06-BK-F

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AMERICAN BAR ASSOCIATION

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August 22, 2006

The Honorable Thomas S. Zilly
United States District Court
Western District of Washington
Room 410, U. S. Courthouse
1010 Fifth Avenue
Seattle, WA 98104

Re: Proposed Attorney Discipline Amendments to the Federal Rules of Bankruptcy Procedure

Dear Judge Zilly:

At the meeting of the House of Delegates of the American Bar Association ("ABA" or the "Association") held August 7-8, 2006, the enclosed resolution was adopted upon recommendation of the ABA's Section of Business Law. Thus, this resolution now states the official policy of the Association. As the Chairs of the ABA Business Law Section's Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Processes (the "Ad Hoc Committee") and Task Force on Attorney Discipline (the "Task Force"), respectively, we have been authorized to present the enclosed ABA policy to you for your consideration.

The new ABA policy, which was prepared by the Ad Hoc Committee and the Task Force, supports proposed attorney discipline amendments to the Federal Rules of Bankruptcy procedure that would clarify the authority of bankruptcy courts to discipline attorneys engaging in a pattern of misconduct and require district or bankruptcy courts to adopt and enforce local disciplinary rules and procedures with respect to attorneys practicing before bankruptcy courts. The ABA policy also states that any disciplinary rules, procedures and standards established under the proposed attorney discipline amendments to the Federal Rules of Bankruptcy Procedure should comply with the ABA Model Federal Rules of Disciplinary Enforcement and the ABA Standards for Imposing Lawyer Sanctions. In addition to the new ABA policy, we also have enclosed a copy of the accompanying background Report. The proposed attorney discipline amendments appear as Appendix A to the Report.

The Task Force and Ad Hoc Committee's recommendations as contained in the new ABA policy were based on their conclusion that:

- State bar disciplinary procedures are not designed to police the kinds of attorney certification or other obligations that have been imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 nor to address such problems in the context of high volume consumer bankruptcy practices.

- Bankruptcy courts generally have not established separate attorney disciplinary rules and procedures. District court-based procedures are rarely used to address bankruptcy attorney discipline issues.

- The only reports of systematic and effective disciplinary proceedings came from those few bankruptcy courts that had in fact implemented their own disciplinary procedures with the blessing of their respective district courts.

Bankruptcy courts present a heightened need for disciplinary rules and procedures because the bankruptcy process differs substantially from the litigation process in the district courts. First, many disciplinary issues in bankruptcy cases do not arise in the traditional adversarial process. This is typically the case for disciplinary issues rising in the context of the petition and the accompanying schedules and statements of financial affairs by which a bankruptcy case is initiated. Thus, frequently, there is no adversary to raise the issue before the bankruptcy court. Secondly, disciplinary issues often arise in matters between consumer debtors and their attorneys. Most consumer debtors lack the resources and sophistication typical of parties to civil litigation. Third, many disciplinary issues arise in connection with large volume practices with tens or hundreds of cases pending before two or more bankruptcy judges. Thus, disciplinary proceedings before the bankruptcy courts frequently involve actions that were not taken in one case before one judge. In addition, many of the actions in a high volume practice can affect hundreds of debtors if not dealt with promptly.

The proposed attorney discipline amendments endorsed by the ABA and attached to the enclosed resolution address this need.

Thank you for considering the views of the ABA on this important subject. If you have any questions or if we can be of any further assistance to the advisory committee in its work, please contact either William H. Schorling at (215) 567-7782, william.schorling@bipc.com, or Judy Miller at (248) 727-1429, jmiller@jaffelaw.com, or the ABA's senior legislative counsel for bankruptcy issues, Larson Frisby, at (202) 662-1098, frisbyr@staff.abanet.org.

