchasing can be used strategically to disqualify a judge.

Judge Cristol said there should be carve-outs for holdings of entities like Blue Cross and public utilities, but Judge Duplantier said the rule could not change the statute, which disqualifies a judge from sitting in a case if the judge holds a single share of stock in a party. Judge Kressel said that Appellate Rule 26.1 would not pick up partnerships and other important connections. Judge Duplantier said he believed any new rule would be broader than the current one. Professor Klee said Rule 26.1 would not create a problem because it is very narrow; his concern, rather, would be with a broader sweep. Judge Gettleman said the simple solution for a judge is to sell

the stock in question when a conflict is discovered. He noted that the frequency of conflicts is increasing with corporate fluctuations and that partnerships which include corporate partners are particularly difficult to monitor for conflicts. He said he would like to see a conflict-checking software program combined with electronic filing.

Judge Tashima said that judges need software similar to that used by law firms to perform conflicts checks and an entity should become a party to which the disclosure requirement would apply only when the party makes an appearance or takes action in the bankruptcy case. Mr. McCabe described a judicial conflict-checking software program originally developed by the district court in Maine and now being distributed by the Administrative Office to any court that requests it. The program runs overnight to check against new filings, but depends ultimately on up-to-date information from judges about their holdings to be fully effective. A conflict-checking function will be included in the Case Management/Electronic Case Files systems now being developed for the federal courts.

Judge Duplantier said that disclosure is all that is being discussed, and it is very simple. What happens after the disclosures are filed is not a concern of the rules, he said. Mr. Smith and Professor Klee pointed out that in a chapter 11 case scheduled claims are allowed and that, if any rule were too broadly stated, the debtor might be required to make the disclosures but not have the information.

The Chairman said he would inform the Standing Committee that the Committee approves in principle the adoption of a general rule to require disclosure of corporate parents and partnership members. He said any bankruptcy problems seem to resemble the ones in civil class action cases and are not insurmountable. He said the Committee should plan on responding to a proposed common draft at its next meeting and could include any special bankruptcy considerations at that time.

Mr. Smith reported on the activities of the Ad Hoc Committee on Attorney Conduct of the Standing Committee. He said the group is still considering whether to propose any federal rule or rules governing attorney conduct, but appears to be moving toward a rule that would expressly make applicable the rules of the state in which the trial court is located, subject to some exceptions. He said the group appeared ready to allow the Committee some leeway in determining the exceptions that would apply in bankruptcy representation. He said it is important for the Committee to continue grappling with the core issues: defining what is an adverse interest in the bankruptcy context, and establishing when a chapter 11 debtor's counsel may become adverse. The Ad Hoc Committee had a meeting scheduled for the day after the Committee meeting, he said, and there would be further developments to report at the March 2000 meeting.

Judge Kressel reported on his attendance at the June 1999 meeting of the Bankruptcy Committee. He said the Bankruptcy Committee members were impressed that the Committee had been willing to change its mind about the effort to nationalize motion practice. The Bankruptcy Committee discussed a proposal to amend the bankruptcy judge recall service regulations to permit recalled judges who serve on bankruptcy appellate panels (BAPs) to hear cases from the districts in which they formerly served, he said. The Bankruptcy Committee, however, determined that considering appeals from a district the recalled judge formerly served in would be

inappropriate, even though the statute (28 U.S.C. § 155(b)) seems not to prohibit it. The Bankruptcy Committee also approved changing the bankruptcy appellate structure to add a method for direct appeal to the circuit, bypassing the district court or BAP, at the option of the circuit and on certification from the district court or BAP that the matter presents an important question of law. At its September 1999 session, the Judicial Conference also had approved the proposal to add the direct appeal option, he said.

The Reporter discussed the pending bankruptcy reform legislation, which could be enacted either before this session of Congress ends or early in the next session. Both the House and the Senate bills contain provisions requiring new official forms in small business chapter 11 cases, including monthly operating reports, disclosure statements, and plans, he said. Mr. Patchan had offered to assist in developing these, and three United States trustees had met with Professor Resnick in New York in anticipation of the enactment of legislation. The trustees had provided Professor Resnick with copies of existing disclosure statement forms used, or proposed to be used, in five United States trustee regions. Mr. Patchan's office also has copies of operating report forms currently in use, he said, and all of these can be used as the basis for any statutorily-mandated forms. Mr. Patchan said his office had prepared a draft set of proposed national forms derived from various local forms, that copies had been sent to the meeting, and that he would welcome any reactions and comments from Committee members.

