ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 18 - 19, 1999

Airlie Conference Center, Warrenton, Virginia

Minutes

The following members attended the meeting:

District Judge Adrian G. Duplantier, Chairman

District Judge Eduardo C. Robreno

District Judge Robert W. Gettleman

District Judge 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

Gerald K. Smith, Esquire

Leonard M. Rosen, Esquire

R. Neal Batson, Esquire

Eric L. Frank, Esquire

J. Christopher Kohn Esquire, United States Department of Justice

Professor Alan N. Resnick, Reporter

District Judge Bernice B. Donald and Professor Mary Jo Wiggins 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"), and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"),

also attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), and Professor Charles J. Tabb, a former member of this Committee, also attended all or part of 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. Channon, 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, Marie Leary, Research Division, FJC, and Alan S. Tenenbaum, Environment and Natural Resources Division, United States Department of Justice, 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 October 1998 meeting.

Judge Duplantier reported that he and Professor Resnick had attended the January 1999 meeting of the Standing Committee. The Chairman had reported on the status of the comment process on the proposed amendments which had been published in August 1998. He noted that the Advisory Committee had not had any action items before the Standing Committee.

Judge Duplantier also reported that the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee") had met simultaneously a few blocks from the location of the Standing Committee meeting. Accordingly, he and Professor Resnick also had attended part of the Bankruptcy Committee meeting. Judge Hodges noted that there was much interest on the part of the Bankruptcy Committee in the "Litigation Package."

Judge Cristol reported on a meeting of the technology subcommittee of the Standing Committee held in Washington in February 1999. The purpose of the meeting was to learn from the prototype courts in the electronic filing effort about their experiences with introducing electronic filing and any amendments to the federal rules that might be needed as the courts move from a paper environment to an electronic one. On the first day of the meeting, the subcommittee heard reports from each of the courts that currently is accepting filings electronically. On the second day, practitioners who are filing documents electronically with the courts also participated. The subcommittee had invited Judge Cristol, Professor Resnick, and the reporters for the other advisory committees to join the meeting. After hearing from the courts and the bar, the subcommittee met with the reporters to consider drafting amendments to the various bodies of federal rules that would employ common language to the extent possible.

Action Items

Published Amendments to "Other Rules." The Reporter introduced the discussion by briefly summarizing the comments received on the proposed amendments to rules that were not part of the "Litigation Package" but were published at the same time. He noted that the proposed amendments concerning notice to governmental units may be pre-empted by statute if some of the bankruptcy reform legislation pending in Congress were to be enacted.

Rule 1007(m). The Committee considered this proposed amendment in light of both the comments received and the pending legislation. The proposed amendment would require a debtor that lists a governmental unit as a creditor to identify, if known to the debtor, any department, agency, or instrumentality of the governmental unit through which the debtor is indebted. The proposed amendment drew six comments. The comments from attorneys for government entities were critical of the final sentence, which states that failure to comply does not affect a debtor's legal rights. Judge Kressel said, and Judge Cordova agreed, that these criticisms had been stated previously by Mr. Kohn, and the Committee's judgment had been to retain the final sentence. Judge Duplantier said he was impressed that the commentators said they would prefer no amendment to one that contains the sentence to which they object. Mr. Rosen suggested modifying the sentence to say that failure to comply does not affect either party's rights. Professor Klee said most people try to comply with the rules, but that if the government does not believe that to be so, the Committee should not go ahead with the amendment, regardless of whether legislation is enacted. Judge Robreno questioned the wisdom of prescribing a rule that vitiates itself. He said the Committee should propose only a rule that is the right rule and, therefore, must first decide the correct policy. Mr. Smith asked how the courts are ruling in cases where the adequacy of notice to a governmental unit is at issue. Mr. Kohn said the results for the government in the cases so far have been mixed. He said that state governments have a much more difficult time participating in a case when a notice does not include the name of the agency through which the debt arises, especially if the debtor has moved across the country since incurring the debt. **A motion by Professor Klee to postpone indefinitely consideration of the proposed amendment carried by a vote of 8 to 3.**

Rule 1017(e). The proposed amendment drew one comment, and **a motion to approve the amendment carried on voice vote.**

Rule 2002(a)(6). The proposed amendment concerning notice of fee applications by professionals was **approved without objection.**