Very truly yours,

William H. Schorling
Chair,
Section of Business Law
Ad Hoc Committee on Bankruptcy
Court Structure and Insolvency
Processes

Judith Greenstone Miller
Chair
Section of Business Law
Task Force on Attorney Discipline

WHS/ap
Enclosure

cc: Professor Jeffrey W. Morris
The Honorable Eugene Wedoff
G. Eric Brunstad, Jr.
R. Larson Frisby

RESOLUTION ADOPTED BY THE

HOUSE OF DELEGATES

OF THE

AMERICAN BAR ASSOCIATION

AUGUST 7-8, 2006*

RESOLVED, That the American Bar Association supports the Proposed Attorney Discipline Amendments to the Federal Rules of Bankruptcy Procedure generally in the form attached as Appendix A that would clarify the authority of bankruptcy courts to discipline attorneys engaging in a pattern of misconduct and require district or bankruptcy courts to adopt and enforce local disciplinary rules and procedures with respect to attorneys practicing before bankruptcy courts.

FURTHER RESOLVED, That any disciplinary rules, procedures, and standards established under the Proposed Attorney Discipline Amendments to the Federal Rules of Bankruptcy Procedure should comply with the ABA Model Federal Rules of Disciplinary Enforcement and the ABA Standards for Imposing Lawyer Sanctions.

*Note: The Resolution and the Proposed Attorney Discipline Amendments attached as Appendix A, but not the attached background Report, constitute official ABA policy.

REPORT

During the nearly decade-long debate leading up to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the legislation's proponents asserted that the bankruptcy bench and bar had failed adequately to address alleged attorney misconduct. This perception – whether accurate or not – persuaded Congress to enact new Bankruptcy Code provisions requiring consumer bankruptcy attorneys to certify the accuracy and appropriateness of their clients' bankruptcy petitions and schedules. The bankruptcy courts are supposed to police these new requirements. However, few bankruptcy courts currently have local bankruptcy rules or general orders establishing effective bankruptcy attorney disciplinary processes and procedures. The proposed Recommendation provides clear ABA policy in support of the Ad Hoc Committee's efforts to address this problem.

The proposed Recommendation provides:

1. The Federal Rules of Bankruptcy Procedure should be amended to clarify the authority of bankruptcy courts to discipline attorneys engaging in a pattern of misconduct and require district or bankruptcy courts to adopt and enforce local disciplinary rules and procedures with respect to attorneys practicing before them; and

2. Such disciplinary rules, procedures, and standards should comply with the ABA Model Federal Rules of Disciplinary Enforcement (as approved, February 1978, and as amended, February 1991) and the ABA Standards for Imposing Lawyer Sanctions (as approved, February 1986, and as amended, February 1992)

BACKGROUND:

The Ad Hoc Committee on Bankruptcy Court Structure and Insolvency Process was created to provide an interdisciplinary working group within the Business Law Section to address bankruptcy law and policy issues. During the long years of debate over the various bankruptcy reform proposals, the Committee members have coordinated the ABA's response. In response to the Congressional and other debates over the perceived inadequacies of existing self-policing mechanisms in the bankruptcy courts, in late 2004 the Committee appointed a Task Force on Attorney Discipline to evaluate the effectiveness of current bankruptcy attorney disciplinary procedures and to make recommendations regarding a proposed model local bankruptcy rule or other appropriate responses.

Like the Committee, the Task Force is comprised of members of the Litigation, Business Law, General Practice and other sections having an interest in bankruptcy law, bankruptcy judges, and other experts. During the past year, the Task Force has investigated and discussed whether and how the ABA can provide leadership and guidance on the issue of bankruptcy attorney discipline. As part of its investigation, the Task Force reviewed local rules and case law, and sent out questionnaires to the bankruptcy courts to collect data about the local discipline rules and procedures currently in effect as to bankruptcy attorneys and about the experiences of the courts in implementing such procedures. This data indicates that, other than case-specific

sanctions, discipline of bankruptcy attorneys is mostly left to the district courts as part of their overall disciplinary procedures. This district court-based approach appears to be largely based upon the view that, because attorneys are admitted to the bar of the district court, symmetry requires that disbarment, suspension and other discipline should also be administered only at the district court level as well. However, as discussed below, bankruptcy courts have inherent authority to impose sanctions and otherwise regulate the conduct of attorneys appearing before them.