Action Items

Rules 9013 and 9014. The Reporter introduced the proposed amendments to Rule 9013 and reviewed their history. The Committee's intent in publishing a draft amendment in 1998 had been to provide guidance to the courts and the bar on matters that usually are routine and uncontested but require a court order and to specify a procedure by which the court could consider and act on such matters ex parte. This proposal had been generally well received, but did not go forward because it was part of a larger package of amendments which the Committee had withdrawn for further study.

Professor Resnick said that Mr. Rosen, who could not attend the meeting, had made a style suggestion concerning line 3 of the draft that would change the first two words from "when an application is authorized" to "made in an application authorized." The Reporter's suggested changes to the existing Rule 9013(a), he said, are all stylistic except in line 6 where the Reporter had inserted "and a hearing" so that a motion generally would be considered "after notice and a hearing" as that phrase is defined in § 102 of the Bankruptcy Code. Proposed Rule 9013(b), he

said, contains a list of matters that could be decided with no prior notice to other parties, matters that would be relatively easy for a court to undo in the event a party were to file a motion to reconsider or vacate.

Concerning the proposed amendments to Rule 9014, the Reporter explained that the purpose of referring to Civil Rule 5 rather than Bankruptcy Rule 7005 is to make it clear that the methods of service authorized, including the proposed authorization of electronic service, apply only to the serving of papers filed after the initiating motion. Rule 9014(d) addresses the use of affidavits, and Rule 9014(e) requires the court to provide notice procedures concerning whether to bring witnesses to a hearing, he said.

A member asked whether the Committee should eliminate the word "application" from the rules, so that every request for court action would be a motion. Another member observed that once "and a hearing" is added to Rule 9013, there really is no difference between Rule 9013 and Rule 9014. The Reporter acknowledged that the terminology is inconsistent and agreed that the inconsistencies make distinguishing between the two rules more difficult. Judge Duplantier suggested changing the phrase to "an opportunity for a hearing" as in Rule 9014. The Reporter said "notice and a hearing" is defined in § 102 of the Code to mean an opportunity for a hearing. Judge Kressel said the phrase should be deleted from Rule 9014 . Professor Klee said the use of the word "service" also is used inconsistently in Rules 9013(a) and (b) and 9014. In addition, he said, the list of matters in Rule 9013(b) is non-exclusive, and judges might be encouraged to determine more and more matters ex parte. The Reporter said the Committee could simply leave Rule 9013 as it is, so that whether a matter could

be determined ex parte would be in each court's discretion. He noted that Rule 9013 as published did not have a list of ex parte matters, that the list was an idea that had come up at the March 1999 meeting, and that perhaps the Committee was again falling into the trap of trying to micro-manage procedure. **A motion not to amend Rule 9013, but leave it as it presently is, passed by a vote of 9 to 3.**

Judge Tashima said that proposed Rule 9014(d) should state explicitly that direct testimony of a witness can be in an affidavit so long as the witness is available for cross examination, but if the Committee disagrees, that the Committee Note should mention that direct testimony by affidavit is permitted in some circuits, citing In re Adair, 965 F.2d 777 (9th Cir. 1992). Judge Duplantier said he opposed the suggestion, and that affidavits should not be admitted as testimony at trial. With respect to proposed Rule 9014(e), Professor Klee said the bracketed language on line 26 should be included so that any notice of an evidentiary hearing would go to the witnesses as well as the attorneys. Judge Cristol suggested simply stating that any notice of a hearing must inform the recipients whether the hearing will be an evidentiary one.

A motion to accept Rule 9014 as drafted, including subdivisions (d) and (e) but without the bracketed language in line 26, passed with no opposition.

