ADVISORY COMMITTEE ON BANKRUPTCY RULES

Amended
Minutes of the Meeting of September 23-24, 1988

The Advisory Committee on Bankruptcy Rules met at the Hyatt Lake Tahoe Hotel, Incline Village, Nevada. The following members were present:

District Judge Lloyd D. George, Chairman
Circuit Judge Edward Leavy
District Judge Franklin T. Dupree, Jr.
District Judge Thomas A. Wiseman, Jr.
District Judge Joseph L. McGlynn, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Ralph R. Mabey, Esquire
Joseph G. Patchan, Esquire
Harry D. Dixon, Jr., Esquire
Herbert P. Minkel, Jr., Esquire
Bernard Shapiro, Esquire
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

The following additional persons also attended the meeting:

District Judge Morey L. Sear, Chairman of the Committee on the Administration of the Bankruptcy System
James E. Macklin, Jr., Secretary to the Committee on Rules of Practice and Procedure and Deputy Director of the Administrative Office
Peter G. McCabe, Assistant Director for Program Management, Administrative Office
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office
William C. Redden, Attorney, Bankruptcy Division, Administrative Office
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California
William R. Parker, Clerk, U.S. Bankruptcy Court for the Southern District of California
Thomas J. Stanton, Director, Executive Office for United States Trustees, U.S. Department of Justice
Barbara G. O'Connor, Senior Counsel, Executive Office for United States Trustees, U.S. Department of Justice

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 Committee on Rules of Practice and Procedure.

Votes and other action by the Advisory Committee and assignments by the Chairman appear in **bold.**

Approval of Minutes of July 1988 Meeting

The Committee approved the minutes of the July 1988 meeting.

Update on New Rules Enabling Act

The Chairman announced that a new Rules Enabling Act had passed the House of Representatives as part of H.R. 4807, the "Court Reform and Access to Justice Act of 1988." This bill contains several provisions which had been discussed at earlier meetings, such as a requirement of publicly announced, open meetings.

The Reporter said that the supersession clause of the new bill is more restrictive than wording used in a predecessor bill, H.R. 1507 and, if enacted, would appear to preclude the Committee from proposing rules governing procedure for chapter 12 cases or any other area not covered in the present rules.[1]

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[1]The wording of the supersession clause as it appears in H.R. 4807 is as follows:

(b) Such rules shall not abridge, enlarge, or modify any substantive right. Such rules may only supersede a rule of practice or procedure or evidence --

(1) in effect on the day before the date of the enactment of the Court Reform and Access to Justice Act of 1988;

(2) prescribed under this chapter; or

(3) consisting of an amendment (including a new rule) made by Act of Congress to the rules described in paragraphs (1) and (2) of this subsection.

The wording of the supersession clause as it appeared in H.R. 1507 was as follows:

(b) Such rules shall not abridge, enlarge, or modify any substantive right or supersede any provisions of a law of the United States except any rule of practice or procedure or evidence --

(1) in effect on the day before the date of the enactment of the Rules Enabling Act of 1987;

(2) prescribed under this chapter; or

(3) consisting of an amendment made by Act of Congress to a rule described in paragraph (1) or (2) of this subsection.

Harry Dixon said he understood that Senator Heflin is opposed to some parts of H.R. 4807 and that its prospects for passage in this Congress, accordingly, are not good. He suggested that the Committee obtain the legislative history of the supersession clause and contact Senators Heflin and DeConcini about the Committee's concerns.

James E. Macklin, Jr., said he understood that Congress believed the Judicial Conference was on record as supporting, or at least not opposing, the supersession clause and that raising opposition now could be difficult. The Reporter stated that he did not oppose the original language used in H.R. 1507. The Reporter said that the H.R. 1507 supersession clause had contained a double negative and it appeared to him that the new H.R. 4807 wording may have arisen from a staff effort to "clean up" the bill grammatically. The Reporter then spoke by telephone with Paul Summitt of the legislative affairs staff of the Administrative Office and requested that the Administrative Office attempt to have the original language from H.R. 1507 reinstated.