Rule 2002(j). The proposed amendment would require any notice sent to the United States attorney to include the name of the department, agency, or instrumentality involved in the matter. Judge Kressel said that the clerk relies on the mailing information provided by the debtor. Mr. Heltzel confirmed and added that if a clerk does any independent checking of addresses supplied by a debtor it is quite a rare occurrence. Professor Klee noted that Judge Arthur J. Spector had pointed out in his comment an inconsistency between the proposed amendment to this rule and proposed Rule 1007(m), that Rule 1007(m) contains a safe harbor provision while Rule 2002(j) does not. Professor Klee suggested postponing this amendment along with Rule 1007(m). **A motion to forward the proposed amendment to the Standing Committee failed on a voice vote. The Chairman said the proposed amendment would be postponed, along with Rule 1007(m).** Mr. Smith thanked Mr. Kohn for his efforts in the interest of improving notice to the governmental units and for bringing the concerns of government entities to the Committee's attention.

Rule 4003(b). The Reporter explained that the draft includes a re-styling of the rule, as required by the Standing Committee, and that the only substantive change would preserve for the trustee or creditor the timely filed motion to extend the time to object to a debtor's claimed exemptions when the court does not rule on the motion to extend time until after the deadline stated in the rule. He noted that one of the comments suggested changing the phrase "trustee or a creditor" to "party." The Reporter said that changing "trustee or a creditor" to "party in interest" would not require republication because the change would be conforming the rule to the language used in

§ 522(l) of the Bankruptcy Code.

Professor Klee suggested deleting from the rule the phrase "or supplemental schedules," which appears in line 6 of the draft, or adding language stating that any supplemental schedules must relate to an exemption. Otherwise, he said, there is a question whether a new creditor added after the time runs would be able to object to a debtor's exemptions. Professor Morris noted that the term "supplemental schedule" appears only in this rule and in Rule 1007(h), which clearly ties it to the after-acquired property provisions of § 541(a)(5) of the Bankruptcy Code.

The Committee approved the draft with the recommended change to " a party in interest" and subject to review by the style subcommittee. Professor Klee asked that, if the amendment is not forwarded to the Standing Committee, the supplemental schedules issue be examined.

Rule 4004(c). The Reporter called attention to his recommendations that the phrase "pursuant to" in line 9 be changed to "under" and that the letters designating the subparts be made upper case, *e.g.,* "(A)" instead of "(a)." The only substantive change, he said, is the addition of subpart (f), which would allow the court to withhold the debtor's discharge if a motion to dismiss the case for substantial abuse is pending. Mr. Frank noted Judge Klein's comment concerning the problem of a discharge "automatically issued," even though the debtor never attended a § 341 meeting. The consensus was that adding language to cover that situation would be a substantive change that would require republication. **On a voice vote, the Committee approved the draft with upper case letters designating the subparts and with the change in line 9 to "under."**

Rule 5003(e). The Reporter noted that this proposed amendment, which would require the clerk to create and maintain a register of mailing addresses for federal and state governmental units would have to change if the pending bankruptcy reform legislation is enacted. Judge Gettleman said that, although there is good reason to defer other proposed amendments that would be affected by the legislation, this proposal can stand alone and should proceed. Mr. Kohn asked that the Committee change the language at page 15, lines 3-5, to say the clerk may list more than one address for an agency rather than that the clerk is not required to list more than one address. Mr. Heltzel said the clerks already oppose the amendment to require them to keep a register and changing the sentence to say "the clerk may" will put clerks under more pressure to do that. Judge Cordova said he thought the change would make little difference as many clerks already have registers and include more than one address. Judge Duplantier said if there is no difference, there is no reason to change the published language and that if the Committee were to change it, he would recommend republication in light of the clerks' opposition. Professor Morris asked what would be the effect to a debtor if there are multiple addresses and the debtor picks the wrong one. **A motion to approved the draft as published carried without objection.**

Official Form 1, Voluntary Petition. The Reporter directed the Committee to the pamphlet containing the preliminary draft amendments for the text of the form. He also noted the comments to the proposed addition of Exhibit "C" that opposed forcing the debtor to admit to liabilities that may be subject to dispute. Judge Kressel suggested changing the phrase "poses a threat . . . of harm" to "may pose a threat . . . harm." Mr. Rosen said using the phrase "may pose" could cause filers to submit a laundry list, because anything "may" pose a threat. Professor Klee said there is no issue if there has been an allegation of environmental threat; in that event, there should be disclosure. Rather, the debate is over whether disclosure should be required if only the debtor knows of the threat, he said. Professor Klee suggested adopting language from the comment, such as "if a governmental agency has determined or alleges that the property poses a threat or which the debtor has admitted might have such characteristics." Mr. Smith said the debtor and the lawyer have a serious duty to disclose imminent potential harm, and Mr.