REASONS FOR THIS RECOMMENDATION:

As a result of its investigation and analysis, the Task Force has concluded that:

- State bar disciplinary procedures are not designed to police the kinds of attorney certification and other obligations that have been imposed by BAPCPA, nor to address such problems in the context of high volume consumer bankruptcy practices.

- Bankruptcy courts generally have not established separate attorney disciplinary rules and procedures, according to the questionnaire responses and other investigation by the Task Force. District court-based procedures are rarely used to address bankruptcy attorney discipline issues.

- The only reports of systematic and effective disciplinary proceedings came from those few bankruptcy courts that had in fact implemented their own disciplinary procedures with the blessing of their respective district courts.

Bankruptcy courts present a heightened need for disciplinary rules and procedures because the bankruptcy process differs substantially from the litigation process in the district courts. First, many disciplinary issues do not arise in the traditional adversarial process. This is typically the case for disciplinary issues arising in the context of the petition and accompanying schedules and statements of financial affairs by which a bankruptcy case is initiated. Thus, frequently, there is no adversary to raise the issue before the Bankruptcy Court. Second, disciplinary issues often arise in matters between consumer debtors and their attorneys. Most consumer debtors lack the resources and sophistication typical of parties to civil litigation. Third, many disciplinary issues arise in connection with large volume practices with tens or hundreds of cases pending before two or more bankruptcy judges. Thus, disciplinary proceedings before the bankruptcy courts frequently involve actions that were not taken in one case before one judge. In addition, many the actions of an attorney in a high volume practice can affect hundreds of debtors if not dealt with promptly. For each of these reasons, there is a pressing need for disciplinary rules and procedures in the bankruptcy courts.

Thus, the first step toward an effective bankruptcy attorney disciplinary process is the amendment of the Federal Rules of Bankruptcy Procedure to clarify the authority of bankruptcy courts to discipline attorneys engaging in a pattern of misconduct and require individual district or bankruptcy courts to adopt and implement their own disciplinary processes separate and apart from the general district court procedures.

URGENT NEED FOR IMMEDIATE ACTION:

The Advisory Committee on Rules of Bankruptcy Procedure is currently in the process of drafting rules to implement the requirements of BAPCPA, including rules and forms addressing the new attorney penalty provisions. It previously recommended adoption of interim local rules dealing with the most urgent of the BAPCPA changes. During the course of the comment period on the interim rules, the Task Force submitted its recommendation that the national rules revision process address the need to clarify the attorney disciplinary process and the scope of the bankruptcy courts' authority to conduct such disciplinary proceedings. The Advisory Committee requested that the Task Force draft and submit any proposed rule changes for the Advisory Committee's consideration as part of the BAPCPA rules amendment process. The Advisory Committee will be finalizing its recommendations for national rules amendments within the next few months.

In response to this invitation, the Task Force has drafted proposed amendments (the "Proposed Attorney Discipline Amendments") to the Federal Rules of Bankruptcy Procedure based upon the ABA Model Federal Rules of Disciplinary Enforcement (as approved, February 1978, and as amended, February 1991). The ABA Standards for Imposing Lawyer Sanctions (as approved, February 1986, and as amended, February 1992) provide the basis for the standards for imposition of discipline embodied in subsection (D) of the proposal. The Proposed Attorney Discipline Amendments are set forth in the Appendix hereto. The precise drafting of the proposal is, of course, tailored to fit into the existing structure of the Federal Rules of Bankruptcy Procedure. We note that the bankruptcy courts have relied upon such ABA standards in determining attorney sanctions and discipline issues. *See, e.g., In re Brooks-Hamilton*, 329 B.R. 270, 287 (BAP 9th Cir. 2005) (citing the ABA Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure).