Local Rules Oversight

Mr. Macklin said he was aware of the Advisory Committee's efforts to obtain private funding for a study of local bankruptcy rules similar to the one performed for the standing Committee by Dean Coquillette of Boston College Law School. That study, however, was funded by appropriations from Congress. Mr. Macklin said that federal statute prohibits agencies from augmenting their appropriations with private funding. He said that the bankruptcy local rules project should be paid for with government monies. He recommended that the Advisory Committee abandon its efforts to obtain private support for the project and expressed confidence in being able to identify and allocate funding from the Administrative Office's budget to perform the work.

[The new Rules Enabling Act passed by the House (H.R. 4807) would require the Administrative Office to compile local rules of all types - civil, criminal, appellate, bankruptcy, and evidence and report to the Judicial Conference concerning any rule found to be in conflict with "Federal law." The Conference would have the authority to abrogate or modify local rules. If enacted, this bill would provide legislative authority for enhanced oversight of local rules by the Advisory Committee.]

The Chairman then requested that the subcommittee which had been seeking private funding for a local rules project cease those efforts and withdraw any applications for funding now

pending with private organizations. He said he hoped the withdrawals would not cause any embarrassment to the subcommittee members. Bernard Shapiro, subcommittee chairman, indicated that no embarrassment would result.

The Chairman and Judge Sear both agreed that the two most frequent complaints they receive from the bar about the bankruptcy system concern inefficiency of the courts and the inconsistency of local rules from one district to another.

Judge Barta suggested that the Administrative Office should take the lead in achieving reform of local bankruptcy rules. He said he would like to see all current local rules abolished and new ones promulgated only according to a uniform numbering system and an outline or statement directing what should be included.

Joseph Patchan suggested that the Committee draft a statement addressed directly to the bankruptcy judges recommending that each district adopt a uniform numbering system which would follow the outline of the national rules and providing a list of acceptable topics for local rule-making.

Chairman George said he doubted that any voluntary approach would work. The only method that would work, he said, would be for the Committee to operate through the circuits, which have the authority to abolish local rules and impose uniform numbering and a restricted list of topics. Richard Heltzel noted that this method would reach all but the "unwritten rules" of some individual judges.

The Chairman asked Mr. Shapiro to continue to direct the local rules subcommittee and requested that it prepare for the November 1988 meeting a recommendation on how to implement the Committee's oversight responsibilities.

Judge Leavy made a motion directing the **subcommittee to try to achieve through the circuits the repeal of existing local rules combined with the prescribing of a list of acceptable topics for local rules provided by the Committee for the purpose of promoting consistency and uniformity in local bankruptcy rules. The motion carried, with one (1) opposed.**

Rule 9006(a)

Professor Resnick reported that the standing Committee had voted to circulate for public comment the proposed amendment to the third sentence of Bankruptcy Rule 9006(a) approved by the Advisory Committee at the July meeting. The amendment would reduce to 8 days, (from 11 in the current rule), the time period

from which intermediate weekends and holidays may be excluded in computing the time, effectively restoring the integrity of various 10-day periods commonly prescribed in bankruptcy proceedings. Corresponding changes in the rules of civil, criminal and appellate procedure also are circulating so that, if all the changes are adopted, the four sets of rules would have uniform provisions on computation of time.

The Committee, however, had not approved a Committee Note to the amendment and needed to do so before the end of the year. In a memorandum dated August 29, 1988, the Reporter had circulated to the members the text of both an interim Committee Note which he had prepared for the circulating draft of the proposal to change the rule and a proposed text of a longer Committee Note for the Committee's consideration.

A motion by Judge Dupree to adopt the longer of the two Committee Notes carried with one (1) opposed.

Proposed Amendments to Appellate Rule 6

Professor King observed that in Line 1 of the proposed rule, the phrase "judgment, order or decree" is used but that in Line 6 only the word "judgments" is used, although the context indicates that an identical meaning is intended. Professor King suggested that the Appellate Rules Committee might want to consider using parallel language in both places.

Professor King said further that the Committee Note on "original jurisdiction" does not explain the several ways in which the district court might become the original forum in a bankruptcy matter (e.g., when a reference is withdrawn). He suggested that the Reporter should draft a more complete explanation to be substituted for this Committee Note.

The Committee authorized the Reporter to contact the Appellate Committee Reporter informally on these matters.