Tenenbaum added that Mr. Foltz earlier had pointed out that restricting the disclosure to government allegations leaves out many potentially harmful situations. [See Minutes of meeting of September 11-12, 1997, pages 10-11, for a report of Mr. Foltz's statement.] Mr. Patchan said the purpose of proposed Exhibit "C" is to alert the trustee to the need for immediate action. **A motion to adopt the proposed form with a change to "may pose" and amended to add also the phrase "or alleged by a government agency" drew a tie vote of 5 to 5, which the Chairman broke by voting in favor. A second motion to change the "may pose" language to "poses or is alleged to pose" carried on a voice vote, overriding the prior close vote.**

Official Form 7, Statement of Financial Affairs. The Committee discussed the comment from a forms publisher stating that the instructions to the form are ambiguous concerning whether an individual not engaged in business is free to skip questions 18-25, the "business" questions or is required to check the "None" boxes beside each of those questions. Judge Cristol said his district requires every debtor to answer every question. **The Committee approved revising the third sentence of paragraph 2 of the instructions to read "If the answer to an applicable questions is 'None,' mark the box labeled 'None.'"** Mr. Heltzel said that in districts such as his, where individual debtors not engaged in business do not answer the business questions, each case file is needlessly fattened with several extra pages of Form 7. He suggested that the forms subcommittee examine the possibility of separating the Statement of Financial Affairs into two forms, so that the only business debtors would file the part containing the business questions. **The chairman of the subcommittee agreed to consider the suggestion. The Committee also approved deleting "a." from question 10, because there is no "b."** Judge Gettleman noted the comment on question 16, requesting that Alaska be added to the list of community property states, based on new legislation in that state. Judge Gettleman questioned the wisdom of listing states at all, and Judge Duplantier observed that under the new Alaska law not every marriage produces community property. The consensus, however, was that listing the states is a guide, especially for those debtors who may formerly have resided in a community property state but have moved elsewhere. **The Committee approved adding the phrase "including Alaska" at the beginning of the list of states.**

The Committee approved forwarding five rules -- Rules 1017(e), 2002(a)(6), 4003(b), 4004(c), and 5003(e) -- and the two forms -- Form 1 and Form 7 -- to the Standing Committee and requesting a six-month delay of effective date for the revised forms.

On the second day of the meeting, the Forms Subcommittee reported that it would be impossible for it to complete the bifurcating of the Form 7 into two forms in time to obtain Committee approval of the revisions and present the forms to the June 1999 meeting of the Standing Committee. **A motion to proceed only with Form 1 failed for want of a second.** The Forms Subcommittee will revise Form 7 for the September 1999 Committee meeting, and **the Committee determined it would be best, in light of the changes proposed, to republish both Form 1 and Form 7 for comment.**

The "Litigation Package." The Reporter introduced the discussion by briefly summarizing the comments on the preliminary draft amendments. He noted that 172 comment letters are digested in the agenda materials but that four additional letters had been received for a total of 176. Many letters said they were sent on behalf of the writer and a group, such as "all the bankruptcy judges of this district" or "the bankruptcy section of the bar," so that the 176 letters actually represent a much larger group of people, including approximately half of all the bankruptcy judges. Most of the comments were negative, he said, and many were redundant. Several comments, however, also made specific suggestions that would have to be taken into account if the package were to go forward, he said. The letters raised 20 major themes or issues, he said, and he had summarized these in the form of questions in a separate memorandum for the Committee's consideration.

The first question is, is there a problem? Judge Duplantier said the overwhelming message of the comments is that, if there is a problem, it does not exist for the 99 percent of the cases that do not involve a serious dispute, and the proposed amendments, accordingly, were perceived as requiring paper shuffling by all participants with no corresponding benefit most of the time. Professor Resnick said the most common objections included the following: 1) the amendments require the court to set a hearing when the writer's court does not set one unless there is an objection; 2) the amendments should not exempt consumer debtors from the requirement to furnish affidavits; 3) there is no reason to require affidavits of any party, ever; and 4) "in our court, everything works fine."