Mr. Frank observed that there remains a gap in the rule concerning who must be served and asked whether that is intentional. The Reporter said the draft is deliberately silent in response to public comment criticizing the service list in the previously published draft. There was no consensus to delete the phrase "opportunity for hearing" from subdivision (a). A member suggested that a sentence be added at the end of subdivision (a) permitting the movant to request a response to a motion. Judge Duplantier suggested deleting "under this rule" from line 4 as a matter of style. Professor Klee questioned the phrase "the court directs" rather than "the court orders," and the Reporter said he had used "directs" so that a court could use a local rule to require a response to a motion, rather than having to order a response in every instance.

Rule 1006. The proposed amendments had been approved for publication previously and were published in 1998, although they were unrelated to the amendments to Rules 9013 and 9014. A member questioned the provision in the rule that forbids paying an attorney until the filing fee has been paid in full and said the provision appears to be substantive. The Reporter agreed that the provision is substantive, although it has been in the rule for a long time. He added that Henry Sommer, a former member of the Committee, often had said a debtor should not have to apply to the court, as the right to pay in installments is granted by statute in 28 U.S.C. § 1930. After discussion, **the Committee determined not to forward the proposed amendments to the Standing Committee and requested the Reporter to prepare a memorandum concerning the rule generally.** The memorandum would cover the following points: whether the provision forbidding payment to an attorney is substantive and, therefore, violative of the Rules Enabling Act, whether the present rule actually favors petition preparers and encourages debtors to use them, the regulation of petition preparers under § 110 of the Code, and ways to safeguard debtors against being punished for using a petition preparer. Mr. Patchan suggested amending the form to require disclosure of the amount paid to a petition preparer and added that the United States trustee program is preparing to issue guidelines on petition preparer fees.

Rule 2004. The amendment to Rule 2004(c), previously approved by the Committee and published for comment, makes it clear that an examination under the rule can be held outside the district where the case is pending. Mr. Kohn suggested that it would be useful to add to the Committee Note the language concerning the issuance of a subpoena by an attorney admitted pro hac vice from the Committee Note to the 1991 amendments to Civil Rule 45. **A motion to include the suggested language in the Committee Note to Rule 2004 carried unopposed.**

Rules 1004 and 1004.1. Professor Morris had prepared draft amendments and a memorandum on the capacity of infants, incompetent persons, and corporate and partnership entities to file bankruptcy for the March 1999 meeting. The Committee considered these briefly at that meeting and postponed further consideration. The Committee also had requested Professor Morris to consider the question of making Civil Rule 17 applicable throughout the Bankruptcy Rules, rather than only in adversary proceedings as it currently is under Rule 7017.

He said it is important in working with Civil Rule 17 to avoid drafting a substantive rule that could be construed as conferring a right or capacity to file a bankruptcy petition by an entity -- a corporation, for example.

Professor Resnick said that if the bankruptcy rules were to make Civil Rule 17(b) applicable beyond adversary proceedings, some states likely would pass laws making corporations bankruptcy-proof, and there is no evidence before the Committee that corporations are encountering challenges to their right to file bankruptcy petitions. Professor Klee said various problems, such as deadlocked boards of directors and bankruptcy-remote state laws, do not currently raise rules questions but would do so under the draft amendments concerning corporations. He also said it does not make sense for the rules to treat partnerships without also treating corporations, limited liability corporations, and limited liability partnerships. **The Committee determined not to go forward with a rule on filing by a corporation and asked the Reporter to study whether to delete existing Rule 1004(a), filing by a partnership, with a Committee Note stating that the question is left to substantive law** (which could be either the Bankruptcy Code or state law).

The Committee discussed redrafting proposed Rule 1004.1, concerning filing a petition for an infant or incompetent person, to track the language of Civil Rule 17(c) more closely, keeping the changes only to those necessary to replace the word "sue" in Rule 17(c) by "file a voluntary petition," and stating in the Committee Note that the bankruptcy rule merely tracks the existing civil rule. **A motion to alter the draft as discussed was not opposed.** On the second day of the meeting, the **Committee agreed to add the words "not otherwise represented" at the end of the draft rule.**

Rule 2014. Mr. Smith introduced the proposed amendments recommended by the Subcommittee on Attorney Conduct, including Rule 2014 Disclosure Requirements. He noted that the amendments specify that a professional seeking approval of employment must disclose any interest, representation, or relationship that bears on whether the applicant has an interest adverse to the estate or on whether the applicant is disinterested. The proposed amendments also substitute "interest or relationship relevant" to determining disinterestedness for the existing "connections." The proposed amendments, however, still fail to provided guidance concerning what is a disqualifying interest or relationship, he said. Mr. Smith said there is no definition of "adverse interest" in the Bankruptcy Code or the Bankruptcy Rules and the unmodified word "connections" is too broad. The bar needs guidance on what to disclose, he said. Mr. Smith said he would like the rule to provide this kind of guidance, but that it probably would take several more years to develop a workable rule.