Alternate Proposal on Time Computation Rules

Professor Resnick reported that he had presented to the standing Committee Judge Leavy's July 1988 suggestion to convert all time periods in the rules to 7, 14, 21 or 28 days. This suggestion had met a favorable reception, he said, and had resulted in a vote to circulate a proposal to delete the third sentence of Rule 9006(a) and similar provisions in the other bodies of rules. If adopted, this proposal would have the effect of eliminating all extensions of time except those resulting from

the expiration of a time period on a Saturday, Sunday or legal holiday. The proposal would be adopted only after study of all other time periods prescribed in the rules to determine whether they should be adjusted to compensate for deletion of the rule permitting intervening weekends and holidays to be excluded from the computation of periods shorter than eight (8) days.

Following the meeting of the standing Committee, Judge Weis determined that circulation of such a proposal to the bar would be confusing and also premature, as none of the other Advisory Committees had an opportunity to consider it. Accordingly, the proposal does not appear in the rules changes now circulating for comment.

Chairman George inquired concerning continued interest by the Committee in a proposal to delete the third sentence of Rule 9006(a). Professor King made a motion "that we not express a disinterest," to which the Committee indicated general agreement, although no formal vote was taken. The Chairman said he thought it best to coordinate work on this proposal with the other Advisory Committees and that the matter, accordingly, would be deferred for the present.

Title of Rules and Form of Citation

The preliminary draft rules changes were published for public comment showing the title of the Bankruptcy Rules as the "Federal Rules of Bankruptcy Procedure." This title conflicts with the form of citation prescribed in Bankruptcy Rule 1001, which is "the Bankruptcy Rules." In addition, the Committee Notes to the various rules on time computation make repeated references to "Fed. R. Bankr. P. 9006(a)."

Ralph Mabey made a motion that Rule 1001 be amended to change the name of the rules to the "Federal Rules of Bankruptcy Procedure," which carried with three (3) opposed.

Docket of Advisory Committee Documents

Peter McCabe announced that he is working on a docket of all of the proposals, memoranda, letters and other documents which have been sent to the Committee and among the members. He said this docket is organized by subject and is nearly complete.

As soon as the docket is complete, Mr. McCabe said, he will circulate it to the members, who then may contact him for copies of any documents missing from members' own files.

Test of Official Form No. 16 and Official Form No. 19

Patricia Channon reported that the testing of proposed new Official Forms for the § 341 Meeting Notice (No.16) and the Proof of Claim (No.19) is underway in eleven (11) courts. The Administrative Office informally has told the participating courts to expect the test period to last approximately six months and conclude sometime in December 1988. **The Committee voted affirmatively to end the test on December 31, 1988.**

A questionnaire for evaluating the test versions of the forms has been developed. **The Committee suggested that the Administrative Office distribute the questionnaire immediately so that courts could provide copies to trustees and other practitioners and obtain the broadest possible spectrum of comments.**

Removal of Certain Forms from the List of Official Forms

Both the Reporter and the Administrative Office had submitted memoranda recommending deletion of certain forms from the list of Official Bankruptcy Forms. The Reporter had divided the forms into three groups: those used by the courts, those relating to matters now assigned to the United States trustee, and those used by counsel.

Concerning forms used by the courts, the Reporter and the Administrative Office agreed that Form No. 5 (Certificate of Commencement of Case), Form No. 13. (Summons to Debtor), Form No. 14 (Order for Relief), Form No. 26 (Certificate of Retention of Debtor in Possession), Form No. 32 (Notice of Filing of Final Account) and Form No. 33 (Final Decree) should be deleted. The Administrative Office disagreed on the proposed deletion of two forms: No. 16 (Order for Meeting of Creditors and Related Orders, Combined with Notice Thereof and of Automatic Stay), commonly known as the § 341 Meeting Notice; and No. 27 (Discharge of Debtor).

One reason the Administrative Office wanted to retain the § 341 notice and discharge order as Official Forms is that in most cases they are the only documents which creditors receive concerning the bankruptcy. As such, it is extremely important that the information they contain be accurate. A number of courts already use the Rule 9009 language permitting "alterations [to Official Forms] as may be appropriate" to add to these forms material which is inaccurate or conflicts with the statute or the national rules. Stripping these forms of their official status, in the opinion of the Administrative Office, would make improper alterations even more difficult to control.