Judge Gettleman said the Chicago commentators think the Committee misread the survey from which the litigation package grew. Professor Resnick said the report on the survey stated that the response rate was only 23 percent; the narrative responses, however, which were not published, had led the Long Range Planning Subcommittee to recommend giving attention to the area of motion practice. The subcommittee had reviewed this narrative material before undertaking the project.

Professor Resnick said much of the opposition to the proposed amendments comes from the fact that they would infringe the local rule authority of each court. There are national rules regulating the procedure in adversary proceedings, he said, but if those rules did not already exist, the idea of creating them would be resisted. Professor Klee said he was not in favor of the package as published. Judge Cristol said there is much good material in the package and if the Committee were to propose item-by-item improvements, that probably would result in 50 percent or more of the substance becoming rule. **A straw poll on sending the package forward with only minor tinkering drew no votes.**

The second question was whether the Committee should try to develop a package of proposed amendments to provide national uniformity for major issues. Mr. Rosen said he doubted that a clear line exists that could be used to identify matters appropriate for the national rules and said it would not be

good for districts to operate under two sets of rules. He said he preferred the approach suggested by Judge Cristol, taking the proposals item-by-item, each on its merits. Mr. Smith said the essential tasks for the national rules are to provide the fundamentals and assure due process. He said in some courts it can be difficult to get a hearing even when there is an objection and a hearing is requested, so that he does not see the fundamentals in place even in his own district.

Professor Klee said the issue whether a judge can decide disputed issues of fact without testimony, *i.e.,* using only affidavits, is fundamental, as is the question of issuing an order without evidence. Professor Resnick said Civil Rule 55 should govern when a party defaults by failing to respond. Judge Cordova said the default situation is much different from that of a party who requests a hearing but cannot obtain one. Mr. Rosen said the rules should state minimal requirements for matters in which there is no contest and state principles to govern contests and full-scale disputes. The Reporter said that one aspect of the preliminary draft that commentators complained about was a perceived proliferation of types of proceedings and that Mr. Rosen's suggested approach might make a future proposal more acceptable.

The Reporter noted that the current Rule 9013 contains principles, *e.g.,* the moving party must serve the motion on the party against whom relief is sought, that the Committee could expand upon to cover the additional subjects on which there is a clear need for guidance. There appear to be three such subjects, he said. One is the proper use of affidavits in a contested matter. Another is telling the parties when a hearing will be a status conference and when they must bring witnesses. A third might be to prescribe a service list, which is not in the current rule but is in the published draft. **The consensus was to attempt to identify principles to be expressed in any future amendments by going through the published draft to ascertain which substantive points the Committee would want to add to current Rules 9013 and 9014.**

Judge Duplantier said that Civil Rule 43(e), which permits a court to decide a motion on affidavits, should apply in a bankruptcy case except when there is a genuine issue of material fact in a contested matter. In the event of a dispute over one or more material facts, whether the proceeding is a trial or an evidentiary hearing on a motion, the dispute must not be resolved by affidavit, he said, but rather upon oral testimony as required by Civil Rule 43(a). In other words, he said, Civil Rule 43 applies. **The consensus was that the appropriate use of affidavits is an issue the Committee should work on.**

The Committee then considered the question whether to retain the framework of the preliminary draft, with Rule 9013 devoted to "applications" and Rule 9014 to motions with a list of matters to which it does not apply. The alternative would be to retain the structure of the current rules under which Rule 9013 governs motions and Rule 9014 governs contested matters. Judge Roettger noted the amount of opposition to the preliminary draft expressed in the written comments and suggested that any new proposals should avoid too close a resemblance to what was published. Mr. Frank said the Committee needs to decide a basic policy issue of whether the matters included in Rule 9013 and the matters

excluded from Rule 9014 should be the Committee's decisions or should be left to local practice and discretion. Mr. Batson said multiple practices among judges in the same district is a problem, but that uniformity such as the Committee proposed in the published draft of Rules 9013 and 9014 is not advisable. Accordingly, he said, "nibbling" at the proliferation of different practices by proposing limited amendments to the national rules may be the best the Committee can do to foster greater uniformity. Judge Gettleman said that each of the district judges in the Northern District of Illinois has an individual website that is used to notify practitioners and parties of the procedures used by each judge.