Professor Resnick said the proposals to amend Rule 2014 began after In re Leslie Fay Companies, Inc. , 175 B.R. 525 (Bankr. S.D.N.Y. 1994). Several courts have indicated that lawyers must disclose all connections without screening out those that the lawyers believe are irrelevant, he said. Thus, it is not the lawyer but the judge who determines what is disqualifying. The new draft would change "setting forth the person's connections" with no limitations to "relevant to a determination that the person is disinterested," which would allow the lawyer to screen out connections that are obviously irrelevant. The judge could still disagree and rule that a particular connection is relevant, but the initial disclosure decisions would be made by the lawyer, he said.

Mr. Adelman commented that as the word "connection" is used in § 101(14) of the Bankruptcy Code, it is only connections with the debtor or an investment banker of the debtor that taint prospective counsel. In his view, he said, it also is important to know that counsel had been retained by a prior board of directors or had brought in the same accounting firm in prior cases, yet such disclosures are not required now. Mr. Smith said there might be ways to avoid an adverse interest problem if debtor's counsel and the debtor were to agree to engage special counsel to determine whether to sue the creditor that debtor's counsel's firm represents in unrelated matters. In response to questions concerning the reason for requiring in the rule a broader range of disclosures than seems to be required by the Bankruptcy Code, Mr. Smith agreed that an admirable principle can be impossible to carry out in practice. As examples, he said a debtor's law firm must conflict-check more than every creditor; it must also check every ongoing contractor of the debtor, relationships anyone in the firm may have with attorneys and accountants for every creditor, and relationships anyone in the firm may have with

any landlord of any of a retail debtor's 400 stores. Mr. Patchan said that at the time the rule originally was drafted there were major ethical problems in bankruptcy practice. Also, at that time, he said the bankruptcy practice mostly was confined to small, boutique firms, rather than the large, full service firms that are active in bankruptcy now.

The Chairman noted that Mr. Smith's term on the Committee would be ending and thanked him for his thoughtful work as subcommittee chairman. The Chairman said the subcommittee should continue its work under a new chairman to be appointed.

Rule 2002(h). Professor Resnick said the proposed amendment had been suggested by Bankruptcy Judge Arthur J. Spector and he reviewed the Reporter's memorandum in which he pointed out that adopting the suggestion to automatically discontinue notices to creditors who miss the claims filing deadline could be ill-advised. The memorandum notes that creditors entitled to priority under § 507 can be paid regardless of whether they file their claims before the deadline, and in certain circumstances general unsecured creditors can be paid if they file a claim before distribution begins. The Reporter suggested that if the Committee wants to amend the rule to save noticing costs, a better approach would be to amend Rule 2002(h) to automatically cut off notices to creditors who miss the deadline, unless the court orders otherwise. **By consensus, the Committee decided to take no action.**

Judge Gettleman noted a second issue contained in Judge Spector's letter, that of restricting the time periods in the rules to 7, 14, and 21 days, so that the time for taking action always would expire on the same day of the week as the filing or ruling to which the party would be responding. The Reporter said the Committee had discussed the idea previously, so he had not written a memorandum on it for this meeting. Judge Gettleman said many courts' local rules are using the uniform one-week, two-week, approach and that he would like to revisit the matter.

The Chairman asked the Reporter to prepare a report on what the time limits are now in the various rules, although the Committee has no immediate plans to amend Rule 9006.