The proposed Recommendation would provide express authority to support the submission of the Proposed Attorney Discipline Amendments and the Task Force's further work to develop a model local rule to implement the Proposed Attorney Discipline Amendments in conjunction with the ABA Governmental Affairs Office.

LEGAL ANALYSIS:

It is well settled that, subject to certain limitations, bankruptcy courts have inherent power to discipline attorneys. However, the bankruptcy courts' status as a unit of the district courts has meant that the bankruptcy courts do not separately control admission to bankruptcy practice. As a result, disbarment and disciplinary procedures regarding bankruptcy attorneys have generally being handled by the district courts, and not by the bankruptcy courts. Clarification of the bankruptcy courts' disciplinary authority must occur before bankruptcy courts can effectively police practice before them as contemplated and required by BAPCPA.

Federal courts enjoy certain inherent powers that "necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962). "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their

presence, and submission to their lawful mandates." *Anderson v. Dunn*, 19 U.S. 204, 227 (1821). As the Supreme Court held in *Freytag v. Commissioner*, 501 U.S. 868, 889 (1991), "non-Article III tribunals exercise the judicial power of the United States." The Court thus rejected arguments "that only Article III courts could exercise the judicial power because the term 'judicial power' appears only in Article III," in holding that the Article I Tax Court exercises judicial power "in much the same way as the federal district courts *exercise* theirs," *i.e.* by construing statutes and not acting as an "advocate" or a "rulemaker." *Id.* at 889-91.

The power to control admission into its own bar and sanction those who appear before it is an inherent power "incidental to *all* courts," including bankruptcy courts. *Chamber v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (emphasis added; citing *Ex parte Burr*, 22 U.S. 529 (1824). The Court recognized that "the inherent power also allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court[, a function which is] necessary to [maintain] the integrity of the courts...." *Id.* at 44. Such a power helps prevent "'tampering with the administration of justice in [this] manner [which] involves far more than an injury to a single litigant [but instead constitutes] a wrong against the institutions set up to protect and safeguard the public.'" *Id.* (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944)).

Courts have generally upheld the inherent powers of the bankruptcy courts to control attorney conduct and impose sanctions. *See, e.g., Yukon Energy Corp. v. Brandon Invs. (In re Yukon Energy Corp.)*, 138 F.3d 1254, 1260 (8th Cir. 1998) ("The bankruptcy court has authority to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions' of the Bankruptcy Code, see 11 U.S.C. § 105(a), which includes the power to maintain decorum within the courtroom."); *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine)*, 77 F.3d 278, 283 (9th Cir. 1996) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases," quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *Jones v. Bank of Santa Fe (In re Courtesy Inns)*, 40 F.3d 1084, 1089 (10th Cir.1994) ("'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates'," quoting *Anderson v. Dunn*, 19 U.S. 204 (1821)); *Saffa v. Wallace (In re Wallace)*, 311 B.R. 601, 606 (N.D. Okla. 2004) ("Bankruptcy courts have the implied 'power to impose silence, respect, and decorum, in their presence, and submission to their lawful dictates.'"); *Knepper v. Skekloff*, 154 B.R. 75, 79-80 (N.D. Ind. 1993) ("Certain implied powers are necessary for the courts to function as an institution, and for this reason, courts are vested with power 'to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates'," quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)).