Judge Kressel noted that many commentators like the proposed amendments to Rule 9013 and said he thinks bifurcation according to *ex parte* matters and potentially contested motions would work with a shortened Rule 9013. Mr. Rosen said the list of matters in the published draft of Rule 9013 that can be handled in a basically *ex parte* manner is not objectionable and probably can be retained for a future proposal. Professor Klee said he thinks the published draft of Rule 9013, modified to accommodate some of the comments received, could go forward; Rule 9014 could follow later after being reworked to focus on the use of affidavits and what kind of evidence is needed for default. Judge Duplantier said he thinks Rule 9013 needs to await Rule 9014 to make sure they both work together. Professor Klee said that Judge Robreno's principles, which were circulated at the Committee's September 1997 meeting, were a different approach; perhaps the Committee should delay further and take a fresh direction, he said. **A straw vote on whether to proceed resulted in 6 votes to continue going through the published draft to identify issues worthy of further consideration, and 4 votes to abandon the effort to amend the rules governing motion practice.**

The Committee went through the preliminary draft Rule 9014, subdivision by subdivision, to determine what elements of the proposed rule to retain. **The Committee decided to retain the title "Contested Matters." The Committee deleted from further consideration subdivisions a), b), d), e), f), g), k), l), m), n), and o).** With respect to **subdivision c), the Committee decided to delete the time period for serving a motion but keep the service list,** and to reconsider the specific parties named in the service list. On the second day of the meeting, **the Committee reconsidered its decision concerning the service list and determined not to retain it.**

The Committee discussed whether to retain the authorization for a court to permit electronic service of a motion under a local rule, an innovative provision of the preliminary draft Rule 9014 which attracted no negative comment. Professor Klee suggested that the Committee consider instead turning to the technology subcommittee for an amendment to Rule 9036, so that electronic service could apply in bankruptcy cases generally. Professor Resnick noted that, under the current Rule 9014, Civil Rule 5, which governs service in civil proceedings, is not applicable to contested matters unless the court specifically orders otherwise; accordingly, amending Rule 9036 rather than Rule 9014 would be more consistent with the electronic service proposals being drafted under the auspices of the Standing Committee. Those proposals would include amendments to Rule 5 and other civil rules.

Concerning subdivision (h), Mr. Frank said he interpreted the preliminary draft as imposing no requirement of mandatory disclosure and suggested that the subcommittee should consider the issue and decide what the policy should be regarding discovery in contested matters initiated by motion. Professor Resnick said he had been told by Chief Bankruptcy Judge Louise DeCarl Adler (CA-S) that she had written a letter to the Civil Advisory Committee about their proposal to eliminate from Rule 26 the authority of a court to opt-out of the mandatory disclosure provisions. She said her reason for submitting the comment is that mandatory disclosure may not work well in bankruptcy matters where most adversary proceedings and other matters involve less than $10,000. The question, he said, is whether the Committee wants to retain an opt-out in the bankruptcy rules. **The consensus was to leave Rule 26 incorporated by reference in Rule 7026, as it is in the current Rule 9014, that is, applicable in contested matters. The Committee also agreed to delete the time periods stated in the published draft and concluded from these decisions that subdivision (h) generally should be deleted.**

The Committee determined that subdivisions (i) and (j) of the published draft should be studied further. Concerning subdivision (i), which provided for an initial hearing that would be a status conference unless there is no disputed issue of material fact or the court determines to hold an evidentiary hearing and notifies the parties to bring any witnesses, **the Committee decided to delete the status conference hearing requirement** and discussed how to require that notice be given of any evidentiary hearing. **The Committee determined that the two most important questions to answer in any new proposals to amend the rules governing motion practice are: 1) how does an attorney or party know when to bring witnesses to a hearing, and 2) when, how, and under what circumstances can the court conduct a trial by affidavits**, a subject which the published draft treated in subdivision (j). The consensus was that a party is entitled to reasonable notice of when a hearing is going to be evidentiary in nature. Mr. Rosen said that if one party brings witnesses and the other does not, there should be some penalty for the party who failed to bring witnesses. Judge Cristol said one possible approach would be to allow for a response and, once a response has been filed, to require the parties to meet and proceed as under civil procedure, but provide that if there is no response, no hearing will be set. The consensus was that this is one approach that the Committee should consider. Mr. Batson said that in preparing any new proposals, the Committee also should review Rule 9029 for possible amendment, to assure that courts know what they need to cover in their local rules.