Some members said that the entire matter of forms should be left to the Administrative Office. Professor King, however, said that, as the Committee knew, he disapproved of anyone other than the Committee drafting forms. The Administrative Office already is responsible for promulgating more than 100 "Director's Forms" for use in bankruptcy courts, pursuant to authorization provided in Rule 9009. The representatives of the Administrative Office said that all current Director's Forms could be submitted to the Committee for its review. The lengthy approval process required for Official Forms, however, would not be practical every time any form needed changing.

The courts appear to find many of the Director's Forms convenient for handling routine matters and use them without alteration. Those Official Forms which go out to the public and require uniformity the most, however, are the same forms the courts most frequently change at the local level. The Administrative Office would favor both retaining Form No. 16 and Form No. 27 as Official Forms and amending Rule 9009 to restrict alterations to forms. Any upgrading in status that would enure to the Director's Forms from their approval by the Committee also would be welcomed by the Administrative Office.

Ralph Mabey made a motion to adopt the Reporter's recommendation to delete from the Official Forms the eight forms used by the courts (Nos. 5, 13, 14, 16, 26, 27, 32 and 33). The motion was defeated by a vote of seven (7) to five (5).

Three Official Forms relate to matters now assigned to the United States trustee: No. 15 (Appointment of Committee of Unsecured Creditors in Chapter 9 Municipality or Chapter 11 Reorganization Case), No. 24 (Notice to Trustee of Selection and of Time Fixed for Filing a Complaint Objecting to Discharge of Debtor) and No. 25 (Bond and Order Approving Bond of Trustee). Both the Reporter and the Administrative Office recommended abrogating these as no longer requiring promulgation by the Judiciary. **A motion to delete Official Forms No. 15, No. 24 and No. 25 carried by a vote of seven (7) to five (5).**

The remaining Official Forms are used by practitioners and members of the public. The Reporter favored retaining official status for all of these. The Administrative Office had advocated dropping several forms which are changed substantially to fit the circumstances of each case in which they are used, (e.g. No. 31, Order Confirming Plan). The argument advanced for their deletion was that it is confusing to have some forms which are intended to be followed strictly and others which are intended only as a guiding framework for custom-drafted documents; yet both types

of forms are "official." In light of the earlier vote on the forms used by the courts, however, Ms. Channon withdrew the Administrative Office's recommendation that Official Forms No. 28, No. 29 and No. 31 be abrogated.

Proposals for Revising the Petition, Schedules and Statements

A Forms Task Force consisting of bankruptcy judges and bankruptcy clerks had submitted to the Committee a package of proposed revisions to the Official Forms comprising the filing documents - the petition, schedules and statements. If adopted, these proposals would result in a generic set of forms applicable to every chapter, with certain additional forms to be completed only by chapter 11 and other business debtors. The chapter 13 statement would be abrogated. The proposals also would merge into the petition requests for information which the clerk needs to complete the statistical case opening report and for the name and telephone number of the debtor's attorney. The proposals for the schedules add new forms of property to be reported and delete requests for information about claims which is not needed at the time of filing. The proposals for the statements of financial affairs consist generally of rearranging and rewording the questions in the current forms, and deleting requests for information provided elsewhere.

The Committee considered the proposals for the voluntary petition, involuntary petition, schedule of priority creditors, schedule of secured creditors, schedule of unsecured creditors, schedule of codebtors, schedule of real property and schedule of personal property and suggested a number of changes. **The Chairman appointed Jerry Patchan to chair a subcommittee to work out style and format problems. The Committee will consider the remaining schedules and statements and the report of the subcommittee at the November 1988 meeting.**

Interim Ch. 11 Rules for Local Adoption Proposed by Judge Sear

Judge Sear had submitted to the Committee two draft rules dealing with management of chapter 11 cases, one for United States trustee districts and another for bankruptcy administrator districts, and had requested that the Committee distribute and recommend them for local adoption. The drafts grew out of concerns about languishing cases raised by a Docket Management Task Force organized by Judge Sear to assist bankruptcy judges.

After discussion, Judge Sear temporarily withdrew the rule in order to work out with Mr. Stanton and Ms. O'Connor a revised version which would be mutually beneficial. Judge Leavy made a

motion that the rules be adopted "in principle" with the understanding ~~that~~ they will be revised as a tool for giving structure to § 105 of the Code and focussing on the time standards in the present draft. The motion carried unanimously.

Judge George directed the Reporter and Judge Barta to work with Judge Sear and Mr. Stanton on a revised draft. The Committee will vote on final language at the November 1988 meeting.