Rule 9027. Bankruptcy Judge Christopher M. Klein had suggested that the rule should provide for notifying the nonbankruptcy court from which an action was removed of the entry of a remand order. In addition, Judge Klein had pointed out that the rules do not establish any time limit for removal of an action that may be filed after a bankruptcy case is closed. The Reporter had drafted an amendment to Rule 9027 that would direct the clerk, after the ten-day period to appeal had expired, to mail a certified copy of the order of remand to the clerk of the court from which the claim or cause of action was removed. The proposed amendment also included a sentence stating that the action then could proceed in the court from which it was removed except as otherwise directed by the court issuing the order of remand. Judge Kressel said that if the debtor is a party to the removed action, the sentence authorizing the court from which the matter was removed to resume the proceeding would violate the automatic stay. The Reporter suggested deleting the final sentence to remove any idea that an order of remand acts to lift the automatic stay. Judge Kressel also said he did not think the ten-day stay was necessary. The Reporter said it serves to recognize the participation of the Article III district court in the process, and that 28 U.S.C. § 1452 provides that an order of remand by a bankruptcy judge is subject to district court review. A motion to delete the ten-day stay was not acted upon. After a discussion about whether to specify or leave ambiguous which clerk -- bankruptcy court clerk or district court clerk -- should notify the court from which the action was removed, a motion to leave the word "clerk" unmodified also was not acted upon. **A motion to adopt the Reporter's draft except the final sentence passed on a voice vote.**

On the matter of removal after a case is closed, the Reporter said there appeared to be various options for amending Rule 9027(a)(3) to insert phrases such as "or is closed," "is or was pending," or "is pending or has been dismissed or closed." Professor Klee said a case might also be suspended if the bankruptcy judge has abstained under § 305 of the Bankruptcy Code. The Reporter said there might be additional considerations, such as whether the case must be reopened to address the removed action. Mr. Heltzel said that although reopening is not necessary for jurisdiction, a court probably would want to reopen the case for practical reasons such as

researching the file in connection with the issues in the removed matter. Judge Kressel suggested deleting from Rule 9027(a)(3) the entire first clause, so that the rule would begin with the words "a notice of removal." This would remove both the existing "is pending" and avoid substituting other words that might not include all the possibilities. The consensus, however, was to substitute for the existing initial clause the following: "If a claim or cause of action is asserted in another court after commencement of the case,". On the second day of the meeting the Reporter offered a proposed Committee Note which, after changes suggested by the Committee, would read:

Subdivision (a)(3) is amended to delete the words "is pending" to make it applicable when a claim or cause of action is removed under 28 U.S.C. § 1452(a) after the commencement of the bankruptcy case, whether the bankruptcy case is pending, suspended, dismissed, or closed.

The proposed amendment and committee note will be brought back to the Committee for final approval at the March 2000 meeting.

Rule 4004. Professor Morris introduced the amendment proposed by the Executive Office for United States Trustees (EOUST) to provide for delaying the debtor's discharge whenever a motion to dismiss is made under § 707, rather than only when the motion is made under § 707(b), as in the current rule. Judge Small said he supported the change, because it is difficult, procedurally, to revoke a discharge, and the only detriment to the debtor would be a delayed discharge. Judge Kressel agreed. **The Committee approved the amendment without opposition.** The Reporter commented that line 3 of the Committee Note should read "present" rather than "prior."

Rule 2015(a)(5). The EOUST also had proposed amending Rule 2015(a)(5) to require the filing of quarterly reports by a chapter 11 trustee or debtor in possession as long as the case is pending. Professor Morris noted that the pending bankruptcy reform legislation contained a provision that would amend 28 U.S.C. § 1930 (a)(6) to provide that quarterly fees to the United States Trustee System Fund are no longer payable after confirmation of a plan or conversion of a case. The amount of any quarterly fee is based on information in the quarterly report. If the amending legislation is enacted, it would be unnecessary to file the reports after confirmation of a plan. **The Committee deferred consideration of the proposed amendment until the March 2000 meeting and instructed Professor Morris to add to the draft to be discussed the closing of the case as one of the events that would end the obligation to file reports.**

Rule 2010(b). The EOUST had proposed amending the rule to cover bonds other than the trustee's bond. **The Committee declined to amend the rule to expand its scope.**