The Committee discussed the issue of the use of affidavits at hearings on "trial-type" motions. Judge Tashima said the Ninth Circuit has approved the use of affidavits as a substitute for direct examination. In re Adair, 965 F. 2d 777 (9th Cir. 1992). It was suggested that the Committee consider a rule that would authorize the use of affidavits but state that if a party objects to a witness' affidavit, the party must be permitted to cross examine the witness. The Reporter said that is the rule for trials now under Civil Rule 43(a), which applies to evidentiary hearings in bankruptcy cases, including those held in contested matters, under Bankruptcy Rule 9017. Another approach would be to draft an amendment that simply states that Civil Rule 43(e) applies in bankruptcy cases (including contested matters) to the same extent that rule applies in civil actions. One member asked whether the Committee should consider authorizing the court to grant relief on a motion without any evidence, *i.e.,* without an affidavit from the moving party when the respondent has defaulted, or leave the issue to be governed by Civil Rule 55 through its incorporation by reference in Bankruptcy Rule 7055, which applies in contested matters. **The consensus was that Rule 55 is sufficient.**

The Committee also decided to consider further an *ex parte* motion rule similar to the published draft Rule 9013.

Concerning the proposed amendments to those rules which in the published draft were carved out from the scope of Rule 9014, **the Committee determined to consider separately Rule 2014. The Committee referred this rule back to the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements** for reconsideration in light of the comments directed toward that rule. The Reporter noted that the amendments to other rules that were included in the "Litigation Package" were conforming amendments the purpose of which was to eliminate separate service lists that now are a part of those rules. At the close of the discussion, **the Committee referred the full "Litigation Package" back to the Litigation Subcommittee to draft new proposals in conformity with the discussion at the meeting and with instructions to review also each of the conforming amendments that were proposed along with Rules 9013 and 9014.**

Injunctions in Plans. The Reporter briefed the Committee on the background of the proposed amendments, which would provide procedural protections to entities affected by injunctions included in a plan. The proposals would amend Rules 2002(c), 3016, 3017, and 3020. The Subcommittee on Injunctions in Plans had prepared drafts but reserved for the full Committee the resolution of two issues.

The first issue was whether to include in the amendments to Rule 3020, governing the order of confirmation, the phrase "and not by reference to the plan or other document." The effect of including those words in the rule would be to require inclusion of a completely self-contained description of a plan's injunctive provision in an order confirming the plan. Judge Kressel said he, as a judge, does not want to enjoin what the plan enjoins; the parties may have agreed to terms which the judge would not have approved. Mr. Rosen said he did not think including a description of the plan injunction in the order would make it the judge's injunction, and the proposed amendment should avoid leading a judge to think additional testimony or other evidence might be needed at the confirmation hearing. Mr. Kohn said he was most interested in making sure all affected entities receive notice of injunctive provisions, although he said he did not understand how an injunction could come into being without an order. Upon a request by a member for examples of non-parties to the bankruptcy case that can be affected by injunctions in plans, some were stated to be 1) partners in a partnership, 2) future asbestos claimants, and 3) the Environmental Protection Agency. **A motion to delete from the proposed amendment to Rule 3020 the phrase "and not by reference to the plan or other document" carried by a vote of 5 to 4.** Members suggested that the description of the injunction in the order could be very general; for example, it could be placed above the "it is ordered" language or the order styled as one "confirming plan and enjoining entities."

The second question was whether the amendments should be broadened to cover more than injunctions, in particular whether the amendments should encompass releases of rights against an entity other than the debtor. Professor Klee said providing for releases in the rules would be interpreted as an attempt to legitimize third party releases and the Fifth and Ninth Circuits specifically prohibit them. **A motion to delete the language concerning releases from the proposed amendments carried on a voice vote.**

Professor Klee said that in the first sentence of the Committee Notes to Rules 2002 and 3016, the text mentions parties "receiving" notice. These sentences should be changed to say that parties must "be given" notice, he said. **The Committee approved the proposed amendments as modified by the Committee without objection.**