Update on Class Proofs of Claims Issue - SEC Position

The Reporter said he had received a telephone call from the Solicitor General's office concerning the Standard Metals case, in which the 10th Circuit held that a creditor could not file a class proof of claim. This case is now awaiting action by the Supreme Court on a petition for certiorari. The Solicitor General is representing the SEC. Although the SEC favors permitting class proofs of claim, it opposes certiorari in this case. The issue has been decided in favor of allowance by the 7th Circuit in American Reserve and is before the 11th Circuit in the Charter case.

At its January 1988 meeting, the Committee considered and rejected a suggestion by the SEC that the rules be amended to permit the filing of class proofs of claim, and the Reporter had so informed the Solicitor General's office. Nevertheless, the government's contains a statement indicating that the matter still is open before the Committee. Herbert Minkel expressed concern about the statement in the Solicitor General's brief that the Committee is reviewing the issue.

A motion that the Committee reaffirm its position against class proofs of claim passed unanimously. The Reporter will advise the Solicitor General that the Committee does not anticipate promulgating any rules that would permit class proofs of claim.

Rules for Bankruptcy Administrator Districts

The Chairman opened the discussion by stating that the Committee had before it two approaches regarding the application of the Bankruptcy Rules to the six districts in the states of North Carolina and Alabama, which are served by bankruptcy administrators rather than by United States trustees. The Reporter had circulated two memoranda, dated August 15, 1988, one describing a proposed Bankruptcy Rule 9034 and the second setting out a proposed Part X to the draft rules.

The Reporter explained that the United States trustee system will not assume jurisdiction over cases in North Carolina and Alabama until October 1992. He also noted that the transition to the United States trustee system there may be delayed if Congress determines to extend the current sunset date for the bankruptcy administrator program. The Reporter stated that he had prepared both approaches to provide the Committee with an opportunity to make a selection that would best address the application of the Bankruptcy Rules in these states.

In discussing the Rule 9034 approach, the Reporter commented that many of the United States trustee provisions in the draft rules need not be duplicated, as these matters (e.g., the receipt of notices) are addressed in the Judiciary-based bankruptcy administrator program's Judicial Conference Regulations and Director's Guidelines (which had been transmitted to the Committee previously).

In discussing the proposal for Part X rules, the Reporter invited the Committee's attention to the absence of any substantive difference between the Part X approach and draft Rule 9034. The difference between the two approaches, in his view, is more of form than of substance.

Professor Resnick added that the bankruptcy administrators and chief bankruptcy judges in North Carolina and Alabama had been invited to review and comment on the two draft approaches. The respondents had expressed a preference for adoption of the Rule 9034 approach.

Herbert Minkel inquired whether the Rule 9034 approach was intended to provide additional flexibility in the districts to which the Rule, if adopted, would apply. Professor King observed that there should be no greater flexibility in the application of the Bankruptcy Rules in a particular judicial district; the rules should be applied uniformly without regard to the presence of a United States trustee or bankruptcy administrator in a district.

Professor King also questioned the need for a separate rule given the time frame for the anticipated promulgation of the revised Bankruptcy Rules and the current sunset date for the bankruptcy administrator program. Professor Resnick again raised the possibility of Congressional action to extend the bankruptcy administrator program and suggested that some type of rule is necessary also to alert practitioners that, in certain respects, the application of the Bankruptcy Rules to the Bankruptcy Code is different in North Carolina and Alabama.

Chairman George invited the Committee to consider the possibility that the bankruptcy administrator program may be extended. He also suggested that given the protracted rules revision process, this Committee meeting provided a timely opportunity to make provision for the uniform application of the rules in the districts served by bankruptcy administrators.

Mr. Patchan expressed concern regarding the force of the Committee Note to proposed Rule 9034 as opposed to the more formal articulation of these statements in the proposed Part X rules. He also said outside practitioners may not have access to the Judicial Conference Regulations and Director's Guidelines that prescribe what is to be done in place of those rules which do not apply in North Carolina and Alabama. Professor Resnick and Professor King noted that the Committee Note statements are more than suggestions in that they should be observed and are not intended to provide greater flexibility than the proposed Part X rules approach. There was a consensus that the Committee Note should be expanded to make clear that it is the statute, and not the bankruptcy judge, which determines whether a United States trustee or a bankruptcy administrator is authorized to act in any particular case.