Rule 9019. The Reporter introduced the problem, raised initially by Bankruptcy Judge L. Edward Friend, that it is unclear whether the Bankruptcy Rules continue to apply when a bankruptcy matter has been appealed to the court of appeals. Rule 1001 states that the rules apply to all cases under title 11 of the United States Code, and it is well understood that they govern in both the bankruptcy court and the district court. Rule 9019 requires that any settlement be approved by the bankruptcy judge after notice to all creditors. A settlement between the debtor and one creditor, or between two creditors, may adversely affect other creditors of the bankruptcy estate who are entitled to equality of treatment. The purpose of the Rule 9019 is to permit any creditor that may be affected to object and be heard by the bankruptcy judge before the settlement takes effect. If a matter is appealed to a court of appeals and a settlement reached at that point, however, the applicability of Rule 9019 is less clear, and at least one circuit has a local rule that permits a mediator "upon agreement of the parties, [to] dispose of the case."

Accordingly, Judge Friend had suggested that the Appellate Rules should be amended to assure that the notice and approval procedures required under Rule 9019 are observed when a matter is settled at that point.

The Committee discussed what the procedure should be when a settlement is reached at the court of appeals level and how the two courts should coordinate. Judge Duplantier said the party benefitting is going to

want to know that the settlement will be approved before the court of appeals dismisses the appeal or otherwise terminates its role. He said that minors and incompetent persons also require delay procedures, so that a state court can approve, when a settlement is involved, and the settlement is not binding on the minor or incompetent person if the approval is not obtained. Judge Walker said many lawyers seem unaware of Rule 9019's continued applicability in an appeal situation, even at the district court level. He recalled one matter in which it was the district judge who brought the attorneys' attention to the rule. **A motion to recommend to the Advisory Committee on Appellate Rules that Appellate Rule 6 be amended to add Rules 9019 and 7041 to the list of bankruptcy rules that apply in the court of appeals passed with one member objecting.**

Official Forms. The Reporter presented several letters commenting on various forms and suggesting amendments to them. Bankruptcy Judge Susan Pierson Sonderby wrote that Official Form 20B seems to require a party to whose claim an objection has been filed both to file a written response and appear in court. Judge Sonderby stated that either a response or an appearance should be sufficient. Members discussed whether the form actually requires both a written response and an appearance or, rather, is ambiguous. The Reporter said the flexibility Judge Sonderby supports should be written in to the form.

A. Thomas DeWoskin, Esquire, a chapter 7 trustee, had written to suggest that Form 9, the Notice of Commencement of Case, etc. (§ 341 Notice) be amended to clarify that the trustee does not represent the debtor. The Reporter noted that the sample notice attached to Mr. DeWoskin's letter is not consistent with the official form. Joel L. Tabas, also a bankruptcy trustee, had written a letter commenting that Form 10, the Proof of Claim, is confusing for unsecured nonpriority creditors, who often mistakenly check the box labeled "Unsecured Priority Claim." This mistake results in the filing by the trustee of many otherwise unnecessary objections to claims. The consensus was that, as the form was amended in 1997, it is too soon to amend it again. Bankruptcy Judge Paul Mannes had forwarded several suggestions to improve the grammar and style of the new Reaffirmation Agreement form, which was adopted in 1999 as a "Director's Form," but is intended to be published for comment and adopted as an Official Form after Congress acts on the pending bankruptcy legislation. **The Committee referred all of these suggestions to the Forms Subcommittee.**

Mr. Patchan said that the copies of the proposed forms package for reporting by small businesses the EOUST had drafted to implement the pending bankruptcy reform legislation had arrived and were available for review by the Committee members. He said his office is prepared to assist the Committee with any official forms that may be required once the legislation is enacted. Professor Klee asked whether the draft forms had been reviewed by an accountant, and Mr. Patchan replied that his staff includes analysts who are certified public accountants. The Reporter mentioned that the Committee also could request that a consultant be engaged to provide any expert review of proposed official forms that might be needed, and Mr. Smith suggested that help also might be available from other private sources, such as from an ad hoc group that could be formed by the Insolvency Institute.