Form for Reaffirmation Agreement. Judge Kressel, as chairman of the Forms Subcommittee, said that in light of the Committee's discussion of proposed amendments concerning motion practice and possible action by Congress that probably would affect reaffirmation agreements, he recommended deleting from the proposed form the motion and order that were included in the agenda book for the meeting. There was no objection to the recommendation. Judge Kressel said the Committee also needed to decide whether to propose the form as an official form, publishing it for comment and delaying its effective date until the year 2000, or issuing the form as soon as possible as a procedural form under the authority of the Director of the Administrative Office to publish bankruptcy forms for optional use. Professor Klee said that although both the Senate and the House bill contain provisions on the subject of reaffirmation agreements, he did not expect any new law to have an effective date earlier than October 1, 2000. He said he did not advise waiting to issue the form. **The Committee agreed that the form should be issued as a Director's form and also should be published, so that it ultimately could become an official form, but that publication should be delayed until legislation has been enacted.** Professor Klee said that sentence at the top of page two of the form which states that the executed form must be filed before it is binding should refer to filing with "the clerk of the bankruptcy court" not simply "the bankruptcy court." Some members said the form is substantive and that issuing it may be ill-advised. Mr. Smith said the phrase "telling the creditor in some other lawful way" in the third paragraph of the section of the form labeled Notice to Debtor is likely to be more confusing than helpful to a lay person. **The Committee agreed to change the sentence to read simply "by notifying the creditor that the agreement is canceled" and approved the form as modified.**

Shortening the Rules Process. The Executive Committee of the Judicial Conference asked the Standing Committee to consider methods by which the rules process could be streamlined, so that an amendment or new rule could be prescribed in a shorter time than the three years that the process currently requires. The Standing Committee, in turn, asked for suggestions from the Advisory Committee. Judge Scirica, the chairman of the Standing Committee, has written a letter to Judge WilliamTerrell Hodges, chairman of the Executive Committee and a former chairman of the Advisory Committee on Criminal Rules, stating the Standing Committee's view that the only periods in the rules process that could be shortened without jeopardizing the deliberative and public review components of the rules process would be the periods provided for review by the Supreme Court and Congress. As neither of these time periods was in the control of the judiciary, Judge Scirica's letter stated that the rules process should remain as it is. **The**

Committee agreed with this conclusion.

Notice to Infants; Capacity to File. The Reporter reviewed the history of the draft amendments to improve the notice given to infants and incompetent persons of events in a bankruptcy case. In the draft of proposed new Rule 2002(g)(3), Professor Klee suggested moving the phrase "unless the court orders otherwise" from the end of the sentence to a location just prior to the word "notices." The Committee agreed. The Committee also decided to delete the phrase "or has reason to know," which was in brackets in the drafts, everywhere it appeared. The reference to "this rule" in Rule 2002(g)(3) was changed to "Rule 2002," and, in light of the Committee's deferral of action on the proposed subdivision (m) to Rule 1007 which was among the proposals concerning notice to governmental units, the cross-reference in the Committee Note to "Rule 1007(n)" was changed to "Rule 1007(m)." **A motion to approve the drafts of Rules 1007(m) and 2002(g)(3) carried without objection.**

Professor Morris reviewed the state of the law concerning the capacity of infants and incompetent persons to file a petition in bankruptcy and the considerations surrounding the requirements for filing a petition by a corporation. Professor Klee said that a simpler approach would be simply to say that Civil Rule 17 applies. [Civil Rule 17 currently is incorporated by reference by Rule 7017 and applicable in adversary proceedings.] Professor Resnick said he opposed the provisions concerning filing by a corporation because no problem exists and creating a rule could lead to unintended consequences. Mr. Frank said he thinks the proposed Rule 1004.1, specifying a procedure for a filing by an infant or incompetent person would be a service and that it would fill a gap in the rules. **A motion to postpone consideration of the draft amendments until the next meeting and to consider then whether to add to proposed Rule 1004.1 provisions similar to Civil Rule 17(b) was not opposed.**

The Committee approved the forwarding to the Standing Committee with a request for publication and comment proposed amendments to the following rules: Rule 1007(m), Rule 2002(c), Rule 2002(g), Rule 3016, Rule 3017, Rule 3020, and Rule 9020.

Proposed Common Draft Amendments to Permit Electronic Service. The Reporter introduced the draft amendments to the civil rules prepared by Professor Edward H. Cooper, reporter to the Advisory Committee on Civil Rules, following the meeting of the Standing Committee's Subcommittee on Technology. Professor Resnick said the Standing Committee had requested feedback from all of the advisory committees with a view toward achieving uniform language for amendments to be published for comment in the fall of 1999. The draft included proposed amendments to Civil Rules 5(b), 6(e), 77(d), and 4(d). The proposed amendments to Rule 6(e) would extend to electronic service the additional three days for response currently afforded to parties when service is made by mail. The Reporter said he opposed affording the additional three days, but that Professor Cooper favored it as a means to encourage parties to use electronic service. Judge Duplantier said he would favor affording the three extra days for all service other than personal service but realized it would not be easy to draft such a provision. Mr.