In addition to the inherent powers given to all courts exercising the judicial power of the United States, bankruptcy courts have also been statutorily vested with inherent judicial powers through Section 105(a). Section 105(a) declares:

> "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

11 U.S.C. § 105(a). Because of this broad grant of power, whenever the statutorily-conferred power by Congress is not sufficient to address the matter at hand, bankruptcy courts are authorized to utilize their inherent powers under Section 105(a) "to fill in the interstices." *Chamber v. NASCO, supra*, 501 U.S. at 46. For example, Section 105(a) has been cited as authority for bankruptcy courts to eject parties to litigation that fail to behave in a civil manner after repeated warnings (*Yukon Energy, supra,* 138 F.3d at 1260), to allow the bankruptcy court to sanction parties for filing petitions frivolously or in bad faith (*Courtesy Inns, supra,* 40 F.3d at 1089), and to give the bankruptcy courts the inherent power to sanction beyond the strict confines of Rule 9011 (*Rainbow Magazine,* 77 F.3d at 283; *DeVille v. Cardinale* (*In re Deville*), 280 B.R. 483 (B.A.P. 9th Cir. 2002); ; *In re U.S. Voting Mach.*, 224 B.R. 165 (Bankr. D. Colo. 1998); *In re Nichols*, 221 B.R. 275, 279 (Bankr. N.D. Okla. 1998).)

Federal Bankruptcy Rule of Procedure 9029(b) implements this inherent and express statutory authority by confirming the bankruptcy courts' power to "regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district [so long as no] sanction or other disadvantage [is] imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement." Rule 9011, modeled after Federal Rule of Civil Procedure 11,[1] is also built upon these inherent powers. The 1993 advisory committee notes to Rule 11 explain that the rule "is not the exclusive source for control of improper presentations of claims, defenses, or contentions. . . . [Rule 11] does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules...." Thus, while F.R.Civ.P. Rule 11 and F.R.B.P. Rule 9011 provide one basis for imposition of sanctions, those rules are not, as a matter of law, the sole source of disciplinary authority.

Moreover, it is not necessary that bankruptcy courts be considered "courts of the United States" before being allowed the right to exercise inherent judicial powers. Although many Courts of Appeals do not consider bankruptcy courts "courts of the United States,"[2] such a conclusion does not foreclose the exercise of inherent judicial powers. For instance, in *Courtesy Inns*, the Tenth Circuit ruled that bankruptcy courts were not "courts of the United States" within 28 U.S.C. § 1927, which states that a "court of the United States" may sanction "[a]ny attorney

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[1] As F.R.B.P. Rule 9011 and F.R.Civ.P. Rule 11 are closely related in language and purpose, Rule 11 precedent may properly be utilized to determine the parameters of Rule 9011. *See Miller v. Cardinale* (*In re* DeVille), 361 F.3d 539, 552 (9th Cir. 2004).

[2] *See In re Volpert*, 110 F.3d 494, 498 (7th Cir. 1997); *In re Perroton*, 958 F.2d 889, 891 (9th Cir. 1992); *In re Arkansas Communities, Inc.*, 827 F.2d 1219, 1221 (8th Cir. 1987) ("it is questionable whether a bankruptcy court falls within the definition of 'courts of the United States'").

or other person admitted to conduct cases ... who so multiplies the proceedings in any case unreasonably and vexatiously...." *Courtesy Inns, supra,* 40 F.3d at 1085-86. The Tenth Circuit nonetheless stated that:

> [T]he Supreme Court [in *Chambers v. NASCO*] recognized the inherent power of a federal district court to sanction conduct abusive of the judicial process. The Supreme Court rejected arguments that specific federal statutes and the various sanctioning provisions of the federal rules reflect legislative intent to displace the court's inherent powers. It held that when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.
>
> Justice Scalia's dissenting opinion may be read to imply that the Court's holding only applies to Article III courts. We believe, however, that the majority opinion does not limit inherent power to Article III courts; it says: It has long been understood that "certain implied powers must necessarily result to our Courts of justice from the nature of their institution," powers "which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." For this reason, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates."
>
> We believe, and hold, that [Section] 105 intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers*. The power to maintain order and confine improper behavior in its own proceedings seems a necessary adjunct to any tribunal charged by law with the adjudication of disputes. We should not lightly infer its absence, and we see no reason to do so here.