Official Form 7. Judge Kressel reported that the Forms Subcommittee had considered the suggestions referred to it at the March 1999 meeting: 1) to separate the business-related questions from those to be answered by all debtors, and 2) to make it clear that individual consumer debtors can skip the business-related questions entirely. He said the subcommittee had decided not to make two separate forms, despite the extra paper that is generated in cases filed by individual consumer debtors, at least as long as the courts still use paper. Mr. Heltzel reiterated his observations about the file space required for the blank pages of the form and the disk space occupied when the documents are scanned, but added that a solution to the storage problem may have to await the next major revision of the forms. Judge Kressel commented that most individual consumer debtors also file several blank schedules, as well. Judge Gettleman asked whether a court could be permitted to dispose of unneeded items after ascertaining that the filing was complete. Professor Resnick suggested that the business questions could become an exhibit to Form 7, similar to Exhibit "A" to Form 1, the Voluntary Petition, with directions to attach the exhibit if the debtor is in business. Professor Morris said that the environmental authorities might not be satisfied with the transfer to an exhibit of the environmental question now Question 25 in the business section. It would be too easy for a debtor to evade answering the question by saying, "I didn't notice the exhibit," he said. Professor Klee observed that the new sentence that had been inserted at the

beginning of the business questions starts with the phrase "An individual or joint debtor" rather than "A debtor" as in the current form; he questioned whether an individual debtor should be exempted from answering the environmental question. Professor Resnick suggested that the Committee could move Question 25 forward to the part of the form to be answered by all debtors. Mr. Kohn said he is concerned that Form 7 not be further delayed and noted that the substance of the changes, the new questions, already had been published for comment. **The consensus was to approve the new instructional sentence, move Question 25 to make it answerable by all debtors, and issue the form without republication.**

Rule 2002(f)(7). This rule requires that notice of the entry of an order confirming a plan in a chapter 9, 11, or 12 case be mailed to all creditors, but does not require that any notice be sent when a chapter 13 plan is confirmed. Bankruptcy Judge Paul Mannes had suggested that the Committee consider amending the rule to include sending notice when a chapter 13 plan is confirmed. Judge Mannes had noted the 1994 increase in the debt limit for eligibility for chapter 13 to more than $1 million and suggested that the higher limit should entitle creditors to notice. Mr. Frank said he did not think the increased debt limit justified requiring notice. He added that many unsecured creditors do not begin receiving payments immediately in chapter 13. He said it is uncertain whether notice would be helpful or would simply lead to unrealistic expectations of prompt payment. Professor Klee noted that, unlike chapter 11, most plans in chapter 13 cases are confirmed. He suggested that any need for notice could be satisfied by including in the notice of the confirmation hearing a sentence that directs creditors to assume confirmation unless they receive notice otherwise.

Judge Walker said that formerly, when notice was given, it included other information that was useful to the parties. Judge Small said that chapter 13 plans change before confirmation and that bare notice may not be useful. Professor Wiggins said the Committee needs more empirical information before deciding what to do. Judge Cordova said that in Colorado the chapter 13 trustee sends every creditor a copy of the order confirming the plan, even though not required by the rules. The court has found that a copy of the order gives creditors the information they need and stops phone calls to the court and the trustee. The Reporter noted that the Committee had a chapter 13 subcommittee in the early 1990s which had found that every court handles chapter 13 cases differently. Professor Morris said that in the Southern District of Ohio, each division has separate local rules governing chapter 13 procedure.

There was no support for a bare notice of confirmation. The Committee preferred either a rule specifying that certain information must be provided upon confirmation or leaving the matter to the local legal culture. Mr. Patchan said the EOUST has general policies on the subject, but that chapter 13 administration is the most local of operations. He said the EOUST could encourage trustees to provide information upon confirmation but that a statement in the national rules would be helpful. Judge Walker suggested asking a sample of chapter 13 trustees what information they can conveniently generate from their existing software and include in a confirmation report to creditors. He said the bankruptcy system faces an integrity issue, because the world at large does not know what the courts and trustees are doing. This lack of information, he said, may be part of what is driving the bankruptcy reform legislation. Mr. Patchan said the EOUST can conduct a survey of current practices and report at the next meeting.