Rosen and Judge Robreno favored extending the three days to those who are served electronically, as in Professor Cooper's "Alternative 3," and others supported Judge Duplantier's approach. **The Committee agreed that the proposed amendment to Rule 77(d) was satisfactory and that bankruptcy clerks also should be able to serve notice of entry of an order or judgment electronically on consent of the receiving party, but that it would be premature to propose amendments to Civil Rule 4 that would permit a defendant to electronically waive service of a summons and complaint. The Committee agreed to submit for publication an amendment to Rule 9006(f) to extend the three-day extension now afforded when service is effected by mail to all forms of service other than personal delivery, if the proposed amendments to Civil Rule 5(b) are published.**

Information Items

Alternative Dispute Resolution Act of 1998. This law was enacted in October 1998. It provides for a wide array of alternative dispute resolution (ADR) procedures in all district courts and requires the district courts by local rule to make available to parties in civil actions at least one form of ADR. The Act expressly includes adversary proceedings in bankruptcy among the civil actions to which this requirement applies. The law does not require the bankruptcy courts to establish ADR programs, although any court may do so voluntarily. The Administrative Office is on record as interpreting the new law's reference to "adversary proceedings in bankruptcy" to mean only those proceedings as to which the reference has been withdrawn to the district court. Mr. McCabe noted that the judiciary had opposed the bill on the ground that the courts should not have a program mandated on them. Judge Small, in a letter to Judge Duplantier, had raised the question whether a bankruptcy rule might be needed to cover the situation when an appellate court ADR program results in a settlement of a bankruptcy matter. Rule 9019 requires that all creditors be sent notice of any potential settlement, because the settlement may affect all creditors, and the parties should come back to the bankruptcy court, give notice, obtain approval of the settlement by a bankruptcy judge, and then dismiss the appeal. Judge Small said he was not pushing for a rule at this time but simply bringing the issue to the Committee's attention.

Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements. The Standing Committee, at its June 1998 meeting, decided that each advisory committee would appoint two members to serve as an Ad Hoc Committee on Attorney Conduct under the leadership of the Chair and Reporter of the Standing Committee. The Ad Hoc Committee hopes to offer recommendations to the Standing Committee at its January 2000 meeting on whether there should be national uniform rules of attorney conduct in all federal courts. In conjunction with this effort, the Advisory Committee asked the Federal Judicial Center ("FJC") to conduct a survey on national uniform standards for attorney conduct in the bankruptcy courts.

Marie Leary of the FJC summarized the survey findings. Of the 77 responding chief bankruptcy judges, 47 (61 percent) said that their courts follow the local rules of attorney conduct of their respective federal

district courts. Most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct; only seven percent of bankruptcy courts indicated that they do. Thus, proposed uniformity in district court attorney conduct rules could carry over to most of the bankruptcy courts, even if the proposed changes are not directly aimed at or applied to the bankruptcy courts. Nine percent indicated that their courts have a local bankruptcy rule that adopts standards other than those in the district court's local rules, and 12 percent said they have no local district or bankruptcy rule governing attorney conduct.

Looking at all bankruptcy judge respondents (chief judges and non-chief judges combined), the survey found that more than 75 percent were satisfied with the statutory and non-statutory standards they now use to resolve attorney conduct issues. Nearly 90 percent found no problematic inconsistencies between the statutory and non-statutory standards used in their district, and nearly 75 percent had never encountered an attorney conduct issue that was not adequately covered by existing standards. Representation of an adverse interest or conflict of interest involving 11 U.S.C. § 327 or § 1103 are the issues that arose most frequently, with 80 percent reporting one or more occurrences within the prior two years.

It would appear from the survey that if a set of core national rules governing attorney conduct were prescribed for the district courts and if those rules were carried over to the bankruptcy courts without taking into consideration the separate attorney conduct issues that face practitioners and judges in bankruptcy cases, the courts would continue to look beyond the core national rules for guidance. Originally, a second phase of the study was to survey a sample of bankruptcy practitioners, but Mr. Smith said that would not be necessary because the first phase had provided sufficient information.

Administrative Matters

The next meeting will be held September 27 - 28, 1999, at the Jackson Lake Lodge in Grand Teton National Park, Wyoming.

The Administrative Office will explore Key West, FL, and Monterey, CA, as possible sites for future meetings.

Respectfully submitted,

Patricia S. Channon