Id. at 1089 (citations omitted). Therefore, even if bankruptcy courts are not technically "courts of the United States," they still enjoy inherent judicial powers.

Neither the proposed Recommendation nor the Proposed Attorney Discipline Amendments require resolution of this split in authority regarding the exact constitutional or statutory boundaries of bankruptcy courts' disciplinary jurisdiction. First, the proposed amendments do not transgress these boundaries because any local bankruptcy rules must be approved by the district courts before implementation. *See Brown v. Smith* (*In re Poole*), 222 F.3d 618, 621 (9th Cir. 2000) ("District courts are empowered to make local rules governing bankruptcy procedure within the district and may also authorize bankruptcy courts to issue local rules."). Second, the Proposed Attorney Discipline Amendments treat disciplinary proceedings as non-core matters that are subject to *de novo* review by the district court, unless the attorney voluntarily submits to entry of final judgment by the bankruptcy court. In addition, appellate

review is available as a further protection, consistent with the constitutional and statutory jurisdictional requirements of the bankruptcy court system. *See In re Sheridan*, 362 F.3d 96, 111 (1st Cir. 2004) (Recognizing the bankruptcy court's inherent and statutory authority to regulate the bar, including imposing sanctions in the course of a particular case, disciplinary proceedings that involve multiple alleged violations in multiple cases are non-core matters in which final orders must be entered by the district court unless the attorney consents to a final order by the bankruptcy court.).

Respectfully submitted,

Alvin W. Thompson, Chair
ABA Section of Business Law

August 2006

APPENDIX A

PROPOSED ATTORNEY DISCIPLINE AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

1. **Proposed Amendments to Rule 5003 (Records Kept by Clerk)**

ADD new subdivision (f); renumber existing (f) as (g):

(f) **Records of Attorney Disciplinary Proceedings.** The clerk shall keep, in the form and manner as the Director of the Administrative Office of the Courts may prescribe, files and records of all attorney disciplinary proceedings conducted by the bankruptcy court, including the disposition of such proceedings. Such files and records shall be available to the public after a determination that probable cause exists to believe that misconduct occurred, provided, however, specific testimony, documents or records may be kept confidential for cause shown, and further provided that the deliberations of the disciplinary panel shall remain confidential.

2. **Proposed Amendments to Rule 9011 (c) (Signing of Papers; Representations to the Court)**

(1)(B) *On the Court's Initiative with Respect to a Specific Filing:* On its own initiative or at the request of a person aggrieved, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

[NEW] (C) *On the Court's Initiative with Respect to a Pattern of Attorney Misconduct:* Upon a determination that probable cause exists to believe misconduct occurred, the court may enter an order describing the specific conduct by an attorney that appears to be part of a pattern of misconduct in multiple bankruptcy cases in the district or that appears to have caused potential or actual injury to clients, the public, the legal system, or the legal profession in violation of subdivision (b) and directing that attorney to show cause why that attorney should not be suspended or disbarred from practice before the bankruptcy court or otherwise disciplined with respect thereto. Orders to show cause issued pursuant to this subdivision shall be subject to the disciplinary process set forth in Rule 9029 (a)(3).

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

3. **Proposed Amendments to Rule 9029**

ADD new subdivision (a)(3):

(3) A local bankruptcy rule shall be adopted to provide procedures for the disciplining of attorneys appearing before the court.

(A) *Initiation of Disciplinary Proceedings:* On the court's own initiative or at the request of a person aggrieved, the court may commence disciplinary proceedings (i) by issuing an order to show cause pursuant to Rule 9011(a)(3), or (ii) by preparing and filing with the clerk a written statement of cause setting forth the basis for recommending discipline of an attorney. Such cause may include diversion of or failure to account for client or estate property; failure to avoid conflicts of interest; lack of diligence; lack of competence; lack of candor; false statements, fraud or misrepresentation; abuse of the legal process; discipline by other courts; incapacity; unauthorized practice; or other violations of the Rules of Professional Conduct adopted by the highest court of the state in which the court sits. Multiple referrals for the same attorney may be consolidated.