The Chairman invited William Redden, who has been directing the bankruptcy administrator program for the Administrative Office, to comment on the two approaches before the Committee. He said that the Bankruptcy Division was recommending the adoption of the Rule 9034 approach.

Judge Leavy made a motion for the adoption of draft Rule 9034. He then accepted an amendment offered by Mr. Minkel, pursuant to which the first two subordinate clauses would be transposed so that the rule would read as follows:

> **In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not inconsistent with the provisions of the Code and title 28 of the United States Code effective in the case.**

The motion to adopt Rule 9034 as amended carried with two (2) opposed.

Rule X-1008(c) and § 707(a) Noticing Requirements

The Bankruptcy Division of the Administrative Office had referred to the Committee a letter from the bankruptcy court in

the Northern District of New York concerning that court's local rule delegating to the moving party the responsibility of serving many of the notices required by Rule 2002. This local rule now has come into conflict with Rule X-1008(c), which exempts the United States trustee from providing any notices required in Rule 2002.

The 1986 Bankruptcy Amendments authorize the United States trustee, and only the United States trustee, to file a motion to dismiss a chapter 7 case for failure to file schedules. Rule 2002(a)(5) requires that notice of the hearing on any motion to dismiss be mailed to all creditors. The court thus finds itself in the position of providing to one moving party services which it denies to others.

Mr. Stanton said the United States trustees have no capability for bulk noticing. He added that the United States trustee files motions to dismiss to flush the court's docket and is not really a party in interest.

Mr. Parker said that the Administrative Office has imposed a cap on use of the BANS noticing system at 5,000 creditors per case. Usually, the court places on the debtor the burden of noticing any additional creditors, but this is not a practical solution for dismissals. Mr. Heltzel observed that the additional workload generated by these notices is not included in the current staffing formula and might have to become an item for reimbursement by the Department of Justice. Mr. McCabe noted that the Judiciary already is in deficit for postage and notice-related overtime and is experiencing continuing appropriations difficulties related to noticing expenses.

The Chairman expressed his view that the entity most able to handle the noticing job efficiently should perform it.

Judge Leavy made a motion that the noticing of United States trustee motions remain with the clerk and that it be made clear that this determination represents a conscious decision by the Committee to avoid the need for another branch of government to duplicate the courts' existing capability to produce and mail notices on a mass scale. The Reporter will draft a letter to the court in Albany.

ABA Proposals Concerning Rule 4001

The ABA's Subcommittee on Bankruptcy Rules has suggested a number of changes to Rule 4001, which were transmitted to the Committee in a report dated April 10, 1986, and reiterated by subcommittee chairman Michael L. Temin in a letter dated

December 2, 1987. The Reporter had commented on these suggestions in a memorandum to the Committee dated April 25, 1988

The ABA subcommittee recommended a complete revision of subdivisions (b), (c) and (d) of the rule for a variety of reasons set forth in both the 1986 and the 1987 communication to the Committee. The Reporter noted that the Committee had approved the final draft of the present rule after full consideration and at a time when it had the 1986 report in hand. It was the Reporter's view that these rules should not be amended after only one year of experience absent any demonstration of serious problems caused by them. **A motion to disregard the proposal for complete revision passed unanimously.**

Concerning the specific suggestion that an immediate preliminary hearing be required on all requests pursuant to the three subdivisions, **a motion to retain the prescribed time periods unchanged also passed unanimously.** The Reporter's memorandum had pointed out that the minimum 15-day period prescribed in subdivision (d) can be shortened upon request and that, although the 15-day period prescribed in subdivisions (b) and (c) may not be shortened, a party may request a preliminary hearing on use of cash collateral [subdivision (b)] or obtaining credit [subdivision (c)]. No maximum time is prescribed for the hearing and thus, if the United States trustee or a creditor do not see any emergency in the debtor's situation, flexibility is provided. The prescribing of a 15-day period also may encourage the United States trustee to move promptly to appoint a creditors committee.

Mr. Minkel said he is concerned that the United States trustee may not be able to look at many smaller or medium-sized cases in time to enable creditors to participate. Mr. Shapiro said there clearly is a need to get a creditors committee appointed quickly, but he is more concerned about early motions to obtain credit or use cash collateral. These are difficult for judges who know nothing about the case; it is a hard decision for the court. Courts will want to authorize short-term carry-over provisions and set the matters down for later hearing with notice. Mr. Shapiro would like to maintain the 15-day minimum in Rule 4001(b) and (c).