Rule 7004. Bankruptcy Judge David H. Adams had suggested that it would be appropriate to state in one location in the rules that service on a corporation, partnership, or unincorporated association must comply with Rule 7004(b)(3). Judge Kressel said the rule appears to be ambiguous, because people address service to "ABC Corp., Attention: officer, managing or general agent." The Reporter pointed out that Rule 7004 tracks the language of Civil Rule 4, and that if the Committee were to change Rule 7004 -- perhaps to require that a name be used -- the Standing Committee would want the Committee to coordinate the proposed amendment with the Advisory Committee on Civil Rules. Judge Walker said he has seen a name challenged on the basis there was no proof that the person named had the capacity to receive service on behalf of the corporation. He said the rule is sufficient as it is, and Judge Gettleman agreed. Judge Donald said requiring parties to name an officer, director, or managing agent would create more problems than it would solve. **The Committee determined to take no action on the rule.**

Civil Rule 4.1. Scott William Dales, Esquire, had recommended that the Bankruptcy Rules be amended to incorporate Civil Rule 4.1(a) or to include a similar rule to provide bankruptcy judges with express authority to direct the United States marshal, or some other person specially appointed, to serve writs of execution and process other than a summons or subpoena. Committee members, however, said bankruptcy judges use United States marshals to dispossess debtors from property of the estate, to apprehend debtors who fail to appear, and to aid the trustee in taking possession of bankruptcy estate property, and that there does not appear to be a problem. **The Committee determined to take no action.**

Attorney Fees in Chapter 13 Cases. Wayne R. Bodow, Esquire, had recommended that the Bankruptcy Rules be amended so that attorneys for chapter 13 debtors would receive higher fees, thereby increasing the incentive for attorneys to channel consumer debtors into chapter 13 instead of chapter 7. The consensus was that the suggestion is substantive and not a matter that can be addressed in the Bankruptcy Rules. **A motion to take no action in the Bankruptcy Rules but to inform Mr. Bodow that he should direct his letter to Congress passed without opposition.**

Rule 2003. A proposal to amend the rule was withdrawn, because a similar amendment had been prescribed by the Supreme Court and was due to take effect December 1, 1999.

Subcommittees

Technology Subcommittee. Judge Duplantier reported that Judge Cristol and Mr. Heltzel had attended all the meetings of the Standing Committee's Technology Subcommittee and had represented the Committee very ably. Mr. McCabe said the major new technology-related issue arises from the posting of documents on the Internet by the courts that are the prototypes for the electronic filing system. Other courts, he said, are imaging paper documents and posting them on the Internet. Section 107 of the Bankruptcy Code also states that every document filed in a bankruptcy case is a public record, he said, and the clerks have traditionally thought that they have no right to restrict access to documents filed with the court. Many judges agree with this view, he said. Others, including some judges, are concerned that unrestricted Internet access to court files may be an unwarranted invasion of the privacy of the parties. This tension between the right of public access and the right of privacy can be resolved only by a combination of statutory and policy actions, he said. The consensus is that the Judicial Conference should provide national guidance in this area, and that it is not for individual courts to decide, he said.

Among the possibilities for regulation of electronic access, he said, are both rules amendments and the granting of statutory authority to the Judicial Conference. Judge Duplantier asked if courts can image documents without putting them on the Internet. Mr. Heltzel said a court can do that but that practitioners eagerly await the easy access from their offices to the court's files. In addition, Mr. Heltzel said, anyone can visit the courthouse, obtain documents, and put them on the Internet, so that it is impossible to keep the material from reaching the Internet. Judge Small said the three years that would be required to achieve a rules solution is too slow, that the problem needs an immediate solution. Professor Resnick noted that the unrestricted access offered by the Internet negates many of the protections that other statutes such as the Fair Consumer Credit Reporting Act provide. Of course, he added, stringers go to the courthouse to obtain the information, which they then sell to their clients. Mr. Patchan said he was disturbed to learn recently that one of the trustee organizations has set up a corporation for the purpose of selling information collected by trustees in the course of their duties. Mr. McCabe said the Committee on Court Administration and Case Management has been given the lead on the privacy issue and had set up a subcommittee to develop policy recommendations for the Judicial Conference. He said that liaisons had been appointed from various other interested committees, and that Gene Lafitte, Esquire, chairman of the Standing Committee's Technology Subcommittee, had been appointed as liaison from the Standing Committee.

Respectfully Submitted,
Patricia S. Ketchum