(B) *Investigation; Selection of a Disciplinary Panel:* The court shall refer orders to show cause pursuant to Rule 9011(a)(3) and statements of cause pursuant to subsection (3)(a) to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate. The court shall appoint as counsel the appropriate state bar disciplinary agency or, if necessary or appropriate, a member of the bar of the court. Upon counsel's recommendation that a formal disciplinary hearing should be conducted, the court shall designate up to three bankruptcy judges in that district (excluding the referring judge) to serve on a disciplinary panel.

(C) *Conduct of Disciplinary Hearing:* At any hearing, the attorney may present evidence, subpoena and cross-examine witnesses, and be represented by counsel. The United States Trustee may appear and participate in the presentation of evidence as a party to any disciplinary proceeding. Discipline shall only be imposed upon clear and convincing evidence.

(D) *Determination of Discipline:* After notice and hearing, the disciplinary panel shall submit to the district court its proposed findings of fact, conclusions of law, and recommendations for imposition of such private or public discipline as may be appropriate under the circumstances after due consideration of the professional duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors. Discipline may include disbarment or suspension from practice before the bankruptcy court, reprimand, admonition, probation, monetary sanctions or restitution, limitation upon practice, required completion of professional responsibility or other professional education training, or any other sanction deemed appropriate. If an attorney consents to entry of a final determination by the disciplinary panel, such order shall be treated as an appealable order pursuant to Rule 8001(a).

(E) *Reinstatement of Privileges:* An attorney whose privileges have been revoked, modified, or suspended pursuant to an order of a disciplinary panel may apply for reinstatement of privileges upon a showing of good cause. Such applications shall be heard by a disciplinary panel pursuant to the procedures set forth in this rule.

COMMENTS:

1. The proposed amendments to Rule 9029 generally rely upon the ABA Model Federal Rules of Disciplinary Enforcement (approved February 1978), and the ABA Model Rules for Lawyer Disciplinary Enforcement (approved August 11, 1993, and as amended on August 5, 1996, February 8, 1999, and August 12, 2002). Subsection (D) relies upon the ABA Standards for Imposing Lawyer Sanctions (as approved, February 1986, and as amended, February 1992). The Model Federal Rules and Standards should be cited for guidance in the Advisory Committee comments.

2. The Task Force proposes these relatively comprehensive standards and guidelines in this amendment so that bankruptcy courts can adopt and implement consistent and appropriate local disciplinary rules as quickly as possible to meet the demands of BAPCPA. It also considered a more general approach to the national rule (*i.e.*, not including the subparagraphs of proposed paragraph (3)) which would leave more of the details to the local rule process. However, the general consensus favored providing more structure and guidance to the local rule making process to assure compliance with the ABA Model Rules and Standards. Several members had strong reservations about setting forth such structural requirements and believe that each district should adopt a local rule with appropriate procedures in conformity with local practice and procedure. Thus, an alternative approach would be to include the proposed subsections of Rule 9029 (3) as recommendations in the Advisory Committee's Comments, rather than as part of the Rule itself.

3. The "person aggrieved" provisions in subparagraphs (1)(A) and (3)(A) adopt the terminology of Rule 9011 (c)(1)(B) and are intended to offer an opportunity for clients and others to bring attorney misconduct to the attention of the bankruptcy court. The Task Force believes that providing an avenue for such input is important.

4. Because of the range of sizes and circumstances of bankruptcy courts across the country, a national rule on panel selection must be flexible. The ABA Model Federal Rules of Disciplinary Enforcement provide for panels consisting of one to three judges.

5. The procedures for the hearing process are only generally stated. It is possible that a more specific provision would be desirable.

6. The appropriate role for the U.S. Trustee in this process was debated by the Task Force. This issue bears further analysis and consideration.