The ABA subcommittee also recommended that preliminary orders governing borrowing or use of cash collateral should not: 1) determine the validity, priority, or amount of the prepetition claim or the value of the collateral; 2) contain a self-executing provision for enforcement; 3) contain a provision collateralizing prepetition debt with postpetition collateral; or 4) provide for the release of claims against the creditor. The Reporter recommended rejection of these proposals as they appeared to be

substantive ones requiring Congressional action to amend § 365. **A motion to reject the proposals passed with two (2) opposed.**

Judge Edith Hollan Jones had written to Judge George enclosing several suggestions and comments from bankruptcy judges in the 5th circuit concerning Rule 4001. **Copies of Judge Jones' letter will be circulated to the Committee members.**

ABA Proposal Concerning Rules 4001(d) and 2002(a)(3)

Rule 2002(a)(3) provides for 20-day notices to parties in interest concerning a hearing on approval of a compromise or settlement of a controversy. This conflicts with the time periods prescribed in Rule 4001(d) for obtaining approval of an agreement to provide adequate protection, modify or terminate the automatic stay, use cash collateral or create a senior or equal lien to obtain credit. The ABA suggested that Rule 2002(a)(3) be amended to exclude Rule 4001(d) agreements. The Reporter agreed that the conflict between the two rules should be corrected.

Professor King said he thinks there is a need to examine all four subdivisions of Rule 4001 in the context of this problem. As an example, he noted that subdivision (d) is more specific than subdivisions (a) through (c.)

The Chairman suggested that the Reporter prepare a draft rule addressing these issues and those raised by Judge Jones which the Committee could consider at the November 1988 meeting. Mr. Patchan said that the notice and service requirements of Rule 4001(d) appear to apply only to a chapter 11 case, although agreements of this nature can arise in chapter 7 cases also. He **suggested that any proposed amendments should broaden the scope of the rule to include chapter 7 cases. Mr. Dixon will prepare a proposal on this issue for the November 1988 meeting.**

Additional ABA Proposals

Rule 1005. The ABA suggested amending the rule to require parties to include the chapter of the case in the caption. The Reporter noted that most forms have the chapter in the title and in others the information is not really necessary. Moreover, amending Rule 1005 would not result in the chapter number appearing on motions and papers filed in adversary proceedings, as the caption for these is governed by Rule 7010 and Official Form No. 34. **A motion not to amend the rule passed unanimously.**

Rule 2007(b). The Committee determined that there was no need to address this proposal because the matter had been dealt with in the United States trustee amendments.

Rule 9014. The Committee determined that there was no need to address this proposal.

Part IX. The Committee agreed with the Reporter's comments expressed in his memorandum of April 25, 1988, and a motion to reject the ABA proposal passed unanimously.

Official Form No. 7 and No. 8. The matters raised are being addressed in the revisions to these forms currently being worked on. The ABA proposal was referred to Mr. Patchan for the report of the subcommittee on forms at the November 1988 meeting.

References to "Executory Contracts." The Reporter agreed with this proposal, and a motion to adopt his recommendations as set forth on page 26 of the memorandum of April 25, 1988, passed by unanimous vote.

Additional Proposals of Michael L. Temin

Committee Note to Rule 1019(4). The Reporter believes this Committee Note is accurate. A motion reflecting the Committee's determination that no action is needed passed unanimously.

Proposal for Rules to Implement §§ 1129(b)(1) and 365(d)(1). A motion reflecting the Committee's determination that no action is necessary passed by unanimous vote.

The Committee agreed with the Reporter's recommendation that no action is needed concerning Mr. Temin's proposals on Rule 8002(a), Rule 9027(a), and change of venue and Rule 1014 .

Rule 9029. The subcommittee on local rules already is addressing the concerns raised about proliferation of local rules.

The Chairman and Reporter will prepare letters to the ABA subcommittee and to Mr. Temin detailing the Committee's action on their proposals.

Chapter 12 Amendments

This agenda item was deferred to the November 1988 meeting.

Respectfully submitted,

Patricia S. Channon

Dated: 11/14/88